



**Submissions on the amendment to the Prevention to
Cruelty to Animals Ordinance, Cap 169.**

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Organisation, July 2020.



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I. GENERAL AMENDMENT TO THE PREVENTION OF CRUELTY AGAINST ANIMALS ORDINANCE, CAP 169.

The Hong Kong Animal Law and Protection Organisation (“**HKALPO**”) unreservedly supports the amendment of the Prevention of Cruelty to Animals Ordinance, Cap 169 (“**Cap 169**”), the main source of legislative protection to animals in Hong Kong.

In 2010, a collaborative effort between The University of Hong Kong (“**HKU**”) and the Society for the Prevention of Cruelty to Animals Hong Kong (“**SPCA HK**”) resulted in the publication of the *Review of Animal Welfare Legislation in Hong Kong*, which identified a number of serious shortcomings and problems in Cap 169. Different areas and aspects that needed significant improvement were highlighted and required legislative reform in order to ensure that the legislation is capable of protecting the welfare of animals in Hong Kong. Furthermore, amendment to Cap 169 will necessarily result in the Prevention of Cruelty to Animals Regulations, Cap 169A to be brought to the same protective standard as its primary legislation.

The amendment to Cap 169 is warmly welcomed by HKALPO as it signifies the changing attitudes towards animals in Hong Kong. Instead of punishing offenders for acts that have already been committed and with legislation that is reactionary in nature, focus should now be placed on being proactive, protecting animals by imposing a legal responsibility on those who own and are responsible for their welfare. Given the importance of this amendment, it is hoped that the matters raised below will also be considered and included. We have also, where appropriate, inserted the legal position of two progressive jurisdictions (the United Kingdom and New Zealand) in relation to some of the matters raised, to act as a valuable comparator when considering the amendment to Cap 169.

HKALPO hopes that the amendments to Cap 169 will allow Hong Kong to develop further as an advanced jurisdiction that not only treats the welfare of animals with compassion but also denounces animal cruelty through a robust legal system. As the primary source of legislation protecting animals in Hong Kong, Cap 169 needs to be ruthless rather than toothless.

II. THE INTRODUCTION OF A DUTY OF CARE UNDER CAP 169.

The genesis of a duty of care requirement in cases of negligence came from the seminal House of Lords decision in *Donoghue v Stevenson* [1932] AC 562, which involved an opaque ginger beer bottle containing the remains of a gastropod, which was unfortunately consumed. The principle laid down by Lord Atkin has since been colloquially known as the “neighbour” principle, and the test of liability in negligence based on foreseeability and proximity. Thus, where a person is closely connected with another and can foresee that if he does not take due care, his act or omission could injure such other person, he would be liable for any injury caused by his negligence.

Cap 169 is largely reactive, and action can only be taken once an animal has suffered unnecessarily. The proposed amendments to introduce the tortious concept of duty of care, would present a new concept for pet owners and those responsible for animals in Hong Kong, and would be a positive step in strengthening and protecting the welfare of animals.

(i) New Zealand

In New Zealand, the most important innovation to the Animal Welfare Act 1999 (NZ) compared to its predecessor¹, which simply imposed liability on those who were cruel to animals, was to impose a positive duty of care “to require owners of animals, and persons in charge of animals, to attend properly to the welfare of those animals.” The core statutory obligations upon owners and persons in charge of animals is established by section 10 Animal Welfare Act 1999 (NZ): -

“The owner of an animal, and every person in charge of an animal, must ensure that the physical, health, and behavioural needs of the animal are met in a manner that is in accordance with both –

(a) good practice; and

(b) scientific knowledge.”

¹ Animal Protection Act 1960 (NZ)

The needs identified in section 10 reflect the “Five Freedoms”², first proposed by Professor FW Rogers Brambell, who authored a report into the welfare of intensively farmed animals in 1965, which has subsequently been judicially defined by the New Zealand Court of Appeal in *Balfour v R*³. New Zealand was also the first country to codify the Five Freedoms into legislation.

