



www.libertyvictoria.org.au

19 March 2015

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

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

Dear Secretary

LIBERTY VICTORIA'S SUBMISSION TO THE INQUIRY INTO THE *CRIMINAL CODE AMENDMENT (ANIMAL PROTECTION) BILL 2015*

Liberty Victoria is grateful for the opportunity to make this submission to the Committee regarding its inquiry into the *Criminal Code Amendment (Animal Protection) Bill 2015*. Liberty Victoria is one of Australia's leading human rights and civil liberties organisations. It is concerned with the protection and promotion of civil liberties throughout Australia. As such, Liberty Victoria is actively involved in the development of Australia's laws and systems of government. Further information may be found at www.libertyvictoria.org.au.

Introduction

1. The Explanatory Memorandum indicates the first priority of the bill is to prevent unnecessary delays in the reporting of animal cruelty. A second purpose is to prevent what are described as 'illegal interferences in the lawful operation of animal enterprises.'
2. These aims are sought to be achieved by amending the Commonwealth *Criminal Code* to include three new offences — failing to report malicious cruelty to animals after recording it (s 383.5) ('**the failure to report offence**'), destroying or damaging property used in an animal enterprise (s 385.5), and causing fear of death or serious bodily injury to a person involved in an animal enterprise (s 385.10) (collectively, '**the interfering with animal enterprises offences**').

3. Whilst Liberty Victoria is broadly supportive of measures aimed at protecting animals against acts of malicious cruelty, we consider that the Bill is deeply flawed and misguided. Some of the major objections to the Bill include:
 - a) The failure to report offence has been drafted in a way which in fact targets persons seeking to expose and prevent acts of malicious cruelty to animals, whilst excluding from its operation those who are most likely to be involved in, or a witness to, animal cruelty. This seriously undermines the claim that the Bill is concerned with protecting animal welfare.
 - b) The failure to report offence impinges unnecessarily on free speech and freedom of the press by criminalising the methods used by investigative journalists, activists and whistleblowers seeking to expose acts of malicious cruelty to animals, and potentially stifling debate on important issues of public policy.
 - c) The failure to report provisions unjustifiably reverse the onus of proof in relation to critical elements of the offence.
 - d) The elements of the failure to report offence are illogically defined, and are likely to result in absurd and unjust outcomes.
 - e) There are a number of existing criminal offences which deal with conduct of the type covered by the interfering with animal enterprises offences. No explanation has been given as to why these existing offences are inadequate.
 - f) The interfering with animal enterprise offences are extraordinarily broad, and will capture conduct which goes far beyond what the legislature could possibly have intended.
4. Liberty Victoria therefore opposes the Bill in its entirety, and urges the Committee to recommend that it not be enacted.

Division 383 — Failing to report malicious cruelty to animals

5. Proposed s 383.5 would make it an offence for a person to make a 'visual record' of an activity which they believe to be 'malicious cruelty to animals' if the activity is not reported to an authority 'with responsibility for enforcing laws relating to animal welfare' within 1 business day, and if 'the record' is not given to such an authority within 5 business days.
6. Liberty Victoria is opposed to the creation of this new offence for the following reasons.

The provision will operate in ways which are inconsistent with the purported goal of animal protection

7. The Explanatory Memorandum states that the purpose of Division 383 is to 'ensure that animals are protected against further unnecessary cruelty caused by a delay in reporting'.
8. The desire to ensure that acts of cruelty to animals are investigated promptly so as to prevent further abuses being committed is understandable. However, there are a number of quite inexplicable aspects of the legislation which undermine the claim that its purpose is to protect the welfare of animals.
9. Most significantly, the provisions only impose an obligation to report acts of malicious cruelty on persons who have (a) made a visual record of the activity and (b) done so *because* they believe that the activity constitutes malicious cruelty to animals. No reporting obligation is imposed upon a person, such as an employee of an organisation in which animal abuse is taking place, who observes acts of malicious cruelty being perpetrated, but who does not make a visual record of it. This is particularly concerning given that such persons are precisely the type of people who are most likely to witness acts of malicious cruelty being perpetrated, and are in the best position to act as whistleblowers. Conversely, by applying only to persons who record footage of an activity *because* they believe it to be malicious cruelty, the legislation targets the very people who are most likely to harbour concerns about animal welfare, and to draw the activity to the attention of the relevant authorities.
10. The Explanatory Memorandum does not explain why the mandatory reporting is only required for those who record what they believe to be malicious cruelty to animals, and not those who are responsible for such cruelty (including businesses) or those who witness it first-hand (such as an employee of an animal enterprise). It is also unclear why the Bill is limited to only domestic animals.
11. These issues raise serious questions as to whether the legislation is, in truth, designed to enhance animal welfare protection or, alternatively, whether some other, unstated purpose is being pursued.

