

DISCUSSION PAPER - THE CRIMINAL LAW DEALING WITH DANGEROUS DOGS

February 2021



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DISCUSSION PAPER – THE CRIMINAL LAW DEALING WITH DANGEROUS DOGS

Ministerial foreword



In September 2019, I published a consultation seeking views on possible changes to help improve the existing civil system of how out of control dogs are dealt with in our communities. I also promised there would be a further review published looking at wider dog control measures with a specific focus on the criminal offence of a dog being allowed to be dangerously out of control contained in the Dangerous Dogs Act 1991. This review takes forward that commitment.

As a result of the initial consultation, there was strong support for the establishment of a dog control database to help enforcement agencies keep track of those irresponsible dog owners who allow their dogs to be out of control. Working with local authorities, progress is being made to work towards establishing a dog control database.

Recently the Scottish Government has published updated statutory guidance in respect of the operation of the Control of Dogs (Scotland) Act 2010. This again will aid enforcement agencies, especially local authorities, as they seek to help keep communities safe. And there is also a refreshed dog control protocol which enforcement agencies can use to help understand who has responsibility for dealing with different types of dog control incidents.

The action noted above is all part of the regime designed to encourage responsible dog ownership so that action is taken when dogs are found to be out of control, but before they become dangerous.

It is unfortunate that despite the efforts to encourage responsible dog ownership, there are still dogs that can on occasion act in a dangerously out of control way.

The vast majority of Scotland's estimated 600,000 dog owners are responsible, take good care of their dogs and are able to experience the benefits of dog ownership.

For the small minority, however, who do not properly control their dogs, this review is focused on steps that might be taken to improve the way in which the criminal law may deal with dog owners where their dogs act in a dangerous way. Any changes must help improve safety from dangerous dogs especially where dogs are out of control in public places.

The views offered will, along with the views offered in the previous consultation, help shape decisions in the next Parliamentary session as to what legislative changes should be progressed. The decision to progress any legislative changes will be for the next Scottish administration to take. I would encourage you to please take the time to consider the questions in this document and provide your views.

A handwritten signature in black ink, appearing to read 'Ash Denham', written in a cursive style.

Ash Denham MSP, Minister for Community Safety
February 2021

Overview

The main criminal law legislation that operates in Scotland in relation to dogs is the Dangerous Dogs Act 1991 (“the 1991 Act”). This was legislation passed by the UK Government at Westminster and, with the exception of section 8 which also extends to Northern Ireland, the Act extends to England and Wales, and Scotland.

Section 3 of the 1991 Act (“section 3 offence”) deals with threatening behaviour or attacks by any type of dog. It provides that, if a dog is dangerously out of control in any place (whether or not a public place), the owner (or if different, the person for the time being in charge of the dog) is guilty of an offence. This offence is aggravated if the dog injures a person whilst out of control. Section 10(3) provides a definition of “dangerously out of control” and states that a dog can be regarded as being dangerously out of control if there are grounds for reasonable apprehension that it will injure a person, whether or not it actually does.

It is important to note that Scotland has taken a different approach to the statutory interpretation of the section 3 offence as compared with England and Wales. This different approach is reflected in the discussion contained within this paper.

The question whether there are grounds for reasonable apprehension that a dog will injure any person is ultimately a matter for the courts to decide based on the facts and circumstances of each individual case.

However, the way the offence has been interpreted by the Scottish courts means that it requires that the owner, or person in charge of the dog, had a *reasonable apprehension* that the dog will injure any person, whether or not it actually does so. Therefore prior actings of the dog and the fact that the owner knew about them require to be established in order for an offence to be committed.

In criminal law policy terms, this approach reflects that it may be seen as unfair to hold a person criminally liable for the actions of their dog if that person had no prior warning and/or no reason to suspect that their dog would act in a dangerously out of control manner. The existence of this requirement as part of the offence can prove to be a difficult evidential hurdle, as the police and prosecutors require to carry out inquiries into the previous behaviour of the dog and the knowledge held by the dog owner/person in charge of the dog. If this reasonable apprehension cannot be established, then proceedings cannot be taken regardless of any injury suffered as a result of a dog attack.

