

Submission  
No 186

## INQUIRY INTO PROVISIONS OF THE RIGHT TO FARM BILL 2019

**Organisation:** Animal Defenders Office

**Date Received:** 2 October 2019

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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.

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The Director  
Portfolio Committee No.4—Industry  
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Dear Committee Members

**Submission to the NSW Legislative Council’s Portfolio Committee No.4—Industry on the provisions of the Right to Farm Bill 2019**

Thank you for the opportunity to provide a submission to the inquiry into the provisions of the Right to Farm Bill 2019 (NSW) (“the Bill”) by the NSW Legislative Council’s Portfolio Committee No.4—Industry.

*About the Animal Defenders Office*

The Animal Defenders Office (“ADO”) is a nationally accredited non-profit community legal centre that specialises in animal law. The ADO offers information and representation for individuals and groups wishing to take legal action 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, the peak body representing community legal centres in New South Wales.

**GENERAL COMMENTS**

*Drafting format*

As an initial comment we note the awkward nature of the Bill as currently drafted. The Bill contains both original legislation (the proposed Right to Farm Act) in the initial clauses, and substantive amendments to an entirely different existing piece of legislation in a Schedule.

The ADO suggests that the Bill in its current form is a confusing way to amend legislation. A preferable way to deal with the proposed measures would have been to create a stand-alone bill containing the clauses of the proposed Right to Farm Act as new ‘original’ legislation, and a separate (amendment) bill containing the amendments to the *Inclosed Lands Protection Act 1901* (NSW) (“ILPA”). They are two distinct pieces of amending legislation with different objectives and subject matters (common law actions in nuisance

and trespass legislation). The confusion arising from the 'hybrid' nature of the draft is exacerbated by the long title, which refers to the different subject matters in the reverse order to which they appear in the Bill itself.<sup>1</sup>

As such this submission will deal with the two sets of proposed amendments separately.

## DETAILED COMMENTS

### Proposed *Right to Farm Act 2019*, clauses 1-6 in the Bill

#### Clause 4 Lawful agricultural activity does not constitute nuisance

According to the Explanatory Note ("EN") for the Bill, its first object is 'to prevent an action for the tort of nuisance being brought in relation to a commercial agricultural activity where it is occurring lawfully on agricultural land' (p1). The EN goes on to state that clause 4:

provides that an action for the tort of nuisance **cannot be brought** in relation to a commercial agricultural activity if the activity is carried out lawfully (and not negligently) on agricultural land that has been used for the purposes of agriculture for at least 12 months. (p2, emphasis added)

In the Minister for Agriculture's Second Reading Speech, however, the proposed Right to Farm Act is described as 'a new standalone piece of legislation that seeks to protect farmers by providing them with a **defence** against common law nuisance action' (p3, emphasis added).<sup>2</sup>

It is not clear how clause 4 is intended to operate. If it is intended to operate as a defence, does this mean that the defendant, ie the farmer, will have the burden of having to point to evidence that the matters outlined in proposed pars. 4(1)(a)-(d) exist (ie the evidential burden)? For example, will the farmer have to provide evidence that the activity is carried out lawfully (par.4(1)(a)), and not carried out negligently (par.4(1)(b))? Will it be clear what these terms mean (they are not defined in the Bill)?

Moreover, if clause 4 is a defence, ie raised after an action has been brought, it is difficult to see how the proposed clause can operate to *prevent* an action for the tort of nuisance being brought in the first place, as stated by the EN.

These issues are not addressed in the explanatory material (either the EN or the Second Reading Speech). The ADO therefore suggests that the clause will not achieve its objective and is therefore incapable of addressing the concerns that would motivate the passage of the Bill.

#### *Evidence-based laws*

The ADO considers that laws should be evidence based.

It is the view of the ADO that a case has yet to be made that the proposed defence in clause 4 is justified.

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<sup>1</sup> The Bill deals with measures to deter actions in nuisance first (clauses 1-6), and amendments to trespass laws second (Schedule 2).

<sup>2</sup> See also 'The defence outlined in the Right to Farm Bill 2019 will cover all agricultural activities...', Second Reading Speech, p3.

