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FIVE YEARS OF THE "NEW" ANIMAL WELFARE REGIME: LESSONS LEARNED FROM NEW ZEALAND'S DECISION TO MODERNIZE ITS ANIMAL WELFARE LEGISLATION*

By
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In 1999, New Zealand took an ambitious step to update its animal welfare legislation. The new law included a limited provision to protect Great Apes from scientific experimentation that was heralded internationally as a huge step forward for animals. The Author suggests, however, that New Zealand's other animals have not fared nearly as well under the new law, and that the notion of New Zealand as the "animal friendly" nation implied by its treatment of primates is more about perception than reality. This article explores the New Zealand experience, and suggests lessons that can be drawn from the modernization of its animal welfare legislation.

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I. INTRODUCTION

In early 1999, little New Zealand, home to just four million people and hidden away deep in the South Pacific, became the subject of intense worldwide publicity,[1] for reasons—quite surprisingly—that had nothing to do with rugby or *The Lord of the Rings*.[2] Astonishingly, the publicity surrounded animal welfare legislation passing through Parliament; legislation that would make New Zealand a world leader in the recognition of animal interests by bestowing certain rights[3] on non-human hominids,[4] or as some have called them, the "great apes." Peter Singer, cofounder of the Great Ape Project and Professor of Bioethics at Princeton University's *Centre for Human Values*, hailed the proposed legislation as a major breakthrough:

> This may be a small step forward for great apes, but it is nevertheless historic—the first time that a parliament has voted in favor of changing the

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[1] *See e.g.* Rachel Nowak, *Almost Human*, New Scientist 20 (Feb. 13, 1999) (highlighting New Zealand's role in the increase in international attention on animal issues); Dan Seligman, *Animal Spirits*, Forbes 136 (May 31, 1999) (discussing the recent surge of international attention on animal issues).

[2] *The Lord of the Rings* (New Line Productions 2001–2003) (motion pictures).

[3] While important, the impact of the legislation, the Animal Welfare Act 1999 (AWA), should not be overstated. It only provides limited "rights" to non-human hominids in regard to research and scientific experimentation. Animal Welfare Act, 1999, § 85 (N.Z.). Special protection in other situations is declined, and non-human hominids owned by, for example, circuses or other private entities receive only the ordinary protections set out in the AWA. *See* Paula Brosnahan, *New Zealand's Animal Welfare Act: What Is Its Value Regarding Non-Human Hominids?* 6 Animal L. 185, 190–91 (2000) (regarding the AWA's negligible effect on the treatment of circus animals).

[4] The AWA defines non-human hominid in section two as "any non-human member of the family Hominidae, being a gorilla, chimpanzee, bonobo, or orangutan." Animal Welfare Act, § 2.

> status of a group of animals so dramatically that the animal cannot be treated as a research tool, to be used for the benefit of humans.[5]

In an instant, New Zealand's reputation as an animal friendly haven, and a worldwide leader in the treatment of animals was born.[6]

While undoubtedly significant, this legislative achievement should be kept in perspective. At the time of enactment, there were thirty-four non-human hominids residing in New Zealand and not one was being used in scientific research.[7] At the same time, New Zealand, a nation that relies primarily upon agricultural production for economic viability,[8] was and is home to some forty-seven million sheep, nine million cows, sixty-four million broiler chickens, nearly one million pigs, and countless other forms of farm livestock.[9] Not surprisingly, the legislation enacted to provide protections and animal welfare for these creatures received much less publicity than the sections addressing primates. Five years later, it is apparent that these animals have not fared nearly as well as the great apes. While in certain respects the Animal Welfare Act 1999 (AWA or "the Act") was a step forward, the legislation has not exactly heralded a revolution for animal welfare in New Zealand. Sadly, in many respects, the country is demonstrating it is far from a haven for animals.

This article will critically examine New Zealand's law governing the treatment of animals, and consider the progress—and lack thereof—made during the first five years under the AWA. It will focus upon lessons learned from the "new" era of animal welfare that began with the enactment of the AWA, with the hope that these lessons will provide insight for animal advocates in jurisdictions contemplating similar changes.

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[5] Canadian Fedn. of Humane Societies, *Legislative Breakthrough for Great Apes in New Zealand*, 15 Caring for Animals (newsletter of the Canadian Federation of Humane Societies) 6 (Winter 2000) (available at http://www.cfhs.ca/CaringForAnimals).

[6] While it is hardly scientific, it is worth noting that in meeting with animal rights advocates around the world, it is inevitable that any mention of the fact that I live in New Zealand is guaranteed to provoke some mention of the legislation. The Ministry of Agriculture and Forestry's (MAF) Director of Animal Welfare has also referred to this reputation in attempting to deflect some of the criticisms raised in this article by remarking that "[t]he Animal Welfare Act has received considerable international attention for its progressive nature." David Bayvel, *A Duty of Care to Our Animals*, New Zealand Herald A19 (Apr. 25, 2002).

[7] Paula Brosnahan, *New Zealand's Animal Welfare Act: What Is Its Value Regarding Non-Human Hominids?* 6 Animal L. 185, 186 (2000).

[8] In 2000, pastoral products accounted for 39.8% of New Zealand exports. *The New Zealand Economy: Issues and Policies* 135 (Stuart Birks & Srikanta Chatterjee eds., 4th ed., Dunmore Press 2001). The economic production is valued at nearly six billion dollars (NZD) annually. Max Chapple, *Animal Exploitation*, Metro Mag. 116, 118 (Nov. 1998).

[9] Ministry of Agric. & Forestry, *MAF's Animal Welfare Mission* 4 (Nov. 1999) (available at http://www.biosecurity.govt.nz/animal-welfare/animal-welfare-in-nz.pdf).

II. NEW ZEALAND: RELATIONSHIP WITH FARM ANIMALS

In a paper such as this, it is difficult to accurately (yet concisely) portray the relationship that New Zealanders have with farm animals. Still, some consideration is vital because this relationship goes a long way towards explaining New Zealand animal welfare policies. New Zealand is a country whose economy relies heavily upon the production of meat products, and consequently, the killing of animals. At any given time, there are at least ten sheep for every human in New Zealand,[10] and the iconic portrayal of the country as a place where livestock range freely across the landscape has some basis in reality. The solitary farmer, herding his sheep and making do without the interference of "accursed Green Townies" remains a popular icon, idolized in literature and advertising campaigns and generally admired by the populace.[11]

More important for our purposes is to recognize that owing to the economic impact created by their production, dairy and livestock farmers hold an enormous amount of political influence in New Zealand,[12] and developments in animal welfare need to be viewed against this backdrop. While it is certainly true that attitudes towards animal welfare have evolved somewhat in the past few decades, and New Zealanders as a group appear to condemn and deplore wanton acts of cruelty against animals,[13] the animal welfare movement is still in a rather nascent state of development. Thus, it would be inaccurate to

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[10] Ministry of Agric. & Forestry, *Total Sheep*, http://www.maf.govt.nz/statistics/primaryindustries/livestock/sheep/sheep.htm (accessed Mar. 13, 2005) (for table of sheep population by year, including provisional population of 39,021,400 for 2004); Central Intelligence Agency, *The World Factbook, New Zealand*, http://www.cia.gov/cia/publications/factbook/geos/nz.html (last updated Feb. 10, 2005) (providing July 2004 population estimate of 3,993,817) (compared with the sheep population, results in a ratio of 10:1).

[11] Perhaps the most prominent example is the Speight's "Southern Man," a mythical rancher who lives in the South, disdains popular culture, spouts common sense, and, naturally, drinks Speight's beer. Speight's, *Southern Man Identification Chart*, http://www.speights.co.nz/south_southernman.cfm (accessed Mar. 19, 2004).

[12] The so-called "protein" industry has been described as the driving force in New Zealand's 20th century economic development. Its relationship with the political structure is described in James Belich, *Paradise Reforged: A History of New Zealanders* 150–54 (U. Haw. Press 2001).

[13] In 2002, an outpouring of emotion and media coverage erupted in support of Smokey the terrier whose ears were crudely cut off with a razor blade by his owner to make him "look more macho." The story stayed in the national media for weeks, as the public read about Smokey's fight to survive and the ensuing investigation of his owner. Rosaleen MacBrayne, *Nation Takes Maimed Puppy to Its Heart*, New Zealand Herald A5 (Aug. 3, 2002). Also, use of the word "wanton" is intentional here. Acts of deliberate cruelty tend to be viewed with disdain, but acts of neglect do not attract the same clear-cut reaction. Regarding neglect, many voice opinions in sympathy of the plight of the farmer, whom they view as being unnecessarily persecuted by urbanites who do not understand the conditions a farmer faces. *See e.g.* TVNZ, *MAF Slaughters Emaciated Cows*, http://onenews.nzoom.com/onenews_detail/0,1227,119499-1-7,00.html (July 26, 2002) (neighbors tried to stop authorities from taking farmer's cows).

categorize the plight of animals as anything close to a national priority.[14] On balance, animal welfare is seen as important enough, so long as it does not interfere too much with farming and economic concerns. On the whole, the view of the public toward the welfare of animals is probably best described as schizophrenic.[15]

This attitude is often reflected in the public reaction to animal welfare concerns. Where acts of cruelty come to light, the public tends to react with outrage. Pictures of mutilated or starving animals are guaranteed to provoke outcry, yet at the same time, there tends to be little expressed concern about institutionalized cruelty or abuses involving established practices with farm animals.[16] This is not to suggest that New Zealanders are any different in this regard than most of the Western world, for there is good reason to believe that this schizophrenia towards animal welfare (with the predominant principle perhaps being that we should not harm the cute animals) exists worldwide.[17] Nonetheless, viewed in conjunction with the basic realization that New Zeland is highly dependent on animal products for its economic sustainability, it goes a long way to explaining how its animal welfare legislation has emerged, and how it is enforced.

III. HISTORY OF ANIMAL PROTECTION LEGISLATION IN NEW ZEALAND

For much of the twentieth century, New Zealand had no animal welfare legislation whatsoever. While certain acts against animals raised the prospect of criminal liability, there was little concern for the well-being of the animals themselves or for punishing acts of cruelty. The protections existed solely to benefit the owners of the animals.

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[14] As will be seen, most animal welfare developments in New Zealand were forced upon it by international economic concerns, rather than as part of any internal movement on behalf of animals. *Infra* nn. 23–26 and accompanying text.

[15] In this regard, the New Zealand public has a great deal in common with other Western countries. Elaine L. Hughes & Christiane Meyer, *Animal Welfare Law in Canada and Europe*, 6 Animal L. 23, 34 (2000). This schizophrenic attitude was explored further in Peter Sankoff, Seminar, *Animal Welfare: Does It Deliver as Promised?* (U. of Auckland, Mar. 18, 2003) (reviewed by Libby Schultz, *Animal Welfare: Does It Deliver As Promised?* 2 ARLAN Rpt. 3, 4 (Mar. 2003) (available at http://www.arlan.org.nz/newsletters/newsletter_march03.pdf)).

