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CROWN LAW OFFICE

9 May 2000

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Dear Lin Da

Involvement of territorial authorities in enforcement of the Animal Welfare Act 1999
Our Ref: MAF277/43

1. Thank you for your letter dated 14 April and your fax of 18 April.
2. Your letter raises an issue about the ability of a territorial authority to provide funding and other resources such as staffing facilities for the enforcement of the Animal Welfare Act 1999. The issue arises in the context of an application by the Animal Welfare Institute of New Zealand ("AWINZ") for approval by the Minister as an approved organisation under s 121 Animal Welfare Act. AWINZ is to be established by deed of trust between various individuals, with the intention that it be funded by Waitakere City Council and North Shore City Council.
3. Your letter does not explain why the Ministry of Agriculture is concerned with these Councils' ability to fund AWINZ. I assume this is because the Minister must have regard to AWINZ's financial arrangements before deciding whether to approve it: s 122(1)(b).
4. Your letter also implies that the two City Councils intend to support AWINZ on the basis of their existing powers and without the additional basis of an agreement with central government under s 37T Local Government Act. I shall therefore not consider whether a s 37T agreement is a relevant option.

Summary of opinion

5. I do not think that a territorial authority can support an animal welfare organisation in the way proposed. Territorial authorities have powers and functions relating to human welfare, dog control and impounding stock but I do not think that the relevant statutory provisions go so far as to allow a territorial authority to fund an animal welfare organisation or employ Animal Welfare Act inspectors.

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6. In particular:
- 6.1 A territorial authority may employ staff only to perform its functions; s 119B(1) LGA; and may spend its money only on matters expressly or impliedly authorised by statute.
 - 6.2 The functions and powers of a territorial authority include:
 - 6.2.1 Section 595, which relates to human medical welfare;
 - 6.2.2 Section 598, which relates to human well-being more generally;
 - 6.2.3 Section 601, which allows a territorial authority to provide "amenities for the public".
 - 6.3 The last of these, s 601, could arguably be used to authorise provision of an animal shelter but for two considerations:
 - 6.3.1 The other detailed legislation in this area, namely the Animal Welfare Act, the Dog Control Act and the Impounding Act, set out clearly what involvement territorial authorities should have; and no broader powers should be implied from a general provision such as s 601.
 - 6.3.2 Proper performance of the functions of an Animal Welfare Act inspector and an approved organisation require specific powers to, for example, impound, sell and destroy animals. If a territorial authority attempted to perform these functions without the specific statutory powers and immunities that go with them, it would incur civil and/or criminal liability.

Background

- 7. The Animal Welfare Act provides for the Minister to recognise "approved organisations", upon whose recommendation he may appoint any person to be an inspector for the purposes of the Act, or to be an auxiliary officer for the purposes of the Act (ss 121-126). Approved organisations also have various responsibilities and powers relating to care for animals and disposal of them (s 141).
- 8. One of the criteria for recognition as an "approved organisation" is that "the principal purpose of the organisation is to promote the welfare of animals" (s 122(1)(a)). This criterion excludes territorial authorities, which of course exist for a much wider range of purposes. The Ministry of Agriculture and Forestry, however, has received an application by the Animal Welfare Institute of New Zealand to be recognised as an "approved organisation". AWINZ is to be set up under a deed of trust between various individuals. It would then be funded by the Waitakere City Council and North Shore City Council. It is proposed that AWINZ will recommend staff of territorial authorities for appointment as inspectors or auxiliary officers, at first staff of those two councils, but in future perhaps staff of

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other territorial authorities as well. The councils would continue to pay these staff members after their appointment as inspectors or auxiliary officers. (I refer to inspectors and auxiliary officers collectively as "inspectors".)

9. If approved, AWINZ will put in place arrangements between itself and each council to meet its funding, operational and facility needs. The inspectors that it would recommend for appointment would be employees of a territorial authority, but AWINZ would be responsible for the training and conduct of those inspectors in carrying out their functions and duties under the Act.
10. The Ministry is satisfied that the proposed arrangements between AWINZ, the establishing territorial authorities and the inspectors that it would recommend are generally of a kind contemplated by the AWA. The concern of the Ministry of Agriculture and Forestry is whether the establishing territorial authorities have the legal ability to provide the funding and other support that they propose.
11. In response to the Ministry's concerns, AWINZ has obtained an opinion from Kensington Swan dated 3 March 2000. That opinion notes that a territorial authority's powers under the Dog Control Act 1996 may not fully justify expenditure on matters covered by the AWA, but concludes that ss 37K, 595, 598 and 601 LGA provide sufficient authority for a territorial authority to fund an animal welfare organisation such as AWINZ.

