

JUSTICE AND THE VULNERABLE: EXTENDING THE DUTY TO PREVENT SERIOUS CRIMES AGAINST CHILDREN TO THE PROTECTION OF AGRICULTURAL AND RESEARCH ANIMALS

ABSTRACT

Commencing in 2004, the United Kingdom, South Australia, and New Zealand have each introduced new laws to protect children from serious harm within the home. Members of a household in these jurisdictions living with a child can now be held accountable for neglecting to seek help or take preventative action if the child is killed or seriously injured. The new duty to protect children from serious crime within the home recognises the special vulnerability of victims within a closed environment. In New Zealand, the duty specifically extends to staff of institutions where children reside. In the same period, legislation has been expanded to protect animals from acts of negligence, as well as overt cruelty. In practice, however, many of the protections introduced do not apply to animals used in agriculture and research. Legal protection for farm animals has been further eroded by the introduction of so called ‘ag-gag’ laws. Historically, the recognition of the special vulnerability of children and animals caused their legal protections to develop in tandem. This article examines the case for extending the duty to prevent serious violent crimes against children in the home, to animals in laboratories, abattoirs and on farms. It concludes that effective protection of animals requires the imposition of a new legislative duty to prevent their unlawful serious harm.

I INTRODUCTION

The Royal Society for the Prevention of Cruelty to Animals (‘RSPCA’) (Australia) has proposed the reform of Australian state laws protecting animals from cruelty.¹ The suggested reform would impose a mandatory duty on

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¹ Royal Society for the Prevention of Cruelty to Animals (Australia), *Act to Protect Animals by Reporting Animal Cruelty: Frequently Asked Questions* (8 September 2014) <http://www.rspca.org.au/sites/default/files/website/media-centre/Press-releases/RSPCA_Australia-Act_to_Protect_Animals_by_reporting_animal_cruelty-FAQs.pdf>.

responsible professional persons, or persons who manage animals, to report animal cruelty by others. The proposal is based on the duty to report child abuse that is imposed on child care professionals in all Australian states. It is built on the premise that animals, like children, are more vulnerable to crime than other victims of crime and require special protective measures under the law. The purpose of this article is to set the RSPCA proposal in context and to critically assess its ability to provide more effective protection against cruelty to animals. This article will critically examine how animals could be better protected within the current legislative regime, and despite the existence of codes of practice for livestock production and scientific research which undermine the effectiveness of the regime.

Part II of this article considers the historical development of legal protections for animals and children in the United Kingdom ('UK') and United States of America ('USA'). Likening the protective needs of children to animals has a long legislative history. Many of the same arguments used to secure legal protections for animals in the mid-19th century were used to assist children in the latter part of that century.² In both the UK and USA, where animal and child protection laws were first developed, the same individuals were often behind both sets of reforms.³ Part II of this article highlights the use made by reformists of society's growing concern for both children and animals in advancing their cause.

Part III of this article examines the development of, and limits to, the duty of care to animals. In recent years, a growing body of animal welfare science, combined with increasing ethical concern for the treatment of animals, has resulted in widespread reforms to legislation protecting domestic animals.⁴ In Australia, and other parts of the common law world, modern animal protection laws not only prohibit cruelty, but require that animals are provided with a minimum standard of welfare. Those who own, or have charge of animals, even on a temporary basis, are required to provide their animals with a reasonable standard of care. Part III of this article notes that while legislative protections for many animals have been improved by the imposition of a duty of care, current laws are still deficient as they do not require persons who witness others committing acts of cruelty to intervene to assist the animals concerned. Further, in Australia, codes of practice for farm and laboratory animal use have been enacted. These codes carve out protection from cruelty prosecutions

² Susan Jane Pearson, *The Rights of the Defenseless: Protecting Animals and Children in Gilded Age America* (University of Chicago Press, 2011) 21–5.

³ John E B Myers, *Child Protection in America: Past Present and Future* (Oxford University Press, 2006) 30–3; Robert Dingwall and John M Eekelaar, 'Families and the State: An Historical Perspective on the Public Regulation of Private Conduct' (1988) 10 *Law and Policy* 341, 350.

⁴ Joy M Verrinder, Nicki McGrath and Clive J C Phillips, 'Science, Animal Ethics and the Law' in Deborah Cao and Steven White (eds), *Animal Law and Welfare — International Perspectives* (Springer International Publishing, 2016) 64.

for widely practiced animal husbandry and experimental procedures.⁵ In the USA, customary husbandry practices are also exempted from cruelty actions.⁶ Accordingly, on farms and in laboratories, culpability for criminal actions against animals is effectively restricted to cases of gratuitous cruelty or gross negligence.

Compounding these problems is the introduction of so called ‘ag-gag’ laws in 10 states in the USA and three in Australia. The term ‘ag-gag’ was coined by journalist Mark Bittman to describe laws which criminalise the unauthorised recording and distribution of images or audio recordings depicting animal use on farms.⁷ ‘Ag-gag’ laws erode the limited legal protections provided to farm animals by undermining public transparency of their use and stifling the capacity of undercover investigations to expose crimes which might otherwise have gone undetected by law enforcement authorities.

Part IV of this article examines the development of, and limits to, the common law duty to assist children and other vulnerable persons where they are in danger of serious harm from others. While public freedoms to report animal abuse are being legislatively curtailed by ‘ag-gag’ laws, legally enforceable duties to report child abuse are on the increase. Since 2004, three common law jurisdictions have enacted legislation requiring persons with frequent residential contact with children and vulnerable adults, who are at risk of serious harm, to take action to protect those individuals. Reporting the abuse, or risk of abuse, to police and other authorities is actively encouraged, and failure to assist the victim may have serious criminal consequences for the people concerned. Such vulnerable victim protection laws are now in force in the UK,⁸ South Australia⁹ and New Zealand.¹⁰ The Law Reform Commission of Hong Kong is also considering similar legislation.¹¹ The need to impose a duty to protect vulnerable children has also been recognised in Victoria,

⁵ Steven White, ‘Regulation of Animal Welfare in Australia and the Emergent Commonwealth: Entrenching the Traditional Approach of the States and Territories or Laying the Ground for Reform?’ (2007) 35 *Federal Law Review* 347.

⁶ David J Wolfson and Mariann Sullivan, ‘Foxes in the Hen House: Animals, Agribusiness and the Law’ in Cass R Sunstein and Martha C Nussbaum (eds), *Animal Rights: Current Debates and New Directions* (Oxford University Press, 2004) 212.

⁷ Garrett M Broad, ‘Animal Production, Ag-Gag Laws, and the Social Production of Ignorance: Exploring the Role of Storytelling’ (2016) 10 *Environmental Communication* 43, 49; Mark Bittman, ‘Who Protects the Animals?’, *The New York Times* (New York) 27 April 2011.

⁸ *Domestic Violence, Crime and Victims Act 2004* (UK) c 28, s 5(4).

⁹ *Criminal Law Consolidation Act 1935* (SA) s 14.

¹⁰ *Crimes Act 1961* (NZ) s 195A.

¹¹ Law Reform Commission of Hong Kong, *Causing or Allowing the Death of a Child* (25 April 2018) < http://www.hkreform.gov.hk/en/projects/death_child.htm>.

where a 2015 amendment to the *Crimes Act 1958* criminalised the failure of persons with authority, working within organisations, to protect children from sexual abuse.¹²

Part V examines the case for extending the duty to prevent crimes against children in the private home to animals confined in farms, abattoirs and laboratories, in light of increasing protection legislation recognising the special vulnerability of children to unlawful harm. This part explores the circumstances in which a person with knowledge of animal cruelty should have a duty to intervene to protect an animal in danger of serious harm or death. The article considers the capacity of the common law to impose such a duty. On the basis that the imposition of a new duty would require legislative intervention, the article examines existing statutory offences requiring bystanders to intervene to assist others.

In Part VI, the article examines the RSPCA (Australia) proposal and evaluates its practical ability to improve animal protection. It is argued that while a duty to report animal cruelty is a laudable idea, effective animal protection would more likely be achieved if the law were to impose a wider duty to intervene to assist the animals concerned.

In Part VII, the article imagines the scope and nature of a new duty to intervene to protect animals from the threat of serious injury or death. The appropriate intensity of criminalisation for such an offence is explored and the requirements which should be placed on those who have the capacity and opportunity to intervene is considered.

Part VIII weighs the practical effect the proposed new duty would have on undercover investigations of illegal harm to animals. It concludes that where threats to animals do not require immediate action, undercover investigations could continue without breaching the proposed duty.

In the concluding Part IX, the article recommends the adoption of legislation which would protect animals from unlawful death and serious harm, in laboratories, abattoirs and on farms. The article suggests using the legislative protection afforded to children, in their places of residence, as a statutory model for animals.

II THE DEVELOPMENT OF LEGAL PROTECTION FOR CHILDREN AND ANIMALS

Legislative protection for both children and animals arose from a general movement towards social justice which gathered pace in the 19th century.¹³ The establishment of such protection arose in the context of a wider social reform movement, which could

¹² *Crimes Act 1958* (Vic) s 490. Organisations under a duty to protect children include churches, religious bodies, education and care services, schools, hostels, hospitals, government agencies, sports groups, youth organisations and charities.

¹³ Mike Radford, *Animal Welfare Law in Britain* (Oxford University Press, 2001) 48.

be traced back to earlier anti-slavery and anti-child labor campaigns.¹⁴ Many of the individuals involved in spearheading the new laws were concerned with society's failure to protect both animals and children.¹⁵ They recognised and capitalised on the parallel moral claims of the two vulnerable groups in calling for laws to protect them.

In 1822, Richard Martin, MP for Galway in the British House of Commons, was responsible for the drafting and passage of the world's first animal cruelty legislation, the *Cruel Treatment of Cattle Act 1822*, 3 Geo 4, c 71.¹⁶ In the absence of a metropolitan police force, which was founded seven years later, Martin enforced the law himself, patrolling the livestock markets and bringing prosecutions to court.¹⁷ He soon recognised the necessity to hire others to assist him and, in 1824, he and other social reformists established the Society for the Prevention of Cruelty to Animals (which later became the RSPCA).¹⁸

In 1866, in New York, humanitarian Henry Bergh, who had visited London and seen the work of the RSPCA, sought, and was granted, a wide charter from the New York legislature which permitted the establishment of the American Society for the Prevention of Cruelty to Animals ('ASPCA'). While the protection of animals was Bergh's chief area of concern, public and private pressure began to be placed on him to assist children in need of a similar champion. In 1874, acting on the Society's behalf, Bergh petitioned the New York courts for a writ of habeas corpus for 10-year-old Mary Ellen Wilson. The writ sought to remove her from the care of her adoptive mother who had subjected the child to savage beatings and neglect, since her adoption at 18 months of age.¹⁹ The case resulted in the convictions of the adoptive mother for assault and battery. A few months later, Bergh called a public meeting to establish the New York Society for the Prevention of Cruelty to Children, the first society of its kind in the world.²⁰

At the same time, active steps were being taken to provide legal protection to children in the UK, beginning in Liverpool. While section 37 of the *Poor Law Amendment Act 1868*, 31 and 32 Vict, c 122, had made it an offence for a parent to deny his child

¹⁴ Dingwall and Eekelaar, above n 3, 351.

¹⁵ James Turner, *Reckoning with the Beast: Animals, Pain, and Humanity in the Victorian Mind* (John Hopkins University Press, 1980) 37; Harriet Ritvo, *The Animal Estate: The English and other Creatures in the Victorian Age* (Harvard University Press, 1987) 133; Elizabeth W LeBow and Debbie J Cherney, 'The Role of Animal Welfare Legislation in Shaping Child Protection in the United States' (2015) 2 *International Journal of Education and Social Science* 35, 40.

