Standards and Standard-Setting in Companion Animal Protection

Steven White*

Abstract

Legal scholarship addressing the protection of animals, including companion animals, is a vibrant and growing field in Australia and beyond. However, limited scholarly attention has so far been directed to the regulatory studies literature and the insights it may provide about standards, standard-setting, compliance monitoring and enforcement for animal protection. I explore how the legal forms of the prevailing governing norm of humaneness function as regulatory standards in a companion animal context. Given the intrinsic moral worth of companion animals, values such as social justice and paternalism, derived from political versions of public interest theory, are most relevant to understanding why the State is justified in restricting the rights that may be exercised by companion animal owners over their 'property'. The key legislative standards are a prohibition of cruelty and an obligation to meet the basic welfare needs of an animal. These provisions operate as principle-based standards, describing duties to be performed, but not specifying how they are to be achieved. I argue that the standards, as criminal provisions, perform an important censoring role. However, their content requires some elucidation, the most productive avenue being guidelines developed through an inclusive, pluralistic, delegated standard-setting process.

I Introduction

The prevailing ethic in animal protection is one of humaneness. This ethic recognises that sentient creatures have intrinsic moral significance and are, therefore, deserving of some protection against harm. This commitment, though, is qualified by the primacy granted to human interests where these may conflict with animal interests.1 An ethic of humaneness underpinned the first animal protection legislation in the United Kingdom (‘UK’)2 and a similar model was transplanted to the Australian colonies.3 Early legislation was focused on the protection of

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1 For a concise consideration of the ethic of humaneness and alternative conceptions of the obligations properly owed to animals see Robert Garner, Animal Ethics (Polity Press, 2005).

2 Cruel Treatment of Cattle Act 1822 3 Geo IV, c 71 (‘Martin’s Act’: ‘An Act to prevent the cruel and improper Treatment of Cattle’). See Radford for an analysis of the humanitarian underpinnings of this reform, one of a number cognate reforms across areas such as abolition of slavery, improved working conditions for factory workers and the protection of children: Mike Radford, Animal Welfare Law in Britain: Regulation and Responsibility (Oxford University Press, 2001) chs 2–4.

working animals. However, the idea that animals were worthy of some moral consideration was, at least in part, influenced by the acceptance of companion animals into households, becoming ‘a normal feature of the middle-class household’ through the 16th and 17th centuries. Today, companion animals are regarded by most households as ‘members of the family’. Their presence in our everyday life is significant, with an estimated 5 million households in Australia having a companion animal, including 4.2 million dogs and 3.3 million cats. The keeping of companion animals is economically significant, generating an estimated $8 billion in spending annually.

Legal scholarship addressing the protection of animals, including companion animals, is a vibrant and growing field in Australia and beyond. However, limited scholarly attention has so far been directed to the regulatory studies literature and the insights it may provide about standards, standard-setting, compliance monitoring and enforcement for animal protection. In this article, I explore how the legal forms of the prevailing governing norm of humaneness function as regulatory standards in a companion animal context.

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7 Ibid 4.
11 Scott suggests that ‘conceived of in the most general terms, standards are the norms, goals, objectives, or rules around which a regulatory regime is organised’: Colin Scott, ‘Standard-Setting in Regulatory Regimes’ in Robert Baldwin, Martin Cave and Martin Lodge (eds), The Oxford Handbook of Regulation (Oxford University Press, 2010) 104, 104. Similarly, Freiberg defines standards as ‘norms or criteria that are provided in order to specify clearly what is acceptable and
principally concerned with standards and standard-setting, some consideration is
given to compliance monitoring and enforcement, since ‘all regulatory techniques
must be given flesh through the enforcement process if they are to achieve their
intended purpose’. The types of standards used in a regulatory regime are a
significant factor in determining the style of compliance monitoring and
enforcement adopted, as the analysis in this article confirms.

The jurisdictional focus of this article is on Queensland, where the
regulatory approach is broadly typical of that taken in other jurisdictions. The key
legislative standards are a prohibition of cruelty and an obligation to meet the
basic welfare needs of an animal. These standards, determined through a process
of political deliberation, operate as principle-based standards, describing duties to
be performed, but not specifying how they are to be achieved. I argue that the
standards, as criminal provisions, perform an important censoring role. However,
their content requires some elucidation, whether through prosecuting authorities
exercising enforcement powers, judicial interpretation and/or transparent and
accessible guidelines readily available to the general public.

To ground my argument, I first examine the justifications for regulatory
intervention in a companion animal context, arguing that non-economic
conceptions of regulation are most relevant here. In particular, I apply what
Morgan and Yeung refer to as ‘political versions’ of public interest theory, which
suggest an understanding of regulation encompassing broader values than those of
traditional welfare economics.
The State, through legislation, is the formal standard-setter. However, in Queensland, as in some other jurisdictions, responsibility for compliance monitoring and enforcement of the legislation has largely been outsourced. This is achieved, in part, through a Memorandum of Understanding (‘MOU’), under which the State Department of Agriculture and Fisheries (‘DAF (Qld)’) is primarily responsible for compliance monitoring and enforcement for farm animal protection, and RSPCA Queensland for companion animal protection. Some other agencies may also have a role in companion animal protection, including the Queensland Police Service (‘QPS’) under relevant legislation, and non-government organisations such as the Animal Welfare League Queensland (‘AWLQ’), to the extent it engages in humane education initiatives. Other institutions may also be significant in broader matters of companion animal welfare, including local governments addressing matters such as identification, registration, desexing, and dangerous or menacing dog declarations. RSPCA Queensland and AWLQ also engage in humane education initiatives through their shelter operations. Although these animal management matters should also be regarded as significant aspects of animal protection, this article is more narrowly focused on animal protection standards.

A companion animal code of practice has not yet been developed to expand on the statutory commands in ss 17 and 18 of the ACP Act (Qld). The scope of the standards is, therefore, left to be shaped principally by two institutions: RSPCA Queensland, as the key agency enforcing the standards, and the courts, by interpreting and applying the legislation. This article examines the strengths and weaknesses of this set of arrangements. The role of the courts in interpreting the statutory standards is extremely limited, given the non-indictable status of offences under the ACP Act (Qld) and the generally cautious approach to prosecution.

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18 Jim Varghese (Director-General, Queensland Department of Primary Industries and Fisheries), Submission No 203 to Senate Rural and Regional Affairs and Transport Committee, Parliament of Australia, Inquiry into the National Animal Welfare Bill 2005, 15 February 2006, 4. The most recent MOU (or Activity Agreement) between DAF (Qld) and RSPCA Queensland is for the period 1 July 2013 to 30 June 2014.

19 Police Powers and Responsibilities Act 2000 (Qld) ch 6 (especially pts 5–6); Criminal Code Act 1899 (Qld) sch 1, ss 242 (serious animal cruelty), 468 (injuring animals) (‘Criminal Code (Qld)’). DAF (Qld), RSPCA Queensland and the QPS have entered into a draft MOU, Draft Protocol for Dealing with Animal Welfare Incidents (2009). No final protocol has yet been produced, and the draft states that the protocol is not intended to be legally binding.

20 See Animal Management (Cats and Dogs) Act 2008 (Qld).

21 For a detailed discussion of animal management issues, see Steven White, ‘Regulation of the Treatment of Companion Animals’ in Deborah Cao, Animal Law in Australia (Thomson Reuters, 2nd ed, 2015) ch 6. See also Alex Bruce, Animal Law in Australia: An Integrated Approach (LexisNexis, 2012) ch 5.

22 ACP Act (Qld) s 178 (‘An offence against this Act is a summary offence’). The offence of serious animal cruelty (Criminal Code (Qld) s 242) commenced 15 August 2014 and is an indictable offence. The scope of this provision may well be tested as a result of numerous charges arising in 2015 from a joint RSPCA Queensland and QPS investigation into live baiting in the Queensland greyhound racing industry: RSPCA Queensland, Annual Report 2014–2015, 19 <http://www.rspcaqld.org.au/who-we-are/annual-report>. The first conviction under this new provision, arising from the live baiting investigation, occurred in February 2016. The defendant pleaded guilty: see Adam Davies, ‘Disgraced Trainer to be Sentenced on Animal Cruelty Charges’, The Queensland Times (online), 10 February 2016 <http://www.qt.com.au/news/greyhound-trainer-pleads-guilty-animal-cruelty-cha/2927420/>. The defendant was subsequently sentenced to a three-
pursued by RSPCA Queensland. Most matters that are appealed to a higher court concern matters of sentencing, rather than conviction, resulting in a paucity of authoritative judgments addressing the content of the standards. Despite this, I argue that the criminalisation of animal protection breaches is defensible, even if steps should be taken to address the level of transparency, accessibility and congruence embodied in the protection standards.

