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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 acknowledges that expenditure by a territorial authority on a particular matter needs to 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 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 vice, 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.

7 This case, and several others like it, establish that there is a definite nexus between animal welfare and the health and well-being of the community, so 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, and other districts, 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. Sections 595-598 refer 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, particularly the more general "public well-being" referred to in s.598. Equally, the word "amenities" in s.601 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 from the State sector, or on the *recommendation* of an approved organisation. Section 124(7) states that where an inspector appointed on the recommendation of an approved organisation no longer acts for that organisation or an affiliate, then the inspector's appointment should be revoked. While there must be some connection between the inspector and an 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. The s.158 protection for persons acting under the authority of the Act, is personal to the inspector and would apply whether the inspector was directly an employee of a territorial authority or of an approved organisation.

12 We understand that prior to the Animal Welfare Act 1999 it was not uncommon for local authority employees to be appointed as inspectors under the Animals Protection Act 1960. We do not understand there to have 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.

13 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. The Primary Production Select Commission when hearing submissions on the Bill rejected a recommendation that inspectors be directly

employed by the nominating approved organisation and accepted that an arrangement such as is now proposed by AWINZ would come within the scope of being "properly accountable" to the organisation – s.122(e)(ii) Parliament's intention is clear in s.122 (1)(d) that there is a distinction between "employment" and "arrangements". In that event, it may be assumed that the Animal Welfare Act was enacted with a background and acceptance of local authority staff being appointed as inspectors.

14 The role of an approved organisation under the Animal Welfare Act 1999 is fairly limited, and is not incompatible with inspectors being employed and paid for by some other entity, 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.

15 The Crown Office opinion relies heavily on an English case *Royal Cross School v Marton* in support of a claimed principle that when express provision is made in other legislation for a particular service to be provided by another organisation, then the Council cannot purport to provide that service under its general public welfare powers.

16 In that case a school for the deaf sought rating relief on the basis that it was "of a kind similar to a structure belonging to a local authority within the meaning of" s.29 National Assistance Act 1948 (UK). Under that section a local authority was given express powers "to make arrangements for promoting the welfare of" (inter alia) deaf persons.

17 The question in that case was whether the school was a facility of a kind which a local authority could have provided in the exercise of its powers under s.29. The English Court of Appeal decided that it was not. However the reasons for this were quite specific to the legislative framework and history.

18 The Court accepted that a school for the deaf could be considered a facility for promoting the welfare of deaf people. The question was whether Parliament intended that "welfare" should include "education" when there was extensive provision made in other legislation for the obligations of local authorities in relation to education.

19 The Royal Cross School could have been established by the local authority, but under the specific legislation relating to education. For this reason it was held that the legislation relating to "welfare" was to be read more restrictively, and not to include education because that was specifically provided for as a separate local authority function elsewhere.

20 The issue in this case is not whether the Council can be an approved organisation, as clearly it cannot. The issue is whether it can make any financial contribution to animal welfare activities, either directly or by providing staff to act as inspectors. The fact that Councils are given specific functions in relation to dogs does not prevent them exercising their general functions in relation to the welfare of other animals. In our view the principles which emerge from the *Royal Cross School* case do not go so far as to prevent Councils making financial contributions in cases such as the present.

21 Otherwise it would be unlawful for Council to make any financial contribution to any welfare activity if there was some specific provision elsewhere for how that activity should operate. This would have serious and far reaching implications. One consequence, for example, would be that all councils would be prohibited from making any financial contribution to the SPCA.

22 For the reasons given above, we consider that support for animal welfare 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.

23 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

24 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).

25 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.

26 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.

27 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.

28 In the letter from the Ministry to the Crown Law Office dated 14 April 2000 it was suggested that s.37T would normally be used where the function or service provided by the TA was paid for by the Crown, and therefore could not be used as a basis for a permanent arrangement. We do not accept this proposition, and there is certainly no qualification in s.37T that it applies only when the service is funded by the Crown.

29 As an agreement under section 37T empowers the territorial authority, a service carried out under section 37T cannot be ultra vires. It follows that expenditure from rating revenue on any lawful purpose is authorised by section 122C(1)(a) of the LGA.

Application of s.223K Local Government Act 1974

30 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.

31 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. It would not be a sound basis for ongoing financial management to rely on this allowance being available for this purpose every year. However it provides a sufficient stop-gap until a more reliable long term situation is established.

Yours faithfully
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