Evaluating China's Draft Animal Protection Law

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Abstract

The proposal to introduce a Prevention of Cruelty to Animals Law in the People's Republic of China is an important development in animal protection legislation. This article examines the motivations behind the draft anti-cruelty law and evaluates its ability to protect animals in China. In particular, the article discusses the problems with relying on anti-cruelty laws to protect animals from harm and the recent development of a statutory duty of care towards animals that is now applied in Europe, the UK, USA, Australia, New Zealand and Taiwan. In its final form, the China draft law has abandoned the inclusion of a duty of care towards animals and prohibits only overt animal cruelty. This article examines how animal cruelty has been defined by courts in the UK, Australia and Hong Kong and concludes that without the inclusion of a statutory duty of care in China's draft law, the effective protection of China's animals cannot be achieved.

I Introduction

In September 2009, the Chinese Academy of Social Sciences — the Chinese central government's top 'think-tank' — released a draft animal protection law for the People's Republic of China ('PRC'). Such a law had been proposed before, but this new draft came on the back of the most significant public pressure in China's history to pass a national law protecting China's animals.

On first release for consultation, the law provided protection to animals from owner negligence as well as cruelty, but political pressures have curbed that aim. When it was formally submitted to the National People's Congress in March 2011, the proposed law[1] had been amended to protect animals from deliberate cruelty, but included little to address the positive welfare of animals. Part II of this article examines the motivations behind the draft law and the incidents that have shaped its current form.

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1 Chinese Academy of Social Sciences, *Prevention of Cruelty to Animals Law of the People's Republic of China 2010* (Paul Littlefair trans, June 2010).

In recent years there has been a rapid move by western governments to introduce legislation that not only protects animals from overt acts of cruelty but also places a duty on those who keep animals to provide them with a satisfactory standard of care. Liability for owner negligence in animal protection law is fast becoming the legislative norm, and is a trend not entirely confined to western jurisdictions. Taiwan prescribed a statutory duty of care towards animals in 1998,[2] and the governments of Hong Kong,[3] India[4] and Sri Lanka[5] have recently been debating similar reforms to their own laws. In Part III, the article examines the reasons for, and the ramifications of, this global trend.

Part III also addresses why and how liability for omissions has developed under the criminal law, where positive acts have traditionally been required to attract culpability. The article identifies the first occasion a statutory duty of care for animals was imposed on owners regardless of the purpose for which the animals were kept. It examines why the Australian legislators who introduced that first general duty of care considered anti-cruelty laws insufficient to protect animals from harm adequately.

Part IV of the article examines the development of the objective test for animal cruelty in criminal law. Recent appellate decisions of the English and Australian courts have provided precedent for strict liability in animal cruelty cases. Despite the confusion concerning the correct test for cruelty that has, at times, been displayed by the UK courts, the article contends there is a clear line of authority which provides that as long as a reasonable person would have perceived the risk to the animal, the cruelty offence is made out. The intention of the owner to act cruelly or otherwise is irrelevant. The article discusses whether this interpretation renders moot the need for a legislative duty of care and argues that the experience in the UK before the introduction of a statutory duty of care and in Hong Kong, where such a duty is yet to be introduced, demonstrates that judges cannot always be relied on to impose an objective test for animal cruelty in the absence of clear legislative intention. Furthermore, legislating for a duty of care provides protection for those animals that have not suffered overt cruelty but are clearly not being provided with a reasonable standard of care.

In Part V, the article considers how easily duty of care legislation protecting animals might be adopted by the Chinese legal system. This part highlights the use China has already made of national laws to protect other vulnerable groups, such

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2 *Animal Protection Law 1998* (Taiwan).

3 On 3 November 2010 in Hong Kong, representatives of all major political parties passed a non-binding motion in the region's Legislative Council calling on the Administration to amend its animal cruelty laws to meet international standards, which includes providing for a duty of care.

4 The Animal Welfare Board of India has published a Draft Animal Welfare Act 2011 which includes a duty of care toward animals. In February 2011, the Indian Ministry of Environment and Forests commenced consultation on the proposed law.

5 A private members bill, which would provide for a duty of care towards animals, was introduced into Sri Lankan Parliament on 19 February 2009 by Ven Athuraliye Rathana. It lapsed without enactment with the dissolution of Parliament. However a public petition signed by 7837 people has recently been sent to the Sri Lankan President urging government to enact the Animal Welfare Bill as soon as possible.

as children and the elderly. It argues that imposing a duty of care for animals on Chinese citizens may not be as difficult as opponents of the law have suggested.

This Part also considers the reasons the PRC drafting team amended their proposed law in 2010, to prevent cruelty primarily, rather than protect animals from negligence and ignorance. It concludes that current political realities in China have forced the drafting team to make a bottom line proposal to the National People's Congress, but it seems their intention to provide fuller legal protection for animals in China has not been completely abandoned.

In the conclusion, the article warns that when the Standing Committee of the National People's Congress comes to debate the draft *Prevention of Cruelty to Animals Law of the People's Republic of China*,[6] it will be of critical importance for legislators to consider the philosophy which should underpin the proposed legislation. If the law is truly to protect the welfare of animals in China it will need to do more than just protect them from cruelty, it will need to promote their welfare actively.

II Background to the Draft Prevention of Cruelty to Animals Law of the People's Republic of China 2010

A *The Push for Change*

The draft law is the result of the collaboration of the Chinese Academy of Social Sciences with overseas experts in animal welfare law and local legal scholars.[7] The introduction to the proposal, written by Professor Chang Jiwen[8], states that there is a need for China to introduce a law which fully reflects the requirements of international animal welfare standards as they apply to trade with overseas partners, and to recognise the desire of its own citizens to protect animals from serious cruelty. He cites an opinion poll, carried out in June 2009 by Sina.com (China's largest web portal) and Sohu.com (a major Chinese search engine), which found that more than 80 per cent of Chinese citizens polled support the introduction of legislation to protect animals in China.[9]

On release, the draft law was met with widespread media attention, both within China and in foreign circles. The question whether China is ready for such a law has for many years been hotly debated among Chinese scholars. Professor Qiu Renzhong, of the Chinese Academy of Social Sciences has long argued for legislative reform.[10] In response to the proposal, Beijing Professor Zhao Nanyuan

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6 This debate is unlikely to occur before, at least, March 2013.

7 The draft was jointly prepared by the Chinese Academy of Social Sciences, the Royal Society for the Prevention of Cruelty to Animals (International), the International Fund for Animal Welfare and invited legal scholars.

8 Professor, Social Law Research Department, Chinese Academy of Social Sciences Institute of Law.

9 Chinese Academy of Social Sciences, *Prevention of Cruelty to Animals Law of the People's Republic of China* (*Experts' Draft Proposal*) (Paul Littlefair trans, June 2010) ('*Draft Law*') introductory remarks..

10 Qiu Renzhong, 'It Is High Time that We Discuss the Question of Rights for Animals' (2002) 3 *Friends of Nature Reportage.*

has argued that pro-animal legislation is anti-human, animals are not sentient and the push for legislative reform is based on 'foreign trash'.[11]

The push for change has now taken root and, in April 2008, the Chinese Academy of Social Sciences, together with the Royal Society for the Prevention of Cruelty to Animals (International), hosted an international legal symposium to review the form any draft law should take. Scholars from the UK, USA, New Zealand, Australia and Hong Kong gave presentations on the animal protection laws of their own countries to 60 legal experts from across China. While some local scholars expressed the reservation that China was not yet ready for such a law, the general view of the participants was that a draft law should be prepared, and forwarded to the National People's Congress.

The motivation for introducing a draft law at this time seems to have arisen from a number of recent events. On 29 January 2002, an incident occurred which drew the attention of the Chinese public, legal academics and judiciary. Liu Haiyang, a student of China's leading Tsinghua University, attacked the brown and black bears on display in the Beijing Zoo. In an effort to satisfy his curiosity as to the animals' intelligence, Liu went to their exhibit and poured caustic soda onto their coats. Although Liu stayed at the scene of his crime long enough to observe the animals overt suffering, he was not satisfied they had demonstrated intelligence. A month later he returned to the zoo and again attacked the bears, this time feeding them sulphuric acid.[12] Five bears suffered severe burns, one later died and two had to be euthanised. At a symposium addressing animal welfare held in Hefei, Anhui in China in October 2002, which was widely attended by law experts and scholars from local universities, the main issue discussed was whether Liu had broken any laws. While China had, at that time — and still has — no laws prohibiting animal cruelty, one law professor, Wang Dawei, of the University of Chinese People's Public Security, argued that Liu was guilty of the offence of illegally killing endangered or precious wildlife under the *Law of the Peoples Republic of China on Protection of Wildlife 1988*.[13] However, the problem with this interpretation is that China's *Wildlife Law* only protects endangered species or those valuable to economic or scientific research. As the bears in question were not living in the wild, nor endangered, the wildlife law could not be used to prosecute Liu.