¹⁶ As well as cattle, the Act protected equines and sheep.

¹⁷ Radford, above n 13, 40.

¹⁸ Ritvo, above n 15, 145.

¹⁹ Lela B Costin, 'Unravelling the Mary Ellen Legend: Origins of the "Cruelty" Movement' (1991) 65 *Social Service Review* 203, 206–7; Myers, 'Child Protection in America: Past, Present and Future,' above n 3, 27–33.

²⁰ John E B Myers, 'A Short History of Child Protection in America' (2008) 42 *Family Law Quarterly* 449, 452.

the basic necessities of life, there was no law prohibiting other forms of cruelty.²¹ In 1881, Reverend George Staite wrote to his local newspaper complaining that while the law in the UK criminalised cruelty to animals, children remained without protection.²² The same year, banker and merchant Thomas Agnew visited New York and noted the action taken there and in other large American cities to protect children. On his return to Liverpool he sought support for the cause from his local member of Parliament, Samuel Smith.²³ A few weeks later, at a meeting of the RSPCA to seek funding for a dogs' home, the urgent need to provide formal support for children was also discussed and, in 1883, the Liverpool Society for the Prevention of Cruelty to Children was established.²⁴ By 1889, 31 societies were established across England, Wales and Scotland and the *Prevention of Cruelty to, and Protection of, Children Act 1889*, 52 & 53 Vict, c 44, was passed. Well drafted in some respects, the new law allowed not only for the punishment of cruelty, but for the prevention of it. Section 1 of the *Prevention of Cruelty to, and Protection of, Children Act 1889*, 52 & 53 Vict, c 44 relevantly provided:

Any person over sixteen years of age who, having the custody, control, or charge of a child, being a boy under the age of fourteen years, or being a girl under the age of sixteen years, wilfully ill-treats, neglects, abandons, or exposes such child, or causes or procures such child to be ill-treated, neglected, abandoned, or exposed, in a manner likely to cause such child unnecessary suffering, or injury to its health, shall be guilty of a misdemeanour ...

By the early 20th century, most states in the USA had laws criminalising abandonment, desertion, or failure to support children but it took many years before legal intervention to prevent child abuse became the rule, rather than a necessary reaction in the most abhorrent of cases.²⁵ Until the mid-20th century, societal attitudes towards children in the USA, as in the UK, widely held children to be the property of their parents.²⁶ Legal intervention was viewed as a last resort.²⁷ However in 1962 the *Journal of the American Medical Association* published a study by Dr C Henry Kempe

²¹ Rachel Taylor and Laura Hoyano, 'Criminal Child Maltreatment: The Case for Reform' [2012] *Criminal Law Review* 871, 874.

²² National Society for the Prevention of Cruelty to Children, *A Pocket history of the NSPCC* (2nd ed, 2008) 4.

²³ Jean Heywood, *Children in Care: The Development of the Service for the Deprived Child* (Routledge and Keegan, 1959) 101.

²⁴ Dingwall and Eekelaar, above n 3.

²⁵ Stephen J Pfohl, 'The "Discovery" of Child Abuse' (1977) 24 *Social Problems* 310, 312.

²⁶ See Steven Mintz and Susan Kellogg, *Domestic Revolutions: A Social History of American Family Life* (Free Press, 1988) 231.

²⁷ See Suzanne Barnard, 'Taking Animal Abuse Seriously: A Human Services Perspective' in Phil Arkow and Frank R Ascione (eds), *Child Abuse, Domestic Violence and Animal Abuse: Linking the Circles of Compassion for Prevention and Intervention* (Purdue University Press, 1999) 101–2.

et al entitled 'The Battered Child Syndrome'.²⁸ The study identified child abuse as a medical pathology and legislation began to be drafted to protect children. Child protection laws were proposed by the National Centre on Child Abuse and Neglect, in 1963, and by the American Medical Association, in 1965.²⁹ By 1967, every state in the USA with child abuse legislation had passed a law to require mandatory reporting of child abuse by doctors.³⁰

Alongside the state's reluctance to intervene in what was seen as a private family matter,³¹ the slower introduction of laws to protect children, in both the USA and the UK, in part resulted from the fact that child abuse then (as today), usually took place in private.³² By way of contrast animal abuse in the 19th century was a very public matter.³³ Livestock were kept on open farms, driven to market along public roads and sold and slaughtered in public markets. It is not surprising that many of the RSPCA's early prosecutions related to offences committed at Smithfield Market in London.³⁴

In the case of both children and animals, it was a growing recognition of the need for laws recognising the inherent vulnerability of both that was the impetus for law reform. Today those vulnerabilities continue to be recognised in attempts to improve their legal protection.

In regard to both children and domesticated animals, inherent vulnerabilities arise from their need to be provided with appropriate food, shelter and protection from injury. However, for certain animals, the social and legal constructs which support their use for human benefit serve to escalate their vulnerable status.³⁵ For agricultural and research animals, confinement in closed environments, where only certain persons have the capacity and opportunity to assist them, increases their inherent vulnerability. For these animals, balancing effective legal protections against human needs presents a particular challenge. Agricultural and research animals are commodities bred for human use, and their lives are expendable and replaceable. As such, more so than any other animals, laboratory and agricultural animals are vulnerable

²⁸ C Henry Kempe et al, 'The Battered Child Syndrome' (1962) 181 *Journal of the American Medical Association* 17.

²⁹ Barnard, above n 27, 102.

³⁰ Monrad G Paulsen, 'Child Abuse Reporting Laws: the Shape of the Legislation' (1967) 67 *Columbia Law Review* 1, 6.

³¹ Pearson, above n 2, 102–3.

³² Dingwall and Eekelaar, above n 3, 352.

³³ Radford, above n 13, 49.

³⁴ See, eg, Richard D Ryder, *Animal Revolution: Changing Attitudes towards Speciesism* (Berg Publishers, 2nd ed, 2000) 87.

³⁵ Ani B Satz, 'Animals as Vulnerable Subjects: Beyond Interest-Convergence, Hierarchy, and Property' (2009) 16 *Animal Law* 65, 79; Jane Johnson, 'Vulnerable Subjects? The Case of Non-Human Animals in Experimentation' (2013) 10 *Journal of Bioethical Inquiry* 497.

in an inherent, situational and pathogenic sense.³⁶ The need to provide them with effective legal protection from harm is obvious.

III THE DEVELOPMENT (AND LIMITS) OF THE POSITIVE DUTY OF CARE TOWARDS ANIMALS

While legislation protecting animals from cruelty has been in place since the early 19th century, in recent years there has been a move across the common law jurisdictions from baseline protection against unnecessary suffering (cruelty), to the requirement that animals are provided with an enforceable minimum standard of care.

This has been a critical step in improving legislative protection for animals. 19th century British lawmakers had considered that matters of how a person ought to act generally fell outside of their remit. Justifying the failure of the first draft in 1837 of the penal code of India to criminalise omissions, Lord Macaulay opined: ‘the penal law must content itself with keeping men from doing positive harm, and must leave to public opinion, and to the teachers of morality and religion, the office of furnishing men with motives for doing positive good’.³⁷

Nearly two centuries later, the UK,³⁸ and common law countries including Australia, New Zealand and the USA,³⁹ legislated to not only protect domestic animals from cruelty but also require that anyone who has care of them must provide them with an objectively reasonable standard of care (positive welfare). Positive welfare laws reflect a growing concern that legislation should reflect advances in animal welfare science. With an improved understanding of animals’ behavioural needs has come

³⁶ Johnson, above n 35, 499.

³⁷ Lord Macaulay, *Speeches and Poems, with the Report and Notes on the Indian Penal Code* (Hurd and Houghton, 1867) vol 2, 408.

³⁸ Including the: *Animal Welfare Act 2006* (UK) c 45; *Animal Health and Welfare (Scotland) Act 2006* (Scot) asp 11; *Welfare of Animals Act (Northern Ireland) 2011* (NI) c 16.

³⁹ See 7 USC § 2131 (Supp 1967) (as amended in 1970, 1976, 1985, 1990, 2002, 2007, 2008 and 2013); *Animal Welfare Act 1999* (NZ); *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 Protection Law 1998* (Taiwan). Note that in Australia, Tasmania, the Northern Territory, the Australian Capital Territory, and Queensland explicitly include a general duty of care towards animals in their legislation. Whilst the other Australian 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 also *Council Directive 98/58/EC of 20 July 1998 Concerning the Protection of Animals Kept for Farming Purposes* [1998] OJ L 221/23, which provides for a duty of care towards all animals kept for farming purposes in the European Union.

increasing recognition of the need to formulate policies and laws that promote good welfare, as well as protect animals from overt harm.⁴⁰

The objective standard of care for animals originated in the UK, with the passing of the *Agriculture (Miscellaneous Provisions) Act* in 1968. Three years earlier, in response to unprecedented community concern about farming practices, the British government had set up a committee chaired by Professor F W Rogers Brambell ('the Brambell Committee'), to inquire into the welfare of animals in intensive husbandry systems.⁴¹ In the drive to increase food security for Britain after the Second World War, farmers were increasingly adopting intensive farming methods.⁴² Public concern about the welfare of farm animals came to the fore after the 1964 publication of Ruth Harrison's book *Animal Machines: The New Factory Farming Industry* which was serialised in a leading British newspaper.⁴³ The Brambell Committee's report resulted in the passing of the *Agriculture (Miscellaneous Provisions) Act 1968* which allowed for the setting of minimum standards for animal welfare and authorised state veterinarians, police and RSPCA inspectors to enter private land and examine farm animals for welfare breaches.⁴⁴ The Act was the first legislation in the world to provide for a minimum standard of care for animals, under its regulations.⁴⁵

Duty of care laws do, however, have their limits. They do not go so far as to require persons who witness first hand animal cruelty, or neglect by others in control of animals, to intervene to assist the animal concerned. This is no longer the case in child protection law. New laws introduced in the UK, South Australia, Victoria and New Zealand have extended the circle of liability for child abuse to criminalise not only those who inflict harm, but also those persons close to the child, who have capacity and opportunity to intervene to assist the child, but who fail, unreasonably, to do so. Neither anti-cruelty laws, nor welfare laws, currently provide the same protection to animals.

The *Animal Welfare Act 2006* (UK) c 45 is an illustrative example. The Act imposes liability not only for acts or omissions that cause cruelty,⁴⁶ but also for failing to provide an animal with a reasonable standard of care.⁴⁷ Liability for failing to provide reasonable care is imposed on owners and other persons with responsibility for

⁴⁰ David Fraser, 'Animal Ethics and Animal Welfare Science: Bridging the Two Cultures' (1999) 65 *Applied Animal Behaviour Science* 171, 177.

⁴¹ Radford, above n 13, 169.

⁴² Clive J C Phillips, *The Animal Trade* (CAB International, 2015) 20.

⁴³ David Fraser, 'Ruth Harrison — A Tribute' in Ruth Harrison, *Animal Machines: The New Factory Farming Industry* (CAB International, 2nd ed, 1964) 18.

⁴⁴ *Agriculture (Miscellaneous Provisions) Act 1968* (UK) c 34, s 6.

⁴⁵ Mike Radford, 'Partial Protection: Animal Welfare and the Law' in Robert Garner (ed) *Animal Rights* (Palgrave Macmillan, 1996) 73.

