

# The Animal Rights Legal Advocacy Network Report

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## ANIMAL WELFARE LAW CONFERENCE REPORT

This month's edition of the ARLAN Report is devoted entirely to a very special topic: a review of the March 13 conference on animal welfare law co-hosted by ARLAN and the Unitec School of Natural Sciences entitled: **Five Years of the "New" Animal Welfare Regime - How We Can Improve in the Investigation and Prosecution of Offences Under the Animal Welfare Act 1999**. The conference was a major success, attracting over ninety participants and exceeding organizers' and participants' expectations in every way. This report is designed to provide a general review of the workshops and plenary sessions held at the conference.

ARLAN wishes to once again thank the many supporters and attendees who made this conference possible. It was an extremely difficult and ambitious undertaking, but one that was also quite rewarding. This review bears testament to the high quality of the presentations that were made at the conference, and we hope it will be of some use to those who were unable to attend. As indicated below, video tapes of the conference should be available shortly.

ARLAN's Executive Committee wishes to thank the supporters who assisted with this review of the conference: Libby Schulz, Deidre Bourke, Louise Brown, Anna Cowperthwaite, and Cherie Gum.

Work is underway to prepare video copies of the seminars and plenary sessions from the conference. The conference web-site ([www.arlan.org.nz](http://www.arlan.org.nz)) will be updated with information on this project as it becomes available. The proceedings will likely encompass three video tapes or one DVD. Viewers will have some ability to choose which sessions they would like to purchase. Funds from sales of the video tapes will go to cover the costs of reproduction, with a nominal amount going to support ARLAN general activities. ARLAN wishes to thank Aaron Koolen of "Meat Free Media" for his considerable assistance with this endeavour.

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## **PLENARY SESSION: PROSECUTIONS UNDER THE ANIMAL WELFARE ACT 1999: ARE WE SUCCEEDING OR FAILING?**

*Plenary Chair: Peter Sankoff, University of Auckland*

*Panelists: Jim Boyd, SPCA; Earl Culham, MAF Animal Welfare Group;  
Neil Wells, UNITEC School of Natural Sciences*

*Reviewed by Deidre Bourke*

The topic for the main plenary at the ARLAN conference was called “Prosecutions under the Animal Welfare Act 1999: Are we succeeding or failing?”. Peter Sankoff chaired the panel consisting of Neil Wells, Programme Leader of the animal welfare department at UNITEC School of Natural Sciences; Jim Boyd, Senior Inspector with the Bay of Islands SPCA, and Earl Culham, Senior Animal Investigator with MAF’s Special Investigation Group. The plenary was among the most popular of the presentations given at the conference and sparked many questions from conference attendees. Probably more than any other workshop this session helped solidify and focus the conference as it provided a forum for wider group discussion on the key issues currently being faced by the animal welfare community in New Zealand.

The discussion started on a positive note, with panellists being asked to talk about what they perceived to be the biggest achievements or steps forward made by the Animal welfare Act 1999 (AWA). All panellists agreed that the changes introduced to make it easier for inspectors to enter properties to obtain evidence was one of the most successful changes. Under the previous Act, inspectors could not inspect a property without cause. Under the AWA it is now possible for inspectors to carry out routine inspections of properties housing animals, such as circuses. This has improved monitoring and assisted in investigations.

All panellists also agreed that the change in focus of the Act - away from simply punishing cruelty to imposing responsibilities and duties on owners and persons in charge of animals - was also an important step forward. It moved the Act away from simply being the “ambulance” to focussing more on preventing harm.

Neil Wells and Jim Boyd also cited the removal of the requirement that cruelty be wilful, and institution of strict liability offences as positive steps that helped shift the onus of proof in cases and made cruelty caused by neglect or omissions easier to prosecute. Mr. Boyd pointed out that the strict liability clauses also assisted prosecutors as it meant the defence’s arguments were disclosed at an earlier stage and made the compilation of evidence and prosecution’s job more efficient and effective.

Neil Wells also considered the introduction of a specific offence dealing with animal fighting ventures to be a necessary and crucial provision, which had been especially timely given the number of recent dog fighting cases. He also saw the increased status of Codes of Welfare and ability to use the codes as evidence in cases as an extremely positive change. **[Continued on page 3]**

## PLENARY SESSION REVIEW

The panellists were also asked whether all the provisions in the Act were being fully utilised and how this might be improved. Neil Wells discussed the value and need for agencies to make better and more frequent use of enforcement orders. Enforcement orders are valuable because they allow the court to make an order which can be instituted immediately. Jim Boyd discussed a recent case where he had been able to get an order that forced an owner to make immediate changes in the management of his animals – even though the case had not yet gone to court. This enables animals to be helped and situations to be improved rapidly where necessary. Neil Wells pointed out that some people do not change their ways even after repeated prosecutions, and in such cases enforcement orders are particularly valuable. He also noted that non-compliance with a court order is generally taken very seriously by judges.

There was some concern expressed that enforcement orders were too technical or complicated to institute and that was hampering their use. Earl Culham felt that the most difficult aspect of instituting an enforcement order was ensuring that the order itself would stand up and be enforceable in practice. For example, to be effective an order had to provide clear and precise directions. It must put objective and quantifiable measures in place as unless specific measures were imposed it could be difficult to prove the order had been breached, or, conversely, to check the order was being complied with. Mr. Culham said that in starvation cases MAF establishes what the sustainable stocking rate for a property is and applies that as a way of asking, for example, for a 50% reduction in stock on the property depending on the capacity to feed animals. He felt that when properly drafted orders could be highly effective.

