



Submission

to the

Speaker of the National Assembly

on the

Animal Protection Amendment Bill, 2017

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1. Introduction

1.1. The Centre for Applied Legal Studies (“CALS”), at the University of the Witwatersrand, the South African Institute for Advanced Constitutional, Public, Human Rights and International Law (“SAIFAC”) of the University of Johannesburg and Animal Law Reform South Africa NPC (“ALRSA”) welcome the opportunity to submit comments on the draft Bill in response to a call by the Speaker of the National Assembly.

1.2. At the outset we wish to record that we welcome this Bill and the prohibition of the sale and manufacturing of cosmetics that are tested on animals. Such a practice involves severe harm to animals and their welfare. There is also no necessity for humans to do so given the wide-ranging products and alternatives which already exist.

2. General Comments

2.1. We applaud the move towards recognizing animals as sentient beings and not merely property and worthy of legal protection.

2.2. Animal testing is unnecessary, especially with modern technologies which have been developed. There are many jurisdictions around the world that have taken similar steps to ban the use of animal testing¹ for cosmetics and household products and we are pleased that there is movement for South Africa to join them.

2.3. There is now, more than ever before, various non-animal testing methods which can and are being utilised across the globe.²

2.4. We hope that this is the first of many steps to improve the protection for animals in the law and to bring this area of the law in line with constitutional values. Legislatures around the world are continuously improving legal regimes for the protection of animals.

2.5. Despite our general support for the Bill, we are of the view that it can be improved in various ways. In summary, our submissions are as follows:

2.5.1. The definition of 'animal' can be improved and must be clarified to extend to all sentient creatures capable of experiencing pain and whose welfare needs to be protected;

2.5.2. There should be a prohibition on the manufacturing and sale of cosmetics in South Africa which were in whole or part also tested on animals beyond South Africa's borders. Absent this type of prohibition, the new legislation could easily be circumvented by companies importing products tested on animals from outside South Africa;

¹ <https://www.peta.org/blog/countries-around-the-world-work-to-ban-cosmetics-testing-on-animals/>.

² <http://www.pcrm.org/research/animaltestalt/tailtox/nonanimal-testing-methods>.

- 2.5.3. We support a strict liability offence for companies involved in the cosmetic industry in this regard;
- 2.5.4. We submit that there should be a prohibition on utilising animal products in the formulation and production of cosmetics;
- 2.5.5. It is necessary that all properly registered animal welfare organisations and officers with a relevant animal welfare qualification are able to assist in the implementation of the Act given the limited capacity of the NSPCA; and
- 2.5.6. We suggest that there should be a requirement for companies to sign a certificate clarifying they do not use animals for testing if they are to manufacture and sell such products in South Africa.

3. **Section 1 – Definitions**

3.1. **'Animal'** - the definition of animal is more expansive and suitable than the definition contained in the Animals Protection Act 71 of 1962 (the 'Act'). The current definition has many anomalies and it is thus appropriate to seek to correct this problem. Any approach which involves lists is likely, in our view, to be under-inclusive. Therefore, we are of the view that the definition could be rendered more concise and inclusive by borrowing from the United Kingdom Animal Welfare Act of 2006. Section 1(1) defines an animal as meaning 'a vertebrate other than man'.

3.2. The UK Act is, however, under-inclusive in light of recent scientific discoveries by failing to include certain invertebrates who have been shown to be capable of experiencing pain. Given that scientific research is currently expanding the categories of which invertebrates experience pleasure and pain, we are in favour of a provision that can expand in light of scientific knowledge. In our view, the

South African definition should be amended to read as follows: 'invertebrates with the capacity to experience pain which clearly includes Cephalopoda and Decaphoda.' The Act could also include a provision to expand this list as follows: 'The list of invertebrates is non-exhaustive and may be extended by a court to another category upon the presentation of scientific evidence. Courts should exercise their discretion in favour of an animal provided there is a reasonable possibility that the invertebrate animal is sentient on the basis of current research'.

3.3. We are not clear why 'a fertilized egg, foetus or embryo' is included in the definition of an animal. We do not support this inclusion given that the focus should be only on those creatures that are sentient. This provision could be reworded to read as follows: 'an animal that remains in utero or development and has not yet been born but has the capacity to experience pleasure or pain falls within the definition of animal'.