II Justifications for Regulatory Intervention to Protect Companion Animals

Animal protection legislation represents an attempt to reconcile the intrinsic moral worth of animals with their legal status as objects of property, typically through provisions that prohibit unnecessary, unjustifiable or unreasonable pain or suffering. Significantly, the intervention is to protect the property itself from harm. This contrasts with regulatory intervention affecting other forms of personal property, which will most often be concerned to set the market rules for trade in the property with little concern for how that property may be treated by the owner. Liability rules may be in place allowing for damages for harm to personal property, including companion animals, but these rules are focused on addressing the economic harm experienced by the owner of that property due to the wrongdoing of another, not the ‘well-being’ of the property per se.

Despite the property status of companion animals, the conception of animal protection regulation advanced in this article is at odds with the conventional, neoclassical economic understanding of regulation as being only concerned with the shaping of markets or, even more narrowly, as a necessary response to instances of market failure. As Prosser points out:

> Particularly in political debate, the meaning of regulation has often been simplistic and taken for granted; it is treated in a deceptively simple manner as imposing a burden, as the opposite of free markets. ... Regulation is thus an always regrettable means of correcting market failures. This concept of...


In Queensland, see ACP Act (Qld) s 18(2)(a) (cruelty includes causing an animal ‘pain that, in the circumstances, is unjustifiable, unnecessary or unreasonable’). This is a utilitarian approach to animal welfare, which requires trade-offs to be made between animal well-being on the one hand, and human judgements about what is necessary, reasonable or justifiable on the other: see further Bruce, above n 21, 48–55. The imprecise nature of this balancing exercise leads to different outcomes for animals depending on their context (for example, a companion animal context versus a farm or research animal context): see Peter Sankoff, ‘The Protection Paradigm: Making the World a Better Place for Animals?’ in Peter Sankoff, Steven White and Celeste Black (eds), Animal Law in Australasia: Continuing the Dialogue (Federation Press, 2nd ed, 2013) 7.

Torts law in Australia currently reflects a rigorous property paradigm in assessing damages for harm to, or loss of, a companion animal. As Bruce suggests ‘the negligent or malicious loss or damage to a companion animal will result in damages that are assessed on the fair market value of the animal’ and ‘it is unlikely that in Australia a court would be prepared to award damages for loss of companionship or emotional distress on the death of a companion animal’: above n 21, 134.
regulation is, by implication, a narrow one; regulation is part of economic management.25

Other conceptions have focused narrowly on regulation as ‘a type of legal instrument’, or as ‘something done by government actors’.26 These standard, early definitions of regulation have given way to accounts that extend beyond economics and the market, beyond legal rules, and beyond only government actors. Black argues for a ‘decentred’ understanding of regulation, defining regulation as ‘the sustained and focused attempt to alter the behaviour of others according to defined standards or purposes with the intention of producing a broadly identified outcome or outcomes, which may involve mechanisms of standard-setting, information-gathering and behaviour-modification’.27 Regulation, according to this definition, is ‘an activity that extends beyond the state, thus regulation may on the basis of such a conceptualisation embrace a variety of forms of relationship between state, law and society’.28 This broader understanding of regulation is important in a context where economic rationales for regulation remain dominant.29

Regulation of companion animal protection can best be understood from a public interest perspective that emphasises values other than those embodied in the idea of market efficiency. This is a ‘political version’ of public interest theory, according to which ‘values such as social justice, redistribution or paternalism may also figure in the critical assessment of what justifies regulation’.30 If the interests of companion animals count for something ethically, then their protection against harm provides a ‘non-economic, substantive’ justification for regulatory intervention.31 This justification is summarised by Sunstein:

The idea here is that animals, species as such, and perhaps even natural objects warrant respect for their own sake, and quite apart from their interactions with human beings. Sometimes such arguments posit general rights held by living creatures (and natural objects) against human depredations. In especially powerful forms, these arguments are utilitarian in character, stressing the often extreme and unnecessary suffering of animals who are hurt or killed. [Animal protection legislation] reflects these concerns.32

28 Ibid.
29 Mike Feintuck, ‘Regulatory Rationales beyond the Economic: In Search of the Public Interest’ in Robert Baldwin, Martin Cave and Martin Lodge (eds), *The Oxford Handbook of Regulation* (Oxford University Press, 2010) 39, 41. Feintuck points out that it ‘is impossible to deny the ongoing dominance of [neoclassical] economic approaches to public services in both governmental and scholarly circles’: at 40.
30 Morgan and Yeung, above n 12, 16.
31 Ibid 27.
If there is a sound, non-instrumental justification for regulatory intervention to protect companion animals, as argued above, does it matter that they are designated as personal property? The significance of the property status of animals is a keenly contested matter, sometimes a proxy for the debate between those advancing animal welfare goals and those advancing animal rights goals. Sunstein rejects the idea that property matters in any substantive sense, arguing that those who ‘have bought their dog do not think that they own a “thing”. Payment does not make people believe that the animal with whom they live is a mere commodity. The real problem here is the mistreatment of animals, not the mere fact of sale. However, issues such as companion animal overpopulation, puppy farming, and perverse breeding standards underscore the significance of the property status ascribed to companion animals. Importantly, Sunstein acknowledges that the rhetorical idea of property, if not the concept itself, is nonetheless important. He states that ‘the idea that animals are mere “property” is an anachronism, inconsistent with our considered judgments about the relationships between people and animals; we should abandon the metaphor of “property”’. Sunstein’s observation about the anachronistic nature of the language of property is compelling — including in a companion animal context, where animals are very often regarded, in a meaningful sense, as members of the family. In a farming context, there is a straightforward commodification of animals. In a companion animal context, though, ‘our relationship ... has become particularly complex, since [companion animals] have been rendered simultaneously more akin to family members and more commodified’.

In summary, intervention by the State to protect companion animals through restricting the rights of owners can be justified on a public interest ground that acknowledges the ethical claims of these animals. However, the prevailing property status of companion animals, while consistent with a governing norm of humaneness, remains problematic, especially given the effects of commodification in the breeding, selling and relinquishing of animals. Having identified these normative constraints for standard-setting to protect companion animals, Part III of this article shifts the focus to a consideration of the standards that are currently in place in Queensland.

III Legislative Standards for Companion Animal Protection

If there is a sound, non-instrumental justification for regulatory intervention to protect the interests of companion animals, how is this intervention expressed in Queensland? This Part explores the key legislative provisions governing

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35 For a detailed account of each of these aspects, see White, above n 21, 165–9.
companion animal protection. The significance of criminalising animal cruelty is discussed, as well as the potential limitations of this approach. No codes of practice for companion animal protection have been developed or adopted in Queensland. This means that the statutory safeguards remain, at least in formal terms, the key standard-setting text. There is a similar absence of a code addressing companion animal protection under the Animal Welfare Act 2006 (UK). Corr speculates that the ‘lack of specific legislation may reflect a belief that companion animals are kept for pleasure and therefore the majority will be well looked after’.38 Corr argues there is a need to see through such complacency, and a similar argument is advanced through this article in a Queensland context.

A The Prohibition against Cruelty

Section 18(1) of the ACP Act (Qld) provides that ‘[a] person must not be cruel to an animal’. This standard is very generally expressed, operating as a principle-based standard. It establishes a duty, but ‘without specifying the means of achieving that outcome, leaving it to other bodies to interpret the meaning of the principle in a particular context’.39 A maximum penalty of 2 000 penalty units40 or three years’ imprisonment applies for breaching the provision. Section 18(2) sets out a non-exclusive list of acts that may amount to cruelty to an animal, providing some limited guidance on the scope of the prohibition:

(a) causes it pain[41] that, in the circumstances, is unjustifiable, unnecessary or unreasonable;
(b) beats it so as to cause the animal pain;
(c) abuses, terrifies, torments or worries it;
(d) overdrives, overrides or overworks it;
(e) uses on the animal an electrical device prescribed under a regulation;
(f) confines or transports it—
   (i) without appropriate preparation, including, for example, appropriate food, rest, shelter or water; or
   (ii) when it is unfit for the confinement or transport; or
   (iii) in a way that is inappropriate for the animal’s welfare; or
   (iv) in an unsuitable container or vehicle;
(g) kills it in a way that—
   (i) is inhumane; or
   (ii) causes it not to die quickly; or
   (iii) causes it to die in unreasonable pain;
(h) unjustifiably, unnecessarily or unreasonably—
   (i) injures or wounds it; or
   (ii) overcrowds or overloads it.