Statutory provisions

12. Your question about the powers of a territorial authority requires the interpretation of the provisions of the Local Government Act to which Kensington Swan refers. That in turn requires reference to the roles of inspectors and "approved organisations" under the AWA, and also provisions of, in particular, the Dog Control Act 1996 and the Impounding Act 1955.

Animal Welfare Act

13. The functions of an "approved organisation" under the Animal Welfare Act are:
 - 13.1 To nominate one member for each Animal Ethics Committee (s 101(6); I note that a territorial authority must also nominate one member of each committee: s 101(8)).
 - 13.2 To recommend inspectors and auxiliary officers to the Minister for appointment (ss 124 - 125).
 - 13.3 To make arrangements with inspectors and auxiliary officers, whether by employment contract or otherwise (compare s 122(1)(d)).
 - 13.4 To take custody of animals, apart from native animals or stock, trace their owners and/or dispose of them (ss 141 - 142, 172).
14. Inspectors appointed under the AWA have various powers and functions:

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- 14.1 Power of entry to inspect any animal, combined with a power to take an animal into his/her possession (ss 127 - 129).
- 14.2 Applying for and executing search warrants (ss 131 - 136).
- 14.3 Power to mitigate the suffering of any animal (s 130) and to destroy sick or injured animals (ss 138 - 139).
- 14.4 Authority to apply to the District Court for enforcement orders, the breach of which is an offence (ss 143 - 152).
- 14.5 Power to require a suspected offender to give his/her name, address and date of birth (s 157).
- 14.6 Limitation of liability for actions under the AWA (s 158).

Local Government Act

- 15. As well as the provisions identified by Kensington Swan, ss 119B(1), 122C(a) and 223J(1)(f) LGA are relevant. These various provisions provide:

37K. Purposes of local government- The purposes of local government in New Zealand are to provide, at the appropriate levels of local government,-

(d) Scope for communities to make choices between different kinds of local public facilities and services:

119B. Staff of local authorities-

(1) There may from time to time be appointed as members of the staff of any local authority such staff as are necessary to assist in the performance of its functions and the exercise of its powers.

122C. Principles of financial management-

(1) Without limiting the provisions of any other enactment relating to the funds and revenues of any local authority, every local authority shall manage its revenues, expenses, assets, liabilities, investments, and financial dealings generally, in accordance with the following principles:

(a) All revenue, expenses, assets, liabilities, and investments are to be managed prudently, in the interests of the district of the local authority or of its inhabitants and ratepayers, and only for lawful purposes: ...

223J. Miscellaneous expenditure—(1) Any local authority may expend money for all or any of the following purposes:

...

(f) The payment of subscriptions, levies, fees, or general contributions to any organisation that the local authority considers appropriate in connection with its functions, duties, and powers.

595. General powers of territorial authority with respect to public health and well-being- A territorial authority may do all things necessary from time to time for the preservation of the public health and well-being and for carrying into effect the provisions of the Health Act 1956 so far as they apply to the district. (emphasis added)

596. Particular powers of territorial authority with respect to public health and well-being -

(1) In order to provide for the health and well-being of the public, a territorial authority may--

(a) Take, purchase, or otherwise provide and maintain land and buildings, within or outside the district, to be used as, or for the purpose of, *mortuaries, rest rooms, creches, nurseries, and other like public amenities*: ...

(2) A territorial authority may make grants of money, or make advances upon such terms and conditions as it thinks fit (including, if the council thinks fit, a condition that the advance is to be free of interest), or grant leases of land at such rental, for such term, and on such conditions as it thinks fit, to the trustees or other governing authority of any body (whether incorporated or not), whether within or outside the district, which is not conducted for private profit and the object or principal object of which is to establish, maintain, control, aid, or carry on any of the following:

(a) *Dental clinics, creches, district nurses, or any branch of the Royal New Zealand Society for the Health of Women and Children, or other body formed for the object of conserving the public health or well-being of the community or tending the sick or injured*:

(b) Generally any purpose of public health or well-being, or of improving or developing such public amenities.

