

Using the law to address harmful conformation in dogs: Is a breed-specific breeding ban the answer?

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Introduction

The case brought by the Norwegian Society for the Protection of Animals (NSPA) seeking to have future breeding of English Bulldogs (Bulldogs) and Cavalier King Charles Spaniels (Cavaliers) banned in Norway has generated significant publicity.¹ The NSPA argues that the high risk of offspring suffering ill-health due to their conformation means any further breeding of Cavaliers and Bulldogs should be prohibited under Norwegian animal welfare legislation. Whilst the Norwegian Court of Appeal agreed that this was the position for Cavaliers, it overturned the ban in respect of English Bulldogs. Regardless of its eventual outcome, the case has highlighted the plight of these dogs and the potential role for the law in tackling it. Norway is not alone in exploring robust legal measures to address breed health. Other European countries have placed severe restrictions on breeding dogs that suffer poor health and welfare due to their conformation.

Particular cause for concern are the brachycephalic (short-muzzled) breeds, like the English Bulldog, the French Bulldog and the Pug. Although the health issues are well-known, the popularity of these breeds in the UK continues to rise at a staggering rate,² leading vets and

welfare organisations to call for more effective legal intervention including, if necessary, a potential breed ban.³ Various views have been expressed on the state of current UK law and the need for change. Some insist that further legislation is needed to protect offspring,⁴ whilst others argue that the UK already has the legislation to prohibit breeding of individual dogs with harmful conformations, it just needs to be better enforced.⁵ Legal analysis, however, is scarce.⁶ This article aims to contribute to this discussion by assessing the scope of the current law and some possible options for future action.

We start by identifying the welfare issues associated with brachycephalic breeds and the rationale for legal intervention. Part two addresses the current law in the UK. We argue that existing rules could – and should – be used much more effectively to protect the health and welfare of dogs but are unlikely to provide the foundation for a ban on breeding specific breeds. Ideally, new legislation will be developed in co-operation with relevant stakeholders to create a workable regime applicable to all breeders. The third part outlines the approaches taken by selected European jurisdictions, which feeds into an assessment – in part four – of the pros and cons of

dog have risen from 4,782 in 2012 to 15, 403 in 2021 <https://www.thekennelclub.org.uk/media/2400/10yr-statsutility.pdf>

3 vetsagainstbrachycephalism.com

4 Dog Breeding Reform Group (DBRG) Policy Position Paper on the Animal Welfare Act 2006 and the protection of offspring (undated), 3.1.7, 3.2.3

5 UK Brachycephalic Working Group, press release 4th Feb 2022

6 DBRG Position Paper (n.4), is a rare example.

1 Case: 043798ASD-BORG/01

2 Kennel Club registrations for the English Bull-



a breed ban versus alternative approaches. The fifth part concludes with some suggestions for future steps in the UK.

Part 1: Why is legal intervention needed?

1.1 The health and welfare situation of brachycephalic dogs

The flat face of brachycephalic breeds is highly distinctive and – for many – hugely attractive. Yet, a substantial body of evidence shows that brachycephalic breeds are at high risk of suffering a range of disorders intrinsically linked to their distinctive conformation, including respiratory disease, eye disease, dystocia, spinal disease, heat stroke and pneumonia.⁷ Many of these diseases are extremely distressing for the dogs, as well as being upsetting and expensive for their owners. One key concern is Brachycephalic Obstructive Airways Syndrome (BOAS) which can induce feelings of suffocation and

⁷ D. O'Neill and others, 'Unravelling the health status of brachycephalic dogs in the UK using multivariable analysis' (2020) *Scientific Reports* 1, 1

even loss of consciousness.⁸ The precise genetic and environmental factors causing a dog to develop these disorders are complex.⁹ Nevertheless, because the disorders are inextricably linked to the conformation of these breeds, the likelihood of those problems being passed to offspring is very high.¹⁰

Dogs have been placed in this position through our selective breeding practices that have prioritised human aesthetic preferences over their health and welfare. We have made them more and more extreme because they are perceived as, amongst other things, being cuter or more appealing like that, as well as being more companionable and more compatible with our - in-

⁸ Kennel Club and Cambridge University Press, *Respiratory Function Grading Scheme Protocol for Assessors*: <https://www.vet.cam.ac.uk/system/files/documents/FrenchbulldogandbulldoggradingschemeKC.pdf>

⁹ L. Farrell and others, 'The challenges of pedigree dog health: approaches to combating inherited disease' (2015) *Canine Genetics and Epidemiology* 2

¹⁰ O'Neill (n.7)

creasingly sedentary - lifestyles.¹¹ The preference for these exaggerated morphologies has largely been generated by breed standards created and enforced by the Kennel Club, breed clubs and show judges over the last 100 or more years.¹² It is now reinforced amongst the public through social media and celebrity endorsement.

The English Bulldog is a striking example. Formerly a breed capable of bringing down a bull, its physical features have been so exaggerated by selective breeding that it is subject to a host of ailments.¹³ Even the healthiest English Bulldog will experience reduced exercise tolerance compared to non-English Bulldogs.¹⁴ But many will suffer more than this. During a relatively short life¹⁵ they face a predisposition more than four times higher than non-English Bulldogs to BOAS, as well as other disorders of the skin, eyes and jaw.¹⁶ Yet in 2022 they are one of the most sought-after breeds by consumers.¹⁷ A recent study from the Royal Veterinary College called for 'urgent action to redefine the English Bulldog away from its current extreme conformation and instead to move the breed rapidly towards a moderate conformation on welfare grounds.'¹⁸

1.2 What can we do?

Despite widespread agreement amongst stakeholders that the health status of certain breeds

11 R. Packer, 'Flat-Faced Fandom: Why do people love brachycephalic dogs and keep coming back for more?' in R. Packer and D. O'Neill (eds), *Health and Welfare of Brachycephalic (Flat-Faced) Companion Animals: A Complete Guide for Veterinary and Animal Professionals* (Taylor & Francis Group 2021)

12 A. Skipper, 'A Historical Perspective on Brachycephalic Breed Health and the Role of the Veterinary Profession' in Packer and O'Neill (n. 11)

13 D. O'Neill and others, 'English Bulldogs in the UK: a VetCompass study of their disorder predispositions and protections' (2022) *Canine Medicine and Genetics* 5

14 L. Lilja-Maula and others, 'Comparison of sub-maximal exercise test results and severity of brachycephalic obstructive airway syndrome in English bulldogs' (2016) *The Veterinary Journal* 219

15 O'Neill (n.13)

16 Ibid. (With true levels of these disorders likely to be much higher, 10, 12)

17 Kennel Club (n.2)

18 O'Neill (n.13) 8

is undeniably poor and requires action, opinion varies over the necessary steps to improve breed health.¹⁹ One proposed approach is to use screening and selective breeding within the breed to reduce the prevalence of these disorders. Some argue that if not all dogs of each breed are affected by BOAS or other likely health issues, there may be potential to breed healthy individuals of even the highest risk breeds if potential parents are evaluated prior to mating. The Respiratory Function Grading Scheme created by the University of Cambridge in partnership with the Kennel Club to grade English Bulldogs is one such assessment.²⁰ Only dogs showing no, or relatively low, levels of BOAS following testing are considered suitable for breeding.

