



To: **The Standing Committee on Agriculture, Environmental Affairs and Development Planning of the Western Cape Provincial Parliament**

Email: sniekerk@wcpp.gov.za

31 July 2020

Dear Honourable Representatives,

Re: Proposed amendments in terms of the National Environmental Management Laws Act Amendment Bill (B14-2017) (“NEMLA”)

We, Animal Law Reform South Africa (“ALRSA”), welcome the opportunity to provide our comments and hereby do so in relation to the Proposed Amendments in terms of the NEMLA. Unfortunately, we were unable to comment on the original call for comments in 2017 as we only became aware of this well after the period for public comments has closed. We are thus thankful to be able to provide some input on this critical issue to The Standing Committee on Agriculture, Environmental Affairs and Development Planning of the Western Cape Provincial Parliament (the “**Standing Committee**”). We hope that you will see the value in our comments and the potentially far-reaching consequences of these on our environment, our animals, and our guaranteed constitutional rights.

We note that there are a number of amendments proposed which implicate a number of acts and issues. Unfortunately, due to time, capacity, resource and other restraints, we have not been able to provide our full comments on all of these acts and issues. We have thus limited our comments to very specific issues for purposes of this Submission (“**Submission**”) which is 6 (six) pages.

We would be delighted to provide further comments and inputs on these issues in due course. We are also happy to provide any resources you think may be of use on these matters.

Kindly confirm receipt of this Submission and address further correspondence to the email address of Amy P. Wilson amywilson@animallawreform.org.

We look forward to receiving a response and are available to engage on any queries, comments, concerns which you might have in respect of the Submission.

Organisational Background and Declaration of Interest

ALRSA¹ is a registered South African non-profit company and non-profit organisation, which has a substantial interest in the issues being considered as aforementioned. ALRSA is composed of compassionate legal professionals and envisages a society and legal system that adequately protects both humans and nonhuman animals.

We have, for years, consistently expressed interest in the issues implicated by NEMLA to the Department of Environment, Forestry and Fisheries (“**DEFF**”), other government departments, NGOs, the South African public and other stakeholders – both privately and within the public domain.² We have furthermore requested engagement with and feedback from the relevant authorities

¹ Animal Law Reform South Africa Website: <https://www.animallawreform.org/>.

² For some examples of our Work, see our Website and of particular relevance, our recent submissions with the EMS Foundation to the HLP: <https://www.animallawreform.org/wp-content/uploads/2020/07/HLP-Submission-ALRSA-EMS-Foundation-June-2020.pdf> and on the Meat Safety Act: <https://www.animallawreform.org/wp->



in respect thereof. We have provided various formal submissions, sent letters, emails, and other correspondence, attended presentations and meetings, and otherwise engaged on these matters (where such engagement has been possible).

ALRSA is an interested stakeholder and representative of vulnerable populations within South Africa, including human as well as nonhuman animals. ALRSA's three main pillars are: (1) Animal Well-being; (2) Law and (iii) Social Justice. We work through three core focus areas being (i) Legislative and Policy Reform; (ii) Litigation and Legal Services and (iii) Education and Research, and we appreciate the need for intersectionality in our approach.

Purpose of our submission

We are pleased to see the inclusion of certain changes within the proposed amendments (the “**Proposed Amendments**”) to the various acts, in particular, the National Environmental Management: Biodiversity Act 10 of 2004 (“**NEMBA**”).

However, we are of the view that there are certain matters which need to be remedied prior to these Proposed Amendments being formally promulgated. We believe it will be extremely beneficial for the Standing Committee to consider these and raise them through the relevant processes. Detailed comments follow below, however in summary, we are of the view that:

1. the term “well-being” as currently defined is deficient in a number of respects (and other definitions that have been amended or included);
2. there is use of inappropriate and problematic language throughout such as “systematic destruction”; and references to animals as “faunal biological resources”;
3. clarity on the intention and consequences of certain amendments as currently construed should be sought and provided for.

While we have attempted to make our submission as concise and succinct as possible for your convenience, please note that it is non-exhaustive and does not represent all the responses to the issues and matters raised herein. We reserve the right to provide any further or additional information on aspects raised herein and take any other actions in respect thereof that we deem necessary and appropriate. Our Submission does not constitute a waiver of any rights we jointly or individually may have and we reserve any and all rights, remedies and actions available to us.

We look forward in engaging further on the issues contained herein. We hope you positively consider our Submission.

Yours sincerely,

Amy P. Wilson | *Director, Animal Law Reform South Africa* | amrywilson@animallawreform.org

[content/uploads/2020/07/ALRSA-and-EMS-Meat-Safety-Act-Comments.pdf](#). We are of the view that a number of the issues raised in these and our other work find application to some of these proposed amendments.