Liu was eventually charged with the offence of damaging state property and was found guilty by the Beijing (Xicheng District) Basic People's Court.[14] That offence allows for two kinds of criminal penalty, depending of the seriousness of the economic loss. For losses of over CNY5000 the penalty is three years imprisonment, criminal detention or a fine. For losses of more than CNY50 000,

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11 See, Peter J Li, 'The Evolving Animal Rights and Welfare Debate in China: Political and Social Impact Analysis' in Jacky Turner and Joyce D'Silva (eds), *Animals Ethics and Trade: The Challenge of Animal Sentience* (Earthscan, 2006).

12 'College Student Detained for Pouring Sulphuric Acid on Bears in Zoo', *China Central Television News* (online) 25 February 2002 <http://www.cctv.com/english/news/news.html>.

13 *Law of the People's Republic of China on Protection of Wildlife* (People's Republic of China) National People's Congress, Order No 9, 8 November 1988, art 2 ('*Wildlife Law*').

14 Ivy Zhang, 'Court Slaps Hand of Bear Burner', *Beijing Today* (online), 16 May 2003 <http://bjtoday.ynet.com/article.jsp?oid=2322837>.

three to seven years imprisonment is permitted.[15] However, the judge in Liu's case excused him of any criminal penalty, despite the fact that the veterinary care for the bears alone was reported to have cost CNY40 000.

In March 2002, another university student allegedly placed a live three-month-old puppy in a microwave and cooked it for over a minute, causing it serious injury. This time the student was from Chengdu.[16] He also was not prosecuted as there was no offence with which to charge him.

Between June and December 2005, Zhang Liangliang, a third-year postgraduate student in mathematics at Fudan University adopted and tortured over 30 cats and kittens. When his actions became known to other students, a public campaign was launched to try to stop him receiving a student visa from universities situated overseas, where he hoped to continue his studies. While he was never prosecuted, Zhang was forced by the attention he received to make an online apology for his actions. His university teachers asked him to seek psychological help with his problems.[17]

In 2006, an unidentified woman appeared in a 'crush' video stomping a kitten to death with her high-heeled shoe. Copies of the video were later sold online for CNY15. Members of the public tracked down the woman, Wang Jue, a nurse from Heilongjiang province, and she was forced into hiding to protect her safety. Both she and the video-maker later apologised to the public on the internet.[18] Neither was prosecuted, but these incidents (and the copycat offending that followed)[19] served to highlight the deficiency of the Chinese legal system in protecting animals and increased the public call for a law to protect China's domestic animals from cruelty.

China's draft law would do more than just protect domestic animals from cruelty. The draft proposes the protection of five categories of animals: wild, economic (farm), pet, laboratory and entertainment. An 'animal' is defined to include all mammals, birds, reptiles, amphibians and fish.[20] 'Cruelty' is defined as the deliberate use of brutal means or methods to cause unnecessary suffering or harm to an animal or the use of brutal means or methods to kill it.[21] Cruelty is prohibited against all five categories of animals. Cruelty also includes the abandonment of animals not suited to the wild (such as pets).[22] Pet animals are defined as domesticated or tame animals possessed for the purpose of personal

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15 According to the standard notice to identify property crime on eight violations released by the Beijing High People's Court, Beijing Municipal Procuratorate and Beijing Municipal Public Security Bureau.

16 Zhang Yu, «微波炉活烤小狗 某名牌大学学生恶行令人震惊» 'Microwaving a Puppy Alive: The Shocking Cruel Act of a College Student', *Chengdu Commercial Times* (China), 21 March 2002.

17 'Fudan seeks help for cat abuser', *Shanghai Daily* (online), 7 December 2005 <http://www.chinadaily.com.cn/english/doc/2005-12/07/content_501351.htm>.

18 'High-heeled kitten killer apologizes', *Shanghai Daily*, (online) 16 March 2006 <http://www.chinadaily.com.cn/english/doc/2006-03/16/content_540375.htm>.

19 He Dan, 'Rabbit Abuse Video Highlights Animal Rights Issue', *China Daily* (online), 1 December 2010, <http://www.chinadaily.com.cn/china/2010-12/01/content_11632772.htm>.

20 *Draft Law* art 2.

21 Ibid art 3.

22 Ibid art 25.

recreation or companionship. Once it becomes a 'pet', the animal is categorised as such for its entire life. The *Draft Law* also seeks to prohibit the dissemination of videos, photographs or sound recordings depicting cruelty to animals.[23] The penalty for cruelty by an individual to an animal is a fine of CNY1000 and the offender can be ordered to sign a statement of repentance. For a work unit or organisation, the fine range is set at CNY5000 to CNY100 000.[24] Public reporting of cruelty cases is encouraged by personal reward. Those who report a case which is successfully prosecuted are entitled to a reward equivalent to 10–20 per cent of any fine imposed on the offender.[25]

In 2009, a further animal cruelty scandal captured the attention of the public and prompted those involved with writing the draft law specifically to prohibit the starvation of animals.[26] Between December 2009 and February 2010, 11 Siberian tigers starved to death at a private zoo in Shenyang, capital of Liaoning province. Earlier in November 2009, two had been shot in the head after they had attacked their keeper, in apparent desperation for food. It was discovered that the zoo keepers had been feeding each tiger on the bones of only one or two chickens per day, for at least two years. Generally, tigers require five or six kilograms of meat per day to maintain their health. The starved tigers were among 40 of their species being kept by the zoo. A veterinary report, prepared for the local government, found all 11 tigers had died of heart, kidney and lung failure, as a result of malnutrition. The investigation also uncovered deaths among other rare species of animal kept by the zoo, including bears, cranes and monkeys. The zoo had been struggling financially for years and had closed for a month in 2006. It was later re-opened after the local government agreed to provide some funding. (The government has a 15 per cent share in the business.)[27] As the tigers were privately owned and kept, no prosecution for causing their deaths was possible under the *Wildlife Law*.

In October 2010, in the wake of extensive reports by Animals Asia on the abuse of animals in zoos and circuses,[28] the Ministry of Housing and Urban-Rural Development issued a notice calling on zoos and safari parks to stop live animal performances by end of January 2011 or risk closure.[29] The Animals Asia reports cited widespread practices of de-fanging/clawing and drugging animals to allow them to be photographed with zoo visitors, cruel punishment and training methods being used to force animals to perform tricks, and live prey being fed to wild animals for the entertainment of the public. On introducing the ban, Sun Xiachun, a director of the Ministry of Housing and Urban-Rural Development, stated that: 'Animal performances are against public interest, animal protection and educational interests and should be prohibited.'[30]

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23 Ibid art 18.
24 Ibid art 64.
25 Ibid art 76.
26 Ibid art 18.
27 Hu Yongqi, Wu Yong, Cao Li and Wang Zhuoqiong, 'The Year of Dead Tigers', *China Daily* (online), 19 March 2010 <http://www.chinadaily.com.cn/china/2010-03/19/content_9611254.htm>.
28 Animals Asia, *Investigation Reports* <http://www.animalsasia.org/index.php?UID=7O8KCG3NKFI>.
29 The *Draft Law* also prohibits such practices, see art 18.
30 Li Jiabao, 'Zoos Flauting [sic] Animal Show Ban, Study Finds', *China Daily* (online), 18 April 2011 <http://www.chinadaily.com.cn/cndy/2011-04/18/content_12341357.htm>.

Unfortunately, as zoos generally do not receive government support, they must rely on the money received from selling tickets to their popular performing animal shows to provide the revenue to feed their animals. For example, in 2010, Contgtai Zoo in Hebei province sold 10 000 tickets to its animal shows, however it reportedly cost the zoo half the sum received to feed just one tiger for the same period.[31] Many zoos are currently flouting the ban in order to remain economically viable. For those that have ceased to provide animal performances, numbers of visitors are decreasing. The ban is unlikely to eradicate the suffering of zoo animals; for many it will merely shift the cause to lack of funding.

