



9 October 2012

Via email

Dear Premier Baillieu, Minister Walsh, Minister Hall and Honourable Members of the Legislative Council of Victoria,

Primary Industries and Food Legislation Amendment Bill 2012 (Vic)

We write to draw your urgent attention to what we believe to be a significant flaw within the *Primary Industries and Food Legislation Amendment Bill 2012 (Vic)* ("**PIAFLA Bill**"), namely: its failure to provide for disallowance by either House of Parliament of a code of practice prescribed under Clause 33. Having already been passed by the Legislative Assembly, this Bill is currently scheduled for second reading in the Legislative Council, having been moved on 13 September 2012.

Codes of practice set minimum standards for the treatment of animals. Parliamentary oversight of these codes is fundamentally important because adherence to a code of practice is a full defence to a charge of animal cruelty. Industry groups are closely consulted in the process of drafting codes of practice and clearly have a vested interest in minimising their legal obligations. In order to maintain transparency and democratic oversight of animal welfare standards, it is our submission that Parliament should maintain its function as the overseer of these codes.

Lawyers for Animals is a not-for-profit incorporated association run by a management committee of lawyers. Its objectives include: alleviating the suffering of animals by engaging with those who create or administer laws in Australia to strengthen legal protection for animals; developing awareness of animal suffering among the legal profession and the wider Australian public through information and education; and promoting better animal welfare practices among animal-related industries in Australia.

Urgent call for amendment to *Primary Industries and Food Legislation Amendment Bill* to preserve democracy

'All regulations are law. Citizens are required to obey them. The regulations are made by the Executive and not the Parliament for good and practical reasons including:—

- pressures on Parliamentary time;*
- dealing with situations which change quickly; and*
- dealing with precise technical matters.*

Even so, it is imperative in our parliamentary democracy that Members of the Parliament have opportunity to examine them and ensure that law thus being made is not inappropriate.'

[Scrutiny of Acts and Regulations Committee, Eleventh Report to Parliament on Subordinate Legislation - Annual Report concerning Statutory Rules Series 1998, para. 1.4, May 1999]

Section 23(1)(a) of the *Subordinate Legislation Act 1994* (Vic) provides for the disallowance of a statutory rule or part of a statutory rule if 'the power to make the statutory rule is expressed to be subject to the statutory rule being disallowed by the Parliament or by a House of the Parliament'. Codes of practice which govern the treatment of most Australian animals are regarded as statutory rules.

Clause 33 of the *PIAFLA Bill* inserts (new) Section 11(2) into the *Prevention of Cruelty to Animals Act 1986* (Vic) (**'POCTAA'**). It states that it is a defence to cruelty or aggravated cruelty if the person charged was carrying out the activity "in accordance with a code of practice prescribed for the purposes of this subsection (other than a Code of Practice made under section 7)".

By email dated 29 August 2012, the Bureau of Animal Welfare informed Lawyers for Animals that:

"A Code of Practice prescribed for the purposes of proposed new section 11(2) of the POCTA Act will need to be prescribed by regulations made by the Governor in Council under section 42 but the Code could be made under other legislation."

In our view, Section 42(1) of the POCTAA may also be interpreted as giving the Governor in Council the power to *make* codes of practice, and then to *prescribe* them for the purposes of proposed new section 11(2). Our concern is that the power of the Governor in Council to make and/or prescribe codes of practice is not subject to disallowance by Parliament.

In contrast, the current power to make, vary or revoke all Codes of Practice under Section 7 of the POCTAA expressly provides for their disallowance by either House of Parliament. In fact, the *PIAFLA Bill*, in revising Section 7 of the POCTAA, inserts (new) Section 7(5A), which states:

'The power to make, vary or revoke a Code of Practice under subsection (1) is subject to the Code of Practice or the variation or revocation of a Code of Practice being disallowed by either House of the Parliament.'

The intentional (or inadvertent) failure to provide for similar disallowance of codes of practice made and/or prescribed under Section 42 of the *POCTAA* for the purposes of proposed new Section 11(2), is an assault on our time-honoured, democratic process. The unspecified institutions that may draft such Codes of Practice need have no direct connection to democratic process or accountability to the electorate. Since Victoria's public interest is strongly affected by (and often correlates with) animal welfare, it is imperative that Parliament retain the mechanism of disallowance as a principal 'check' on an otherwise undemocratic system for generating animal laws.

For all the above reasons, Lawyers for Animals urgently calls on all members of the Legislative Council, particularly the Government (who propose the *PIAFLA Bill*), to amend Clause 32 of the *PIAFLA Bill* as follows:

32 Codes of Practice

...