The panellists were then asked to discuss any problems or shortcomings they thought existed within the AWA. All panellists considered that the provisions dealing with the seizure and disposal of animals were problematic. Jim Boyd noted that because animals were evidence, they had to be held until trial. In one dog fighting related case, the SPCA had been forced to house, feed and care for a number of dogs for nearly two years. This was unacceptable both in terms of resources but also for the welfare of the animals. Mr. Boyd felt the kennelling of already stressed animals for such a prolonged time in effect added to the cruelty they suffered and that the condition of the animals only grew worse due to the isolation.

Earl Culham also felt that time limitations for laying information in cases needed to be changed, for at present charges must be laid within 12 months of the matter arising or it was no longer possible to prosecute. Many animal welfare offences are of an ongoing nature, and where matters arise and continue for a long time, this can mean that by the time the animals are found it may be more than 12 months after the initial event arose and it might not be possible to prosecute the case. Peter Sankoff suggested the provision needed to be changed to allow the 12 months to run from the date of discovery rather than the date of the event.

There has been much recent debate and discussion about the inadequacy of fines and penalties handed out in recent animal cruelty cases, notwithstanding the increase in penalties provided for under the AWA. This issue was also discussed by the panel in some depth. Panellists noted that since the Act was introduced the average fine had increased, however in general it was recognized that sentences remained low. **[Continued on page 4]**

## PLENARY SESSION REVIEW

Jim Boyd expressed hope that a jail sentence might be achieved in an upcoming case dealing with an incident where a dog was dragged behind a car. Others remained pessimistic about the probability of jail sentences being likely in the near future. Mr. Boyd noted that a recent case involving a rodeo horse had received the maximum \$10,000 fine, while Earl Culham remarked that recent successes had been seen in various MAF cases, in one instance resulting in a farmer being fined \$116,000, which was the largest penalty to date. He also noted the farmer had been disqualified from owning animals for 5 yrs, and that in the case of farmers at least this was a significant penalty as it affected his livelihood.

The panelists were then asked about whether a lack of funding to properly enforce the Act was a serious issue. Jim Boyd pointed out that his Bay of Islands SPCA branch receives no money from the government for this task and relies totally on public donations. There was concern that the lack of funding for local SPCA's might be affecting the number of cases which could be taken, and that persons may not be being prosecuted due to lack of funds. When the SPCA was given standing to take cases, they had initially decided they did not wish to have government funding out of concern that would destroy their unique position, and might compromise their activities and choice of cases. However it had become increasingly clear that some official funding was necessary. Earl Culham recognised that funding must be sufficient to cover prosecutions and said that they were currently discussing the issue, but that how it would work needed to be finalised and costed. Neil Wells questioned whether SPCA's needed to have a clearer focus, and if the dual role of trying to be both animal cruelty prosecution agency and animal shelter group hindered them - as the cost of running shelters is high – perhaps the organization's participation in both roles needed to be reevaluated.

Discussion was then opened up to the floor. The panel was asked whether they thought the police should have a greater role, noting that in the United States criminal offences are dealt with by police. It was suggested that this might make the issue be taken more seriously. There was concern that relegating prosecutions to a non governmental body, that was privately rather than publicly funded might actually be harming the cause. Neil Wells agreed but noted that there would also be down sides to referring cases to the police, since the cases would be given a lower priority in their work load. As an ex-policeman, Jim Boyd noted that police have little animal training and knowledge about animals to act as inspectors so there would be practical problems. He noted that police often get called out to the more violent offences, and usually contact the SPCA for homing the animal. Peter Sankoff noted that Canada operated a hybrid scheme where less serious offences were taken by SPCA's but the wilful cruelty cases were dealt with by police.

Jim Boyd said that he had been able to raise awareness of the seriousness of the issue by utilising media coverage on recent cases and that this had produced results. Publicity on key cases had helped put the issue on the map and had made the community more aware of the issue and its importance. He had seen change in recent years, as the public were becoming less hostile and more responsive when they were asked to do something.

To end the session, the panel were asked about what changes would they like to see occur within the next ten years. Earl Culham thought funding was key, **[Continued on page 5]**

## **PLENARY SESSION REVIEW**

and that he would like to see animal welfare prosecutions adequately funded so that headway could be made in reducing animal cruelty. Neil Wells said that in ten years he would like us to have come to the point where there would no longer be any need for Part 6 of the Act, which regulates animal use for research, testing and teaching purpose. However given this was unlikely he would at least like to see greater restrictions in this area and a reduction in such use of animals for experimentation. Jim Boyd agreed. Mr. Boyd also hopes changes will have been made to our forfeiture laws and that specific stand alone provisions dealing with holding animals in custody pending trial will have been introduced into the AWA. Mr. Boyd felt that public education was key, since he feels that pockets of New Zealand “are still in the 1960’s in their treatment of animals.” His ultimate goal of course was to one day see the public’s attitude towards animals change to the extent that he would be out of a job. Most of those at the plenary appeared to agree with this last sentiment!

