

The imposition of a positive duty of care: Notes on *Proposals to Enhance Animal Welfare in Hong Kong 2019*

Wai Ting Lam

1 Introduction

Hong Kong – a city which encompasses a fantastic diversity of wild animals and a rapidly developing pet industry, animals have become an integral part of Hongkongers’ daily lives. Ironically, the current law of HK offers insufficient protection for animals, and there appear to be incidents of brutal animal abuses from time to time. When the animal law of HK is compared to that of other jurisdictions, it is apparent that the standard of animal welfare in HK is far from satisfaction.

Realising the urgency of an up-to-date framework of law, in April 2019, the Food and Health Bureau of Hong Kong drafted a consultation document in which proposed various ways to promote animal welfare in HK (“the Proposal”)¹. This article aims to shed light on the proposed changes, particularly *the novel ‘duty of care’*.

2 Overview of the Proposal

In Hong Kong, the current statutory framework of animal law consists of several pieces of legislation² - precisely, a bundle of antiquated statutes. For example, the HK’s Prevention of Cruelty to Animals Ordinance (Cap. 169) (“PCAO”) is a carbon-copy of the UK’s Protection of Animals Act 1911. Undoubtedly, in the past century, the relationship between animals and human beings have undergone substantial changes³. It is certainly unacceptable that the law in HK has not responded to the social change accordingly. When a boat is stuck in the middle of the sea, a small breeze which changes the current could be the push that the boat needs. The initiatives contributed by the Proposal are what HK has been longing for. The Proposal contains many aspects, with PCAO being the main focus. According to the Proposal, the concept of “animal welfare” would be incorporated into the law; it requires a person who owes a responsibility to an animal (such as owner) to safeguard the corresponding animal’s welfare.

Throughout the history of animal law, the same question has been raised on numerous occasions: what level of protection should be given to animals? In the present day, against the backdrop of the development of animal awareness⁴, the law in other jurisdictions is gradually shifting towards the promotion of animal welfare⁵; in other words, instead of merely preventing animals from

¹ Food and Health Bureau, *Proposals to Enhance Animal Welfare in Hong Kong* (Food and Health Bureau Consultation Document, April 2019)

² Examples of relevant statutes are Prevention of Cruelty to Animal Ordinance (Cap 169), Dogs and Cats Ordinance (Cap 167) and Rabies Ordinance (Cap 421).

³ An obvious example would be production. As the status of animals has been raised, the wellbeing of animals which involve in production activities is concerned by many. J.L. Albright, 'Status of Animal Welfare Awareness off Producers and Direction of Animal Welfare research in the Future' (1983) 66(10) *Journal of Dairy Science* 2208

⁴ Marie Blosh, 'The History of Animal Welfare Law and the Future of Animal Rights' (LLM thesis, University of West Ontario 2012)

⁵ For example, the UK introduced the Animal Welfare Act 2006.

suffering, the law operates to endorse welfare issues like the “five freedoms”⁶. Meanwhile, the current PCAO, which is an equivalent to the UK legislation in 1911, is silent on the matter of animal welfare. With this being the main direction of change, the Proposal would navigate and bring the law back on the right track.

3 Positive duty of care

In the Proposal, the idea of “positive duty of care” has been brought up. It suggests that persons responsible for animals should take reasonable steps to ensure the welfare of animals is up to standard. In concert with the imposition of a positive duty, other practices such as the issuing of improvement notices would also be implemented.

Principles in relation to the positive duty of care

Under the current PCAO framework, despite imposing a duty of care, such duty owed to animals is passive; which means the responsible person would not be liable as long as the animals do not suffer⁷. It does not require any positive act to be taken by the person. For instance, under PCAO, a dog-keeper would not be liable for cruelty if he confines his dog in a small room all day, that is because the dog has suffered no ‘real’ detriment. This practice is however below the standard of animal welfare – the dog-keeper should provide a spacious environment for the dog, and ensure that the dog could enjoy healthy growth and development, in both mental and physical aspects.

The positive duty of care in animal welfare law could be traced back to the UK Animal Welfare Act 2006⁸. Some requirements (i.e. the “five freedoms”⁹) are set out and it is likely that the Proposal would follow the footsteps of the UK. Nevertheless, in the absence of details, one might ponder when would the said positive duty of care arise. To put it in another way, what is the legal basis of imposing a positive duty of care?

The positive duty of care is not a novel creation in law. In common law, the positive duty of care exists when there is a relationship of reliance¹⁰. In *Kent v Griffith (No.3)*¹¹, the court ruled that the ambulance service owed a positive duty of care to the person in peril due to the relationship of reliance. Similar to many other rules, there always comes an exception – a duty owed to the general public (e.g. police service) would not amount to a positive duty of care¹². The distinction was made due to policy consideration; for example, a police officer should not have been expected to help a citizen when he is occupied by helping another. The exception aims to protect the public service provider from unforeseen liability.

⁶ Five freedoms include freedom from thirst, hunger and malnutrition, freedom from discomfort and exposure, freedom from pain, injury, and disease, freedom from fear and distress, and freedom to express normal behaviour. John Webster, ‘Animal Welfare: A Cool Eye Towards Eden’ (1995) Blackwell Science 10

⁷ Prevention of Cruelty to Animals (Cap 169) s 3

⁸ Animal Welfare Act 2006 s 9

⁹ *Report of the Technical Committee to Enquire Into the Welfare of Animals Kept Under Intensive Livestock Husbandry Systems* (HMSO 2004)

¹⁰ Sandy Steel, ‘Rationalising omissions liability in negligence’ [2019] LQR 484, 499

¹¹ [2011] QB 36, para 45

¹² In *Kent*, the court reasoned that the police and fire service protected the public generally, while the ambulance served specifically the person mentioned in the 999 call. Without a call, the ambulance would not operate or patrol around the city. Thus, it owed no duty to the general public in this sense.