[16] *See e.g.* MacBrayne, *supra* n. 13, at A5 (regarding Smokey, the terrier). In contrast, an investigation by Auckland Animal Action (an activist group) that uncovered serious animal abuse at an Auckland battery hen farm where thousands of hens were found injured and dying, was barely deemed newsworthy at all and received scant attention. Auckland Animal Action, *Battery Hen Farm Horror 2004*, http://www.enzyme.org.nz/aucklandanimalaction; *select* Media/News/Archives, *select* Battery Hen Farm Horror 2004 (last updated Mar. 16, 2005).

[17] Jerrold Tannenbaum, *Animals and the Law: Property, Cruelty, and Rights*, 62 Soc. Research 539, 576 (Fall 1995). Naturally, I do not support this principle, but merely point out that it clearly exists.

Thus, where an animal was damaged in such a way that caused loss to the owner, the offender might be subject to criminal prosecution.[18]

In 1960, New Zealand passed the Animals Protection Act 1960 (APA), the first statutory enactment to reflect a "modern" approach to animal welfare.[19] The APA developed the concept that certain types of conduct could be punished on the basis of their being harmful to the animals themselves, rather than to their owners. Still, the APA was an extremely limited document that did little more than set out a number of very broad and often unenforceable prohibitions. Rather than address specific troublesome practices, the APA simply forbade certain types of cruelty, including "the [willful] infliction . . . of pain or suffering that . . . is unreasonable or unnecessary,"[20] as well as limited types of neglect.[21] In addition, a small number of particularized activities were forbidden, most of them concerning veterinary procedures being conducted without proper supervision.[22]

As the end of the century approached, it quickly became apparent that this legislation was both ineffective and incomplete. At best, the APA attempted to curtail deliberate and malicious cruelty, but it failed to provide any impetus for reform of agriculture or other practices that were negatively affecting animals on a widespread scale. In fact, the APA was never designed to examine established methods of handling and treating animals. If a particular practice was "within the norm," in that it accorded with what other farmers or owners of animals were doing, then it was deemed acceptable. Eventually, however, this shortcoming began to cause a great deal of concern.

Ironically, the primary impetus for new legislation came from the agricultural industry itself.[23] Not surprisingly, meat producers were hardly seized by an altruistic desire to reform animal welfare standards. On the contrary, the primary motivation was economic. In the early 1990s, legislators in Europe forced to implement European Community (EC) mandated animal welfare reforms suddenly recognized that many of New Zealand's methods of animal production (including the practice of cow tail docking, transporting animals long distances for slaughter, and dehorning deer without anesthetic, amongst others) did not adequately account for the well-being of the animals, and were seriously out of kilter with European practice.[24] When this disparity, along with a veiled threat of tightening import restrictions, was

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[18] Crimes Act, 1961, § 221 (N.Z.) (available at http://www.legislation.govt.nz/browse_vw.asp?content-set=pal_statutes).

[19] Animals Protection Act, 1960 (N.Z.) (available at http://rangi.knowledge-basket.co.nz/gpacts/reprint/text/1960/an/030.html).

[20] *Id.* at § 2.

[21] *Id.* at § 3(b) (owners were required to provide food, water, and shelter, and they could also be charged if their "wanton neglect" caused unnecessary suffering).

[22] *Id.* at § 2(e) (mandating veterinary treatment of parasite infections).

[23] Libby Schultz, *ARLAN Seminar Explores History and Intention of the Animal Welfare Act 1999*, 2 ARLAN Rpt. 8 (Apr. 2003) (available at http://www.arlan.org.nz/articles/Neil%20Wells%20seminar%2003.htm).

[24] Chapple, *supra* n. 8, at 118–20.

pointed out by the European Union (EU) trade officials, the New Zealand agricultural community suddenly became a great deal more concerned with animal welfare.[25] At risk of losing its major export market, both New Zealand farmers and legislators realized that the international playing field had changed, and that New Zealand had to make changes as well. As the government's agricultural ministry recently stated: "[V]alue systems outside New Zealand . . . have a strong influence on animal welfare practices in this country. Throughout the world, consumers have become more sensitive to the way in which animals are raised for food and [fiber]."[26] While the process took nearly ten years to complete, this international impetus signaled that New Zealand animal welfare reform was finally underway.

IV. THE ANIMAL WELFARE ACT 1999

The reform process culminated with the passage of the AWA 1999, which came into force on January 1, 2000.[27] While the legislation contains many troublesome flaws (and it is easy in an article of this nature to step immediately into a criticizing mode), it is appropriate to begin by recognizing that the passage of the AWA was a major step forward for New Zealand. As the Minister originally responsible for administering the Act noted on the occasion of its passing through Parliament:

> This Bill represents a significant change in philosophy from the current Animals Protection Act, now nearly forty years old. The Bill focuses on punishing acts of cruelty [and] adopts a more active and preventive approach. The obligations that owners and those in charge of animals have in respect of the care of the animals are clearly set out.[28]

This is certainly correct. Whatever flaws the legislation possesses, it cannot be disputed that the AWA heralded a major step forward for New Zealand in a number of respects.[29] In contrast with the APA, which did little more than set out a few specific crimes against animals, the AWA enumerates more than forty.[30] In certain areas it is extremely detailed, and, more importantly, it significantly expands the range of obligations owed by owners to their animals. For example, the

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[25] *Id.*

[26] Ministry of Agric. & Forestry, *supra* n. 9, at 7.

[27] Animal Welfare Act, 1999, § 1(2) (N.Z.).

[28] New Zealand Parliamentary Debates, *Animal Welfare Bill (No. 2)*, 580 NZPD 19745 (Oct. 5, 1999) (statement of John Luxton).

[29] In this paper, I am dealing primarily with issues pertaining to farm animals. The Act also took significant steps to address welfare issues in the areas of research, experimentation and teaching, traps and hunting devices, and more. Animal Welfare Act, §§ 1–202. Few of these endeavors have been immune from criticism. *See e.g.* Anna Cowperthwaite, *Animal Ethics Committees and Experimentation on Animals: A Need for Reform*, 2 ARLAN Rpt. 5 (Mar. 2003) (available at http://www.arlan.org.nz/newsletters/newsletter_march03.pdf) (effects of the AWA on animal experimentation). These steps were, however, certainly a move forward from what existed previously.

[30] Animal Welfare Act, §§ 1–202 (offenses listed throughout).

AWA requires owners to provide proper food and water, adequate shelter, protection from and treatment of injury and disease, proper handling, and an opportunity to display normal patterns of behavior.[31] Moreover, it does a much better job than the APA of defining terms and absolutely prohibiting certain common, yet highly distasteful, practices.[32]

The AWA also makes clear that crimes against animals needed to be taken seriously, and Parliament emphasized this by significantly increasing the penalties for contraventions of the Act.[33] In addition, the Act mandated training programs for animal welfare investigators, increased the available search and forfeiture powers, and eased the mens rea requirements for many of the offenses.[34] Without question, the new legislation made a significant change to the legal landscape. As one Parliamentarian somewhat giddily noted as the legislation was passed: "[T]he legislation being deliberated on here tonight is at the forefront of international animal welfare legislation. It is at the leading edge. It is not often that this Parliament discusses legislation that is at the leading edge of global opinion . . . ."[35] While it is not clear that this level of enthusiasm was ultimately warranted, it is easy to understand the calls for celebration. The new legislation, by any measure, was a move out of the "Dark Ages" in terms of animal welfare, and in many ways, a step in the right direction for New Zealand.

V. LESSONS LEARNED: FIVE YEARS UNDER THE NEW ANIMAL WELFARE REGIME

A. Lesson Learned: A Revised Statute is the First Step, Not the Last Step

Five years into this new animal welfare regime, it is now possible to undertake a preliminary critical assessment of how well the new legislation is operating for animals and whether there has been any noticeable improvement from the previous system. Unfortunately, to date, the answer remains mixed at best. The first problem, and arguably the most significant, lies in the fact that the legislative process has not yet completely run its course, and consequently, many animals are still not able to receive the primary protections the AWA offers. To the extent they do, the standards that define their "legitimate" treatment have not been tested against the principles governing the AWA, and

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[31] *Id.* at § 4.

[32] One good example relates to surgical procedures that farmers often performed themselves. Under the AWA, most procedures can no longer be performed without the assistance of a qualified veterinarian. Animal Welfare Act, §§ 15–19.

[33] Gretel Fairbrother, *S.A.F.E., Animals and Law, Friend or Foe?* S.A.F.E. The Voice for All Animals 20, 21 (Autumn/Winter 2002).

[34] Animal Welfare Act, §§ 13, 30, 122, 124, 127, 131–37.

[35] New Zealand Parliamentary Debates, *Animal Welfare Bills*, 578 NZPD 17450 (June 16, 1999) (statement of John Banks).

there is good reason to believe that these existing standards do not accord with emerging international practice.

This shortcoming arises from the AWA's operating structure. Like the APA, the AWA governs most animal owners by setting out general standards of welfare rather than addressing specific issues of animal treatment. Instead, particular practices are dealt with through "codes of welfare," a form of supplemental regulation.[36] The legislative structure is slightly complicated; sections ten and eleven of the AWA set out general obligations that must be maintained towards animals, including the need for owners to provide proper food and water, adequate shelter, and the opportunity to display normal patterns of behavior.[37] Where an owner (or person in charge of animals) fails to comply with these standards, they will have prima facie committed an offense under the AWA. This is straightforward enough. Unfortunately, the matter is complicated by section 13(2) of the AWA that provides the following defense:

> It is a defence in any prosecution for an offence . . . if the defendant proves—
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> . . .
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> (c) That there was in existence at the time of the alleged offence a relevant code of welfare and that the minimum standards established by the code of welfare were in all respects equaled or exceeded.[38]

This is in accord with the AWA's design: rather than trying to address every conceivable type of harm done to animals, the AWA creates a number of general and relatively vague standards about how animals should be treated. For example, terms like "proper treatment," "adequate care," and "reasonable precautions" are not defined in regard to particular practices. In most cases, however, it is unnecessary to do so because no practice—no matter how unreasonable it might seem—is illegal if it can be shown to comply with a relevant code of welfare. In other words, laws defining how owners can treat their animals (and the basic standards of the AWA that were lauded by Parliamentarians in passing the legislation) are irrelevant if a code exists that trumps the statute. Code preemption is common because the codes are extremely detailed and discuss a wide variety of practices

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[36] *See* Publications Officer, MAF Information Bureau, *Guidelines for Drafting Codes of Welfare: MAF Information Paper No. 36* 1–2 (May 3, 2001) (available at http://www.biosecurity.govt.nz/animal-welfare/codes/codes-of-welfare-guidelines.pdf) (providing information as to the purpose and legal status of the codes).