⁴⁶ *Animal Welfare Act 2006* (UK) c 45, s 4.

⁴⁷ *Ibid* s 9.

animals, even where they are responsible only on a temporary basis.⁴⁸ However, the Act does not require that persons who witness cruelty to animals they are not responsible for, or neglect of such animals by others, take any action to protect the animals concerned from serious harm. There is no general duty to report an offence, or take steps to assist an animal in harm's way, even where it would be relatively easy to do so.

Similarly, the *Animal Welfare Act 1985* (SA) imposes liability for cruelty on any person whose actions or omissions cause harm to animals, and liability for neglect on those who own or otherwise have the custody and control of them.⁴⁹ The law does not, however, impose any duty on those who are not legally responsible for animals to intervene to protect them from cruelty or neglect by others.⁵⁰

Finally, it would be incomplete not to acknowledge the broad limitations placed on duty of care laws by the widespread implementation of codes of practice for livestock production and scientific research. Such codes have undermined the effectiveness of duty of care legislation introduced in Australia, where compliance with codes exempts users from prosecution for actions which would otherwise be defined as animal cruelty. The injustices inherent in allowing codes to legalise the use of farm and laboratory animals, in ways that would be prohibited for companion animals, have been widely acknowledged and lamented by others.⁵¹ Such concerns will not be addressed further here. The purpose of this article is to examine how animals could be better protected *within* the current legislative regime, and *despite* the existence of the codes. Accordingly, the article offers a framework for extending criminal culpability for failing to protect animals from the harms which currently fall outside the protection of codes, namely, gratuitous cruelty and gross negligence.

IV LIMITS ON LIABILITY FOR OMISSIONS IN OFFENCES AGAINST THE PERSON

Criminal liability for omissions is notably unusual in the common law jurisdictions. Most crimes are founded on liability for positive acts rather than omissions. In this regard, little has changed since the publication of *A History of the Criminal Law of England* (1883), in which Sir James Fitzjames Stephen stated the common law position of the time: 'A number of people who stand round a shallow pond in which a child is drowning, and let it drown without taking the trouble to ascertain the depth

⁴⁸ Ibid s 3.

⁴⁹ *Animal Welfare Act 1985* (SA) s 13.

⁵⁰ Ibid.

⁵¹ Christine Parker and Josephine De Costa, 'Misleading the Ethical Consumer: The Regulation of Free-Range Egg Labelling' (2016) 39 *Melbourne University Law Review* 895; Arnja Dale, 'Animal Welfare Codes and Regulations — The Devil in Disguise?' in Peter Sankoff and Steven White (eds), *Animal Law in Australasia: A New Dialogue* (Federation Press, 2009).

of the pond, are no doubt, shameful cowards, but they can hardly be said to have killed the child'.⁵²

The early common law judges took the view that the criminal law should not intervene in the actions of the individual, unless or until such intervention became necessary to prevent harm.⁵³ However, in the case of special relationships between the parties, the courts have proved more willing to impose liability for omissions leading to death or serious injury. In *R v Gibbins*,⁵⁴ the father and common law wife of a seven-year-old girl were held liable by the English Court of Criminal Appeal for her murder after they failed to provide her with food. In *R v Russell*,⁵⁵ the Supreme Court of Victoria found a father who had stood by and watched his wife drown their two young children, and then herself, liable for the children's manslaughter, on the basis that he had a duty to take reasonable steps to save them.

Extending the duty beyond parent and child, the English courts have recognised and enforced a duty of care between adults, where the defendant has voluntarily assumed a duty of care towards another person, then failed to meet that duty. In *R v Stone*,⁵⁶ the defendants, a man with disabilities and of low intelligence, and his female partner, allowed the man's adult sister to come to live with them. Despite her developing serious medical problems, including anorexia, they failed to seek assistance for her and were held liable by the English Court of Appeal for her manslaughter. More recently, in *R v Barrass*,⁵⁷ a man was held liable for the manslaughter of his adult sister who suffered from learning difficulties and physical problems. The pair had shared a home since their mother died, and the sister who had lain on the floor for two weeks after falling down, died from lack of medical assistance.

In the Australian case of *R v Taktak*,⁵⁸ the defendant had procured a 15-year-old female prostitute and heroin user to attend the party of a friend. On being called to collect the girl, the defendant found her unconscious in the foyer of a building. He took her back to his flat and tried to revive her, but did not immediately call a doctor. The girl died. The Court of Criminal Appeal for New South Wales quashed the defendant's conviction for manslaughter. However, Yeldham J, with whose reasons Loveday J agreed, stated that a duty of care arises where a person voluntarily assumes care for another, so secluding a helpless person as to prevent others from rendering aid.⁵⁹

⁵² Sir James Fitzjames Stephen, *A History of the Criminal Law of England* (Macmillan, 1883) vol 3, 10.

⁵³ Sally Kift, 'Criminal Liability and the Bad Samaritan: Failure to Rescue Provisions in the Criminal Law: Part II' (1997) 1 *Macarthur Law Review* 258, 259.

⁵⁴ (1918) 13 Cr App R 134.

⁵⁵ [1933] VLR 59.

⁵⁶ [1977] QB 354.

⁵⁷ [2012] 1 Cr App R (S) 80.

⁵⁸ (1988) 14 NSWLR 226.

⁵⁹ *Ibid* 245, 250.

In each of these cases, the common law recognised a special relationship between the parties, whether that of parent/guardian and child or a duty voluntarily assumed between adults in a situation where one necessarily relied on the other for aid. In such cases, liability for the most serious offences against the person — murder, manslaughter, wounding and causing grievous bodily harm — can be founded, in the right circumstances, on an omission.

Despite sustained criticism from some legal scholars,⁶⁰ the UK Law Commission has resisted calls to propose legislation setting out the circumstances which would give rise to such liability.⁶¹ In the UK, the question of when to impose liability for omissions, in relation to offences against the person, largely remains a matter for the common law. Exceptionally, the *Children and Young Persons Act 1933*, 23 & 24 Geo 5, c 12 (the successor to the original *Prevention of Cruelty to, and Protection of, Children Act 1889*, 52 & 53 Vict, c 44) criminalises the neglect of children by their parents or guardians with up to 10 years' imprisonment.⁶² The *Mental Capacity Act 2005* (UK) c 9 makes it an offence, carrying a maximum penalty of five years' imprisonment, for a carer to ill-treat or willfully neglect a person lacking in mental capacity⁶³ and the *Criminal Justice and Courts Act 2015* (UK) c 2 criminalises the neglect or ill treatment of a patient in health or social care.⁶⁴ Both individuals receiving payment for care and institutional care providers can be held accountable for failing to meet their duty of care. A convicted individual is liable to a maximum of five years' imprisonment,⁶⁵ and an institution may be fined and ordered to take steps to remedy the procedures which allowed a breach to occur. The court may also order publicity of the institution's breach to deter further offences.⁶⁶

In the absence of statutory guidance, the Australian courts have developed their own test for gross negligence manslaughter.⁶⁷ However, all states and territories have enacted legislation to protect children from neglect. The most common offences

⁶⁰ Andrew Ashworth, 'Manslaughter by Omission and the Rule of Law' [2015] *Criminal Law Review* 563, 577; Glenys Williams, 'Gross Negligence Manslaughter and Duty of Care in "Drugs" Cases: R v Evans' [2009] *Criminal Law Review* 631, 646–7; Catherine Elliot, 'Liability for Manslaughter by Omission: Don't Let the Baby Drown!' (2010) 74 *Journal of Criminal Law* 163, 178.

⁶¹ UK Law Commission, *A Criminal Code for England and Wales*, Report No 177 (1989) vol 2, 186–8.

⁶² *Children and Young Persons Act 1933*, 23 & 24 Geo 5, c 12, s 1.

⁶³ *Mental Capacity Act 2005* (UK) c 9, s 44.

⁶⁴ *Criminal Justice and Courts Act 2015* (UK) c 2, ss 20–5.

⁶⁵ *Ibid* s 20(2).

⁶⁶ *Ibid* s 23.

⁶⁷ Stanley Yeo, 'Manslaughter Versus Special Homicide Offences: An Australian Perspective' in C M V Clarkson and Sally Cunningham (eds), *Criminal Liability for Non-Aggressive Death* (Ashgate Publishing, 2008) 200.

include exposing or abandoning a child,⁶⁸ failing to provide necessities to a child,⁶⁹ child abuse⁷⁰ and failing to protect a child from harm.⁷¹ In 2008, Victoria enacted an offence of child homicide.⁷² Neglect offences which may be applied to other vulnerable persons have also been enacted in most jurisdictions.⁷³

The criminal code of Queensland places a legal duty on parents and other guardians of children under the age of 16, to take reasonable steps to avoid danger to a child's life, health or safety; the duty arises even where the child themselves could have avoided the danger.⁷⁴

In 2004, in an effort to specifically target cases of domestic violence where it is unclear who has caused the injuries to or death of the victim, the UK enacted a new offence of negligently failing to protect a child or vulnerable adult from others. Section 5 of the *Domestic Violence, Crime and Victims Act 2004* (UK) c 28 imposes a positive duty on members of the same household to assist an abused child or vulnerable adult who is in danger of being killed, or suffering serious physical harm at the hands of another member.⁷⁵ A person is considered to be a 'member' of a particular household, 'even if he does not live in that household, if he visits it so often and for such periods of time that it is reasonable to regard him as a member of it.'⁷⁶ The offence carries a maximum penalty of 14 years' imprisonment, if the victim dies, and 10 years, if they suffer serious injury. As to what circumstances present a 'significant' risk of serious physical harm, the UK Court of Appeal has held that the word carries its normal meaning and need not be defined by the judge to a

⁶⁸ *Crimes Act 1900* (ACT) s 41; *Crimes Act 1900* (NSW) s 43; *Criminal Code Act 1983* (NT) s 184; *Criminal Code Act 1899* (Qld) s 326.

⁶⁹ *Criminal Code Act 1983* (NT) ss 149, 153; *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 228; *Crimes Act 1900* (NSW) s 43A; *Criminal Code Act 1924* (Tas) ss 145, 177; *Criminal Code Act 1899* (Qld) s 324; *Criminal Code Act Compilation Act 1913* (WA) s 263.

⁷⁰ *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 227; *Children, Young Persons and their Families Act 1997* (Tas) s 91; *Children, Youth and Families Act 2005* (Vic) s 493(1)(a); *Children and Community Services Act 2004* (WA) s 101(1).

⁷¹ *Children, Youth and Families Act 2005* (Vic) s 493(1)(b); *Children, Young Persons and their Families Act 1997* (Tas) s 91; *Children and Community Services Act 2004* (WA) s 101(1).

⁷² *Crimes Act 1958* (Vic) ss 5A, 421.

⁷³ *Crimes Act 1900* (NSW) s 44; *Criminal Code Act 1899* (Qld) ss 285, 324; *Criminal Code Act Compilation Act 1913* (WA) s 262; *Criminal Code Act 1924* (Tas) s 144; *Criminal Code Act 1983* (NT) s 149.

⁷⁴ *Criminal Code Act 1899* (Qld) s 286.

⁷⁵ As amended by the *Domestic Violence, Crime and Victims (Amendment) Act 2012* (UK) c 4.