On 2 February 2011, China Central Television aired a live show to celebrate the Chinese New Year Festival. The festival is the most important in the Chinese calendar and the show featured the famous magician Fu Yandong performing a trick involving live goldfish. The fish appeared to swim in straight lines at his command. Within days, copycats began to post their own version of the trick online, openly admitting to gluing magnets into the animals' mouths to allow them to manipulate their movements. On 14 February, 53 animal rights groups issued a joint call to the network to stop airing similar acts on television. The network (the major state-owned broadcaster in China) acceded to the request and Fu's scheduled performance of the trick in the extremely popular Lantern Festival program was subsequently cancelled.[32]

If the law is passed, art 18 of the *Draft Law* will ban the use of electrodes or sharp or blunt implements to train or tame animals for entertainment and prohibit de-clawing and de-fanging for entertainment and photographic purposes. The feeding of live prey to carnivores would also be prohibited, under art 21.

B *The Current Legal Protection Available to Animals in China*

Apart from the *Wildlife Law*, there is scant other law available to protect animals in China from cruelty. *Regulations for the Administration of Affairs Concerning Experimental Animals* (1988) provide some limited protection to laboratory animals. In the absence of a national law, these State Council approved regulations apply to all units and individuals engaged in scientific research and the feeding, breeding, supply, use, administration and supervision of experimental animals.[33] Those units which feed and breed animals are specifically required to provide wholesome food and comfortable enclosures. Vegetables and fruits provided must be washed clean and sterilised before being fed to the animals. For those animals purely used in research, welfare requirements are weaker. There are some vague requirements for their safe and reliable transportation but none requiring sufficient food and water, care for sick or pregnant animals or humane euthanasia. Fortunately for laboratory animals, in 2006 China's Ministry for Science and Technology issued a policy document:

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31 Ibid.

32 Yang Winli, 'CCTV axe magician's goldfish trick from festival showcase', *China Daily* (online), 16 February 2011 <http://english.peopledaily.com.cn/90001/90776/90882/7289135.html>.

33 *Regulations for the Administration of Affairs Concerning Experimental Animals* (PRC) State Science and Technology Commission, Decree No 2, 14 November 1988, art 3.

Guiding Opinions Concerning Ethical Treatments to Laboratory Animals ('*The Opinions*'). This document underscored the need for all animal research in China to respect the 3Rs concept[34] (although it did not go so far as to make the implementation of the 3Rs a precondition for the grant of an animal experiment licence). *The Opinions* require effective measures to be taken to avoid unnecessary suffering to animals in laboratories, including the right to have their behavioural needs met.[35] Special care for sick and pregnant animals, humane endpoints to experiments, and euthanasia are also prescribed.[36] Detailed requirements for animals in transport are provided, including safe enclosures, access to water, and training in welfare for staff.[37] The Ministry has further made non compliance with *The Opinions* (which is essentially a policy document) a basis for disciplinary (but not criminal) action.[38] Certain provinces have also passed specific animal welfare regulations to protect laboratory animals in their local areas, with Beijing Municipality having the most advanced regulations to date.[39]

The *Draft Law* includes a section specifically targeting the legal protection of laboratory animals.[40] The *Draft Law* includes much of the same protection prescribed in *The Opinions*. The 3Rs are promoted, and as far as possible, animals should not be caused unnecessary suffering or harm.[41] Where surgery may lead to intense pain, only a veterinary surgeon may perform the procedure using anaesthesia and other pain relief.[42] Animals are required to be handled with sensitivity, given regular health checks and humanely euthanased at the end of the experiment where suffering.[43] Teasing, harassment, abandonment and cruelty to laboratory animals are also specifically prohibited.[44]

Despite being the largest producer of meat in the world,[45] China still has no national law to protect farm animals from cruel husbandry practices or inhumane slaughter. The national *Animal Husbandry Law*[46] does not address cruelty to animals.

There have been some steps forward in recent years. In February 2007, The World Society for the Protection of Animals, the President of the Chinese General

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34 The replacement of animal research with other types of research whenever possible; the reduction in the number of animals used in research and the refinement of experimental techniques to minimise pain and distress.

35 *Guiding Opinions Concerning Ethical Treatments to Laboratory Animals 2006*, Ministry for Science and Technology of the People's Republic of China, art 2.

36 Ibid art 28.

37 Ibid art 20–2.

38 Ibid art 3(5).

39 *Regulations of Beijing Municipality for the Administration of Affairs Concerning Laboratory Animal*, (Beijing Municipality) Beijing Municipal People's Congress, 17 October 1996, revised 2 December 2004.

40 *Draft Law* ch 3, s (iv).

41 Ibid art 33.

42 Ibid art 35.

43 Ibid art 36.

44 Ibid art 37.

45 76.5 million tonnes in 2009 (29 per cent of the world's total); see, Agri-Food Trade Service, *China's Meat Market Outlook 2011–2015* (July 2010). Department of Agriculture and Agri-food, Canada <http://www.ats-sea.agr.gc.ca/asi/5546-eng.htm>.

46 *Animal Husbandry Law of the People's Republic of China* (People's Republic of China) National People's Congress, Order No 45, 1 July 2006.

Chamber of Commerce, and the Beijing Chaoyang-Anhua Animal Product Safety Research Institute, signed a Memorandum of Understanding to provide training to slaughterhouse staff on humane slaughter. In August 2008, on the back of this initiative, regulations were put in place to try to curb the common practice of force hosing water into pigs to increase their weight at slaughter.[47] However, most slaughter houses are small local establishments and good animal welfare is not practised. Since the restoration of pork supply after the H1N1 virus, the Chinese government has been keen to improve the health of farm animals and the link between animal health and good animal welfare has not gone unnoticed. As a member of the Office International des Epizooties ('OIE'),[48] China is obligated to give due regard to this link. In light of this, the *Draft Law* specifically plays on the need for China to ensure the safety of its meat supply (both for local consumption and export) by promoting good animal husbandry and slaughter practices. In the introduction to the *Draft Law*, Professor Chang Jiwen highlights the need for China to develop an export market for its livestock production. Of the 72.69 million tonnes of meat China produced in 2008, only 742 000 tonnes were exported.[49] Chang's introduction to the *Draft Law* stresses that solving the central government's current problems with rural employment, growth in agricultural production and rural development will require reforming the structure of the rural industry. Strengthening animal protection through the legal system is cited as a key step towards economic growth.

Alongside the general ban on brutal acts of cruelty, the *Draft Law* would specifically prohibit farm animals from being driven or used in such a manner as to cause them unnecessary harm or suffering. Abandonment of farm animals would be prohibited.[50] Pregnant, very young, sick and injured animals could not be transported.[51] Transport containers would be regulated and requirements to treat animals humanely during journeys would be introduced.[52] Given the extremely long distances (up to 3500 km) animals must journey across China to satisfy the local requirement for freshly-slaughtered meat, such regulations are urgently needed.[53]

Over the past decade, China has also become the world's largest producer and processor of fur,[54] producing around one million mink and fox pelts every year. China also farms the fur of Asiatic raccoons, rabbits, chinchilla, cats and dogs. While China is a member of the International Fur Trade Federation, there is no national law to prohibit cruel practices in the husbandry and slaughter of these animals either.

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47 *Regulations on Administration of Hog Slaughter* (People's Republic of China) State Council, Decree No 525, 1 August 2008; *National Standard GB/T 22569-2008: The Technical Criterion of Pig Humane Slaughter* (People's Republic of China).

48 The World Organisation for Animal Health.

49 Source: China Meat Association.

50 *Draft Law* art 23.

51 Ibid art 49.

52 Ibid art 50.

53 See also, Peter J Li, *Global Live Transport: China* (World Society for the Protection of Animals Report, 2006).

54 US Department of Agriculture Global Agriculture Information Network Report (2010).

If the *Draft Law* is passed, it will require slaughter methods used on animals to adhere to humane principles. Species-appropriate slaughter methods will be prescribed by the state with the intention of reducing the stress fear and suffering of animals during pre-slaughter handling, and at the point of slaughter.[55] The *Draft Law* stipulates that unloading of animals should be done immediately on arrival at the slaughterhouse and with minimum risk of injury to the animals.[56] Animals should be slaughtered as soon as possible and where they must be left to wait, they should be provided with food, water and adequate shelter.[57] Humane stunning methods before slaughter are prescribed.[58] The articles included in the *Draft Law* mirror the requirements of the OIE's Terrestrial Animal Health Code.[59] Their inclusion reflects a clear intention to bring China into compliance with its OIE member obligations.

