NSW Law Reform Commission

REPORT 52 (1988) - COMMUNITY LAW REFORM PROGRAM: TENTH REPORT - LIABILITY FOR INJURIES CAUSED BY DOGS

Table of Contents

Terms of Reference and Participants

New South Wales Law Reform Commission
To the Honourable J R A Dowd LLB, MP,

Attorney General for New South Wales

COMMUNITY LAW REFORM PROGRAM

LIABILITY FOR INJURIES CAUSED BY DOGS

Dear Mr Attorney

We make this Report pursuant to the reference received from the then Attorney General for New South Wales, the Honourable T W Sheahan BA, LLB, MP on 4 August 1985.

Helen Gamble

(Chairman)

Russell Scott

(Deputy Chairman)

Professor Colin Phegan

(Commissioner)

Paul Byrne

(Commissioner)

June 1988

Terms of Reference

On 4 August 1985, the Attorney General of New South Wales, the Honourable T W Sheahan BA, LLB, MP made the following reference to the Commission:

> To inquire into and report on the following matters:
>
> > 1. Whether, and if so the circumstances in which, criminal and/or civil liability, beyond that presently provided for in ss6 and 20 of the Dog Act 1966, should be imposed on an owner or person who has the effective care and control of a dog which causes harm to any person or property;
> >
> > 2. Any related matter.

Participants

For the purpose of the reference a Division was created by the Chairman in accordance with s12A of the Law Reform Commission Act 1967. The Division comprised the following members of the Commission:

> Ms Helen Gamble (Chairman)
>
> Paul Byrne
>
> Keith Mason QC
>
> Professor Cohn Phegan

Mr Russell Scott

Keith Mason QC was a member of the Division until 5 February 1987.

Honorary Consultant to the Division

Mr Trevor Martin QC

Research and Writing

Ms Laura Beacroft

Mr Ian Ramsay

Mr Ross Ramsay

Ms Fiona Tito

Ian Collie

Research Director

Mr William J Tearle

Secretary

John McMillan

Word Processing and Typing

Ms Lorna Clarke

Mrs Margaret Edenborough

Mrs Nozveen Khan

Mrs Irene Vassarotti

Ms Judith Grieves

Administrative Assistance

Ms Zoya Howes

Mrs Jennifer McMahon

Ms Dianne Wood

Mr Grant Van Wingerden

Librarian

Ms Beverley Caska

Summary of Principal Recommendations

The Commission recommends:
1. That council officers be given power to issue on-the-spot infringement notices for offences under the Dog Act. (paras 4.31-4.36; 5.13)

2. That the definition of “public place” be clarified to ensure that private property to which the general public has ready access is included. (paras 4.22-4.26; 5.3, 5.5)

3. That the s6 offence of dogs attacking or injuring persons or animals continue. (para 4.37; 5.4)

4. That a new offence (s6A) be created which would impose criminal liability for serious injury which the owner or person responsible for control of the dog foresaw would occur but against which no reasonable precautions were taken. The crime could be committed on either public land or on the owner’s land. (para 4.20-4.21; 5.4)

5. That the current defences to criminal liability of intentional cruelty or provocation (s6(2)(b)) be available only where the provocation or cruelty are offered by the victim or someone closely associated with the victim. Further, that the defence of self-defence of person or property be made expressly applicable to the new s6A offence. (paras 4.20, 4.38; 5.4)

6. That a provision be inserted in the Dog Act which would allow a magistrate, upon complaint that a dog is dangerous and is not kept under proper control, to order the owner of the dog to keep it under control or ultimately to order that the dog be destroyed. (para 4.21; 5.14)

7. That there should be enacted a provision which imposes strict civil liability in respect of all harm caused by a dog while outside its owner’s property. (para 4.40; 5.10)

8. That the current defences to the action in strict civil liability continue. These are the defences that the attack was in immediate response to, and wholly induced by, either intentional cruelty or intentional provocation, but they should be confined to cruelty or provocation offered by the victim or someone associated with or acting on behalf of the victim (s20(2)(b)). Where the damage is due partly to the negligence of the plaintiff this will constitute contributory negligence (s20C). (paras 4.43-4.44; 5.11)

