

40TH PARLIAMENT



## Report 36

### STANDING COMMITTEE ON LEGISLATION

*Animal Welfare Amendment Bill 2017*

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Presented by  
Hon Dr Sally Talbot MLC (Chair)  
June 2018

## **Standing Committee on Legislation**

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Hon Pierre Yang MLC

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Hon James Chown MLC substitute for Hon Nicholas Goiran MLC (Deputy Chair)

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# EXECUTIVE SUMMARY

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- 1 On 21 March 2018, the Minister for Agriculture and Food, Hon Alannah MacTiernan MLC, moved without notice:
  - (1) that the Animal Welfare Amendment Bill 2017 be discharged and referred to the Standing Committee on Legislation for consideration and report no later than 12 June 2018; and
  - (2) the committee has the power to inquire into and report on the policy of the bill.
- 2 The question was put to the House and passed.
- 3 The main purpose of the Animal Welfare Amendment Bill 2017 Bill is to provide the statutory architecture for the adoption in Western Australia of nationally agreed animal welfare standards and guidelines, via amendments to the *Animal Welfare Act 2002* (the Act), and to provide the means to regulate and monitor compliance with them. The policy objective of the Bill is to shift the focus of Part 3 of the Act away from being simply about preventing and punishing animal cruelty to establishing and policing nationally agreed standards and guidelines for animals' health, safety and welfare.
- 4 Enactment of the Bill would also lead to the creation of a new class of animal welfare inspector, the 'designated general inspector', appointed by the relevant Minister and with enhanced powers to enter premises and vehicles without consent, notice or warrant.
- 5 A number of new heads of power to make regulations would be created by the enactment of the Bill, including a power to prescribe circumstances when defences to a charge of animal cruelty, as set out in the Act, would not apply.

## Findings and recommendations

**Findings and recommendations are grouped as they appear in the text at the page number indicated. Where a majority finding or recommendation is indicated, the majority consisted of Hon Colin de Grussa MLC, Hon Jim Chown MLC and Hon Dr Steven Thomas MLC.**

### FINDING 1

Page 34

The Committee finds that the commitment given by the Commonwealth and all states and territories to the legislative adoption of universal animal welfare standards and guidelines should be legislated in Western Australia without further delay.

### RECOMMENDATION 1

Page 34

Clauses 1 to 8 of the Animal Welfare Amendment Bill 2017 may be made.

**FINDING 2**

Page 34

The majority of the Committee finds that the Legislative Council's consideration of the Animal Welfare Amendment Bill 2017 should cease after clause 8. The regulatory scheme that would be legislated under clauses 1 to 8 may proceed effectively without the more contentious provisions provided for in clauses 9 to 13. Those proposed amendments to the *Animal Welfare Act 2002* should not be legislatively progressed until they have been the subject of the promised review.

**RECOMMENDATION 2**

Page 35

Majority recommendation: Animal Welfare Amendment Bill 2017, pages 5 to 9, clauses 9 to 13 — delete the clauses.

- 6 Should Recommendation 2 not be accepted by the Legislative Council, then the majority of the Committee makes the following findings and recommendations with regard to this part of the Bill.

**FINDING 3**

Page 35

The majority of the Committee finds that national standards and guidelines should be simply prescribed as regulatory offences, as has occurred in other states and territories, and elements of them should not be elevated to cruelty offences by further prescription. Any proposed new cruelty offences, to be added to section 19 of the *Animal Welfare Act 2002*, should be fully set out in the Animal Welfare Amendment Bill 2017.

**RECOMMENDATION 3**

Page 35

Majority recommendation: Animal Welfare Amendment Bill 2017, at page 5, lines 8 to 11, clause 9(1) — delete the clause.

**FINDING 4**

Page 35

The majority of the Committee finds that no sufficient justification for the Henry VIII clause that appears at clause 9(2) of the Animal Welfare Amendment Bill 2017 has been given. Any proposed modifications to the statutory defences that are set out at sections 21 to 25 of the *Animal Welfare Act 2002* should be fully set out in the Animal Welfare Amendment Bill 2017. Likewise, proposed additional defences to charges of cruelty to animals should not be the subject of prescription, but should be fully considered by the Parliament.

**RECOMMENDATION 4**

Page 35

Majority recommendation: Animal Welfare Amendment Bill 2017, at page 5, lines 13 to 20, clause 9(2) — delete the clause, and at page 6, lines 8 to 14, clause 11 — delete the clause.

**FINDING 5**

Page 35

The majority of the Committee finds that the proposal to add the words '(however described)' after 'codes of practice' is misconceived. The Department of Primary Industries and Regional Development has produced no justification for this proposed amendment, which has caused, and would cause, unnecessary uncertainty and concern.

**RECOMMENDATION 5**

Page 36

Majority recommendation: Animal Welfare Amendment Bill 2017, at page 10, lines 1 to 3, clause 19 — delete the words:

'(b) in paragraph (d) after "practice" insert:  
(however described).'

**FINDING 6**

Page 49

The majority of the Committee finds that it is reasonable that an entry to a private property should continue to only be effected in the circumstances currently set out in the *Animal Welfare Act 2002*. Should a search warrant be necessary, it may be granted under section 59(a)(i) of the *Animal Welfare Act 2002*, where there are reasonable grounds for suspecting that there is in a place or vehicle, an animal the welfare, safety or health of which is under threat. This would cover grounds for suspicion that a breach of the national standards is occurring.

**FINDING 7**

Page 49

The majority of the Committee finds that it has not been persuaded that there is a need for the creation of this new category of designated general inspector at this point in time, nor for the enhanced powers of entry that such an inspector would enjoy. No evidence was adduced that the role of monitoring compliance with legislated standards and guidelines could not be adequately undertaken by existing inspectors, under existing powers, and the provisions in this part of the Animal Welfare Amendment Bill 2017 should be held in abeyance pending the outcome of the full review.

**RECOMMENDATION 6**

Page 49

Majority recommendation: Animal Welfare Amendment Bill 2017, at pages 7 to 9, clauses 14 to 17 — delete the clauses.

- 7 Should clauses 14 and 15 be proceeded with, and the new class of designated general inspector be created, the majority of the Committee would make the following findings and recommendations.

**FINDING 8**

Page 50

The majority of the Committee finds that the proposal that designated general inspectors be appointed by the Minister instead of, as is more usually the case, the administrative head of the relevant department, has caused an unnecessary measure of uncertainty and mistrust.

**RECOMMENDATION 7**

Page 50

Majority recommendation: Animal Welfare Amendment Bill 2017, at page 7, line 5, clause 14 — delete the word 'Minister' and replace it with 'CEO'.

**FINDING 9**

Page 50

The majority of the Committee finds that, for the purposes of monitoring compliance with legislated animal welfare standards and guidelines, the comparatively unfettered powers of entry that are proposed for designated general inspectors are unnecessary. The powers that exist for inspectors generally under the *Animal Welfare Act 2002* are sufficient for those purposes.

**RECOMMENDATION 8**

Page 50

Majority recommendation: Animal Welfare Amendment Bill 2017, at pages 8 to 9, clauses 16 and 17 — delete the clauses.

- 8 Should clauses 16 and 17 be proceeded with, the majority of the Committee makes the following finding and recommendation.

**FINDING 10**

Page 50

The majority of the Committee finds that, in the context of monitoring activities, no sufficient evidence was produced to justify a lack of any provisions allowing for notice to be given to owners or occupiers of premises prior to entry being effected. Consideration should be given to an amendment to section 38(3) of the *Animal Welfare Act 2002*, requiring the giving of 24 hours' notice before an entry to premises may be effected, or to an additional provision along the lines of that contained in section 65(3) and (4) of the *Biosecurity and Agriculture Management Act 2007*.

**RECOMMENDATION 9**

Page 50

Majority recommendation: that consideration be given to the inclusion in the *Animal Welfare Act 2002* of a statutory notice period of at least 24 hours before entry to non-residential premises may be effected by an inspector.

The Committee recommends that, should the Legislative Council be minded to pass all or any of the clauses of the Bill, consideration should be given to the addition of a 3-year sunset clause. This would give the Department of Primary Industries and Regional Development adequate time to commence a full review of the *Animal Welfare Act 2002* and return to Parliament with properly thought-out and coherent proposals before the amendments that would be made by the Animal Welfare Amendment Bill 2017 would cease to have effect.



# CHAPTER 1

## Introduction

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### Reference and procedure

- 1.1 On 21 March 2018, the Minister for Agriculture and Food (Minister), Hon Alannah MacTiernan MLC, moved without notice:
  - (1) that the Animal Welfare Amendment Bill 2017 be discharged and referred to the Standing Committee on Legislation for consideration and report no later than 12 June 2018; and
  - (2) the committee has the power to inquire into and report on the policy of the bill.
- 1.2 The question was put to the House and passed.<sup>1</sup>
- 1.3 An advertisement was placed in the *Weekend West* on 24 March 2018, and the referral of the Animal Welfare Amendment Bill (Bill) to the Standing Committee on Legislation (Committee) was announced on social media. 198 organisations and members of the public took the opportunity to make submissions to the Committee, and a list of them may be found at Appendix 1.
- 1.4 Many of the submissions received from the public were seemingly copied from templates as part of a co-ordinated mailing campaign. Whilst the Committee formally accepted each of the submissions into evidence, and took into account all of the matters raised in them during its deliberations, it resolved to publish on the internet only those submissions that offered substantive individual views. Submissions that were the same or substantially similar to ones previously received are listed in Appendix 1 but were not published. Two submitters sought, and were granted, confidentiality.
- 1.5 The Committee received two briefings from officers of the Department of Primary Industries and Regional Development (Department). Given the relatively short timescales to which the Committee were bound, and the quality and quantity of submissions received, it was felt that public hearings with submitters were unnecessary. The Committee extends its thanks to all of those who took the time to provide the Committee with their views.
- 1.6 At the outset of the inquiry, two Members of the Committee were substituted under Standing Order 163 of the Standing Orders of the Legislative Council — for the duration of the inquiry into the Animal Welfare Amendment Bill 2017, Hon Jim Chown MLC replaced Hon Nick Goiran MLC and Hon Dr Steven Thomas MLC replaced Hon Simon O'Brien MLC. Both substitutions were duly reported to the House by the President.<sup>2</sup>
- 1.7 On 10 May 2018, the Committee sought an extension of the time in which it was to report to the Legislative Council, from 12 June 2018 to 28 June 2018. That extension of time was granted on 15 May 2018.<sup>3</sup>

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<sup>1</sup> Hon Alannah MacTiernan MLC, Minister for Agriculture and Food, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 21 March 2018, p 1056.

<sup>2</sup> Hon Kate Doust MLC, President, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 27 March 2018, p 1303 and 29 March 2018, p 1414.

<sup>3</sup> Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 15 May 2018, p 2664.

## Live animal exports

- 1.8 Many of the submissions received by the Committee from members of the public appear to have been prompted by a '60 Minutes' television programme broadcast on 8 April 2018, reporting incidents alleged to have occurred on a ship transporting live sheep from Fremantle to the Middle East in August 2017. Those public submissions universally called upon Parliament to enact the Bill to enable stronger regulation to be exercised as regards the live animal export trade.
- 1.9 The Commonwealth Parliament retains power to make legislation with respect to trade and commerce with other countries.<sup>4</sup> A suite of legislative provisions, regulations and export control orders govern the live animal export trade, but in particular Part 2 of the *Australian Meat and Live-stock Industry Act 1997* (Cth) deals with the control of meat and livestock exports.<sup>5</sup>
- 1.10 An example of how this legislative framework played out occurred in 2005, when the Department of Local Government and Regional Development, commenced criminal proceedings in the Perth Magistrates Court against Emanuel Exports Pty Ltd and two of its directors for animal cruelty arising out of a shipment of live sheep to the Middle East in November 2003.<sup>6</sup> The charges were based on alleged breaches of section 19 of the *Animal Welfare Act 2002* (the Act). One charge of animal cruelty was found to be proven beyond reasonable doubt, but after considering the constitutional issues, the Court found operational inconsistency between the Commonwealth regime and the Act. To the extent of that inconsistency, the Act was found to be invalid under section 109 of the Commonwealth Constitution.<sup>7</sup> Accordingly, the accused were acquitted.
- 1.11 In brief the Court found that, taken together, the Federal laws then in force<sup>8</sup> together comprised a regime for regulating the transport of sheep by sea for the purposes of export. Insofar as an exporter complied with that regime, a state regulator should not be permitted to seek to overrule or second guess the Federal agencies under local animal welfare laws.
- 1.12 According to the Commonwealth Government's website, at least 10 Government and Parliamentary reviews into the live export system and its associated animal welfare issues have taken place since 1985.<sup>9</sup> At the time of this inquiry, the issues again raised in connection with the live animals export industry continue to be dealt with at the Commonwealth Government level.

<sup>4</sup> Commonwealth of Australia Constitution Act 1901 (Cth) s 51(i).

<sup>5</sup> Section 34 of that Act permits an authorised officer, for the purposes of monitoring compliance with the relevant parts of the Act, the regulations or export licence conditions, at any time during working hours, to enter any registered premises (meaning premises registered under regulations made under the *Export Control Act 1982* (Cth)) or any vehicle, vessel or aircraft and, if necessary, stop and detain it.

<sup>6</sup> *Department of Local Government and Regional Development v Emanuel Exports Pty Ltd, Graham Richard Daws and Michael Anthony Stanton*, Perth Magistrates Court (Crawford M) judgment given 8 February 2008 (unreported).

<sup>7</sup> Section 109 states 'When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid'.

<sup>8</sup> The *Australian Meat and Live-stock Industry Act 1977* (Cth), regulations made under that Act, the *Export Control Act 1982* (Cth) and regulations and control orders made under that Act and the *Navigation Act 1912* (Cth) and marine orders made pursuant to that Act.

<sup>9</sup> Parliament of Australia, viewed 18 April 2018,  
[https://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/rp/rp1617/Chronology/LiveExport](https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1617/Chronology/LiveExport).

- 1.13 The position of the State Government is that it has jurisdiction to inspect animal export vessels that are moored at its ports or are in its territorial waters<sup>10</sup>, and indeed the Committee heard that its inspectors regularly attend at wharves in order to inspect for compliance with state laws when vessels are being loaded.<sup>11</sup> However, in relation to the transporter vessels, whilst inspections may occur whilst vessel are in state waters<sup>12</sup>, statutory enforcement is still a matter for the Federal Government, unless and until the High Court decides otherwise.<sup>13</sup>
- 1.14 In any event, this was not an inquiry into the live animal export trade. It was an inquiry into the proposed measures contained in the Bill, and the policy behind those measures, which may be found in particular in the Minister's second reading speech. In this regard, it is also noted that the Bill was introduced into Parliament on 11 November 2017, before the *60 Minutes* television broadcast.
- 1.15 For those reasons, the Committee is of the view that the live animal export issue is a matter outside the scope of this Bill.

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<sup>10</sup> Hon Alannah MacTiernan MLC, Minister for Agriculture and Food, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 14 March 2018, p 686-7 and 10 April 2018, p 1499.

<sup>11</sup> Mia Carbon, Acting Executive Director, Biosecurity, Department of Primary Industries and Regional Development, *Transcript of evidence*, 2 May 2018, pp 22-23.

<sup>12</sup> Hon Alannah MacTiernan MLC, Minister for Agriculture and Food, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 12 April 2018, p 1963.

<sup>13</sup> The Committee is aware that conversations are ongoing as to the respective jurisdictional parameters of the Federal and State Government powers.

## CHAPTER 2

### Background

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- 2.1 All states and territories in Australia have some form of legislation protecting animals from cruelty or safeguarding their welfare. The Commonwealth Government's role is largely limited to some significant animal-related matters under its trade and commerce powers and, for example, fisheries and quarantine<sup>14</sup> but, generally speaking, state and territory governments are responsible for animal production and welfare laws and their enforcement.<sup>15</sup>
- 2.2 That is not to say that there is no national government involvement in the issue. An Animal Welfare Strategy (Strategy) was developed under the direction of the Commonwealth Department of Agriculture, Fisheries and Forestry, in consultation with the states and territories, in 2005. Model Codes of Practice for the Welfare of Animals, first developed as national guidelines in the 1970s and 1980s, were accepted and have since been further developed as an agreed set of principles and practices with added regulatory strength.
- 2.3 The first of these, the 'Australian Animal Welfare Standards and Guidelines — Land Transport of Livestock', was endorsed by the Primary Industries Ministerial Council on 21 May 2009, with a revised edition being further endorsed by the then Primary Industries Standing Council in 2012, to be implemented through state and territory legislation.
- 2.4 Those land transport standards and guidelines have since been brought into legal effect through regulations in all states and territories except Western Australia (WA) and the Australian Capital Territory (ACT). Standards and guidelines relating to sheep and cattle were agreed by states and territories in 2016, and have been implemented in New South Wales (NSW) and South Australia (SA).<sup>16</sup> Standards and guidelines for poultry are under development.
- 2.5 Each of the standards and guidelines so far produced were the subject of a comprehensive and exhaustive consultation process. The land transport standards and guidelines, for example, were the subject of a regulatory impact statement process and a further full consultation exercise in 2008, and were said to consolidate seven model codes of practice together with provisions on livestock transport that had previously appeared in 13 other codes. Full details of the various standards and guidelines, and the consultation processes that preceded them, may be found at the Animal Welfare Standards website.<sup>17</sup>

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<sup>14</sup> Commonwealth of Australia Constitution Act 1901 (Cth), s 51(ix) and (x).

<sup>15</sup> Deborah Cao, *Animal Law in Australia*, Thomson Reuters, Pyrmont NSW, 2015, pp 110 - 111, and Australian Government, Department of Agriculture and Water Resources, 7 January 2016, viewed 12 April 2018, <http://www.agriculture.gov.au/animal/welfare/animal-welfare-in-australia>.

<sup>16</sup> Animal Health Australia, 27 February 2018, viewed 10 April 2018, <http://www.animalwelfarestandards.net.au/>.

