

**INQUIRY INTO LANDOWNER PROTECTION FROM  
UNAUTHORISED FILMING OR SURVEILLANCE**

**Organisation:** NSW Government

**Date Received:** 6 July 2018

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# **NSW Government Submission to the Select Committee on Landowner Protection from Unauthorised Filming or Surveillance**

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PREPARED BY THE NSW GOVERNMENT

08 July 2018

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## Executive Summary

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The NSW Government recognises that unauthorised filming and surveillance is an issue of concern for individuals, businesses, and the community and has strengthened legislative and policy frameworks aimed at preventing and reducing the impact of such incidents.

Anecdotally, some industries and individuals have experienced repeated incidents of unauthorised filming or surveillance. For individuals, unauthorised filming and surveillance is an intrusion into the personal and private aspects of people's lives. For agricultural businesses, unauthorised filming and surveillance is predominantly focused on intensive livestock production facilities such as dairies, feedlots, piggeries, egg and chicken meat production facilities, or abattoirs, to record farming operations on film. There have been cases where such footage is released publicly with the aim of discrediting both the individual farm and the wider industry.

The NSW Government does not tolerate those who mistreat animals and will continue working with industry and enforcement agencies to ensure compliance with relevant legislation and frameworks. At the same time, the NSW Government does not tolerate people who breach community expectations around privacy and who deliberately and wilfully break the law in order to generate media stories to discredit farming businesses who are undertaking legitimate and lawful agricultural business activities.

In recent years, the NSW Government has acted in response to concerns from farmers about the issue of farm trespass. In 2015, the NSW Minister for Primary Industries and the Commonwealth Minister for Agriculture hosted a national Farm Trespass Roundtable, with representatives from government, industry and enforcement agencies including NSW Police. In 2016, the Bradshaw Review into NSW Stock Theft and Trespass (Bradshaw Review) was undertaken to analyse the intertwined crimes of stock theft, rural trespass and illegal hunting.

The NSW Government has been proactive in establishing a strong legislative framework to support primary producers as they undertake their business. Offences relating to trespass are contained within the *Inclosed Lands Protection Act 1901* and the *Crimes Act 1900* and include financial penalties and in some cases imprisonment. Particularly relevant to intensive animal industries, abattoirs and meat processors, in 2017 the *Inclosed Lands Protection Act 1901* was strengthened to include a new aggravated unlawful entry on inclosed lands offence where the unlawful entry introduces or increases the risk of a biosecurity impact on the property.

The *Biosecurity Act 2015* contains provisions that relate to the introduction and spread of plant and animal pests and diseases, which can result from unauthorised access to farming properties.

The *Surveillance Devices Act 2007* contains the primary protections against unauthorised filming or surveillance for landowners. Under this Act, there are financial penalties for offences committed by companies and financial and imprisonment penalties for individuals.

The NSW Government commends farmers who are proactive in providing suitable care for their animals. Some farmers are using advancements in technology, such as live streaming video footage, to increase their transparency and demonstrate their high animal welfare standards to the community. However, the NSW Government recognises that there is still more to do, with advancements in technology also adding new aspects to the issue of unauthorised filming and surveillance, in regard to both the capturing and publication of this footage.

## Impacts of unauthorised filming or surveillance

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Unauthorised filming and surveillance can be associated with farm trespass. Frequently, a perpetrator of unauthorised filming or surveillance commits a number of other farm trespass offences at the same time.

Based on NSW Police Force data, there were 442 reported incidents for farm trespass during 2015. Only a couple of these were farm incursions by animal activists. However, the NSW Government acknowledges these incursions may be highly concerning to land owners.

During the 2016 Bradshaw Review, land owners repeatedly expressed how important it is to have control over who comes on to their property and the fear and frustration they experience when they are unable to control this.

The Bradshaw Review also highlighted that some rural landholders have expressed concerns regarding drones flying over their properties, viewing farming activities, potentially surveying properties for future trespass, and startling livestock.

However, there have not been any incidents reported to the NSW Police Force to date where drones were used with a view to commit a property crime. Nor have there been reported incidents of stress or injury being caused to animals as a result of low flying drones.

### Impact of unauthorised filming of animal activities

Intensive animal businesses such as feedlots, piggeries, dairies and poultry operations as well as abattoirs and processing establishments may be the subject of unlawful filming and surveillance. Unlawful entry and surveillance poses risks to agricultural businesses, in addition to property damage. These incidents can be associated with risks to human security, biosecurity (introduction of animal and plant diseases and pests), and animal welfare.

