

Inquiry into the Criminal Code Amendment (Agricultural Protection) Bill 2019

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Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

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

Contact: **Jennifer Windsor**
President, NSW Young Lawyers

Daniel Cung
Chair, NSW Young Lawyers Animal Law Committee

Contributors: Timothy Allen, Alana Davison, Shar Doudman, Rishika Pai, Giulia Prospero-Porta and Gillian Shaw

The NSW Young Lawyers Animal Law Committee (**Committee**) makes the following submission in response to the *Criminal Code Amendment (Agricultural Protection) Bill 2019 (Bill)*.

NSW Young Lawyers

NSW Young Lawyers is a division of the Law Society of New South Wales. NSW Young Lawyers supports practitioners in their professional and career development in numerous ways, including by encouraging active participation in its 15 separate committees, each dedicated to particular areas of practice. Membership is automatic for all NSW lawyers (solicitors and barristers) under 36 years and/or in their first five years of practice, as well as law students. NSW Young Lawyers currently has over 15,000 members.

Animal Law Committee

The Committee comprises a group of over 400 members interested in animal welfare and laws regulating the treatment of animals. The Committee aims to raise awareness and provide education to the legal profession and wider community, while increasing understanding about the importance of protecting animals from abuse and neglect. A common theme amongst Committee members is a passion and desire to use their legal skills and the law to improve the welfare of animals.

Summary of Recommendations

With respect to the Bill, in summary the Committee submits that:

1. Australia's existing law is adequate in dealing with trespass and incitement to trespass using a carriage service. Studies indicate that shielding the public from commercial animal agricultural practices is likely to lead to public mistrust of the commercial animal agricultural industry and farmers.
2. The Bill will place restrictions on obtaining footage of commercial animal agricultural farms which often plays a vital role in exposing contraventions of animal welfare protection laws. In the Committee's view, the current policing of animal welfare protection laws across Australia is inadequate in achieving its purpose of protecting animals from poor welfare practices.
3. The narrower fault element of 'intention' ought to replace the broad fault element of 'recklessness' in clause 474.46(1)(d) of the Bill, and the word 'detriment' should be replaced or altered to capture more serious consequences for primary production businesses.
4. The scope of the exemptions applying to journalists and whistleblowers:
 - a) are not fit for purpose;
 - b) are too narrow in scope; and
 - c) are inconsistent with the nature of the Bill; in particular the Bill's approach to the use of carriage services for the publication of content.

Discussion

The Bill proposes to amend the *Criminal Code Act 1995* (Cth) (**Criminal Code**) to introduce two new offences relating to the incitement of trespass or property offences on agricultural land.

The Committee comments on the Bill, specifically in relation to the following issues:

1. The existing law

The Committee submits that existing laws relating to the incitement of trespass or property offences on agricultural land provide adequate protections for farmers and animals. Physically trespassing onto private land without permission,¹ or trespassing onto commercial property for purposes that are contrary to the interests of the occupier/owner is a statutory and common law offence.² Similarly, in NSW, the *Surveillance*

¹ *Plenty v Dillon* (1991) 171 CLR 635.

² In NSW see the *Inclosed Lands Protection Act 1901* (NSW) ss 4–4AA; *Lincoln Hunt Aust P/I v Willesee* (1986) 4 NSWLR 457.

Devices Act 2007 (NSW) prohibits the installation of secret surveillance devices within premises or vehicles; however, it does not prohibit a person from conducting off-site surveillance³, which in turn allows animal protection activists to do so.

Importantly, the invasion of privacy is not a valid cause of action under Australian law.⁴ This was decided in the case of *Australian Broadcasting Corporation v Lenah Game Meats*,⁵ where the High Court of Australia (**High Court**) rejected the argument that the trespass and covert filming of animal protection advocates on the respondent's property constituted a privacy breach. The High Court also noted that the activity observed by a trespasser does not automatically make the activity itself private.⁶

While the Committee accepts that it is, of course, open to the legislature to prohibit certain breaches of privacy (as the Bill would, if passed), there is insufficient reason to do so in the present case. The primary effect of the Bill, as with other "ag-gag" laws⁷ would not be to protect any real personal interest of agricultural operators, but rather would be to prevent the public from being informed of the treatment of animals by the commercial animal agricultural industry.⁸ Importantly, the High Court in *Lenah Game Meats* acknowledged the importance of transparency in order to promote debate for the effective operation of Parliamentary democracy and the improvement of animal welfare, in particular in commercial settings (emphasis added):

*Parliamentary democracies, such as Australia, operate effectively when they are stimulated by debate promoted by community groups. To be successful, such debate often requires media attention. Improvements in the condition of circus animals, in the transport of live sheep for export and in the condition of battery hens followed such community debate.*⁹

Accordingly, ag-gag laws ultimately hinder transparency on the disclosure of poor animal welfare practices, in particular on the standard practices in the commercial animal agriculture industry.¹⁰ The Committee submits that transparency in the agriculture industry is essential to exposing poor animal welfare practices which will allow the public to make informed decisions and also better ensure the welfare of animals in the industry.

