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## **Destruction Obstructions: The legal considerations relevant to dealing with 'dangerous' dogs**

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### **Abstract**

*A pre-condition to the exercise of certain regulatory powers in relation to a dog, such as a decision to issue a destruction order, is often a finding that the dog is dangerous. Animal Management Officers are usually required to make this determination, which necessarily requires careful consideration of a number of relevant factors that are not always identifiable in legislation.*

*This paper gives consideration to the legislative powers to destroy a dog contained in State legislation that may be exercised by Animal Management Officers and examines judicial consideration of the exercise of such powers. In doing so, the paper provides guidance to Dog Management Officers by outlining the relevant factors that must be taken into account in determining whether a dog is dangerous and, indeed, whether a destruction order is warranted.*

### **Introduction**

The decision to exercise a statutory power to cause a dog to be destroyed is an important one. This is because liability implications can potentially arise if such action was appropriate and not taken. For example, where a council has been made aware of a dangerous dog that poses a significant risk to public safety and takes inadequate steps (or none at all) to manage that risk (i.e. by exercising its power to destroy the dog), if the dog causes injury or damage to any person or property, the council may be liable in negligence.

Conversely, if a decision is made to issue a destruction order in respect of a dog and the order is not justified in the circumstances, the council risks its decision to issue the order being challenged (i.e. by way of appeal through the Courts, or by complaint to the Ombudsman) which, at the very least, will have negative resource implications for the Council. Accordingly, there is a need to ensure that any decision to destroy a dog is justified.

With this in mind, often, the one obstruction that an Animal Management Officer must overcome before he/she may lawfully destroy a dog is making a determination that the dog is categorised as sufficiently dangerous such that it poses a serious risk of harm to persons and/or other animals. If this is determined to be the case, it is likely that the destruction of the dog will be warranted.

In practice, the decision to exercise a statutory power to destroy a dog usually comes about following a serious dog attack in which a dog has exhibited behaviour traits that evidence it is dangerous. In these circumstances, destruction of a dog may be considered to be viable and appropriate, especially when such action is deemed necessary to protect the community and to ensure that there is not a repeat of the incident.

Taking the above into account, the question that an Animal Management Officer must answer before exercising statutory powers to destroy a dog is, *'is the dog sufficiently dangerous'*? The answer lies in examining both the applicable legislation that confers the relevant power of destruction, and the case law that has applied it. Both these factors are addressed below.

### **So, exactly what is a 'dangerous dog'?**

#### **LEGISLATIVE CONSIDERATIONS**

Legislation relevant to the management of dogs differs from state to state. However, every Act that operates within each State jurisdiction contains reference to the term *'dangerous dog'*. Unfortunately, a clear definition of this term and/or the word *'dangerous'* is not always provided. For example, the *Animal Management (Cats and Dogs) Act 2008* (QLD), the *Companion Animals Act 1998* (NSW), and the *Dog and Cat Management Act 1995* (SA) each define a *'dangerous dog'* in a relatively ambiguous manner.

Specifically, the Queensland Act provides that a '*dangerous dog*' for the purposes of that Act is a dog that has been declared a dangerous dog<sup>1</sup>. Similarly, in New South Wales, a '*dangerous dog*' is defined under the relevant Act as a dog that has been declared dangerous pursuant to the provisions of the Act<sup>2</sup>. Finally, in South Australia a dangerous dog, is legislatively defined as a dog in relation to which a Control (Dangerous Dog) Order applies<sup>3</sup>.

In the absence of a clear definition, in order to ascertain exactly what constitutes a dangerous dog, the focus must be shifted as to *when* a dog might be declared to be dangerous. In this regard, legislation across Australia provides guidance as to the circumstances when it is appropriate for a council, or an authorised Animal Management Officer to make a declaration (or similar) that a dog is dangerous. This is evident from the following legislative provisions which outline the different approaches in each State:

### 1. New South Wales - *Companion Animals Act 1998*

Section 33(1) of the Act provides that a dog is dangerous (and may, therefore, be declared dangerous under the Act) if it:

- a. has, without provocation, attacked or killed a person or animal (other than vermin), or
- b. has, without provocation, repeatedly threatened to attack or repeatedly chased a person or animal (other than vermin), or
- c. has displayed unreasonable aggression towards a person or animal (other than vermin), or
- d. is kept or used for the purposes of hunting.

### 2. South Australia – *Dog and Cat Management Act 1995*

Section 51(2) of the Act provides that a council may make a Control (Dangerous Dog) Order in relation to a dog if it is satisfied that:

- a. the dog is dangerous; and
- b. the dog has attacked, harassed or chased a person or an animal or bird owned by or In the charge of a person in circumstances that would constitute an offence against this Act.