[37] Animal Welfare Act, §§ 10–11; *id.* at § 4 (defining the various responsibilities).

[38] Defenses also exist where the defendant can demonstrate: (a) that he or she took all reasonable steps towards the animal, or (b) that the act or omission took place in circumstances of stress or emergency and was necessary for the preservation, protection, or maintenance of human life. *Id.* at § 13(2)(a)–(b).

and regulations of matters as specific as indoor temperatures[39] and stocking densities.[40]

Obviously, the details of a code are of major concern for animal law advocates. Consider the following example of a farmer who keeps a large number of hens in squalid conditions that ultimately lead to numerous deaths. Using the offense provisions of the AWA, a judge may well find that the farmer was negligent when he failed to provide appropriate food or shelter to the hens, with the deaths demonstrating that ill treatment occurred. This finding notwithstanding, a conviction will not be entered if the farmer can show that his conduct was no worse than he was required to provide by the minimum standards set out in the relevant code of welfare.[41] These standards have a huge impact in determining whether "cruelty against animals" (as defined in the AWA) has actually occurred. The lower the minimum standard, the more ill treatment is permitted, with the converse proposition being equally true.

Where exactly do these codes of welfare come from? The overwhelming majority of them were drafted in the early 1990s (prior to the enactment of the AWA) as a way of signaling to European markets—in the absence of a major legislative initiative—that some progress in animal welfare reform was made. While these codes had no legislative force at the time they were written, they were meant to provide transparency to existing practices, and to give farmers some guidance about the type of conduct viewed acceptable in New Zealand. Six codes of welfare were in existence at the time of enactment of the AWA in 2000 and three of them (the codes of welfare for pigs, layer hens, and broiler chickens) specifically relate to farm animals.[42]

Still, it is important to note that these codes were not enacted through any type of legislative or public process and while it appears that the Society for the Prevention of Cruelty to Animals (SPCA) may have participated on some level, there was very little—if any—formal

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[39] Ministry of Agric. & Forestry, *Animal Welfare (Pigs) Code of Conduct* § 4.3, http://www.biosecurity.govt.nz/animal-welfare/codes/pigs/index.htm (Jan. 1, 2005).

[40] Ministry of Agric. & Forestry, *Animal Welfare (Layer Hens) Code of Welfare 2005* § 3.4.1, http://www.biosecurity.govt.nz/animal-welfare/codes/layer-hens/index.htm (Jan. 1, 2005).

[41] Technically, conflicts between the AWA and the codes should not occur. Section 73(1) of the AWA provides that the National Animal Welfare Advisory Committee (NAWAC) should not recommend acceptance of a code unless it is satisfied that the proposed standards meet with the purposes of the AWA, and under section 73(3), NAWAC cannot recommend standards that do not meet the general obligations provided for by the AWA unless there are "exceptional circumstances." Animal Welfare Act, § 73. Still, the codes are not evaluated by Parliament itself, and there does not appear to be a mechanism for obtaining judicial review to ensure that NAWAC is acting in accordance with the dictates of the AWA.

[42] The remaining codes relate to circuses, layer hens, and animal exhibitors. All six codes are available at Ministry of Agric. & Forestry, *Codes of Welfare*, http://www.maf.govt.nz/biosecurity/animal-welfare/codes/index.htm (accessed Mar. 19, 2005).

input from other interested parties.[43] On the contrary, it is believed that most of the codes were drafted by representatives of the various industries they govern. As one commentator has noted, "Effectively, the [legislation] provides for these industries to regulate themselves."[44]

These shortcomings were recognized when the AWA was enacted. It appears the government intended for new codes of welfare to eventually be drafted that would cover every major type of animal-related activity in New Zealand and ensure these codes measured up to the principles set out in the AWA.[45] However, at the time of enactment in 2000, the government recognized that the animal industries would resist changes to the standards that had been in place for almost a decade, and it would take time for public and private consultation on these matters before new and more effective codes could be enacted.[46]

In an attempt to meet both concerns, a compromise was reached. Rather than simply scrapping the existing codes, the AWA granted a temporary reprieve, stating that the codes would remain in tact for three years from the commencement of the AWA.[47] In theory, this period allowed the government ample time to review the codes against the new imperatives of the AWA.[48] It also afforded the government an opportunity for public consultation, during which time outmoded standards could be replaced, and new protections could be created by relying upon modern knowledge of animal behavior and farming practices.[49]

Nearly five years later, the picture is hardly so rosy. As of this writing, only two codes (the Code of Welfare for Broiler Chickens and the Code of Welfare for Rodeos) have been revised.[50] Delays involved with the other codes led the government to enact supplementary legis-

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43 *See* Libby Schultz, *Veil of Secrecy Surrounds Research on Animals in New Zealand*, 1 ARLAN Rpt. 1 (Oct. 2002) (available at http://www.arlan.org.nz/newsletters/newsletter_october02.pdf) (suggesting "just a hand picked few" were allowed to participate directly, all of whom were animal industry elites).

44 Fairbrother, *supra* n. 33, at 20.

45 Animal Welfare Act, § 73.

46 *See* Peter Sankoff & Deidre Bourke, *Parliament to Shelf Codes of Welfare Revisions for Another Year*, 1 ARLAN Rpt. 8, 9 (Oct. 2002) (available at http://www.arlan.org.nz/newsletters/newsletter_october02.pdf) (suggesting the delay was a result of pressure from the animal industry).

47 Animal Welfare Act, § 191.

48 Sankoff & Bourke, *supra* n. 46, at 9.

49 *Id.*

50 Natl. Animal Welfare Advisory Comm., *Animal Welfare (Broiler Chickens: Fully Housed) Code of Welfare 2003*, http://www.maf.govt.nz/biosecurity/animal-welfare/codes/broiler-chickens/broiler-chickens.pdf (July 25, 2003) [hereinafter Natl. Animal Welfare Advisory Comm., *Broiler Chickens*]; Natl. Animal Welfare Advisory Comm., *Animal Welfare (Rodeos) Code of Welfare 2003*, http://www.maf.govt.nz/biosecurity/animal-welfare/codes/rodeo-events/rodeo-events.pdf (Jan. 1, 2004).

lation to extend the three-year transitional period indefinitely.[51] A two-year extension has already been approved,[52] leading one animal welfare organization to comment:

> It is inconceivable to expect the public can have confidence in a government-appointed animal welfare committee when none of the codes have yet been completed. The Minister of Agriculture and his advisory committee has had three years to formulate and implement these codes of welfare .... If Mr. Sutton doesn't feel the fate of 80 million animals is important enough to allocate sufficient resources in order to implement improved animal welfare legislation, the position should be given to someone genuinely committed to improving animal welfare in New Zealand.[53]

Not surprisingly, the government tells a very different story, contending that the complexity of the codes makes the revising process a more time consuming exercise than expected.[54] Regardless of the reason for the delays, the bottom line for animals is clear enough: treatment of the vast majority of animals continues to be governed by codes of welfare enacted prior to the AWA. These codes use outdated benchmarks that have neither been tested nor reviewed in accordance with modern standards of animal welfare and fail to take into account current scientific knowledge demonstrating how animals suffer.

Equally—if not more—problematic are the amorphous Codes of Recommendations and Minimum Standards.[55] These codes were created by relevant industries in consultation with the Ministry of Agriculture and Forestry (MAF), around the same time as the aforementioned Codes of Welfare. The Codes of Recommendations and Minimum Standards deal with a host of farming-related and other concerns, and include recommendations for the treatment of sheep, dairy calves, animals during transport, and more.[56] While these codes are not legally enforceable[57] and are not referred to in the AWA itself, they are promoted by MAF, and are made available to individuals involved in the various industries. Moreover, they are often utilized to demonstrate that a particular farming practice is in accordance with

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[51] Animal Welfare Amendment Act, 2002, § 14 (N.Z.) (allowing the cabinet to extend the transitional provisions for two-year periods without requiring new legislation in Parliament).

[52] Sankoff & Bourke, *supra* n. 46, at 8.

[53] *Id.* (quoting SAFE Director, Anthony Terry).

[54] The government body responsible for enacting the codes maintains that it is trying to do so as quickly as possible and that it has simply been overwhelmed by the number of submissions received. For example, 692 written submissions were received for the Code of Welfare for Pigs. *Natl. Animal Welfare Advisory Committee 2002 Annual Report* § 3.3 (Natl. Animal Welfare Advisory Comm. June 2003).

[55] Ministry of Agric. & Forestry, *Animal Welfare*, "Codes of Recommendations and Minimum Standards," http://www.biosecurity.govt.nz/animalwelfare/codes/index.htm (accessed Mar. 19, 2005).

[56] *Id.*

[57] Ministry of Agric. & Forestry, *Guidelines for Drafting Codes of Welfare: MAF Information Paper No. 36*, § 1.1, 20 (Ministry of Agric. & Forestry 2001) (available at http://www.biosecurity.govt.nz/animal-welfare/codes/codesofwelfare-guidelines.pdf).

good practice and scientific knowledge, thus satisfying the requirements of the AWA and relieving the farmer of liability. At present, there appears to be no plan to review these codes.

Where codes have been modernized, different, but equally significant, issues arise. The code review process itself has been both challenging and time-consuming for animal advocates. Long delays in the consultation process have frustrated public momentum in favor of change. For example, in 2001 MAF announced that the Code of Welfare for Layer Hens would be reviewed.[58] In response, the SPCA, in conjunction with international retailer, The Body Shop, launched a massive campaign in order to pressure the government to outlaw battery hen cages in New Zealand. The campaign was extremely successful. Thousands of people signed cards and sent them to MAF, requesting the practice be outlawed or at least improved.[59] Unfortunately, the code review process came to a sudden halt, and more than three years later, the code has yet to be completed.[60] Naturally, this has deflated the impetus of the public campaign, and the media has lost interest in the issue.

These events raise suspicions about how seriously MAF (the primary entity responsible for the code process)[61] considers animal welfare. Indeed, while this phenomena is not unknown in other countries, it remains curious that responsibility over the AWA remains under the exclusive jurisdiction of MAF, especially considering that MAF has primary responsibility for ensuring that the production of meat products continues in an economically effective manner. It is hardly conspiracy mongering to recognize that MAF faces a conflict of interest when addressing animal welfare matters, and at least one political opposition party has formally called for change. The Green Party, currently the third-largest opposition party in Parliament with nine sitting Ministers of Parliament, has challenged the government to establish an independent ministry for animals:

> At present animal welfare issues are addressed within the Ministry of Agriculture and Forestry. This gives rise to a perception that producer inter-

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[58] Ministry of Agric. and Forestry, *Developing Codes of Practice*, Rural Bulletin, 9, 10 (Oct. 2001) (available at http://www.maf.govt.nz/mafnet/publications/ruralbulletin/october-2001/october-01-19.htm).

