

'Dangerous Dogs' different dog, same lamppost?

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"Dangerous dogs": different dog, same lamppost?

Lydia Bleasdale-Hill and Jill Dickinson

Abstract

Legislation governing the regulation of dangerous dogs is notoriously fraught with difficulties, in particular concerning the definitions incorporated within, and the enforcement and application of, the relevant provisions. This paper examines two aspects of the legislative framework; the regulation of 'type-specific' breeds of dogs, and the extension of regulations relating to the control of dogs from public to private spheres. These aspects afford an opportunity for two principal justifications in favour of controlling owners and their dogs to be analysed: the protection of the public and the need to responsabilise dog owners. This paper considers the extent to which type-specific provisions and the extension of dangerous dogs legislation to cover private spheres achieve those desired aims and concludes that these goals are not clearly met. The authors recommend a consolidated piece of legislation, alongside a more sophisticated approach (supported by further research) being adopted with respect to the nature of dog ownership.

Introduction

The Dangerous Dogs Act 1991 was introduced in response to a number of attacks by dogs on children in particular, and has been described as: "a synonym for any unthinking reflex legislative response to media hype".¹ This paper summarises the potted, historical development of the legislation concerning dangerous dogs, and analyses the rationale behind the legislation. The paper explores two aspects of legislation covering the field; namely, the extension of the area within which an owner can be liable for the behaviour of their dog, from public to private grounds,² and the retention of type-specific definitions of which dogs are to be considered "dangerous." Increased public safety and the need for responsabilising dog owners are two motivations that governments have repeatedly expressed in favour of the development or extension of dangerous dogs laws.³ However, the inherent problem with such a purely legislative approach is its apparent inability to solve the flexibility v certainty conundrum:

¹ C. Hood, "Assessing the Dangerous Dogs Act: When Does a Regulatory Law Fail?" (2000) Summer *Public Law* 282-305 at 282

² As introduced by the Anti-Social Behaviour, Crime and Policing Act 2014, Part 7

³ DEFRA, *Annex A: Promoting More Responsible Dog Ownership: Proposals to Tackle Irresponsible Dog Ownership* (DEFRA: London, 2012) at 2; DEFRA, "Dangerous Dogs Law Changes Cover Attacks on Private Property" (9 April 2013), available at: <https://www.gov.uk/government/news/dangerous-dogs-law-changes-cover-attacks-on-private-property> (accessed 11 December 2015); DEFRA, "Dangerous Dogs: Tough New Law to Help Prevent Attacks" (17 October 2014), available at <https://www.gov.uk/government/news/dangerous-dogs-tough-new-law-to-help-prevent-attacks> (accessed 11 December 2015); DEFRA *Dangerous Dogs Law: Guidance for Enforcers* (DEFRA: London, 2009), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/69263/dogs-guide-enforcers.pdf (accessed 11 December 2015); E. Ares and S. Coe, *Dangerous Dogs*, House of Commons Library (23 June 2015), available at www.parliament.uk/briefing-papers/sn04348.pdf (accessed 11 December 2015); *House of Commons Hansard Ministerial Statements for 6 February 2013: Environment Food and Rural Affairs--Irresponsible Dog Ownership*, available at <http://www.publications.parliament.uk/pa/cm201213/cmhansrd/cm130206/wmstext/130206m0001.htm#1302066000007> (accessed 11 December 2015); DEFRA, *Public Consultation on Dangerous Dogs: Does Current Dangerous Dogs Legislation Adequately Protect the Public and Encourage Responsible Dog Ownership?* (DEFRA: London, 2010).

"Whilst statute is best-placed to codify general principles, it is let down by its inflexible approach ... whilst case-law can provide this flexibility, it is not always easy to draw out general principles from cases which can often turn on their own facts."⁴

The paper concludes that, in light of sustained criticism of this area of law, coupled with the failure of at least some of the framework to meet the legislature's primary aims, there are strong arguments in favour of a complete legislative overhaul, alongside the introduction of supporting structural and cultural changes to underpin its effectiveness. In particular, the paper advocates further research into the potential diversity of dog owners' motivations and characteristics. The outcomes from such research could support a more nuanced legislative framework which better reflects the fact that dog owners are unlikely to be either an homogenous, or a binary, group. Instead, they are more likely to feature on a broad reaching spectrum, which ranges from wilfully-criminal dog owners (often members of gangs, involved in dog-fighting), through to more conscientious owners who always take responsibility for their dogs, whether within a public or private domain. Whilst further changes to the law could encourage some of these different owners to take more care and be more accountable for their dogs' actions, it is submitted that other types of dog owners are unlikely to respond to such legislative modification alone.

The Dangerous Dogs Act 1991

By early 1991, a number of high-profile dog attacks on young children (attacks with very serious consequences)⁵ had fuelled a national media frenzy and understandable public concern.⁶ In a bid to reassure the voters, the then Home Secretary promised "to rid the country of the menace of these fighting dogs,"⁷ prompting the government to introduce the Dangerous Dogs Bill within just four days of the latest attack.⁸

Until then, responsibility for dealing with such issues was squarely placed upon the shoulders of the civil law system. Section 1 of the Dogs Act 1871 enabled the police to take possession of, and detain, any dog which they believed was either savage or dangerous, if they found it "straying on any highway, and not under the control of any person". If the dog's owner failed to take steps to retrieve the dog within a matter of days, the police could either decide to sell the dog or destroy it.⁹ In a similar vein, the Act provided the civil courts with powers to make orders directing the dog to be either kept under proper control by its owner or destroyed.¹⁰ A failure to comply with any such order would result in an ongoing daily fine.¹¹ The 1871 Act dealt with so-called "mad dogs" separately; providing the local authorities with discretion to make orders restricting such dogs where they were not under control.¹² Once again, anyone found to be in breach of such an order could be liable to a fine¹³ and the dog could also be sold or destroyed.¹⁴ However, in 1991, Parliament took the view that the criminal law needed to step in to support its civil law counterpart, perhaps in part due to the severity of attacks seen by dogs on members of the public. This intervention took the form of the Dangerous Dogs Act 1991, which adopted a two-pronged approach to the problem of dangerous dogs.

