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**THE LEGISLATIVE ASSEMBLY FOR
THE AUSTRALIAN CAPITAL TERRITORY**

ANIMAL WELFARE AMENDMENT BILL 2016

EXPLANATORY STATEMENT

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Introduction

This explanatory statement relates to the Animal Welfare Amendment Bill 2016 (the bill) as presented to the Legislative Assembly. It has been prepared to assist the reader of the bill and to help inform debate on it. It does not form part of the bill and has not been endorsed by the Assembly.

The statement should be read in conjunction with the bill. It is not, and is not intended to be, a comprehensive description of the bill. What is written about a provision is not to be taken as an authoritative guide to the meaning of a provision, this being a task for the courts.

Overview

In August 2015, the Government noted recommendations made by the Select Committee on Estimates' *Inquiry into Appropriation Bill 2015-2016 and Appropriation Bill (Office of the Legislative Assembly) Bill 2015-2016* (made in response to submissions by RSPCA ACT) that the Government develop a long-term strategy for the delivery of animal welfare services for the ACT, including preventive investment and educational approaches.

On 28 October 2015, the Legislative Assembly passed a resolution noting the mission, objectives and achievements of RSPCA ACT, calling on the government to develop a long-term strategy for the delivery of animal welfare services, and to legislate for improved animal welfare.

The Animal Welfare Amendment Bill 2016 is the Government's response to these calls for action. The bill reflects consultation with the Territory's peak animal welfare stakeholders and targets issues identified in enforcement activity and prosecutions under the Act.

The bill will improve the operation of the *Animal Welfare Act 1992* (the Act), to—

- i. promote and protect the welfare, safety and health of animals;
- ii. ensure the proper and humane care and management of animals;
and
- iii. reflect the community's expectation that people who keep or care for animals will ensure they are properly treated.

The bill will resolve structural and procedural issues that are hindering the application, enforcement and prosecution of the Act. These amendments are briefly discussed below.

New section 6A defines cruelty for sections 7 and 7A. Cruelty, in relation to an animal, will include—

- (a) causing pain that is unjustifiable, unnecessary or unreasonable in the circumstances;
- (b) beating that causes pain;
- (c) abusing, terrifying or tormenting;
- (d) injuring or wounding that is unjustifiable, unnecessary or unreasonable in the circumstances.

The inclusion of this list more clearly identifies the physical or objective elements of the offences under section 7 and 7A, correcting deficiencies in the construction of the previous provisions, which required the court to make a subjective determination of a person's intention.

New section 6B provides a clear statement that a person in charge of an animal has a duty to care for the animal. The duty to care for an animal requires only that a person take reasonable steps to provide for the animal's needs in a way that is appropriate, including such basic needs as food, water, accommodation and treatment for illness, disease or injury. The offence provision under this statement provides that a person who fails to take reasonable steps to provide for an animal's basic needs, or who abandons the animal, will be guilty of an offence for which the maximum penalty is 100 penalty units. Subsection (3) gives further guidance for this section—

appropriate means suitable for the needs of the animal having regard to the species, environment and circumstances of the animal.

reasonable steps means the steps a reasonable person would be expected to take having regard to all the circumstances.

treatment includes veterinary treatment if a reasonable person would expect veterinary treatment to be sought in the circumstances.

Codes of practice made under section 22 of the Act provide further and more detailed guidance on the welfare of animals and responsible animal ownership.

Sections 6A and 6B will replace section 8 (pain) to more clearly and effectively prohibit animal neglect and cruelty. Section 8 (2) (d) of the Act had created an unintended barrier to the prosecution of neglect because it criminalised the outcome of neglect, not the neglect itself. Specifically, it required the prosecution to establish that a person had neglected an animal *in a way that caused it pain*. This issue of construction was the subject of Burns J's comment in recent appeal proceedings—

"It will immediately be observed that s 8 (2) (d) of the Act does not criminalise all forms of neglect of an animal, but only those that cause

*the animal pain.*¹

The bill amends section 14 of the Act to provide a more effective prohibition on cockfighting spurs and other devices that are made or adapted to be attached to an animal that lets the animal cause injury to another animal. Under the amended provision, a person commits an offence if the person possesses a prohibited item. The bill moderately increases the maximum penalty for this offence, from 5 penalty units to 20 penalty units. Amendments also narrow the exception to the offence to those circumstances in which a genuine exception might apply to excuse the possession of these items. This amendment in particular has been included at the request of RSPCA ACT during consultation on the draft bill. The amended provision is similar to the New South Wales *Prevention of Cruelty to Animals Act 1979* and is broadly consistent with prohibitions in Queensland, Western Australia and Tasmania, representing greater jurisdictional consistency.

