

CAUSING DEATH BY DANGEROUS DOG: VICTORIA'S NEW OFFENCES FOR FAILING TO CONTROL PRESCRIBED DOGS

PATRICK LEADER-ELLIOTT*

In 2011 the Victorian Parliament passed the Crimes and Domestic Animals Acts Amendment (Offences and Penalties) Bill 2011. The main purpose of the Bill was to create a new offence of causing death by failure to control a dangerous, menacing or restricted breed of dog. This was done by the insertion of sections 319B and 319C into the Crimes Act 1958 (Vic). Section 319B creates a new homicide offence where a person fails to control a dangerous, menacing or restricted breed of dog and that failure results in death. This offence has no requirement of subjective fault with respect to death, and is comparable to the Victorian offence of causing death by dangerous driving. It is argued that there are serious flaws in the offence, particularly concerning the absence of any need to prove subjective fault on the part of the person in charge of the dog. The offence in s 319C of failing to control a dangerous, menacing or restricted breed dog where that failure endangers, or may endanger, life is also considered. The legislation is critically examined and its necessity discussed, leading into a comparison of the new provisions with existing criminal offences that may apply in the case of dog attacks on humans.

I INTRODUCTION

On 17 August 2011, four year old Melbourne girl Ayen Chol was fatally mauled by a pit bull terrier that had escaped from a neighbour's yard. Her death was widely reported and it prompted the Victorian Parliament to pass the *Crimes and Domestic Animals Acts Amendment (Offences and Penalties) Act 2011*.¹ This Act received royal assent on 8 November 2011, less than two months after being introduced on 14 September 2011.² It inserted two new offences into the *Crimes Act 1958 (Vic)* (the Act): failure to control a dangerous, menacing or restricted breed dog that kills a person;³ and reckless failure to control a dangerous, menacing or restricted breed dog where that failure creates a danger that another person may be killed.⁴ Various sections of the *Domestic Animals Act 1994 (Vic)* ('DAA') were also amended.

* LLB (Hons), BA, Lecturer, University of South Australia School of Law.

¹ Victoria, *Parliamentary Debates*, Legislative Assembly, 14 September 2011, 3216 (Peter Walsh); Megan Levy, 'Pit Bull Ripped Girl From Mum's Leg', *The Age* (online), 18 August 2011 <<http://www.theage.com.au/victoria/pit-bull-ripped-girl-from-mums-leg-20110818-1iyvs.html>>; 'Dog Pulled Girl From Mother's Legs' *ABC News* (online), 19 August 2011, <<http://www.abc.net.au/news/2011-08-18/dog-pulled-girl-from-mothers-leg/2845390>>; Amelia Harris and Terry Brown, 'Ayen Chol Clung to her Mum But Relentless Pitbull Could Not be Stopped', *The Daily Telegraph* (online), 19 August 2011, <<http://www.dailytelegraph.com.au/news/sydney-news/ayen-chol-clung-to-her-mum-but-relentless-pitbull-could-not-be-stopped/story-e6freuzi-1226117752772>>, among many others.

² Victoria, *Parliamentary Debates*, Legislative Assembly, 14 September 2011, 3215–6 (Peter Walsh).

³ *Crimes Act 1958 (Vic)* s 319B.

⁴ *Crimes Act 1958 (Vic)* s 319C.

This article will critically examine the new provisions of the Act, analysing the way they are likely to operate in practice. The new provisions will be considered in light of the existing law in Victoria relating to offences against the person, particularly the offences of manslaughter,⁵ and endangerment of life.⁶ Both of the new offences are specific offences against the person arising from the failure to control dogs of certain prescribed types.

Both offences traverse ground covered by a number of existing offences in Victoria.⁷ This in itself is not a reason to object to the new offences, as there are a number of good reasons to create specific offences to cover conduct already falling within a broad offence, particularly where that broad offence is one as serious and amorphous as manslaughter. Two of these reasons are the historical reluctance of juries to convict of manslaughter in what might be thought of as borderline cases, and the desirability of fair labelling of conduct.⁸ The offence of causing death by failure to control a prescribed dog is also likely to have an area of operation not covered by the existing law of negligent manslaughter. It is necessary to consider the differences between the criminal negligence standard of fault and that provided for by s 319B. The development of the law in relation to causing death by dangerous driving provides a helpful parallel in this regard.⁹

The provisions, particularly s 319B, are problematic for a number of reasons. Section 319B is an offence carrying a maximum penalty of imprisonment for 10 years that does not require any proof of subjective fault where the defendant is the owner of the dog. Minimal fault is required for this offence where the defendant is not the owner of the dog. The only available defences are reasonable mistake of fact and the act of another.¹⁰ Liability may be imposed without proof of any intentional or reckless act on the part of the defendant. Section 319C requires proof of a reckless act which results in the dog being out of control, but may not require proof of any subjective foresight of result. If it does require such subjective foresight, it is entirely subsumed within the existing offence of recklessly endangering life contained in s 22 of the Act. Again, this may be justified from a labelling perspective, but does not extend potential criminal liability beyond the existing criminal law of Victoria.

It will be argued that s 319B sets the threshold for criminal liability too low; a serious offence of this type demands some form of subjective fault. Section 319C is either redundant or sets the threshold for liability lower than the offence of recklessly endangering life. Though

⁵ *Crimes Act 1958 (Vic)* (Vic) s 5; *Nydam v The Queen* [1977] VR 430; *Wilson v The Queen* (1992) 174 CLR 313.

⁶ *Crimes Act 1958 (Vic)* s 22.

⁷ For example, the offence of manslaughter in the case of s 319B, and recklessly endangering life and negligently causing serious injury in the case of s 319C. There are also a number of offences under the *DA Act* that will overlap with ss 319B and 319C, which are discussed later in this article.

⁸ Andrew Ashworth, *Principles of Criminal Law* (Oxford University Press, 4th ed, 2003) 89–92.

⁹ See, *King v The Queen* (2012) 245 CLR 588; *McBride v The Queen* (1966) 115 CLR 44; cf *Callaghan v The Queen* (1952) 87 CLR 115. It is worth noting that the new provisions appear immediately after the offences of causing death by dangerous or culpable driving in the *Crimes Act 1958 (Vic)*. While this is not significant as a matter of statutory construction, it is indicative of the mindset of the Victorian parliament. This mindset is further evidenced by the Explanatory Memorandum to the Bill, which expressly compares s 319B with the offence of causing death by dangerous driving: Explanatory Memorandum, Crimes and Domestic Animals Acts Amendment (Offences and Penalties) Bill 2011 (Vic) 4.

