

Chapter 2

Background

2.1 The Explanatory Memorandum (EM) to the bill notes that the bill is 'designed to minimise unnecessary delays in the reporting of malicious cruelty to animals'. It is argued that when there is 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.¹

2.2 The amendments proposed to the *Criminal Code Act 1995* include the insertion of 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, which relates to interference with the conduct of lawful animal enterprises.²

Schedule 1 – Amendments

Part 1 – Main Amendments

2.3 **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

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

2.5 Section 383.5 sets out two obligations relating to the reporting of malicious cruelty to animals. Under the amendments proposed by the bill, if a person has made a visual recording of an activity they believe to constitute malicious cruelty to an animal or 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 five business days.³

2.6 The EM indicates that if a person fails to fulfil either or both of these obligations, they have committed an offence under section 383.5.⁴

2.7 The EM indicates that the bill is not intended to override the constitutional rights of states and territories to enact and enforce laws. It is also noted that Subsection 383.5(4) limits the effect of the offence to where the alleged malicious

1 Explanatory Memorandum, Criminal Code Amendment (Animal Protection) Bill 2015, p. 1.

2 Explanatory Memorandum, Criminal Code Amendment (Animal Protection) Bill 2015, p. 1.

3 Explanatory Memorandum, Criminal Code Amendment (Animal Protection) Bill 2015, p. 3.

4 Explanatory Memorandum, Criminal Code Amendment (Animal Protection) Bill 2015, p. 3.

cruelty is observed and recording made by a federally regulated entity or in constitutional trade or commerce or in a territory or Commonwealth place.⁵

2.8 It is proposed that the extent of the bill will be 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.⁶

2.9 The EM notes that subsection 383.5(3) would set out that the defendant would bear an evidential burden in relation to making out the matter in paragraph 383.5(1)(c). It is suggested that this is appropriate, because 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.⁷

2.10 It is also noted that 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.⁸

Division 385

2.11 It is proposed, under Section 385.5, that a person would commit 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 would be 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.⁹

5 Explanatory Memorandum, Criminal Code Amendment (Animal Protection) Bill 2015, p. 3.

6 Explanatory Memorandum, Criminal Code Amendment (Animal Protection) Bill 2015, p. 3.

7 Explanatory Memorandum, Criminal Code Amendment (Animal Protection) Bill 2015, p. 3.

8 Explanatory Memorandum, Criminal Code Amendment (Animal Protection) Bill 2015, p. 3.

9 Explanatory Memorandum, Criminal Code Amendment (Animal Protection) Bill 2015, p. 3.

2.12 It is proposed that Section 385.10 would create 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. It is proposed that this offence would be punishable by imprisonment.¹⁰

2.13 The EM notes that the bill is not designed to limit the lawful conduct of any person engaged in peaceful picketing or 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.¹¹

2.14 Under the proposed amendment, it is proposed that the prosecution would 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 would 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.¹²

2.15 It is indicated that, in relation to both Division 383 and 385:

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.¹³

2.16 Item 2 would insert definitions for the following terms:

- animal enterprise;
- constitutional communication;
- economic damage;
- federally regulated entity;
- serious bodily injury; and
- substantial bodily injury.¹⁴

10 Explanatory Memorandum, Criminal Code Amendment (Animal Protection) Bill 2015, p 4.

11 Explanatory Memorandum, Criminal Code Amendment (Animal Protection) Bill 2015, p 4.

12 Explanatory Memorandum, Criminal Code Amendment (Animal Protection) Bill 2015, p. 3.

13 Explanatory Memorandum, Criminal Code Amendment (Animal Protection) Bill 2015, pp 3 and 4.

14 Explanatory Memorandum, Criminal Code Amendment (Animal Protection) Bill 2015, p. 5.

Part 2 – Consequential Amendments

2.17 The EM indicates that, under Part 2, a number of amendments are proposed in relation to defined terms that are to be used in 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 one place. Part 2 also includes two 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.

Senate Standing Committee for the Scrutiny of Bills – comments on bill

2.18 Under its terms of reference the Senate Standing Committee for the Scrutiny of Bills (the Scrutiny committee) is appointed to report, in respect of the clauses of bills introduced into the Senate or the provisions of bills not yet before the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise:¹⁵

- (i) trespass unduly on personal rights and liberties;
- (ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
- (iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;
- (iv) inappropriately delegate legislative powers; or
- (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

2.19 The Scrutiny committee examined the bill and its provisions. The Scrutiny committee's findings are summarised below.

Undue trespass on personal rights and liberties – reversal of burden of proof – schedule 1, item 1, proposed subsection 383.5(3)

2.20 In commenting on Schedule 1, Item 1, proposed subsection 383.5(3), the Scrutiny committee noted that the proposed subsection provides that the defendant would bear an evidential burden in relation to making out the matter in paragraph 383.5(1)(c), namely, that malicious cruelty was not reported to a relevant authority within one day after the activity occurred and that the visual record of that activity was not given to the relevant authority within five days. The Scrutiny committee acknowledged the argument provided in the EM as to why this approach is appropriate.¹⁶ However, it argued that:

15 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 2 of 2015*, 4 March 2015, Terms of Reference (1)(a), p. v.