598. Council may promote community welfare- (1) The council may, either singly or jointly with any other local authority or any other organisation or group or body of persons (whether incorporated or not), undertake, promote, and encourage the development of such services and facilities as it considers necessary in order to *maintain and promote the general well-being of the public* and may promote or assist in promoting co-operation in and co-ordination of *welfare activities* in the district... (emphasis added)

(4) The council may—

(a) Make grants of money, or make advances on such terms and conditions as it thinks fit (including, if a council thinks fit, a condition that the advance is to be free of interest), or grant leases of land at such rental and for such term and on such conditions as it thinks fit, to any organisation or group or body of persons (whether incorporated or not) whose object or principal object is conserving or promoting the welfare of the community or of any members of the community;

(b) By deed or other instrument, and subject to such terms and conditions as it thinks fit, guarantee the repayment of any money (including any interest payable on that money) advanced to any such organisation or group or body.

601. Powers of council in relation to recreation and community development-

(1) The council may, either singly or jointly with any other local authority or any other organisation or group or body of persons (whether incorporated or not), undertake, promote, and encourage the development of such services, facilities, amenities, and programmes as it considers necessary to provide for the recreation, amusement, and instruction of the public, and the provision or improvement or development or maintenance of amenities for the public." (emphasis added)

(5) The council may—

(a) Make grants of money, or make advances on such terms and conditions as it thinks fit (including, if the council thinks fit, a condition that the advance is to be free of interest), or grant leases of land at such rental and for such term and on such conditions as it thinks fit, to any organisation, group, or body of persons (whether incorporated or not) whose object or principal object is the recreation, enjoyment, education, or instruction of the public, or the promotion of any form of culture, or the improvement or development of amenities for the public:

16. Under ss 661 and 662 a territorial authority may construct stock dips and regulate the use of those dips and may acquire land for paddocking stock in-transit together with all necessary associated facilities and equipment. In addition, a territorial authority may make bylaws under s 684(1) regulating the slaughter of stock within an urban area (para 12), and regulating the keeping of animals if they are likely to become "a nuisance or injurious to health or dangerous" (para 35).

Dog Control Act

17. Territorial authorities have various powers and functions under the Dog Control Act 1996. As the name of the Act suggests, those powers and functions generally relate to preventing the spread of disease, and preventing nuisance or harm caused by dogs. In addition, however, s 6(2) provides:

6. Functions, duties, and powers of territorial authorities-

(2) In addition to any power conferred on a territorial authority by this Act, any territorial authority may,--

(a) Either singly or jointly with any other territorial authority or any other organisation or group or body of persons (whether incorporated or not) undertake, promote, and encourage the development of such services and programmes as it considers desirable to promote responsible dog ownership and the welfare of dogs:

(b) Make grants to any organisation or group or body of persons (whether incorporated or not) whose objects include the care, custody, training, or welfare of dogs or the instruction or education of persons concerning such care, custody, training, or welfare:

(c) Engage in publicity for the purposes of this Act.

18. The Dog Control Act empowers territorial authorities to collect various fees. Section 9 of the Act provides that all money received under the Act shall be expended only for the purposes authorised by or under the Act.
19. The Dog Control Act also requires territorial authorities to make provision for dog pounds and regulates disposal of impounded dogs (ss 67 and 69).
20. Territorial authorities are also required to appoint Dog Control Officers, whose powers and functions include:
- 20.1 Power of entry to inspect any dog, to inspect the conditions in which a dog is kept or to feed and water a dog (especially ss 14 - 15).
- 20.2 Seizure of a dog in certain circumstances (see ss 14, 15, 19, 42, 50, 52, 55 - 60, 69 - 71).
- 20.3 Power to request the name, address and date of birth of a person in charge of a dog and of the owner of a dog (s 19).
- 20.4 Limitation liability for actions under the Dog Control Act (ss 73, 74).

Impounding Act

21. The Impounding Act 1955 requires all local authorities to provide and maintain a public pound, into which must be received all tendered "stock", that is any horse,

cattle, deer, ass, mule, sheep, pig or goat (ss 3, 43). The Act regulates detention of stock in a pound and disposal of impounded stock (Parts VII and VIII). Each local authority's expenses are met both out of fees (s 14) and its ordinary general fund (s 66).

22. Apart from a power to destroy an impounded animal that is continually suffering, the Impounding Act does not provide for any functions or powers of the kind conferred on inspectors by the AWA.

Other legislation

23. Legislation confers on territorial authorities pest management powers (s 14 Biosecurity Act 1993), power to apply funds for the destruction of wild animals (s 31 Wild Animal Control Act 1977) and powers relating to the enforcement of the Hazardous Substances and New Organisms Act 1996 (see s 97 of that Act). I am not, however, aware of any provision which requires or empowers a territorial authority to become involved in animal welfare, apart from the provisions of the Dog Control Act set out above.

Issue for opinion

24. As you have noted in your letter, the issue that arises is whether a territorial authority has the ability to provide funding, staff and other resources to support an organisation such as AWINZ.