³ *Surveillance Devices Act 2007* (NSW) s 8(1).

⁴ *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479.

⁵ *Australian Broadcasting Corporation v Lenah Game Meats Pty* (2001) 208 CLR 199.

⁶ *Ibid*, 43.

⁷ Legislation that hinders animal protection advocates by limiting or preventing the recording of, or publication of, commercial agricultural operations.

⁸ 'Ag-gag', *Voiceless Limited* (Web Page, March 2015) <https://www.voiceless.org.au/hot-topics/ag-gag?gclid=Cj0KCKQjwvdXpBRCoARIsAMJSKqLknNkt2fjydIU-TfQpY1NVg0MkZVCL4vCcmh7jI0o6kYEMxXUPmkwaAnSJELw_wcB>.

⁹ *Ibid*, quoting *Australian Broadcasting Corporation v Lenah Game Meats Pty*, above (n 10), [218].

¹⁰ *Ibid*.

Concealing information from the public in such a way is inconsistent with the freedom of speech, freedom of information, and freedom of the press that the Australian public expect. The carve-out in proposed section 474.38(1), which prevents conduct from being an offence to the extent it would infringe the implied freedom of political communication, is not an adequate protection – the very narrow and uncertain scope of that implied freedom means that it will do little to remove the chilling effect of the Bill.

The Committee concludes that the introduction of the proposed incitement to trespass offences lacks legal justification in light of consideration of the existing tort laws which appropriately balance the protection of the commercial animal agriculture industry from unjustifiable trespass, against ensuring transparency in the industry to expose poor animal welfare practices.

2. The role of covert footage on agricultural farms

Significant contributions have been made by covertly obtained footage in exposing, and raising public awareness of, poor animal welfare practices in the agriculture industry. In the United States, for example, the increasing public awareness with respect to the treatment of animals on agricultural farms has influenced public demand for legislative and industry practice changes.¹¹ Reports indicate there is an increased awareness and concern for animal welfare issues amongst the public, with advocacy groups that expose poor animal welfare practices playing a vital and effective role in raising awareness and stimulating debate.¹²

The videos and images emerging from agricultural farms often have a substantial impact on animal welfare legislation.¹³ For example, there was public condemnation after covert footage of a New Zealand owned company in Chile showed bobby calves being killed by blunt force trauma to the head. The covert footage exposing poor animal welfare practices by the New Zealand company resulted in the New Zealand Government amending their *Animal Welfare (Care and Procedures) Regulations 2018* to ban the slaughter of bobby calves by such means.¹⁴ This exemplifies the significant contribution that covert footage of agricultural farms have on triggering legislative changes which improve the welfare of animals.

An article published in the *Animal Production Science* journal¹⁵ noted that animal agricultural practices (specifically, dairy farm practices) ‘have fallen out of favour’ with public values.¹⁶ The study concluded that

¹¹ Pew Commission on Industrial Farm Animal Production, *Putting Meat on the Table: Industrial Farm Animal Protection in America*, (Report, April 2008), 31.

¹² *Ibid*, 37.

¹³ DM Weary and MAG von Keyserlingk, ‘Public concerns with dairy-cow welfare: how should the industry respond?’ (2017) 57 *Animal Production Science* 1201, 1202.

¹⁴ *Animal Welfare (Care and Procedures) Regulations 2018* (NZ) LI 2018/50, reg 8.

¹⁵ DM Weary and MAG von Keyserlingk (n 16) 1201.

¹⁶ *Ibid*.