⁷⁶ *Domestic Violence, Crime and Victims Act 2004* (UK) c 28, s 5(4).

jury.⁷⁷ Liability for the offence does not arise when the death or serious injury was an accident or could not have been reasonably anticipated or avoided.⁷⁸

In 2005, one year after the UK introduced their new offence, the South Australian *Criminal Law Consolidation Act 1935* (SA) was amended to introduce the crime of ‘criminal liability for neglect where death or serious harm results from unlawful act’.⁷⁹ Until this year, the offence definition was similar to that of the UK, although in South Australia the offence is also applicable to staff members of hospitals and other residential facilities where the victim and the defendant have had close contact and the defendant has voluntarily assumed a duty of care for the victim (such as under an employment contract). Recently, the South Australian law further deviated from the UK model when, on 2 August 2018, the *Criminal Law Consolidation (Children and Vulnerable Adults) Amendment Act 2018* (SA) was assented to. The Act removes the requirement for the harms caused by the crime to be unlawful and serious in nature and raises the maximum penalty, where a victim dies, from 15 years to life imprisonment. In other cases, the maximum penalty has been raised from five to 15 years’ imprisonment.

In 2011, New Zealand also imposed a legal duty on adults to protect children and vulnerable adults with whom they have frequent contact as a result of living in the same residence (specifically including hospitals, institutions and other facilities where children reside). The law imposes a duty to protect the child or vulnerable adult from death, grievous bodily harm or sexual assault under the *Crimes Act 1961* (NZ).⁸⁰ The offence carries a maximum penalty of 10 years’ imprisonment. The New Zealand Law Commission Report responsible for the introduction of the legislation recommended that the maximum penalty for the offence should be reserved for those cases where the offender deliberately closed his or her eyes to the risk of death, or very serious harm, over a prolonged period.⁸¹

In all of the jurisdictions surveyed in the preceding paragraphs, it is important to note that a defendant will avoid conviction for failing to intervene if they take what would be regarded as reasonable steps, in all the circumstances, to protect the child or vulnerable adult from harm. According to the UK Ministry of Justice, examples of such reasonable steps would include: reporting suspicion or knowledge of the risk of abuse to police or other assistance services; seeking the assistance of other persons with authority within the household to minimise the risk; and providing appropriate and timely treatment in response to injuries.⁸² In New Zealand, the Law Commission

⁷⁷ *R v Stephens* [2007] EWCA Crim 1249 (25 May 2007) [31] (Moore-Bick LJ).

⁷⁸ UK Ministry of Justice, Criminal Law and Legal Policy Unit, *Domestic Violence, Crime and Victims Amendment Act 2012* (Circular No 2012/03, UK Ministry of Justice, 29 June 2012) 3 [10].

⁷⁹ *Criminal Law Consolidation Act 1935* (SA) s 14, as inserted by *Criminal Law Consolidation (Criminal Neglect) Amendment Act 2005* (SA) s 4.

⁸⁰ *Crimes Act 1961* (NZ) s 195A, as inserted by *Crimes Amendment Act (No 3) 2011* (NZ) s 7.

⁸¹ New Zealand Law Commission, *Review of Part 8 of the Crimes Act 1961: Crimes against the Person*, Report No 111 (2009) 56.

⁸² UK Ministry of Justice, above n 78, 13.

noted that the duty only required reasonable steps to be taken and the nature of the duty would vary according to the nature and degree of the vulnerability of the victim. Liability would also require that the jury must find the defendant's failure to act was grossly negligent (a major departure from the standard of care expected of a reasonable person in the same circumstances) before they could convict of the offence.⁸³

V EXTENDING TO ANIMALS A SIMILAR DUTY TO PREVENT CRIMES AGAINST THEM

A The Current Legislative Framework

Should the legislature impose a similar duty on those who witness animal cruelty by others to protect them from unlawful harm? This article contends that, in some cases, it should. With the rise of so called 'ag-gag' laws in Australia and the USA, agricultural and laboratory animals are now at an unprecedented risk of crimes against them going unreported. New forms of legislative protection are required to ensure their safety.

In recent years, the introduction of laws which criminalise unauthorised access to farms and laboratories have provided a new threat to animal cruelty safeguards. In Australia, Queensland has passed the *Biosecurity Act 2014* (Qld), which imposes an obligation on the public to prevent biosecurity risks. The Act commenced on 1 July 2016.⁸⁴ The Act exposes those who trespass on farms and cause such a risk, to prosecution for an offence with a maximum penalty of three years' imprisonment.⁸⁵ Biosecurity risks are defined as 'a risk of any adverse effect on a biosecurity consideration caused by, or likely to be caused by — biosecurity matter; or dealing with biosecurity matter or a carrier; or carrying out an activity relating to biosecurity matter or a carrier'.⁸⁶ New South Wales has passed the *Biosecurity Act 2015* (NSW), which also carries a maximum penalty of three years' imprisonment for those who create a biosecurity risk.⁸⁷ While the New South Wales legislature assured concerned parties that the provisions were not intended to stifle investigations of animal welfare,⁸⁸ both Acts are too new for their practical effect to be determined.

While biosecurity laws may be legitimately used to address biosecurity concerns, the 'ag-gag' intention of a new Bill introduced into the New South Wales Parliament in

⁸³ New Zealand Law Commission, above n 81, 60.

⁸⁴ Department of Agriculture and Fisheries, Government of Queensland, *Biosecurity Act 2014* <<https://www.daf.qld.gov.au/business-priorities/biosecurity/about-biosecurity/biosecurity-act-2014>>.

⁸⁵ *Biosecurity Act 2014* (Qld) s 24.

⁸⁶ *Ibid* s 16.

⁸⁷ *Biosecurity Act 2015* (NSW) ss 23, 279.

⁸⁸ New South Wales, *Parliamentary Debates*, Legislative Council, 8 September 2015, 3097–8 (Niall Blair, Minister for Primary Industries).

March 2018 is very clear. The Animal Protection and Crimes Legislation Amendment (Reporting Animal Cruelty and Protection of Animal Enterprises) Bill 2018 (NSW)⁸⁹ seeks to amend the *Prevention of Cruelty to Animals Act 1979* (NSW) by introducing an offence of failing to report the recording of an act of animal cruelty to authorities within one day, and for failing to provide footage within five days.⁹⁰ The Bill would, however, only criminalise a failure to report that a visual recording of animal cruelty had been made, and not a failure to report the abuse itself, begging the question of who the Bill is seeking to protect: the animals, or the industries that utilise them?

While no federal ‘ag-gag’ law has yet been passed, there remains the threat of the Criminal Code Amendment (Animal Protection) Bill 2015 (Cth) which would also require the visual recording of alleged animal cruelty to be reported to law enforcement authorities within 24 hours. Similar to the Bill introduced in New South Wales, the Outline of the federal Bill, in its Explanatory Memorandum,⁹¹ states that the Bill’s first priority is to address animal cruelty and ensure that there is the least possible delay in action to prevent further abuses.⁹² It does not, however, impose any duty to report cruelty, only the recording of it.

Surveillance device control laws, which exist in all Australian states, may also be used to undermine the transparency of animal use on farms. South Australia recently repealed its previous surveillance device legislation and passed the *Surveillance Devices Act 2016* (SA), which criminalises, with a maximum penalty of three years’ imprisonment, the recording and publication of private activities and conversations, unless a court permits publication in the public interest.⁹³ That same year, activists Christopher Delforce and Dorottya Kiss were charged with offences under the *Surveillance Devices Act 2007* (NSW). The prosecution alleged that the pair had been involved in the unauthorised recording and publishing of video footage of piggeries in New South Wales.⁹⁴ While the charges were eventually dismissed, the use of the legislation to prosecute animal activists has led to concern that the South Australian law may be used in the same way.⁹⁵

⁸⁹ Introduced by Robert Borsak, representative of the Shooters, Fishers and Farmers Party, New South Wales Legislative Council.

⁹⁰ Animal Protection and Crimes Legislation Amendment (Reporting Animal Cruelty and Protection of Animal Enterprises) Bill 2018 (NSW) sch 1.

⁹¹ Circulated by authority of Western Australian Senator Dr Chris Back.

⁹² Explanatory Memorandum, Criminal Code Amendment (Animal Protection) Bill 2015 (Cth).

⁹³ *Surveillance Devices Act 2016* (SA) ss 4–6. The Act commenced operation in December 2017.

⁹⁴ Colin Bettles, ‘Animal Activists “Let Off” Charges Under NSW Surveillance Devices Act Due to Technicality’, *FarmOnline National* (online), 8 August 2017 <<https://www.farmonline.com.au/story/4842862/animal-activists-let-off-charges-due-to-technicality/>>.

⁹⁵ Leah MacLennan, ‘Ag-Gag Bill Will Make Exposing Animal Cruelty Harder: Law Society’, *ABC News* (online), 3 December 2015 <<http://www.abc.net.au/news/2015-12-03/ag-gag-bill-surveillance-devices-sa-parliament/6994516>>.

In the USA, ‘ag-gag’ laws have been passed in 10 states: Montana and North Dakota in 1991, Kansas in 1990, Utah, South Carolina, Iowa and Missouri in 2012, Idaho in 2014, North Carolina in 2015 and Arkansas in 2017.⁹⁶ These laws criminalise unauthorised entry onto farms and research facilities and the recording, possession or publication of photographs, video or audio recordings of animals kept there. At the federal level, the *Animal Enterprise Terrorism Act*, 18 USC § 43 (2006) prohibits the communication or transmission of material intended to cause loss or damage to animal enterprises, including farms and laboratories.⁹⁷

The criminalisation of unauthorised access to farms and subsequent undercover investigations of animal conditions has been widely recognised as a serious step backwards in the transparency and accountability of livestock production.⁹⁸ In the USA, such laws have been criticised for being unconstitutional, as they breach the First Amendment right to free speech.⁹⁹ Although to date, only the Utah and aspects of the Idaho law have been struck down by the courts,¹⁰⁰ the negative publicity surrounding the enactment and enforcement of these laws may serve to limit their application. New research suggests that growing publicity about these laws has worked against the interest of the agricultural industries that lobbied for them; a 2016 survey of consumer attitudes to proposed ‘ag-gag’ legislation in the USA found that on being told that local governments were considering the adoption of such

⁹⁶ Idaho Code Ann § 18-7042 (2014) prohibits unauthorised recording inside agricultural facilities and gaining employment by misrepresentation; Utah Code Ann § 76-6-112 (2012) prohibits unauthorised recording inside agricultural facilities and gaining employment with the intent to make such a recording; Iowa Code § 717A.3A (2013) prohibits the entry into a private agricultural facility and gaining employment by misrepresentation; Mo Rev Stat § 578.013 (2012) requires that any image or recording of cruelty made at an agricultural facility must be provided to law enforcement authorities within 24 hours; Kan Stat Ann §§ 47-1825–47-1827 (West 2012) prohibits entry into and unauthorised recording inside agricultural facilities; Mont Code Ann §§ 81-30-101–81-30-105 (2015) prohibits entry into and unauthorised recording inside agricultural facilities with the intent to commit criminal defamation; ND Cent Code § 12.1-21.1 (2013) prohibits entry into and unauthorised recording inside agricultural facilities; NC Gen Stat § 99A-2 (2017) prohibits entry into the non-public area of an employer’s property for the purpose of making secret recordings or removing data or other material and creates a civil cause of action, allowing a business to sue for damages; and ‘Ark Code Ann § 16-118-113 (2017) prohibits entry into and unauthorised recording inside agricultural facilities and creates a civil cause of action, allowing a business to sue for damages.

⁹⁷ *Animal Enterprise Terrorism Act*, 18 USC § 43 (2006).