This review will explore why the criminal law is framed and operates in this way in Scotland. We are seeking initial views on whether this is an appropriate approach or whether there could be a different way in approaching how the criminal law can hold to account dog owners and others who allows dogs to act in a dangerous manner.

The focus of the review is on the section 3 offence in the 1991 Act. However, wider views can be offered on some other issues relating to dangerous dogs as part of this review.

Why we are consulting

All of the comments received will be considered as potential changes in the areas discussed are assessed.

Consultation contents

This discussion paper relates to the operation of the 1991 Act. In particular, it is focused on the criminal offence of a dog being dangerously out of control. It also allows respondents to offer views on wider dog control law as they see fit.

Responding to this Consultation

We are inviting responses to this consultation by 30 April 2021.

Please respond to this consultation using the Scottish Government's consultation hub, Citizen Space (<http://consult.gov.scot>). Access and respond to this consultation online at <https://consult.gov.scot/justice/criminal-law-dealing-with-dangerous-dogs/>. You can save and return to your responses while the consultation is still open. Please ensure that consultation responses are submitted before the closing date of 30 April 2021.

Handling your response

When responding using the consultation hub, you will be directed to the About You page before submitting your response. Please indicate how you wish your response to be handled and, in particular, whether you are content for your response to be published. If you ask for your response not to be published, we will regard it as confidential, and we will treat it accordingly.

All respondents should be aware that the Scottish Government is subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made to it under the Act for information relating to responses made to this consultation exercise.

To find out how we handle your personal data, please see our privacy policy: <https://www.gov.scot/privacy/>

Next steps in the process

Where respondents have given permission for their response to be made public, and after we have checked that they contain no potentially defamatory material, responses will be made available to the public at <http://consult.gov.scot>. When you use the consultation hub to respond, you will receive a copy of your response via email.

Following the closing date, all responses will be analysed and considered along with any other available evidence to help us. Responses will be published where we have been given permission to do so. An analysis report will also be made available.

Comments and complaints

If you have any comments about how this consultation exercise has been conducted, please send them to the contact address above or at dogsconsultation@gov.scot.

Scottish Government consultation process

Consultation is an essential part of the policymaking process. It gives us the opportunity to consider your opinion and expertise on a proposed area of work.

You can find all our consultations online: <http://consult.gov.scot>. Each consultation details the issues under consideration, as well as a way for you to give us your views, either online, by email or by post.

Responses will be analysed and used as part of the decision making process, along with a range of other available information and evidence. We will publish a report of this analysis for every consultation. Depending on the nature of the consultation exercise the responses received may:

- indicate the need for policy development or review
- inform the development of a particular policy
- help decisions to be made between alternative policy proposals
- be used to finalise legislation before it is implemented

While details of particular circumstances described in a response to a consultation exercise may usefully inform the policy process, consultation exercises cannot address individual concerns and comments, which should be directed to the relevant public body.

Introduction and background

The consultation published in September 2019 by the Scottish Government, Steps to Improve the Operational Effectiveness of the Control of Dogs (Scotland) Act 2010 (“the 2010 Act”), explored a number of areas relating to the civil regime in place to help keep dogs under control in communities. This regime is intended to act as a preventative regime so that dogs that are out of control are brought under control by more responsible dog ownership before they become dangerous.

At the heart of the 2010 Act regime is an ability for local authority ‘authorised officers’ to be able to impose dog control notices (DCNs) on any dog owner who allows their dog to be out of control. The DCN is a civil notice which can contain a number of conditions such as requiring a dog to be on a lead when in public.

Notwithstanding the establishment of the dog control notice regime in 2011, there exists various criminal law relating to the behaviour of dogs and the liability of dog owners. The main criminal offence in this area is section 3 of the Dangerous Dogs Act 1991.

This review will focus on this offence as well as allowing people to offer views on certain other issues relating to the law and dangerous dogs.