<sup>17</sup> ibid.

## CHAPTER 3

### The Bill

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#### The need for the Bill

- 3.1 The Bill recognises and accepts that the focus of animal welfare matters, not least in the public eye, has shifted from solely preventing and punishing cruelty to animals to establishing and policing standards for their health, safety and welfare. However, there was a view that WA's legislation in this sphere was limited. As the Minister said in opening her second reading speech:

On coming to office the government was advised that the Animal Welfare Act was very limited in its capacity to regulate matters relating to the health, safety and welfare of animals. The act in its current form is still largely based on the old concept of prohibition of cruelty to animals rather than on setting standards for the health and welfare of animals. Importantly, the act in its current form is unable to give full regulatory effect to the Australian Animal Welfare Standards and Guidelines for livestock, which Western Australia along with all other Australian jurisdictions has agreed to implement. More national standards are in train and would meet similar obstacles to their implementation in this state. The changes now proposed will enable the implementation of those standards. Additional changes to the act are also required, principally to provide the capacity for inspectors to monitor compliance. With the implementation of the standards being the primary driver, the broad purpose of the amendment bill is to provide greater capacity to regulate matters relating to animal welfare in Western Australia.<sup>18</sup>

- 3.2 The need for the Act to be amended to accommodate this intended renewed focus came to light when attempts were made, through regulations, to implement the initial land transport standards and guidelines. Ministerial approval for the drafting of those regulations was given in March 2012, but significant doubts arose as to whether the regulation-making powers in the Act could fully support the provisions being planned.

#### Policy and intent of the Bill

- 3.3 The Bill is designed primarily to provide the statutory architecture for the adoption in WA of those animal welfare standards and guidelines, via amendments to the Act, and to provide the means to properly regulate and monitor compliance with them.
- 3.4 In her second reading speech, the Minister identified five areas in which the Act would be changed by this Bill:
- the introduction of new regulation-making powers to cover the health, safety and welfare of animals
  - provisions to ensure that a person in charge of an animal can be held responsible for acts of cruelty prescribed under regulation
  - modification of the defences available to a charge of animal cruelty
  - simplification of the Act as regards the operation of codes of practice, to avoid confusion
  - the introduction of a new class of general inspector.

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<sup>18</sup> Hon Alannah MacTiernan MLC, Minister for Agriculture and Food, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 11 October 2017, p 4456.

## This report

- 3.5 For the purposes of this report, however, the five areas of prospective change outlined by the Minister in her second reading speech can effectively be broken down into two distinct sets of considerations:
- first, making the legislative amendments necessary to reflect the updated content and intent of the statute and to facilitate the incorporation and future application of the national standards and guidelines (clauses 1 to 8), and measures that the Department believe are necessary for the proper incorporation of those standards and guidelines (clauses 9 to 13). This covers the first four of the Minister's areas. The Department is of the view that these are inextricably linked
  - second, the creation of a new class of inspector with enhanced regulatory powers.
- 3.6 Following a brief outline of the clauses of the Bill in Chapter 4, this report will deal with the policy and intent of the amending provisions, and the technical legislative mechanisms adopted in this Bill, before scrutinising the meaning and practical effect of those two groups of clauses, and whether there is a need for them, in Chapters 6 and 7. Where necessary, the clauses will be scrutinised with reference to 'fundamental legislative principles'.<sup>19</sup> A full list of those principles may be found at Appendix 2.

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<sup>19</sup> Fundamental legislative scrutiny principles (FLPs) are taken from section 4 of Queensland's *Legislative Standards Act 1992*, and are described by section 4(1) of that Act as being 'the principles relating to legislation that underlie a parliamentary democracy based on the rule of law'. Although they have not been formally adopted by the Legislative Council as part of the Committee's terms of reference, these principles are applied as a convenient framework for the scrutiny process.

# **CHAPTER 4**

## **Outline of clauses**

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### **Clauses 1 - 3**

- 4.1 These contain the standard introductory provisions, stipulating that the Bill, if it became law, would amend the principal Act.
- 4.2 Clause 2 provides that the substantive parts of the Bill would come into force on a day fixed by proclamation. As has been noted by this Committee previously<sup>20</sup>, it is the Committee's view that commencement of legislation by proclamation should be avoided unless absolutely necessary. It is a mechanism by which the Executive is left to determine commencement dates, potentially eroding the sovereignty of Parliament.
- 4.3 The Committee does however note that, in this instance, commencement by proclamation would probably be necessary to allow for the preparation of the plethora of regulations proposed to be made under the new provisions.

### **Clause 4**

- 4.4 This clause would insert into section 3 of the Act ('Content and intent') a new section 3(1)(aa). Section 3 provides the objects of the Act. These are currently:
  - regulating the use of animals for scientific purposes, and by whom; and
  - prohibiting cruelty to animals.
- 4.5 The clause would add, ahead of those two objects:

regulating the conduct of people in relation to animals, including the manner in which animals are treated, cared for and managed.
- 4.6 Section 3(2) already states that the Act 'intends' to provide this protection for animals, but the Explanatory Memorandum (EM) to the Bill points out that it was lacking in its ability to do so, hence the need for these amending provisions.<sup>21</sup>

### **Clause 5**

- 4.7 This clause would add two new definitions to the Act for the purposes of the new provisions:
  - 'designated general inspector'; and
  - 'prescribed code of practice'.
- 4.8 The meaning of these terms is discussed at paragraphs 4.30 to 4.31 and 4.32 to 4.34 below.

### **Clauses 6 and 7**

- 4.9 These clauses together would amend the heading of Part 3 of the Act from 'Offences against animals' to 'Welfare, safety and health of animals', and would split this Part into three divisions. The provisions already in Part 3 of the Act, regarding offences against animals, would become Part 3 Division 3, to be titled 'Cruelty and other inhumane and improper treatment of animals', and two new divisions would be inserted ahead of them.

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<sup>20</sup> Western Australia, Legislative Council, Standing Committee on Legislation, Report 34, *Sentence Administration Amendment Bill 2017*, November 2017, p 18.

<sup>21</sup> Animal Welfare Amendment Bill 2017, *Explanatory Memorandum*, Legislative Council, p 2.

- 4.10 First, Part 3 Division 1 — a new section 18A would provide the objects of this entire Part 3, being:
- (a) to promote and protect the welfare, safety and health of animals; and
  - (b) to ensure animals are properly and humanely treated, cared for and managed.
- 4.11 Second, without limiting section 94(1) of the Act (which is the current regulation-making power thought to be deficient for the purposes of the new intended regulations), a new Part 3 Division 2, section 18B(2), would provide new, wide-ranging powers, to make regulations pertaining to animal welfare, safety and health, specifically to provide for, authorise, prescribe, require, prohibit, restrict or otherwise regulate the following:
- (a) the treatment, care and handling of animals;
  - (b) animal accommodation;
  - (c) the transportation of animals;
  - (d) the keeping of animals;
  - (e) the husbandry of animals;
  - (f) the identification of animals;
  - (g) the medical or surgical treatment of animals;
  - (h) facilities and equipment used in relation to animals;
  - (i) the destruction and slaughtering of animals;
  - (j) the control of animals, including pest animals;
  - (k) farming or grazing activities;
  - (l) the management of zoos, wildlife parks or similar establishments;
  - (m) the management of animal breeding establishments;
  - (n) the training of animals;
  - (o) the sale of animals;
  - (p) the use of animals for commercial, recreational or other purposes;
  - (q) the qualifications and experience of persons dealing with animals.
- 4.12 The effect of proposed section 18B would be to extend the list of matters for which regulations may be made under section 94(1). A contravention of a regulation made under these extended powers would result in a penalty not exceeding \$20 000.

## **Clause 8**

- 4.13 As mentioned, the current Part 3 of the Act would simply become Part 3 , Division 3, with a new heading:
- Cruelty and other inhumane and improper treatment of animals.

## **Clause 9**

- 4.14 This clause would effect a number of amendments to section 19 of the Act. That section deals with cruelty to animals – subsection (1) states that a person must not be cruel to an animal, with a minimum penalty of \$2 000 and a maximum of \$50 000 and 5 years

imprisonment. Whether an act or omission by a person amounts to animal cruelty for the purposes of this offence provision is a matter for the courts. However, the section establishes some principles. For example, subsection (2) states that a person, whether in charge of an animal or not, is cruel to it if he or she:

- (a) tortures, mutilates, maliciously beats or wounds, abuses, torments, or otherwise ill-treats, the animal;
  - (b) uses a prescribed inhumane device on the animal;
  - (c) intentionally or recklessly poisons the animal;
  - (d) does any prescribed act to, or in relation to, the animal; or
  - (e) in any other way causes the animal unnecessary harm.
- 4.15 Again without limiting the courts' discretion under subsection (1), subsection (3) as it currently stands sets out examples of behaviour by a person in charge of an animal that would amount to cruelty; thus, such a person is cruel to an animal if the animal:
- (a) is transported in a way that causes, or is likely to cause, it unnecessary harm;
  - (b) is confined, restrained or caught in a manner that —
    - (i) is prescribed; or
    - (ii) causes, or is likely to cause, it unnecessary harm;
  - (c) is worked, driven, ridden or otherwise used —
    - (i) when it is not fit to be so used or has been over used; or
    - (ii) in a manner that causes, or is likely to cause, it unnecessary harm;
  - (d) is not provided with proper and sufficient food or water;
  - (e) is not provided with such shelter, shade or other protection from the elements as is reasonably necessary to ensure its welfare, safety and health;
  - (f) is abandoned, whether at the place where it is normally kept or elsewhere;
  - (g) is subjected to a prescribed surgical or similar operation, practice or activity;
  - (h) suffers harm which could be alleviated by the taking of reasonable steps;
  - (i) suffers harm as a result of a prescribed act being carried out on, or in relation to, it; or
  - (j) is, in any other way, caused unnecessary harm.
- 4.16 The Committee notes at this point that some of the acts of cruelty are as 'prescribed', i.e. contained in regulations. Some of these have already been prescribed in Part 2 of the *Animal Welfare (General) Regulations 2003* including, for example, the use of inhumane devices (such as jawed traps and spurs) and wrongly administering electric shocks.
- 4.17 In her second reading speech, the Minister said:

there will be a provision to ensure that a person in charge of an animal can be held responsible for acts of cruelty prescribed under regulation. This, together with the existing provision for prescribed acts of cruelty by a person who may or may not be in charge of an animal, will be used to implement and enforce the Standards

and ensure any person who should be held responsible for the welfare of an animal is covered by the Act.<sup>22</sup>

- 4.18 For this purpose, clause 9(1) of the Bill would add to that list another regulation-making power — a new subsection 19(3)(fa) would be added to the above list of examples of cruelty carried out by a person in charge of an animal, where the animal:

has a prescribed act carried out on it, or in relation to it.

- 4.19 Clause 9(2) would insert a new section 19(4) — this is helpfully flagged-up in the EM as being a Henry VIII clause, requiring particular attention from the Committee.<sup>23</sup>

- 4.20 As seen above, section 19(1)-(3) sets out what amounts to an offence of cruelty — sections 20 to 30 of the Act then set out what are the statutory defences to such a charge of cruelty, being:

- self-defence or protecting another person or animal (section 20)
- veterinary care (section 21)
- an act authorised by law (section 22)
- normal animal husbandry (section 23)
- killing pests (section 24)
- acting within a relevant code of practice (section 25). The Committee notes that this section 25 would be amended by clause 10 of the Bill to read 'prescribed' instead of 'relevant' code of practice
- stock tending for itself – the animal is of a kind that ordinarily roams at large and tends for itself (section 26)
- releasing animals into the wild (section 27)
- that the person in charge of an animal is not in actual custody of it (section 28)
- prescribed use of devices in the prescribed manner (section 29) – these permitted uses of devices, such as electric shock prods, electro-ejaculators and electric training collars, or metal-jawed traps for wild dog control, are prescribed in regulations 7 and 8 of the *Animal Welfare (General) Regulations 2003*. The Committee notes that 'prescribed manner' would be amended to 'prescribed manner or in prescribed circumstances' by clause 13 of the Bill
- prescribed surgical or similar operations, practices and activities (section 30).

- 4.21 In respect of those defences, the new section 19(4) would state:

Sections 20 to 30 provide for defences to a charge under this section, however, where the regulations so provide, a defence provided under section 21, 22, 23, 24 or 25 does not apply to a charge under subsection (1) committed in a prescribed manner or in prescribed circumstances.

- 4.22 This is a Henry VIII clause, in that it would make provision for regulations to be made which would have the effect of amending primary legislation. This has a direct effect on Parliamentary sovereignty, as it would take away the right of Parliament to debate such legislative provisions. Whilst regulations might be the subject of a motion for disallowance, and in fact may be disallowed, they take effect for the period from the commencement date

<sup>22</sup> Hon Alannah MacTiernan MLC, Minister for Agriculture and Food, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 11 October 2017, p 4456.

<sup>23</sup> Animal Welfare Amendment Bill 2017, *Explanatory Memorandum*, Legislative Council, p 4.

until the date of disallowance (which is commonly some months). This aspect of clause 9(2) will be dealt with more fully in Chapter 6.

- 4.23 Clause 9(3) would correct a minor drafting error.

## Clause 10

- 4.24 As mentioned at paragraph 4.20, this clause 10 would amend 'relevant' codes of practice to 'prescribed' codes of practice in section 25.

## Clause 11

- 4.25 This clause would insert a new section 25A into the Act, reading:

25A. Defence — prescribed in regulations

It is a defence to a charge under section 19(1) for a person to prove that the person was acting in accordance with a prescribed defence.

- 4.26 So whilst the new section 19(4) would permit the modification or amendment of statutory defences by delegated legislation, this new section would allow for the creation, by regulations again, of additional defences to a charge of cruelty under section 19.

- 4.27 This provision is again justified by the Department as allowing flexibility as and when the new standards and guidelines come into force. The EM states:

This is necessary as a number of standards in the NSG [i.e. national standards and guidelines] will be simpler to apply as a defence rather than as a complex prescribed act of cruelty, especially where there may be some overlap with existing provisions. As well, offence provisions already exist in relation to matters for which the NSG Standards provide exceptions. These include mulesing of sheep less than 12 months old and time off water when transporting livestock. These will need to be included as a defence to a charge of cruelty under s.19(3)(d) - failure to provide proper and sufficient water and food to an animal. Under the existing provisions these defences are provided through section 25 and the codes of practice. The currently applicable codes of practice will no longer be adopted by the regulations once the appropriate NSG Standards are regulated.

## Clause 12

- 4.28 Clause 12 would amend section 29 as mentioned at paragraph 4.20 — the use of devices 'in a prescribed manner' as a defence to a charge of cruelty would be amended to the use of devices 'in a prescribed manner or in prescribed circumstances'.

## Clause 13

- 4.29 This clause would make the same amendment as clause 12, but this time to section 30, carrying out prescribed surgical operations, practices or activities 'in a prescribed manner or in prescribed circumstances' would be a defence to a charge of cruelty under the amended section.

## Clauses 14 to 17

- 4.30 These would create a new class of inspector under the Act, a 'designated general inspector', with enhanced powers of entry to monitor compliance with the new standards as adopted in the proposed new regulations. They would introduce a new function for the designated general inspectors, together with those new monitoring powers.

- 4.31 The current provisions around general inspectors, and the proposed amendments providing for the appointment of the new class of inspector, are discussed in detail at Chapter 7.

### **Clause 18**

- 4.32 Section 84 of the Act currently provides that a breach of a relevant code of practice is not in and of itself sufficient proof of the commission of an offence of cruelty, but will be taken into account by a court. Clause 18 would merely make amendments to section 84 consequent to those made under clauses 8 and 10 (splitting the existing Part 3 into three Divisions and replacing 'relevant' with 'prescribed').

### **Clause 19**

- 4.33 Clause 19(a) would make some a minor amendment to the existing general regulation-making power at section 94 of the Act, making the language consistent with the new proposed regulation-making powers at proposed section 18B (paragraph 4.11 above).
- 4.34 Section 94(2) permits the making of regulations that 'adopt codes of practice' relating to the care, etc., of animals. This would be amended by clause 19(b) to 'adopt codes of practice (however described)'. The EM explains that this 'makes it clear that a document does not need to be described as a "code of practice" to enable it to be adopted as such under the regulations.'<sup>24</sup>

### **Tabled amendment**

- 4.35 Hon Diane Evers MLC has signalled her intention, recorded in Supplementary Notice Paper No. 33, to move an amendment to the Bill during its passage through the Legislative Council, which would cause to be inserted at the end of the new section 35A (creation of the new designated general inspectors) the following:
- (6) The Minister must ensure the Department's annual report includes a description of the activities of designated general inspectors during that year and the outcomes of those activities.

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<sup>24</sup> Animal Welfare Amendment Bill 2017, *Explanatory Memorandum*, Legislative Council, p 7.

# CHAPTER 5

## Architecture of the Bill

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- 5.1 Two issues with the Bill can be immediately identified. First of all, its provisions are largely skeletal, in that detailed provisions are left to be made in regulations. As the Department states:

If the Bill is passed and the Act is amended as has been proposed, there will not be any immediate changes to the way the department enforces the Act or to what constitutes an offence under the Act. This is because regulations need to be drafted to enable the national livestock standards to be enforced. As part of this drafting phase, the department will consult with livestock industries and others with an interest in animal welfare.<sup>25</sup>

- 5.2 Secondly, the provisions are said by the Minister for Agriculture and Food (in her second reading speech) to be a stopgap. A review of the Act is expected to take some 18 months.<sup>26</sup> This raises questions as to the timing of this Bill ahead of any outcomes from that review.

