

2013-2014-2015

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE

**CRIMINAL CODE AMENDMENT (ANIMAL PROTECTION) BILL 2015**

EXPLANATORY MEMORANDUM

(Circulated by authority of Senator Dr Chris Back)

## CRIMINAL CODE AMENDMENT (ANIMAL PROTECTION) BILL 2015

### OUTLINE

This Bill is designed to minimise unnecessary delays in the reporting of malicious cruelty to animals. When there is a delay in the reporting of such events, there are serious implications for the animals involved as well as the risk of significant threats to animal enterprise industries which include economic viability, safety and biosecurity.

The Bill's first priority is to ensure that animals are protected against further unnecessary cruelty caused by a delay in reporting. It does this by creating new offences that are punishable by penalty units and/or imprisonment. The Bill acts in two parts:

- To ensure that any recording of malicious cruelty to domestic animals is reported without delay which will allow relevant authorities to investigate and act against perpetrators expeditiously; and
- To prevent illegal interference in the lawful operation of animal enterprises.

The Australian community has no tolerance for malicious cruelty directed at animals. Providing all supporting information such as visual images of an observed event may add to the successful examination of a case of suspected cruelty and a subsequent prosecution. Where such an event has occurred or is suspected to have occurred, there should be the least possible delay in the matter being reported and acted upon by authorities charged with responsibility for animal welfare. This Bill legislates to ensure such a course of action is taken.

The Bill proposes to prevent unnecessary delays in the reporting of malicious cruelty to animals by amending the *Criminal Code Act 1995* to insert a new Part 9.7 in relation to protecting animals and animal enterprises, consisting of Division 383, which relates to failing to report malicious cruelty to animals, and Division 385, relating to interfering with the conduct of lawful animal enterprises.

The Bill provides for the following:

#### **1. Failing to report malicious cruelty to animals.**

A person recording what they believe to be malicious cruelty to an animal or animals commits an offence if they fail to report the event to the relevant authorities within one business day of the event occurring and to provide all recorded material within five business days.

The Bill is not designed to infringe on any constitutional doctrine of implied freedom of political communication or the law relating to professional privilege.

The Bill will not apply to the exclusion of a law of an Australian state or territory to the extent that the law is capable of operating concurrently with this Division.

Malicious cruelty to animals is defined in the Bill.

## **2. Interfering with the conduct of lawful animal enterprises.**

The Bill provides that a person commits an offence if they engage in conduct that destroys or damages property used in carrying on an animal enterprise or belonging to a person who carries on or is associated with a person who carries on an animal enterprise.

The Bill also creates a new offence of causing fear of death or serious bodily injury if a person engages in conduct involving threats, vandalism, property damage, criminal trespass, harassment or intimidation to another person or persons connected with a lawful animal enterprise. This offence is punishable by imprisonment.

The Bill is not designed to limit the lawful conduct of any person engaged in peaceful picketing or who is acting in good faith in an industrial matter or who, in good faith, is reporting on a matter of public interest.

The Bill will not apply to the exclusion of a law of an Australian state or territory to the extent that the law is capable of operating concurrently with this Bill.

The term ‘animal enterprise’ and other relevant terms are defined in the Bill.

## **NOTES ON CLAUSES**

### **Clause 1 - Short title**

This Act may be cited as the *Criminal Code Amendment (Animal Protection) Act 2015*.

### **Clause 2 - Commencement**

The table in this clause sets out when the Bill’s provisions will commence. Sections 1 to 3 of the Bill will commence on the day it receives Royal Assent. Schedule 1 will commence on the 28<sup>th</sup> day after the Bill receives Royal Assent.

### **Clause 3 - Schedule(s)**

Clause 3 provides that the Act specified in the Schedule is amended in accordance with the applicable items of the Schedule.

## **Schedule 1— Amendments**

### **Part 1 – Main Amendments**

**Item 1** inserts a new Part 9.7 into the *Criminal Code Act 1995*, consisting of two divisions, providing for the protection of animals and animal enterprises.

#### **Division 383**

Division 383 relates to failure to report malicious cruelty to animals.

Section 383.5 sets out two obligations relating to the reporting of malicious cruelty to animals. If a person has made a visual record of an activity they believe to be malicious cruelty to animals, they must report the activity to the relevant authority within one business day. The person must also provide this record to the relevant authority that has responsibility for animal welfare in the jurisdiction within 5 business days. If a person fails to fulfil either or both of these obligations, they have committed an offence under section 383.5.

The Bill is not intended to override the constitutional rights of States and Territories to enact and enforce laws associated with animal welfare. Subsection 383.5(4) limits the effect of the offence to where the alleged malicious cruelty is observed and recording made by a federally regulated entity or in constitutional trade or commerce or in a Territory or a Commonwealth place.