Keeping dogs under proper control – the criminal offence of a dog being dangerously out of control

Current law

The relevant law in this area as it is currently provided in Scotland is as below:

Section 3 of the Dangerous Dogs Act 1991 - Keeping dogs under proper control

(1) If a dog is dangerously out of control in any place (whether or not a public place)—

(a) the owner; and

(b) if different, the person for the time being in charge of the dog, is guilty of an offence, or, if the dog while so out of control injures any person or assistance dog, an aggravated offence, under this subsection.

(2) In proceedings for an offence under subsection (1) above against a person who is the owner of a dog but was not at the material time in charge of it, it shall be a defence for the accused to prove that the dog was at the material time in the charge of a person whom he reasonably believed to be a fit and proper person to be in charge of it.

(3) [...]

(4) A person guilty of an offence under subsection (1) above other than an aggravated offence is liable on summary conviction to imprisonment for a term not exceeding six months or a fine not exceeding level 5 on the standard

scale or both; and a person guilty of an aggravated offence under that subsection is liable—

(a) on summary conviction, to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum or both;

(b) on conviction on indictment, to imprisonment for a term not exceeding two years or a fine or both.

In addition, section 10(3) of the 1991 Act provides the following:

For the purposes of this Act a dog shall be regarded as dangerously out of control on any occasion on which there are grounds for reasonable apprehension that it will injure any person or assistance dog, whether or not it actually does so, but references to a dog injuring a person or assistance dog or there being grounds for reasonable apprehension that it will do so do not include references to any case in which the dog is being used for a lawful purpose by a constable or a person in the service of the Crown.

In the years since the section 3 offence came into force in Scotland, there have been a number of cases where courts have interpreted what is required for an offence under section 3 to be committed. This case law has generally focused on what it means for a dog to be dangerously out of control including what is meant by the concept of reasonable apprehension.

In general terms, the courts in Scotland have found that an offence is only committed where there has been knowledge or expectation on the part of the person that the dog in question would have acted in the manner it did¹.

This usually would require to be a relevant prior incident where the dog has acted in a manner that would give some sort of warning that it may act in a dangerously out of control manner. This does not mean the dog must previously have, say, bitten a person which the dog owner was aware of (though that could clearly be relevant evidence of reasonable apprehension in a given case), but it could be any relevant behaviour such as, for example, a dog has a history of acting in an aggressive and overly excitable manner in certain situations e.g. when close to children.

The requirement for reasonable apprehension effectively means that the dog owner (or person in charge of the dog at the time of an incident) is not liable under the existing criminal law where that dog, without warning, unexpectedly bites a person or an assistance dog.

This contrasts with the situation where a dog owner (or person in charge of the dog at the time of an incident) is liable under the criminal law if they do have reasonable apprehension that their dog/the dog they are looking after has a certain predisposition to act in a manner that may give rise to the dog behaving in a dangerous manner.

¹ This differs from case law in England and Wales and it is important to note the discussion in this paper relates to possible policy reforms that would apply only in Scotland.

In considering the operation of the criminal law in Scotland in this area, it is important to note that corroboration of the essential elements of a criminal offence is required. This would normally be evidence from at least 2 separate sources. This is a general requirement under Scots law rather than any specific requirement relating to the section 3 offence; however it does seem relevant in assessing potential changes to the law in this area.

The operation of corroboration dictates the ability of enforcement agencies to take relevant action in a given case. For example, this evidential requirement may be particularly relevant in relation to e.g. establishing the owner of a dog where the owner is not a responsible citizen or in the particular circumstances of such offences e.g. the only persons present at the time of the incident are the dog owner and the victim.

This criminal law policy approach of requiring reasonable apprehension is embedded within the operation of the section 3 offence. The provisions contained in the 1991 Act were based on a UK Government consultation published in 1990. When the relevant legislation was being debated in the Houses of Parliament in 1991, there was not much specific debate and scrutiny of this particular requirement within the operation of the section 3 offence.

