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Dr Hon KWOK Ka-ki, Chairman
Panel on Food Safety and Environmental Hygiene
Legislative Council
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Dear Chairman and Panel members

Thank you for the opportunity to provide a representation to you on the Administrations' proposed amendments to Cap 169 to enhance animal welfare. The *HKU/SPCA Review of Animal Welfare Legislation in Hong Kong* (2010), of which I was the primary author, identified serious shortcomings in the legislation protecting animals in Hong Kong. Some of these would be addressed by the 'Proposals to Enhance Animal Welfare'. In particular, the introduction of a duty of care to animals would provide a long overdue and critical amendment to Cap 169, and has my full support.

Duty of Care

The primary recommendation that came out of the *HKU/SPCA Review of Animal Welfare Legislation in Hong Kong* (2010) was the introduction of a duty of care towards animals for Hong Kong. That duty would provide that a person commits an offence if he does not take such steps, as are reasonable, in all the circumstances, to ensure that the needs of the animal, for which he is responsible, are met, to the extent required by good practice.

The need for a duty of care in Hong Kong is clear. As section 3 currently appears in Cap 169, an animal must actually suffer before an offence has been committed. Only then can any action be taken to protect the animal. This means that in cases of neglect, authorities currently have to wait until evidence of suffering is legally actionable before the animal can be, in any way, protected. Accordingly, the current law in Hong Kong does not allow for enforcement authorities to take any action at all to prevent the impending suffering of animals, despite the fact that their care is obviously inadequate. As a result, many welfare abuses go unprosecuted. Such a situation is clearly unsatisfactory. Modern animal welfare laws do not just prosecute cruelty, they actively prevent it.

In many overseas jurisdictions it has long been recognized that the problem of animal abuse cannot be addressed, in law, without imposing a duty of care on those who keep animals, requiring them to protect those animals from harm. Once there is a positive duty, imposed at law, requiring people to care for their animals, enforcement authorities are able to step in and protect the animals, when care is not being provided. Authorities need not wait until the animal has suffered an overt act of cruelty before it can be protected.

The addition of a duty of care, in law, focuses a legal responsibility on the owner for the conditions in which he keeps the animal, not just their subsequent effect. Whilst it must remain an offence to treat animals cruelly, the law must also place a positive duty on those who keep animals to provide their animals with adequate care to meet their basic needs.

The policy behind the law recognizes that placing a duty on those who keep animals to provide them with adequate care is not unnecessarily burdensome. No person is forced to keep animals. The choice to keep animals is voluntarily assumed and, as such, there is no reason why the law should not regulate the way in which they are kept, to ensure their most basic needs are met. Whilst many people who keep animals are already doing all that they need to do to comply with a duty of care requirement, the change to the law is critical to ensure that those persons not ensuring the welfare of their animals do not escape intervention because the legal requirements for a prosecution could not be adequately met.

On this basis, I support Cap 169 being amended to provide a duty of care towards animals. To this end, species specific codes of practice for the care of animals must also be introduced.

Abandonment

Currently Hong Kong prohibits the abandonment of animals under Cap 421, at section 22. Section 22(1) provides that the offence occurs where a keeper of any animal, without reasonable excuse, abandons that animal. Unfortunately, this section has been interpreted to require that a conviction can only be achieved if the prosecution is able to prove the defendant had an intention to permanently abandon the animal and the animal has suffered.

The *HKU/SPCA Review of Animal Welfare Legislation* (2010) recommended that the offence of abandonment should be prosecuted as a manner of failing to meet the needs of the animal, under the recommended duty of care offence. Anyone who leaves their animal, without taking reasonable steps to ensure their needs are met, as required by good practice, would then commit an offence of

abandonment. Failing to provide a suitable diet, suitable environment, and protection from pain and suffering, by leaving an animal to fend for itself, whether for a short or long term period, would fall foul of the duty of care offence whether or not the animal has suffered. I support the proposal to include abandonment as a contravention of the duty of care offence.

Improvement Notices

Another of the recommendations made in the *HKU/SPCA Review of Animal Welfare Legislation* (2010) was the introduction of improvement notices for relatively minor and easily rectifiable breaches of the duty of care. The beauty of an improvement notice system is that it does not require authorities to initiate prosecutions in most cases. Where the animal's welfare needs are not being fully met, but the animal is not yet at the point of suffering, the law should allow authorities to serve improvement notices. These notices would provide the opportunity for the person responsible for the animal to rectify the problem, within a specified time period. The time period allowed for fixing the problem should take into account the need to ensure that action is taken before the animal begins to suffer. If it is suspected that the animal is already suffering, issuing an improvement notice would not be appropriate. The law must also allow for swift action if the situation changes. If, after an improvement notice is served, the animal's condition deteriorates, and it is in danger of suffering before the time for compliance with the notice has expired, authorities must be empowered to step in and take possession of the animal, to protect it from harm.