For example, neither the EN nor the Second Reading Speech provide any data on the prevalence of ‘actions in respect of nuisance’ in NSW courts regarding activities carried out on agricultural land.

Conversely, the NSW Parliament’s Legislation Review Committee ‘acknowledges evidence that local councils receive a number of nuisance complaints that concern compliant agricultural practices’.<sup>3</sup> Yet it would appear that the proposed Right to Farm law would not address nuisance complaints lodged with councils.

#### *Other consequences: Stifling legitimate complaints*

The Legislation Review Committee notes that:

limiting the right of a person to bring a civil action for nuisance and authorising what would otherwise be a tort may impact the right of a person to enjoy their property free from interference from the actions of their neighbour.<sup>4</sup>

The ADO is concerned about the potentially broad scope of the proposed measure in clause 4, and that it may inhibit legitimate complaints against agricultural practices that the general community no longer regard as acceptable.

The ADO notes that the Minister referred to the types of nuisances neighbours may complain about as being ‘the incidentals of accepted farming practices such as noise, dust or odour’.<sup>5</sup> Yet it is accepted that ‘right to farm’ legislation may apply to other more harmful matters such as chemical sprays<sup>6</sup> and ‘pest control’<sup>7</sup>. The latter would presumably include the unconscionable use of 1080 baits, a poison which is banned in other countries,<sup>8</sup> and which the Australian community is increasingly rejecting as cruel and inhumane.<sup>9</sup> The ADO submits that residents should be able to register their legitimate concern about the use of this poison around their homes, and that the Bill could deter residents from pursuing legal measures against this and other highly controversial animal management measures used by their neighbours.

#### **Clause 5 Courts to not order cessation of agricultural activity if other order available**

The purpose of this clause is unclear.

Subclause (1) and its explanatory note imply that the clause applies to a substantive decision by the Court (ie that there is a nuisance), and would operate to direct the Court in its consideration of what order to apply (having found that there is a nuisance). Yet in the

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<sup>3</sup> Legislation Review Committee *Legislation Review Digest No. 5/57 – 24 September 2019*, Parliament NSW, p4.

<sup>4</sup> Ibid.

<sup>5</sup> Second Reading Speech, p3.

<sup>6</sup> Legislation Review Committee *Legislation Review Digest No. 5/57 – 24 September 2019*, p4.

<sup>7</sup> Protection of Agricultural Production (Right to Farm) Bill 2005 (NSW), Second Reading Speech.

<sup>8</sup> <https://www.safe.org.nz/about-1080-poison>.

<sup>9</sup> See various petitions to ban the poison eg [Ban 1080](#) (39,374 signatories) and [Stop using Poisons to Kill Dingoes & Stop Renewal of Aerial Baiting](#) (23,498 signatories); and other online sites calling for a ban: <https://ban1080.org.au/1080-horror-stories/> and <https://www.facebook.com/Ban1080BaitsInAustralia/>.

Second Reading Speech the Minister refers to ‘injunctions’ ie the bill ‘will also stop courts from imposing injunctions on farmers without first considering other options’ (p3). Injunctions are, however, temporary and apply before or up to a substantive hearing, so they would not appear to be covered by subclause 5(1) despite the reference to them in the Minister’s Second Reading Speech.

## **History—Right to Farm laws and policies in NSW**

The ADO notes that NSW history is replete with ‘right to farm’ proposals that were wisely rejected by the parliament of the day.

### Protection of Agricultural Production (Right to Farm) Bill 2005

In 2005 Donald Page MP (the Nationals, in opposition) introduced the Protection of Agricultural Production (Right to Farm) Bill 2005 (NSW) as a private members bill.<sup>10</sup> Its purpose was ‘to provide for a system of rural land use notices for the purpose of protecting existing farming rights and other rural land uses’. The notices would be taken into account in any subsequent proceedings by neighbours to limit or prohibit the use of the rural land for rural purposes.