The bill amends sections 82 and 84 of the Act, which provide for the powers of inspectors and authorised officers. New sections 82 (1) (fa) and (fb) and 84 (1) (ga) and (gb) clarify an area of uncertainty and provide a power to enforce court orders. Under these provisions, inspectors and authorised officers will have the power to seize dependent offspring of a seized animal and to seize an animal where the inspector or authorised officer believes on reasonable grounds that the animal is kept in contravention of an interim or other order.

New sections 82 (4), 84 (4), 82A, 82B and 84 AA and 84AB are regulatory revisions, which bring the Act up to date with template powers exercised by authorised officers in equivalent circumstances under other Territory legislation. These amendments will facilitate a more effective framework for the welfare and protection of animals and provide an essential safety measure for inspectors and authorised officers performing their functions under the Act.

New section 100A allows the court to make an interim order as it considers appropriate that a person must not purchase or acquire, keep, care for or control any animal within a stated period. The interim order will be available in very limited circumstances, where an animal has been seized from a person, proceedings commenced, and the court is satisfied that unless an appropriate order is in place, the person is likely to engage in conduct in relation to an animal that requires—

- i. the seizure of an animal under the Act; or
- ii. a further proceeding to be started for an offence.

This amendment aims to prevent or deter the commission of further offences and ensure the welfare and protection of any animals that may be acquired subsequent to a seizure and prior to the determination of any charges.

An amendment to section 101 (3) maintains consistency with this provision and allows the court at the time of sentencing to make an order as it considers

¹ *Croatto v Banks* [2015] ACTSC 398

appropriate, that a person must not purchase or acquire, keep, care for or control any animal within a stated period. This order will be available where the court has convicted a person, or found them guilty, of, animal welfare offences, and the court is satisfied that unless an appropriate order is in place, the person is likely to commit a further animal welfare offence.

New sections 101 (2) and 101 (5) will allow a court, in specific and limited circumstances, to make an order in relation to the payment to the Territory of expenses incurred in the care of animals. This amendment responds to an increasing, unintended and unfeasible trend where owners who are alleged to have committed animal welfare offences are indirectly being permitted to shift the costs of their animal's care, treatment and rehabilitation to the Territory, and ultimately, the community. The amended provisions are consistent with section 114(6) of the *Domestic Animals Act 2000*, which provides that an owner of an animal seized under the animal nuisance provisions is responsible for any costs or expenses incurred by the Territory for seizing or impounding the animal.

Human rights

The bill includes a number of amendments that engage and or limit rights protected under the *Human Rights Act 2004*.

The preamble to the Human Rights Act notes that few rights are absolute and that they may be subject only to the reasonable limits in law that can be demonstrably justified in a free and democratic society. Section 28 (2) of the Human Rights Act contains the framework that is used to determine acceptable limitations that may be placed on protected rights. Section 28 requires that any limitation on a fundamental right must be authorised by a Territory law, based on evidence, and must be reasonable to achieve a legitimate aim. Whether a limitation is reasonable depends on whether it is proportionate. Proportionality can be understood and assessed as explained in *R v Oakes*².—

[f]irst, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair “as little as possible” the right or freedom in question. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of “sufficient importance”³.

The Government considers that the limitations on human rights in this bill are proportionate and justified in the circumstances because they are the least restrictive means available to remove unintended barriers from effective

² [1986] 1 S.C.R. 103.

³ *R v Oakes* [1986] 1 S.C.R. 103.

government action in animal welfare matters and achieve the objectives of the Animal Welfare Act.

The nature of the right affected

The bill engages and limits the right to privacy and rights in criminal proceedings, which are protected under sections 12 and 22 respectively of the Human Rights Act. Section 12 of the Human Rights Act provides,

Everyone has the right not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily.