While the Animal Welfare Act 1999 (NZ) does not exhaustively define “owner”, it is not a difficult concept in law. Ownership is often established by matters of fact. “Person in charge”, is however, a term of art. It thus extends the duty of care obligations to those who may not own, but are in charge of animals, thereby preventing the effect of escaping liability by virtue of lack of ownership. In a broader context, it will include when an animal is left for treatment at a veterinary clinic, at a boarding kennel or cattery for care or seized by an animal welfare organisation.

(ii) United Kingdom

The Animal Welfare Act 2006 (UK) is predicated upon responsibility for an animal. Once responsibility attaches to a person, the duty towards that animal and the consequences for its welfare flows from that status. Section 3 of the Animal Welfare Act 2006 (UK) provides that “references to a person responsible for an animal are to a person responsible for an animal whether on a permanent or temporary basis.”

Section 9 of the Animal Welfare Act 2006 (UK) places a duty of care on people to ensure that they take reasonable steps in all the circumstances to meet the welfare needs of their animals to the extent required by good practice. Once again, the needs of an animal include the ‘Five Freedoms’, which considers the animal in relation to their environment and protection from suffering. In short, positive steps must be taken to ensure they care for their animals properly and in particular must provide for their welfare needs, which are: -

- (i) need for a suitable diet;
- (ii) need for a suitable environment;
- (iii) need to be able to exhibit normal behaviour patterns;

² <https://www.animalhumanesociety.org/health/five-freedoms-animals>

³ *Balfour v R* [2013] NZCA 429 at §12

- (iv) need to be housed with, or apart, from other animals;
- (v) need to be protected from pain, suffering, injury and disease.

HKALPO strongly supports the introduction of a positive duty of care for all owners and persons responsible for animals as recommended by the *Review of Animal Welfare Legislation in Hong Kong (2010)*. Any owner or person responsible for an animal, who fails to adhere or maintain the welfare needs of their animals will commit an offence under Cap 169.

(iii) Code of Practices (“CoPs”)

CoPs provide guidance for those involved in the welfare of animals and can be issued, amended and revoked. CoPs take account of changing conditions within society, which are then be reflected in the best practice to promote animals’ welfare.

HKALPO supports the proposition that CoPs should be issued and promulgated by the Director of the Agriculture, Fisheries and Conservation Department (“**AFCD**”) after prior consultation with the Animal Welfare Advisory Group (“**AWAG**”) and other relevant animal law and welfare organisations⁴. The flexibility to issue and amend CoPs easily will ensure that they remain in line with and complimentary of primary legislation, as well as the developing trends and scientific knowledge, without the need for any lengthy amendment debates and consultation.

Current CoPs in Hong Kong focus mainly on three groups of stakeholders:

- (1) Laboratory researchers, covered by the *Code of Practice for Care and Use of Animals for Experimental Purposes* (the “**Experiment Code**”) (issued by AWAG, AFCD in 2004);⁵

⁴ In the UK, a COP is issued following a draft and consultation by the Secretary of State with interested persons and the approval of Parliament (section 15 AWA 2006 (UK)). In New Zealand, a Code of Welfare (similar to COPs) is issued by the Minister on the recommendation of the National Animal Welfare Advisory Committee (“**NAWAC**”) (similar to AWAG), by the publication of a notice in the New Zealand Gazette.

⁵https://www.afcd.gov.hk/english/aboutus/abt_adv/files/Code_of_Practice_Care_and_Use_of_Animals_for_Experimental_Purposes_English.pdf

- (2) Animal breeders, covered by the *Code of Standards for Licensed Animal Traders* (issued under the Public Health (Animal & Birds) (Trading and Breeding) Regulations Cap. 139B⁶ and specifically in respect of dogs, the *Code of Practice for Animal Traders (Dogs)*⁷ both issued in 2017; and
- (3) Pet shop owners, covered by the *Code of Standards for Licensed Animal Traders* (issued under the Public Health (Animal & Birds) (Trading and Breeding) Regulations Cap. 139B⁸ and specifically in respect of dogs, the *Code of Practice for Dog Breeders*⁹ both issued in 2017.

