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Enforcing animal welfare law: the NSW experience

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Abstract
As animal law in Australia is a relatively new field, there has been little research into the operation of State and Territory animal welfare legislation. Yet to understand any area of law requires not only knowledge of the relevant legislation and cases but also an appreciation of how the law ‘in the books’ is interpreted and applied. This is particularly important in a field where the regulatory subjects lack any direct legal claim and are unable to articulate their own experience. The abdication by governments of responsibility for much of the law enforcement in this field makes it even more crucial that the practical operation of the law be subject to scrutiny. This article aims to contribute to this process by examining some aspects of the operation of the Prevention of Cruelty to Animals Act 1979 (NSW). The first part situates the Act within the legal and regulatory framework governing animal welfare in NSW, while the second part provides data with respect to its enforcement. The final part seeks to identify general issues in relation to animal law enforcement arising from the first two sections. The article does not purport to be an exhaustive study of animal welfare law enforcement in NSW but to identify some of the matters that merit further discussion and research. While the focus of the study is NSW, the discussion is likely to have relevance for animal law enforcement in Australia more generally.

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Enforcing, animal, welfare, law, NSW, experience

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Enforcing Animal Welfare Law: The NSW Experience

Keely Boom and Elizabeth Ellis*

Introduction

As animal law in Australia is a relatively new field, there has been little research into the operation of State and Territory animal welfare legislation. Yet to understand any area of law requires not only knowledge of the relevant legislation and cases but also an appreciation of how the law ‘in the books’ is interpreted and applied. This is particularly important in a field where the regulatory subjects lack any direct legal claim and are unable to articulate their own experience. The abdication by governments of responsibility for much of the law enforcement in this field makes it even more crucial that the practical operation of the law be subject to scrutiny.

This article aims to contribute to this process by examining some aspects of the operation of the Prevention of Cruelty to Animals Act 1979 (NSW). The first part situates the Act within the legal and regulatory framework governing animal welfare in NSW, while the second part provides data with respect to its enforcement. The final part seeks to identify general issues in relation to animal law enforcement arising from the first two sections. The article does not purport to be an exhaustive study of animal welfare law enforcement in NSW but to identify some of the matters that merit further discussion and research. While the focus of the study is NSW, the discussion is likely to have relevance for animal law enforcement in Australia more generally.

Part 1: Legal and Regulatory Framework NSW

In Australia, the States and Territories have primary responsibility for animal welfare. In NSW, the principal animal welfare provisions are found in the Prevention of Cruelty to Animals Act 1979 (‘POCTAA’) and the Prevention of Cruelty to Animals (General) Regulation 2006 (NSW) (‘POCTAR’). This penal legislation is supplemented by two animal cruelty offences in the Crimes Act 1900 (NSW). Complicating this legal framework are national model codes of practice for the welfare of animals, only some

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of which have been adopted for the purposes of POCTAA, as well as NSW codes of practice incorporated by POCTAR which operate with different legal effect to the national codes. In addition, there are statutes which regulate animal use in specified contexts, in particular the *Animal Research Act 1985* (NSW) and the *Exhibited Animals Protection Act 1986* (NSW). Finally, there is legislation directed at more general ends but which incorporate animal welfare provisions. A notable example is the inclusion of animal welfare standards in relation to abattoirs in food safety laws. These different legislative contexts are outlined below.

*Prevention of Cruelty to Animals Act 1979* (NSW)

The objects clause of POCTAA is expressed exclusively in terms of preventing cruelty to animals and promoting their welfare. This is supported by the Long Title which states that it is an Act for the prevention of cruelty to animals. Section 5(1) makes it an offence to commit an act of cruelty upon an animal. In addition, a person in charge of an animal shall not authorise the commission of an act of cruelty upon an animal or fail to take certain steps to prevent cruelty, alleviate pain or provide veterinary treatment. The maximum penalty in each case is 250 penalty units for a corporation and 50 penalty units or imprisonment for 6 months, or both, in the case of an individual. Section 6(1) of POCTAA further provides that a person shall not commit an act of aggravated cruelty upon an animal. Aggravated cruelty is an act of cruelty that results in death, deformity or disability or such injury or condition that it is cruel to keep the animal alive. This offence carries a maximum penalty of 1,000 penalty units in the case of a corporation and 200 penalty units or imprisonment for two years, or both, in the case of an individual. Offences under s5(1)-(2) and s6(1) do not require proof of mens rea. In addition to these general cruelty offences, ss7-23 contain a range of specific animal cruelty offences. Specific offences include failing to provide animals with food, drink or shelter, confining an animal without providing adequate exercise, administering poison to a domestic animal and using an animal for coursing and similar activities. Further offences are created by POCTAR. Importantly, POCTAA provides various exemptions and defences, particularly in relation to stock animals, but also including the use of animals in connection with hunting, religious

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1. Section 3.
2. Section 5(2).
3. Section 5(3).
4. Section 5(1).
5. *Pearson v Janlin Circuses Ltd* [2002] NSWSC 1118, 7, 8; *Fleet v District Court of NSW* [1999] NSWCA 363, 48. See also *Bell v Gunter* (NSW Supreme Court, Dowd J, 24.10.97, unrep.).
6. Section 8.
7. Section 9(1). This section does not apply to stock animals, other than horses.
8. Section 15.

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practices, animal research and the feeding of predatory animals. Exceptions to various offences are also prescribed by POCTAR.

**Codes of Practice**

POCTAA incorporates codes of practice of two different kinds. First, s34A (1) provides that the regulations may prescribe guidelines, or may adopt a document in the nature of guidelines or a code of practice as guidelines, relating to the welfare of species of farm or companion animals. Pursuant to this section, reg24 of POCTAR currently adopts eight documents, including seven Model Codes of Practice for the Welfare of Animals. These are national codes in relation to livestock developed by the Animal Welfare Working Group under the auspices of the Primary Industries Ministerial Council. Compliance with the prescribed Codes is not compulsory in NSW or in most other States and Territories. Instead, in NSW, compliance or noncompliance with any guidelines prescribed or adopted by the regulations pursuant to s34A is admissible in proceedings as evidence of compliance, or failure to comply, with POCTAA or the regulations. This contrasts with most other jurisdictions in Australia where compliance with the Code provides a defence.

A number of the national codes are not incorporated into POCTAA, for example the Model Code of Practice for the Welfare of Animals: Livestock and Poultry at Slaughtering Establishments and the Model Code of Practice for the Welfare of Animals: Pigs. As a result, the status of these codes is unclear. While they are not adopted by the legislation, the NSW Department of Primary Industries has stated that unincorporated codes are 'still regarded as the minimum standard by which livestock should be kept.' Nonetheless, the exclusion of some codes from POCTAA contributes to the uncertainty and lack of coherence which characterise the legal

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10 See, eg, ss9, 24.
11 See, eg, reg 6 which prescribes circumstances in which tail docking is permitted.
13 This article does not attempt to deal with the larger issues of policy and governance associated with the development and content of these Model Codes of Practice. For more detailed discussion, see, eg, Arnja Dale, 'Animal Welfare Codes and Regulations – The Devil in Disguise?' in Peter Sankoff and Steven White (eds) Animal Law in Australasia: A New Dialogue (2009, Federation Press) 174 and Caulfield M, Handbook of Australian Animal Cruelty Law (2008, Animals Australia) ch3.
14 For details of relevant legislative provisions in all jurisdictions, see Caulfield, above n13.
15 POCTAA s34A(3).
16 See, eg, Animal Care and Protection Act 2001 (Qld) ss38, 40 and Animal Welfare Act 2002 (WA) s25.
framework in relation to animal welfare in NSW. Some changes are underway, however, in relation to the national codes. As part of the Australian Animal Welfare Strategy endorsed by the Primary Industries Ministerial Council in 2004, the existing model codes are to be converted into national standards and guidelines. The aim is to re-write the existing livestock codes to incorporate national animal welfare standards and industry guidelines, with the standards to be implemented by regulation in the States and Territories.  