Section 22 details rights in criminal proceedings. Perhaps the most well-known of these is the right to be presumed innocent until proved guilty according to law. Section 22 rights are engaged by any offence provision in legislation.

The importance of the purpose of the limitation

The Animal Welfare Act aims to promote the welfare, safety and health of animals, ensure their proper and humane care and management, and reflect the community's expectation that people who keep or care for animals will ensure they are properly treated. However, evidence from prosecutions indicates that animal neglect is emerging as a significant problem in the Territory and the construction of certain provisions in the Act is creating barriers to the Government's ability to respond to animal neglect and abuse. Corrective amendment is necessary to remove impediments to effective investigation, enforcement and prosecution of animal welfare offences. The bill makes targeted amendments to ensure the Act can achieve those objectives.

The nature and extent of the limitation

The amendments involve minimal limitation on protected rights. These limitations will apply in specific and limited circumstances, to ensure the Territory's animal welfare framework operates effectively.

The duty to care for an animal and the definition of animal cruelty will operate as moderate and reasonably defined boundaries of proper and humane care and management of animals. People who keep or care for animals will be required only to take reasonable steps to provide for the animal's needs in a way that is appropriate, including such basic needs as food, water, accommodation and treatment for illness, disease or injury. The list of acts that will be taken to constitute animal cruelty is, similarly, moderate, contemplating overt, excessive and deliberate acts of cruelty.

Amendments to section 14 insert the definition of *prohibited item* to describe more clearly these items, and revise the exception to the offence. The bill increases the maximum penalty for possession of a prohibited item from 5 penalty units to 20 penalty units. This is a moderate increase but one which seeks to more effectively prohibit items that are used to significantly increase the damage that can be inflicted on an animal by a person or another animal

in a fight. A person who merely displays a prohibited item and demonstrates that the item is not intended for use on or in relation to an animal will not be guilty of an offence. Charges will be decided by the court after a fair and public hearing, applying the rights guaranteed to all people involved in criminal proceedings.

The power to seize dependant offspring of a seized parent animal under new sections 82 (1) (fa) and 84 (1) (ga) will protect very young animals from neglect and abuse, and prevents the health and welfare risks associated with separation before an animal is able to feed independently. The amendment corrects an area of ambiguity within the operation of the law and ensures the welfare of all at-risk animals. While the exercise of this power limits the right to privacy, the power will only be used in accordance with the entry and search powers at section 81 of the Act, in circumstances where an inspector or authorised officer believes on reasonable grounds that the exercise of the power is necessary for the purposes of the Act. The power to seize dependent offspring will only be used where the mother has been seized under sections 82 (1) (f), or 84 (1) (g), and in accordance with section 74 of the Act. Under section 74 of the Act, an animal or thing is *connected with a particular offence if—*

- i. it is an animal or thing in relation to which the offence has been committed; or
- ii. it will provide evidence of the offence; or
- iii. it was used, or is or was intended to be used, to commit the offence.

Other amendments to sections 82 and 84 update the legislation and ensure the Act is consistent with the powers that are exercised by authorised officers in equivalent circumstances under other Territory legislation. These amendments reflect the Territory's obligation to ensure officers performing compliance and enforcement functions have the minimum powers necessary to discharge their functions effectively and safely. Animals can be unpredictable and may attack when they are hurt or feel threatened. Inspectors have also been threatened or seriously assaulted by owners in a number of recent cases. The amendments allow an inspector or authorised officer to require a person's compliance with a requirement made of them. Their purpose is to ensure the safety of an animal, the authorised officer and any other person present and to ensure the officer can perform their functions effectively. Once again, the power to enter a private residence will only be used in accordance with section 81 of the Act—

- i. with the consent of the occupier of the premises;
- ii. in accordance with a warrant; or
- iii. where an inspector or authorised officer believes on reasonable grounds that serious or urgent circumstances require the immediate exercise of their powers without a warrant.