¹⁰ The legislation is silent on the availability of these defences, so recourse must be had to general common law principles articulated in cases such as *He Kaw Teh v The Queen* (1985) 157 CLR 523; *CTM v The Queen* (2008) 236 CLR 440 and *Proudman v Dayman* (1941) 67 CLR 536 in relation to reasonable mistake of fact, and *Snell v Ryan* [1951] SASR 59 in relation to act of another.

specific offences can have value for the purposes of denunciation and fair labelling of conduct, it will be argued that there is no coherent reason to enact such laws in relation to dangerous, menacing or prescribed dogs as a discrete class of dangerous thing requiring specific regulation.

II STRUCTURE OF THE LEGISLATION

Sections 319B and 319C of the Act provide:

319B. Failure to control dangerous, menacing or restricted breed dog that kills person

(1) If-

- (a) an owner of a dangerous dog, menacing dog or restricted breed dog fails to keep the dog under control; and
- (b) the dog kills another person (the victim); and
- (c) a reasonable person would have realised that that failure would expose the victim or any other person to an appreciable risk of death-

the owner is guilty of an indictable offence and liable to level 5 imprisonment (10 years maximum).

(2) If-

breed dog)- (a) a person (other than the owner of a dangerous dog, menacing dog or restricted

- (i) is, for the time being, in charge or has care of the dog; and
- (ii) fails to keep the dog under control; and
- (iii) is reckless as to whether the dog is a dangerous dog, menacing dog or restricted breed dog; and

(b) the dog kills another person (the victim); and

(c) a reasonable person would have realised that that failure would expose the victim or any other person to an appreciable risk of death-

the first mentioned person is guilty of an indictable offence and liable to level 5 imprisonment (10 years maximum).

319C. Recklessness as to whether controlling dangerous, menacing or restricted breed dog may place another person in danger of death

(1) An owner of a dangerous dog, menacing dog or restricted breed dog who, without lawful excuse, recklessly engages in conduct so that the dog is not under control, and that conduct places or may place another person in danger of death, is guilty of an indictable offence.

Penalty: Level 6 imprisonment (5 years maximum).

(2) A person (other than the owner of a dangerous dog, menacing dog or restricted breed dog) who-

- (a) for the time being, is in charge or has care of the dog; and
- (b) is reckless as to whether the dog is a dangerous dog, menacing dog or restricted breed dog; and
- (c) without lawful excuse, recklessly engages in conduct so that the dog is not under control, and that conduct places or may place another person in danger of death-

is guilty of an indictable offence. Penalty: Level 6 imprisonment (5 years maximum).

Both of the new offences concern dogs falling within three legislatively defined categories: dangerous, menacing, and restricted breed.¹¹ Throughout this article, dangerous, menacing or restricted breed dogs will be referred to by the general term 'prescribed dogs', except where it is necessary to distinguish between the categories of prescription.¹² Section 319B(1) of the Act makes it an offence for the owner of a prescribed dog to fail to keep that dog under control where the dog causes the death of another person in circumstances where a reasonable

¹¹ Each category is defined by the *DA Act*: Restricted breed dogs are identified in s 3 of the Act. Part 3 Division 3 deals with dangerous dogs, and Part 3 Division 3A with menacing dogs.

¹² As, for example, when discussing the various offences that may be committed under s 29 of the *DA Act*.

person would realise that the failure to maintain control of the dog would expose another person to an appreciable risk of death. Section 319B(2) creates a very similar offence, except that it applies to a person other than the dog's owner who at the relevant time has control or charge of the dog. Section 319C of the Act creates an offence of recklessly engaging in conduct so that the prescribed dog is not under control, where the dog not being under control exposes another person to danger of death. Again, the offence is divided into subsections (1) and (2), depending on whether the person is the owner of the dog or merely in control of the dog at the relevant time.

The offences impose serious criminal liability on people who fail to control certain classes of dog, where that failure leads to the death of another person, or to a situation in which some other person's life is, or may be, endangered. In the s 319B offence, there is no requirement of subjective fault in relation to the failure to control, result or risk of harm, and liability will attach where a reasonable person would have recognised that such failure would expose another person to an appreciable risk of death. In the s 319C offence, subjective fault is required only in relation to the failure to control, which must be reckless.

Dangerous, menacing and restricted dog breeds are all defined in the *DAA*.¹³ Only dogs falling within these statutory definitions are subject to the offences created by ss 319B and 319C. Death, injury or the endangerment of life caused by dogs which have not been designated dangerous, menacing or restricted breeds are dealt with under separate provisions of the *DAA*. Deaths caused by dogs not falling within the relevant classes may also amount to manslaughter if the requirements for that offence are met.¹⁴

¹³ See, *DA Act* s 3; pt 3, divs 3, 3A and 3B. Restricted breeds are the American Pit Bull Terrier or Pit Bull Terrier, Dogo Argentino, Fila Brasileiro, Japanese Tosa and Perro de Prasa Canaria, all of which are prohibited from import into Australia under Schedule 1 of the *Customs (Prohibited Imports) Regulations 1956* (Cth). Such dogs are also restricted or prescribed in New South Wales, South Australia, Tasmania and Western Australia. Under s 34 of the *DA Act* a dog may be declared dangerous if it has caused death or serious injury either to a person or animal by biting or otherwise attacking, if the dog is a menacing dog and the owner has been issued with two infringement notices in respect of failing to keep that dog restrained, if the dog has been declared dangerous by another jurisdiction or if the dog has attacked other people or animals on two or more occasions. Section 34A also provides that a guard dog kept on non-residential purposes is a dangerous dog, as is a dog that has been trained to bite or attack. Under s 41A, a dog may be declared a menacing dog if it has rushed at any person, or attacked any person or animal, but not so as to cause serious injury, or if the dog has been so declared in another jurisdiction. Both provisions contain exemptions to cover situations where the dog attacked due to being abused, teased or assaulted, where the person or animal attacked was a trespasser to premises inhabited by the dog, where another person known to the dog was being attacked in front of the dog or in the course of certain approved hunts.