In addition to the national Model Codes of Practice, reg19, sch2 of POCTAR incorporate Codes of Practice relevant to prescribed animal trades. The codes of practice prescribed under sch2 are developed in NSW by the Animal Welfare Branch of the NSW DPI, for example the Animal Welfare Code of Practice – Animals in Pet Shops, 2008. By operation of reg20 of POCTAR, it is an offence, inter alia, for the proprietor and managers of an animal trade to fail to take all reasonable steps to comply with the provisions of the relevant prescribed code.

**Crimes Act 1900 (NSW)**

While the Crimes Act 1900 (NSW) is a general penal statute it contains two offences with respect to animals, both inserted by the Crimes Amendment (Animal Cruelty) Act 2005 (NSW). Section 530 creates a serious animal cruelty offence, whereby a person who, with the intention of inflicting severe pain tortures, beats or commits any other serious act of cruelty on an animal, and kills or seriously injures or caused prolonged suffering to the animal, is guilty of an offence. The maximum penalty is five years imprisonment. Section 531 provides that a person who intentionally kills or seriously injures an animal used for law enforcement is guilty of an offence, for which the maximum penalty is five years imprisonment. The element of intention significantly distinguishes these offences from an act of cruelty under s5 and an act of aggravated cruelty under s6 of POCTAA. A person is not criminally responsible for an offence under s530 if the conduct occurred in accordance with an authority conferred by or under the Animal Research Act 1985 or any other Act or law.  A further exception is provided where the conduct occurred in the course of or for the purposes of routine agricultural or animal husbandry activities, recognised religious practices, the

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19 Section 530(2)(a).
extermination of pest animals or veterinary practice. These exceptions are broadly consistent with the exceptions and defences in POCTAA.

Animal Research Act 1985 (NSW) and the Exhibited Animals Protection Act 1986 (NSW)

While cruelty to stock/production animals falls generally under POCTAA's provisions, two other areas of animal use are primarily regulated through separate statutory animal welfare regimes. These two areas are the use of animals in connection with research and the exhibition of animals at marine or zoological parks, circuses and other places. The relevant statutes are the Animal Research Act 1985 (NSW) and the Exhibited Animals Protection Act 1986 (NSW) respectively. A detailed description of the provisions of these statutes is beyond the scope of this article but a few points are salient. First, by contrast with POCTAA, the focus of each of these statutes is not penal but regulatory that is, they provide for certain uses of animals subject to licensing and other forms of regulation. In the case of the Animal Research Act, licence holders are authorised to use animals for specified purposes, subject to certain conditions. Failure to comply with the required conditions can lead to suspension or cancellation of a licence and, without a valid licence, the animal use is unlawful. Although the express object of the Animal Research Act is to protect the welfare of animals used in connection with research, its function is to reduce or mitigate the occurrence of cruelty, rather than to prevent it entirely. That the regulatory scheme encompasses cruelty is evidenced by s24(1)(e) of POCTAA which provides that a person has a defence if the act or omission was in the course of, and for the purpose of, carrying out animal research or supplying animals for use in connection with animal research in accordance with the provisions of the Animals Research Act 1985. The regulatory position with respect to exhibited animals is different again. While the Exhibited Animals Protection Act also creates a licensing regime, the protections it affords are additional to those provided by POCTAA.

The above two Acts are listed as animal welfare legislation on the NSW DPI's website. But there are also other statutes in NSW that relate to animals and which contain provisions relevant to animal welfare. Examples are the Companion Animals Act 1998 (NSW) and the Game and Feral Animal Control Act 2002 (NSW). These statutes may provide for how they are to operate in conjunction with POCTAA.

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20 Section 530(2)(b).
21 Section 2A.
23 Section 4 provides that the protection of native birds and animals is an objective of animal welfare policy in NSW. Cats and dogs are prohibited from wildlife protection areas under ss14, 30.
Food Safety Legislation

POCTAA also operates within the context of statutory regimes whose general purposes are not related to animals yet which may contain provisions with respect to their welfare, notably the Food Act and Food Regulation. It is important to refer to this legislation because of the inherently violent nature of slaughter. Despite the violence of the process, the relevant national code of practice is not adopted by POCTAR and the only specific provision in POCTAA relevant to slaughter is the defence contained in s24(1)(b)(ii).

The Food Act 2003 (NSW) is designed to ensure food safety and to regulate the handling of food for sale. The inclusion of its animal welfare provisions appears to be on the basis that “animal welfare objectives … impact on food safety and on public expectations as to wholesomeness.” The Food Regulation 2004 (NSW) prescribes the Australian Standard for the hygienic production and transportation of meat and meat products for human consumption (‘Australian Standard’) as both minimum standards and operational standards for abattoirs. While breaches of the animal welfare provisions of these Standards are unlikely to constitute the serious offences relating to food and some other offences under the Act, they could lead to the commission of an offence under s104. Section 104(1) of the Food Act states that a person who handles or sells food in a manner that contravenes a provision of the food safety scheme is guilty of an offence. The maximum penalty is 500 penalty units in the case of an individual and 2,500 penalty units in the case of a corporation. An abattoir is defined to mean premises used for or in connection with the slaughtering of animals for human consumption. The slaughtering of animals for human consumption would appear to fall within the definitions of ‘food’ and ‘handling of food’ in ss4 and 5 of the Act. Clauses 66 and 67 of the Food Regulation prescribe the Australian Standard as the minimum standards and operational standards for abattoirs under the meat food safety scheme. Accordingly, a person who contravenes the Australian

24 Compliance with mandatory animal welfare provisions under a ministerial code of practice is a condition of a game hunting licence: s 24; Game and Feral Animal Control Regulation 2004 (NSW) sch 2.
25 See, eg, Game and Feral Animal Control Act 2002 (NSW) s6(b).
26 Australia and New Zealand Food Regulation Ministerial Council, The Australian Standard for the hygienic production and transportation of meat and meat products for human consumption, iv.
27 Regulation 66.
28 Regulation 67. The Australian Standard provides for the minimisation of the risk of injury, pain and suffering and the least practical disturbance to animals in slaughter. Specifically, Part 7 provides various standards for the welfare of animals.
29 Regulation 60.
Standard’s animal welfare provisions is arguably guilty of an offence under s104(1) Food Act.

In addition, s104(3) provides that the holder of a licence granted under the regulations who contravenes or fails to comply with a condition of the licence is guilty of an offence. The maximum penalty is 500 penalty units in the case of an individual and 2,500 penalty units in the case of a corporation. Clause 63 of the Regulation sets out the classes of activity that may be licensed for the carrying on of a meat food business, including the operation of an abattoir. The holder of a licence is required to ensure that the provisions of the Act, the Regulation and the Food Standards Code are complied with.\textsuperscript{30} The Regulation prescribes the Australian Standard as the minimum standards and operational standards for an abattoir,\textsuperscript{31} making compliance with the Australian Standard a condition of the licence of an abattoir operator. Where an abattoir operator fails to comply with the animal welfare provisions of the Australian Standard, the holder of the licence may have committed an offence under s104(3) Food Act.

Although providing animal welfare standards for the operation of abattoirs, the Food Act and Food Regulation do not refer to POCTAA; nor does POCTAA contain any reference to this legislation. Relevantly, POCTAA provides that where an animal has been destroyed, or prepared for destruction, for the purpose of producing food in a manner that inflicted no “unnecessary pain” upon the animal, the accused person will have a defence.\textsuperscript{32} A person involved in the slaughter of animals in a manner that inflicted “unnecessary pain” would fall within the scope of the legislation. Thus there is substantive overlap between POCTAA and the Food Act and Food Regulation.