(Section 383.20 clarifies that it is the intention of this Bill that is not to apply to the exclusion of a law of a State or Territory to the extent that the law is capable of operating concurrently.)

Malicious cruelty is defined in Section 383.10 as being an unlawful activity for the purposes of inflicting unnecessary pain, injury or death on domestic animals.

The extent of the Bill is confined to domestic animals. It is intended that these will be those which are husbanded by or rely on humans for elements of their nutrition, management, housing and general wellbeing. This is in contrast to feral animals or other animals that are not domesticated or reliant on human nurture.

New subsection 383.5(3) sets out that the defendant will bear an evidential burden in relation to making out the matter in paragraph 383.5(1)(c). This is appropriate as it reflects the fact that it would be significantly more difficult and costly for the prosecution to in effect prove a negative – i.e. that the activity was not reported – as information about whether the matter was reported would in most cases be peculiarly within the knowledge of the defendant.

The prosecution will not need to prove that a person knew that the conduct occurred in the circumstances mentioned in subsections 383.5(4). Absolute liability will apply. The effect of applying absolute liability to this element would mean that no fault element needs to be proved and the defence of mistake of fact is not available.

Absolute liability is appropriate and required for this element of the offences because it is a jurisdictional element. A jurisdictional element of an offence is an element that does not relate to the substance of the offence, but marks a jurisdictional boundary between matters that fall within the legislative power of the Commonwealth, States or Territories. This is consistent with Commonwealth criminal law policy, as described in the Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers.

### **Division 385**

Section 385.5 provides that a person commits an offence if they engage in conduct that destroys or damages property used in carrying on an animal enterprise or that belongs to a person who carries on or is associated with a person who carries on an animal enterprise. This offence is punishable by imprisonment according to the following:

- An offence which results in economic damage exceeding \$10,000: 5 years.
- An offence which results in substantial bodily injury or economic damage exceeding \$100,000: 10 years.
- An offence which results in serious bodily injury or economic damage exceeding \$1,000,000: 20 years.
- An offence which results in death of any individual: Life imprisonment.
- In any other case: 1 year.

Section 385.10 creates a new offence of causing fear of death or serious bodily injury if a person engages in conduct involving threats, vandalism, property damage, criminal trespass, harassment or intimidation to another person or persons connected with an animal enterprise. This offence is punishable by imprisonment.

The Bill is not designed to limit the lawful conduct of any person engaged in peaceful picketing or who is acting in good faith in an industrial matter or who, in good faith, is reporting on a matter of public interest according to the defences listed in section 385.15. A defendant bears an evidential burden in relation to these matters.

The prosecution will not need to prove that a person knew that the conduct occurred in the circumstances mentioned in subsections 385.5(3) or 385.10(3). Absolute liability will apply. The effect of applying absolute liability to this element would mean that no fault element needs to be proved and the defence of mistake of fact is not available.

Absolute liability is appropriate and required for this element of the offences because it is a jurisdictional element. A jurisdictional element of an offence is an element that does not relate to the substance of the offence, but marks a jurisdictional boundary between matters that fall within the legislative power of the Commonwealth, States or Territories. This is consistent with Commonwealth criminal law policy, as described in the Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers.

## Item 2

Item 2 inserts definitions into the Dictionary for the following terms: animal enterprise, constitutional communication, economic damage, federally regulated entity, serious bodily injury, and substantial bodily injury.

## Part 2 – Consequential Amendments

Part 2 makes a number of amendments relating to defined terms that are to be used in the new Part 9.7 of the *Criminal Code Act 1995*. The terms ***Commonwealth place*** and ***constitutional trade and commerce*** are already used, and defined, elsewhere in the *Criminal Code* so the definitions for these terms have been moved to the Dictionary, without any changes, so that each term is only defined in the one place. Part 2 also includes 2 new signpost definitions for ***close family member*** and ***malicious cruelty to animals*** and replaces a reference to postal, telegraphic, telephonic communications in paragraph 400.2A(4)(b) with the new term of ***constitutional communication*** that is inserted by Part 1.

## **Statement of Compatibility with Human Rights**

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

### **Criminal Code Amendment Bill (Animal Protection) 2015**

#### **Overview of the Bill**

This Bill is required to prevent unnecessary delays in the reporting of animal cruelty. When there is a delay in the reporting of such events, there are serious implications for the animals involved as well as significant threats to animal enterprise industries. The Bill's first priority is to ensure that animals are protected against further unnecessary cruelty caused by a delay in reporting. It does this by creating new offences that are punishable by penalty units and/or imprisonment. The Bill acts in two parts:

- To ensure that any recording of malicious cruelty to domestic animals is reported without delay which will allow relevant authorities to investigate and act against perpetrators expeditiously; and
- To prevent illegal interference in the lawful operation of animal enterprises.

