

**Submission  
No 10**

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

**Organisation:** Humane Society International Australia

**Date Received:** 7 July 2018

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# HUMANE SOCIETY INTERNATIONAL

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Select Committee on Landowner Protection from Unauthorised Filming or Surveillance

Parliament House  
Macquarie St  
Sydney NSW 2000

Submitted via upload to inquiry webpage

7 July 2018

Dear Committee,

## **RE: SUBMISSIONS IN RELATION TO THE SELECT COMMITTEE ON LANDOWNER PROTECTION FROM UNAUTHORISED FILMING OR SURVEILLANCE**

Humane Society International (HSI) welcomes the opportunity to provide this submission to the Legislative Council Select Committee on Landowner Protection from Unauthorised Filming or Surveillance. We are the world's largest conservation and animal welfare organisation with over 10 million supporters and are leaders in the movements to save wildlife and their habitats and to reduce cruelty to animals in farming and other industries. We have more than 25 years' experience in Australia working actively to assist government bodies and agencies to further the protection of animals and the environment through appropriate regulations and enforcement. HSI offers the comments below to the Select Committee on behalf of our 70,000 Australian supporters and we hope their consideration will contribute to improved farm animal welfare measures in NSW.

We note the Select Committee media release dated 23 May 2018 creates an explicit link between this inquiry and the *"...issue of animal welfare advocates trespassing on land to try expose animal cruelty"* and as such that is the context within which we have addressed the Terms of Reference below.



## Terms of Reference

### **(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 (NSW)* (SDA)**

Under the SDA, landholders are protected from installation, use, and maintenance of optical surveillance devices on premises and in vehicles without express or implied consent of the owner.<sup>1</sup> There are a number of exemptions to this prohibition, such as where surveillance occurs in accordance with a warrant or as a result of other investigations as permitted by law.<sup>2</sup> The SDA does not apply to the use of optical recording devices on public land. It is also an offence under the SDA to publish or communicate any record that is obtained via a contravention of the SDA. Similarly, the SDA prohibits unauthorised audio recordings in much the same way.<sup>3</sup>

Under the *Inclosed Lands Protection Act 1901* (NSW) it is unlawful to enter any land (public or private) that is surrounded by a fence, wall, or recognised boundary without consent. It is also unlawful to remain on such land after being requested by the occupier to leave.<sup>4</sup>

Under the *Privacy Act 1988* (Cth), a reference to personal information may include the image of a person where they are clearly identifiable.<sup>5</sup> Personal information collected by an organisation (which under the Act includes individuals) in relation to the carrying out of the entities functions or activities<sup>6</sup> cannot be disclosed for any purpose other than for that which it was primarily obtained.<sup>7</sup> This is relevant to the present inquiry, as it creates a potential avenue for recourse against groups or individuals who obtain video footage of farmers or their employees committing acts of animal cruelty.

Finally, given the clear link between this enquiry and the “surveillance” of agriculture practices, it is relevant to acknowledge the impact of the *Biosecurity Act 2015* (NSW). The *Biosecurity Act* has the potential to prevent the entry of investigators or activists to farms or other livestock housing for the purpose of limiting biosecurity risk.<sup>8</sup>

HSI is of the view that the existing laws around surveillance, trespass, privacy, and biosecurity are more than sufficient to capture non-consensual entry and recording of agricultural practices. To add specific “Ag Gag” laws to this existing suite of protections would be an unjustified and narrowly targeted restriction on free speech. A further discussion of the relevance and impacts of such action is discussed below in section (e).

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<sup>1</sup> *Surveillance Devices Act 2007* (NSW) s8(1)(a) (‘SDA’)

<sup>2</sup> SDA s8(2)

<sup>3</sup> SDA s7

<sup>4</sup> *Inclosed Lands Protection Act 1901* (NSW) s4(1)

<sup>5</sup> Office of the Australian Information Commissioner, *What do I need to think about if I want to put photographs or video of people on the web?* <<https://www.oaic.gov.au/agencies-and-organisations/faqs-for-agencies-orgs/businesses/what-do-i-need-to-think-about-if-i-want-to-put-photographs-or-video-of-people-on-the-web>>

<sup>6</sup> *Privacy Act 1988* (Cth), Sch1, Pt 2, s3.2

<sup>7</sup> *Privacy Act 1988* (Cth), Sch1, Pt 3, s6.1

<sup>8</sup> *Biosecurity Act 2015* (NSW) s22

**(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**

Under the SDA, fines for the installation, use and maintenance of optical surveillance devices without consent can be up to 100 penalty units (500 for corporations) and/or up to five years imprisonment.