⁹⁸ John Hopkins Centre for a Livable Future, *Industrial Food Animal Production in America: Examining the Impact of the Pew Commission’s Priority Recommendations* (Report, John Hopkins Bloomberg School of Public Health, 2013) 28–30.

⁹⁹ See Will Potter, ‘ag-gag Laws: Corporate Attempts to Keep Consumers in the Dark’ (2017) 5 *Griffith Journal of Law and Human Dignity* 1, 20–2.

¹⁰⁰ *Animal Legal Defence Fund v Otter*, 118 F Supp 3d 1195 (D Idaho, 2015); *Animal Legal Defence Fund v Herbert* (D Utah, No 2:13-cv-00679-RJS, 7 July 2017); *Animal Legal Defence Fund v Wasden* (9th Cir, No 15-35960, 4 January 2018).

legislation, consumers reported an eroded level of trust in farmers and increased their support for animal welfare regulations.¹⁰¹

Whether the new Australian laws will erode the transparency of industries utilising animals and undermine the public accountability of those responsible for their welfare remains to be seen. However, the effective enforcement of animal protection laws on farms and in laboratories and abattoirs in Australia has long been problematic. Over 500 million farm animals are raised in Australia every year.¹⁰² The Federal Department of Agriculture and Water Resources has responsibility for ensuring the welfare of farm animals used for live export.¹⁰³ In practice, however, enforcement of animal cruelty legislation is a matter for each individual state or territory. It is common for individual state or territory's department of primary industry or agriculture to share responsibility for enforcing legislative protection for animals with that state or territory's branch of the RSPCA. In some states (and territories), responsibility for farm animal and companion animal investigations has been entirely carved up between the parties.¹⁰⁴

In New South Wales, the Department of Primary Industries is not authorised to investigate offences against farm animals. Such investigations are undertaken by the police, the RSPCA or the Animal Welfare League (a charitable organisation authorised by the Minister for Primary Industries for this purpose).¹⁰⁵ In order to ensure that the provisions of the Act are not contravened, authorised investigators have the power to inspect and examine farm animals and any accommodation or shelter provided to them.¹⁰⁶ However, the capacity of these institutions to enforce the law is questionable. The RSPCA is largely funded by the public and, across the entire country, employs less than 100 inspectors.¹⁰⁷ Despite being the largest state inspectorate in Australia, the New South Wales RSPCA has only had 32 inspectors appointed by the Minister under the *Prevention of Cruelty to Animals Act 1979* (NSW) and only 14 of those are located in regional areas.¹⁰⁸

¹⁰¹ J A Robbins et al, 'Awareness of ag-gag Laws Erodes Trust in Farmers and Increases Support for Animal Welfare Regulations' (2016) 61 *Food Policy* 121, 124.

¹⁰² Australian Bureau of Statistics, *Livestock Products Australia* (14 February 2017) <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/7215.0>>.

¹⁰³ Peter John Chen, *Animal Welfare in Australia: Politics and Policy* (Sydney University Press, 2016) 127.

¹⁰⁴ See, eg, Deborah Cao, *Animal Law in Australia and New Zealand* (Thomson Reuters, 2010) 171–2, 212–15.

¹⁰⁵ *Prevention of Cruelty to Animals Act 1979* (NSW) ss 24D, 34B.

¹⁰⁶ *Ibid* s 24G.

¹⁰⁷ RSPCA Australia, 'Report on Animal Outcomes from Our Shelters, Care and Adoption Centres 2015–16' (Report, 2016) 15 <<https://www.rspca.org.au/sites/default/files/RSPCA%20Report%20on%20animal%20outcomes%202015-2016.pdf>>.

¹⁰⁸ RSPCA NSW, *Animal Welfare* (2018) <<https://www.rspcansw.org.au/what-we-do/animal-welfare/#1505874101079-1d4874ba-225f>>.

Concerns with the capacity of the RSPCA to enforce the law are not limited to New South Wales. There have been calls for the removal of RSPCA powers to enforce offences against farm animals in South Australia and Western Australia.¹⁰⁹ However, competing concerns regarding possible conflicts of interest arising from placing the watchdog role solely in the hands of government departments responsible for the success of agribusiness have also been recognised.¹¹⁰

Problems with animal protection in abattoirs are also of increasing public concern. Responding to undercover investigations exposing inhumane slaughter practices in abattoirs, the Animal Justice Party in New South Wales introduced a Bill in 2015 which would require mandatory video and audio recording of animal use within abattoirs.¹¹¹ The Greens Party had introduced a similar Bill in 2013.¹¹² Calls have been made for corresponding legislation in other states.¹¹³ While many abattoirs have begun to install closed-circuit television ('CCTV') surveillance voluntarily,¹¹⁴ the New South Wales Government has opposed mandatory surveillance, citing the cost to the industry and lack of data demonstrating necessity.¹¹⁵ The Victorian Government has also expressed resistance to mandatory legislation, relying instead on auditor oversight.¹¹⁶ However, the capacity of the Victorian regulator PrimeSafe to protect animals in abattoirs is questionable. In particular, the authority has failed to prevent the widespread abuse of animals for the second time in three years, at the Riverside Meats abattoir in Echuca in 2016,¹¹⁷ and at the Star Poultry Supply slaughterhouse in the suburb of Keysborough in early 2017 where chickens were boiled alive.¹¹⁸

¹⁰⁹ Chen, *Animal Welfare in Australia: Politics and Policy*, above n 103, 316.

¹¹⁰ Jed Goodfellow, 'Animal Welfare Law Enforcement: To Punish or Persuade?' in Peter Sankoff, Steven White and Celeste Black (eds), *Animal Law in Australasia: Continuing the Dialogue* (Federation Press, 2nd ed, 2013) 204–7; Elizabeth Ellis, 'Bearing the Burden: Shifting Responsibility for the Welfare of the Beast' (2013) 11 *Macquarie Law Journal* 39, 41.

¹¹¹ Prevention of Cruelty to Animals Amendment (Stock Animals) Bill 2015 (NSW).

¹¹² Food Amendment (Recording of Abattoir Operations) Bill 2013 (NSW).

¹¹³ Animals Australia, 'Echuca Horrors Prompt Call for CCTV in all Abattoirs Nationwide' (Press Release, 25 November 2016) <http://www.animalsaustralia.org/media/press_releases.php?release=234>.

¹¹⁴ Terry Sim, *Echuca Abattoir Agrees to CCTV after Cruelty Investigations Launched*, (23 November 2016) *Beef Central* <<https://www.beefcentral.com/news/echuca-abattoir-agrees-to-cctv-after-cruelty-investigations-launched/>>.

¹¹⁵ New South Wales, *Parliamentary Debates*, Legislative Council, 15 February 2018, 39–41 (Niall Blair, Minister for Primary Industries).

¹¹⁶ Victoria, *Parliamentary Debates*, Legislative Council, 7 February 2017, 298–9 (Fiona Patten, Minister for Agriculture).

¹¹⁷ Animals Australia, 'Echuca Horrors Prompt Call for CCTV in all Abattoirs Nationwide' (Press Release, 25 November 2016) <http://www.animalsaustralia.org/media/press_releases.php?release=234>.

¹¹⁸ Pat McGrath, *Chickens Boiled Alive at Star Poultry Supply Abattoir in Melbourne, Secret Footage reveals* (16 November 2017) ABC News <<http://www.abc.net.au/news/2017-11-16/chickens-boiled-alive-inside-melbourne-abattoir/9157186>>.

Current legislative protections for laboratory animals are also of concern. As many as 9.9 million animals are utilised in Australian research each year.¹¹⁹ Most research is funded by the National Health and Medical Research Council ('NHMRC'). In order to receive funding, researchers are required to comply with NHMRC guidance notes and observe the *Australian Code for the Care and Use of Animals for Scientific Purposes* ('*ACCUASP*').¹²⁰ While the *ACCUASP* is not a federal law, the Australian states and territories have given it legislative teeth by incorporating the requirement to observe its principles into their local legislation. In many cases, compliance with the code provides a defence to a charge of animal cruelty.¹²¹ Further, while the code endorses the principle of the '3R[s],'¹²² that researchers should replace, reduce and refine the use of animals in animal research, it has been suggested that the principle of replacement receives very short shrift within the document.¹²³ The code requires research institutions to establish Animal Ethics Committees ('AECs'). These committees authorise and oversee research, and are responsible for ensuring the research institution complies with the code. Under the code, independent inspections of facilities are only required at four yearly intervals,¹²⁴ leaving policing of welfare largely to the institute's AEC and animal welfare officer (where one is appointed).¹²⁵

Problems with the ability of AECs to ensure the welfare of animals in Australia have been explored by others.¹²⁶ Several problems include lack of objectivity, avoidance of dissent amongst committee members and the desire to keep problems identified

¹¹⁹ For example, Humane Research Australia estimates that 9.90 million animals were utilised in Australian research in 2015, 6.99 million in 2014 and 6.60 million in 2013: Humane Research Australia, *Statistics of Animal Use in Australian Research and Teaching* (2016) <<http://www.humanersearch.org.au/statistics/>>.

¹²⁰ National Health and Medical Research Council, *Australian Code for the Care and Use of Animals for Scientific Purposes* (2013).

¹²¹ See, eg *Animal Welfare Act 1992* (ACT) s 20; *Animal Research Act 1985* (NSW) s 47; *Animal Welfare Act 1985* (SA) s 43; *Animal Care and Protection Act 2001* (Qld) s 40; *Animal Welfare Act 1993* (Tas) s 4(c); *Prevention of Cruelty to Animals Act 1986* (Vic) s 11(2).

¹²² A framework for researchers to design experiments promoting more humane animal research. The framework encourages researchers to replace, reduce and refine their use of animals in laboratories: Peter Chen, 'Animal welfare officers in Australian higher education: 3R application, work contexts, and risk perception' (2017) 51 *Laboratory Animals* 636, 636.

¹²³ Paula Gerber, 'Scientific Experimentation on Animals: Are Australia and New Zealand implementing the 3Rs?' in Peter Sankoff, Steven White and Celeste Black (eds), *Animal Law in Australasia: A New Dialogue* (Federation Press, 2009) 212, 224–5.

¹²⁴ National Health and Medical Research Council, above n 120, s 6.1.

¹²⁵ Chen, 'Animal Welfare Officers in Australian Higher Education: 3R Application, Work Contexts, and Risk Perception', above n 122, 637.

¹²⁶ Katrina Sharman, 'Opening The Laboratory Door: National and International Legal Responsibilities for the Use of Animals in Scientific Research — An Australian Perspective' (2006) 2 *Animal Law Journal* 67; Denise Russell, 'Why Animal Ethics

‘in-house’. For example, in a serious case of animal cruelty in 2010, the Ombudsman for the Northern Territory found that conflicts of interest had prevented the Deputy Vice Chancellor of Research at Charles Darwin University from properly exercising his duties as chair of the university’s AEC.¹²⁷

B Under What Circumstances Should a Person Have an Affirmative Duty to Act?

