

Instant Fines for Animal Abuse?
The Enforcement of Animal Welfare Offences and the
Viability of an Infringement Regime as a Strategy for
Reform

Danielle Rebecca Duffield

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Law without enforcement is only good advice.

~ Abraham Lincoln

INTRODUCTION

New Zealand is a nation of animal lovers. With 68% of people owning a companion animal, totalling five million, it is said that our country has more pets per capita than any other nation in the world.¹ In a recent survey undertaken by the National Animal Welfare Advisory Committee, New Zealanders ranked animal welfare as the sixth most important national issue, above reducing unemployment and combating climate change.² The New Zealand Royal Society for the Prevention of Cruelty to Animals (SPCA), a charity that will be discussed in detail in this dissertation, receives the second-highest number of donations of any charity in the country.³ And New Zealand's Animal Welfare Act 1999 is heralded as world leading in the protections it confers upon our nation's four-legged friends.⁴

Yet, the current enforcement model for animal cruelty offences remains an anomaly within the criminal law. Instead of utilising a state prosecutor, as in the vast majority of states in the world,⁵ New Zealand relies primarily upon the work of a private charity to detect and prosecute companion animal abuse. This arrangement chronically undermines the effectiveness of the statute, generating far-reaching ramifications for the detection, prosecution, and sentencing of animal welfare crimes.

Remarkably, very little legal scholarship has examined the operation of this highly unusual enforcement regime.⁶ However, these issues will soon come to the forefront of public discussion amidst the government's current review of the Animal Welfare Act. As part of this process, which began in August 2012, the Ministry of Primary Industries

¹ New Zealand Companion Animal Council *Companion Animals in New Zealand* (July 2011) <<http://www.nzcac.org.nz/images/stories/canz2011report/nzcac-canz2011.pdf>> at 2.1.

² Ministry of Agriculture and Forestry *What New Zealanders Really Think about Animal Welfare* (MAF Technical Paper No: 2011/55, March 2011) at 4.5.1.

³ Interview with Steph Saunders, Regional Manager, Inspectorate and Centre Support, South Island, SPCA, and Virginia Pine, Chief Inspector Otago, SPCA (Danielle Duffield, University of Otago, 24 July 2012).

⁴ See (16 June, 1999) 578 NZPD 17450.

⁵ See BA Wagman and M Liebman *A Worldwide View of Animal Law* (Carolina Academic Press, Durham, 2011) Chapter Three.

⁶ So far, former Auckland University academic Peter Sankoff is the only scholar who has touched on this issue, and only in brief. See Peter Sankoff "Five Years of the "New" Animal Welfare Regime: Lessons Learned From New Zealand's Decision to Modernize its Animal Welfare Legislation" (2005) 11 *Animal L.* 7 at 22 - 27.

(MPI) published a policy document identifying problems with the Animal Welfare Act and proposing a series of amendments open for public consultation.⁷ One of these proposals is to establish infringement offences for certain welfare offences under the Act.⁸ To date, no legal research has examined the viability of an infringement scheme for animal welfare offences in New Zealand.⁹

Against this background, the purpose of this dissertation is two-fold: to analyse the current problems with the enforcement of animal welfare legislation, and to examine the viability of creating an infringement scheme as a partial solution to this problem. Part One of this dissertation explores the enforcement of crimes under the Animal Welfare Act 1999. Within this, Chapter One sets out the *mens rea* and strict liability offences provided for under the Act, and the effect of the Animal Welfare Amendment Act 2010. Chapter Two outlines the charity-based enforcement model, and Chapter Three discusses its implications for animal cruelty prosecutions and sentencing.

Part Two then examines the viability of creating an infringement scheme for welfare offences administered under the Animal Welfare Act as a strategy for reform. Chapter Four examines the history and purpose of infringement schemes within New Zealand. Chapters Five and Six analyse, respectively, the advantages and risks associated with such a scheme. Finally, Chapter Seven draws upon infringement notice systems established under other statutory regimes both in New Zealand and in foreign jurisdictions, in order to ascertain the recommended scope of such a scheme. In analysing these issues, this dissertation combines theoretical research examining the philosophical foundations of infringement regimes with practical insights acquired from interviews conducted with SPCA and MPI inspectors and executives working in the field. It concludes that such a regime could significantly benefit the enforcement of the Animal Welfare Act 1999, provided that it is utilised only for minor, strict liability offences and is buttressed by appropriate legal protections for offenders.

⁷ Ministry of Primary Industries *Animal Welfare Matters: Proposals for a New Zealand Animal Welfare Strategy and amendments to the Animal Welfare Act 1999* (Ministry of Primary Industries, MPI Discussion Paper No: 2012/07, August 2012).

⁸ *Ibid.*, at 4.9.4.

⁹ Peter Sankoff discussed the possibility of this reform option in a 2005 article addressing broader problems with the Animal Welfare Act 1999, but neither he nor anyone else has examined the idea any further. See Peter Sankoff “Five Years of the “New” Animal Welfare Regime: Lessons Learned From New Zealand’s Decision to Modernize its Animal Welfare Legislation,” above n 6 at 31-32.

PART ONE: THE ENFORCEMENT OF ANIMAL WELFARE OFFENCES

Chapter One

Animal Cruelty Offences under the Animal Welfare Act

I Early New Zealand Animal Welfare Legislation

New Zealand's first animal protection legislation was inherited through our colonial heritage, with the Cruelty to Animals Act 1835 (UK)¹⁰ becoming a part of the statutes of New Zealand.¹¹ Following a series of developments in the early 20th century,¹² the Animals Protection Act was enacted in 1960.¹³ In many respects, this Act reflected a more "modern" approach to animal welfare. For instance, it developed the concept that certain types of conduct deserved prohibition on the basis of the harm done to the animals themselves, rather than to their owners.¹⁴ Nevertheless, the Act suffered from severe limitations, and as the end of the 20th century neared, it became clear that new legislation was necessary if New Zealand's animals were to be genuinely protected against cruelty.¹⁵

¹⁰ Cruelty to Animals Act 1835 (UK) 5 & 6 Will. 4, c. 59.

See Ministry of Primary Industries "Animal Welfare in New Zealand" (2011) *Biosecurity New Zealand* <<http://www.biosecurity.govt.nz/files/regs/animal-welfare/pubs/aw-poster-2011.pdf>>.

¹¹ The English Laws Act 1858 deemed that the laws of England as existing on 14 January 1840 were to be in force in New Zealand so far as applicable to the circumstances of the Colony and in so far as the English laws were in force immediately before the commencement of that Act.

¹² The Cruelty to Animals Act 1835 was followed by provincial legislation enacted by Otago and Nelson legislating against cruelty. The first national animal protection statute in New Zealand was then passed in 1878, *The Cruelty to Animals Act*, following the abolition of the Provincial Councils in 1877. During the next few decades, this animal welfare legislation was subject to a series of changes by Parliament. First, the Cruelty to Animals Act 1878 was repealed just two years after its enactment, being replaced by the Cruelty to Animals Act 1880. Then, in 1884, the Cruelty to Animals Act 1880 was repealed by the Police Offences Act 1884. Whilst the earlier legislation had focused on explicit *acts* of cruelty, this statute was significant in legislating against cruelty by omission, specifically by deeming it to be an offence to "omit to supply any animal with proper and sufficient food, water and shelter." See N Wells *Animal Law in New Zealand* (Brookers Ltd, Wellington, 2011) at 19.1.2, above n 11.

¹³ Animal Protection Act 1960 (repealed).

¹⁴ See Peter Sankoff "Five Years of the 'New' Animal Welfare Regime: Lessons Learned From New Zealand's Decision to Modernize Its Animal Welfare Legislation" (2005), above n 6.

¹⁵ Ministry of Agriculture and Forestry *A Review of the Animals Protection Act 1960: Public Discussion Paper MAF Policy Paper 103* (MAF, Wellington, December, 1990).

II *The Animal Welfare Act 1999*

On 1 January 2000, the Animal Welfare Act of 1999 (“the Act”) came into force. Undoubtedly, this legislation represented a major step forward in New Zealand’s animal welfare law.¹⁶ Indeed, Members of Parliament regarded the Act as internationally progressive, as epitomised by John Banks’ statement, then a Member of Parliament for the National Party:

[T]he legislation being deliberated on here tonight is at the forefront of international animal welfare legislation. It is at the leading edge. It is not often that this Parliament discusses legislation that is at the leading edge of global opinion . . .¹⁷

A. **The Animal Welfare Offences under the Animal Welfare Act 1999**

Whilst John Banks’ statement was perhaps hyperbolic, from a criminal law perspective, many of the changes adopted in the Animal Welfare Act 1999 were significant. In particular, the Act was progressive in substantially expanding the number of crimes against animals, the obligations owed by owners to their animals, and the penalties for failing to comply with such obligations. Most significantly perhaps, the new Act lowered the prosecutorial burden by removing the *mens rea* requirements for certain cruelty offences provided for under the Act.¹⁸

Mens Rea Offences (Appendix I)

(i) *Wilful Ill-treatment: Section 28*

This is the most serious animal welfare offence prescribed under the Act. It holds that a person commits an offence if that person wilfully ill-treats an animal with the result that the animal is permanently disabled;¹⁹ or the animal dies;²⁰ or the pain or distress caused to

¹⁶ See Peter Sankoff “Five Years of the ‘New’ Animal Welfare Regime: Lessons Learned From New Zealand’s Decision to Modernize Its Animal Welfare Legislation”, above n 6 at 12.

¹⁷ (16 June, 1999) 578 NZPD 17450, above n 4.

¹⁸ Compare s 3 of the Animals Protection Act 1960 (repealed) with ss 12 and 29 of the Animal Welfare Act 1999.

¹⁹ Section 28(1)(a) Animal Welfare Act 1999.

²⁰ Section 28(1)(b).

an animal is so great that it is necessary to destroy the animal to end its suffering;²¹ or the animal is seriously injured or impaired.²² Section 2 defines ‘ill-treat’ as ‘causing the animal to suffer, by any act or omission, pain or distress that in its kind or degree, or in its object, or in the circumstances in which it is inflicted, is unreasonable or unnecessary.’

(ii) *Reckless Ill-treatment: Section 28A*

The rationale for the establishment of the offence, implemented in July 2010 by virtue of the Animal Welfare Amendment Act, was to overcome the difficulty of establishing the requisite intent required for wilful ill-treatment under s 28.²³ This offence prescribes that a person commits an offence if that person recklessly ill-treats an animal with the result that the animal is permanently disabled;²⁴ or the animal dies;²⁵ or the pain or distress caused to the animal is so great that it is necessary to destroy the animal in order to end its suffering;²⁶ or the animal is seriously injured or impaired.²⁷ Both wilful and reckless ill-treatment are indictable offences.²⁸

(iii) *Further Mens Rea Offences*

Sections 29(b)-(f) and 31(1) establish further *mens rea* crimes relating to animal fighting, branding, and piercing. Sections 34, 35(1), and 35(2) also establish offences concerning the use of prohibited traps. The Act also sets out a series of other offences, namely keeping an animal alive when it is suffering unreasonable or unnecessary pain or distress (s 14(1)), deserting an animal (s 14(2)), performing prohibited surgical procedures (s21) and transport offences (ss 22 – 23).

²¹ Section 28(1)(c).

²² Section 28(1)(d). As per 28(2), an animal is seriously injured or impaired if the injury or impairment involves prolonged pain and suffering; or a substantial risk of death; or loss of a body part; permanent or prolonged loss of a bodily function; and requires treatment by or under the supervision of a veterinarian. The first of these, ‘prolonged pain and suffering’, was added by the Animal Welfare Amendment Act 2010.

²³ See (18 February 2010) 660 NZPD 9073.

²⁴ Section 28A(1)(a).

²⁵ Section 28A(1)(b).

²⁶ Section 28A(1)(c).

²⁷ Section 28A(1)(d). As per s 28A(2)(a)(i)-(iv), an animal is “seriously injured or impaired” if the injury or impairment involves prolonged pain and suffering; or a substantial risk of death; or loss of a body part; or permanent or prolonged loss of a bodily function; and requires treatment by or under the supervision of a veterinarian (s 28A(2)(b)).

²⁸ Sections 28(3) and 28A(3).

Strict Liability Offences (Appendix II)

Section 13 and 30 of the Act deem the following offences to be of strict liability. Thus, the offences do not require the prosecution to prove that the defendant intended to commit an offence:

- (i) Breach of s 10: Obligations in relation to physical, health and behavioural needs of animals: s 12(a);²⁹
- (ii) Breach of s 11: Obligation to alleviate pain or distress of ill or injured animals: s 12(b);³⁰
- (iii) Killing an animal in such a manner that the animal suffers unreasonable or unnecessary pain or distress: s 12(c);
- (iv) Ill-treatment: s 29(a).³¹

Defences to Strict Liability Offences

Section 75 of the Act also enables the MPI to issue codes of welfare governing conduct towards certain animals.³² Compliance with a relevant code of welfare may also be used

²⁹ This section requires that these needs be “met in a manner that is in accordance with both good practice and scientific knowledge.” Section 4 then defines “physical, health and behavioural needs” in accordance with the international “five freedoms”: proper and sufficient food and water; adequate shelter; opportunity to display normal patterns of behaviour; physical handling in a manner which minimises the likelihood of unreasonable or unnecessary pain or distress; and protection from, and rapid diagnosis of, any significant injury or disease. See Appendix II.

³⁰ This section requires that “the owner of an animal that is ill or injured, and every person in charge of such an animal, must, where practicable, ensure that the animal receives treatment that alleviates any unreasonable or unnecessary pain or distress being suffered by the animal.” Section 12(b) makes it an offence to fail to comply with s 11. See Appendix II.

³¹ This offence is essentially a lower-threshold alternative to the offences of wilful and reckless ill-treatment, appropriate for more minor cases of ill-treatment, or cases where culpability is difficult to establish. See Appendix II.

³² Section 75. These codes are deemed to be regulations for the purposes of the Regulations (Disallowance) Act 1989. However, they are not deemed to be regulations for the purpose of the Acts and Regulations Publication Act 1989: s 79 Animal Welfare Act. Most of these codes are industry-specific, however there are codes of welfare for companion cats, dogs, and goats. See MPI “Alphabetically by Code” (26 July 2012) Animal Welfare Codes <<http://www.biosecurity.govt.nz/regs/animal-welfare/codes/alphabetically>>. In the policy document recently released by the MPI reviewing the Animal Welfare Act, the MPI proposed replacing codes of welfare with a mix of mandatory standards and guidelines. See Ministry of Primary Industries *Animal Welfare Matters: Proposals for a New Zealand Animal Welfare Strategy and amendments to the Animal Welfare Act 1999* (MPI Discussion Paper No: 2012/07, August 2012), above n 7 at 4.

as a defence to certain offences under the Act.³³ The Act also stipulates two other defences for breaches of ss 12 and 29(a): if the defendant can prove on a balance of probabilities that he or she took reasonable steps to comply,³⁴ or if the act or omission took place during stress or an emergency and was necessary for the preservation, protection or maintenance of human life.³⁵

B. The Animal Welfare Amendment Bill 2010

In early 2010, following a series of high-profile animal cruelty incidents,³⁶ such as the massacre of 33 dogs in Wellsford,³⁷ Simon Bridges, National MP for Tauranga, introduced a Private Member's Bill to amend the Animal Welfare Act. The Bill was ultimately adopted by the National government, and uniquely received the vote of every single Member of Parliament.³⁸ It entered into force on 6 July 2010.³⁹

The Act significantly increased the maximum penalties prescribed under the Act. With respect to wilful ill-treatment, the maximum penalty was increased from three years imprisonment and/or a \$50,000 fine for an individual, or \$250,000 for a body corporate, to five years in prison and/or a \$100,000 fine for an individual, and \$500,000 for a body corporate.⁴⁰ The Act also established the new offence of reckless ill-treatment, noted above (s28A). The maximum prescribed penalty for reckless ill-treatment is three years for an individual, and/or a fine not exceeding \$75,000, or \$350,000 for a body corporate.⁴¹ Significantly, the amendment also increased the maximum penalty for ill-treatment (s29), and all other welfare offences from six months imprisonment and/or

³³ Section 13(1)(c). These include offences under ss 12 (failing to provide for the needs of an animal, failing to alleviate the suffering of an ill or injured animal, and killing an animal in such a manner that the animal suffers); 29(a)(ill-treating an animal), s 21(1)(b) (performing a surgical procedure in such a manner that an animal suffers), s 22(2) (failing to provide for animals being transported), s 23(1) (transporting an animal in such a manner that it suffers),³³ and s 23(2) (permitting an animal to be driven, ridden or transported while the animal is in an unfit condition). However, a breach of a minimum standard established in a code is not an offence itself, although a failure to adhere to minimum standards can be used as rebuttable evidence to support prosecutions under certain sections of the Act. See ss 13(1A), 24(1), and 30(1A).

³⁴ Section 13(2)(a).

³⁵ Section 13(2)(b).

³⁶ Ministry of Agriculture and Forestry *Animal Welfare Amendment Bill: Regulatory Impact Statement* (978-0-478-35784-4, February 2010) at 2.

³⁷ See "Haunting scene of death and destruction! - SPCA describes dog massacre" *The New Zealand Herald* (online ed., Auckland, 28 January 2010).

³⁸ (1 July 2010) 664 NZPD 12399.

³⁹ Animal Welfare Amendment Act 2010, s 2.

⁴⁰ Section 5.

⁴¹ Section 5.

\$25,000 fine for an individual, and \$125,000 for a body corporate, to 12 months imprisonment and/or a \$50,000 fine for an individual, and a \$250,000 fine for a body corporate.⁴²

⁴² Animal Welfare Amendment Act, s 4. The Act also expanded the threshold for wilful and reckless ill-treatment to include outcomes involving “serious injury or impairment” (s 28(2)(iv) and s 28(2)(iv)), and amended s 169, relating to disqualification orders for the ownership of animals, by enabling the court to set a minimum review period within which no application for removal of a disqualification order can be made. Furthermore, the amendment changed the provision relating to forfeiture of animals (s 172) by enabling the Court to order forfeiture of any or all animals owned by a convicted person, if the Court considers it desirable for the protection of the animals in question.