\textit{Enforcement Agencies}

The NSW DPI has the primary role in the administration of animal welfare legislation. In addition to this administrative function, the Animal Welfare Branch of the DPI is involved in enforcing the Animal Research Act and the Exhibited Animals Protection Act. The complex enforcement arrangements arising under these two Acts are beyond the scope of this article. Note, however, that the regulatory scheme governing animals in research is one of enforced self-regulation and

\textsuperscript{30} Food Regulation 2004 (NSW) reg 12.
\textsuperscript{31} Regulations 66-67
\textsuperscript{32} Section 24(1)(b)(ii).
relies heavily on the work of animal ethics committees and the involvement of the Animal Research Review Panel. 33

By contrast with the Animal Research Act and the Exhibited Animals Protection Act, the DPI has no active role in the enforcement of POCTAA. 34 This is not due to any statutory limitation. Comprehensive enforcement powers are given to officers appointed as inspectors in accordance with s24D. Inspectors are police officers or officers (other than a police officer) holding an authority issued by the Minister or Director-General or Deputy Director-General of the DPI. ‘Officer’ is defined in s4 to mean (a) a member of the police force or an inspector within the meaning of the Animal Research Act 1985, (b) an officer of an approved charitable organisation who is a special constable within the meaning of the Police Offences Act 1901, or (c) a public servant who is appointed by the Minister, as an officer for the purposes of this Act. 35 An approved charitable organisation is one that has been approved by the Minister in accordance with s34B of POCTAA and must report annually to the Minister with respect to the matters set out in reg25 of POCTAR. 36 The Royal Society for the Prevention of Cruelty to Animals NSW (‘RSPCA’) and the Animal Welfare League NSW (‘AWL’) are currently the only approved charitable organisations. In practice, almost all enforcement functions in relation to POCTAA are carried out by the RSPCA, 37 whose powers include entering certain land, detaining vehicles and seizing animals. 38 In 2006 and 2007, for example, the RSPCA brought 90% of prosecutions under POCTAA. 39 This unusual arrangement means that a charitable organisation (the RSPCA) is the principal enforcement agent for the primary penal animal welfare legislation in NSW.

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34 Apart from the requirement under s8(4) of POCTAA for consultation with the Department of Agriculture with respect to certain stock animals.
35 POCTAA s24D provides that an inspector appointed under POCTAA may not exercise powers in relation to animal research carried out in accordance with the Animal Research Act 1985 on designated land within the meaning of that Act unless the inspector is also an inspector within the meaning of that Act.
36 POCTAA ss4(1), 34B(3).
37 Established by members of the community in 1873, RSPCA NSW is an incorporated company governed by an elected Board of Directors, with paid staff for its core administrative, inspectorial and shelter work. As with other State and Territory RSPCAs, the NSW Society is a member of RSPCA Australia, which formulates national animal welfare policies. For information about the history of the RSPCA in Australia and the development of its prosecutorial function in Britain see www.rspcansw.org.au/who_we_are/history and Bradford M, Animal Welfare Law in Britain: Regulation and Responsibility (2001, Oxford University Press) 40-42.
38 In accordance with the requirements of POCTAA Part 2A.
Authority to prosecute under POCTAA is provided under s34AA only to approved charitable organizations ('ACOs'), inspectors within the meaning of Division 2 of Part 2A, police officers, the Minister or the Director-General of the Department of Primary Industries, persons with the written consent of the Minister or the Director-General, or any other person or body prescribed by the regulations for this purpose. Section 34AA was only recently inserted to preclude private prosecutions. Prior to the enactment of the Prevention of Cruelty to Animals Amendment (Prosecutions) Act 2007 (NSW), anyone could initiate a prosecution under POCTAA. In introducing the amendment, the Government expressed concern that without limiting the power to prosecute, POCTAA encouraged persons to engage in trespass and posed a threat to the biosecurity of farms.

Although the police have a very limited role in the enforcement of POCTAA, their involvement in relation to some animal cruelty matters has recently increased. Following a number of violent and publicised attacks on kittens in 2005, the NSW Government established an Animal Cruelty Taskforce to consider animal cruelty offences, the applicable penalties, how those offences may be prevented and the recording of animal cruelty offences in the police criminal records system. Among the Taskforce’s findings was that where matters were prosecuted by the RSPCA or the AWL, with no involvement of the police in the investigation, it was not guaranteed that cruelty offenders would be fingerprinted or that their offence would be recorded on their criminal record. As a result, the Crimes Amendment (Animal Cruelty) Act 2005 amended the Crimes Act, Criminal Procedure Act 1986 and the Law Enforcement (Powers and Responsibilities) Act 2002 to address this procedural problem. Section 134 of the Law Enforcement (Powers and Responsibilities) Act 2002 now provides that a court may order the particulars of a person convicted under s5 or s6 of POCTAA to be taken at a police station, including their photograph, fingerprints and palm-prints. A person who fails to comply with this order may be arrested and taken into custody for their particulars to be taken.

The Crimes Amendment (Animal Cruelty) Act 2005 also inserted s530 and s531 into the Crimes Act which means that the police are responsible for enforcement of the serious animal cruelty offence and the offence of killing or seriously injuring an animal used in law enforcement. The police powers to enforce the Crimes Act are provided in the Law Enforcement (Powers and Responsibilities) Act which includes various powers.

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40 Criminal Procedure Act 1986 (NSW) s14 enables any person to institute criminal proceedings in respect of an offence under an Act unless the right to do so is expressly conferred on a specified person or class of persons by the Act.
42 NSW, Parliamentary Debates, Legislative Assembly, 18.10.05 (Morris lemma).
43 Ibid.
to arrest, search premises, investigate, question and take identification particulars. Sections 530 and 531 are indictable offences that are triable summarily. The procedure for these offences is dealt with by the Criminal Procedure Act 1986 (NSW).

In view of the relevance of the Food Act to animal welfare in the context of slaughter, the enforcement provisions of that Act are also worthy of mention. Enforcement of the animal welfare provisions is the responsibility of the Food Authority, enforcement agencies appointed by the Food Authority, authorised officers appointed under the Act, food safety auditors and the police. The Food Authority has appointed each NSW local council and the NSW Department of Environment and Climate Change as enforcement agencies for the purposes of the Act. Proceedings are to be dealt with summarily before a Local Court or before the Supreme Court in its summary jurisdiction. Penalty notices may be issued under s120 by authorised officers, which refers to police officers, the Director-General of the NSW Food Authority and persons appointed as authorised officers by an enforcement officer under s114.

Auditing of food businesses under the Act is carried out by food safety auditors. The Food Authority may authorise a person who is a member of staff of the Food Authority, or approve any other natural person, to be a food safety auditor for the purposes of the Act if the Food Authority is satisfied that the person is competent to carry out this role. Food safety auditors are given a number of enforcement duties under the Act, to carry out audits and carry out follow-up action (including further audits). Enforcement agencies determine the priority classification of individual food businesses and the frequency of auditing of food businesses. The overlap between POCTAA and the Food Act may also be seen in enforcement as approved charitable organisations are required to report, inter alia, on the number of routine inspections they carry out, including inspections of abattoirs.

**Part 2: How POCTAA is enforced**

The fragmented nature of the legal and regulatory framework governing animal welfare makes examination of the enforcement of all relevant provisions beyond the scope of this article. Accordingly, this section is restricted to an examination of the

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45 Criminal Procedure Act 1986 (NSW) sch 1, Table 2, Pt 2A, cl4C.
46 Food Act 2003 (NSW) s111.
47 Food Act 2003 (NSW) s4, s111, s114.
49 Food Act 2003 (NSW) s118.
50 Food Act 2003 (NSW) s87.
51 Food Act 2003 (NSW) s94.
52 Food Act 2003 (NSW) s93.
53 POCTAR reg25(2)(c).
enforcement of POCTAA. As this is the primary animal welfare statute in NSW, findings in relation to POCTAA may also yield insights into animal welfare law enforcement more generally.