39 Freiberg, above n 11, 92.
41 Pain is defined to include ‘distress and mental or physical suffering’: ACP Act (Qld) s 10, sch (Dictionary).
There are a number of important points to note about the regulatory standard imposed by s 18: the liability status of the offence; the lack of significant case law addressing the meaning of cruelty and, in particular, the ‘no unnecessary suffering’ qualification reflected in s 18(2)(a); the significant increase in penalties imposed under the provision since 2001; and the introduction of a new aggravated cruelty offence. Collectively, these characteristics of the cruelty prohibition reflect a lack of judicial or other interpretation of the scope of the prohibition and a policy focus on penalty escalation.

1 Liability Status of the Offence under ACP Act (Qld) s 18

The liability status of the offence under s 18 of the ACP Act (Qld) is not clear on the face of the statute. There are no reported Queensland cases on this point, either under the ACP Act (Qld), or previous legislation. Pearson v Janlin Circuses Pty Ltd, a Supreme Court of New South Wales (‘NSW’) case on the equivalent NSW provision, suggests that mens rea would not be required.42 This authority turns on an understanding of the distinction between ‘strict liability’ and ‘absolute liability’, where strict liability offences are ‘those offences for which a person may be convicted without proof of intention, recklessness or knowledge’, while absolute liability offences ‘are more draconian in that they do not permit a claim of honest and reasonable mistake of fact’.43

The NSW authority suggests that while liability for the offence of animal cruelty is not absolute, the legislative intent of such provisions should be read as not requiring proof of mens rea.44 In the Al Kuwait live export case,45 the Magistrate considered the issue of knowledge on the part of the accused in establishing the cruelty offence under s 19 of the Animal Welfare Act 2002 (WA). The Magistrate observed that Western Australia (like Queensland) is a code jurisdiction, and that the Criminal Code (WA) provides a defence where there is a finding of honest and reasonable but mistaken belief in a state of things.46 The Al Kuwait case, although noting Bell v Gunter,47 did not further examine the issue of mens rea, so that the NSW approach remains persuasive.48
A second important point about s 18 is the lack of any significant case law on the meaning of ‘cruelty’. In characterising the meaning of ‘cruelty’, the use of the qualifying phrase ‘unjustifiable, unnecessary or unreasonable’ in some of the examples of cruelty provided in s 18(2) is notable. Such a qualification has been a staple of animal protection legislation almost since its inception. The qualification suggests a need to balance any harm inflicted on an animal with considerations of what might be justifiable, necessary or reasonable. This is a legislative expression of the governing norm of humaneness, extending protection to animals, but only so far as this does not conflict with any overriding human interests. In an early and still influential English case, *Ford v Wiley*, Lord Coleridge held that:

> It is further lawful to inflict [pain] if it is reasonably necessary; a phrase vague, no doubt, but with which in many branches of the law every lawyer is familiar. This involves the consideration of what ‘necessary’, and ‘necessity’ mean in this regard. It is difficult to define these words from the positive side, but we may perhaps approach a definition from the negative ... Abuse of the animal means substantial pain inflicted upon it, and unnecessary means that it is inflicted without necessity, and under the word ‘necessity’ ... . I should include adequate and reasonable object.

The UK adopted a form of this judicial characterisation of the ‘no unnecessary suffering’ standard in the *Animal Welfare Act 2006* (UK). A number of considerations relevant to determining whether ‘unnecessary suffering’ is made out are listed in s 4(3) of that statute, including ‘whether the conduct which caused the suffering was for a legitimate purpose’.

The exercise of balancing pain inflicted on an animal with a reasonable object has been characterised as making an important contribution to the improved treatment of animals:

> The concept of unnecessary suffering, which has been developed by the courts and widely adopted by the legislature, has two very considerable merits. First, it may be applied to a multitude of different situations. Secondly, it can be constantly reinterpreted by the courts in the light of greater understanding about animal suffering, and changing social attitudes regarding the proper treatment of animals.
Radford argues, by reference to English and Scottish decisions concerning the cruel treatment of farm animals, that the courts have, in some circumstances, shown a willingness to place the interests of animals ahead of those of farmers. In Australia, the Magistrates Court in the Al Kuwait case found that it was not necessary for a proportion of sheep in a live export shipment — those which were adult fat sheep — to be shipped during summer months. The Court in Al Kuwait drew on Ford v Wiley to state that ‘necessity requires proportion between the object and the means’. The Magistrate stated that the object of commercial gain had to be weighed against the likelihood of harm to the sheep if transported in the hot part of the year, and concluded that ‘I am satisfied and find that any harm suffered to fat adult sheep was unnecessary’.

There has been no higher court consideration of how the balancing test should be applied in Australia, including in Queensland. When the ACP Act (Qld) was introduced in 2001, the Queensland branch of the Australian Veterinary Association noted the need for further clarification of the meaning of the cruelty provision clauses in s 18, suggesting any ambiguity should be tested in court, rather than legislation being overly prescriptive.

There are at least two important reasons why the scope of s 18 has not been tested in court. For one thing, although the ‘no unnecessary pain’ standard nominally applies to the treatment of companion animals in Queensland, it generally does not apply to the treatment of most other categories of animal, due to the application of offence exemptions for compliance with codes of practice. These exemptions significantly limit the potential pool of cases in which the scope of the provision might be tested.

While the cruelty standard (and duty of care standard) might nominally apply in a companion animal context, a range of structural factors render them largely irrelevant. The annual number of prosecutions brought for animal cruelty or breach of duty offences is very low. Table 1 below summarises cases brought by RSPCA Queensland since 1999.

DAF (Qld) has brought some prosecutions concerning companion animals, although these have been comparatively few and focused on puppy farming.
### Table 1: Summary of Complaints and Prosecutions Conducted by RSPCA Queensland 1999–2015

<table>
<thead>
<tr>
<th>Year</th>
<th>Complaints</th>
<th>Prosecutions</th>
<th>Outcome: Successful/Convictions/Pending</th>
</tr>
</thead>
<tbody>
<tr>
<td>2014–15</td>
<td>18499</td>
<td>20</td>
<td>All completed prosecutions successful, with 36 further prosecutions pending.</td>
</tr>
<tr>
<td>2013–14</td>
<td>18332</td>
<td>27</td>
<td>One matter did not proceed, all other prosecutions successful or pending.</td>
</tr>
<tr>
<td>2012–13</td>
<td>15737</td>
<td>11</td>
<td>One matter did not proceed, 11 successful prosecutions, with 10 further cases pending.</td>
</tr>
<tr>
<td>2011–12</td>
<td>15102</td>
<td>30</td>
<td>All prosecutions successful, with four further cases pending.</td>
</tr>
<tr>
<td>2010–11</td>
<td>13661</td>
<td>26</td>
<td>10 successful prosecutions, with 16 pending.</td>
</tr>
<tr>
<td>2009–10</td>
<td>13191</td>
<td>26</td>
<td>18 convictions, with 14 cases pending.</td>
</tr>
<tr>
<td>2008–09</td>
<td>11724</td>
<td>23</td>
<td>20 convictions, with three cases pending.</td>
</tr>
<tr>
<td>2007–08</td>
<td>11034</td>
<td>51</td>
<td>50 convictions, with three cases pending.</td>
</tr>
<tr>
<td>2006–07</td>
<td>9574</td>
<td>40</td>
<td>32 convictions, with nine cases pending.</td>
</tr>
<tr>
<td>2005–06</td>
<td>9445</td>
<td>51</td>
<td>51 convictions.</td>
</tr>
<tr>
<td>2004–05</td>
<td>10942</td>
<td>48</td>
<td>34 convictions, with 11 cases pending.</td>
</tr>
<tr>
<td>2003–04</td>
<td>10260</td>
<td>43</td>
<td>32 convictions, with 11 cases pending.</td>
</tr>
<tr>
<td>2002–03</td>
<td>9079</td>
<td>57</td>
<td>No figures available on convictions, with 16 cases pending.</td>
</tr>
<tr>
<td>2001–02</td>
<td>10675</td>
<td>62</td>
<td>56 convictions, with 10 cases pending.</td>
</tr>
<tr>
<td>2000–01</td>
<td>10704</td>
<td>87</td>
<td>61 convictions, with 25 cases pending.</td>
</tr>
<tr>
<td>1999–2000</td>
<td>9441</td>
<td>70</td>
<td>65 convictions, with 5 cases pending.</td>
</tr>
</tbody>
</table>

Data is drawn from RSPCA Queensland, Annual Report and AGM Notices [http://www.rspcaqld.org.au/who-we-are/annual-report] and RSPCA Australia, Published Statistics [http://www.rspca.org.au/facts/annual-statistics/published-statistics]. Reporting of statistics is not necessarily consistent across years (eg categories may change) and there are minor discrepancies between the figures reported by each entity. Also, the prosecution results for one year may include those commenced in a previous year, but not finalised until the reporting year. The results in Table 1 seek to synthesise the data, but may reflect some of this lack of uniformity.