Chapter Two

The Enforcement Model

I Inspection under the Animal Welfare Act

There are three categories of inspectors under the Act: Ministry of Primary Industry inspectors⁴³ (usually those in the Enforcement and Compliance group),⁴⁴ inspectors appointed on the recommendation of approved organisations (currently the SPCA is the only approved organisation)⁴⁵ and members of the police.⁴⁶ All three categories of inspectors have equal enforcement powers as inspectors under the Act, although the police also have the power to stop vehicles where they believe that an animal in the vehicle is suffering unreasonable pain or distress.⁴⁷

II Inspection in Practice

A. The Police

In practice, the utilisation of the powers of inspection varies considerably between these three groups. Whilst the police have theoretical inspection powers under the Act, their powers are rarely actualised. For instance, in *R v Balfour & Anor* (2009) 9 HRNZ 211, it was a police search of the defendant's property to locate two allegedly stolen dogs that exposed the major welfare issues with respect to the conditions in which the defendants' animals were living. However, instead of utilising his powers as an inspector under the Animal Welfare Act to address the situation, the police officer concerned wrote to MAF (the predecessor to the MPI) and the SPCA outlining his concerns with the living conditions of the animals.⁴⁸

⁴³ Section 124(1).

⁴⁴ N Wells *Animal Law in New Zealand* at 37.1, above n 11.

⁴⁵ Section 124(2). See N Wells *Animal Law in New Zealand* at 20.10, above n 11.

⁴⁶ Section 124(5).

⁴⁷ Section 127(2).

⁴⁸ *Balfour & Anor v R* [2010] NZCA 465 at [5]. That police powers under the Act remain largely notional, is of course, not surprising. As Cao notes, the contribution to animal law enforcement by the police is ultimately "limited by the fact that animal cruelty complaints need to be balanced against a range of other criminal matters ranging from acts of domestic violence to murder. In this context, it seems implausible that animal law enforcement would be considered a key

B. The Ministry of Primary Industries (MPI)

A Memorandum of Understanding was signed between the SPCA and the MPI on 12 August 2004⁴⁹ to the effect that the SPCA focus on enforcing companion animals and small-scale livestock operations, whereas the MPI focus on enforcing large-scale livestock operations.⁵⁰ However, in practice the MPI's enforcement role is limited, with only eleven inspector positions for New Zealand's 28 million farm animals.⁵¹ Moreover, neither the MPI nor any other government agency enforces the Animal Welfare Act with respect to New Zealand's five million companion animals; this remains the almost exclusive domain of the SPCA.⁵²

C. The SPCA

The SPCA is a registered charity aimed at advancing animal welfare in New Zealand.⁵³ With nearly 100 inspectors working throughout New Zealand,⁵⁴ the SPCA performs the vast majority of the inspection work in the country. For instance, in 2010, only 567 of the 16,421 animal welfare complaints received from the public were dealt with by the MPI,

priority.” See D Cao *Animal Law in Australia and New Zealand* (Thomas Reuters, Sydney, 2010) at 221. Note however, that the comparably low seriousness of animal welfare offences as compared with certain other offences does not appear to be a particularly sound justification for the absence of executive enforcement. Rather, the police are charged with enforcing offences of much less seriousness than those prescribed under the Animal Welfare Act, such as minor traffic offences. Although there may be a sensible rationale for not delegating the enforcement of animal welfare to ordinary police officers, this is no reason why a subset of the police ought not to explicitly attend to animal welfare issues. Indeed, this is precisely the arrangement adopted in the Netherlands, who employ an “animal police” to enforce animal welfare law. See Government of the Netherlands “Animal Police Officers” <<http://www.government.nl/issues/police/animal-police-officers>>.

⁴⁹ Julie Collins *Audit Report: Delivery of Animal Welfare Services by the Waikato Branch of the RNZSPCA* (Ministry of Agriculture, Biosecurity, 14 December 2004) at 1.2.4.

⁵⁰ Ministry of Agriculture and Forestry *Animal Welfare Amendment Bill: Regulatory Impact Statement* (978-0-478-35784-4, February 2010), above n 36 at 6; Interview with Bob Kerridge, National President, NZRSPCA (Danielle Duffield, 13 August, 2012), above n 50.

⁵¹ Currently there are seven inspectors, with four vacancies. Interview with Mark Fisher, Manager Animal Welfare, Standards Branch, Ministry of Primary Industries (Danielle Duffield, 27 September 2012).

⁵² Interview with Bob Kerridge, National President, NZRSPCA, above n 50.

⁵³ SPCA New Zealand “About the Royal NZ SPCA” <<http://rnzspca.org.nz/about>>.

⁵⁴ Ibid.

the rest being attended to by the SPCA.⁵⁵ Thus, the SPCA performed close to 97% of the enforcement work for that year.

III *Background to the SPCA's Enforcement Role*

In 1822, the House of Lords in England passed *The Cruel Treatment of Cattle Act* (“Martin’s Act”), which outlawed cruelty to cattle, horses and sheep.⁵⁶ This was the world’s first anti-cruelty statute.⁵⁷ Two years later, in 1824, the SPCA was established.⁵⁸ Wells notes how this group soon started investigating and prosecuting offences of cruelty out of necessity: at the time, there was no police force to which complaints of cruelty could be made, as the London Metropolitan Police was not established until 1829.⁵⁹

The first New Zealand branch of the SPCA was founded in Christchurch in 1872, followed shortly afterwards by Otago, Auckland, and Wellington.⁶⁰ In 1884, the New Zealand legislature enacted the Police Offences Act.⁶¹ Section 14 of this Act adopted the English enforcement model by providing for the appointment of SPCA inspectors as special constables, who were provided with wide powers of inspection and arrest.⁶² Due to our shared Commonwealth heritage, the SPCA continues today to play a significant role in enforcing animal welfare crimes throughout the United Kingdom, Canada, and Australia, as well as in New Zealand.⁶³

⁵⁵ See Ministry of Primary Industries *Animal Welfare Matters: Proposals for a New Zealand Animal Welfare Strategy and amendments to the Animal Welfare Act 1999* (Ministry of Primary Industries, MPI Discussion Paper No: 2012/07, August 2012), above n 7 at 27.

⁵⁶ Cruel Treatment of Cattle Act 1822 (UK) 2 Geo IV c.71.

See N Wells *Animal Law in New Zealand* at 50, above n 11; SPCA Auckland “History” <<http://www.spca.org.nz/Aboutus/history.aspx>>.

⁵⁷ *Ibid*, at 50.

⁵⁸ See N Wells *Animal Law in New Zealand* at 51, above n 11; SPCA Auckland “History” <<http://www.spca.org.nz/Aboutus/history.aspx>>, above n 56.

⁵⁹ N Wells *Animal Law in New Zealand* at 16.1, above n 11.

⁶⁰ *Ibid*.

⁶¹ Police Offences Act 1884.

⁶² *Ibid*, s 14. For instance, special constables had powers to take into custody animals and vehicles (s 12); to enter saleyards to inspect animals (s 10); and to arrest offenders (s 11).

⁶³ See D Cao *Animal Law in Australia and New Zealand*, above n 48 at 219-200; RSPCA “What We Do” <http://www.rspca.org.uk/in-action/whatwedo/-/article/EM_what_we_do>; M Radford *Animal Welfare Law in Britain: Regulation and Responsibility* (Oxford University Press, Oxford, 2001) at 363; and British Columbia Society for the Prevention of Cruelty to Animals “Stats at a Glance” <<http://www.spca.bc.ca/about/our-work/stats-at-a-glance.html>>.

IV Powers of Inspectors

Inspectors have wide inspection powers under the Act. As per s 127(1) they can inspect land, premises, places, stationary vehicles, aircraft, and ships without warrant for the purpose of inspecting animals.⁶⁴ Although under the Animals Protection Act 1960 an inspector had to have been satisfied on reasonable grounds that an offence has or was being committed,⁶⁵ this requirement was removed with the adoption of the Animal Welfare Act 1999. However, inspection must be at a “reasonable time.”⁶⁶ Furthermore, a search warrant is required before any inspector may enter a dwelling (house) or marae,⁶⁷ or to enter any land or premises to search for or to seize evidence.⁶⁸ Additionally, inspectors hold the power to seize an animal (s 127(5)),⁶⁹ to mitigate suffering (s 130),⁷⁰

⁶⁴ Section 127(1). Thus, officers can enter commercial premises such as pet shops, zoos, animal shows, abattoirs, etc. See N Wells *Animal Law in New Zealand* at 38.3, above n 11.

⁶⁵ See Animals Protection Act 1960, s 10.

⁶⁶ Section 127(1) Animal Welfare Act 1999.

⁶⁷ Section 131 Animal Welfare Act 1999.

⁶⁸ Section 133(e) Animal Welfare Act 1999. A search warrant can be provided by an issuing officer, as defined by the Search and Surveillance Act 2012, to any inspector who is satisfied that there are reasonable grounds for believing that in the place specified an offence against the Act has been or is being committed; or that the suffering of an animal could be prevented or mitigated; or there is any thing that is evidence of an offence committed against the Act; or that there is reasonable grounds to believe that there is something that may be evidence of the commission of any offence against the Act. This includes offences made against any of the regulations made under the Act.

⁶⁹ Where an inspector has reasonable grounds to believe that an animal has been wilfully ill-treated contrary to s 28, or that the physical, health, and behavioural needs of the animal, or the need for the animal to receive treatment from a veterinarian make it necessary or desirable to remove the animal, the inspector may take possession of the animal, by force if necessary, and remove it to another place. The inspector must keep the animal until it is forfeited to the Crown or to an approved organisation following conviction under s172 of the Act, or until it is ordered by a District Court judge to be delivered back to its owner.

⁷⁰ Where an inspector has reasonable grounds to believe an animal is suffering, or is likely to suffer, unreasonable or unnecessary pain or distress, he or she may take all such steps that he or she considers necessary or desirable to prevent or mitigate this suffering. This may involve non-penal measures, for instance, moving an animal elsewhere, or giving writing to the owner to take certain steps: s 130(1)(b). The Search and Surveillance Act further adds to the powers under this section to include, if necessary, “destroying or arranging for the destruction of an animal.” Under s 130 (2), it is an offence for someone to fail to comply, without reasonable excuse, with any requirement imposed in the notice. The maximum penalty for this offence is \$5,000 for an individual or \$25,000 for a body corporate: s130 (3). In its recent discussion paper reviewing the Act, the MPI noted that value of this power is somewhat limited by the requirement that the animal be suffering or likely to suffer, which makes it too late for a simple intervention in many cases. See Ministry of Primary Industries *Animal Welfare Matters: Proposals for a New Zealand Animal Welfare Strategy and amendments to the Animal Welfare Act 1999*, above n 7 at 4.9.3.

to destroy injured or sick animals (s 138),⁷¹ to issue enforcement orders (s 143),⁷² and to prosecute (s 168).⁷³

The Act also stipulates that inspectors have the power to issue infringement notices for three offences under the Act. These are the breach of an obligation to inspect traps (\$400 fine, as compared with a \$1,200 maximum fine where the offence is proceeded with summarily);⁷⁴ giving a false name and address (\$300 fine, as compared with a \$900 maximum fine where the offence is proceeded with summarily);⁷⁵ and any offence against any regulations made under the Act (the fine being specified in those regulations in relation to that offence, but not exceeding \$200).⁷⁶ However, none of these infringement notice provisions can currently be employed, as there is no administration infrastructure in place to oversee the process, for instance to manage fine recovery or appeals.⁷⁷ As such, this infringement mechanism has never been utilised by the SPCA or the MPI.⁷⁸

V Animal Welfare Investigations and the Search and Surveillance Act 2012

The controversial new Search and Surveillance Act 2012 significantly impacts the nature of investigations and searches under the Animal Welfare Act. Notably, the Act removes the legal requirement of an inspector to keep a seized animal until a court makes an order

⁷¹ If an inspector finds a severely injured or sick animal and in his or her opinion, the animal should be destroyed because treatment will not be sufficient to make the animal respond and the animal will suffer unreasonable or unnecessary pain or distress if it continues to live, the inspector must consult with the owner, and allow the owner to obtain a second opinion as to whether the animal should be destroyed, if requested. If the owner and/or the second veterinarian agree, the animal must be destroyed. Where the owner has surrendered animals to the inspector, this provision will not apply, as the legal ownership of the animals will be transferred to the inspecting body: *R v Balfour & Anor* (2009) 9 HRNZ 211 at [131].

⁷² These orders can require the person to comply with the Act or any regulations made under it. However, because these must be issued by a District Court, these are used on a relatively infrequent basis: Ministry of Primary Industries *Animal Welfare Matters: Proposals for a New Zealand Animal Welfare Strategy and amendments to the Animal Welfare Act 1999* at 4.9.3, above n 7 at 3.

⁷³ This section enables an inspector to lawfully conduct a prosecution without instructing a solicitor. Under s171, the court can order that the fines be paid to the prosecuting SPCA.

⁷⁴ Section 36(2).

⁷⁵ Section 157(4).

⁷⁶ Section 162(4)(b)(iii).

⁷⁷ Interview with Mark Fisher, Manager Animal Welfare, Standards Branch, Ministry of Primary Industries (Danielle Duffield, 27 September 2012), above n 51.

⁷⁸ Email from Alan Wilson (National Manager, Inspectorate and Centre Support, SPCA) regarding infringement offences to Danielle Duffield (28 August 2012).

of forfeiture or orders that the animal is returned to its owner.⁷⁹ Furthermore, the Act removes provisions related to the form and content of search warrants,⁸⁰ and modifies the powers conferred by search warrant, except those that relate to the seizure and custody of animals.⁸¹ Instead, the standardised provisions of Part 4 of the Search and Surveillance Act, outlining the search, surveillance and inspection powers of enforcement officers (defined to include MPI officers and SPCA inspectors)⁸² apply to all search warrants issued under the Animal Welfare Act.⁸³

VI Animal Welfare Investigations and the New Zealand Bill of Rights Act 1990 (NZBORA)

In *R v Balfour & Anor*, Judge Garland of the Palmerston North District Court ruled that NZBORA protections applied to SPCA inspections, as in such capacity they were performing a public function imposed pursuant to law as per s 3(b) NZBORA 1990.⁸⁴ Accordingly, s 21 of the New Zealand Bill of Rights Act 1990, which protects all citizens from unreasonable search and seizure, will apply to both investigations conducted under s 127 Animal Welfare Act and to searches conducted pursuant to a search warrant under s 131 Animal Welfare Act.

⁷⁹ Now, under s 136A, if an animal is seized, the District Court can determine, for instance, that the animal/s be sold (s 136A(2)(a)), or placed with another person (s 136A(2)(b)). The proceeds of the sale must then be paid to the owner, unless forfeited to the Crown under s172(1), as soon as the determination of an offence is made, or a decision is made not to commence any such proceedings: s 136A(6).

⁸⁰ For instance, the requirement for an inspector applying for a search warrant to make inquiries about previous applications is removed: Search and Surveillance Act, s 195(4).

⁸¹ Search and Surveillance Act, s 195(4).

⁸² Search and Surveillance Act, Part One, s 3.

⁸³ Column 2 to the Schedule states that all sections of Part 4 of the Search and Surveillance Act are deemed to apply to Section 131(1) and (2) Animal Welfare Act, regulating search warrants, except ss 118 and 119, powers of detention incidental to powers to search places and vehicles and powers of search by person who has power of arrest, that apply to constables only. Column 2 of the Schedule also deems Subparts 1, 5, 6, 7, 9, and 10 in Part 4 of the Search and Surveillance Act to apply the disposal of seized property under 136(1) Animal Welfare Act. The Act also makes a series of more minor amendments to the administration of inspections. For instance, under s 195(3) the class of people who may issue search warrants is changed from “District Court Judge or Justice or Community Magistrate or any Registrar (not being a member of the police)” to “issuing officer” within the meaning of Section 3 of the Search and Surveillance Act.

⁸⁴ *R v Balfour & Anor*, above n 71 at [21].

VII *The Funding of Enforcement*

Despite the instrumental role played by the SPCA in the enforcement of the Act, it does not receive any regular government funding for this work.⁸⁵ Rather, the SPCA funds both investigations and prosecutions itself, relying upon charitable donations from the public.⁸⁶ Currently, the only government funding provided to the SPCA for its enforcement work is a \$300,000 per year grant from the MPI that has been provided since 2008. This constitutes just two per cent its annual budget,⁸⁷ and is earmarked specifically for farm animal cases.⁸⁸ As agreed to in the Memorandum of Understanding signed between the two parties, this is an area primarily within the MPI's responsibility.⁸⁹ The MPI also funds the one year Certificate in Animal Welfare Investigations course at *Unitec* that all inspectors must take in order to achieve their full three-year warrant, and provides \$25,000 towards training, although the bulk of the training costs fall with the SPCA.⁹⁰ To date, the SPCA has received no regular funding for its enforcement role with respect to New Zealand's five million companion animals, a function that costs a significant portion of its annual budget.⁹¹

This funding arrangement is not merely a policy issue, but a legal one that goes to the heart of enforcement problems by adversely affecting the detection, prosecution, and sentencing of animal abuse. These problems will be explored further in the next chapter.

⁸⁵ Interview with Bob Kerridge, National President, RNZSPCA, above n 50.

⁸⁶ *Ibid.*

⁸⁷ SPCA New Zealand "About the Royal NZ SPCA" <<http://rnzspca.org.nz/about>>, above n 53.

⁸⁸ *Ibid.*

⁸⁹ See n 49 above.

⁹⁰ Interview with Bob Kerridge, National President, RNZSPCA, above n 50.

