

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WASDEN

September 29, 2009

The Honorable Ben Ysursa
Idaho Secretary of State
STATEHOUSE MAIL

Re: Certificate of Review – Proposed Initiative Related to Animal Cruelty

Dear Secretary of State Ysursa:

An initiative petition was filed with your office on August 31, 2009. Pursuant to Idaho Code § 34-1809, this office has reviewed the petition and has prepared the following advisory comments. Given the strict statutory timeframe in which this office must respond to the complex legal issues raised in this petition, our review only isolates areas of concern and does not provide a detailed analysis of each issue that may present problems. Further, under the review statute, the Attorney General's recommendations are "advisory only." Petitioners are free to "accept or reject them in whole or in part." This office offers no opinion with regard to the policy issues raised by the proposed initiative.

BALLOT TITLES

Following the filing of the proposed initiative, this office will prepare short and long ballot titles. The ballot titles must impartially and succinctly state the purpose of the measure without being argumentative and without creating prejudice for or against the measure. While our office prepares titles for the initiative, petitioners may submit proposed titles for consideration. Any proposed titles should be consistent with the standard set forth above.

MATTERS OF SUBSTANTIVE IMPORT

The proposed initiative ("Initiative") seeks to amend Idaho Code § 25-3504, Committing Cruelty to Animals, "to make it a misdemeanor for any person to perform, or otherwise procure or arrange for the performance of, an ear cropping procedure on any dog within this state, except by a licensed veterinarian." Initiative at 1. The Initiative proposes adding the following paragraphs to Idaho Code § 25-3504:

- (a) Any person who performs, or otherwise procures or arranges for the performance of, an ear cropping on any dog within the state is guilty of a misdemeanor.
- (b)
 - (1) This section does not apply to a procedure performed by a licensed veterinarian.
 - (2) Nothing in this section shall prohibit any of the following:
 - (A) Showing a dog with cropped ears in a dog show or competition.
 - (B) Owning or harboring a dog with cropped ears.
 - (C) Selling, buying or adopting a dog with cropped ears.
- (c) A peace officer, officer of a humane society, or officer of an animal control or animal regulation department of a public agency may enforce this chapter.
- (d)
 - (1) Any person who violates this section is subject to a civil penalty in an amount not to exceed five thousand dollars (\$5,000) for each violation.
 - (2) The civil penalty shall be payable to the local agency initiating the proceeding to enforce this section to offset the costs to the agency related to court proceedings.
- (e) A person or entity that violates this section may be prosecuted by the district attorney of the county in which the violation occurred, or by the city attorney of the city in which the violation occurred.
- (f) For the purpose of this section, the following term has the following meaning: (1) "Ear cropping" means the surgical alteration, manipulation or removal of any part of a dog's ear so that the ear then heals in a pointed, erect or severed state.

A. The Initiative's Prohibitions are Not Consistent with the Statutory Scheme of the Cruelty to Animals Statute.

Before discussing the specific provisions of the Initiative, a brief discussion of the statutory scheme in Chapter 25 of Title 25, Idaho Code (the "Cruelty to Animals Statute") is instructive. Prohibited conduct in the Cruelty to Animals Statute is divided into one general section and several conduct-specific sections. The general prohibition against committing cruelty to animals is found in § 25-3504, which provides:

Every person who is cruel to any animal, or who causes or procures any animal to be cruelly treated, or who, having the charge or custody of any animal either as owner or otherwise, subjects any animal to cruelty, is, for

every such offense, guilty of a misdemeanor and shall, upon conviction, be punished in accordance with section 25-3520A, Idaho Code. Any law enforcement officer or animal care and control officer, subject to the restrictions of section 25-3501A, Idaho Code, may take possession of the animal cruelly treated, and provide care for the same, until final disposition of such animal is determined in accordance with section 25-3520A or 25-3520B, Idaho Code.

Idaho Code § 25-3504 (Supp. 2009). The Cruelty to Animals Statute defines the terms “cruel” or “cruelty” to mean five types of conduct:

- (a) The intentional and malicious infliction of pain, physical suffering, injury or death upon an animal;
- (b) To maliciously kill, maim, wound, overdrive, overload, drive when overloaded, overwork, torture, torment, deprive of necessary sustenance, drink or shelter, cruelly beat, mutilate or cruelly kill an animal;
- (c) To subject an animal to needless suffering, inflict unnecessary cruelty, drive, ride or otherwise use an animal when same is unfit;
- (d) To abandon an animal;
- (e) To negligently confine an animal in unsanitary conditions or to negligently house an animal in inadequate facilities; to negligently fail to provide sustenance, water or shelter to an animal.

Idaho Code § 25-3502(5) (Supp. 2009). The general prohibition on committing cruelty to animals in § 25-3504 depends on the definition of “cruel” or “cruelty” in § 25-3502(5). In other sections of the Cruelty to Animals Statute, specific acts are prohibited, e.g., poisoning animals (Idaho Code § 25-3503), carrying in a cruel manner (Idaho Code § 25-3505), exhibition of cockfights (Idaho Code § 25-3506), exhibition of dogfights (Idaho Code § 25-3507), impounding without food or water (Idaho Code § 25-3510), permitting animals to go without care (Idaho Code § 25-3511), use of a high-altitude decompression chamber (Idaho Code § 25-3516), and beating and harassing animals (Idaho Code § 25-3518). The specific sections prohibit conduct apart from that conduct defined as “cruel” in § 25-3502(5).