A similar logic applies here. In the context of animal welfare, whether a positive duty of care should be imposed depends on the role of the person. If the person involved is the owner or caretaker of animals, a positive duty of care can be justified by the relationship of reliance¹³. For domesticated animals, the owners and caretakers would be in control of their living environment and food source¹⁴. Thus, reliance exists between animals and their owners and caretakers. It is safe to say that the positive duty of care should apply in these situations.

Nevertheless, from the Proposal, since a person having temporary custody of animal is also regarded as a person responsible, animal service providers may be included under this broad definition. That is, volunteers who provide checkups for feral cats may be burdened with the positive duty of care when they have physical custody of the cats over a short period of time. This might potentially attract unknown liabilities. Similar to the reasoning in *Kent*, if a person provides services for animals in general, the person should be relieved from a positive duty of care. It is understandable that the broad definition is meant to extend the applicability of the rule. Still, it would be more desirable if the authority could clarify the scope of the proposal and make exceptions to this rule available to people with special roles.

Practical concerns

In the Proposal, the overall objectives are to enhance animal welfare and elevate public awareness. When assessing the suggestion, the effectiveness should be considered, i.e. whether it would achieve the objectives through the recommended changes.

First and foremost, the positive duty of care applies in cases of abandonment, which fills the loopholes of the current laws. According to the Rabies Ordinance, the prosecution has to prove the keeper of the animal abandons the animal without reasonable excuses¹⁵. Meanwhile, the provision provides an avenue of defence – the abandonment was due to causes beyond his control¹⁶. That means, when a person is accused of abandoning his animal, he can always conveniently excuse that his animal escapes from the premise¹⁷, and he would not be held liable without the intention to abandon¹⁸. This renders the offence a “paper tiger” that disappointedly fails the legislative intent. By incorporating abandonment into the welfare offence, it would be more difficult for the offender to get away with liabilities; since an escaping animal reflects that a person has not endeavoured to look after his animal, regardless of the person’s true intention. Hence, it is believed that it could improve the implementation of the law by filling the void.

Furthermore, the issuing of improvement notices functions as an effective tool to raise awareness of animal welfare. Currently, the Society for the Prevention of Cruelty to Animals (“SPCA”) makes recommendations to the owners who overlook their animals’ welfare. Unfortunately, those recommendations are always ignored due to the lack of consequences¹⁹. By adding legal effects on the recommendations, the problem could be tackled directly. Moreover, a retrospective remedy

¹³ Inferences could be drawn from the offence relating to child neglect, where parents fail to provide sufficient care to child commit an offence. See Offences against the Person Ordinance (Cap 212) s 27

¹⁴ Sarah Marshall-Pescini, ‘The role of domestication and experience in ‘looking back’ towards humans in an unsolvable task’ [2017] 7 *Scientific Reports* 1

¹⁵ Rabies Ordinance (Cap 421) s 22(1)

¹⁶ Rabies Ordinance (Cap 421) s 22(4)

¹⁷ Information provided by the Inspector of the Society for the Prevention of Cruelty to Animals

¹⁸ Amanda Whitfort & Fiona Woodhouse, *Review of Animal Welfare Legislation in Hong Kong* (HKU 7010-PPR-5, 2010)

21

¹⁹ n 15

could not ensure the animals' wellbeing in the first place. The law should allow people to understand the standards (i.e. the *ex-ante* function of law)²⁰. Through the issuing improvement notices, the public would comprehend and conform to the standards expected from them. In the UK, a jurisdiction which has a similar practice, 99% of recipients of improvement notices would take positive actions for the benefit of animals²¹. Likewise, the positive effect of the notice is believed to be transferrable to HK context.

In spite of the possible practical benefits, the proposal has not entirely addressed the blind spots of the current law. To facilitate the enforcement of the laws, the Proposal also gives suggestions that enhance the powers of a public officer. Although this idea was referenced from the UK²², it is nevertheless doubted as to whether these powers could contribute to a considerable improvement in enforcement. In particular, some animals that are kept on private premises, and it may be almost impossible to discover their welfare problems²³. For instance, rabbits, which live in an apartment and do not make dramatic sounds, may not be easily observable by others. How could the treatment of animals come to the public officers' attention? On the other hand, it is unfair to challenge the effectiveness on this basis, as this is impossible to regulate all owners' conducts. To a worth-mentioning extent, the changes would be useful in cases involving an outdoor land or a request to SPCA for animal rescue²⁴. Thus, a substantial degree of improvement is certain upon the enactment of the law in accordance with the Proposal.

4 Conclusion

When the law has to shift towards the promotion of animal welfare, imposing a positive duty of care might be an attractive route to take. However, to avoid being trapped by doctrinal confusion and practical difficulties, the law should be presented in an explicit way. In general, it is believed that the proposed change in the law that could possibly transform HK into an animal-caring city.

²⁰ John Darley, Kevin Carlsmith & Paul Robinson, 'The Ex Ante Function of the Criminal Law' [2001] 35 LSR 165

²¹ n 16, 17

²² See Animal Welfare Act 2006 s 18

²³ Information provided by the Officer of Animal Earth. 彭麗芳, '未來城市：修訂動物法 從刑罰出發，動物真的受益嗎？' *Ming Pao* (Hong Kong, 5 May 2019)

²⁴ n 15