During one of the Parliamentary debates whilst the section 3 offence was being developed, the UK Government Minister Angela Rumbold, Minister of State at the Home Office, said in the House of Commons:

*'... the new offence will apply more widely and I hope that it will be easier to enforce. It will attract higher penalties than the current offence. Those who allow their dogs to cause injury to others must know that they will be liable to the criminal law. It is essential that that is clearly understood.'*²

Although it is far from clear, this reference to the policy intent of criminalising dog owners who 'allow' their dogs to cause injury may be seen as the policy intent of the section 3 offence. In other words, one interpretation of the UK Government policy approach was to provide for criminal liability only where there was some fault on the part of the dog owner in allowing their dog to act in a dangerously out of control manner. However, this is not clear and this is only tentatively suggested as a possible interpretation of the UK Government policy approach.

Difference in case law in Scotland as compared to England and Wales

Although the wording of the criminal offence is almost identical in Scotland and England and Wales, this area of law is complex and there would appear to have been a divergence of approach taken in statutory interpretation between Scotland and England and Wales in the years following the introduction of the section 3 offence.

This divergence relates to how reasonable apprehension is to be considered as part of the operation of the offence.

² [23 May 1991 House of Commons debate](#)

Scotland

A discussion paper would not necessarily normally seek to explain case law, but it is important to be aware of relevant case law in this particular area as it lies at the heart of the policy issues arising when assessing whether the section 3 offence should be adjusted.

To help understand this difference in approach, a short summary of relevant case law which shows how the criminal courts in Scotland have interpreted the provision is given below.

Norman v Lucas 1993 GWD 15-975

It was held that a court had erred in upholding a submission of no case to answer where a Jack Russell terrier had bit and injured C and M. The dog had been invited to sit on C's knee and had bit her face. Sometime after whilst C had been attended to by M it bit M. Whilst it could not be concluded that the dog was dangerously out of control before it bit C, it could be inferred thereafter that it could injure someone.

Tierney v Valentine 1994 SCCR 697 (the leading case)

Two children were bitten in a play park but it was held that this amounted to a single incident and that there was no stage at which it could be said there were reasonable grounds for apprehension that the dog would injure before the incident was over.

Louden v Howdle 1995 GWD 14-762

Evidence existed that the dog was often unsupervised, had caused nuisance prior to biting and that a neighbour had shouted a warning to the boy who was bitten. The court found that was sufficient evidence that the dog dangerously out of control i.e. there was reasonable apprehension.

Littlejohn v McLeod 1999 JC 333

It was held that there was no reasonable apprehension that the dog would bite where the victim stated that the accused had trouble controlling the dog as it approached, and that it had broken free and bitten him several times. This was because there was no significant interval between the bites.

McIlwaine v Higson 2000 GWD 31-1211

Two bull mastiffs escaped from M's house and attacked and severely injured an 8 year old. It was held that on previous occasions the dog had behaved aggressively towards a postman and neighbour, the accused was not aware of this but damage to post and the neighbour's fence coupled with the dogs size and weight made it likely they would injure unless kept under control and M ought to have appreciated this. Reasonable apprehension was established.

Thomson v Hutchison 2010 SCCR 193

A dog carried out a sustained and frenzied attack on another dog for around 8 minutes before the dog's owner was injured in bringing the dog under control. It was held there was a reasonable gap in time from when the incident started to when it ceased for reasonable apprehension that the dog would injure someone.

England and Wales

In England and Wales, case law suggests the criminal courts have interpreted the relevant provision differently than in Scotland. The following are some examples of this:

R v Bezzina [1994] 1 WLR 1057

It was held that the 1991 Act imposed absolute liability upon the owner of a dog which was shown to have acted in a way which gave reasonable grounds for apprehension it would injure and it was no defence that the owner had no realisation the dog might behave in such a way and it was for the owner to ensure that it did not.

Rafiq v DPP [1997] 161 JP

It was held an attack without warning was capable of being conduct giving grounds for reasonable apprehension of injury.