HKALPO understands AWAG is currently in the process of producing other CoPs for various industries, as well as reviewing the current the Experiment Code which has not been updated since its enactment. Notably, is also not linked to any primary legislation. The new Experiment Code should follow more recent international standards including the United States of America, which address areas such as: housing for animals should be of sufficient space and materials to permit the expression of basic species-specific behaviour, for example burrowing and gnawing for rodents; climbing, perching and swinging for nonhuman primates, and perching and scratching for birds. Moreover, social animals should be housed with one or several compatible conspecifics to address their biological needs for companionship¹⁰.

The salient danger is that if CoPs are not regularly updated, it may result in the compromised welfare standards of animals and as a further consequence, place animals at risk. When updates and developments of CoPs are undertaken, they should be made publicly available to ensure transparency and accountability. For the further development

⁶https://www.pets.gov.hk/english/publications_and_downloads/animal_business/files/COS_ATL_except_dogs.pdf

⁷https://www.pets.gov.hk/english/publications_and_downloads/animal_business/files/COP_ATL_dogs.pdf

⁸https://www.pets.gov.hk/english/publications_and_downloads/animal_business/files/COS_ATL_except_dogs.pdf

⁹https://www.pets.gov.hk/english/publications_and_downloads/animal_business/files/COP_DBLA.pdf and

https://www.pets.gov.hk/english/publications_and_downloads/animal_business/files/COP_DBLB.pdf

¹⁰ Animal Welfare Institute policy on research and testing with animals

of CoPs, it may be useful to refer to the guidance and regulations implemented in other jurisdictions, including the United Kingdom, the European Union, Singapore, the United States and Queensland as guidance.

The amendment to Cap 169 introducing a duty of care requirement under may also provide increased bite to CoPs, as a lack of duty of care by those responsible for animals may be established if it can be shown that the relevant CoP has been disregarded. Although a breach of a CoP may not be an offence *per se*, it can nevertheless be used as evidence in Court by a prosecutor and considered by a Court when considering the evidence adduced to support a charge.

In parallel to the Experiment Code, the Animals (Control of Experiments) Ordinance, Cap 340 (“**Cap 340**”) is completely outdated and inadequate for what it serves to protect. Currently, the only benefit that can be discerned from Cap 340 is that it provides the Hong Kong Government with a catalogue of institutes and people who perform animal procedures, as well as the numbers of animals that are used in experiments. There may be some practical benefit to link the Experiment Code to Cap 340, or to adopt it under Cap 169, after the present amendments and updates

HKALPO invites CoPs to be issued and amended regularly to compliment primary legislation as well as scientific developments and public perception in relation to animals and their welfare. HKALPO also hopes that working groups will be invited to assist in the drafting of CoPs, and thereafter jointly approved by AWAG and the Director of AFCD. A breach of the CoPs may be evidence of a breach of duty of care under the amended Cap 169.

(iv) Abandonment

Abandonment is a problem that needs to be addressed in Hong Kong. The introduction of a duty of care under Cap 169 will also capture the abandonment of animals by those responsible for their well-being. Where an animal suffers due to distress and hunger as a result of abandonment, these factors should be considered an aggravating factor that would elevate it to a more serious form of the offence.

HKALPO supports the introduction of a duty of care requirement under Cap 169 to encompass abandonment, so that all animals are protected under the legislation, and not just those set out in Schedule I of Cap 421.

(v) Release of animals

An offence would be committed if a domesticated animal, was released in an area whereby they were unable to realistically survive. Similarly, it would be an offence if a wild animal that has been recuperating in captivity is released before it is able to fend for themselves; or captive-bred animals are released without care. Another avenue of concern are the animal release activities that operate on a commercial scale, with the majority of species occurring in the food trade. Often animal species are caught overseas, then imported into Hong Kong, and released into the environment, which may be wholly detrimental to their wellbeing.

HKALPO supports the introduction of a duty of care requirement under Cap 169 to encompass the abandonment and release of animals that would cause the animals to suffer unreasonable and unnecessary pain or distress. We also support the proposals as suggested by AFCD.

