

8 February 1999.

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Write to me.

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**REQUEST FOR LEGAL OPINION - INVOLVEMENT OF
TERRITORIAL AUTHORITIES IN ENFORCEMENT OF THE ANIMAL
WELFARE ACT.**

Summary

1. This request seeks your opinion on the following:
 - (i) Whether the current continuation of the Waitakere City Council 'Pilot' Scheme is appropriate in the light of Government policy;
 - (ii) Whether the aspects of the draft proposal from Neil Wells relating to territorial authorities (TAs) would meet the criteria for approved organisation status under the Animal Welfare Bill;
 - (iii) Whether Waitakere City Council, or other TAs, would be legally empowered to rate for animal welfare activities under the AWINZ draft proposal; and
 - (iv) Whether MAF Reg or MAF Policy should be responsible for advising the Minister on applications to be approved organisations.

Background

2. To date, the only organisation outside Government that has been involved in animal welfare enforcement is the RNZSPCA. When Government policy was determined for the Animal Welfare Bill in the early 1990s, it was agreed that any non-Government organisation should be able to enforce the new legislation provided they met certain criteria. At that stage it was envisaged that only voluntary organisations would be eligible.
3. In 1995 the MAF RA decided to assess the appropriateness of territorial authorities enforcing the Act. The reasons were :

A desire to involve a greater number of agencies given pressure on the Crown-provided service from the increasing numbers of complaints and budget cuts;

- Greater security of delivery when the voluntary sector experienced resourcing problems;
- Expressions of interest by some TAs and, in particular, by Waitakere City Council;

- Potential synergies between animal welfare and dog control:
4. In 1995 MAF established a pilot programme in Waitakere City Council to determine whether a quality service could be provided and to assess the impacts on existing service providers. In 1997, the trial was working well and it was proposed that the pilot scheme be extended to 5 - 7 additional authorities. MAF Reg held discussions Neil Wells and Associates on a proposal that it (Neil Wells and Associates) would act as a Quality Assurance and Accrediting Body to this group.
 5. During 1997 MAF Policy became concerned that there may be no legal basis for Waitakere City Council recovering the costs of animal welfare enforcement through rates. After discussions with the Department of Internal Affairs it was agreed that section 37T of the Local Government Act was adequate for the pilot scheme. However, Internal Affairs noted that this provision would normally be used to empower TAs to undertake work paid for by the Crown and should not be relied on permanently. Should TAs be involved beyond the trial scheme, MAF was advised that they should be empowered through an express function in legislation and be required to consult with their communities before becoming involved.
 6. MAF Policy subsequently developed policy proposals for incorporation in the Animal Welfare Bill that met these criteria. Given the hybrid nature of the function (with accountabilities both to ratepayers and to central government), there were no known legislative precedents and so considerable discussion was needed. These proposals are summarised in **Appendix A**.
 7. After consultation with all territorial authorities and other interested parties, the proposed policy was considered by the Cabinet Economic Committee on February 25, 1998. The Committee expressed reservations about the policy and agreed to defer consideration of the paper to enable the issues to be discussed with the Agricultural Caucus Committee.
 8. The Agriculture Caucus Committee indicated it was conscious of the criticism levelled at central government when functions are devolved without any accompanying funding. Members noted this proposal was essentially shifting the funding from the taxpayers to the ratepayer. While they understood that involvement would be voluntary, they were nevertheless concerned that it blurred the boundaries between central and local government. The Committee advised that its preference was for the Government to address MAF's funding concerns.
 9. At a meeting on June 2 1998 the Minister agreed to a MAF proposal that the Bill not provide for involvement of TAs and that MAF would reconsider the issue as part of a wider strategic review in train. It was noted that should the review support TA involvement this could be promoted at the Select Committee given TA involvement was provided in the Hodgson Bill.
 10. The strategic review concluded the arguments against involvement of TAs outweighed those in support. MAF recommended to the Minister that a paper seeking confirmation of this policy be submitted to Cabinet (so that officials could represent the Government position at the Select Committee). However the Minister considered

that such confirmation was not necessary as he was aware of the Government position and directed on 11 August 1998, "that the matter be pursued no further at this stage".
(Appendix B)

11. The Select Committee requested a briefing on the issue of TA involvement in enforcement (17 December 1998). In particular it asked MAF to assess whether the model used for enforcement of the Hazardous Substances and New Organisms Act (HSNO) could be applied to animal welfare and if it would overcome the concerns held by the Government. This paper prepared by MAF recommended that the HSNO model was not applicable and in fact appeared to have significant deficiencies. The Select Committee accepted MAF's advice and it is MAF's understanding that the Committee does not intend to pursue the matter further. Accordingly the issue has not been covered in the Departmental Report.