### 3. Victoria – *Domestic Animals Act 1994*

Section 34 of the Act empowers a Council to declare a dog to be dangerous:

- a. if the dog has caused the death of or serious injury to a person or animal by biting or attacking that person or animal; or

- b. if the dog is a menacing dog and its owner has received at least 2 infringement notices in respect of a prescribed offence; or
- c. if the dog has been declared a dangerous dog under a corresponding law of another State or a Territory; or
- d. if there has been a finding of guilt or the serving of an infringement notice (which has not been withdrawn and the penalty has been paid under the *Infringements Act 2006*) in respect of 2 or more offences under specified sections of the Act.

Further, section 34A of the Act prescribes the following as dangerous dogs:

- a. a dog that is kept as a guard dog for the purpose of guarding non-residential premises; or
- b. a dog that has been trained to attack or bite any person or anything when attached to or

### 4. Tasmania – *Dog Control Act 2000*

Under section 29(1)(a) of the Act, a dog may be declared dangerous where:

- a. the dog has caused serious injury to a person or another animal; or
- b. there is reasonable cause to believe that the dog is likely to cause serious injury to a person or another animal.

### 5. Western Australia – *Dog Act 1976*

Pursuant to section 33E(1) of the Act, a dog is dangerous where:

- a. the dog has caused injury or damage by an attack on, or chasing, a person, animal or vehicle;
- b. the dog has repeatedly, shown a tendency—
  - i. to attack, or chase, a person, animal or vehicle even though no injury has been caused by that behaviour; or
  - ii. to threaten to attack.

### 6. Queensland – *Animal Management (Cats and Dogs) Act 2008*

Section 89(2) of the Act provides that a dog may only be declared to be dangerous if the dog:

- a. has seriously attacked, or acted in a way that caused fear to, a person or another animal; or
- b. may, in the opinion of an authorised person having regard to the way the dog has behaved

1 *Animal Management (Cats and Dogs) Act 2008* (QLD), s 61

2 *Companion Animals Act 1998* (NSW), s5

3 *Dog and Cat Management Act 1995* (SA), s 4.

towards a person or another animal, seriously attack, or act in a way that causes fear to, the person or animal.

A review of the above provisions highlights a trend in State legislation, whereby a dog may be deemed to be 'dangerous' by a council if it attacks or injures a person or another animal.

Importantly, however, the fact that a dog has attacked another person or animal does not automatically demand a decision by a council to destroy the dog. This is because there are other, potentially mitigating factors to which regard must be had before such a decision is made. To this end, the case law that has considered the application of statutory powers to destroy a dog provides useful guidance as to the considerations that must be taken into account.

### Case law considerations

Courts across Australia have been called upon to assess the appropriateness of council decisions to exercise statutory powers to destroy a dog. This usually occurs where a council's decision to issue a destruction order in respect of a dog has been contested by the dog's owner, in which case, the Court is left to determine whether the destruction order should be upheld. In doing so, the Courts pay close attention to the particular facts of the case in question, the gravity of the circumstances giving rise to the destruction order, and the owner's role in enabling a dangerous dog.

With regard to the Court examining the particular facts of each case, this was demonstrated in the South Australian case of *Clare & Gilbert Valleys Council v Crawford*<sup>4</sup>. Specifically in that case, Judge Millsted stated that:

*...the test of dangerous must be applied having regard to the circumstances in which the dog presents a risk of harm. In my view it would be inappropriate to characterise a dog as dangerous if the risk of the dog harming someone is limited, for example, to circumstances where it is mistreated, provoked or being used in the reasonable defence of a person or property.*<sup>5</sup>

This case is also authority for the fact that a dog may be classed as dangerous where it exposes people and/or animals to an appreciable or substantial risk of harm or injury. In this regard, the question as to the degree of harm a dog may be likely to inflict is also relevant.

In the case of *District Council of Grant v Tremelling*,<sup>6</sup> Magistrate Hiskey considered that other factors relevant to determining whether a dog is sufficiently dangerous to warrant a destruction order include whether or not it is likely that the dog will be involved in further attacks, and whether or not the particular circumstances which led to an attack are likely to reoccur.<sup>7</sup> In this case, Magistrate Hiskey determined that the dog in question fell short of being sufficiently dangerous to warrant a destruction order because the dog had never been involved in a similar attack, the attack in question was not '*particularly vicious*', and the dog's owner was considered to be a responsible dog owner.<sup>8</sup>

By comparison, in *Martin v City of Stirling*,<sup>9</sup> the destruction order issued by the council in respect of a dog that attacked a 13 year-old girl was upheld. The reasons for this was because the attack was considered vicious and involved the dog forcing the girl into a submissive position and snapping aggressively at her until it was eventually chased away by an onlooker.

Dogs that act unpredictably have also been held to be dangerous as demonstrated in the case of *Rodger v City of Onkaparinga*<sup>10</sup>, in which the Court had regard to evidence that the dog subject of a destruction order issued by the council was '*fine one day*', but would act in a manner that was so out of character the next.<sup>11</sup> In this case, the evidence of the unpredictable nature of the dog contributed to the Court's decision to uphold the destruction order.