¹⁴ It seems more probable that death caused by failure to control a dog would give rise to a charge of negligent manslaughter, and that is the offence which will be particularly considered in this article, with specific reference to the difference between the criminal negligence standard and the reasonable person standard in s 319B. However, it is possible that such a death could also give rise to a charge of manslaughter by unlawful and dangerous act where there was some other unlawful act preceding death. Given the breadth of 'failure to control' as an expression, almost all instances of a s 319B offence will involve an unlawful act. The test for 'dangerousness' set out in *Wilson v The Queen* (1992) 174 CLR 313 is less stringent than that in s 319B, requiring only that a reasonable person would recognise that the unlawful act carries an appreciable risk of serious injury, rather than the s 319B requirement that the realisation would be one of an appreciable risk of death. The question is whether the various offences amounting to a 'failure to control' constitute 'unlawful acts' for the purposes of unlawful dangerous act manslaughter. On this point, see *Andrews v DPP* [1937] AC 576, and more recently in Victoria, *R v Nguyen (Ruling No 2)* [2010] VSC 442 (29 September 2010). The question whether failing to control a dog is an unlawful act or a lawful act done in a dangerous way is capable of being answered either way. In many cases the underlying offence will be one of omission, which may preclude prosecution for unlawful dangerous act manslaughter: see, Paul Fairall, *Homicide: The Laws of Australia* (Thomson Reuters, 2012) 226–7 [10.1.1030].

Harm caused by such non-prescribed dogs may give rise to liability under the general offence of causing harm by negligence, but only where the harm amounts to serious injury.¹⁵

Victoria's new offences go further than any other jurisdiction in specifically criminalising the conduct of dog owners whose failure to control their prescribed dogs results in death. The offence created by s 319B is comparable to the offence of dangerous driving causing death.¹⁶ The comparison arises because the s 319B offence will impose criminal liability where death is caused regardless of subjective fault, and does not require satisfaction of the criminal negligence standard required for negligent manslaughter. Parliament has created a specific offence of causing death by the failure to adequately manage a defined class of dangerous thing; a prescribed dog. The offence in s 319B creates a new homicide offence separate from the general law of homicide, which suggests that there is something particularly serious or culpable about causing death by failure to control a prescribed dog.

The offence created by s 319C is clearly analogous to the existing offence of recklessly endangering life in s 22 of the Act.¹⁷ Both offences require that there be reckless conduct on the part of the defendant which endangers life. The new offence in s 319C has an additional requirement that the reckless conduct be such that a dog is out of control. It can be seen as a specialised form of the reckless endangerment offence. As discussed below,¹⁸ it may require less to be proved in terms of subjective fault than the general endangerment offence in s 22.

A Table Showing ss 319B and 319C

Physical Element Type	Physical element	Fault Element	Physical Element	Fault Element
	Section 319B		Section 319C	
Conduct	Owner or other person in charge of dog fails to control	- Act of another will apply as a defence Reasonable mistake of fact may apply	Owner or other person engages in conduct such that dog is not under control	Recklessness
Circumstance	Dog is Dangerous, Menacing or Restricted breed	Where failure to control is by owner, no fault. Where failure	Dog is Dangerous, Menacing or Prescribed breed	Where failure to control is by owner, no fault. Where failure

¹⁵ *Crimes Act 1958* (Vic) s 24.

¹⁶ *Crimes Act 1958* (Vic) s 319; So much is acknowledged in the Explanatory Memorandum, Crimes and Domestic Animals Acts Amendment (Offences and Penalties) Bill 2011 (Vic) 4; Victoria, *Parliamentary Debates*, Legislative Assembly, 14 September 2011, 3216 (Peter Walsh); Cf the offence of culpable driving causing death contained in s 318 *Crimes Act 1958* (Vic).

¹⁷ Explanatory Memorandum, Crimes and Domestic Animals Acts Amendment (Offences and Penalties) Bill 2011 (Vic) 4.

¹⁸ See the heading 'Section 319C'.

	Reasonable person would recognise failure to control carries appreciable risk of death	to control by a person other than the owner, knowledge or recklessness that dog is a prescribed dog - Reasonable mistake of fact may be available.	Conduct places or may place another person in danger of death	to control by a person other than the owner, knowledge or recklessness that dog is a prescribed dog. Uncertain whether the person need to be aware of the fact that life has been endangered. ¹⁹
Result	Death	-	-	-

The following discussion considers each element of the new offences.

III CAUSING DEATH OR ENDANGERING LIFE

Section 319B applies only in circumstances where failure to control the dog causes the death of another person. Insofar as the offence is one falling within the homicide cluster, this is a necessary precondition; a homicide offence obviously requires death as an element. Similarly, s 319C will only be engaged where a person's life is or may have been endangered. Any lesser risk created by failure to control a dog will be insufficient to ground liability. The offence may be made out where someone has been injured by an out of control dog, but only if the prosecution is able to prove that life was or may have been endangered.

If the aim of the new offences is to criminalise the conduct of those who culpably fail to control prescribed dogs, it appears incongruent that liability be limited to the situation where death is caused or life endangered. It is probable that far more people are injured by dogs than are killed by dogs. This limitation may be justified by the fact that the provision is designed only to capture the most consequentially serious instances of dog attack. Death is, obviously, the most serious consequence. A statutory regime that applied only to causing death would fail to capture conduct which resulted in catastrophic injury but not death. The inclusion of s 319C would likely cover this situation — such injury would be likely to endanger life. However, these provisions will not apply where serious but not life-threatening injuries are inflicted.

¹⁹ Under s 22 of the Act, which provides for a general offence of recklessly endangering life, the defendant must subjectively be aware that their conduct has endangered life. The question whether this is required for s 319C is considered below.

Much contemporary criminal law assesses culpability at least in part on consequence.²⁰ The significance of this observation in the present context is not that the consequence affects liability, but that it affects culpability. The fact that a defendant's conduct has inadvertently caused serious harm is a factor that may be considered when assessing culpability. Limiting ss 319B and 319C to circumstances in which death is caused or life is endangered limits potential liability to all but the most serious instances of dog attack. Conduct falling short of this most serious category is not seen as being so culpable, and is dealt with under the much more forgiving provisions of the *DAA*.²¹

Even allowing for the fact that the legislation is designed to capture only the most serious and morally culpable instances of dog attacks, there is little justification for the omission of an offence covering the situation in which a person is seriously injured but their life is not endangered.