The ACP Act (Qld) commenced 1 March 2002.

Emmerson notes that in the 1999–2000 reporting year, RSPCA Queensland ‘placed a record number of 70 prosecutions before the Queensland courts. … However, the RSPCA claims the cost of investigating animal cruelty is more than 1.1 million annually. The Queensland branch of the RSPCA has recently achieved two precedent-setting victories. The first was a conviction for dog fighting, the first in Queensland’s history. In addition, the Court of Appeal upheld a conviction against Afro-Ostrich Farms in relation to providing food and shelter to livestock animals, establishing a legal standard for animal husbandry’: Emmerson, above n 56, 12 (citations omitted).
Further, where cases are brought, they tend to be the most extreme incidents of cruelty or breach of duty, consistent with a strategy of general deterrence and with ensuring that the regulator’s legitimacy is not undermined by unsuccessful prosecutions. The strict liability status of the cruelty offence, combined with the policy of prosecuting only the worst examples of breach, ensures that most offenders plead guilty. In practice, the only substantive arguments concern the appropriate penalty. This means that ‘very little case law is generated to assist in future interpretation of the statute’.  

A rare example of higher court consideration of a ‘no unnecessary pain’ standard is the Québec Court of Appeal judgment in *R v Menard*.  

Notably, however, this case interprets the ‘no unnecessary pain’ standard in a way that is consistent with a limited ethic of humaneness. Sankoff argues that the case dilutes the test of necessity to one of legitimacy, and that on this approach only three purposes will clearly fall outside the scope of legitimacy: sadistic cruelty or cruelty imposed for no reason at all; cruelty amounting to a waste of economic capital (that is, harm to an animal without any corresponding economic gain); and cruelty caused by laziness or poor management by animal owners.  

In a companion animal context, this test will be more easily met than for animals in primarily commercial contexts. For example, Francione points that out imposition of ‘unnecessary pain’ will be permissible where this is ‘part of an institutionalized or accepted exploitation of animals’, such as in farming. However, there will be cases, including that of the ‘family’ companion animal owner, where the imposition of harm will not bring any corresponding gain. In these cases, the ‘property owner must not inflict gratuitous pain on the animal, since this would generate no social benefit and would decrease overall social wealth’.  

### 3 Penalties and Enforcement for Breach  

A third important feature of the cruelty prohibition in s 18 is the significant increase in the maximum penalty since 2001 and the introduction of the *ACP Act* (Qld). Prior to the passage of this Act, the maximum penalty for cruelty was $1500 (20 penalty units) or imprisonment for six months.  

The new legislation increased the penalty to $75 000 (1000 penalty units) or two years’ imprisonment. A specific increase in 2013, as well as general increases in the value of a penalty unit, mean that as from 1 July 2016 the maximum penalty stands at $243 800 (2000 penalty units) or three years’ imprisonment.  

In a context where, since 2001, there has not been significant structural change in animal protection regulation, penalty increases for cruelty — a form of general and specific deterrence — can be characterised as the main vehicle of reform. Deterrence, as a feature of criminal law, has a clear regulatory objective,
aiming ‘to change the behaviour of offenders or potential offenders’, so that acts are avoided for fear of the consequences.\(^{68}\) In the language of deterrence theory, recent Queensland animal protection reform has, in part, implemented marginal deterrence ‘where existing laws are better enforced or where penalties are increased’.\(^{69}\)

Freiberg suggests that deterrence involves a calculus where the perceived benefit of offending must be outweighed by the sum of multiplying the perceived severity of the sanction and the perceived likelihood of detection and punishment.\(^{70}\) Importantly, Freiberg points out that ‘[t]hough the certainty (of detection) effect is stronger than the severity effect, it is much easier for policy makers and legislators to boost maximum penalties (severity) in order to be seen to be doing something about crime’.\(^{71}\) This observation is borne out with respect to the significant penalty increase under s 18, implemented in 2013, which involved a doubling of the maximum fine and an increase in potential imprisonment from two years to three years.\(^{72}\) The increase was introduced as part of a newly elected conservative government’s broader commitment to a ‘crackdown’ on law and order.\(^{73}\) The Minister, in his Explanatory Speech on the Bill, stated that the ‘amendment is in response to concerns from the public and animal welfare organisations over the relatively low level of penalties applied by the courts to those who perpetrate animal cruelty’ and is ‘intended to signal to the community and the courts that animal cruelty is a serious matter to which serious penalties should apply’.\(^{74}\)

The initial significant increase in penalties in 2001 was similarly premised on deterrence concerns and community expectations. The Minister, in his Second Reading Speech on the Animal Care and Protection Bill 2001, referred to the conventional wisdom that the general community holds that deliberate cruelty to animals is abhorrent and unacceptable, and expects that, in other than exceptional circumstances, the perpetrator must be punished severely, and severely enough to deter others.\(^{75}\)

4 **Aggravated Cruelty Offence**

A fourth feature of the cruelty prohibition in s 18 of the *ACP Act* (Qld) is that it is no longer the only statutory standard specifically prohibiting cruelty to animals. Consistent with a focus on deterrence, the Queensland Parliament enacted s 242 of the *Criminal Code* (Qld), a new indictable offence of serious animal cruelty with a maximum penalty of seven years’ imprisonment.\(^{76}\) The provision is explicit about

\(^{68}\) Freiberg, above n 11, 211.
\(^{69}\) Ibid (emphasis added).
\(^{70}\) Ibid 212.
\(^{71}\) Ibid 213.
\(^{72}\) *Agriculture and Forestry Legislation Amendment Act 2013* (Qld) s 26.
\(^{73}\) It should be noted that the previous (Labor) Government had proposed very similar changes, the Bill lapsing with the calling of an election and the proroguing of Parliament: see Criminal and Other Legislation Amendment Bill 2011 (Qld).
\(^{76}\) As noted previously, the provision commenced 15 August 2014.
the need for intent, providing that a ‘person who, with the intention of inflicting severe pain or suffering, unlawfully kills, or causes serious injury or prolonged suffering to, an animal commits a crime’. In introducing the Bill containing the new offence, the Attorney-General of Queensland stated:

The bill inserts a new offence into the Criminal Code of serious animal cruelty. The new offence will target those persons who intentionally inflict severe pain and suffering on animals — in effect, their torture. This type of offending is abhorrent and, to ensure offenders are appropriately punished, the new offence carries a maximum penalty of seven years imprisonment. The government shares the community’s frustration when offenders who have done terrible things to animals walk free without any jail time. This new offence sends a clear message that animal cruelty will not be tolerated in Queensland. The bill also amends the Animal Care and Protection Act 2001 to give animal welfare officers greater powers to investigate the new offence of serious animal cruelty. These amendments will ensure alleged offences can be appropriately investigated and offenders are brought to justice.77

The Attorney-General did not refer specifically to companion animals. However, this is an unstated assumption, since even quite serious harms imposed, for example, on farm animals or research animals, are not captured by this provision so long as they are consistent with relevant codes of practice.78

Section 242 creates an indictable offence,79 which, given the substantial penalty, may mean a greater willingness on the part of accused offenders to contest a charge or to appeal a conviction.80 Importantly, the introduction of the new offence was accompanied by an amendment to the ACP Act (Qld) providing that inspectors appointed under the ACP Act (Qld) can ‘investigate and enforce compliance’ with ss 242 and 468 of the Criminal Code (Qld),81 as well as with the ACP Act (Qld). This, in effect, bestows authority on RSPCA Queensland inspectors to enforce the new serious animal cruelty offence, at least through the committal stage in the Magistrates Court.82 While this allows the expertise and