## **BETTER SENTENCING SUBMISSIONS BY INSPECTORS COULD LEAD TO HEAVIER SENTENCES UNDER THE ANIMAL WELFARE ACT**

*Workshop by Annabel Markham, Crown Law Office  
Review by Louise Brown*

The potential of the Animal Welfare Act 1999 to achieve higher sentences for offenders is currently not being realized, according to Annabel Markham from the Crown Law Office in Wellington, who gave an informative and useful lecture on sentencing under the Animal Welfare Act at the conference. Ms Markham suggested a number of valid reasons for the low sentencing of individuals convicted under the Act, but stressed that inspectors have an important role to play in this area and that better sentencing submissions could be a part of the solution. During her workshop, Ms Markham offered informative guidelines on how a sentencing submission should be prepared for an animal welfare prosecution.

One of the best ways to counter low fines and limited sentences, it was suggested, would be to develop a clear sentencing submission model that all inspectors could use for convictions imposed under the Animal Welfare Act. Ms Markham stressed that “the more developed and detailed the sentencing submission of the inspector, the more information the judge has to better determine a sentence reflective of the offence.” To generate more efficient sentencing, Ms Markham outlined the current sentencing principles under the Sentencing Act 2002 and applied them in a useful way to convictions under the Animal Welfare Act.

In preparing a submission, it is first important to begin with a detailed Summary of Facts. In determining the sentence, these are the facts of the case the judge will use to reach an appropriate sentence. In forming a detailed summary it is critical to include any aggravating features of the offence, including: whether there were multiple victims, the time and extent of suffering for the animal(s), the vulnerability of the animal in the situation, any additional actions of the offender that impeded the prosecution, the resulting injuries of **[Continued on page 6]**

## **BETTER SENTENCING SUBMISSIONS REQUIRED**

the animal, and whether the defendant made any statements reflecting knowledge of his actions. Ms Markham's experience suggests that the more information on the offending that is available, the more likely it is that the judge will deliver a tougher sentence.

Second, it is important to give clear guidance as to the believed appropriate sentence. This includes a "starting point" from which the final sentence will result. While most sentences will result from the judge taking into consideration the aggravating and mitigating factors before determine the final sentence, it is crucial that the sentence have a clear starting point. When suggesting a sentence, it is important that the Inspector is clear about whether the submitted sentence is either the starting point or the suggested final sentence.

Next, Ms. Markham suggested drawing from the Sentencing Act 2002 the principles of sentencing – including the aggravating and mitigating factors - that should be considered. Sections 7, 8 and 9 of the Sentencing Act are the relevant sections for this part of the submission. Here, the Inspector should address all applicable principles and purposes under sections 7 and 8 and the aggravating factors under section 9, but it is discretionary as to whether the Inspector need mention possible mitigating factors under section 9.

The remaining part of the submission should then focus on the believed appropriate sentence supported in detail by facts from the offending. It is important here to set forth a general guideline of a starting point from which the final sentence will result. Judges tend to start with the suggested starting point then weigh the aggravating and mitigating factors to determine the resulting sentence, for this reason it is important the starting point put forth is sufficiently high to reflect the severity of the offending.

Any authorities which can support these submissions, should then follow. If a Inspector is asking for a higher sentence than what has been the norm, it would be beneficial in this section to clearly state why the offending in question should warrant a higher penalty. Referring to the increased penalties enacted under the Animal Welfare Act (as compared to the prior legislation) as being the intention of Parliament to increase sentences is another good argument to make here. Finally an inspector can conclude the submissions with any additional requests of penalties, for example disqualification or forfeiture. However, most important in making any submissions is be clear in what the appropriate sentence for the offending is believed to be and why it should be set at such a level as the Judge will be inclined to take consideration of this in making his final judgment.

In conclusion, it is clear from the Ms. Markham's workshop that inspectors can have a more active role in sentencing under the Animal Welfare Act. At present, sentences handed down do not reflect the true offending, but with more effective sentencing submissions by inspectors who establish strong arguments for greater sentences, the Courts will have to begin to look more seriously at their approach.

## **PREPARING A SUMMARY PROSECUTION FILE**

*Workshop by Tiana Epati, Meredith Connell*

*Review by Cherie Gum*

This workshop, by Tiana Epati of Meredith Connell – the Crown Solicitor’s Office in Auckland - described in a very methodical fashion the procedure for preparing a prosecution file for summary offences. This progressed from the very first stage of a prosecution, laying the information, right through to sentencing and appeals. It was a useful overview of what is required in any Animal Welfare Act prosecution.

### *1. Laying the Information*

The sworn Information is the document setting out the charge against the defendant and the particular court that the defendant must appear in. The correct court is the court closest to where the defendant resides, or where most of the witnesses reside or where the offence occurred. The defendant may also request that the hearing be transferred to a different court if it is too arduous for him/her to attend the court allocated. The sworn original copy of the Information must also be placed on the prosecution file.

### *2. First call*

Once the Registrar provides a date for the first call of the charge, a notice of the date of first call must be served on the defendant. If service proves difficult the prosecution may seek a new date from the court. This is called an enlargement. At court, the prosecution must provide proof of service of the first call notice. This can be either by way of proof endorsed or affidavit of service. If the defendant is overseas and cannot be located the notice of first call can be served by registered post at the defendant’s last known address. However, the court does prefer an affidavit sworn by a process server where possible.