9. That the general law of negligence continue to apply to harm caused by dogs on the owner s land. (paras 4.14-4.16; 5.12)

10. That those seeking lawful entry to private land for statutory purposes whose previous attempts have been thwarted by fear of attack by a dog be able to apply to a magistrate for an order to assist their entry. (para 4.17-4.18; 5.14)

II. Injury and Damage Occurring on the Owner’s Property

The Commission recommends:

1. That the general law or any statutory scheme of occupier’s liability substituted for it apply to harm caused by dogs on the owner’s land. (paras 4.14-4.16; 5.12)

2. That those seeking lawful entry to private land for statutory purposes whose previous attempts have been thwarted because of actual or likely savage behaviour of a dog be able to apply to a magistrate for an order to assist their entry. (para 4.18-4.19; 5.14)

3. That a new offence be created which would impose criminal liability for serious injury which the owner or person responsible for control of the dog foresaw would occur but against which no reasonable precautions were taken. Such a crime would be committed where it could be shown that the dog was savage and the owner encouraged or directed it to attack or where the owner did not exercise effective control over it although aware of its capacity to attack and cause injury. The crime could be committed on either public land or on the owner’s land. (para 4.21; 5.4)

4. Further, that a provision be inserted in the Dog Act which would allow a magistrate, upon complaint that a dog is dangerous and is not kept under proper control, to order the owner of the dog to keep it under control or ultimately to order that the dog be destroyed. (para 4.22; 5.14)

1. The Community Law Reform Program and This Reference

I. INTRODUCTION

1.1 This is the tenth report in the Community Law Reform Program. The Program was established by the then Attorney General, the Hon F J Walker, QC, MP, by letter dated 24 May 1982 addressed to the Chairman of the Commission. The letter contained the following statement:

> This letter may therefore be taken as an authority to the Commission in its discretion to give preliminary consideration to proposals for law reform made to it by members of the legal profession and the community at large. The purpose of preliminary consideration will be to cring to my attention matters that warrant my making a reference to the Commission under s10 of the Law Reform Commission Act 1967.

The background and progress of the Community Law Reform Program are described in greater detail in the Commission's Annual Reports since 1982.

II. BACKGROUND TO THE REFERENCE

1.2 The Police Association of New South Wales wrote to the Commission in October 1983 expressing concern “at the lack of protection afforded to its members in regard to attacks by dogs under the present legislation” and drawing attention to the limited criminal liability imposed by s6 of the Dog Act 1966.

Section 6(1) of the Dog Act 1966 provides that:

> The owner of a dog that attacks or causes injury to a person or animal shall be guilty of an offence against this Act and liable to a penalty not exceeding $200.

Section 6(2)(a) states that subsection (1) shall not apply if the attack or injury by the dog:

> occurs on any land, vehicle or premises -
>
> (i) of which the owner of the dog is an occupier; or
>
> (ii) on which the dog is ordinarily kept.

1.3 Section 6 of the Dog Act was amended in 1981. Prior to 1981 there was no subsection (2) and s6 simply provided that the owner of a dog that:

> (a) in or on a public place, attacks or causes injury to a person or animal; or
>
> (b) in or on any other place, attacks or causes injury to a person who is lawfully in or on that other place,
>
> shall be guilty of an offence.

The Police Association stated that as a result of the amendment:

> there is no provision in the current legislation whereby the owner of a dog is legally committed to ensure the safety of persons entering or leaving his property for lawful purposes.

The Association observed that “the duties of Police Officers regularly require them to lawfully enter private property on a daily basis”.

1.4 During our inquiries, it became apparent that the provisions of the Dog Act dealing with civil liability for attacks or injuries by dogs were also a cause of concern. The relevant section of the Dog Act is as follows:

> 20. (1) Subject to subsection (2), the owner of a dog shall be liable in damages in respect of -
>
> (a) bodily injury to a person caused by the dog wounding that person; and
>
> (b) damage to the clothing of a person caused by the dog,

in the course of attacking that person.