R v Gedminintaitė [2008] EWCA Crim 814

A case where a Rottweiler being walked on a lead bit a passerby. It was held when the dog bit there was reasonable apprehension it would injure and thus when it bit it was out of control. Moreover the definition of when a dog was dangerously out of control was not limited to the definitions listed in section 10 of the 1991 Act so long as the straightforward words of section 3 were satisfied.

Views sought on possible approaches to dog control criminal law

It would be helpful to understand what views are held as to how the criminal law should operate in this area.

This discussion paper does not propose a specific policy preference, but rather lays out two general approaches that could be adopted. There may be other general approaches that could be adopted. The views offered will help as further policy development is considered.

Option 1 - placing an absolute responsibility on dog owners as to the behaviour of their dogs

The criminal law could be reformed in a way that a dog owner (and/or person in charge of a dog) is held criminally liable if their dog acts in a manner where, say, a person is injured and/or where a person has reasonable grounds to suffer fear or alarm that they are about to be injured by a dog.

This would not require any reasonable apprehension to be proven on the part of the dog owner (or person in charge of the dog) that the dog would act in this way.

This approach could be seen as placing an absolute responsibility for dog owners to be responsible for the actions of their dogs at all times. This is because there would be no requirement to prove beyond reasonable doubt that a dog owner should have known that their dog would act in such a manner. Such a requirement would be irrelevant in respect of an offence being committed.

In a given situation, this could mean a dog owner whose dog has no history of aggressive behaviour and is generally always kept under effective control could be criminally liable if their dog acts in a completely out of character manner in, say, nipping a child's finger when the child got too close to the dog.

In another given situation however, this would mean a dog owner whose dog did have tendencies to be aggressive in certain situations and where the dog owner does not generally always keep their dog under effective control could be held criminally liable if a dog attack occurs. Importantly, however, this criminal liability would arise without the need to prove the dog owner should have had a more effective approach of keeping their dog under control the dog's tendency to act in an aggressive manner.

Option 2 - requiring some knowledge on the part of the dog owner or person in charge of a dog that the dog would act in a dangerously out of control manner

The criminal law could be largely maintained in its present state so that a dog owner (and/or person in charge of a dog) continues to be able to be held criminally liable if their dog acts in a manner which is dangerous only where the owner/person in charge should have had some awareness/ reasonable apprehension that the dog would act in this way.

In a given situation, this would continue to mean a dog owner whose dog has no history of aggressive behaviour and is generally always kept under effective control would not be criminally liable if their dog acts in a completely out of character manner in, say, nipping a child's finger when the child got too close to the dog.

In another given situation however, this would mean a dog owner whose dog did have tendencies to be aggressive in certain situations and where the dog owner does not always keep their dog under effective control could be held criminally liable if a dog attack occurs. However, in order for criminal liability to arise, it would be necessary to prove that the dog owner should have had a more effective approach of keeping their dog under control given the dog's tendency to act in an aggressive manner.

Summary

While there are other options for how the criminal law in this area could be approached, in order to help inform the further policy development that will be necessary, this discussion paper has presented these two options in order to elicit views on the manner and area where policy development should focus.

The overall aim of any policy reforms would be to balance fairness for those who own dogs as to their responsibilities and potential for criminal liability arising from actions by their dogs with the need for effective laws to protect public safety.

It would be helpful to understand the views of consultees as to whether criminal liability in the area of dangerous dogs should be adjusted in light of the two options presented above.

Do you think option 1 or option 2 is the preferred model for criminal liability falling on dog owners/persons in charge of a dog in the area of dangerous dogs?

If you wish to offer an explanation as to how you have arrived at your preference, please do so below.

Further issues

Seizure of dogs

There are various powers available in respect of certain persons being able to seize dogs.

Section 9 of the Control of Dogs (Scotland) Act 2010 provides a power for a local authority to make an application to the court for a dog to be subject to a destruction order. This is in the circumstances when the authorised officer considers a dog is out of control and dangerous to such an extent that serving a DCN (or a further DCN) would be inappropriate.