“ag-gag” laws were ultimately ineffective, serving to foster distrust and misinformation about the industry¹⁷ - rather, only two-way engagement with the community (including the industry listening to community concerns) was found to be a viable method for retaining the public trust.¹⁸

Public interest in where animal products come from is increasing, especially on social media platforms.¹⁹ Attempts to conceal or implement the ‘closed-door’ approach by way of ag-gag laws is likely to have a counterintuitive effect by spreading public misinformation; in particular leading the public to believe the situation “behind closed doors”, in the absence of full transparency, is worse than what it may be in reality.²⁰ A separate study found that laws designed to protect agricultural industries from criticism led to lower public confidence in farmers and the industry and greater support for animal welfare laws.²¹ The same study also found ag-gag laws led the public to think that practices in the industry were poorer than what they actually were.²² The education method is likely to be unsuccessful because of the public’s ability and willingness to trust the industry. The study found that farmers held different views of animal welfare than lay members of the public,²³ in particular holding animal welfare with less concern than lay members of the public.²⁴ Working in an environment void of transparency, in favour of a “closed door” business policy, is likely to cause the public to view farmers with less integrity.²⁵

Whilst there are animal protection laws in the agricultural industry in Australia,²⁶ in the Committee’s view the policing of such laws is inadequate. Reliance on voluntary standards and self-regulation is unlikely to meet the public’s concern for animal welfare standards in the agricultural industry.²⁷ Covert footage is admissible in court in animal cruelty cases,²⁸ and in some instances is the leading source of evidence against animal cruelty cases.

¹⁷ Ibid, 1202.

¹⁸ Ibid, 1207.

¹⁹ Ibid.

²⁰ Ibid, citing EH Ormandy et al, ‘Public attitudes towards the use of animals in research: effects of invasiveness, genetic modification and regulation’ (2013) *Anthrozoos* 26, 165–184.

²¹ Ibid, citing JA Robbins, ‘Awareness of AG-GAG laws erodes trust in farmers and increases support for animal welfare regulations’ (2016) *Food Policy* 61, 121–125.

²² Ibid.

²³ Ibid, citing F Vanhonacker et al, ‘Do citizens and farmers interpret the concept of farm animal welfare differently?’ (2008) *Livestock Science* 116, 126–136.

²⁴ Ibid.

²⁵ DM Weary and MAG von Keyserlingk (n 16) 1201.

²⁶ *Animal Welfare Act 1992 (ACT)*, *Prevention of Cruelty to Animals Act 1979 (NSW)*, *Prevention of Cruelty to Animals Act 1986 (VIC)*.

²⁷ Pew Commission on Industrial Farm Animal Production, (n 14) 38.

²⁸ Voiceless et al, (n 8).

The Committee submits that covert footage which exposes, and raises public awareness of, poor animal welfare practices plays a significant role, and contributes substantially to law reform, transparency and public awareness.

3. The “recklessness” requirement

The Criminal Code holds that a person is reckless if he or she is aware of a substantial risk that: a circumstance exists or will exist;²⁹ and/or a result will occur;³⁰ and having regard to the circumstances known to him or her, it is unjustifiable to take the risk.³¹ The question regarding whether or not a risk is unjustifiable ‘is one of fact’.³² Moreover, evidence substantiating intention, knowledge or recklessness satisfies the fault element where the recklessness is a fault element for a physical element of an offence.³³

The use of ‘recklessness’ as the fault element in clause 474.46(1)(d) of the Bill is too broad, in particular given the 12 month imprisonment penalty and the irrelevance of the occurrence of detriment. Detriment is defined in the Dictionary of the Criminal Code as ‘any disadvantage, not limited to personal injury or to loss of, or damage to property’.³⁴ Effectively, a person may be sentenced to imprisonment even if the person did not intend for any loss or damage to occur to the primary production business, and regardless of whether the trespass occurred.

The Committee submits that the penalty of imprisonment under clause 474.46(1) in the Bill is disproportionate to the offence if no loss or damage occurred to the primary production business. The Committee notes that clause 474.46(1) could target animal protection activists using a carriage service to incite trespass, with the aim of uncovering illegal animal cruelty on agricultural land. The Committee further notes that the treatment of animals in primary production businesses is a matter in the public interest. However, the penalty under clause 474.46(1) is comparable to the penalties for acts of animal cruelty in several Australian jurisdictions. For example, in NSW, Victoria and the ACT, animal cruelty offences carry a maximum penalty of two years.³⁵ In the Committee’s view, the penalty for committing illegal acts of cruelty against sentient animals on agricultural land should be considerably higher than the penalty for seeking to expose said acts of cruelty (through inciting trespass on agricultural land).

²⁹ *Criminal Code Act 1995* (Cth) s 5.4(1)(a).

³⁰ *Criminal Code Act 1995* (Cth) s 5.4(2)(a).

³¹ *Criminal Code Act 1995* (Cth) ss 5.4(1)(b) and 5.4(2)(b).