[59] Royal N.Z. Socy. for the Prevention of Cruelty to Animals, *SPCA Alarmed Over Animal Code Process*, http://www.rnzspca.org.nz/news/press_releases/spca%20alarm%20over%20animal%20code%20prsess.doc (accessed July 3, 2003) (indicating that more than 120,000 New Zealanders sent in postcards asking for a ban on battery hens, a considerable number for a country of four million); *contra* New Zealand Parliament, *Questions for Oral Answer: Battery Hen Farming—SPCA Campaign*, 599 Parliamentary Rec. 15426 (Mar. 28, 2002) (contending the government received only 5,000 postcards); *see also* New Zealand Parliament, *Debate—General*, 599 Parliamentary Rec. 15175–76 (Mar. 20, 2002) (statement of Sue Kedgley) (also discussing the pouring in of postcards).

[60] Royal N.Z. Socy. for the Prevention of Cruelty to Animals, *supra* n. 59.

[61] Though, as discussed below, the specifics of the code review process are ultimately reviewed by a quasi-independent body, NAWAC. *Infra* n. 63 and accompanying text.

> ests may be given priority over animal welfare issues in the consideration of controversial issues such as whether it is acceptable to raise animals in cages.[62]

Obviously, it is impossible to determine whether this apparent conflict of interest has manifested itself to the detriment of animal welfare, but as I shall describe shortly, most of the signs are not particularly encouraging.

In fairness, the AWA went to some lengths to address this criticism by creating an independent body, the National Animal Welfare Advisory Committee (NAWAC), to advise MAF on all legislative proposals concerning the welfare of animals.[63] However, members of this committee are appointed by the Minister. In addition, appointed members have verifying commitments to reform, as the body's composition is intended to represent diverse interests, including animal welfare groups like the SPCA, but including a healthy contingent of members representing commercial farmers and other industry-friendly bodies.[64]

Not surprisingly, the government has used the participation of animal advocacy groups to its advantage by trumpeting that code reform is a "joint enterprise" whereby NAWAC manages the competing claims of animal producers and animal welfare groups.[65] Indeed, when NAWAC finally released the new Code for Broiler Chickens in July 2003, Jim Sutton, the Minister of Agriculture and Forestry, stated that "[t]he code was . . . drafted in consultation with organizations such as the SPCA, the New Zealand Veterinary Association, and the Animal Behavior and Welfare Research Centre."[66]

The reality is a far cry from this statement and there is good reason to believe NAWAC is not as far removed from MAF and the animal production industries as Mr. Sutton suggests. Upon hearing the Minister's comments, the SPCA responded with outrage. Chief Executive Peter Blomkamp retorted:

> We are . . . frankly flabbergasted by Mr. Sutton's claim that the new code has been drafted in consultation with the SPCA. We were certainly permitted to make a submission . . . but that's as far as it went. Our understanding of the term "consultation" is that it involves an exchange of views between the parties. It's mischievous to suggest that consultation has

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62 Green Party of Aotearoa, *Animal Welfare Policy*, http://www.greens.org.nz/searchdocs/policy5349.html (July 17, 2002).

63 Animal Welfare Act, §§ 56–57.

64 The current membership of NAWAC offers a group representing mixed interests, including members from farmers' groups, animal research interests but also the President of the Royal New Zealand Society for the Prevention of Cruelty to Animals (RNZSPCA). It is difficult to speculate on the "leanings" of the members, but animal welfare advocates do not appear to constitute a majority of the group. *See* Ministry of Agric. & Forestry, *National Animal Welfare Advisory Committee Membership*, http://www.maf.govt.nz/biosecurity/animal-welfare/nawac/membership.htm (accessed Mar. 19, 2005) (listing brief biographies of members).

65 Jim Sutton, *New Code of Welfare for Broiler Chickens Published*, http://www.beehive.govt.nz/ViewDocument.cfm?DocumentID=17217 (July 2, 2003).

66 *Id.*

> taken place when all that happened was that our submission was received and then ignored or discounted.[67]

Mr. Blomkamp also questioned whether NAWAC was acting in an independent manner, stating:

> To date, NAWAC's approach to [the] codes has not been encouraging. It has repeatedly declined our requests for information over progress on code drafting. In contrast, information seems to be shared freely with industry organizations such as the New Zealand Pork Industry Board. Indeed, code-writing has been largely left to livestock industry bodies, which, in the nature of things, cannot be expected to give due weight to animal welfare issues.[68]

In addition to conflict of interest concerns, strong evidence suggests NAWAC is taking an overly conservative approach in implementing standards beneficial to animal welfare if they would be detrimental to economic productivity. The codes of welfare that have been completed, especially the Code for Broiler Chickens, serve as ample proof.[69]

As aforementioned, codes of welfare are designed to have regard to the purposes of the AWA, and cannot set standards that allow for the contravention of the physical health and behavioral needs of the animals unless there are "exceptional circumstances."[70] The Code of Welfare for Broiler Chickens addresses a wide range of concerns, but for our purposes, it is useful to focus on one of the most important: the permissible stocking densities of these birds.[71] This is an issue of no small importance, for the broiler chicken industry in large part depends upon an ability to maximize production while minimizing cost. The more birds it can produce in a smaller environment, the greater the profits. Of course, this can lead to grossly overcrowded warehouses full of birds, a condition that has been all too common.[72]

Obviously, the health of the birds, and their ability to "demonstrate normal patterns of behavior," as required by the AWA, is af-

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67 Royal N.Z. Socy. for the Prevention of Cruelty to Animals, *supra* n. 59.

68 *Id.*

69 While this article focuses upon the Code for Broiler Chickens, similar critiques could be made about the Code for Rodeos, which legalized such events as calf roping and even permits rodeos to continue in the absence of a veterinarian. Press Release, Royal N.Z. Socy. for the Prevention of Cruelty to Animals, *SPCA Condemns Weak New Rodeo Code* (Dec. 5, 2003) (available at http://www.rnzspca.org.nz/news/press_releases/031205-rodeocoderelease.doc) (criticizing the new codes for "simply rubber-stamping the continuance of rodeos without addressing key animal welfare concerns"). The soon to be released Code for Layer Hens promises to be equally grim, with all indications being that battery cages will remain in place for at least another ten years.

70 Animal Welfare Act, § 73.

71 For a broader critique of this Code of Welfare, see Cherie Gum, *New Code of Welfare in Place for Broiler Chickens: It Is New But Is It Improved?* 2 ARLAN Rpt. 4 (Sept. 2003) (available at http://www.arlan.org.nz/newsletters/newsletter_sept2003.pdf).

72 *See e.g.* Royal N.Z. Socy. for the Prevention of Cruelty to Animals, *The Facts about Battery Hen Farming in New Zealand*, http://www.rnzspca.org.nz/campaigns/the_facts.html (accessed Mar. 13, 2005) (providing statistics and descriptions of hens' conditions).

fected by factors like stocking density. Indeed, international studies have shown that a high stocking density is directly related to illness, injury, and the development of serious disorders. The Scientific Committee of Animal Health and Animal Welfare, part of the European Commission, Health and Consumer Protection Directorate General, has concluded that "pathologies (breast blisters, chronic dermatitis and leg disorders) are a result of high stocking" and that "walking ability is severely affected" by high stocking densities.[73] The Committee recommended that European stocking densities be no more than twenty-five kilograms per square meter (approximately twelve birds per square meter), with a lower level being advisable.[74] Other studies have come to similar conclusions.[75]

NAWAC appeared to recognize that high stocking densities could cause serious problems:

> [P]roduction and welfare problems . . . can be exacerbated by high stocking densities. These include mortality and culls, leg disorders, suppressed individual broiler chicken growth rate, breast blisters and poor quality litter. Further problems include . . . obvious difficulty for broiler chickens maneuvering about the broiler shed and expressing normal patterns of behavior without excessive disturbance.[76]

Still, rather than adopt a lower maximum stocking limit to reduce the likelihood of these problems arising, NAWAC made the cryptic comment, "in selecting densities, animal welfare obligations must be viewed in a holistic way . . . [taking] into consideration" other factors, including "management skills" and the New Zealand "environment."[77] NAWAC ultimately dismissed the international evidence as being inapplicable,[78] citing an absence of New Zealand research as a reason for maintaining higher stocking densities:

> [T]here is no published information for New Zealand production on broiler behavior, on the status of key environmental parameters (such as air and litter quality and temperature/humidity) which influence broiler welfare,

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[73] Sci. Comm. for Animal Health & Animal Welfare, *The Welfare of Chickens Kept for Meat Production (Broilers)*, European Commission: Health and Consumer Protection Directorate-General § 7.5, 66 (Mar. 21, 2000).

[74] *Id.*

[75] Donald M. Broom, *Sustainability and Animal Welfare with Reference to Developments in Poultry Welfare*, 14 ANZCCART News 4 (Sept. 2001) (available at http://www.adelaide.edu.au/ANZCCART/publications/news0901.pdf); A.L. Hall, *The Effect of Stocking Density on the Welfare and Behavior of Broiler Chickens Reared Commercially*, 10 Animal Welfare 23 (Feb. 2001).

[76] Natl. Animal Welfare Advisory Comm., *Broiler Chickens*, *supra* n. 50, at 19.

[77] *Id.*

[78] It also dismissed submissions from ARLAN, the RNZSPCA, and others that recommended a considerably lower limit. *See* Gum, *supra* n. 71, at 4 (detailing ARLAN's suggestions for revision of the code, all of which were ultimately rejected); *see generally* Socy. for the Prevention of Cruelty to Animals, *Submissions*, http://www.rspcanz.org.nz/submissions/ (accessed Mar. 19, 2005) (for SPCA's submissions); *see generally* Animal Rights Leg. Advoc. Network, *Submissions*, http://www.arlan.org.nz/submissions.htm (accessed Mar. 19, 2005) (for ARLAN's submissions).

> or on the relationship of such measures to changes in stocking density. NAWAC recognizes the research and development, and the commercial trials, that are being conducted internationally with respect to stocking densities, and that they may have relevance to the New Zealand broiler industry. However, before any changes can be introduced, there needs to be independently driven research and development carried out in New Zealand conditions.[79]

Rather than setting a maximum density in accord with the recommendations of the European Union—or anything close—NAWAC ultimately agreed to a density that is more than fifty percent higher, at thirty-eight kilograms per square meter, housing about twenty birds in an area roughly the size of a phone booth.[80] Apparently recognizing this was a high upper limit, NAWAC left it to individual farms to determine whether a lower threshold was desirable, "[recommending] that at individual farms the stocking density [be] reviewed regularly and if necessary adjusted to maintain adequate welfare of the broiler chickens."[81]

This is entirely unsatisfactory. Regardless of whether or not clear New Zealand based research exists, it is extremely disturbing that NAWAC completely dismissed the international research without providing any cogent grounds for doing so. More troubling is that it cites the absence of research as justification for adopting a more industry-friendly standard in spite of the proven correlation between high stocking densities and poor animal health.[82] While this is only one of many examples,[83] it shows clearly that "where there is any degree of uncertainty, NAWAC is prepared to err on the side of productivity at the expense of animal welfare."[84]

Hence, a deeply disturbing question regarding the code process emerges: Are codes designed to reform or simply to legitimize current practice? The broiler chicken example is once again apposite. There is, of course, no such species as a "broiler chicken" and it is arguable that the manner in which these birds are raised is entirely antithetical to

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79 Natl. Animal Welfare Advisory Comm., *Broiler Chickens*, *supra* n. 50, at 22.