The Initiative’s proposed amendment is not consistent with the statutory scheme in the existing Cruelty to Animals Statute. The Initiative proposes to add language prohibiting ear cropping directly to § 25-3504. The prohibition in § 25-3504 is dependent upon the definition of “cruel” or “cruelty” in § 25-3502(5). Rather than amending the definition of “cruel” or “cruelty” to include ear cropping, the Initiative proposes adding an ear cropping prohibition and a definition of ear cropping directly to § 25-3504. The Initiative’s approach

could cause confusion regarding what conduct is “cruel” and therefore prohibited under § 25-3504.

If the Initiative sponsors seek to prohibit ear cropping on dogs as an act of animal cruelty under § 25-3504, the Initiative could amend the definition of “cruel” or “cruelty” in § 25-3502(5) to include the term “ear cropping” (currently found in subsection (f) of the Initiative). Alternatively, the Initiative sponsors could propose a new section specifically prohibiting ear cropping on dogs, in the same manner other specific acts are prohibited under the Cruelty to Animals Statute, *e.g.* poisoning animals (Idaho Code § 25-3503), exhibition of dogfights (Idaho Code § 25-3507), *etc.* Either approach would make the Initiative’s proposed language more consistent with the existing statutory scheme in the Cruelty to Animals Statute.

B. The Nature of the Penalty is Ambiguous and May Be Unconstitutionally Vague.

The Initiative proposes that “[a]ny person who performs, or otherwise procures or arranges for the performance of, an ear cropping procedure on any dog within this state is guilty of a misdemeanor.” Initiative at 1 (emphasis added). The Initiative, however, rather than incorporating the fines otherwise specified in the Idaho Code for misdemeanors,¹ provides that persons in violation of the ear cropping section would be “subject to a civil penalty in an amount not to exceed five thousand dollars (\$5,000) for each violation.” *Id.* (Emphasis added.) Regarding payment of the penalty, the Initiative proposes “[t]he civil penalty shall be payable to the local agency initiating the proceedings to enforce this section to offset the costs to the agency related to the court proceedings.” *Id.*

The nature of the proposed penalty in the Initiative is ambiguous. The Initiative provides a civil penalty for what is declared to be a misdemeanor crime. As discussed below, if a statute or act carries both a misdemeanor criminal provision and a civil penalty, those provisions should be set forth separately, to make it clear that a person may face a misdemeanor charge (with the potential for jail time and a criminal fine) and/or a civil penalty. “Statutes that are found to be vague, indefinite or uncertain are in violation of the constitutional provisions found in the Fourteenth Amendment to the United States Constitution or Article I, section 13 of the Idaho Constitution.” Cowan v. Board of Com'rs of Fremont County, 143 Idaho 501, 513, 148 P.3d 1247, 1259 (2006) (citations omitted). A statute may be so vague as to violate constitutional due process requirements “if it is found to contain terms so vague that persons of common intelligence must guess at its meaning and differ as to its application.” Lindstrom v. District Bd. of Health Panhandle Dist. I, 109 Idaho 956, 960, 712 P.2d 657, 661 (Ct. App.1985).

¹ Unless otherwise provided in the Idaho Code, a misdemeanor crime “is punishable by imprisonment in a county jail not exceeding six (6) months, or by a fine not exceeding one thousand dollars (\$1,000) or by both.” Idaho Code § 18-113 (Supp. 2009).

The Initiative's proposed penalty language is a significant departure from the existing penalty provisions in the Cruelty to Animals Statute. All violations of the existing Cruelty to Animals Statute are misdemeanors punishable according to the penalties in Idaho Code §§ 25-3505 (poisoning animals) and 25-3520A (all other violations). Civil penalties are not a part of the statutory scheme in the Cruelty to Animals Statute because the legislature made the policy determination that all persons committing cruelty to animals should be subject to criminal penalties. Specifically, § 25-3504, the subject of the Initiative, provides that violator is "guilty of a misdemeanor and shall, upon conviction, be punished in accordance with section 25-3520A, Idaho Code."

In contrast, the Initiative's proposed penalty is ambiguous and creates a conflict with the existing Cruelty to Animals Statute. As the Initiative is written, a person is left to guess if unlawful ear cropping is a crime or not. The Initiative either criminalizes ear cropping punishable by an inconsistent civil penalty, or the Initiative decriminalizes an act of cruelty in an existing statute that only allows criminal penalties. Moreover, the Initiative imposes a new penalty on "[a]ny person who violates this section." Initiative at 1 (emphasis added). By reference to "this section" the Initiative is referring to § 25-3504, which already provides for a penalty pursuant to § 25-3520A. Consequently, the Initiative's proposed language creates two penalty provisions in § 25-3504 that are in direct conflict. The Initiative's sponsors should clarify whether unlawful ear cropping is a misdemeanor crime and subject to criminal penalties, or if the unlawful act is a law violation punishable by a civil penalty. The Initiative's sponsors should also clarify if ear cropping violations are punishable by the existing penalty in § 25-3504 or a new penalty.

