

Review

Reducing the Gap Between the Ambitious Goals and Practical Reality of Animal Welfare Law Enforcement: A Review of the Enforcement Gap in Australia

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Simple Summary: Animal welfare is a highly considered, and often contentious social issue. Despite the advancements made in animal welfare science, animal welfare laws seem to be lagging behind, and animal abuse appears to be a prevalent social issue. The ‘enforcement gap’ is a concept which recognizes the presence of the gap between the expectations and the current reality of animal law enforcement, which is created by weakness in the enforcement process. This paper reviews the available resources to identify the causes of the ‘enforcement gap’. It is concluded that the ‘gap’ is caused by numerous factors derived from all stages of the enforcement process, starting with reporting acts of animal cruelty, to finalizing the matters in court. In order to reduce the enforcement gap and bring the goals closer to the reality, a combination of changes to the enforcement agencies’ nature or funding model, animal welfare legislation, as well as public education, are likely to be required.

Abstract: Enforcement of animal welfare statutes are the primary protection given for the maintenance of animal welfare and prevention of cruelty. It is speculated that animal law enforcement in Australia has a number of weakness in the enforcement model. These weaknesses create a gap between the goals of animal law enforcement and the reality of the animal law justice system. This gap is defined as the ‘enforcement gap’. This paper identifies and investigates the causes of this gap. The hypothesized causes discussed are (1) the impact the public can have on reporting animal cruelty, (2) the reliance on charitable organizations as enforcement bodies, (3) the inconsistencies in animal welfare legislation, and (4) the role of the sentencing courts. Thus, the causes of the enforcement gap are multifactorial; derived from all stages of the enforcement process. Further research is needed to investigate the concepts raised in this paper. However, it is likely that a combination of structural change to enforcement agencies, legislative reform and public education is required to reduce the enforcement gap.

Keywords: animal welfare legislation; animal cruelty; law enforcement; Australia; enforcement gap

1. Introduction

In the last few decades, there has been an increase in public concern regarding issues of animal welfare [1]. With this growing concern, researchers have started to question the role and efficacy of law in the regulation and promotion of animal welfare [1-9]. Studies have identified several weaknesses in the animal protection legal process; from the ambiguity of the language used in legislation [5], the questionable reliability of using an inadequately resourced charitable body for enforcement [5,7,10], to the severity of the penalties imposed for offences [6,8]. These weaknesses



create a gap between the ambitious goals of animal law enforcement and the practical reality of the animal law justice system. This gap is defined as the 'enforcement gap'.

The causes of the enforcement gap can be anything that arguably impedes the 'expected' outcome of animal law enforcement. These 'expectations' can be derived from the opinions of the enforcement bodies, the findings and interpretations of animal law academics [5-8,11-15], and the public: the latter being of the subject of numerous social studies [1-4,16,17]. Responses from surveys of members of the public have indicated a belief that the current penalties are too lenient [1,4]. As well as the desire for the criminal justice system to take crimes against animals more seriously [1,17]. The public are largely in favor of harsher penalties, such as imprisonment [1], for deliberate acts of cruelty. Whereas in reality, terms of imprisonment are rarely handed down for animal welfare offences [7,8,18]. Public sentiment has been the catalyst for legislative reform of penalties for animal welfare offences cross-jurisdictionally, with Queensland increasing maximum penalties in 2001 [19], South Australia in 2008 [20], Victoria in 2012 [21] and Northern Territory proposing to in 2020 [22]. These amendments indicate an intention of Parliament to "get tough" on animal welfare offenders, by sending a message that animal cruelty will not be tolerated [23,24]. However, studies have shown that this movement to "get tough" on animal abusers is not being reflected by the Magistrates' Courts in sentencing [7,8,13,25], as less than 10% of the maximum penalties are being used in court [8]. Due to this poor use of statutory maximums, the initial concern from the public that the justice system is not taking animal abuse seriously, and that the penalties are too lenient, are still valid concerns. This feeds into the enforcement gap, since there is a gap between the 'expectations' of animal law enforcement and the current reality of the criminal justice system.

This paper seeks, through literature analysis, to investigate this enforcement gap concept further, both identifying and describing the causes of the gap. The entire process, starting with reporting cruelty to ending with sentencing in court, as depicted in Figure 1, will be discussed. Hypothesized causes to be discussed include: (1) the impact the public can have on reporting animal cruelty, (2) the reliance on charitable organizations as enforcement bodies, and their unusual relationship with the Australian State and Territory governments, (3) the inconsistencies and ambiguity of language used in animal welfare legislation, and (4) the role of the sentencing courts. This review will discuss these topics, with a primary focus on the South Australian (SA) jurisdiction, with comparison drawn to other Australian, and overseas States and Territories. Throughout this article, the term 'animal law' is used to refer to Statutes with the object of animal protection, by prevention of cruelty, and promotion of welfare.