80 *Id.* at 21.

81 *Id.* at 22. NAWAC did, however, recommend that New Zealand research on the issue be commenced, with a review of the code scheduled for 2013. *Id.* at 8.

82 Royal N.Z. Socy. for the Prevention of Cruelty to Animals, *supra* n. 72. Additionally, leaving the decision about whether to reduce stocking densities to individual farms is nothing short of bizarre. There is little reason to believe that commercial farmers will voluntarily reduce density, and the dictate will have no impact as an enforceable legal standard.

83 As aforementioned, no other codes of welfare have been finalized, so it is not possible to make wider conclusions. Still, the Draft Codes of Welfare (preliminary attempts written by NAWAC after consultations with interested parties, but prior to receiving public submissions and undertaking refinements) released by NAWAC for public consultation show the same conservative approach to animal welfare. *See e.g.* Deidre Bourke, *Code of Welfare for Circuses Up For Review and It Needs Work*, 2 ARLAN Rpt. 12 (May 2003) (available at http://www.arlan.org.nz/newsletters/newsletter_may03.pdf) (detailing the horrors of mistreatment of circus animals and an unsympathetic code).

84 Gum, *supra* n. 71, at 6.

any sensible notion of animal welfare, in that the very process of raising these animals deprives them of any sensible concept of demonstrating "normal patterns of behavior."[85] Yet, the code ratification process is not designed to question entire practices from an animal-friendly perspective.[86] Rather, it is simply a method of refining accepted means of animal production to ensure balance of economic needs with some forms of restraint. In this regard, it is appropriate to recognize that under the current procedure: "[T]he notion of protecting animals because they have inherent value and rights to lead their natural lives is not even open for discussion. The morality of the list of current 'uses' of animals will also not be questioned."[87] Simply stated, the Code process does not attempt to identify and eliminate ranges of practice that are objectionable or even unnecessary. At best, it is an attempt to refine and excise the *worst* parts of existing practices.[88] Consequently, animal rights advocates dragged into the code process seem to always be fighting a defensive action.

The New Zealand experience demonstrates that the enactment of animal welfare legislation is often only the first step, as opposed to the last step, in creating an improved legal regime for animals. It also illustrates the many difficulties arising in a multi-dimensional regulatory regime, and lends support for the notion that perception (exemplified by a "strong" statute) and reality (a diluted legal regime, created through codes) are two very different things.

VI. ENFORCEMENT

While it may be difficult for supporters of better animal welfare standards to fully accept, it is perhaps only fair to begin a section on enforcement by recognizing that the prosecution of crimes against animals will probably always be a struggle. The victims themselves are unable to speak, their supporters are fighting battles on numerous

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[85] *See e.g.* Animal Rights Leg. Advoc. Network, *Submissions, Submission on the Draft Animal Welfare (Broiler Chickens) Code of Welfare 2001*, http://www.arlan.org.nz; select Submissions; *select* Broiler Chickens (Dec. 24, 2001) (detailing ARLAN's submission).

[86] As was attempted, albeit unsuccessfully, with broiler chickens in the U.K. *See R (on the application of Compassion in World Farming Ltd.) v. Sec. of St. for the Env., Food & Rural Affairs*, 2003 All E.R. 410 (Q.B. 2003) (for an example of unfriendly treatment of this cause). This problem is not confined to the Code process. The AWA generally exempts conduct causing harm to animals that was undertaken in accordance with "good practice and scientific knowledge." Animal Welfare Act, § 10. There is considerable concern that these terms will simply reflect the status quo, rather than seriously challenge practices that are no longer sound. *See* Fairbrother, *supra* n. 33, at 22 (for examples of barbaric and outdated practices still in effect).

[87] Hughes & Meyer, *supra* n. 15, at 41.

[88] Once legitimized, it would be extremely difficult to challenge an entire Code of Welfare or a particular practice on the grounds that it was inconsistent with the Act itself, as was done in Israel with foie-gras production. C.A. 9232/01, *Noah (The Israeli Fedn. of Animal Protec. Orgs.) v. The Attorney-General et al.* (English version available at http://www.animallaw.info/nonus/cases/cas_pdf/Israel2003case.pdf).

fronts, and without a major shift in consciousness, it is difficult to imagine crimes against animals ever being one of law enforcement's priorities, no matter how high Parliament sets the penalty for crimes.[89] Even if one takes into account this reality, however, there remains a great deal of room for improvement in this area in New Zealand. The current prosecution model for investigating crimes against farm animals is a recipe for confusion, with several factors combining to produce an almost unworkable system.

A. *Lesson Learned: Animal Welfare Prosecutions Require Resources to Succeed*

The first problem is probably the most obvious and one that undoubtedly occurs in many jurisdictions: a serious lack of money to fund prosecutions. In this regard, it is important to recall that the enactment of the AWA was no mere legislative refinement of an existing regime. On the contrary, it created a completely new system of animal welfare in New Zealand. Upon coming into force, it immediately imposed a stunning array of new responsibilities on New Zealand animal owners. Overnight, a large scope of activity, previously benign, suddenly became the subject of potential criminal liability.

Unfortunately, while the drafting of the legislation received a fair degree of scrutiny, it appears that very little thought was given to the manner in which these new crimes would be enforced. Surprising as it may seem, very little (if any) new funding was put into place to complement the AWA. Of course, as any law enforcement official knows, a legal regime is only as effective as the resources put in place to enforce it; a fact at the heart of the new legislation's failure to adequately police crimes against animals. As we shall see, the problems have been exacerbated by the prosecutorial structure itself,[90] but the primary deficiency appears to be a lack of resources, for prosecutions against farmers and other animal owners tend to be complicated affairs, and ultimately, cost money.

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89 Once again, an unwillingness to prosecute is hardly a problem confined to New Zealand. *See* Jennifer H. Rackstraw, *Reaching for Justice: An Analysis of Self-Help Prosecution for Animal Crimes*, 9 Animal L. 243 (2003) (regarding reluctance to prosecute in the United States); Hughes & Meyer, *supra* n. 15, at 70–71 (regarding reluctance to prosecute in Canada).

90 This problem is compounded by the New Zealand prosecutorial structure, an issue of concern that extends beyond the animal welfare sphere. New Zealand still follows an old English model in which most non-indictable prosecutions are conducted by a police prosecutor who lacks legal training. There is no "District Attorney" or "Crown Attorney" per se, though there is a Crown Solicitor (by warrant) who prosecutes the more serious indictable offences. This model is not particularly helpful for the prosecution of animal crimes, because the investigators who undertake these prosecutions cannot seek help from the Crown Solicitor. There is, effectively, no legal assistance available; a situation that does not appear to exist in other jurisdictions. *See e.g. Criminal Prosecution*, Preliminary Paper, 28, 19–72 (New Zealand Law Commn. 1997) (for a broader look at the New Zealand prosecutorial structure).

B. *Lesson Learned: The Use of Multiple Prosecution Agencies Causes Multiple Problems*

In New Zealand, prosecution of animal cruelty offenses is effectively undertaken by two wholly distinct bodies that are both authorized to bring cases to court: MAF and the SPCA.[91] Neither body has an exclusive jurisdiction over any species of case, but in practice, certain delineations have emerged. While both are responsible for enforcing the Act, the two organizations could not be more dissimilar in philosophy, resources, and their approach to cases.

MAF is the primary body responsible for prosecuting cases involving farm animals, with a special group of investigators and lawyers, the Animal Welfare Group ("the Group"), allocated to this cause.[92] While relatively well-funded in comparison to the SPCA, and having a number of experienced investigators on staff, the Group is still extremely small when compared with the size of its task and the number of farming operations they are expected to monitor. Seven investigators spread across New Zealand are charged with the task of inspecting a massive farming industry in a country the geographical size of Japan.[93] Despite this hurdle, with few exceptions, the Group has arguably been the most successful New Zealand organization in prosecuting cases of animal cruelty. Within an eighteen month period, MAF obtained two high profile convictions involving two sheep farmers in the South Island,[94] and managed to secure one of the largest fines ever handed down in New Zealand (and certainly the largest for an animal cruelty case): $210,430.[95]

What is the reason behind these successes? Unlike its SPCA counterparts, the Group, as part of MAF, is reasonably well funded by the government, has access to several lawyers on staff, and its members receive ongoing training as a way of ensuring that they can keep up

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91 The AWA does provide for other organizations to get involved in prosecutions (Animal Welfare Act, §§ 121–26), but for the moment, prosecutions are primarily undertaken by the SPCA and MAF, although city councils are also permitted to engage their own investigators, and a few have done so. The police are also entitled to lay charges for these crimes (*Id.* at § 2), but in practice, they have consistently refused to do so, referring complaints to the SPCA.

92 Ministry of Agric. & Forestry, *Animal Welfare Group*, http://www.maf.govt.nz/biosecurity/about/animal-welfare/index.htm (accessed Mar. 13, 2005).

93 E-mail from Dr. Wayne Ricketts, Program Manager Animal Welfare, Animal Welfare Group, Biosecurity Auth., Ministry of Agric. & Forestry, N.Z., to Sunrise A. Cox, Form and Style Editor, Animal L., *Website Enquiry 1044* (Mar. 16, 2005, 10:43 p.m. PST) (copy on file with Animal L.).

94 For details, see Alex Conte, *"Concentration Camps" and the "Gestapo": Sheep Farming and the Animal Welfare Act 1999*, 2 ARLAN Rpt. 19 (May/June 2003) (available at http://www.arlan.org.nz/newsletters/newsletter_may03.pdf) (describing other high profile cases against farmers).

95 *Id.* The farmers, Keith and Susan Falconer, were convicted on eleven charges under the AWA, for offenses involving close to three thousand sheep that were starving. Four hundred had to be euthanized. *Id.*

with new developments in the field.[96] The advantage of permanent legal assistance cannot be overstated; in fact, most of the legal advances in areas like forfeiture and animal ownership prohibition orders have come from the Group and its unique knowledge of these complex issues. Moreover, the Group is a centralized agency with a clear operating structure, and while it certainly has financial restrictions, it is—at least to some degree—able to fund and pursue complicated and lengthy prosecutions.

