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Contact: P H Mulligan/ G R Milner-White

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Dear Stuart

## **Dog Control Advice - Attack on Carol Jones**

### **Introduction**

- 1 You requested our advice in relation to two matters relating to the above dog attack:
  - 1.1 What options or rights does Council have to reconsider its decision not to prosecute in this case and initiate action under Section 58 of the Dog Control Act 1996 ('DCA'); and
  - 1.2 If Council now determined to initiate prosecution action, who would be the named defendant(s) in any information laid. To resolve this it must be determined who was the "Owner" of the dog at the time of the attack.

### **Background**

- 2 The factual background to the attack is set out in your report to the Mayor dated 17 August 2006. In summary:
  - 2.1 At the time of the incident the dog was in the care of Mrs Jones as part of her kennel operation.
  - 2.2 The registered owners, Mr and Mrs Pleasants were away overseas and had placed the dog in Mrs Jones' care.
  - 2.3 On 16 July 2006 Mrs Jones was out walking the dog when the dog's lead became caught up in a tree and the dog turned on Mrs Jones and attacked her, repeatedly biting both arms as she attempted to protect herself.
  - 2.4 Mrs Jones was seriously injured and taken to hospital and was operated on to repair wounds to her arms. She stayed in hospital for two days.
  - 2.5 Following investigation of the complaint there was an informal "hearing" to allow all parties to put their views forward.
  - 2.6 The decision following that meeting was to request Mr and Mrs Pleasants to sign over the dog for destruction, or if they were not prepared to do that, enter into a formal agreement that the dog be classified as dangerous under the Act and various other

restrictions (including that the dog is not allowed off the property unless with Council's permission).

- 2.7 Mr and Mrs Pleasants refused to hand over the dog for destruction, and, as we understand it, a written agreement has been signed agreeing to the classification and the other terms sought.
- 2.8 Mrs Jones is dissatisfied with Council's decision and has complained to the Ombudsman about Council's conduct in this case<sup>1</sup>.

### **Can Council now Prosecute?**

- 2.9 There are a number of case authorities which deal with the situation where the prosecution reaches an agreement or understanding with a defendant and then (for often legitimate reasons) chooses to change its position and initiate prosecution action. From these we note the following:
- a. In general the Courts, particularly Appeal Courts, have been reluctant to interfere with decisions to initiate prosecutions in these circumstances. They have said that they will only interfere where there is a clear abuse of process.
  - b. The hallmarks of official conduct that warrant a stay will often be bad faith or some improper motive for initiating or continuing to bring a prosecution but may also be simply a change of course by the prosecution having a prejudicial impact on an accused.
  - c. To stay a prosecution and thereby preclude the determination of the charge on its merits, is an extreme step which is to be taken only in the clearest of cases.<sup>2</sup> For example the Court of Appeal has declined to interfere with a prosecution where the Crown solicitor relaid informations which were earlier withdrawn by the Police after discussions with defence counsel, leading to the defendant's plea of guilty to lesser charges.
  - d. The Court may intervene if it concludes that the Court processes are being employed for ulterior purposes or in such a way (for example, through multiple or successive proceedings) as to cause improper vexation and oppression.<sup>3</sup>
- 2.10 In our view it is very likely that if Council was to now seek to initiate prosecution action under Section 58 that the existence of the agreement with the Pleasants will be raised as a defence to the prosecution or in support of a challenge to the decision to initiate prosecution. Clearly there is a fairness issue to the Registered Owners if Council now seeks to resile from that position, particularly given the careful process that has been gone through to get to this point. In addition there may be arguable prejudice to the

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<sup>1</sup> WDC have not been privy to the correspondence between Mrs Jones and the Ombudsman (except for a short extract from the Ombudsman's letter provided to Council by Mrs Jones in relation to the ownership issue). We are unaware therefore what findings if any the Ombudsman has made in relation to the case.

<sup>2</sup> *Attorney General v Fox* [2002] 3 NZLR 63, 72

<sup>3</sup> *Moenvao v Department of Labour* [1980] 1 NZLR 464 at 482 (CA).

owners if they have taken steps to implement the agreement, such as building a secure enclosure on the property and/or other steps to ensure the dog is adequately secured.

- 2.11 Although the caselaw suggests the Courts are reluctant to interfere with prosecutions, we consider that it is a very real possibility that a District Court faced with the circumstances of the current case could be supportive of the Pleasants' plight. We consider there are significant risks associated with commencing a prosecution at this stage after the agreement between the parties has been signed and (we assume) implemented.

### Who Should be Prosecuted?

- 3 If despite this advice Council does wish to proceed with a prosecution, the question then arises as to who should be prosecuted.