The *Draft Law* is also intended to address China's problems in managing its large population of stray dogs and cats. In Beijing alone, it is estimated that there are at least 100 000 abandoned dogs and cats living wild. Catching, locating the owners, or killing, each animal is estimated to cost the government CNY300–500.[60] The *Draft Law* would not only make the abandonment of pet animals an offence[61] but would require owners who could not keep their animals to surrender them. The *Draft Law* allows for the setting up of non-government animal shelters and rescue centres which would be required to take in homeless animals and seek new owners for them. The establishment and operation of such centres would be supported by government funding, where necessary.[62]

Reducing the number of stray animals living in urban cities would also benefit the government in controlling rabies. A large number of government-enforced dog culling sprees in recent years, usually ordered in response to outbreaks of rabies, have met with local and international condemnation. In June 2009, in Shan Xi province alone, 37,000 dogs were clubbed to death by local public security bureau officers. Many of the dogs were pets with rabies vaccinations out on walks with their owners when they were killed.[63]

C *The Change from Welfare to Anti-Cruelty in the Draft Law*

When it was originally released for comment to international NGOs and experts in animal protection and welfare in September 2009, the *Draft Law* had a different name. Its original title was the *Animal Protection Law of the People's Republic of China*. In the original version, the law included not only a

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55 *Draft Law* art 56.
56 Ibid art 57.
57 Ibid art 58.
58 Ibid art 59.
59 *Terrestrial Animal Health Code 2011* (OIE) ch 7.5.
60 This estimate of animal numbers and the cost to government is described in the introductory remarks to the *Draft Law*.
61 *Draft Law a*rt 25.
62 Ibid art 27.
63 Malcolm Moore, 'China carries out mass dog cull: 37000 animals clubbed to death', *The Telegraph* (London) 17 June 2009 < http://www.telegraph.co.uk/news/worldnews/asia/china/5557831/China-carries-out-mass-dog-cull-37000-animals-clubbed-to-death-to-contain-rabies.html>.

prohibition against cruelty, but also against wilful or grave negligence causing suffering to animals. In its next draft, released in March 2010, the law was entitled the *Prevention of Cruelty to Animals Law of the People's Republic of China*. This draft removed the reference to negligence as a basis for legal action. Brutal cruelty became the only basis for prosecution, although a specific requirement that the keeper of a seriously injured or sick animal had a duty to provide it with prompt treatment or relief was included.[64] The Expert Drafting Team's final proposal, drafted in June 2010, maintained the anti-cruelty focus.

This change to the *Draft Law* underscores an important shift in philosophy and will seriously affect the way the law can be enforced in China. Around the world, recent reforms to animal welfare legislation have demonstrated that without including negligence as a basis for criminal liability, the vast majority of animal abuse cases cannot be prosecuted. In most instances of animal suffering, the owner is not deliberately cruel, but causes suffering through negligence or ignorance. It is only where the law imposes a duty on owners to provide a reasonable minimum standard of care towards their animals that animal welfare is effectively safeguarded. In China, the concept of keeping animals as companions is relatively new.[65] Imposing a legal responsibility on the public to treat farmed or wild animals humanely is even more novel. Without the imposition of a strict duty of care on those who keep animals, the scope for effective prosecutions will be severely compromised. While the political reality in China may make a simple anti-cruelty prohibition easier to steer through the National People's Congress, the wider cost to animal welfare in removing negligence, and the incumbent duty of care, as a ground of liability, should not be underestimated.

III The Development of a Duty of Care towards Animals around the World

A *Laws Based on Science*

The scientific study of 'animal welfare' has evolved considerably in recent years[66] and the resulting information is now being widely used to set minimum standards of care in legislation. While it used to be that studies of animal welfare only assessed the absence of negative experience for the animal, increasingly they consider whether the animal's experiences are positive.[67] Against this background, a legal assessment of the needs of animals need no longer be rooted in anthropomorphism. Animal protection laws can now be based on hard science.

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64 *Draft Law* art 43.

65 Until the 1980s such practice was regarded as bourgeois and a public health nuisance. See, Paul Littlefair, 'Why China is Waking Up to Animal Welfare' in Jacky Turner and Joyce D'Silva (eds), *Animals Ethics and Trade: The Challenge of Animal Sentience* (Earthscan, 2006).

66 In 1968, the word 'welfare' first entered UK legislation via the *Agriculture (Miscellaneous Provisions) Act 1968* (UK) c 34 and scientific animal welfare research commenced. This legislation was the direct result of the *Brambell Report*. See below n 81 and accompanying text.

67 D M Broom and A F Fraser, *Domestic Animal Behaviour and Welfare* (Cambridge University Press, 4th ed, 2007).

The more scientific research has discovered about animal behaviour and animal suffering, the stronger has been the pressure on governments to promulgate laws which promote positive animal welfare. Over the past two decades, laws have been introduced, in both western and eastern countries, which place a duty of care on those keeping animals to meet their basic needs. Failing to meet that duty of care, through deliberate acts and omissions or negligence, is now actionable under the law. Animal cruelty prohibitions have been in place in many jurisdictions for over a century, but new legal reforms have added the power to prosecute offenders for failing to meet the basic needs of their animals. In England and Wales, legislation such as the *Protection of Animals Act 1911* allowed for persons that had treated animals *cruelly* to be prosecuted but, until 2006, remained silent as to how animals *ought* to be treated.[68] As Radford has argued, there are important differences between prohibiting cruelty and promoting welfare.[69] 'Welfare' is a state inherent to the animal itself, which may be good or bad at any given time depending on the animal's circumstances. Prejudicing an animal's welfare may not, of itself, amount in law to 'cruelty'. As such, it may go unpunished unless the legislation also enforces a duty of care towards the animal's welfare. For this reason, modern legislation goes further than simply prohibiting cruelty; it promotes positive animal welfare. Indeed, since 2002, the OIE, whose role it is to manage animal health across the world, has also begun to provide recommendations for positive animal welfare, underscoring an international recognition of the link between animal health and animal welfare.[70] As a member of the OIE, China cannot afford to ignore this link.

Over the past 20 years, in Europe, the UK, USA, New Zealand, Australia and Taiwan, animal welfare laws have been newly promulgated, or revised, to require that animals are provided with a reasonable minimum level of care.[71] Modern animal welfare laws now not only guard against cruelty, but often also

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68 *Animal Welfare Act 2006* (England and Wales).

69 Mike Radford, *Animal Welfare Law in Britain* (Oxford University Press, 2001) 261.

70 To date, seven animal welfare standards have been adopted under the *OIE Terrestrial Animal Health Code* and two under the *OIE Aquatic Animal Health Standards Code*. These Codes are updated each year by the OIE and can be found on their website, 'International Standards, *OIE* 2012 <http://www.oie.int/en/international-standard-setting>. Currently, the *Terrestrial Animal Code* includes welfare standards for: Transport of Animals by Land, Transport of Animals by Sea, Transport of Animals by Air, Slaughter of Animals for Human Consumption, Killing of Animals for Disease Control Purposes, Control of Stray Dog Populations, and the Use of Animals in Research and Education. Animal welfare standards for farm animals are also currently in development. The *Aquatic Animal Code* includes welfare standards for: Farmed Fish during Transport, and Stunning and Killing Farmed Fish for Human Consumption.