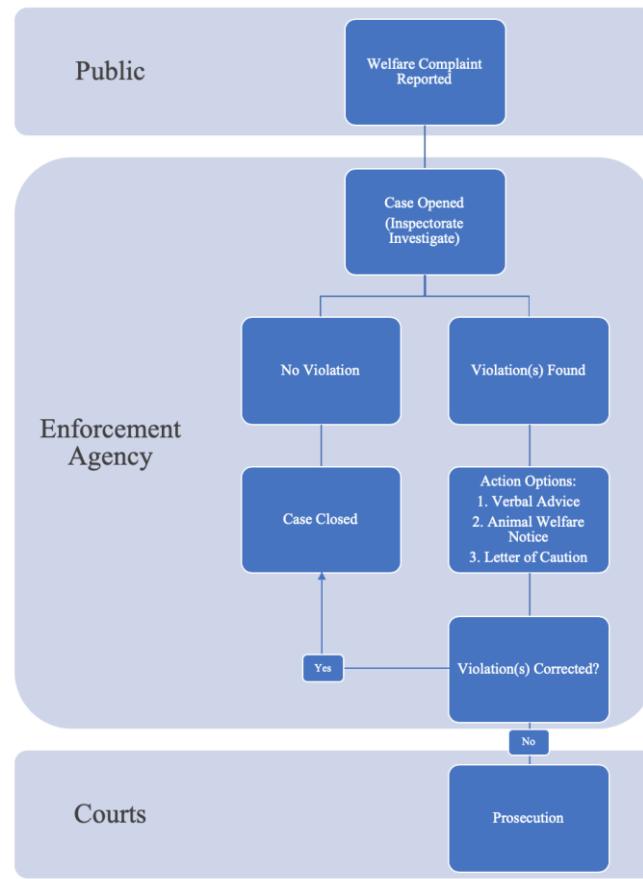


Figure 1: Flowchart of the Australian animal law enforcement process, indicating the parts where the public, enforcement agencies or the courts have the predominant power.

2. Animal Law Enforcement and the Public

2.1 Charitable Organisations

Generally, individual government agencies, such as state police forces, are given power under the general criminal law to enforce legislation. In the case of animal law in Australia, a non-government organization, namely the Royal Society for the Prevention of Cruelty to Animals (RSPCA), has the bulk of the enforcement burden. This is achieved through their inspectorate division [5,26-28]. These inspectors are given powers of enforcement after being appointed by the Minister of each state or territory's relevant government department [29-33]. However, in some jurisdictions the RSPCA are listed directly as inspectors/officers in the legislation, for example in the Victorian, Queensland and Western Australian (WA) statutes [34-36]. This inclusion of a charitable organization in the legislation is not universal and is often seen for state/territory police officers, not charitable bodies [37-41].

The RSPCA are involved in animal law enforcement in each state and territory of Australia, with the exception of Northern Territory (NT), where a government department (Department of Primary Industries and Resources) enforces the legislation entirely [42]. The enforcement burden is often shared between two agencies in each state and territory (Table 1), through the signing of a memorandum of understanding [27,43,44]. This shared agreement often sees the RSPCA most commonly enforcing companion animal matters and government run departments enforcing livestock cases [27,43-46]. It is unknown why the RSPCA are mostly tasked with animal law

enforcement relating to companion animals, which make up the majority of animal welfare complaints, [27] and prosecutions [8].

Table 1. Each states and territories relevant animal welfare legislation and predominant enforcement agencies in Australia.

State/Territory	Animal Welfare Legislation	Enforcement Agency*
South Australia	<i>Animal Welfare Act 1985</i> [32]	RSPCA SA [47]
Victoria	<i>Prevention of Cruelty to Animals Act 1986</i> [48]	RSPCA Victoria [43] Department of Job, Precincts and Regions [43] Department of Environment, Land, Water and Planning [49]
New South Wales	<i>Prevention of Cruelty to Animals Act 1979</i> [30]	RSPCA NSW [50] Animal Welfare League NSW [50]
Australian Capital Territory	<i>Animal Welfare Act 1992</i> [29]	RSPCA ACT [51]
Queensland	<i>Animal Care and Protection Act 2001</i> [52]	RSPCA Queensland [53] Biosecurity Queensland [54]
Northern Territory	<i>Animal Welfare Act 1999</i> [31]	Department of Primary Industries and Resources [42]
Western Australia	<i>Animal Welfare Act 2002</i> [55]	RSPCA WA [56] Livestock Compliance Unit [57]
Tasmania	<i>Animal Welfare Act 1993</i> [33]	RSPCA Tasmania [58]

*All State and Territory police forces are given powers to enforce the animal welfare legislation

2.2 Reporting Cruelty

The first step of the enforcement process is reliant on the public. This step involves contacting one of the above enforcement agencies (Table 1) to report the details of an act of animal cruelty. Reporting cruelty as a whole contains several variables that come into play. From previous research it is understood that the propensity to report criminal acts (not exclusively involving animals) involve the following factors: (1) presence or absence of witnesses, (2) financial losses incurred, (3) the seriousness of the crime [59,60], (4) distrust in the relevant enforcement agency, (5) and fear of retaliation [61]. Although these studies are not predominantly animal crime orientated, they can be used as a guide into the decision-making process someone undertakes before reporting animal cruelty. An individual's likeliness to report animal abuse was further examined by Taylor and Signal [62]. This study had the major findings of (1) people working within the livestock industry had the lowest propensity to report animal abuse and (2) although people have the intention to report, they do not know whom to report to.

The first major finding of Taylor and Signal [62] that people within the livestock industry are less likely to report animal cruelty was discussed by Kellert [63], where this lower propensity was related to the strong utilitarian views these workers have. That is, they show greater concern for the animal's practical and material value rather than solely their welfare. This however does not imply that those working within the livestock industry condone or engage in acts of animal abuse, they just have a different attitude towards animals influencing their propensity to report [64], which can be related to their experiences in working within the livestock industry [65]. A further consideration of demographics may also be important. Individuals in rural populations, in comparison to urban populations, may be less likely to report cruelty because livestock ownership is comparatively more 'hidden' than companion animal ownership, especially in the case of intensive industries such as

piggeries and poultry farms. It is hypothesized that because of the often secluded and geographically dispersed nature of the livestock industry, evidence of abuse is harder to obtain, the cases are expensive to prosecute because of the number of animals involved, and it has been suggested that prosecutors often view them as risky [12].