The NSW Government acknowledges business owners may be concerned about potential impacts, which could include:

- reduced production due to disruption caused by trespass and/or measures required to minimise risks;
- costs associated with veterinary care, death of animals, mitigation of biosecurity breaches or repair of equipment and infrastructure; and
- loss of product due possible contamination.

Intensive animal enterprises and abattoirs operate with strict biosecurity procedures to minimise the risk of disease occurrence within their animals. Entry to the property and to associated buildings without the appropriate biosecurity safety measures can cause the introduction of harmful animal and plant diseases or pests. This risk is heightened if trespassers enter multiple farms. It is standard practice that pig and poultry farmers do not visit one another's farms and service providers do not enter production facilities on different farms without appropriate periods of elapsed time, showering and changing clothes. Trespassers risk introducing diseases that can dramatically impact on animal health and welfare.

The personal impact on farmers and their families are potentially significant. If publicly released images are misconstrued, farmers have little opportunity to defend themselves or correct any misrepresentations. They may be filmed in highly stressful situations if they confront trespassers.

There may also be wider negative impacts on their family, staff, the local community and the broader industry.

At a broader industry and national level, there are significant potential negative impacts for Australia's international agricultural trade partnerships. Good biosecurity is a critical aspect of any farming enterprise. Collectively every farming enterprise, along with entire industries, make their contribution to Australia's 'clean and green' reputation throughout the rest of the world in relation to the export of plant, livestock and animal products. Any unlawful entry onto farms which breaches good biosecurity practice has the potential to risk, if not actually threaten, this hard won track record and reputation for Australia's animal production industries. Misrepresentations of practices on Australian farms have the potential to compromise markets for Australian agricultural products.

## **Impact of unauthorised filming of humans**

Community expectations about personal privacy are very high. The NSW Government is committed to ensuring that people are free to live in their own homes without unauthorised filming or surveillance of their personal activities. Any intrusion into the privacy of people within their home through unauthorised filming can result in significant public humiliation and associated mental health problems. Many of the personal impacts discussed in the previous section are also applicable to unauthorised filming of humans, especially when the people are engaged in private activities where they would reasonably expect privacy.

## Previous steps to address farm trespass

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The issue of farm trespass has been raised at both the state and national level. The Farm Trespass Round Table in 2015 and the Bradshaw Review have provided relevant points for discussion between jurisdictions and relevant agencies. These discussions have resulted in associated tightening of legislation and policy frameworks aimed at minimising the adverse impacts of farm trespass on farming businesses within NSW and Australia.

The Bradshaw Review also highlighted a number of areas for improvement in responding to rural crime, including the penalties delivered by courts. In response to the issues raised in the Bradshaw Review, the NSW Government introduced a new aggravated trespass offence where there is an enhanced biosecurity risk and included a specific reference to a victim's geographical isolation as an aggravating factor on sentence. The NSW Police Force has improved officer training and education by updating the rural crime manual, introducing workshops led by the Department of Primary Industries and experienced regional officers, and placing specially trained police in the areas they are needed most.

The next section details the current legislation governing farm trespass offences.

## Legislation affecting Farm Trespass in NSW

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The NSW Government takes animal welfare and biosecurity seriously, while also noting that intensive livestock producers and abattoirs should be able to operate their businesses without the threat of unlawful entry and unauthorised filming and surveillance. The NSW Government is committed to ensuring that farming businesses treating their animals in a lawful and responsible manner are permitted to carry out their business undisturbed by the unlawful actions of animal activists. The NSW Government has been proactive in establishing the legislative framework to support the care and management of animals and support farmers and meat processors as they undertake their business.

The *Inclosed Lands Protection Act 1901* (ILP Act) relates to the protection of inclosed lands from intrusion and trespass. The ILP Act includes an unlawful entry on inclosed lands offence of 5 penalty units (\$550) and an aggravated entry on inclosed lands offence with a maximum penalty of 50 penalty units (\$5,500). As all agricultural businesses and meat processing businesses meet the definition of inclosed lands under the ILP Act, they are protected from intrusion and trespass under this Act.<sup>1</sup>

The new aggravated entry on inclosed lands offence in the ILP Act was amended in November 2017 and operates where the unlawful entry introduces or increases the risk of a biosecurity impact on the property. This new offence is relevant to many primary industry businesses, particularly intensive animal operations and meat processing operations. No one has been prosecuted under this provision to date.

In addition to the aggravated unlawful entry offence, the *Crimes (Sentencing Procedure) Act 1999* was amended to include a victim's geographical isolation as an aggravating factor to be taken into account in determining the appropriate sentence for an offence.