III. THE ISSUANCE OF IMPROVEMENT NOTICES FOR BREACHES OF DUTY OF CARE.

HKALPO supports the introduction of an improvement notice scheme to ensure a person discharges their duty towards any animal they are responsible for in terms of its welfare. The improvement notice must be particularised in a way so a person who is subject to such, understands what they are expected to do and the time frame in which they are to complete the suggested improvements. Breach of an improvement notice may be considered as a breach of duty of care towards an animal.

If an owner or responsible person fails to ensure the needs and welfare of the animal are met, they will commit an offence. However, in instances where the contravention can be said to be trivial or minor, there is value in issuing an improvement notice by an authorised public officer to require any person to take reasonable steps to improve the welfare of the animal within a set period of time. If no remedial actions are taken, or the actions taken are insufficient to meet the necessary welfare standards of the animal within the set period of time, it may lead to the prosecution for contravening the duty of care.

If the specified steps are taken within the compliance period no proceedings will be taken in respect of that potential breach, but it should not be a bar against a different or further offence. The fact a person has ignored an improvement notice should be considered an aggravating factor the Court can consider in any proceeding.

In the UK, an inspector is empowered to serve an improvement notice on any person they consider as having failed in his or her duty to maintain the welfare of any animal they are responsible for. The notice serves as a direct warning to the person and informs them to take immediate action or further action will be pursued. Failure to adhere or satisfy the conditions set out in the improvement notice will result in a prosecution.

An inspector is defined in AWA 2006 (UK) as ‘a person appointed to be an inspector for the purposes of that provision by the appropriate national authority or a local authority’

and should possess particular experience and knowledge of animal welfare, such as a Royal Society for the Prevention of Cruelty to Animals (“**RSPCA**”) inspector.

A notice issued by an inspector must be precise in detail and specification, much like a search warrant, as it has legal implications and consequences. It should specify at a minimum: -

- i) The inspector’s opinion in relation to the welfare of the animal;
- ii) How the person subject to the notice has failed to comply with necessary welfare standards;
- iii) What steps the person should take to comply to remedy to issue.

IV. THE INTRODUCTION OF SPECIFIC OFFENCES UNDER CAP 169.

HKALPO supports the inclusion of specific offences under Cap 169 as recommended by the *Review of Animal Welfare Legislation in Hong Kong (2010)*.

(i) Cruel devices and trapping

HKALPO would invite proper regulation and licensing in relation to the sale and possession of traps and other pest control items. HKALPO also supports a complete prohibition of glueboard traps to be used in Hong Kong.

Under the Wild Animals Protection Ordinance, Cap 170 (“**Cap 170**”), the definition of “hunt” and “hunting appliance¹¹” only relates to “wild animals”, which is defined as: -

“wild animal” (野生動物) means any animal, other than those classed at common law as domestic (including those so classed which have gone astray or have been abandoned).

Section 7 of Cap 170 provides that unless a person obtains a special permit under section 15 of the Ordinance, that person shall not hunt any wild animal with means including hunting appliances. The protection against the possession and use of hunting appliances needs to be extended to include domesticated and companion animals, as unfortunate and unintended victims. Furthermore, the sale of electric shock collars and similar devices should also be prohibited from sale and possession.

The possession, sale and use of glueboard traps should be subject to strict and proper regulations as trapped animals often suffer unnecessarily as a result of being caught in these contraptions. Animals stuck in these traps often struggle and fight for release, which only increases their aggravation, stress and may ultimate result in their injury and death.

¹¹ “hunting appliance” (狩獵器具) means any net, gin, snare, poison or poisoned weapon, bird lime, trap or bright light;

The offences relating to traps carry a maximum penalty of 12 months' imprisonment and/or a fine of \$50,000 for an individual or a fine of \$250,000 for a body corporate.¹²

From 1 January 2015, the use and sale of glueboards in New Zealand was prohibited¹³, and similarly in Victoria, Australia where the sale and use of glue traps for trapping animals was prohibited (with the exception of insect glue traps so long as they are not capable of trapping an animal).