Some data is readily available from the annual reports of the approved charitable organisations charged with the enforcement of POCTAA. The Annual Reports of the NSW RSPCA have generally provided data with respect to the number of complaints received (by type of complaint and type of animal), number of prosecutions (by type of offence)\(^{54}\) and number of defendants. Some additional RSPCA data is available in the form of national statistics published online. The Annual Reports of the AWL provide data with respect to the number of animal cruelty complaints received, ‘official cautions’ issued and details of criminal proceedings commenced and finalised. In addition, data is available from the NSW Bureau of Crime Statistics and Research (‘BOCSAR’) about penalty notices and those matters that reach the court stage of the criminal justice process.

Despite this data, various problems arise in trying to ascertain how POCTAA is enforced in NSW. The problems fall broadly into two camps: gaps in the availability of data and difficulty in interpreting the data that is available. Each of these problems is noted below in the context of information about routine inspections, notices issued, prosecutions and outcomes.

**Routine inspections**

The reports of ACOs must include a statement of the number of visits or investigations made by officers of the organisation that were unrelated to received complaints, such as routine inspections of abattoirs, veterinary practices, pet shops or sale yards.\(^{55}\) While the NSW RSPCA Annual Reports include reference to inspections by animal type in their complaint statistics it is unclear to what extent these complaints were the result of routine inspections as opposed to being undertaken in response to complaints. According to the RSPCA National Statistics, 527 routine inspections were carried out by the RSPCA in Australia in 2006-2007, with 45 of these conducted in NSW. The figures for 2007-2008 are 575 and 50 respectively.\(^{56}\) While the National Statistics list examples of the types of establishments subject to routine inspections by the RSPCA, no information is provided as to the types of establishments actually visited or the basis

\(^{54}\) The RSPCA NSW Annual Report 2007-2008 does not provide information on the types of offences prosecuted.

\(^{55}\) POCTAR reg 25(2)(c).

on which those inspected were chosen. Upon request, RSPCA NSW provided the following data about the number of routine inspections and types of establishments visited for the last two years.

<table>
<thead>
<tr>
<th>Type of establishment</th>
<th>2006-2007</th>
<th>2007-2008</th>
</tr>
</thead>
<tbody>
<tr>
<td>Animal park</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td>Circus</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>Feedlot</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>Board/breeding kennel</td>
<td>3</td>
<td>8</td>
</tr>
<tr>
<td>Pet shop</td>
<td>25</td>
<td>27</td>
</tr>
<tr>
<td>Poultry inspection</td>
<td>3</td>
<td>3</td>
</tr>
<tr>
<td>Saleyard</td>
<td>4</td>
<td>5</td>
</tr>
<tr>
<td>Rodeo</td>
<td>4</td>
<td>3</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>45</strong></td>
<td><strong>51</strong></td>
</tr>
</tbody>
</table>

**Statutory notices**

POCTAA provides enforcement options other than prosecution, in the form of notices authorised by s24N and s33E. These sections, which provide for two different kinds of notices, were inserted by the *Prevention of Cruelty to Animals Amendment Act 2005* (NSW) and commenced operation on 25.11.05. Where satisfied on reasonable grounds that a person is contravening a provision of the Act or regulations, s24N allows an inspector to give a written notice requiring specified action in relation to the care of an animal. Section 33E allows an inspector to serve a penalty notice where it appears that an offence prescribed for this purpose against the Act or regulations has been committed. Regulation 23 of POCTAR prescribes the offences and penalties set out in sch3. This schedule currently lists 27 penalty notice offences in relation to the Act and 22 penalty notice offences in relation to the regulations. As already noted, approved charitable organisations must report annually to the Minister with respect to the matters set out in reg25 of POCTAR. The various matters that the report must address include notices issued, the number of notices issued under s24N and the number of penalty notices issued. While the RSPCA provides this data to the Department of Primary

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57 The AWL Annual Report 2006-2007 states that there were 49 inspections of animal trade establishments and the AWL Annual Report 2007-2008 states that there were 13 inspections of animal trade establishments although it is unclear whether these were routine inspections or in response to complaints.
58 Email from David O'Shanessy to AUTHOR, 6.2.09.
59 Although the *Prevention of Cruelty to Animals (General) Amendment (Laying Fowl) Regulation 2007* (NSW) repealed reg16 of POCTAR, it omitted to delete this clause from the penalty provisions set out in sch3.
60 Regulations 25(1)(c), 25(2)(f), 25(2)(g).
Industries, there is no information about notices in the RSPCA NSW Annual Reports. On request, however, the following data was made available by RSPCA NSW with respect to cautions and notices issued by that organisation since the amendment of POCTAA in 2005.\textsuperscript{61}

**Table 2 Notices issued**

<table>
<thead>
<tr>
<th></th>
<th>Letters of caution\textsuperscript{62}</th>
<th>Section 24N notices</th>
<th>Penalty notices\textsuperscript{63}</th>
</tr>
</thead>
<tbody>
<tr>
<td>2005-2006</td>
<td>9</td>
<td>8</td>
<td>0</td>
</tr>
<tr>
<td>2006-2007</td>
<td>4</td>
<td>10</td>
<td>0</td>
</tr>
<tr>
<td>2007-2008</td>
<td>3</td>
<td>10</td>
<td>44</td>
</tr>
</tbody>
</table>

Of the 44 penalty notices issued by the RSPCA in 2007-2008, 32 were for companion animals, eight were for production/stock animals and four for animals used in a commercial context.\textsuperscript{64}

There is no information about either s24N notices or s33E penalty notices in the Annual Reports of the AWL, although it is planned to include penalty notice data in 2008-2009 as the AWL has now started issuing them.\textsuperscript{65} According to the 2006-2007 Annual Report, nine 'official cautions' were administered by the AWL. The 2007-2008 AWL Annual Report provides that two people received official cautions in relation to five offences.

**Prosecution data**

Subject to their charging policy (see Part 3 below), data is available from BOCSAR in relation to those matters which come before the courts. Interpretation of this data is complicated, however, by differences between the RSPCA and BOCSAR statistics. The following illustrates the difficulties. According to RSPCA NSW, there were 704 charges approved to commence by court attendance notice for alleged breaches of POCTAA and POCTAR in 2006-2007.\textsuperscript{66} If the 14 matters falling under POCTAR are

\textsuperscript{61} Email from David O'Shanessy to AUTHOR, 6.2.09.
\textsuperscript{62} Although reg25(2)(e) of POCTAR requires ACOs to report on the number of persons cautioned, POCTAA makes no specific provision with respect to cautions.
\textsuperscript{63} All but three of the penalty notice offences with respect to a breach of the regulations were only inserted recently, by the Prevention of Cruelty to Animals (General) Amendment (Laying Fowl) Regulation 2007 (NSW) and the Prevention of Cruelty to Animals (General) Amendment (Animal Trades) Regulation 2008 (NSW).
\textsuperscript{64} The production/stock category includes horses; the four penalty notices in the commercial category related to one company. Email from David O'Shanessy to AUTHOR, 6.2.09.
\textsuperscript{65} Keely Boom, interview with Paul Johnston, Senior Inspector NSW AWL, (telephone interview, 3.2.09).
\textsuperscript{66} Email from David O'Shanessy to AUTHOR, 6.2.09.
discounted the number of charges is 690. According to BOCSAR, however, there were only 468 charges finalised in relation to POCTAA in 2006-2007. Both the RSPCA and BOCSAR give a breakdown of these figures by the relevant section of the Act, but this does not shed any light on the matter. For example, the RSPCA lists 215 offences under s8(1) failure to provide food, water or shelter for 2006-2007, while BOCSAR gives 101 finalised charges for the same section for the same period. Some discrepancy is to be expected due to the difference in what is counted (charges commenced and charges finalised) but the size of the difference is difficult to reconcile.