There are also strong penalties under the *Biosecurity Act 2015* for those who create a biosecurity risk or spread a pest/disease, particularly if it is undertaken intentionally or recklessly. The maximum penalties range from \$220,000 to \$1,100,000 and imprisonment for up to 3 years in the case of an individual, or from \$440,000 to \$2,200,000 in the case of a corporation.

Finally, there are a range of offences under the *Crimes Act 1900* for damaging property, causing violence or threatening violence against another person, or for injuring another person which carry imprisonment penalties.

In relation to animal welfare, the *Prevention of Cruelty to Animals Act 1979* (POCTA) and its supporting Regulation and Codes and Standards set out the required animal welfare standards in NSW. They apply to every person playing a role in the care of animals. Any suspected animal welfare offences should be notified to the enforcement agencies under POCTA, namely the NSW Police, RSPCA NSW or the Animal Welfare League NSW. Authorised inspectors from these organisations have the power to enter the land to undertake inspections (among other things).

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<sup>1</sup> The definition of "inclosed lands" is set out in s3 of the ILP Act.



# Response to the Select Committee Terms of Reference

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## Terms of Reference

**A select committee be established to inquire into and report on the extent of protection for landowners from unauthorised filming or surveillance and in particular:**

- (a) the nature of protection for landholders from unauthorised filming or surveillance, including but not limited to installation, use and maintenance of optical surveillance devices without consent under the *Surveillance Devices Act 2007*,**

The *Surveillance Devices Act 2007* (SD Act) contains the primary protections for landowners against unauthorised filming or surveillance. Section 8 of the SD Act makes it an offence for a person to use an optical surveillance device on or within premises to record an activity if the use of the device involves entry onto or into the premises without the consent of the owner or occupier of the premises.

For the purposes of the SD Act, an optical surveillance device means any device capable of being used to visually record an activity. Therefore, a person who enters private land, such as a farm, without the consent of the landowner and uses an optical surveillance device to record an activity on that land commits an offence under the SD Act.

Further protection is also provided against unauthorised audio listening or recording devices by section 7 of the SD Act. Section 7 of the SD Act makes it an offence for a person to use a listening device to record private conversations, whether they are part of the conversation or not, unless all parties consent to the recording.

In addition, section 11 of the SD Act makes it an offence for a person to publish any recording of a conversation or the carrying on of activities, that has come to the person's knowledge as a result of unlawful use of a listening device or optical surveillance device. This may capture some recordings taken by trespassers.

- (b) the extent and appropriateness of penalties for unauthorised filming or surveillance, including but not limited to on-the-spot fines and/or relevant penalties under the *Summary Offences Act 1988*,**

The maximum penalty for the offence of using an optical surveillance device without consent (s8 of the SD Act) is \$55,000 for a corporation or \$11,000 and/or 5 years imprisonment for an individual. In relation to individuals, this means the offence is a serious indictable offence, which is the most serious category of offence. However, this offence can be dealt with summarily in accordance with Schedule 1 to the *Criminal Procedure Act 1986*. This offence is not a penalty notice offence and there are no offences in the *Summary Offences Act 1988* relating to unauthorised filming.

- (c) the implications with regard to self-incrimination of the request of disclosure by a person of any recordings made by that person,**

It is a common law right that a person should not be required to provide evidence that could incriminate that person (the privilege against self-incrimination). A person who enters land without consent and records an activity may be entitled to refuse to provide any recording to police on the

grounds of self-incrimination as the recording could implicate that person in the commission of an offence, such as an offence against the SD Act or the ILP Act.

**(d) the implications of rapidly changing media environment, including social media platforms such as Facebook Live, and**

The rapidly changing media environment is bringing new challenges for both rural and urban landholders. Two main areas are discussed below.

**Remotely Piloted Aircraft Systems**

Remotely Piloted Aircraft Systems (RPAS), commonly known as drones, with a camera attached, have many uses in rural and coastal areas for positive information gathering, for example: assisting in spotting outbreaks during bushfires; shark spotting; marine and remote area search and rescue; monitoring endangered wildlife; locating pest animals using thermal readings to enable pest controllers to locate them; and monitoring of stock animals or water availability on geographically large properties by the property manager.

The use of RPAS with cameras attached is also a recreational and artistic activity that is growing in popularity. For both commercial and recreational use, RPAS must comply with the federal *Civil Aviation Safety Regulations 1998* (CASR), especially in relation to public safety and no fly zones. The rules relating to recreational drone flying means that drones can only be flown in daylight hours and the drone must remain in visual line-of-sight by the operator's eyes. Drones must not be flown: near airports; near situations where emergency operations are underway such as floods, fires or car accidents; or over people including beaches, parks, events, or sport ovals where there is a game in progress. Offences under CASR are summary Commonwealth Offences and administrative offences punishable by fine only via infringement notice or court action. NSW Police officers are not authorised to commence proceedings against any person found committing offences for the misuse of RPAS. The Civil Aviation Safety Authority (CASA) is the only entity with authority to take action on offences committed by RPAS, which are primarily related to aviation safety and do not address security or privacy issues.