The second major finding of the Taylor and Signal [62] study was that a large proportion of people (27% of their sample) were unaware of how to report acts of cruelty, leading them to either not report, or to report to agencies not tasked with the bulk of animal law enforcement. This is a major issue and indicates the need to educate the public on the means of reporting animal abuse to the appropriate enforcement agencies, which are outlined in Table 1.

2.3 Public Relations

A factor found to deter people from reporting criminal acts was distrust in the relevant enforcement agency [61]. Since the RSPCA has been criticized from an academic perspective [28,66], and some public responses have indicated a desire for the RSPCA to step down as an enforcement agency [67], it is assumed that the propensity for the public to report cruelty offences may be affected by a distrust of the RSPCA. An American case demonstrated frustration the public may feel when they have no legal way to prevent cruelty towards an animal, and they are reluctant to report it to the SPCA. A not-for-profit group tried to take actions into their own hands, and took an emaciated dog chained in a back garden from the premises, and to a vet. They refused to give the dog back and were subsequently charged and convicted of theft [12]. Their defense counsel argued that a defense to the theft charge should apply since a living being's welfare was at stake [12]. After a review of the case, Ellison [12] discussed the possibility of letting citizens take civil action towards an owner to have their animals removed from them, just as one would in a civil claim arguing property rights in Australia [68]. It was concluded that mechanisms that enable citizens to bring civil ownership claims is a cause that could unite advocates, because it would provide a cost-effective, non-controversial means of ensuring more vigorous enforcement of animal welfare laws. However, RSPCA Victoria have stated that the community expectations of animal welfare is much higher than the legal standard the RSPCA has to work within [69], implying that the public misunderstand what constitutes an animal welfare offence, and consequently misreport to the RSPCA. Sophie Buchanan, Head of Prevention at RSPCA Victoria, stated:

“One of the things that we continually observe is that community understanding of what constitutes an offence under the Prevention of Cruelty to Animals Act and the reality of the act are quite separate. Community expectations about welfare are quite high, but the threshold for an offence under the act is quite significant. Even though these are summary offences, the level of harm that has to be proven that an animal has suffered makes the threshold for investigation and prosecution quite significant. So rather than vexatious, the majority of unsubstantiated complaints or reports that we receive relate more to people’s misunderstanding of what would constitute an offence” [69]

Given this knowledge, there is a risk that the public would abuse any civil right to strip someone of their ownership rights. Especially since there are so many reports of animal cruelty that are unfounded [69]. As a civil society, it could become impossible to regulate and control people from infringing property rights, and trespassing on private premises, every time they perceive there to be an issue of animal welfare, especially considering the growing public concern for animal welfare [1].

The best course of action for rebuilding any distrust the public may feel towards animal law enforcement agencies may be education. Although animal care education has been a major focus within RSPCAs in recent years [27,70], the effects will take several years to become apparent as it is often focused on youth [70]. Education that should take an immediate effect, is to inform the public about animal cruelty reporting, since there appears to be some confusion around which agency to report to [62]. There may also be some confusion from the public about what happens to their cruelty report. There is the need for more transparency in animal welfare investigations, not relating to the

confidential information of a cases, but the process the enforcement agencies undertake once they receive a cruelty report. This will allow the enforcement agencies and the public to work towards a relationship that is filled with understanding and trust and consequently will reduce the enforcement gap in due time.

3. Animal Law Enforcement Agencies

3.1 Community Involvement

The relationship between the RSPCA, and Australian State Governments, has an extensive history, with the SA Government entrusting the RSPCA to enforce animal welfare laws for more than 100 years [47]. Nowadays, the Australian RSPCAs are involved in activism and advocacy campaigns on animal-related issues. In addition to their campaigns, they are also involved in education, fundraising, retail services, and providing animal welfare services through their animal shelters and adoptions [67]. It is clear that they are involved in an extensive number of roles, which differ from each other. The enforcement of the animal welfare statutes is a small component of their work, especially when considering the expenditure incurred across all of these roles. It costs the RSPCA SA approximately five million dollars annually to fund their animal operations, and three million dollars for their fundraising and marketing work [71]. However, the costs of enforcement, to include the inspectorate, legal counsel, legal fees, and equipment costs, equates to approximately two and a half million dollars [71]. This is half of that spent on their animal operations division. It has been said by members of the Australian public, in regard to RSPCA Victoria, that “the RSPCA is attempting to be all things to all people and therefore does none of these things well” [67]. To put this quote in context, it was taken from a review on RSPCA Victoria’s inspectorate division undertaken after some high profile controversies involving the RSPCA; a duck shooting campaign, [72] and concern regarding their ability to deal with large-scale cruelty incidents [73]. Given this, there is the possibility that public opinion on RSPCA Victoria may have been negatively influenced by the controversy they were involved in, and it should be noted that since the review there have not been any reported issues with RSPCA Victoria. There is, however, a need to re-establish public opinion on the animal law enforcement process, without the influence of any controversy. Nonetheless, there is still the possibility that the RSPCA’s engagement in all of these roles may negatively affect their enforcement responsibilities, through conflicts of interests that may arise as a result of philosophical or ethical stance, or resourcing issues.