### Skeletal legislation

- 5.3 A great deal of the substantive law is proposed to be made by regulation or by incorporation into law of extraneous documents. A report by this Committee in 2014 explained its concerns with the concept of skeletal legislation as follows:

Legislation can be described as ‘skeletal’ where it covers major policy matters and principles in the barest terms, and leaves detailed, substantive matters, to be set out in regulations. These regulations are typically made by the Executive government, sometime after the legislation has been passed by the Parliament. Legislation that is skeletal in nature interferes with the generally accepted fundamental legislative principle that Parliament is the principal legislative body in the State, and adversely impacts on the ability of Parliament to scrutinise Executive government.<sup>27</sup>

- 5.4 Skeletal legislation is often justified on two main bases — first, it allows for a measure of flexibility to cater for changing and possibly unforeseen circumstances (such as the future promulgation of new and additional standards and guidelines for animal welfare, in this particular instance), and, second, this in turn prevents parliamentary overload given the sheer detail that may be contained in the regulations which would otherwise require debate. There is of course scope for some limited parliamentary oversight in the form of motions for disallowance (paragraphs 5.12 and 6.51 below).

- 5.5 However, the scant detail set out in skeletal primary legislation gives Parliament inadequate information about what the regulations will eventually contain, thereby undermining its scrutiny function. As further stated in that 2014 report:

Members of Parliament, as representatives of the people of Western Australia, are denied the ability to clarify, contest, challenge and defend the policy behind

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<sup>25</sup> Department of Primary Industries and Regional Development, viewed 9 April 2018, <https://www.agric.wa.gov.au/animalwelfare/animal-welfare-act-amendments?page=0%2C1>.

<sup>26</sup> Hon Alannah MacTiernan MLC, Minister for Agriculture and Food, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 11 October 2017, p 4457.

<sup>27</sup> Western Australia, Legislative Council, Standing Committee on Legislation, Report 22, *Workforce Reform Bill 2013*, March 2014, p 8.

relevant legislation. This has an incalculable effect in diminishing Parliamentary sovereignty within the system of government.<sup>28</sup>

- 5.6 Clause 7 of the Bill provides a new head of power to make regulations concerning some 17 aspects of human behaviour with regard to treatment of animals (listed at paragraph 4.11). The extended regulation-making powers at proposed section 18B are linked to the general regulation-making power at section 94(1). The effect is that a breach of a regulation made under one of the 17 new heads of power may lead to a penalty not exceeding \$20,000.
- 5.7 Clause 9(1) provides for the prescription of acts that are carried out on, or in relation to, an animal, to be classified as acts of cruelty to animals, potentially punishable by way of a fine up to a maximum of \$50,000 and a period of imprisonment of up to five years (section 19 of the Act), whilst Clause 9(2) would allow for the disapplication of some statutory defences to a charge of cruelty against an animal.
- 5.8 The referral to this Committee from the Legislative Council authorised a scrutiny of the Bill's provisions from a policy point of view. However, the Committee's scrutiny of bills also includes an assessment as to whether its provisions are consistent with fundamental legislative scrutiny principles (FLPs).

### **Fundamental legislative principles**

- 5.9 In respect of these clauses 7 and 9, the Committee applies FLPs 12 and 13:

*12: Does the Bill allow the delegation of legislative power only in appropriate cases and to appropriate persons?*

- 5.10 It might be said that the greater the level of potential interference with individual rights and liberties, the greater will be the likelihood that the matter should be dealt with in an Act of Parliament, and thus subjected to the appropriate level of full parliamentary scrutiny and debate, and not delegated to the Executive branch of government. If that be the case, then the Bill allows for delegation in inappropriate cases.
- 5.11 The Committee concedes however that the Act already allows for a measure of prescription by regulation of offences, for example at section 19(2)(b) and (3)(g).

*13. Does the Bill sufficiently subject the exercise of a proposed delegated legislative power (instrument) to the scrutiny of the Legislative Council?*

- 5.12 The regulations would be made by the Governor, in the usual way, under the powers contained in the amended section 94(1) of the Act. The regulations would be published in the *Government Gazette* and be laid before each House of Parliament under sections 41(1)(a) and 42(1) of the *Interpretation Act 1984*. Thereafter they would be subjected to the scrutiny of the Joint Standing Committee on Delegated Legislation under paragraph 10.5 of Schedule 1 to the Standing Orders of the Legislative Council. The terms of reference of that Committee include the power to inquire whether an instrument:
- has no unintended effect on any person's existing rights or interests
  - contains only matter that is appropriate for subsidiary legislation.<sup>29</sup>

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<sup>28</sup> ibid., at p 9.

<sup>29</sup> Parliament of Western Australia, Standing Orders of the Legislative Council, Schedule 1, Part 10, paragraph 10.6(b) and (d).

- 5.13 Moreover, the regulations would be a disallowable instrument under section 41(2) of that *Interpretation Act 1984*, and any Member of the Legislative Council may move a motion for disallowance.<sup>30</sup>

## Stopgap measures

- 5.14 The Minister, in her second reading speech, said:

Although the changes to the Animal Welfare Act proposed by this bill will significantly improve animal welfare outcomes in this state, our government is in the process of undertaking a more comprehensive review of the Animal Welfare Act to modernise laws in this state. These measures act as a stopgap, addressing critical issues around the enforcement of animal welfare standards while we complete this review, which we expect to take some 18 months.<sup>31</sup>

- 5.15 The Committee notes that the matter of reviews of this Act has arisen before.
- 5.16 In May 2015, the former Minister for Agriculture and Food appointed an independent panel, chaired by Mr Brian Easton (Easton Review), to undertake a review into certain aspects of administration of the Act. A draft report of that panel was tabled in the Legislative Council on 2 December 2015.<sup>32</sup>
- 5.17 That report looked into the arrangements whereby various bodies were involved in the administration of the Act (the Department, RSPCA WA, the Department of Parks and Wildlife, local governments, the WA Police Force and the Department of Commerce). The current list of bodies from which inspectors may be appointed is at paragraphs 7.8 to 7.11 below. In its summary of findings and recommendations, the Easton Review commented:

There is no strategic plan and policy framework for animal welfare in WA and the Panel recommends that this be addressed to guide public sector officers and inform stakeholders and the community as to how animal welfare is handled in WA.<sup>33</sup>

- 5.18 The Easton Review noted that the Act was more than 10 years old, and had not been reviewed since its inception. It had heard examples of simple changes that would make the Act easier to understand. The report went on:

In the absence of a clear strategic plan, it is difficult to assess the success (or otherwise) of service delivery models, the performance of the public sector and the efficacy of grants. This has been the Panel's experience when conducting this Review.

A policy framework provides the public sector, stakeholders and the community more generally with a clear understanding of the priorities and directions for the legislation, subsidiary legislation, codes and policy documents. Projects, such as proposals for legislative amendment, can be developed in accordance with the framework. In the absence of such a framework, proposals for legislative and policy change become piecemeal, if they are made at all.<sup>34</sup>

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<sup>30</sup> ibid., at Standing Order 67.

<sup>31</sup> Hon Alannah MacTiernan MLC, Minister for Agriculture and Food, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 11 October 2017, p 4457.

<sup>32</sup> *Animal Welfare Review: Draft report on an independent review of the investment in and administration of the Animal Welfare Act 2002 in Western Australia*, Tabled Paper 3698, Legislative Council, 2 December 2015.

<sup>33</sup> ibid., at p 2.

<sup>34</sup> ibid., at p 19.

5.19 Recommendation 2 of the report was that:

A review of the Act is undertaken.<sup>35</sup>

5.20 On 13 May 2015, the Legislative Council ordered that a select committee be established to inquire into the operations of the Western Australian Royal Society for the Prevention of Cruelty to Animals (the Select Committee), including an examination of —

- (a) its funding from the government;
- (b) its objectives; and
- (c) the use of its powers.

5.21 The Select Committee reported to the Legislative Council in May 2016.<sup>36</sup> That report also made the point that the Act had not been reviewed since proclamation in 2002 (the Easton Review having been a review of the administration of the Act rather than of the Act itself), and thus its first recommendation was:

Recommendation 1: The Committee recommends that the *Animal Welfare Act 2002* be reviewed to assess if it adequately serves its intended purpose.<sup>37</sup>

5.22 The Government's response to the Select Committee report was tabled in the Legislative Council on 23 August 2016.<sup>38</sup> In respect of that recommendation 1, the Government's proposed position was 'Supported'. It commented further:

The 2015 Report on the Independent Review of the investment in and administration of the *Animal Welfare Act 2002* in Western Australia (Easton Review) recommends that a review of the *Animal Welfare Act 2002* is undertaken. The Government has supported all of the recommendations of the Easton Review and has made funding available to implement the recommendations.<sup>39</sup>

5.23 On the matter of inspectors, the Select Committee made the following finding and recommendation:

Finding 12: The Committee finds that under the *Animal Welfare Act 2002* the CEO of the Department of Agriculture and Food has no power or discretion to decide whether to appoint a person nominated by RSPCA WA as a general inspector under the *Animal Welfare Act 2002*.

Recommendation 4: The Committee recommends that the *Animal Welfare Act 2002* be amended to include an express provision to provide that only the CEO of the Department of Agriculture and Food has the power and discretion to appoint all general inspectors.<sup>40</sup>

5.24 The Government response to this recommendation was 'Noted and will be considered in the review of the *Animal Welfare Act 2002* and inspector governance'.

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<sup>35</sup> ibid., at p 20.

<sup>36</sup> Western Australia, Legislative Council, Select Committee into the operations of the Royal Society for the Prevention of Cruelty to Animals Western Australia (Inc), *Report of the Select Committee into the operations of the Royal Society for the Prevention of Cruelty to Animals Western Australia (Inc)*, May 2016.

<sup>37</sup> ibid., at p 19.

<sup>38</sup> Tabled Paper 4410, Legislative Council, 23 August 2016.

<sup>39</sup> ibid., at p 1.

<sup>40</sup> Western Australia, Legislative Council, Select Committee into the operations of the Royal Society for the Prevention of Cruelty to Animals Western Australia (Inc), *Report of the Select Committee into the operations of the Royal Society for the Prevention of Cruelty to Animals Western Australia (Inc)*, May 2016, p 50.

5.25 It went on:

The need for and the nature of the discretionary power of the CEO of the Department of Agriculture and Food (DAFWA) in the appointment of inspectors, irrespective of their nominating organisation, will be considered as part of the review of the *Animal Welfare Act 2002* and the Inspector Governance Framework being developed by DAFWA as part of the Government's response to the Easton Review.<sup>41</sup>

- 5.26 The statement made by the Minister in her second reading speech (at paragraph 5.14 above) could be taken to indicate that the Department was currently engaged in its review of the Act, as recommended by the Easton Review and then by the Select Committee. If that were the case, it might be thought premature to bring forward recommendations for statutory amendment as contained in the Bill.
- 5.27 In fact, the Committee has been informed that this, or indeed any review, has yet to commence. Moreover, there are as yet no terms of reference for it, no decision has been made as to who should carry out the review and there is no firm timetable for it.
- 5.28 It is not clear to the Committee whether the terms of reference for the review will encompass the issues raised in the Easton Review and Select Committee reports mentioned above, or the undertakings given by Government in response to that report. Indeed, departmental officials who appeared before the Committee seemed to be completely unaware of those Government undertakings. The following exchange occurred during the hearing that took place on 2 May 2018:

The CHAIR: Can we just establish, as far as the review goes, if you have started it, what stage are you at and what are the scoping guidelines?

Ms CARBON: No, we have not started that review yet.

The CHAIR: Is there a reason why you have not started?

Ms CARBON: At the moment, we have been doing other legislative reviews within the department and they have taken priority. We will need to do that in a stepwise fashion. We are currently scoping and about to undertake a review of the Biosecurity and Agriculture Management Act. It is certainly planned that this full review will follow from there and there may be some overlap.

The CHAIR: Has this government taken up the same commitment that was made by the previous government? For example, in response to the RSPCA select committee report, we have all noted that a number of those recommendations were deferred to the review of the Animal Welfare Act. Has this government made the same commitment to defer those recommendations from that report?

Ms CARBON: I am not sure exactly what recommendations you are referring to that are being deferred—Katy or Mark, I do not know if you are aware of those. I am not able to comment on the government's position on those.

The CHAIR: Going back to the review, you have not started it yet.

Ms CARBON: No, we have not started.

The CHAIR: When are you going to start it?

Ms CARBON: Towards the end of 2018 is the current planned start date.

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<sup>41</sup> Tabled Paper 4410, Legislative Council, 23 August 2016, p 1.

The CHAIR: Who will undertake the review?

Ms CARBON: I think that is still to be determined.

Ms KATY ASHFORTH: I certainly have not heard anything definite on that before.<sup>42</sup>

5.29 That exchange continued a short while later:

The CHAIR: I just want to go back to the review. You say that it has not commenced and you are not sure who is going to carry out the review. Have you got some terms of reference for that review?

Ms CARBON: No, we are developing those. The review is due to commence later in 2018. We will be developing terms of reference and scope for that review. Beyond that, I do not have the detail of who will be undertaking that. That will, in part, depend on the terms of reference and the scope as to whether that is something that can be done internally or not.<sup>43</sup>

5.30 It would appear therefore that the review referred to by the Minister may not be the same one mentioned by the previous Government in response to the Select Committee report.

5.31 A body of industry submitters to the inquiry questioned why the Bill had been introduced ahead of the outcome of this review.<sup>44</sup> The Livestock and Rural Transport Association of Western Australia (Inc) said:

There has been no evidence that there is any urgency surrounding the implementation of the outstanding standards and guidelines which is the stated reason for the amendment bill. In practice industry has been informally working with the transport standards and guidelines since 2012.<sup>45</sup>

5.32 On the subject of the creation of another class of inspectors, the Stud Merino Breeders' Association of WA (Inc) wrote:

The Easton review found that there were problems with Public Service and NGO inspectors having different operating procedures and guidelines. The proposed amended Animal Welfare Act allows for another level of inspector, the Designated General Inspector, appointed by the Minister in a separate capacity from the Department of Primary Industries and Regional Development and the RSPCA inspectors and whose role and powers are indeterminate.<sup>46</sup>

### **Timing of this Bill**

5.33 The Committee is concerned that the grounds for describing the Bill as a stopgap measure pending the outcomes of a review of the Act are undermined by the Department's evidence that the timelines and details of the review are not as described in the Minister's second reading speech. Further, the Committee was informed by the Department that its intention

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<sup>42</sup> Hon Dr Sally Talbot MLC, Chair, Mia Carbon, Acting Executive Director, Biosecurity, and Katy Ashforth, Legal Officer, Department of Primary Industries and Regional Development, *Transcript of evidence*, 2 May 2018, p 2.

<sup>43</sup> *ibid.*, at p 3.

<sup>44</sup> For example, Submission 152 from Golden Eggs, 19 April 2018, p 3, Submission 151 from the Pastoralists and Graziers Association of Western Australia (Inc), 20 April 2018 pp 1-2, Submission 195 from Wellard Limited, 27 April 2018, p 2 and Submission 48 from the West Australian Pork Producers Association (Inc), 17 April 2018, p 3.

<sup>45</sup> Submission 111 from the Livestock and Rural Transport Association of Western Australia (Inc), 18 April 2018, pp 1- 2.

<sup>46</sup> Submission 192 from the Stud Merino Breeders' Association of WA (Inc), 26 April 2018, p 2.

was to monitor the operation of the amendments to be made by the Bill as part of the foreshadowed review.<sup>47</sup>

- 5.34 In the Committee's view, it is important that the measures contained in the Bill be considered on their own merits rather than as stopgap measures, with the implication the term stopgap conveys of being of a temporary nature. That the new measures may be altered as a result of the review is noted by the Committee.
- 5.35 Further, it seems to the Committee that elements of this Bill illustrate the piecemeal nature of policy making in the field of animal welfare, spoken of by the Easton Review and reflected in piecemeal legislation, that the much-mentioned review of the Act was meant to address.

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<sup>47</sup> Katy Ashforth, Legal Officer, Department of Primary Industries and Regional Development, *Transcript of evidence*, 2 May 2018, p 19.

## CHAPTER 6

### Standards and guidelines

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- 6.1 Clauses 4 to 13 would have the overall effect of realigning the practical intent of the statute, from dealing with animal cruelty alone to incorporating measures ‘regulating the conduct of people in relation to animals, including the manner in which animals are treated, cared for and managed’ (intended new section 3(1)(aa) of the Act). The Act has in fact always stated as one of its intentions the promotion and protection of the welfare, safety and health of animals, but as the EM states, ‘this intent has been found lacking, giving rise to the need for amendment’.<sup>48</sup>
- 6.2 It is perhaps unsurprising that the universal public response to the Bill in this respect was positive. Many individuals made submissions to the Committee welcoming moves to improve the legal protections for stock and companion animals. This, it was recognised, would be achieved by transforming the previously unenforceable codes of practice into various binding and enforceable standards, a breach of which may be prosecuted.<sup>49</sup> Adoption of the land transport standards was particularly supported by some, given the vast distances that animals in WA sometimes need to be carried.<sup>50</sup>
- 6.3 Industry and welfare groups also widely endorsed this proposal — the concept of national, enforceable standards was supported by, for example, WA Farmers<sup>51</sup> and the Pastoralists and Graziers Association of Western Australia (Inc)<sup>52</sup>, as well as (for example) the Royal Society for the Prevention of Cruelty to Animals Western Australia Inc (RSPCA)<sup>53</sup>, Animals Australia<sup>54</sup> and the Canine Welfare Alliance of Australia Inc, which echoed the views of many in stating:
- Changes to our current laws and regulations, which will introduce national standards and guidelines, and improve chances of successful prosecutions where there is non-compliance, are long overdue.<sup>55</sup>
- 6.4 The starting point for the Bill is therefore to allow for the incorporation by reference of the national standards and guidelines — the other elements of the Bill, regarding the enforcement of those standards and guidelines, flow from that incorporation (the proposed creation of a new class of inspectors will be dealt with separately in Chapter 7). Thus:
- the power to create new regulatory offences would be legislated (the initial implementation stage) to deal with matters covered by those standards and guidelines (clauses 4 to 8 of the Bill), and
  - an ability to modify the application of statutory defences currently available, or indeed add new ones, would be added, again to reflect the renewed focus of the legislation, and

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<sup>48</sup> Animal Welfare Amendment Bill 2017, *Explanatory Memorandum*, Legislative Council, p 2.