Whilst screening for disorders may be part of the toolkit to improve brachycephalic breed health, it is unlikely to make a significant difference to future health if extreme conformation is maintained. It is also very difficult to develop an effective testing regime because the causal factors involved in the disorders of brachycephalic dogs are complex and uncertain. To have a real impact, tests would need to target the multiple disorders affecting these dogs, not just BOAS. If such tests are developed, a high proportion of breeders would need to use them to exclude dogs with a predisposition to disease, whilst moving to a more moderate conformation overall. A one-off function test, such as the Respiratory Function Grading assessment on a potential parent is a positive step. But it is not designed to capture the overall health risk to future offspring, linked to its conformation. It is also only set as a recommendation by the Kennel Club, and not a mandatory measure,²¹ thus ultimately leaving this decision at the discretion of the breeder.

Moreover, breeding programmes based on screening presuppose that there is sufficient genetic diversity to change morphology. Yet the extremely low genetic diversity within some

19 D. O'Neill and others, 'Moving from information and collaboration to action: report from the 3rd International Dog Health Workshop' (2017) *Canine Genetics and Epidemiology* 4

20 Kennel Club, 2022. Respiratory Function Grading Scheme: <https://www.thekennelclub.org.uk/health-and-dog-care/health/getting-started-with-health-testing-and-screening/respiratory-function-grading-scheme/>

21 Ibid.

breeds, such as the English Bulldog, makes it virtually impossible to breed out the problems whilst maintaining the breed purity desired by breeders.²² As such, improving the health of breeds with high disease burden and low genetic diversity is only possible by careful outcrossing with breeds possessing healthier conformations. It follows that a ban on breeding these breeds, unless outcrossing, may not just be the fastest way to improve health and welfare but the only way to ensure the sustainability of these well-loved breeds. Even where breeds do have a healthy population, it can still be considered proportionate to take robust action to reduce the ill-health of the subpopulation who suffer.

A slightly less drastic alternative to an outright ban would restrict breeding from dogs with extreme physical features. Certain conformational traits have been shown to correlate with a high risk of suffering health disorders associated with brachycephaly (and thus posing a risk to offspring). A low cranio-facial ratio (i.e. short muzzle length comparative to head length) has been identified as a key determinant of the risk of BOAS,²³ as have abnormal breathing at rest (stridor); narrow nostrils (stenosis) and presence of a nasal skin fold.²⁴ Whilst not perfect, these traits give a strong indication of health risks.²⁵ As such, we could prohibit breeding from dogs that score poorly when assessed on these traits.²⁶ Permitting breeding from dogs only at the least risky end of the conformation spectrum would move the breeds towards a healthier morphology, albeit potentially more slowly than an outright ban. However, where breeds have no mem-

bers which have moderately healthy standards of these traits, this approach will still require outcrossing with another breed.

1.3 The failure of self-regulation

Ideally regulation of a potentially harmful activity is undertaken voluntarily by those involved, supported by other stakeholders with specialist knowledge. Steps have been taken by the Kennel Club and other influential bodies to change breed standards and highlight health,²⁷ particularly in the wake of reports highlighting the plight of these dogs.²⁸ These include the Breed Watch initiative to enable breeders and show judges to report concerning changes affecting breeds and the Assured Breeder Scheme to incentivise responsible breeders and provide a recognised standard for the public.²⁹ A code of good practice has also been issued by stakeholders, in the absence of a statutory code.³⁰ Numerous attempts have been made to reduce demand for these dogs.³¹ However, despite mounting evidence of welfare concerns, decades of campaigning by vets, welfare organisations and members of the breeding world, voluntary measures for changing breeder and consumer behaviour have achieved little.³²

22 N. C. Pedersen, 'A genetic assessment of the English bulldog' (2016) *Canine Genetics and Epidemiology* 6

23 R. Packer and others, 'Impact of Facial Conformation on Canine Health: Brachycephalic Obstructive Airway Syndrome' (2015) *PLOS ONE* 10

24 M. van Hagen, 'Breeding Short-Muzzled Dogs: Criteria for the Enforcement of Article 3.4 of the Animal Keepers Decree (Besluit Houders can dieren) – Breeding Companion Animals' (2019) : https://www.uu.nl/sites/default/files/eng_breeding_short-muzzled_dogs_in_the_netherlands_expertisecentre_genetics_of_companionanimals_2019_translation_from_dutch.pdf

25 Cf. R. Gill, 'Relationship between incidence of breathing obstruction and degree of muzzle shortness in pedigree dogs' (2022) <https://doi.org/10.48550/arXiv.2209.08934>

26 van Hagen (n. 24)

27 Kennel Club, 'Breed Health Improvement Strategy: a step-by-step guide' : <https://www.thekennelclub.org.uk/health-and-dog-care/health/breed-health-co-ordinators/breed-health-improvement-strategy-toolkit/#:~:text=What%20is%20a%20breed%20health,be%20present%20in%20their%20breed.> Although only approximately one third of dogs are KC registered: L. Asher et al, 'Estimation of the number and demographics of companions dogs in the UK' (2011) *BMC Veterinary Research* 7

28 D. Sargan and N. Rooney, 'Pedigree Dog Breeding in the UK: a major welfare concern?' RSPCA, 2008; P. Bateson, 'An Independent Enquiry into Dog Breeding' (2010); APGAW, 'A Healthier Future for Pedigree Dogs' 2009, 2012, 2014; EFRA Committee, *Progeny of Dogs*, 2016

29 Kennel Club, 2022. Breed Watch: <https://www.thekennelclub.org.uk/events-and-activities/dog-showing/judging-dog-shows/breed-watch/>

30 Dog Breeding Reform Group, *Code of Practice for Dog Breeding*, 2020

31 For a recent example see the UK Brachycephalic Working Group campaign, 'Stop and think before buying a flat-faced dog': <http://www.ukbwg.org.uk/wp-content/uploads/2021/03/210321-BWG-Concensus-Stop-and-think-before-buying-a-flat-faced-dog.pdf>

32 Skipper, (n.12) It is notable that the Irish Kennel

A complex range of factors have made non-binding measures hard to agree and implement.³³ The space is populated by a large, diverse body of stakeholders with a variety of competing interests with no one body having the authority to mandate and oversee changes. For the Kennel Club, imposing tough rules that are not accepted by members risks alienating its registered breeders and losing its influence. Success of initiatives to improve within breed have been hampered by a lack of metrics by which they can be measured and enforced.³⁴ Added to which, some owners and breeders remain sceptical of the need for substantial change in practice and others will supply whatever the public demands. Variations in scientific views about the potential to improve health within the breed, coupled with a failure to acknowledge ill-health in their own dogs³⁵ contributes a perceived lack of urgency. This is also demonstrated through the high breed loyalty among brachycephalic dog owners, with Packer et al suggesting that there is a high likelihood that current brachycephalic dog owners will want to reacquire the same breed in the future.³⁶ Strong attachment to their dogs, who are part of the family for many, makes this a particularly emotive issue.³⁷

Vets have also played a part in normalising the disorders and associated medical care required by some breeds, leading to a perception that

a degree of disorder is 'normal for the breed'.³⁸ Vets have a professional and moral obligation to prevent or minimise negative health and welfare issues of the animals in their care. However, this must also be balanced with the risk of alienating clients if they raise concerns about the severity of the clinical symptoms of an animal. There is also a risk of a conflict of interest where veterinary clinics make an income from treating BOAS.³⁹ Failing to adequately educate owners, is further perpetuating poor welfare in this industry, and 'simply facilitating the status quo'.⁴⁰ It may be suggested that by providing treatments, such as surgery to alleviate BOAS, this is feeding into the perception that such surgeries are normal for even the most affected breeds.