On the other hand, MAF's prosecution unit has a number of significant flaws. First, due to its relatively small size, its charging rate remains miniscule.[97] MAF may take only a dozen prosecutions against farmers nationwide per year. It has also shown a conservative disposition and a reluctance to prosecute unless the facts of the case are truly egregious.[98] In fact, MAF has yet to bring a test case to challenge some type of *established* (yet cruel) farm practice.

MAF occasionally seems more concerned about New Zealand's image as a compassionate farming nation than about rectifying abuses. For example, MAF has shown an alarming unwillingness to prosecute in cases where the victim animals have died or where the perpetrator of the offense is no longer involved in farming. For instance, in December 2003, the New Zealand Herald reported a case in the northern region of New Zealand involving dozens of starving cattle.[99] The case first came to the attention of the SPCA, but because of the scale of the incident, it was referred to MAF.[100] MAF investigated, but ultimately declined to prosecute.[101] The reason, delivered by a senior investigator: "I am told [the offender] no longer has any cattle on the farm so

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96 Controller and Auditor-General, *Ministry of Agriculture and Forestry: Management of Biosecurity Risks*, fig. 10, 74–76 (The Audit Office 2002) (available at http://www.oag.govt.nz/homepagefolders/publications/biosecurity/biosecurity.pdf) (showing 2001–2002 budget for animal welfare standards and pest management and describing the structure of MAF biosecurity as including solicitors in the special investigations group); *MAF's Animal Welfare Mission*, *supra* n. 9, at 15–16 (MAF provides education and training regarding animal welfare).

97 Peter Sankoff, *Animal Welfare Laws Need Teeth to Bite*, New Zealand Herald A15 (May 14, 2003).

98 There is anecdotal evidence of several incidents where the matter was deemed by MAF to not be serious enough to warrant its intervention, and it was referred to the SPCA. *See e.g.* Sabrina Muck, *First Ever Animal Welfare Jury Trial Ends with a $13,000 Fine for Cruel Treatment of Horses*, 2 ARLAN Rpt. 1 (Mar. 2003) (available at http://www.arlan.org.nz/newsletters/newsletter_march03.pdf) (an example of truly egregious cruelty). There have also been suggestions that MAF has frequently attempted to take a cooperative approach with offenders rather than a confrontational one, removing only the worst treated animals and allowing the farmer to continue in business. *See* Claire Trevett, *Cattle's Agonizing Death Goes Unpunished*, New Zealand Herald A1 (Dec. 30, 2003) (offender was not prosecuted because he no longer had any cattle).

99 Trevett, *supra* n. 98, at A1.

100 *Id.*

101 *Id.*

there is no need to lay charges. Obviously there is no animal welfare offence if he has no animals."[102]

This leaves a great deal to be desired and shows a critical misunderstanding of an enforcement authority's role in deterring future offenders.[103] Then again, reading between the lines reveals MAF's allocation of priorities in light of limited resources. Faced with a choice between whom it can effectively prosecute, MAF may simply be opting in favor of offenders who retain animals, on the basis that these pose an ongoing hazard to animals, and to New Zealand's international image. While perhaps understandable in light of current funding limits, this example certainly demonstrates the weakness of the country's enforcement regime.

The second major prosecutor of animal welfare offenses is the SPCA, which is essentially left to investigate every offense that MAF is unwilling to prosecute.[104] This primarily includes abuse to domestic companion animals, but also includes cases involving farm animals, especially in jurisdictions where MAF has no permanent staff. As is the case with MAF, however, SPCA investigations seem to only rarely turn into actual prosecutions.

The MAF/SPCA split has had a number of important downsides, and has retarded the progress of investigations for welfare offenses. First, the two sides do not share resources, legal knowledge, or any type of organizational structure. While there is certainly some informal contact between the two, no attempt appears to have been made by either side to pool knowledge to expand operations. For reasons that are not entirely clear, each side retains full organizational autonomy and jealously guards its information.[105]

The problem is compounded by the loose internal structure of the SPCA. The national organization, the Royal New Zealand Society for the Prevention of Cruelty to Animals, theoretically controls the operations of the fifty-three branches of the SPCA, all of which are technically authorized to prosecute animal welfare offenses. This control, however, deals more with issues like funding and general operating practices than with animal welfare prosecutions. In reality, it appears that there is very little national control over the prosecutions themselves, or for that matter, whether prosecutions will be undertaken in

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[102] *Id.*

[103] Similar approaches have been detected in other nations. *See* Hughes & Meyer, *supra* n. 15, at 71–72 (discussing the approach taken in Canada).

[104] Sankoff, *supra* n. 97, at A15 (main responsibility for prosecuting animal cruelty ends up falling to the SPCA).

[105] This is most clearly evident in terms of the organizations' approach to unreported court decisions. Most AWA prosecutions are undertaken in the District Court, where very few decisions are reported. Communications by the Author with both the SPCA and MAF reveal that each side keeps its own private database of judicial decisions, in spite of the fact that the legal precedents might prove useful to each other. Interview with Bruce Wills, Senior Inspector, Auckland SPCA (May 12, 2003); Interview with Earl Culham and Jeff Storey, MAF Animal Welfare Group (Oct. 15, 2003).

any jurisdiction at all.[106] The number of SPCA offices is highly misleading, and suggests investigative resources that do not really exist because all but a handful of these local chapters are extremely small. Most do not have even one full time animal welfare investigator. One of the smaller SPCA offices might be fortunate to have a volunteer inspector who works part-time.[107]

In many ways, the lack of a coherent prosecutorial structure or strategy from the SPCA is entirely understandable. The organization has a great deal on its plate and was not designed with prosecutorial operations in mind. The SPCA is the national conscience on animal welfare issues, and must spend a great deal of time lobbying the government in regard to animal concerns. The organization's primary goal is to alleviate animal suffering by ensuring that abandoned or mistreated animals have a place to go.[108] Most of its resources, which all come from private donations and bequests, are devoted to providing animal treatment, housing, and adoption services. Not surprisingly, the organization takes the position that ensuring the well being of animals dropped on its doorstep is its preeminent concern and deserves the lion's share of its resources.[109]

This is all both understandable and laudable. While the SPCA has a long history of performing this role in New Zealand (most likely as a response to the public prosecutor's traditional lack of interest in enforcing the APA), it must be recognized that the SPCA is not an organization that was created for this purpose. Astonishingly, despite its fulfilling an important public role, the SPCA receives no government funding for this purpose,[110] nor for any other purpose. The prosecution of animal cruelty offenses remains dependent upon whether the organ-

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[106] There is good reason to believe that this lack of coordination is a contributing factor in the low conviction and sentencing rate, as no national investigation, prosecution or sentencing policy even exists. Each SPCA simply proceeds as it wishes. These issues were explored more fully in Peter Sankoff, *Animal Law in the News*, 1 ARLAN Rpt. 7 (Sept. 2002) (available at http://www.arlan.org.nz/newsletters/newsletter_september02.pdf). In fairness, the RNZSPCA has recently made moves to address this issue, by establishing a coordinating body of senior inspectors to review policy initiatives. Peter Mason, *President's Report*, RNZSPCA Annual Rep. [¶¶ 11–12] (available at http://www.rspcanz.org.nz/news/general_news/spca_2003_ar_150dpi.pdf). Sentencing policy was also addressed at a recent Auckland conference on animal welfare law hosted by ARLAN and the Unitec School of Natural Sciences.

[107] The exceptions are located in New Zealand's larger cities. The Auckland SPCA, which has little to do with the RNZSPCA owing to its size, has six to eight full time inspectors, and takes on roughly twelve prosecutions every year. Catriona MacLennan, *If This Law Was an Ass We'd Be Much Better Off*, http://www.arlan.org.nz/articles/law_ass.htm (accessed Mar. 19, 2005).

[108] Auckland Socy. for the Prevention of Cruelty to Animals, *The Auckland Society for the Prevention of Cruelty to Animals Strives to Achieve the Following Aims*, http://www.spca.org.nz/home.htm (accessed Mar. 19, 2005).

[109] *Id.*

[110] Royal N.Z. Socy. for the Prevention of Cruelty to Animals, *The Work of the Royal New Zealand SPCA*, "How is the Society Funded," http://www.rspcanz.org.nz/introduction.html (accessed Mar. 16, 2005).

ization has sufficient resources (obtained by donations) to undertake them.[111]

Not surprisingly, the new era of animal welfare has not been kind to the SPCA. One of the ironic benefits of the old legislation was simplicity, and investigators could usually proceed without requiring legal counsel. The increased penalty structure, and new provisions allowing for forfeiture, has frightened defendants in more serious cases into hiring legal counsel and launching pre-trial applications to exclude evidence or have their animals returned pending trial.[112]

The result? The SPCA is becoming reluctant to take matters to court,[113] especially where the matter involves agricultural concerns that might require technical legal analysis of whether a particular farmer complied with a relevant code of welfare. Statistics from the SPCA bear this out, with figures that can only be described as staggering. In 2002, SPCA investigators considered almost twelve thousand complaints nationwide resulting in only 126 charges against 61 defendants.[114] Assuming the complaints were against different individuals, this means that formal charges were brought against roughly 0.5% of the potential offenders referred to the organization.[115]

Lack of resources for prosecution is also becoming a pressing concern. In a recent newspaper story, two of the more successful investigators from the Bay of Islands SPCA[116] publicly expressed their frustration with the situation. After a lengthy and successful prosecution of a horse trader who starved several of his animals to death, the Bay of Islands SPCA was left effectively "broke and forced to fundraise

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111 *Id.*

112 *See e.g. R. v. Walker*, No. CA409/03 (N.Z.L.R. Dec. 9, 2003) (pre-trial application to exclude evidence as pursuant to an illegal search); *Summers v. MAF*, No. M53/02 (N.Z.L.R. Feb. 4, 2003) (application to return animals pending trial).

113 These results have also been seen in U.S. jurisdictions that grant the SPCA authority to prosecute animal cruelty offenses. Rackstraw, *supra* n. 89, at 246–47.

114 Royal N.Z. Socy. for the Prevention of Cruelty to Animals, *2002 National Statistics*, Animals' Advocate (RNZSPCA newsletter) 4 (Barbara Daw ed., Winter 2003) (available at http://www.rnzspca.org.nz/news/advocate/winter_2003_advocate-150dpi.pdf).

115 Figures from 2003 are even more dispiriting and show that fewer charges are being laid. In 2003, SPCA investigators addressed close to twelve thousand complaints, with charges being laid against only forty-four individuals. Assuming each complaint was in relation to a distinct case of animal abuse, this amounts to a charging rate of 0.3%. Royal N.Z. Socy. for the Prevention of Cruelty to Animals, *2003 National Statistics*, Animals' Advocate (RNZSPCA newsletter) 4 (Barbara Daw ed., Winter 2004) (available at http://www.rnzspca.org.nz/news/advocate/winter04_150.pdf).

