

**Submission
No 12**

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

Organisation: Animal Defenders Office

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Animal Defenders Office
Using the law to protect animals

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The Animal Defenders Office Inc. is accredited by the National Association of Community Legal Centres.

Select Committee on Landowner Protection From Unauthorised Filming or Surveillance
Legislative Council
Parliament of New South Wales
Macquarie Street
Sydney NSW 2000

via: landowner.surveillance@parliament.nsw.gov.au

Submission from the Animal Defenders Office

Dear Sir/Madam

Thank you for the opportunity to provide a submission to the inquiry by the Select Committee on Landowner Protection for Unauthorised Filming or Surveillance (“the Inquiry”).

About the Animal Defenders Office

The Animal Defenders Office (hereinafter “ADO”) is a non-profit community legal centre that specialises in animal law. The ADO offers information and representation for individuals and groups wishing to protect animals. The ADO also produces information to raise community awareness about animal protection issues, and works to advance animal interests through law reform.

The ADO is a member of Community Legal Centres NSW Inc.

Our submission, as prompted by the Terms of Reference, are set out below.

Our submission

Term of Reference 1(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.*

Protection under surveillance devices legislation

The ADO submits that landholders are already sufficiently protected from filming or surveillance without consent under the *Surveillance Devices Act 2007* (NSW) (“the SD Act”). The SD Act replaced the *Listening Devices Act 1984* (NSW). The SD Act makes it an offence to install, use, or maintain a surveillance device, except in very limited circumstances, or to publish or communicate matters obtained in contravention of the SD Act.¹ Surveillance devices include

¹ *Surveillance Devices Act 2007* (NSW) ss 7, 8, 9 and 11.

listening devices and ‘optical surveillance’ devices (such as cameras).² Strict penalties already apply to these offences (as discussed in the next section of this submission).

The ADO submits that the NSW surveillance devices legislative scheme is one of the toughest in the country. For example, the *Surveillance Devices Act 2016* (SA) commenced in South Australia on 18 December 2017.³ This Act contains offences relating to the installation, use and maintenance of optical surveillance devices without consent that are very similar to the offences in the SD Act in NSW.⁴ Yet unlike the SD Act in NSW, the South Australian Act contains a defence if the surveillance device is used in the ‘public interest’.⁵ ‘Public interest’ is not defined. In our view, the ‘public interest’ exemption could apply to recording ‘private activities’ involving cruelty to animals.

The ADO therefore submits that the SD Act should be amended to include a public interest exemption to recording and publishing ‘private activities’ involving cruelty to animals.

Protection under biosecurity legislation

The *Biosecurity Act 2015* (NSW) aims to prevent, eliminate, minimise and manage ‘biosecurity risks’. Under the law a biosecurity risk could arise from a ‘carrier’ of biosecurity matter (for example, an activist) and extend to anything that could have an adverse effect on the economy, environment or community. It contains ‘biosecurity’ offences that could apply to members of the public who enter commercial animal facilities without consent⁶, and grants broad powers to government officials to confiscate footage and other evidence obtained by concerned members of the public.

The ADO submits that NSW’s biosecurity legislation provides significant protection against farm trespass and unauthorised filming or surveillance. For example, a person installing a surveillance device on a farm without consent may be considered a biosecurity risk because the person could be a carrier of biosecurity matter, and his or her act could be said to pose a risk to the economy or to the community—that is, to the social cohesion of a particular community, or to employment at a commercial animal business, or to cultural values of the local farming community as a whole.

Protection under other legislation

Property rights of land and business owners are already well protected by existing criminal offences. For example, the *Inclosed Lands Protection Act 1901* (NSW) contains various penalties for unlawful entry on private land.⁷ These provisions are routinely used against persons identifying as animal advocates and apprehended on private land where animals are farmed.

The ADO submits that the case for increasing protections for landholders against unwanted entry has not been established and is not supported by evidence.

² Ibid ss 7 and 8.

³ South Australia, *South Australian Government Gazette*, No 81, 12 December 2017, 4961.

⁴ See for example *Surveillance Devices Act 2016* (SA) s 5 ‘Optical surveillance devices’.

⁵ *Surveillance Devices Act 2016* (SA) s 6.

⁶ See for example s 23 ‘Offence of failing to discharge biosecurity duty’.

⁷ Sections 4 and 4B.

Landholder protection—addressing the core issue

The ADO suggests that the best protection for landholders against unauthorised filming or surveillance is complete transparency and visibility. The main concern for members of the public is the treatment of animals behind the closed doors of animal enterprises. The public's confidence in how farmed animals are treated could be greatly increased if enforcement powers of officers authorised under animal welfare laws were strengthened. For example, increased powers of entry to land could be given to authorised officers under the *Prevention of Cruelty to Animals Act 1979* (NSW). The ability to conduct random, unannounced inspections could also be strengthened both through legislative amendment and greater funding of enforcement bodies. As an absolute minimum, CCTV could be installed in animal enterprises and made publicly available.⁸

Term of Reference 1(b): *The extent and appropriateness of penalties for 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.*

Penalties re unauthorised filming or surveillance

Under the *Surveillance Devices Act 2007* (NSW) ("the SD Act"), penalties of \$11,000 or 5 years imprisonment (or both) may apply to a person convicted of an offence relating to the installation, use and maintenance of optical surveillance devices without consent.⁹

The maximum penalty of 5 years imprisonment makes these offences serious indictable offences. In NSW a "serious indictable offence" means an offence that is punishable by imprisonment for life or for a term of 5 years or more.¹⁰

As mentioned previously, in our view the NSW surveillance devices legislative scheme is one of the toughest in Australia. Under the *Surveillance Devices Act 2016* (SA) (commenced 18 December 2017), the maximum imprisonment penalty for installing, using or maintaining an optical surveillance device without consent is imprisonment for 3 years.¹¹

Moreover, if a person is found guilty of breaching the *Biosecurity Act 2015* (NSW) by (for example) trespassing on a farm in order to use or install an optical surveillance device, the person could face a penalty of up to \$1,100,000 or imprisonment for 3 years, or both.¹²

The ADO therefore submits that the penalties relating to unauthorised filming or surveillance in NSW are already strict and do not need to be strengthened.