<sup>49</sup> For example, Submission 5 from Claire Dolling, 15 April 2018, Submission 31 from Christine Smith, 18 April 2018, and Submission 87 from Katherine McCann, 19 April 2018..

<sup>50</sup> For example, Submission 29 from Immacolata Lamberti, 16 April 2018.

<sup>51</sup> Submission 195 from WA Farmers, Kimberley Pilbara Cattlemen's Association, Australian Dairy Farmers Ltd. and Stud Merino Breeders Association WA, 26 April 2018, p 1.

<sup>52</sup> Submission 151 from Pastoralists and Graziers Association of Western Australia (Inc), 20 April 2018, p 2.

<sup>53</sup> Submission 198 from the Royal Society for the Prevention of Cruelty to Animals Western Australia Inc., 27 April 2018, p 2.

<sup>54</sup> Submission 193 from Animals Australia, 27 April 2018, p 1.

<sup>55</sup> Submission 191 from the Canine Welfare Alliance of Australia Inc, 25 April 2018, p 1.

- a new power to prescribe an act of cruelty by a person in charge of an animal is also included (clauses 9 to 11).
- 6.5 The following paragraphs deal with these two elements of this part of the Bill, the initial implementation of the standards and guidelines and the additional amendments sought, separately, commencing with a description of what the standards and guidelines encompass.

## **Content of standards and guidelines**

- 6.6 These standards and guidelines are designed in such a way that the standard for a particular activity is to be the legal requirement. As such, it uses the word 'must'.
- 6.7 The guidelines are the recommended practices to achieve the intended legislated outcomes, and use the word 'should'. The guidelines are not intended to be legally enforceable, but may be used by courts in deciding cases brought before them.
- 6.8 The Committee notes that each of the standards and guidelines so far published have been the subject of exhaustive consultation, full details of which may be found at the Australian Animal Welfare Standards and Guidelines website.<sup>56</sup>

### **Land transport of livestock**

- 6.9 As an example of the standards and guidelines nationally agreed, the first set endorsed by the Primary Industries Ministerial Council (paragraphs 2.3 and 2.5 of this report) concerned the 'Land Transport of Livestock'. They run to some 115 pages, and are extremely comprehensive.
- 6.10 Part A sets out general standards and guidelines for transporting livestock, including planning, vehicles, stock-handling competency and humane destruction. Part B then sets out species-specific standards and guidelines. By way of illustration, 'B7 – Specific requirements for the transport of goats', outlines the following enforceable standards:

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<sup>56</sup> Animal Health Australia, 28 March 2017, viewed 10 April 2018, viewed 10 April 2018,  
<http://www.animalwelfarestandards.net.au/>.

- SB7.1 A person in charge must ensure time off water does not exceed the time periods given below for each class of goat:

Goats	Maximum time off water (hours)	Minimum Spell duration (hours)
Goats over 6 months old	48	36
Kids under 6 months old	28	12
Goats known to be more than 14 weeks pregnant, excluding the last 2 weeks	24	12

- SB7.2 If goats over six months old have been off water for 48 hours, the person in charge must ensure the goats have a spell for 36 hours before starting another journey.

If kids have been off water for 28 hours, the person in charge must ensure the kids have a spell for 12 hours before starting another journey.

If goats known to be more than 14 weeks pregnant excluding the last two weeks have been off water for 24 hours, the person in charge must ensure the goats have a spell for 12 hours before starting another journey.

- SB7.3 A person must not use an electric prod on goats known or visually assessed to be pregnant.

Figure 1. *Specific requirements for the land transport of goats.*

[Source: Australian Animal Welfare Standards and Guidelines; Land Transport of Livestock; Edition One, Version 1.1, 21 September 2012.]

- 6.11 Guidelines (GB7.1 to GB7.24) give more detailed advice on additional species-specific considerations to be taken into account in addition to the general guidance in Part A. In this particular instance, the advice covers:

- fitness to travel
- food and water
- loading densities
- vehicles and facilities
- handling
- humane destruction (including diagrammatic instructions).

## Adoption of standards and guidelines

- 6.12 The refocusing of the Act is best reflected in the intended reorganisation of Part 3. It is currently entitled 'Offences against animals', but this would be amended to 'Welfare, safety and health of animals.' Division 2 of that Part then allows for the creation of new regulations covering a wide range of activities (paragraph 4.11 above) which would allow for the enforcement of the new standards and guidelines. Advice received by the Department indicated that the current heads of power, contained in section 94 of the Act, are not broad enough to encompass such matters as are listed at proposed new section 18B.

- 6.13 The Minister said of this new Division 2 of Part 3:

This will clearly provide for regulations to be made dealing with matters that are, or are likely to be, encompassed by current and future animal welfare standards.

- 6.14 The Department advised the Committee that these proposed regulations have yet to be prepared. Their content will be the subject of consultation between the Department and stakeholders.<sup>57</sup>
- 6.15 WA and the ACT remain the only jurisdictions yet to have legislated any of the standards and guidelines agreed to at a national level. The ACT is reported to have no issue with doing so, but is said to be awaiting advice from its Animal Welfare Advisory Committee regarding the manner in which the standards and guidelines should be implemented.<sup>58</sup> Legislative adoption as an enforceable code of practice (a disallowable instrument) under Part 3 of the *Animal Welfare Act 1992* (ACT) is envisioned.
- 6.16 States and territories have used varying methods to give legal effect to the standards, reflecting the different ways that jurisdictions legislate and the preferred methods of departments and drafters. Again taking the Land Transport of Livestock Standards as the example, a number of legislative routes to enforceability may be identified:
- Simple adoption of the standards by reference
  - Adoption of the standards by reference, but with minor modifications
  - Setting out the standards in full in delegated legislation (with modifications).

### **Simple adoption by reference**

- 6.17 The first method was adopted in Victoria. Section 6 of the *Livestock Management Act 2010* (Vic) states simply that 'a livestock operator must comply with all applicable prescribed livestock management standards when engaging in a regulated livestock management activity'. Section 46(1)(a) goes on to set out an inspector's power to issue notices to comply with 'a prescribed livestock management standard'. The prescription then takes place by virtue of the *Livestock Management Regulations 2011* (Vic) (as amended in March 2013); regulation 5(a) simply says:
- For the purposes of sections 6 and 46 of the Act, the following livestock management standards are prescribed — the Land Transport Standard.
- 6.18 For the avoidance of doubt, regulation 3 contains the following:
- Land Transport Standard means the Australian Animal Welfare Standards and Guidelines— Land Transport of Livestock, published on 21 September 2012.
- 6.19 The Committee notes that this formulation would cause further regulations to be made when and if the standards and guidelines are amended. Incorporation of "Land Transport of Livestock, published from time to time' may avoid that need.
- 6.20 The Legislative Assembly of the Northern Territory utilised the same, simple, legislative technique. Regulation 82B of the *Livestock Regulations* (NT) simply states 'The Land Transport Standard (defined in regulation 82A as the national standard) is incorporated into these Regulations for the purposes of this Part'.

### **Adoption by reference with minor modifications**

- 6.21 In New South Wales (NSW), the standards have been adopted by reference, but with modifications. The relevant legislation regulates 'animal trades', defined in section 4 of the *Prevention of Cruelty to Animals Act 1979* (NSW) as 'a trade, business or profession in the

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<sup>57</sup> Mia Carbon, Acting Executive Director, Biosecurity, Department of Primary Industries and Regional Development, *Transcript of evidence*, 28 March 2018, p 4.

<sup>58</sup> Animal Health Australia, 28 March 2017, viewed 10 April 2018, <http://www.animalwelfarestandards.net.au/land-transport/>.

course of which any animal is kept or used for a purpose prescribed for the purposes of this definition.' Regulation 25 of the *Prevention of Cruelty to Animals Regulations 2012* (NSW) then prescribes those trades by reference to Schedule 1, which includes 'Land transport of livestock'. Regulation 26 sets out a list of statutory requirements of people engaged in the relevant animal trade, including, at regulation 26(3)(i), the relevant code of practice or standard listed alongside the relevant trade in that Schedule 1. The relevant part of that schedule reads:

Column 1	Column 2
Land transport of livestock (that is, a business in the course of which alpacas, buffalo, camels, cattle, deer, emus, goats, horses, ostriches, pigs, poultry or sheep are transported for fee or reward)	Prevention of Cruelty to Animals (Land Transport of Livestock) Standards 2013 No 2, approved by the Minister and published on the NSW legislation website

- 6.22 The national standard can therefore be said to have been adopted, but in a modified way to suit local requirements. For example, maximum travelling times and minimum spelling provisions are added to what is in the table at Figure 1 above for goats that are more than 19 weeks pregnant. Further, standard SB7.3 in that table, regarding the use of electric prodders on pregnant goats, is omitted entirely, because the use of such an instrument on any goat is already an offence under NSW law (section 16(2), *Prevention of Cruelty to Animals Act 1979* (NSW)).

### **Setting out the standards in full**

- 6.23 An example of the use of the third method of legislating the standards occurred in South Australia. The *Animal Welfare Regulations 2012* (SA) set out the terms of the standards in full, as the means to give them legislative effect. This method of adoption may have been chosen because some modifications to the standards were required — taking again the transport by land of goats example, the equivalent South Australian regulation (regulation 57) adds a list of maximum travelling times to the lists of maximum times off water and minimum spell durations, as set out in the table at Figure 1 above.
- 6.24 Tasmania also opted for this legislative device, modifying the standards and then setting them out in full in the *Animal Welfare (Land Transport of Livestock) Regulations 2013* (Tas). Finally, Queensland adopted the same method of setting out the standards in full, with modifications, at Schedule 3 to the *Animal Care and Protection Regulation 2012* (Qld).
- 6.25 In WA, the Department has yet to commence preparation of the regulations to be made under the new proposed section 18B, but according to advice from the Department it is anticipated that all matters covered by the standards will be set out in full, with the guidelines prescribed as a code of practice under section 84 of the Act as matters to be taken into account by the courts when a person is charged with an offence under Part 3.<sup>59</sup>

### **Conclusions on this part**

- 6.26 On the issue of the incorporation of standards and guidelines, the Department was unable to provide any evidence as to why this is urgent. The national decision to convert codes of practice into standards and guidelines was made in 2005. The need for statutory amendment to facilitate the making of the regulations, in order to give statutory effect to those standards and guidelines, was first recognised in about 2012. Presumably, this is why several

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<sup>59</sup> Mia Carbon, Acting Executive Director, Biosecurity, Department of Primary Industries and Regional Development, email, 19 June 2018.

submissions said this part of the Bill (clauses 1 to 8) should await the outcome of the review announced by the Minister.

- 6.27 However, the Committee is prepared to recommend that Parliament proceed with this part of the Bill immediately because:
- the review announced by the Minister is expected to take longer than was anticipated by her in her second reading speech (paragraph 5.14 above). It has not commenced yet, and the Department was unable to identify any timelines for transition into regulations
  - there is a clear commitment from the Commonwealth, states and territories that there should be universal animal welfare standards. It is unfortunate that WA has yet to bring into effect those standards and guidelines, and this should be done without further delay. Taking the livestock transport standards and guidelines as an example, this is an industry that may operate across state and territory boundaries, and it is only fair to that industry to have uniform measures in place across the country
  - the standards and guidelines so far adopted have been comprehensively consulted upon
  - community expectations are that animal welfare laws should be strengthened
  - the Department stated that standards and guidelines are expected to be subject to a review every five years<sup>60</sup>, but no evidence was offered that this is occurring. This weakens the Department's argument that WA's credibility in future negotiations is undermined.<sup>61</sup> Nevertheless, it is the Committee's view that WA needs to adopt these standards and guidelines.

## Provisions as to cruelty offences and defences

- 6.28 The provisions of the Bill to this point are relatively uncontroversial. However, in order to provide for the enforcement of standards and guidelines, as brought into effect by those regulations, the Bill goes on to propose at clauses 9 to 13 more regulation-making powers affecting cruelty offences and defences to charges of cruelty or a regulatory breach.
- 6.29 A number of issues surrounding these proposals were raised in submissions received by the Committee. Some questioned whether the additional clauses were necessary to achieve the Bill's principal aim of implementing standards and guidelines.<sup>62</sup> Others were suspicious of the Department's intentions as regards an ability through regulations to introduce new cruelty offences or limit the statutory defences currently available.<sup>63</sup> The Committee's consideration of these issues is set out below.

### Need for these provisions

- 6.30 The RSPCA, in its submission, took the view that the Bill's provisions for incorporating and enacting the standards and guidelines should cease at this point. It stated:

RSPCA WA submits that the simple amendment to introduce new section 18B should be sufficient to implement the National Standards. This is because of the

<sup>60</sup> Mia Carbon, Acting Executive Director, Biosecurity, Department of Primary Industries and Regional Development, *Transcript of evidence*, 28 March 2018, p 11.

<sup>61</sup> Sarah Kahn, Director, Animal Welfare Education, Department of Primary Industries and Regional Development, *Transcript of evidence*, 28 March 2018. p 5.

<sup>62</sup> For example, Submission 198 from the Royal Society for the Prevention of Cruelty to Animals Western Australia Inc., 27 April 2018, pp 7 and 10.

<sup>63</sup> For example, Submission 195 from WA Farmers, Kimberley Pilbara Cattlemen's Association, Australian Dairy Farmers Ltd and Stud Merino Breeders Association WA, 26 April 2018, p 2, and Submission 197 from the Commercial Egg Producers Association of WA (Inc), 27 April 2018, pp 4-5.

manner in which the National Standards have been already been regulated in other Australian jurisdictions.

Other states have generally adopted the Standards as a complete set of enforceable regulations that largely follow and mirror the agreed National Standards. As intended when the National Standards and Guidelines were developed, this creates a clear guide for regulators and industry as to the standards of care to be expected for livestock.

In those jurisdictions, a breach of the National Standards is a regulatory offence, punishable by a fine. However, in more serious cases, a failure to comply with the National Standards can instead result in a prosecution for a cruelty offence under the Act (rather than a breach of the Standards) which has higher penalties, including imprisonment. RSPCA WA recommends that, in Western Australia, the National Standards are implemented in a similar way under the proposed regulation making power in section 18B.<sup>64</sup>

### **Prescription of a new cruelty offence**

- 6.31 The current list of cruelty offences that may be committed by a person in charge of an animal at section 19(3) of the Act (paragraphs 4.14 and 4.15 above) would be expanded by clause 9(1) of the Bill to include where an animal 'has a prescribed act carried out on, or in relation to, it'. The reason given by the Minister for this provisions is that:

This, together with the existing provision for prescribed acts of cruelty by a person who may or may not be in charge of an animal, will be used to implement and enforce the standards and ensure any person who should be held responsible for the welfare of an animal is covered by the act.<sup>65</sup>

- 6.32 This would seem to suggest that, by regulation, the Government may elevate a breach of national standards (otherwise a regulatory offence under proposed section 18B, with a penalty of up to \$20 000) into a cruelty offence under section 19, with a penalty of up to \$50 000 plus possible imprisonment.
- 6.33 As the RSPCA contended, a breach of national standards in other jurisdictions is treated as a regulatory offence, punishable by way of a smaller fine and with no prospect of imprisonment unless investigations reveal a more serious state of affairs which might lead to a cruelty charge. Of the proposal to create new offences of cruelty in this way, the RSPCA goes on:

RSPCA WA understands this proposed approach goes against one of the core reasons for developing the National Standards, which was to separate out industry husbandry practices from animal cruelty offences ... the Standards are intended to bridge the "legislative gap between a cruelty investigation and no further action". Therefore, it is not clear why this approach is being proposed. RSPCA WA submits the National Standards were not intended to be implemented as cruelty offences.<sup>66</sup>

- 6.34 Some industry members are suspicious of this proposed regulation-making power, added to the wide power that would be added by clause 7 of the Bill. Concerns were raised that these

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<sup>64</sup> Submission 198 from the Royal Society for the Prevention of Cruelty to Animals Western Australia Inc., 27 April 2018, pp 6-7.

<sup>65</sup> Hon Alannah MacTiernan MLC, Minister for Agriculture and Food, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 11 October 2017, p 4456.

<sup>66</sup> Submission 198 from the Royal Society for the Prevention of Cruelty to Animals Western Australia Inc., 27 April 2018, p 8.

provisions could be used to make criminal what is regarded in the industry as normal animal management. The Commercial Egg Producers Association of WA Inc. said:

First, it provides a greater scope for the creation and prosecution of offences under the Act under a very general and expanded "catch all" objective to include the "management" of animals. It is noteworthy that this is a specific objective beyond prohibiting cruelty to, and the inhumane and improper treatment of, animals.

Second, it would allow the executive government to make regulations that would, without limitation, allow the government of the day to prohibit any action or lack of action with respect to almost any dealing with an animal and determine that it does not promote the welfare of an animal.<sup>67</sup>

- 6.35 The Pastoralists and Graziers Association of Western Australia (Inc) said:

it appears this Bill is using Standards and Guidelines to introduce a range of new offences that is beyond compliance with standards, as well as making some of the currently available defences to producers in relation to animal cruelty charges unable to be relied upon (that is, standard industry practice and reliance upon a Code of Practice for the Welfare of Animals).<sup>68</sup>

- 6.36 In respect of the provision at clause 9(1) of the Bill, the Committee identified three legislative options, set out here in order of the Committee's preference:

- i. The proposed new cruelty offence(s) should be fully set out in the Bill. The Department has now seen the full details of the finalised standards and guidelines relating to the land transport of livestock, for cattle and for sheep. The poultry standards have been in development since 2015. Department officials should now be in a position to know what amendments to cruelty offences may be necessary, and to be able to come to Parliament with fully-considered legislative proposals.
- ii. Alternatively, the Department should simply and clearly legislate that a breach of a standard is a regulatory offence (unless promoted to a cruelty offence due to the circumstances of the incident), with compliance with a standard being a defence to those regulatory offences, as other jurisdictions have done.
- iii. The Committee's third preference would be that the provision proceed in its current form. Whilst the Committee is of the view that, generally, the creation of new offences by delegated legislation is to be frowned upon, it is not unusual, and this power to make regulations reflects what is already in force under the Act — for example, the powers to prescribe cruelty offences in more detail as provided for in section 19(2)(d),(3)(b) and (3)(g), which has resulted in the making of Part 2 of the *Animal Welfare (General) Regulations 2003*. Local consultation on these provisions needs to be robust however.