The prosecution file for first call must consist of:

- (a) summary of facts;
- (b) proof of service of the notice of first call;
- (c) copy of the Information; and
- (d) any statements of witnesses.

Where the defendant pleads guilty at the first call of the matter, he/she goes straight to sentencing. Where the defendant pleads not guilty he/she must attend a second call. If the defendant fails to appear at the first call, the Judge may issue a warrant for the defendant’s arrest. This method may only be used for indictable offences which carry a sentence of imprisonment. Where a warrant is issued the Police should be advised.

Where the defendant is a company and the maximum penalty is a fine only, the matter can proceed by way of formal proof. Formal proof can be used where service of the first call was unable to be carried out or where the defendant fails to appear in Court. Under formal proof the witnesses execute affidavits which are produced to the Judge. **[Continued on page 8]**

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## **PREPARING A SUMMARY PROSECUTION FILE**

If the charge is proved a conviction is entered. Where a conviction is entered, it is very wise to always make sure to have all affidavits and sentencing submissions ready so the Court can act on the matter quickly.

### *3. Second call*

At this stage, the Court deals with any disclosure issues. Anything relevant and not privileged must be disclosed. This includes statements, briefs of witnesses and diary notes.

### *4. Status hearings*

This is the 'clearing house' for all hearings. It is like a pre-hearing hearing. The purpose of it is to explore whether the charge can be resolved without proceeding to a full defended hearing and to ensure that the hearing can proceed as scheduled, if that is necessary.

The Judge gives a view on the charge and looks at the strengths and weaknesses of the case. Any compromise may be reached at this stage. The defendant may also enter a plea. If the defendant does enter a plea at the status hearing, the prosecution must be prepared with any sentencing submissions.

Even where the defendant has no defence, the Judge cannot stop the defendant going to a defended hearing. Where the defendant pleads at this hearing he/she may be given some leniency. If the matter then goes onto a defended hearing the same Judge which heard the status hearing does not hear the defended hearing.

### *5. Defended hearing*

Defended hearings are heard by a Judge alone. Full disclosure must be completed by the time of the defended hearing. The prosecution file must contain everything, including non-disclosed material. Any witnesses the prosecution intends to call must be available.

### *6. Sentencing*

A pre-sentencing report is requested by the Judge and is prepared by community corrections. The Sentencing Act 2002 prescribes the matters the Court must consider on sentencing a defendant. It is important that counsel make submissions on sentencing in order to bring these considerations to the attention of the Judge.

### *7. Appeal*

The defendant cannot appeal as of right. He/she must first seek leave from the Solicitor-General to appeal to the High Court. The defendant can only appeal to the High Court on questions of law.

## **SEARCH AND SEIZURE UNDER THE ANIMAL WELFARE ACT**

*Workshop by Scott Optican, Senior Lecturer, University of Auckland*

*Reviewed by Anna Cowperthwaite*

This workshop principally addressed sections 127 and 131 of the Animal Welfare Act 1999 (“the Act”), which provide inspectors with the ability to inspect land etc. and obtain search warrants. Mr Optican outlined the powers given to, and obligations placed on, inspectors under the Act, and highlighted the potential application of section 21 of the New Zealand Bill of Rights Act 1990 (“NZBORA”) to the powers of inspectors.

### **1. Power of Inspection - Section 127**

A broad power of inspection is provided by section 127(1), which gives inspectors the “power to inspect land, premises and places and stationary vehicles, aircraft, and ships”, without a search warrant. Mr Optican highlighted that it is a “regulatory” provision - an inspector is not required to have reasonable grounds or suspicion that an animal is or will be mistreated before having recourse to section 127(1). The legislation requires nothing more than that an inspector is entering a place for the purpose of inspecting an animal. Mr Optican noted that while section 127(1) appears very broad on its face, the Court may read in limitations on the power it gives to inspectors – for example, through section 21 of the NZBORA, which provides that powers of search have to be exercised reasonably.

The greater the intrusion the exercise of an inspector’s powers has on the rights of an individual, the more conditions the Act places on the exercise of those powers. Mr Optican highlighted this through an examination of the subsections of section 127:

- Section 127(2) allows a vehicle to be stopped for inspection. Only a member of the police is able to stop a vehicle, and then only if they have reasonable grounds to believe that an animal is, or is likely, to suffer unnecessary or unreasonable pain or distress.
- Section 127(3) provides that an inspector may not enter a private home or marae without a warrant. Mr Optican noted that requiring a warrant provides an extra layer of protection to the rights of the individual, as an inspector has to provide evidence in support of their application to a neutral decision maker (either a District Court judge or Justice of the Peace).
- Section 127(5) gives an inspector the power to seize an animal in order to provide it with care. It requires the inspector to have reasonable grounds to suspect that an animal has been willfully ill-treated, or that it is necessary or desirable for the physical, health and behavioural needs of the animal to remove it.

Despite the powers of inspection given by section 127, Mr Optican recommended that where time permits, and an inspector has a factual predicate for wanting to inspect, then a search warrant should be obtained. Warrants protect inspectors and make a search look more reasonable for the purposes of section 21 NZBORA. In addition, a warrant gives an inspector greater powers under section 133 of the Act – for example, **[Continued on page 10]**

## **SEARCH AND SEIZURE UNDER THE ANIMAL WELFARE ACT**

they can search for or seize anything specified in the warrant, or that they could have obtained a warrant for, and use reasonable force where necessary.

