

20 November 2013

The Executive Director
Australian Law Reform Commission
GPO Box 3708
Sydney NSW 2001

Via email: privacy@alrc.gov.au

Dear Sir, Madam

Submission to Serious Invasions of Privacy in the Digital Era Issues Paper

RSPCA Australia thanks the Australian Law Reform Commission (the Commission) for the opportunity to comment on the Serious Invasions of Privacy in the Digital Era Issues Paper (the Issues Paper).

This submission first deals with the specific issues the Commission has requested information on relating to the RSPCA's role in enforcing animal welfare legislation and investigating complaints made by animal groups, before providing some more general comments about selected questions raised in the Issues Paper.

The RSPCA's role in the enforcement of animal welfare legislation

RSPCA Australia is a federated, community based organisation that works to prevent cruelty to animals by actively promoting their care and protection. The work of the RSPCA includes the operation of animal care centres, community education, and the enforcement of state and territory animal welfare legislation.

The RSPCA employs just under 100 inspectors throughout the country via state and territory RSPCA Societies. Inspectors are appointed by the Ministers responsible for the administration of the animal welfare legislation in each state jurisdiction (with the exception of the Northern Territory). Once appointed, inspectors are defined as 'public officers' (or its equivalent) for the purposes of state Ombudsman and Freedom of Information legislation, and are also subject to relevant state public sector accountability codes of conduct.

Inspectors are afforded a range of powers to effectively investigate animal cruelty offences and enforce animal welfare legislation. These powers will generally include the power to enter property under warrant or in urgent circumstances, to seize animals and evidence of animal welfare offences, to issue animal welfare directions and infringement notices, and to commence prosecution proceedings.

In the 2011/12 Financial Year, RSPCA inspectors received 51,961 complaints throughout the country and finalised 266 prosecutions resulting in 298 convictions (further statistics can be found at: <http://www.rspca.org.au/facts/statistics>).

RSPCA Australia Inc.
ABN 99 668 654 249

P 02 6282 8300
F 02 6282 8311
E rspca@rspca.org.au
W rspca.org.au

PO Box 265
Deakin West ACT 2600



Investigating complaints by animal groups

From time to time RSPCA inspectorate departments will receive complaints from groups (often anonymously) who have conducted investigations of animal cruelty incidents. These complaints frequently concern livestock production and processing practices and will sometimes include video footage obtained via the installation of CCTV cameras. The installation of such cameras is often undertaken via trespass.

Upon receipt of such complaints inspectors will assess the allegations and supporting evidence in the same way they do for all reports of animal cruelty. The appropriate response is determined on a case by case basis. Depending upon the evidence depicted in the footage and other supporting information such complaints may provide cause to initiate a formal investigation.

The extent to which such footage can be used as evidence in any subsequent prosecution proceedings however is limited due to the often anonymous nature of the complaint and the illegal means by which the evidence was obtained. Inspectors will usually have to rely on evidence obtained during the course of the formal investigation to support any subsequent charges.

The admission of evidence obtained improperly or in contravention of an Australian law is of course subject to the court's discretion taking into account the relevant considerations prescribed under the law governing the admissibility of such evidence.¹ The starting presumption is that such evidence will not be admissible.²

Over the past couple of years the RSPCA has acted on a number of complaints made by animal groups which have resulted in formal investigations, successful prosecutions and in some cases broader regulatory reforms.³ We would be happy to provide the Commission with further information about these matters upon request.

The use of drones to monitor animal welfare

The RSPCA is aware of the recent use of drones by Animal Liberation NSW to monitor animal welfare conditions on livestock properties. We have not to-date received any footage from Animal Liberation from these operations.

Complaints of this nature would be considered on a case by case basis in the manner as other reports. It is likely that the admission of any evidence obtained via the use of drones would also be subject to the court's discretion taking into account the same considerations as prescribed in the Evidence Acts.

The impact of drone use on personal privacy is not a matter the RSPCA feels it is in a position to comment on. The Commission is certainly better placed to determine whether using drones to film commercial farming operations should be subject to a cause of action for 'serious invasion of privacy' and we will respect the Commission's determination in this regard. In considering the issue we would however ask the Commission to take into account the following matters:

¹ See for instance, s.183(3), *Evidence Act 1995* (NSW).

² See s.183(1), *Evidence Act 1995* (NSW).