(3) After section 42(3) of the **Prevention of Cruelty to Animals Act 1986 insert—**

"(4) The power of the Governor in Council to make or prescribe a code of practice under subsection (1) is subject to the code of practice or the prescription of a code of practice being disallowed by either House of the Parliament."

Earlier warning given

We first alerted the Bureau of Animal Welfare (within the Department of Primary Industries) to our concerns over Clause 33 of the *PIAFLA Bill* via email on 23 August 2012. On 29 August 2012 we were advised via email from the Bureau that: 'Regulations prescribing a Code of Practice for the purposes of proposed new section 11(2) can be disallowed by Parliament in accordance with the Subordinate Legislation Act 1994.'

However, on 10 September we sent a further email to the Bureau, noting that the *Subordinate Legislation Act 1994* only provides for Parliament's disallowance of a statutory rule (such as a code of practice) in two (main) circumstances:

1. If the Scrutiny of Acts and Regulations Committee of the Parliament recommends disallowance; and/or
2. If the 'authorising Act under which the legislative instrument is made states that the legislative instrument is subject to disallowance by the Parliament or by a House of the Parliament' [section 25C(1)(a)].

We explained to the Bureau that only the first circumstance can apply to codes of practice prescribed under Clause 33 of the *PIAFLA Bill*, since there is no applicable 'disallowance clause' outside Section 7 of the authorising Act. Around three days later, on 13 September 2012, the *PIAFLA Bill* was passed, unamended, by the Legislative Assembly and immediately introduced to the Legislative Council.

On 1 October 2012, having received no response from the Bureau to our email of 10 September - other than a promise to respond - and having learned of the Bill's passage through the Lower House, we sent a reminder email to the Bureau which prompted the following response: 'Yes, the Bill has been passed by the Lower House... It is appropriate that the Parliament be able to disallow POCTAA codes where there has been a SARC recommendation to that effect.'

Within a Parliamentary democracy, we submit that it is wholly inadequate for an unelected body, such as the Scrutiny of Acts and Regulations Committee ('**SARC**'), to be the sole avenue of review for statutory rules of such significance as to effectively define what constitutes 'animal cruelty' within contemporary society. Parliament, itself, must retain this power, in order for democracy to function effectively. In any event, SARC's power to review statutory rules is limited to certain grounds [Section 16, *Subordinate Legislation Act 1994*] and excludes the broader question of public interest that elected Parliamentarians are charged with considering.

Historical background

We refer to the letter that we sent by email in the early hours of 9 March 2010 to all members of the Victorian Parliament, including many current members. This letter drew attention to what we then perceived to be a significant flaw within the original drafting of the *Livestock Management Bill 2009 (Vic)*, namely: the failure to provide for disallowance of a regulation made under Clause 63 by either House of Parliament.

After 8pm on 9 March 2010, Minister Walsh – then Shadow Minister for Agriculture – rose to propose the following amendment to Clause 63 of the *Livestock Management Bill*: 'The regulations are subject to disallowance by a House of Parliament.' This amendment was defeated by a Labor majority in the Legislative Assembly – apparently acting on the advice of the Department of Primary Industries – but subsequently proposed by Ms Lovell and passed by a Liberal/National/Greens/DLP majority in the Legislative Council. On

return to the Assembly, Labor withdrew their objections to the amendment, and the Bill was then passed in amended form. From the content of (then) Shadow Minister Walsh's amendment to that Bill, and his accompanying explanation to the House, it became apparent that both he and the Coalition were willing to preserve a vital thread of democracy in the creation of animal regulations.

So it is with some surprise and a growing concern as the nature of advice given to various Ministers by the Department of Primary Industries – considering the advice we have received on the impact of Clause 33 from the Bureau of Animal Welfare – that we now draw your attention to a very similar threat to democracy, contained in the *PIAFLA Bill*.

Urgent action required to restore democratic oversight to all Codes of Practice

We again ask the Government to propose an amendment to Clause 32 of the Bill, to ensure that the power to make Codes of Practice is subject to such statutory rules being disallowed by either House of Parliament. We ask all Honourable Members to support this small yet significant amendment. We note that this is not our sole objection to the *PIAFLA Bill*, but represents the most damaging infraction of democratic process of which we are aware.

If you have any queries, please do not hesitate to contact the principal author via email: nichola@lawyersforanimals.org.au or by phone: 0423 659 042.

Yours faithfully,

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