⁴ Dickinson, "Open Season for Burglar Battering: Is it Time to Check in With the Civil Courts?" (2014) 2 *Journal of Personal Injury Law* 63 at 76

⁵ N. Parpworth, "Reforming the Dangerous Dogs Act 1991" (2013) 177 *Justice of the Peace* 378 at 378.

⁶ See Hood, above n. 1 at 296.

⁷ The Secretary of State for the Home Department, House of Commons Hansard Debates for 10 June 1991, c. 644.

⁸ BBC News, Pledge Watch: Dangerous Dogs (4 December 2009), available at http://news.bbc.co.uk/1/hi/uk_politics/8391175.stm (accessed 11 December 2015).

⁹ The Dogs Act 1871, s.1.

¹⁰ *Ibid* at s.2

¹¹ *Ibid*.

¹² The Dogs Act 1871, s.3.

¹³ *Ibid*.

¹⁴ *Ibid*.

First, it introduced a new offence of either owning or being in charge of any dog which was dangerously out of control within either a public place,¹⁵ or a non-public place in which it was not permitted to be.¹⁶ Section 10(2) of the Act defined public place as: "any street, road or other place (whether or not enclosed) to which the public have (or are permitted to have) access".¹⁷ The Act also defined a dangerous dog as one dangerously out of control in circumstances where there are "grounds for reasonable apprehension that it will injure any person."¹⁸ Whether or not any injury was actually sustained was irrelevant.

Secondly, the Dangerous Dogs Act 1991 introduced type-specific legislation for the first time, in particular banning pit bull terriers, Japanese tosas and "any type designated ... by an order of the Secretary of State, being a type appearing to him to be bred for fighting or to have the characteristics of a type bred for that purpose".¹⁹ This type-based approach mirrored what was happening in the Netherlands, Denmark and Ireland, whose legislatures had similarly responded following "strong media pressure after high visibility incidents".²⁰ However, unlike legislation in some jurisdictions,²¹ the Dangerous Dogs Act focused on "types" rather than "breeds". This provided the courts with discretion in deciding whether or not a particular dog could fall within this category, and whether or not its owners (or those otherwise in charge of it) could therefore be responsible for any related offence. The focus on type rather than breed meant that cross-breeds exhibiting physical characteristics of a prohibited type were captured, in addition to pure breeds, and the onus was clearly placed upon the owner or person in charge to prove that their dog did not fall within this list.²²

With the aim of ensuring the future extinction of these types within England and Wales,²³ the 1991 Act clearly restricted the freedom of such dogs, and consequently that of their owners. Following the Act, it became an offence to breed or breed from,²⁴ advertise, sell, exchange or give such a dog away,²⁵ allow such a dog to be in a public place without a muzzle or a lead,²⁶ or abandon such a dog or allow it to stray.²⁷ Those found guilty of such offences could be liable to either a fine and/or six months' imprisonment.²⁸ The Act also provided the courts with powers to order the destruction of any such dog (which was in fact a mandatory requirement in certain circumstances),²⁹ and to disqualify the offender from having future custody of a dog for a

¹⁵ The Dangerous Dogs Act 1991, s.3(1).

¹⁶ *Ibid.* at s.3(3).

¹⁷ This included the common parts of any building which comprised two or more separate dwellings.

¹⁸ The Dangerous Dogs Act 1991, s.10(3).

¹⁹ *Ibid.* at s.1(1).

²⁰ M. Lodge and C. Hood, "Pavlovian Policy Responses to Media Feeding Frenzies? Dangerous Dogs Regulation in Comparative Perspective" (2002) 10(1) *Journal of Contingencies and Crisis Management* 1-13 at 2.

²¹ See e.g. C. Haupt "Who Let the Dangerous Dogs Out? The German States' Hasty Legislative Action, the Federal Law on Dangerous Dogs and the Kampfhunde Decision of the Federal Constitutional Court" (2006) 2 *Journal of Animal Law* 27.

²² DEFRA, Controlling Your Dog in Public (14 June 2014), available at <https://www.gov.uk/control-dog-public/banned-dogs> (accessed 11 December 2015).

²³ See, for example, the statement by Lord Houghton of Sowerby: "The Act came as near as possible to being a programme of extinction of a whole breed or identification in the canine world known as the pit bull terrier. Everything in the Act is designed to make it difficult for those dogs to survive or to make their care tolerable to those who desire to keep them under the Act's harsh conditions." (HL Deb 20 January 1993, vol 541, cc933-56, at 933).

²⁴ The Dangerous Dogs Act 1991, s.1(2)(a).

²⁵ *Ibid.* at s.1(2)(b) and (c).

²⁶ *Ibid.* at s.1(2)(d).

²⁷ *Ibid.* at s.1(2)(e).

²⁸ *Ibid.* at s.1(7).

²⁹ *Ibid.* at s.4(1)(a).

discretionary period.³⁰ Further, if the court held that the dog was of a banned type,³¹ but did not present any danger to the public, it could require the owner to register the animal on the Index of Exempted Dogs.³² The owner would then be issued with a certificate of exemption which would apply for the rest of the dog's life. Whilst the owner would then be allowed to keep the dog, it would be on condition that they complied with a comprehensive list of requirements, including being required to take out liability insurance against their dog injuring other people.³³

The Aftermath

Since its enactment, the 1991 Act has been the subject of consistently heavy criticism, in particular for its fitness for purpose.³⁴ The Dogs Trust has cited it as being: "probably the worst bit of legislation that's ever come onto the statute books."³⁵ Yet when the next, much-welcomed opportunity arose to make amends, it was seemingly wasted. The Dangerous Dogs (Amendment) Act 1997 served only to remove the mandatory destruction order provisions,³⁶ provide the courts with some discretion as to their sentencing powers³⁷ and enable the Index of Exempted Dogs, which was originally intended to be time-limited, to be re-opened.³⁸