The *Inclosed Lands Protection Act* prescribes a maximum penalty of five penalty units<sup>9</sup> (or higher for certain prescribed premises)<sup>10</sup> for unlawful entry.

The *Privacy Act* imposes a maximum penalty of 60 penalty units and/or imprisonment for one year for the disclosure of personal information without consent.<sup>11</sup>

The *Biosecurity Act* imposes a maximum penalty of \$1,100,000 and/or imprisonment for 3 years for individuals who recklessly cause significant biosecurity impacts.

The scope of this Term of Reference is misleading and inadequate to address the issue at hand. We remind the Committee that animal cruelty is a criminal offence in NSW.<sup>12</sup> As in all issues before the law, the question of context is highly relevant to the appropriateness of the penalty imposed. As will be addressed in (c) below, there is legislative support and precedent in case law for immunity from obtaining evidence illegally, and the legitimate admission of said evidence in proceedings. The issue of farm animal welfare rests squarely within the realms of the public interest<sup>13</sup> and as such it is inappropriate to pre-emptively suggest that the penalty for exposing one illegal act by committing another is, or is not, appropriate.

Therefore, HSI recommends the Committee also considers the appropriateness and adequacy of penalties for farm animal mistreatment, and for reporting false or misleading information surrounding farm practices.

**(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 well established in Australian law that there is privilege in respect of self-incrimination during proceedings.<sup>14</sup> Evidence obtained illegally can still be admissible, should the witness be willing to provide it, on the condition the witness is granted a certificate providing immunity from proceedings in relation to the evidence.

Furthermore, evidence obtained illegally may be admissible in proceedings under the *Evidence Act* where the desirability of the evidence outweighs the undesirability of the same.<sup>15</sup> The Act is prescriptive in terms of what factors should be considered by the court when making such a

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<sup>9</sup> *Inclosed Lands Protection Act 1901* (NSW) s4

<sup>10</sup> *Inclosed Lands Protection Act 1901* (NSW) s3

<sup>11</sup> *Privacy Act 1988* (Cth) s 80Q

<sup>12</sup> *Prevention of Cruelty to Animals Act 1979* (NSW); *Crimes Act 1900* (NSW) s530

<sup>13</sup> *ABC v Lenah Game Meats Pty Ltd* [2001] HCA 63, Kirby J at para 217

<sup>14</sup> *Evidence Act 1995* (NSW) s128

<sup>15</sup> *Evidence Act 1995* (NSW) s138

determination. The intention is to strike a balance between the public interest in good evidence, and the public interest in deterring illegal activity. The concept of “unfairness” as it relates to the accused against which such evidence is to be used is but one of several factors that will determine the admissibility of this evidence.<sup>16</sup>

These provisions exist in the fundamental legal principle of equity, as a means of ensuring that all competing interests are considered before the law, and a determination that balances the private privacy interests of the individual and the relevant public interests (such a free speech, expression, and press) is made in good conscience.<sup>17</sup>

HSI submits to the Committee that the issue of animal welfare activists and farm trespass should under no circumstances depart from the accepted common law and legislative standards of equity in relation to the balance of public and private interest. HSI does not encourage illegal activities in the name of investigation, but we do support the right for the public to have access to transparent farm practices and full understanding of the animal agriculture industry in which nearly every individual in Australia participates as a consumer. We would strongly oppose any direct action by the NSW Government to restrict the self-incrimination or evidence admissibility privileges as they presently exist in Australian law insofar as they apply to the activities of animal welfare activists.

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

Live streaming platforms, such as Facebook Live, have yet to be directly addressed by surveillance laws in NSW. HSI notes that the SDA prohibits the publication or communication of records obtained as a contravention of the act, both directly and indirectly. This would seem to preclude live streaming by optical surveillance devices used in contravention of the act, as this is a communication of illegally obtained footage and an offence under the SDA.

