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Submission to the inquiry by the Senate Rural and Regional Affairs and Transport Legislation Committee into the *Criminal Code Amendment (Animal Protection) Bill 2015*.

Introduction

Legislation concerning animal cruelty is made by parliaments of the States, there being no head of power in the *Commonwealth Constitution* relating to animal welfare.¹

The Explanatory Memorandum for the Bill (“the EM”) says that it “is designed to minimise unnecessary delays in the reporting of malicious cruelty to animals”. This presumably, then, is the object of the Bill.

There are two main parts to the Bill. The first seeks to compel persons who make a “visual record” of an activity of another person which the first person believes to be “malicious cruelty” to report to a relevant State or Territory authority within one day. It is an offence not to make such a report within time. The second part of the Bill seeks to impose severe penalties on persons who trespass or otherwise interfere with the carrying on of “animal enterprises”. This latter term is widely defined to catch everything from pig farms to shoe shops.² It is difficult to see how the second part of the Bill does anything in relation to animal welfare – so on its face it is not consistent with the Bill’s stated object.

Reporting of animal cruelty in the media

I suggest that the true object of the Bill is to protect firstly farmers and others who keep and use animals out of public view, then by a sidewind, anyone else dealing with animals or animal products. The reason for making this suggestion is that over the last decade, there have been several notable instances of persons making video recordings, often with hidden cameras, which have revealed quite horrendous animal cruelty in premises such as piggeries, chicken sheds and abattoirs. The perpetrators of the cruelty understandably do not want this surveillance to reveal their activities. The most recent example concerns the use of live animals as baits in greyhound training.³ What was very notable about that footage were the absolutely convincing lies told by the perpetrators when asked whether the practice of live baiting occurred in the industry. And these were the same people caught by the covert cameras. It is these sorts of people this Bill seeks to protect, in my view, and it is the reporters of the conduct the Bill seeks to persecute.

¹ However, there are limited areas where legislation under a Constitutional head of power, such as trade and commerce (eg regulating the live export trade), incidentally addresses animal welfare. Examples are the *Export Control Act 1982* (Cth) and the *Australian Meat and Live-stock Industry Act 1967* (Cth) and associated subsidiary legislation.

² This is because the Bill defines an “animal enterprise” to include a commercial or academic enterprise that uses, sells, houses 25 or stores animals or animal products for...profit”

³ ‘Making a killing’ 16 February 2015:

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

In all these instances, it is likely that the placing of the cameras and the making of the videos was illegal, in the sense of trespass on premises to put the cameras there, and illegal making of the video without the permission of the property owner.

The crux of the matter is that the act of reporting by the media has raised public awareness of animal cruelty behind closed doors. This has in turn achieved results in terms of changes to legislation and better enforcement of laws. For example, the decision of Australian Pork Limited to reverse its policy on sow stalls, and undertake to stop their use, undoubtedly came about because of revelations in the media of cruelty to pigs in intensive piggeries. The same can be said about the ban on sow stall use in Tasmania. Likewise, public awareness of conditions in intensive chicken farms has been enhanced by media stories based on secret videos. The most recent example is that of use of live animals as lures to train greyhounds. This has resulted (at the time of writing) in the announcement of high-level inquiries into greyhound racing in New South Wales, Victoria, Queensland and Tasmania. This simply would not have happened had the observations been reported to the relevant authorities one day after they were made. The story as reported by *Four Corners* was based on extensive footage and interviews obtained over several months.⁴ Another positive change which I would argue has come from this public awareness of animal abuse in agricultural “animal enterprises” is the increasing involvement of the New South Wales Rural Crime Unit in policing animal welfare offences in these situations.

An incidental issue is that those who make videos of this sort are often not in a position to decide within one day of making them that what they are witnessing (even in their opinion) is “malicious cruelty”. Frequently, these persons take videos to veterinarians or other animal welfare experts and seek their opinions. This may take some considerable time. They may also seek legal advice.

Another salient point is that the Bill seeks to introduce draconian penalties for those that seek to obtain evidence of cruelty in “animal enterprises”. To my knowledge, in over 10 years of monitoring this area, there has been not one single instance of those seeking such evidence being involved in creating significant damage. Arguments made by the intensive animal industry of breaches of biosecurity or damage to property or production are simply that – arguments. As an example, in one case where the piggery owner brought a civil action against the individuals who filmed activities secretly, the Court ruled that no damage was caused by the trespassers.⁵

Finally, so far as I am aware, there are no instances certainly in the last decade of responsible authorities becoming aware through their own investigations of serious animal cruelty in “animal enterprises” operating behind closed doors.

⁴ ‘Making a killing’ 16 February 2015:
<http://www.abc.net.au/4corners/stories/2015/02/16/4178920.htm>

⁵ *Windridge Farms v Grassi* [2011] NSWSC 196, at 160.

The conclusion is that the reporting of large-scale, egregious animal cruelty by the media has been a most effective way of increasing public awareness of the issue, achieving legislative change for the better, and prosecuting those who are responsible for the cruelty.

The adequacy of existing laws

At common law (in essence inherited from old English law) there is an offence of “misprision of felony”. This in effect makes it an offence not to report a felony. However, this is arguably no longer the case.