3.2 Conflicts of Interest

The range of activities performed by the RSPCA may lead to some public confusion. In the Victorian report on the RSPCA inspectorate division, Comrie [67] discussed the public’s difficulty in differentiating between their activism work and law enforcement responsibilities, arguing that there is a conflict of interest since the law fails to align with the RSPCA’s core beliefs and values. However, the overarching objective of animal welfare statutes is to prevent animal cruelty by promoting animal welfare [74-81], and the RSPCA Australia’s mission is “to prevent cruelty to animals by actively promoting their care and protection” [82]. Also RSPCA promotes the concept of ‘welfare’ as maintaining the ‘five freedoms’ of animals [83], and it has been suggested that animal welfare legislation in Australia is underpinned by the ‘five freedoms’ [84]. This indicates that there is no conflict of interest between the legislative objectives and the RSPCA’s core values.

Despite this apparent alignment between legislative objectives and RSPCA’s values, at face value there does appear to be a conflict of interest between the activism work in which RSPCA is involved, and lawful activities as authorized by animal welfare legislation. An example of this was discussed by the Victorian Legislative Assembly Committee of Economy and Infrastructure on RSPCA Victoria’s fitness as an enforcement agency [85]. Representatives of the Sporting Shooters Association of Australia raised concerns about the RSPCA’s stance on hunting as a recreational activity [85]. This being a legal activity in Victoria under the Code of Practice for the Welfare of

Animals in Hunting (revision no. 1) [86]. The issue of contention was that RSPCA Victoria was campaigning against duck hunting, as per RSPCA Australia's policy of being

"opposed to the hunting of any animal for sport as it causes unnecessary injury, pain, suffering, distress or death to the animals involved" [87]

However, given the legality of duck hunting in Victoria, RSPCA Victoria were campaigning against lawful activity. It was argued that RSPCA Victoria could not carry out enforcement related to duck hunting in an unbiased manner due to RSPCA Australia's stance on recreational hunting [85]. This same issue has been noted in their campaigns on dairy cows, greyhound racing, layer hens, live exports, meat chickens, pig farming and whips in horse races [72], which are all legal activities under Victorian laws [85], and common campaigns run by RSPCA's across Australia.

It is important to note when discussing the RSPCA's community involvement and the choices they make as an organization that they are not a government agency; they are a not-for-profit organization. Aside from their animal law enforcement role, where they have an agreement with the state and territory governments to enforce animal welfare statutes, as an organization the choices they make are not, and should not, be dictated by government. One of the objectives of the RSPCA is "to educate the community with regard to the humane treatment of animals" [88], and one method of achieving wide-spread public education is through advocacy campaigns [89,90]. However, conflicts of interest may arise when advocacy campaigns imitate activism activity [67]. According to the Oxford Dictionary, the definition of advocacy is "public support for, or recommendation of, a particular cause or policy" [91], while activism means "the policy or action of using vigorous campaigning to bring about political or social change" [92]. Although both words refer to creating a change through means of public expression, the differing factor is the way the expression is conducted; activism seems to take a more forceful approach.

Comrie [67] suggested that RSPCA Victoria was taking a more activist stance with their campaigns at the time of the review, and found from interviews with the inspectorate staff, and key stakeholders, that they agreed. The opinion was expressed by those interviewed that the campaigns had caused reputational damage to RSPCA Victoria, with the relationship between RSPCA Victoria, government officials, and members of hunting, sporting and primary production organizations being compromised [67]. RSPCA Victoria have since acknowledged this issue and released a response to the Comrie review [67], stating they will "focus on achieving improvements in animal welfare by using trust-based advocacy approaches" [73]. They voiced that all public campaigns will be focused exclusively on direct owner care of animals, not advocating against the Victorian laws [69]. RSPCA Victoria have had no reported issues with their campaigns since the review.

Other research has highlighted this issue of conflict between RSPCA campaigning activities and law enforcement activities. RSPCA UK have also received significant criticism for the manner in which they had been campaigning. The Chief Executive, Jeremy Cooper, commented on this issue in 2016, stating:

"we are going to be a lot less political. It doesn't mean that we won't stand up for animals. But we are not a political organization" [93]

In an independent review on animal welfare enforcement in WA, it was recommended that the inspectorate divisions within both the RSPCA and the government department (Department of Agriculture and Food WA), were kept separate from the operational areas, to avoid any potential conflicts of interest [94]. Thus, RSPCA's enforcement and campaigning activities should work independent from one another as two completely separate entities, despite the fact that they come from the same organization.

3.3 Resourcing Issues

Each financial year, State governments fund the individual RSPCAs to cover the costs of enforcement. However, according to the annual reports available on the RSPCA SA's website, the government funding they received for the 2018/2019 financial year only covered 43% of the total cost to enforce SA's relevant animal welfare legislation (*Animal Welfare Act 1985* (SA)) [95]. The remainder being funded at their own expense. There is no other branch of criminal law that relies so heavily on charity to ensure the enforcement of what is essentially a public interest law [10,96]. The position of RSPCA Victoria in regard to their enforcement responsibilities was well summarized by Magistrate D.J. Faram during a Victorian animal welfare case in 2015. His Honour said:

"The RSPCA in particular is a statutory body with prosecutorial powers but without significant support from Parliament. They are also the body charged with rescuing and rehabilitating these animals. This comes at a significant cost for an organization that receives some state funding but otherwise relies on donations and bequests and other fundraising activities" [67]

In the 2018/2019 financial year, the South Australian inspectors responded to 4,244 cruelty reports [95]. Out of those reports, only 32 were prosecuted in court, meaning only 0.8% of the complaints investigated resulted in charges being laid. These low prosecution rates are not exclusive to South Australia, as cumulative prosecution rate for Australia also equates to 0.7% (Table 2).