As a result, there appears to be a clear need for statutory regulation to help protect the welfare interests of these dogs. There is evidence to suggest the public may welcome legal intervention to address this issue, despite the reluctance of some stakeholders.⁴¹ Nevertheless, attempts to strengthen the law in this area must be undertaken in collaboration with as many stakeholders as possible. Bonnett and others caution against 'unilaterally' enacted legislation that does not consider all the consequences.⁴² This is a warning that must be heeded if we do not want to make the situation worse for dogs. It will not be easy to construct effective and workable rules that are accepted by all stakeholders. The complexity that has bedevilled voluntary approaches will also challenge the development of statutory measures, perhaps more so. It may take

Club have recently announced that from 2024 puppies of brachycephalic breeds will be endorsed 'not to be bred from', until required health tests have been completed. This appears to have been a response to proposals to take legislative action: [https://www.ourdogs.co.uk/News/newsa.php?title=IKC_takes_decision_on_brachycephalic_breeds#:~:text=The%20Irish%20Kennel%20Club%20\(IKC,and%20exhibition%20of%20brachycephalic%20breeds.](https://www.ourdogs.co.uk/News/newsa.php?title=IKC_takes_decision_on_brachycephalic_breeds#:~:text=The%20Irish%20Kennel%20Club%20(IKC,and%20exhibition%20of%20brachycephalic%20breeds.)

33 B. Bonnett and others, 'International and National Approaches to Brachycephalic Breed Health Reforms in Dogs' in Packer and O'Neill (n.11)

34 Ibid., 131,133

35 R. Packer and others, 'Do Dog Owners Perceive the Clinical Signs Related to Conformational Inherited Disorders as 'Normal' for the Breed? A Potential Constraint to Improving Canine Welfare'(2012) *Animal Welfare* 81-93

36 R. Packer and others, 'Come for the Looks, Stay for the Personality? A Mixed Methods Investigation of Reacquisition and Owner Recommendation of Bulldogs, French Bulldogs and Pugs' (2020) *PLoS ONE* 15

37 Ibid.

38 Packer (n.35)

39 A. Fawcett and others, *Consequences and Management of Canine Brachycephaly in Veterinary Practice: perspectives from Australian Veterinarians and Veterinary Specialists* (2019) *Animals* 3

40 BVA, *Vets Speaking up For Animal Welfare: BVA Animal Welfare Strategy* (2016), 1.4

41 K. Steinert and others, 'People's perception of brachycephalic breeds and breed-related welfare problems in Germany' (2019) 33 *Journal of Veterinary Behaviour* 96

42 Bonnett (n.33) 134 citing DogWellNet, "International Working Group on Extremes of Conformation in Dogs (IWGECD)." IPFD DogWellNet: <https://dogwellnet.com/content/international-actions/extremes-of-conformation-brachycephalics/international-working-group-on-extremes-of-conformation-in-dogs-iwg-eecd-r695/>

time to generate the political will and resources to implement proposals and the outcomes will not satisfy everyone. However, clearly voluntary approaches have not been able, by themselves, to improve welfare sufficiently quickly. Whilst the precise shape of legal intervention for the UK should come from close consultation with relevant parties, much can be learnt from the experiences of other jurisdictions with more advanced regimes. To that end, we outline some possible options for intervention after a consideration of the scope of existing UK law.

Part 2: The current scope of UK law

2.1 Legislation applying to all breeders

There is currently no statutory provision in any of the countries of the UK that is aimed at restricting the breeding of dogs with harmful conformation by all breeders within that jurisdiction. The Animal Welfare Act (AWA) 2006, which covers England and Wales, has two sections that could potentially be interpreted as imposing a duty of care when breeding dogs with exaggerated conformations. The first of these makes it an offence to cause 'unnecessary suffering' to an animal⁴³ and the second makes it an offence not to take reasonable steps to meet the needs of an animal for which a person is responsible. This includes protection from 'pain, suffering, injury or disease.'⁴⁴ Similar provisions exist in the equivalent Acts of Scotland and Northern Ireland.⁴⁵ DEFRA have indicated that an offence could be committed under the AWA 2006 where a breeder 'knowingly selects and breeds animals with genetics leading to extreme conformations that cause pain, suffering or distress'.⁴⁶

However, the option of using these general welfare provisions faces significant difficulties. A successful prosecution would have to show a causal relationship between the breeding decision and the defect which gives rise to the

pain, suffering, injury or disease of the offspring. The Act excludes animals in foetal or embryonic form from its coverage,⁴⁷ which may be seen to break that chain of causation.⁴⁸ It must also be shown that the breeder could have reasonably foreseen that the defect – and the suffering – would be the outcome of that breeding decision.⁴⁹ All of which would have to be proven beyond reasonable doubt, as required by criminal law, rather than on a balance of probabilities. Prosecuting bodies have, perhaps unsurprisingly, been resistant to testing the possibilities of the Act.⁵⁰

Nevertheless, it may be argued that a causal link can be established between a breeding decision and the suffering of live offspring. It is arguable that the decision to breed from certain breeds involves a risk of suffering of offspring that is so high that a causal link – and the knowledge or foresight – could be established.⁵¹ Such a case might be made for the English Bulldog.⁵²

A further hurdle, however, lies in establishing when the relevant criminal act takes place by the breeder for the purpose of ss4 or 9. It has been argued that this must be the moment of conception, yet at this moment the offspring are explicitly excluded from the protection of the 2006 Act.⁵³ However, it is the act of mating of the selected dogs over which the breeder has greatest control. The birth of the offspring being the intended result of that act. As such, mating would seem to be more appropriate as the legally relevant act.

This interpretation may not be workable because the liability under ss.4 and 9 requires harm caused to an animal by the 'person responsible' for it.⁵⁴ Here that animal is the offspring. Yet the offspring do not exist at the time of the mat-

43 s.4 Animal Welfare Act 2006

44 s. 9 England

45 ss. 19 and 24 Animal Health and Welfare (Scotland) Act 2006; ss. 4 and 6 Animal Welfare Act (Northern Ireland) 2011

46 Secretary of State for the Environment, Food and Rural Affairs, George Eustice, 6.11. 2017 available at: <https://questions-statements.parliament.uk/written-questions/detail/2017-10-27/110078>

47 s.1(2)

48 DBRG (n.4) 3.1.2

49 Ibid.

50 DBRG (n.4) 3.1.7

51 DBRG (n.4) 3.1.3

52 On the basis of findings of, for example, O'Neill (n. 7)

53 M. Radford, 'Can irresponsible breeders be made criminally liable?' (Letter) Vet Record (2017)

54 This is not explicit in the wording of s.4 but see R (on the Application of Gray) [2013] EWHC 500 (Admin)

ing. It is therefore difficult to argue that they are harmed by the act or that, before they exist, the breeder is 'responsible' for them. Yet the birth of live offspring is the intended and likely result of such mating. As such, the overall process of breeding could be seen to include all the stages flowing from the mating and ending in birth, thus avoiding the exclusion of the embryonic stage of development. However, the need for such convolution supports the view that Parliament intended to exclude offspring from protection under these provisions, whilst providing the power to extend coverage via s.12 if desired.⁵⁵

In short, the 2006 Act, as it stands, is not the perfect vehicle to prohibit breeding of even individual dogs with poor conformation, let alone entire breeds. Targeted legislation to properly address irresponsible breeding practices would be preferable, as discussed in part 4. Nevertheless, the potential of the current AWA 2006 – and its national equivalents – to make irresponsible breeding of brachycephalic dogs unlawful should be exploited fully. The same is true of the more specific rules aimed at licensed breeders, that we turn to now.