116 Jim and Gail Boyd, who together run the investigation branch of the small Bay of Islands SPCA in the north of New Zealand, are an exception deserving of mention. Jim, a former police officer, ran many of the prosecutions himself and secured numerous convictions, along with some of the highest penalties handed out under the Act. With few resources, the couple does an admirable job of getting results. *See* Muck, *supra* n. 98, at 1–2 (discussing Jim Boyd and his involvement in a horse cruelty case resulting in a thirteen thousand dollar fine); Catherine Masters, *Powerless to Protect the Abused*, New Zealand Herald A7 (May 10, 2003) (mentioning the Boyds and their inspection role in the horse cruelty case).

to pay thousands of dollars in lawyer's fees."[117] After the man appealed the conviction, the SPCA was forced to consider not defending the appeal because it lacked sufficient funds; the MAF also refused to intervene. Thankfully, the crisis was averted, and the appeal successfully defended, when the Crown Law office, a separate government department, agreed to take over the appeal. However, six months later, after obtaining another conviction for serious animal abuse and incurring in excess of $35,000 in legal fees and expenses, the Bay of Islands SPCA's chief investigator commented: "I think a lot of inspectors would probably think[,] '[W]hat is the point?' . . . We will do the ground work, we'll do the investigation[,] but the financial burdens of prosecuting, they just bleed us dry."[118] In an earlier article, I criticized the government for putting the SPCA in this untenable position:

> Rather than providing funding to target this new range of offenders, the Government decided to dump the main responsibility for investigating and prosecuting animal cruelty offences into the lap of the SPCA, a charitable organisation funded almost entirely by private donations.
> Very little funding has been provided to train those who must enforce the [Act], let alone any financial help for the often expensive prosecutions that take place under it.
>
> . . .
>
> The result is that the SPCA is forced to do a public job using private funds, and must balance the desirability of investigation and prosecution against its other costly objectives. It places the organisation in a tough spot, one that it shouldn't be in.[119]

While it is hardly the fault of the SPCA for being willing to undertake a function that the government of New Zealand continues to identify as being of low priority, it is hardly surprising that prosecutions for animal cruelty offenses have been mostly ineffective. Unless a serious reassessment of priorities, organizational structure, and training needs occurs, the current situation is likely to continue indefinitely.

VII. SENTENCING

A. Lesson Learned: Raising the Maximum Penalty May Not Lead to More Severe Penalties. Animal Welfare Legislation May Require Separate Sentencing Guidelines to Assist Judges

Of all the issues created by the enactment of new animal welfare legislation, perhaps none have been more troubling than the sentencing of offenders. The AWA was clearly intended to "get tough" on people who abuse animals, especially those who have animals in their care, like farmers. Sentencing under the previous legislation had been a major concern and most offenders received nominal fines or complete dis-

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117 Masters, *supra* n. 116, at A7.

118 Claire Trevett, *SPCA Wants Government Backup*, New Zealand Herald A10 (Nov. 15, 2003).

119 Sankoff, *supra* n. 97, at A15.

charges, unless the crimes were extremely serious.[120] To its credit, Parliament attempted to address this issue by significantly raising the available maximum penalties for crimes committed against animals.[121] Most of the penalties were increased from three to six months imprisonment (and/or fine of twenty-five thousand dollars) while the crime of willful ill treatment leading to death or permanent disability of an animal was provided with a whopping three-year imprisonment and a fifty thousand dollar maximum fine.[122] To animal advocates, the message was clear: Parliament was showing its concern about animal abuse by raising the available penalties. New Zealand's sentencing legislation states that courts "must impose the maximum penalty prescribed for the offence if the offending is within the most serious of cases for which that penalty is prescribed, unless circumstances in relation to the offender make that inappropriate."[123] By raising the ceiling for penalties, it stood to reason that sentences would rise accordingly across the board, as judges would have to re-assess the "seriousness" of the crimes.[124]

Unfortunately, the first few years of sentencing decisions have been a colossal disappointment. Rather than triggering an upsurge in penalties, enactment of the Act appears to have, at best, maintained the status quo, and at worst, actually caused a downswing in sentence severity. Week after week, judges from across the country have imposed sentences on animal abusers that would be laughable, if they were not so tragic. Some examples include:

> COURT COSTS OF $200: To a cat owner who failed to take the animal to the vet despite its suffering from severe cancer. The cat was in extreme pain and had most of its jaw missing, leaving a "gaping hole" where its nose should have been.[125]

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120 Fairbrother, *supra* n. 33.

121 *See e.g.* Animal Welfare Act, 1999, §§ 25, 28 (N.Z.) (increased penalties for animal crimes, especially for willful abuse).

122 *Id.*

123 Sentencing Act, 2002, § 8(c) (N.Z.) (available at http://www.legislation.govt.nz/; *select* statutes; *select* search; *enter* sentencing act 2002; *select* GO; *select* S \ SENTENCING ACT 2002; *select* 8. Principles of sentencing or otherwise dealting with offenders).

124 *R. v. Accused* [1999] 17 CRNZ 190, 195 (regarding increase in penalties for home invasion).

> Parliament's intent [in raising the maximum sentence] is clear. Where the specified offences [are committed] the sentencing judge is to give discrete and concrete recognition to that fact having regard to the maximum term of imprisonment. A significantly greater penalty or longer term of imprisonment is required. . . . It is clearly Parliament's expectation that substituting higher maximum terms of imprisonment for offences [of this nature] will result in correspondingly higher sentences.

Id. See also R. v. A. [1994] 2 NZLR 129; *Fisheries Inspector v. Turner* [1978] 2 NZLR 233, 11–12 (for more on increased penalties).

125 Dianne Haworth, *Is the Law an Ass?* Animals' Voice (magazine of Auckland Socy. for the Prevention of Cruelty to Animals) 11 (Winter 2002).

FINE OF $400: To the owner of a three-year-old jersey cow investigators found lying in the mud, suffering from extreme starvation. Evidence indicated that the cow had been there for some time, and the owner likely knew this, as he pleaded guilty to the crime.[126]

FINE OF $250: To a pig's owner who was caught after bashing the animal repeatedly over the head with an axe. The pig was discovered alive, covered in blood, with holes in its head and neck.[127]

150 HOURS COMMUNITY SERVICE/$45 COSTS: To a golden retriever's owner who left the dog in a small box standing in its own feces. The dog's right hind leg was partially missing, with only a bloody stump remaining. The dog was euthanized.[128]

Without question, sentencing has been an issue of great concern, and animal advocates have repeatedly called upon politicians and judges to take a tougher stand.[129] At the time of this writing, efforts have mostly been to no avail. Despite hundreds of convictions, there have been very few sentences of imprisonment imposed for crimes committed in violation of the Animal Welfare Act 1999.[130] In fairness, this is not a problem restricted to New Zealand, and sentences for crimes against animals in other jurisdictions have generally failed to measure up to expectations as well.[131] However, the sentences handed out in New Zealand make the penalties in most other jurisdictions look harsh, and there is serious concern that judges have simply failed to adapt to the new legislation.[132]

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126 *Id.*

127 Fairbrother, *supra* n. 33, at 21.

128 Sue Fox, *Cruelty Sentence Pathetic*, East & Bays Courier (Auckland) 3 (April 2, 2003) (These are simply isolated examples demonstrating a wider trend. More detailed examples are available in the ARLAN Report and Animals' Voice.).

129 Catherine Masters, *Call to Get Tough on Cruelty to Animals*, New Zealand Herald A5 (Sept. 7, 2002).

130 This has led to the speculation that penalties have actually decreased since the enactment of the new legislation, considering that several terms of imprisonment were handed out for crimes committed in contravention of the old Animals Protection Act 1960. *See Porter v. SPCA* [1988] 220 N.Z.L.R. 87 (sentence of three months imprisonment for the ill-treatment of eleven farm animals); *see also* Peter Sankoff, *Two Animal Law Cases Provide Old Reminders and New Lessons*, 2 ARLAN Rpt. 5 (Oct. 2003) (available at http://www.arlan.org.nz/newsletters/newsletter_Oct03.pdf) (offering more inadequate punishments mixed with two hopeful examples). It should be noted, however, that recently, two convictions for extremely serious harm against animals have resulted in sentences of imprisonment, hopefully indicating that judges are beginning to address animal issues more seriously. *See* Louisa Cleave, *Jail Term for Killing Pet Dog*, New Zealand Herald A3 (May 12, 2004) (offender received prison sentence); N.Z. Press Assn., *Pet's Ordeal Shocks Judge*, New Zealand Herald A5 (Aug. 12, 2004) (offender received prison sentence).

131 The Canadian experience appears similar: Hughes & Meyer, *supra* n. 15, at 68. There has not been a definitive study of the Australian case law, but certainly terms of imprisonment are not infrequently imposed for crimes against animals. *See e.g. Joyce v. Visser* [2001] TASSC 116 (Tas. Sup. Ct.) (suggesting terms of imprisonment are not infrequently imposed for crimes against animals).

132 The judiciary's reluctance to come to grips with the issue has been compounded by a general failure to make coherent submissions on sentencing, an indirect result of the

For instance, in *SPCA v. Berryman and Murphy*,[133] involving two offenders having organized a dogfighting ring,[134] one judge finally voiced what so many of us had already suspected, that New Zealand judges did not believe crimes against animals should be treated seriously, on the basis that the victims were only animals:

> [W]e are dealing here with animals, not with people, not with children, not with women, we are not dealing with violence towards people or attacks on people, or a [person's] property such as their house . . . or with people selling illegal substances such as drugs and the like. This is an animal case, and I think that sight cannot be lost of that, although for . . . the SPCA and supporters, the prime motivation in life as far as their work goes, is the welfare and [well-being] of animals, and that is not to be in any way denigrated, but they see things from a different perspective.[135]

The decision is seriously flawed and demonstrates a misunderstanding of both the AWA and New Zealand's governing sentencing legislation.[136] More importantly, it illustrates a need for judges to be provided, either through judicial training initiatives or more polished sentencing submissions, with education about the manner in which harm against animals needs to be assessed in sentencing. In truth, one could make the case that even more is required. The "animals as property" model that currently holds sway in New Zealand and around the world is clearly inhibiting sentencing procedures, for judges seem to impose penalties that are premised on "harm" as measured by the animal's financial value, rather than upon any broader conception of

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organizational split discussed in the preceding section. *Supra* n. 105 and accompanying text. For a more detailed discussion of this issue, see Sankoff, *supra* n. 106, at 7.

133 Notes of Judge T.H. Everitt on Sentencing ¶ 14 (Nov. 11, 2003).

134 The offenders were convicted for having set up the dogfighting ring, and for neglecting to properly care for the animals. They were ultimately sentenced to two hundred hours of community service, and ordered to pay one thousand dollars each in costs. *See* Royal N.Z. Socy. for the Prevention of Cruelty to Animals, *Dog Fighting Sentence*, Animals' Advocate 2 (Barbara Daw ed., Summer 2003) (available at http://www.rspcanz.org.nz/news/advocate/issue7_summer2003_150dpi.pdf) (for more details about the illegal dogfighting ring).