Taking the above into account, it is clear that the Courts distinguish between erratic and vicious behaviour displayed by a dog, as opposed to a once-off reaction which occurs when the dog is provoked (it is more likely that the former behaviour will warrant a destruction order).

The extent of any injury sustained as a result of a dog attack is another important consideration that the Courts may take into account when determining whether a dog is dangerous. This was explained

4 *Clare & Gilbert Valleys Council v Crawford* [2005] SADC 135

5 as above, at 68

6 *District Council of Grant v Tremelling* [2007] SAMC 3

7 as above, at 29

8 as above, at 31, 42 and 44 respectively

9 *Martin v City of Stirling*, Unreported, 13 Sept 1990, WASC

10 *Rodger v City of Onkaparinga*, Unreported, 8 September 2006, SADC

11 as above at 224

in the *Clare & Gilbert Valleys* case in which Judge Millstead commented:

... a dog should be categorised as dangerous if it exposes a person to no more than slight or trivial injury. To my mind, it is unlikely that parliament would have intended to impose the stringent Dangerous Dog Order requirements upon a dog that was disposed to inflict no more than trivial injury.<sup>12</sup>

In turn, there exists a strong legal argument that a more serious injury is reflective of a more dangerous dog and, therefore, is more likely to enliven (and justify) the application of destruction powers conferred upon councils.

Finally, the conduct of a dog owner is another factor that must be taken into account when determining the degree of danger a dog presents to the community. For example, in *Mnyirrinna v McIntosh*,<sup>13</sup> it was found that the dog owner had overlooked adequately fencing her property to enclose her dog and that she was unable to effectively control the dog. As such, the owner's failures, combined with the dog's history of attacking other dogs, resulted in the Court upholding the destruction order issued by the council.

Having regard to the relevant case authorities, it is apparent that in determining whether a dog is sufficiently dangerous to warrant a council taking action to destroy it (such as by way of issuing a destruction order), the following are relevant considerations:

- the circumstances involving the incident(s) giving rise to any proposed destruction order, including whether the dog was provoked;
- the nature and severity of any injuries caused by the dog;
- the general temperament of the dog and the likelihood it will attack (again);
- the effect of the proposed destruction order (or similar) in preventing a repeat of the incident, and whether there are any other alternative means to achieving this result;
- the willingness of the dog owner to cooperate with lawful directions, and/or evidence that the dog owner is responsible and/or has otherwise taken adequate steps to address the dog's behaviour; and
- the history of the dog's behavior and/or any evidence that it has a propensity to attack and/or act aggressively.

## Conclusion

Ultimately, it is a question of 'fact and degree' as to whether a dog is sufficiently 'dangerous' such that its lawful destruction is warranted. Accordingly, a council or an Animal Management Officer's decision to destroy a dog is one that can only be made on a case-by-case basis, and often, only after a determination has been made (supported by evidence) that the dog in question is sufficiently dangerous.

It is recognised that the decision to destroy a dog can be a difficult one to make. Fortunately, however, the considerations outlined above, including those contained in relevant legislation and the case law that applies it, provide valuable guidance to those persons who are charged with making such decisions.

## References

- Clare and Gilbert Valleys v Crawford* [2005] SADC 135  
*District Council of Grant v Tremelling* [2007] SAMC 3  
*Martin v City of Stirling* Unreported, 13 Sept 1990, WASC  
*Mnyirrinna v McIntosh* [2003] WA SCA 305  
*Rodger v City of Onkaparinga*, Unreported, 8 September 2006, SADC  
*Animal Management (Cats and Dogs) Act 2008* (Qld)  
*Companion Animals Act 1998* (NSW).  
*Dog Act 1976* (WA)  
*Dog and Cat Management Act 1995* (SA).  
*Dog Control Act 2000* (Tas)  
*Domestic Animals Act 1994* (Vic).

<sup>12</sup> *Clare & Gilbert Valleys Council v Crawford* [2005] SADC 135 at 68

<sup>13</sup> *Mnyirrinna v McIntosh* [2003] WA SCA 305

## ◎ BIOGRAPHY

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Cimon was admitted to legal practice in 2007 and holds an honours degree in Laws and Legal Practice and a Bachelor of Arts from the University of Adelaide. Cimon worked in the Office of the Director of Public Prosecutions before joining Wallmans Lawyers in 2008 as a specialist practitioner in the firm's leading Local Government team.

Cimon advises metropolitan and regional Councils on a diverse range of governance issues and regulatory matters relevant to local government practices and procedures including:

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Active in her field, Cimon also regularly presents training seminars and papers. With a keen passion for, and an appreciation of the political environment in which local government operates, Cimon's approach is to provide her clients with practical solutions that will withstand public scrutiny.





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