The latest changes encapsulated by the Anti-Social Behaviour Crime and Policing Act 2014 unfortunately appear to be no different in this respect. Following DEFRA's consultation on how the law ought to be reformed, it became apparent that the law's failure to cover private as well as public spaces caused numerous difficulties, to the extent that 70 per cent of respondents to the consultation supported extending the law to cover private property.³⁹ As such, the first key element of the 1991 Act (which covers any dangerously out-of-control dog) has been extended to cover such dogs if they are found on *private* as well as *public* land, except in situations known as "householder cases". Such excepted cases cover situations where a dog is either within (or partly within) a building (or part of a building), which is either a "dwelling" or forces accommodation, and attacks someone who is either a trespasser or who the owner of that building believes to be a trespasser. Previously, dog owners were only liable for prosecution when their dog was deemed to be out of control within a public place, such as a public road, public park or public beach. The Association of Chief Police Officers noted that, within this preceding arrangement, operational difficulties could arise when a violent incident occurred between a dog and an individual on private property:

"The public and families affected by tragedy expect the police to be able to take effective action. There are horrific and all too frequent examples of where the police have limited or no means to take appropriate action. Victims and their families must have the ability to hold to account those responsible for attacks causing injury. Often, where there are extremely serious attacks

³⁰ Ibid. at s.4(1)(b).

³¹ Namely pit bull terriers, Japanese tosas and any dog so designated by an order of the Secretary of State as to be of a type which appears to him to be either bred for fighting or which has the characteristics of such a type, as per the Dangerous Dogs Act 1991, s.1(1).

³² This is a record maintained by DEFRA on behalf of the Government under the Dangerous Dogs Compensation and Exemption Schemes Order 1991(SI 1991/1744).

³³ As set out in Part III of The Dangerous Dogs Compensation and Exemption Schemes Order 1991 SI 1991/1744; also see DEFRA, n. 22 above. The French legal system later followed a similar approach in 1999, requiring owners of specific types of dogs to register, insure and sterilise them as per Lodge and Hood, above n. 20 at 3.

³⁴ See Hood, above n. 1 at 282; and N. Parpworth, "The Dangerous Dogs Act 1991: The Meaning of "Public Place"" (2008) 172 *Justice of the Peace* 94 at 94.

³⁵ P. Barkham and S. Murphy, "Bark But No Bite: Dangerous Dogs Act in Spotlight as Attacks Rise" (18 January 2012) *The Guardian*.

³⁶ The Dangerous Dogs (Amendment) Act 1997, s.1.

³⁷ The Dangerous Dogs (Amendment) Act 1997, s.2.

³⁸ Ares and Coe, above n. 34.

³⁹ DEFRA, Promoting More Responsible Dog Ownership: Summary of Responses to Consultation and Way Forward (DEFRA: London, 2013) at 2.

on private property (10 in the past 7 years), the owners of the dogs are effectively immune from criminal prosecution."⁴⁰

Limiting owners' liability to public places was also problematic in the sense that it required "public place' to be clearly defined. In *R v Bogdal*,⁴¹ for example, the Court of Appeal was required to determine whether a shared driveway constituted a "public place' for the purposes of s. 3(1) of the Dangerous Dogs Act 1991.⁴²

However, despite the sound reasons in favour of extending the law to private spheres, the authors contend that operational difficulties are likely to remain and that key aims of the legislation are not guaranteed to be met. Furthermore, there was no movement away from the type-specific legislation within the 2014 Act, in spite of the criticisms levelled at it.⁴³

The paper will now consider the extent to which the areas of the legislation discussed thus far meet the primary aims of successive governments; namely, to responsabilise owners and to increase public safety.

Responsibilising Owners

Whilst the Dogs Act 1871 referred to above is now over 140 years old, DEFRA has recommended that it is still always "taken into consideration when ... concerns are raised over an allegation of irresponsible dog ownership".⁴⁴ The acknowledgment of the role that dog owners play (either on purpose or inadvertently) in instances of dog attacks is something that successive governments have reiterated in their manifestos on anti-social behaviour.⁴⁵ Whilst cynics may argue that such an approach is driven by a political hunger for headline-grabbing, and believers may cite more altruistic underpinnings, the practical problem of responsabilising dog ownership is one that has plagued many a ministerial debate, without any real effective changes having been made.⁴⁶ On the contrary, further legislation seems to have served only

⁴⁰ Written evidence submitted by Association of Chief Police Officers (ACPO) to the Environment, Food and Rural Affairs Committee (July 2012), available at <http://www.publications.parliament.uk/pa/cm201213/cmselect/cmenvfru/575/575we08.htm> (accessed 11 December 2015). See also N. Padfield, "Sentencing Those Guilty of Dangerous Dog Offences' [2015] 7 Criminal Law Review 471 at 471.

⁴¹ *R v Bogdal* [2008] EWCA Crim 1. See also *Fellowes v Crown Prosecution Service* [1993] WL 964524.

⁴² *Fellowes v Crown Prosecution Service*, *ibid*.

⁴³ These will be explored further under "Does Type-specific Legislation Responsibilise Dog Owners?" below.

⁴⁴ DEFRA, 2009, above n. 3 at 3.

⁴⁵ See for example: Labour Press, Ministers Have Failed to Tackle Dangerous Dogs and Promote Responsible Dog Ownership, 24 April 2014, available at <http://press.labour.org.uk/post/83718600505/ministers-have-failed-to-tackle-dangerous-dogs-and> (accessed 11 December 2015); Conservative Party, Invitation to Join the Government of Britain: The Conservative Manifesto 2010 (Conservative Party: London, 2010), available at <https://www.conservatives.com/%EB/media/files/activistcentre/pressandpolicy/manifestos/manifesto2010> (accessed 11 December 2015) at 95; and HM Government, The Coalition: Our Programme for Government (Cabinet Office: London, 2012), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/78977/coalition_programme_for_government.pdf (accessed 11 December 2015) at 18.