(2) Subsection (1) does not apply in the case of -

(a) an attack by a dog occurring on any land, vehicle or premises -

(i) of which the owner of the dog is an occupier; or

(ii) on which the dog is ordinarily kept; or

(b) an attack by a dog which is in immediate response to, and is wholly induced by, intentional cruelty to, or intentional provocation of, the dog by a person other than the owner of the dog, his servants or his agents.

(3) This section does not affect the liability apart from this section of any person for damage caused by a dog.

1.5 The following aspects of this provision have given rise to concern:

1. Damages are available pursuant to s20(l) only in respect of "bodily injury to a person caused by the dog wounding that person ... in the course of attacking that person". As employed in criminal law the term "wound" means a breaking of the skin. Consequently, a person who suffers a fractured bone in the course of a dog attack but whose skin is not broken may not be able to claim under s20. There is a recent District Court decision to the effect that "wound", for the purposes of s20 of the Dog Act, does not require the plaintiff's skin to be broken, but this interpretation has not been considered by a higher court.[1]

2. In order to claim under s20, the bodily injury must have been caused in the course of an attack on the plaintiff. Clearly, there may be circumstances in which a person may suffer bodily injury as a result of conduct of a dog which does not involve a direct personal attack. The plaintiff may be injured by someone running to avoid an attack or the injury may be incurred as the plaintiff acts to avert a threatened attack. These situations would appear to be outside the scope of s20.

3. Similarly, dogs may be the cause of injury even though not behaving in a hostile manner. Dogs engage in other types of behaviour, such as running or simply obstructing passage on a footpath which may result in injury to a person. Section 20 would not apply to such injuries.

4. As the provision is limited to bodily injury, injuries resulting in nervous shock are probably excluded.

5. The only property damage for which the owner of a dog which attacks is liable is damage to the clothing of the plaintiff. Compensation for other items that may be damaged in the course of the attack (for example, spectacles or a camera) cannot be recovered under s20. The plaintiff must pursue a separate common law action.

6. As compensation is not payable for damage to possessions other than clothing no claim can be made for damage caused to a vehicle such as a motor bike, bicycle or car in which the plaintiff may have been travelling.

7. No liability is imposed if the dog is provoked by anyone other than the owner or the owner s servants or agents. Thus, the owner would not incur liability if the dog was provoked by the owner's child or spouse.

8. The definitions of the owner's land, vehicle and premises are not drafted so as to exclude private premises which are used for public purposes. Section 20(2) may relieve the owner from liability even though the attack occurs in the public area of the owner's shop or on the open platform of a commercial vehicle.

1.6 During its preliminary consideration the Commission received a letter from eight residents of Mullumbimby who suggested, *inter alia*, that s20(2) should be amended. Section 20(2) provides that absolute civil liability will not be incurred where the attack by the dog occurs on any land, vehicle or premises of which the owner of the dog is an occupier or on which the dog is ordinarily kept. The signatories to the letter suggested that absolute civil liability should cover all situations "where an attack by a dog causes severe multiple injuries and/or any injury requiring multiple stitching, regardless of whether such an attack occurs on the owner's premises, land or vehicle". The Commission also received a submission from the late Mr T J Martin, QC, a retired judge of the District Court, who argued for the reform of s20. His submission pointed to several anomalies in the present legislation and suggested that the need for an "attack" to have occurred should be removed from the legislation. Mr Martin joined the Commission later as a consultant to the reference.

1.7 The Commission has made extensive inquiries in an effort to assess the impact of private ownership of dogs on the community. Submissions were sought from local councils through the Local Government and Shires Associations of New South Wales, from the Traffic Authority of New South Wales, the Department of Local Government, the Australian Postal Commission, the Sheriff's Office of New South Wales, the RAS Kennel Control, the Insurance Council of Australia, from the Government Insurance Office and the NRMA as well as from several private dog breeding and training organisations.[2] Surveys on different aspects of the problem were conducted for the Commission by the Australian Bureau of Statistics, the Traffic Authority of New South Wales, the Australian Postal Commission and the Sheriff's Office. A summary of the information obtained is presented below.

