



JOINT MEDIA ORGANISATIONS SUBMISSION TO THE NSW LEGISLATIVE COUNCIL SELECT COMMITTEE ON LANDOWNER PROTECTION FROM UNAUTHORISED FILMING OR SURVEILLANCE

20 July 2018

The Joint Media Organisations – whose logos appear above – appreciate the opportunity to make a submission to the NSW Legislative Council *Select Committee on Landowner Protection from Unauthorised Filming or Surveillance* (the Inquiry).

We note that the Committee Chair also has a related Private Members Bill in the Parliament, the Animal Protection and *Crimes Legislation Amendment (Reporting Animal Cruelty and Protection of Farm Enterprises) Bill 2018* (the Bill).

Executive Summary

In response to the terms of reference for the Inquiry the Joint Media Organisations submit:

- a) The nature of protection from landholders from unauthorised filming or surveillance under existing legislation is adequate.
- b) The extent and appropriateness of penalties for unauthorised filming or surveillance under existing legislation is also adequate.
- c) The implications with regard to self-incrimination of the request of disclosure of recordings by those who have made them are considerable.
- d) The rapidly evolving media environment does not in any real way decrease landowners' capacity to protect themselves from unauthorised filming.
- e) In light of the above, any legislation which seeks to unjustifiably enhance landowner protection at the expense of whistle-blowers and public interest journalism, including the Hon Mr Robert Borsak's Private Members Bill, should not be passed.

Each of these points is discussed in more detail below including the Joint Media Organisations' unique perspective on how the Bill and any other legislation in similar terms would act as an unacceptable impediment to the media's critical role in exposing and therefore discouraging animal cruelty.

1. Terms of reference (a) and (b) – protection from and penalties for unauthorised surveillance

In the **attached** 2015 submissions, the Joint Media Organisations explained how landowners already enjoy sufficient protection from existing legislation and how similar proposed legislation would result in an unnecessary overlap.

For example, Part 4AD of the *Crimes Act 1900* (NSW) already includes the following offences:

- Destroying or damaging property (section 195)
- Destroying or damaging property with intent to injure a person (section 196)
- Dishonestly destroying or damaging property (section 197)
- Destroying or damaging property with intention of endangering life (section 198)
- Threatening to destroy or damage property (section 199).

The penalties for offences under these provisions are severe, including substantial terms of imprisonment ranging from 5 to 25 years. These offences capture people who destroy property for the purpose of obtaining unauthorised surveillance.

Any argument for more severe deterrents to those who damage landowner property than the substantial prison terms referred to above would have to be based on empirical evidence.

The law of trespass would also potentially apply to people who enter properties for the unauthorised purpose of obtaining surreptitious surveillance or recordings.

Penalties for less serious offences of merely obtaining unauthorised recordings (without damaging property) are also relatively severe. Landowners have protection beyond the penalties provided in the *Summary Offences Act 1988* (NSW).

For example, section 8 of the *Surveillance Devices Act 2007* (NSW) prohibits the installation, use or maintenance of optical surveillance devices while entering premises without the express or implied consent of the owner or occupier. Contravention of this provision, which would capture people obtaining unauthorised recordings on landowners' properties, carries a penalty of 100 penalty units or 5 years imprisonment or both.

It is doubtful that people are encouraged to breach landowners' rights in obtaining unauthorised surveillance because the current penalties are too lenient. Rather, people appear motivated to expose practices such as animal cruelty, regardless of the severity of the penalty if apprehended. To this end, combating animal cruelty must be the solution rather than unfairly targeting those who seek to expose it.

Further, if unauthorised surveillance is obtained which amounts to evidence of animal cruelty, there are already provisions in place which require parties to provide that material to authorities. The veracity of the recordings can thereby be tested rather than being manipulated to cause maximum damage to the particular landowners' business or reputation.

For example, section 316 of the *Crimes Act* makes it an offence to conceal a serious indictable offence which includes failing to provide information to the Police Force that might assist in apprehending offenders.

In the circumstances, landowners enjoy sufficient protection and penalties are adequate under the existing legislation provided that legislation is properly implemented.

Enacting further legislation such as the Bill would create unnecessary duplication which invariably leads to increases in the time and expense required to engage with the State's legal system. This would be contrary to the State Government's previously stated deregulation agenda and the public interest.

2. Term of reference (c) – implications of required disclosure including self-incrimination

Legislation such as the Bill which effectively requires immediate disclosure to authorities of evidence of animal cruelty imperils journalists and their sources both on confidentiality and self-incrimination grounds.