135 Notes of Judge T.H. Everitt on Sentencing ¶ 14 (Nov. 11, 2003). Sadly, Barbara McCarthy, a litigator engaged by the Auckland SPCA for the past twelve years to litigate animal cruelty offenses, appears to share this view, asserting at a recent conference that "the maximum penalties [for animal welfare offenses] are too high when compared with other legislation . . . making judges incredulous and doing a disservice to the prosecutors." Ms. McCarthy stated that increasing the maximum penalty from three to six months imprisonment "had been a mistake." Auckland Socy. for the Prevention of Cruelty to Animals, *Companion Animal Workshop 2002: Lawyers Debate "Is the Law an Ass?"* Animals' Voice 9 (Summer 2002); Kate Alliston, *Inadequate Animal Welfare Act Penalties Debated in Auckland*, 1 ARLAN Rpt. 1 (Sept. 2002) (available at http://www.arlan.org.nz/newsletters/newsletter_september02.pdf).

136 It is beyond the scope of this paper to fully examine the flaws of this decision here, but see Peter Sankoff, *Flawed Logic Impairs Animal Welfare Act Sentencing*, 2004 New Zealand L.J. 357.

the moral or societal harm caused through commission of the offense.[137]

While a resolution of this problem is beyond the scope of this paper, one way to upgrade sentences within the boundaries of the current system might be to include specific sentencing principles or guidelines within animal welfare legislation. In other words, legislators could specifically indicate to judges what principles should be considered in sentencing animal welfare offenders, rather than simply leaving it to judges' discretion, with the attendant results.

Before leaving this topic, it should be noted that in spite of the numerous paltry sentences that have been handed out in the first five years, some recent rays of hope have emerged out of the gloom. Aside from the aforementioned large fines handed out in the two cases involving serious mistreatment, the Court of Appeal, formerly New Zealand's highest domestic court,[138] recently released its first decision addressing the AWA, confirming a fine of thirteen thousand dollars for an offender who mistreated two horses.[139] In particular, the court noted:

> This was a serious case of mistreatment of a number of animals over a period of time by a person whose experience with horses meant that, in the words of the sentencing judge, he ought to have known better. Given the significant increases in maximum sentences available for offences against animals under the Animal Welfare Act, the fines imposed cannot be said to be manifestly excessive.[140]

B. Lesson Learned: Legislation Treating Animal Welfare Offenses as Criminal May Be Counterproductive

By now it should be apparent that the new animal welfare regime has had less than sterling results for animals in New Zealand. Indeed, many of the initiatives that have been introduced to improve standards have resulted in the opposite effect. Prosecutions have become harder to come by, with longer, increasingly complicated applications burdening the process. Sentences have dropped. The code system has been plagued with paralysis, and the few results that have been brought out have been disappointing. Perhaps rather than simply accusing the government of indifference towards animals, it is time to suggest a more radical solution to these issues. Since the mid-twentieth century, it has become *de rigeur* to suggest that crimes against

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137 *See* Libby Schultz, *Animal Welfare: Does It Deliver As Promised?* 2 ARLAN Rpt. 3, 4 (Mar. 2003) (available at http://www.arlan.org.nz/newsletters/newsletter_march03.pdf) (for broader treatment of this issue).

138 Until 2004, parties could only attempt to appeal from the Court of Appeal to Britain's Privy Council (with leave). That appeal route has now been abolished, and a new Supreme Court of New Zealand has been established. At the time of its decision however, the Court of Appeal remained New Zealand's highest domestic court.

139 *SPCA v Albert*, No. CA126/03, slip op. at ¶ 17 (N.Z.L.R. Dec. 19, 2003).

140 *Id.* at ¶ 17.

animals "need to be taken seriously," with increased penalty structures and more intensive prosecutorial action.[141] Instinctively, the Author shares these sentiments, not only because he recognizes morally that crimes against animals require redress, but also because there is good reason to believe that these crimes ultimately lead to violence against humans.[142]

Still, the New Zealand experience demonstrates that altering the nature of animal welfare legislation in a way that increases the severity of the crime has a number of negative impacts, especially when the state refuses to make the full-scale financial commitment required to treat the offenses as criminal.[143] While the Author hesitates to fully endorse such a move at this stage, he believes some thought should be given to shifting, at least in part, to a regulatory or administrative regime in which prosecutions would be summary proceedings, even if this results in lower maximum penalties. Under such a scheme, most crimes against animals could be treated like highway traffic violations for speeding, with a fine and, in the case of repeat offending, imprisonment.

A move to a regulatory structure would have a number of important benefits. To begin with, it would immediately remove all need for a full-scale prosecution and would eliminate the requirement to prove any substantial degree of mens rea, as regulatory offenses tend to be proven on a strict liability threshold.[144] Furthermore, the move would be in line with what inspectors currently do best—inspect—and it would remove, or at least reduce, many of the protections defendants

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[141] Rackstraw, *supra* n. 89, at 247–48; Hughes & Meyer, *supra* n. 15, at 67.

[142] *See generally* Randall Lockwood, *Animal Cruelty and Violence Against Humans: Making the Connection*, 5 Animal L. 81 (1999) (discussing history and evidence of the connection); Alan R. Felthous, *Aggression Against Cats, Dogs and People*, in *Cruelty to Animals and Interpersonal Violence* 159 (Randall Lockwood & Frank R. Ascione eds., Purdue U. Press 1997) (elaborating on the correlation between cruelty to animals and humans and the increased academic acceptance of this connection).

[143] This paper has addressed many of the negative effects of imposing a criminal regime, but there are still others, two of which are worth briefly mentioning. First, making animal welfare legislation criminal usually imports the need for mens rea standards of liability, in that the offender must have intended to commit the crime. This has led to difficulties in prosecuting both in New Zealand and abroad. Hughes & Meyer, *supra* n. 15, at 60–61. Additionally, the criminal standard tends to bring with it the highest level of constitutional (or human rights) protections for the offender, something which is beginning to wreak havoc in New Zealand, with accused persons challenging the admission of evidence on the ground that it was obtained in contravention of the New Zealand Bill of Rights Act 1990. *See e.g. R. v. Walker*, No. CA409/03 (N.Z.L.R. Dec. 9, 2003) (pretrial application to exclude evidence as pursuant to an illegal search). SPCA investigators, in particular, receive no training in Bill of Rights law. However, efforts are underway to offer investigators more legal training. *See e.g.* Animal Rights Leg. Advocacy Network, *Assisting the SPCA*, 2 ARLAN Rpt. 10, 11 (Peter Sankoff ed., April 2003) (available at http://www.arlan.org.nz/newsletters/newsletter_april03.pdf) (efforts to offer investigators more legal training).

[144] A.P. Simester & W.J. Brookbanks, *Principles of Criminal Law* 161–69 (2d ed., Brooker's Ltd. 2002).

currently possess under Bill of Rights jurisprudence.[145] More importantly, the change would substantially reduce the cost of prosecuting and would allow agencies to bring prosecutions that more accurately reflect the scope of offenses.

Obviously, a change of this nature would not need to completely abandon the current approach. Wide scale or intentional offending could still be dealt with as a criminal offense. In this regard, misconduct against animals could be treated like driving offenses and thus although the majority of transgressions would attract only administrative sanction, conduct that rose to a dangerous level would enter the criminal realm. This is undoubtedly not a perfect solution, and at this stage, the Author acknowledges that it would serve to symbolically lessen the seriousness of crimes against animals and notionally remove the deterrent value of higher penalties. Still, the New Zealand experience has demonstrated that, at least for the moment, these higher penalties do not exist anyway. To date, the criminal model has primarily served to make prosecutions more difficult to undertake, and at some point, if matters do not improve, this model should be reconsidered.

C. *Lesson Learned: In the Area of Animal Welfare, It Is Important to Distinguish between Perception and Reality*

This article began with a discussion of the problems of perception. Of all the problems that the Author has described, this one strikes him as the most serious. As many animal advocates know, much of the battle to make advances in the area of animal welfare law involves first demonstrating to the public that there is, in fact, a problem that requires rectification.

Misperception in this area is widespread. On one hand the government tells the public that crimes against animals are serious, while on the other hand, low numbers of prosecutions, poor funding of prosecutorial agencies, and trifling penalties send a very different message. Similarly, we are told that we have a system that protects animals against ill treatment and allows them to observe normal patterns of behavior, yet in reality, broiler chickens are legally crammed into conditions that virtually defy description, and again a different story emerges.

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[145] Based on the assumption that those who enter a regulatory regime (animal production) have less of an expectation of avoiding interference from government than the ordinary individual. Andrew S. Butler, *Regulatory Offences and the Bill of Rights*, in *Rights and Freedoms: The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993*, at 347 (Grant Huscroft & Paul Rishworth eds., Brooker's Ltd. 1995). The move to a regulatory regime, with fines as the primary penalty, would also eliminate the defendant's ability to elect trial by jury as provided for by the New Zealand Bill of Rights Act 1990, § 24(e), a matter that has already caused the SPCA considerable difficulty. *See* Muck, *supra* n. 98, at 2 (explaining the burdensome costs accompanying the jury trial in that case).

Equally troubling is the matter of the international perception of New Zealand, which proved so important in changing our welfare laws in the first place. This perception appears to be that in 1999 New Zealand enacted a powerful legislative tool to deal with animal welfare concerns that, more than simply following the trend of other nations, was "on the cutting edge" of international standards. The legislation went so far as to enshrine specific protection for non-human hominids, and in enacting this law, it permitted New Zealand to demonstrate its concern for animal welfare. As one author noted, "At the very least, this sends a moral message to other nations."[146]

While the Author is reluctant to dispute this, and wishes to stress that the enacted provisions on hominids were ultimately both important and, to a certain degree, ambitious, it is highly ironic that New Zealand is sending a moral message on animals to anyone. As pointed out in the first paragraphs of this article—in a more humorous tone—it appears to me hardly coincidental that New Zealand took a "strong" stand on non-human hominids that hardly exist in the country.

While occasionally worrying about becoming overly cynical, the Author truly wonders whether this minor inclusion providing for the limited rights of non-human hominids was, on balance, as beneficial as its proponents make it out to be. In truth, this provision sent two messages, not one, to other nations. The first, repeated by animal advocates worldwide, relates to non-human hominids and is beneficial, as has been pointed out previously. The second message is somewhat more subtle, though in my view no less present and far less benign. It suggests that New Zealand is a place that takes animal welfare concerns seriously and, consequently, that there is no need to worry about the purchases of New Zealand farm-raised products. In my view, this second message is much more about perception than reality and, in light of events described in this paper, is seriously open to question.

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[146] Rowan Taylor, *A Step at a Time: New Zealand's Progress Toward Hominid Rights*, 7 Animal L. 35, 38 (2001).