ALRSA'S COMMENTS (NON-EXHAUSTIVE)

A. Amendment of section 1 of Act 10 of 2004, as amended by section 29 of Act 14 of 2009 and section 1 of Act 14 of 2013

1. Definition of "control"

- a. We support the removal of the words "an alien or" as they appear.
- b. We reject the remainder of the amendments, including the words "systematic destruction". These words are inappropriate and problematic and this proposal must be rejected. They must be removed wherever they appear.
- c. As invasive species can be animals, including sentient animals, reference to their "destruction" is hugely problematic. Please see below reference in this regard to the Constitutional Court case. We are of the view that given this judgement and other factors, it cannot simultaneously be acknowledged (as has been done by the Constitutional Court) that animals have (*inter alia*) intrinsic value, while also referring to their "systematic destruction". The Court did not limit its judgment to non-invasive species, who also deserve proper consideration and humane treatment.
- d. In addition to the above comments, this definition must, out of necessity, include that any "control" must be done in the most humane way possible. This must be based on the relevant species specific needs as well as the best practices, and the relevant science.
- e. As a separate point, we believe that the current definition of "invasive species" is also problematic as currently construed. Although this is not up for comment, it is broadly framed, as it includes "may result in economic... harm" which is extremely far-reaching and not related to purely environmental factors.

2. Definition of "eradicate"

- a. This definition must similarly include wording that this action be performed utilising the most humane methods possible. This must be based on the relevant species specific needs as well as the best practices, and the relevant science.
- b. This must be included in the definition itself in order for it to apply to this action where it is used.
- c. It is also unclear from the word "remove" whether these species may simply be transported out of the country, alive? And if so, what this destination might be, and for what purpose?
- d. Clarity should be sought on this term and the consequences thereof.

3. Definition of "well-being"

- a. The current definition is problematic and could have far-reaching consequences.
- b. While the insertion of the definition of the term 'well-being' is commended, it does not provide sufficient clarity on what it entails and does not go far enough.
- c. Well-being includes more than simply "conducive to health". In addition, it is not only "living conditions" as the Act implicates more than "living conditions" and relates to



other actions and processes relating to animals – including their usage, killing, environment, and other circumstances. Thus, the definition must include reference to these and other relevant factors.

- d. The definition should at a minimum include reference to the animal's 'physical, mental and emotional health', and the recognition of animals as sentient individuals.³
- e. Health and well-being are **explicitly** considered to be separate terms in terms of section 24 of the Constitution. The proposed definition of well-being in the NEMBA therefore does not align with this differentiation provided in the Constitution.
- f. The interpretation of 'wellbeing' in terms of section 24 of the Constitution is a disputed issue which has resulted in a number of cases in the judicial system.⁴ Thus, a proper legislated definition of the term could remedy this issue, potential confusion and harms as well as further consequences.
- g. These submissions pertaining to the inadequacy of the definition of 'well-being' have been mentioned in ALRSA's previous submission for the proposed amendments to the Meat Safety Act.⁵ In that submission, we noted that the term 'welfare' is a more applicable term. The definition of 'welfare' is covered in a vast array of jurisprudence and is recognized in both national, foreign domestic as well as international law. For example, the World Animal Health Organisation ("OIE") has defined animal welfare as the "physical and mental state of an animal in relation to the conditions in which it lives and dies."⁶
- h. It further states that: "Good welfare, by its very definition, promotes healthy development, humane treatment, the ability to express innate behaviour and the fostering of biodiversity as each species performs its role in the ecosystem optimally."⁷
- i. In addition, the Constitutional Court's 2016 judgement finds relevance and application here:⁸
 - i. The Court stated that "the rationale behind protecting animal welfare has shifted from merely safeguarding the moral status of humans to placing intrinsic value on animals as individuals".
 - ii. The Court recognised an 'integrative approach' that it states "correctly links the suffering of individual animals to conservation, and illustrates the extent to which showing respect and concern for animals reinforces broader

³ As declared by the Constitutional Court in the case of *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development and Another* [2016] ZACC 46. The purpose of the NEMBA is for the protection and conservation of species and ecosystems, therefore adopting an integrative approach (as supported by the NSPCA Court) needs to be applied.

⁴ See as one example *Highchange Investments (Pty) Ltd v Cape Produce Company (Pty) Ltd t/a Pelts Products and Others* 2004 (2) SA 393, where the Court found that wellbeing entailed physical discomfort and set the bar for determining what well-being entailed as being very low.

⁵ Page 30: Accessible: <https://www.animallawreform.org/wp-content/uploads/2020/07/ALRSA-and-EMS-Meat-Safety-Act-Comments.pdf>

⁶ The OIE lists five freedoms which animals are entitled to, one of them being the freedom from thirst. This should be taken into account, when allocating water use licenses in terms of the National Water Act 36 of 1998.

⁷ See <https://cer.org.za/wp-content/uploads/2018/06/CER-EWT-Regulation-of-Wildlife-Welfare-Report-25-June-2018.pdf> (Accessed 25 July 2020).