The process laid out in section 9 of the 2010 Act empowers the court to decide whether to grant a destruction order in respect of the dog and, if decided that its destruction should take place, require that the dog be delivered up for that purpose. However, there are no powers contained within section 9 which permit a dog to be seized pending consideration of the application for a destruction order.

There are powers of seizure available within the 1991 Act.

Section 5(1)(c) of the 1991 Act allows a constable or an officer of the local authority authorised to carry out the powers of that subsection to seize *any* dog in a public place which appears to him to be dangerously out of control. However, where a dog is not in a public place, only a constable has the power to seize the dog (section 5(1A) of the 1991 Act).

The use of these powers may also provide a further limitation with regard to the circumstances in which a dog can be seized pending the consideration of a destruction order under section 9 of the 2010 Act. Given these limitations there is a risk that on some occasions the local authority would have no powers of seizure under the 2010 Act.

In particular, in a situation where a prosecution is being progressed against the owner of a dog due to, say, a person being seriously injured by their dog, there may not be sufficient flexibility in the current law to allow the dog to be seized pending the outcome of the case.

On the other hand, section 5(2) of the 1991 Act provides that where a justice of the peace or sheriff is satisfied by evidence on oath that there are reasonable grounds for believing that an offence under the 1991 Act has been committed or that

evidence of the commission of any such offence is to be found, he may issue a warrant authorising a constable to enter certain premises and to search them and seize any dog or other thing found there which is evidence of the commission of such an offence.

There may be a requirement for further limited flexibility in the law in this area to address situations where powers in either the 1991 Act or the 2010 Act are seen as insufficient for consideration to be given to a dog being seized pending consideration of a destruction order being sought.

Do you think new powers should be provided for seizure of dogs in respect of where a court is considering whether a destruction order is being sought and/or in other situations involving dangerous dogs?

Consolidation of legislation

The law in the area of dog control is provided for across a range of current legislation. As outlined in this discussion paper, the Dangerous Dogs Act 1991 provides for criminal law measures for dog owners and persons in charge of dogs. The Control of Dogs (Scotland) Act 2010 provides for a civil regime in respect of dog owners who allow their dogs to be out of control. There is also other legislation which contains provisions relating to dog control.

As part of any reform to certain aspects of legislation relating to the control of dogs, consideration could be given to consolidation of relevant legislation into one new piece of dog control legislation. In itself, consolidation does not adjust the operation of existing laws, but bringing together relevant legislation into one overall enactment can make it more user friendly and accessible.

Do you think relevant legislation should be consolidated?

Please provide any further views on the criminal law and dangerous dogs below.

Next steps

All of the responses to this consultation will be considered as next steps in each of the areas discussed are assessed. Following the next Scottish elections in May 2021, it will be for the next Scottish Government to decide on whether policy in this area should be progressed.

Title – Discussion Paper – The Criminal Law Dealing With Dangerous Dogs

RESPONDENT INFORMATION FORM

Please Note this form **must** be completed and returned with your response.

To find out how we handle your personal data, please see our privacy policy:

<https://www.gov.scot/privacy/>

Are you responding as an individual or an organisation?

- Individual
- Organisation

Full name or organisation's name

Phone number

Address

Postcode

Email

The Scottish Government would like your permission to publish your consultation response. Please indicate your publishing preference:

- Publish response with name
- Publish response only (without name)
- Do not publish response

Information for organisations:

The option 'Publish response only (without name)' is available for individual respondents only. If this option is selected, the organisation name will still be published.

If you choose the option 'Do not publish response', your organisation name may still be listed as having responded to the consultation in, for example, the analysis report.

We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again

in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

Yes

No



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This publication is available at www.gov.scot

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The Scottish Government
St Andrew's House
Edinburgh
EH1 3DG

ISBN: 978-1-80004-630-6 (web only)

Published by The Scottish Government, February 2021

Produced for The Scottish Government by APS Group Scotland, 21 Tennant Street, Edinburgh EH6 5NA
PPDAS822166 (02/21)

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