3.4. '**Cosmetic**' – it is important to recognise that some people distinguish between cosmetics which are usually inessential to daily life – such as make-up and perfumes – and toiletries which are essential to human hygiene – soap, toothpaste and shampoo. The current definition is wide enough to embrace both categories but, given the possible confusion in future by courts, it might be useful to clarify that the Act seeks to include both these categories and that 'toiletries' are included in the notion of 'cosmetic.'

3.5. We welcome the inclusion of 'any ingredient of any such article, preparation or substance' in section 1(c). As stated below, the Bill is silent on adequate oversight, regulation and enforcement though in this regard.

3.6. The Act as it is currently drafted fails to include a prohibition on the testing of household products on animals. In our view, this type of testing may be equally harmful (or even more harmful) to animals as compared with cosmetic testing. It is also unnecessary given current adequate number of such products.

Furthermore, prohibiting testing of cosmetics on animals and not including household products is arbitrary and has no rational basis. Such a prohibition should, if possible, also include disinfectants.

3.7. A proposed definition for household products is as follows -

*'Household Products' are those bought by the general public for use in the domestic home and garden. They include, but are not limited to, detergents, polishes and cleaning products, laundry products, household cleaners, air fresheners, toilet cleaners, descalants, deodorisers, adhesives, paints and varnishes, sealants, caulks and other decorating materials.*³

4. Section 2 – Offences of testing

4.1. Section 2(a)(pA) states that any person who 'tests a cosmetic on an animal' shall be guilty of an offence. We welcome the inclusion of this provision. Whilst the crime of acting in this manner applies only within South Africa, please see our submission in order to render this prohibition effective regarding the need to extend the prohibition on the sale and manufacture of cosmetic products tested on animals in South Africa in amending the Foodstuffs, Cosmetics and Disinfectants Act, 1972.

4.2. Section 2(c) includes **offences by companies**, were 'every director or prescribed officer of the company who knowingly was a party to the contravention, shall, be guilty of an offence'. We welcome the inclusion of company liability, and that of a director or responsible officer.

4.3. However, in keeping with other statutory offences, we submit that this ought to be a strict liability offence, without an onus on prosecution having to prove the director or responsible officer's knowledge of this practice. The avoidance of liability for Directors, prescribed officers, and by extension the whole company,

³ L, Featherstone 'Testing of household products in animals: Written statement - HCWS385' 12 March 2015 *United Kingdom Parliament*. Available at <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2015-03-12/HCWS385/>

by alleging their lack of knowledge, undermines the very purpose of the Bill. It is the Director and prescribed officers' obligation to ensure that no animal testing takes place within their company to avoid breach of the law, and the ensuing consequences.

- 4.4. In relation to the insertion of a provision requiring sufficient space for animals, we welcome this provision. We note, however, that the psychological needs of animals should also be included in this provision.

5. Animal Organisations

- 5.1. There are several provisions of the draft Bill which refers to the society for the prevention of cruelty to animals. In this regard we submit that the reference to one specific organisation could be unintentionally limiting. The NSPCA does not necessarily have the capacity to deal with all of cases or trainings referenced in the draft Bill. There are many welfare organisations operating within the Republic of South Africa, and currently they are all able to apply to the local magistrate for the necessary authority which gives them certain powers associated with inspection, arrest, seizure of animals, and destruction of animals etc. This authorisation currently lies within the discretion of the local magistrate and the current legislation states that any officer of any society for the prevention of cruelty to animals may apply for same. The legislation also makes provision for such authorisation to be revoked by the magistrate at any time (subject to the provisions of administrative law). Although the NSPCA is a crucial institution in protecting animals, it should not have control over all other welfare organisations. In addition, there are currently a number of organisations which have their own requirements and qualifications for inspectors. There are also qualifications at formally recognised institutions.

- 5.2. The current system allows for the magistrate to apply his/ her discretion in both the award and revocation of the authorisation. The magistrate can request proof

of the relevant training and experience of the person applying for authorisation and thus provides an independent adequate and objective test.

5.3. Specifically, in respect of Section 8(1)(a), we therefore suggest that this provision be removed. As the intention is to provide some standard for qualification, this should be linked to a NQF standard and should be regulated by an independent body such as SAQA. This would enable all welfare organisations to select which qualification they would require for their inspectors.