⁴⁶ DEFRA, Annex A: Promoting More Responsible Dog Ownership: Proposals to Tackle Irresponsible Dog Ownership (DEFRA: London, 2012) at 2, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/82469/dangerous-dogs-annexa-condoc-120423.pdf; DEFRA, Dangerous Dogs Law Changes Cover Attacks on Private Property (9 April 2013), available at <https://www.gov.uk/government/news/dangerous-dogs-law-changes-cover-attacks-on-private-property> (accessed 11 December 2015); DEFRA, "Dangerous Dogs: Tough New Law to Help Prevent Attacks' (17 October 2014), available at <https://www.gov.uk/government/news/dangerous-dogs-tough-new-law-to-help-prevent-attacks> (accessed 11 December 2015); DEFRA, Dangerous Dogs Law: Guidance for Enforcers (DEFRA: London, 2009), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/69263/dogs-guide-enforcers.pdf (accessed 11 December 2015); Ares and Coe, above n. 3.

to further muddy the already murky waters in this area of law. The authors would argue that much more radical change is needed, both legislative and cultural, to responsabilise dog owners.

Does Extending the Liability of Owners to Private Spheres Responsibilise Owners?

Section 106 of the Antisocial Behaviour, Crime and Policing Act was welcomed by campaign groups as the need to distinguish between "private" and "public" spaces was seemingly removed, and it was perceived that this piece of legislation would encourage people to be more responsible with their dogs on private property.⁴⁷ However, the previous definitional complexities have arguably been replaced by another such difficulty. Section 106 states that the liability of owners is extended from public to private spaces, except for "householder cases" involving trespassers within a "dwelling", meaning that the definition of dwelling is key to the question of whether a dog owner will be responsible for damage caused by their dog to another. In light of this, and given the previous definitional difficulties, one might have expected a definition of the term "dwelling" to have been included within the Act. Unfortunately, dangerous dogs law remains silent on this point.⁴⁸ Instead, the government suggested that "the definition of the dwelling is widely understood in English law; that it refers to the usual place of residence of a person and there is no need to provide a separate definition of dwelling in this legislation ..."⁴⁹ In support they cited⁵⁰ the definition of the householder cases provided by the Crime and Courts Act 2013. This Act amended the Criminal Justice and Immigration Act 2008 as far as the use of self-defence in the home was concerned. The difficulty is that "dwelling" is similarly not defined within that Act. Although a definition of "dwelling" is provided by s. 8 of the Public Order Act 1986 (for the purposes of defining when intentional harassment, for example, might be committed), case law suggests that "dwelling" can be a flexible term; a question of degree based on the use of the building and on all the other relevant evidence.⁵¹ This leaves the law, and therefore its key actors, in an uncertain position in some cases. Clarissa Baldwin, Director of the Dogs Trust, in giving evidence to the House of Commons Public Bill Committee, noted: Certain things such as where the dwelling begins and ends, whether it will be just the curtilage of the house and whether a farm dog [which] is protecting his farmer's equipment is going to be caught up in the law ... such factors, which may go in the guidance, might well be misinterpreted by the courts if we are not very careful. We need some clarity on such things.⁵²

If a trespasser was bitten by a dog whilst in someone's living room, for example, there is no doubt that would constitute their dwelling and they would therefore fall within the exemption. What might be less certain is precisely where the boundaries of a dwelling begin and end. For example, would an open porch area constitute part of a "dwelling"?

Dog owners whose private property is now being regulated in a way that it was not previously might not be clear about where their responsibilities start and end, as far as trespassers and people who have a right to be on the property are concerned. Indeed, a recent

⁴⁷ See RSPCA, "Tougher Sentences for Irresponsible Dog Owners", (17 March 2014)

<http://news.rspca.org.uk/2014/03/17/tougher-sentences-for-irresponsible-dog-owners/> (accessed 11 December 2015); RSPCA, "New Law Won't Prevent Dog Bites" (13 May 2014), available at <http://news.rspca.org.uk/2014/05/13/new-law-wont-prevent-dog-bites/>; and "Disappointment at Government Proposals on Dangerous Dogs" (2012) 170(17) *Veterinary Record* 425-6.

⁴⁸ The legacy of definitional issues that both the legislature and the judiciary are still seemingly grappling with clearly stem back to the Dogs Act 1871. Whilst the Act does attempt to define "highway," there are obvious omissions when it comes to providing clarification as to what the terms: "savage", "dangerous" and "mad" mean (see sections 1, 3 and 5 of the 1871 Act).

⁴⁹ Environment, Food and Rural Affairs Committee, Draft Dangerous Dogs (Amendment) Bill: Government Response to the Committee's First Report of Session 2013-14 (September 2013), available at <http://www.publications.parliament.uk/pa/cm201314/cmselect/cmenvfru/637/63704.htm> (accessed 11 December 2015).

⁵⁰ *Ibid.*

⁵¹ See for example, K. Laird, "Conceptualising the Interpretation of "Dwelling" in Section 9 of the Theft Act 1968" [2013] 8 *Criminal Law Review* 656-673, as cited by L. Bleasdale-Hill, "'Our Home is Our Haven and Refuge--A Place Where We Have Every Right to Feel Safe": Justifying the Use of Up to "Grossly Disproportionate Force" in a Place of Residence" [2015] 6 *Criminal Law Review* 407-19.

⁵² House of Commons Public Bill Committee: Anti-Social Behaviour, Crime and Policing Bill (20 June 2013) c110.

survey⁵³ reported that one third of respondents were not aware that changes had been made to the law in this regard. Furthermore, only 23 percent reported managing their dogs differently in the home as a result of this legislative shift. Notably, however, a third of owners had modified how they managed their dogs in public. It would therefore appear that the amendment to the law has not resulted in a significant increase in responsible owners: under a quarter of owners have altered the way in which they control their dogs around their private property, and those owners who have modified their behaviour in light of the legislation have seemingly misunderstood its effect. This suggests that the effect of this legislative change has not been sufficiently clearly advertised to dog owners.