⁸ *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development* ('NSPCA judgment') 2017 (1) SACR 284 (CC)



environmental protection efforts. Animal welfare and conservation together reflect two intertwined values”.

- iii. This judgment clearly indicates that section 24 of the Constitution applies to animals and that it must be interpreted to take account of animal welfare.
 - iv. The Court also quotes a Supreme Court of Appeal judgment *S v Lemthongthai*,⁹ stating that “constitutional values dictate a more caring attitude towards fellow humans, animals and the environment more generally”.¹⁰
 - j. In addition to the above two cases, these ideas have been further adopted by the High Court in dealing with the annual export quota surrounding lion bones. Justice Kollapen recognised the way in which animal welfare concerns have been included in the interpretation of section 24 of the Constitution. It was thus ‘inconceivable’ in his view that ‘the State Respondents could have ignored welfare considerations of lions in captivity in setting the annual export quota’.¹¹
 - k. Furthermore, “...[t]he latter case clearly disapproved of the view that has been expressed on several occasions by DEFF – that, it is not responsible for taking animal welfare into account in its decision-making. That case as well as the NSPCA case represent a clear and ringing rejection of this irrational approach. Decision-making concerning the environment must take account of animal welfare and must have regard to the intrinsic value of animals. These are the clear legal consequences of the recent court decisions and the DEFF is required to adhere to them. The same is true for any recommendations of the HLP – they take place within a constitutional framework and must therefore demonstrate they have internalised the changes that are required by the Constitution in the approach of the government to wild animals.”¹²
 - l. Thus, in addition to the other concepts already mentioned, the definition of well-being should include reference to welfare too, as well as the intrinsic worth of animals. This can be mentioned in addition to health and the other proposals set out above.
4. Use of the term “faunal biological resources”
- a. While we appreciate that the term “indigenous biological resource” is included in NEMA, this term needs to be reconsidered and amended. In particular, in relation to the 2016 Constitutional Court judgement as aforementioned.
 - b. We thus strongly object to the inclusion of this term throughout. Animals are not and cannot simply be considered as “biological resources” and have intrinsic value. Thus, any and all references to them simply as “resources” is inconsistent with the Constitutional Court’s ruling and other growing public opinion, beliefs, etc.

⁹ 2015 (1) SACR 353 (SCA).

¹⁰ NSPCA judgment at para 57 quoting *Lemthongthai* at para 20.

¹¹ National Council of the Society for the Prevention of Cruelty to Animals v Minister of Environmental Affairs 2019 (1) SA 249 (GP) at para 74.

¹² SAIFAC Submission to the HLP, Appendix III of Submission by ALRSA and EMS Foundation to HLP:

<https://www.animallawreform.org/wp-content/uploads/2020/07/HLP-Submission-ALRSA-EMS-Foundation-June-2020.pdf>



- c. The sentience of Elephants for example, is explicitly recognised in the Norms and Standards relating to the Management of Elephants. One cannot rightfully marry the concepts of animals as “sentient” but also “resources”.
- d. These comments apply everywhere where this term is proposed to be mentioned and we have not included all of these herein.
- e. As a suggestion, the word “animal” should be utilised instead as broadly defined.

B. Amendment of section 2 of Act 10 of 2004

1. Deletion of “sustainable”

- a. We reject the proposal to remove the word “sustainable” and change this to “ecological sustainable”.
- b. The term “sustainable” is defined and is much broader than simply “ecological sustainability”. For example, the current definition includes: “would not lead to its long-term decline”.

2. Reference to Well-being

- a. This amendment is satisfactory provided that an appropriate definition of “well-being” as aforementioned.

3. “Taking into account”

- a. This term is too vague and could result in a “tick the box exercise”. Rather, it should read along the lines of appropriately considering the well-being, and taking necessary steps to ensure such well-being is ensured.

4. “Faunal Biological resource”

- a. Comments as aforementioned.

5. Additional Comments for inclusion

- a. While we commend the inclusion of well-being, we also note that any use must include the well-being of the animal, but must also include the impacts on:
 - i. Other animals and/or species;
 - ii. The environment more broadly;
 - iii. Constitutional rights; and
 - iv. All other relevant factors.

C. Amendment of section 9A of Act 10 of 2004

1. Prohibition of certain activities

- a. We are of the view that when an activity negatively impacts on the well-being of an animal, there should be an obligation on the Minister to prohibit such activities (i.e. this should not be discretionary).
- b. Again here we refer to our comments in relation to the term “well-being” and “faunal biological resource”.
- c. Accordingly, we suggest that the word ‘may’ in section 97, should be substituted with the word ‘shall’.

D. Amendment of section 73 of Act 10 of 2004

1. Deletion of paragraph (a) in subsection (2)

- a. This should not be deleted. -----END-----