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77 Queensland, Parliamentary Debates, Legislative Assembly, 8 May 2014, 1465–6 (Jarrod Bleijie).
78 This is because any acts authorised by the ACP Act (Qld) through an exemption process will not be unlawful under s 242: see Criminal Code (Qld) s 242(2).
79 Criminal Code (Qld) s 3(3).
80 It should also be acknowledged that proceedings for indictable offences ‘may be lengthy, expensive and resource intensive’, which may persuade a prosecuting agency (such as RSPCA Queensland or DAF (Qld)) to exercise a discretion to proceed summarily rather than on indictment: Freiberg, above n 11, 217–18.
81 ACP Act (Qld) s 115(1)(c). Criminal Code (Qld) s 468(1) provides that ‘[a]ny person who wilfully and unlawfully kills, maims, or wounds, any animal capable of being stolen is guilty of an indictable offence’. A maximum penalty of two years’ imprisonment applies, or three years if the offence occurs at night: s 468(3). The Queensland Government argued that a new offence of serious animal cruelty was required in addition to s 18 of the ACP Act (Qld) and s 468 of the Criminal Code (Qld) since ‘[t]hese existing offences both have limitations and do not adequately provide for the case where a person intentionally inflicts severe pain and suffering on an animal’: Office of the Director-General, Department of Justice and Attorney-General, Queensland, ‘Parliamentary Committee Briefing Note for the Legal Affairs and Community Safety Committee on the Criminal Law Amendment Bill 2014’, (20 May 2014), 6 <http://www.parliament.qld.gov.au/documents/committees/LACSC/2014/CLAB2014/cor-20May2014.pdf>.
82 The extent to which RSPCA Queensland engages in enforcement activities is determined by the resources available and strategic decisions about the appropriate mix between compliance activities (ie humane education) and deterrence activities. The passage of s 242 of the Criminal Code (Qld),
experience of RSPCA inspectors to be utilised in investigating and prosecuting offences under s 242, it may also undermine the significance of s 18 of the ACP Act (Qld). There is a risk that in establishing parallel offences in the Criminal Code (Qld) and the ACP Act (Qld), offences in the ACP Act (Qld) will come to be seen as less clearly ‘criminal’ than the provision in Queensland’s key criminal statute.83

More broadly, the enactment of s 242 of the Criminal Code (Qld), as well as the penalty increases under s 18 of the ACP Act (Qld) discussed above, reflect a resort to penalty escalation, arguably a blunt tool for addressing harm to companion animals. This approach, couched in the general observation of Brown et al, ‘demonstrates the over-reliance we place on the operations of the criminal justice system as a protection against crime’.84 Drawing on research into crime statistics and the extent of crime, Brown et al recognise that criminal justice agencies including the police, courts and penal system are important in responding to crime.85 However, they also point out that ‘the criminal justice system is never going to substantially affect the incidence of crime because crime is largely a function of social, economic and cultural factors which remain for the most part unaffected by changes to the criminal justice system’.86 In a companion animal context, relevant factors giving rise to abuse may include mental illness, childhood abuse, and domestic violence.87

B Duty of Care

The other major animal protection standard in Queensland is the duty of care imposed on persons in charge of an animal. In 2001, the ACP Act (Qld) introduced this significant new standard, with s 17(1) providing that a ‘person in charge of an animal owes a duty of care to it’. Section 17(2) sets out a maximum penalty for breach of 300 penalty units or one year’s imprisonment.88 Section 17(1), like s 18(1), is very broadly expressed, taking the form of a principle-based standard. However, while s 17(1) can be characterised as a general duty, its scope is constrained by s 17(3), making it narrower than textbook examples of general

and the likely increased calls on RSPCA Queensland investigation and enforcement resources, was not addressed by the Government (for example, through a commitment to fund RSPCA Queensland for enforcement expenses under the new provision).

85 Ibid.
86 Ibid (emphasis in original).
87 See Catherine Tiplady, ‘Why Some People are Cruel to Animals’ in Catherine Tiplady, Animal Abuse: Helping People and Animals (CABI, 2013) 17. In Queensland, domestic violence is defined to include ‘causing or threatening to cause the death of, or injury to, an animal, whether or not the animal belongs to the person to whom the behaviour is directed, so as to control, dominate or coerce the person’: Domestic and Family Violence Protection Act 2012 (Qld) ss 8(2)(g).
88 As from 1 July 2016, this represents a fine of $36 570: see above n 40. By contrast, breach of a health and safety duty in Queensland that exposes an individual to risk of death or serious injury or illness brings a maximum fine of $182 850 (1500 penalty units): Work Health and Safety Act 2011 (Qld) s 32. Where the breach is reckless the penalty is up to $731 400 (6000 penalty units) or five years’ imprisonment: Work Health and Safety Act 2011 (Qld) s 31.
duties in other regulatory fields. Section 17(3) incorporates the ‘Five Freedoms’ into the duty, providing that:

For subsection (2), a person breaches the duty only if the person does not take reasonable steps to—

(a) provide the animal’s needs for the following in a way that is appropriate—
   (i) food and water;
   (ii) accommodation or living conditions for the animal;
   (iii) to display normal patterns of behaviour;
   (iv) the treatment of disease or injury; or

(b) ensure any handling of the animal by the person, or caused by the person, is appropriate.

Under s 17(4):

In deciding what is appropriate, regard must be had to—

(a) the species, environment and circumstances of the animal; and

(b) the steps a reasonable person in the circumstances of the person would reasonably be expected to have taken.

The ‘Five Freedoms’ are freedom from hunger, thirst and malnutrition; freedom from fear and distress; freedom from physical and thermal discomfort; freedom from pain, injury and disease; and freedom to express normal patterns of behavior. The origin of the Five Freedoms can be traced back to the 1960s Brambell Committee inquiry into the treatment of farm animals in Great Britain, with their current settled form established by the UK’s Farm Animal Welfare Council (‘FAWC’) in 1979.

The introduction of a duty of care in Queensland in 2001 reflected the temper of the times. Tasmania was the first Australian jurisdiction, in 1993, to introduce an explicit duty of care, but this provision does not define elements of the duty. The UK introduced a duty of care for farm animals in 2000. In 2006,
as part of a major revision of animal protection law, the UK included a broad duty of care applying to all domesticated animals.\footnote{Animal Welfare Act 2006 (UK) s 9. For a discussion of various elements of the UK legislation, see Oliver Bennett, ‘The Animal Welfare Bill’ (Research Paper 05/87, House of Commons Library, 7 December 2005) <http://www.parliament.uk/briefing-papers/RP05-87/animal-welfare-bill-bill-58-of-200506>.} Like the Queensland provision, the UK duty essentially incorporates the Five Freedoms. In 2012, the Northern Territory introduced a duty of care provision, again incorporating the Five Freedoms, but also including other elements explicitly allowing for the working and constraining of animals in ‘ways that are appropriate’.\footnote{Animal Welfare Act (NT) ss 7, 8.} Most recently, in 2016, the Australian Capital Territory (‘ACT’) introduced a duty of care provision substantially similar to the Queensland standard.\footnote{Animal Welfare Act 1992 (ACT) s 6B.}

Two notable aspects of the duty of care standard and its application will be addressed here. The first is whether the foundation on which the duty standard is built — the Five Freedoms — remains adequate. The second concerns the increasing significance of duty of care breaches for RSPCA Queensland prosecutions, a vivid illustration of the point made at the outset of this article about the way that the type of standard can influence approaches to enforcement.