For this reason, it would be premature to suggest that the amendment to this area of legislation necessarily increases dog owners' responsibility in all spheres. Whilst many owners will presumably be encouraged to take more responsibility for their dog once they are aware of the change to the law, they would need to be aware of the change in law in the first place to feel *forced* to be more responsible. Also, the level of responsibility which they have for their dogs in areas which fall upon the boundaries to their dwelling could be seen as blurred. Of course, owners might be encouraged to adopt an 'ultra-cautious' approach towards others in light of such uncertainty,⁵⁴ but the law ought to strive for clear definitions within which owners can usefully work.

Does Type-specific Legislation Responsibilise Dog Owners?

Under type-specific legislative arrangements, certain types of dogs are presumed to be dangerous (regardless of either the characteristics and/or previous conduct of the individual dogs in question), and are therefore automatically captured by the relevant legislation. The distinction between broader laws covering all dogs which exhibit dangerous behaviour (such as those which are deemed to be 'out of control') and type-specific legislation is neatly summarised by Shulan:

"Under [type-specific legislation] a dog is not judged on his behavior and disposition but rather upon his identity as a member of a particular breed that had been deemed--on the whole--to be unusually prone to violent attacks. Under [dangerous dogs laws] a dog is deemed dangerous or vicious vis-à-vis documented complaints in a particular jurisdiction."⁵⁵

The approach to controlling both the numbers and activities of 'types' of dogs (as opposed to focusing only upon the behaviour exhibited by individual animals), has been criticised on the basis that it is both over- and underinclusive. It is perceived as being overinclusive "by subjecting all members of the target breed to regulation regardless of prior behaviour; that is ... it reaches both dangerous and docile members of the target breed".⁵⁶ McNeely and Lindquist advocated governments taking a more nuanced approach to this issue as an acknowledgement of their responsibility towards *all* citizens:

"Local governments must realise that they serve the parties who complain about dogs who are allegedly dangerous to the same degree that they serve owners of dogs who are accused of behaving in dangerous [ways]. To classify dogs who are not truly dangerous, 'dangerous', as a means to circumvent deficient running-at-large laws, to avoid future liability, or even to

⁵³ National Animal Welfare Trust, 'One Year On--Are Changes to the Dangerous Dogs Act Effective?' (12 May 2015), available at <http://www.nawt.org.uk/media-centre/owners-think-dangerous-dogs-act-remains-ineffective> (accessed 11 December 2015).

⁵⁴ Organisations such as the National Animal Welfare Trust have provided guidance as to how owners might best ensure the safety of callers to their homes: <http://www.nawt.org.uk/advice/changes-dangerous-dogs-act-advice-owners>.

⁵⁵ J.R. Shulan, 'When Dogs Bite: A Fair, Effective, and Comprehensive Solution to the Contemporary Problem of Dog Attacks' (2010) 32 University of Arkansas at Little Rock Law Review 259 at 260.

⁵⁶ S. Gray Hussain 'Attacking the Dog-Bite Epidemic: Why Breed-Specific Legislation Won't Solve the Dangerous Dogs Dilemma' (2006) 74(5) Fordham Law Review 2847 at 2863.

assuage aggressive citizens' complaints, means that local governments are failing to meet their responsibility to serve all citizens in a professional, fair, and legally responsible manner."⁵⁷

Whilst many agree that a type-specific approach is fundamentally flawed (not least because breed is a poor indicator of aggression),⁵⁸ this legislative strategy does still exist in a number of jurisdictions, primarily with the purpose of either regulating or completely banning the breeding or ownership of particular breeds of dogs.⁵⁹ Although legislation focusing on the control of pit bulls in particular has received support on the basis that pit bulls are unlike other dogs in key ways (in light of their particular strength, temperament and unpredictability)⁶⁰ and on the basis that there are concerns relating to the genetics of this particular breed,⁶¹ there are difficulties with this approach--not least in expecting it to have the side-effect of responsabilising owners.

Dog owners will only be responsabilised by type-specific legislation (which presumably means not purchasing a dog of a banned type) if they know that the dog in question is of that type. Determining the type of dog is notoriously difficult to do, meaning that owners will often be unaware that their dog is of a banned type. Burstein, for example, noted that " ... there is no real pit bull breed and it is difficult for owners of mixed breed dogs or adopted dogs without genealogical records to determine whether their owners are covered by the ordinance,⁶² a point which is repeated by Hood.⁶³ A recent, high-profile, example of this problem is provided by the case of Lee Wright. Wright's dog, classified as a pit bull terrier, killed an 11-month old baby who was in Wright's house at the time. At trial, it was accepted by the judge that Wright "did not know the dog was a pit bull type"⁶⁴ and it was noted that the assessment of the type of dog (made by expert witnesses in line with the American Dog Breeders Association guidance), was "comment rather than definitive".⁶⁵ This case illustrates why type-specific legislation is not guaranteed to responsabilise owners: rather, it is more likely to be of use in sentencing owners (on the basis of enhanced culpability) who knowingly possess such a banned type of dog which has then been involved in a violent incident.

Type-specific legislation can simultaneously be regarded as under-inclusive, in view of the fact that only certain types of dogs are banned or regulated by virtue of their breed, and determining the type of dog can be problematic. If the type of dog can only be determined following a battery of scientific tests, can an owner realistically be expected to readily identify the type of dog that they are taking responsibility for, and therefore be encouraged to be a "responsible" dog owner through the provision of type-specific legislation?

Finally, type-specific legislation arguably fails to serve its purpose of responsabilising owners in that it risks encouraging dangerous dogs issues underground. Citing specific types as dangerous has historically served to make them more attractive to particular groups:

⁵⁷ C.A. McNeely and S.A. Lindquist, "Dangerous Dogs Laws: Failing to Give Man's Best Friends a Fair Shake at Justice" (2007) 3 *Journal of Animal Law* 99 at 137.