The community has no tolerance for malicious cruelty directed at animals. Providing all supporting information such as visual images of an observed event may add to the successful examination of a case of suspected cruelty and a subsequent prosecution. Where such an event has occurred or is suspected to have occurred, there should be the least possible delay in the matter being reported and acted upon by authorities charged with responsibility for animal welfare. This bill legislates to ensure such a course of action is taken.

The Bill proposes to do this by amending the *Criminal Code Act 1995* to insert a new Part 9.7 in relation to protecting animals and animal enterprises, consisting of Division 383, which relates to failing to report malicious cruelty to animals, and Division 385, relating to interfering with the carrying on of animal enterprises.

The Bill will create a new offence in section 383.5 which provides that any person filming what they believe to be malicious cruelty to animals commits an offence if they fail to promptly report the event to the relevant authorities within one business day and to provide a copy of the recorded material without editing within five business days. The penalty for the offence is 30 penalty units. The defendant will bear an evidential burden to demonstrate why they did not meet this timeframe because it would be significantly more difficult for the prosecution to in effect prove a negative.

One business day is an appropriate timeframe for the reporting of animal cruelty as, in the incidence of animal cruelty occurring, it is of the utmost urgency that the matter be reported to the relevant authorities so that they have the capacity to stop the cruelty and thereby prevent further unnecessary suffering for the animals concerned. Prompt reporting will also prevent other animals from being subjected to the same cruelty.

Five business days is an acceptable timeframe for the transfer of the record to the appropriate authority. It is intended that it would be an allowable defence of the accused if the defendant were in an outback location and did not have access to the means to be able to allow this transfer of the record within five business days as long as every endeavour has been made to transfer the record to the responsible authorities as soon as possible.

The Bill also provides for a new criminal offence where a person engages in conduct that destroys or damages property used in carrying on an animal enterprise or belongs to a person who carries on or is associated with a person who carries on an animal enterprise in new section 385.5. This offence is punishable by imprisonment according to the following:

- An offence which results in economic damage exceeding \$10,000: 5 years.
- An offence which results in substantial bodily injury or economic damage exceeding \$100,000: 10 years.
- An offence which results in serious bodily injury or economic damage exceeding \$1,000,000: 20 years.
- An offence which results in death of any individual: Life imprisonment.
- In any other case: 1 year.

In section 385.10 the Bill also creates a new offence of causing fear of death or serious bodily injury if a person engages in conduct involving threats, vandalism, property damage, criminal trespass, harassment or intimidation to another person or persons connected with an animal enterprise. This offence is punishable by imprisonment according to the above schedule. New section 385.20 also sets out aggravated offences.

### **Human rights implications**

The Bill has been written with the least rights restrictive approach. As an amendment to the *Criminal Code Act 1995*, the Bill will engage the following human rights:

- the presumption of innocence in Article 14(2) of the International Covenant on Civil and Political Rights (ICCPR),
- the right to freedom of expression in Article 19 of the ICCPR,
- the rights to freedom of assembly and association in Articles 21 and 22 of the ICCPR, and
- the rights in work in Article 7 of the International Covenant on Economic Social and Cultural Rights (ICESCR).

The Bill uses the least rights restrictive approach in that it does not censor or restrict media coverage. It does not require material to be approved before it may be published. It does not restrict the ability of journalists to protect their sources. The Bill is not designed to censor the media or any other person in any way. Nor is it designed to allow the relevant authorities to censor the media or any other person in any way.

### ***Right to be presumed innocent.***

The presumption of innocence is a fundamental principle of the common law. The United Nations Human Rights Committee has stated that the presumption of innocence imposes on the prosecution the burden of proving the charge and guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt. Some laws, commonly called reverse onus provisions, shift the burden of proof, including an evidential burden, to the accused. Under international human rights law, a reverse onus provision will not necessarily violate the presumption of innocence provided that the law is not unreasonable in the circumstances and maintains the rights of the accused. The purpose of the reverse onus provision is important in determining its justification. Such a provision may be justified if the nature of the offence makes it very difficult for the prosecution to prove each element, or if it is clearly more practical for the accused to prove a fact than for the prosecution to disprove it.

The Bill will engage the right to the presumption of innocence as subsections 383.5(3), 383.10(3) and 383.15(3) of the Bill set out that the defendant will bear an evidential burden in relation to making out the matters mentioned in those subsections. This is appropriate as it reflects the fact that it would be significantly more difficult and costly for the prosecution to in effect prove matters such as the fact that the activity was not reported, as information about whether the matter was reported would in most cases be peculiarly within the knowledge of the defendant.

The prosecution will not need to prove that a person knew that the conduct occurred in the circumstances mentioned in subsection 383.5(4), 383.10(4), 383.15(4), 385.5(3) or 385.10(3). Absolute liability will apply only to jurisdictional elements of the offence. The effect of applying absolute liability to this element would mean that no fault element needs to be proved and the defence of mistake of fact is not available.