Improvement notices must specify the actual breach of the duty of care, the steps which should be taken by the person responsible to remedy the situation, the period in which remedial action should be taken and the consequences of non-compliance with the notice. The compliance period may be short (such as 24 hours) for urgent action, or longer (e.g. 4 weeks) for a long term solution. If the person responsible for the animal takes remedial action, within the time specified in the notice, to meet the needs of the animal, then a prosecution cannot be instituted. If he fails, however, to act on the notice, then a criminal prosecution should follow.

Powers to deal with Animals in Distress

Under the current law in Hong Kong there is insufficient power for the authorities to enter premises, assist and, where necessary, remove an animal from conditions where it is suffering or likely to suffer. Such powers should be enforceable without bringing a prosecution and achieving a conviction. The *HKU/SPCA Review of Animal Welfare Legislation* (2010) recommended the

introduction of a power for authorities to step in early, assist and, where necessary, take possession of animals which are suffering, or likely to suffer if their circumstances do not change. No offence need be committed, or proven, for this action to be taken. The point of the law is simply to protect the animal from harm or further harm. The proposal to enhance enforcement powers for safeguarding animal welfare should therefore be supported.

Maximum penalties

Whilst Hong Kong's maximum sentencing levels for cruelty were significantly raised in 2006, for the most part sentencing practices have not altered, with moderate fines remaining a common sentence for animal cruelty offences in the magistrates' courts. Even in very serious cases, sentences of imprisonment have remained well below the three year maximum penalty. While raising the penalty again should encourage higher sentences to be imposed, other matters must also be addressed to ensure justice for animal victims.

In the UK, New Zealand and Australia, sentencing guidelines have been formulated to assist courts in passing appropriate sentences in difficult cases. In the UK, Sentencing Council Guidelines apply to animal cruelty and welfare offences. These Guidelines identify high culpability features which should increase sentences, including where the offender acted deliberately or gratuitously to cause suffering, the offender has used the animal in a commercial context or the animal has suffered prolonged or deliberate ill treatment or neglect. In such cases the UK government has suggested the (soon to be amended) maximum penalty of 5 years' imprisonment would be applicable.

In Hong Kong there is no Sentencing Council. Reliance on the Court of Appeal's guideline judgments has traditionally been used to serve the same purpose in criminal law, however animal cruelty cases are very rarely appealed. As such, the appellate courts have had little opportunity to set down guidelines in animal cruelty cases. A recent and important opportunity for this lacuna to be filled was provided in *SJ v Fung Chi Hoi* (CAAR 4/2017). In that case, while the Court declined to set down tariffs for animal cruelty offences it did provide some guidance to prosecutors and judges in identifying aggravating features which should be taken into account in sentencing. In a non-commercial context, aggravating factors may include:

- (1) prolonged cruelty to the animal victim;
- (2) use of extreme violence;
- (3) use of a weapon;

- (4) causing serious, severe or persistent physical or psychological harm or suffering;
- (5) how the offence is committed increases or aims at increasing or extending the shock or torment suffered by the animal victim;
- (6) premeditation in the commission of the offence;
- (7) causing severe pain or suffering to the animal victim in a perverted manner or with a distorted mind, thereby gaining a sense of perverted gratification;
- (8) breach of the trust given in relation to the animal victim or abusing power;
- (9) causing influence on third parties, such as the public who witness the course or result of the offence;
- (10) making use of technology, such as broadcasting the commission of the crime through social platforms on the internet so as to publicize or promote cruelty to animals
- (11) repeated commission of the offence.

One of the proposals made has been to allow offences of cruelty to be charged as summary or indictable offences ('either way'). I support the proposal and suggest that when a determination is made as to how an offence is charged, the matters highlighted in *SJ v Fung Chi Hoi* are taken into account.

Were the sentencing limits increased I would suggest increasing the maximum penalty for cruelty tried summarily to 5 years' imprisonment and a fine of \$300,000. Where the offence is tried on indictment the maximum penalty should be ten years' imprisonment with a maximum fine of \$2,000,000. The penalty for the duty of care offence should be set at a lower level, to reflect their educative, rather than punitive purpose, with a maximum of 3 years' imprisonment and a fine of \$200,000. Where breaches of welfare have caused significant suffering, charges of cruelty should be laid instead.