### **2. Obligations on inspectors**

Mr Optican drew attention to several sections of the Act that place obligations on inspectors in the exercise of their powers:

- Section 128 requires an inspector to carry evidence of their identity, and that they are an inspector.
- Section 129 requires that where an inspector makes entry and the person in control of the land/place is not present, a notice of the visit must be left in a visible place. That notice must contain details that are specified in section 129.

### **3. Section 21 of the New Zealand Bill of Rights Act 1990**

Section 21 of the NZBORA impacts on every search and seizure in New Zealand. Where a search is legal under section 127 of the Act, a Court is likely to find that the search is reasonable under section 21 NZBORA. However, it is important to bear in mind that a lawful search can be unreasonable, and an unlawful search can be reasonable. Mr Optican gave an example where an inspector acted properly to gain entry to a property, but then caused damage to that property. Such a search is legal, but the Court could find the manner in which it was conducted unreasonable. The implication of breaching section 21 NZBORA is the potential exclusion of evidence obtained from the search. New Zealand case law has generally held that evidence gained from an unreasonable search will be excluded, though this will not always be the case.

### **4. Search Warrants - Section 131**

To obtain a search warrant under section 131, an inspector must have reasonable grounds to suspect that either one, or a combination, of 131(1)(a) to (d) is occurring. Mr Optican highlighted several aspects regarding search warrants that should be given careful consideration:

- Under section 133 of the Act, a warrant can only be used “on one occasion”, and must be actioned within 14 days. Given this requirement, if a search will take longer than one day, it is important that this is specified in the application.
- An inspector must disclose any previous applications regarding the same property, and the results of any previous searches, when making an application.
- The correct form and content of search warrants is critical. An application should set out the facts required to show the reasonable grounds. In addition, the places that are to be the subject of the search should be clearly described, and detailed descriptions should also be given of the items to be seized. **[Continued on page 11]**

## **SEARCH AND SEIZURE UNDER THE ANIMAL WELFARE ACT**

### 5. Importance of correct procedure

Mr Optican concluded the workshop by stressing the importance of following correct procedures when exercising powers under the Act. As a precautionary example, Mr Optican cited the case of *Walker*. In this case, the SPCA had made two visits to a property using section 127. Following the first, a notice was left as required by section 129. After the second visit, the first notice was removed and replaced with a composite one. Therefore, there was not a notice for each entry. The Court stated that this was a minor, technical illegality. It made the search illegal, but it was not unreasonable.

Two months later the SPCA applied for a search warrant for the same property. The affidavit supporting the application was deficient in the sense that it stated a conclusory belief, which was not referenced to supporting facts. Again the Court held that it was a minor error, and that the search was not unreasonable. However, an application for a warrant should clearly reference its conclusions to supporting facts.

Finally, when the search warrant was issued, it was wrongly worded. As such, it was illegally issued, which made the search conducted in reliance upon it illegal. Again, the Court held that it was not unreasonable.

Mr Optican stated that this case is an example of a series of minor illegalities being saved by reasonableness. However, he stressed the importance of exercising powers correctly, as the Court gave a clear warning that it will not always give the same leeway it did in *Walker*.

## **FROM THE BENCH – A JUDGES’ PERSPECTIVE ON SENTENCING.**

*Workshop: Judge David Harvey, Manakau District Court  
Reviewed by Libby Schultz*

Does the community need the same protection against the animal abuser as the armed robber? Can an animal be defined as a ‘victim’ under sentencing legislation?

These were just some of the questions raised by District Court judge David Harvey in his conference address *Relevant Factors in Sentencing for Animal Welfare Offences*. He offered an interesting insight into the statutory obligations placed on judges when considering the imposition of a relevant sentence.

The most important piece of legislation guiding judges is the Sentencing Act 2002, which sets out both the purposes and principles of sentencing. The judiciary is bound to consider these when imposing a sanction. Judge Harvey described the Sentencing Act as “the guiding light as far as judges are concerned.” **[Continued on page 12]**

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## **FROM THE BENCH – A JUDGES’ PERSPECTIVE ON SENTENCING.**

“A judge or lawyer has to use the purposes and principles of sentencing as their starting point,” he explained. “Firstly you need to ensure what you’re seeking in terms of sentencing fulfills the purposes of sentencing under section 7.”

The purposes of sentencing include concepts such as deterrence, denouncing the conduct, holding the offender accountable for harm done to the victim and community, and providing for the interests of the victim. From the perspective of offences against animals, Judge Harvey said these statutory purposes raise some interesting legal questions.

“Does the community need protection from the person who is cruel to an animal as much as the aggravated robber?” he asked. And while victimology principles have traditionally focused on human beings, they may also be relevant to animals.

“Is a dog any less a victim? Are you the voice who speaks for those who cannot speak for themselves? The law has specified that animals need protection, so could it not be argued that there is a victim interest involved here?”

Section 9 of the Act sets out aggravating and mitigating factors which must be taken into account when sentencing. Some of the factors relevant to animal welfare include “particular cruelty in the commission of the offence”, premeditation on the part of the offender, and “that the offender was abusing a position of trust or authority in relation to the victim”.