The ADO notes from Donald Page’s Second Reading Speech for this Bill that even in 2005, ‘right to farm’ legislation was well established overseas to ‘protect’ agricultural production in the face of urban encroachment. The Second Reading Speech for the 2005 Bill notes that farm numbers in Australia had already been in steady decline for several decades, and that the NSW Farmers Federation had ‘long been calling’ for such legislation.

Yet despite these calls, in 2006 the Bill was ‘negatived on division in the LA’. The ADO notes that these calls were not considered compelling enough to take legislative action then, and submits that ‘right to farm’ laws are equally unnecessary today.

### *Shooters and Fishers Party (“SFP”)—Right to Farm Policy—adjournment speech 2015*

On 23 June 2015 the Hon. Robert Brown (SFP) gave an adjournment speech on ‘Right to Farm Policy’.

He noted other jurisdictions’ attempts to introduce ‘right to farm’ legislation, based on models adopted from North America.

He referred to agricultural nuisances which should be immune from nuisance complaints as including ‘noise, odours, visual clutter and agricultural structures’.<sup>11</sup>

He represented the conflict at the heart of the issue as being between ‘traditional farmers’ ‘versus’ ‘hobby farmers and blow-in greenies [and] naïve, ignorant and intolerant individuals and groups upset at the damage that cow manure does to their nostrils [and] so-called conservationists—and indeed rent-a-crowd, green-minded militants...’ It is tempting to suggest that the ‘green-minded militants’ of yesterday have been replaced by the ‘vegan vigilantes’ of today in the current political pro-animal agriculture rhetoric.

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<sup>10</sup> <https://www.parliament.nsw.gov.au/bills/Pages/bill-details.aspx?pk=2334>.

<sup>11</sup> Hansard, 23 June 2014, p1611.

This again supports the view that calls for 'right to farm' laws are more about appealing to constituents than responding to a genuine, evidence-based need for legislative reform.

It is for these reasons that the ADO does not support the proposed 'right to farm' provisions in the Bill.

## **Schedule 2 Amendment of Inclosed Lands Protection Act 1901**

The ADO notes that trespass, property damage and theft are unlawful under existing NSW laws.

The ADO, while not opposed to the provision of protection to any person against unlawful activity, maintains that it is necessary to balance this aim with good, evidence-based and proportionate laws.

The ADO submits that there is insufficient evidence to demonstrate that the proposed amendments to the *Inclosed Lands Protection Act 1901* (NSW) ("ILPA") are necessary or proportionate.

### *Proposed amendments to ILPA not evidence-based*

According to the Minister's Second Reading Speech, the Bill addresses 'all of the risks posed by unsafe protest activities happening on farms' (p1) and responds to 'the tactics of animal rights groups who trespass on farms' (p2). Yet the EN and Second Reading Speech do not provide evidence of 'the risks' or that they are caused by 'animal rights groups'.

For example:

- There is no evidence that the reported increased incidence of farm trespass<sup>12</sup> is due to animal advocates rather than illegal hunters, other farmers, or individual members of the public.
- Collecting and publishing farm locations and data<sup>13</sup> is legal and has long been carried out by entities such as Yellow Pages.
- No evidence is provided of animal rights groups installing recording devices or damaging fences so that stock can escape,<sup>14</sup> such as successful prosecutions of members of such groups under surveillance devices legislation or s195 of the *Crimes Act 1900* (NSW)<sup>15</sup>.
- Nor is there any actual evidence of 'farming families' being 'intimidated' in the middle of the night.<sup>16</sup>

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<sup>12</sup> 'Make no mistake, on-farm trespass is increasing and the questioning by vegan vigilantes and other ideologically motivated groups of a farmer's right to undertake lawful activities is also on the rise. Since 2014, according to the Bureau of Crime Statistics and Research, there has been a 27 per cent increase in the number of recorded incidents of trespass on farms and rural properties.' Second Reading Speech, p2.

<sup>13</sup> Ibid.

<sup>14</sup> Ibid.

<sup>15</sup> *Crimes Act 1900* (NSW), s195 'Destroying or damaging property'.

<sup>16</sup> Second Reading Speech, p5.