1 Grounding the Duty of Care Standard: The Five Freedoms

Concepts of animal welfare have advanced since the Five Freedoms were first formulated in 1979, raising the issue of whether legislation utilising the Freedoms is keeping up with science. This might not matter if the Five Freedoms are understood as ideals for animal protection:

Ideals, strictly speaking, are ‘highest conceptions’, ‘perfect’, ‘existing only in idea’, ‘visionary’, and ‘dependent on the mind’. In contrast to this, the Five Freedoms could have been cast as non-ideal, i.e. real. The formulation of the Five Freedoms as ideals leads to both advantages and disadvantages as a framework for the analysis of animal welfare. The main advantage is that the ideals are more likely to be complete and comprehensive.\footnote{McCulloch, above n 91, 973.}

A criticism of the Five Freedoms, though, is that they are predominantly negative in nature: ‘freedom from’ rather than ‘freedom to’. Developed as a response to the already well-established intensification of the raising of farm animals, the Five Freedoms address objectively poor animal welfare practices. Since the 1970s, however, there has been a shift in animal welfare science research towards consideration of animal feelings, quality of life, a life worth living and well-being.\footnote{For an overview of this shift, see Mellor and Webster, above n 91. Mellor and Webster suggest at 125 (citations omitted) that [a]lthough the predominant initial purpose of science-based animal welfare initiatives was to minimise or eliminate negative affects, during the last 20 years the importance of positive experiences has become increasingly apparent. Thus, the early, almost exclusive focus on negative states may now be regarded as minimalist … . See also FAWC, Farm Animal Welfare in Great Britain: Past, Present and Future (2009). An emphasis on welfare enhancement in addition to welfare compromise underpins the notion of a life} Broom argues that ‘[t]he freedoms are not precise enough to be used...
as a basis for welfare assessment. This is now an out-dated approach that may still be useful as a preliminary guideline but should not be used if scientific evidence about needs is available.\textsuperscript{100} The Five Freedoms remain highly significant given their influence on legislation, codes of practice and other forms of regulation in a number of jurisdictions, including Queensland. This means that ‘individually, each of the freedoms is a necessary component of any comprehensive animal welfare analysis’.\textsuperscript{101} However, McCullough suggests that ‘due to the progressive nature of science, whether the Five Freedoms really are sufficient for the analysis of animal welfare will, to some extent, be an open question and subject to revision’.\textsuperscript{102}

To some extent, the framing of the duty of care in s 17 of the \textit{ACP Act (Qld)} could be interpreted as being consistent with this evolution in animal welfare science, although this has not been judicially tested and accepted. Section 17 is explicitly qualified by an appeal to providing for an ‘animal’s needs’, and reframes the Five Freedoms as positive obligations (for example, to provide for an animal’s needs for food and water, rather than to uphold a freedom from thirst or hunger). Even interpreted this way, the difficulty remains that s 17, like the cruelty prohibition in s 18, is a principle-based standard, even if its scope is narrowed by the requirements in s 17(3). This implies that the interpretation of the meaning of the standard is a matter for other bodies.\textsuperscript{103} As has been addressed already, there has been virtually no higher court consideration of the meaning and scope of the cruelty provision in Queensland, and the same is so for the duty of care standard in s 17. This means that interpretation of the duty of care provision is, in practice, a matter for institutions other than the courts.

Delegated standard-setting processes could be particularly significant in the absence of judicial guidance. A general duty such as that embodied in s 17(1) is consistent with the idea of ‘responsive law’, a general social theory of law that ‘suggests that law should promulgate broad substantive values across a range of self-regulating or semiautonomous social fields’.\textsuperscript{104} Responsive law also emphasises that identification and promulgation of values should occur in a participatory way, with delegated decision-making processes allowing for a range of non-legal perspectives in setting more detailed standards.\textsuperscript{105} In the context of the \textit{ACP Act (Qld)}, s 17(1) reflects the broadly expressed, substantive value of ensuring that reasonable steps are taken to address the basic welfare needs of animals. However, consistent with a regulatory theory of responsive law, if principle-based standards based on reasonableness are to work effectively they need ‘to be supplemented by other forms of regulation, such as detailed regulations, incorporation of standards, codes of practice, evidentiary standards and provision of detailed information’.\textsuperscript{106} With the exception of a voluntary code

\textsuperscript{100} Donald M Broom, ‘A History of Animal Welfare Science’ (2011) 59(2) \textit{Acta Biotheoretica} 121, 129.
\textsuperscript{101} McCulloch, above n 91, 974.
\textsuperscript{102} Ibid.
\textsuperscript{103} Freiberg, above n 11, 92.
\textsuperscript{104} Christine Parker, ‘The Pluralization of Regulation’ (2008) 9(2) \textit{Theoretical Inquiries in Law} 349, 356.
\textsuperscript{105} Ibid 356–7.
\textsuperscript{106} Freiberg, above n 11, 94 (citations omitted).
of practice for pet shops, no codes of practice have been prepared in Queensland addressing care of companion animals.

Other jurisdictions have adopted a range of codes of practice, mostly voluntary, focused on various aspects of companion animal management or their care in particular settings (for example, for pet shops, boarding establishments, keeping pets in cages etc). However, the ACT has published two codes of practice — one for cats and one for dogs — that focus specifically on companion animal welfare. Some government departments have published extensive guidance on choosing and caring for companion animals, although DAF (Qld) has published only limited information. RSPCA Queensland publishes limited advice on various aspects of companion animal care, with more detailed guides published by RSPCA Australia. AWLQ, an animal shelter organisation based in south-east Queensland, provides significant educational resources addressing companion animal care. There exists, then, a plethora of sources of information on companion animal welfare, of varying quality and depth. It is not clear, though, how this could be used in an enforcement context under a provision such as s 17 of the ACP Act (Qld). The Companion Animal Working Group, part of the Australian Animal Welfare Strategy (‘AAWS’), recognised this gap in standard-setting and the need for supplementation in this area:

107 DAF (Qld), About the Pet Shop Code. This code is under revision.
108 It is notable that the only relevant guidelines in place in Queensland are for a sector commercially exploiting companion animals. More prescriptive guidelines may be particularly important in a context outside a household ‘pet’ scenario, where the risk of harm to animals is accentuated by their instrumental use as tools of profit. Although outside the scope of this article, effective regulation of breeders and pet shops may require regulatory responses that are distinct from those for companion animals in a household setting.
110 Animal Welfare (Welfare of Cats in the ACT) Code of Practice 2007 and Animal Welfare (Welfare of Dogs in the ACT) Code of Practice 2010 (‘Dogs Code (ACT)’): see. The codes were developed by the ACT Animal Welfare Advisory Committee (ie not a government department) and then tabled by the Minister. The ACT has a small population and is Australia’s best-educated and wealthiest jurisdiction. The codes are premised on the obligation created by choosing to keep domesticated animals and a need to provide guidelines on proper care. For example, the Dogs Code (ACT) states that it has been prepared in order ‘to provide guidelines for the welfare of dogs, including minimum standards of accommodation, management and care. Since humans can alter and control an animal’s environment, animal welfare includes the concept that people have duties and responsibilities towards animals. The greater the level of interference or control of an animal’s environment, the greater our responsibility’: Dogs Code (ACT), 1.
111 See, eg, Agriculture Victoria, Pets.
112 DAF (Qld), Information for Pet Owners.
113 See, eg, RSPCA Queensland, Provide Animal Care Advice.
114 RSPCA Australia, Knowledgebase – Caring for a New Pet.
115 AWLQ, Education.
116 The Commonwealth Government coordinated the AAWS until December 2013, when funding was withdrawn. The AAWS was introduced in 2004 and was a collective, federal response to the need
During phase 1 of the AAWS, this working group progressed a national standard for non-production animals with the Council of Australian Government’s (COAG) decision-making process. Work was undertaken to benchmark the companion animal sector. This identified the need to have an animal population management system that provides information on euthanasia rates and where pets are sourced from. It also revealed a need to continue to improve pet wellbeing, conduct more animal welfare research and develop consistent standards nationwide. The priority in phase 2 will be to progress the development, consultation and endorsement of national standards for cats and dogs.117

With the cessation of the AAWS, there is no institutional commitment to implementation of the second phase of the Companion Animal Working Group national standards development process.

2 Preponderance of Duty of Care Prosecutions vis-a-vis Cruelty Prosecutions

A second notable aspect of the duty of care offence is the extent to which it has become a significant tool in the enforcement armoury of RSPCA Queensland. This is so notwithstanding that the ideals underpinning the provision, the Five Freedoms, were developed as a response to concern about the intensification of the rearing of farm animals. In recent years, the overwhelming majority of prosecutions in a companion animal context have been for breach of duty of care, rather than cruelty. For example, in 2013–14, of the 15 prosecutions listed by RSPCA Queensland in their annual report, three were identified as cruelty prosecutions, one was not identified, and 11 were identified as duty of care offences.118 In 2012–13, of the 17 prosecutions listed, 16 concerned duty of care offences.119 In 2011–12, of the 20 prosecutions listed, four were cruelty prosecutions, one was an unreasonable abandonment prosecution and 15 were duty of care offences.120 This might suggest that duty of care incidents are more common than incidents of cruelty, or at least that a duty of care breach is easier to establish than the narrower standard of cruelty, especially in circumstances where there is a thin line between neglect on the one hand, and cruelty on the other.