IV FAILURE TO CONTROL

'Control' is inclusively defined to include a range of circumstances covered by the *DAA*.²² 'Control' is defined to include failing to comply with any of the requirements of ss 24, 26(1), 28, 29, 38, 39, 40, 41, 41E, 41F(1)(a), 41G, 41H, 41HA and 41I of that Act. These sections create a range of offences that may be committed by a dog owner, or by someone who is in apparent control of a dog. The offences cover dogs found at large outside of the owner's premises,²³ urging dogs to attack,²⁴ incidents of dog attack, rushing at or chasing people,²⁵ the restraint of dangerous, menacing and restricted breed dogs,²⁶ and the use of warning signs and appropriate identification for such dogs.²⁷ It should be noted that s 319A of the *Act* provides that the definition of 'control' is inclusive of those sections of the *DAA*, and therefore is likely to apply to situations not directly covered by those sections. Breach of any of the enumerated provisions of the *DAA* will constitute a failure to control for the purposes of the serious offences created in ss 319B and 319C. Conduct not amounting to a breach of any of these provisions may still constitute a failure to control as the sections identified in s 319A of the *Act* do not provide an exhaustive definition of 'control'.

A *Control as Physical Element*

Conduct that may amount to a failure to control includes both acts and omissions. Determining whether an act has occurred will generally be fairly straightforward. Urging a dog to attack,²⁸ for example, requires a positive act of urging, which can be clearly identified. However, conduct amounting to a failure to control a dog may also be an omission, and issues arise here around both subjective fault and voluntariness. For example, a dog is not under control if it is at large outside the owner's premises.²⁹ This is better seen as a state of affairs

²⁰ Offences of causing death or harm by dangerous driving fall within this description.

²¹ See 'Comparable Law', below.

²² *Crimes Act 1958* (Vic) s 319A.

²³ *DA Act* s 24.

²⁴ *DA Act* s 28.

²⁵ *DA Act* s 29.

²⁶ *DA Act* ss 38, 41, 41E, 41G and 41I.

²⁷ *DA Act* ss 39, 40, 41F, 41H and 41HA.

²⁸ *DA Act* s 28.

²⁹ *DA Act* s 24.

than as conduct on the part of the owner, and may arise without any act on the part of the owner. Indeed, such a situation may arise without any conduct whatsoever on the owner's part. It could be argued that any instance in which a dog is at large outside the owner's premises demonstrates a failure to fulfil the duty to control the dog, and is therefore an omission, but this transforms the offence into a compound requiring conduct (failing to fulfil the duty) leading to a state of affairs (the dog being at large). If this construction is accepted, it is then necessary to ask whether fault is required in relation to the failure.

Given that there is already a range of legal duties to control dogs, there is no problem with characterising most instances of a failure to control as an omission.³⁰ That said, a failure to control may not fall within any of the duties articulated in the *DAA*, although the duties are quite comprehensive. The new offences themselves create a general duty to keep any prescribed dog under control. Serious issues in relation to voluntariness also arise. If there is no conduct engaged in by the defendant, and no awareness on the part of the defendant that anything must be done (because, for example, the defendant has no idea her dog is not under control), it seems impossible to meaningfully speak of the defendant voluntarily failing to control her dog. Voluntariness in relation to control of dogs can be distinguished from voluntariness in cases involving causing death by dangerous driving. In those cases, there is a clearly identifiable course of voluntary conduct (driving) immediately before death is caused.³¹

This is an example of the potential breadth of s 319B — it is an offence that may be committed without any physical element that can be fairly described as conduct, although conduct will of course be sufficient. As long as a particular state of affairs — a prescribed dog being out of control — exists, this physical element will be made out. There is no need to prove that the dog was out of control due to any act on the part of the owner or person in charge of the dog.

B *Fault with Respect to Control*

There is no express requirement in s 319B that the owner or person in charge of the dog must knowingly fail to keep the dog under control, or be aware that the dog is not under control. Arguments in favour of implying such a requirement are likely to be defeated by a comparison with the wording used in s 319C.³² The requirement in s 319C that the defendant's failure to control the dog be reckless serves as an indication that no fault is required for the element of failure to control under s 319B, which contains no reference to fault in relation to the failure to control. This observation leads to the conclusion that the s 319B offence is one that may be made out without the need to prove any fault element, at least where the defendant is the owner of the dog.³³

³⁰ For a recent judgment on omissions in the criminal law, see, *Poniatowska v DPP (Cth)* (2011) 244 CLR 408.

³¹ See, eg, *Jiminez v The Queen* (1992) 173 CLR 572, in which the defendant fell asleep while driving, resulting in a fatal collision. While asleep, his conduct was not voluntary, but leading up to falling asleep it was.

³² *Crimes Act 1958* (Vic) s 319C(1), (2)(c), which expressly requires that the defendant 'recklessly engages in conduct so that the dog is not under control'.

³³ Where the defendant is not the owner of the dog, fault must be proved with respect to the fact that the dog is a prescribed dog: *Crimes Act 1958* (Vic) s 319B(2)(a)(iii). There is no need to prove fault in relation to the dog being out of control.

Requiring an intentional or reckless failure seems to set the bar too high, as in many cases it would be very difficult to show that a defendant intentionally failed to exercise control over a dog.³⁴ It is much more likely that the failure to control will be determined on an objective basis; the dog is either under control or it is not. The question is then whether a reasonable person would regard that failure as likely to expose others to the unacceptable risk.

This raises a significant issue. Section 319B appears not to require proof of fault with respect to failing to control a prescribed dog. As an objective assessment, the dog is either out of control or it is not. If the dog is out of control, the question asked by s 319B is whether a reasonable person would have realised that that failure would expose the victim or any other person to an appreciable risk of death. The reasonable person here is, presumably, one who is aware that the dog is out of control. In many cases it will be the situation that the reasonable person and the person in charge of the dog are not in the same position.

Assuming that the defence of reasonable mistake of fact would be available to a defendant charged under s 319B,³⁵ the approach taken to what the reasonable person would have realised will be very important. If the defendant is confined to arguing that he or she was reasonably mistaken with respect to the risk posed by the dog when out of control, then the scope of the defence will be very limited, possibly to the point of non-existence.³⁶ On the other hand, if the defendant is also able to argue that he or she was reasonably mistaken about the dog being out of control in the first place, then its scope is broader.³⁷ Whichever approach is adopted, it remains the case that there is no need for subjective fault to be proven in order for the offence to be made out, and the onus falls to the defendant to point to some evidence supporting a claim of reasonable mistake of fact.³⁸

The main constraint on the scope of s 319B is likely to be the requirement that a reasonable person would recognise that failure to control the dog would pose an appreciable risk of death. In fact, this appears to be the only constraint. ‘Control’, even though defined by reference to the *DAA*,³⁹ is likely to cover almost anything someone can do or fail to do with a dog. There is very little conduct which is not going to fall under one or other of the *DAA* offences. In any event, the definition given to ‘control’ in s 319A of the Act is not exhaustive.