⁹¹ *Ibid.* This funding arrangement was criticised by Jim Anderton, leader of the Progressive Party, during the first reading of the Animal Welfare Amendment Bill. In discussing the SPCA's enforcement role, Anderton noted "The Government pays nothing to their costs, apart from some training costs. In 2008 as Minister of Agriculture, through the Ministry of Agriculture and Forestry, I gave the RSPCA a \$300,000 one-off grant. But I recognise that it was nowhere near enough, nor has it been consistently funded." Similarly, during the first reading, Sue Kedgley, then a Green Party MP, asked Parliament "Why does the Government not properly fund prosecutions of animal welfare breaches, instead of relying on the public to donate to the SPCA? Why does it not fund the SPCA properly? Why has it basically abdicated all its work to the SPCA, which is so cash-strapped that it does not carry out any random inspections and cannot afford to undertake prosecutions that would be expensive?" See (18 February 2010) 660 NZPD 9073, above n 23.

Chapter Three

Problems with the Enforcement Model

I A Private Charity Performing a Public Function

A. Conceptual Problems

On a conceptual level, the existing enforcement arrangement begs important questions about the appropriateness of a private charity being charged with the enforcement of a criminal statute entirely at its own cost and discretion. First, it must be emphasised that the current enforcement regime arose out of historical circumstances that no longer exist. As noted earlier, the role of the SPCA in investigating and prosecuting offences arose because at the time of the SPCA's inception in 1824, there was no central police force in London to investigate and prosecute animal cruelty offences.⁹² Clearly, the situation is patently different today with the existence of a fully equipped police force and other government enforcement agencies.

Second, in the words of the Law Commission, "the operation of the criminal justice system is the responsibility of the state."⁹³ In New Zealand, there are no other instances of a charity being charged with enforcing a criminal statute – and rightfully so.⁹⁴ As noted by Cao in the context of the virtually identical situation in Australia, "it is difficult to think of another criminal statute that relies so heavily on charity to ensure enforcement of what is essentially a public interest statute."⁹⁵ Indeed, the enforcement role of the SPCA could be considered analogous to the executive delegating the enforcement of sexual violence offences to an organisation such as Women's Refuge, without providing any funding or support. Undoubtedly, such an arrangement would be considered farcical.

Third, as a charity, the SPCA must constantly balance competing resources and priorities. For instance, in addition to its role in leading inspections and prosecutions, the SPCA

⁹² See N Wells *Animal Law in New Zealand* at 16.1, above n 59.

⁹³ Law Commission *Delivering Justice For All: A Vision for New Zealand Courts and Tribunals* (2.2.R 85, 2004), at 23.

⁹⁴ Law Commission *Criminal Prosecution: A Discussion Paper* (PP28, 1997) at 78.

⁹⁵ D Cao *Animal Law in Australia and New Zealand*, above n 48 at 220.

undertakes other tasks important to the promotion of animal welfare in New Zealand, such as operating animal shelters and conducting public education campaigns to promote responsible pet ownership.⁹⁶ Thus, it is placed in an undesirable position in which it must choose whether to address root causes of animal cruelty offending, or to undertake prosecutions. Yet, the role of the criminal law is to prohibit types of behaviour that are an offence to society at large, and to punish such breaches if and when they occur.⁹⁷ Whilst alternatives to prosecution are appropriate in certain instances,⁹⁸ preventative measures for society at large are generally not considered legitimate alternatives to prosecution where the elements of an offence, and the public interest and evidential test, have been satisfied.⁹⁹

Fourth, relying upon the SPCA to enforce animal cruelty offences with its private funding is inconsistent with jurisprudence under the Act, which acknowledges the public function that animal welfare investigations fulfil. For instance, in determining that these investigations constituted a public function imposed pursuant to law as per s 3(b) NZBORA 1990, Judge Garland noted the relevance of the fact that the SPCA was effectively standing in the shoes of the government in exercising its enforcement function.¹⁰⁰ Furthermore, he noted that coercive powers analogous to those of the state are conferred during the investigation process, and that the SPCA is exercising powers that affect the rights of other people.¹⁰¹ Finally, he noted the significance of the SPCA's ability to prosecute breaches, and the fact that every police officer has the same powers and duties as an inspector appointed under the Animal Welfare Act.¹⁰² These public powers are difficult to reconcile with the current expectation that the SPCA undertake prosecutions entirely at its own cost and discretion.

⁹⁶ SPCA New Zealand "About the Royal NZ SPCA" <<http://rnzspca.org.nz/about>>, above n 53.

⁹⁷ For instance, in its 2004 report *Delivering Justice for All*, the Law Commission reconceptualised the four fundamental goals of the criminal justice system, one of which is the "bringing of offenders to justice." See Law Commission *Delivering Justice For All: A Vision for New Zealand Courts and Tribunals*, above n 93 at 9.

⁹⁸ Law Commission *Criminal Prosecution: A Discussion Paper*, above n 94 at 321.

⁹⁹ In particular, the Crown Law Prosecution Guidelines acknowledge that criminal activity should not necessarily automatically be prosecuted. However, there is nothing in the Guidelines to suggest that concerns of opportunity costs, in terms of financial and legal resources, should be considered when deciding whether to prosecute. See Crown Law *Prosecution Guidelines* (1 January 2010) at 6.6.

¹⁰⁰ *R v Balfour & Anor*, above n 71 at [19].

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*

Finally, the current arrangement compromises the objectivity of the prosecutor – a central principle underlying our justice system.¹⁰³ Arguably, the decision whether to initiate a criminal prosecution should not be subject to the whims of the public, but this is essentially what happens when you place the role of enforcement in the hands of a private organisation whose survival relies entirely on the generosity of the public. For instance, Caulfield comments that:

By the end of the 19th Century, the English RSPCA was becoming very respectable, such that ‘its preoccupation with established respectability caused it to lose touch with the more progressive and inspirational elements in the animal welfare movement.’ This is another reason for not giving responsibility for the enforcement of part of the criminal law to a private society. There is the potential for shifts in direction and emphasis, under the influence of whoever happens to be in power, such that proper independent enforcement is compromised.¹⁰⁴

B. Practical Problems

In addition to the conceptual incongruity of the current enforcement regime, the arrangement creates a number of practical difficulties out in the field. As noted in an interview with Bob Kerridge, National President of the SPCA, animal welfare inspections are a multifarious task that require numerous skillsets due to the double-barrel requirement to mitigate suffering and to investigate; this task requires both legal knowledge and animal knowledge.¹⁰⁵ Consequently, Kerridge points out that inspectors are essentially “part policeman, part vet, and part social worker.”¹⁰⁶

Given the complexity of this enforcement role, placing enforcement in the hands of a charity that depends on donors and has a limited budget inevitably limits the extent of enforcement work undertaken.¹⁰⁷ For instance, the ratio of inspectors to animals remains

¹⁰³ Crown Law *Prosecution Guidelines*, above n 99 at 2.3; Law Commission *Criminal Prosecution: A Discussion Paper*, above n 94 at 315.

¹⁰⁴ M Caulfield *Handbook of Australian Animal Cruelty Law* (Animals Australia, Melbourne, 2008) at 172.

¹⁰⁵ Interview with Bob Kerridge, National President, NZRSPCA, above n 50.

¹⁰⁶ *Ibid.*

¹⁰⁷ BA Wagman and M Liebman *A Worldwide View of Animal Law* (Carolina Academic Press, Durham, 2011), above n 5 at 175.

very low, at approximately one inspector per 50,000 companion animals.¹⁰⁸ This problem is exacerbated by the fact that many inspectors must work across a wide geographical region; for instance, there are only two full-time inspectors throughout the entire Otago region.¹⁰⁹ This not only limits the inspection time in each locality, but further constrains the ability of inspectors to respond to emergency situations.

The practical constraints systemic to relying upon a private charity to enforce a criminal statute came to light in the circumstances surrounding *R v Balfour & Anor*. In this case, one of the most severe animal hoarding cases ever prosecuted in New Zealand, the SPCA received information about 87 dogs and 161 cats living in overcrowded conditions with insufficient shelter, water, lighting and ventilation.¹¹⁰ However, the SPCA waited five-months between receiving this information and executing the search warrant, and whilst doing so brought a TVNZ cameraman along to film the property. Judge Garland held that the delay in acquiring and executing was both unlawful under the Animal Welfare Act and unreasonable as per s21 BORA.¹¹¹ However, this time lag was the result of systemic delay at the SPCA: at the time, the SPCA had insufficient resources to allocate to a search of the defendant's property.¹¹² Judge Garland was also critical of the publicity objectives behind taking along the TV3 cameramen,¹¹³ noting that the SPCA could have hired an independent contractor instead, yet chose not to in order to avoid the expense.¹¹⁴ The case thus highlights how practical constraints implicit within the enforcement model can act to compromise the integrity of the inspection process, with negative ramifications both for animals and offenders alike.

¹⁰⁸ That is, there are 96 inspectors for approximately five million companion animals. See "Companion Animal Report" above n 1, and Interview with Bob Kerridge, above n 50.

¹⁰⁹ There is also one on-call inspector who also works as a fundraiser. Interview with Steph Saunders, Regional Manager, Inspectorate and Centre Support, South Island, SPCA, and Virginia Pine, Chief Inspector Otago, SPCA, above n 3.

¹¹⁰ *Balfour & Anor*, above n 71 at [3] – [4].

¹¹¹ *Ibid*, at [204].

¹¹² *Ibid*, at [42].

¹¹³ This, he held, "aggravated the nature of the impropriety": [222].

¹¹⁴ *R v Balfour & Anor*, above n 71 at [119].

II *Impact on Animal Cruelty Prosecutions*

The Crown Law Guidelines stipulate a two-pronged public interest and evidential test as to whether or not a prosecution should be pursued.¹¹⁵ Many of the public interest considerations factors weighing in favour of prosecution are present in animal cruelty cases. These include:

- 6.8.2: Where the defendant was in a position of authority or trust and the offence is an abuse of that position;
- 6.8.7: Where the offence was motivated by hostility against a person because of their race, ethnicity, sexual orientation, disability, religion, political beliefs, age, the office they hold, or similar factors (“species” arguably constituting a ‘similar factor’);
- 6.8.6: Where the offence was carried out pursuant to a plan in pursuit of organised crime or was an offence involving serious or significant violence;
- 6.8.8: Where the offence is prevalent;
- 6.8.11: The more vulnerable the victim, the greater the aggravation; and
- 6.8.12: Where there is a marked difference between the actual or mental ages of the defendant and the victim and where the defendant took advantage of this.

However, in spite of these factors weighing in favour of prosecuting animal cruelty offences, due to the SPCA’s resource constraints, the vast majority of reported instances of animal cruelty go unprosecuted, with generally only the most egregious making their way to the courts.¹¹⁶ For instance, in 2011, the SPCA received 13,089 complaints from the public about mistreated animals, yet only initiated 35 prosecutions (20 of which have been completed).¹¹⁷ These prosecutions involved 32 defendants and 85 charges, with 57 convictions secured thus far. Accordingly, less than 0.27% of complaints led to prosecutions. This is of major concern given that complaints made to the SPCA are

¹¹⁵ Crown Law *Prosecution Guidelines*, above n 99 at 6.1.

¹¹⁶ Of course, state prosecutors in other jurisdictions such as the United States have also been accused of not adequately funding animal cruelty prosecutions. See Allan Yancy “Veterinarians and the Case against Legal Personhood for Animals” in Marc. D Hauser, Fierly Cushman, and Matthew Kamen (ed) *People, Property or Pets?* (Purdue University Press, USA, 2006) at 199. However, at least in such cases the state has accepted responsibility for enforcement, albeit discharging this obligation insufficiently. This is one step superior to the situation in New Zealand, in which the state has failed to acknowledge responsibility for enforcing companion animal welfare law altogether, instead effectively free-riding off the work of a charity.

¹¹⁷ Society for the Prevention of Cruelty to Animals *National Statistics 2011* (obtained via email from Bob Kerridge, National President, RNZSPCA, 13 August 2012).

screened so that only those that sound as though they constitute an offence under the Act are investigated.¹¹⁸ Moreover, due to the difficulties inherent in detecting this type of offending in the first place,¹¹⁹ the actual number of welfare offences perpetuated is likely to be much higher.

These figures strongly contrast prosecution figures for the justice system as a whole. For instance, in 2011, 60.3% of all resolved offences¹²⁰ led to prosecution.¹²¹ Because only 47% of reported offences¹²² were resolved, in total, 28.3% of all complaints investigated by police resulted in prosecution.¹²³ Alarming, these figures highlight that the prosecution rate for animal welfare offences is more than 100 times lower than the justice system as a whole. This in itself ought to send a definitive message to the executive that something is seriously defective about the manner in which animal cruelty law is enforced in this country.¹²⁴

¹¹⁸ Interview with Steph Saunders, Regional Manager, Inspectorate and Centre Support, South Island, SPCA, and Virginia Pine, Chief Inspector Otago, SPCA, above n 3.

¹¹⁹ In particular, animals rely on humans to report abuse. This makes it difficult for animal welfare crimes to be reported, as the perpetrator of the abuse is in the majority of cases the owner. JE Schaffner *An Introduction to Animals and the Law* (Palgrave MacMillan, London, 2011) at 69.

¹²⁰ A recorded offence is counted as resolved when police apprehend an offender and decide how to deal with him/her. (E.g. warn, prosecute, etc.). See New Zealand Police *New Zealand Crime Statistics 2011* (ISSN 1178 – 1521, April 2012)

<http://www.police.govt.nz/sites/default/files/00_national_2011_official_stats.pdf> at 1.

¹²¹ Statistics New Zealand *National Annual Apprehensions for Latest Calendar Years* (2012).

Note that there is a discrepancy between these figures from Statistics New Zealand as to the number of resolved offences with the New Zealand Police 2011 Statistics (210,341 and 190,820 respectively). If the Statistics New Zealand resolution rate were applied (51.8%), then the number of overall offences that lead to prosecution would be even higher, at 31.2%, and thus the disparity with animal welfare prosecutions even greater.

¹²² Unless the matter is minor where police attendance is sufficient, a matter that is reported to or discovered by police where police believe an offence is likely to have been committed is counted as a ‘recorded offence’: New Zealand Police *New Zealand Crime Statistics 2011*, above n 120 at 1. This recording system is therefore consistent with the SPCA’s policy for investigating complaints, in which they are recorded as ‘complaints’ only if the SPCA believes on the basis of the information provided that an offence is likely to have been committed.

¹²³ Of the 210,341 resolved offences in 2011, 126,835 led to prosecutions, 1,607 were resolved by way of Family Group conference, 56,781 were warned or cautioned, 14,507 were resolved by way of youth aid, and the final 10,611 were dealt with by an ‘other’ form of remedy. See Statistics New Zealand *National Annual Apprehensions for Latest Calendar Years* (2012), above n 121.

¹²⁴ Addressing this point, Neil Wells, who was president of the Auckland SPCA from 1973-1978, noted, “The SPCA has always been hampered by a lack of funding for adequately investigating and prosecuting breaches of animal welfare legislation with vigour. The general trend has been that offences that should have been prosecuted were not for a number of reasons: lack of resources to fund the legal costs of private prosecutions; and an archaic structure whereby local SPCA committees consisting of volunteers with no formal training and varying levels of understanding of the prosecutorial process, have been expected to make decisions on

III *Impact on Judicial Sentencing*

These low prosecution figures have major implications for sentencing. In particular, under the Sentencing Practice Note 2003, the prevalence of a particular offence is a factor likely to result in a higher sentence being imposed.¹²⁵ Furthermore, prosecutions play an important role in raising awareness and rousing public opinion, which indirectly impacts the sentencing process.¹²⁶ Yet, by relying upon a charity with limited resources to enforce a criminal statute, the number of prosecutions for animal cruelty fails to accurately reflect the true prevalence of the offence. This problem is compounded by the rarity of appeals by the prosecution, which serves to entrench existing penalty levels.¹²⁷

Consequently, sentences for animal cruelty offences under the Animal Welfare Act remain deflated. Despite imprisonment of up to five years being prescribed in the Act following the Animal Welfare Amendment Act, a prison sentence of any length remains a rare sentence. Prior to the Animal Welfare Amendment Act 2010, only three per cent of all prosecutions under the Animal Welfare Act had resulted in imprisonment,¹²⁸ and in the two years since the passage of the amendment, only three further cases have resulted

prosecutions.” N Wells *Animal Law in New Zealand* at 133, above n 11. These sentiments were affirmed by Bob Kerridge, National President of the NZRSPCA, who noted in interview that due to resource limitations, the current enforcement arrangement resulted in a lot of animal abuse going undetected, and moreover that “not only does it go undetected, much of what is detected goes without sanction e.g. prosecution and ends up as ‘education’.” Interview with Bob Kerridge, above n 50.

¹²⁵ *Sentencing -- Practice Note 2003* [2003] 2 NZLR 575 at 2(e). Prevalence is also relevant to 7(1)(f) of the Sentencing Act 2002, which establishes general and specific deterrence as purposes of sentencing. See, for example, *Christofides v R* [2011] NZCA 126.

¹²⁶ A Markham “Animal Cruelty Sentencing in Australia and New Zealand” in Peter Sankoff and Steven White (ed) *Animal Law in Australasia* (The Federation Press, Sydney, 2009), above n 126 at 292.

¹²⁷ A Markham “Animal Cruelty Sentencing in Australia and New Zealand”, above n 126, at 299. Of course, current low sentences are likely to reflect more than just the influence of low prosecution rates. For instance, Peter Sankoff notes that judges likely often reason that if a person is not imprisoned for certain offences involving the neglect or abuse of a child, given that children are regarded as more morally significant than animals, a person ought not be imprisoned for harming an animal. However, he notes that harming one child is also worse than stealing 100 cars, yet that is no reason in itself to not impose imprisonment for certain property offences. More fundamentally, he points out whilst the judiciary should certainly consider the gravity of a particular crime, it is not the role of the judiciary to “value” offences against one another. See Peter Sankoff “Animal Welfare Sentencing” (2004) NZLJ 357 at 358 – 359.