5.4. Finally, we suggest a definition be included for “Animal Welfare Organisations” in the main section and this should refer to recognised non-profit animal organisations which have been registered with the court as such.

6. Amendment of Foodstuffs, Cosmetics and Disinfectants Act, 1972

6.1. The Schedule to the amendment bill proposes amending the Foodstuffs, Cosmetics and Disinfectants Act of 1972 to render it consistent with the Animal Protection Act. In our view, these provisions do not go far enough. The intention of the proposed act involves recognising the need to eliminate the testing of cosmetics on animals and that this is unjustifiable. Given the global nature of the cosmetics industry, such a goal **would not be achieved by a prohibition on animal testing within South Africa only. It is necessary to prohibit the importing and selling of products in South Africa, from wherever they originate, that are tested on animals, that contain any ingredient that has been tested on animals within a specified period of time, and / or that contains any animal product.** This is because most of the products sold in South Africa today originate from corporations with a global footprint.

6.2. As such, it would make no sense if South Africa prohibits a practice that can simply be circumvented by allowing it to continue in a jurisdiction where the practice is allowed. Consequently, it is necessary to prohibit the manufacture, importing or sale of products tested on animals, or which contain ingredients that

were tested on animals within a specified time, whether that occurs in South Africa or elsewhere. This will also send a strong message that South Africa does not support harm against animals globally.

6.3. This point was recognised by the European Union (EU) when it sought to impose a ban on cosmetics that were tested on animals. There has also been no problem with implementing that ban and no challenge at the World Trade Organisation. We include below a portion of the European Council's regulations that pertain to testing on animals -

“Article 18

Animal testing

1. *Without prejudice to the general obligations deriving from Article 3, the following shall be prohibited:*
 - (a) *the placing on the market of cosmetic products where the final formulation, in order to meet the requirements of this Regulation, has been the subject of animal testing using a method other than an alternative method after such alternative method has been validated and adopted at Community level with due regard to the development of validation within the OECD;*
 - (b) *the placing on the market of cosmetic products containing ingredients or combinations of ingredients which, in order to meet the requirements of this Regulation, have been the subject of animal testing using a method other than an alternative method after such alternative method has been validated and adopted at Community level with due regard to the development of validation within the OECD;*
 - (c) *the performance within the Community of animal testing of finished cosmetic products in order to meet the requirements of this Regulation;*
 - (d) *the performance within the Community of animal testing of ingredients or combinations of ingredients in order to meet the requirements of this Regulation, after the date on which such tests are required to be replaced by one or more validated alternative methods listed in Commission Regulation (EC) No 440/2008 of 30 May 2008 laying down test methods pursuant to Regulation (EC) No 1907/2006 of the European Parliament and of the Council on the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH)⁽¹⁵⁾ or in Annex VIII to this Regulation.”*

6.4. This provision which is perhaps overly complex seeks to ensure that the EU ban on cosmetic testing entails that products tested on animals – and which

contain ingredients that were tested on animals – are not allowed to be sold within the European Union.

6.5. A similar provision in South Africa would be simple in light of proposed amendments to the Foodstuffs, Cosmetics and Disinfectants Act of 1972. Instead of simply prohibiting manufacturing and sealing products tested on animals 'in the Republic', the proposed provisions should be changed to read 'in the Republic or in any other country or jurisdiction'. These changes would need to be implemented in the proposed changes in point 2, 3, and 4 in the schedule regarding changes to this Act.

6.6. In our view, the Foodstuffs, Cosmetics and Disinfectants Act should also be modified to include a prohibition on manufacturing and selling products that include products derived from animals. Cosmetics have often been created by using products from animals which have been maltreated. Placing such a prohibition in the Act would prevent such practices. There is no need to create cosmetics with animal products and, doing so, would hence improve animal welfare.

7. Implementation of the Act and oversight mechanisms

7.1. The Bill is not sufficiently clear on how it will be enforced, and the establishment of oversight bodies that extend beyond those of animal welfare organisations. We submit that it could be important to create a requirement that companies operating in the cosmetics industry in South Africa apply for accredited certificates of compliance. Upon any application, they can be required to assert that they do not test any product or ingredient therein upon animals. Such a certificate could be required customs and excise officers to further ensure compliance with the Act.