In order to demonstrate this point, it is necessary to explain the role that the media plays in exposing animal cruelty.

Impediment to the media's democratic function

The media plays a significant role in countering animal cruelty through exposure which can often lead to perpetrators being prosecuted and may deter animal enterprise operators from engaging in animal cruelty. Several examples of the media performing this function effectively are discussed below.

Underpinning the media's ability to play this crucial role is its relationship with sources and whistle-blowers. Typically a whistle-blower or source will approach a journalist or media organisation with evidence of animal cruelty.

The journalist will then investigate the allegation. The journalist is obliged to ensure the story is newsworthy, the source is credible and that there is a proper basis for any allegation being published. This includes an assessment of potential legal exposure under defamation laws, where wrongdoing is alleged (for example), as well as compliance with internal editorial policies and procedures aimed at ensuring fair and accurate reporting.

Once the above steps have occurred, the publisher will decide whether to publish the story.

Confidential sources

In the present environment, sources and whistle-blowers are emboldened to approach the media to expose animal cruelty because they can protect themselves from unwarranted retribution by keeping their identities confidential.

Under the cloak of confidentiality, whistle-blowers can also protect themselves from potential self-incrimination.

Proposed new Section 6A to the *Prevention of Cruelty to Animals Act 1979* (NSW) jeopardises whistle-blower and source identity protection and increases the risk of self-incrimination. Proposed Section 6A requires reporting of animal cruelty within 1 day and recordings to be given to relevant authorities within 5 business days of the recording being made.

Journalists and their sources will have to disclose to authorities that they have made or obtained recordings possibly in breach of the *Surveillance Devices Act* and other similar legislation.

As a result, sources risk their identities being exposed and suffering retribution, for example losing their employment or in the worst-case scenarios, incriminating themselves.

In this respect, legislation compelling disclosure is contrary to the *Evidence Act 1995 (NSW)* which expressly provides a privilege against self-incrimination. Parliament has previously emphasised the importance of allowing witnesses to object to giving evidence in proceedings where that evidence may tend to prove that they have committed an offence or are liable to a civil penalty.

The proposed Bill conflicts with this important protection by arbitrarily placing journalists and whistle-blowers at risk of self-incrimination.

Whilst the Bill purports to be aimed at reducing animal cruelty, it is plain that it will have the opposite impact. As whistle-blowers face higher risks and are increasingly disincentivised from exposing animal cruelty, the instances of animal cruelty that go undetected and unpunished will increase.

Interference with public interest journalism

Journalists will often investigate instances of animal cruelty where regulatory authorities have failed to act. A story can commonly take two months to be thoroughly investigated and prepared for publication.

The Joint Media Organisations reject any notion that the Legislature is empowered to dictate when news is compiled and reported. By its very nature, news does not comply with arbitrary timeframes. Indeed, it would be impractical to expect that reporting on animal cruelty could comply with the arbitrary timeframes provided in proposed new Section 6A of the Bill.

Putting journalists at risk

In addition to increasing the risk of self-incrimination through compelled disclosure, the proposed legislation also increases the risk that journalists will be convicted of criminal offences simply for doing their jobs. Journalists have ethical obligations to maintain confidentiality of sources. As a result, journalists rarely offend that confidence even when faced with serious consequences such as imprisonment.

For example, in the 2007 case of *R v McManus and Harvey* [2007] VCC 619, two *Herald Sun* journalists received fines and convictions for contempt of court after refusing to reveal the source of an article they had published.

Knowing that journalists will go to extreme lengths to comply with their ethical obligations, the Joint Media Organisations submit that it would be unconscionable for the Inquiry to recommend that legislation such as the Bill be passed because the effect would be to systematically put journalists, acting in accordance with their ethical obligations, at risk of conviction.

Whilst this is not the stated object of the Bill, it will be the practical impact. Undemocratic regimes around the world that imprison journalists for doing their jobs are regularly condemned. In this respect, legislation that compels disclosure is a step in the direction of regimes we regularly admonish.

Journalists' privilege under the *Evidence Act*

The Bill is also inconsistent with Parliament's previously stated intention to protect journalists and their sources given the public interest in doing so.

In 2011 the *Evidence Amendment (Journalist Privilege) Bill 2011 (NSW)* introduced current section 126J of the *Evidence Act 1995 (NSW)*, otherwise known as journalists' privilege.

The effect of the privilege is that if a journalist is required by a process or order of New South Wales Court to give information or to produce a document that would result in the disclosure of the identity of an informant, the journalist may rely upon the privilege to resist the requirement.