³² *Criminal Code Act 1995* (Cth) ss 5.4(3).

³³ *Criminal Code Act 1995* (Cth) ss 5.4(4).

³⁴ *Criminal Code Act 1995* (Cth), Dictionary.

³⁵ *Animal Welfare Act 1992* (ACT), *Prevention of Cruelty to Animals Act 1979* (NSW), *Prevention of Cruelty to Animals Act 1986* (VIC).

It is a flawed justification to hold that the use of 'recklessness' as the fault element is appropriate for clause 474.46(1)(d) on the basis that intent is the fault element in clause 474.46(1)(c).³⁶ This is because the two clauses relate to different elements of the offence, with clause 474.46(1)(c) providing for the incitement of the trespass, and clause 474.46(1)(d) relating to the detriment caused by the trespass.

The Committee submits that the narrower fault element of 'intention' would be more appropriate for clause 474.46(1)(d). This would require prosecutors to prove the offender intended for the trespass to cause detriment.³⁷ While it is accepted that such intention may not always be easily proven, in circumstances where (as already stated) the existing law already provides remedies for ordinary trespasses it is reasonable to impose a high bar before also exposing defendants to the additional offences provided for by the Bill.

The word 'detriment' is also too broad as it may capture insignificant impacts on a primary production business which do not have material effect on its operations. For example, minor damage to an insignificant wall could be construed as 'detriment.' While minor damage may incur repair costs, it would not have severe financial and non-financial consequences for the business, to warrant imprisonment. The Committee therefore submits that the word 'detriment' should be replaced, or amended, to capture serious consequences for the business and eliminate minor damage, particularly given the offence may carry imprisonment.

4. Exemptions contained in the Bill

Notwithstanding the Committee's earlier submissions as to the merit or otherwise of the Bill, if Parliament were minded to enact the Bill, the Committee considers that the scope of the exemptions as presently drafted are too narrow.

Journalists

With respect to the exemptions under the proposed clauses 474.46(2) and 474.47(2) applicable to material published in the public interest by a professional journalist (**Journalist Exemption Clauses**), the Committee submits that the restrictions embodied in the Journalist Exemption Clauses are impractical and their scope is inconsistent with that of the proposed offences.

The proposed offences extend the concept of trespass into the digital/online arena, purporting to acknowledge that modern offences now operate in that realm as well as through the physical acts involved. However, the terminology used to describe the Journalist Exemption Clauses does not include the same extension. Modern news publications are not simply comprised of established media outlets that charge for

³⁶ Explanatory Memorandum, Criminal Code Amendment (Agricultural Protection) Bill 2019.

³⁷ *Criminal Code Act 1995* (Cth) s 5.4(2).

their output; content is often prepared free of charge, private citizens publish blogs online, student bodies publish newspapers, videos are published online canvassing a wide range of news content and generally, aspiring journalists seek to publicise their work as much as possible.³⁸ In response, the Legislature repeatedly sought to adapt applicable legal regimes to capture new issues to which this shift has given rise.³⁹

However, the Journalist Exemption Clauses has not been drafted in a manner that reflects modern media in the same way, and limits the scope of what could be considered journalistic output to a more traditional form. This appears entirely out of place in the context of a new offence purporting to address more modern, technology-dependent activities.

The Committee considers that as a minimum, the words “a person working in a professional capacity as” ought to be removed from the Journalist Exemption Clauses and a new definition of the term “journalist” added. To ensure consistency with other sections of Criminal Code, this may include, for example, someone who is ‘engaged in the reporting of news, presenting current affairs or expressing editorial or other content in news media’.⁴⁰ The concept of journalistic output currently captured by the proposed amendment is not, despite suggestions made in the Explanatory Memorandum, an exhaustive or even appropriate conceptualisation of *bona fide* journalism.

The Committee submits that the public interest requirement for journalists in these provisions is unsuitable. Views will differ on whether the public interest lies with, for example, the protection of agricultural industry or the transparency of their practices as the circumstances may dictate. The proposed amendment appears to favour publications that endorse all agriculture and is likely to cause hesitation amongst other outlets wishing to comment on agricultural practices.

For this reason, more conservative publications are likely to avoid agricultural news, lest such outlets risk breaching the Criminal Code, given the uncertainty of whether their reporting will be considered to be in “the public interest” as conceptualised in the proposed amendment.

