Tom Didovich

From: Amy Daw [adaw@kpmg.co.nz]
Sent: Monday, 17 July 2000 16:38
To: 'Tom Didovich'
Subject: DRAFT ANIMAL WELFARE LETTER

Mr Tom Didovich - ANIMAL WELFA...

<<Mr Tom Didovich - ANIMAL WELFARE - FUNDING ISSUES>>

Tom,

Please have a read of this draft letter, and let Matt have any comments before he finalises it. If you think there is anything to add please let
Matt know.
Thanks,
Amy Daw
Legal Secretary
(for Matt Casey, Robert Enright & Patrick Mulligan)
KPMG Legal
22 Fanshawe Street
AUCKLAND
Ph: 09 914 7251
Fax: 09 309 4276
Email: adaw@kpmg.co.nz

Refer to: M E Casey
Direct Phone: 375 1139
email: mecasey@kpmg.co.nz

18 July 2000

Mr Tom Didovich
Waitakere City Council
DX CX 10250
AUCKLAND MAIL CENTRE

ANIMAL WELFARE – FUNDING ISSUES

1 In this report, we consider three matters as follows:

1.1 A response to the advice of the Crown Law Office dated 9 May 2000;

1.2 The possible application of s.37T Local Government Act 1974;

1.3 The possible application of s.223K of the LGA.

Crown Law Office advice

2 In our view, the advice from Crown Law Office to the Ministry of Agriculture and Forestry is flawed in several respects, and takes far too restrictive an approach to the interpretation of the relevant legislation.

3 Although the opinion appears to acknowledge that expenditure by a territorial authority on any matter can be authorised either expressly or by implication, the focus of the opinion is on express authorisation. It is largely premised on the argument that because a territorial authority may not itself become an "approved organisation" under s.122 of the Animal Welfare Act 1999, then it is not able to contribute financially to such an organisation, nor have its staff act as inspectors. In our view, this argument is flawed. The Local Government Act specifically contemplates a territorial authority making contributions to other organisations, whether or not Council could itself provide the services which that organisation provides.

4 The critical issue is the narrow interpretation which the Crown Law Office has placed on s.601 of the Local Government Act 1974. Section 601(1) states:

> *"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".*

5 It is clear from the above wording, and from its context, that this section is intended to be of broad application. It is not to be limited by reading into it a restrictive definition of the word "amenities" as in the Crown Law Office opinion. The word "amenities" is used twice in subsection (1), and its second occurrence is clearly of broader application.

6 It is clear from a number of legal authorities that the animal welfare is beneficial to the community in the sense that it promotes public morality, health and well-being. In *Allen v Wedgwood* [1915] 1 Ch 113, the English Court of Appeal held that a trust which was established for the protection and benefit of animals was charitable as it was "for purposes beneficial to the community". The reasons given included:

> *it tends to promote public morality by checking the innate tendency to cruelty ...*
>
> *...Cruelty is degrading to man, and a society for the suppression of cruelty to the lower animals, whether domestic or not, has for its object, not merely the protection of the animals themselves, but the advancement of morals and education among men ...*
>
> *... The intention is to benefit the community ...*
>
> *...it is for the benefit of the public that such cruelty should be prevented ...*
>
> *... If it is beneficial to the community to promote virtue and to discourage mice?, it must be beneficial to teach the duty of justice and fair treatment to the brute creation, and to repress one of the most revolting kinds of cruelty;*

Vice

7 This case, and others like it, establish a sufficient nexus between animal welfare and the health and well-being of the public, that there can be no doubt that facilities and activities which promote and provide for the welfare of animals are of public benefit.

8 We would expect that within Waitakere City, if not within other territorial authorities, the welfare of animals (both domestic and other) is seen as a worthwhile community endeavour, both in the public interest and for the good of the community. Section 596 refers specifically to public health and well-being

and in our view, based on legal authority, there is no doubt that animal welfare activities come within that terminology. Equally, the word "amenities" includes "desirable facilities" and other matters which improve the pleasantness or agreeability of the district. Services and amenities which provide for the welfare of animals within the district enhance its amenities, in the sense of people's perception of the district as a pleasant and agreeable one, as well as directly in the sense of providing desirable facilities.

9 The long title to the Animal Welfare Act 1999 itself illustrates the acceptance that the care and welfare of animals is a societal amenity issue.