71 See *Animal Welfare Act 2006* (England and Wales) c 45; *Animal Health and Welfare (Scotland) Act 2006* (Scot) asp 11; *Animal Welfare Act 1966* 7 USC §§ 2131-59 (2009); *Animal Welfare Act 1992* (ACT); *Prevention of Cruelty to Animals Act 1979* (NSW); *Animal Welfare Act 1999* (NT); *Animal Care and Protection Act 2001* (Qld); *Animal Welfare Act 1985* (SA); *Animal Welfare Act 1993* (Tas); *Prevention of Cruelty to Animals Act 1986* (Vic); *Animal Welfare Act 2002* (WA); *Animal Welfare Act 1999* (NZ); *Animal Protection Law 1998* (Taiwan). Such a law has is also being discussed by legislators in Hong Kong, India and Sri Lanka. See also the *Council Directive 98/58/EC of 20 July 1998 Concerning the Protection of Animals Kept for Farming Purposes* [1998] OJ L 221/23which provides for a duty of care towards all animals kept for farming purposes in the European Union.

against negligence, by providing that if a person keeping an animal fails to meet his duty of care towards that animal, that person is liable for prosecution.[72]

B *The Duty of Care in Criminal Law*

It is interesting, at this point, to reflect on the historical development of a criminally-punishable duty of care towards animals. In criminal law, there is generally no liability for failing to act. Those situations in which the legislation makes it a criminal offence to fail to act involve particular circumstances where a positive duty has been imposed on a defendant, usually due to some voluntary action taken by him or her, which warrants holding the defendant legally and morally responsible for the omission. Examples include circumstances where the defendant has created a dangerous situation, but fails to act to rectify it, thereby causing harm to others.[73] In some cases complete rectification may not be possible but there may be a requirement to assist others, such as the duty imposed on drivers to stop and provide assistance after a road traffic accident involving injury to another person.[74] Legislation has also long placed a duty of care on parents, obligating them to care for their children,[75] and for some time the offence of manslaughter has been interpreted to impose a duty on adults to care for other adults in cases where the adult defendant has voluntarily assumed responsibility for the adult victim and the victim lacks the capacity to care for herself.[76]

Most recently, in the UK, and in South Australia, the duty of care imposed on those who live with, and have frequent contact with, children has been extended. In both jurisdictions, legislation now places a duty on every person living in the same household as a child, whether a parent or otherwise, actively to care for the child's well being. Failing to protect that child from harm may result in a criminal prosecution.[77] If a child is seriously injured or killed in the home, then every adult whom the child lived with can be held accountable for the child's fate, whether they themselves inflicted the harm or not.

As Lord Coleridge LJ stated, in relation to duties arising under the common law, in the celebrated case of *R v Instan*,[78] 'It would not be correct to say that every moral obligation involves a legal duty; but every legal duty is founded on a moral obligation.'

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72 Note that only the Australian States of Tasmania and Queensland explicitly include a general duty of care towards animals in their legislation. While the other states' legislation does not provide a general duty of care, they do include specific welfare related offences such as failure to provide adequate exercise or shelter. See, Deborah Cao, *Animal Law in Australia and New Zealand* (Thomson Reuters, 2010) 120.

73 *R v Miller* [1983] 2 AC 161.

74 *Road Transport (Safety and Traffic Management) Act 1999* (NSW) s 70.

75 *Children and Young Persons Act 1933* (England and Wales) c 12 s 1; *Crimes Act 1900* (NSW) s 43A(2).

76 *R v Stone; R v Dobinson* [1977] QB 354.

77 See *Domestic Violence, Crime and Victims Act 2004* (England and Wales) c 28 ss 5–6; *Criminal Law Consolidation Act 1935* (SA) s 14.

78 [1893] 1 QB 450. In this case, the defendant allowed her aunt to die in a house they shared, through want of food and medical attention. As the defendant had voluntarily assumed the care of her elderly and infirm aunt, the court ruled there was a legal duty of care.

Of course it should also be remembered that the offence of overt animal cruelty has long been able to be committed by an act of omission as well as commission.[79] Against this background, the legislative duty of care towards animals has been developing. The assumption behind the duty of care is that it is not unnecessarily burdensome to place a duty on those who keep animals to provide them with adequate care. 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 not only that they are protected from overt acts of cruelty but that their most basic needs are met.[80]

In theory, farm animals have enjoyed the right to minimum standards of care in the UK for quite some time. Nearly 50 years ago, in response to rising public concern about the welfare of farm animals, a committee on intensive livestock husbandry systems was set up under the chairmanship of Professor Rogers Brambell. The *Brambell Report*,[81] released in 1965, called for new farm animal welfare legislation to replace the *Protection of Animals Act 1911* and identified the so called *five freedoms* for animals.[82] This legislation came in the form of the *Agriculture (Miscellaneous Provisions) Act 1968* (UK) which provided for the imposition of regulations setting minimum welfare standards with respect to livestock.[83] The *Brambell Report* also led the establishment of the UK's Farm Animal Welfare Advisory Committee.

A minimum standard of care for companion animals is a more recent protection. With the ratification of the *European Convention for the Protection of Pet Animals 1992*,[84] pets in many European states became legally entitled to a minimum standard of care. The Convention requires any person keeping, or responsible for, an animal, to provide it with 'accommodation, care and attention which take account of the ethological needs of the animal in accordance with its species and breed'.[85]

C *The First Legislative Duty of Care towards Animals*

It appears that the first time a general duty to provide a minimum standard of care was imposed on persons keeping animals, regardless of the animals'

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79 Previously provided in s 1 of the *Protection of Animals Act 1911* (England and Wales) and now at s 4 of the *Animal Welfare Act 2006* (England and Wales).

80 Radford, above n 69, 393.

81 F W Rogers Brambell, *Report of the Technical Committee to Enquire into the Welfare of Animals kept under Intensive Livestock Husbandry Systems* (Her Majesty's Stationery Office, 1965) ('*Brambell Report*').

82 These include freedom from hunger and thirst, freedom from discomfort, freedom from pain, injury or disease, freedom to express normal behaviour and freedom from fear and distress.

83 *Agriculture (Miscellaneous Provisions) Act 1968* (UK) c 34 s 2.

84 *European Convention for the Protection of Pet Animals 1992*, opened for signature 13 November 1987, CETS 125, (entered into force 1 May 1992). To date, the Convention has been signed by Austria, Azerbaijan, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Finland, France, Germany, Greece, Italy, Latvia, Lithuania, Luxembourg, Norway, Portugal, Romania, Serbia, Sweden, Switzerland and Turkey. Ukraine and the Netherlands have also signed but the Convention is not yet in force in those two countries.

85 Ibid art 4(2).

purpose, was under the *Animal Welfare Act 1993* (Tas). The stated purpose of that Act is to prevent neglect of, and cruelty to, animals, to ensure the welfare of animals.[86] Section 6 specifically provides that a person who has the care or charge of an animal has a duty to take all reasonable measures to ensure the welfare of the animal. This is in addition to the legislative prohibition on cruelty to animals found at s 8.

It is important to remember that in law, not all breaches of reasonable welfare standards are prosecutable as acts of cruelty. Successful prosecution for the offence of cruelty requires proof, beyond reasonable doubt, of unnecessary suffering. In the case of neglected animals, they may have been harmed because their welfare condition fell below a reasonable minimum standard well before evidence of their suffering could be proven in court, to the criminal standard.[87] Legislation which imposes liability, not just for cruelty, but also for failing to meet a reasonable standard of care, ensures animals do not have to display signs of overt suffering before enforcement action may be taken to assist them. Neglected animals in danger of suffering can be assisted too.

Tasmanian Hansard states that the motivation to supplement the old-style cruelty laws of 1925[88] with a law imposing a duty of care, arose as a direct result of the discovery of 107 neglected dogs in cages near New Norfolk in 1989. The case involved serious breaches of welfare and the old anti-cruelty laws were found to be entirely inadequate to ensure that proper enforcement action could be taken against those responsible, or even to allow the animals to be seized legally.[89] In the wake of this case, the *Animal Welfare Act 1993* (Tas) was passed, including what appears to be the first legal duty in the world to provide a reasonable standard of care to animals.[90]

Also serving to fuel the call for better protection for animals in Tasmania was a highly-publicised private prosecution relating to battery caged hens which was won in 1993 by animal rights activist Pam Clarke, in *Clarke v Golden Egg Farm.*[91]

In *Golden Egg Farm*, Magistrate Philip Wright heard seven charges of cruelty, brought under the *Cruelty to Animals Prevention Act 1925* (Tas). Each charge related to an individual battery hen kept at the defendant's farm. The complaint related to the wire cages, in which these hens were housed, which each measured, in centimetres, approximately 41H x 46W x 45D. The cramped

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86 Long title of the *Animal Welfare Act 1993* (Tas).