¹²⁸ (18 February 2010) 660 NZPD 9073, above n 23.

in this outcome.¹²⁹ This low rate of imprisonment is particularly significant given that, due to the limited resources of the SPCA, it is generally only the most serious cases that are prosecuted in the first place. Currently, the highest sentence issued is 18 months imprisonment (with a starting point also of 18 months), issued last year in *Karekare v Police*, and affirmed by the Hamilton High Court on appeal.¹³⁰ This case involved the wilful ill-treatment of a kitten, in which the defendant violently abused a 12 month old kitten before kicking it in the head and then burning it alive in an incinerator in front of his five-year-old granddaughter. An 18-month imprisonment sentence (with a two-year starting point) was also issued in June 2011 by the Te Kuiti District Court in *Police v George*, in which a man bludgeoned his pit-bull puppy to death with a golf club.¹³¹

Rather, the most common sentence is a fine, the second-least severe sentence option.¹³² In the majority of cases, these are of a modest nature up to \$1500,¹³³ with community work occasionally being issued in addition to, or instead of, a fine. These penalties are scarcely higher than those issued under the former Animals Protection Act 1960.¹³⁴ This is despite the Animal Welfare Act increasing the maximum imprisonment term from three months to three years initially – which as Peter Sankoff notes, is a “massive leap in legal terms”¹³⁵ – and the recent Animal Welfare Amendment Bill further increasing this to five years.

¹²⁹ These are *Karekare v Police* HC Hamilton, CRI-2011-419-000067, 3 November 2011; *Police v George* DC Te Kuiti, CRI-2011-019-001837, 29 June 2011; and another case whose official citation is unavailable, but which involved a Wairarapa man being sentenced to four months’ imprisonment after beating and kicking his dog in a very public place, resulting in the dog requiring euthanasia. See SPCA *List of Shame 2011: October 2010 – September 2011* (2011). The high-profile case involving the slaughter of 33 Kaikoura seals also led to 2 months’ imprisonment at the District Court, but was reduced to 8 months’ home detention on appeal. See *Godsiff v R* 34 TCL 48/2.

¹³⁰ *Karekare v Police*, above n 129.

¹³¹ *Police v George*, above n 129. Prior to these two cases, the highest sentence issued was ten months’ imprisonment (reduced on appeal from 12 months’ imprisonment) in *Hurring v Society for Prevention of Cruelty to Animals* [2009] BCL 746. In this case, a 19-year-old was sentenced for killing a Jack Russell dog after strangling it, pouring diesel down its throat and then hitting it over the head with a spade.

¹³² Sentencing Act 2002, s 10A(2). The only sentences considered less restrictive than a fine are a discharge or an order to come up for sentence if called on.

¹³³ For a discussion on this, see A Markham “Animal Cruelty Sentencing in Australia and New Zealand”, above n 126 at 295.

¹³⁴ See Peter Sankoff “Animal Welfare Sentencing”, above n 127.

¹³⁵ Edith Schofield “Inertia in Animal Cruelty Sentencing” *The Otago Daily Times* (New Zealand, 29 August 2009).

This tendency of the judiciary to respond to animal cruelty cases with fines is problematic on a number of levels. First, it undermines the deterrent and retributive goals of the criminal law by sending a message to animal abusers, and to the wider public, that animal cruelty offences are not taken seriously. This outcome is inconsistent with the primary concern of the sentencing court, and the criminal law more broadly, which is to protect the community from crime.¹³⁶ Indeed, the explanatory note of the Animal Welfare Amendment Bill stated that “These amendments...will send a strong signal to the judiciary that the Government and general public wish to see heavier penalties for this type of offending. The increased penalties will also act as a deterrent to potential offenders.”¹³⁷ As long as the judiciary continues to issue sentences closer to the minimum than the maximum,¹³⁸ even following the 2010 penalty increase, this deterrence function appears unlikely to materialise.

Second, s 7(1)(g) of the Sentencing Act 2002 establishes that one of the purposes of sentencing is to “protect the community from the offender.” Applying this principle, the often-stated and well-proven connection between violence against animals and later violence against humans ought to be a relevant consideration. For instance, a 1997 Northeastern University study found that animal abusers were more than five times more likely to commit violent crimes against people and four times more likely to be arrested for property crimes, as compared with individuals from the same neighbourhoods without a history of animal abuse.¹³⁹ Of course, sentencing is a complex task that requires the judge to impose the least restrictive outcome appropriate in the circumstances,¹⁴⁰ and

¹³⁶ G.G. Hall *Hall's Sentencing* (Lexis Nexis, Wellington, 2009) at I.3.1.

¹³⁷ Animal Welfare Amendment Bill 2010 (118-2) (explanatory note) at 3.

¹³⁸ Peter Sankoff “Animal Welfare Sentencing” (2004) NZLJ 357 at 357.

¹³⁹ A Arluke, Jack Levin, C Luke and F Ascione “The Relationship of Animal Abuse to Violence and Other Forms of Anti-social Behaviour” (1999) 14 *J Interpers Violence* 963 at 969.

Furthermore, studies have also found there to be a strong correlational relationship between animal abuse and domestic violence. For instance, a 2012 study conducted by New Zealand's Women's Refuge in conjunction with the SPCA found that one third of women surveyed reported delaying leaving violent relationships because they feared that their pets and other animals would be killed or tortured. Of these, one quarter said that their children had witnessed violence against animals. See Women's Refuge *Pets used as Pawns in Domestic Violence* (28 March 2012)

<<http://www.womensrefuge.org.nz/WR/News/Pets%20used%20as%20Pawns%20in%20Domestic%20Violence.htm>>. Also see JE Schaffner *An Introduction to Animals and the Law*, above n 119 at 31; K Sharman “Sentencing Under our Anti-Cruelty Statutes: Why our leniency will come back to bite us” (2002) 13(3) *Current Issues in Criminal Justice* 333 at 334; and S Nelson “The Connection between Animal Abuse and Family Violence: A Selected Annotated Bibliography” (2011) 17 *Animal L.* 369.

¹⁴⁰ Sentencing Act 2002, s 8(g).

to provide sentences comparable with similar forms of offending.¹⁴¹ Nevertheless, current sentencing trends suggest that insufficient weight is being given to the impact that low sentences may have upon human victims as well as the animals themselves.

Third, responding with fines in the majority of cases naturally discourages later prosecutions for animal cruelty offences, even those of relative severity. Despite some regional SPCAs receiving discounted legal fees,¹⁴² the literal and opportunity cost of prosecutions to the SPCA is very high, ranging anywhere from \$2,000 to \$50,000 or more, depending on the complexity of the case and the nature of the defence.¹⁴³ Whilst some costs are claimed with each case,¹⁴⁴ these rarely come close to covering the full cost of undertaking the prosecution.¹⁴⁵ Thus, there is little incentive to focus resources on initiating prosecutions where the sentence issued is likely to be low.¹⁴⁶ In fact, this is not merely a rational strategic response by a charity, but legally mandated: the likelihood of the court imposing a very small or nominal penalty is identified in the Crown Law Guidelines as a public interest consideration weighing against prosecution.¹⁴⁷

Finally, as Markham points out, the issue is essentially the frustration of legislative intent:¹⁴⁸ throughout the entire history of the Animal Welfare Act, and even following the recent penalty increase, no term of imprisonment higher than a third of the maximum prescribed period has ever been imposed.¹⁴⁹ This strongly contrasts other areas of the criminal law, in which penalties close to the maximum, while not the norm, will be issued where appropriate. Indeed, the maximum is not intended to be unattainable or even

¹⁴¹ Sentencing Act 2002, s 8(e).

¹⁴² Interview with Bob Kerridge, National President, NZRSPCA, above n 50.

¹⁴³ *Ibid.*

¹⁴⁴ Under s 173 of the Act, expenses incurred by an inspector may be recovered as a fine when there is a conviction, or as a debt where there is no conviction.

¹⁴⁵ Interview with Steph Saunders, Regional Manager, Inspectorate and Centre Support, South Island, SPCA, and Virginia Pine, Chief Inspector Otago, SPCA, above n 3.

¹⁴⁶ Moreover, this problem is exacerbated by the psychological toll that low sentences may have upon SPCA workers and/or volunteers, who have often dedicated years towards a case without any formal legal training. For instance, in the recent sentencing of the Wellsford dog massacre, news media headlines noted how the SPCA inspector in charge of the case “broke her back - and spirit - working on the case involving 33 slaughtered dogs, while the culprits walked away with community sentences.” See *R v Campbell* DC Auckland CRI-2010-044-004577, 11 May 2012; and Michelle Robinson “SPCA Staff Tearful at Dog Killers’ Sentencing” *Auckland Now* (New Zealand, 21 July 2012) <<http://www.stuff.co.nz/auckland/local-news/7318600/SPCA-staff-tearful-at-dog-killers-sentencing>>.

¹⁴⁷ Crown Law *Prosecution Guidelines*, above n 99 at 6.9.1.

¹⁴⁸ A Markham “Animal Cruelty Sentencing in Australia and New Zealand”, above n 126 at 303.

¹⁴⁹ As noted above, these were in *Karekare v Police*, and *Police v George*, above n 129.

reserved for the worst cases conceivable.¹⁵⁰ Rather, it is an indication of the penalty that Parliament considers appropriate for cases falling within the ‘broad band or bracket comprising the worst class of cases encountered in practice.’¹⁵¹ Arguably, the two record-holding cases of *R v Karekare* and *Police v George* fell within this bracket. In fact, in *R v Karekare*, Judge Ruth explicitly stated that he could ‘hardly think of a more serious and cruel act’¹⁵² – yet the starting point adopted was less than a third of the maximum prescribed.¹⁵³

¹⁵⁰ *R v Beri* [1987] 1 NZLR 46 at 48.

¹⁵¹ *Ibid.* Also see *Ibbs v R* (1987) 163 CLR 447 and *Veen v R* (No 2) (1998) 164 CLR 4645. This principle is affirmed in the Sentencing Act 2002, s 8(c), which provides that judges must impose the maximum penalty prescribed for the offence if the offending is within the most serious of cases for which that penalty is prescribed, unless circumstances relating to the offender make that inappropriate. Similarly, 8(d) requires a judge to impose a penalty near to the maximum prescribed for the offence if the offending is near to the most serious of cases for which that penalty is prescribed, unless circumstances relating to the offender make that inappropriate.

¹⁵² *Karekare v Police*, above n 129 at [2].

¹⁵³ Note that in the High Court appeal, Keane J disagreed that the offence was amongst the most serious of its kind. However, he still upheld the sentence, noting that Judge Ruth’s view that the offence was amongst the most serious did not lead him to impose a sentence at or near the maximum. See *Karekare v Police*, above n 129 at [34]. These sentencing trends, which are similar in Australia, have not been without criticism. For instance, in recent years, former Australian High Court Justice, the Honourable Michael Kirby, AC, CMG, has called for harsher sentences for animal cruelty cases. See Amanda Woods “Kirby Speaks out Against Animal Cruelty” *The Age* (Australia, May 10 2009) <<http://www.theage.com.au/national/kirby-speaks-out-against-animal-cruelty-20090509-ayp7.html>>.

PART TWO: THE VIABILITY OF AN INFRINGEMENT REGIME AS A STRATEGY FOR REFORM

Chapter Four

The Infringement Notice System as a Penal Remedy

I The MPI's Proposal

Unsurprisingly, this enforcement regime has been subject to criticism. After discussing certain problems with the Act, in a 2005 article Peter Sankoff proposed considering a shift towards a regulatory or administrative regime for animal welfare offending. Sankoff notes “under such a scheme, most crimes against animals could be treated like highway traffic violations for speeding, with a fine and, in the case of repeat offending, imprisonment.”¹⁵⁴ On 13 August 2012, after the research for this dissertation was substantially completed, the MPI published a policy document reviewing the Animal Welfare Act 1999 and proposing a series of amendments open for public consultation.¹⁵⁵ One of these is, incidentally, to establish an infringement notice system for certain offences under the Act. The goal of this proposal is to ‘enhance the range of enforcement tools available under the Act, to allow a larger number of animal welfare problems to be addressed locally and more quickly, without resorting to prosecutions.’¹⁵⁶ The core components of MPI’s proposal are to:¹⁵⁷

- Create new infringement offences and fines tied to the proposed regulations. Specific infringement offences and fines would be set in regulations.

- Enable animal welfare inspectors to issue compliance orders for certain breaches of the Act, without needing to apply to a District Court. Compliance orders would

¹⁵⁴ Peter Sankoff “Five Years of the “New” Animal Welfare Regime: Lessons Learned From New Zealand’s Decision to Modernize its Animal Welfare Legislation”, above n 6.

¹⁵⁵ See Ministry of Primary Industries *Animal Welfare Matters: Proposals for a New Zealand Animal Welfare Strategy and amendments to the Animal Welfare Act 1999*, above n 7 at 3.

¹⁵⁶ *Ibid.*, at 4.9.4.

¹⁵⁷ *Ibid.*

require a person to cease doing something or to prohibit them from doing something that would breach or be likely to breach an animal welfare law. Failing to follow a compliance order would be an offence liable for either an instant fine or prosecution.

- Increase the maximum infringement fee set in the Act from \$200 to \$1000 to give flexibility to set a suitable level of penalty for each infringement offence.

Under this model, “inspectors would still be able to seek prosecutions for breaches of the general duty of care or for ill-treatment offences.”¹⁵⁸ Furthermore, the MPI notes that only certain offences would be suitable to be subject to instant fines, as fines should only be issued for relatively minor offending where it is “clear and a matter of fact as to whether an offence has been committed.”¹⁵⁹ Furthermore, under the MPI’s proposal, only animal welfare inspectors with a certain level of experience and training would have the power to issue infringement notices.¹⁶⁰ The process to determine which offences would be suitable to be classified as infringement offences would take place once the legislation is changed, and would be subject to public consultation.¹⁶¹

II Infringement Offences in Australian Animal Welfare Legislation

Certain Australian states provide for the issuance of small infringement fines for minor breaches of animal welfare regulations. For instance, the South Australian Animal Welfare Regulations 2012, promulgated under the Animal Welfare Act 1985, provide for infringement notice fines to be issued for offences such as using a jawed leg hold trap for an animal other than for a wild or feral dog, a fox or a rabbit;¹⁶² using a gel to catch or deter birds;¹⁶³ or failing to inspect a pig’s well-being at least once a day.¹⁶⁴ These offences can be dealt with summarily (with a maximum fine of \$2,500) or by way of a \$210 infringement fee. However, the general ill-treatment offences under Part 3 of the Animal Welfare Act 1985 cannot be dealt with by an infringement fine.

¹⁵⁸ Ibid.

¹⁵⁹ Ibid, at 4.9.5

¹⁶⁰ Ibid. The MPI noted that further analysis is necessary to determine the precise amount of training required.

¹⁶¹ Ibid.

¹⁶² Section 9(1).

¹⁶³ Section 10.

¹⁶⁴ Section 29(3).

III *The History and Purpose of Infringement Schemes*

Infringement offence schemes involve the issuing of instant fines, the amount of the fine being fixed in legislation or regulations and thus not providing any consideration as to the means of the offender.¹⁶⁵ A notice or ticket is issued on the spot or through the post by the enforcement authority.¹⁶⁶ In *Wellington City Council v McCready*, Judge Keane described the infringement offence procedure as:¹⁶⁷

... a process which enables offences of the least relative significance to be processed swiftly, efficiently, and inexpensively. To enable this to happen it abrogates minimum rights, and reverses the usual onuses. But, equally, it transforms the offence into an infringement, and no conviction is ever imposed. The transformation is not complete. The one who commits the infringement faces a liability which can be enforced, like a fine. But the absence of a conviction is a distinction of real, and probably decisive, significance.

The Ministry of Justice's Guidelines for New Infringement Schemes set out a series of purposes for infringement schemes.¹⁶⁸ Many of these correspond to the goals of prosecution: to achieve compliance with the law and to reduce the harm caused by minor offending; to hold people accountable for their actions and to promote a sense of responsibility; and to educate people about unacceptable conduct and its inherent social harm.¹⁶⁹ However, unlike a prosecution, which is time- and resource-intensive, an infringement scheme provides an 'administratively efficient method of encouraging compliance with the law by imposing a set financial penalty following relatively minor breaches of the law.'¹⁷⁰

Infringement notices were first introduced into New Zealand in 1968 for parking and

¹⁶⁵ David Wilson "Instant Fines: Instant Justice? The Use of Infringement Offence Notices in New Zealand" (2001) 17 *Social Policy Journal of New Zealand* 72 at 76.

¹⁶⁶ Law Commission *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals*, above n 93 at 31.

¹⁶⁷ [1995] DCR 536 at [8].

¹⁶⁸ Ministry of Justice *Guidelines for New Infringement Schemes* <<http://www.justice.govt.nz/publications/global-publications/i/infringement-guidelines/guidelines-for-new-infringement-schemes>> at 4.

¹⁶⁹ *Ibid.*

¹⁷⁰ Ministry of Justice *Guidelines for New Infringement Schemes*, above n 168 at 5.

vehicle overloading offences,¹⁷¹ following a similar development in the United Kingdom in 1960.¹⁷² In 1971, speeding infringements came into force.¹⁷³ In 1987, the basic summary procedure for infringement offences was set out in Section 21 of the Summary Proceedings Act 1957.¹⁷⁴ Although certain infringement regimes vary slightly from this process,¹⁷⁵ generally an offender has 28 days to pay the fee or to request a hearing, or a reminder notice is sent.¹⁷⁶ The offender is then given a further 28 days to pay the fee, after which the reminder notice is filed in court and an order is then deemed to have been made for the defendant to pay the fine, and in addition, court costs.¹⁷⁷ The outstanding amount may then be collected through the fines enforcement process contained in Part 3 of the Summary Proceedings Act 1957.¹⁷⁸

Today, local councils, the police, and other prosecuting authorities can issue infringement fees for a wide variety of offences under a range of statutes including the Dog Control Act 1996, Land Transport Act 1998, the Litter Act 1979, the Weights and Measures Act 1987, the Civil Aviation Act 1990, and the Biosecurity Act 1993.¹⁷⁹ Fees can range from \$12 for minor parking offences, to \$10,000 for heavy vehicle overloading offences.¹⁸⁰ It is estimated that infringement and minor offences account for around 90 percent of offences that result in formal action by a prosecuting authority,¹⁸¹ with the police alone issuing nearly 1.3 million infringement notices each year.¹⁸²

¹⁷¹ Law Commission *The Infringement System: A Framework for Reform* (SP16, 2005) at 14.