The new offence impinges upon free speech and freedom of the press by undermining methods to investigate and expose systemic animal cruelty

12. Article 19 of the UDHR states that:

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.
13. Liberty Victoria is concerned that the proposed provisions will impinge upon the methods available to journalists, activists and whistleblowers seeking to investigate and expose acts of malicious cruelty to animals which occur on a widespread and systemic basis. Such investigations often rely on covert recordings, made over a period of time, which record multiple occasions of animal cruelty. Most recently, this technique has been used in a high profile investigation by the ABC Four Corners program which exposed

widespread and systemic animal abuse in the greyhound industry.¹ It has also previously been used to expose systemic abuse perpetrated against Australian sheep and cattle exported overseas.² These and other similar investigations have made important contributions to public debate in Australia, and have prompted significant social, political and legislative responses.

14. The requirement for persons who record footage of malicious cruelty to immediately report the activity to the relevant authority may undermine such investigations by exposing the covert activities of the investigator at an early stage. In other words, by requiring the reporting of what may be isolated and relatively minor instances of malicious cruelty (or indeed acts which do not amount to malicious cruelty but which are erroneously thought to do so), the proposed provisions may in fact make it harder to expose more serious and widespread cases of systemic animal abuse.
15. Liberty Victoria is concerned that these provisions will have the unintended consequence of not only stifling public debate about important public policy issues, but also undermining the very purpose for which the legislation has been proposed. The explanatory material accompanying the Bill, as well as the public statements which have been made in relation to it, indicate that adequate consideration has not been given to these issues of public policy.

The provision unjustifiably reverses the onus of proof in respect of a critical element of the offence

16. Section 383.5(3) provides that a defendant bears the evidential burden of establishing that the activity has been reported to an authority within 1 business day, and that a copy of the record has been provided to the authority within 5 business days. This means that the defendant has the burden of adducing or pointing to evidence that suggest a reasonable possibility that he or she has complied with those requirements.³
17. Section 385(3) reverses the ordinary position at law which places the onus on the prosecution to prove, beyond reasonable doubt, all of the elements of an offence, and does not impose an evidential burden on the defendant in respect of any of those elements.⁴ That requirement is essential to the presumption of innocence upon which the criminal justice system is founded.
18. The Explanatory Memorandum claims that the reversal of the onus of proof is justified because:

it would be significantly more difficult and costly for the prosecution to in effect prove matters such as the fact that the activity was not reported, as information about whether

¹ See <http://www.abc.net.au/4corners/stories/2015/02/16/4178920.htm>.

² See <http://www.abc.net.au/4corners/stories/2012/11/02/3623727.htm>.

³ *Criminal Code* s 13.3(6).

⁴ *He Kaw Teh v R* (1985) 157 CLR 523; *Chugg v Pacific Dunlop Ltd* (1990) 170 CLR 249. See also *Criminal Code* (Cth) s 13.1(1).

the matter was reported would in most cases be peculiarly within the knowledge of the defendant.

19. This justification is unconvincing. Given the broad and subjective nature of the offence, reversing the onus of proof in this way would pose an unreasonable burden on individuals to keep records of reporting when authorities would be better equipped and resourced to keep such information, and produce it to the prosecution. If defendants cannot adduce evidence that suggests a reasonable possibility that they have reported and given the record to an authority, the defendant will be presumed to have not done either, which may lead to innocent people being convicted unjustly.

Other concerns with the proposed provisions

20. There are a number of other problems with the way in which the proposed provisions have been drafted. These include the following.

Section 383.15(1) is ambiguous as to whether only one copy of the record needs to be provided to the authority, or alternatively whether all records must be handed over

21. Section 383.15(1) provides that the reference to a ‘record’ in s 383.5 is to be treated as ‘including a reference to a copy of the record’. The present wording creates ambiguity as to whether the effect of the provision is to require that *all copies* of the record be handed over to the authorities or, conversely, whether only *a copy* of the record must be provided.

22. The Explanatory Memorandum relevantly states:

The Bill will create a new offence ... which provides that any person filming what they believe to be malicious cruelty animals commits an offence if they fail ... to provide **a copy** of the recorded material without editing within five business days.⁵

23. This suggests that the intention is not to require that *all copies* of the record be handed over; the provision of *a copy* to the authority will suffice. That must, of course, be the case. There would be no rational justification for restricting the ability of persons to disseminate or publish the visual record to other persons, which would be the consequence if the provision was interpreted as requiring that all copies of the record be handed over. Such a restriction would also almost certainly violate the implied freedom of political communication protected under the Constitution.⁶

It is not a physical element of the offence that the activity recorded amounts to malicious cruelty

24. Section 383.5(2) provides that in order for an offence to be committed against s 383.5(1), it is immaterial whether the activity actually constitutes malicious cruelty to animals. The rationale for this provision is unclear. If the concern is to ensure that instances of malicious cruelty are reported to authorities in a timely fashion, it is difficult to see why it

⁵ See Explanatory Memorandum, p 6 (emphasis added). See also pp. 8–9.