According to the RSPCA NSW Annual Reports, the number of ‘offences’ under POCTAA and POCTAR between 2000-2001 and 2006-2007 were as follows.

<table>
<thead>
<tr>
<th>Table 3</th>
<th>No. of offences (RSPCA data)</th>
</tr>
</thead>
<tbody>
<tr>
<td>2006-2007</td>
<td></td>
</tr>
<tr>
<td>239</td>
<td>346</td>
</tr>
<tr>
<td>442</td>
<td>656</td>
</tr>
<tr>
<td>1784</td>
<td>1092</td>
</tr>
<tr>
<td>704</td>
<td></td>
</tr>
</tbody>
</table>

According to BOCSAR, the number of finalised charges brought under POCTAA for the same period is as follows. Note that the BOCSAR data does not include charges under the regulations.

<table>
<thead>
<tr>
<th>Table 4</th>
<th>No. of finalised charges (BOCSAR data)</th>
</tr>
</thead>
<tbody>
<tr>
<td>2006-2007</td>
<td></td>
</tr>
<tr>
<td>291</td>
<td>378</td>
</tr>
<tr>
<td>406</td>
<td>457</td>
</tr>
<tr>
<td>401</td>
<td>409</td>
</tr>
<tr>
<td>468</td>
<td></td>
</tr>
</tbody>
</table>

---

68 The BOCSAR data includes the small number of finalised charges brought by the AWL. The AWL NSW Annual Report lists 12 finalised matters for 2006-2007.
69 The RSPCA NSW Annual Reports appear to use the terminology ‘offences’ in relation to charges. See the Annual Report 2006-2007, 8, 10-11.
70 These would generally constitute a very small proportion of charges. For example, the RSPCA NSW Annual Report 2004-2005 lists 6 offences under the regulations out of a total of 1784 charges for that year.
In relation to the finalised charges in Table 4, the following convictions were secured:

Table 5  
No. of finalised charges where offence proven or defendant convicted in their absence\(^{72}\)

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>2001</td>
<td>241</td>
<td>282</td>
<td>304</td>
<td>299</td>
<td>316</td>
<td>311</td>
<td>368</td>
</tr>
</tbody>
</table>

Pleas

Of those charged with breaches of POCTAA, there appears to be a high proportion of not guilty pleas compared with other summary offences. For all finalised charges under POCTAA in the period January 2001-December 2007, the not guilty plea rate ranged between approximately 17% and 23%. In relation to the general cruelty offences in s5(1) and s6(1) the proportions were even higher as the following table illustrates.

Table 6  
Not Guilty Pleas as a proportion of finalised charges\(^{73}\)

<table>
<thead>
<tr>
<th></th>
<th>2001</th>
<th>2002</th>
<th>2003</th>
<th>2004</th>
<th>2005</th>
<th>2006</th>
<th>2007</th>
</tr>
</thead>
<tbody>
<tr>
<td>s5(1)</td>
<td>22%</td>
<td>22%</td>
<td>25%</td>
<td>33%</td>
<td>33%</td>
<td>26%</td>
<td>28%</td>
</tr>
<tr>
<td>s6(1)</td>
<td>22%</td>
<td>27%</td>
<td>32%</td>
<td>19%</td>
<td>19%</td>
<td>21%</td>
<td>19%</td>
</tr>
</tbody>
</table>

By contrast, for all charges finalised in Local Courts in the period 2001-07, the not guilty plea rate was between approximately 8% and 10%\(^{74}\).

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\(^{72}\) BOCSAR, NSW Local Courts Statistics 2001-2007, No. of finalised charges brought in the Local Courts under the Prevention of Cruelty to Animals Act 1979 by outcome. For the years 2002-2005 and 2006-2007 there were also a small number of arrest warrants issued.

\(^{73}\) BOCSAR, NSW Local Courts Statistics 2001-2007, No. of finalised charges brought in the Local Courts under the Prevention of Cruelty to Animals Act 1979 by plea. Rounded to the nearest 0.05%.

\(^{74}\) BOCSAR, NSW Local Courts Statistics 2007, No. of charges finalised in the NSW Local Courts by plea. Rounded to the nearest 0.05%.
Sentencing

With respect to those against whom a conviction was secured for an offence under POCTAA, sentencing outcomes for the calendar years 2001-07 were as follows:

Table 7  No. of persons convicted under POCTAA as their principal offence by principal penalty\(^75\)

<table>
<thead>
<tr>
<th></th>
<th>2001</th>
<th>2002</th>
<th>2003</th>
<th>2004</th>
<th>2005</th>
<th>2006</th>
<th>2007</th>
</tr>
</thead>
<tbody>
<tr>
<td>Imprisonment</td>
<td>2</td>
<td>2</td>
<td>3</td>
<td>2</td>
<td>4</td>
<td>3</td>
<td>8</td>
</tr>
<tr>
<td>Home detention</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>Periodic detention</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>Suspended sentence with supervision</td>
<td>2</td>
<td>1</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Suspended sentence without supervision</td>
<td>5</td>
<td>2</td>
<td>5</td>
<td>3</td>
<td>5</td>
<td>5</td>
<td></td>
</tr>
<tr>
<td>Community service order</td>
<td>6</td>
<td>5</td>
<td>8</td>
<td>6</td>
<td>5</td>
<td>3</td>
<td>5</td>
</tr>
<tr>
<td>Bond with supervision</td>
<td>1</td>
<td>5</td>
<td>2</td>
<td>2</td>
<td>4</td>
<td>3</td>
<td>2</td>
</tr>
<tr>
<td>Bond without supervision</td>
<td>14</td>
<td>15</td>
<td>16</td>
<td>21</td>
<td>28</td>
<td>19</td>
<td>33</td>
</tr>
<tr>
<td>Fine</td>
<td>119</td>
<td>93</td>
<td>107</td>
<td>86</td>
<td>109</td>
<td>98</td>
<td>110</td>
</tr>
<tr>
<td>Nominal sentence</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>Bond with no conviction</td>
<td>6</td>
<td>4</td>
<td>18</td>
<td>11</td>
<td>14</td>
<td>10</td>
<td>9</td>
</tr>
<tr>
<td>No conviction recorded</td>
<td>20</td>
<td>12</td>
<td>19</td>
<td>16</td>
<td>12</td>
<td>13</td>
<td>12</td>
</tr>
</tbody>
</table>

\(^{75}\) BOCSAR, NSW Local Courts Statistics 2001-2007, No. of persons convicted of an offence under the Prevention of Cruelty to Animals Act 1979 who received a principal penalty of imprisonment or fine by average duration of imprisonment or average fine amount. A person's principal offence is the offence for which he/she receives their most serious penalty.
For the calendar years 2001-07, the following charges resulted in a penalty of imprisonment:

**Table 8** Offences resulting in imprisonment\(^{76}\)

<table>
<thead>
<tr>
<th>Offence</th>
<th>Number of persons</th>
</tr>
</thead>
<tbody>
<tr>
<td>s5(1) Commit an act of cruelty</td>
<td>6</td>
</tr>
<tr>
<td>s5(3) Being in charge of an animal fail to exercise</td>
<td>1</td>
</tr>
<tr>
<td>s6(1) Commit an act of aggravated cruelty</td>
<td>14</td>
</tr>
<tr>
<td>s8(1) Fail to provide proper and sufficient food</td>
<td>3</td>
</tr>
</tbody>
</table>

For those who received a principal penalty of imprisonment for their principal offence, the average duration of imprisonment was as follows:

**Table 9** Average duration of imprisonment\(^{77}\)

<table>
<thead>
<tr>
<th>2001</th>
<th>2002</th>
<th>2003</th>
<th>2004</th>
<th>2005</th>
<th>2006</th>
<th>2007</th>
</tr>
</thead>
<tbody>
<tr>
<td>2 months</td>
<td>1 month</td>
<td>5 months</td>
<td>4 months</td>
<td>4 months</td>
<td>9 months</td>
<td>4 months</td>
</tr>
</tbody>
</table>

The average duration of imprisonment in the case of aggravated cruelty is similar, with the average for each of the years 2001-2007 being respectively four months, two months, five months, four months, five months, nine months and four months.