Recent developments.

12. Since September 1998, and possibly earlier, MAF Reg has been in discussions with Neil Wells about a proposal to establish the Animal Welfare Institute of New Zealand (AWINZ). A draft proposal dated 15 December to the Chief Veterinary Officer, along with related e-mails from MAF Policy files is attached as APPENDIX C. Recent discussions in relation to this proposal (Challis/O'Neil/Bayvel) are summarised in APPENDIX D.

Legal Issues

13. Consideration of the AWINZ proposal has raised questions in the minds of staff as to:
- (i) Whether a MAF Reg decision to roll over the appointments of Waitakere City Council inspectors is consistent with Government policy;
 - (ii) Whether arrangements of the type proposed by Waitakere City Council (in relation to TAs), would meet the criteria in clause 105(2) of the Animal Welfare Bill relating to the declaration of "approved organisations";
 - (iii) If the answer to (ii) is in the affirmative:
 - whether the criteria in clause 105(2) give proper effect to Government policy (refer para. 10 above); and
 - whether such arrangements would be consistent with the accountability requirements under the Local Government Act (this is a legislative interface issue that we may need to be mindful of in the collective interests of the Crown);
 - (iv) Whether MAF Policy or MAF Reg should be responsible for considering applications from organisations to be declared as approved organisations once the Bill has commenced.
14. Accordingly you are requested to provide legal advice in response to the following three questions. It is appreciated that you may not consider the AWINZ proposal sufficiently detailed to give a firm legal view. You may consider it appropriate to seek further clarification from MAF Reg or from Neil Wells.

Is continuation of the Waitakere Pilot Scheme appropriate?

15. Advice from David Bayvel and the wording of the proposal from Neil Wells would appear to indicate that the Waitakere trial has been extended to provide transitional approval for the involvement of Waitakere City Council until such time as AWINZ has been considered for "approved organisation" status under the new Act. It should be noted, however, that Barry O'Neil is of the view that the continuation of the Waitakere scheme has no relationship with the AWINZ proposal (Refer **Appendix D**).
16. Existing Waitakere inspectors have their approval rolled over on a quarterly basis. The current approvals are valid until 12 March 1999. Late last year Waitakere City took over animal care and control for North Shore City and we understand that 6 new officers have been warranted under section 9 of the Animal's Protection Act 1960 to cover this additional work. It is my understanding that the CVO made these appointments under delegated authority from the Minister.
17. The Waitakere Pilot was established to provide MAF with information on whether TAs could successfully deliver enforcement services. This information was sought to assist MAF to make a case to Cabinet. Given that the Government has made a decision against TA involvement and the Select Committee has indicated it does not wish to pursue the issue via the Hodgson Bill, MAF Policy queries whether it is appropriate for the Waitakere Trial to continue and to be expanded to include North Shore City.
18. MAF Policy is not aware of whether a request was made to the Minister to approve the extension of the scheme and its change of purpose. In the past, MAF Reg sought the Minister's agreement to any changes to the scheme (such as when it was proposed in 1997 that it be extended to other TAs).
19. It is anticipated that you may advise that this is principally a policy matter and does not raise legal issues. Nevertheless you may wish to comment.

Would the present AWINZ proposal meet the criteria for "approved organisation" status under the Animal Welfare Bill?

20. The criteria that must be met for declaration as an approved organisation are provided in clause 105(2) Animal Welfare Bill. Clause 105 (2)(a) provides that an applicant organisation must be able to produce evidence that "The principal purpose of the organisation is to promote the welfare of animals." It had been anticipated that this would exclude TAs and thus ensure that the Bill was consistent with Government policy.
21. Your opinion is sought as to whether the criteria as drafted would exclude TAs which were undertaking animal welfare enforcement but under a contractual arrangement of the nature proposed in the AWINZ proposal (note that the main AWINZ proposal under cover of a letter dated 15 December 1998 has been amended in an e-mail dated 19 January 1999).
22. By way of background, you should note that the policy, in relation to approved organisations and the appointment of inspectors, was developed with a view to

strengthening the current system. A strategic review of the delivery of animal welfare services undertaken by MAF Policy in 1998 indicated there was a need to improve the lines of accountability particularly with respect to member societies of the RNZSPCA which are affiliated to, but not accountable to, the national society.