The real world implications, however, are quite different. Information obtained by optical recording devices now has the ability to be immediately distributed and viewed by a wide audience. There is no opportunity for any injunction to be ordered to prevent the broadcast of the footage, as the broadcast is instantaneous. Even with the ability to impose a penalty on an investigator for taking such action, the social impacts of such footage will be unavoidable as the information cannot be removed from the public consciousness. It is in light of this that we urge the NSW Government to instead impose a higher standard of practice and monitoring on the agriculture industry, instead of limiting transparency and availability of information to the public, below in (e). For example, Humane Society International recommends the NSW Government enact mandatory surveillance in abattoirs. With public concern over animal welfare only predicted to increase, greater transparency of in farming operations is an obvious strategy to remove the motivation for 3<sup>rd</sup> party monitoring and surveillance.

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<sup>16</sup> Australian Law Reform Commission, *Evidence (Interim Report) 1985*, 26:1 at [964]; *Bunning v Cross* [1978] HCA 22 at [27]

<sup>17</sup> *ABC v Lenah Game Meats Pty Ltd* [2001] HCA 63, Kirby J at para 181-182

### **(e) other issues**

The issue of most concern, which is conspicuously not addressed directly by the Terms of Reference for this inquiry, is the public interest and freedom of political speech implications of creating extra legislation to directly target the activities of one group. The Terms of Reference also do not inquire as to opportunities for improved farm animal welfare standards, improved auditing of those standards and improved transparency in the animal agriculture industry, all of which would remove the motivation for 3<sup>rd</sup> party monitoring and surveillance.

We bring to the Committee's attention the significant number of institutionalised animal cruelty practices that have been exposed and ultimately redressed as a result of the efforts of undercover investigators and animal welfare proponents. The large number of investigations into the live export trade, animal processing facilities, abattoirs, and greyhound racing that have uncovered abhorrent treatment of animals and elicited significant public outrage have resulted only through the direct actions of individual activists or groups.<sup>18</sup> These efforts have been aided by the media coverage of these issues as significant matters of interest to the public. In alignment with the democratic principles by which Australia aims to operate, there can be no legitimate interference by the Government in the decision by media outlets to present cruel agricultural practices to the public. The balance of interests between the privacy of farmers and the right for the Australian public to know how animals are treated in the agriculture industry is a matter for the Courts to decide on a contextual and conscionable basis.

Australia need only look to the results on other countries for proof that "Ag Gag" legislation is not widely considered to be the legally acceptable way to resolve a lack of public confidence with the treatment of animals in the agriculture industry. As of 2015, only four Ag Gag bills out of 20 in the United States had been successfully passed since 2011. In 2013, state legislatures looked at 15 Bills that would criminalise unauthorised videotaping on farms and ranches. Of those 11 were considered, and all failed.

Such laws only give the impression there is something to be hidden by the agriculture industry. Why else would such consistent efforts be taken to limit public knowledge of animal welfare practices on farms? Ag Gag laws are a "shoot the messenger" approach to dealing with a single symptom of a far larger animal welfare issue in Australia. Any legislation designed to directly silence the acquisition and publication of information related to cruel farming practices can exist only to protect the perpetrators of such abuse. Animal abuse is a crime like any other, and the mere suggestion that the existence of such crimes should be actively hidden from the public by the government is alarming.

If animal protection laws were adequate with sufficient compliance monitoring, enforcement and transparency, then there would be no need for undercover investigations (undertaken by individuals at the real risk of prosecution) to expose cruelty and neglect. These duties are instead often left to charitable organisations who have limited resources and staff, relying on public donations. Today, most animal cruelty cases are reported by animal activists and animal protection groups. Without their investigations, this cruelty would continue, hidden from public scrutiny.

HSI struggles to identify the benefit of introducing any further legislation to deal with the issues of trespass on farms by investigators. Australian law already provides remedy for trespass, unauthorised

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<sup>18</sup> RSPCA Discussion Paper, *Ag-gag laws in Australia?* <<http://kb.rspca.org.au/afile/558/122/1/>>

surveillance, privacy breaches, and biosecurity risk exposure. What is to be gained by singling out a group of individuals, or stifling a very specific topic of public discussion? Conversely, there is much to lose in the long standing rights to freedom of speech, media and politics should such laws come to pass. If the interests of animal welfare, livestock security, and private property rights are truly the main concerns of this inquiry then the Committee can rest assured that these interests are currently adequately dealt with in Australian law, without any need to further limit free public discourse in relation to serious animal welfare issues.

Please forward any correspondence in relation to these submissions by email to \_\_\_\_\_ I  
can be contacted anytime on \_\_\_\_\_ or at the email address noted above.

Yours sincerely,

Nicola Beynon  
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