\(^{77}\) BOCSAR, NSW Local Courts Statistics 2001-2007, No. of persons convicted of an offence under the Prevention of Cruelty to Animals Act 1979 who received a principal penalty of imprisonment or fine by average duration of imprisonment or average fine amount.
For those whose principal penalty was a fine for their principal offence, the average fine amount was as follows:

**Table 10.1  Average amount of fine all principal offences**

<table>
<thead>
<tr>
<th>Year</th>
<th>2001</th>
<th>2002</th>
<th>2003</th>
<th>2004</th>
<th>2005</th>
<th>2006</th>
<th>2007</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fine</td>
<td>$652</td>
<td>$753</td>
<td>$719</td>
<td>$707</td>
<td>$871</td>
<td>$731</td>
<td>$738</td>
</tr>
</tbody>
</table>

A fine was overwhelmingly the most frequently imposed penalty for offences under POCTAA. This was so even for those convicted of an act of aggravated cruelty under s6(1). In relation to persons convicted under s6(1) as their principal offence during 2001-2007, 6% received a penalty of imprisonment and 48% a fine. Where a fine was imposed for s6(1) as the principal offence, the average amount was as follows:

**Table 10.2  Average amount of fine for s6(1) principal offences**

<table>
<thead>
<tr>
<th>Year</th>
<th>2001</th>
<th>2002</th>
<th>2003</th>
<th>2004</th>
<th>2005</th>
<th>2006</th>
<th>2007</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fine</td>
<td>$1,061</td>
<td>$1,286</td>
<td>$993</td>
<td>$725</td>
<td>$1,871</td>
<td>$1,203</td>
<td>$976</td>
</tr>
</tbody>
</table>

The current maximum penalties under POCTAA are 250 penalty units in the case of a corporation and 50 penalty units or imprisonment for six months, or both, in the case of an individual, for most offences. A lesser penalty applies for an offence under s12A and s31(3), while the current maximum penalty with respect to an offence under s6(1), s15(2) or s21(1) is 1,000 penalty units in the case of a corporation and 200 penalty units or imprisonment for 2 years, or both, in the case of an individual. Note that the *Prevention of Cruelty to Animals Amendment (Penalties) Act 2003* (NSW) doubled the number of maximum penalty units for offences under s6(1), s15(2) and s21(1) from 500 to 1,000 in the case of a corporation and from 100 to 200 for an individual.

**Court orders: s31(1)(b)**

Section 31(1) of POCTAA allows a court to make certain orders in addition to any penalty where a person has been convicted of an offence under Part 2 of the Act or an offence against the regulations involving the way in which an animal was treated. Where satisfied that the convicted person would be likely to commit another such offence, the court may, inter alia, order that the person is not to purchase or acquire, or

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78 BOCSAR, NSW Local Courts Statistics 2001-2007, No. of persons convicted of an offence under the *Prevention of Cruelty to Animals Act 1979* who received a principal penalty of imprisonment or fine by average duration of imprisonment or average fine amount.

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take possession or custody of, any animal within such period as specified.\textsuperscript{79} BOCSAR has advised that they do not collect data on orders made under s31.\textsuperscript{80} While the RSPCA holds this information in its complaint and prosecution database, the statistics are not easily generated\textsuperscript{81} and are not available in the Annual Reports. In response to a request by the authors, however, the RSPCA advised that the following individuals had restrictions placed on them in accordance with section 31(1)(b) of the POCTAA for matters commenced by the RSPCA between 1/7/2006 and 30/6/2007 and 1/7/2007 and 30/6/2008.\textsuperscript{82}

<table>
<thead>
<tr>
<th>Total prohibition</th>
<th>2006-2007</th>
<th>2007-2008</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 year</td>
<td>9</td>
<td></td>
</tr>
<tr>
<td>2 years</td>
<td>5</td>
<td>3</td>
</tr>
<tr>
<td>3 years</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>5 years</td>
<td>5</td>
<td></td>
</tr>
<tr>
<td>10 years</td>
<td>4</td>
<td>4</td>
</tr>
<tr>
<td>20 years</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Lifetime</td>
<td></td>
<td>1</td>
</tr>
</tbody>
</table>

**Restriction on Type or Number of Animals 2006-2007**

- No cats for 3 Years: 1
- Only possess 1 dog for 6 months: 1
- No more than 10 cattle for 2 years (under appeal): 1
- No companion animals for 2 years: 1
- Only possess 3 cats and 1 dog for 10 years: 1

**Restriction on Type or Number of Animals 2007-2008**

- No Dogs for 5 years: 1
- Stock at RLPB Stocking Rate for 5 years: 1
- Possess no animals except cats for 5 years: 1
- Possess maximum of 21 dogs for 3 years: 2

According to the RSPCA, orders made under s31(1)(b) are primarily enforced in two ways. First, the details are entered into their cruelty database so they are picked up when complaints are logged. In addition, the RSPCA conducts unannounced random

\textsuperscript{79} Section 31(1)(b).
\textsuperscript{80} Email from BOCSAR to AUTHOR, 28.8.08.
\textsuperscript{81} Email from David O’Shanessy to AUTHOR, 6.2.09.
\textsuperscript{82} Ibid.
inspections during the period of prohibition. Local Councils do not have access to the RSPCA database, however, and there is currently no provision for the cross-referencing of prohibition orders with animals registered under the Companion Animals Act 1998 (NSW). There does not appear to be any mechanism to prevent a person against whom a prohibition order has been made from purchasing or otherwise acquiring an animal from a shelter which lacks access to the RSPCA database, or from a pet shop, market, registered breeder, backyard breeder or private owner. Moreover, while s31(3) makes it an offence to fail to comply with a s31(1) order, the maximum penalty is only 25 penalty units.

Part 3: Issues

The above overview of animal welfare law enforcement in NSW suggests that the following matters would benefit from government attention and further research. Although discussed primarily in relation to POCTAA, these issues are typical of problems more generally with the enforcement of animal welfare legislation.

Access to information

The most basic requirement in evaluating the operation of law is access to comprehensive and reliable data. In the case of POCTAA, information about enforcement is not available on the website of the Animal Welfare Branch of the NSW Department of Primary Industries which administers the Act; nor are details provided in the Department’s Annual Reports. The data routinely made available by the ACOs in their Annual Reports is insufficient to allow more than a cursory appraisal of complaints and prosecutions. Nor do the ACOs keep statistics on s530 and s531 of the Crimes Act as the police are primarily responsible for these matters. Some data is obtainable from BOCSAR, for example information about penalty notices and detailed data on court outcomes, but accessing this data has its own difficulties. First, court statistics in relation to animal cruelty are not listed under a separate head so they are not identifiable from a general perusal of BOCSAR’s publicly available statistics. Instead, breaches of POCTAA are included under the unlikely classification of ‘disorderly conduct’, a sub-category of ‘public order offences’ because, according to BOCSAR, this is the Australian Standard Offence Classification used by the Australian

83 Ibid.
84 In 2007, the independent NSW MP, Clover Moore, introduced a private member’s bill, the Animals (Regulation of Sale) Bill 2007, into the NSW Parliament in an attempt, inter alia, to ban the sale of mammals in pet shops and markets. This Bill was withdrawn in 2008 and replaced with a more limited version, the Animals (Regulation of Sale) Bill 2008 which restricts the prohibition on sale only to cats and dogs.
85 For example, there are major problems in accessing data about the operation of the Animals Research Act and the Exhibited Animals Protection Act.
Bureau of Statistics.\textsuperscript{86} Secondly, as of August 2008, BOCSAR introduced a policy of charging for requests that take more than 30 minutes to complete. Accordingly, any request for data which forms part of more detailed or systematic research into animal welfare enforcement in NSW may incur charges.\textsuperscript{87} Thirdly, BOCSAR does not keep data with respect to all relevant matters, for example prohibition orders under s31(1)(b). Finally, there is the difficulty of trying to reconcile the apparent anomalies in prosecution data provided by BOCSAR and the RSPCA.