Reasoning

Introductory comments

25. There are various statutory provisions that give territorial authority powers to prevent illness, injury or nuisance caused by animals. There is not, however, an express statutory provision which empowers territorial authorities to concern themselves with the welfare of animals. In that regard, s 6(2) Dog Control Act appears exceptional.
26. In considering whether the provisions discussed below authorise territorial authorities to fund a body such as AWINZ and to employ staff as AWA inspectors and auxiliary officers, it is important to bear in mind:
- 26.1 Statutory corporations such as a territorial authority have only those powers that are expressly or impliedly conferred by Parliament: 9(2) Halsbury's Laws of England (4th reissue) para 1137 fn 1-5.
- 26.2 This principle is reflected in s 122C(1)(a) LGA, which requires territorial authorities to manage their expenses for lawful purposes.
- 26.3 Similarly, s 119B(1) LGA allows local authorities to employ such staff "as are necessary to assist in the performance of its functions and the

exercise of its powers." A territorial authority may not employ a member of staff for any other purpose.

27. The decision of the English Court of Appeal in *Royal Cross School v Morton* [1975] 1 WLR 1002 illustrates the underlying principle. Royal Cross School provided special education facilities for deaf children, social activities and the special care needed for deaf children. The question of the school's rating valuation status arose, and depended on whether a local authority could provide such a school under s 29 National Assistance Act 1948 (UK). That section empowered local authorities to "make arrangements for promoting the welfare of persons to whom this section applies, that is to say persons who are ... deaf ...".
28. The Court held that a local authority could not provide a school for the deaf under that section. Cairns LJ noted:
- "Now in the widest sense of the word "welfare", there could be no doubt that the whole purpose of this school is to promote the welfare of the pupils. That, I suppose, might be said of any school which is not run for profit, and more particularly of a school for deaf children which has such staff, equipment and methods as described by Mr Gaskell, going far beyond what is included in the case of an ordinary curriculum. But many schools provide boarding facilities, many schools are devoted to the education of children with special needs, which inevitably involves providing something not covered by an ordinary education, and the problem is whether Parliament can have intended the word "welfare" in a wide enough way to cover a school like this, having regard to the extensive provision made for education in the Education Acts." (at 1006)
29. His Lordship's reasoning involved two steps. First he referred to an earlier decision that held that "welfare" did not extend to residential accommodation, because the same Act expressly provided for residential accommodation elsewhere. He then held that a local authority could not have provided a school like Royal Cross School under s 29, because such a school would fall within the local authority's powers to establish schools under the Education Act 1944 (UK). As the Education Act powers were more specific, a council should work within them.
30. The Local Government Act also uses broad terms such as "welfare" and "well being". These cannot be read more widely than their context allows, or used to cut across other statutory regimes.
31. In this regard I should also mention s 223J(1)(f) LGA, which relates to miscellaneous expenditure. This paragraph is ambiguous. Its interpretation turns on the meaning of "its". If "its" refers to the organisation, then the territorial authority has a general power to make contributions to any organisation that it considers worthy. If "its" refers to the "local authority", however, the paragraph allows the local authority only to make contributions to organisations which further the performance of the authority's own functions, duties and powers. I

consider that the latter must be the correct interpretation (and do not see anything to the contrary in Kensington Swan's opinion):

- 31.1 It would be unlikely that Parliament intended to undermine the detailed statutory scheme of financial management provisions in the LGA and related legislation by allowing unrestricted payments to other organisations in a section headed "miscellaneous expenditure".
- 31.2 The public interest, and s 122C(1)(a) LGA, weigh against allowing expenditure by a territorial authority for purposes foreign to the LGA and other legislation relating to territorial authorities.
32. I therefore turn to the sections discussed in Kensington Swan's opinion. I am not aware of any other statutory provision that could arguably authorise a territorial authority to support a body such as AWINZ and employ AWA inspectors.

Section 37K(d)

33. This paragraph is descriptive, not empowering. The facilities and services referred to must be those which can lawfully be provided by a territorial authority.

Section 595

34. This section authorises a territorial authority to do things necessary "for the preservation of the public health and well-being" and to give local effect to the Health Act 1956. There can be no suggestion that "public health and well-being" in this context includes animal welfare, as the references in s 596 to mortuaries, rest rooms, dental clinics, etc indicate.
35. The provisions of the Health Act that relate to animals concern matters of human health also, for example destruction of vermin and disposal of offensive carcasses (s 29(c), (k)). The reference to the Health Act is telling. The focus of s 595, and indeed all of Part XXXV LGA, is very much human medical welfare rather than animal welfare. Section 595 cannot be used to authorise territorial authority funding of an animal welfare organisation or the employment of AWA inspectors.