¹⁷² David Wilson “Instant Fines: Instant Justice?” above n 165 at 72.

¹⁷³ Law Commission *Delivering Justice For All: A Vision for New Zealand Courts and Tribunals*, above n 93 at 30.

¹⁷⁴ David Wilson “Instant Fines: Instant Justice?” above n 165 at 72.

¹⁷⁵ For example, section 159A of the Biosecurity Act 1993 allows for an “accelerated infringement notice procedure” that is designed for foreign visitors likely to be in the country for a short period. See Ministry of Justice and the Law Commission *Review of the Infringement System: Options for Reform* (Discussion Paper, November 2004) at 54.

¹⁷⁶ Summary Proceedings Act 1957, s21(2).

¹⁷⁷ Summary Proceedings Act 1957, s21(5).

¹⁷⁸ Law Commission *The Infringement System: A Framework for Reform*, above n 171 at 9.

¹⁷⁹ Ministry of Justice *Review of Monetary Penalties in New Zealand* (June 2000) <<http://www.justice.govt.nz/publications/global-publications/r/review-of-monetary-penalties-in-new-zealand/issues-for-fines-and-infringement-fees-1>>.

¹⁸⁰ Law Commission *Delivering Justice For All: A Vision for New Zealand Courts and Tribunals*, above n 93 at 31.

¹⁸¹ Ministry of Justice and the Law Commission *Review of the Infringement System: Options for Reform*, above n 175 at 40.

¹⁸² Law Commission *Delivering Justice For All: A Vision for New Zealand Courts and Tribunals*, above n 93 at 27.

Chapter Five

The Advantages of Establishing an Infringement Scheme for Minor Offences under the Animal Welfare Act

Whilst the creation of a scheme is likely to improve enforcement by facilitating extra revenue for the SPCA, in absence of government funding, the effect of resource limitations on the number of prosecutions is likely to remain apparent. Thus, sentences are also likely to remain at the lower end of the spectrum so long as prosecutions remain rare. However, providing inspectors with an extra compliance tool may produce two significant advantages for the enforcement of animal welfare. These benefits will be explored in the next section.

I Filling the Gap for Offences that Deserve More than a Warning, but Less than the Full Sanctions of Criminal Law¹⁸³

Due to the cost of prosecutions, warnings are the most common punitive measure issued in response to animal welfare offending.¹⁸⁴ However, they also represent the ‘sanction’ with by far the weakest deterrent power. This problem was acknowledged by the MPI in their animal welfare discussion paper, *Animal Welfare Matters*:¹⁸⁵

Inspectors encounter a significant number of situations that warrant a response that is stronger than a warning letter, but are not severe enough to justify a full prosecution or court order. To address welfare problems early and deter more serious offending, animal welfare inspectors need an alternative penalty that is more suited to lower level offending.

An example of an offence of this nature can be demonstrated from the 2011 SPCA ‘List

¹⁸³ Infringement schemes are designed for offences of this nature. Ministry of Justice *Guidelines for New Infringement Schemes*, above n 168 at 23.

¹⁸⁴ For instance, one of the inspectors I interviewed stated that a warning would be the outcome of approximately 80% of complaints investigated. Interview with Steph Saunders, Regional Manager, Inspectorate and Centre Support, South Island, SPCA, and Virginia Pine, Chief Inspector Otago, SPCA, above n 3.

¹⁸⁵ Ministry of Primary Industries *Animal Welfare Matters: Proposals for a New Zealand Animal Welfare Strategy and amendments to the Animal Welfare Act 1999*, above n 7 at 4.9.3.

of Shame’:¹⁸⁶

In South Taranaki, thirteen Lop Eared Rabbits were found living in filthy conditions. Cage floors were covered in several inches of faeces and the animals were forced to live with their maggot- covered dead and dying young. Due to mitigating circumstances, the decision was made not to prosecute, provided that the owner adheres to strict instructions issued by SPCA Inspectors. Rabbit numbers were reduced to a manageable level, breeding was discontinued and the owner was educated on the appropriate care of rabbits.

Deterrence theory assists in explaining the value of an infringement regime, as an intermediary solution between warnings and prosecution, in addressing offending of this nature. Deterrence theory holds that if offenders are detected with sufficient frequency and punished with appropriate severity, then they will be less likely to commit a particular offence as they will perceive that the costs of violation outweigh the perceived benefits.¹⁸⁷ This theory can be further broken down into ‘general deterrence’ and ‘specific deterrence.’

General deterrence holds that people will be persuaded against violating a law if they believe that non-compliance will be detected and punishment severe and swift.¹⁸⁸ Scandinavian and German criminologists have further conceptualised this theory of general deterrence to consist of both a short-term element, in which people react through fear of threat, and long-term mechanisms in which habit formation and moral education result from exposure over time to the short-term threat.¹⁸⁹ Thus, although fear of threat is the original trigger discouraging people from breaking the law, compliance is later done voluntarily due to internalisation of the law.¹⁹⁰

Applying this theory, imposing infringement fines to acts or omissions that are unlikely to ever be prosecuted is likely to increase the perceived cost of offending. This effect is likely to be augmented by the fact that most New Zealanders have first-hand experience

¹⁸⁶ SPCA *List of Shame 2011*, above n 129.

¹⁸⁷ L Bluff and R Johnstone “Infringement Notices: Stimulus for Prevention or Trivialising Offences?” 19(4) *J Occup Health Safety – Australia and New Zealand* 337 at 338.

¹⁸⁸ *Ibid.*

¹⁸⁹ HL Ross “Deterring The Drinking Driver: Legal Policy and Social Control” (Lexington Books, Lexington, Massachusetts, 1984), at 8.

¹⁹⁰ *Ibid.* Although deterrence theory is known to have its limitations, it is nevertheless generally accepted as a central principle guiding penal policy, for instance in 7(1)(f) of the Sentencing Act 2002.

with infringement regimes, and are thus familiar with the immediate cost and inconvenience of acquiring such fines.¹⁹¹ As the Law Commission notes, “the fixed penalty and greater immediacy of the [infringement] enforcement process is considered to act as a sufficient deterrent for the types of offending involved.”¹⁹² Furthermore, general deterrence is considered most effective as a penal strategy when applied to offences involving rational deliberation, as opposed to impulsive acts,¹⁹³ making it particularly pertinent to the strict-liability animal welfare offences under ss 12 and 29, which tend to be omission-based.¹⁹⁴ Thus, general deterrence theory would suggest that an infringement remedy would enhance the effectiveness of the Act by providing companion animal owners with a greater disincentive to ill-treat their animals.

In addition to increasing the likely *cost* of offending, an infringement regime may also impact the second element of general deterrence theory, that of *detection*. As discussed above, the inspection process is limited by the fact that resources are consistently stretched. However, by enabling the SPCA to acquire the proceeds,¹⁹⁵ the issue of infringement fines is likely to create a steady flow of revenue for the SPCA.¹⁹⁶ This may in turn facilitate greater detection of animal abuse by providing more resources for inspection. In other words, infringement fines for animal welfare offending, much like speeding fines, can serve a dual purpose of discouraging non-compliance and financially sustaining enforcement and detection operations.¹⁹⁷ Given the public importance

¹⁹¹ As noted above, nearly 1.3 million infringement notices are issued by the police alone every year. See Law Commission *Delivering Justice For All: A Vision for New Zealand Courts and Tribunals*, above n 93 at 27.

¹⁹² Law Commission *The Infringement System: A Framework for Reform*, above n 171 at 32.

¹⁹³ Barbara Hudson *Understanding Justice: An introduction to ideas, perspectives and controversies in modern penal theory* (Open University Press, Buckingham, 1996) at 22.

¹⁹⁴ By contrast, given the nature of the *mens rea* requirement, wilful ill-treatment under s 28 generally involves more impulsive acts of violence.

¹⁹⁵ It is standard for the issuing agencies to receive the proceeds from infringements schemes. For instance, Section 343D of the Resource Management Act provides that a local authority shall be entitled to retain all infringement fees received for notices. Although there is concern that such a model would raise concerns of “revenue-raising”, as with traffic offences, the fact that the SPCA rely upon public acceptance to acquire donations is likely to be a sufficient check on their power.

¹⁹⁶ The Law Commission describes this revenue-facilitating factor as a major benefit of infringement schemes. See Law Commission *The Infringement System: A Framework for Reform*, above n 171 at 41.

¹⁹⁷ This is confirmed by studies of drink driving schemes in New Zealand, the United Kingdom, Canada, the Netherlands, and Scandinavia, which have concluded that “changes in the law promising increased certainty of detection, or combined certainty of detection and severity of punishment, reduce the amount of drinking and driving.” See HL Ross *Detering the Drinking Driver: Legal Policy and Social Control*, above n 189 at 103.

assumed to animal welfare and the detection of abuse, this ought not to be considered an illegitimate rationale for the scheme.¹⁹⁸

An infringement regime may also foster a specific deterrence effect. This form of deterrence stipulates that if a particular person is punished for violating a law, he or she will be less likely to repeat the violation.¹⁹⁹ This is a particularly pertinent theory in this context as less serious forms of animal welfare offending, if left unattended, can often lead to more serious abuse, or prolonged neglect, later on. For instance, the inspectors I interviewed noted several offences that tended to be subject to repetition, such as tying a dog up all day without giving it any exercise, or not providing adequate food or water for companion animals.²⁰⁰ As one inspector put it, “there are some [companion animal owners] we deal with who we know we will have to monitor until the day they die, but whose offending simply isn’t enough to justify a prosecution under the Act.”²⁰¹

Studies from overseas jurisdictions support the proposition that infringement schemes facilitate both specific and general deterrence. For instance, a study of 6,842 manufacturing plants that were inspected and issued penalties under the US Occupational Safety and Health Administration's (OSHA) infringement scheme between 1979 and 1985 found a 15-22% reduction in injuries in the three years following inspection.²⁰² The study concluded that even relatively small fines could achieve higher

¹⁹⁸ For instance, scholars tout one of the most significant advantages of drink driving infringement schemes in New York State as their ability to “help pay for various components of the DWI control system such as enforcement, prosecution and adjudication, education, and public information.” See JL Nichols and HL Ross “The Effectiveness of Legal Sanctions in Dealing with Drinking Drivers” (1990) 6(2) *Alcohol Drugs Driving* 93 at 107.

Furthermore, increased animal welfare inspections could potentially have positive externalities in the realm of domestic violence and child abuse; in recognition of the overlap between animal abuse and domestic violence, Child, Youth and Family (CYF) has an agreement with the SPCA that CYF will keep an eye out for signs of animal abuse during visits, and the SPCA will take note of any signs of child abuse during their inspections, with each agency informing the other accordingly. Thus, by facilitating more revenue for inspections, an infringement regime may have the potential to increase the prospect of family violence being detected, as well as animal abuse. See Child, Youth and Family “Agreement to Protect Children and Animals Thought to be World-first” (16 September 2008) <<http://www.cyf.govt.nz/about-us/news/2008/agreement-to-protect-children-and-animals-thought-to-be-world-first.html>>.

¹⁹⁹ Barbara Hudson *Understanding Justice: An introduction to ideas, perspectives and controversies in modern penal theory*, above n 193 at 19.

²⁰⁰ Interview with Steph Saunders, Regional Manager, Inspectorate and Centre Support, South Island, SPCA, and Virginia Pine, Chief Inspector Otago, SPCA, above n 3.

²⁰¹ Ibid.

²⁰² L Bluff and R Johnstone “Infringement Notices: Stimulus for Prevention or Trivialising Offences?”, above n 187 at 340.

levels of compliance with health and safety laws.²⁰³ By contradistinction, the study found that inspections that did not result in penalties had no injury-reducing effects.²⁰⁴ A general deterrent effect was also identified: once one firm in an area or trade had received an on-the-spot fine, the “word got around” and other firms were influenced to reassess their OHS performance and adopt preventive measures.²⁰⁵

The Ministry of Justice notes that the establishment of an infringement regime is likely to widen the number of actions that will be subject to a penal action.²⁰⁶ This ‘net-widening’ is often regarded as a negative feature of infringement regimes, as it brings more individuals into contact with the justice system who may otherwise have avoided it.²⁰⁷ However, in this context, net-widening ought to be regarded as a positive corollary: it assists in absolving the current anomaly in which legislative intent in enacting the Animal Welfare Act is frustrated by a defective enforcement regime. Indeed, penalising the perpetrators of animal cruelty offences, and thus helping to deter these individuals and the wider public from committing future offences, ought to be regarded as the precise justification for such a scheme.

²⁰³ Ibid.

²⁰⁴ Ibid.

²⁰⁵ Ibid. Although these studies are based in a commercial context, numerous studies of infringement schemes within regimes governing natural persons support their ability to achieve specific and general deterrence. For instance, studies of Scandinavian traffic infringement schemes have found there to be a negative correlation between the use of fines and the number of fatal accidents: JL Nichols and HL Ross “The Effectiveness of Legal Sanctions in Dealing with Drinking Drivers” (1990) above n 198 at 98.

²⁰⁶ This ‘net-widening’ occurs in two respects. First, the ease with which infringement regimes may be issued makes it likely that, in absence of other controls, they will be ‘used when previously no action, a caution, or a warning would have been the official response’: Ministry of Justice *Review of Monetary Penalties in New Zealand* (June 2000), above n 179. For instance, studies of the Cannabis Expiation (infringement) Notice scheme in South Australia found that police officers were more likely to deal formally with minor cannabis offences with infringement notices following the introduction of the scheme, where previously they may have issued warnings or cautions: C Paul and A Robert “Offences under the Cannabis Expiation Notice scheme in South Australia” (Sept 2000) 19.3 *Drug and Alcohol Review* at 251. Second, the fine that the offender receives may be harsher or unrealistic as compared with a court-imposed sentence: Law Commission *Delivering Justice For All: A Vision for New Zealand Courts and Tribunals*, above n 93 at 2.1.8.

²⁰⁷ A Sutton and D Hawks “The Cannabis Infringement Notice scheme in Western Australia: a review of policy, police and judicial perspectives” 24 *Drug and Alcohol Review* 331 at 334.

II Providing an Alternative Penal Measure to Prosecutions for Low- to Medium-level Offending

Another significant advantage of adopting an infringement notice system is that it can act as an alternative remedy to prosecution in instances of minor to medium-level offending. As discussed above, although the statutory penalties prescribed under the Animal Welfare Act are relatively high, sentences issued remain very low, with most cases resulting in a fine, even following the Animal Welfare Amendment Act 2010. For instance, even cases of reckless ill-treatment under s28A – an offence of greater seriousness than the strict liability ss 12 and 29 offences – are often dealt with by way of fines less than \$1,000.²⁰⁸ The following are recent examples of prosecutions that arguably could have been more appropriately dealt with by infringement fine than a prosecution:

- In Onerahi, Whangarei, a 28 year old woman was convicted for failing to provide appropriate food and veterinary treatment to a male Sharpei dog. The woman was fined \$500 payable to the SPCA.²⁰⁹
- A Milton woman was convicted of recklessly ill-treating her horse. Her horse was found by an MAF inspector with a huge weeping growth on its right rear leg that was covered in wasps and flies and had to be put down. She was convicted and ordered to pay \$1,000 reparation to the SPCA in Christchurch.²¹⁰

By attending to offences of this nature with infringement notices instead of prosecutions, a similar penal outcome could be achieved, without the great transaction costs associated with prosecutions. Furthermore, the rights of defendants under such a scheme would

²⁰⁸ For instance, even in *SPCA v Wilson* DC Dunedin CRI-2012-012-000938, 1 June 2012, which involved a charge of reckless ill-treatment for starving 200 hens to death in what was described as a “death camp for chickens”, the sentence issued was only five months’ home detention; a ban on possessing or owning any animal for five years; and a fine of \$1,357 to be paid to the SPCA, and \$3,000 costs.

²⁰⁹ *SPCA List of Shame 2011*, above n 129. Official citation unavailable.

²¹⁰ *Police v McHaffie* DC Balclutha CRI -2010- 005-000479, 20 June 2011. Although *McHaffie* was an offence of reckless ill-treatment under s 28A Animal Welfare Act, the overlapping nature of this and the s 29 ill-treatment offence would enable less serious forms of reckless ill-treatment be dealt under the latter offence where appropriate.

still be protected by virtue of their opportunity to defend the charge in court, as required by the Ministry of Justice Guidelines for New Infringement Regimes.²¹¹

A shift towards this alternative penalty for certain offences would create significant resource savings for the prosecuting agency, the judiciary, and the defendant. For instance, the Ministry of Justice notes that whereas a notice can be completed immediately at a crime scene, a prosecution file “represents a considerable amount of paperwork by the officer in charge of the case and others.”²¹² Indeed, it has been reported that changing minor cannabis offences to an infringement regime saved South Australia nearly 1.5 million during 1995/1996.²¹³

Of course, only a very small number of prosecutions are made under the Animal Welfare Act, and only a limited number of these could appropriately be dealt with by way of an infringement notice. Thus, resource savings are likely to be smaller as compared with another prosecuting agency diverting minor offending away from the courts and into an infringement regime. However, in a charity-based enforcement model in which resources are so precious, even small savings are significant. In particular, by enabling the most minor forms of offending to be addressed by infringements, the SPCA would be able to focus its prosecutorial resources on the most serious forms of offending.²¹⁴ This may make it more manageable to prosecute large-scale commercial neglect cases that are often legally complex and financially burdensome.²¹⁵

Furthermore, such savings could be used to increase the scale of investigations in order to ensure more animal abuse is detected. Indeed, even the cost of just one or two prosecutions could fund a part- or full-time inspector for an entire year.²¹⁶ Moreover, in addition to bolstering the number of inspections, such savings, in combination with the increased revenue collected from infringement fines,²¹⁷ could be used to support legal training initiatives for inspectors in order to enhance the *quality* of the inspections process. This is important in preventing instances of ‘bungled’ evidence as in the *R v*

²¹¹ Ministry of Justice *Guidelines for New Infringement Schemes*, above n 168 at 34-35.