“Misprision of felony” has a parallel in the *Crimes Act 1900* (NSW) (s316), which makes it an offence to conceal a “serious indictable offence”. This latter offence is one which carries a penalty of 5 years imprisonment or more. I note that this section would not apply to breach of any of the provisions of the *Prevention of Cruelty to Animals Act 1979* (NSW), but would apply to section 530 of the *Crimes Act 1900* (NSW), which deals with “serious animal cruelty”. The common law offence has been abolished by s341 *Crimes Act 1900* (NSW).

In Victoria, the failure to report a serious offence is itself only an offence if the person (in effect) concealing the crime does so in order to receive a benefit.⁶

The common law offence of misprision of felony has been abolished by statute in South Australia.⁷

The situation is less clear in the other States. A search of legislation databases shows that in Queensland, Western Australia and Tasmania, there are no statutes which refer to an offence as a “felony”. Consequently, it is arguable whether there can be an offence of misprision of felony in those jurisdictions.

Whatever is the case, it is apparent that there is no equivalent of the first part of the Bill, as regards its application to the requirement to report a “visual record” of “unlawful activity for the purpose of inflicting unnecessary pain, injury or death upon domestic animals”.

I further note that the second clause of the first part of the Bill seeking to exempt “humane slaughter” from the requirement in the first part, may not necessarily apply to non-stun slaughter of animals, as the Bill does not define the word “humane”, nor does that word have a definition in other relevant or cognate legislation. Thus any images made of legally-authorized non-stun slaughter, for example during Halal or kosher slaughter, could arguably need to be reported under the proposed legislation.

The second part of the Bill, which seeks to impose penalties for all sorts of actions against “animal enterprises”, ranging from trespass to the equivalent

⁶ s326 *Crimes Act 1958* (Vic).

⁷ s370 *Criminal Law Consolidation Act 1935* (SA).

of murder, is likewise quite unnecessary. There are existing laws, both criminal⁸ and civil,⁹ which are available to protect all persons, including operators of “animal enterprises”, from such activities. The criminal laws are state laws, and that is the proper place for them, not in a piece of federal legislation. As an aside, should such laws end up in federal legislation, one has to ask who is going to enforce them. Is it going to be the Australian Federal Police? And if so, how are they going to deal with the countless thousands of hours of footage of agricultural shows, pet shops and horse races they will undoubtedly be deluged with? Or might they think they have better things to do?

A final comment worth making under this heading is that those who use animals for profit, keep them away from public view, and inflict cruelty on them, have a vested interest in whipping up baseless concerns about intruders who record these activities. We should remember that in Australia we have thankfully been spared the excesses which have occurred, for example, in the UK, where extremists advocating animal rights have taken actions which could be regarded as terrorism, including planting bombs in people’s cars. This has not occurred in Australia, nor in my view is it likely to occur. Given this, the existing law is completely adequate to deal with people who trespass or cause damage to property.

Is the proposed law *ultra vires* the Australian Constitution?

So far as activities in the states are concerned, arguably, the second part of the Bill, dealing with trespass, damage and the like, can be entertained as incidental to either the corporations power in section 51(xx) of the *Constitution*, or the trade and commerce power in section 51(i) of the *Constitution*.

The same cannot necessarily be said about the first part of the Bill. In deciding whether that part of the Bill is “within power”, one must first determine the character of the law by reference to “rights, powers, liabilities, duties and privileges which it creates”.¹⁰ In my view the first part of the Bill seeks to impose only a duty and liability, being the creation of a criminal offence not to report a putative criminal offence. The fact that the putative criminal offence involves animal cruelty is not relevant. Having determined that, the next question is whether such a law is connected to any relevant constitutional head of power, and in particular the corporations power and the trade and commerce power. In my view it is not. To my mind, the argument that forcing the reporting of animal cruelty carried out by, or by the agents of, an “animal enterprise” assists the trade and commerce of the enterprise, or is relevant to the business of the corporation, is unsupportable.

⁸ For one such example, see section 195 of the *Crimes Act 1900* (NSW) (destroying or damaging property), which carries a maximum penalty of 5 years imprisonment.

⁹ See the *Windridge Piggery* case (fn 4), where the judge remarked on the “unauthorised invasion of commercial premises” representing a “serious unlawful intrusion”, given the “specialist commercial operations”, and noted the “risk of serious harm” to the operations. He awarded \$15,000 in damages.

¹⁰ *Re Dingjan; ex parte Wagner* (1995) 183 CLR 323, 368 (per McHugh J).

The real issue – the existing system of reporting animal cruelty in “animal enterprises” operating behind closed doors is inadequate

What can be learned from all of this is that the existing mechanisms, both in terms of the laws as drafted, and their enforcement, are inadequate to prevent cruelty to animals going on away from the public gaze. This of course raises the question of what can be done to improve things. It is not the role of the Commonwealth to legislate in this area. It is the role of the States. However, what the Commonwealth can do is seek to provide expertise and advice to the States in a bid to modernise and streamline existing legislation. I have long held the view that an independent, statutorily-established Commission for Animal Welfare is the way to go.¹¹

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¹¹ See M Caulfield *Handbook of Australian Animal Cruelty Law* (2009), page 138.