2.2. Rules applying to licensed breeders only

The only provision directly aimed at addressing the breeding of dogs with harmful conformation is found in the licensing regimes in England and Scotland. In England Sch. 6, 6(5) of the Animal Welfare (Licensing of Activities Involving Animals) Regulations (LAIAR) 2018 states that: 'No dog may be kept for breeding if it can reasonably be expected, on the basis of its genotype, phenotype or state of health, that breeding from it could have a detrimental effect on its health or welfare or the health or welfare of its offspring.'

The provision captures inheritable disorders resulting from conformation by the reference to 'phenotype'. The equivalent legislation in Scotland is identical, except it uses the word 'conformation' instead of 'phenotype'.⁵⁶ Northern Ireland lacks equivalent legislation but there is a recommendation that a similar provision be in-

roduced in Wales.⁵⁷ The Regulations only apply to breeders who require a licence. This includes commercial dog breeders or breeders who have had three or more litters of puppies in any one year.⁵⁸

England

All licensees in England must meet the minimum standards for Sch. 6, 6(5) set out in the DEFRA guidance. This includes taking 'all reasonable steps' only to breed from dogs that are in 'good physical and genetic health' and 'fit for function.'⁵⁹ The latter explicitly includes being able to 'see, breathe normally', be 'physically fit' and be 'able to exercise freely'.⁶⁰

Licence holders must 'be aware' of any health risks that may be specific to that type or breed and veterinary advice on the suitability of an animal for breeding must be sought 'where appropriate'.⁶¹ Dogs that have required surgery to rectify an exaggerated conformation, or who require lifelong medication, must not be bred from.⁶² Nor must bitches that have had two litters delivered by caesarean section.⁶³ Breeders must supply purchasers with written guidance on any conformation issues and how to manage them.⁶⁴

Notably, breeders are only required to use health screening for hereditary diseases in their breed or type if they wish to meet higher standards.⁶⁵ Breeders are guided to 'test all breeding

⁵⁵ Explanatory Notes to the Animal Welfare Act 2006 para. 63

⁵⁶ The Animal Welfare (Licensing of Activities Involving Animals) (Scotland) Regulations 2021 Sch. 6 8(5)

⁵⁷ Review of the Animal Welfare (Breeding of Dogs) (Wales) Regulations 2014 (2019) 34

⁵⁸ Sch. 1 para. 8. The Animal Welfare (Licensing of Activities Involving Animals) (Scotland) Regulations 2021, Sch. 1 Part 4

⁵⁹ DEFRA, 'The Animal Welfare (Licensing of Activities Involving Animals) (England) Regulations 2018 Guidance notes for conditions for breeding dogs (updated 2020) 31

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ *Ibid.*

⁶⁵ And obtain a longer licence. *Ibid.* 31-32. The only optional higher standard related to Sch. 6, 6(5) regards the Coefficient of Inbreeding: "No bitch will be intentionally mated when the Coefficient of Inbreeding of the puppies would exceed the breed average or 12.5% if no

stock for hereditary disease using the accepted and scientifically validated health screening schemes relevant to their breed or type'.⁶⁶ However, the guidance does not explicitly list what schemes are relevant to each breed or type, leaving heavy reliance on breeders' knowledge and experience as to the accepted and validated health screenings for their breed or type of dog. They must not mate a dog if the results of those tests and/or the relevant breeding strategy indicate that it would be 'likely to produce health or welfare problems in the offspring and/or it is inadvisable in the context of a relevant breeding strategy'.⁶⁷ Breeders are only required to report surgery to correct exaggerated conformation to the appropriate body under the higher standard.⁶⁸

Scotland

Whilst the legislation is drafted in similar terms, minimum duties on breeders under the Scottish Regulations appears to be on a par with the higher standards expected in England.⁶⁹ For example, all Scottish licensed breeders are required to undertake screening, compared to only those seeking to meet the higher standard in England.⁷⁰ Moreover, the standard of care expected of a licensed breeder in Scotland is explicitly higher where they are seeking to breed a Kennel Club Breed Watch Category 3 breed.⁷¹ These breeds are judged to have the highest susceptibility to inherited health and welfare disorders and include several popular brachycephalic breeds, such as the English Bulldog and Pug. In Scotland, breeders of these breeds must demonstrate knowledge and experience of breeding the breed concerned and satisfy the inspector that they undertake 'robust' selection and screening procedures that are 'sufficient to minimise the risk of extreme conformations in

breed average exists as measured from a minimum five generation pedigree.'

66 Ibid. 32

67 Ibid. 31-32

68 Ibid. 32

69 The Animal Welfare (Licensing of Activities Involving Animals) (Scotland) Regulations 2021 Sch. 6 8(5)

70 The Animal Welfare (Licensing of Activities Involving Animals) (Scotland) Regulations 2021 Guidance for Local Authorities, 77

71 Ibid. 77

any offspring.⁷² This provides welcome recognition that health outcomes are a concern at the level of the breed and not simply the individual.

Significantly, the guidance raises a presumption that breeding 'teacup' dogs will not meet the licence conditions (i.e., it suggests a failure to take 'all reasonable steps' to ensure the offspring will be of good physical and genetic health and fit for function).⁷³ This is due to the likelihood of negative health and welfare impacts of breeding from the runt of litters.⁷⁴ Anyone seeking to breed these dogs should be treated as unlikely to be sufficiently prioritising the interests of dogs.⁷⁵ This use of a presumption that selection for certain problematic traits will fail to meet the duty of care is a potentially useful device to alert inspectors to key issues with brachycephalic breeds and shift the onus to the breeder to show why a breeding decision was lawful.

Weaknesses of the licensing regulations

The limited application to breeders within the licensing regime is a major weakness of relying on Sch. 6 6(5) to address the issue of breeding brachycephalic dogs. Whilst an improvement on the previous licensing regime under the 1991 Dog Breeding legislation,⁷⁶ the majority of puppies bred in the UK will still not be covered.⁷⁷ Nevertheless, it is a step in the right direction and should be employed to its fullest extent.