Where the Minister does refer to actual evidence to support a claim made in favour of the Bill, it is a selective use of evidence. In the Second Reading Speech the Minister refers to testimony given at a 2018 NSW parliamentary inquiry by a farmer as evidence of the ‘**permanent** impact’ [emphasis added] that activists’ activities are having on farmers, ‘physically and mentally’.<sup>17</sup> According to the Minister the ‘victim’ farmer:

told how his daughter, who had been studying agriculture with the view to pursue her passion for the industry and return to work alongside her father, had turned away from that career path as a result of the actions of protesters...

What the Minister neglected to add was that at a more recent parliamentary inquiry, the same farmer admitted his daughter is ‘still in agriculture and involved in the farm’.<sup>18</sup> This also undermines the claim that the Bill is necessary because ‘the next generation’ of farmers will otherwise be driven ‘off-farm to look for other employment in other professions’.<sup>19</sup>

Finally the Minister refers to the significant uptake by farmers of biosecurity signs after the recent amendments to the *Biosecurity Regulation 2017*.<sup>20</sup> This undermines the argument that the Bill’s proposed amendments to trespass laws are necessary, as it would appear, by the uptake of the signs, that farmers consider that the new regulations both protect their farms and deter would-be trespassers. The ADO notes that no evidence has been provided as to whether trespasses have increased or decreased with the thousands of biosecurity signs presumably now in place. If the signs are to achieve their objective, then presumably on-farm trespasses (whoever the perpetrator) will decrease, and the need for the Bill is therefore (further) reduced.

### **Existing laws—potential overlap**

Schedule 2[5] to the Bill amends ILPA to create a new offence of directing, inciting, counselling, procuring or inducing aggravated unlawful entry on inclosed lands.

The ADO is concerned that the proposed measures may overlap with existing offences covering similar conduct.

NSW already has legislated offences criminalising trespass, unlawful entry, criminal damage and similar conduct. Inciting trespass and property damage behaviour may also already be criminalised through various legislative and common law extensions of criminal responsibility.

For example, the following offences already exist in the *Crimes Act 1900* (NSW):

- s195 (Destroying or damaging property),
- s351A (Recruiting persons to engage in criminal activity),
- s 351B (Aiders and abettors punishable as principals), and
- s249F (incitement)

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<sup>17</sup> Second Reading Speech, p2.

<sup>18</sup> Legal and Constitutional Affairs Legislation Committee, inquiry into the Criminal Code Amendment (Agricultural Protection) Bill 2019 (Cth), public hearing 12/08/2019: <https://tinyurl.com/y6gd6z73>.

<sup>19</sup> Second Reading Speech, p3.

<sup>20</sup> Second Reading Speech, p2.

The Australian Government has also recently introduced new offences in the *Criminal Code Act 1995* (Cth). The offences are contained in the new ‘Subdivision J—Offences relating to use of carriage service for inciting trespass, property damage, or theft, on agricultural land’.<sup>21</sup>

In relation to the proposed offence in Schedule 2[5] to the Bill, the Legislation Review Committee<sup>22</sup> states:

The Bill introduces a new offence that applies to those who incite or direct trespass without committing trespass themselves... The Committee notes that the creation of new offences impacts upon the rights and liberties of persons as previously lawful conduct becomes unlawful. However, the Committee acknowledges that the purpose of this offence is to address a gap in the legislation where people incite or direct trespass without actually committing it themselves.

In light of our earlier submissions regarding the potential overlap with existing offences, the ADO suggests that the case has yet to be made that there is a gap in legislation, or that the new offence in Schedule 2[5] is necessary, and submits that further justification is required from the NSW Government for introducing the proposed offence.

## Penalties

The ADO is concerned about the severity of the penalties attached to the proposed new and existing offences in the Bill.

The Legislation Review Committee notes that:

Large increases in penalties can result in excessive punishment where the penalty is not proportionate to the offence.<sup>23</sup>

Given the lack of evidence supporting the need for the amendments, the ADO submits that it is difficult to justify the considerable increases in penalties for trespass related offences as proportionate to the alleged problems they are meant to address.

The ADO notes that the Minister stated in the Second Reading Speech for the Bill that:

The suite of measures contained in the Right to Farm Bill 2019 means New South Wales will have the toughest penalties for farm trespass in the country for this sort of offence.