Section 319B provides that a reasonable person would recognise ‘that that failure would expose the victim or any other person to an appreciable risk of death.’ The use of ‘that that’ may be important. It demands an assessment of the specific failure alleged against the defendant — would a reasonable person recognise that *the very* failure to control by the defendant exposed some other person to an appreciable risk of death? This demands consideration of the foreseeable risks of what the defendant actually did or failed to do, not an

³⁴ Although, of course, there may be cases in which this can be shown, such as the situation in which the person in charge of a dog urges the dog to attack.

³⁵ Casting the offence as one of absolute liability seems unduly harsh. On determining whether an offence is one of strict or absolute liability: see, eg, *He Kaw Teh v The Queen* (1985) 157 CLR 523, *Proudman v Dayman* (1941) 67 CLR 536; *CTM v The Queen* (2008) 237 CLR 440.

³⁶ See, for example, *R v Clarke* (2008) 100 SASR 363, in which Doyle CJ held that there was no scope for a defence of reasonable mistake where the central question involved consideration of what a reasonable person would have realised: at [25]–[28]. A mistake in such circumstances is by definition unreasonable.

³⁷ Of course, the defendant must point to evidence showing a positive belief, which if true, would have rendered the conduct innocent. Ignorance is insufficient: *Proudman v Dayman* (1941) 67 CLR 536; *State Rail Authority of New South Wales v Hunter Water Board* (1992) 65 A Crim R 101.

³⁸ *CTM v The Queen* (2008) 237 CLR 440.

³⁹ *Crimes Act 1958* (Vic) s 319A.

abstract consideration of possible risks arising from some general failure to control. However, even if the consideration is one specifically focused on the facts of the particular case, it remains an objective consideration with no regard to what the defendant actually knew.

V REASONABLE PERSON STANDARD V NEGLIGENCE

Section 319B requires that a reasonable person would realise that failure to control the prescribed dog would expose others to an appreciable risk of death. This operates as an objective standard that determines whether the owner or handler of a prescribed dog that causes death will be liable under s 319B.

This offence reflects a legislative trend in favour of enacting specific statutory homicide offences rather than relying on the existing manslaughter offences to cover such conduct.⁴⁰ The legislation raises general issues in relation to various forms of what may be called ‘objective liability’, that is, liability which attaches to a person without proof of subjective fault. There is a particular difference between criminal negligence as it exists at common law and the specific standard of objective fault provided for by the legislation.⁴¹

Victoria already has an offence of negligent manslaughter.⁴² This offence will be made out where the conduct (whether an act or omission) of the defendant causes the death of another person, and that conduct falls so far short of the standard a reasonable person would expect as to warrant criminal sanction.⁴³ Any person in charge of a dog who failed to maintain control of that dog would be liable for manslaughter if the dog caused the death of another person and the failure to maintain control was determined to be grossly negligent. This will cover some, but not all, cases in which a dog causes death. One clear purpose of the legislation is to create a new and extended category of specific liability where a prescribed dog causes death — a category that does not require negligence to be made out.

The question whether a reasonable person would recognise that the defendant’s failure to control the dog would expose another person to an appreciable risk of death is more closely aligned with considerations of dangerousness than negligence.⁴⁴ Given the legal distinction between ‘dangerous’ and ‘culpably negligent’,⁴⁵ there will be a significant area of exclusive operation for the s 319B offence. In part, this is because not every culpable failure to control will be grossly negligent and, in part, because the two considerations are legally quite unrelated. Although the two questions are likely to require consideration of the same factors, the High Court has held that it is appropriate to consider the question of dangerousness in isolation from that of negligence in cases concerning dangerousness.⁴⁶

⁴⁰ In Victoria, see ss 318 and 319 of the *Crimes Act 1958* (Vic) covering causing death by culpable or dangerous driving. These offences are a paradigm example of statutory homicide offences that apply to conduct which otherwise would be likely to fall under the manslaughter umbrella.

⁴¹ This is very similar to the differences between dangerousness and negligence discussed in *King v The Queen* [2012] HCA 24 (20 June 2012) and *McBride v The Queen* (1966) 115 CLR 44; cf *Callaghan v The Queen* (1952) 87 CLR 115.

⁴² *Crimes Act 1958* (Vic) s 5; *Nydam v The Queen* [1977] VR 430.

⁴³ *Nydam v The Queen* [1977] VR 430.

⁴⁴ Explanatory Memorandum, Crimes and Domestic Animals Acts Amendment (Offences and Penalties) Bill 2011 (Vic) 4.

⁴⁵ *King v The Queen* [2012] HCA 24 (20 June 2012); *McBride v The Queen* (1966) 115 CLR 44.

⁴⁶ *King v The Queen* [2012] HCA 24 (20 June 2012); *McBride v The Queen* (1966) 115 CLR 44.

The approach taken by the courts to offences of causing death by dangerous driving shows that the standard to be applied when assessing liability for the s 319B offence does not involve a determination of negligence, criminal or otherwise. The statutory standard expressly stated in s 319B is whether ‘a reasonable person would have realised that [the] failure [to keep the dog under control] would expose the victim or any other person to an appreciable risk of death’. This is different from, and less stringent than, the common law requirement that the failure be a gross departure from the general standard of care.

Section 319B can be seen as imposing a more onerous standard on the owner or handler of a prescribed dog than is imposed on other dog owners or handlers. A person who owns or is in charge of a non-prescribed dog must be culpably negligent before they can be convicted of manslaughter where that dog kills someone. A person who owns or is in charge of a prescribed dog need only fail to control in circumstances where a reasonable person would recognise that failure would expose another person to appreciable risk of death. The lower threshold for prescribed dogs appears to be justified on the basis that the owner or handler should be ‘on notice’ as regards the particular risk posed by that dog. Owners and handlers of non-prescribed dogs are not similarly on notice, and are not held to such a high standard.

The existence of s 319B as a separate offence also means that people who fail to control their prescribed dogs, or prescribed dogs under their control, resulting in the death of another are more likely to be convicted of a homicide offence than people who manage other potentially dangerous things with less than an acceptable level of care. A person who fails to take reasonable care when using a firearm, for example, and thereby causes death may be convicted of manslaughter, but only if the failure to take care can be said to be grossly negligent.⁴⁷ By creating a specific offence with a reasonable person test different from the objective test of gross negligence, the Victorian Parliament has placed the failure to control prescribed dogs in a special category of culpability shared with dangerous or culpable driving.