Section 598

36. Section 598(1) empowers territorial authorities to support the development of such services and facilities as the authority considers "necessary in order to maintain and promote the general well-being of the public".
37. "Well-being" is defined in the *New Shorter Oxford English Dictionary* (1993 edition):
- "healthy, contented, or prosperous conditions; moral or physical welfare (of a person or community)"
38. Section 598(4) refers to grants to organisations which promote "the welfare of the community or of any members of the community". These words provide a further

context for the territorial authority's power to promote the "general well-being of the public". Again the "well being" in question is that of people rather than animals.

39. If Parliament had not provided for dog control and impounding stock it could be suggested that these services/facilities were "necessary" and improve the "general well-being of the public". But there are express and detailed provision for these matters which involve territorial authorities; and there are express and detailed provisions in the Animal Welfare Act, which excludes territorial authorities: see s 122(1)(a) AWA. Section 598 LGA cannot be used to cut across other legislation in this area.

Section 601

40. This section allows a territorial authority to provide for the "recreation, amusement and instruction of the public". None of these words is apt to describe the function of an animal welfare organisation.
41. Section 601 also authorises a territorial authority to provide "amenities for the public". The word "amenities" potentially has a broad meaning:

"Amenity ... a pleasure; a delight; a pleasant feature; a desirable facility." - *The New Shorter Oxford English Dictionary on Historical Principles* (1993)

"'Amenity values'" means those natural or physical qualities and characteristics on an area that contribute to peoples' appreciation of its pleasantness, aesthetic coherence, and cultural and recreational attributes:" - s 2 Resource Management Act 1991

"'Amenities'" means canteens, cinematograph theatres and other theatres and places of social entertainment, hair dressing salons, cafeterias, shops, and other facilities calculated to meet the current requirements of members of [Her Majesty's] armed forces and of other persons employed or residing on ... establishments; but does not include any service mess:" - s 2 Armed Forces Canteens Act 1948

42. "Amenities for the public" is not, however, defined in the Local Government Act. The above definitions are such that the expression "amenities for the public" could, standing alone, be considered broad enough to include a facility such as an animal shelter. But I do not think that that is the correct interpretation in the context of the LGA. As noted above, Parliament has expressly made other provision for dog pounds, stock pounds and animal welfare more generally. It has indicated what degree of involvement territorial authorities ought to have in each area. I refer again to *Royal Cross School v Morton* - that case indicates that where other more specific legislation confers some powers and functions on a territorial authority, the authority's general powers should not be assumed to allow what Parliament has not otherwise permitted.

43. In this context there is a greater problem. Animal Welfare Act inspectors and approved organisations have statutory authority to commit acts which would otherwise give rise to civil or criminal liability, for example the detention, sale and destruction of animals. These powers (and the accompanying restrictions on liability) cannot be conferred on a territorial authority by a general power to provide "amenities". The word "amenities" denotes desirable facilities which may or may not be enjoyed by members of the public as they individually wish. The roles of inspectors and approved organisations include the provisions of "services" which may not be declined such as the destruction of suffering animals.
44. As s 601 does not confer on a territorial authority all the powers and immunities necessary for it to perform the functions of an animal welfare inspector or for it to perform the functions of an approved organisation, I consider that the power to provide "amenities for the public" does not extend to providing services and facilities of the kinds provided by inspectors and approved organisations.

Conclusion: Absence of general power to fund animal welfare organisations

45. I do not think any of the provisions of the Local Government Act that I have discussed above empower a territorial authority to fund an animal welfare organisation. A useful contrast is s 6 Dog Control Act, which clearly allows a territorial authority to apply funds (whether obtained through fees under the Dog Control Act or not) to the welfare of dogs. If Parliament had intended a territorial authority to have a general role in animal welfare, one would expect that to be expressly identified in the Local Government Act or other legislation.
46. Nor could a territorial authority employ a person to perform the functions of an Animal Welfare Act inspector, as those are not functions of the authority. (See s 119B(1) LGA.)
47. An animal welfare organisation such as AWINZ therefore cannot rely for funding on territorial authorities alone. A territorial authority may make contributions to such an organisation to meet its costs in relation to dogs under s 6 Dog Control Act, but it would be improper for a territorial authority to make a more generous contribution than that.
48. Accordingly I do not think that the Waitakere City Council and North Shore City Council can support AWINZ as they propose.

Yours sincerely


Peter McCarthy
Crown Counsel