Unfortunately, the scope of both English and Scottish provisions is unclear and substantial work is needed to make them truly functional. The English guidance is particularly underdeveloped, and the minimum standards are weak by comparison to Scotland. Breeding from dogs with extreme conformation is only prohibited on the grounds of conformation-related surgery or lifelong medication, or two previous caesareans. Currently, screening for defects is only re-

72 Ibid.

73 Ibid. 78

74 Ibid.

75 Ibid.

76 EFRA Committee - Animal welfare in England: domestic pets Third Report of Session 2016-17 (2/11/2016) para. 30

77 DBRG (n. 4), 3.3.10 and CFSG/DBRG, Guidance on Dog Conformation, 2020, 20



quired under the higher standards. Accordingly, all a breeder needs to show to establish they took 'all reasonable steps' in selecting a dog for breeding is that they avoided any dog who is demonstrably suffering from a conformation-related disorder or possesses an unusually extreme conformation.

This narrow interpretation of 'all reasonable steps' fails to properly address the risk to offspring posed by some breeds and does not fully exploit the capacity of the provision.⁷⁸ It may be even weaker than it first appears, given the findings of Packer et al that owners do not recognise or accept the presence of common disorders in their own dogs.⁷⁹ If this is the case, then breeders may not be best placed to accurately assess the health risks posed by their own dog as a sire

78 See DBRG analysis, that breach of duty could occur under this section 'where a disease is not evident (i.e. visible or palpable) in a dog selected for breeding. However, prevalence of the disease is known to be high in a breed such that offspring are likely to be affected.' This is not developed further. DBRG (n.4) 4.3

79 Packer (n.35)

or dam.

As noted above, current screening regimes have serious limitations. But if effective screening becomes available it should be required for all breeders. Where screening is not sufficient to address the problems of extreme conformation, some other objective measures should be required under both the English and Scottish rules by which breeding decisions can be assessed. This should involve indicative guidelines on when a harmful result to offspring could 'reasonably be expected' to result from mating, developed in conjunction with vets and other stakeholders. For brachycephalic dogs, this might include reference to a range of indicative traits associated with high risk of conformation-related disease. This could also be useful for establishing when breeders have satisfied the 'robust' selection procedure required for Category 3 breeds in Scotland; a requirement that could usefully be adopted in England.

More attention should also be given in both England and Scotland to establishing what level

of risk should make breeders particularly careful in their selection of parents. Ideally, the guidance would take a precautionary approach and require extra care due to the severe impact on a significant proportion of dogs, even where evidence of the degree of risk is not complete and some members of the breed remain healthy.

Enforcement of Sch. 6, 6(5) is almost certainly a problem. Licence conditions are monitored and enforced by the local authority inspectors.⁸⁰ It is extremely difficult for inspectors to assess whether breach of duty has occurred given the 'technical and complex' range of factors used by the breeder in deciding whether to breed from a dog.⁸¹ These challenges are exacerbated by inadequate training and lack of resources resulting in weak and ineffective enforcement of animal welfare laws, including the 2018 Regulations.⁸² A review of these Regulations is due in 2023.⁸³ Local authorities' failure to fulfil reporting duties⁸⁴ will impact the accuracy and validity of any report.⁸⁵

2.3 Could we ban the breeding of entire breeds currently?

It is not impossible to argue that either the 2006 Animal Welfare Act (and its equivalents) or Sch. 6 6(5) and 6 8(5) could be used to ban future breeding of certain breeds. However, it seems unlikely that either the 2006 Act or the Regulations would be interpreted by the courts as having this effect. Nor may such an approach be the most effective for improving welfare.

Sch. 6 6 (5) was included in the 2018 Regulations following detailed reports on the welfare impacts of extreme conformations. These reports highlight the extremely low genetic diversity in breeds, such as the English Bulldog, and the virtual impossibility of breeding out disorders without cross breeding. Whilst one influential report specifically recommended restricting the breeding of individuals with exaggerated con-

formations,⁸⁶ this is not made explicit in Sch. 6, 6(5) or 6 8(5). There is nothing in the wording of Sch. 6, 6(5) or the Scottish equivalent limiting it to individuals; it simply prohibits the use of a dog in breeding where it can 'reasonably be expected' that health or welfare harms could result.

Thus, if it can reasonably be expected that any breeding of a certain breed will result in a health or welfare detriment to the offspring due to parental conformation then, arguably, any breeding from a dog of that breed is a breach of the licence. This could apply, for example, to the English Bulldog. Given the genetic predisposition to disorders of this breed, it is surely plausible that any further breeding of pure English Bulldogs gives rise to a reasonable expectation – even likelihood – that many offspring would suffer negative health and welfare impacts, contrary to Sch. 6, 6(5). It is also difficult to see how a breed with such high disease burden and low genetic diversity can be said to possess members in good 'genetic health', even if some are accepted to be in good 'physical' health currently.

Moreover, the guidance requires all dogs kept for breeding to be 'fit for function' – able to see and breathe 'normally' and exercise 'freely'. The scope of this rule clearly depends on the definition given to these words. If the reference standard is the breed, then the provision is self-limiting and can never truly move the breed towards real health.⁸⁷ In breeds like the English Bulldog, only the animals with the most extreme conformation will be caught as poor respiratory function and mobility are considered 'normal for the breed'. The better view is that 'normally' and 'freely' should be judged by reference to the sight, respiratory function and exercise tolerance of other members of the species with average conformation. This accords better with the 'fit for function' requirement and the aim of the legislation to promote welfare. There is substantial evidence to suggest that no member of certain breeds can breathe or exercise 'normally' by

80 s.15

81 DBRG (n.4) 3.3.8

82 APGAW, *Improving the Enforcement of Animal Welfare Law*, 2022, 8. 9

83 s.28(2) LAIAR 2018

84 s.29 LAIAR 2018

85 APGAW (n.90) 9

86 Advisory Council on Welfare Issues in Dog Breeding Summary of the progress since the Bateson Report of 2010, 2014, 76

87 I. Seath, 'Sound in Wind and Limb – what do we mean by 'sound?'' available at: <https://dogeduk.wordpress.com/2022/09/25/sound-in-wind-and-limb-what-do-we-mean-by-sound/>

this standard. On this basis, any further breeding could breach the provision.

Despite this, it is virtually certain that Sch. 6 6(5) and 6 8(5) are to be interpreted as applying only to individual dogs by local authorities and breeders. There are good reasons to believe that a court is unlikely to accept that the provision could ban any future breeding of entire breeds. Significantly, it is unlikely – and undesirable – that a court would accept that a breed ban should be applicable to licensed breeders, leaving unlicensed breeders free to breed with impunity. It would have a substantial and immediate impact on a number of businesses and result in the potential destruction of many dogs, without evidence that this was the legislative intent.⁸⁸

On this basis, the way forward may be to accept that these provisions apply only to individual dogs but can require a higher emphasis on breed level problems in their application. Drawing on the approach in Scotland, the guidance could be developed to impose higher standards when breeding certain higher-risk breeds. This might cover a wider range of dogs than the KC category 3 breeds already highlighted in the Scottish guidance and include more detailed requirements as to selection. The indicative requirements could include certain features that suggest a high predisposition to poor health and welfare, such as a low cranio-facial ratio, eye shape or exaggerated skin folds. The options for this type of trait-based restriction, and the question of whether this approach is preferable to banning breeding of certain breeds, will be discussed in part 4. But it would appear to be more easily accommodated within the existing licensing regulations than a breed ban.