10 The Crown Law Office opinion also confuses the roles of inspectors and approved organisations. Inspectors can be appointed directly, or on the recommendation of an approved organisation. Section 124(7) states that where an inspector who has been appointed on the recommendation of an approved organisation is no longer acting for that organisation or an incorporated society affiliated to it, then the inspector's appointment should be revoked. While clearly there must be some connection between the inspector and the approved organisation, the statute does not require the inspector to be an employee of the organisation.

11 Elsewhere in Part 7 of the Animal Welfare Act 1999 inspectors are required to act under the direction of the Director-General and the inspector's duties under the Act take precedence in the event of a conflict by reason of his / her connection with an approved organisation.

12 The s.158 protection for persons acting under the authority of the Act, is personal to the inspector and would apply whether or not the inspector was directly an employee of a territorial authority or of an approved organisation.

13 We understand that for many years prior to the Animal Welfare Act 1999 it was commonplace for local authority employees to be appointed as inspectors under the Animals Protection Act 1960. We do not understand there to been any challenge to, or questioning of, the legality of this state of affairs. Reference to s.119B(1) of the Local Government Act 1974 as a bar to the continuation of this practice is misplaced. Again, the Crown Law Office has relied on its narrow interpretation of ss.598 and 601, and seems to be only looking for "express" functions and powers as a basis for the appointment of local authority staff.

14 It must be assumed that at the time the Animal Welfare Act 1999 was enacted, the legislature was aware of the practice of appointing local authority staff as inspectors. We understand that an attempt by the Ministry of Agriculture and Fisheries to introduce a late amendment at the Select Committee stage expressly to prohibit local authority staff from appointment as inspectors was rejected. In that event, it is clear that the Animal Welfare Act was enacted with a background and acceptance of local authority staff being appointed as inspectors.

15 The role of an approved organisation under the Animal Welfare Act 1999 is quite limited, and not incompatible with inspectors being employed and paid for by the

State or other entities, such as a local authority. Accordingly, we see nothing in that act which either expressly or by implication detracts from the interpretation of the Local Government Act 1974 by which local authorities can promote or encourage animal welfare activities by funding an approved organisation and providing staff to act as inspectors.

16 For the reasons given above, we consider that this is clearly, both in fact and as a matter of law, for the public benefit and well-being, and is in the nature of providing and maintaining public amenities.

17 The fact that there may be specific powers and duties conferred on territorial authorities by the Dog Control Act 1996 and the Impounding Act 1955, does not detract from the discretionary powers of the Council embodied in ss.598 and 601 of the Local Government Act.

Section 37T Local Government Act

18 Section 37T states that every territorial authority has the functions, duties and powers conferred by statute or Order in Council. Subsection (2) provides that a territorial authority may enter into an agreement with the Crown under which the territorial authority may exercise any function or provide any service for and on behalf of the Crown. Subsection (2) is by way of extension to the general statement in sub-s.(1).

19 In other words, the Crown and a territorial authority may agree that the territorial authority will conduct some activity which would normally be outside its powers, but is brought within those powers by virtue of the agreement under s.37T(2). If such an agreement is entered into, the activity is within the Council's powers because s.37T makes it so.

20 Section 37T applies to any function or service which the territorial authority may provide "for and on behalf of the Crown". The provision of territorial authority staff as inspectors under the Animal Welfare Act 1999 would fit within this term, as inspectors are appointed by the Minister and are required to act under the directions of the Director-General.

21 Although a territorial authority could not be an "approved organisation" within the terms of the Animal Welfare Act, it could perform some of the functions or services of such an organisation, where the organisation would itself be carrying out a function or service for and on behalf of the Crown.

Application of s.223K Local Government Act 1974

22 This section provides that a Local Authority may "expend for purposes not authorised by any Act or law" a sum or sums not exceeding in the aggregate $50,000. If the Crown Law Office opinion is correct, and expenditure for matters under the Animal Welfare Act unrelated to dogs is *ultra vires* the Council, then such expenditure can be covered by s.223K provided the aggregate of all unauthorised sums does not exceed $50,000. The difficulty about relying

on this section is that there may be other areas of activity in which the Council finds that it has spent money without legal authority. This would not be a sound basis for ongoing financial management to rely on this allowance being available for this purpose every year.

Yours faithfully
KPMG Legal

Matthew Casey
Partner