The Committee notes that, in any event, the proposed amendment will likely have a detrimental impact on free speech and public awareness generally. It is likely to suppress the distribution of information or

³⁸ See, for example, regarding the rise of the ‘citizen journalist’, Rabia Noor, ‘Citizen Journalism vs. Mainstream Journalism: A Study on Challenges Posed by Amateurs’ (2017) 3(1) *Athens Journal of Mass Media and Communications* 55.

³⁹ See, for example, a response to bloggers analysed in Hannah Ryan, ‘What’s in a Name? Bloggers, Journalism, and Shield Laws’ (2014) 33(4) *Communications Law Bulletin* 10.

⁴⁰ In accordance with part of section 122.5(6) of the Criminal Code.

discussion via social media relating to farming practices in circumstances where the rationale for providing an exemption for journalists only and not public awareness more broadly is unclear.

Whistleblowers

The Committee submits that whistleblowing and public interest disclosures are essential to the transparency of the animal agricultural industry,⁴¹ especially at a time where there is a growing mistrust of the agricultural industry.⁴² The Committee is concerned that certain Australian farmers and primary production businesses may, under the proposed amendment, be able to hide behind a claim of inciting trespass to land, inciting damage to property or ‘detriment’ even in circumstances where it is found that they are violating animal protection and animal welfare laws.

The Committee submits that the regime with respect to whistleblowers should be made clearer by identifying the disclosures attracting an exemption under this section. For example, and similarly to s 1317AA(4) of the *Corporations Act 2001* (Cth) (**Corporations Act**) in which ‘disclosable matters’ are defined, the Committee considers that it would be appropriate to set out what information constitutes disclosable matters under this proposed part of the Act. A disclosable matter may include information that indicates or concerns any misconduct, an improper state of affairs or circumstances that contravene animal welfare under the laws of a State, Territory or the Commonwealth.

The Committee notes that the purpose of the transmission, availability, publication and/or distribution of material by a whistleblower does not aim to target individuals or to violate the personal privacy of Australian farmers and primary production businesses. Rather, it seeks to target the mistreatment of animals in commercial agricultural operations, against which Parliament has separately legislated, and against improper or illegal conduct generally. On that basis, the Committee submits that it may be appropriate to define an “eligible whistleblower” in order to clarify the circumstances a whistleblower would be exempt from an offence, while balancing this with the purpose of the amendment, being the privacy and protection of Australian farmers and primary production businesses. For example, an eligible whistleblower may be a person who has reason to suspect that a contravention of animal welfare laws is occurring or will occur.

The notes to the proposed amendment include a reference to the applicability of the whistleblower regime in Part 9.4AAA of the Corporations Act. However, given the specificity of the proposed amendment (that is, it is evidently intended to address a very specific perceived problem), whilst it is appropriate to provide a

⁴¹ RSPCA, ‘Ag-gag’ laws in Australia?’ (Discussion Paper, August 2014).

⁴² ‘What are Ag-gag laws and how would they affect transparency and trust in animal production?’ RSPCA (Web Page, 2 May 2019) < <https://kb.rspca.org.au/knowledge-base/what-are-ag-gag-laws-and-how-would-they-affect-transparency-and-trust-in-animal-production/>>.

whistleblower exemption, the Committee submits that the whistleblower exemption must be modified and adapted to the circumstances. This is particularly evident in Part 9.4AAA which includes an exemption for circumstances where an act is being carried out that would attract a penalty of 12 months' imprisonment itself; as many animal cruelty and biosecurity offences carry relatively low penalties.⁴³ It would, in the Committee's view, be undesirable to suggest that the whistleblowing exemption only applies to persons seeking to expose a higher grade of criminal activity and that the exemption would not apply in circumstances where, say, a person was starving an animal.

As presently drafted, the Committee considers the terms of the proposed amendment to be inconsistent and susceptible to producing undesirable outcomes. While the exemptions appear to be aimed at curtailing such outcomes, the exemptions do little to satisfy their mission statement and present numerous opportunities for the proposed amendment to result in unsuitable, heavy-handed and unintended consequences.

Concluding Comments

NSW Young Lawyers and the Committee thank you for the opportunity to make this submission. If you have any queries or require further submissions, please contact the undersigned at your convenience.

Contact:



Jennifer Windsor
President
NSW Young Lawyers

Email: president@younglawyers.com.au

Alternate Contact:



Daniel Cung
Chair
NSW Young Lawyers Animal Law Committee

Email: alc.chair@younglawyers.com.au

⁴³ For example, the offence of failing to provide sufficient food, drink or shelter to an animal in NSW carries a maximum prison sentence of only 6 months – *Prevention of Cruelty to Animals Act 1979* s 8(1).