### **Modification of existing defences / Henry VIII clause and creation of new defences**

- 6.37 An issue that raised a good deal of concern amongst representatives of the farming and animal transport industries was the proposed power for the Executive, through regulations, to modify or limit the defences available to a charge of cruelty under sections 21 to 25 of the Act (clause 9(2)).
- 6.38 The rationale for this clause was set out by the Minister in her second reading speech:

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<sup>67</sup> Submission 197 from the Commercial Egg Producers Association of WA (Inc), 27 April 2018, pp 4-5.

<sup>68</sup> Submission 151 from Pastoralists and Graziers Association of Western Australia (Inc), 20 April 2018, p 4.

When the current act was drafted there were no Australian Animal Welfare Standards and Guidelines for livestock to be addressed by the regulatory framework. Offences against animals were based on broad cruelty provisions. There was concern on the part of the farming community that these offence provisions could make certain farming practices unlawful and the defence provisions were introduced to address this concern. I am pleased to say that animal welfare has moved forward considerably since the Animal Welfare Bill was debated over 15 years ago. We now have Australian Animal Welfare Standards and Guidelines for livestock that clearly set out what are and are not acceptable farming practices. These standards and guidelines were agreed nationally following extensive consultation with stakeholders, and in some instances, are a significant improvement on the model codes of practice that they are intended to replace. It is therefore necessary to include a capacity for the existing defences to a charge of cruelty to be modified to allow the new standards to be implemented as intended and to ensure that the defence provisions cannot be used to wind back the clock to permit archaic farming practices. There is also provision in the amendments for additional defences to be prescribed.<sup>69</sup>

- 6.39 It seems to the Committee therefore that this particular power to make regulations is intended to effectively modernise the existing animal welfare laws by eliminating some farming or husbandry (or indeed veterinary) practices that were considered to be acceptable in 2002, but may not be considered to be acceptable now.
- 6.40 If that is the case, then perhaps a more effective approach would be that any such defences should be modified or repealed in this amending Bill. This would overcome the perception that farmers and veterinary practitioners are being denied some measure of certainty. The Committee agrees that modernisation of these laws is desirable — however, what is not desirable is the proposed method of leaving in place the old defence provisions and then seeking to adapt them in a piecemeal fashion.
- 6.41 Further, as the RSPCA contends, it is outside the nationally agreed approach to the implementation of these standards and guidelines to use them to modify existing defences to cruelty charges or to create new ones. The RSPCA submission as regards this part of the Bill concludes:

The amendments in proposed sections 19(fa), 19(4) and 25A depart from the national approach to implementing National Standards. It is not clear to RSPCA WA why this approach has been taken. RSPCA WA is concerned this approach could disrupt the nationally consistent approach, create a lack of regulatory clarity for regulators and industry and lead to delays in the implementation of National Standards, given the detailed regulations that will need to be drafted.

RSPCA WA recommends that consideration is given to limiting the Amendment Bill to fixing the regulation making power in the Act and then promptly regulating the National Standards in the same manner as other jurisdictions.<sup>70</sup>

- 6.42 As with the prescription of cruelty offences, despite officers of the Department having worked collectively on the national standards and guidelines for some years now, and three sets of standards and guidelines (land transport, cattle and sheep) having been drafted, consulted upon and brought into effect elsewhere, and draft regulations contemplated for some six years, Parliament is being asked to accept that necessary amendments to the

<sup>69</sup> Hon Alannah MacTiernan MLC, Minister for Agriculture and Food, Western Australia, Legislative Council, Parliamentary Debates (Hansard), 11 October 2017, p 4456.

<sup>70</sup> Submission 198 from the Royal Society for the Prevention of Cruelty to Animals Western Australia Inc., 27 April 2018, p 10.

defences currently in sections 21 to 25 of the Act are unforeseeable. The Department produced no evidence as to the unforseeability of what may be needed in this regard however.

- 6.43 As has been mentioned in Chapter 4, this clause 9(2) is a ‘Henry VIII clause’. A Henry VIII clause is the term commonly given to a provision in primary legislation which grants a power for secondary legislation (regulations in this case) to be made which have the effect of amending or repealing that primary legislation. Such clauses are generally felt to be repugnant in that they remove from the Parliament to the Executive the power to make or repeal statute law. The term is a reference to King Henry VIII’s preference of making laws by proclamation, rather than through the English Parliament, following the making of the *Statute of Proclamations 1539*.

- 6.44 That being so, the Committee then has to consider FLP 14, which reads:

*14: Does the Bill allow or authorise the amendment of an Act only by another Act?*

- 6.45 The Committee concludes that, in respect of clause 9(2) of the Bill, the answer is in the negative. It would allow for the provisions of the Act to be amended by subsidiary legislation.
- 6.46 For ease of reference, clause 9(2) of the Bill would insert a new section 19(4) into the Act, which would read:

Sections 20 to 30 provide for defences to a charge under this section, however, where the regulations so provide, a defence provided under section 21, 22, 23, 24 or 25 does not apply to a charge under subsection (1) committed in a prescribed manner or in prescribed circumstances.

- 6.47 The EM to the Bill acknowledges that this is a ‘Henry VIII clause’.<sup>71</sup> As recently as February 2016, government departments have been the subject of criticism from Legislative Council scrutiny committees for failing to draw attention to Henry VIII clauses in the EM.<sup>72</sup> The Committee acknowledges the Department’s transparency in this instance.
- 6.48 In this instance, the Act sets out a number of defences to a charge of animal cruelty. Clause 9(2) would allow the Executive to make a regulation which would limit the availability of those defences. The EM justifies the use of this Henry VIII clause as follows:

This clause is necessary as the Act has a number of provisions that provide defences to acts of cruelty and these may need to be modified to ensure that the Act, as originally drafted, cannot operate to prevent or undermine the operation of the NSG Standards that will be implemented under the amended Act. To do this by means of the regulations contemplated by proposed clause 19(4) is preferable to attempting the more extensive modification of both offences and defences as currently applying under the Act. It will allow any modifications revealed as necessary when regulations are drafted to be carefully tailored to go no further than is necessary, and to avoid unintended consequences that may result from attempting to change the current application of the defences more broadly.<sup>73</sup>

- 6.49 Much has been written in the past of the use of Henry VIII clauses, revealing a softening of approach to such clauses over time. The Donoughmore Committee of 1932<sup>74</sup> found them generally to be repugnant, opining that even in times of urgency or crisis, parliamentary time

<sup>71</sup> Animal Welfare Amendment Bill 2017, *Explanatory Memorandum*, Legislative Council, p 4.

<sup>72</sup> Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 96, *Co-operatives Amendment Bill 2015*, February 2016, p 13.

<sup>73</sup> Animal Welfare Amendment Bill 2017, *Explanatory Memorandum*, Legislative Council, p 4.

<sup>74</sup> Report by the Committee on Ministers’ Powers, Great Britain Lord Chancellor’s Department, HMSO, London 1932.

could and should be found for proper debate on legislative matters that are not of a machinery nature. The Working Party of Representatives of Scrutiny of Legislation Committees throughout Australia in 1996<sup>75</sup> alerted all Australian parliamentary scrutiny committees to be wary of Henry VIII type clauses.

- 6.50 More recently, courts have been more willing to accept the validity of regulations made under such clauses so long as there is 'direct and unambiguous authority' to make them in the parent statute.<sup>76</sup> Further, there is more of an acceptance that Henry VIII clauses will not be declared invalid, or be found to be objectionable, where there is a process for proper scrutiny of the subsidiary legislation. In the matter of *ADCO Constructions Pty Ltd v Goudappel* [2014] HCA 18, Gageler J said (of the *Workers Compensation Act 1987* (NSW)):
- That parliamentary oversight, together with the scope for judicial review of the exercise of the regulation-making power, diminishes the utility of the pejorative labelling of the empowering provisions as "Henry VIII clause". The empowering provisions reflect not a return to the executive autocracy of a Tudor monarch, but the striking of a legislated balance between flexibility and accountability in the working out of the detail of replacing one modern complex statutory scheme with another.<sup>77</sup>
- 6.51 The equivalent provisions for WA, allowing for the consideration of all regulations while they are subject to disallowance, and considering whether the special attention of Parliament should be drawn to any such regulations, may be found at section 42 of the *Interpretation Act 1984*. The scrutiny of which Gageler J spoke is afforded by Part 10 of Schedule 1 to the Standing Orders of the Legislative Council (see paragraph 5.12 above).
- 6.52 In a more recent and local context, the former Attorney General of WA, Hon Michael Mischin MLC, spoke in 2016 of situations where there is a legitimate use for Henry VIII clauses. This was in the context of a uniform bill, the Co-operatives Amendment Bill 2015. The report of the Uniform Legislation and Statutes Review Committee of the Legislative Council on that bill, in the absence of a proper explanation from the sponsoring department as to the reasons for the use of Henry VIII clauses, had recommended that the Minister responsible for the bill give such an explanation to the House.<sup>78</sup> In the course of that explanation, he said:
- In an increasingly complex legislative environment, it is not always possible to have effective lawmaking without some modification or compromise of principle. We have that quite frequently with the use of regulations, and those are quite an accepted part of devolving the attention to minutiae in order that acts of Parliament can be made to work and massaged as necessary without the necessity of bringing bills before the Parliament.<sup>79</sup>
- 6.53 The Committee is firmly of the view that the use of Henry VIII clauses, and clauses akin to them, should be avoided in the absence of compelling reasons for them being required. The Department has defended clause 9(2) as being necessary to allow the legislation to cope with situations that are currently unforeseen.

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<sup>75</sup> Parliament of Australia, Working Party of Representatives of Scrutiny of Legislation Committees throughout Australia, *Position paper on the Scrutiny of National Schemes of Legislation*, Commonwealth of Australia, October 1996, pp 21 and 24.

<sup>76</sup> *Combined State Unions v State Service Coordinating Committee* [1982] 1 NZLR 742 at 745, per Woodhouse P.

<sup>77</sup> *ADCO Constructions Pty Ltd v Goudappel* [2014] HCA 18 at p 61.

<sup>78</sup> Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 96, *Co-operatives Amendment Bill 2015*, February 2016, p 14.

<sup>79</sup> Hon Michael Mischin MLC, Attorney General and Minister for Commerce, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 22 March 2016, p 1494.

- 6.54 During the hearing that took place with Departmental officials on 2 May 2018, the following exchange occurred:

Hon COLIN de GRUSSA: If I can go back to the regulations, you talked about certainty for industry, and for animal welfare as well. This is a point that I have had raised directly with me a number of times—the Henry VIII clause that allows changes to defences and so on actually creates uncertainty. Can you explain the need for that and why through a clause like that instead of through the normal legislative process?

Ms CARBON: I can certainly start to address that and I will probably need to pass to Katie for the legal details. Obviously, the aim is being able to regulate the national standards, but there will still be codes of practice as well. They may at times conflict and we need the ability to say that the regulated standard has legal power over a code of practice as a defence. Is that correct, Katie?

Ms ASHFORTH: Unfortunately, it is very hard to give examples of how it might operate in practice because it depends on what the actual regulation says as drafted to know whether you need to—because of the way it is drafted and its interaction with the act et cetera—know whether or not you do need to modify the operation of the defence as it would otherwise apply. It is difficult to be helpful, but the thing is that the regulations themselves will need to be closely scrutinised during drafting and, obviously, after tabling in Parliament. Mark may be able to give more specific examples but we do not have a list of things where we will need to use this clause and say that the defence in section such and such does not apply.<sup>80</sup>

- 6.55 It would appear to the Committee that the intended overriding of the codes by enforceable standards and guidelines could easily be achieved in the body of the Bill. It can see no practical reason why provision could not be made at this stage for standards and guidelines to automatically replace codes of practice insofar as they are inconsistent with one another in any instance, whereby adherence to such codes or standards is a defence to a charge of animal cruelty.

- 6.56 Upon being asked by Hon Jim Chown MLC how the Department would achieve its desired legislative outcomes in the absence of this clause 9(2), Ms Ashworth continued:

It will take a bit of work and we will have to go back to the drawing board and the drafter.<sup>81</sup>

- 6.57 The Department should be able to clearly foresee and enunciate what it wishes to see legislatively when it brings proposals to Parliament. At this point in time, the Department appears to be unable to do so in terms of statutory defences. It is certainly not the job of Parliament to give carte blanche to the Department to make whatever law it likes if an unforeseeable matter arises — that is precisely the job of Parliament. The Department has itself admitted that, with more forethought, it could achieve its desired outcomes without the Henry VIII clause.

- 6.58 In the Committee's view, it should be straightforward in drafting terms to legislate for standards and guidelines to override codes of practice insofar as they may conflict. Furthermore, where the defences in sections 21 and 23 rely on compliance with 'generally accepted veterinary practices' or a 'generally accepted animal husbandry practice' as a

<sup>80</sup> Hon Colin de Grussa MLC, Mia Carbon, Acting Executive Director, Biosecurity, and Katy Ashforth, Legal Officer, Department of Primary Industries and Regional Development, *Transcript of evidence*, 2 May 2018, pp 17-18.

<sup>81</sup> Katy Ashworth, Legal Officer, Department of Primary Industries and Regional Development, *Transcript of evidence*, 2 May 2018, p 19.

defence to a charge of cruelty, those practices could be defined as being whatever practices are contained within the standards and guidelines. Finally, the defence of acting in accordance with a ‘prescribed code of practice’ in the amended section 25 could be refined so that the defence amounted to acting in accordance with standards and guidelines or, if relevant standards and guidelines are yet to be brought into effect, a prescribed code of practice.

- 6.59 The RSPCA certainly agrees with this view. It said:

It is not apparent why national standards would be selected and introduced as defences to cruelty offences, instead of being implemented as regulated standards, as has occurred in other states.

The effect appears to be that general inspectors enforcing the Standards will have to use different parts of the Act and regulations to work out the appropriate conduct. RSPCA WA is concerned that the overall consequence of this approach is that the National Standards will not be clear or readily discernible, from both the enforcement perspective of general inspectors and for those involved with the National Standards.<sup>82</sup>

- 6.60 Industry would appear to agree. For example, the West Australian Pork Producers Association (Inc) said:

We believe that drafting techniques exist that would ensure that standards and guidelines are not compromised and that defences carry through from standards and guidelines into the Act.<sup>83</sup>

- 6.61 By the same token, whilst seeking to reserve to itself the power to modify or limit statutory defences, the Department also seeks the power to make new ones. As noted at paragraph 4.25 of this report, but repeated here for ease of reference, a new section 25A would be inserted by clause 11 of the Bill, which would provide that:

It is a defence to a charge under section 19(1) for a person to prove that the person was acting in accordance with a prescribed defence.

- 6.62 This in itself would not meet the accepted definition of a Henry VIII clause. It does not allow for the amendment of the Act by delegated legislation. It does however provide for the creation of new defences to a charge of cruelty to be created by the Executive, when defences have already been provided in primary legislation at sections 20 to 30 of the Act.

### **Codes of practice**

- 6.63 The available defence to a charge of cruelty currently contained in section 25 (‘acting in accordance with a relevant code of practice’) would be amended by clause 10 of the Bill to the extent that ‘relevant’ would be replaced with ‘prescribed’. Clause 18 would make the same amendment to section 84 (whereby, currently, a breach of a ‘relevant’ code of practice must be taken into consideration by a court but is not sufficient, on its own, to prove the commission of an offence’).

- 6.64 The Minister explained this proposal:

The bill will provide for codes of practice to be prescribed for the purposes of the particular provision to which they are intended to operate; that is, either as a defence to a charge of cruelty, or as a guide to the courts when deciding a cruelty

<sup>82</sup> Submission 198 from the Royal Society for the Prevention of Cruelty to Animals Western Australia Inc., 27 April 2018, p 9.

<sup>83</sup> Submission 48 from the West Australian Pork Producers Association (Inc), 17 April 2018, p 2.

matter. Previously, these two distinct purposes of codes of practice adopted under the act were linked and this caused confusion. The amendment does not change the practical application of the codes of practice.<sup>84</sup>

- 6.65 This proposal appears to be innocent and acceptable.
- 6.66 Separately, clause 19(b) of the Bill would insert the words ('however described') after 'codes of practice' as documents that may be incorporated into the statute by reference under section 94, the general regulation-making power. According to the EM, this proposed amendment is intended to make it clear that a document does not have to be described as a 'code of practice' to enable it to be adopted as such under the regulations.<sup>85</sup>
- 6.67 This proposed amendment is clearly causing confusion and uncertainty amongst the farming and transport industries. The Department has failed adequately to explain its intentions in this regard, and the Bill's wording is less than clear. As the West Australian Pork Producers Association (Inc) put it:

The potential for unpredictable outcomes in this area will lead to uncertainty and undermine producer confidence when investing in new operations and infrastructure. It is submitted that careful drafting would accommodate new or different terms that may be used to describe standards and guidelines that have been rigorously assessed and are scientifically defendable, without risking industry confidence.<sup>86</sup>

- 6.68 Mr Stuart, Senior Policy Officer of the Department, sought to explain the Department's thinking holistically:

the way the act is constructed at the moment is we have incredibly broad cruelty provisions: proper and sufficient food, unnecessary harm. These are all offence provisions that exist within section 19. They are somewhat mitigated by some very broad defences—generally accepted animal husbandry practice, veterinary practice or whatever. These are all very broad and it is really up to the discretion of the courts as to how they will go about interpreting that. "Harm" is also a reasonably broad term. Then we have the codes of practice, which are a defence and are a little bit more specific, but they are written in such a way that they are open to a great deal of interpretation. It does not give a lot of certainty to producers, in my mind, and to the regulator as to exactly where these lines are drawn, as you very rightly point out. The standards, on the other hand, are trying to be far more prescriptive, so they are saying "if you do this" or "you cannot do this"—it is very clear, you cannot dehorn a cow unless it is older than six months with pain relief. That is pretty prescriptive. At the moment it is very ambiguous in the sense of whether unnecessary harm was caused and then you have got a [sic] look at the defences and all the rest of it. I think where we are moving with these standards and guidelines is to something that is very prescriptive that makes it very clear as to the obligations on the producer and very clear to the regulator as to exactly what they have got to do.<sup>87</sup>

- 6.69 So, it would seem that the aim of this statutory exercise is to replace the broad and unclear offence provisions and defence provisions, and the vague provisions of the codes of practice, with the more certain and prescriptive terms of the national standards and guidelines. Yet

<sup>84</sup> Hon Alannah MacTiernan MLC, Minister for Agriculture and Food, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 11 October 2017, p 4456.