87 By way of example, in the RSPCA's written evidence on the Animal Welfare Bill 2006 (UK) to the UK Parliament's Select Committee on Environment Food and Rural Affairs, the Society stated that in 2004 there were a total of 870 convictions for animal cruelty. However, during the nearly identical period of June 2004 to May 2005, the Society recorded 68,732 welfare advice cases in which animals were harmed because owners were failing to meet the animals' needs but legal action could not be taken for the offence of cruelty.

88 As found in the *Cruelty to Animals Prevention Act 1925* (Tas) which was repealed by the *Animal Welfare Act 1993* (Tas).

89 Tasmania, *Parliamentary Debates*, House of Assembly, 19 May 1993, 40–95 (Robin Gray, Minister for Primary Industry and Fisheries).

90 *Animal Welfare Act 1993* (Tas) s 6.

91 *Clarke v Golden Egg Farm* (Unreported, Magistrates Court of Tasmania, Magistrate Wright, 24 February 1993) ('*Golden Egg Farm*').

conditions required the three hens in each cage to crane through the wires to reach food and water, causing them to lose feathers at their necks and breasts. The magistrate was satisfied that 'if a bird is unable to move without affecting, physically, others in the cage nor to lay or rest without affecting itself deleteriously, cruelty is constant and continual.'[92]

The cages in question complied with industry standards of the time. They had passed inspections by the Tasmanian Egg Marketing Board, municipal health authorities and the RSPCA, and the farm had been licensed to keep up to 8000 hens, for egg production, under the *Egg Marketing Act 1954* (Tas) and the *Egg Industry Act 1988* (Tas). Only the year before the case was heard, the farm had been inspected by the principal agricultural officer specialising in poultry, for the Tasmanian Department of Primary Industry. Despite due compliance with industry standards, Magistrate Wright found the hens had been treated with 'unjustified and unnecessary cruelty, constituted by great indifference to their suffering and pain'[93]. In reaching his decision, he referred to the duty provided under section 4 of the *Cruelty to Animals Prevention Act 1925* (Tasmania), which required every person having the charge or care of an animal to take all reasonable measures to ensure its well being and to prevent it being inflicted with unnecessary suffering. He quoted from a judgment of the Supreme Court of South Australia, *Backhouse v Judd*,[94] in which Napier J spoke of the duty towards animals, under the equivalent South Australian anti-cruelty legislation, as a 'moral duty' accepted by every reasonable member of the community.

Magistrate Wright also relied on the judgment of Hawkins J in the English case of *Ford v Wiley*.[95] In that case, the court ruled that in determining whether there had been unnecessary suffering caused to cattle during normal animal husbandry procedures, the view of a reasonable person was critical. The test was therefore an objective one. The court also ruled that profitability did not equate with necessity, and any pain caused must be 'reasonably proportionate' to the purpose achieved.

Applying the *Ford v Wiley* 'reasonably proportionate' test, Magistrate Wright ruled that it was a matter for the Tasmanian judiciary to make a value judgment, on behalf of the community as to what constituted 'unnecessary suffering'.[96] He ruled that while it may be normal practice for commercial egg producers to treat animals cruelly, on a large scale, as a matter of routine, that did not absolve the courts of the responsibility to define the proper scope and limits of the legislative duty towards animals and to reflect current community views as to what farming practices would be tolerated.[97] He found all seven charges proven.

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92 Ibid [12].
93 Ibid.
94 [1925] SASR 16, 20–1.
95 (1889) 23 QBD 203.
96 *Golden Egg Farm* (Unreported, Magistrates Court of Tasmania, Magistrate Wright, 24 February 1993) [12].
97 Ibid.

IV The Development in Case Law of an Objective Test for Cruelty

A *The English Authorities*

In the same year as *Golden Egg Farm*[98] was decided in Tasmania, the English High Court expressly underscored that the criminal standard for a cruelty offence of 'unreasonably causing unnecessary suffering' was objective. In *Hall v RSPCA*[99] and then again, the following day, in *RSPCA v Isaacs*,[100] the Divisional Court ruled on two cases of animal cruelty. These were the first cases of animal cruelty to come on appeal before the court in 82 years. The court took the opportunity to clarify the law in the area and devised a formula for determining cases of unnecessary suffering caused by an owner's omissions. In both cases, the actual omission complained of was failing to seek veterinary care. The court ruled that in such cases, three questions were to be asked: (1) whether the animal had suffered; (2) whether the suffering was unnecessary; and (3) whether there was enough evidence (viewed objectively) that the omission of the owner was unreasonable, in that no reasonably caring, reasonably competent owner would be guilty of a similar omission. If the answer to all three questions was 'yes', then the defendant was guilty of causing unnecessary suffering.

Despite these clear rulings, subjective knowledge and foresight of harm have proved difficult requirements for the courts to abandon in animal cruelty cases, particularly where the owner pleads ignorance of the suffering of his animal. As late as 2007, in England, the courts were still displaying a confused understanding of the mens rea requirement for animal cruelty offences. In *Hussey v RSPCA*,[101] the Divisional Court considered an appeal against the conviction of a dog owner for causing unnecessary suffering by omission. The dog was a male German shepherd mixed breed, and the owner was convicted for unreasonably failing to provide it with an adequate and suitable diet. In the 9 months immediately prior to the dog being seized by authorities, its weight had fallen to half the average of a dog of the same breed/age. The owner was aware the dog had lost a significant amount of weight, yet she had not sought veterinary care for the dog. At trial, the magistracy found the owner's failure to seek care for her dog was unreasonable, convicted her of causing unnecessary suffering, removed the dog from her care and disqualified her from owning a dog for two years.

The case went on appeal to the Divisional Court. The court was referred to *Hall* and the express ruling, in that case, that the test for unnecessary suffering was an objective one. However the court was also referred to the decision on appeal of a differently constituted Divisional Court, handed down in early 1993. In *Peterssen v RSPCA*,[102] the appellant had appealed against his conviction for causing

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98 (Unreported, Magistrates Court of Tasmania, Magistrate Wright, 24 February 1993).
99 (Unreported, High Court of Justice Queens Bench Division, Holland J, 11 November 1993) ('*Hall*').
100 [1994] Crim LR 517 ('*Isaacs*').
101 [2007] EWHC 1083 (Admin) ('*Hussey*').
102 [1993] Crim L R 852 ('*Peterssen*').

unnecessary suffering to sheep. The facts in that case were that while the defendant was out, his dogs escaped from his premises and killed and injured 10 lambs and ewes on adjacent land. At trial, the defendant argued unsuccessfully that cruelty could not be established unless the prosecution proved the defendant had foreseen the risk to the sheep and had recklessly disregarded it. On appeal, this argument was again taken up and, giving the first judgment, Morland J ruled that the appellant showed the necessary knowledge and foresight of the consequences to the nearby sheep through his unreasonable behaviour. He found the appellant had the necessary mens rea to uphold his conviction.[103] Giving the second judgment, Evans LJ ruled that in order to prove animal cruelty the defendant must be shown to have had guilty knowledge of the fact that unnecessary suffering would, or might, be caused by his actions. He stated that 'unreasonably' could not necessarily be equated with the civil law concept of negligence and that foresight is an essential element of guilty knowledge. He found that the appellant had the necessary guilty knowledge and foresight of the likelihood of harm to the sheep, if he failed to adequately secure his dogs.[104]

In his commentary on the *Peterssen* appeal judgment, Professor Smith criticised the Divisional Court's definition of 'guilty knowledge'. He pointed out that the appellant's knowledge of the risk to the sheep, if he left his dogs unsecured, was not, in fact, evidence of guilty knowledge, but the awareness of a prudent man. It would only become guilty knowledge if he then also acted in a manner likely to cause injury or damage. The facts in *Peterssen* established that it was the appellant's usual practice to leave the dogs securely confined and their escape was entirely unintentional. However, as Professor Smith pointed out, the offence required only that the appellant had caused the suffering by his unreasonable act or omission. His failure to securely contain his dogs, on the day they escaped, was a clear case of an unreasonable omission. As Professor Smith stated, 'The offence is one of negligence. Talk of mens rea and guilty knowledge is confusing and misleading'.[105]

In determining the appeal in *Hussey*,[106] it is unfortunate the Divisional Court did not take the opportunity to expressly prefer the objective test for cruelty laid down in *Hall*,[107] and again in *Isaacs*.[108] Instead, the court ruled that whether the test was subjective or objective was essentially moot, as the owner herself had admitted she knew the dog was losing weight and that there was a problem with its welfare. The court also took comfort in the likelihood that the correct test for conviction was soon to be clarified by the *Animal Welfare Act 2006* (England and Wales), which was shortly to come into force. This Act[109] indeed rectified the problem in the UK by prohibiting, not only objective animal cruelty, but extending legislative protection to those animals which are clearly not being provided with a reasonable standard of care.