⁵⁸ M. Kaspersson, "On Treating the Symptoms and Not the Cause: Reflections on the Dangerous Dogs Act" (2008) 8 *Papers from the British Criminology Conference* 215. See also e.g. J. Medlin "Pit Bull Bans and the Human Factors Affecting Canine Behaviour" (2007) 56 *DePaul Law Review* 1285 at 1314.

⁵⁹ See for example the Gesetz zur Bekämpfung gefährlicher Hunde in Germany as referred to by Haupt, above n. 21 at 34.

⁶⁰ K.A. Nelson, "One City's Experience: Why Pit Bulls are More Dangerous and Breed-Specific Legislation is Justified" (2005) 46(6) *Municipal Lawyer* 12-29 at 15.

⁶¹ Medlin, above n. 58 at 1293.

⁶² D. Burstein, "Breed-specific Legislation: Unfair Prejudice and Ineffective Policy" (2004) 10 *Animal Law* 313 at 320. See also Medlin, above n. 58 at 1295-6 and 1297.

⁶³ Hood, above n.1 at 289.

⁶⁴ The Guardian/Press Association, "Owner of Dog that Killed Baby Girl is Jailed for Possessing Dangerous Animal" (9 June 2015), available at <http://www.theguardian.com/uk-news/2015/jun/09/owner-dog-killed-baby-blackburn-guilty-possessing-dangerous-animal> (accessed 11 December 2015).

⁶⁵ *Ibid.*

"... the terms 'status dog' and 'weapon dog' are now entering the public lexicon. These are the labels applied to those dogs proscribed by [the dangerous dogs legislation] ... or considered sufficiently fierce to warrant pariah status. However, it is often precisely this pariah status, coupled with the aggressive nature and fierce loyalty of dogs like pit bulls, Staffordshire bull-terriers and rottweilers that make them desirable to their owners."⁶⁶

Such dogs might be desirable not only for 'socialising and companionship', but also to assist their owners in enhancing their general status,⁶⁷ maintaining control over territoriality⁶⁸ or in enhancing their financial status⁶⁹ and protection.⁷⁰

Critics have further argued that the Act's particular restrictions on specific types of dog (and those responsible for them) have only served to reopen the nature v nurture debate; that 'dog risks stem as much from training, housing and husbandry as from breed'.⁷¹ Indeed, in line with a growing trend overseas,⁷² many have called for the complete removal of breed or type-specific law, suggesting that it 'place[s] the emphasis at the wrong end of the lead; [that] the emphasis should [instead] be on trying to change the culture of ownership'.⁷³

In conclusion, if it is difficult to determine what type of breed a dog is, how can owners *knowingly* avoid those types of dogs and become more 'responsible' dog owners? Conversely, certain groups or individuals might knowingly seek out types of dogs on the banned list *precisely* because they are banned. Although some people will avoid the purchase or adoption of a type of dog specifically because it is banned--and might therefore be labelled as 'responsible'--this aspect of the legislation needs to more broadly encourage all owners to be responsible in how they treat their dogs.

Does Extending the Liability of Owners to Private Spheres Enhance Public Safety?

The 2014 Act exempts owners from liability where their dog attacks a trespasser (or a perceived trespasser) within their dwelling. There was a clear policy objective underpinning the extension of the law to cover private spaces; namely to reduce the number of dog attacks on individuals (not least children) within homes. Such protection was not extended to trespassers within a dwelling because it was regarded as important that householders would not incur liability if their dogs were to (understandably) attack a trespasser in those circumstances. In fact, the Environment, Food and Rural Affairs Committee specifically dismissed a proposal to exempt dog owners from prosecution in respect of injuries sustained by trespassers within their garden (and not merely within the confines of their dwelling): "a child retrieving a ball from a garden, or a neighbour retrieving garden cuttings, should be protected from dog attacks ... Such a distinction reflects the higher likelihood of a trespasser inside or entering a dwelling having malign intent."⁷⁴

However, the law remains unsatisfactory in that owners do not appear to be aware of the change in law (or its implications)⁷⁵ and there continues to be a lack of clarity about the definition of key terms. Although the expanded law removes concerns about where the dividing line between 'public' and 'private' space lies, the same difficulties could arise in respect of 'dwelling' (as previously discussed). An additional concern is the clear intention on the part of the legislature to remove those with 'malign intentions' from the protection of the law. This

⁶⁶ S. Harding, 'Status Dogs and Gangs' (2010) 9(1) Safer Communities 30 at 30.

⁶⁷ J. Mayer and H. Pierpoint, 'Friends, Status Symbols and Weapons: The Use of Dogs by Youth Groups and Youth Gangs' (2011) 55 Crime Law and Social Change: Special Issue on Animal Abuse 405 at 406.

⁶⁸ Harding, above n. 66 at 33.

⁶⁹ *Ibid*, at.34

⁷⁰ S. Harding *Unleashed: The Phenomena of Status Dogs and Weapon Dogs* (Policy Press: Bristol, 2014) at xii.

⁷¹ Hood, above n. 1 at 284. See further See for example Haupt, above n. 21; Kaspersson, above n. 58 at 215.

⁷² See for example Gray Hussain, above n. 56; and Haupt, above n. 21.

⁷³ Above, n.8

⁷⁴ Draft Dangerous Dogs (Amendment) Bill: Government Response to the Committee's First Report of Session 2013-14--Environment, Food and Rural Affairs Committee, available at <http://www.publications.parliament.uk/pa/cm201314/cmselect/cmenvfru/637/63704.htm> (accessed 11 December 2015).