Table 2: Numbers of inspectors, cruelty reports and prosecutions for each state and territory in Australia. All data were gathered from the most recent RSPCA annual reports. Note as described in Table 1 that the RSPCA may not be the sole enforcement body for that state or territory.

State/Territory	RSPCA Inspectors	Cruelty Reports	Prosecutions	Prosecution Rate (%)
South Australia	9 [95]	4,244 [95]	32 [95]	0.8
Queensland	24 [67]	17,810 [97]	154 [97]	0.9
Victoria	26 [98]	10,642 [98]	113 [98]	1.1
New South Wales	32 [99]	15,673 [99]	77 [99]	0.5
Australian Capital Territory	3 [67]	988 [100]	20 [100]	2.0
Western Australia	15 [67]	6,417 [101]	10 [101]	0.2
Tasmania	4 [58]	2,188 [100]	8 [100]	0.4

This small percentage of prosecutions in relation to reports is assumed to be caused by a lack of resources available to the enforcement agencies, most commonly the state and territory-based RSPCAs. The resourcing issue is often referred to in monetary terms [12], however there is minimal evidence to support this claim, nor the ability to measure the magnitude of its effects, there is only speculation.

According to the available literature, RSPCA will only prosecute cases of grievous nature as a way of saving their resources [12,102]. That is, they will only prosecute cases where guilty verdicts are likely to be assured due to the risk of adverse costs orders against them in the event of a not guilty finding. If true, this position may preclude the bringing of test cases and some neglect cases where impact on animal wellbeing may be less easy to characterize. An example of these test cases could include cases of mental suffering experienced by animals, which is not widely recognized in animal law [9], despite the scientific evidence in support of animals experiencing emotion [103-106]. The issue of obese pets is becoming increasingly prevalent and has now been tested in UK courts see e.g. [107]. Two brothers were found guilty of causing unnecessary suffering to their dog by allowing the dog to become so obese that he was "effectively crippled" [107]. Cases of this nature appear not to have been tried in Australia. The doctrine of precedent allows the law to develop through case law, since precedents in certain circumstances are legally binding, meaning that judges must follow the determinations and rulings of judges in higher courts. However, if test cases are not initiated to test

the boundaries of legal terminologies such as animal “harm” or “suffering”, the only opportunity for animal law to progress is through statutory reform [108]. The latter requires a groundswell of support, is retrospective and often lengthy [108]. These test cases have significant value not only for incrementally progressing animal law, but in guiding statutory interpretation and safeguarding animal welfare. Therefore, the speculated under-resourcing has the potential to impact on animal law development.

Nonetheless, prosecution is only one way to promote animal welfare and it may not be optimal method. In the WA independent review of animal welfare enforcement, both the RSPCA and the Department of Agriculture and Food WA, who share the enforcement responsibilities, made a submission to the review based on their belief that education was the most appropriate method of achieving compliance with the legislation [94]. This suggests that both enforcement agencies will use prosecution as a tool only when the education of an individual has failed. Thus, they will only prosecute cases if necessary, as a last resort, not because they are required to prioritize the cases of the worst nature due to resourcing concerns. However, it is possible that the cases of the worst nature are in fact the cases where education would fail, as these animal abusers are often displaying levels of moral numbness [6], rendering education ineffective, and punitive measures more appropriate. It is probable, in reality, that decision-making as to course of action does not follow a clear step-by-step ‘trial’ of increasingly more punitive measures, instead being more nuanced, based on individual case facts and personal experiences of enforcement personnel. Another point of note, given that both the RSPCA, as a charitable organization, and the Department of Agriculture and Food, as a government department, both gave preference to education over prosecution, when they have access to different levels of resourcing, is indicative that the low prosecution rate is not necessarily reflective of resourcing strains experienced by the RSPCA. This focus on education goes back to the RSPCA’s mission to prevent cruelty by promoting animal welfare, which is where their name came from: Royal Society for the *Prevention* of Cruelty to Animals [88], not the ‘*Prosecution*’ of Cruelty to Animals.

There is however evidence in support of a resourcing issue; in statements made during the consultation on the bill proposing changes to the *Animal Welfare Act 1985 (SA)*; the Honourable Mark Parnell stated:

“What is the point of increasing penalties if we do not increase the resources that are used to investigate cases of animal cruelty?” [109]

Further evidence in support is from the independent review of animal welfare enforcement in both Victoria [67] and WA [94]. Comrie [67] acknowledged the resourcing issue by suggesting potential alternative resourcing strategies. The main suggestions were to: delegate some of the tasks of the inspectorate division to other departments within the RSPCA, engage more volunteers in inspectorate functions, and work more closely with local government agencies for a greater widespread animal welfare network. Since the Comrie review [67], it has been stated that RSPCA Victoria has made significant improvements in this regard [72], however the nature of the improvements were not commented on. Thus, no conclusions can be drawn on whether the apparent resourcing issue has improved for RSPCA Victoria. In the WA review, Easton, Warbey, Mezzatesta and Mercy [94] acknowledged the need to allocate additional resources to animal welfare, however the authors noted that they did not have access to any statistical data, and derived their conclusions based on the submissions made to the review, which may have been influenced by bias.

The statement made by RSPCA Victoria cited earlier on the public’s misunderstanding of what constitutes cruelty under law [69], is further evidence disputing the resourcing issue. It can be argued that the alleged resourcing issue, as measured by the substantial gap between reports and prosecutions, is due to the public misreporting acts of animal welfare concerns, rather than an inability to fully investigate due to inadequate resourcing. It is likely that both inadequate fund provisions to enforcement agencies, as well as public misunderstanding of what constitutes an animal

welfare offence play a part in the low prosecution rates presented in Table 2. However, without the guidance of any statistical support or claims from the enforcement agencies themselves, the existence or extent of a resourcing issue is mere conjecture.