The power to require a person's full name and address is consistent with the *Public Unleased Land Act 2013*, the *Domestic Animals Act 2000*, and can only

be exercised if an inspector or authorised officer believes on reasonable grounds that a person—

- i. has committed, is committing or is about to commit an offence against the Act; or
- ii. may be able to assist in the investigation of an offence under the Act.

The requirement for *belief on reasonable grounds* limits the use of the power to those situations where an inspector or authorised officer determines it is just and appropriate in all the circumstances.

The amendments limit the right to privacy and engage rights in criminal proceedings through a strict liability offence and a reverse burden of proof. These elements of the offence are applied consistently with the template powers for authorised officers in Territory legislation and are clearly identified, in accordance with government policy.

Because they reverse the onus of proof, strict liability offences represent a limitation of rights in criminal proceedings, protected under section 22 of the Human Rights Act. While there is no requirement to prove a fault element in strict liability offences, such as intention or recklessness, the defence of reasonable mistake of fact will apply through section 36 of the *Criminal Code 2002*. The penalty units for the strict liability offences are within the acceptable range for a strict liability offence. The offence provisions enforce standard directions that apply if an inspector or authorised officer believes on reasonable grounds that a person has committed, is committing or is about to commit an offence against this Act, or may be able to assist in the investigation of an offence against this Act. The offences will not apply to a person if the inspector or authorised officer did not produce their identity card for inspection by the person if asked. They will not apply if the inspector or authorised officer did not warn the person that failure to comply with the direction is an offence. The reverse evidential burden will not impose an unreasonable or onerous requirement.

While penalties already apply for contravention of an order under section 101, the bill will facilitate the swift action that may be required to effectively enforce the Act or prevent further offences.

The power to seize an animal kept in contravention of a court order is necessary to give proper effect to the court's power to make an order under new section 100A and section 101. RSPCA ACT (performing the ACT's animal welfare inspectorate functions) has advised that people from whom animals have been seized under section 82 (1) (f) or 84 (1) (g) are subsequently obtaining animals before the conclusion of proceedings against them, or in contravention of an order by the court under section 101.

The interim order under section 100A will be available in very limited circumstances, where an animal has been seized from a person, proceedings commenced, and the court is satisfied that unless an appropriate order is in

place, the person is likely to engage in conduct in relation to an animal that requires—

- i. the seizure of an animal under the Act; or
- ii. a further proceeding to be started for an offence.

Section 101 responds to evidence that some people who are convicted of offences in relation to animals are likely to commit further offences in relation to the animal or other animals. The amendment to this section provides—

- i. if the court has convicted or found a person guilty of animal welfare offences, and
- ii. the court is satisfied that, unless an appropriate order is made, the person would be likely to commit a further offence,
- iii. the court may make an order that the person must not purchase or acquire, or take possession or custody of, any animal within the period stated in the order.

The amendments will facilitate more effective responses in animal welfare matters, and aim to prevent or at least deter further offences under the Act. This outcome is in the community's interests and is consistent with the objects of the Act.

The relationship between the limitation and its purpose

Each limitation is necessary to meet the objectives of the Act, to ensure the safety of enforcement officers, and to maintain the balance between protected rights and the community's expectation that the government will provide and maintain an effective framework for animal welfare and protection.

Any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve

The bill's amendments are necessary and rationally connected to protecting the welfare, safety and health of animals and ensuring their proper and humane care and management. As discussed above, they are moderate, regulatory in nature, and the least restrictive means to accomplish these objectives. They will not have a disproportionately severe impact on the people to whom they apply. The amendments necessarily involve limitations on protected rights. However, these are limited, clearly defined and consistent with other legislation in the Territory and other jurisdictions.

OUTLINE OF PROVISIONS OF THE BILL

Clause 1 Name of Act

This clause provides that the name of the Act is the *Animal Welfare Amendment Act 2016*.

Clause 2 Commencement

This clause provides for the commencement of the Act. The Act commences on a day fixed by the Minister by written notice.

Clause 3 Legislation amended

This clause provides that this Act amends the *Animal Welfare Act 1992*. The note to clause 3 provides that the Act also amends the following legislation:

- *Domestic Animals Act 2000*
- *Domestic Violence and Protection Orders Act 2008*
- *Magistrates Court (Animal Welfare Infringement Notices) Regulation 2014*.