If governments are serious about improving animal welfare law, they need to ensure easy access to reliable and more detailed information as to how various enforcement options are being used. As it stands, it is difficult to monitor even the basic operation of POCTAA, let alone investigate more complex enforcement issues. The latter includes the way in which agencies interpret key sections of POCTAA (and the relationship between POCTAA and other animal welfare provisions), why different enforcement options are chosen in particular circumstances and how these choices are affected by agency culture. In relation to penalty notices, for example, the Government claimed that their introduction would ‘greatly increase the efficiency of the Act’s administration’ while the new power to issue directions would ‘provide a new, more appropriate tool for inspectors to use in the care of animals’.\textsuperscript{88} It is impossible, however, to assess the operation of the penalty notice and directions regimes without knowing the number of notices served, to whom they were issued and for which offences or concerns.\textsuperscript{89} As already noted, ACOs are required to provide the Minister with more comprehensive information than is available in their Annual Reports. A more complete picture of enforcement activity could be obtained if the DPI acted as a single source of comprehensive, publicly available data for all animal welfare statistics. This would be consistent with the DPI’s responsibilities in relation to the enforcement of the Exhibited Animals Act and the Animals Research Act.

\textit{Enforcement activities}

During 2006-2007, the RSPCA received 11,812 complaints and commenced charges against 140 defendants in relation to 704 offences. BOCSAR data lists 468 finalised charges brought in the Local Court under POCTAA for that period. According to the RSPCA Annual Report 2007-2008, 835 charges were brought against 129 defendants.

\textsuperscript{86} Email from BOCSAR to AUTHOR, 24.4.07.
\textsuperscript{87} Sentencing data is also available from the Sentencing Information System of the Judicial Information Research System but access is via subscription. See www.judcom.nsw.gov.au/sentencing/jirs.php
\textsuperscript{88} NSW, \textit{NSW Legislative Assembly Hansard: Prevention of Cruelty to Animals Amendment Bill Second Reading}, 9 November 2004, 2400 (Alison Megarry).
\textsuperscript{89} The NSW Government Review Group recommended the expansion of enforcement options to include penalty notices for offences of ‘a minor nature’, in which category they included failure to provide food, water or shelter and abandonment. NSW Government Review Group, \textit{Review of the Prevention of Cruelty to Animals Act 1979}, Final Report, February 2003, 26.
in a year when it received 13,649 complaints. As some complaints relate to more than one animal, the total number of animals involved may be considerably greater than the number of recorded complaints.\(^9\) Not all complaints are substantiated and, where they are, prosecution is not necessarily the appropriate response.\(^9\) For example, the AWL Annual Report states that of the 391 animal cruelty complaints received in 2007-2008, only 97 were substantiated, with only three people being prosecuted. Further, some enforcement options, for example penalty notices, are of relatively recent origin and it may be that their use will increase over time. In addition, the small proportion of complaints which result in formal proceedings is partly a function of resources, as discussed below. Nevertheless, the number of finalised charges compared to the number of animals subject to a complaint raises questions about how the enforcement task is being approached and whether current strategies are the most effective. For example, it is known that agencies tend to impose their own ideas about culpability when deciding what enforcement action to take, including in cases where there is no mens rea requirement in the relevant legislation.\(^9\) Meaningful debate about complex issues like this requires qualitative research, as well as access to considerably more information than is available at present.

One problematic aspect of enforcement is the very limited number of routine inspections of commercial premises. As noted above, RSPCA NSW conducted only 50 routine inspections in 2007-08. This is roughly comparable to the other jurisdictions listed in the National Statistics, with the exception of Queensland which conducted 361 inspections in the same period. The inadequacy of 50 routine inspections of commercial premises has to be seen in the context of the large number of establishments using animals and the huge number of animals involved. In NSW, for example, there are hundreds of pet shops alone, yet this is only one of many different kinds of commercial premises routinely keeping and using animals. Indeed, the RSPCA National Statistics list 22 types of establishments as examples of those subject to routine inspections. In 2008, POCTAR was amended to prescribe the 2008 Animal Welfare Code of Practice – Animals in Pet Shops and to allow an offence under reg20 to be dealt with by way of a penalty notice. This means that a pet shop which fails to comply with a requirement of the 2008 Code may be liable to a $200 penalty notice. Although pet shops are included in routine inspections, those visited constitute only a small proportion of all pet shops in NSW. In this context, it is interesting to

\(^{9}\) Since 2003, complaints have been logged by the RSPCA on the basis of address not the number of animals.

\(^{9}\) Note that the complaints data in the RSPCA NSW Annual Reports also includes animals that required rescue.

note that the RSPCA NSW Annual Report 2007-2008 (p49) lists a total of 480 complaints in relation to Pet Shop Inspections in its cruelty complaints statistics.

At least some of what happens in shops is subject to scrutiny by members of the public. By contrast, commercial premises such as intensive farms and abattoirs are largely hidden from any public gaze. For the most part, those likely to be aware of the occurrence of cruelty have a vested interest in the establishment, as owner, manager, employee or service provider. In these circumstances, routine inspections are a critical tool in the enforcement process. Unlike some jurisdictions, there appears to be no legislative restriction with respect to this kind of enforcement activity in NSW. While s24E(2) of POCTAA confines an inspector’s power to enter a dwelling, absent the owner’s consent, to circumstances in which there are reasonable grounds for believing that an animal is at risk or a search warrant has been obtained, the ordinary meaning of this provision in the context of the Act limits it to residential premises. By contrast, s24G empowers inspectors generally to enter land used for commercial purposes involving animals in order to ensure compliance with POCTAA. A broad power to conduct routine inspections of commercial premises is also consistent with reg25(2)(c) of POCTAR which includes abattoirs as examples of routine inspections, reports of which the clause requires. Note, also, that in 2007, POCTAR was amended to prescribe 18 offences in relation to the confinement of laying fowl as penalty notice offences. Again, the efficacy of so providing would seem to depend upon routine inspections of these premises. While poultry inspections are included in the RSPCA’s routine inspections, only three inspections were conducted in each of 2006-2007 and 2007-2008.

Responsibilities and resources

Evaluating animal welfare enforcement is complicated where the law governing the activity is unclear or where responsibilities are duplicated or divided between different agencies. An example is animal welfare in the context of slaughter. As noted in Part 1, the Model Code of Practice for the Welfare of Animals: Livestock at Slaughtering

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93 In practice, exposure of cruel practices may depend upon animal activists, as for example in Tasmania in May 2009 where the owner of a pigpenny was charged with cruelty offences after video footage obtained by a local activist was aired on the ABC. See Paul Carter, ‘Woolworths standing by pork supplier’ Nine News, 11.5.09 http://news.ninemsn.com.au/national/812308/woolworths-standing-by-pork-supplier at 9.6.09.

94 See, eg, the Prevention of Cruelty to Animals Act 1986 (Vic) Part 2A.

95 This interpretation is supported by the Explanatory Note to the Prevention of Cruelty to Animals Amendment Bill 2004 sch1[15](e).