Finally, a few important words must be said as to the test for culpability for cruelty under section 3 of Cap 169. The test for cruelty under section 3's English equivalent statutory provision, as set down by the English High Court in *Ford v Wiley* (1889) 23 QBD 203, requires that a defendant's behavior is judged by an objective standard: namely that of a reasonably humane counterpart, confronted with the same circumstances. This objective standard has, far too often, been overlooked in Hong Kong cases. Correctly applied, the standard does not allow a defendant's lack of cruel intention or unreasonable misunderstanding of an animals' needs to be used to obfuscate his legal responsibility. Nor can a lack of financial or domestic ability to care for an animal excuse its suffering as 'necessary' under the statutory test. Such matters may be relevant to decisions as to

whether to prosecute a defendant and can be raised in mitigation but they are not relevant to the determination of guilt. With the introduction of a new duty of care in law, it is imperative that the legal tests for both cruelty and the duty of care are properly applied by prosecutors and judges in Hong Kong and the widespread misunderstanding of the appropriate test for culpability is remedied.

Role of the Prosecutor

The importance of the role of the prosecutor in ensuring that the facts relevant to sentencing are placed before the court, cannot be overemphasized. The Brief Facts of the case, provided to the magistrate, should, as a matter of course, include a detailed description of the offending, along with veterinary evidence of the injuries sustained, the likely level of suffering the animal endured and the period over which this suffering was inflicted. Unfortunately the Brief Facts provided in many cases have included scant veterinary evidence of such matters. Expert witnesses statements detailing the extent and nature of suffering should be sought by prosecutors as a matter of course.

As most cases are prosecuted in the magistrates' courts, and not appealed, sentencing notes are extremely rare. It is difficult therefore for prosecutors to build knowledge of this highly specialized area of law and a bank of precedent, on which legal submissions on appropriate sentences, in future cases, can be based. It is therefore recommended that only permanent prosecutors who are trained and specialized in animal cases are tasked with the prosecution of these complex crimes. Cases involving animals should not be briefed out to prosecutors on fiat. Where regulatory cases are prosecuted in house, by government departments, legal training in case preparation and expert support at trial must be provided.

Time Bar

The proposal to allow for animal cruelty offences to be tried as dual offences ('either way') would permit serious cases to be tried in the District Court. Charging offences as indictable crimes would ensure that the current problems experienced by prosecutors with charges becoming time barred would be alleviated. Where animal related crimes are necessarily charged as summary offences, it is critical that the time for laying an information is extended from 6 months to 3 years, to allow for effective prosecutions.

Disqualification and Deprivation Orders

I support the proposal to disqualify and deprive those convicted of animal offences from keeping and dealing with animals. The *HKU/SPCA Review of Animal Welfare Legislation (2010)* recommended that on conviction for any animal related offence the Court should have the power to disqualify a person from keeping animals and deprive him of any animals currently being kept. On conviction, where such an order is not imposed, the Court should be required to give written reasons why such an order was not made. Such orders should be broad in nature. The offender who is the subject of the order should be disqualified not only from owning or keeping those animals he presently has in his possession but also, where necessary, from owning or keeping animals in the future, participating in the keeping of animals with others, dealing with animals, transporting animals and from being a party to an arrangement under which he is able to control or influence the way in which animals are kept. A necessary power to seize animals currently being kept by the person subject to the disqualification order should also be introduced.

Other matters

For a newly amended Cap 169 to be effective, it must be effectively enforced. In conjunction with the introduction of the duty of care and power to give improvement notices, I recommend that AFCD senior veterinary officers, police and SPCA senior inspectors should all be empowered to enforce duty of care related provisions under Cap 169 and, where necessary, take possession of animals which are suffering or in danger or suffering, without the need for an offence to be charged or prosecuted.

It is also critical that where animals have been seized and it is judged that their return would present a welfare risk, they should be released for rehoming without delay. Cap 169 should be amended to allow for administrative forfeiture of surrendered animals by both AFCD and police and, where forfeiture is challenged, early judicial intervention for the benefit of vulnerable animal victims.

Finally, for animal protection legislation to remain effective developing scientific knowledge, changing ethical considerations and perceived weaknesses in the current framework must be able to be addressed quickly. The *HKU/SPCA Review of Animal Welfare Legislation (2010)* recommended that extensive enabling powers be introduced under Cap 169 which would allow for up to date regulations to be introduced, as required, without the need to amend primary legislation, ensuring prompt and effective protection of animals in Hong Kong.

In conclusion, the current inability to impose a duty of care has damaged public confidence in the law's ability to ensure proper protection for animals. The time has come to address the inadequacies in Cap 169, a law which today remains largely modelled on legislation which was passed by the UK government over a century ago.

I invite the members of this Panel to strongly support the introduction of the duty of care under Cap 169 and the other proposals to enhance animal welfare in Hong Kong.

Yours sincerely

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(Electronically)

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