²¹² Ministry of Justice *Review of Monetary Penalties in New Zealand* (June 2000), above n 179.

²¹³ Law Commission *The Infringement System: A Framework for Reform*, above n 171 at 187.

²¹⁴ *Ibid*, at 32.

²¹⁵ For example, *R v Balfour & Anor*, above n 71.

²¹⁶ See n 143 above.

²¹⁷ Ministry of Justice *Review of Monetary Penalties in New Zealand* (June 2000), above n 179.

Balfour & Anor case.²¹⁸

Finally, as the Ministry of Justice notes, reducing reliance on the formal criminal justice system by employing alternative mechanisms to deal with less serious offences may encourage, or even provide, resources to apply more effective strategies in other fields to reduce the incidence of those offences.²¹⁹ In this context, this could entail concentrating on preventative initiatives such as public media campaigns against animal cruelty. Such education programmes can not only serve to decrease the prevalence of animal welfare offending, but can also increase the reporting of such crimes; for instance increased feminist consciousness in recent years has been said to have led to an increase in the recording rates of domestic violence and sexual offences.²²⁰

²¹⁸ Ibid.

²¹⁹ Ibid.

²²⁰ Barbara Hudson *Understanding Justice: An introduction to ideas, perspectives and controversies in modern penal theory*, above n 193 at 22.

Chapter Six

The Risks and Concerns Associated with Adopting an Infringement Scheme

I Undermining the Public's Perception of Animal Welfare Offences

Throughout the globe, and certainly in New Zealand, the animal rights movement is gaining greater political momentum and clout. As this movement has gained increasing influence, one of its major platforms of reform has been to move the criminal law's treatment of crimes against animals closer to that of offences against humans. This trend is reflected in the history of animal welfare legislation in New Zealand, which has seen the incremental increase of penalties for animal welfare offences.²²¹

Against this background, any proposal to modify penalties prescribed by criminal law and to allow for the issue of an infringement notice is counter-intuitive: it shifts animal welfare offences further away from similar offences against humans, and instead positions the offences alongside mere regulatory breaches. This classification is categorically significant, as the characterising features of this class of offences are a low degree of seriousness, and an absence of significant moral blameworthiness.²²² Indeed, the Ministry of Justice Guidelines explicitly define infringement offences as being for those that are 'minor' in nature²²³ – a classification that many animal advocates, and much of the wider public, would reject as an inapt label for animal cruelty offences.

Such concerns ought not to be dismissed as mere sentimentality. As the Ministry of Justice notes, "One view is that the application of an infringement fee to any particular offence, thereby removing its criminal status, may lessen the seriousness with which that offence is publicly regarded."²²⁴ Several features of infringement fines foster this

²²¹ As noted above, the Animal Welfare Act increased penalties three-fold from the former Animal Protection Act 1960, with the Animal Welfare Amendment Act 2010 increasing these further.

²²² Law Commission *The Infringement System: A Framework for Reform*, above n 171 at 40.

²²³ Ministry of Justice *Guidelines for New Infringement Schemes*, above n 168 at 22.

²²⁴ Ministry of Justice *Review of Monetary Penalties in New Zealand* (June 2000), above n 179. Peter Sankoff also noted that creating infringement offences, whilst having many advantages, would serve to "symbolically lessen the seriousness of crimes against animals." See Peter Sankoff *Five Years of the "New" Animal Welfare Regime: Lessons Learned From New Zealand's Decision to Modernize its Animal Welfare Legislation*, above n 6 at 32.

perception. For instance, infringements enable defendants to avoid the time, inconvenience and embarrassment of appearing before a court. Significantly, defendants are also able to escape without a conviction or criminal record regardless of their record of previous offending, thus meaning that the “social opprobrium associated with the offence is zero.”²²⁵

In light of this, the Ministry of Justice notes that by reducing the penalty level and the possibility of conviction, the deterrent force of the law may be reduced when a particular matter is addressed administratively rather than judicially.²²⁶ This may lead to lower levels of compliance with the law and to higher levels of re-offending than would otherwise be the case.²²⁷ If such concerns were valid, the establishment of an infringement scheme would in fact be counter-productive. Moreover, taking this concern one step further, by lowering society’s perception of the blameworthiness of animal welfare offending, the initiative could act to undermine the moral regard in which animals are held within society generally.

However, upon closer analysis, the specific circumstances concerning animal welfare offending reduce the weight of these concerns in this particular context. First, the Ministry of Justice’s point is premised upon the notion that an infringement regime would result in a lower penalty being issued to the offender. Yet, as discussed above, currently judges are “treating animal cruelty as a purely regulatory offence” anyway.²²⁸ Furthermore, although infringements may be used in replacement of minor prosecutions, in most instances their use will entail a shift *up* the enforcement ladder, by superseding warnings. Thus, rather than degrading the offences, if anything, this harsher compliance tool is likely to send the opposite message, cementing public condemnation of animal welfare offending.

Second, whilst the historical origin of infringements was to address minor offending, generally of a regulatory nature, this is changing. Today, the number of infringement regimes is evolving beyond strict liability offences to encompass a broad range of activities, including more serious offences involving elements of *mens rea* such as

²²⁵ Ministry of Justice *Review of Monetary Penalties in New Zealand*, above n 179.

²²⁶ *Ibid.*

²²⁷ David Wilson “Instant Fines: Instant Justice? The Use of Infringement Offence Notices in New Zealand”, above n 165 at 79.

²²⁸ A Markham “Animal Cruelty Sentencing in Australia and New Zealand” above n 126 at 303.

knowledge, culpability or fault.²²⁹ Furthermore, many strict liability offences that the public perceive to involve a high level of moral culpability are dealt with by infringement regimes; drink driving by those aged under 20 under the Land Transport Act 1998 is a case in point.²³⁰ Similarly, in Australia, where infringement regimes are becoming increasingly common, more serious offences continue to be incorporated within such regimes. For instance, in Victoria, infringement notices are currently being trialled for the offences of shop theft of goods valued at \$600 or less, and wilful damage to property valued at less than \$500.²³¹ Thus, the expansive nature of infringement regimes diminishes the cogency of any concern that such a scheme would demean animal welfare offences.

Finally, whilst there is evidence to suggest that changes in law can provoke changes in public perception towards certain acts or omissions, the main factor influencing public attitudes towards animal welfare offending is arguably not the penalty, but the social harm it involves. Unlike certain infringement offences that are victimless and see offenders being fined even when no social harm results,²³² animal welfare offending involves clear and vulnerable victims. In fact, the public tends to regard crimes against animals as akin to offences perpetrated against children and the elderly, due to the abuse of a power relationship that this form of offending entails.²³³ Accordingly, as long as this social harm remains apparent, it is unlikely that providing inspectors with one additional legal remedy would radically change the public's perception of this wrongdoing. Indeed, rather than trivialising such offences, there is contrary evidence to suggest that infringement regimes can promote greater compliance with such laws.²³⁴

²²⁹ For instance, wilful obstruction of a dog control officer or ranger is an infringement offence under s18 of the Dog Control Act 1996. See *Ministry of Justice Review of Infringement System: Options for Reform*, above n 175 at 43.

²³⁰ Land Transport Act, s 57.

²³¹ Courts and Sentencing Legislation Amendment Act 2012 (Vic), s 1(b); Justice Legislation Amendment (Infringement Offences) Act 2011 (Vic), ss 5,6.

²³² For instance, minor traffic offences.

²³³ JE Schaffner *An Introduction to Animals and the Law*, above n 119 at 28.

²³⁴ For instance, Bluff and Johnstone conclude after studying occupational health and safety regimes in New Zealand, Australian, and US jurisdictions, that there is tentative evidence in favour of using infringement notices in OHS enforcement, as they have the potential to favourably influence OHS performance. L Bluff and R Johnstone "Infringement Notices: Stimulus for Prevention or Trivialising Offences?", above n 187 at 344.

II Justice for Offenders

Another major concern about the use of infringement regimes focuses on the legal rights of recipients of notices.²³⁵ In particular, there is concern with an administrative remedy of this nature, that the absence of court involvement and procedure may abrogate the principles of due process and fairness. For this reason, the Ministry of Justice advises that infringements ought only to be issued in instances involving clear issues of fact.²³⁶ This concern is significant: whereas some infringement offences are automated and therefore clear-cut, e.g. speeding, animal welfare offences can be more complex. Furthermore, there is also a risk that innocent people may pay infringement notices to avoid the cost and inconvenience of contesting proceedings.²³⁷

Infringement schemes also do not give any consideration as to the circumstances surrounding the commission of the offence, or the financial and other circumstances of the offender when imposing the penalty.²³⁸ Thus, previous offending is not taken into account and more affluent offenders will always find it easier to pay fines than those who have fewer means.²³⁹ Noting this, in its submission regarding the recent trial of infringement notices for the offences of shop theft and wilful damage in Victoria, Australia, the Federation of Community Legal Centres Victoria noted that “legal sector clients are rarely able to afford to pay a fine and have more pressing needs that they struggle to meet such as housing and healthcare.”²⁴⁰ This imposition of monetary penalties without regard to the offender’s ability to pay is regarded as inconsistent with sentencing principles.²⁴¹

However, these concerns act more to inform the design of an infringement regime, rather than to disprove the appropriateness of adopting one per se. For instance, they

²³⁵ Ibid, at 341.

²³⁶ Ministry of Justice *Guidelines for New Infringement Schemes*, above n 168.

²³⁷ L Bluff and R Johnstone “Infringement Notices: Stimulus for Prevention or Trivialising Offences?”, above n 187 at 341.

²³⁸ Law Commission *Delivering Justice For All: A Vision for New Zealand Courts and Tribunals*, above n 93 at 2.2.33-2.2.34.

²³⁹ Ibid, at 2.2.34.

²⁴⁰ Letter from Federation of Legal Services Victoria to Anthea Derrington (Director, Policy and Strategic Services, Infringement Management and Enforcement Services, Department of Justice, Victoria, Australia) regarding infringement trial – shop theft and wilful damage (11 November 2011) at 4.

²⁴¹ Law Commission *Delivering Justice For All: A Vision for New Zealand Courts and Tribunals*, above n 93 at 2.2.36.

highlight the value of incorporating a ‘time-to-pay’ mechanism, or the option of the Court imposing alternative remedies, such as compulsory animal welfare educational sessions, similar to those adopted under the Western Australian Cannabis Control Act (2003),²⁴² in instances where the offender is genuinely unable to pay.

²⁴² J Fetherston and S Lenton “Community attitudes towards Cannabis Law and the Proposed Cannabis Infringement Notice Scheme in Western Australia” (July 2005) 24 *Drug and Alcohol Review* 301 at 302. Under this scheme, adults who are apprehended for a minor cannabis offence have the option of paying the fine in full, or completing a specified cannabis education session, within 28 days of receiving a Cannabis Infringement Notice in order to avoid a criminal charge. *Ibid*, at 301.

Chapter Seven

The Appropriate Scope of An Infringement Scheme

Given the aforementioned benefits and risks associated with establishing an infringement regime in this context, is it a suitable remedy to address animal welfare offending? If so, what is the appropriate scope of such a regime with respect to offences, penalties, and rights of offenders? These questions will be explored in this chapter.

I Are any Offences under the Animal Welfare Act Suitable for Inclusion in an Infringement Regime?

The Ministry of Justice Guidelines state that infringement regimes ought to address misconduct of comparatively minor concern to the public.²⁴³ The Law Commission and Ministry of Justice note several criteria that are relevant in determining whether or not an offence ought to be considered minor:

- The level of penalty it attracts;
- The extent to which the wrong has socially harmful consequences (actual or potential);
- If the offence is considered less morally reprehensible than other forms of offending;²⁴⁴
and
- The degree of fault on the part of the offender.²⁴⁵

However, the Ministry of Justice Guidelines for New Infringement Regimes states that infringement notices may be issued for more serious forms of offending provided that the following criteria also apply:

²⁴³ Ministry of Justice *Guidelines for New Infringement Schemes*, above n 168 at 21.

²⁴⁴ Law Commission *The Infringement System: A Framework for Reform*, above n 171 at 40.

²⁴⁵ Ministry of Justice *Review of Monetary Penalties in New Zealand* (June 2000), above n 179.

- The offence involves actions or omissions that involve straightforward issues of fact;
- The offences are of strict or absolute liability; and
- An infringement regime would be an appropriate mechanism or part of an appropriate mechanism to encourage compliance with the law.²⁴⁶

Similarly, in recognising the inadequacy of the ‘minor’ classification as the defining characteristic determining whether a particular offence ought to be subject to an infringement regime, the Law Commission has suggested that the real test ought to be:

- Whether the range of seriousness and culpability covered by the offence is such that it can be adequately dealt with by the fixed penalty available within the infringement system?²⁴⁷

Are any of the offences under the Animal Welfare Act sufficiently minor to justify inclusion into an infringement regime?

A. Mens Rea Offences

Reckless Ill-treatment (s28) and Wilful Ill-treatment (s28A)

These *mens rea* offences are not minor, but rather are the most serious offences prescribed under the Act. Indeed, they have been explicitly created by Parliament to capture forms of ill-treatment more serious than those encompassed by s29. These offences mandate up to three and five years imprisonment respectively, and therefore well exceed the gravity threshold suitable for an infringement offence. As the Law Commission notes, “the greater the severity of the offence, the greater the necessity and degree of involvement of the court.”²⁴⁸ In cases of this gravity, prosecutions also play an important role in educating the public about animal abuse. Due to the high level of media attention this form of offending attracts, animal advocates view this educative

²⁴⁶ Ibid.

²⁴⁷ Law Commission *Review of the Infringement System: Options for Reform*, above n 175 at 62.

²⁴⁸ Law Commission *Delivering Justice For All: A Vision for New Zealand Courts and Tribunals*, above n 93 at 2.1.20.

function to play an important deterrent role in preventing animal abuse by the wider public.²⁴⁹

Other Mens Rea Offences

If the Ministry of Justice Guidelines for New Infringement Schemes is strictly abided by, the other *mens rea* offences provided for under the Act will not be appropriate for inclusion in an infringement regime.²⁵⁰ However, certain *mens rea* offences that involve more clear issues of fact, such as keeping an animal alive when it is suffering unreasonable or unnecessary pain or distress under s 14(1), arguably are minor enough to be re-characterised as strict liability offences and worked into an infringement regime in the long run. However, given the significant nature of a shift to an infringement scheme within the Animal Welfare Act, arguably it would be more appropriate to exclude many of the more serious *mens rea* offences to begin with. Furthermore, because the majority of offences perpetrated in a companion animal context are general ill-treatment offences,²⁵¹ incorporating these specific cruelty offences is unlikely to have a significant impact on the enforcement of the Act.

B. Strict Liability Offences: ss 12 and 29

Does the level of penalty imposed make offences against ss 12 and 29 'minor'?

The Law Commission recommends that infringement notices not be used for imprisonable offences.²⁵² However, literature has pointed to those offences that carry a fine only as a maximum penalty as being minor, although offences that carry a maximum prison term of up to six months have also featured in discussions on the definition of offences considered minor.²⁵³

The strict liability offences under the Animal Welfare Act carry a maximum penalty of 12

²⁴⁹ Interview with Steph Saunders, Regional Manager, Inspectorate and Centre Support, South Island, SPCA, and Virginia Pine, Chief Inspector Otago, SPCA, above n 3.

²⁵⁰ As stated in Chapter One, these are ss 29(b)-(f), 31(1), 34, 35(1), 35(2), 14(1), s 14(2), s21, 22 and 23.

²⁵¹ Email From Virginia Pine, Chief Inspector Otago NZRSPCA, to Danielle Duffield regarding inspections (8 October 2012).

²⁵² Law Commission *Review of the Infringement System: Options for Reform*, above n 175 at 225.

²⁵³ Ministry of Justice *Review of Monetary Penalties in New Zealand* (June 2000), above n 179.

months in prison and/or \$50,000 fine for an individual, and a \$250,000 fine for a body corporate.²⁵⁴ Upon this basis, the penalties imposed for these offences would appear to place them outside the ‘minor’ category. However, three considerations are relevant regarding this point. The first is that these offences have only recently acquired maximum penalties of 12 months. As stated in Part One, prior to the Animal Welfare Amendment Act 2010, maximum penalties were six months – a term enabling the offences to be considered ‘minor’ by the literature. Second, in spite of the penalty increase, judges rarely impose imprisonment of any duration for these offences.

Finally, as the Law Commission notes, in the absence of a clear definition of what amounts to “minor offending,” this calls for a subjective determination. Today, it can no longer be said that all infringement offences attract a penalty low enough to be considered minor offending.²⁵⁵ For instance, infringement offences under the Resource Management Act 1991 involve offences that if prosecuted summarily, carry a maximum penalty of two years’ imprisonment or a \$300,000 fine for a natural person, or \$600,000 for other legal persons.²⁵⁶

Is the level of social harm, and moral reprehensibility, pertaining to the ss 12 and 29 offences, minor?

Most New Zealanders would agree that the social harm resulting from these offences is significant. Rather than being offences of a merely regulatory nature, these offences involve physical harm to sentient beings. Consequently, the offences could be considered more morally significant than the penalties may otherwise suggest. This point was noted by Judge Garland in *R v Balfour & Anor*, who stated in relation to s 12(a) (failing to provide for the physical health and behavioural needs of animals) that:

This offence is to stop people causing suffering to animals who are totally reliant on their owners. The animals cannot stop or protest the harm that is inflicted on them. This offence [s12] should also be construed as having some form of “public policy” behind it. The purpose behind the Act is “to require owners of animals, and persons in charge of animals, to attend properly to the welfare of those animals.” Public policy would dictate that we take this offence more seriously than perhaps we would for some other offence that does not threaten the public safety but only prescribes a

²⁵⁴ Sections 25 and 37, Animal Welfare Act 1999.