In the Second Reading Speech for the amending Act, Attorney General Mr Greg Smith made the following remarks:¹

"Freedom of expression, including freedom of the press, is vital to the proper functioning of an open and transparent democracy...Consequently, there is an important public interest served in supporting journalists to carry out their work.

...

Laws that allow journalists to preserve the anonymity of their sources- when they have a promise to do so- are essential to support the work of journalists."

Parliament has previously acknowledged the importance of supporting journalists to investigate and report on matters of public interest. Any legislation which effectively compels journalists to reveal their sources by requiring disclosure to authorities within any timeframe, including 5 days, is inconsistent with this intention.

Enactment of the Bill will lead to the incongruous scenario in which Parliament has strongly endorsed protecting journalists' sources by introducing the privilege yet now undermines it by imperilling sources who obtain evidence of animal cruelty.

Example: "Making a Killing", ABC Four Corners investigation into the NSW greyhound racing industry

In February 2015, an episode of Four Corners revealed footage of live piglets, possums and rabbits being used to "blood" greyhounds during secret race training sessions.

The footage was obtained as a result of a six-month operation during which undercover investigators tracked dogs and their trainers from private training facilities to official race meets.

Despite the practice having been illegal for decades, the graphic video showed animals being fixed to mechanical lures and catapulted around tracks at high speeds to act as bait for dogs to chase and eventually kill.

Following the airing of the program, a string of inquiries were launched across the country. The Victorian State Government announced two separate investigations into the sport as it was revealed the state's former integrity and racing manager had featured in the footage aired by the ABC.

Tasmania and Queensland followed suit, launching their own investigations.

The saga culminated in the New South Wales Government banning greyhound racing in July 2017.

In conducting the investigation, the ABC was required to verify footage, locations, identities and to gather further supporting material. Had the Bill been in place at the time, the ABC would have been required to hand its recordings over to authorities, jeopardising the on-going investigation. Offenders could have received notice of the media's activities and gone to ground.

¹ *Evidence Amendment (Journalist Privilege) Bill 2011, Second Reading Speech, 27 May 2011, p.22 per Mr Greg Smith.*

If the Bill had been enacted at the time of the Four Corners investigation above, the likely impact of the Bill, would have been that the conduct would have gone unpunished. If not for the media's rigour, live baiting could still be commonplace today.

Example: 60 Minutes – live export trade

In April 2018, footage was aired on Channel Nine's *60 Minutes* program showing hundreds of live sheep, cramped together and dying aboard a squalid live export ship.

The video was filmed by a navigation officer on-board the ship who told the *60 Minutes* crew that the sheep, unable to leave the boat, were essentially being put in an oven.

Following the airing of the program, the Federal Department of Agriculture sent Emanuel Exports, the company responsible for the live export ship featured in the footage, a show-cause notice. Emanuel Exports was required to demonstrate why it should not be stripped of its export licence.

Emanuel failed to satisfy the Department and its licence was suspended in June 2018.

Had the Bill or other equivalent provisions been in operation at the time the live export footage was taken, the navigation officer would have been required to hand the footage over to authorities within 5 days. *60 Minutes* would not have been able to research its story and verify the footage. Emanuel Exports may have had time to go to ground or cover up any further evidence. The program most likely would not have been aired. The public outcry that followed the airing of the program and prompted the Department to launch its criminal probe would not have occurred.

The Joint Media Organisations' submit that it is likely that if the Bill had been enacted, Emanuel Exports' practices would not have been exposed and it would still be exporting live sheep with impunity.

3. Terms of reference (d) – implication of the changing media environment

It has become easier for people to make a recording and upload it to the internet. This does not create a need for bolstered protection for landowners from unauthorised filming or surveillance.

Cameras with recording capabilities have been installed on mobile phones for many years. Whilst platforms such as Facebook Live make the recording process simpler, they do not pose an altogether new threat.

The device used to make a recording is an irrelevant consideration as to whether the recording was made in breach of the *Surveillance Devices Act*. Damage to property offences under the *Crimes Act* are no more or less severe based on whether the damage was caused in the course of making a recording on a hand-held video recorder or on an iPhone Facebook live app.

Similarly, whether a recording is made using a mobile phone or a drone has no bearing on whether it is a breach of the *Surveillance Devices Act* or whether it constitutes trespass.

To the extent that potential reputational damage to landowners via new technologies is a concern, this is unfounded. Australian publishers are subject to onerous defamation laws, which apply to existing and new technologies alike where defamatory material about an identified party is communicated to more than one recipient. Publication of any material by a broadcaster on any platform naturally requires rigorous investigation into the accuracy of any claims made, including as to the credibility of any source and origins of any source material such as footage or information, so that a publisher can publish an accurate story and prove the truth of any allegations made if sued.