When a particular statute authorizes both criminal and civil penalties, the different penalties are clearly distinguishable. For example, Chapter 39 of Title 25, Idaho Code, distinguishes between civil and criminal penalties for violations:

(1) Failure to comply with provisions of this chapter, or rules promulgated thereunder, shall constitute a violation. Civil penalties may be assessed against a violator as follows:

(a) A civil penalty as assessed by the department of agriculture or its duly authorized agent not to exceed five thousand dollars (\$5,000) for each offense;

(b) Assessment of a civil penalty may be in conjunction with any other department administrative action.

(c) No civil penalty may be made in conjunction with any other department administrative action.

...

(8) Any person, firm or corporation violating any of the provisions of this chapter, or rules promulgated thereunder by the division of animal industries shall be guilty of a misdemeanor, and upon conviction, shall be subject to a fine

of not less than one hundred dollars (\$100) nor more than five thousand dollars (\$5,000) for each offense.

Idaho Code § 25-3905 (Supp. 2009). See *also* Idaho Code § 25-3706 (Supp. 2009) (providing a civil penalty and misdemeanor criminal penalty for violations). In contrast to penalty provisions in other laws, the penalty proposed in the Initiative does not clearly identify the nature of the penalty.

Like the nature of the penalty, the Initiative's penalty payment language is also ambiguous and conflicts with Idaho law. The Initiative proposes that "[t]he civil penalty shall be payable to the local agency initiating the proceedings to enforce this section to offset the costs to the agency related to the court proceedings." Initiative at 1. If unlawful ear cropping is a misdemeanor crime, the proposed language conflicts with the payment procedures for fines set forth in Idaho Code § 19-4705. The Initiative sponsors should clarify the penalty payment language so that it is consistent with the existing Cruelty to Animals Statute.

C. The Enforcement Provision Conflicts with the Cruelty to Animals Statute and Idaho law.

The Initiative's proposed language addressing enforcement conflicts with existing language in the Cruelty to Animals Statute. The Initiative proposes amending § 25-3504 to state: "A peace officer, officer of a humane society, or officer of an animal control or animal regulation department of a public agency may enforce this chapter." Initiative at 1 (emphasis added). However, the proposed language would conflict with the enforcement section already in the Cruelty to Animals Statute: "Law enforcement agencies and animal care and control agencies that provide law enforcement or animal care and control services to a municipality or county, may enforce the provisions of this chapter in that municipality or county." Idaho Code § 25-3501A(1) (emphasis added). Assuming the voters approved the Initiative, there would be two different sections addressing enforcement of the Cruelty to Animals Statute. Moreover, the Initiative's proposed enforcement language would expand the enforcement beyond those agencies mentioned in § 25-3501A(1) to include the "officer of a humane society" and the "animal regulation department of a public agency". Initiative at 1. By amending § 25-3504 with a new enforcement section, the Initiative creates a conflict in the Cruelty to Animals Statute.

We also note that subsection (e) of Initiative, provides:

A person or entity that violates this section may be prosecuted by the district attorney of the county in which the violation occurred, or by the city attorney of the city in which the violation occurred.

Initiative at 1 (emphasis added). Idaho has county prosecuting attorneys rather than district attorneys. See Idaho Cons. art. V, § 18, and Idaho Code § 31-2601, *et seq.* Therefore, we

recommend that the Initiative sponsors change the language to identify prosecutors in a manner consistent with other Idaho Code provisions.

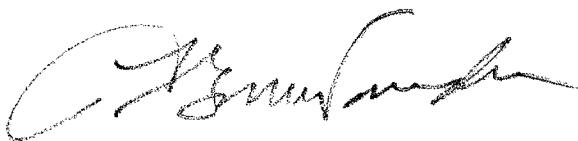
D. Amendments Should Be Printed In Full.

Article III, § 18, of the Idaho Constitution prohibits any act from being "revised or amended by mere reference to its title, but the section as amended shall be set forth and published at full length." See Golconda Lead Mines v. Neill, 82 Idaho 96, 99-101, 350 P.2d 221, 222-23 (1960). We, therefore, recommend that the full text of Idaho Code § 25-3504, and any other section amended by the Initiative, be reproduced in the proposed initiative, with amendments indicated appropriately by underscoring for additions and strikeouts for deletions. These underscoring and strikeouts, while not required constitutionally, may facilitate informed decision-making with respect to whether to sign the petition.

CONCLUSION

I HEREBY CERTIFY that the enclosed measure has been reviewed for form, style, and matters of substantive import and that the recommendations set forth above have been communicated to petitioner Talitha Neher by deposit in the U.S. Mail a copy of this Certificate of Review.

Sincerely,

A handwritten signature in black ink, appearing to read 'L. Wasden', is written over a horizontal line.

LAWRENCE G. WASDEN
Attorney General

Analysis by:

Tyson K. Nelson
Deputy Attorney General