(ii) Cruel practices and mutilation

Section 5 Animal Welfare Act 2006 (UK) uses the word “mutilation” deliberately to indicate the physical change by a procedure that is inimical to an animal. This also explains why “prohibited procedure¹⁴” has been given such a wide ambit in the UK legislation. A person commits an offence if the mutilation is performed on a protected animal. The section creates three offences: -

- (1) Carrying out a prohibited procedure;
- (2) Causing such a procedure to be carried out; and
- (3) Permitting or failing to prevent another person doing so.

The interference to an animal alters their condition by some form of mutilation which is not for their benefit. This includes cropping of ears, declawing of puppies, tail docking and other botched medical operations that border on butchery. Such conduct needs to be sanctioned as any physical change to the animal may also bring about a change to their mental condition.

While mutilations may fall under the definition of acts of veterinary surgery and the *Code of Practice for the Guidance of Registered Veterinary Surgeons* requires a vet to justify any such act, mutilations have nevertheless been carried out illegally by those who are not subject to any

¹² Section 37 Animal Welfare Act 1999 (NZ)

¹³ See also Animal Welfare (Glueboard Traps) Order 2009, which prohibited from 1 January 2010, the use of glueboard traps to catch rodents, including mice and rats, but did not prohibit their use by commercial pest control operators, persons employed to conduct pest control on food production premises until the end of 2014

¹⁴ A prohibited procedure involves interference with ‘the sensitive tissues or bone structure of the animal, otherwise than for the purpose of medical treatment.’

CoP. Where a veterinary surgeon performs an act of mutilation without ethical justification, they face disciplinary action from the Veterinary Surgeons Board of Hong Kong, where on the contrary, an owner who performs a similar act would be free from liability.

It is of paramount importance to condone the mutilation and suffering to animals where there is an absence of a legitimate reason. A clear message of deterrence needs to be made by the legislation, to prevent such acts from continuing, and in order to better regulate and control unnecessary alterations to animals.

HKALPO would like to see cruel practices and mutilations become a specific offence under Cap 169, and for any person who carries out, or causes, or permits or fails to prevent another person, a prohibited procedure, to be liable and prosecuted.

(iii) Poisons and injurious substances

HKALPO would like to see the administration of poisons or injurious drugs or substances to animals, to be included as a specific offence under Cap 169.

The offence of administering a poison to an animal (regardless of whether or not an animal can be shown to have suffered as a result) and possession of poisons in a public place (without reasonable excuse) should be a specific offence.

Under ss 22 – 24 Offences Against the Persons Ordinance, Cap 212, the administering of poisons to any person is an indictable offence and carries with it a maximum penalty of 3 years' imprisonment¹⁵.

In the UK, section 7 Animal Welfare Act 2006 (UK) provides that a person commits an offence if they administer or cause any poisonous or injurious drug or substance, to be taken by an animal, knowing it to be poisonous or injurious, and without lawful authority or reasonable excuse. The act of administration requires an intent to do so as opposed to accidentally, and the person must know that they are a poisonous or injurious drug or

¹⁵ See too section 33 of the Public Order Ordinance relating to the possession of an offence weapon.

substance. The animal does not have to suffer as a result of the administration of the drug to be guilty of the offence.

It is also important to know that a harmless substance could be harmful if administered in a way that is injurious to an animal. Likewise, a substance that is harmless in small doses could be harmful if the dose is too high¹⁶.

(iv) Animal fighting

Unlike the United Kingdom, animal fighting is not an issue that dominates Hong Kong, but there is nonetheless merit in including a specific offence of “fighting” in the amended Cap 169. It is important Hong Kong takes a strong proactive stance in relation to the control and denunciation of animal fighting. Under section 8 of the Animal Welfare Act 2006 (UK), animal fighting is a specific offence.

The definition of “fighting” should extend to causing an animal fight to take place to attempting to do so, so that all attendant activities from start to finish are prohibited. Anyone who is directly or indirectly involved in abusing animals by participating or promoting fighting will commit an offence.

HKALPO supports the introduction of the specific offence of “fighting” encompassing a wide definition, which includes choate and inchoate offences. HKALPO also supports the notion of giving relevant authorities the necessary powers to enter a premise, seize animals related to fighting offences, as well as disqualification orders imposed upon conviction [see below].