If a duty to protect animals is enacted, under what circumstances should it be applied? Professor Andrew Ashworth suggests the two major questions for those seeking to legitimately criminalise omissions are ‘(i) in what situations should a person be said to have an affirmative duty to act ... ; and (ii) what is the appropriate intensity¹²⁸ of criminalisation?’¹²⁹

Considering the first of these questions, Ashworth observes that most people would draw a moral distinction between a person who pushes a non-swimmer into deep water, realising the likelihood he will drown and a person who observes the victim in the water and realises the danger but walks away. However, as he points out, a difference in the degree of blame does not necessarily exclude the law from criminalising the act of the observer.¹³⁰ Ashworth suggests that in order to determine whether liability for omissions is justifiable under the criminal law, three general principles have particular relevance. These are the principles of urgency, priority of life, and opportunity and capacity. The principle of urgency would suggest that in a situation of emergency, the case for imposing criminal liability, for failing to act, is strongest. Further, the priority of life principle similarly suggests that where a life is at risk, there is a strong argument for imposing a legal duty to act. Finally, the three general principles can be applied together to suggest that, where the situation is urgent and a life is endangered, then a person with the opportunity and capacity to assist should be liable for failing to do so, in a situation where such an intervention is reasonable.¹³¹

Amongst philosophers there is wide support for the existence of a moral duty to rescue those in distress. Jeremy Bentham advocated a duty to rescue (other humans)

Committees Don’t Work’ (2012) 15 *Between the Species* 127; Honor Figgis and Gareth Griffith, ‘Animal Experimentation’ (Background Paper No 3/98, Parliamentary Library, Parliament of New South Wales, 1998).

¹²⁷ The Ombudsman for the Northern Territory, ‘Report of Investigation into the Treatment of Cattle & Horses at Charles Darwin University Mataranka Station’ (Report, Northern Territory Government, 2010) 13.

¹²⁸ Ashworth defines ‘intensity’ as ‘the degree of criminal liability, on a scale from an offence of mere failure to report an event (low intensity) to a serious substantive offence such as manslaughter (high intensity)’: Andrew Ashworth, *Positive Obligations in Criminal Law* (Hart Publishing, 2013) 32.

¹²⁹ *Ibid.* See also Andrew Ashworth, ‘The Scope of Criminal Liability for Omissions’ (1989) 3 *Law Quarterly Review* 424, 432–3.

¹³⁰ Ashworth, ‘The Scope of Criminal Liability for Omissions’, above n 129, 435.

¹³¹ Ashworth, *Positive Obligations in Criminal Law*, above n 128, 41.

where such rescue could be achieved without self-prejudice.¹³² Immanuel Kant famously concluded that, while effecting a rescue is a virtuous act, it is an imperfect duty of beneficence and could not be externally enforced.¹³³ However, extrapolating from Kant's support for a perfect duty to avoid coercion, contemporary writers have argued that as a duty to rescue can be likened to a duty to avoid coercive situations, a duty to rescue can be justifiably compelled by law.¹³⁴ Such a duty need not be imposed in all possible rescue situations: an easy rescue with a high probability of changing the coercive situation may attach a perfect duty, while a more difficult or remote rescue may not.¹³⁵

Samuel Freeman argues that we have a 'perfect moral duty' to give emergency assistance to those in danger of significant injury when:

- (a) we have the clear opportunity and are in a privileged position to give aid;
- (b) we have knowledge of their jeopardy and knowledge of the means necessary to relieve it; (c) we have the ability to directly relieve their distress by immediate and well-circumscribed action; and (d) we can do so at negligible risk, minimal costs and at little inconvenience to ourselves.¹³⁶

A particular issue in the case of animals in laboratories and abattoirs and on farms is the private nature of their holding facilities, due to concerns about public safety and biosecurity. The fact that these animals are not publicly visible effectively restricts the opportunity for public monitoring and outside interventions to assist them.¹³⁷ They are also at much greater risk of unlawful death or serious harm than animals used by humans in other ways. The routine application of potentially painful procedures (in husbandry practices, experimental procedures, and methods of stunning for slaughter) exposes them to a far higher risk of unlawful suffering, where legal boundaries are overstepped, than animals used for any other purpose.

Where animals are being unlawfully treated on farms and in laboratories and abattoirs, those working with them are in the best position to take swift action to relieve their distress. In cases of animal cruelty, swift action will always be the most positive

¹³² Jeremy Bentham, J H Burns J and H L A Hart (eds), *An Introduction to the Principles of Morals and Legislation* (The Athlone Press, 1970) 292–3.

¹³³ Immanuel Kant (1785) *Groundwork of the Metaphysic of Morals*, H J Paton (translator) (Hutchinson University Library, 1966) 86.

¹³⁴ Onora O'Neill, *Faces of Hunger: An Essay on Poverty, Justice and Development* (Allen and Unwin, 1986) 138–43; Michael A Menlowe, 'The Philosophical Foundations of a Duty to Rescue' in Michael A Menlowe and Alexander McCall Smith (eds), *The Duty to Rescue: the Jurisprudence of Aid* (Dartmouth Publishing, 1993) 16.

¹³⁵ Gavin Dingwall and Alisdair A Gillespie, 'Reconsidering the Good Samaritan: A Duty to Rescue?' (2008) 39 *Cambrian Law Review* 26, 32.

¹³⁶ Samuel Freeman, 'Criminal Liability and the Duty to Aid the Distressed' (1994) 142 *University of Pennsylvania Law Review* 1455, 1478.

¹³⁷ Siobhan O'Sullivan, *Animals, Equality and Democracy* (Palgrave Macmillan, 2011) 76, 86.

outcome. Animals do not seek retribution, they seek protection. Where the cruel behaviour is likely to be repeated, it may also be necessary to seek the assistance of others within the facility to minimise the risk of future harm.

As has been observed by Robert Garner, moral obligations to animals are unlikely to be protected by laws where they conflict with human interests.¹³⁸ However, where there is no personal risk or cost to the intervener in taking action to assist an animal in danger of unlawful suffering, it would seem reasonable to impose a duty to protect agricultural and laboratory animals.

C The Capacity of the Common Law to Address the Issue

Is it necessary to enact legislation or could the common law address the issue?

In his notes on the Indian Penal Code, Lord Thomas Macaulay claimed that a legal obligation to assist would only be justified in cases involving a special relationship between the parties. He asserted:

It will hardly be maintained that a surgeon ought to be treated as a murderer for refusing to go from Calcutta to Meerut to perform an operation, although it should be absolutely certain that this surgeon was the only person in India who could perform it, and that if it were not performed, the person who required it would die.¹³⁹

Since then, the common law has not only recognised the voluntary assumption of responsibility for another as an acceptable basis for liability, but has imposed a duty of care when the defendant has created a dangerous situation and failed to rectify it. In *R v Miller*,¹⁴⁰ the House of Lords imposed a conviction for arson on a man who accidentally set fire to a mattress in a building in which he was squatting and failed to put it out. In *R v Evans*,¹⁴¹ the English Court of Appeal imposed liability for gross negligence manslaughter on a woman who helped her half-sister purchase heroin and subsequently failed to seek emergency medical attention when she overdosed.

The Australian attitude has been more conservative. In *Burns v The Queen*,¹⁴² the High Court of Australia quashed the conviction of a woman for manslaughter who, together with her husband, had sold methadone to a drug user at their flat. After ingesting the drugs, the customer showed signs of ill effect and was asked to leave the flat. He was later found deceased in an outside toilet block. At trial, there was

¹³⁸ Robert Garner, *A Theory of Justice for Animals: Animal Rights in a Nonideal World* (Oxford University Press, 2013) 49–50.

¹³⁹ Lord Thomas Macaulay, 'Notes on the Indian Penal Code' in Lady Trevelyan (ed), *Lord Macaulay's Works* (Longmans, Green and Co, 1866) vol 7, 493–4.

¹⁴⁰ [1983] 2 AC 161 ('*Miller*').

¹⁴¹ [2009] 1 WLR 1999.

¹⁴² (2012) 246 CLR 334.

conflicting evidence as to whether the defendant had assisted the deceased to ingest the drug. Chief Justice French observed:

If the deceased had ingested the drug himself and had rebuffed a suggestion that an ambulance be called, there could be no basis to support a finding that Mrs Burns owed a duty to him. On that hypothesis, which cannot be excluded, the deceased had created the danger to himself. While Mrs Burns may well have been under a strong moral duty to take positive steps to dissuade him from leaving until medical assistance could be called, there was, in the circumstances, no legal duty, breach of which would support a finding of criminal negligence.¹⁴³

Considering whether the common law should hold drug suppliers liable for the deaths of their customers, on the basis that they owe them a duty of care, both the plurality opinion and Heydon J asserted that ‘courts must be circumspect in identifying categories of relations that give rise to a previously unrecognised legal obligation to act’.¹⁴⁴

While the merits of the English Court of Appeal’s decision in *R v Evans* have been much debated,¹⁴⁵ it is clear that the circumstances in which a duty of care might exist are not static. However, for the common law to impose a new liability for failing to assist an animal in danger of unlawful injury or death, there would need to be an existing duty to protect it. Currently, criminal liability for animal cruelty attaches only to those who act cruelly towards animals, neglect their own animals, or procure others to do the same. No legislation in the UK or Australia imposes a duty on persons who witness animal cruelty, or neglect by others in control of animals, to take any action to protect the animals concerned from serious harm. There is no duty to prevent cruelty or neglect or to take steps to assist an animal, even where it would be easy to do so, unless the defendant is the animal’s owner, or has otherwise assumed legal responsibility for it. In this context, even if the courts wished to impose liability for failure to assist an animal in danger, there is currently no duty to act which will sustain such liability. As such, developing a duty for third parties to assist animals, under the common law, is not currently possible.

D Existing Statutory Offences Based on Omissions

While statutory offences of omission in common law jurisdictions are comparatively rare, they do exist. Many countries criminalise failure to file a tax return¹⁴⁶ or provide a specimen of breath after a car accident.¹⁴⁷ Similar to the common law duty

¹⁴³ Ibid 334–5 [48].

¹⁴⁴ Ibid 369 [107] (Gummow, Hayne, Crennon, Kiefel and Bell JJ), 376 [128] (Heydon J).

¹⁴⁵ Williams, above n 60; Cyrus Chua and Hin Ting Liu, ‘Joint Enterprise Liability and Omissions’ (2016) 80 *Journal of Criminal Law* 138.

¹⁴⁶ See, eg, *Finance Act 2009* (UK) c 10, s 106, sch 55; *Taxation Administration Act 1953* (Cth) s 8C.

¹⁴⁷ See, eg, *Road Traffic Act 1988* (UK) c 52, s 6(6); *Road Traffic Ordinance* cap 374 (Hong Kong) s 39B.

to rectify a hazardous situation recognised by the House of Lords in *Miller*, is the widely imposed statutory duty to assist others injured in a car accident in which you were involved.¹⁴⁸ Statutory duties are commonly placed on persons working within specified businesses to report possible criminal activity by others. Duties to report money laundering provide an obvious example.¹⁴⁹ Similarly, the duty imposed on childcare professionals to report suspected child abuse has been widely accepted as a justifiable imposition of criminal liability.¹⁵⁰

In all the Australian states there is a mandatory duty on certain professionals to report child abuse. The *Children, Youth and Families Act 2005* (Vic) provides a pertinent example. The Act places a mandatory duty on doctors, nurses, midwives, teachers, school principals and police officers to report suspected physical and sexual abuse, where the child's parents have not protected the child and are unlikely to protect them.¹⁵¹ This Act also requires a person in charge of a registered out of home care service to report suspected child abuse by a foster or other type of carer employed by the service.¹⁵² In October 2014, the *Crimes Act 1958* (Vic) was amended to make it an offence for any adult to fail to report a sexual offence committed against a child under the age of 16.¹⁵³

In Australia, elders are also provided with some limited reporting protection. Residential aged care providers, subsidised by the Australian Government, are obliged under the *Aged Care Act 1997* (Cth) to report unlawful sexual contact with, or unreasonable use of force on, a resident of an aged care home.¹⁵⁴

Unusually, 17 states and territories in the USA have extended the duty to report child abuse beyond professionals, and imposed a duty to report on anyone who becomes aware of the abuse.¹⁵⁵ In some states, the reporting obligation is not limited to child abuse, but extends to a general duty to report all serious crime

¹⁴⁸ See, eg, *Vehicle Code* ch 1 Cal Vehicle Code § 20001 (West 2008) and *Criminal Code* RSC 1985, c. C-46, s 252.