“You could argue [in animal cruelty] cases that those are aggravating circumstances,” said Judge Harvey. “What you’ve got to do is try and fit the offender within those aggravating circumstances, or at least point them out to the Court.”

While acknowledging that not all the purposes and principles will be relevant to animal welfare prosecutions, Judge Harvey encouraged the audience to apply them where possible. “Don’t be intimidated. Stand your ground and argue logically.”

He also cautioned against allowing emotion to replace logical legal argument. “There is a huge amount of emotion underpinning [these cases], but you cannot allow emotion to enter into it. Your duty is to put the information before the Court in a logical and intellectually rigorous way. The place for emotion lies in the policy or legislative arguments.”

## **EXPERT EVIDENCE – HOW, WHEN AND WHY?**

*Workshop by: Jacqui Pate, Senior Investigating Solicitor  
MAF Special Investigations Group  
Review by Deidre Bourke*

Expert assistance is required in a number of areas throughout the investigative and prosecutorial process, from assisting in the field to alleviate animal suffering, in the collection and processing of evidence, and during litigation where experts are required to provide evidence to support charges. In her talk Ms. Pate focused on issues such as how to source an expert and the role of experts in animal welfare prosecutions and also gave detailed advice on how and when experts should be used. The workshop was very practically oriented and provided a plethora of information and useful advice on a wide range of issues in this area.

Ms. Pate focused on three areas where experts are used: in the collection of evidence and presentation of that evidence as a witness in court; to provide an expert opinion on a matter in dispute in a case; and to assist in obtaining and drafting enforcement orders.

### *Collecting evidence and attesting to the facts of the case in court*

A veterinarian will usually have been on the scene in the field, or have had the animals brought to them for examination and treatment. They may also have taken samples or conducted a post-mortem. This means they have first hand experience and knowledge of facts in the case, and their records will form a part of the evidence presented. They are key witnesses as they have experience of the immediate circumstances and state in which the animals were found and they have been directly involved in the collection of evidence.

Ms. Pate gave detailed practical advice on how to ensure that the evidence recorded and presented by the vet in court was as robust and useful as possible, specific pointers given included:

- It is vital that vets take good notes in the field and record key events and discussions they have with the accused. Ms. Pate suggests that inspectors should ask vets to record all their observations and specifically inquire about any conversations with the accused. If time is an issue, she suggests investigators try asking the vet if they could talk into a dictaphone and record their observations in that way instead. She also stressed the need for the vet's notes to be as specific and descriptive as possible.
- Inspectors should also be aware of the potential conflict of interest that can exist in small towns, where the vet called out may have had previous dealings with or have been the local vet of the accused. If this is the case, it may be better to source another vet so that their credibility cannot be questioned.
- Conflicts can also exist if the initial vet dealing with the situation is resistant to appear in court or assist with the case. While another vet can be called in to look at the evidence and testify, it should be remembered that if the vet used has had limited involvement they may be seen as less credible. **[Continued on page 14]**

## EXPERT EVIDENCE – HOW, WHEN AND WHY?

- It is important that animals and samples and evidence taken from animals are specified and identified right through the entire process. It is insufficient to gather general evidence on the state of a herd, evidence must be collected from specific animals within the herd so that the suffering of each animal can be individually proved. For this reason each sample taken from an animal must be treated as an exhibit and must be able to be linked to the animal.

### *Using an 'expert opinion' in court*

Expert witnesses or evidence may also be needed when an issue in litigation cannot be readily understood without explanations from someone who is familiar with the subject. Such evidence is used to help establish that the elements of the offence are proven. Such experts must be used in order to establish whether there has been a breach of section 10 of the AWA, since that section specifically states that the physical, health and behavioural needs of animals must be met in accordance with good practice and “scientific knowledge”. Ms. Pate also notes that if reliance is being placed on published articles and reports, it is important to obtain at least a copy of the original article as the court will ask for this.

### *Enforcement Orders*

Affidavits from an expert can also be used to support an application for an enforcement order. When obtaining an affidavit it is important to make sure that the affidavit is factual and specific, objective not emotive, that the information is set out chronologically, and that it is logical. Proof of the breach of the Act should be provided, and the vet should attest both to the need for an enforcement order and the need for its specific wording. The affidavit must present the available evidence on paper as grounds. Ms. Pate also suggests that inspectors use experts to negate possible defences, or provide a contrary view to the defence. She advises that it is absolutely fine to let the expert go through the defence’s briefs. In fact, Ms. Pate says, the vet will often be able to assist in identifying flawed reasoning in the defence’s argument. The affidavit itself should contain short concise paragraphs dealing with individual concepts and avoid vague terms and assertions. Ms. Pate points out that vets will often use veterinary terms such as “ill-thrift” or “thin” in their descriptions, but that such terms like these, that will not be clear to the court, should be avoided.

The role of vets as consultants can also be overlooked. However when drafting an enforcement order a vet can greatly assist in evaluating and advising on the nature and scope of the order as well as with the wording and content. In order to be effective, an enforcement order must be specific and set out exactly what is required. For example, if a vet says that the person in question must “drench” their animals, then the enforcement notice must detail what specific action is required and a vet will be needed to advise as to the doses to be given, and to help set time limits for requiring action to be taken. **[Continued on page 15]**

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## EXPERT EVIDENCE – HOW, WHEN AND WHY?