¹⁶ *R v Marcus* 73 Cr App R 49, CA.

V. THE INTRODUCTION OF INDICTABLE OFFENCES

HKALPO supports making cruelty to animals an indictable offence (triable either way) in order to effectively deter against future acts of cruelty, whilst reflecting the seriousness of the offending. We further support the maximum penalty for animal cruelty to be increased, to a penalty of 10 years' imprisonment and a fine of up to \$2,000,000 for an indictable offence.

Currently, the offence of cruelty to animals is a summary offence. The sentencing powers of the Hong Kong Courts were significantly raised in 2006, although moderate fines still remain as the most common sentence imposed by Magistrates, and any sentence of imprisonment have remained well below the three-year maximum penalty.

An introduction of an indictable offence to increase penalties would bring Cap 169 in line with other comparable jurisdictions such as Australia, New Zealand, United Kingdom and Singapore. It would also be in line with other similar local legislation such as the Protection of Endangered Species of Animals and Plants Ordinance, Cap 586.

HKALPO supports the introduction of indictable offences for animal cruelty under Cap 169 in order to more effectively deter against future acts, whilst also reflecting the seriousness of the offending.

VI. POWERS OF THE COURTS

(i) Disqualification Power

HKALPO supports the introduction of a disqualification power for the Court. The power will disqualify a person from owning, keeping, participating in the keeping or being a party to an arrangement under which they are entitled to control or influence the way any animal is kept, for a specific period or permanently.

The power of disqualification should be a wide one and should limit the involvement to which any person has with an animal. Furthermore, the discretion for the Court should allow the imposition of a wide period of disqualification, relative to the seriousness and gravity of the offending. Disqualification can be an alternative or an additional sentence imposed by the Court. The period of disqualification should be any period that the Court ‘thinks fit’.

Any disqualification order should be made in open Court, with reasons to be provided so that not only concentrates the mind of the Court to its duty to the community at large, but also allows the public to be reminded that the law holds the welfare of the animals as its paramount concern. A defendant will also be made aware as to why an order for disqualification has been made and will be a valuable factor for the Court to consider in the case of a subsequent breach.

Before the disqualification order is imposed, the Court should consider the following factors, such as: -

- (i) Maximum penalty specified for the charge from which the conviction arose;
- (ii) Seriousness of the offending, including the nature and gravity of the harm, number of animals involved and frequency of the offending;
- (iii) The character of the person;
- (iv) The previous offending history (if any); and
- (v) Any other circumstances of the case.

Similar to an application for the variation of bail conditions, a defendant may apply to a Court for variation or removal of a disqualification order, after considering the same factors and the conduct of the defendant after the order was imposed. A breach of a disqualification order should be considered a separate offence.

VII. POWERS OF ENFORCEMENT

HKALPO supports extending the pool statutorily authorised officers under section 4 of Cap 169 to include Hong Kong Society for Prevention of Cruelty to Animals (“SPCA HK”) Inspectorate as well as the introduction of a specific offence of obstructing a statutorily authorised officers in the discharge of their lawful duties under Cap 169.

(i) Extension of a pool of statutorily authorised officers.

Section 4 of Cap 169 provides: -

“Any senior veterinary officer, any other officer of the Agriculture, Fisheries and Conservation Department of the grade of Field Officer II and above and authorised in writing by the Director of Agriculture, Fisheries and Conservation, health officer, health inspector or police officer may arrest without warrant any person who he has reason to believe is guilty of an offence against section 3 or against any regulation under this Ordinance, whether upon his own view thereof or upon the complaint and information of any other person. Any such other person shall declare his name and place of abode to any such officer or inspector.”

Currently, Cap 169 only provides that an approved senior veterinary officer or Field Officer II and above from the AFCD, have the power to arrest a person who they believe has contravened section 3 or any regulation set out in Cap 169.