²⁵⁵ Law Commission *Review of the Infringement System: Options for Reform*, above n 175 at 40.

²⁵⁶ Resource Management Act 1991, s338. See Ministry for the Environment Resource Management Enforcement Manual (October 2009).

maximum term of imprisonment of six months.²⁵⁷

However, as noted earlier, today infringement regimes are being issued to address offences of much greater seriousness. Thus, as the Law Commission notes, whilst in many cases, the harm resulting from an infringement offence is low (for example, parking offences), in other instances the potential for harm is significant (for example, driving at between 45 and 50 kph over the speed limit).²⁵⁸ Furthermore, the high penalties prescribed for some infringements if proceeded with summarily suggest that the behaviour in issue is in fact relatively serious and/or morally reprehensible.²⁵⁹

If not minor, do the ss 12 and 29 offences meet the other criteria required in order to justify inclusion into an infringement regime?

The above analysis suggests that the penalties and social harm pertaining to the strict liability offences under the Animal Welfare Act place them outside the category of offences that could reasonably be considered ‘minor.’ However, the same analysis finds that this is true of many infringement offences. Thus, consistent with the Ministry of Justice Guidelines for New Infringement Schemes, this consideration ought not to be solely determinative.²⁶⁰ Therefore, in considering whether these offences ought to be subject to an infringement regime, it must be determined whether they involve straightforward issues of fact; are part of an appropriate mechanism to encourage compliance with the law; and involve appropriate variations in degrees of culpability.

Do offences against ss 12 and 29 involve actions or omissions that involve straightforward issues of fact?

On the face of it, animal welfare offences do not appear to fulfil this requirement. Unlike certain traffic offences such as speeding, where detection is often automated – someone exceeded the speed limit or they did not – issues as to what constitutes cruelty may appear complex. For instance, s12 offences are qualified by words such as ‘good practice and scientific knowledge’²⁶¹ ‘where practicable’²⁶² and ‘unreasonable or unnecessary’.²⁶³ Similarly, s2 defines ‘ill-treat’ to mean, “causing the animal to suffer, by any act or

²⁵⁷ *R v Balfour & Anor*, above n 71 at [232].

²⁵⁸ Law Commission *Review of the Infringement System: Options for Reform*, above n 175 at 41.

²⁵⁹ Law Commission *Review of the Infringement System: Options for Reform*, above n 175 at 42.

²⁶⁰ Ministry of Justice *Review of Monetary Penalties in New Zealand* (June 2000), above n 179.

²⁶¹ Animal Welfare Act, s 10.

²⁶² Animal Welfare Act, s 11(1).

²⁶³ Animal Welfare Act ss 11(1), 12(c).

omission, pain or distress that in its kind or degree, or in its object, or in the circumstances in which it is inflicted, is unreasonable or unnecessary.” Addressing this point, Bluff and Johnstone note in the context of official health and safety schemes that regulators may be cautious about using infringement notice systems for offences that are qualified by phrases of this nature, or which require a decision about the adequacy of risk management processes. In addition to concerns of unfairness to offenders, in such instances significant time and resources may be required by inspectors to justify a notice in the event that a court review is requested – thus undermining the very rationale for their use.

While this is a significant concern, it ought not to be overstated. Whereas explicit or highly negligent acts of cruelty tend to be prosecuted under the wilful or reckless ill-treatment offences under s28 and s28A of the Act, the strict liability offences under s 12 and s 29 tend to be committed by omission rather than by overt acts of cruelty. Indeed, ss 12(a) and 12(b) are explicitly breaches of the duty of care. In many instances, these omissions are likely to be quite apparent – this being precisely why someone has reported the offence to the SPCA in the first place. For instance, if an inspector finds an animal ill-equipped with the necessities of life defined in Section 4 of the Act (for instance, food, water, or shelter), in most cases it will be relatively clear that an offence against s 12(a) has been committed.

Furthermore, many infringement regimes incorporate offences that require judgments on the facts. For instance, under s 15(1)(a) and (b) of the Resource Management Act, it is an offence to discharge contaminants into water or onto or into land where contaminant is ‘likely’ to enter water. Similarly, under the Dog Control Act, the welfare offence of “failing to provide proper care and attention, to supply proper and sufficient food, water, and shelter, and to provide adequate exercise,” effectively parallels the offence under s 12 of the Animal Welfare Act in terms of requiring judgment as to the adequacy of the life necessities provided.²⁶⁴

Of course, as with all forms of offending, including those incorporated within infringement regimes, there will be cases in which the offending is borderline, or less clear-cut. Therefore, two important protections ought to be provided in order to protect the rights of offenders in such circumstances. The first of these is the discretion of

²⁶⁴ Section 54(2) Dog Control Act.

inspectors to decide whether to issue a warning or an infringement fine; the SPCA relies upon support from the public, and is unlikely to want to damage this rapport by issuing notices where they are not warranted or where the factual circumstances surrounding the offence are unclear. The second is the most important right of those issued with an infringement notice: the recipient's ability to contest the offence in court if he or she considers it unwarranted.

*Would an infringement regime in this context be an appropriate mechanism or part of an appropriate mechanism to encourage compliance with the law?*²⁶⁵

As noted above, studies of infringement regimes implemented in other statutory regimes have proved successful in encouraging compliance. Indeed, throughout New Zealand and overseas jurisdictions, an increasing number of offences are beginning to be addressed by way of an infringement notice system in recognition of the expediency of this approach.²⁶⁶

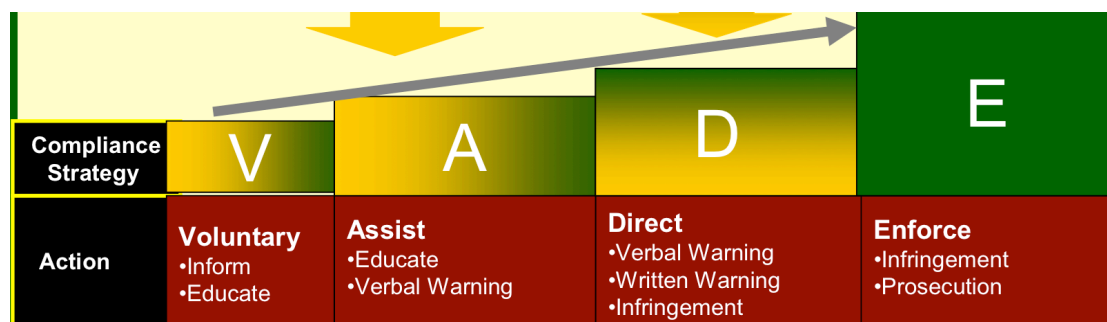
However, in this context, an infringement regime is likely to be most effective if it is part of a tiered enforcement model as is typical with many infringement regimes.²⁶⁷ Under such a tiered scheme, investigators would have the discretion to: issue a warning; provide the offender with an opportunity to rectify the situation (thus being analogous to instructions to obtain a warrant of fitness given under the Land Transport Act); issue an instant fine (infringement notice); undertake a prosecution; or disqualify the person's right to own an animal following multiple offending.

²⁶⁵ Ministry of Justice *Review of Monetary Penalties in New Zealand* (June 2000), above n 179.

²⁶⁶ See David Wilson "Instant Fines: Instant Justice? The Use of Infringement Offence Notices in New Zealand", above n 165 at 72.

²⁶⁷ For instance, under the proposed NAIT scheme, NAIT officers and NAIT authorised persons will have discretion to decide whether to provide further education, information and guidance; issue a written warning; recommend that MPI issues an infringement notice; or (in the most serious cases of offending) referring the offence to MPI for a decision on whether to proceed directly to seek a prosecution for the high-level offence rather than to issue an infringement notice. See MPI "Regulations under the National Animal Identification and Tracing Act 2012 to implement the NAIT scheme: Regulations for Infringement Offences and Regulations Establishing the NAIT Information System Access Panel" (MPI Discussion Paper No 2012/15, August 2012) at 10. Similarly, under the Resource Management Act, local authorities are required to consider the scale of offending involved when deciding whether to prosecute or to issue an infringement notice. See Ministry for the Environment "Resource Management Enforcement Manual" (October 2009).

The 'VADE' model within the proposed infringement regime for the National Animal Identification Tracing (NAIT) scheme highlights the operation of a tiered system:²⁶⁸



A tiered system of this nature would mitigate the bluntness of the fixed-penalty regime by enabling the circumstances of the offending to be taken into account. Such exercise of discretion could be subject to formal operational guidelines in order to ensure that officials act in a consistent manner.²⁶⁹

Is the range of seriousness and culpability covered by the offences such that they can be adequately dealt with by an infringement regime?

Section 29: Ill-treatment

Whilst early New Zealand animal welfare legislation tended to have a 'catch-all' ill-treatment offence, crossing a large spectrum of culpability levels, the Animal Welfare Act specifically separates offences according to culpability level. These range from the strict liability offence of ill-treatment under s29 (generally applied to minor offending), to the *mens rea* offences of reckless ill-treatment under s 28A (for more serious cases) and wilful ill-treatment (the most serious cases). Consequently, the range of offences addressed under s29 fall within a relatively similar, narrow range of culpability, with the more serious forms of ill-treatment being addressed by prosecution under s 28 and s 28A.

²⁶⁸ Ibid, at 10.

²⁶⁹ Ministry of Justice *Guidelines for New Infringement Schemes*, above n 168 at 32. Also see Law Commission *Review of the Infringement System: Options for Reform*, above n 175 at 232.

Section 12: Duty of Care Offences

The offences under s 12 essentially create three specific forms of ill-treatment. Due to this overlap with s29, infringements for offences under s 12 would generally be reserved for those involving low levels of culpability, with the more serious forms of offending triggering a prosecution under the s 28 and 28A *mens rea* offences. Therefore, the separation of offences according to the level of seriousness under the Act weighs in favour of their incorporation into an infringement regime.

II Should an Infringement Notice Issued under the Act Lead to Conviction?

A. The ‘No-conviction’ Provision in the Summary Proceedings Act 1957

Section 78A(1) of the Summary Proceedings Act 1957 holds that notwithstanding any other provision of that or any other Act, a conviction should not result from an infringement offence. Whereas in the United Kingdom if a defendant chooses to go to court to challenge the notice, a conviction may ensue,²⁷⁰ the New Zealand Law Commission and Ministry of Justice hold that conviction ought never to result from an infringement notice, even when challenged in court.²⁷¹ This is held to be important protection for defendants, as it ensures that there is no disincentive for a defendant to challenge the infringement notice in court.²⁷²

B. Variations on the ‘No-Conviction’ Model

A variation of this model would be to create some infringement offences that involve no criminal record, and others that do result in a criminal record.²⁷³ Alternatively, a conviction could result only if the matter is referred to the court for non-payment of the fee, as adopted in the South Australian cannabis expiation scheme.²⁷⁴ Similarly, a conviction could be an option to respond to recidivist defendants, for instance following

²⁷⁰ Law Commission *Review of the Infringement System: Options for Reform*, above n 175 at 65.

²⁷¹ *Ibid*, at 72.

²⁷² Law Commission *Review of the Infringement System: Options for Reform*, above n 175 at 63.

²⁷³ Ministry of Justice *Review of Monetary Penalties in New Zealand* (June 2000), above n 179.

²⁷⁴ *Ibid*.

the fifth occurrence of a particular infringement offence.²⁷⁵

Although this model is likely to encourage greater compliance with infringement notices, it is not apposite in this context. As the Ministry of Justice notes, the power to issue convictions has, for sound reasons, always been the constitutional prerogative of the judiciary – not the executive.²⁷⁶ Following this rationale, a conviction would be particularly incongruous under the Animal Welfare Act, as it would involve a transfer of this judicial function one step further, namely to a private charity.

III. *What Penalty should Infringement Notices Attract?*

In setting appropriate infringement fees within this range, a careful balance must be struck between ensuring that the penalty is high enough to deter offending, but not so high so as to hinder compliance. The Ministry of Justice states that the fee ought to be considerably less than the statutory maximum available to the court following a successful summary prosecution,²⁷⁷ and recommends that they not exceed \$1,000, unless in the particular circumstances of the case a high level of deterrence is required. Abiding by this rule, the Ministry of Primary Industries has proposed increasing the maximum infringement fine under the Animal Welfare Act to \$1,000.²⁷⁸ In determining what precise penalty within this range should be adopted, consideration must be given to the affordability and appropriateness of the penalty for the target group, and the proportionality of the proposed fee with infringement fees for offences involving comparable social harm.²⁷⁹

²⁷⁵ Law Commission *Review of the Infringement System: Options for Reform*, above n 175 at 69.

²⁷⁶ Ibid. Also see Ministry of Justice *Guidelines for New Infringement Schemes*, above n 168 at 29.

²⁷⁷ Ministry of Justice *Guidelines for New Infringement Schemes*, above n 168 at 28. Whereas the Australian Law Reform Commission has recommended that the level of penalty should not exceed 20% of the maximum penalty that could be imposed by a court, the New Zealand Law Commission has explicitly rejected the adoption of a specific percentage. See Law Commission *Review of the Infringement System: Options for Reform*, above n 175 at 134, and L Bluff and R Johnstone “Infringement Notices: Stimulus for Prevention or Trivialising Offences?”, above n 187 at 343.

²⁷⁸ Ministry of Primary Industries *Animal Welfare Matters: Proposals for a New Zealand Animal Welfare Strategy and amendments to the Animal Welfare Act 1999*, above n 7 at 4.9.4.

²⁷⁹ Ministry of Justice *Guidelines for New Infringement Schemes*, above n 168 at 27.

A. Affordability and appropriateness of the penalty for the target group

Studies of infringement regimes within New Zealand have found that higher value infringement notices tended to be filed in court for collection more often than lower value notices.²⁸⁰ This is confirmed by the experiences of overseas jurisdictions. For instance, under the Canadian Contraventions Act 1992, a statute regulating all infringements (“contraventions”) issued under Canadian legislation, the maximum infringement fine that can be issued is \$500. This ceiling was based on past experience that found offenders were systematically challenging tickets when the fine exceeded \$500.²⁸¹ This is an important consideration with respect to animal cruelty offending, which is particularly prominent within low socio-economic sectors of society.²⁸²

B. Proportionality of the proposed fee with infringement fees for other comparable infringement offences

Administrative coherence with the existing body of New Zealand infringement law is critical to the credibility of the scheme. The ss 12 and 29 offences under the Animal Welfare Act are serious offences that involve tangible social harm, falling within the Law Commission’s second tier category for offending.²⁸³ Therefore, in analysing an appropriate penalty, comparably serious offences under The Resource Management Act, Dog Control Act and Land Transport Act are instructive (see Appendix III). For instance, the offences of failing to provide proper care and attention, to supply proper and sufficient food, water, and shelter, and to provide adequate exercise (\$300 infringement fine) under the Dog Control Act and the offences of contravening Section 15(1)(a) and (b) (discharge of contaminants or water into water or onto or into land where contaminant is likely to enter water) of the Resource Management Act (\$750 infringement fine) could be considered analogous, in terms of net societal harm, to ss 12 and 29 offences.

Drawing upon these infringement offences, fines between the range of \$300 - \$750 appear appropriate. However, this is qualified by the Canadian experience, which suggests that setting offences within the \$300 to \$400 range may be most sensible in

²⁸⁰ Law Commission *Review of the Infringement System: Options for Reform*, above n 175 at 22.

²⁸¹ Fisheries and Oceans Canada – *Contraventions Act* – Questions and Answers (May 2004) <<http://www.dfo-mpo.gc.ca/media/infocus-alaune/2004/20040504/faq-act-eng.htm>>.

²⁸² Interview with Steph Saunders, Regional Manager, Inspectorate and Centre Support, South Island, SPCA, and Virginia Pine, Chief Inspector Otago, SPCA, above n 3.

²⁸³ See Law Commission *Review of the Infringement System: Options for Reform*, above n 175 at R9.

order to ensure the efficiency of the scheme is not undermined by a high number of reviews. The use of penalty units may further assist in ensuring that these fines can be easily modified to account for inflation.²⁸⁴

IV Could a Disqualification Order Follow from the Commission of an Infringement Offence?

One major advantage of undertaking a prosecution is that as per s169 of the Act, the Court is able to disqualify a person from owning an animal or animals, following conviction for certain serious offences.²⁸⁵ This generally operates in conjunction with the forfeiture provision (s172), in which the animal that is the subject matter of the proceeding may be forfeited to another owner, as well as other animals in the defendant's possession, if the court considers this desirable. This is an invaluable tool under the Act, as it ensures that those with a propensity to mistreat animals are inhibited from causing further harm to animals in the future.²⁸⁶ Thus, if infringement notices are to replace prosecutions in certain instances, it is necessary to consider whether it would be appropriate to incorporate a disqualification mechanism within an infringement regime under the Animal Welfare Act.

A. Would it be appropriate to issue a disqualification order following the commission of a single infringement offence?

In certain Australian states, "loss of license" infringements exist for serious traffic

²⁸⁴ A penalty unit is an alternative to setting maximum fine amounts for offences. Instead, each offence is given a designated number of penalty units that are multiplied by a particular value in order to fine an offender. This makes it easier to maintain the real value of fines, as a single legislative change to the value of the penalty unit from time to time is all that is required. See Ministry of Justice *Review of Monetary Penalties* (2000), above n 179.

²⁸⁵ Under s 169 of the Animal Welfare Act, a court may disqualify person from having custody of animals where the court convicts the person of an offence against 28 (willful ill-treatment) or 28A (reckless ill-treatment); or an offence under Part 1 & 2 if the person has committed offences in the past; or any offence in Part 1 or 2 and the court considers that by reason of the serious nature of the offence the person should be disqualified under this section; or 152(1) (contravening an enforcement order) or section 169B(1) (contravening a disqualification order). Section 169A enables a person to apply to the court for removal or variation of the disqualification order, and 169B makes it an offence to contravene a disqualification order.