*Specific issues that experts can assist with also include:*

- Establishing that an animal has experienced “pain suffering and distress” under s11 or s12(c) of the AWA. Ms. Pate notes that vets will often be reluctant to commit themselves to whether an animal experienced “pain” since there is no definitive objective scientific scale or measure of pain. However she advised that even if it is not possible to establish “pain” it is normally possible for the vet to testify as to “distress”.
- Assessing the nature of the injury or disease in the animal and what action is required.
- Determining specific time periods at question in the case – this is especially important in cases dealing with malnutrition, where it is necessary to establish how long it would have taken the animal to starve, or the dates when the actual offence would have happened. Prosecutors need to be able to pinpoint the dates and duration of the offence, where there is little direct evidence from witnesses the vet’s opinion may be the only means of determining this.
- Providing recorded evidence, photography, video footage, statistics, scientific papers etc.

### **Sourcing an expert**

In looking for an expert Ms. Pate notes that it is important to remember that even within the field of veterinary science there are a wide range of specialisations and that it pays to be selective. Vets vary widely in their experience and expertise, even a large animal vet may have had little experience and knowledge of dairy cattle for example. Professional bodies such as the New Zealand Veterinary Association (NZVA) maintain skills registers that list veterinarians by specialisation. Checking the NZVA’s ‘special skills register’ is probably the easiest and quickest way to locate a vet who is an expert in a specific area (nutrition, pathology etc.), or with a particular species.

Experts in other areas should also be considered, for example agricultural consultants can be useful in malnutrition cases to determine what feed volumes were available. Veterinary pathologists and animal behaviourists can also provide highly valuable information – although Ms. Pate notes that inspectors should be aware that the court may have difficulty in recognising an expert in a new field of science.

No matter who the expert or what the field, it is always important to obtain information on the specific qualifications and experience of the experts. To avoid getting caught out, she suggests finding out if the expert has published, on what issues and how recently. Generally explore their background as a safety check. **[Continued on page 16]**

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## **EXPERT EVIDENCE – HOW, WHEN AND WHY?**

### **The role of the expert**

Ms. Pate also pointed out that it should always be remembered that the role of an expert is not to 'prove the case' but to assist the court and to demystify scientific questions at issue. Essentially the role of the expert is primarily to:

- answer questions
- explain, educate
- express an unbiased professional opinion

Because of the specific role experts play Ms. Pate advised that prosecutors should direct the expert to avoid providing speculative opinions and close down any questions posed by the defence that require a subjective response. Their evidence should be objective and relevant – they are there because of their knowledge. For this same reason, the expert should only answer questions on which they are expert. Ms. Pate suggests that experts be advised to tell the court if a question is outside their area of expertise. It is this objectivity that adds value to the expert's opinion.

## **KEYNOTE SPEAKER: AN INTERNATIONAL PERSPECTIVE ON ANIMAL WELFARE**

*Speaker: Dr. Al Gillespie, University of Waikato, Faculty of Law  
Reviewed by Libby Schultz*

When it comes to international standards in animal welfare we are “moving forward on some things, but backwards on others.” This was the message delivered by Dr Al Gillespie, a keynote speaker at the recent ARLAN conference, when describing his work as New Zealand's legal representative on a number of international delegations.

These include the Convention on International Trade and Endangered Species, the Convention on Biological Diversity, the Convention on Migratory Species, and the International Whaling Commission. “The work's really exciting,” he said. “When you're at these conferences sometimes you can see the world change for the better a little bit.”

He gave some interesting insights into the political influences which govern the protection of wildlife, biodiversity and endangered species.

“International law is international politics,” he said. “For countries like New Zealand we don't have a big army or a big chequebook, so we are having to get out there and argue on principle.”

He pointed out that international wildlife law has no compliance methods as such. While trade boycotts were a traditional method of enforcing standards, today much of the work is left to the lobbying of non-governmental organizations. **[Continued on page 17]**

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## KEYNOTE SPEAKER: AN INTERNATIONAL PERSPECTIVE ON ANIMAL WELFARE

“I don’t think it’s possible for one country to shout at another country across the table – the NGOs have to do it by applying pressure internally. Ultimately it is a ‘shame technique’...and the NGOs are very effective in this area.”

Dr Gillespie also pointed out that international law does not currently prohibit the killing of any species. “There is no international Treaty that says a species should not be killed – even heavily endangered species. There will always be exceptions that you can take those species if you need to.”

The planet’s wildlife is also facing emerging new threats – such as climatic change, organic pollutants and other environmental hazards. And while there are no definitive statistics on the actual number of species in the world, it has been estimated we could be losing 50,000 each year.

Dr Gillespie says the international community has recognized that “wildlife and biodiversity is in a mess.”

“At the 2002 World Summit on Sustainable Development, it was the first time the international community has recognized there is a problem. So the good news is that we know there’s a problem. But the bad news is we’re losing control of the conventions...and on a lot of wildlife fronts we’re not making progress.”

One of the positive things to emerge from the international stage in recent years, however, is the focus on humane standards. “Throughout all of these forums, we are finding the word ‘humane’,” said Dr Gillespie. “Across all levels, we are generally talking about humane standards much more.”