⁷⁵ National Animal Welfare Trust, above n. 53.

raises the issue of who is perceived as being deserving of state protection from harm, and why. As noted elsewhere (in the context of the permissible level of defensive force within the home),⁷⁶ the state arguably has a duty to protect the physical sanctity of all of its citizens as best it can, regardless of what the individual's perceived intentions were. Furthermore, the definition of a trespasser does not require that trespasser to have any "malign intent", despite the government's focus on such, meaning that someone might innocently enter a dwelling (such as a neighbour checking on another), and not be protected by s. 106. Again, it must therefore be questioned whether this provision meets its objective in encouraging dog owners to ensure the safety of members of the public.

Finally, Liberty argued that the Act would create "a perverse incentive for people to keep dangerous dogs on their property for protection"⁷⁷ on account of the fact the extension of the law did not cover a trespasser or perceived trespasser to a dwelling. Although this might be disputed--not least on the grounds that it is difficult to be pejorative about the motivations of a dog owner--it is concerning from the perspective of increasing the safety of the general public (for how can safety be increased if dangerous dogs are being kept with the specific purpose of protecting property?) It also potentially brings the law into further conflict with Article 2 of the European Convention on Human Rights.⁷⁸ Although the Convention does not explicitly state that fatal defensive force must be proportionate, it has been interpreted as such.⁷⁹ It is arguable to what extent fatal dog bites could be regarded as "grossly disproportionate" in the protection of a home. Furthermore, under the 2014 amendments, the homeowner, if present, need only honestly believe that the person being attacked by their dog is a trespasser, whereas the Convention requires a *reasonable* belief in the need to use force.⁸⁰

In summary, the extension of liability from public to private areas (save for "householder cases") could enhance public safety, but only if dogs are actually prevented from attacking members of the public. The current law fails to do this, enhancing the remit of the criminal law within this area, rather than public safety itself. Affording the public recourse to legal remedies does not, in and of itself, increase public safety. An increase in public safety would be illustrated by a reduction in the harm caused by dogs on private property, whereas providing a harmed individual with some form of redress under the criminal law does not equate to increasing that individual's safety if harm has already occurred.

Does Type-specific Legislation Enhance Public Safety?

As noted above, it is notoriously difficult to determine whether a dog falls within the specific category. The law is therefore potentially difficult to enforce in this regard, as well as being unlikely to satisfactorily enhance public safety, given that dogs falling within that "type" are not necessarily those which attack people. This is one of the reasons why type-specific legislation does not receive broad support from those working within this area. Hussain, after a thorough examination of statistics regarding type-specific legislation and its effectiveness, concluded that:

"... breed-specific legislation, and breed-based bans in particular ... [ignore] the effects of ownership and environment on a dog's behaviour and [ignore] or [eliminate] the rights of responsible owners. Breed-specific laws regulate or destroy dogs regardless of prior conduct and may require even responsible dog owners to sacrifice their rights to private property and, as is often the case with dogs, members of their families."⁸¹

⁷⁶ Bleasdale-Hill, above n. 51.

⁷⁷ Liberty's Report Stage Briefing on the Anti-social Behaviour, Crime and Policing Bill in the House of Commons (October 2013), available at https://www.liberty-human-rights.org.uk/sites/default/files/Liberty-s-Report-Stage-Briefing-on-the-ASBCP-Bill-in-the-House-of-Commons-Oct-2013_0.pdf (accessed 11 December 2015).

⁷⁸ F. Leverick, "Is English Self-Defence Law Incompatible with Article 2 of the ECHR?" [2002] 5 Criminal Law Review 347-62.

⁷⁹ See for example *McCann and Others v United Kingdom* (1996) 21 EHRR 97.

⁸⁰ *Ibid.*

⁸¹ Gray Hussain, above n. 56 at 2883.

Furthermore, Shulan has commented on the minimal extent to which such legislation can hope to increase public safety:

"... most of the breed-bans set forth in municipal codes represent a knee-jerk approach meant to ensure the safety of vulnerable citizens following a well-publicised and especially vicious attack. Yet such an approach only improves the safety of the community if there are a number of otherwise model, law-abiding citizens who happen to be harbouring vicious dogs--of named breed(s)--in an irresponsible manner that permits grossly violent incidents to occur. In effect, the registration approach merely infringes upon the civil liberties of a substantial number of dog owners who have nurtured docile and loving pets that pose no threat to the community, while incentivising rogue ownership and poor breeding practices of the most potentially dangerous breeds by non-law-abiding citizens."⁸²

Despite the difficulty with this approach, type-specific legislation seems to have been retained for several reasons; first, because of the risks *potentially* posed by the banned types of dogs. For example, specific types' particular physical strength and sometimes unpredictable nature have been cited as reasons for type-specific, legislative approaches.⁸³ However, it is suggested that such a blinkered focus on a specific type's *potential* to cause harm is unhelpful; it unnecessarily clouds an already hazy rationale. Instead, it is submitted that legislation against dangerous dogs needs to be founded on supporting data rather than anecdotes. Secondly, type-specific laws remain part of the government's approach to protecting the public from dangerous dogs and encouraging responsible dog ownership due to ministerial and police concerns "about the risk that unrestricted ownership of section 1 dogs ("dogs bred for fighting') could present to the public".⁸⁴ Finally, it seems that type-specific laws continue to limp along because there is no feasible substitute, not least because it is "impossible to change the view of the public and media".⁸⁵ In 2010, DEFRA consulted on a number of matters pertaining to the existing dangerous dogs legislation, including asking whether the current form of breed-specific legislation was effective in protecting the public from dangerous dogs, and whether such laws should be repealed.⁸⁶ DEFRA noted that some "welfare groups, local authority interests and the Association of Chief Police Officers consider that while breed-specific law is not easy to enforce at present, there are no viable alternatives and it should not be repealed."⁸⁷

Nevertheless, the authors would question whether an outright ban on a limited number of breeds can be justified on the grounds of public safety. It has already been noted that such an approach does not necessarily meet the intended aim of enhancing public safety (the "benefit'), given that breed is only one factor which determines a dog's propensity to attack people, yet dogs could be removed from their owners for assessment or put down (the "risk') without those owners having previously realised that their dog might fall within the description of a particular type of prohibited breed.⁸⁸ Furthermore, the focus on type once again tends towards absolving owners of responsibility for their *own* behaviour towards their dogs--as stated earlier, evidence suggests that dogs are more likely to be violent or dangerous as a consequence of how they have been raised or treated, as opposed to an innate propensity towards violence.