Clause 4 New sections 6A and 6B

This clause inserts new section 6A, to define cruelty for Part 2. *Cruelty*, in relation to an animal, includes the following:

- (a) causing pain that is unjustifiable, unnecessary or unreasonable in the circumstances;
- (b) beating that causes pain;
- (c) abusing, terrifying or tormenting;
- (d) injuring or wounding that is unjustifiable, unnecessary or unreasonable in the circumstances.

New section 6B (1) provides that a person in charge of an animal has a duty to care for the animal. Section 6B (2) provides that a person in charge of an animal commits an offence if the person—

- (a) fails to take reasonable steps to provide the animal with appropriate—
 - (i) food and water; or
 - (ii) shelter and accommodation; or
 - (iii) opportunity to display behaviour that is normal for the animal; or
 - (iv) treatment for illness, disease, and injury; or
- (b) abandons the animal.

Consistent with other penalties in the Act, the maximum penalty for this offence is 100 penalty units, imprisonment for 1 year, or both.

This section also includes definitions of *appropriate*, *reasonable steps* and *treatment*.

Clause 5 Pain

New section 8

This clause omits section 8 (Pain), which is no longer necessary as a consequence of new sections 6A and 6B.

Clause 6 Section 14

This clause substitutes new section 14. New section 14 reads, *Use or possession of prohibited item*. Amended section 14 (1) provides that a person commits an offence if the person uses a prohibited item on, or in relation to, an animal. The maximum penalty for this offence remains unchanged, at 100 penalty units, imprisonment for 1 year or both.

Amended section 14 (2) provides that a person commits an offence if the person possesses a prohibited item. The maximum penalty for this offence is increased from 5 penalty units to 20 penalty units, to provide a more effective prohibition on the possession of the items listed at subsection (4).

The amended offence reflects information that other items are being used on or in relation to animals, for example, in matches or competitions that are prohibited under section 17 of the Act. The offence will not apply to a person if the person possesses the item only for display or as part of a collection that is not intended for use on, or in relation to, an animal.

The new definition of prohibited item clarifies that prohibited items include not only spurs with sharpened or fixed rowels, but also cockfighting spurs and any device that is made or adapted to be attached to an animal that lets the animal cause injury to another animal.

Clause 7 Exception—conduct in accordance with approved code of practice or mandatory code of practice

Section 20 (d)

This clause substitutes the amended heading of section 14—(Use or possession of prohibited item).

Clause 8 Powers of inspectors
New sections 82 (1) (fa) and (fb)

This clause inserts an authority to seize dependent offspring of an animal seized under section 82 (f), or any animal the inspector believes on reasonable grounds is kept by, or in the care or control of, a person in contravention of an interim or other order.

New section 82 (1) (fa) provides that the power to seize an animal under section 82 (f) extends to any dependent offspring of that animal.

Under new section 82 (1) (fb), inspectors will have the power to enforce orders made by the court under new section 100A (2) and section 101 (3).

Clause 9 New section 82 (4)

This clause inserts new section 82 (4), which provides that a person must take reasonable steps to comply with a requirement made of them by an inspector under subsection (1) (g).

The maximum penalty for this offence is 20 penalty units. The new provision is consistent with the Territory's compliance models.

Clause 10 New sections 82A and 82B

This clause provides standard directions that apply if an inspector believes on reasonable grounds that a person has committed, is committing or is about to commit an offence against this Act, or may be able to assist in the investigation of an offence against this Act.

Section 82B includes a strict liability offence and applies a maximum penalty of 5 penalty units. Balancing the moderate limitation on the right to privacy and the engagement of rights in criminal proceedings, the offence will not apply to a person if the inspector did not produce their identity card for inspection by the person if asked. The offence will also not apply if the inspector did not warn the person that failure to comply with the direction is an offence.

The note to this provision identifies that the defendant has an evidential burden in relation to the matters mention in subsection 4.

Clause 11 Powers of authorised officers
New sections 84 (1) (ga) and (gb)

Consistent with new sections 82 (1) (fa) and (fb), this clause inserts an authority to seize any dependent offspring of an animal seized under paragraph (f), or any animal the authorised officer believes on reasonable grounds is kept by, or in the care or control of, a person in contravention of an interim or other order.