VI DOG A PRESCRIBED TYPE

A universal problem arising from breed-specific legislation is determining whether a particular dog is or is not a member of a restricted or prescribed breed.⁴⁸ This article is concerned with the attribution of fault as a result of a dog’s categorisation as being a dangerous, menacing or restricted breed dog, rather than the wisdom of enacting breed-specific legislation.⁴⁹

⁴⁷ Liability for manslaughter may also attach to such a case by operation of the doctrine of unlawful and dangerous act manslaughter: see, *R v Nguyen (Ruling No 2)* [2010] VSC 442.

⁴⁸ There is a wealth of scholarship on this question, and it is not one I propose to discuss in this article: See, Devin Burstein ‘Breed Specific Legislation: Unfair Prejudice & (and) Ineffective Policy’ (2004) 10 *Animal Law* 313; Safia Gray Hussain ‘Attacking the Dog-Bite Epidemic: Why Breed-Specific Legislation Won’t Solve the Dangerous-Dog Dilemma’ (2006) 74 *Fordham Law Review*, 2847; Bruce McKenna, ‘Breed Discrimination Laws: So Wrong in So Many Ways’ (2011) 58 *Federal Lawyer*, 4; Julie A Thorne ‘If Spot Bites the Neighbor, Should Dick and Jane go to Jail?’ (1988) 39 *Syracuse Law Review* 1445, among many others. The debate is particularly vigorous in the United States. In Victoria there is a detailed gazetted standard for restricted breed dogs, almost exclusively given over to pit bull terriers: Victoria, *Standard for Restricted Breed Dogs in Victoria*, No S 283, 1 September 2011. Despite the detail in the gazetted standard, problems with its application remain. For example, see *Dundas v Monash City Council* [2012] VSC 578 (29 November 2012), in which Kaye J overturned two council determinations that particular dogs were pit bulls and held that there must be a ‘a substantial, or high, level of correspondence between the material characteristics of the dog and the criteria specified in the Standard’: at [120]. That said, the problem is one of correct application of a detailed standard by councils and courts, rather than an amorphous assessment of whether a dog is a particular breed or not.

⁴⁹ It is acknowledged that some of the criticisms of the Victorian offences are very similar to general criticisms of breed-specific legislation, particularly with regard to the need to assess the risk posed by a particular dog.

The offences distinguish between the owner of a dog and a person who is not the owner, but who is in charge of the dog at the relevant time. For the most part the offences are structured in the same way regardless of who is in charge of the dog, but there is an extra element where the person in charge of the dog is not the owner: recklessness with respect to status as a prescribed dog.⁵⁰ The purpose of this additional fault element is to exclude from the ambit of liability a person who is ‘unaware of the classification or status of the dog at the end of their leash’.⁵¹ The presence of this fault element is an acknowledgement that in some cases, the new offences may operate in a very harsh manner. It is a further objection to these offences that this requirement that the person in charge of the dog at least be reckless about the dog’s status does not extend to the owner of the dog. While it is less likely that the owner of a dog will be unaware of its status, it is not unthinkable. Particularly, the owner of a dog may be unaware that the dog is of a restricted breed.⁵²

The limited scope of the legislation in relation to prescribed dogs is somewhat problematic. It requires that the dog has previously been declared dangerous or menacing, or that it has been found to be of a restricted breed. An assessment that the dog is of a restricted breed may have been made previously by a council, or on the occasion of trial by the Court. If the dog does not fall within one of these categories, there can be no liability for the ss 319B and 319C offences. As was demonstrated in *Dundas v Monash City Council*,⁵³ the application of the gazetted standard may not be as straightforward as that standard’s high level of detail might suggest. Most dogs will not fall within the area of operation of ss 319B and 319C. Where a dog that is not a prescribed dog causes death, any charge brought must fall under the previously existing law of Victoria, whether as a form of manslaughter or one of the specific but much less serious offences in the DAA.⁵⁴ There may be no difference in the level of culpability actually demonstrated by the owner of a non-prescribed dog and a prescribed dog, but only the owner of the prescribed dog stands potentially liable under ss 319B and 319C.

It is acknowledged that limiting the application of the offences to dogs falling within the three prescribed types serves to exclude the majority of dog owners from potential liability for these serious offences. This restriction is similar to the requirement discussed above, that failure to control the dog causes death or the endangerment of life. Its purpose is to exclude from the operation of the legislation all but the most culpable instances of failing to control a dog. Further, it can be argued that requiring dogs to which the section applies be prescribed effectively places the owners of those dogs on notice should anyone be killed or life endangered. The notice argument is strengthened by the distinction between owners and others in charge of the dog in relation to fault for the status of the dog because a person, not being the owner, must be proved to have been reckless with respect to the status of the dog as a prescribed dog. Even having regard to this consideration, it is argued that confining the legislation to the three classes of prescribed dogs is unnecessary when proper regard is had to the objective standard at the heart of the offences.

⁵⁰ *Crimes Act 1958* (Vic) ss 319B(2)(a)(iii) and 319C(2)(b)

⁵¹ Explanatory Memorandum, Crimes and Domestic Animals Acts Amendment (Offences and Penalties) Bill 2011 (Vic) 4.

⁵² Questions of liability become quite thorny here. Whether a dog is a restricted breed, dangerous or menacing dog is a question at least in part, if not entirely, of law. Mistakes about law, no matter how reasonable, cannot defeat liability: *Ostrowski v Palmer* (2004) 218 CLR 493. Dangerous or menacing dog needs for an order to be made, in which case the owner is likely to know. All three classes are difficult to register, and there is no way a moderately prudent dog owner *should* be unaware that his or her dog falls into one of the three classes. That said, is the distinction justified?

⁵³ [2012] VSC 578 (29 November 2012)

⁵⁴ These offences are considered below under the heading ‘Comparable Law’.

Parliament obviously sought to confine the new offences to deaths caused by dogs which either had a history of aggression (dangerous and menacing dogs) or which should be viewed with caution because of general perceived characteristics of the breed (restricted breed). The fact that the legislative amendments only apply to dogs falling within one of these three classes acts as a limitation on the scope of potential liability. Presumably, Parliament has taken the view that it would be unduly harsh to expose to criminal liability owners or handlers of dogs that had never displayed any tendency towards dangerous or menacing behaviour in the event that such a dog escaped the owner's control and caused the death of another person. This is echoed in the need to prove knowledge that the dog is a prescribed dog where the person in question is not the owner.