Moreover, the Scottish guidance indicates that there can be a presumption that the standard of care will not be met where a breeder breeds from dogs possessing certain traits. Whilst 'teacup' dogs are not a breed or even a defined genetic group, they have a common set of physical features (size) caused by their genetics (being bred from the runt of litters). This suggests that further presumptions against selecting for certain traits that are known to involve negative welfare impacts can be covered within the reg-

ulations. The targeted traits would need to be evidence-based and established in conjunction with stakeholders.

The upshot is that there is real potential in the licensing regulations in England and Scotland to restrict breeding of many dogs with a substantial risk of passing harmful conformation to offspring. Whilst it appears to be very difficult to ban the breeding of entire breeds using current laws, there is more scope to restrict breeding of collections of individuals with high-risk characteristics. Nevertheless, all nations of the UK would benefit from legislation targeted at this issue that makes application clear and covers all breeders. The form this should take is explored more in part 4 after a brief look at the approach in several other nations that are seeking to take robust action on this issue.

Part 3: Approaches in other European countries

3.1 Norway

The Norwegian Animal Welfare Act (NAWA) 2009 places a positive obligation on breeders and breed organisations to produce animals which function well.⁸⁹ Breeding will be prohibited where it passes on genes which negatively impact physical or mental functions, reduces the ability to engage in natural behaviour or raises ethical concerns.⁹⁰ These provisions are capable of applying at breed level and not just to individual animals.⁹¹ The Oslo District Court found that the prevalence of genes resulting in serious health conditions in the population of Cavaliers King Charles Spaniels and English Bulldogs meant that any further breeding of these breeds would be unlawful.⁹² Whilst the Court of Appeal agreed that any further breeding of purebred Cavalier King Charles Spaniels was contrary to s.25 of NAWA 2009, this did not apply to English Bulldogs.⁹³ The court placed significant weight on the existence of screening for BOAS in Bulldogs prior to mating.⁹⁴ An appeal is due to be

89 s.25(1)

90 s.25(2)(3)

91 Case:043798ASD-BORG/01

92 Case:20-169475TVI-TOSL/04

93 Case:043798ASD-BORG/01

94 *Ibid.* 51

88 M. Radford, personal correspondence.

heard in the Supreme Court in August 2023.

3.2 The Netherlands

In 2014, the Netherlands brought in legislation prohibiting the breeding of companion animals where that would be detrimental to the health or welfare of the parent or offspring.⁹⁵ This includes breeding of dogs with conformational features that cause health and welfare issues. A regime to implement this obligation in relation to certain breeds of brachycephalic dogs came into force in 2020 following a commissioned report.⁹⁶ The approach aims to prevent the long-term breeding of any dog which falls below an 'ideal type' of morphology. This is based on a set of conformational traits, such as cranio-facial ratio (CFR), identified to be the main indicators of Brachycephalic Ocular Syndrome and BOAS; the two key pathologies addressed in the report.

A traffic light system is used to move breeders towards the ideal standard by prohibiting breeding of those animals with the most extreme set (red) of problematic conformational characteristics. A moderate level (amber) is acceptable during the transitional phase. It is anticipated that it will take 2-3 generations for breeders to move to a green set of outcomes. If this proves impossible, then a mandatory breeding programme involving outcrossing is likely. Enforcement inspectors use a functional set of indicators, with additional tests outlined for further assessment.

Unlike the Norwegian approach, this does not directly ban the future breeding of a specific breed. It provides a set of six criteria which the individual dog must meet. However, if all members of a breed fail to meet the amber standard for one of the criteria, no breeding can take place. For example, no Pugs can meet the amber CFR standard and to avoid a ban on future breeding of Pugs, a temporary relaxation of this standard for one parent has had to be introduced.⁹⁷ However, the Dutch government have just announced that they are considering the introduction of keeping ban and a showing ban on companion animals with harmful physical characteristics, which would also require a ban on

⁹⁵ Article 3.4 of the Animal Keepers Decree 2014

⁹⁶ van Hagen (n.24)

⁹⁷ Bonnett (n.33) 143

their trade and import.⁹⁸

3.3 Finland

Finland is replacing the existing Animal Welfare Act which prohibits breeding that causes harm to parent or offspring,⁹⁹ with new legislation that will address harmful conformation more rigorously.¹⁰⁰ The proposed law prevents the use in breeding of animals with exaggerated features unless it can be shown via testing that harm will not be transmitted to the offspring.¹⁰¹ Brachycephaly is identified as the primary welfare concern and the proposed law uses a detailed range of factors to assess health, which will become stricter after the 5 year transitional period.¹⁰² These include physical traits, such as CFR, eye function and nostril stenosis, in combination with respiratory testing and veterinary evaluation. It differs from the approach in The Netherlands because none of the criteria will independently prohibit breeding but will be part of an overall assessment of sire and dam. Although this will be tightened following the transitional period. The criteria will also apply to all dogs, rather than those of specified breeds. However, where a breed cannot improve conformational health due to low genetic diversity, outcrossing will be required.¹⁰³

Part 4: The benefits and drawbacks of different legal approaches

4.1 A ban on breeding from certain breeds

A breed ban involves a prohibition on any further breeding of certain specified breeds, unless outcrossing with a dog of another breed possessing

⁹⁸ <https://www.rijksoverheid.nl/actueel/nieuws/2023/01/20/naar-een-verbod-voor-dieren-die-lidjen-onder-hun-uiterlijk>

⁹⁹ s.8(2) Animal Welfare Act 247/1996

¹⁰⁰ Government Proposal HE 154/2018 vp 'The government's proposal to parliament for a law on animal welfare and some related laws', Section 25, 3rd November 2021: https://www.eduskunta.fi/FI/vaski/HallitukseenEsitys/Sivut/HE_154+2018.aspx.

¹⁰¹ Animal Welfare Bill s.25(1) and Government Proposal (n.103)

¹⁰² Finnish Food Authority, 'Improving the implementation of animal welfare legislation in animal breeding', 2020 Ch. 9.2

¹⁰³ *Ibid.* 60

more species-average conformation. This approach could have benefits for dog welfare by substantially reducing the numbers of certain high-risk breeds born in the UK, whilst sending a very clear message about the harms involved in breeding and purchasing such dogs. The law reflects changes in social attitudes, but it is also capable of driving those changes.¹⁰⁴ Ideally a breed ban would reduce the acceptability and fashion-status of such dogs, as well as making acquiring them more difficult. Fundamentally, it would reinforce that dogs are not commodities designed to meet our needs but sentient beings with their own intrinsic interests in health and wellbeing.

Prohibiting future breeding of pure-bred dogs with a high disease burden would emphasise that health should be the priority in breeding. It may also have the advantage of speed. The introduction of a ban on future breeding of the English Bulldog, for example, may encourage breed organisations to adopt new breed standards and monitored outcrossing programmes more quickly. To some extent, a breed ban could make enforcement easier for inspectors as any advertisement for such a breed could be investigated.

However, a breed ban may not produce an overall rise in dog welfare. First, a breed ban in the UK would simply prevent domestic breeding of these dogs but not impact the importation of such dogs. It has potential to target the most responsible breeders affiliated with the organisations like the Kennel Club, leaving these breeds to be imported from abroad or bred in contravention of the law by less scrupulous breeders. To have the most impact, the breed ban should be enforced on all UK breeders, not just those that are licensed. For a breed ban to work for dogs – and be fair to breeders – additional measures would be needed to address these likely consequences. Such a ban may also result in higher numbers of these dogs being abandoned as breeders and owners either cannot make use of them commercially or feel stigmatised.