3.4 Alternative Enforcement Models

Other countries have implemented different methods for animal law enforcement. The Auckland SPCA of New Zealand, do not receive any government funding for their enforcement work [110]. They rely on fundraising and donations to fund their investigation work. However, they have formed a pro bono panel of lawyers who offer their time and experience to prosecute animal welfare offences on behalf of the Auckland SPCA [110]. In Killeen's review [110] of this pro bono panel in 2013, it was reported that the panel have been very successful in securing severe penalties for offences and arguing for legislative reform. An article on New Zealand's Law Society website confirms that this pro bono panel was still in action in March 2017, and comprises approximately 40 lawyers [111]. Recently, Canada has removed the SPCA from their enforcement role all together, after concerns over charitable dollars subsidizing a government function [17]. Coulter [17] suggested that Canada should consider a strategic combination of a government division for enforcement and not-for-profits for support and animal care. This partnership model has been successfully implemented in New York City, where the police force and ASPCA now work symbiotically with 14,000 police officers trained for animal cruelty investigations, and the ASPCA providing support [17].

In Australia, from the two independent reviews of animal welfare enforcement in Victoria [67] and WA [94], and the Victorian Government's inquiry into RSPCA's fitness as an enforcement agency [72], the final conclusions drawn are that the current model in place, where charitable organizations enforces animal welfare statutes, is the most appropriate. The assumption that transferring enforcement responsibility to the government, will lead to greater transparency, may be too simplistic. [5] Currently, in jurisdictions where government agencies are tasked with animal law enforcement, commonly involving cases of farm animal abuse [27,43-46], little to no information on their enforcement activities is made publicly available [46]. In contrast, the RSPCA release figures each financial year detailing their enforcement activities [95,97-101]. It is, however, unknown whether the public have a high regard for the more transparent approach taken by the RSPCA.

4. Animal Welfare Legislation

4.1 Legal Status

Legally animals are a form of personal property [112-114], and defined as 'goods' under Australian Commonwealth legislation [115]. The legal status of animals has been debated and discussed by legal scholars for decades, arguing between awarding rights to animals [116,117], to maintaining the current protection approach but strengthening the existing framework [118]. In relation to the protection of animals, some legal scholars argue that the current property status means to undermine animal welfare to the extent that its promotion conflicts with human interests [66,113,116,117,119]. Simply put, property status allows the exploitation of animals in production systems, animal experimentation, and sports and entertainment [66,119]. It has been stated that humans may use the fact that animals are their property as justification to treat animals how they wish [116] and compared them to inanimate objects [114]. However, as Nurse [96] noted, animal welfare statutes provide protection to animals by making owners or responsible persons have a duty of care responsibility. This means that they are not comparable to inanimate objects since their welfare is protected by law, something that is not in place for inanimate objects such as mobile phones.

In regard to the 'enforcement gap' the property status of animals is not a major contributor, as there are more detail orientated issues in the legislation that should be the primary focus. The current status quo on property status is unlikely to change in the near future, especially since the discussion began with Peter Singers book, *Animal Liberation* in the 1970s [120] and almost half a century later

there has been no legal change to the definition. Focus should be on progressive amendments to animal welfare legislation for the improvement of animal welfare, which may one day be changing the property status, but it may be more efficient to take small increments to that step not a giant jump. The remainder of this section will consider some of those small incremental improvements.

4.2 Inconsistency Issues

Animal welfare legislation differs between each state and territory in Australia [29-33,48,52,55]. There is no single overarching federal animal protection legislation in Australia, since there is no 'head of power' for animal welfare in the *Commonwealth of Australia Constitution Act* ('Constitution') [121]. Thus, animal welfare is a residual power, within the domain of the Australian states and territories [121]. Consequently, there are eight pieces of animal welfare legislation at the state and territory level in Australia (Table 3), hereafter termed 'the Acts'.

Table 3: Each state and territory's relevant animal welfare legislation in Australia.

State/Territory	Animal Welfare Legislation
South Australia	<i>Animal Welfare Act 1985</i> [32]
Victoria	<i>Prevention of Cruelty to Animals Act 1986</i> [48]
New South Wales	<i>Prevention of Cruelty to Animals Act 1979</i> [30]
Australian Capital Territory	<i>Animal Welfare Act 1992</i> [29]
Queensland	<i>Animal Care and Protection Act 2001</i> [52]
Northern Territory	<i>Animal Welfare Act 1999</i> [31]
Western Australia	<i>Animal Welfare Act 2002</i> [55]
Tasmania	<i>Animal Welfare Act 1993</i> [33]

The definition of an 'animal' is a key element in animal protection legislation. It is defined in each Act in a generally consistent manner. The term 'animal' is often any member of the vertebrate species, excluding human beings [10]. However, there is an inconsistency between the Acts. In the SA and WA Acts, the definition of 'animal' does not include fish, whereas all other state and territory legislation includes fish as protected species. Another inconsistency is the type of offences. Some states and territories have aggravated cruelty offences, where intention (or recklessness) needs to be demonstrated as elements of the offence; the mens rea. This is in addition to duty of care offences, requiring persons to provide basic standards of care to animals. Whereas, Queensland, Tasmania and NT only include duty of care breaches [10]. Since the aggravated cruelty offences attract severer penalties, there are discrepancies between the maximum penalties for offences. Some states, such as New South Wales (NSW), use 'penalty units' to calculate monetary fines [30], whereas South Australia has set dollar amounts for the maximum monetary fines [32].