96 Enforcement is further complicated where Commonwealth legislation intersects with State animal welfare laws because of the operation of s109 of the Constitution. See, eg, Department of Local Government and Regional Development v Emanuel Exports Pty Ltd (Magistrates Court of Western Australia, 8.2.08, un.). Note that the magistrate’s decision in that case has been questioned. See www.vicbar.com.au

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Establishments has not been adopted in NSW. In any case, adoption of a code pursuant to s34A simply enables it to be tendered in evidence in proceedings under POCTAA or POCTAR. The threshold question, therefore, is what enforcement action is taken in relation to abattoirs that might lead to prosecution. According to the RSPCA, limited resources mean that inspections of abattoirs are only conducted in conjunction with the investigation of a complaint.\(^7\) As set out in Part 1, however, animal welfare standards are also relevant to the Food Act and Food Regulation even though this legislation is primarily concerned with food safety.\(^8\) According to the RSPCA, there are no formal cooperative arrangements between it and the bodies which enforce the Food Act although there is an exchange of information in relation to individual jobs from time to time.\(^9\) According to the Food Authority, each abattoir in NSW is audited every six months and identification of animal welfare problems can result in a ‘corrective action request’ and follow up visits. A failure to comply with a request may lead to the issue of an improvement notice or penalty notice or, in more serious cases, prosecution under s104 of the Food Act.\(^10\) The Food Authority also advised that information on penalty notices served on abattoirs is included on the Authority’s Name and Shame website but a check of this online register failed to find any notices in relation to abattoirs.\(^11\) The Food Authority further advised that information about improvement notices should be sought via a Freedom of Information application because of concerns about confidentiality but that the abattoirs would be likely to object to its release.\(^12\)

As described in Part 1, POCTAA is only part of a complex legal and regulatory framework governing animal welfare. The example of slaughterhouses illustrates how fragmented responsibility and lack of information make the most basic evaluation of animal welfare enforcement time consuming and difficult. It also suggests that the principal enforcement agency, the RSPCA, is seriously under-resourced. In 2006-07, the RSPCA received $424,000 from the government for its inspectorial functions and the same amount again in 2007-08.\(^13\) Its 2006-07 Annual Report states that the RSPCA had 31 full time and six honorary inspectors for the whole of NSW. No

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\(^7\) Email from David O'Shanessy to AUTHOR, 6.2.09.

\(^8\) In addition, abattoirs which slaughter animals for export are subject to Commonwealth regulation although there are constitutional limits on the scope of Commonwealth power with respect to intrastate trade. See O'Sullivan v Noarlunga Meats (1954) 92 CLR 565 and Swift Australian Co Pty Ltd v Boyd-Parkinson (1962) 108 CLR 189 where this issue was raised in the context of animal slaughter.

\(^9\) Email from David O'Shanessy to AUTHOR, 6.2.09.

\(^10\) Keely Boom, Interview with John Fallon, Senior Food Safety Officer (telephone interview, 10.2.09).

\(^11\) NSW Food Authority, 'Register of penalty notices' <http://www.foodauthority.nsw.gov.au/penalty-notices/> at 14.2.09. Note, however, that this is not an easy task as those penalised are listed by company name not by industry.

\(^12\) Keely Boom, interview with Anne McIntosh, Support and Development Officer (telephone interview, 10.2.09).

\(^13\) RSPCA NSW Annual Report 2007-08, 46-47. In 2008, the RSPCA received an additional government grant of $10,818 for its shelters.
information about the size of the inspectorate is included in the 2008 Annual Report. While government funding has increased since 2004-2005, current funding remains severely limited given the size and complexity of the enforcement task. No information is provided in its Annual Report about income apart from bequests but the AWL advises that $54,000 was received in government funding in 2006-2007 for their inspectorate. Although recent years have seen various amendments to POCTAA, POCTAR and the Crimes Act, these initiatives are unlikely to improve animal welfare unless they are matched by a significant increase in resources for their enforcement.

Penalties

When the offence of serious animal cruelty was inserted into the Crimes Act in 2005 the Government asserted that ‘(u)nwarranted and unjustified cruelty to animals is unacceptable to our society and the Government wishes to send a strong message that such unacceptable actions will be dealt with as serious criminal offences and offenders can be assured of strong enforcement of these new laws'. Similarly, in 2003 the Government stated that the doubling of maximum penalties for offences under s6(1), s15(2) and s21(1) demonstrated its ‘commitment to protecting the welfare of animals by increasing the range of monetary penalties available to the courts for the most serious offences provided under the Act'. Table 10.2 reveals, however, that, while the average amount of fines was higher in 2005, the increase in maximum penalties does not appear generally to have affected the quantum of fines with respect to s6(1) aggravated cruelty. Moreover, there were very few convictions under s15(2) and no convictions under s21(1) between 2001 and 2007. The only s15(2) offence listed as the principal offence during this seven-year period was in 2005 and received a bond without supervision as the principal penalty. In relation to the Crimes Act, there were no s530 charges in 2005. In 2006, there were five charges resulting in three findings of guilty and in 2007 seven charges with three guilty outcomes. The sentencing data obtained from BOCSAR only relates to persons convicted of their principal offence and therefore does not include all relevant penalties and/or offenders. According to this data, one person was convicted of a s530 offence in 2006 where that offence was their principal offence and received a penalty of imprisonment. In 2007, three persons were convicted of a s530 offence where that offence was their principal

105 Keely Boom, interview with Paul Johnston, Chief Inspector NSW AWL (telephone interview, 13.2.09).
107 NSW, NSW Legislative Council Hansard: Prevention of Cruelty to Animals Amendment (Penalties) Bill Second Reading, 15.10.03, 3650 (Ian MacDonald).
109 Email from BOCSAR to AUTHOR, 10.2.09.
110 BOCSAR, NSW Higher Criminal Courts Statistics 2006-07, No. of finalised charges for selected sections of the NSW Crimes Act 1900 relating to animal cruelty by juris-diction and outcome.
offence. Of these three persons, one received a suspended sentence without supervision, one received a bond with supervision and one received a bond without supervision.\textsuperscript{111} While sentencing is a complex process, it is difficult to reconcile these outcomes with the stated intention of governments,\textsuperscript{112} particularly as resource limitations mean that prosecution is likely to be reserved for the most serious cases. Harsher penalties are not necessarily the best way of dealing with animal cruelty but there is a legitimate debate to be had with respect to sentencing issues without recourse to an unthinking and punitive law and order response.\textsuperscript{113}

\textbf{Conclusion}

This study suggests the following matters have relevance for the enforcement of animal welfare laws in NSW:

\begin{itemize}
    \item While POCTAA is the primary animal welfare statute, the wide range of other legislative provisions and codes means the law lacks coherence and certainty.
    \item The spread of responsibility for the enforcement of animal welfare across different agencies creates difficulties with communication and accountability.
    \item Successive governments have not only delegated the crucial task of law enforcement in large measure to private charities but have failed to resource these bodies adequately.
    \item The difficulty of obtaining detailed information means the community has little basis on which to evaluate the efficacy of current animal welfare law enforcement or legislative change with respect to it. On the available evidence, however, there appear to be significant gaps in enforcement activity.
    \item The high proportion of those charged under POCTAA who enter a not guilty plea suggests many accused fail to view their conduct as wrong and/or think they have a good chance of escaping conviction and/or that the wrong people are being targeted for prosecution.
    \item Sentencing data indicates judicial officers may be failing to give effect to the legislature’s stated intent with respect to penalties.
    \item Governmental reforms tend to focus on symbolic initiatives, such as increasing penalties, rather than politically less popular strategies that might help to change cultural attitudes and behaviour in the longer term, such as banning the sale of animals in pet shops.
\end{itemize}

\begin{footnotes}
\item[111] BOCSAR, NSW Local Courts Statistics 2006-07, No. of persons convicted of their principal offence under selected sections of the NSW \textit{Crimes Act} 1900 relating to animal cruelty by penalty.
\item[112] They also raise issues about the relationship between \textit{Crimes Act} 1900 (NSW) s530 and the general cruelty offences in POCTAA.
\end{footnotes}
Each of these factors is problematic on its own but, taken together, they tend to construct a view of animal cruelty as different from, and less serious than, other criminal conduct. Even within a welfare paradigm that accepts the routine use of animals for human ends, much more is required if animals are to receive meaningful protection.