This restriction is unnecessary and inconsistent with the purpose of the legislation. It is unnecessary because the dog's history, temperament and breed are all matters that should be considered by operation of s 319B(1)(c) and (2)(c), and the need for an objective assessment of risk to life in s 319C. Whether a reasonable person would realise that failure to keep a dog under control would expose others to an appreciable risk of death, or endanger life, will obviously depend on factors specific to that dog, such as temperament, history and breed characteristics: for example, a Rottweiler obviously poses a greater risk than a Chihuahua. It is this reasonableness requirement which also, in part, renders the limitation inconsistent with the purpose of the new offences. If the central question is one of adequacy of control and the prospect of death being caused, the breed of dog or its status as dangerous or menacing ought not matter, at least as a precondition to the imposition of liability. It is an artificial constraint on a legislative instrument directed at preventing deaths caused by a failure of dog owners to control their dogs.

By way of analogy, dangerous or culpable driving causing death is not confined to certain types of motor vehicles.⁵⁵ These are not offences that can only be committed in a V8 car, or a motorcycle with an engine capacity greater than 500CC, for example. They are not offences that require proof the driver had previously driven dangerously. What must be investigated is the manner of driving in a particular case: did that driving depart so far from the relevant standard as to amount to dangerous or culpable driving? The type of vehicle used in the commission of the offence will be relevant to an assessment of dangerousness, but is not a precondition to liability. In the case of dogs, the relevant question should be whether a reasonable person would recognise that a failure to control the dog would expose others to an appreciable risk of death. The dog's nature, as partially reflected in its designation as a dangerous or menacing dog, or restricted breed, is obviously a relevant consideration in answering this question, but should not be set up as a precondition to liability. The enquiry should be one directed towards the reasonably apparent risks posed by failure to control a particular dog in particular circumstances.

⁵⁵ *Crimes Act 1958* (Vic) ss 318–319.

VII SECTION 319B OVERVIEW

There is nothing in the legislation to suggest that any fault on the part of the owner is required in any way for the offence to be made out. It will be sufficient for conviction if the prosecution is able to prove that the owner or person in control of a prescribed dog failed, in some way, to maintain control of that dog, that failure resulted in the death of another person, and a reasonable person would recognise that failure would expose others to an appreciable risk of death. There is limited scope for a defence of reasonable mistake of fact, which will only be available where the defendant was reasonably mistaken about the fact the dog was not under control.

The central objection to the offence as currently framed is that it does not require proof of fault with respect to the dog being out of control. The defendant will be held liable for circumstances of which he or she may quite reasonably have been unaware. In such a case reasonable mistake of fact may afford no defence, as unawareness, no matter how reasonable, is likely to be characterised as ignorance rather than mistake.⁵⁶

VIII SECTION 319C

The main difference between the offences created by ss 319B and 319C is the result. One offence requires actual harm (death) to result, while the other needs only the risk of that harm to be created. Additionally, s 319C is not subject to the same objections in relation to fault for failure to control as s 319B.

Section 319C provides for a compound physical element consisting of conduct (failing to control) that produces a result or state of affairs (dog is out of control). Consideration of control as a physical element may differ from that required for s 319B. Section 319C refers to a person who 'recklessly engages in conduct so that the dog is not under control'. This formulation expressly requires that there be conduct, something absent from s 319B. This may mean that s 319C applies to a narrower range of incidents than s 319B, which would apply in circumstances where there is no conduct at all on the part of the defendant.

Section 319C expressly requires recklessness with respect to the conduct that causes the dog not to be under control.⁵⁷ It is unclear whether it also requires recklessness with respect to the fact that the lack of control places another person in danger of death. If the provision is to be interpreted consistently with the offence of reckless endangerment of life contained in s 22 of the Act, then this will be required. Section 22 provides a split objective/subjective approach to the question whether conduct endangered, or may have endangered, life. The prosecution must prove that a reasonable person engaging in the same conduct as the defendant would recognise they had endangered the life of another, and also that the defendant foresaw that engaging in that conduct would probably endanger the life of another.⁵⁸ Such a reading is open for s 319C, and would be consistent with the approach taken to s 22 by the Victorian courts.

⁵⁶ *Proudman v Dayman* (1941) 67 CLR 536. The defence of act of another may apply where the defendant was reasonably unaware the dog was out of control, but requires that there be an identifiable act from someone else to produce this state of affairs. There are also issues concerning voluntariness in relation to the dog being out of control. The intersection between omissions and voluntariness in this context is blurry.

⁵⁷ *Crimes Act 1958* (Vic) s 319C(1), (2)(c).

⁵⁸ *R v Abdul-Rasool* [2008] VSCA 13 (12 February 2008), [19] (Redlich JA, Chernov JA and King AJA concurring); See also, *R v Nuri* (1990) 49 A Crim R 253, 256 (Young, Crockett and Nathan JJ).

However, such a reading would render this offence redundant, as it would be entirely subsumed within the existing s 22. Indeed, it would not only be entirely subsumed within s 22, but also subject to additional elements not required to be proved in order to secure a conviction for the s 22 offence, being proof that the dog was a prescribed dog, and that the person (if not the owner) was reckless with respect to the dog's status. Section 319C is better read as requiring only that the person recklessly engage in the conduct that results in the dog being out of control, coupled with an objective assessment that life has been endangered. That is, once the dog is out of control due to the defendant's recklessness, he or she is liable for all reasonably foreseeable risks to life, regardless of whether he or she actually foresaw any risk eventuating. It appears that the recklessness in this offence will go to whether the dog was under control, not whether life will be endangered. This seems to differ from the reckless endangerment offence, which requires intentional conduct and recklessness with respect to the fact that life will be endangered by that conduct. Construed this way, the offence will cover those who did not realise their conduct endangered life.

The differentiation in penalty between the s 22 offence and s 319C offence is also relevant to the question of construction. Section 22 provides for a maximum penalty of imprisonment for 10 years. Section 319C provides for a maximum penalty of imprisonment for five years. The lower the penalty, the more likely a court will be to construe a provision as not requiring proof of subjective fault.⁵⁹

One area where s 319C may be quite useful is the situation where failure to control a prescribed dog results in injuries to another person. The infliction of injury may serve as evidence that life was, or may have been, endangered. However, this will not cover every situation in which failure to control a prescribed class of dog results in injury. There may be no risk to life, though injury was an obvious potential outcome. This may be seen as a further instance of the new offences being confined to the worst class of possible cases. Most dog attacks will not result in death, nor will they endanger life.