⁶ See *Coleman v Power* (2004) 220 CLR 1; *Levy v State of Victoria* (1997) 189 CLR 579.

should be an offence to fail to report something that is found not to amount to malicious cruelty.

The present definition of the offence will lead to unjust and absurd outcomes

25. The requisite mental state for the offence is belief that the activity being recorded amounts to 'malicious cruelty to animals'. The definition of 'malicious cruelty to animals' in s 383.10 requires that the relevant activity be 'unlawful', and that it be engaged in by the perpetrator 'for the purpose' of inflicting 'unnecessary' pain, injury or death. Several problems emerge from this.
26. First, there are obvious practical difficulties inherent in the situation where the mental element of the offence involves belief as to the state of mind of another person and, more specifically, his or her purpose in engaging in a particular activity.⁷
27. Second, whether an activity is 'unlawful' or is 'unnecessary' are legal conclusions. Making these factors part of the mental element of the offence (by requiring the accused to form a belief as to malicious cruelty), but excluding them from the physical element (by deeming it irrelevant whether or not the activity in fact amounts to malicious cruelty), will lead to unjust and absurd outcomes. For example, under the provision as drafted, a person unconcerned about the welfare of animals who records an activity which, in fact, amounts to malicious cruelty, but who, for whatever reason, does not believe that it does (eg, because they believe the cruelty inflicted was not 'unnecessary') will not commit an offence by failing to report the activity. By contrast, a person more attuned to the suffering of animals, who records the same footage, or indeed footage that does *not* amount to malicious cruelty, but who erroneously believes that the activity does amount to malicious cruelty, will commit an offence if they fail to report the activity. Such an outcome would be unjust, and clearly inconsistent with the purported purpose of the legislation.

The timeframes in s 383.5(1)(c) are too short and may be impossible to comply with

28. The timeframe of 1 business day for the activity to be reported to an authority, and 5 business days for the record to be provided to the authority, is unreasonably short.
29. Neither limb of s 383.5(1)(c) is qualified by the expression 'without reasonable excuse'. In some circumstances, it may not be possible to comply with the obligation to report the activity, or provide a copy of the visual record, to an authority within the prescribed timeframes (eg if the activity occurs in a remote place without access to the internet). A person should not be liable for an offence in such circumstances.

The authorities to whom activities must be reported are not specified

⁷ The problem arises in the present case because the putative offender under s 383.5 must believe that the activity being recorded was engaged in 'for the purpose of inflicting unnecessary pain, injury or death upon domestic animals'.

30. The authorities to whom activities must be reported are not specifically defined in the legislation. Given that the failure to report the activity constitutes a criminal offence, it is unreasonable for any ambiguity to exist in this regard, or for it to be expected that individuals will determine for themselves which Commonwealth or State authority is 'responsible for enforcing laws relating to animal welfare'.

Division 385 — Interfering with the carrying on of animal enterprises

31. The proposed Division would create two new offences of extraordinarily broad width.
32. Section 385.5 would make it an offence to engage in conduct that destroys or damages property used in carrying on an 'animal enterprise' if the accused intends that the conduct will interfere with the carrying on of the 'animal enterprise'. The offence also applies in respect of property belonging to a person who carries on, or is 'otherwise connected with or related to', an animal enterprise.
33. Section 385.10 would make it an offence to engage in conduct involving 'threats, vandalism, property damage, criminal trespass, harassment or intimidation' if the conduct is intended to interfere with the carrying on of an 'animal enterprise', and the conduct causes a person who carries on an 'animal enterprise' (or is otherwise connected with or related to an animal enterprise) reasonably to fear that death or serious bodily injury will be inflicted upon him/her, a 'close family member', or an employee or contractor.
34. The proposed new offences are of significant concern and ought not be enacted for the following reasons:

No explanation has been provided as to why existing criminal offences are inadequate

35. Wilful or unlawful damage of property is already a criminal offence recognised in the statute books of every jurisdiction in Australia.⁸ For example, s 197 of the *Crimes Act 1958* (Vic) provides:
- (1) A person who intentionally and without lawful excuse destroys or damages any property belonging to another or to himself and another shall be guilty of an indictable offence and liable to level 5 imprisonment (10 years maximum).
 - (2) A person who intentionally and without lawful excuse destroys or damages any property, intending by the destruction or damage to endanger the life of another, shall be guilty of an indictable offence and liable to level 4 imprisonment (15 years maximum).