²⁸⁶ This is universally regarded as one of the central objectives of animal cruelty prosecutions. For instance, American animal cruelty prosecutor Geoffrey Fleck notes, "gaining control of the affected animal so that it can be treated and adopted as soon as possible is top priority." See G Fleck "Ethical Considerations in the Prosecution of Animal Cruelty Cases" (2011) *The Prosecutor Feature* 38 at 45.

offences. For instance, in Victoria, “loss of licence” infringements exist for excessive speed or first drink- or drug-driving offences, enabling police to immediately suspend a person’s license following the commission of one of these offences.²⁸⁷ However, no similar schemes operate in New Zealand. Furthermore, the Animal Welfare Act does not allow disqualification orders to result from any forms of animal welfare convictions, but rather, explicitly limits this remedy to convictions for the most serious forms of offending.²⁸⁸ Thus, any single offence that is serious enough to justify a disqualification order is unlikely to be appropriately dealt with by an infringement notice in the first place.

B. Would it be appropriate to issue a disqualification order following recidivist infringement offending?

The Ministry of Justice Guidelines permit disqualification schemes for instances of repeat offending,²⁸⁹ as exemplified by the demerit regime operating under the Land Transport Act. This scheme involves the imposition of demerit points, ranging from 10 points for more minor offences, such as exceeding the speed limit by up to 10 km/h, to 50 points for more serious offences such as exceeding the speed limit by more than 35 km/h and a failure or refusal to remain for evidential breath test or blood test.²⁹⁰ Once a driver has accumulated 100 or more demerit points, their license will be suspended for a three-month period.²⁹¹ This sanction, based upon 1936 Norwegian legislation and 1941 Swedish legislation, is considered a critical part of drink-driving laws worldwide.²⁹²

On a practical level, a similar disqualification scheme under the Animal Welfare Act could be suitably modeled on the Land Transport Act scheme. Under such a regime, infringement offences for animal welfare offending could attract a designated number of penalty points that would result in forfeiture of the animals in question, and a disqualification of the right to own an animal or animals following the accumulation of a certain number of points. However, the Law Commission recommends that if a disqualification-based infringement regime is to operate for repeat offenders, then the

²⁸⁷ Road Safety Act 1989 (Vic), s 89A.

²⁸⁸ See n 285 above.

²⁸⁹ Ministry of Justice *Guidelines for New Infringement Schemes*, above n 168.

²⁹⁰ New Zealand Transport Agency *Demerit Points* (1 October 2012) <<http://www.nzta.govt.nz/licence/offences-penalties/demerit.html#speed>>.

²⁹¹ Land Transport Act 1998, s 90.

²⁹² H.L. Ross “Deterring the Drinking Driver: Legal Policy and Social Control”, above n 189 at 24.

sanction should be legislated for and operate automatically – there being no power on the part of an officer to choose an alternative penalty.²⁹³ Yet, whereas the disqualification period under the Land Transport Act operates automatically for a three-month period,²⁹⁴ it would be neither feasible nor desirable to temporarily remove a person’s animal from their owner; this would both generate undue stress for the animal, and involve significant costs for the SPCA.

Rather, both forfeiture and disqualification orders for animal ownership issued in Court tend to be more long-term in nature, and require the exercise of discretion by the Court with respect to both the scope of the order, in terms of whether it applies to all animals or only a particular animal, and its length. Therefore, in order to overcome these barriers, a disqualification scheme would need to be subject to a standardised penalty, for instance, a permanent forfeiture of the abused animal and a one-year ban on owning any other animal. Whilst this would be viable, it would arguably only be proportionate in extreme instances of recidivist offending, as the longer term of the penalty would deem it a more significant impediment on a person’s freedom than a temporary license disqualification.

V Would an Infringement Regime be a Feasible Remedy for Farm Animal Welfare Offences?

Although outside the scope of this dissertation, an important question warranting further discussion is whether an infringement regime would be viable within a commercial context, e.g. for farms and large-scale animal breeding operations. Certainly, there is a growing legislative trend in New Zealand to apply infringement fees within industry, particularly in the form of administrative penalties.²⁹⁵ Indeed, the Law Commission notes that the most significant development with regard to infringement schemes in New

²⁹³ Law Commission *Review of the Infringement System: Options for Reform*, above n 175 at 75.

²⁹⁴ *Ibid*, at 73.

²⁹⁵ Administrative penalties are similar to infringement notices in that they may be proceeded by way of a notice served on the offender if the circumstances of the offence make it minor. However, unlike infringement offences, an offender may make submissions as to what should be taken into account when determining the penalty. The penalty is then decided (and it cannot exceed one-third of the maximum penalty prescribed for the offence) and notice of the penalty is served on the offender. If it is paid there is no conviction. Alternatively, upon receiving notice of the offence the alleged offender may require that the matter be subject to court proceedings. The offence can still result in a conviction if it goes to court. Under the Fisheries Act 1996, administrative penalties involve fines up to \$250,000, whereas infringement fees do not exceed \$3,000. See Ministry of Justice *Review of Monetary Penalties in New Zealand* (June 2000), above n 179.

Zealand has been their increasing use in legislation regulating commercial activity.²⁹⁶ There is also evidence supporting the success of such regimes in commercial contexts. As noted above, studies of OHS schemes in the U.S. found that inspection, coupled with an administrative penalty, had a positive impact on compliance, even when the costs of complying exceeded the economic costs of the fine.²⁹⁷

Nevertheless, the application of such a scheme in a farming context ought to be approached with caution.²⁹⁸ In particular, there is concern that monetary penalties have a lower deterrent function on corporations, as they merely signal that the offences are “purchasable commodities”, as opposed to acts and omissions regarded as reprehensible by society.²⁹⁹ By contrast, prosecutions can engender negative publicity that can have long-term ramifications for the corporation at issue. For instance, whereas an individual is unable to personally punish an individual perpetrator of animal abuse, he or she can make a decision as a consumer not to purchase the products of farms found to ill-treat their animals. Again, the problem persists that a larger resource commitment than currently provided is required by the state to ensure that such prosecutions, when warranted, do in fact materialise.

Moreover, it is important to note that the MPI would need to extend the \$1,000 maximum infringement fine proposed if farms were to be sufficiently deterred from committing abuse. As the Ministry of Justice notes, higher maximum infringement fees are often required to deter offending where an offender can acquire a significant economic benefit from a breach.³⁰⁰ In recognition of this, fine schemes administered

²⁹⁶ For instance, throughout the past two decades, infringement schemes have been implemented to secure regulatory compliance in legislation governing biosecurity, civil aviation, gambling, occupational health and safety, motor vehicle sales, resource management, and building. See Law Commission *Review of the Infringement System: Options for Reform*, above n 175 at 20.

²⁹⁷ This outcome was further confirmed by studies of the OHS scheme in New South Wales. According to inspectors and policy-makers, concern as to what the public knowledge the fine may have on its reputation, the effect of drawing attention to inspectors' powers and presence, and the swift method for warning and fining offenders, were all cited as reasons explaining the success of the regime. Although OHS legislation regulates a different form of offending to that of the Animal Welfare Act, both share a common threat of severe physical harm or death where certain standards are not abided by, albeit the former regime applying to human subjects. L Bluff and R Johnstone “Infringement Notices: Stimulus for Prevention or Trivialising Offences?”, above n 187 at 339.

²⁹⁸ Note that a distinction between natural and legal persons could easily be made in the legislation, i.e. when stipulating to whom infringement notices may be served upon.

²⁹⁹ L Bluff and R Johnstone “Infringement Notices: Stimulus for Prevention or Trivialising Offences?”, above n 187 at 341.

³⁰⁰ Ministry of Justice *Guidelines for New Infringement Schemes*, above n 168 at 31.

within commercial contexts are generally substantially higher. For instance, administrative penalties are as high as \$20,000 under the Building Act 2004³⁰¹ and \$50,000 for a licensee under the Gambling Act 2003.³⁰² Likewise, in Australia, infringement fines extend up to \$110,000 for corporate offending,³⁰³ and in Canada administrative penalties are as steep as CAD\$500,000 in certain provinces.³⁰⁴ Adopting administrative penalties of these levels in a farming context is likely to be a more effective form of monetary penalty than nominal infringement fines. Indeed, modelling an infringement scheme upon the South Australian Animal Welfare Regulations with mere \$200 fines for welfare breaches is unlikely to act as a sufficient deterrent for large agricultural corporations.³⁰⁵

³⁰¹ Section 402(1)(z).

³⁰² Section 360.

³⁰³ Law Commission *Review of the Infringement System: Options for Reform*, above n 175 at 49.

³⁰⁴ For instance, OHS offences in British Columbia can attract penalties this high. See L Bluff and R Johnstone “Infringement Notices: Stimulus for Prevention or Trivialising Offences?”, above n 187 at 339.

³⁰⁵ Animal Welfare Regulations 2012 (SA).

CONCLUSION

The current enforcement arrangement for animal welfare offences under the Animal Welfare Act is an aberration in New Zealand's criminal justice system. Relying upon a private charity to enforce a criminal statute is inappropriate, and severely undermines the effectiveness of the Act. Part One of this dissertation highlighted the manner in which this model adversely impacts the entire enforcement process, resulting in the detection, prosecution and sentencing of animal welfare offences being disproportionately low. It concluded that this enforcement arrangement essentially frustrated the core purpose of the Act, deeming many of the protections it establishes for animals more notional than real. As Liebman and Wagman emphasise, "even with strong laws on the books, the detection, investigation, conviction, and punishment of animal abusers cannot occur without the willingness of law enforcement authorities and courts to do their part in the process."³⁰⁶

Part Two examined infringement regimes operating within New Zealand and internationally to ascertain whether adopting an infringement scheme under the Act may ameliorate these problems. It found that as an intermediary remedy between warnings and prosecutions, such a regime could act to 'fill the gap' for offences that were not fitting to either of those measures. It further showed that this ought to be considered valuable in the context of minor animal welfare offending, which can often lead to more serious cases of ill-treatment or neglect if left unaddressed. Moreover, it highlighted that the arrangement could prove a suitable alternative to prosecution for medium-level offences, which tend to attract low fines following a successful conviction. However, it also demonstrated that although an infringement scheme may finance greater inspection efforts, many of the practical problems identified in Part One pertaining to the charity-based enforcement model are likely to remain outstanding in absence of adequate government funding, particularly the low prosecution figures and correspondingly low sentences.

³⁰⁶ BA Wagman and M Liebman *A Worldwide View of Animal Law*, above n 5 at 177.

Part Two identified several potential risks associated with adopting an infringement scheme. One of these was the possibility of undermining the public's perception of animal cruelty offending, given the nature of the administrative remedy as a tool to address relatively minor breaches of the law. Yet, it noted that the soundness of this criticism is somewhat undercut by the expansive nature of the infringement remedy, which now applies to offences of greater seriousness. It also discussed the concern that the regime may raise questions as to the rights of offenders, and the importance of mechanisms within the regime to protect offenders in these scenarios.

These advantages and concerns were then used alongside the Ministry of Justice Guidelines to inform the appropriate scope of such a scheme. Based on the above analysis, and the value and importance of prosecutions in cases of serious offending, it found that the *mens rea* offences of wilful (s 28) and reckless (s 28A) ill-treatment are not appropriate for inclusion in the regime. However, it concluded that the strict liability offences under ss 12 and 29 could be suitably included in such a regime. After examining comparable infringement offences under other statutory regimes, it proposed that penalties between the range of \$300-\$400 may be fitting, but that a conviction ought not to result from such offences, even in cases of recidivist offending. Finally, it noted that whilst the possibility of implementing the remedy within large-scale farming or commercial contexts should be considered, it ought to be approached with care as judicial scrutiny may be a more effective deterrent for corporate actors.

Considering these issues in their entirety, this dissertation has demonstrated that the current enforcement regime for animal welfare crimes necessitates reform. Creating an infringement scheme may constitute an important component of such an overhaul, but it will be most effective if supported by greater resource commitments and public information campaigns by the state.³⁰⁷ Perhaps, given the unprecedented nature of an infringement scheme in an animal welfare statute, the most sensible option would be to implement a four-year trial period, as adopted in certain Australian states to test the

³⁰⁷ These public education campaigns could serve to educate pet owners about the nature and introduction of the scheme. Additionally, requiring that pet shop owners and breeders inform their customers of their potential infringement liability for certain offences may be helpful in discouraging people from acquiring pets who are unwilling to make the commitment necessary to adequately care for them.

inclusion of more serious offences into infringement notice systems.³⁰⁸ That way, experience will tell if the regime is able to bestow the protections that the Animal Welfare Act 1999 intended to provide for our nation's five million companion animals.

³⁰⁸ Courts and Sentencing Legislation Amendment Act 2012 (Vic); Justice Legislation Amendment (Infringement Offences) Act 2011 (Vic).

Appendix I: *Mens Rea* offences under the Animal Welfare Act 1999

Section 28: Wilful ill-treatment of animals

- (1) A person commits an offence if that person wilfully ill-treats an animal with the result that—
 - (a) the animal is permanently disabled; or
 - (b) the animal dies; or
 - (c) the pain or distress caused to the animal is so great that it is necessary to destroy the animal in order to end its suffering; or
 - (d) the animal is seriously injured or impaired.
- (2) For the purposes of subsection (1)(d), an animal is **seriously injured or impaired** if the injury or impairment—
 - (a) involves—
 - (i) prolonged pain and suffering; or
 - (ii) a substantial risk of death; or
 - (iii) loss of a body part; or
 - (iv) permanent or prolonged loss of a bodily function; and
 - (b) requires treatment by or under the supervision of a veterinarian.
- (3) A person who commits an offence against this section is liable on conviction on indictment,—
 - (a) in the case of an individual, to imprisonment for a term not exceeding 5 years or to a fine not exceeding \$100,000 or to both;
 - (b) in the case of a body corporate, to a fine not exceeding \$500,000.

Section 28A: Reckless ill-treatment of animals

- (1) A person commits an offence if that person recklessly ill-treats an animal with the result that—
 - (a) the animal is permanently disabled; or
 - (b) the animal dies; or
 - (c) the pain or distress caused to the animal is so great that it is necessary to destroy the animal in order to end its suffering; or
 - (d) the animal is seriously injured or impaired.
- (2) For the purposes of subsection (1)(d), an animal is **seriously injured or impaired** if the injury or impairment—
 - (a) involves—
 - (i) prolonged pain and suffering; or
 - (ii) a substantial risk of death; or
 - (iii) loss of a body part; or
 - (iv) permanent or prolonged loss of a bodily function; and
 - (b) requires treatment by or under the supervision of a veterinarian.
- (3) A person who commits an offence against this section is liable on conviction on indictment,—
 - (a) in the case of an individual, to imprisonment for a term not exceeding 3 years or to a fine not exceeding \$75,000 or to both;
 - (b) in the case of a body corporate, to a fine not exceeding \$350,000.

Appendix II: Strict Liability Offences under the Animal Welfare Act 1999

Section 10: Obligation in relation to physical, health, and behavioural needs of animals

- The owner of an animal, and every person in charge of an animal, must ensure that the physical, health, and behavioural needs of the animal are met in a manner that is in accordance with both—
 - (a) good practice; and
 - (b) scientific knowledge.

Section 11: Obligation to alleviate pain or distress of ill or injured animals

- (1) The owner of an animal that is ill or injured, and every person in charge of such an animal, must, where practicable, ensure that the animal receives treatment that alleviates any unreasonable or unnecessary pain or distress being suffered by the animal.
- (2) This section does not—
 - (a) limit section 10; or
 - (b) require a person to keep an animal alive when it is in such a condition that it is suffering unreasonable or unnecessary pain or distress.

Section 12: Animal welfare offences

- A person commits an offence who, being the owner of, or a person in charge of, an animal,—
 - (a) fails to comply, in relation to the animal, with section 10; or
 - (b) fails, in the case of an animal that is ill or injured, to comply, in relation to the animal, with section 11; or
 - (c) kills the animal in such a manner that the animal suffers unreasonable or unnecessary pain or distress.

Section 4: Definition of physical, health, and behavioural needs

- In this Act, unless the context otherwise requires, the term **physical, health, and behavioural needs**, in relation to an animal, includes—
 - (a) proper and sufficient food and water:
 - (b) adequate shelter:
 - (c) opportunity to display normal patterns of behaviour:
 - (d) physical handling in a manner which minimises the likelihood of unreasonable or unnecessary pain or distress:
 - (e) protection from, and rapid diagnosis of, any significant injury or disease,—being a need which, in each case, is appropriate to the species, environment, and circumstances of the animal.

Section 29: Further offences

- A person commits an offence who—
 - (a) ill-treats an animal.

Appendix III: Comparable Infringement Fines under Analogous New Zealand Statutes

The Dog Control Act 1996

Section 54(2): Failure to provide proper care and attention, to supply proper and sufficient food, water, and shelter, and to provide adequate exercise: \$300

Section 19(2): Failure or refusal to supply information or wilfully providing false particulars: \$750

Section 72(2): Releasing dog from custody: \$750

Section 28(5): Failure to comply with effects of Disqualification: \$750

Section 32(2): Failure to comply with effects of classification of dog as dangerous dog: \$300

Section 62(4): Allowing dog known to be dangerous to be at large unmuzzled or unleashed: \$300

The Resource Management Act 1991

Section 338(1)(a):

Contravention of section 9 (restrictions on use of land): \$300

Contravention of section 12 (restrictions on use of coastal marine area): \$500

Contravention of section 13 (restriction on certain uses of beds of lakes and rivers): \$500

Contravention of section 15(1)(a) and (b) (discharge of contaminants or water into water or onto or into land where contaminant is likely to enter water): \$750

Section 338(1B) Contravention of section 15B(1) and (2) (discharge in the coastal area of harmful substances contaminants, or water from a ship or offshore installation): \$500

The Land Transport Act 1998

Land Transport (Offences and Penalties) Regulations 1999: Schedule 1B

Any speeding offence, where the speed exceeds the limit by:

- more than 30 km an hour but not more than 35 km an hour: \$300.

- more than 35 km an hour but not more than 40 km an hour: \$400.

- more than 40 km an hour but not more than 45 km an hour: \$510.

- more than 45 km an hour but not more than 50 km an hour: \$630.

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