

**Submission
No 7**

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

Organisation: Animal Liberation

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Submission to

THE LEGISLATIVE COUNCIL SELECT COMMITTEE
ON LANDOWNER PROTECTION FROM
UNAUTHORISED FILMING OR SURVEILLANCE





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1. Introduction

1.1 This document has been prepared by Animal Liberation in response to the Animal Justice Party's (AJP) formal request and invitation to lodge a submission concerning the Legislative Council's Select Committee on Landowner Protection for Unauthorised Filming or Surveillance.

1.2 Animal Liberation has considerable experience and knowledge relating to animal welfare and protection. Our mission is *to permanently improve the lives of all animals*. As an active organisation of over four decades, Animal Liberation has witnessed growing popular sentiment towards the welfare of other animals. Over time, this has been increasingly coupled with a diminishing level of public confidence in current attempts, legislative or otherwise, to protect animals from egregious, undue or unnecessary harm.

1.3 Developing public sentiment regarding the increasing importance placed on animal welfare issues can be seen most immediately in the size and scope of public demonstrations (e.g., live export rallies). However, growing levels of involvement in and awareness of the animal advocacy space¹, increasing levels of consumer activity in the promotion of welfare improvements², the development and marketing of alternatives to animal-based products and the associated engagement of retail sectors³, and an increasing concern regarding the reliance on overburdened institutions, welfare agencies and/or charities to ensure regulatory compliance concerning animal welfare, are important factors to consider. The impetus for these developments includes a perception of current Australian laws and protective frameworks as inadequate for the actual protection of animals, as well as a notable lack of enforcement, monitoring, and transparency.

1.4 Animal Liberation understands that there is occasionally a need to minimise or correct certain inconsistencies within existing law. However, we wish to emphasise a range of related concerns. These primarily relate to alterations of existing legislation that seek to prejudice private animal cruelty investigators from performing investigations intended to provide evidence of systemic animal cruelty⁴. Following former High Court Justice Michael Kirby: "concerns about animal welfare are clearly legitimate matters of public debate across the nation. Many advances in animal welfare have occurred only because of public debate and political pressure from special interest groups"⁵.

¹ Complaints to Australian RSPCAs increased by over 150% between 2005-06 and 2014-15. Though there is some ambiguity as to whether this reflects an increase in actual animal abuse or an increase in popular sensitivity to such abuse, there are indications to suggest it is the latter. For further information, see Chen, P J 2016, *Animal Welfare in Australia: Politics and Policy*, Sydney University Press, Sydney.

² Following calls for public submissions on the draft Australian Animal Welfare and Guidelines for Poultry, Animal Health Australia (AHA) announced that it was the largest response to a public consultation they had ever managed. For further information, see Animal Health Australia (AHA) 2018, 'Record response to poultry welfare standards during public consultation,' 26 February.

³ Major Australian retailers have incorporated plant-based products into the traditionally animal-based meat aisle. Though this has been met with condemnation from certain political parties, retailers are recording high sales. For further information, see Condon, J 2018, 'Woolies [Woolworths Australia] vegetarian 'mince' sells out within days of launch,' *Beef Central*, 19 June; Wahlquist, C 2018, 'Not mincing words: Nationals denounce vegetarian product in meat aisle,' *The Guardian*, 18 June.

⁴ Advocates for a range of social justice issues, including environmental and animal protection, are known to utilise surveillance technologies to monitor the activities of various enterprises. These activities primarily relate to concerns stemming from activities conducted upon private property and are performed to provide the public with information otherwise unavailable. Such covert surveillance may lead to issues related to current legislation, such as the *Surveillance Devices Act 2007* (NSW), designed and intended to provide protection of people's private activities and/or conversations.

⁵ Kirby, M quoted in Goodfellow, J and Radan, P 2015, 'Australia's new bill to protect animals will do anything but,' *The Conversation*, 1 March.

2. Public interest

2.1 Unlike international laws associated with privacy protection, Australian law does not formally recognise a “right” to privacy per se. Australian common law privacy protection is accessible only via the invocation of existing torts, such as trespass or defamation⁶. Thus, the determination of the rights or responsibilities of investigators as applied to the rights of those being investigated is largely conditional on an amalgam of “implied rights, assorted pieces of state and federal legislation [...] and privacy-related common law”⁷. For the purposes of the current submission, focus will be upon animal enterprises and investigations conducted by private animal cruelty investigators.

2.2 Attempts to gag the collection of materials obtained by private animal cruelty investigators significantly diminishes the capacity of the consumer to be reliably aware of practices inherent in the production of animal products⁸. Given attempts occasionally made by animal enterprises to provide consumers with misleading or deceptive information⁹, such investigations are often the only form of transparent information concerning animal enterprises that the public have access to. Following Kirby, such knowledge is thereby considered legitimate matter of public interest. The 2015 live-baiting scandal¹⁰, Hawkesbury Valley Meat Processors¹¹, and the High Court’s judgment in *ABC v Lenah Game Meats Pty Ltd*¹² are relevant cases in this context, as they directly relate to the strain between privacy “rights” and associated public interest considerations¹³.