³ For instance, in May 2012 the NSW Government instituted new regulatory requirements for abattoirs including the appointment of animal welfare officers at all facilities and annual animal welfare audits following the exposure of animal cruelty at a Hawkesbury Valley abattoir:
<http://www.foodauthority.nsw.gov.au/news/media-releases/mr-17-May-12-animal-welfare-training-abattoirs/#.UoxUp9lwo1g>

- The difficulties in monitoring animal welfare, particularly relating to livestock due to the remote locations of many operations and the lack of resources made available by state governments for compliance inspections.
- The strong public interest in animal welfare and growing demand for greater assurances regarding the welfare of animals used in the course of producing food and fibre.

General comments on selected questions raised in the Issues Paper

1. *What guiding principles would best inform the ALRC's approach to the Inquiry and, in particular, the design of a statutory cause of action for serious invasion of privacy? What values and interests should be balanced with the protection of privacy?*

The RSPCA acknowledges the importance of protecting personal privacy and takes its obligations in this regard very seriously. Equally, we acknowledge and indeed actively promote, the broad public interest in animal welfare and the public's right to communicate in a political manner about animal welfare issues. We do not believe there are many circumstances in which these interests come into conflict, however, as the abovementioned use of drones demonstrates, it is not unforeseeable.

Inevitably, the Commission will have to apply the principle of proportionality in determining the correct approach to balancing these competing interests. In undertaking such an analysis we would ask the Commission to pay due regard to the need to protect the implied freedom of political communication and the public's legitimate interest in animal welfare. We refer to the words of former Justice Michael Kirby in *ABC v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 to demonstrate the importance of this consideration:

The concerns of a governmental and political character must not be narrowly confined. To do so would be to restrict, or inhibit, the operation of the representative democracy that is envisaged by the Constitution. Within that democracy, concerns about animal welfare are clearly legitimate matters of public debate across the nation. So are concerns about the export of animals and animal products. Many advances in animal welfare have occurred only because of public debate and political pressure from special interest groups. The activities of such groups have sometimes pricked the conscience of human beings.

Parliamentary democracies, such as Australia, operate effectively when they are stimulated by debate promoted by community groups. To be successful, such debate often requires media attention. Improvements in the condition of circus animals, in the transport of live sheep for export and in the condition of battery hens followed such community debate. Furthermore, antivivisection and vegetarian groups are entitled, in our representative democracy, to promote their causes, enlisting media coverage, including by the appellant. The form of government created by the Constitution is not confined to debates about popular or congenial topics, reflecting majority or party wisdom. Experience teaches that such topics change over time. In part, they do so because of general discussion in the mass media.⁴

Accordingly, it is of vital importance that any cause of action for serious invasion of privacy does not inhibit the community's ability to openly discuss the political and ethical aspects of our treatment of animals.

3. *What specific types of activities should the ALRC ensure are not unduly restricted by a statutory cause of action for serious invasion of privacy?*
15. *What, if any, activities or types of activities should be exempt from a statutory cause of action for serious invasion of privacy?*

⁴ *ABC v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 [217-218]

As an organisation that is involved in the investigation of offences and enforcement of law, we are concerned to see that any cause of action for serious invasion of privacy would not unduly impede the conduct of lawful investigations. Accordingly, we would ask the Commission to ensure that investigative mechanisms that are currently authorised by law, including Integrated Public Number Database and motor vehicle registration searches, and the use of audio recordings in evidence, are not affected. This may be provided for through an exemption for lawful investigative activities conducted in the course of enforcing a criminal law.

10. Should a statutory cause of action for serious invasion of privacy require proof of damage or be actionable per se?

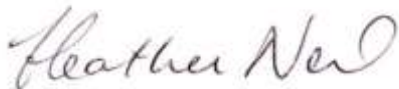
To ensure any new cause of action does not unduly interfere with the implied freedom of political communication, it should not be drafted in a way that results in excessively broad application. We would be concerned if the cause of action was actionable *per se* because it may be open to exploitation for ulterior motives such as preventing the disclosure of animal welfare matters in the public interest. For the cause of action to be actionable we feel that some form of genuine damage must be established.

17. What, if any, specific provisions should the Act include as to matters a court must consider when determining whether to grant an injunction to protect an individual from a serious invasion of privacy? For example, should there be a provision requiring particular regard to be given to freedom of expression, as in s 12 of the Human Rights Act 1998 (UK)?

We would support such a requirement.

We trust our submission has been of assistance in conveying our position on the matters before the inquiry. Please do not hesitate to contact our office should you require further clarification or information.

Yours sincerely



Heather Neil
Chief Executive Officer
RSPCA Australia