C  Other Prohibitions and Restrictions

In addition to the two key principle-based standards set out in ss 17 and 18 of the ACP Act (Qld), the legislation includes a number of specific prohibitions or requirements that are imposed on persons in charge of an animal. These include penalties for: conducting prohibited events (such as cockfights and dogfights);\(^\text{121}\) causing a captive animal to be injured or killed by a dog;\(^\text{122}\) releasing an animal for injuring or killing by a dog;\(^\text{123}\) using an animal as a kill or lure to race or train a coursing dog;\(^\text{124}\) using certain traps or spurs;\(^\text{125}\) and baiting.\(^\text{126}\) A number of practices are prohibited unless considered reasonably necessary and performed by a veterinary surgeon, including ear cropping, tail docking, debarking and declawing.\(^\text{127}\)

Section 33(1) imposes a highly prescriptive duty on persons in charge of a closely confined dog:\(^\text{128}\)

(1) A person in charge of a dog that is closely confined for a continuous period of 24 hours must, unless the person has a reasonable excuse, ensure the dog is exercised or allowed to exercise itself for—

(a) the next 2 hours; or

(b) the next hour and for another hour in the next 24 hours.\(^\text{129}\)

Finally, the important offence of abandonment prohibits the abandonment or release of an animal without reasonable excuse, with a maximum penalty of 300 penalty units or one year’s imprisonment.\(^\text{130}\) Abandonment needs to be

\(^{121}\) ACP Act (Qld) ss 20–22.

\(^{122}\) Ibid s 30.

\(^{123}\) Ibid s 31.

\(^{124}\) Ibid s 32. This provision will be particularly relevant in charges arising from a joint Animals Australia and Animal Liberation Queensland investigation that uncovered widespread live baiting in the greyhound industry and that was followed up by relevant state enforcement authorities: Caro Meldrum-Hanna and Sam Clark, ‘Making a Killing’, Four Corners (ABC Television, 16 February 2015) <http://www.abc.net.au/4corners/stories/2015/02/16/4178920.htm>. RSPCA Queensland stated that RSPCA Queensland Inspectors and veterinarians last week raided the property of a prominent greyhound trainer following information provided by Animal Liberation and Animals Australia. Last night the ABC’s Four Corners program aired disturbing footage that showed live animals being used to “train” greyhounds. Live baiting uses live animals as bait to encourage the dogs [to] chase the lure. These animals are subjected to extreme stress before being mauled to death. RSPCA Queensland, ‘Live Baiting in Greyhound Racing Industry’ (Media Statement, 17 February 2015) <http://www.rspcaqld.org.au/news-and-events/news/greyhound-industry>. The first conviction arising from the live baiting investigations, based on breach of s 242 of the Criminal Code (Qld), occurred in February 2016: see above n 22.

\(^{125}\) ACP Act (Qld) ss 34–35.

\(^{126}\) Ibid s 36.

\(^{127}\) Ibid ss 23–29.

\(^{128}\) Freiberg defines prescriptive regulation as ‘a rule or statement that specifies in relatively precise terms what is required to be done’: above n 11, 89.

\(^{129}\) No specific definition of ‘closely confined’ is provided. Instead the ACP Act (Qld) s 33(2) states that in ‘deciding whether a dog is closely confined for subsection (1), regard must be had to the dog’s age, physical condition and size’.

\(^{130}\) ACP Act (Qld) s 19. As at 1 July 2016 this represents a fine of $36 570: see Queensland Government, above n 40.
distinguished from relinquishment. Relinquishment involves the voluntary, consensual transfer of property ownership by an animal owner to a shelter or vet. In order to address a culture of ‘easy come, easy go’ in the acquisition and relinquishment of companion animals, Rollin and Rollin suggest a range of possible reforms including, relevantly, that ‘humane societies and veterinarians [be] positioned to reject convenience euthanasia for morally unacceptable reasons’, or at least that companion animal owners be required to post a bond, which ‘they would forfeit if they elect convenience euthanasia’.

**D Criminalising Breaches of Broadly Expressed Animal Protection Standards**

The prohibition against cruelty in the *ACP Act* (Qld) is a non-specific, principle-based standard, as analysed above. The duty of care standard incorporates some process aspects, through incorporation of the Five Freedoms, but is not prescriptive and is expressed at an abstract level. In assessing the likely success of standards generally, Scott draws on the work of Diver to highlight three key criteria: transparency, accessibility and congruence. Scott suggests that:

> Transparency refers to the requisite that a rule should be comprehensible to its audience, using words with ‘well-defined and universally accepted meanings’. Accessibility refers to the ease of application of a rule to its intended circumstances and congruence to the relationship between the rule and the underlying policy objective. A rule should apply to all the circumstances within the intent of the policy maker and to none that fall outside that intent. Put more technically, it should be neither under- nor over-inclusive.

Analogising from Scott’s analysis of the European Commission *Directive on General Product Safety*, the desired output of the general cruelty prohibition and duty of care standards has ‘the merit of a high degree of congruence with the overall objectives of the regulatory regime’. In an animal protection context, an overall objective of the regime is preventing companion animals from suffering unnecessary harm at the hands of those in charge of them or third parties.

Advantages of the standards include their potential application to a wide range of harms and the potential for flexible interpretation of their meaning over time. However, the lack of specificity in the scope of the standards reduces their transparency, with concepts such as ‘reasonableness’, ‘necessity’ and ‘justification’ requiring ‘further elaboration in order to know what is meant’.

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135 Scott, above n 11, 109.
136 Ibid. Freiberg makes a similar point, arguing that ‘[c]ompared with rule-based regulation, which demands strict adherence to detailed requirements, it is left to a court or some other body to
Freiberg points out that principle-based standards are ‘most often used in combination with rule-based and prescriptive regulation, and rarely alone’. As shown above, further information on these standards is diffused among a diverse range of sources, but varies widely in quality and depth, impeding accessibility and transparency.

Scott also points out that ‘vagueness may make enforcement (and even compliance) more costly’. This observation may be relevant to animal protection in Queensland. Very few prosecutions are undertaken by RSPCA Queensland, with almost all involving guilty pleas and arguments about sentence. Table 1 above shows a clear trend of an increase in annual complaints year-on-year, at the same time as the number of prosecutions has been declining. This approach may also reflect a strategic decision to focus on humane education and a concern to maintain regulatory legitimacy, rather than being purely driven by resource constraints. RSPCA Queensland emphasises the fact that it is almost entirely reliant on public donations to conduct its work, including compliance monitoring and enforcement. However, the organisation has not claimed that it lacks enforcement resources, particularly in an era of significantly increased pro bono legal representation coordinated through the pro bono legal panel BLEATS.

One response to the limitations of principle-based standards would be to shift to more prescriptive standards. However, Scott cautions that recognising the limitations of general standards does not necessarily imply that we should abandon them. He argues that the process of creating general standards through a delegated process can both stimulate a productive relationship between regulators and representatives of those to be protected by the regulation, and increase accountability. The viability of such a delegated dialogue in a companion animal protection context is complicated by the difficulty in identifying representative regulatees, and the need to be clear about who is to be protected by regulation (that is, companion animals who cannot speak on their own behalf).

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137 Freiberg, supra n 11, 92–3.
138 Ibid 93.
139 Scott, supra n 11, 109.
140 The organisation states that it ‘requires $42 million annually to support our animal centres, programs and services’ and that as ‘a non-government, community based charity [RSPCA Qld] receives less than 1% of funding from the government and relies on donations, bequests and sponsorships from ordinary Queenslanders’: RSPCA Queensland, About Us <http://www.rspcaqld.org.au/who-we-are/about-rspca-qld>.
141 BLEATS (Brisbane Lawyers Educating and Advocating for Tougher Sentences) <http://www.bleats.com.au/Home>. BLEATS was founded in 2007 and ‘comprises a panel of more than 300 lawyers (about 150 barristers including three Queens Counsel and about 150 solicitors) as well as 150 support staff (including psychologists, psychiatrists, administrative staff and university students)’: Michael Byrne and Tracy-Lynne Geysen, ‘Prosecuting Animal Cruelty and Neglect Matters’ in Catherine Tiplady, Animal Abuse: Helping People and Animals (Centre for Agriculture and Biosciences International (CABI), 2013) 142, 144.
those organisations that would claim to be acting in the interests of companion animals — not only RSPCA Queensland, but also other non-government organisations with an animal protection raison d’être. This process of ‘regulatory enrolment’\textsuperscript{143} may stimulate unified and clearer guidance as to the way in which the standards in ss 17 and 18 of the ACP Act (Qld) ought to be understood.