23. Key features of the system are:

- Inspectors are appointed by the Minister and they must act under the direction of the Director-General (section 16(1) Ministry of Agriculture and Fisheries Restructuring Act 1995).
- To ensure that inspectors are not subject by their employers to obligations that conflict with directions from the Director-General, clause 105(2)(d) provides that the DG must be satisfied that the employment contracts (or arrangements in the case of inspectors working in a voluntary capacity), are "such that having regard to the interests of the public, the organisation is suitable to be declared ---". This ensures a direct line of accountability between inspectors and the Government in respect of the exercise of coercive powers.
- In declaring an organisation to be declared to be an approved organisation, the Minister may impose conditions relating to the establishment of performance standards and technical standards (clause 105(3)). Such standards could, for example, require that an approved organisation have policies in place to ensure separation between complaint investigation and decisions to prosecute. The current lack of such separation in some SPCAs has been of concern.
- Current concerns about the lack of a direct line of accountability between inspectors employed by member societies of the RNZSPCA and the Crown, are addressed in clause 170 (2). This deems all such societies to be approved organisations but only while they remain affiliated to the RNZSPCA and while the RNZSPCA itself is an approved organisation.

Would Waitakere City Council or other TAs be legally empowered to rate for animal welfare activities under the AWINZ proposal?

24. Para 5 of the AWINZ proposal indicates that, in the short term, Animal Welfare Services of Waitakere City Council will continue to operate as a business unit of Waitakere City Council. This business unit will interface with AWINZ through performance contracts. The medium term strategy is that this business unit will be vested in AWINZ and all assets will be transferred to the Institute (once this has been through the annual plan process).
25. You are requested to provide an opinion on whether Waitakere City Council, under either of these strategies, would be legally entitled to rate for animal welfare work given the advice of Internal Affairs that it does not have a statutory animal welfare function. Your attention is drawn to **Appendix A** which sets out the provisions in law that Internal Affairs considered would be necessary to empower TAs to rate for animal welfare activity.

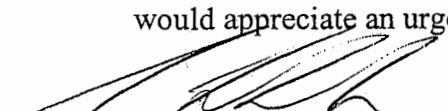
26. You should note that the AWINZ proposal, as submitted to MAF Reg in December 1998 is confidential to MAF.

Should MAF Reg or MAF Policy be responsible for advising the Minister on whether to declare an organisation to be an 'approved organisation' under the Act?

27. Currently it would appear that the CVO MAF Reg anticipates that he will be responsible for either: considering applications for "approved organisation" status once the Bill is enacted (under delegated authority from the DG/Minister) or making recommendations to the DG/Minister on whether applications should be approved. You are asked for your opinion on whether this is appropriate.
28. As you are aware, MAF Reg has responsibility for the delivery of a proportion of enforcement services (around 10% nationally). It is also responsible for ensuring that the overall system (voluntary societies, Police, MAF) works effectively. Where the system is not working (eg gaps in voluntary coverage) MAF Reg is responsible for ensuring that this is addressed or that, where it is beyond MAF's financial capacity, the issue is raised with Ministers. The proposal to involve territorial authorities in animal welfare, for example, was the MAF Reg response to concerns about budget cuts and the need for greater resilience in the system.
29. MAF Policy queries whether MAF Reg's role as an enforcement provider and system administrator would mean that it could be perceived as having a conflict of interest if it was also responsible for approving/recommending approval for other organisations.
30. Note that, in relation to the AWINZ proposal, Mark Neeson has been careful to advise MAF Reg that it should be careful, in its discussions with Neil Wells, that it does not say anything that would create an expectation that the proposal will be approved once a formal application is made under the Act, or to show any form of bias or predetermination of a view on the proposal.

Time frame for response

31. As you are aware, the Select Committee is currently considering MAF's departmental report on the Animal Welfare Bill. It is expected that the consideration phase will be completed by February 25.
32. MAF is aware that Neil Wells, who is acting as an independent advisor to the Committee, intends to recommend that clause 105 of the Bill commence earlier than the rest of the Bill (1 October, 1999). His reason is that this would enable his application for AWINZ to be declared an approved organisation to be considered in advance of 1 October.
33. Should it be considered desirable to strengthen the criteria in clause 105, MAF will need to advise the Select Committee on, or prior to February 25. Accordingly we would appreciate an urgent response.


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