- 4 S58 DCA provides that an "*the owner of any dog that attacks any person ... and causes serious injury to any person ... commits an offence*". An "owner" is defined as:

*...every person who—*

- (a) Owns the dog; or*
- (b) Has the dog in his or her possession, whether the dog is at large or in confinement, otherwise than for a period not exceeding 72 hours for the purpose of preventing the dog causing injury, damage, or distress, or for the sole purpose of restoring a lost dog to its owner; or*
- (c) The parent or guardian of a person under the age of 16 years who—*
  - (i) Is the owner of the dog pursuant to paragraph (a) or paragraph (b) of this definition; and*
  - (ii) Is a member of the parent or guardian's household living with and dependent on the parent or guardian;—*

*but does not include any person who has seized or taken custody of the dog under this Act or the [Animal Welfare Act 1999] or the National Parks Act 1980 or the Conservation Act 1987 or any order made under this Act or the [Animal Welfare Act 1999]:*

- 5 We have assumed that Council's primary motivation in pursuing a prosecution would be to ensure the destruction of the dog. The difficulties arise in this case because an order for destruction of the dog can only be obtained after the successful prosecution of the 'owner' of the dog. In this case there are two potential 'owners', the Pleasants and Mrs. Jones and neither make ideal candidates for prosecution.

*Mrs Jones*

- 5.1 Given the definition of 'owner' we consider it is relatively clear that in this case Mrs Jones is a person who had possession of the dog over a number of weeks while Mr and Mrs Pleasants were away and is therefore deemed to be an "owner" in terms of the Act.

- 5.2 Mrs. Jones contends that she is covered by the exception to being a deemed ‘owner’ set out at the end of the definition; namely that she is a person “who has seized or taken custody of the dog under the Act or the Animal Welfare Act 1999”. We understand she contends her kennel facility falls within the definition of an “Animal Establishment”<sup>4</sup> under the Animal Welfare Act 1999 and that by taking the dog in that capacity she falls within the exception.
- 5.3 We consider Mrs. Jones’ interpretation is unsustainable. The Animal Welfare Act gives Animal Welfare Officers powers to unilaterally seize or take custody of a dog where the officer considers that dog has been or will be subject to maltreatment. In our view it is clear that the exception to ownership by possession is intended to relate to situations where Animal Welfare Officers, using their powers under the Animal Welfare Act seize or take custody of a dog. The reference to Animal Establishment is a reference to places where animals will be kept and is not relevant to the definition of owner in the Dog Control Act. In this case Mrs. Jones cannot be said to have seized or taken custody of the dog under the Animal Welfare Act where she has taken control of the dog pursuant to a private agreement with its owners. In our view she therefore clearly falls within the definition of an owner.

*Mr and Mrs Pleasant*

- 5.4 Mr and Mrs Pleasants are clearly also owners of the dog and can be prosecuted. However even putting aside the issue arising from their agreement with Council, their level of culpability in this case is so low that we think it may be hard to secure a conviction against them.
- 5.5 The fact that they were absent at the time the attack occurred and had placed the dog with a professional boarding kennel and experienced dog handler (presumably Mrs. Jones will confirm this) means that arguably they took all reasonable steps to ensure the control of the dog in their absence. We consider they have a strong chance of successfully defending the prosecution.

**Conclusion**

- 6 One of the key objectives of the DCA is to impose obligations on dog owners to ensure that they do not injure, endanger or cause distress to any person. They are required to take “all reasonable steps” to achieve this.
- 6.1 In our view the dangerous dog classification which Council have agreed with the owner in addition to the further restrictions requiring the dog essentially to be kept securely on the property in the care of Mr and Mrs Pleasants go a significant way to achieving the objectives of the Act in this case. The point could also be made that should Mr and Mrs Pleasants breach any of the terms of the dangerous dog classification they are liable for prosecution and destruction of the dog **must** follow unless there are exceptional circumstances. In those circumstances the public interest in further prosecution action in light of the unusual circumstances of the case is arguably limited.

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<sup>4</sup> “Animal Establishment means a place at which animals are used or held in the charge of any person, and which has, as its principal purpose, the using or holding of animals for display, sport, entertainment, temporary care, sale, conservation, scientific study, or other activity:

- 6.2 Of the two possible prosecution targets we conclude that the best chance of a successful prosecution is against Mrs Jones, purely because she was controlling the dog at the time of attack. Despite the greater chances for success, the prospect of prosecuting the victim in this matter is not satisfactory for obvious reasons. As stated above because the Pleasants had so little involvement we think it likely they will mount a strong defence based the fact that they took all reasonable steps in the circumstances. This coupled with the agreement reached means the chances of a successful prosecution make them a difficult prosecution target.
- 6.3 If notwithstanding the difficulties with prosecuting either of the parties outlined above, Council choose to pursue prosecution to secure the destruction of the dog, we would recommend both parties be prosecuted on the basis that Council was only seeking the destruction of the dog and would recommend a discharge without conviction for both defendants if prosecuted. As stated above we would recommend that Mrs Jones be prosecuted to provide the best chance of a successful prosecution and the Pleasants so they could then play a part in the process in circumstances where if only Mrs Jones were prosecuted, they would not be guaranteed a right to oppose the destruction order.
- 6.4 As a final point, we note that any decisions made by the Council in relation to prosecution do not affect the right of Mrs Jones to take civil action against Mr and Mrs Pleasants should she wish to do so. In our experience, it is normal for the District Court to make some form of reparation order to cover medical or hospital expenses and loss of income (to the extent this is not covered by ACC). Mrs Jones may be able to claim similar items via a civil suit in the District Court.
- 6.5 We hope this answers your immediate queries. We will be happy to assist further as required.

Yours sincerely



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