## FORFEITURE AND THE ANIMAL WELFARE ACT

*Workshop by Gina de Graaff, Crown Law Office*

*Reviewed by Libby Schultz*

The high-profile case of *Summers v MAF* has highlighted the need for law reform regarding the forfeiture of animals under the Animal Welfare Act. Gina de Graaff, from the Crown Law Office in Wellington, presented a workshop on this topic at the ARLAN conference.

As counsel for the Ministry in the *Summers* case, Ms. De Graaff outlined the difficulties involved with caring for animals seized under the AWA. The herd of 318 severely neglected cattle had been removed by MAF under the authority of a search warrant in July 2002. But because the trial was not scheduled for 12 months, the Ministry was facing considerable costs for their ongoing care – amounting to \$8,000 per month.

“It reached the point in late 2002 where the value of the herd was about the same value as MAF’s costs.” said Gina de Graaff. **Continued on page 181**

To recoup these costs, MAF applied to the District Court for permission to sell the animals. However the defendant, Mr Summers, applied to get his cattle back. The district court granted MAF's application, but Mr Summers appealed to the High Court and won.

In delivering his judgment, Justice O'Regan acknowledged that it was difficult to discern from the wording of the legislation exactly what Parliament's intention was in these situations. However he concluded there were only two options under the Act – to return the animal to the owner, or to order that the organization who seized the animal must keep it until such time as there is a trial and conviction.

According to the Judge: "If it had been intended that the Ministry could obtain an order for sale of the animals and retention of the proceeds, then there would have been an express statutory power [in the AWA]."

However Ms. de Graaf believes the *Summers* case highlighted the problems of the AWA – and specifically section 136 which incorporates elements of section 199 of the Summary Proceedings Act – which only allows the disposal or sale to take place post-conviction.

"This is not a situation where the police have seized cannabis or stolen TVs which then sit in a custodial situation. We're talking here about living breathing things that require food and shelter. Section 199 was patently not designed to apply to animals."

This raises problems for organizations such as MAF or the SPCA who are responsible for the ongoing costs of the animals' care. The forfeiture provision itself, section 172, also raises other difficulties. It reads:

(1) If the owner of animal is convicted of an offence against this Act in respect of that animal, the Court may, if it thinks it desirable for the protection of the animal...order that the animal be forfeited to the Crown or to an approved organization.

"Not every case will result in a conviction before the Courts, for different reasons; but what if you are satisfied the animal needs to be removed? Another problem is what you do with animals in the lead-up to a Court case, as with *Summers*."

Another problem is that the provision requires a conviction in respect of an individual animal. "This section was perhaps best suited to those cases where there was one cat, one dog, one horse. But you might come across whole fields of cattle in neglect. What does this mean for prosecuting agencies – do you need to lay an information in respect to each animal and ensure each animal is properly identified?"

These questions, unfortunately, remain unanswered, and given the decision in the *Summers* case, it may ultimately be necessary for legislative intervention to solve the problem.

# Animal Rights Legal Advocacy Network

Improving the law to improve the conditions of animals

**ARLAN** is an organization of New Zealand lawyers and law students established in 2001, working to improve the law as it affects animals. We need your help to make this a reality.

## How you can help?

- **Information** – By joining our e-mail chat group you can learn more about animal law issues in New Zealand. In turn, you can keep us posted about issues arising near you. E-mail: [contact@arlan.org.nz](mailto:contact@arlan.org.nz) to join in. Also, check out our web page: [www.arlan.org.nz](http://www.arlan.org.nz)
- **Become an Active Member of ARLAN** – ARLAN urgently needs dedicated lawyers and law students who care about the plight of animals to join our cause. We succeed only to the extent that we have supporting volunteers who are willing to help. There are a number of ways you can assist, and what we need most is your time and enthusiasm! Several projects are underway and require assistance:

-the **ARLAN Report** needs volunteers to assist in writing and production. We also require volunteers outside of Auckland to assist in distributing our newsletter. To help out contact: [newsletter@arlan.org.nz](mailto:newsletter@arlan.org.nz)

-the **ARLAN Animal Cruelty Committee** needs volunteers to help us ensure that better animal cruelty prosecutions are undertaken where animals are deliberately hurt. This committee is still in the process of being established, but for more information, contact: [cruelty@arlan.org.nz](mailto:cruelty@arlan.org.nz)

-the **ARLAN Legislative Review Committee** needs volunteers to assist in reviewing and making submissions on legislative initiatives at different levels of government. To help contact: [betterlaws@arlan.org.nz](mailto:betterlaws@arlan.org.nz)

-support ARLAN and learn about Animal Law by attending one the **ARLAN Seminar Series**. Watch out for notices in this newsletter.

**-There are other ways to help!** If you're not sure what you wish to do, just send us an e-mail at any of the addresses listed above. We'll find a way for you to help!

- **Support ARLAN Financially** – ARLAN is a non-profit organization that exists through the generosity of its members and supporters. While we endeavour to keep costs low, several of our activities require some degree of financial support including the maintenance of our website, and distribution of this newsletter. Any amount you can give would be hugely appreciated. To make a financial contribution, contact: [contributions@arlan.org.nz](mailto:contributions@arlan.org.nz), or simply send a cheque made out to ARLAN to: ARLAN, PO Box 6065, Wellesley St., Auckland, New Zealand.