Although many animal welfare organisations have an interest in the mechanism of Cap 169, it is only a subset of statutorily approved officers that are allowed to act with lawful authority. HKALPO would like to see an extension of this pool to include inspectors from the SPCA HK, if deemed qualified and suitable by the Director of AFCD to assist with enforcement. The SPCA HK Inspectorate has created a legacy of animal welfare and protection efforts in Hong Kong. Their inspectors are well trained to provide advice and assistance on matters relating to animals and would be a natural extension of the daily work undertaken by the SPCA HK. Extending the subset of approved officers would allow for

a greater enforcement capability and to allow more animals to be protected as well as ensure the law is widely enforced.

(ii) Specific offence of obstruction

Section 23 of the Summary Offences Ordinance, Cap 228 (“**Cap 228**”) stipulates that any person who resists or obstructs a public officer or other person lawfully engaged, authorised or employed in the performance of any public duty shall be liable to a fine of \$1,000 and imprisonment for 6 months. A public officer (公職人員) extends to and includes the Chief Executive and every officer or department invested with or performing duties of a public nature, whether under the immediate control of the Chief Executive or not.

A statutorily authorised officer under section 4 of Cap 169, in performance of their duties under the Ordinance, will be likely to fall under the definition of “public officer” under Cap 228. However, for the avoidance of doubt, and to empower statutorily authorised officers to exercise their powers impressed on them under section 4, it would be of benefit to create a separate offence under Cap 169 for the obstruction of statutorily authorised officers when performing their duty under the Ordinance.

VIII. OTHER MISCELLANEOUS MATTERS

(i) Third party restitution

Section 5(3) of Cap 169 provides: -

“If any animal has been taken to any place in pursuance of an order made under this section any person who has been convicted of an offence in respect of such animal shall be liable to pay the prescribed fees for its maintenance and treatment for so long as it shall remain therein, and such fees may be recovered as a fine.”

All expenses incurred may be recovered as a fine when there has been a conviction. Those expenses typically include veterinary expenses, local authority costs, boarding fees and other related costs incurred where the animal is held pending court proceedings. However, this subsection only relates to instances where a person has been convicted, and the prescribed fees only encompass the maintenance and treatment post order. There is currently no legal mechanism for costs and expenses to be recovered by a third-party animal welfare organisation (such as the SPCA HK), for incidental costs prior to conviction, which is generally where most of the costs related to treatment are realistically incurred.

Routinely in criminal matters, animals are held for several months as the cases are investigated and progress through the legal system. Considerable time can elapse before a matter comes to Court, which necessarily means a high level of costs are spent to ensure the welfare and safety of the animals. There are mechanisms for third party restitution that exists in other Hong Kong legislation: -

- (i) section 73 Criminal Procedure Ordinance, Cap 221;
- (ii) section 98 Magistrates Ordinance, Cap 227.

In overseas jurisdictions, a bond system has been implemented to cover the expenses of care for their animal. In cases which result in an acquittal, the bond is returned. If the case results in a conviction, the bond is forfeited to cover the costs of care. The employment

of such a system may relieve some financial burden from the third-party animal welfare organisations which, currently under Cap 169, are unable to claim any financial restitution.

HKALPO strongly recommends an amendment to Cap 169 to allow the Court the discretion of considering requiring a person convicted under the Ordinance to pay costs incurred by third party animal welfare organisations from the date of seizure of the animal, rather than upon conviction, and the implementation of a bond system.

(ii) Extension of Time Bar for Summary Offences

As advocated for above (section V), the introduction of indictable offences (triable either way) in connection to animal cruelty offences will practically remove the time bar concerns for cases that are tried on indictment. However, for those that remain summary offences, the current time bar of 6 months is too short. The problem with animal abuse cases is that often they are not discovered for some time. An offence may also be a continuing one with regard to the animal's welfare. Even when a complaint is made or the offence is discovered, the investigation may still take some time. Animal cruelty can often only be prosecuted well after the six-month statutory period as evidence is analysed when the investigation is completed. Furthermore, there is often not enough time to locate a suspected offender and serve them with a summons. As a result, many animal cruelty cases are not proceeded with.

In England, the usual period within which a Magistrates' Court may try a case is six months. However, that time bar does not apply if it is: -

- (i) within three years of the commission of the offence; and
- (ii) within six months of which time the prosecutor 'thinks' the evidence is sufficient to justify the proceedings comes to his knowledge.