⁸ *Crimes Act 1958* (Vic) s 197; *Crimes Act 1900* (NSW) s 195; *Criminal Law Consolidation Act 1935* (SA) ss 85, 85A; *Criminal Code* (WA) ss 444, 445; *Criminal Code* (Tas) s 273; *Criminal Code* (Qld) ss 468, 469; *Criminal Code* (NT) s 241; *Crimes Act 1900* (ACT) s 116.

36. Similarly, conduct which causes another person to fear that violence will be perpetrated against them is captured not only by the various common law and statutory assault offences, but also by specific statutory threat offences which apply in each Australian jurisdiction.⁹
37. The Explanatory Memorandum does not provide adequate detail as to the purpose behind the creation of the two new offences. More specifically, it does not proffer any explanation whatsoever as to why the existing criminal offences are thought to be inadequate. Nor does it attempt to explain why the interference with property or persons involved in ‘animal enterprises’, as distinct from other property or persons, warrants, as a matter of public policy, some special protection.

The concept of an ‘animal enterprise’ has been defined in extraordinarily broad terms

38. The touchstone of the two new offences is the concept of an ‘animal enterprise’. That term is defined as including ‘a commercial or academic enterprise that uses, sells, houses or stores animals or animal products for [profit, food, fibre production, agriculture, education, research or testing]’.
39. The definition is extremely broad. It would include, for example, a restaurant. It could, conceivably, include any business that sells, for profit, goods which contain any animal product whatsoever. Moreover, when one considers that the operation of the two offences extends to all persons ‘connected with or related to’ an animal enterprise, the scope of the provisions become so broad as to be absurd.
40. The proposed provisions could not have been intended to have such a wide operation. Indeed, the fact that legislation such as this, which creates serious criminal offences carrying mandatory terms of imprisonment, could be drafted in such extraordinarily broad terms is of considerable concern.

‘Economic damage’ should not be the criterion by which the maximum sentence is determined

41. The concept of ‘economic damage’ is specified as the ‘aggravating feature’ which determines the length of the maximum sentence available in respect of an offence against s 385.5 (destroying or damaging property). The problems inherent in utilising the concept of economic loss as a basis for imposing liability are well-known to the law. In the torts context, allowing recovery for pure economic loss has been described as raising the prospect of the imposition of liability ‘in an indeterminate amount for an indeterminate time to an indeterminate class’.¹⁰ It is precisely because of this

⁹ *Crimes Act 1958* s 20; *Crimes Act 1900* s 31; *Criminal Law Consolidation Act 1935* (SA) s 19; *Criminal Code* (WA) s 338; *Criminal Code* (Tas) s 162; *Criminal Code* (Qld) s 308; *Criminal Code* (NT) s 166; *Crimes Act 1900* s 30.

¹⁰ *Ultrameres Corp v Touche* 174 NE 441, 444 (1931) (Cardozo CJ).

‘indeterminacy’ that courts continue to carefully restrict the circumstances in which a person will be held to be civilly liable for economic loss.

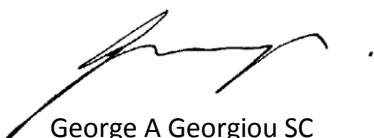
42. In that context, the fact that the nebulous concept of ‘economic damage’ has been employed as the criterion by which the maximum sentence is to be determined is problematic. The fact that the legislation does not confine the relevant economic damage to any particular persons will, on a practical level, make the task of determining the applicable maximum sentence in any given case needlessly complex. Of greater concern, it will also enliven the possibility of a very lengthy prison sentence being imposed on the basis of economic damage caused to an indeterminate class of people whose economic interests might be indirectly affected by the act for which the accused person is convicted.

Conclusion

43. Each of the proposed criminal offences created by the Bill are attended with numerous difficulties. These difficulties are significant, and point to the fact that the public policy sought to be achieved by the Bill, the scope of its operation, and the negative impacts it might have, have not been thought through with the degree of care and scrutiny required, particularly where serious criminal offences are being proposed.
44. Moreover, there are a number of deficiencies in the way the Bill has been drafted. Whilst some of these deficiencies could be ameliorated by carefully drafted amendments, there are a number of other, more fundamental, problems relating to the way in which the offences have been conceptualised and defined.
45. For these reasons, Liberty Victoria considers that the Bill should be abandoned in its entirety.
46. Liberty Victoria acknowledges the work of Karan Raghavan in preparing this submission.

Thank you for the opportunity to make this submission. If the Committee has any questions regarding this submission, or if we can provide any further information or assistance, please do not hesitate to contact George Georgiou SC, President of Liberty Victoria, or Michael Stanton, Vice-President of Liberty Victoria through the Liberty Victoria office by email: info@libertyvictoria.org.au. This is a public submission and is not confidential.

Yours sincerely



George A Georgiou SC
President
Liberty Victoria