Another response to the broad nature of the standards in ss 17 and 18 is to question their status as criminal sanctions. Breach of the standards is a criminal offence, consistent with the classical definition of a command-and-control regime as involving ‘the exercise of influence by imposing standards backed by criminal sanctions’.\textsuperscript{144} Alternative approaches suggest that criminal sanctions should be just one sanction, the most stringent, among a range of other sanctions that could more easily be applied.\textsuperscript{145} Sanctions falling between criminal prosecution at one end of the scale, and administrative sanctions (such as fines) at the other, include court-ordered undertakings, adverse publicity orders, remedial orders and enforceable undertakings.\textsuperscript{146}

Criminal law, though, needs to continue to play a central role in animal protection regulation. For one thing, there may be practical limitations in applying an elaborate, tiered sanction approach in a context of harm to companion animals, where ‘there might be insufficient repeat interactions between regulator and regulated to allow a pyramidal strategy to be operated’.\textsuperscript{147}

For another, criminal sanctions are important in signalling the seriousness with which harm to animals should be regarded. The ‘censuring function’ of criminal law\textsuperscript{148} is as relevant for harm committed against animals as for that committed against humans. Reducing cruelty offences and duty of care offences to the status of parking fines risks exacerbating an enforcement system that already detracts from principles such as ‘proportionate responses to wrongdoing’.\textsuperscript{149}

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\textsuperscript{144} Robert Baldwin, Martin Cave and Martin Lodge, Understanding Regulation: Theory, Strategy and Practice (Oxford University Press, 2\textsuperscript{nd} ed, 2011) 106.
\textsuperscript{146} For a summary of these sorts of sanctions in a responsive regulation context, see Freiberg, above n 11, 95–103.
\textsuperscript{148} Andrew Ashworth, ‘Is the Criminal Law a Lost Cause?’ (2000) 116 Law Quarterly Review 225, 250. See also Baldwin and Black, ibid. Freiberg observes that the ‘elevation of a social norm into legislation, or the desire to create a social norm by an Act of Parliament, can send important moral signals’, with law having an expressive function, able to ‘channel and express emotions by requiring the denunciation of certain forms of conduct’: Freiberg, above n 11, 181 (citations omitted).
\textsuperscript{149} A detailed analysis of sentencing outcomes in Australian and New Zealand animal cruelty cases suggests that it is rare for custodial sentences to be imposed and that, where they are imposed, it is more likely to be in cases where there has been extreme animal cruelty. Even in those cases, though, sentences are low, dampening down upper level sentences for less extreme, but still very serious offending: Annabel Markham, ‘Animal Cruelty Sentencing in Australia and New Zealand’
\end{flushright}
A process of tiered enforcement is undermined when prosecution is only pursued in the very worst cases of abuse or neglect. Further, Coffee argues that ‘[p]redictions that the criminal law will “shrink” in the wake of enhanced civil penalties ... seem unrealistic in light of the bureaucratic incentives to bring criminal cases’. Coffee points out that the criminal process brings with it publicity and public drama. This can be very important for some organisations essentially funded by public donations and motivated by a ‘moral’ mission, including, I would argue, RSPCA Queensland. Coffee states:

Public attention is important to an agency for a variety of reasons. Public visibility may help the agency communicate its self-image as a tough, ‘no-nonsense’ enforcer. That image may in turn assist ... in maintaining morale among its officials. In addition, such an image may generate greater general deterrence than a substantial number of low-visibility civil penalties ... No agency believes that violations of its rules are simple regulatory offenses that lack inherent moral culpability ... it is a safe bet that its staffers believe that their agency’s rules protect vital public interests. To communicate this view, the agency needs the public morality drama that only the criminal law affords.

Finally, it should be acknowledged that a limited, parallel sanctions framework already exists in most jurisdictions, including in Queensland. Animal welfare directions (‘AWDs’) can be issued by inspectors, in written or oral form, instructing persons in charge of an animal to take steps to address the needs of an animal. AWDs provide a formal mechanism for the exercise of discretion in enforcement. This form of regulatory device can be characterised as compliance regulation, with the regulator engaging in a ‘conversation’ with the regulated. It is a mid-level sanction, able to be used as a spur, under threat of prosecution, to compliance.

IV Conclusion

This article has focused on key standards in the regulation of companion animal protection. The key governing norm underpinning companion animal protection is humaneness. This ethic allows that animals have intrinsic worth, and should be protected against harm, at least to the extent that this does not interfere with conflicting human interests, such as buying and selling animals for profit, imposing harmful breeding standards or freely relinquishing animals when no longer wanted. I have argued that the continued commodification of companion animals — allowed by a governing principle of humaneness and constraints in defining the

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152 The ACT, for example, has adopted regulations that allow for the imposition of infringement notices for a range of offences, mostly concerning confined animals (ie commercial farm animals), but not for the generic cruelty or aggravated cruelty offences: Magistrates Court (Animal Welfare Infringement Notices) Regulation 2014 (ACT).

153 ACP Act (Qld) ch 6, pt 2, div 5.

scope of applicable standards — mean that their protection is less robust than it might otherwise be.

Justification for state intervention to protect the interests of companion animals requires a broader conception of the role of regulation than the traditional market model allows. Given the intrinsic moral worth of companion animals, values such as social justice and paternalism, derived from political versions of public interest theory, are most relevant to understanding why the State is justified in restricting the rights that may be exercised by companion animal owners over their ‘property’.

In Queensland, state intervention is effected through the key standards set out in ss 17 and 18 of the *ACP Act* (Qld), establishing a duty of care obligation and a prohibition against cruelty respectively. The standards embodied in the legislation are broad-based, principle-style standards. Detailed information about care for companion animals is available in the public domain, although it is piecemeal, with little obvious coordination between the different agencies making this information available. No code of practice supplementing the legislative standards has been prepared in Queensland for care of companion animals. Proposed development of a code to be applied on a nationally consistent basis has ground to a halt with the cessation of the AAWS.

Judicial interpretation of the legislative standards is limited given the summary jurisdiction for offences under the *ACP Act* (Qld). The most significant area of judicial oversight in this area assumes application of the standard (generally through guilty pleas on the part of offenders) and focuses on sentencing. In Queensland, the response to perceived shortcomings in the punishment imposed on offenders has been to focus on penalty escalation. The maximum sentence for breach of the cruelty prohibition has increased significantly since the passage of the *ACP Act* (Qld) in 2001 and with the introduction of a new aggravated cruelty offence under the *Criminal Code* (Qld).

Given the limited effectiveness of penalty escalation as a means of addressing the drivers of cruelty, it appears important to implement other measures. One of these could be the development and dissemination of standards and guidelines for the keeping of companion animals. They could serve to unify the disparate and uneven information currently available on good practice in the keeping of companion animals. Excellent models exist in other Australian jurisdictions and New Zealand. The potential exists for a national approach to standard-setting in this area, as reflected in the preliminary work of the now disbanded AAWS Companion Animal Taskforce.

If a national approach to standard-setting for companion animal protection was pursued, other actors could be enrolled, particularly if national standards were

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to address issues of animal management as well as animal protection. For example, the AWLQ plays an important role in educating individuals about the responsibilities of companion animal ownership, as well as being expert in addressing companion animal overpopulation. The QPS may be increasingly significant as a source of investigative expertise, financial resources and authority given the recent introduction of the indictable offence of serious animal cruelty in Queensland. Finally, researchers or research institutions could also be engaged, bringing expertise not only in animal welfare science, but also in areas that can help to frame approaches for addressing the underlying causes of animal abuse, including sociology, social work, criminology and companion animal ethics.

Overall, a more pluralistic, inclusive approach to standard-setting, drawing on institutions, resources and expertise from around the country, is likely to result in more robust, transparent and accessible companion animal protection standards for all Australian states and territories, including Queensland.