Personal privacy from unauthorised filming or photography by drones is important. The *Crimes Act 1900* has a number of offences relating to voyeurism, however it is unlikely that these offences would apply to observing farming practices. There are also situations where a drone could be used innocently for this purpose.

Under the SD Act, although a video camera attached to a RPAS meets the definition of an optical surveillance device, no offence is committed for using a device on, in or over a premises or property that has been lawfully accessed. For example, if a RPAS operator has gained permission from a landholder's neighbour to operate the RPAS, as long as the RPAS is operated from his or her own side of the fence in order to record or observe activities on the other side, no law has been breached. If the RPAS does not enter into a private landholder's airspace whilst filming persons or activities on that land without consent, it may not be an offence under the SD Act.

In addition, the airspace over private land is not inclosed and as long as an RPAS is flown over land quickly and at a height that does not detract from the landholders use and enjoyment of the property, no trespass is committed under the ILP Act. However, it is not clear on what height the RPAS would need to be flown to avoid trespassing on private land.

On the other hand, landholders deliberately interfering with a RPA (e.g. shooting it down, damaging it or confiscating it), could themselves be investigated and prosecuted by police.

## **Live Broadcast**

There have been recent developments in live streaming through Facebook Live or other platforms such as Instagram, YouTube, Twitter and other live streaming specialist websites. The ability to live stream video footage may make it easier to publicise unlawfully obtained images or footage and to remain anonymous.

The ability to live stream video footage can also be lawfully used to increase transparency. Accredited quality assurance and auditing programs can help support consumer confidence in animal welfare in livestock production. These programs may include the installation of web cams that are streamed live to assure consumers of the high animal welfare standards that are employed by the firm. This practice is widespread in parts of the European Union.

### **(e) any other related matter.**

The *Surveillance Devices Act 2007* s8(1) provides:

“A person must not knowingly install, use or maintain an optical surveillance device on or within premises or a vehicle or on any other object, to record visually or observe the carrying on of an activity if the installation, use or maintenance of the device involves:

- (a) entry onto or into the premises or vehicle without the express or implied consent of the owner or occupier of the premises or vehicle, or
- (b) interference with the vehicle or other object without the express or implied consent of the person having lawful possession or lawful control of the vehicle or object.”

Therefore, any video footage or imagery recorded or transmitted with any kind of optical recording device without the owner’s consent to enter the premises is considered unlawful. However, a video recording taken by a staff member of the business is unclear, as in this situation, the employee has the owner’s consent to enter the premises, and as long as the employee does not interfere with the premises, a vehicle or other object, it is unclear if s8(1) would apply. It is possible that s8(1) may not apply to an employee who films wearing a body worn camera, even though the employee does not have the owner’s consent to film.

RSPCA NSW has noted that they have had matters referred to them by people who have taken video footage at their place of employment. The legal standing of this footage is unclear.

## Conclusion

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The NSW Government is committed to safeguarding animal welfare and providing the strongest possible regulatory framework to promote responsible animal ownership and care in NSW. At the same time the rights of people to live and operate businesses with reasonable levels of privacy is important.

As a society, we do not accept citizens breaking and entering private homes. Nor do we accept trespass onto farms and business premises.

The NSW Government has recently created and amended several pieces of legislation to provide more protection against trespass on farms and is committed to ensuring that there are suitable protections for landholders from unauthorised filming or surveillance, including footage taken using existing and future camera technology.

Community expectations around the maintenance of animal welfare standards within animal production industries must be balanced with the reasonable expectation that lawful animal production practices can continue to operate safely and uninterrupted. The clear majority of farm businesses provide appropriate care for their animals. The POCTA along with its supporting Regulation, national model codes of practice and NSW codes, standards and guidelines set the minimum standard by which production animals should be kept and articulate acceptable industry standards set in line with community expectations.

Primary producers work hard to rear healthy animals for market and the NSW Government is completely committed to ensuring it is done in a humane and ethical way. The legislative framework in NSW can protect the legitimate interests of whistle-blowers and investigative journalists. Anyone who has a concern relating to animal welfare is encouraged to alert relevant authorities rather than undertaking unauthorised filming of farm operations for the purpose of providing the footage to media companies or to upload on social media.