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103 Ibid.
104 Ibid 852.
105 Ibid 853.
106 [2007] EWHC 1083 (Admin).
107 (Unreported, High Court of Justice Queens Bench Division, Holland J, 11 November 1993).
108 [1994] Crim LR 517.
109 Along with the *Animal Health and Welfare (Scotland) Act 2006* (Scot) asp 11.

While legislation now sets out an objective duty to provide a reasonable standard of care to most, and in some cases, all kinds of animals in the EU, UK, USA, New Zealand, Taiwan and parts of Australia,[110] it is of concern that decisions such as *Peterssen*[111] and *Hussey*[112] have continued to cloud the law in this area. *Ford v Wiley*[113] and later, *Hall*[114] and *Isaacs*,[115] arguably settled the fact that the intention of the offender is irrelevant to the offence of cruelty, at least in the UK.[116] It is regrettable that the English line of authorities has not been firmer in underscoring the importance of applying an objective test. As Hawkins J stated in *Ford v Wiley*, if the law provided an excuse for cruelty based on a defendant's subjective belief that the law justified his actions then:

> [i]t is difficult to see the limits to which such a principle may not be pushed, and the creatures it is man's duty to protect from abuse, would oftentimes be suffering victims of gross ignorance and cupidity.[117]

B *The Australian Authorities*

It should be noted here that even in the Australian State of New South Wales, where a legislative duty of care has not been introduced, authorities have, in any case, provided support for the application of an objective test of cruelty. The *Prevention of Cruelty to Animals Act 1979* (NSW) prohibits direct cruelty to animals and also provides that a person in charge of an animal shall not authorise the commission of an act of cruelty upon the animal.[118] Section 4(2) of that Act states that an act of cruelty includes any act or omission as a consequence of which the animal is unreasonably, unnecessarily or unjustifiably inflicted with pain.[119] There is also a requirement to exercise reasonable care to prevent cruelty, to alleviate pain, and to provide veterinary treatment, where necessary.[120] In *Pearson v Janlin Circuses*,[121] an appeal against the dismissal of a magistrate of a charge of animal cruelty, the Supreme Court of New South Wales sought to determine whether the offence was one of strict liability.

Earlier, in *He Kaw Teh v The Queen*,[122] the High Court of Australia had recognised three categories of offences in criminal law. The first included offences in which mens rea, consisting of some positive state of mind such as intent,

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110 See above n 71.
111 [1993] Crim L R 852.
112 [2007] EWHC 1083 (Admin).
113 (1889) 23 QBD 203.
114 (Unreported, High Court of Justice Queens Bench Division, Holland J, 11 November 1993).
115 [1994] Crim LR 517.
116 Radford, above n 69, 254.
117 (1889) 23 QBD 203, 229. See also, on the correct interpretation of the unnecessary suffering test, Mike Radford, 'Unnecessary Suffering: the Cornerstone of Animal Protection Legislation Considered' (1999) *Criminal Law Review* 702, 712.
118 *Prevention of Cruelty to Animals Act 1979* (NSW) s 5.
119 Further s 8(1) of the Act imposes an obligation on the person in charge of the animal to provide it with food, drink and shelter and section 9 requires exercise to be provided for certain animals which are kept in confinement.
120 *Prevention of Cruelty to Animals Act 1979* (NSW) s 5(3).
121 [2002] NSWSC 1118 ('*Pearson*).
122 (1985) 157 CLR 523 ('*He Kaw Teh*').

knowledge, or recklessness, must be proved by the prosecution. The second included offences in which there was no necessity for the prosecution to prove the existence of mens rea; the doing of the prohibited act prima facie imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. For this secondary category of offences a defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. The third category of offences included those of absolute liability, where it is not open to the accused to exculpate himself by showing that he was free of fault.

In determining the appeal of *Pearson*,[123] the New South Wales Supreme Court followed the earlier decision of Dowd J, sitting in the same court, in the unreported case of *Bell v Gunter*.[124] Also hearing an appeal, by way of case stated, Dowd J ruled that a charge of aggravated cruelty falls into the second category of offences, as enumerated by Gibbs CJ in *He Kaw Teh*,[125] and as such is one of strict liability. Justice Dowd found that while the legislative intention seemed clearly not to require mens rea, in proof of the offence, the crime was not one of absolute liability. In *Pearson*, the court found no reason not to apply the same reasoning when interpreting the statutory meaning of cruelty without aggravating circumstances.

In passing judgment in *Pearson*, the Supreme Court of New South Wales also referred to *Fleet v District Court of NSW*, in which the NSW Court of Appeal appears to have approved *Bell v Gunter*.[126] In that case, the court found no merit in the argument that in a case of aggravated cruelty the prosecution needs to prove mens rea, in the sense of a positive state of mind.[127]

C *Ramifications for Anti-Cruelty Prosecutions in Asia*

Despite the assistance of these Australian authorities, in common law jurisdictions such as Hong Kong, Malaysia and Singapore, decisions such as *Peterssen*[128] and *Hussey*[129] have only served to promote confusion. Each of these former colonies still base their anti-cruelty legislation on the original draft of the *Protection of Animals Act 1911* (England and Wales) and have yet to introduce a statutory duty to provide a minimum standard of care.[130] In such jurisdictions, the temptation for a court to excuse an offender from full culpability, where there

123 [2002] NSWSC 1118.
124 (Unreported, Supreme Court of New South Wales Supreme Court, Dowd J, 24 October 1997).
125 (1985) 157 CLR 523.
126 [2002] NSWSC 1118. [5].
127 *Fleet v District Court of NSW* [2002] NSWCA 25, 48.
128 [1993] Crim L R 852.
129 [2007] EWHC 1083 (Admin).
130 The introduction of such a duty is currently under consideration by the government in the Hong Kong Special Administrative Region (Peoples Republic of China). See, Amanda Whitfort, 'Advancing Animal Welfare Laws in Hong Kong' (2009) 2 *Australian Animal Protection Law Journal* 65.

is evidence the offender did not positively intend to be cruel, should not be underestimated. In a recent unreported decision of the Hong Kong Special Administrative Region's High Court, on appeal from the magistracy,[131] Deputy Judge Line reduced the sentence on four convictions for cruelty, on the basis that the appellant had been neglectful, rather than deliberately cruel, to the animals in his care. In this case, the appellant had pleaded guilty to failing to provide water, shelter and adequate accommodation to four dogs and three cats. These animals had been found crowded together in cages, on the roof of the appellant's premises. The appellant told the court that he regarded his animals as his children, and that it was only his job as a lorry driver that had caused him to neglect them. He was sentenced by a magistrate to 100 hours of community work, on two of the cruelty charges, and fined HKD5000 on each of the two other charges. Deputy Judge Line, hearing an appeal against the sentences, halved them all, on the basis that 'the appellant loved the animals in his charge, and it was merely inadequacy that led to the situation that developed…inflicting cruelty was very far from his intent.'[132]

In this case, the question of the prosecution proving the appellant's intention to act cruelly never arose, as he pleaded guilty to all the charges. However, it is lamentable, given the clear intent of the *Protection of Animals Act 1911* (England and Wales), on which Hong Kong's *Prevention of Cruelty to Animals Ordinance*[133] is exactly modelled, that Hong Kong's highest trial court has ruled an appellant's lack of subjective intent warrants as much as a 50 per cent discount on his sentence.

V A Duty of Care for China?

A *Protecting the vulnerable*

The post-Mao era has seen significant attempts by the leadership to restore social stability in China. Since 1989 there has been a flood of national and provincial legislation protecting the interests of the vulnerable. This legislation has sought to protect the welfare of the disabled, the elderly, children and women.[134] Some of this legislation specifically imposes a duty of care on the guardian of the vulnerable party.