Absolute liability is appropriate and required for this element of the offences because it is a jurisdictional element. A jurisdictional element of an offence is an element that does not relate to the substance of the offence, but marks a jurisdictional boundary between matters that fall within the legislative power of the Commonwealth, States or Territories. This is consistent with Commonwealth criminal law policy, as described in the Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers. On this basis, the imposition of absolute liability is consistent with the presumption of innocence in Article 14(2) of the ICCPR.

### ***Right to freedom of expression.***

Freedom of expression in Article 19(2) of the ICCPR protects freedom of expression in any medium, for example written and oral communications, the media, public protest, broadcasting, artistic works and commercial advertising. It applies not only to the imparting and seeking of ideas and information but also to receiving information. Freedom of expression carries with it special responsibilities and may be restricted on several grounds, as provided for by law and when necessary to protect the rights or reputations of others, national security, public order, or public health or morals.

The Bill may engage the right to freedom of expression. While it does not require material to be approved before it is published, it does require material to be reported to the relevant authorities immediately as it attaches criminal liability to the failure to do so. Thereby it creates a new offence that engages the right to freedom of expression.

The Bill uses the least rights restrictive approach in that it does not censor or restrict media coverage. It does not require material to be approved before it may be published. It does not limit the sharing of the material. It does not restrict the ability of journalists to protect their sources. The Bill is not designed to infringe on any constitutional doctrine of implied freedom of political communication or the law relating to professional privilege.

The Bill is designed to take the least rights restrictive approach as it is not censoring the person who reports the animal cruelty, it is only ensuring that the material has been reported to the relevant authorities. This ensures that the relevant authorities are able to deal with the animal cruelty with the least possible delay. The Bill is not designed to censor the media or any other person in any way. Nor is it designed to allow the relevant authorities to censor the media or any other person in any way.

This limitation is reasonable and necessary as it will effectively ensure that animal cruelty is reported to the relevant authorities immediately. This will allow the relevant authorities to investigate the reported cruelty without delay. There are no exceptions to this rule, which makes it clear for all concerned.

This division does not apply to the extent that it would: (a) infringe any constitutional doctrine of implied freedom of political communication; or (b) affect the law relating to legal professional privilege. In this regard, the Bill is designed to use the least rights restrictive approach and is compatible with the right to freedom of expression in Article 19(2) of the ICCPR.

### ***Right to freedom of assembly and association.***

The right to peaceful assembly in Article 21 protects the right of individuals and groups to meet and to engage in peaceful protest. The right to freedom of association in Article 22 protects the right to form and join associations to pursue common goals. The Bill does not impose a limitation on the right to freedom of assembly or the right to freedom of association. While the Bill has the potential to impose on the right to freedom of assembly and association, the Bill ensures that these rights are protected in Section 385.15.

The Bill is not designed to limit the lawful conduct of any person engaged in peaceful picketing or who is acting in good faith in an industrial matter or who, in good faith, is reporting on a matter of public interest according to the defences listed in section 385.15. Section 385.15, outlined below, specifies that peaceful picketing or some other legally sanctioned peaceful demonstration is not an offence but that the defendant bears an evidential burden in relation to this matter.

### **385.15 Defences**

This Division does not apply to conduct if the conduct is:

- (a) peaceful picketing, or some other legally sanctioned peaceful demonstration; or
- (b) done in good faith in connection with an industrial dispute or an industrial matter; or
- (c) publishing in good faith a report or commentary about a matter of public interest.

In accordance with these defences, the right to freedom of assembly and association is protected. The Bill does not limit or regulate the ability of a person or group of persons to peacefully protest or be a member of groups or associations or trade unions. Therefore the Bill is consistent with the right of freedom of assembly and association.

#### ***Rights at work.***

The Bill promotes the right to the enjoyment of just and favourable conditions of work in Article 7 of the International Covenant on Economic Social and Cultural Rights (ICESCR). Article 7 ensures that the rights in work are protected and so is the right to just and favourable conditions of work, in particular, safe and healthy working conditions.

The Bill creates an offence in new section 385.5, if a person engages in conduct that destroys or damages property used in carrying on an animal enterprise or belongs to a person who conducts or is associated with a person who carries on an animal enterprise. This protects the right to safe and healthy working conditions for employees of the animal enterprise. In this way, the Bill ensures workers are not affected by unjustifiable threats, interference or industrial sabotage. In this regard the Bill promotes the right to the enjoyment of just and favourable conditions of work in Article 7 of the ICESCR.

#### **Conclusion**

The Bill is compatible with human rights because the only potential limitations on human rights in the Bill are reasonable, necessary and proportionate in achieving the Bill's legitimate policy objectives.

**Senator Dr Chris Back**  
**Senator for Western Australia**