There is no question that the reduction of dog bites is an important issue that requires government attention and action. Breed bans, however, gloss over the complexity of the issue and apply a superficial fix to an expansive problem. The proper attention to the pit bull problem requires the study of regulatory alternatives that will root out the causes of the problem, rather than the symptoms. Irresponsible human actions will continue to produce dangerous dogs as long as legislation leaves human conduct unchecked. Banning an entire breed from existence

⁸² Above n. 55 at 277-78.

⁸³ S. Collier, "Breed-Specific Legislation and the Pit Bull Terrier: Are the Laws Justified?' (2006) 1 Journal of Veterinary Behavior 17-22 at 20-1.

⁸⁴ DEFRA, Public Consultation on Dangerous Dogs: Does Current Dangerous Dogs Legislation Adequately Protect the Public and Encourage Responsible Dog Ownership? (DEFRA: London, 2010) at 17.

⁸⁵ Kaspersson, above n. 58 at 215. Note further Hood, above n. 1 at 296.

⁸⁶ DEFRA, above n. 84 at 16.

⁸⁷ Ibid. at 15.

⁸⁸ Burstein, above n. 62 at 320.

will not alter irresponsible human behaviour, nor will it reduce the number of dangerous dogs resulting from this behaviour.⁸⁹ A true solution requires bringing the issue of irresponsible and inhumane ownership to the forefront.⁹⁰

Conclusion

A review of two issues pertaining to the 2014 Act--the extension of the Dangerous Dogs Act 1991 to private places and the ongoing application of type-specific legislation--demonstrates how the law relating to dangerous dogs is pock-marked by a multitude of uncertainties, and explains why this area is the subject of ongoing criticism and concern. Type-specific legislation has been heavily criticised at both national and international levels on the basis that it does not necessarily result in greater public safety and is potentially very damaging to both owners and their dogs. It has been extensively argued that this aspect of the legislation needs to be reconsidered. For example, the Chief Executive for the Royal Society for the Prevention of Cruelty to Animals, when giving evidence to the House of Commons Public Bill Committee, stated that he wished for the government to reconsider the amendments within the 2014 Bill (as was), on the grounds that:

"In 1991, this House got it fundamentally wrong. A piece of legislation was passed with the best of intent that simply failed to deal with the dog attacks that had occurred in that summer and the previous one. It attempted to prevent certain breeds of animal--ill defined--coming into this land. That was the intent of the 1991 Act ... We warned at the time that breed-specific legislation and the approach that was being taken, without a comprehensive underpinning, would singularly fail to deal with the problem. Here we are 22, 23 years later, and sadly--I hate to say it--our words have been proven correct."⁹¹

The extension of dangerous dog law to the private sphere is similarly problematic in that it places unclear expectations upon householders with dogs on their premises, and there are ambiguities around how far the definition of "dwelling" extends. Such uncertainties are problematic in their potential to undermine the purpose behind the legislation.

A possible solution to these problems would be to create a consolidated piece of legislation. Such recommendations have been made for many years,⁹² yet the authors would argue that further legislation *alone* is unlikely to reduce the problem of dangerous dogs to the desired extent. Merely legislating in order to ensure that owners are more responsible and humane, or that owners who do not reach such standards are banned from owning dogs, is ineffective as a solitary measure. Responsible owners will respond to such legislation accordingly, but could nevertheless become inadvertently entangled within it (as highlighted during the analysis of breed-specific legislation). Less responsible owners are either likely to be dealt with only after an incident has occurred (the legislation thereby failing in its intended mission to reduce the number of attacks by dogs), or could be encouraged to take steps to circumvent whichever laws are in place by, for example, obtaining dogs through the black market. Irresponsible dog ownership has numerous factors underpinning it and the authors would argue that it ought to be tackled in a nuanced manner. It is possible that the historical ineffectiveness of legislation in this area can in part be attributed to an assumption that dog owners fall within two distinct categories: responsible and irresponsible individuals. The authors suggest that further research into such an assumption needs to be conducted, which would usefully examine the motivations of the "classic" irresponsible groups (such as those who knowingly breed and keep banned or dangerous dogs), as well as owners of dogs who might be described as more responsible but who still engage in objectively risky behaviour (such as, for example, knowingly retaining possession of a banned type of dog following the birth of a child). A cultural shift in both the legal framework governing this area and public attitudes could usefully be informed by cultural

⁸⁹ See, for example, Padfield's overview of the prosecution and sentencing rates in this area, above n. 40 at 471.

⁹⁰ Medlin, above n. 58 at 1318.

⁹¹ House of Commons Public Bill Committee: Anti-Social Behaviour, Crime and Policing Bill (20 June 2013) at c111.

⁹² Most recently, by Clarissa Baldwin, Chief Executive of the Dogs Trust when giving evidence to the House of Commons Public Bill Committee: Anti-Social Behaviour, Crime and Policing Bill (20 June 2013) at c108.

shifts which have occurred in other areas of policy concern, such as a reduction in behaviour harmful to health (for example, smoking) and reducing the rate of unplanned pregnancies. Whilst such issues might initially appear to be startlingly different to that under discussion within this paper, the authors would argue they share common ground in being concerned with behaviour underpinned solely, or in combination with, matters of lack of information, unawareness of preventative measures and an assumption (or hope) that potential problems will not arise from the behaviour for that specific individual.

The authors acknowledge the sheer scale and complexity of effecting a cultural change in this area, but the historical evolution of dangerous dogs law has illustrated just how ineffective legislation alone can be in both responsabilising dog owners and increasing public safety. Further research could beneficially determine how to disincentivise individuals from engaging in illicit activities with dogs.