¹⁴⁹ See, eg, *Proceeds of Crime Act 2002* (UK) c 29, ss 330–1.

¹⁵⁰ Ben Mathews, Xing Ju Lee and Rosanna E Norman 'Impact of a New Mandatory Reporting Law on Reporting and Identification of Child Sexual Abuse: A Seven Year Time Trend Analysis' (2016) 56 *Child Abuse and Neglect* 62, 64–5.

¹⁵¹ *Children, Youth and Families Act 2005* (Vic) ss 162, 182, 184.

¹⁵² *Ibid* s 81.

¹⁵³ *Crimes Act 1958* (Vic) s 327.

¹⁵⁴ *Aged Care Act 1997* (Cth) s 63.1AA.

¹⁵⁵ These are Puerto Rico, Delaware, Florida, Idaho, Indiana, Kentucky, Maryland, Mississippi, Nebraska, New Hampshire, New Mexico, North Carolina, Oklahoma, Rhode Island, Tennessee, Texas, and Utah: Child Welfare Information Gateway, 'Mandatory Reporters of Child Abuse and Neglect' (Report, United States Department of Health and Human Services, Children's Bureau, 2016) 2.

to authorities.¹⁵⁶ However, none of these legally-enforceable obligations require citizens to engage in active interventions to prevent crimes from continuing, or to effect a rescue.

In civil law countries the situation is different. Civil legal systems have long recognised a criminally enforceable duty to intervene and assist others. In France there is a duty to assist persons in peril, where there is no serious danger to the intervener.¹⁵⁷ Such ‘ease of rescue’ duties also exist in Austria, Belgium, Denmark, Finland, Germany, Greece, Iceland, Italy, Norway, Portugal, Russia, Spain, Switzerland, The Netherlands, Turkey, and most Latin American countries.¹⁵⁸ Most of these countries penalise the offence with a fine or permit a fine in lieu of imprisonment.¹⁵⁹ Sentences of imprisonment are generally low, although France permits imprisonment for up to five years. This appears to be the result of the French legal system failing to recognise ‘substantive liability for ... commission by omission’.¹⁶⁰ The higher penalty allows courts to impose heavier sentences where the defendant owed the victim a particular duty of care, such as may be owed by a doctor.¹⁶¹ Unusually for a common law jurisdiction, the Northern Territory imposes a penalty of up to seven years’ imprisonment on anyone who callously fails to rescue others in danger of death.¹⁶² In the USA, five states have criminalised a failure to rescue.¹⁶³

VI THE RSPCA (AUSTRALIA) PROPOSAL

The RSPCA (Australia) has recently made a proposal for the reform of Australian state laws to protect animals, based on the mandatory duties of reporting which are imposed on child care professionals in all Australian states.¹⁶⁴ They have suggested a law be introduced which would impose a duty on responsible professional persons or persons who manage animals to report instances of animal cruelty by others to

¹⁵⁶ Steven J Heyman, ‘Foundations of the Duty to Rescue’ (1994) 47 *Vanderbilt Law Review* 673, 689.

¹⁵⁷ *Code pénal* [Penal code] (France) art 223–6.

¹⁵⁸ Alberto Cadoppi, ‘Failure to Rescue and Continental Criminal Law’ in Michael A Menlowe and Alexander McCall Smith (eds), *The Duty to Rescue: the Jurisprudence of Aid* (Dartmouth, 1993) 100–4.

¹⁵⁹ *Ibid* 108.

¹⁶⁰ The phrase ‘commission by omission’ refers to the circumstance where an individual is held liable for a substantive offence because they failed to act: Edward A Tomlinson, ‘The French Experience with Duty to Rescue: A Dubious Case for Criminal Enforcement’ (2000) 20 *New York Law School Journal of International and Comparative Law* 451, 463.

¹⁶¹ Cadoppi, above n 158, 109.

¹⁶² *Criminal Code Act 1983* (NT) s 155.

¹⁶³ Wis Stat Ann § 940.34 (2017); Haw Rev Stat Ann § 663-1.6 (2011); RI Gen Laws § 11-56-1 (2012); Vt Stat Ann § 12.23.519 (2012); Minn Stat Ann § 604A.01(1) (2016).

¹⁶⁴ RSPCA Australia, above n 1, 3.

authorities. Such persons would include veterinarians, vet nurses, livestock managers (including those on farms, feedlots, shearing sheds, saleyards, ports and abattoirs), event organisers (for horse shows, dog shows, agricultural shows, and rodeos), zoo managers and zookeepers, researchers, animal trainers, and animal control officers.

Whether veterinarians should have a duty to report animal cruelty has long been a source of ethical concern within the profession. While it is not a legal requirement for veterinarians to report suspicions of animal cruelty in Australia, the Australian Veterinary Association's policy states that, where a vet suspects animal cruelty, they should report it.¹⁶⁵ In the UK, the Royal College of Veterinary Services ('RCVS') suggests that a report to authorities should be made where the surgeon considers, on reasonable grounds, that an animal shows signs of abuse or is at real or immediate risk of abuse. In such a case, the RCVS takes the view that the public interest in protecting the animal overrides any professional obligation on the vet to maintain client confidentiality.¹⁶⁶

Elsewhere, legislation imposes a mandatory duty to report. Currently 18 states in the USA have laws requiring veterinarians to report suspected animal cruelty violations.¹⁶⁷ In New Zealand, veterinarians are obligated to report to authorities suspected breaches of the *Animal Welfare Act 1999* (NZ) as well as cases of severe cruelty or neglect.¹⁶⁸

The RSPCA's proposal is a laudable attempt to align with community expectations of persons with a professional responsibility for animals with enforceable legislative protection. However, the assumption that simply imposing a mandatory duty to report cruelty to authorities would be effective in assisting farm animals is questionable.

Studies of farm industry workers' attitudes to animal cruelty suggest mandatory reporting laws are not readily complied with. Research conducted in the 1970s in the USA found that farmers and livestock producers 'showed primary concern for the practical and material value of animals in conjunction with a comparative lack of concern for animal welfare and cruelty issues.'¹⁶⁹ An Australian study, conducted

¹⁶⁵ Australian Veterinary Association, *Policy 1.2* (December 2014) <<http://www.ava.com.au/policy/12-animal-abuse>>.

¹⁶⁶ Royal College of Veterinary Surgeons, *Code of Professional Conduct*, (at 22 June 2017) ch 14.

¹⁶⁷ These are Alabama, Arizona, California, Colorado, Illinois, Kansas, Maine, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, North Dakota, Oklahoma, Oregon, Virginia, West Virginia and Wisconsin: American Veterinary Medical Association, *Abuse Reporting Requirements by State* (2018) <<https://www.avma.org/KB/Resources/Reference/AnimalWelfare/Pages/Abuse-Reporting-requirements-by-State.aspx>>.

¹⁶⁸ Veterinary Council of New Zealand, *Code of Professional Conduct* (at 2004), cl 3.

¹⁶⁹ Nicola Taylor and Tania D Signal, 'Community Demographics and the Propensity to Report Animal Cruelty' (2006) 9 *Journal of Applied Animal Welfare Science* 201, 207; see also Stephen R Kellert, 'American Attitudes Toward and Knowledge of Animals:

by the Centre for Social Science Research at Central Queensland University, found that propensity to report animal abuse is influenced by gender, employment status and occupation type.¹⁷⁰ Primary industry workers, particularly men, were found to be less likely to report deliberate animal harm than either gender working in any other occupation. The authors of the study concluded that this may be caused by work in primary industries fostering a ‘functional or pragmatic attitude to animals’.¹⁷¹ Another Australian study investigating acceptance of agriculture and environmental management legislation, amongst Australian farmers, found significant resistance to stringent regulatory controls.¹⁷²

Recognising this aversion, some jurisdictions have moved towards a more co-regulatory style of governance within the agricultural industry. This model provides for government and industry to both play a role in ensuring compliance with mandatory animal welfare standards. The model has been widely utilised over the past decade in Australia, where, in exchange for decreased governmental inspection, industries have developed and implemented government-approved quality assurance programs, intended to ensure compliance with mandatory standards.¹⁷³ One recent study in Queensland found that, whilst most livestock saleyard managers support the introduction of mandatory quality assurance reporting across the meat production industry, they are reluctant to report transport operators who brought in unfit animals, or co-workers who treated animals cruelly, to prosecuting authorities.¹⁷⁴ The study identified social pressure or fear of affecting others’ financial livelihoods, through criminal prosecution, as major barriers to improving animal welfare protections in transport and at saleyards.¹⁷⁵

In 2014, the New South Wales Farmers’ Association New England representative James Jackson commented on the RSPCA’s proposal to require mandatory reporting of animal abuse:

these situations often involve quite fragile human situations ... people are in a fragile mental state, and you don’t want people suiciding after an intervention and

an Update’ in M W Fox and L D Mickley (eds), *Advances in Animal Welfare Science 1984/85* (The Humane Society of the United States, 1984) 187.

¹⁷⁰ Taylor and Signal, above n 169.

¹⁷¹ Ibid.

¹⁷² Robyn Bartel and Elaine Barclay, ‘Motivational Postures and Compliance with Environmental Law in Australian Agriculture’ (2011) 27 *Journal of Rural Studies* 153, 156.

¹⁷³ Goodfellow, above n 110, 193.

¹⁷⁴ Rebekah Eyers, *A Regulatory Study of the Australian Animal Welfare Framework for Queensland Saleyard Animals* (PhD Thesis, Griffith University, 2016) 144, 197.

¹⁷⁵ Ibid 223.

people being publicly humiliated ... Ultimately what we want is good outcomes for animals, but we don't want bad outcomes for the people.¹⁷⁶

In light of these concerns, the introduction of a law imposing a mandatory duty to report animal cruelty to authorities seems unlikely to assist farm animals in the way the RSPCA envisages. Imposing a wider duty to intervene to protect the animals concerned would be more effective. It would also be more likely to receive legislative support, as it would allow workers to deal with cruelty concerns in-house, where possible and appropriate.

VII THE SCOPE AND NATURE OF A DUTY TO PROTECT ANIMALS

A Why an Effective Duty to Protect Animals Should Impose a Duty to Intervene

Why would a wider duty to intervene provide any better protection to animals than a simple duty to report abuse? Surely any such duty would be similarly disregarded by an industry resistant to external regulation and eager to protect its own?

Before addressing these concerns, it is first necessary to consider who would be targeted by a legislative duty to protect animals. The RSPCA proposal suggests that a duty to report cruelty should be limited to persons in positions of animal management. Its proposal states that mandatory reporting should not be required of those who work with animals but are not professional animal managers, as they are not required to have an understanding of animal welfare legislation as part of their employment. Instead, the RSPCA suggests such people have a moral obligation to report animal cruelty to their manager.¹⁷⁷

It is submitted here that the RSPCA's distinction is unnecessary. Currently, under the criminal law, an act of cruelty occurs when an animal is caused to suffer unnecessarily (in accordance with the unnecessary suffering test).¹⁷⁸ Objective mens rea applies, as the courts have long held criminal liability for cruelty can be founded on both the deliberate or negligent infliction of unnecessary harm.¹⁷⁹ Ignorance that one's own actions are cruel has never been a permissible defence to the crime. It is therefore contended that the law should impose an objective requirement on individuals working on farms to intervene and assist animals subjected to cruelty by others, on the basis that they can reasonably be expected to recognise cruelty.