Secondly, a breed ban is the approach most likely to antagonise and alienate the breeding community. In a field where tensions run ex-

tremely high, legal action which targets specific breeds is likely to receive intense opposition from breeders and breed organisations. This is particularly challenging as the evidence base for a breed ban remains contested.¹⁰⁵ Arguably we should not wait for watertight evidence given the high risk of negative welfare outcomes and the better approach is to take a precautionary stance. As such, we should take action to mitigate the risks to dogs despite the lack of complete knowledge or consensus. Nevertheless, breeders can legitimately point to expert evidence that a breed ban is not necessary.

An outright ban is also less likely to gain public support than other options, especially where the target breeds are iconic. An attempt to ban the English Bulldog in Britain is likely to be framed as an attack on the country's heritage and personal freedom, overshadowing the welfare basis for action and potentially making such dogs even more attractive to some. This will make getting such a law in place and enforcing it extremely difficult and thus may make this the least pragmatic approach.

On the other hand, if a breed ban is shown to be necessary because in-breed improvement is virtually impossible, then this should be pursued despite opposition. Explanation of an outcrossing programme and its benefit for the health and sustainability of the breed might alleviate public concerns about the loss of much-loved breeds and even gain support from attempts to return a breed such as the English Bulldog to its perceived former glory. In this way, taking a breed ban head-on – rather than indirectly banning the breeding by restricting breeding of dogs with certain traits – might have more success, rather than less.

However, monitoring and enforcing the law could be extremely difficult, with breeders denying dogs are pure-bred examples of a banned breed. Although in a different context, the enforcement of the breed ban under the Dangerous Dogs Act highlighted difficulties in determining specific dog breeds.¹⁰⁶ There may be similar difficulties if the UK was to enforce a breed ban

¹⁰⁴ As shown, for example, in post-legislative attitudinal shifts around smoking and equalities.

¹⁰⁵ Evident, for example, in Case:043798ASD-BORG/01

¹⁰⁶ C. Hood, *Assessing the Dangerous Dogs Act: when does a regulatory law fail?* (2000) Public Law 282

within the breeding industry. However, this problem would seem to be less likely in this context than under the Dangerous Dogs legislation as breeders would then be unable to advertise and sell the dogs as examples of a particular breed. It may also encourage breeders to engage in minor and unskilled outcrossing that, at best, does not reduce the problematic conformational features of the breed and, at worst, introduces other genetic problems. Such a ban would reduce further the oversight and engagement of the Kennel Club in respect of those breeds, as crossbreeding would not produce the pedigree dogs which the Kennel Club registers. Although, this need not be the outcome. If the Kennel Club did support a breed ban and oversaw an outcrossing programme, this could have a positive impact on the success of such a ban.

Finally, the ban would also have to be policed. Sufficient resources will need to be directed to the responsible body to enable the action to be effective. Crucially, this would include sufficient enforcement personnel who were adequately trained for the task. This is not a problem particular to a breed ban. However, a breed ban may be more difficult and thus expensive to operate because of the issues identified.

4.2 Breed restrictions based on physical traits

There appear to be advantages to restricting breeding based on certain physical criteria associated with disorders of brachycephalic dogs, rather than focusing solely on breed. This approach – seen in The Netherlands – may obtain similar welfare benefits for dogs associated with a breed ban, particularly a reduction in numbers of unhealthy dogs being born in the UK. Whilst the rules are limited to certain breeds in The Netherlands, this would not need to be the case. This approach may not send such an explicit message about the harm associated with breeding and owning certain breeds, but it does recognise dogs' interest in being healthy. Importantly, it may have a greater chance of stakeholder support than a breed ban.

One advantage of this approach is that breeders are more likely to accept the regulations and co-operate in drafting workable rules because they can continue breeding their breed. However, this only works if the standards set do not de facto preclude some breeds, because they have

no members whose conformation fits within the acceptable range. Buy-in by breeders is also more likely if physical traits chosen are generally agreed to correlate closely with high risk of disease. One objection to the rules in the Netherlands is that CFR requirement is an absolute standard; if it is not met then no breeding can take place even if the other traits are within an acceptable range. Moreover, there is disagreement about whether CFR is a reliable indicator of BOAS across all relevant breeds.¹⁰⁷ There is also concern that there can be undue focus on traits associated with muzzle length and ignoring the other problematic features of brachycephalic conformation.¹⁰⁸ In this respect, there may be advantages to the Finnish approach, where a variety of indicators are assessed together to establish whether breeding can take place.

Another benefit of restricting breeding where dogs fail to meet the criteria for identified physical traits is that it provides some time for breeders to improve. Whereas a ban is once and for all. In this respect, the Dutch traffic light system which moves breeders towards offspring with an improved set of physical criteria over five years appears to be a pragmatic approach. This may help reduce the number of dogs being destroyed or abandoned because they do not meet the legal requirements, as well as provide time for breed organisations and breeders to plan adapted breeding programmes.

Whilst monitoring and enforcement will not be simple, it is potentially easier than the current position in England and Scotland, where the breeding decision must be evaluated with very little guidance. The Netherlands shows that it is possible to enforce using a set of basic indicators as provided to the inspectors, with further detailed guidance for breeders and vets available where needed.

4.3. Multi-factor approach

Given the drawbacks of both these approaches, there is much to be said for a framework that utilises aspects of each of these approaches

¹⁰⁷ <https://dogwellnet.com/content/international-actions/extremes-of-conformation-brachycephalics/challenges-for-pedigree-dogs-regulatory-enforcement-of-brachycephalic-dogs-in-the-netherlands-r686/>

¹⁰⁸ Bonnett (n.33) 140

in combination with others. This multi-pronged approach could require the use of screening procedures where these are available, as well as an assessment based on the physical characteristics of the dog to exclude those with extreme features. Such a combined assessment could avoid the exclusion of a dog based on a single element of the assessment, at least in the short term. Moreover, initially at least, the physical trait assessment could be set at a point to avoid prohibiting all members of a breed, even if that standard is tightened up in time. These requirements could be complemented by others to address wider inherited health disorders, such as using Estimated Breeding Values – which employ a formula to calculate the risk each dog poses of passing on certain genetic disorders – and addressing the popular sire problem by restricting the number of litters each male can be responsible for over a certain period.¹⁰⁹

These measures might be further strengthened by ensuring that information about the breeder can be retained on the microchip to assist monitoring and enforcement. Additional information on the bloodlines of both sire and dam, and any health tests undertaken might also be included. This framework may need to include the option of a ban on future breeding of certain breeds, unless outcrossing to improve conformation, where the disease burden remains high despite breeders pursuing the measures outlined.

Part 5: Conclusion - next steps for the UK?

5.1 Options that don't need new legislation

Developing the existing Regulations in England and Scotland

The first step in the UK should be making more robust use of the provisions of the licensing regulations in England and Scotland. Care needs to be taken not to make these rules too restrictive until all breeders – including those outside the licensing regime – are legally required to meet minimum standards of conformational health. At the same time, licensing regulations made to promote welfare should reflect current welfare science and licensed breeders should meet obligations that accord with this evidence. At a

minimum, the mandatory standard of care expected under Sch. 6 6(5) in England should be brought up to match the standard in Scotland. This would require breeders to use screening or testing where appropriate and, as discussed above, for Category 3 breeds show the inspector that their selection process was 'robust' and able to minimise the risk of extreme conformations in any offspring.