⁶ Although the Australian Federal Parliament has recourse to enact such legislation, there has been a reluctance on the part of government to do so. For further information, see Sarre, R 2003, ‘Journalists, invasion of privacy and the High Court decision in Lenah Game Meats,’ *Australian Journalism Review*, 25: 1, 115-128.

⁷ For further information, see Sarre, R 2003, ‘Journalists, invasion of privacy and the High Court decision in Lenah Game Meats,’ *Australian Journalism Review*, 25: 1, 115-128.

⁸ For example, previous attempts to require the reporting and provision of covertly captured footage (potentially) containing evidence of animal cruelty within a set time frame effectively impairs the capacity of any investigation, private or otherwise, to provide evidence of systemic cruelty.

⁹ For example, a claim lodged with the Australian Consumer and Competition Commission (the ACCC) in 2011 held that one of Australia’s largest duck meat producer had used deceptive labelling on their products. Covert footage obtained via trespass showed ducks had “no access to open water,” despite claims made that the ducks were “open range” and were “grown nature’s way”. Similarly, the ACCC has taken action against several chicken meat producers for intensively confining animals despite claiming they were “free to roam”. For further information, see McCausland, C, O’Sullivan, S and Brenton, S 2013, ‘Trespass, animals and democratic engagement,’ *Res Publica*, 19, 205-221; Parker, C and de Costa, J 2016, ‘Misleading the ethical consumer: the regulation of free-range egg labelling,’ *Melbourne University Law Review*, 39: 3, 895-949.

¹⁰ The 2015 live baiting exposé would not have provided the required documentary evidence to secure an inquiry were it not for the capacity to document this systematically. The televised exposé, utilising materials filmed by activists surveillance, included trainers who denied the use of live baiting as a practice. Subsequently, these trainers were shown to be involved. The ensuing controversy, including revelations revealed via FOI requests that the state racing regulator and its executives actively strategised to downplay the scandal in spite of prior knowledge, furthers concerns associated with authorities actively concealing criminal conduct. For further information, see Chen, P J 2016, *Animal Welfare in Australia: Politics and Policy*, Sydney University Press, Sydney; Meldrum-Hanna, C and Clark, S 2015, ‘Greyhound live baiting: internal documents reveal cover-ups, tip-offs and mismanagement inside NSW racing regulator,’ *ABC News*, August 31.

¹¹ Workers at this abattoir stated that they had contacted the RSPCA and the NSW Department of Primary Industries (DPI), though neither had taken action. Critically, these authorities were proven unable to act as cruelty would cease upon the presence of external officers. Subsequently, workers installed a device to document instances of animal cruelty. These materials were then provided to the relevant authorities and led to law reform within NSW abattoirs, including the installation of a designated Animal Welfare Officer at abattoirs. Such an outcome would not have been possible if the proposed Bill was accepted.

¹² Early in 1998 a surveillance device was covertly installed inside a Tasmanian animal enterprise (‘Lenah Game Meats’). The collected footage, containing evidence of alleged animal cruelty, was subsequently supplied to the Australian Broadcasting Corporation (‘the ABC’). Thereafter, the ABC’s *7.30 Report* successfully satisfied a Tasmanian court that the materials could be broadcast, though this decision was later reversed. The ABC subsequently appealed this decision. The High Court allowed the appeal, thereby exonerating the ABC, its decision to broadcast materials obtained covertly, without prior permission, and via trespass on private land. Critically, the joint judgment of Justices Gummow and Hayne held that: ‘Lenah’s reliance upon an emergent tort of invasion of privacy is misplaced. Whatever development may take place in that field [privacy] will be to the benefit of natural, not artificial, persons’. Similarly, CJ Gleeson maintained that: ‘The problem for [Lenah] is that the activities secretly observed and filmed were not relevantly private’. That is, though the premises of an animal enterprise are ‘private in a proprietary sense,’ granting the property owner the right of exclusive possession, CJ Gleeson held that this alone ‘does not make everything that the owner does on the land a private act’. Similarly, an act cannot be held private ‘simply because the owner of land would prefer that it were unobserved’. For further information, see Stewart, D 2002, ‘Protecting privacy, property, and possums: Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd,’ *Federal Law Review*, 30:1, 117-201.

¹³ For further information, see Heath, W M 2002, ‘Possum processing, picture pilfering, publication, and privacy: Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd,’ *Monash University Law Review*, 28:1, 162-180.