IX COMPARABLE LAW

There are numerous offences already enacted in Victoria that may cover failure to control a dog resulting in death or injury. This is also the position in other Australian jurisdictions. Existing offences of general application will likely apply in almost any case in which ss 319B or 319C could be invoked.

All Australian jurisdictions other than South Australia provide general offences of causing harm (of varying degrees) through negligence.⁶⁰ In each of these jurisdictions, negligence must be gross for criminal liability to attach. New South Wales has a specific offence of causing dogs to attack where grievous bodily harm results.⁶¹ This offence is better seen as a specific form of assault, rather than an offence relating to negligence or failure to control a dog.

⁵⁹ *He Kaw Teh v The Queen* (1985) 157 CLR 523.

⁶⁰ *Crimes Act 1900* (ACT) s 25; *Criminal Code* (NT) s 174E; *Crimes Act 1900* (NSW) s 54; *Criminal Code* (Qld) ss 320, 328; *Criminal Code 1924* (Tas) s 172; *Crimes Act 1958* (Vic) s 24; *Criminal Code* (WA) s 304.

⁶¹ *Crimes Act 1900* (NSW) s 35A.

It can be argued that the Victorian offence of causing harm through gross negligence will cover the situation where a person fails to control *any* dog and that dog causes harm, as long as that failure amounts to gross negligence. In that sense, there is no need for a specific offence relating to harm caused by negligent failure to control a dog. This argument could also be put for causing death. Negligent manslaughter covers that situation, and unlawful dangerous act manslaughter may also apply if there is an underlying offence of failing to control a dog, and that offence is one which can be characterised as ‘unlawful’ for the purposes of unlawful dangerous act manslaughter.⁶² The difference between criminal negligence and the objective standard provided for in ss 319B and 319C draws a distinction between the new offences and those that already exist. However, it does not provide a particularly satisfactory answer as to why the offences are required in the first place.

All jurisdictions other than Tasmania have minor offences of allowing or encouraging dogs to attack.⁶³ For the most part these offences are punishable by fine only, although some jurisdictions provide for relatively short terms of imprisonment. Penalties may increase where the dog in question is of a prescribed type, or where the attack results in some level of actual harm to the victim.

The Griffith Code states have an offence similar to negligent manslaughter, being the failure to exercise a proper standard of care in relation to dangerous things.⁶⁴ This offence most certainly can apply in relation to fatal dog attacks, but again requires a high degree of negligence.⁶⁵

The DAA contains offences which cover attacks on humans or other animals by dogs that are not prescribed dogs.⁶⁶ These offences are punishable by fine only, except where it is shown that death or serious injury resulted from the attack and the dog was a dangerous dog or restricted breed, in which case the maximum penalty is imprisonment for six months. This penalty applies both to the owner and any other person in apparent control of the dog.⁶⁷

The real objection to the new offences is to the disparity in maximum penalty between the offences in ss 319B and 319C and those offences contained in s 29 of the *Dangerous Dogs Act 1994* (Vic). That a fatal attack by a dog which is not in one of the three prescribed categories is punishable by fine only, whereas a fatal attack by a prescribed dog may attract a sentence of up to 10 years imprisonment, is so disproportionate as to amount to a serious

⁶² As discussed above at footnote 14, unlawful dangerous act manslaughter may only be available where the underlying offence involves an act, not an omission.

⁶³ *Domestic Animals Act 2000* (ACT) s 51: 50 penalty units; *Companion Animals Act 1998* (NSW) s 17: 200 penalty units or imprisonment for two years in the case of a dangerous or restricted dog that has bitten a person, 100 penalty units or imprisonment for six months in the case of a dangerous or restricted dog, and 20 penalty units for any other dog; *Summary Offences Act* (NT) s 75A: \$5,000 fine; *Animal Management (Cats and Dogs) Act 2008* (Qld) s 195: 300 penalty units if death or grievous bodily is caused, 50 penalty units if bodily harm is caused, and 20 penalty units in any other case; *Dog and Cat Management Act 1995* (SA) s 44: \$10,000 fine or imprisonment for two years, aggravated if the dog is dangerous or of a prescribed breed, in which case the maximum penalty is doubled; *DA Act* s 28: 120 penalty units or imprisonment for 6 months; *Dog Act 1976* (WA) s 33D(2): \$10,000 fine and imprisonment for 12 months.

⁶⁴ *Criminal Code* (Qld) s 289; *Criminal Code* (WA) s 266.

⁶⁵ *Pacino v The Queen* [1998] WASCA 335 (14 December 1998); Ian Macfarlane ‘R v Pacino: Extending the Limits of Criminal Negligence?’ (1998) 5 *Murdoch University Electronic Journal of Law* 9.

⁶⁶ *DA Act* s 29(1)–(8), which specifies eight separate offences depending on the class of dog, what the dog does (attacks or bites as opposed to rushes at or chases), whether the person is the owner or another person in apparent control of the dog, and the level of harm sustained by the victim.

⁶⁷ *DA Act* s 29(1)–(2).

injustice. It is true that the offences in the Act have different elements from those in s 29(3) and (4) of the *DAA*, particularly the reasonableness standard, but they are not so different as to make the Act offences 20 times more serious.⁶⁸

X CONCLUSION

In response to the death of a young child, the Victorian parliament passed two separate offences that extend the reach of the criminal law to dog owners who fail to take adequate precautions to ensure their dangerous, menacing or restricted breed dogs are under control. Neither offence requires full subjective fault, and the homicide offence contained in s 319B requires no subjective fault at all where the defendant is the owner of the dog. Section 319B is best compared with offences relating to causing death by the dangerous use of a motor vehicle, in that it renders a defendant liable for a homicide offence carrying a heavy maximum penalty without any proof of subjective fault, and with a lower threshold of culpability than gross negligence required.

The offences suffer from being both too broad and too narrow. Imposing liability for the actions of a dog on a person without proof of subjective fault, or even of any voluntary conduct in the case of s 319B, is too harsh. On the other hand, limiting the offence to the three categories of prescribed dog means that equally culpable conduct from those in charge of other dogs will not be captured by the new offences. Further, the requirement that death result or life be endangered means that equally culpable conduct from those in charge of prescribed dogs will avoid sanction based on an outcome for which no fault needs be proven. The attribution of liability should not turn solely on proof of a prohibited outcome, regardless of how serious that outcome may be.

⁶⁸ Ashworth, above n 8, 37. While comparison of maximum penalties is a somewhat inexact means of ranking the relative seriousness of offences, it does give some insight.