There appears to be a common understanding amongst authors of the literature that a more uniform approach to animal welfare laws would be beneficial especially given the similarity of issues across states and the frequent transport of animals across state lines [10,11,46]. In spite of Constitutional restrictions, this approach can be achieved through the creation of Uniform Acts adopted independently by each State and Territory. An example of such an approach in Australia is the Uniform Evidence Acts, which have been adopted by NSW [122], Victoria [123], Tasmania [124], ACT [125], NT [126]. Parliaments in SA, Queensland and WA are yet to follow. Although a uniform approach to state and territory-based legislation appears in theory to be beneficial, it still comes with its challenges. Firstly, the harmonizing of the evidence acts began in 1995, and two decades later all states are yet to comply [127], indicating that a uniform approach is a slow process and that beneficial results may take years to be realized. Secondly, the application of this uniform approach has been suggested to be more dis-uniform in practice [127]. Priest [127] has discussed numerous occasions extending over a decade of when the application of the Uniform Evidence Acts has differed between states. Thus, even if a uniform approach were to be adopted for animal protection statutes, given the need for enforcement by State agencies there is no guarantee that it would be applied similarly, and

consistently, across jurisdictions. However, before any consideration of the value of a uniform approach can be undertaken, there needs to be an assessment of the presence and extent of inconsistency between current state and territory animal welfare acts. To date there has been no such comprehensive summary.

4.3 Problematic Definitions

Focusing on the SA *Animal Welfare Act 1985*, there are some issues surrounding specific terms and definitions in the Act. ‘Harm’ by definition is “any form of damage, pain, suffering or distress (including unconsciousness), whether arising from injury, disease or any other condition” [37]. The issue then is the need for harm to have occurred before any legal action can be taken. An example of a provision where harm is required to be shown is section 13(3)(b)(iv) of the *Animal Welfare Act 2985 (SA)* below:

- (3) Without limiting the generality of subsection (1) or (2), a person ill treats an animal if the person –
 - (b) being the owner of the animal –
 - (iv) neglects the animal so as to *cause it harm*; [128]

The fact that a person’s actions must “cause it harm” means that harm has had to happen and must be proven beyond reasonable doubt in court to secure a finding of guilt. This prevents the enforcement agency from intervening in potential animal abuse situations, as harm must occur before they can intervene. If harm has not occurred yet, or there is dispute amongst experts as to the presence of harm, or insufficient evidence of that harm, then prosecution cannot be pursued. Therefore, it could be argued that the *Animal Welfare Act 1985 (SA)*, does not allow for the prevention of cruelty, it only allows the prosecution thereof. This appears in direct contradiction of the objective of the Act [74], which is for the *promotion* of animal welfare.

The WA legislature does not have this issue as the *Animal Welfare Act 2002* includes the words “likely to cause harm” [129] instead of a singular “harm”. An example of the application of harm from section 19(3) of the amended *Animal Welfare Act 2002 (WA)* is below:

- (3) Without limiting subsection (1) a person in charge of an animal is cruel to an animal if the animal –
 - (a) is transported in a way that causes, *or is likely to cause*, it unnecessary harm; or
 - (b) is confined, restrained or caught in a manner that –
 - (i) is prescribed; or
 - (ii) causes, *or is likely to cause*, it unnecessary harm; [129]

This allows the enforcement agencies in WA to intervene before harm has occurred, thus protecting animals by promoting their welfare. According to an update on the WA Government website, the Department of Agriculture and Food have successfully prosecuted a person transporting livestock in a way that was likely to cause harm [130]. This provides some measure of success associated with the new wording. However, the effect of the amendment on prosecutions rates has not been reported and it may be too early to draw firm conclusions on both the impact on animals, and any consequent increased evidential burden on the enforcement agency and difficulties in meeting this burden.

The discussed issues in Australian animal welfare legislation require further investigation and consideration. However, it is hypothesized that they contribute to the enforcement gap by preventing the enforcement agencies from carrying out their enforcement responsibilities to the full extent of the law.

5. The Court Process

5.1 Court Level

Animal welfare offences are generally initiated in the Magistrates Court in Australia [10]. Being a lower court, any decisions made are not binding to future cases, and are unreported, resulting in lack of precedents. Decisions are only binding when made in higher courts. This usually only applies to animal law appellate cases presented to the higher courts. As discussed earlier, law develops incrementally through case law [108]. The absence of precedents renders animal law to be somewhat of a 'statutory beast'.

5.2 Maximum Penalties

Penalties for animal welfare offences were the subject of numerous amendments in SA [8], Queensland [13] and Victoria [49], where the maximum penalties for offences were increased. Although the maximum penalties for offences are significant, for example, in SA the maximum custodial sentence is 4 years and monetary fine is \$50,000, on average less than 10% of these maximums are being used in court [8]. This raises questions on the purpose of maximum penalties. It is suggested that they are reserved for the worst, most serious examples of an offence [131] but if they are never applied are they just a symbolic gesture? It has been suggested that terms of imprisonment and fines are not the most effective way to punish animal abusers, and alternative penalties should be considered [6,8]. Such reasoning is derived from the fact that imprisonment as a penalty for criminal offences meets very few of the punishment theory facets, being deterrence, rehabilitation, retribution, restitution and incapacitation [132-135]. When considering animal law, imprisonment only completely satisfies the retribution aspect, as the suffering experienced by the animal harmed is compensated by the suffering experienced by the offender in jail [133]. Other facets of punishment theory seem to be ignored or are not fully satisfied. Alternative penalties, such as court mandated counselling, should aim to reduce the prevalence of reoffending and prevent the likelihood of later human violence, as there is an established link between animal abuse and human violence [136-143]. However, as noted by Holoyda [14], it is unclear what type of counselling should be imposed since there are no models for the treatment of animal abuse that have undergone any sort of study or peer review. Despite uncertainty around the effectiveness of alternatives penalties, their consideration is still warranted to prevent further acts of cruelty, whether to animals or humans.