<sup>85</sup> Animal Welfare Amendment Bill 2017, *Explanatory Memorandum*, Legislative Council, p 7.

<sup>86</sup> Submission 48 from the West Australian Pork Producers Association (Inc), 17 April 2018, p 2.

<sup>87</sup> Mark Stuart, Senior Policy Officer, Department of Primary Industries and Regional Development, *Transcript of evidence*, 2 May 2018, p 13.

the amendment proposed by clause 19 to section 94(2)(d) would do the opposite — legislating for the words '(however described)' after 'codes of practice' would simply lead to more confusion and uncertainty, as evidenced by the submissions. The Committee notes that, were the Bill to be more explicit on this point, the fears of the industry members may be somewhat assuaged.

### **Conclusions on this part**

- 6.70 In respect of these clauses 9 to 11 of the Bill, allowing for the making of regulations which have the effect of creating new cruelty offences, nullifying defences or creating new ones and allowing for the adoption of codes of practice (however described), Parliament is being asked to take a number of matters on trust. It is being asked to accept that the Department will legislate sensibly in the future, through delegated legislation, without being subject to the vigorous scrutiny that a full Parliamentary debate would otherwise provide. It is clear that the Department's thinking is unclear ahead of the outcome of the promised review of the Act.
- 6.71 Should the Legislative Council's consideration of the Bill extend beyond consideration of clause 8, the Minister should be invited to give full and detailed explanations about what precisely is envisaged to be in the proposed regulations with respect to the creation of new cruelty offences as well as:
- i. why these clauses cannot be replaced with direct references to standards and guidelines so that the distinction between animal husbandry practices and animal cruelty offences is maintained; and
  - ii. why the desired outcomes cannot be attained without the creation of a Henry VIII clause.

### **Findings and recommendations on this part**

**Where a majority finding or recommendation is indicated, the majority consisted of Hon Colin de Grussa MLC, Hon Jim Chown MLC and Hon Dr Steven Thomas MLC.**

#### **FINDING 1**

The Committee finds that the commitment given by the Commonwealth and all states and territories to the legislative adoption of universal animal welfare standards and guidelines should be legislated in Western Australia without further delay.

#### **RECOMMENDATION 1**

Clauses 1 to 8 of the Animal Welfare Amendment Bill 2017 may be made.

#### **FINDING 2**

The majority of the Committee finds that the Legislative Council's consideration of the Animal Welfare Amendment Bill 2017 should cease after clause 8. The regulatory scheme that would be legislated under clauses 1 to 8 may proceed effectively without the more contentious provisions provided for in clauses 9 to 13. Those proposed amendments to the *Animal Welfare Act 2002* should not be legislatively progressed until they have been the subject of the promised review.

## **RECOMMENDATION 2**

Majority recommendation: Animal Welfare Amendment Bill 2017, pages 5 to 9, clauses 9 to 13 — delete the clauses.

- 6.72 Should Recommendation 2 not be accepted by the Legislative Council, then the majority of the Committee makes the following findings and recommendations with regard to this part of the Bill.

### **FINDING 3**

The majority of the Committee finds that national standards and guidelines should be simply prescribed as regulatory offences, as has occurred in other states and territories, and elements of them should not be elevated to cruelty offences by further prescription. Any proposed new cruelty offences, to be added to section 19 of the *Animal Welfare Act 2002*, should be fully set out in the Animal Welfare Amendment Bill 2017.

## **RECOMMENDATION 3**

Majority recommendation: Animal Welfare Amendment Bill 2017, at page 5, lines 8 to 11, clause 9(1) — delete the clause.

### **FINDING 4**

The majority of the Committee finds that no sufficient justification for the Henry VIII clause that appears at clause 9(2) of the Animal Welfare Amendment Bill 2017 has been given. Any proposed modifications to the statutory defences that are set out at sections 21 to 25 of the *Animal Welfare Act 2002* should be fully set out in the Animal Welfare Amendment Bill 2017. Likewise, proposed additional defences to charges of cruelty to animals should not be the subject of prescription, but should be fully considered by the Parliament.

## **RECOMMENDATION 4**

Majority recommendation: Animal Welfare Amendment Bill 2017, at page 5, lines 13 to 20, clause 9(2) — delete the clause, and at page 6, lines 8 to 14, clause 11 — delete the clause.

### **FINDING 5**

The majority of the Committee finds that the proposal to add the words '(however described)' after 'codes of practice' is misconceived. The Department of Primary Industries and Regional Development has produced no justification for this proposed amendment, which has caused, and would cause, unnecessary uncertainty and concern.

## **RECOMMENDATION 5**

Majority recommendation: Animal Welfare Amendment Bill 2017, at page 10, lines 1 to 3, clause 19 — delete the words:

'(b) in paragraph (d) after "practice" insert:  
(however described).'

- 6.73 Should this part of the Bill be proceeded with, clauses 9(3), 10, 12 and 13 (the latter two merely making contextual amendments to reflect the new language proposed for Part 3 of the Act) are acceptable to the Committee and may be passed.

## CHAPTER 7

### Designated general inspectors

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- 7.1 Clauses 14 to 17 of the Bill would create a new category of general inspector, the 'designated general inspector', with new powers of entry for the purpose (amongst other things) of monitoring compliance with Part 3 of the Act. The Minister introduced these proposed measures in the following terms:

The final area of change is to introduce a new class of general inspector who will have expanded powers of entry to non-residential properties. The existing powers of entry of general inspectors to non-residential places and vehicles without the owner or occupier's consent are inadequate. Exercise of these powers is currently limited to circumstances in which there is a reasonable suspicion of a cruelty offence or, in limited circumstances, under a warrant. There is no capacity to enter without the owner or occupier's consent to investigate compliance with the act, including welfare direction notices and court orders made under the act. Similar powers of entry already exist for inspectors appointed under the Biosecurity and Agriculture Management Act and other legislation. They do not represent a conferral of powers of an exceptional nature. These powers are consistent with those in South Australia and New South Wales.<sup>88</sup>

- 7.2 Again, these proposals were universally supported by members of the public. Submitters felt that animal businesses should be overtly transparent and accountable, and that the proposed power to enter premises without notice, consent or warrant was thus entirely justified.<sup>89</sup> Unsurprisingly, animal welfare organisations agreed.<sup>90</sup> The RSPCA added that the proposed power for the designated general inspector to enter land or vehicles without consent, notice or a warrant to monitor compliance with court orders and with statutory directions given under the Act, as well as to monitor compliance with Part 3 of the Act:

address[es] a material gap in the Act, which currently restricts proper enforcement work.<sup>91</sup>

- 7.3 The proposals were not supported however by the agricultural and transport industries. Submitters outlines three main areas of concern:
- Whether there was a need for these new provisions
  - How it was proposed that the designated general inspectors would be appointed
  - The qualifications and experience of the designated general inspectors.

#### A need for a new category of inspector with additional powers of entry

- 7.4 Agricultural and transport industry representatives questioned the need for a new class of inspector given the statutory powers already available under the Act.

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<sup>88</sup> Hon Alannah MacTiernan MLC, Minister for Agriculture and Food, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 11 October 2017, p 4456.

<sup>89</sup> For example, Submission 42 from Natalie Davis, 18 April 2018 and Submission 147 from Dr Susan Foster, 18 April 2018.

<sup>90</sup> For example, Submission 193 from Animals Australia, 27 April 2018, pp 4-5, Submission 191 from the Canine Welfare Alliance of Australia Inc, 25 April 2018, p 4 and Submission 126 from Animals' Angels, 20 April 2018, p 2.

<sup>91</sup> Submission 198 from the Royal Society for the Prevention of Cruelty to Animals Western Australia Inc., 27 April 2018, p 11.

7.5 The Livestock and Rural Transport Association of Western Australia (Inc) wrote:

There has been no commentary as to why this new category of inspector is necessary and in what circumstances they will be used. General inspectors already have a power of entry if they have reason to suspect an offence will be, has been or is being committed.<sup>92</sup>

7.6 The Minister felt stronger powers were needed, however. She said:

The existing powers of entry of general inspectors to non-residential places and vehicles without the owner or occupier's consent are inadequate. Exercise of these powers is currently limited to circumstances in which there is a reasonable suspicion of a cruelty offence or, in limited circumstances, under a warrant. There is no capacity to enter without the owner or occupier's consent to investigate compliance with the act, including welfare direction notices and court orders made under the act.<sup>93</sup>

### **Current provisions**

7.7 Part 4 of the Act as it currently stands deals with the appointment of inspectors, be they general inspectors or scientific inspectors, and sets out their functions and powers. The Bill, and this report, deals only with general inspectors.

7.8 Section 33(1) of the Act requires the CEO of the Department to appoint as general inspectors:

- those members of the staff of the RSPCA that are nominated by the RSPCA; and
- as many other people (from the list at subsection (2) at paragraph 7.10 below) whom the CEO considers to be suitably qualified or experienced as he or she considers necessary for the purposes of the Act.

7.9 The CEO has no discretionary power over the appointment of any member of staff of the RSPCA nominated by the RSPCA under section 33(1)(a). The nomination is itself sufficient to require the appointment to be made.

7.10 In relation to the appointment of suitably qualified or experienced persons under section 33(1)(b), section 33(2)(a) permits the CEO to appoint a member of staff of the following organisations that have been nominated by the CEO of the organisation in question, being:

- (i) the Department;
- (ii) Agriculture WA (defined as the Department principally assisting with the administration of the *Biosecurity and Agriculture Management Act 2007* — at this time, that is also the Department);
- (iii) whichever department at the time is administering the *Conservation and Land Management Act 1984* (currently the Department of Biodiversity, Conservation and Attractions);
- (iv) Fisheries Western Australia; or
- (v) a local government.

7.11 Under section 33(2)(b), the CEO may also appoint 'any other person whom the CEO considers it appropriate to appoint.' The Committee notes that all police officers are deemed to be general inspectors by virtue of section 5 of the Act.

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<sup>92</sup> Submission 111 from the Livestock and Rural Transport Association of Western Australia (Inc), 18 April 2018, p 2.

<sup>93</sup> Hon Alannah MacTiernan MLC, Minister for Agriculture and Food, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 11 October 2017, p 4456.

- 7.12 The terms of a general inspector's appointment are set out in his or her instrument of appointment (section 33(3)). Any restrictions on the appointment may be notified in writing (section 35) and section 33(4) provides that an appointment is for five years, unless it ceases before it has run its natural course because of resignation, revocation or the general inspector ceasing to be an employee eligible for appointment under section 33(1)(a) or (2)(a).
- 7.13 The general inspectors' functions and powers are set out in sections 37 to 48 of the Act. His or her three key functions under the Act (providing he or she has not additionally been appointed as a scientific inspector in relation to schools) are:
- enforcing Part 3 of the Act
  - providing assistance to scientific inspectors
  - providing information and assistance to the CEO of the Department in relation to matters arising under the Act.
- 7.14 The Committee notes that the principal function is to enforce Part 3 of the Act. In order to do so, general inspectors may exercise a range of powers. They may:
- enter a place (section 38) in the following circumstances:
    - with the consent of the owner/occupier
    - under a warrant issued by a justice under section 59
    - where notice has been given to the owner/occupier, and no objection has been received within the specified time
    - in the case of non-residential premises, if the general inspector reasonably suspects that a cruelty offence has been, or is being, committed at the premises, or is likely to be, or to continue to be, committed at the place if entry is not effected
  - enter a vehicle (section 39), again with consent, under a warrant or (where the vehicle is not also a residence) on the same grounds of reasonable suspicion as to the commission of a cruelty offence
  - care for an animal, or direct a person in control of an animal to do so (section 40)
  - humanely destroy an animal (section 41)
  - seize an animal (section 42)
  - seize property that is or has been used to commit an offence, or may provide evidence of the commission of an offence (section 43)
  - require information (asking for a person's name, address, date of birth) (section 46)
  - exercise a range of consequential powers such as searching a place or vehicle and taking samples from it, directing a person to take an animal to a specified place or not to remove it from a specified place, giving directions to a person in control of an animal, etc. (section 47).

### **Proposed amendments**

- 7.15 A new section 35A, which would be inserted by clause 14 of the Bill, would allow the Minister, by written notice, to designate a person who is a general inspector under section 33 (other than a police officer) as a designated general inspector.
- 7.16 A designated general inspector would have additional functions and powers over and above ordinary general inspectors (unless those powers are limited by the Minister in the Notice of Designation), being:

- under a new section 37(1)(aa), which would be added by clause 15 of the Bill:
  - the function of monitoring compliance with Part 3 (including the proposed new animal welfare, safety and health regulations as well as the cruelty provisions, mentioned above)
  - the function of monitoring court orders under section 55(1) (which are court orders that may be imposed in addition to a fiscal penalty for the protection of animals, such as prohibiting an offender from future ownership of an animal or animals)
  - the function of monitoring directions given under section 40(1) (directing a person in control of an animal to provide care to that animal in the form of food, water, shelter or whatever else may be appropriate) or section 47(1) (assorted directions that may be given, for example to take an animal or not take an animal to a specified place)
- under the new section 38(1A), which would be inserted by clause 16 of the Bill, power to enter a non-residential place at any time, without consent, a warrant or a reasonable suspicion (paragraph 7.14 above) to carry out one of the three functions listed above
- under the new section 39(1A), which would be inserted by clause 17 of the Bill, power to enter a vehicle that is not a residence at any time, again without consent, a warrant or a reasonable suspicion, to carry out one of the three functions mentioned above.

7.17 The creation of these new functions and powers are justified in the EM as follows:

This new class of inspector is necessary because the existing powers of general inspectors to enter non-residential places and vehicles without the owner/occupier's consent are limited to where there is a reasonable suspicion of a cruelty offence or in limited circumstances under a warrant. There is no capacity to enter without the owner/occupier's consent to investigate possible breaches of the regulations or to verify compliance with the Act, including directions notices and court orders. The powers are not extraordinary in nature: similar inspection powers exist under other legislation, for example the *Biosecurity and Agriculture Management Act 2007*.

#### *Biosecurity and Agriculture Management Act 2007*

7.18 Part 4 of the *Biosecurity and Agriculture Management Act 2007* deals with inspection and compliance. Inspections may be carried out for a number of purposes (section 64), including to search for or inspect any organism, agricultural product, etc., to search for and inspect any records kept for the purposes of the Act or, at section 64(c):

to ascertain whether this Act, or a management plan, code of practice, direction, notice or other instrument given, issued, made or adopted under this Act is being complied with.

7.19 Under section 65(1), for the purposes of such an inspection, an inspector may (among other things):

- (a) at any time stop, detain, board or enter a conveyance (except a conveyance that is a mobile home); and
- (b) at any time enter a place that is not a dwelling.

7.20 The Committee notes that there is a statutory limitation on these powers however. Section 65(3) goes on to say that before exercising a power under subsections (1)(a) or (b):

an inspector must take reasonable steps to inform the owner, occupier or person in charge of the place, as the case requires, of his or her intention to exercise the power.

7.21 By virtue of section 65(4), that limitation on the powers of entry does not apply if:

- (a) the inspector reasonably suspects that to do so will endanger any person, including the inspector, or jeopardise the purpose of the proposed entry or the effectiveness of any search of the place; or
- (b) the power is to be exercised in a public place or quarantine facility.

7.22 Comparison may also be made with the powers of fisheries officers in WA.

*Fish Resources Management Act 1994*

7.23 Section 182 of the *Fish Resources Management Act 1994* (FRMA) sets out the routine inspection powers of fisheries officers, to enter 'certain places' to inspect 'certain matters'. Such an officer may, at any reasonable time —

- (a) enter and inspect any land or premises or any waters in respect of which there is an authorisation in force under this Act to check whether this Act or the conditions of the authorisation are being complied with; or
- (b) enter and inspect any land or premises that are being used for the purpose of selling fish, or storing fish for a commercial purpose, to check whether this Act is being complied with; or
- (c) enter any land or premises ordinarily used for the purpose of manufacturing, repairing or selling boats or fishing or aquaculture gear and inspect the boats or gear; or
- (d) enter any land or premises where records are required to be kept for the purposes of this Act and inspect those records.

7.24 These inspection powers would outwardly appear to be unfettered, much like the proposals regarding the proposed powers of entry of designated general inspectors under the Bill (clauses 16 and 17). They are limited though to premises having a connection with an activity being undertaken under the FRMA.

7.25 For the purposes of investigating offences against the FRMA, however, a fisheries officer may enter and search any land (other than land appurtenant to any premises) without consent only if he or she has reasonable grounds to suspect that an offence has been, is being or is about to be committed, or there is anything on the land that may be evidence of the commission of such an offence (section 183(b)). In that regard, and in respect of non-residential premises, section 184 of the FRMA goes on to say:

A fisheries officer may, for the purposes of this Act, enter and search any premises, other than premises used as a residence —

- (a) if the fisheries officer has reasonable grounds to suspect that an offence against this Act has been, is being or is about to be committed in or on the premises; or
- (b) under a warrant issued under section 187; or
- (c) with the consent of the occupier of the premises.