16 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 2 of 2015*, 4 March 2015, p. 29.

On the other hand, it may be noted that the matter the defendant is being required to prove is central to the question of liability for the offence. Further, it is arguably the case that the relevant authorities should be required to implement systems which facilitate proof through systems for recording, processing and storing records. Given the existence of such systems it may be considered inappropriate to require defendants to discharge an evidential burden of proof. It is also suggested that the appropriateness of placing an evidential burden on defendants may be thought problematic as the entities to whom disclosure of cruelty reports and delivery of records must be made is not defined with precision, but by reference to whether the authority has 'responsibility for enforcing laws relating to animal welfare'. In light of these matters and the brevity of the justification offered for the approach the committee seeks the Senator's more detailed explanation of the reversal of onus be sought. **The committee therefore seeks the Senator's explanation as to why the entities to whom disclosure of cruelty and the delivery of records must be made cannot be defined with more precision as uncertainty in the operation of offences may also be considered to trespass on personal rights and liberties.**¹⁷

Undue trespass on personal rights and liberties – absolute liability schedule 1 item 1, proposed subsections 383.5(5), 385.5(4) and 385.10(4)

2.21 The Scrutiny committee noted that absolute liability applied in relation to the 'jurisdictional' element of the offence set out in subsection 383.5(4). The Scrutiny committee indicated that, in light of the explanation at page four of the EM – which is consistent with the *Guide to Framing Commonwealth offences, Civil Penalties and Enforcement Powers* – it would make no further comment in relation to this issue.¹⁸

2.22 The Scrutiny committee noted that this same issue also arises in relation to subsection 385.5(4) and subsection 385.10(4). The Scrutiny committee indicated that in the circumstances, it would make no further comment on these subsections.¹⁹

Undue trespass on personal rights and liberties – new offences and penalties – schedule 1, item 1, proposed subsection 385.5(1), 385.10(1), section 385.20

2.23 The Scrutiny committee noted that these provisions detail proposed penalties for the offences of destroying or damaging property connected with an animal enterprise, causing fear of death or serious bodily injury to a person connected with the carrying on of an animal enterprise. It was also noted that section 385.20 sets out

17 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 2 of 2015*, 4 March 2015, pp 29 and 30.

18 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 2 of 2015*, 4 March 2015, p. 30.

19 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 2 of 2015*, 4 March 2015, p. 30.

aggravated offences in relation to conduct that results in the differing levels of economic damage or that results in physical injury or death.²⁰

2.24 The Scrutiny committee also observed that the penalties proposed involve significant custodial sentences ranging from 1 year imprisonment to life imprisonment. In response to which it was stated that:

The committee's normal expectation is that new offences will be justified by reference to (a) the need for the offences where existing offences would also cover the conduct (e.g. crimes against property and persons) and (b) that penalties imposed for new offences be justified by comparison with those imposed for similar offences in Commonwealth legislation. **As the explanatory memorandum does not address these matters, the committee seeks the Senator's comprehensive justification for the proposed approach.**²¹

Undue trespass on personal rights and liberties – reversal of burden of proof – schedule 1, item 1, proposed subsection 385.15

2.25 The Scrutiny committee noted that this provides for three defences to conduct which would otherwise be caught by offences in Division 385. The proposed defences are that the conduct is:

- (a) peaceful picketing, or some other legally sanctioned peaceful demonstration;
- (b) done in good faith in connection with an industry dispute or an industrial matter; or
- (c) publishing in good faith a report or commentary about a matter of public interest.²²

2.26 It was also observed by the Scrutiny committee that, in relation to each of these defences, a defendant bears an evidential burden of proof.

2.27 The Scrutiny committee acknowledged that the bill's Statement of Compatibility (at page eight) states:

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.²³

20 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 2 of 2015*, 4 March 2015, pp 30 and 31.

21 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 2 of 2015*, 4 March 2015, p. 31.

22 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 2 of 2015*, 4 March 2015, p. 31.

23 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 2 of 2015*, 4 March 2015, p. 31.

2.28 It went on to argue however, that:

Unfortunately this justification for the approach lacks specificity and seems directed only to the offence in Division 383, not those in Division 385. Given that aggravated versions of the offences attract very significant penalties and that the matters in the offence are central to the question of liability, **the committee seeks the Senator's detailed justification for this approach.**²⁴

2.29 The Scrutiny committee concluded as follows in relation to the three amendments summarised above:

*Pending the Senator's reply, the committee draws Senators' attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the committee's terms of reference.*²⁵

24 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 2 of 2015*, 4 March 2015, pp 31 and 32.

25 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 2 of 2015*, 4 March 2015, pp 30, 31 and 32.