5.3 Prohibition Orders

Enforcement agencies commonly apply to the court for prohibition orders as a mechanism to further protect animals [144], as stated by RSPCA Queensland's Prosecutions Officer, Tracey Jackson:

"In many cases, the best way to protect animals, is to use prohibition orders to limit or regulate animals owned by offenders. Many times people offend due to their current circumstances, and they simply need a break from having animals, or from having so many animals" [144].

A prohibition or supervision order is a direction issued by the court to an offender found guilty of an offence, and the provisions of which are outlined in the state and territory Acts [145-152]. These orders either prevent offenders from owning animals for a set period, or until a further order is approved by the courts or limit the number of animals to be owned [145-152]. Supervision orders work similarly to prohibition orders. The difference is that the offender is not prohibited from owning animals, they are under supervision of an enforcement agency, who can regularly check up on the welfare of the offender's animals [153].

The issue with these court orders is that they are not cross-jurisdictionally recognized, allowing people who have been prosecuted and placed under a prohibition order for animal welfare offences in one state, to cross the border and be free of the provisions therein. In a recent scenario, dog breeders pleaded guilty to animal welfare offences in Victoria and were placed under a nine-year prohibition order from owning animals [154]. The breeders entered SA and continued to breed dogs, since the Victorian prohibition order no longer had effect. The breeders have since been alleged to have committed offences under the *Animal Welfare Act 1985* (SA) and have had animals seized from them [155]. They are currently undergoing prosecution in the SA Magistrates' Court [154]. In an opinion piece to the South Australian Law Society, the Chief Executive Officer for RSPCA SA, argued for the

recognition of interstate prohibition orders, as it would discourage people with prohibition orders from relocating to another state, and continuing the ownership of animals [156]. Currently in Australia, the recognition of interstate orders has been achieved for domestic violence orders [157] and is undergoing debate by members of Queensland Parliament for firearm prohibition orders [158]. Thus, there is legal precedent for making such a change in relation to animal welfare offences.

5.4 Case Sentencing

Currently fines, generally considered as the least severe option, are the most common penalty given, while imprisonment, being the most severe option, is the least common [7,8,18,25]. This is in contradiction to the public's expectations, since they appear to largely favor prison sentences [1,16]. However, case sentencing is a complex process and as Markham [25] noted, analysis of sentencing data would be a difficult task. There is no strict formula for sentencing cases, there is human (judicial) input as well as any factors that the court will take into account. For this reason, the remaining discussion on case sentencing does not proclaim to be a comprehensive analysis on the entirety of the process, nor does it intend to undermine the current processes in place or underestimate the complexities of the criminal justice system. This discussion is simply a review of the available literature in relation to case sentencing, and ways in which it may contribute to the enforcement gap concept.

In court the judge will use the maximum penalty as a guide and decide the sentence they see fit in accordance with the relevant sentencing legislation taking into account aggravating and mitigating factors. In SA, the sentencing legislation in place is the *Sentencing Act 2017* [159]. This piece of legislation provides provisions to the courts when sentencing offenders for criminal offences [160]. For example, section 10 of the *Sentencing Act 2017* outlines the use of imprisonment sentences, stating:

- (2) Subject to this Act or any other Act, a court must not impose a sentence of imprisonment on a defendant unless the court decides that—
(a) the seriousness of the offence is such that the only penalty that can be justified is imprisonment; or
(b) it is required for the purpose of protecting the safety of the community (whether as individuals or in general) [161]

This specifies that in SA, terms of imprisonment must only be handed out as a last resort, which is in contradiction of the public's expectations, who are largely in support of prison sentences for animal welfare offences [1,16]. Public support for prison sentences is not unique to animal law; general community opinions on sentencing in criminal law are that courts are 'too lenient' and 'not severe enough' [162]. This suggests that the public are not aware of the complexity of case sentencing, and that terms of imprisonment cannot be handed out for any case. Judges have a legal obligation to not misuse prison sentences for a myriad of reasons. One being to not utilize costly prison resources on offenders who do not pose a risk to the community, as costs associated with incarcerating an individual in Australia is high [163]. Misuse of those resources would result in over-stretched prison systems, which would prevent the incarceration of criminal offenders who pose a serious risk to the community. Also considering the majority of animal abuse cases are negligence cases, where the offender has failed to provide an animal with adequate living conditions or veterinary treatment, not aggravated offences cases, where the offender intended to harm the animal [8], it implies that the majority of animal abusers do not pose a risk to the community. Therefore, other rehabilitative forms of penalty are likely to be more appropriate and cost-efficient. Thus, despite the fact that the public are largely in favor of prison sentences, they may not necessarily be warranted for the majority of perpetrators of animal crimes.

6. Conclusions

The enforcement gap in animal law is created as a result of a range of factors derived from all stages of the enforcement process, from cruelty reports to sentencing. The enforcement gap concept

is certainly not isolated to animal law, but this area of law has some unique elements due to the unusual reliance on a charitable organization for policing. There is a dearth of empirical data on contributors to this gap, and further research on concepts raised in this paper is needed. Without such evidence it is challenging to suggest solutions to the problem, but it is likely that a combination of structural change to enforcement agencies, legislative reform and public education is likely to be required.

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