Further developments of the guidance should be sought in conjunction with vets, local authorities, welfare and breed organisations. This should explain more clearly what a 'robust' process involves. It should also outline when a breeder should 'reasonably expect' a harmful outcome to result from breeding a dog with a brachycephalic conformation and what taking 'all reasonable steps' to avoid this situation looks like. This could include a range of indicative physical characteristics that suggest a breeder should not be using a dog in breeding, with the prospect that these will be further tightened in future. This could be on a points system to avoid total reliance on CFR. There could be a presumption that breeding dogs that score poorly on key traits will fail to meet the standard of care unless they can show that they mitigated the risk through other selection procedures.

A higher standard could be used to encourage further endeavours to improve health. This might include, for example, extending the standard of care expected of breeders of Kennel Club Category 3 breeds to all brachycephalic breeds. It could even be framed as a presumption that breeding any brachycephalic dog is unlikely to meet this higher level – and thus be granted a licence – unless the breeder satisfies the inspector that they are using animals with the least exaggerated conformational features.

Further resources need to be devoted to supporting local authorities to monitor and enforce the regulations, with particular attention paid to training sufficient inspectors to assess breed decisions with confidence. In Wales and Northern Ireland enacting a similar provision for licensed dog breeders would be a step in the right direction but ideally, these jurisdictions would move straight to creating a duty on all breeders to avoid breeding dogs with harmful conformations.

¹⁰⁹ Welfare in Pet Trade, Responsible Dog Breeding Guidelines, 2020, 9

Create a statutory Code of Good Practice on Dog Breeding

It is desirable that a statutory code of good practice covering all breeders be issued by DEFRA under s.14 of the Animal Welfare Act 2006.¹¹⁰ Whether this option can be adopted without new legislation or not depends on the interpretation of the 2006 Act. If ss. 4 and 9 place a duty on breeders to take reasonable care when making breeding decisions, then DEFRA could create a statutory code of practice (COP), which would help establish liability under those sections (s.14(4)). If ss.4 and 9 are found not to cover breeding decisions, then a statutory COP would have to be part of new legislation under s.12, as outlined below.

Whilst not a breeding-related measure, highlighting the obligations on owners regarding health and welfare of dogs under the AWA 2006 may also help reduce demand. A more explicit description in the existing COP on the welfare of dogs¹¹¹ of the obligation to avoid 'pain, suffering, injury and disease' and ensure 'normal behaviour' as applied to brachycephalic dogs, might encourage prospective owners to reflect on their ability to lawfully meet the needs of a such a dog.

A non-statutory COP was issued by the Dog Breeding Reform Group (DBRG) in 2020.¹¹² Whilst it highlights issues of inherited diseases associated with certain breeds, the wording on conformation issues appears relatively weak. It requires that breeders 'be aware of the potential health and welfare implications of breeding dogs with extreme conformations.'¹¹³ Some guidance is given but this is limited. It would be helpful if this COP could be more ambitious. Wording such as breeders 'should take all reasonable steps to avoid breeding dogs with extreme conformations due to the health and welfare implications' would provide a stronger message. A robust COP may help raise the standard of breeding and – if used effectively – reduce the need for

further legal intervention.

5.2 Options requiring new legislation

New rules aimed at all breeders under the AWA 2006

Additional secondary legislation to protect progeny as anticipated under s. 12 of AWA 2006 is recommended as the most effective way of addressing the issue of inheritable disorders.¹¹⁴ The DBRG suggest that this should impose a duty '... on breeders when selecting [dogs] for breeding to have regard to the anatomical, physiological and behavioural characteristics which are likely to put at risk the health or welfare of the progeny or the female parent' with failure to comply being an offence.¹¹⁵ Such a legal duty on all those breeding dogs within the jurisdiction would be a huge step forward. However, the obligation to 'have regard' is relatively weak language. It would be preferable if any legislative duty stated that breeders must 'take all reasonable care' to avoid breeding dogs with harmful physical characteristics. Or, at least, require breeders to have 'all due regard' to relevant factors. Ideally the legislation would apply to all those involved in breeding, not just breeders themselves, so as to cover decision-making by breed organisations¹¹⁶ as well as the growing number of fertility clinics used to produce these dogs.¹¹⁷

Drafting the legislative duty broadly is advisable so that it remains able to meet emerging scientific evidence. The legislation could make reference to a code of good practice which would provide a more detailed explanation of the obligation placed on breeders to avoid breeding harmful, exaggerated conformations. This COP should replicate the requirements expected of licensed breeders in the associated guidance, which we have argued should be further developed.

All of these approaches only target the breeding of dogs in the jurisdiction enacting the leg-

110 Recommended by Bateson (n.28) 8.9

111 DEFRA, Code of practice for the welfare of dogs, 2018

112 CFSG/DBRG, Code of Practice for Dog Breeding, 2020

113 Ibid. 8

114 E.g. Bateson (n.28); APGAW (n.28); Advisory Council on Dog Breeding (n.86)

115 DBRG (n.4) 3.2.3; Recommendation 8 of Bateson (n.28)

116 As in Norway, s.25(1)

117 NatureWatch Foundation, Canine Fertility Clinics A new frontier in the fight against puppy farms, 2022

isolation. Further measures will undoubtedly be needed to avoid simply shifting the breeding further out of the UK. If secondary legislation is enacted which follows Environmental Food and Rural Affairs Committee's recommendations of increasing the minimum age in which dogs can be commercially or non-commercially imported into the UK from 15 weeks to 6 months, this would also aid in reducing this issue.¹¹⁸ Yet it may still be a problem if tightening up on conformational traits means that demand for a breed outstrips supply in the UK. Ideally, countries would work together to raise breeding standards. But restrictions on importing and owning these dogs should be considered, as in the Netherlands. Continuing initiatives to reduce the appeal and status of these dogs through public information campaigns and by targeting irresponsible use of their images in advertising, for example, will also be crucial.

Conclusion

Despite many initiatives aimed at raising awareness of the health and welfare issues of breeding dogs to extreme conformation and the introduction of a licensing regime for dog breeders, there has been a lack of positive human behaviour change by consumers and breeders. The introduction of more stringent legislation in other jurisdictions aiming to address extreme conformation raises questions concerning the efficacy of the current UK legislative framework, whilst raising potential options for reform. Despite our focus on brachycephaly, much of the discussion is applicable to dogs with other exaggerated conformational features.

The next steps for the UK are not entirely clear. What is clear, however, is that adequate steps need to be taken by all stakeholders to ensure that health and welfare is placed at the heart of breeding decisions. This may well require new legislation coupled with detailed guidance and codes of practice, developed in co-operation with relevant stakeholders. It almost certainly involves more effective use and enforcement of existing rules, as well as their wider publicization. We are at a crucial point where if nothing

is done dogs will continue to suffer and we risk losing some of our best-loved breeds.

¹¹⁸ s.46(2) Kept Animals Bill; EFRA, Commercial and Non-Commercial Movement of Pets into Great Britain: Consultation Document, 2021