Similarly, an objective standard for liability has been proposed under the Animal Protection and Crimes Legislation Amendment (Reporting of Animal Cruelty and

¹⁷⁶ Lucy Barbour, 'Pork Industry Welcome RSPCA's Call for Mandatory Reporting of Animal Cruelty' (25 August 2014) ABC News <<http://www.abc.net.au/news/rural/2014-08-25/pork--supports-rspca-mandatory-reporting-animal-cruelty/5694268>>.

¹⁷⁷ RSPCA Australia, above n 1, 3.

¹⁷⁸ *Ford v Wiley* (1889) 23 QBD 203, 209.

¹⁷⁹ *Ibid* 225.

Protection of Animal Enterprises) Bill 2018 (NSW). The Bill proposes to insert s 6A into the *Prevention of Cruelty to Animals Act 1979* (NSW) which would create an offence if members of the public fail to report to an authority, that they had recorded an act which they knew, or ought reasonably to have known, constituted cruelty. Given that the proposed law assumes members of the public can recognise cruelty when they see it, it hardly seems unreasonable that the law would require less of those working within the industry.

With regard to laboratory animals, it would also be reasonable to expect that those working in laboratories can, and should, recognise acts of animal cruelty by others. Legislation in all states has enforced compliance with the *ACCUASP*. The code imposes a duty on all researchers using live animals to take personal responsibility for their wellbeing, including their housing, husbandry and care.¹⁸⁰ It also places responsibility on facility managers, animal technicians and stock handlers to ensure that steps are taken to safeguard animals' wellbeing by avoiding and minimising harm, including pain and distress, before they are transferred to laboratories for research.¹⁸¹

Society is not only justified in expecting workers in laboratories and agricultural facilities to demonstrate a capacity to recognise animal cruelty, but in requiring them to take action to remedy it. Those working in laboratories and agricultural facilities are in a unique position to be able to take effective action to protect animals in closed environments. It is also reasonable to expect them to do so. However, where unlawful cruelty has occurred, the studies described above suggest agricultural workers may prefer to intervene to protect the animals concerned by taking action in-house, rather than alerting authorities and running the risk of exposing co-workers to prosecution. Where swift action can be taken in-house to assist animals, a pragmatic law would encourage it. While some may choose to turn a blind eye to cruelty altogether, the imposition of a legal duty to intervene to protect animals would expose all concerned to the risk of prosecution if an unaddressed incident subsequently came to light. If, as is the case under section 23 of the *Criminal Justice and Courts Act 2015* (UK) c 2, courts could order the publication of breaches by offending institutions, fear of publicity may well provide sufficient incentive for management to ensure their staff make timely internal reports of cruelty (allowing matters to be dealt with in-house). Fear of consumer backlash is regarded as a significant factor in ensuring compliance with animal welfare standards.¹⁸²

In cases where serious injuries have already been inflicted on an animal, or it is at risk of being unlawfully killed, timely acts of intervention are of significantly more benefit to the animals concerned than reports to authorities, where investigators will

¹⁸⁰ National Health and Medical Research Council, above n 120, 2.4.1.

¹⁸¹ *Ibid* 2.5.2.

¹⁸² See, eg, Louise Floyd, 'How Abolishing (or at Least Reforming) Australia's Live Export Cattle Trade Supports Hong Kong Animal Law Reform and Why it is Desirable for Both Jurisdictions' (2012) 42 *Hong Kong Law Journal* 453, 464.

need time to conduct inspections and, in appropriate cases, secure warrants and seek authority to seize animals.

B If a Duty to Protect Animals Were Imposed, What Would be the Appropriate Intensity of Criminalisation?

It should be recognised here that this article does not advocate the introduction of a law criminalising a failure to protect animals which is equated in terms of severity with the crime of cruelty itself. In Europe, the generally lenient penalties imposed reflect a recognition that culpability is for the omission only — the failure to rescue. The defendant is not to be held accountable for the potentially grave consequences of that failure.¹⁸³

In contrast, s 5 of the *Domestic Violence, Crime and Victims Act 2004* (UK) c 28 allows prosecutors charging offenders with criminal neglect of children who have been killed, to also indict them for the alternative offences of murder and manslaughter. Further, even where the defendant is convicted of the lesser charge of neglect, and the child has died, the maximum penalty is a very substantial 14 years imprisonment (which is longer than is served in most manslaughter cases).¹⁸⁴ Section 14 of the *Criminal Law Consolidation Act 1935* (SA) permits a maximum penalty of life imprisonment if the child is killed, but a maximum of 15 years in any other case.

In the case of a duty to protect animals, it is suggested here that penalty provisions should follow the European model and be legislated at a much lower level than is possible for the primary perpetrators of cruelty.

C What Form Would Adequate Fulfilment of a Duty to Protect Animals Take?

It would be extremely difficult for the legislature to prescribe the exact form of a legal duty to protect animals that would ensure adequate fulfilment of that duty. Ideally, it should be left to the courts to determine on a case by case basis. Generally, the duty to rescue offences in Europe require only that the rescuer makes a telephone call to emergency services. The UK Ministry of Justice has expressed a view that reporting of the crime may be sufficient to meet the expectations of the law in relation to section 5 of the *Domestic Violence, Crime and Victims Act 2004* (UK).¹⁸⁵ In cases of animal cruelty, where the animal is not in any immediate danger of serious injury, it may be possible for effective protection to be achieved by simply reporting an act of ill treatment, internally or externally.

However, it is crucial to note that the child protection laws in the UK, South Australia and New Zealand are not limited to a duty to report. In some circumstances, acts of

¹⁸³ Cadoppi, above n 158, 96.

¹⁸⁴ Julian V Roberts and Andrew Ashworth 'The Evolution of Sentencing Policy and Practice in England and Wales 2003–2015' (2016) 45 *Crime and Justice* 307, 328.

¹⁸⁵ *Domestic Violence, Crime and Victims Act 2004* (UK) c 28, s 5; UK Ministry of Justice, above n 78, 13.

physical intervention, such as treating the injuries, seeking help from other persons in the household or even removing the child from harm's way, may be required. In situations where there is no physical danger to the intervener, taking action to protect a vulnerable victim may be a reasonable expectation. This would be particularly the case where the situation is urgent and the victim is in danger of death or serious injury if the abuse continues, and the secluded environment in which the abuse is taking place require that those best placed with capacity and opportunity take effective action.¹⁸⁶

Sensible criticisms have been made of section 5 of the *Domestic Violence, Crime and Victims Act 2004* (UK) on the basis that for victims of domestic violence, laws requiring them to intervene against physical aggressors may be unreasonable.¹⁸⁷ The response of the New South Wales Farmers' Association New England representative to the RSPCA proposal would suggest that whistleblowers within the agricultural industry may fear backlash for their actions. Such concerns should be taken into account by a court in considering what constitutes a reasonable response. It would also be necessary for laws to be drafted which provide employment protection for industry whistleblowers.

In terms of possible defences to such a crime, it has been suggested that legislators seeking to reform the law of manslaughter by omission in the UK should take guidance from s 50 of the *Serious Crime Act 2007* (UK) c 27 which 'provides a statutory defence to the inchoate offences of assisting or encouraging a crime'.¹⁸⁸ The defence of acting reasonably is available where the person concerned can prove they knew or believed certain circumstances existed and it was reasonable for them to act/omit to act as they did in those circumstances. In determining whether their act/omission was reasonable, the court will consider the seriousness of the alleged offence, the purpose of the act/omission claimed by the defendant and the authority by which they claimed to act/omitted to act.

VIII THE EFFECTIVENESS OF THE DUTY

It might be claimed that the introduction of a mandatory duty to intervene to assist cruelly treated animals in an institutional setting could be used as a double-edged sword. Those seeking to gather evidence of systematic abuse over a long period may find themselves prosecuted for a failure to intervene. In practice, the introduction of a duty to protect animals would be unlikely to undermine undercover investigations of systematic abuse (although hopefully it would help to reduce the need for them, as continuing cruelty would be less likely to occur). Undercover investigators

¹⁸⁶ Ashworth, *Positive Obligations in Criminal Law*, above n 128, 52–3.

¹⁸⁷ See, eg, Jonathan Herring, 'Familial Homicide, Failure to Protect and Domestic Violence: Who's the Victim?' [2007] *Criminal Law Review* 923; Julia Tolmie, 'The "Duty to Protect" in New Zealand Criminal Law: Making it Up as We Go Along?' [2010] *New Zealand Law Review* 725.

¹⁸⁸ *Serious Crime Act 2007* (UK) c 27, s 50; Elliot, above n 60, 178.

who witnessed abuse would only need do what is reasonably necessary to protect the animals concerned to avoid the risk of personal liability. Based on existing child protection laws, a reasonable response would include making a report of the offending behaviour to the person in charge of the facility. Making such a report internally would transfer liability for the abuse to the person in charge, hopefully ensuring those in power take swift action to protect the animals concerned.

Where a report is made internally and those in control take insufficient steps to halt the abuse, then evidence of their unreasonable failure to adequately intervene could be documented over a period of time by the complainant and used by authorities to support a wider prosecution of those in the hierarchy of management. In the case of laboratory animal cruelty, the conviction of an entire board of directors, or senior management team of a university, would have a much higher deterrent value for the institution, as a whole, than prosecuting a few employees, which could always be trivialised by senior management as an isolated incident.

In some scenarios, swift action by those who directly witness cruelty may be the only reasonable response. Where an animal is in immediate danger of unlawful death or serious injury, and there is no physical risk to the intervener, a reasonable response would require a physical intervention, along with an attempt to seek the assistance of others, within the institution, to minimise the risk of future harm.

However, in those cases where animal abuse is systematic, but the animals themselves are in no immediate danger of unlawful death or serious injury, the law could recognise the ongoing undercover recording of the abuse as a reasonable step — taken long term — to protect the animals concerned.

IX CONCLUSION

As noted by Barnard,¹⁸⁹ the legal definitions of animal cruelty, including which animals are protected and against what, have never been as well defined as those provided under child abuse laws. The passing of ‘ag-gag’ laws in the USA and Australia have compounded existing difficulties in effectively monitoring animal cruelty on farms and in laboratories. In 1964, when the UK government set up the Brambell Committee to investigate the welfare of animals under newly developed intensive farming methods, it was Ruth Harrison’s photographs of animals on private farms, published in her book *Animal Machines: The New Factory Farming Industry*, and in the British press,¹⁹⁰ which instigated public outcry and set law reform in motion. Today, the actions of Harrison would render her liable to prosecution in the USA and Australia. In an era of decreasing surveillance of animal welfare on farms and in laboratories, effective protection for animals requires lawmakers to rethink the accepted parameters of criminal responsibility.

¹⁸⁹ Barnard, above n 27, 103.

¹⁹⁰ Fraser, ‘Ruth Harrison — A Tribute’, above n 43.

Legislators seeking to provide more effective safeguards for animals should look to the recently-imposed laws regarding the protection of vulnerable children enacted in South Australia, Victoria, New Zealand and the UK. Such laws have recognised the special vulnerability of children in closed environments, a vulnerability shared by agricultural and research animals. Today, as in the past, child protection models have significant relevance for animal welfare advocates.