In short, landowner protection laws are rightly concerned with the conduct of the individual rather than the device used to cause an alleged interference.

For the reasons outlined above, the existing protections are more than adequate. On this basis, the Joint Media Organisations submit that the changing media environment is an irrelevant consideration for the Inquiry.

4. Term of reference (e) – other related matters

Prior attempts to encroach on public interest journalism

On 31 March 2015 the Joint Media Organisations provided submissions to the Senate Committee on Rural and Regional Affairs and Transport in opposition to the *Criminal Code Amendment (Animal Protection) Bill 2015*. That proposed legislation was in similar terms to the Bill.

The 2015 bill was not passed by the Senate and has since expired.

The Joint Media Organisations submit that the Committee should recommend that the Bill and any other similar proposed legislation should not be passed for substantially the same reasons.

Provisions contrary to objects of the Bill

The Joint Media Organisations seek to make a number of further submissions relating specifically to the Bill. In the Second Reading Speech for the Bill on 8 March 2018, Mr Borsak stated:

“The object of the bill is to minimise unnecessary delays in reporting malicious cruelty to animals...The bill’s first priority is to ensure that animals are protected against further unnecessary cruelty caused by a delay in reporting.”

This stated object conflicts with the provisions of the Bill.

Contrastingly, throughout the Second Reading Speech, Mr Borsak states:

“Sadly, the law in this State has been found to be lagging when it comes to affording lawful animal enterprises and farmers the security and peace of mind to conduct their business free of unwarranted trespass and attack.

...

Equally, the law has been soft on prosecuting those who intentionally threaten, abuse or trespass onto lawful animal enterprises.

...

Whether it is an animal enterprise or a farmer, they do not have a the time or resources to defence their industry and educate decision-makers on the realities of animal production.”

The Bill is founded on this fundamental inconsistency. It seeks to protect landowners who are already afforded more than adequate protections, as detailed above.

Even if we accept the stated object of the Bill at face value, there is little doubt that the Bill will have the opposite effect. In hampering the media’s ability to expose animal cruelty and discouraging whistle-blowers from coming forward, the Bill will shield animal cruelty which would have otherwise been curbed. The Bill and any legislation that is obviously incapable of achieving its stated objects should not be passed.

The Bill will lead to increased prejudice for landowners

The examples referred to above demonstrate that the media plays an effective role in exposing animal cruelty and assisting in bringing perpetrators to justice.

When those conducting animal enterprises have an opportunity to condemn operators within the industry that have been exposed and when firm action is taken against such perpetrators, it creates a positive perception of the industry.

If the Bill is enacted it will create an air of secrecy and culture of suppression around animal enterprises. Rather than transparency acting as a disinfectant, the Bill will create a perception that landowners have something to hide and are trying to avoid scrutiny of their operations through intimidating whistle-blowers and stifling legitimate media activity.

The Bill is misconceived in that it creates barriers to exposing animal cruelty. Animal enterprises and the people of New South Wales are better served by existing legislation which addresses the cause of the issue, perpetrators of animal cruelty, rather than extending further protection to them.

5. Conclusion

The Bill is misconceived. The Select Committee should recommend that it not be passed. The only proper conclusion for the Inquiry to draw is that landowners conducting legitimate enterprises already enjoy adequate protections from unauthorised surveillance, including substantial terms of imprisonment for those convicted of offences under the *Surveillance Devices Act*, *Crimes Act* and other areas of law such as trespass. Imprisonment is the most serious limitation on individual liberty at our judicial system's disposal. It is difficult to conceive how landowners could require more protection.

Legislation such as the Bill poses an unacceptable interference with the media's democratic function and the crucial role it plays, in collaboration with its sources and whistle-blowers, to expose and therefore discourage animal cruelty.

The Bill would plainly fail to achieve its stated objects; in fact it would have the opposite effect of prolonging animal cruelty by protecting perpetrators.

It is also contrary to Parliament's stated intention to protect journalists, expressed in clearest terms when journalists' privilege was introduced as well as the intention to protect people from incriminating themselves through the privilege against self-incrimination.

Rapidly changing media has the potential to change the form but not the substance of the threat of unauthorised surveillance. Accordingly, no additional protections are necessary to protect against it. Finally the Bill and similar legislation will lead to increased prejudice for landowners conducting animal enterprises by creating a perception of secrecy and suppression which invariably exists in industries seeking to conceal a particular vice.