⁸ See for example, the [Prevention of Cruelty to Animals Amendment \(Stock Animals\) Bill 2015](#), introduced to the NSW Legislative Council by the Hon. Mark Pearson MLC, member of the Animal Justice Party.

⁹ *Surveillance Devices Act 2007* (NSW) ss 7, 8, 9 and 11.

¹⁰ *Crimes Act 1900* (NSW) s 4.

¹¹ *Surveillance Devices Act 2016* (SA) s 5.

¹² Section 279(a).

Penalties—animal cruelty

At the heart of this inquiry is, or should be, a genuine concern regarding the incidence of animal cruelty in enterprises using animals. Members of the public are becoming particularly intolerant of cruelty towards animals used in agricultural enterprises. Yet in NSW, financial penalties for animal cruelty are the lowest in Australia.¹³ The maximum financial penalty for a person found guilty of aggravated cruelty under the *Prevention of Cruelty to Animals Act 1979* (NSW) is \$22,000.¹⁴ This is the lowest ‘maximum’ in all Australian jurisdictions, and compares with approximately \$261,000 in Queensland.¹⁵

The ADO submits that animal cruelty penalties require urgent attention, rather than the penalties relating to unauthorised filming or surveillance of landholders and businesses. Penalties for offences relating to farm trespass and the installation, use and maintenance of optical surveillance devices without consent are far higher than penalties for aggravated cruelty to sentient animals. The ADO therefore recommends that penalties for cruelty are reviewed and brought into line with other large jurisdictions in Australia such as Queensland.

Term of Reference 1(d): *The implications of rapidly changing media environment, including social media platforms such as Facebook Live.*

Traditionally, one of the alleged concerns of animal industries is that ‘undercover’ footage of animal cruelty is not disseminated quickly enough. This concern is stated as being one of the main policy drivers behind the Criminal Code Amendment (Animal Protection) Bill 2015 (Cth), which was introduced into the Australian Senate in early 2015 by Chris Back, a former Liberal Senator for Western Australia.¹⁶ The bill claims to encourage the speedy reporting to authorities of footage of ‘malicious cruelty’ to farm animals. It would make it an offence to fail to report footage of ‘malicious’ animal cruelty to authorities within one business day, or to give the unedited footage to authorities within five business days.¹⁷

Yet Term of Reference 1(d) in the Inquiry seems to suggest that the main concern now is that footage of animal cruelty may be disseminated *too quickly*.

This goes to one of the main issues underpinning the Inquiry, which is that the public wants to know about how farmed animals are treated, and about animal husbandry practices that it may no longer tolerate.¹⁸

¹³ See <https://www.ado.org.au/penalties-for-animal-cruelty-and-ne>.

¹⁴ *Prevention of Cruelty to Animals Act 1979* (NSW) s 6.

¹⁵ *Animal Care and Protection Act 2001* (QLD) s 18(1).

¹⁶ ‘The Bill’s first priority is to ensure that animals are protected against further unnecessary cruelty caused by a delay in reporting.’ Explanatory Memorandum, Criminal Code Amendment (Animal Protection) Bill 2015, page 1.

¹⁷ Criminal Code Amendment (Animal Protection) Bill 2015 (Cth) s 383.5.

¹⁸ See for example the public outcry at the practice of ‘forced moulting’ of layer hens by deprivation of food and water, exposed as part of the investigation into Lakesland Farm in NSW in June 2018: <https://www.change.org/p/rspca-nsw-we-demand-action-to-rescue-abused-and-neglected-hens-in-lakesland-now>; and <https://www.facebook.com/NSWHenRescue/posts/lakesland-hens:-on-tuesday-steve/2139180379443586/>.

This is an important consideration because in its current form the existing surveillance devices regulatory framework risks stifling legitimate political discussion about how we treat animals. Animal welfare has been accepted as a subject of political debate by Justice Kirby in the High Court case of *Australian Broadcasting Corporation v Lenah Game Meats*.¹⁹ The relevance of animal welfare as a matter of political debate was also demonstrated when a member of a party championing animal protection was elected to the NSW Upper House in 2015.²⁰ The ADO submits that by criminalising communication of matters concerning animal welfare,²¹ the existing framework risks infringing the implied freedom of political communication that the High Court of Australia has confirmed in recent cases.²²

The ADO therefore submits that NSW needs more open doors to its farms, and more 'instant' forms of broadcasting activities in animal enterprises, rather than devising new ways to shut out the light, and the eyes of the public, from these enterprises.

In conclusion, we submit that the existing regulatory framework protecting landholders from unauthorised filming or surveillance one of the strictest in Australia, to the point where the public interest and constitutional freedom of political communication may be at risk.

Tara Ward
Executive Director
Animal Defenders Office

8 July 2018

¹⁹ (2001) 208 CLR 199.

²⁰ Nicole Hasham, 'Animal Justice Party's Mark Pearson joins NSW Parliament', *The Sydney Morning Herald*, <https://www.smh.com.au/national/nsw/animal-justice-partys-mark-pearson-joins-nsw-parliament-20150417-1mn9xh.html>.

²¹ This could happen under the *Surveillance Devices Act 2007* (NSW) s 11.

²² See for example *McCloy v New South Wales* (2015) 89 ALJR 857.