The most important national laws protecting children are the *Law on the Protection of Minors*[135] and the *Adoption Law*[136]. The stated goals of the *Law on*

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131 *HKSAR v Shu Ngai Fung* (Unreported, High Court of the Hong Kong Special Administrative Region, Deputy Judge Line, 30 September 2008).

132 Ibid [16].

133 *Prevention of Cruelty to Animals Ordinance (Hong Kong)* cap 169.

134 Michael Palmer, 'The Re-emergence of Family Law in Post-Mao China: Marriage, Divorce and Reproduction' in Stanley Lubman (ed) *China's Legal Reforms* (Oxford University Press, 1996).

135 *Law of the People's Republic of China on Protection of Minors* (People's Republic of China) National People's Congress, Order No 50, 4 September 1991, revised 29 December 2006 ('*PRC Law on the Protection of Minors*').

136 *Adoption Law of the People's Republic of China* (People's Republic of China), National People's Congress, Order No 54, 29 December 1991, revised 4 November 1998 ('*PRC Adoption Law*')

the Protection of Minors are to protect their mental and physical health, guarantee their rights and promote their comprehensive moral, intellectual and physical development.[137] Families, schools, the state and society are all responsible for implementing these goals. Where a family member must leave the minor for travel, there is a duty to provide an adult replacement to protect the minor.[138] Where the family fails in its duty of care towards the minor, the courts can appoint a new guardian and administrative penalties may be imposed on the wrongdoers.[139]

A particular social problem which has arisen since the end of the Cultural Revolution is the return of responsibility for the elderly to the family unit. The *PRC Adoption Law* prescribes a duty of care towards adopted children and a reciprocal responsibility towards their adopting parents, as they age.[140] Adoptions are viewed as legal contracts and where insufficient care is provided to either party, the aggrieved can dissolve the agreement in court.[141] In return for caring for adoptive parents in their old age, an adopted child also has a legally enforceable inheritance claim.[142] The benefit of legal protection has led to the widespread use of legacy-support agreements which recognise adult adoptions for mutual benefit.[143] In China it is not uncommon for elderly childless persons to adopt an adult 'child' to care for them for the reminder of their lives. In exchange, the adopted 'child' receives a legally enforceable right of inheritance. Criminal sanctions for failing to show filial piety are also legislated. Where aged parents are not cared for, the children responsible (whether adopted or not) can be held criminally liable under the *Marriage Law*.[144]

The *PRC Law of Succession* also protects the rights of daughters, traditionally second-class citizens in the family unit, to receive their fair share of any inheritance, including widowed daughters-in-law who have remarried and other dutiful daughters-in-law.[145] It also provides that minors and disabled children can never be legally disinherited where they have no other source of income.[146]

As can be seen, the important principle of promoting obligations towards the vulnerable is already running through modern Chinese social laws. This principle is not only a feature of socialist law but also underscores Chinese traditional values. Against this background, the imposition of a duty of care towards animals does not seem so unlikely a step for the Chinese legislators to take. In fact, in the introductory remarks to the *Draft Law*, the drafting team specifically argue that by protecting animals through the law, traditional Chinese

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137 *PRC Law on the Protection of Minors* art 1.
138 Ibid art 16.
139 Ibid arts 53, 62.
140 *PRC Adoption Law* art 30.
141 Ibid art 27.
142 *Law of Succession of the People's Republic of China* (People's Republic of China) National People's Congress, Order No 24, 1 October 1985 ('*PRC Law of Succession*').
143 Ibid art 31.
144 *Marriage Law of the People's Republic of China* (People's Republic of China) National People's Congress, Order No 9, 10 September 1980, amended 28 April 2001 art 45.
145 *PRC Law of Succession* art 12.
146 Ibid art 19.

virtues such as compassion for living things will be encouraged and a civilised and harmonious society developed.[147]

Further, the *Draft Law* is careful to prescribe criminal sanctions for only the worst kinds of deliberate cruelty. Where the offence involves a failure to immunise an animal, or killing an animal in a cruel way, criminal sanctions will not follow unless the act was clearly deliberate. Instead, such offences would be dealt with by way of administrative penalties.[148] Criminal penalties would only be imposed where the offender can be shown to have been deliberately cruel to an animal in circumstances which warrant criminal prosecution. The law suggests such circumstances should include the removal of organs from a live animal for commercial purposes, permitting cruel animal performances, publicly disseminating videos of animal cruelty, deliberately abandoning large numbers of animals and the indiscriminate and inhumane culling of animals. It is clear that these practices have been singled out for special focus in the law because they reflect the types of cruelty which have attracted significant public outcry in China in recent years

B *The Shift from Welfare to a Prevention of Cruelty Law*

Why then has the Expert Drafting Team retreated from its original draft of the law — which would have protected animals from neglect under a duty of care — and settled instead for a revised law prohibiting only deliberate cruelty? The decision seems to have been purely pragmatic. In the final part of the introductory remarks to the *Draft Law*, the team states that the revised draft of the law represents the Chinese people's 'bottom line'.[149] Professor Chang Jiwen has claimed that the revised focus, which has abandoned the duty of care principle, acknowledges the moral position Chinese people have taken against animal cruelty but also recognises that much of China is not ready for a true animal welfare law. A public consultation exercise was conducted over the four months following the release of the original draft of the law in September 2009. The drafters received over 300 emails and 400 telephone calls. The views provided established that although anti-cruelty legislation is widely supported by the public, some participants could not support an animal welfare law at a time when China has yet to adequately protect human welfare.[150]

After the law was modified to focus mainly on cruelty, the popular Chinese news and television website 'ifeng.com' conducted an acceptance poll in May 2011. The revised cruelty law was found to have a support rate of 83 per cent among respondents.

It is also relevant to note that the law is intended to assist in removing welfare-based barriers faced by China's exporters of meat, wool and feathers.[151]

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147 *Draft Law* introductory remarks.
148 *Draft Law* art 78.
149 Ibid introductory remarks.
150 'Proposed animal welfare law watered down', *China.org.cn* (online), 26 January 2010 <http://www.china.org.cn/china/2010-01/26/content_19309286.htm>.
151 The China Native Produce and Animal Product Import and Export Corporation support the *Draft Law*.

China has more than 800 million farmers. The imposition of a duty on farm workers to provide animals with a minimum standard of care, as well as to protect them from deliberate cruelty, would be extremely difficult for local authorities to enforce in much of rural China.

While political realities have resulted in a dilution of the original draft law, Professor Chang has commented that the legal protection of animals in China is in a state of evolution. He has said he is confident that with the enhancement of people's awareness of animal welfare, China's animal protection laws and regulations will become more sophisticated in years to come.[152]

VI Conclusion

Nearly 20 years ago, showing admirable foresight, the Australian State of Tasmania's Parliament considered it dangerous to rely on local courts to promote an objective duty of care, in the absence of the clearest legislative intent. When the Tasmanian Parliament debated the Animal Welfare Bill 1993 (Tas) in 1993, it was acknowledged by many members present that the *Cruelty to Animals Prevention Act 1925* (Tas) was in fact already modern enough to allow Magistrate Wright to find the *Golden Egg Farm* farmers objectively guilty of cruelty.[153] However, law reform was still pursued, as some recent cases of neglect in that jurisdiction had not been able to be prosecuted adequately under the 1925 Act. It was for this reason that the 1993 Bill specifically identified as its purpose, 'the prevention of neglect' as well as of cruelty.

Without doubt, the members of the Expert Drafting Project Team, who created the *Draft Law*, should be congratulated on their proposal to introduce the first law to prevent cruelty to animals in China. If their proposal is accepted by the National People's Congress, animals in China will gain the same protection from deliberate cruelty already enjoyed by many animals around the world. What must be recognised, however, is that a major portion of animal suffering is not caused by deliberate cruelty but by human neglect and ignorance. In failing to impose a duty of care on those who keep animals, China's proposed law will do nothing to remedy the suffering of neglected animals which fall victim to owner ignorance. At this historical moment in the development of modern animal protection laws, we would do well to remember that to an animal in pain, the cause of his suffering is irrelevant: it is the remedy that counts.

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[152] 'Humane Slaughtering Spearheads China's Drive to Promote Animal Welfare', *China.org.cn* (online), 5 September 2009 <http://www.china.org.cn/environment/2009-09/05/content_18519951.htm>.

[153] *Golden Egg Farm* (Unreported, Magistrates Court of Tasmania, Magistrate Wright, 24 February 1993).