New section 84 (1) (ga) clarifies that the power to seize an animal under section 84 (g) must also extend to any dependent offspring of that animal.

Under new section 84 (1) (gb), authorised officers will have the power to enforce orders made by the court under new section 100A (2) and section 101 (3).

Clause 12 New section 84 (4)

This clause inserts a parallel to section 82 (4), for authorised officers. New section 84 (4) provides that a person must take reasonable steps to comply with a requirement made of them by an authorised officer under subsection (1) (h). The new provision is consistent with the Territory's compliance models.

Clause 13 New sections 84AA and 84AB

Consistent with new sections 82A and 82B, which apply to inspectors, this clause provides standard directions that apply if an authorised officer believes on reasonable grounds that a person has committed, is committing or is about to commit an offence against this Act, or may be able to assist in the investigation of an offence against this Act.

An offence against this section is a strict liability offence with a maximum penalty of 5 penalty units. The offences will not apply to a person if the authorised officer did not produce their identity card for inspection by the person if asked. The offence will not apply if the authorised officer did not warn the person that failure to comply with the direction is an offence.

The note to this provision identifies that the defendant has an evidential burden in relation to the matters mention in subsection 4.

Clause 14 New section 100A

Clause 14 inserts new section 100A. This clause applies if an animal has been seized under section 82 (1) (f) or section 84 (1) (g), and a proceeding for an offence has been started in a court against a person who was, before the seizure, in charge of the seized animal. The clause provides that—

- (i) if the court is satisfied that, unless an appropriate interim order is made, the person is likely to engage in conduct relating to an animal that requires the seizure of an animal under this Act or a further proceeding to be started for an offence,
- (ii) the court may make an order (an interim order) as it thinks fit that the person must not purchase or acquire, keep care for or control any animal within the period stated in the order.

The duration of an interim order must be stated in the order and must not be longer than 6 months. Contravention of an order carries a maximum penalty of 50 penalty units, imprisonment for 6 months or both.

Clause 15 Animal offences—court orders (general)

Section 101 (2) and 101 (3)

Clause 15 substitutes section 101 (2) and 101 (3). Section 101 (2) will provide for the court to make a further order as it considers appropriate in relation to the payment to the Territory of expenses incurred in the care of the animal in relation to which the offence was committed, and any other animal of which the person is in charge.

Amended section 101 (3) no longer depends on an order being made by the court under subsection (2). This distinction limited the power of the court to make appropriate orders in circumstances where the court is satisfied that, unless an order is made, the person would be likely to commit a further offence in relation to an animal.

Clause 16 New section 101 (5)

This clause inserts a definition of expenses incurred in the care of an animal. These will include any expense incurred by, or on behalf of the Territory for—

- (a) taking possession of the animal;
- (c) transporting the animal;
- (d) providing food, drink and water for the animal;
- (e) providing shelter or accommodation for the animal;
- (f) providing veterinary care for the animal.

Clauses 17—23

These clauses are consequential to the amendments to section 14.

Clause 24 Dictionary, new definition of *cruelty*

This clause inserts a reference to the definition of cruelty for Part 2.

Clause 25 Dictionary, new definition of *prohibited item*

This clause inserts a reference to the definition of prohibited item at section 14.

Schedule 1 Consequential amendments

Part 1.1 Domestic Animals Act 2000

1.1 Dictionary, definition of *animal welfare offence*, paragraph (c)

This clause substitutes the dictionary reference to section 6B.

1.2 Dictionary, definition of *animal welfare offence*, paragraph (m)

This clause updates the dictionary reference to section 14 (Use or possession of a prohibited item).

Part 1.2 Domestic Violence and Protections Orders Act 2008

1.3 Section 13 (3), definition of animal violence offence, paragraph (c)

This clause omits section 8 (Pain) at paragraph (c).

Part 1.3 Magistrates Court (Animal Welfare Infringement Notices) Regulation 2014

1.4 Schedule 1, Item 7

This clause removes section 14(2) from the list of offences for which an infringement notice may be issued under the *Magistrates Court (Animal Welfare Infringement Notices) Regulation 2014*.