3. What are the rights of those who wish to remain outside the public gaze?¹⁴

3.1 The Australian public have a legitimate and intelligible interest in knowing how their food is produced¹⁵. Correspondingly, animal enterprises may have an active interest in preventing the collection and dissemination of such information. Legislation that requires the rapid reporting of incidents of animal cruelty captured via surveillance, for instance, fails to acknowledge the significant public interest considerations associated with the collection of evidence of systemic animal cruelty. Such evidence can also be of importance to human health, environmental protection, or the transparency of commercial conduct¹⁶. As such, these considerations relate to: a) the materials providing the public with otherwise unavailable information concerning the conduct and practice of industries involved in the production of animal products, b) the advancement of public awareness and discourse on matters associated with animal welfare, c) the safety of food and consumer awareness, and d) broader justice issues.

3.2 As the primary regulatory authorities¹⁷ tasked with investigating and/or prosecuting animal cruelty cases do not currently have the power or authority to utilise surveillance technologies, and simultaneously face significant resourcing challenges that often prevent the adequate inspection of animal enterprise facilities, the probability that such investigations will never take place is unacceptably high. That is, upon provision of either a) notification of the existence of materials containing evidence of animal cruelty and/or b) the provision of said materials, the relevant authorities will enforce the discontinuation of any private investigation(s). The relevant authority would then consider commencing an investigation of their own.

3.3 According to RSPCA Australia, “in the vast majority of cases this will not involve the continuation of covert surveillance operations”. This is partly due to the RSPCA not having the authority to do so. However, a requirement to report the collection of materials (possibly) containing evidence of “serious” animal cruelty, combined with the requirement to then physically provide such materials to the relevant office, effectively ensures that the collection of evidence of systemic, illegal and punishable animal cruelty is impossible. As such, this equates to the targeting of one cohort for the benefit of another. This is echoed by the RSPCA, who note that rapid reporting requirements “effectively cease the continuation of any investigation the individual may have been engaged in, preventing the detection of *repeated or routine* forms of animal abuse” (emphasis added). The introduction of such laws ultimately means that “evidence of routine or widespread animal cruelty will simply not be forthcoming”.

¹⁴ For further information, see Sarre, R 2003, ‘Journalists, invasion of privacy and the High Court decision in *Lenah Game Meats*,’ *Australian Journalism Review*, 25: 1, 115-128.

¹⁵ This is reflected in existing law that holds that animal welfare issues impact upon a) the safety of the food derived thereof and b) public expectations associated with this. See the *Food Act 2003* (NSW), for example. Designed to regulate the handling of food and thereby ensure its safety, the *Food Act 2003* also includes provisions pertaining to animal welfare. Boom and Ellis: “The inclusion of its [the *Food Act 2003*] animal welfare provisions appears to be on the basis that ‘animal welfare objectives ... impact on food safety and on public expectations as to wholesomeness’”. For further information, see Boom, K and Ellis, E 2009, ‘Enforcing animal welfare law: the NSW experience,’ *Australian Animal Protection Law Journal*, 3, 6-32.

¹⁶ For example, footage obtained over six weeks by the Humane Society of the United States (HSUS) in early 2008 showed workers at a Californian animal enterprise physically abusing sick or injured cows. This led to the largest recall of beef in America. Given that the facility was a major supplier to the National School Lunch Program, the depth of ramifications associated with Bills such as these warrant careful and transparent analysis. In the absence of the incriminating footage, or in the presence of rapid reporting Ag-gag legislation, workers may have been informally reproached or reprimanded, or a small recall may have been issued. The illegally operating facility may have been permitted to continue practicing, despite the documented abuse of animals and danger presented to human health. Similar laws seeking to impose a rapid reporting requirement *vis-à-vis* material evidence of animal cruelty have been proposed in Australia.

¹⁷ In NSW, these authorities are the Royal Society for the Prevention of Cruelty to Animals (RSPCA) and the Animal Welfare League (AWL).

4. Conclusion and recommendations

4.1 Given the above, there are a range of concerns associated with current and/or proposed amendments to existing legislation as applied to landowner protection. Chief amongst these concern differential protection and a dismantling of key public interest areas.

4.2 Awareness of the significant practical shortcomings of authorities currently tasked with animal welfare governance and enforcement as stemming from a) an inherent clash of interests¹⁸ and b) an institutional reluctance to provide the requisite resources required to appropriately prosecute, or otherwise police, cases of animal cruelty, suggests the need for structural changes in this arena. Proactive policy, rather than reactive legislation, is urgently required.

4.3 Developments that promote genuine improvements to animal protection may include the establishment of an Independent Office of Animal Welfare (IOAW)¹⁹. Additionally, given that the current portfolio of animal welfare resides with the Minister of Primary Industries and the inherent conflict of interest stemming from the dual-responsibilities of this office²⁰, it is essential that responsibility for animal welfare issues be reallocated elsewhere to remedy this intrinsic conflict.



¹⁸ For example, the NSW Minister for Primary Industries is simultaneously tasked with the promotion of primary industries (including animal enterprises) and the protection of animals. This structural conflict of interest is unacceptable, and reveals the inadequacies in current Australian law.

¹⁹ Various organisations and political parties have advocated for the establishment of an IOAW, notably the Australian Greens and the introduction of the *Voice for Animals (Independent Office of Animal Welfare) Bill*.