The ADO notes that in contrast, animal cruelty penalties under NSW animal welfare laws remain the lowest in the country, and that there would be a significant public interest in increasing these penalties given the high level of concern about the treatment of farm animals in the general community.<sup>24</sup>

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<sup>21</sup> Sections 474.46 and 474.47.

<sup>22</sup> Legislation Review Committee *Legislation Review Digest No. 5/57 – 24 September 2019*, p6.

<sup>23</sup> *Ibid*, p6.

<sup>24</sup> See Futureeye (for the Cth Department of Agriculture), *Australia’s Shifting Mindset on Farm Animal Welfare* (2018): <http://www.agriculture.gov.au/SiteCollectionDocuments/animal/farm-animal-welfare.pdf>. The nationally representative survey found that “many of the public now support the activist views that animal welfare isn’t being sufficiently delivered by the agricultural sector for today’s values” (p20). It also found that:

- 95% of people view farm animal welfare to be a concern;
- 92-95% view farm animals as sentient; and
- 91% of people want to see some reform to address their concerns.



## Clause 2 ‘Commencement’

The Bill proposes that the new laws would commence ‘on the date of assent to this Act’. This presumably applies to the amendments to the offence provisions in Schedule 2.

Commencement on assent is not desirable if the Act is taken to have commenced at the start of the day on which assent occurs which could physically be later in the day, thereby giving the Act retrospective effect. That is, criminalising behaviour that was not a criminal offence at the time it was committed.

## Animal agricultural activity—transparency and visibility

The ADO submits that the proportionality of the provisions in the Bill can be validly assessed by considering whether the law is necessary. One way of assessing the need for the proposed provisions is to ask whether there is ‘no obvious and compelling alternative, reasonably practical, means of achieving the same purpose’.<sup>25</sup>

The ADO submits that farmers, landowners and other agricultural and associated industries are already afforded comprehensive protections under a range of state-based legislation.<sup>26</sup> Arguably, the best protection for farms and other animal agricultural and associated industries against unauthorised activity is complete transparency and visibility.

As an absolute minimum, the ADO submits that CCTV could be installed in animal enterprises and made publicly available.<sup>27</sup>

The ADO submits that requiring transparency in animal-use industries would be a more effective way of dealing with animal advocate activities targeting animal agriculture facilities. This is because transparency would negate the purpose of such activities, being to expose the conditions and treatment of the animals.

Of particular relevance to this inquiry is the 2018 Inquiry by the NSW Legislative Council’s Select Committee on Landowner Protection for Unauthorised Filming or Surveillance. The Final Report of the Select Committee (“the Report”)<sup>28</sup> made relevant recommendations, including that the NSW Government:

encourage animal industries to be proactive in engaging with the community, and collaborate with animal industries to investigate schemes to increase transparency about food production and animal husbandry practices (Recommendation 2).

We also note that the Final Report stated that ‘greater transparency around animal welfare practices may go some way to addressing the motivation behind unauthorised filming and surveillance’.<sup>29</sup>

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<sup>25</sup> *Clubb v Edwards* (2019) 93 ALJR 448.

<sup>26</sup> See the provisions in the *Crimes Act 1900* (NSW) cited earlier, and other legislation such as the *Surveillance Devices Act 2007* (NSW).

<sup>27</sup> 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.

<sup>28</sup> Report of the Legislative Council Select Committee on Landowner Protection from Unauthorised Filming or Surveillance, NSW Parliament, October 2018.

<sup>29</sup> Page 18 of the Parliamentary Select Committee Report, *ibid*.

It is for these reasons that the ADO does not support the proposed amendments to ILPA in the Bill.

**Recommendation:**

The ADO 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 therefore the eyes of the public, from these enterprises.

In particular, the ADO submits that the NSW Government should:

- address the cause of the issue not the symptom,
- increase transparency of animal industries, and
- increase animal cruelty offences.

We thank the Committee for taking our submission into consideration.

Tara Ward (Volunteer)  
Executive Director | Lawyer

Animal Defenders Office

1 October 2019