- 7.26 The Minister mentioned that these powers are also consistent with those available in South Australia and New South Wales.<sup>94</sup> Similar powers to those proposed for WA do exist in other states, the style of drafting often being the only difference.

#### *Animal Welfare Act 1985 (SA)*

- 7.27 Section 30 of the *Animal Welfare Act 1985 (SA)* deals with the general powers of an inspector including, at subsection (1), the power to:

- (a) enter and search and, if necessary, use reasonable force to break into or open—
  - (i) premises or a vehicle to which this section applies; or
  - (ii) part of, or anything in or on, premises or a vehicle to which this section applies,

as reasonably required for the administration and enforcement of the Act. Entry may be without consent or warrant. Only the use of force to enter a premises or vehicle is limited by subsection (2)(a) — such force may only be used:

on the authority of a warrant issued by a magistrate or in circumstances in which the inspector reasonably believes that urgent action is required in order to prevent or mitigate serious harm occurring to an animal.

- 7.28 Under section 31, if an inspector proposes to conduct a 'routine inspection' of premises or a vehicle, in circumstances where there is a reasonable suspicion that there is an animal in respect of which an animal welfare notice or animal welfare order in place, no notice of the inspection need be given.

#### *Prevention of Cruelty to Animals Act 1979 (NSW)*

- 7.29 The Committee notes that, in NSW, section 24E of the *Prevention of Cruelty to Animals Act 1979 (NSW)* reads:

Power to enter land [Note that, under section 24D(1) of the Act, land includes a premises or a vehicle, vessel or aircraft.

- (1) An inspector may enter land for the purpose of exercising any function under this Division.

- 7.30 This power to enter without notice, consent or warrant is only limited where the land is a dwelling. Additionally, by virtue of section 24G(2), the inspector has a general power to inspect land, and any animal on it:
- that is used for the purposes of a sale-yard
  - that is used for the purposes of an 'animal trade'
  - any land 'in or on which an animal is being used, or kept for use, in connection with any other trade, or any business or profession (including a place used by a veterinary practitioner for the purpose of carrying on his or her profession).

- 7.31 These disparate provisions illustrate the fact that it is difficult to place too much emphasis on what powers are available in other jurisdictions. Where a power of entry without consent, warrant or reasonable suspicion is available, different limitations apply. In Victoria, for example, there is no such general power of entry, save for a 'specialist inspector' with the

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<sup>94</sup> Hon Alannah MacTiernan MLC, Minister for Agriculture and Food, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 11 October 2017, p 4456.

written authority of the Minister'.<sup>95</sup> In Queensland, such a power is limited to situations where an animal welfare direction is in place and the time and place of the entry is recorded in that direction or to provide immediate relief to an animal.<sup>96</sup>

7.32 With regard to the Bill under consideration, and ss mentioned at paragraphs 7.4 and 7.5, doubts were raised in submissions to the Committee as to the need for this new designation of general inspector and the enhanced powers of entry. The Committee also questioned whether amendment to this part of the Act is necessary.

- If the standards and guidelines were incorporated under clauses 1 to 8, with no other amendments to the Act, then to carry out his or her duties under that expanded Part 3, incorporating regulatory offences under the national standards, a general inspector under existing powers would be able to enter a non-residential place:
  - with consent
  - with notice
  - under a warrant

or

  - where the inspector reasonably believes that an offence under Part 3 has been or is being committed, or is likely to be or continue to be committed, at that place if entry is not effected.

Grounds for entry to a vehicle are similar (paragraph 7.14 of this report)

- Under section 37(1)(a) of the Act, one of the functions of a general inspector (perhaps the main function) is to enforce Part 3 of the Act. At present, that Part 3 covers the cruelty offences. However, should the amendments to the Act proposed by 7 of the Bill be enacted, Part 3 will also encompass the range of regulatory offences taken from the national welfare standards. Thus, those standards may be 'monitored' if it is accepted that 'monitoring' falls within the definition of 'enforcing'. As a regulatory concept, the Committee is of the view that monitoring would be a necessary pre-requisite, in many cases, to enforcement.

7.33 The Department has stressed that what is sought is the ability to actually monitor compliance with the standards. The new powers for designated general inspectors are not, it is said, intended to be an expansion of the current role in respect of animal cruelty, but an ability to take a more preventative role.<sup>97</sup>

7.34 In fact, the Committee observes that the activity of 'monitoring' is already being carried out, and that preventative role appears to be established. For example, in the Department's response to questions taken on notice during the hearing held on 2 May 2018, it was said of the Livestock Compliance Unit (LCU) of the Department:

The LCU currently undertakes routine inspections at livestock establishments, including but not limited to; saleyards, abattoirs, knackeries, export depots, live export wharves and intensive industries such as piggeries and poultry units to monitor compliance with the Act and identify where there is a risk of non-compliance. Inspections are proactive, are initiated by the LCU, and are not a response to a report of animal cruelty.

<sup>95</sup> Prevention of Cruelty to Animals Act 1986 (Vic) s 24L.

<sup>96</sup> Animal Care and Protection Act 2001 (Qld) ss 122 and 123.

<sup>97</sup> Mia Carbon, Acting Executive Director, Biosecurity, Department of Primary Industries and Regional Development, *Transcript of evidence*, 2 May 2018, p 14.

If a possible breach of the Act is identified during a routine inspection an inspector may investigate the incident and/or use other enforcement measures to ensure good animal welfare outcomes. Inspectors may also respond to and investigate animal welfare complaints regarding commercial livestock referred to the LCU by the RSPCA.<sup>98</sup>

- 7.35 That Departmental response went on to describe the LCU's activities in some detail. The number of inspectors within the unit has increased from 4.9 full time equivalent (FTE) staff in 2011 to 11.4 in 2017. The LCU's 'compliance activities' are described as follows:

From 1 July 2011, detection of non-compliance resulted in a range of regulatory responses, consistent with the Department's Compliance, Enforcement and Prosecution Policy. Response options include;

- Advice: Livestock Management Advice (LMA). Non-compliance with a Code of Practice or industry guideline may result in either verbal or written Livestock Management Advice, providing there has been no adverse animal cruelty outcome.
- Industry liaison: Where systemic problems have been identified in relation to compliance with the Act in one establishment or a sector of industry, and an LMA is unlikely to achieve the necessary changes, the LCU may undertake training or more detailed industry liaison.
- Direction: Where there is a direct risk of non-compliance, a direction can be issued under Section 40 or 47 to protect the health, safety or welfare of an animal.
- Prosecution: If a potential offence of cruelty is detected an investigation with a view to possible prosecution may be initiated.

There have been over 340 LCU investigations or responses during inspections which have resulted in Livestock Management Advices being issued.<sup>99</sup>

- 7.36 In the Committee's view, on the basis of the evidence provided by the Department, the distinction between monitoring, compliance and prevention is not clear.
- 7.37 Some industry representatives objected to the proposal to allow the new designated general inspectors the ability to appear unannounced to conduct inspections, suggesting that notice (perhaps 24 hours) should be given.<sup>100</sup> Upon being asked whether, in his opinion, designated general inspectors should be required to give 24 hours' notice of an inspection, Mr Stuart of the Department said:

I think under most circumstances that would be just a normal practice. They certainly would not have an issue, or the inspectorate would not have an issue, with providing that sort of notice or even more. But I think there are certain circumstances where notice is not necessarily appropriate, and that would be consistent with our existing policy. Even when it comes to entry under part 3,

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<sup>98</sup> Mia Carbon, Department of Primary Industries and Regional Development, Answer to question on notice 2 asked at hearing held 2 May 2018, dated 11 May 2018, pp 4 - 5.

<sup>99</sup> ibid., at p 5.

<sup>100</sup> For example, Submission 48 from the West Australian Pork Producers Association (Inc), 17 April 2018, p 2, and Submission 111 from the Livestock and Rural Transport Association of Western Australia (Inc), 18 April 2018, pp 1- 2.

reasonable suspicion under part 3, we do give notice and sometimes we do not give notice.<sup>101</sup>

- 7.38 Alternatively, of course, the Committee notes that an inspector may seek consent or obtain a warrant under the legislation as it stands. In response to questions on notice put to the Department during the hearing on 2 May 2018, it was said:

*5. How often has consent to enter been sought, how often consent has been denied and the sorts of circumstances in which that has occurred? (page 11)*

The vast majority of inspections currently undertaken by LCU inspectors are in public places where consent is not directly sought.

Over the last 4 financial years LCU inspectors have sought and been denied access to two places and six vehicles. There are no clear records of how many times access has been sought and granted.

Over the last 6 months LCU inspectors have sought consent to enter vehicles (livestock vessels) on 11 occasions. Six of these have been denied.

Once national Standards are regulated it will be possible to undertake inspection for compliance with the regulations. This will entail a greater focus on on-property inspection, and so increase the number of times entry will be sought.

*6. How many warrants have been sought and refused? (page 11)*

Since July 2011, eight warrants to enter a place have been sought by the LCU. One warrant has been sought to enter a vehicle (livestock vessel).

All warrants sought have been granted.<sup>102</sup>

- 7.39 Records show that, over the last 4 financial years, LCU inspectors have sought and been denied access to two places and six vehicles. However, the Committee was also told that there are no clear records of how many times access has been sought and granted. It is difficult therefore to see what proportion of requests have been denied, and whether this indeed constitutes a practical problem. The Department did add that, over the last six months, LCU inspectors have sought consent to enter livestock vessels on 11 occasions, and six of these have been denied. The Committee was not given the context of these refusals. More importantly, no applications for search warrants under section 59 of the Act have been denied.<sup>103</sup>
- 7.40 Should clause 14 of the Bill be enacted, and the new classification of inspector created, the Committee goes on to question whether the controversial new enhanced powers of entry in clauses 16 and 17 are necessary. That will be considered as a fundamental legislative principle at the end of this chapter.
- 7.41 Should the overall policy case be made for the principle of creating this new class of inspectors, together with enhanced powers of entry, the Committee makes mention of two

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<sup>101</sup> Mark Stuart, Senior Policy Officer, Department of Primary Industries and Regional Development, *Transcript of evidence*, 2 May 2018, p 28.

<sup>102</sup> Mia Carbon, Department of Primary Industries and Regional Development, Answers to question on notice 5 and 6 asked at hearing held 2 May 2018, dated 11 May 2018, p 6.

<sup>103</sup> Section 59 of the Act states 'A justice may issue a warrant authorising an inspector to enter a place or vehicle if satisfied, by an application supported by evidence on oath, that (a) there are reasonable grounds for suspecting that there is at the place or in the vehicle (i) an animal the welfare, safety or health of which is under threat; or (ii) anything that may afford evidence of the commission of an offence under this Act; or (b) entry onto the place or into the vehicle is reasonably required to investigate a suspected offence'.

other concerns raised by the agriculture and transport industries regarding the content of the Bill.

## Appointment of designated general inspectors

- 7.42 Proposed new section 35A(1), which would be inserted into the Act by clause 14 of the Bill, particularly raised concerns. For ease of reference, that subsection would read:

The Minister may, by written notice, designate a general inspector, other than a police officer, as a designated general inspector.

- 7.43 A joint submission by a number of industry bodies questioned this, on the grounds that such a designation should be made by the CEO of the Department, not the Minister.<sup>104</sup> The Western Australian Livestock Exporters' Association feared that a political element may infect the appointment process.<sup>105</sup> Wellard Limited agreed, adding:

The proposed new category of inspectors appointed by the Minister differs significantly to the existing General Inspectors that are appointed by the Director General of the Department. Arguably ministerial appointments have the potential to be politicised and could jeopardise the independence and impartiality of the animal welfare regime.<sup>106</sup>

- 7.44 The West Australian Pork Producers Association (Inc) raised the issue of accountability should the designate not be an employee subject to public sector guidelines.<sup>107</sup>
- 7.45 The Committee notes that it is unusual for an appointment of this type to be made at ministerial level. It is generally the head of the relevant government department that would decide administrative matters such as this.
- 7.46 In NSW, the regulatory powers set out under Division 2 of Part 2A of the *Prevention of Cruelty to Animals Act 1979* (NSW) are available only to duly appointed inspectors — these are officers who have been issued with an additional authority by the Minister, or the Secretary or Deputy Secretary of the relevant Department. In Victoria, a general inspector may be a public sector or RSPCA employee 'who is approved as a general inspector by the Minister in writing'. The Minister may further appoint someone who he or she considers to have appropriate qualifications to be a specialist inspector.<sup>108</sup>
- 7.47 In evidence to the Committee, the only explanation for this higher level of involvement in the appointment process was that, given that this is a new class of inspector with broader powers, it was felt appropriate for the Minister to make the designation.<sup>109</sup>
- 7.48 Only Victoria amongst the other states and territories has the minister alone being involved in such appointments. Fisheries officers in WA are appointed by the CEO of the department.<sup>110</sup>

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<sup>104</sup> Submission 195 from WA Farmers, Kimberley Pilbara Cattlemen's Association, Australian Dairy Farmers Ltd and Stud Merino Breeders Association WA, 26 April 2018, p 3.

<sup>105</sup> Submission 110 from the Western Australian Livestock Exporters' Association, 16 April 2018, p 1.

<sup>106</sup> Submission 195 from Wellard Limited, 26 April 2018, p 2.

<sup>107</sup> Submission 48 from West Australian Pork Producers Association Inc., 17 April 2018, p 1.

<sup>108</sup> *Prevention of Cruelty to Animals Act 1986* (Vic) ss 18(1)(b) and 18A(1).

<sup>109</sup> Mia Carbon, Acting Executive Director, Biosecurity, Department of Primary Industries and Regional Development, *Transcript of evidence*, 2 May 2018, p 27.

<sup>110</sup> *Fish Resources Management Act 1994*, Part 16.

## **Qualifications and experience of new inspectors**

- 7.49 Another area of concern for some submitters was that the Bill is silent as to the qualifications and experience of potential designated general inspectors. For example, the Pastoralists and Graziers Association of Western Australia (Inc) was concerned that the proposals would allow the Minister ‘to appoint any person’. It went on:
- This is simply unacceptable. These inspectors must be able to demonstrate experience of, skills in and knowledge of animal husbandry for their authority to be accepted by the livestock industry.
- They must have suitable qualifications; operate within clear terms of reference (and not a poorly drafted amendment to the current Animal Welfare Act), and have a clear reporting structure that is subject to adequate checks and balances.<sup>111</sup>
- 7.50 In WA, there are no statutory requirements in relation to the qualifications or experience of general inspectors. As has been mentioned, under section 33 of the Act, they are either nominated by the RSPCA or are people whom the CEO of the Department considers to be suitably qualified or experienced for the role. The Bill does not seek to make any amendments to those provisions in respect of the new class of designated general inspectors.
- 7.51 However, the Committee was informed that the Department requires all general inspectors to complete an online animal welfare training course before they are appointed under the Act. Moreover, they undertake a Certificate IV in Government Investigations or an equivalent qualification.<sup>112</sup> These are administrative rather than statutory requirements.
- 7.52 As in WA, no statutory requirements as to the requisite qualifications or experience of inspectors (however titled) exist in NSW. Nor do they in Victoria — eligibility for appointment as a general inspector is very similar to WA, though someone appointed as a Specialist Inspector must be a person ‘whom the Minister considers to have appropriate qualifications’.<sup>113</sup> In SA, an inspector must be a ‘qualified person’, meaning someone ‘who has successfully completed training as prescribed by the regulations’. That prescribed training is simply a course of training for inspectors provided or approved by the Minister.<sup>114</sup> In Queensland, the chief executive officer must be satisfied that someone being considered for appointment as an authorised officer has the necessary expertise or experience and has satisfactorily completed training approved by that chief executive officer. The same requirements exist for someone appointed as an inspector.<sup>115</sup>
- 7.53 Thus, it is usual for the requisite qualifications and experience of an inspector, however titled, to be determined administratively, and not to be enshrined in statute. The Committee see no issue with this aspect of the provisions.

### **Conclusions on this part**

- 7.54 The Committee questions whether the new designation of inspector is needed. It appears to the Committee that previous reports and inquiries were correct in saying that the existing provisions around inspectors are confusing. There are many types of appointees, all of whom can prosecute in their own name. There seems to be no centralised coordination of what

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<sup>111</sup> Submission 151 from Pastoralists and Graziers Association of Western Australia (Inc), 20 April 2018, p 3.

<sup>112</sup> Mark Stuart, Senior Policy Officer, Department of Primary Industries and Regional Development, *Transcript of evidence*, 2 May 2018, pp 28-29.

<sup>113</sup> *Prevention of Cruelty to Animals Act 1986* (Vic) ss 18 and 18A.

<sup>114</sup> *Animal Welfare Act 1985* (SA) s 28 and *Animal Welfare Regulations 2012* (SA), reg 4.

<sup>115</sup> *Animal Care and Protection Act 2001* (Qld) ss 99 and 114.

duties the varying types of inspector might be undertaking. The risk is that the addition of a new class of inspector potentially adds to the overall confusion.

- 7.55 Perhaps more importantly in terms of the exercise of existing powers, which would extend to the matters prescribed from national standards (that is, the welfare, safety and health of animals, as well as the investigation of cruelty offences), the Committee was also told that a warrant has never been refused. Reasonable suspicion that the welfare, safety or health of an animal is under threat is already grounds for the grant of a warrant under section 59 (paragraph 7.39 above).