In New Zealand, the time limits for filing proceedings for offences depends upon the category of offence and the applicable penalty: -

- (i) Category 1 or 2 offences with a penalty of three months' imprisonment or less (or a fine not exceeding \$7,500); within six months after the commission of the offence;

- (ii) Category 1 or 2 offences with a penalty between three to six months' imprisonment or (or a fine between \$7,500 to \$20,000); within 12 months after the commission of the offence;
- (iii) Category 1 or 2 offences with a penalty of greater than six months' imprisonment (or a fine greater than \$20,000): within five years of the commission of the offence;
- (iv) Category 3 offences with a penalty of three years' imprisonment or less: within five years of the commission of the offence; and
- (v) Category 3 offences with a penalty of greater than three years' imprisonment: at any time.

HKALPO supports the extension of the six-month time bar for animal cruelty offences which are tried summarily.

(iii) Specialist Prosecution Team and Animal Prosecution Guides

The Hong Kong Police and AFCD are two of the agencies in Hong Kong that tend to bring prosecutions against animal cruelty offences. Both agencies seek legal advice from the Department of Justice (“**DOJ**”), who are then also tasked to prosecute offending contrary to Cap 169.

Animal law is an emerging area of the law which requires in-depth understanding and knowledge. It would be extremely beneficial if the DOJ were to develop a subgroup of specialist prosecutors who have a passion and understanding of animal law, to prosecute and advise on such matters. Unfortunately, cases relating to cruelty to animals and other offending against animals are often unable to be given the time and care necessary to ensure that justice is done. It is of utmost importance for a prosecutorial system to be robust and the development of a specialized animal law prosecutorial team will ensure that offending against animals will get the precision and consistency it deserves. The DOJ already have specialized teams that handle prosecutions that relate to child abuse, human rights and cybercrime. The addition of an animal-centric team would be welcomed.

The Crown Prosecution Service (UK) have published prosecution guidance for prosecutors making decisions about cases relating to animals (“**Guides**”)¹⁷. Current Guides include: Dangerous Dog Offences, Wildlife Offences, Hare Coursing and Offences Involving Domestic and Captive Animals. The Guides provide prosecuting authorities with information to assist in reviewing and prosecuting offences under the respective categories. They *inter alia* set out the different offences under the legislation, definitions, time limits for bringing prosecutions, sentencing guidelines and other relevant matters. Similar prosecution guides in Hong Kong would be beneficial to aid prosecutors in future animal welfare related prosecutions. The prosecution guides should be drafted by those with the legal understanding of animal law.

HKALPO strongly recommends the development of a specialized animal law prosecution team within the DOJ, and to consider the implementation of animal law prosecution guides to aid prosecutors when prosecuting cases relating to animals.

(iv) Increased awareness

One of the primary missions of HKALPO has been to raise awareness for animal welfare and animal law in Hong Kong. To this end, HKALPO has built a strong social media presence as well as website to home to all matters relating to animal law, both locally and internationally. However, to continue promotion of better welfare and conduct of animals it is essential to continue to raise awareness in Hong Kong and to highlight the position that offending will not be tolerated and met with harsh punishment.

Awareness and knowledge of animal welfare and law needs to be demonstrated by those who are regularly in contact with animals, be it the Hong Kong Police, AFCD or DOJ prosecutors, in order to cement the principles behind the amendments to Cap 169, to safeguard better protections to animals in Hong Kong.

¹⁷ <https://www.cps.gov.uk/legal-guidance/animals>

IX. SUMMARY

HKALPO supports wholeheartedly the initiative to enhance animal welfare in Hong Kong through the amendment of Cap 169. Given the importance of this amendment, it is hoped that the above matters raised will also be considered and included. The introduction of a duty of care requirement will have an extremely positive impact on animals and their welfare and guarantee that the legislation considers both prevention and reaction to animal cruelty. It is hoped that the amendment to Cap 169, will mean the Ordinance will have the teeth it needs to be truly protective of animals.

We look forward to providing further assistance and input on the amendment of Cap 169. Should you have any questions or want further information in relation to anything that has been raised above, please do not hesitate to contact us.