### Fundamental legislative principles

- 7.56 As has been recounted, where a person who is a general inspector becomes a designated general inspector under the terms of proposed new section 35A of the Act, he or she would be equipped with new statutory powers not available to those without such a designation — the power to enter a non-residential place or vehicle at any time. These powers may be exercised without notice to the owner or occupier, and without the need for a warrant.
- 7.57 The Committee therefore turned its attention to FLP 5:
- 5: Does the Bill confer power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer?*
- 7.58 The general starting point is the long established common law principle that an invasion of private property is a trespass. Clearly, that principle has long been derogated from, though it remains the case that legislation should generally only confer power to enter premises with consent or a judicially-issued warrant.
- 7.59 Greater latitude has been granted in the past where the premises in question are non-residential. As detailed at paragraph 7.18, a power of inspection of this type has been granted by the WA Parliament in the past in the case of the *Biosecurity and Agriculture Management Act 2007*. The powers to enter a vehicle or non-residential premises under section 65 of that act were granted in the act as made — they were not provided by some later amendment bill.
- 7.60 Indeed, the bill which became that Act (the Biosecurity and Agriculture Management Bill 2006) was subjected to scrutiny by this Committee. No issue was taken with what was at that stage clause 65 of that bill.<sup>116</sup>
- 7.61 Some safeguards against an unwarranted exercise of the proposed powers have been built-into the Act as it would be amended by the Bill:
- Residential premises are safeguarded, as are vehicles used as a residence
  - The new entry powers are specifically limited to monitoring activities by proposed section 37(1)(aa)
  - The authority of a designated general inspector to exercise the new entry powers may be restricted by the Minister under proposed section 35A(3) at any time
  - A general inspector (including a designated general inspector) must carry an identification card, and must produce it if requested (section 36 of the Act).
- 7.62 Nevertheless, the statutory limitation on the powers of inspectors under the *Biosecurity and Agriculture Management Act 2007* (paragraphs 7.20 and 7.21 above), whereby inspectors should take reasonable steps to inform an owner or occupier before gaining entry, unless

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<sup>116</sup> Western Australia, Legislative Council, Standing Committee on Legislation, Report 7, *Biosecurity and Agriculture Management Bill 2006, Biosecurity and Agriculture Management (Repeal and Consequential Provisions) Bill 2006 and Biosecurity and Agriculture Management Rates and Charges Bill 2006*, April 2007, pp 57-58 and 138-40.

there is a reasonable suspicion that someone may be endangered or the purpose of the inspection compromised, is absent from this Bill.

- 7.63 The Committee is of the view that this fundamental legislative principle is clearly breached. The powers of entry that would be afforded designated general inspectors under clauses 16 and 17 of the Bill are generally unfettered, Section 38(3) of the Act merely states that an inspector (which would include a designated general inspector) *may* give not less than 24 hours' notice of an intended entry to premises.
- 7.64 Given that these enhanced powers of entry are intended only to be exercised in the context of 'monitoring' activities, rather than enforcement of the wider cruelty provisions, the Committee is unconvinced that a statutory notice provision should not be included in the Bill — either by amending 'may' to 'shall' in section 38(3), or by making a provision along the lines of that contained in section 65 of the *Biosecurity and Agriculture Management Act 2007*.

## **Findings and recommendations on this part**

**Where a majority finding or recommendation is indicated, the majority consisted of Hon Colin de Grussa MLC, Hon Jim Chown MLC and Hon Dr Steven Thomas MLC.**

### **FINDING 6**

The majority of the Committee finds that it is reasonable that an entry to a private property should continue to only be effected in the circumstances currently set out in the *Animal Welfare Act 2002*. Should a search warrant be necessary, it may be granted under section 59(a)(i) of the *Animal Welfare Act 2002*, where there are reasonable grounds for suspecting that there is in a place or vehicle, an animal the welfare, safety or health of which is under threat. This would cover grounds for suspicion that a breach of the national standards is occurring.

### **FINDING 7**

The majority of the Committee finds that it has not been persuaded that there is a need for the creation of this new category of designated general inspector at this point in time, nor for the enhanced powers of entry that such an inspector would enjoy. No evidence was adduced that the role of monitoring compliance with legislated standards and guidelines could not be adequately undertaken by existing inspectors, under existing powers, and the provisions in this part of the Animal Welfare Amendment Bill 2017 should be held in abeyance pending the outcome of the full review.

### **RECOMMENDATION 6**

Majority recommendation: Animal Welfare Amendment Bill 2017, at pages 7 to 9, clauses 14 to 17 — delete the clauses.

- 7.65 Should clauses 14 and 15 be proceeded with, and the new class of designated general inspector be created, the majority of the Committee would make the following findings and recommendations.

## FINDING 8

The majority of the Committee finds that the proposal that designated general inspectors be appointed by the Minister instead of, as is more usually the case, the administrative head of the relevant department, has caused an unnecessary measure of uncertainty and mistrust.

## RECOMMENDATION 7

Majority recommendation: Animal Welfare Amendment Bill 2017, at page 7, line 5, clause 14 — delete the word 'Minister' and replace it with 'CEO'.

## FINDING 9

The majority of the Committee finds that, for the purposes of monitoring compliance with legislated animal welfare standards and guidelines, the comparatively unfettered powers of entry that are proposed for designated general inspectors are unnecessary. The powers that exist for inspectors generally under the *Animal Welfare Act 2002* are sufficient for those purposes.

## RECOMMENDATION 8

Majority recommendation: Animal Welfare Amendment Bill 2017, at pages 8 to 9, clauses 16 and 17 — delete the clauses.

- 7.66 Should clauses 16 and 17 be proceeded with, the majority of the Committee makes the following finding and recommendation.

## FINDING 10

The majority of the Committee finds that, in the context of monitoring activities, no sufficient evidence was produced to justify a lack of any provisions allowing for notice to be given to owners or occupiers of premises prior to entry being effected. Consideration should be given to an amendment to section 38(3) of the *Animal Welfare Act 2002*, requiring the giving of 24 hours' notice before an entry to premises may be effected, or to an additional provision along the lines of that contained in section 65(3) and (4) of the *Biosecurity and Agriculture Management Act 2007*.

## RECOMMENDATION 9

Majority recommendation: that consideration be given to the inclusion in the Act of a statutory notice period of at least 24 hours before entry to non-residential premises may be effected by an inspector.

- 7.67 Should this part of the Bill be proceeded with, clauses 18 and 19(a) are acceptable to the Committee and may be passed.

## **CHAPTER 8**

## **Conclusions**

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- 8.1 Key to the Committee's consideration of the Bill have been two matters — a desire to have those clauses that are necessary to legislate the national standards and guidelines operational in WA without further delay, tempered with a sense of frustration at the paucity of detail of the remainder of the provisions included.
- 8.2 The skeletal nature of some of those provisions, together with the deployment of a Henry VIII clause, reflected not a desire to provide flexibility in law-making in the future but a lack of consideration of what legislation is really required.
- 8.3 If clauses 1 to 8 are passed by the Parliament, without further consideration of clauses 9 to 19, regulations may be made that will give full legislative effect to the standards and guidelines, which is the main focus of the Bill. The Committee was unconvinced that any of the ancillary proposals contained in clauses 9 to 19 were necessary. Moreover, no evidence was offered that they were urgent.
- 8.4 As has been mentioned, a review of the Act has been spoken of by Government since 2016. The Minister also mentioned such a review in her second reading speech, yet the evidence given to the Committee by Departmental officials revealed that this was not even close to commencement as yet. In order to ensure that the promised review is commenced and completed as soon as possible, the Committee makes one further recommendation.

### **RECOMMENDATION 10**

The Committee recommends that, should the Legislative Council be minded to pass all or any of the clauses of the Animal Welfare Amendment Bill 2017, consideration should be given to the addition of a 3-year sunset clause. This would give the Department of Primary Industries and Regional Development adequate time to commence a full review of the *Animal Welfare Act 2002* and return to Parliament with properly thought-out and coherent proposals before the amendments that would be made by the Animal Welfare Amendment Bill 2017 would cease to have effect.

## **Minority findings and recommendations**

**A minority of the Committee, comprising Hon Dr Sally Talbot MLC and Hon Pierre Yang MLC, made the following findings and recommendations:**

### **Finding**

The minority of the Committee finds that it is concerned that the Department of Primary Industries and Regional Development did not adequately demonstrate its claim that regulating for the creation of new cruelty offences would provide legal certainty for industry and producers (paragraph 6.25 above), and notes the strong view of all stakeholders that such measures would in fact undermine certainty by eroding the distinction between animal husbandry practices and animal cruelty offences. However, it is the minority of the Committee's view that the contentious measures set out in clauses 9-13 of the Animal Welfare Amendment Bill 2017, including the Henry VIII clause, are not necessarily inconsistent with either the operation of the *Animal Welfare Act 2002* or the growing trend towards delegating matters of considerable significance to regulation. It is therefore the minority of the Committee's recommendation that, subject to consideration of the further explanatory information outlined in 6.70 above, when these clauses are considered by the Legislative Council, clauses 1-13 of the Animal Welfare Amendment Bill 2017 be supported.

### **Recommendation**

The minority of the Committee recommends that, subject to consideration of the further explanatory information outlined in paragraph 6.71 above, clauses 9 – 13 of the Animal Welfare Amendment Bill 2017 be supported.

### **Finding**

The minority of the Committee finds that, due to recent events involving breaches of animal welfare standards, particularly with respect to the transport of animals, there is widespread public support for strengthening the powers of inspectors. Further, the Committee notes that the two previous inquiries which made recommendations about the operation of inspectors (Chapter 5 above) both found that clarification of the roles and responsibilities of inspectors was required. For these reasons, the minority of the Committee finds that the measures expanding inspectorial powers of entry are warranted, with an appropriate model being established in the *Biosecurity and Agriculture Management Act 2007* and the *Fish Resources Management Act 1994*.

### **Recommendation**

The minority of the Committee recommends that the measures contained in clauses 14 to 17 of the Animal Welfare Amendment Bill 2017 for expanded inspectorial powers of entry are warranted, with an appropriate model for the powers being established in the *Biosecurity and Agriculture Management Act 2007* and the *Fish Resources Management Act 1994*.



Hon Sally Talbot MLC

**Chair**

## **APPENDIX 1**

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### **LIST OF SUBMISSIONS**

<b>Number</b>	<b>From</b>
1	Mark Simonsen
2	Australian Livestock and Property Agents Association
3	Gail Wright
4	Jemma Ridgeway
5	Claire Dolling
6	Donna Bree Griffiths
7	Dr Kirsten Jackson
8	Lynda Purser
9	Dani Summers
10	Karina Thirling
11	Prema and Jaggu Saklani
12	Malcolm Hollier
13	Sarah Herzberger
14	Sue Littleton
15	Kyley Felix
16	Shoba Nair
17	Bridget Ingram
18	Anne Greenaway
19	Marriana Chester
20	Ashlin McKenna
21	Meghala Nair
22	Albert Mah
23	Heather Scott
24	Carmen Chan
25	Verena Homburger
26	Sue Forte

<b>Number</b>	<b>From</b>
27	Karys Bovell
28	Kirsten Weber
29	Immacolata Lamberti
30	Peta Rakela
31	Christine Smith
32	Helen McLernon
33	Richard Ingram
34	Ric Earnshaw
35	Michelle Espinoza
36	Hugo Jorge
37	Katherine de jong
38	Sue Turland
39	Kathryn Smith
40	Ursi Israng
41	Simone Van Vugt
42	Natalie Davis
43	Naomi Blondel
44	Jessica Atkinson
45	Jane Flynn
46	Margaret Celenza
47	Melissa Macpherson-Kardol
48	Western Australian Pork Producers Association Inc
49	Caroline Perks
50	WA Police Union
51	Kelly Hodges
52	Lara Dwyer
53	Belinda Warner
54	Renae Russo
55	Candice Gillam

<b>Number</b>	<b>From</b>
56	Katie Lucantonio
57	Mark Dolling
58	Clarise Forte
59	Gabby Pieri
60	Kate Rodger
61	Linda Kemp
62	Rosalie Brittain
63	Melanie Griffiths
64	Emma Coles
65	Adam O'Neill
66	Anita Goldsmith
67	Russell Corbin
68	Rick Dolling
69	Zuzanna Kania
70	Ray Leemans
71	Elizabeth Barr
72	Chiara Simone
73	Amber Caldwell
74	Andrea Shackel
75	Melissa Randall
76	Anne Mummery
77	Michelle James
78	Sarah Anderson
79	Dr Donna Mazza
80	Lucy Henderson
81	Kaitlan Sonnendecker
82	Paul Gregory
83	Catherine Gray
84	Marina Cortvriendt

<b>Number</b>	<b>From</b>
85	Robyn Socksmith
86	Emily Cook
87	Katherine McCann
88	Carol Hutchinson
89	Jehni Thomas-Wurth
90	Lauren Yerex
91	Ajit Varsani
92	Erna Stein
93	Mark Berriman
94	Cassidy Austin
95	Pamela Hall
96	Crystal Tania
97	Michelle Johnston
98	Di Rowling
99	Josephine Shaw
100	Adrienne Byrd
101	Jennifer Bell
102	Lisbeth Caldwell
103	Dr Jennifer Harris
104	Judy and Jonathan Smith
105	Brenda Boulter
106	Kiara Clinton
107	Dr Diane Raphaely
108	Judy Jenkinson
109	Carolyn Byrne
110	The Western Australian Livestock Exporters' Association
111	Livestock and Rural Transport Association of WA (Inc)
112	Alyss Liu
113	Kim Eldret

<b>Number</b>	<b>From</b>
114	Joanne Douglas
115	Kerry-Ella McAullay
116	Eric Gobbert
117	Dr Alicia Sutton
118	Tanya Urago
119	Giselle Tonee
120	Dee-Dee Lovering and Niall Tallon
121	Kate Mitchell
122	Sylvia Cooper
123	Julie Trew
124	Anne Leeson
125	Treacy Lockie
126	Animal Angels' - Australia
127	Department of Primary Industries and Regional Development
128	Nicole Arielli
129	Alexandra Newman
130	Craig Mansfield
131	Helen Ivory
132	Dr Sally Vindedzis
133	Graham Johnson
134	Jenny Crisp
135	Clare Hitt
136	Katrina Sobianina
137	Elizabeth Johnson
138	Vanessa Williams
139	Sarah Gould
140	Shelby Newman
141	Robyn McMahon
142	Julie Hay

<b>Number</b>	<b>From</b>
143	Cornelia and Thomas Brieden
144	Mary Kovacevich
145	Private Submission
146	Jamie Coombs
147	Dr Susan Foster
148	Sharon Aritonovic
149	Talitha Marco
150	Greener Pastures Sanctuary Inc.
151	Pastoralists and Graziers Association of Western Australia (Inc)
152	AAA Egg Company Pty Ltd
153	Lara Paulson
154	Bruno Lamberti
155	Christine Blakers
156	Deanne Vines
157	Luella Botteon
158	Jessica Boak
159	Jan Rodda
160	Michael D'Andrea
161	Betty Kooy
162	Sam and Colleen Piantadosi
163	Bridgit Anderson
164	Carly Leeson
165	Teri Goldsworthy
166	Robyn Fary
167	Joanna Watts
168	Linda Stewart
169	Susan Guy
170	Elizabeth McCasker
171	Judith Fakhoury

<b>Number</b>	<b>From</b>
172	Holly Campbell
173	Christine Yurovich
174	Andrea Pollard
175	Australian Pork Limited
176	James Alexander
177	Wendy Maben
178	Ruchita Saklani
179	Rosemary Waldron-Hartfield
180	Romany Spencer
181	Heather Jones
182	Liddell Williams
183	Amanda Pringle
184	Roz Robinson
185	Rachel Currie
186	Animal Aid Abroad Inc.
187	Marlies Loescher
188	Ina-Marie Canutel
189	Dr Nathalie Casal
190	Sheree Yorke
191	Canine Welfare Alliance of Australia Inc.
192	Stud Marino Breeders Association of WA (Inc)
193	Animals Australia
194	Renee Cusworth
195	WA Farmers, Kimberley-Pilbara Cattleman's Association, Australian Dairy Farmers Limited and Stud Breeders Association of WA (Inc)
196	Wellard Limited
197	The Commercial Egg Producers Association of WA (Inc)
198	Royal Society for the Protection of Animals Western Australia

## **APPENDIX 2**

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### **Fundamental Legislative Principles**

#### **Does the legislation have sufficient regard to the rights and liberties of individuals?**

1. Are rights, freedoms or obligations, dependent on administrative power only if sufficiently defined and subject to appropriate review?
2. Is the Bill consistent with principles of natural justice?
3. Does the Bill allow the delegation of administrative power only in appropriate cases and to appropriate persons?
4. Does the Bill reverse the onus of proof in criminal proceedings without adequate justification?
5. Does the Bill confer power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer?
6. Does the Bill provide appropriate protection against self-incrimination?
7. Does the Bill adversely affect rights and liberties, or impose obligations, retrospectively?
8. Does the Bill confer immunity from proceeding or prosecution without adequate justification?
9. Does the Bill provide for the compulsory acquisition of property only with fair compensation?
10. Does the Bill have sufficient regard to Aboriginal tradition and Island custom?
11. Is the Bill unambiguous and drafted in a sufficiently clear and precise way?

#### **Does the Bill have sufficient regard to the institution of Parliament?**

12. Does the Bill allow the delegation of legislative power only in appropriate cases and to appropriate persons?
13. Does the Bill sufficiently subject the exercise of a proposed delegated legislative power (instrument) to the scrutiny of the Legislative Council?
14. Does the Bill allow or authorise the amendment of an Act only by another Act?
15. Does the Bill affect parliamentary privilege in any manner?
16. In relation to uniform legislation where the interaction between state and federal powers is concerned: Does the scheme provide for the conduct of Commonwealth and State reviews and, if so, are they tabled in State Parliament?







## **Standing Committee on Legislation**

### **Date first appointed:**

17 August 2005

### **Terms of Reference:**

The following is an extract from Schedule 1 of the Legislative Council Standing Orders:

#### **'4. Legislation Committee**

- 4.1 A *Legislation Committee* is established.
- 4.2 The Committee consists of 5 Members.
- 4.3 The functions of the Committee are to consider and report on any Bill referred by the Council.
- 4.4 Unless otherwise ordered, any amendment recommended by the Committee must be consistent with the policy of the Bill.'



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