A. Survey of Census Collectors' Experience

1.8 A national population census was conducted by the Australian Bureau of Statistics on 30 June 1986. Collectors from the Bureau visited each household in the State two or three times to deliver and collect the census forms. At the Commission's request the Bureau conducted a survey in which 2,500 collectors were asked three questions about their experiences with dog attacks during the census. Replies were received from 2,058 collectors. From those replies the Bureau estimated that of the 9,930 collectors employed in New South Wales, 873 or 8.8%, were attacked by dogs, 106 seriously enough to contemplate making a claim for compensation. Attack was defined in the questionnaire to mean a bite resulting in some injury or damage to clothing. The majority of the attacks (87.4%) occurred on private land.

1.9 Other figures produced by the Bureau showed further cause for concern. It estimated that "3,749 or 37.8% of collectors ... had, on at least one occasion, to employ means other than personal delivery or collection at the door because of threatening behaviour by a dog on private land". In total collectors were estimated to have been prevented from delivering or collecting the forms by normal means on an estimated 12,878 occasions and on many more occasions were able to make the delivery or collection only by the timely intervention of the owner or by returning to the house later in the day when the owner was available to control the dog. Interference from other animals was less frequent but the Bureau reported that "one collector was bitten by a horse and another was 'bailed-up' by a horse, while a third met with a large bull standing guard at a house. A few collectors were driven off by geese, two were pursued by pet emus, one was attacked by nesting plovers, and another had the misfortune to be chased by a large pig".

B. Traffic Authority of New South Wales

1.10 Statistics provided by the Traffic Authority of New South Wales indicated that animals were involved in or were the cause of a more serious traffic accident in about 10% of all cases. Dogs were the animals involved in just over half of these cases. The statistics kept by the Authority relate to accidents which involve the driver in either hitting the animal or in swerving to avoid it. Only accidents causing injury or requiring a tow-away service were recorded.

C. Australia Post

1.11 In the year July 1985 to June 1986 205 accidents involving dogs were reported to the Australian Postal Commission in New South Wales. Seventy five per cent of these incidents occurred on private land and "in a large number of cases the owner of the dog was present at the time of the attack". In most cases (75%) the injuries caused did not entail time lost from work. In the remaining 53 cases the injuries were more severe and a total of 444 days was lost from work. Falls from motor bikes accounted for most of the serious injuries incurred. Australia Post paid out $23,955 as a direct result of injuries caused by dogs. No figures were provided on indirect costs.

D. Insurance Industry

1.12 In the 12 months to June 1986 the NRMA received 31 claims involving injuries caused by dogs. The average cost of a claim for personal injury was $15,000 while the average cost of a claim for property damage was $580. The NRMA had received 21 claims for property damage between May 1985 and October 1986. The GIO did not provide statistics on the numbers and average cost of claims involving injury or damage caused by dogs, but did indicate a range of settlements of between $3,000 and $32,000. The Home Building and Home Contents policies of both insurers cover injuries caused by dogs to a maximum of $5 million.[3] Representatives of the Insurance Council of Australia also reported that the home building and contents policies of most insurance companies now cover injuries and damage caused by dogs owned by the householder.

E. Police Department

1.13 The "Hurt on Duty Incidents" statistics kept by the Police Department showed that in 1983 there was an average of one dog attack a month which resulted in a police officer having to take at least one day off work.

F. Metropolitan Water Sewerage and Drainage Board

1.14 Attacks by dogs are not a significant problem for the Board. It does not keep statistics on the number of instances of injuries occurring but an officer of the Board was willing to gauge that there would be no more than two or three attacks each year on its 50 meter readers.

G. Sydney County Council

1.15 In 1983 officers of the Council lost nine days from work due to injuries caused by dogs. Seventeen other reported incidents of dog attacks did not result in time lost from work.

H. Sheriff's Office

1.16 There were 140 officers attached to the Sheriff's Office in 1983. The Office does not keep statistics on the numbers of attacks which its officers suffer but believes the problem to be significant. Comments submitted by officers at 18 court houses throughout the State in response to the Commission's request for information in 1984 revealed a range of attacks from the trivial to the very serious involving skin grafts. Most officers responding regarded the problem as serious. Some officers told of experiences in rural areas where they were forced to stay in their cars and sound the horn to avoid attack. Others told of dogs attacking the vehicle in which they were sitting and one achieved some notoriety when an incident in which he used ammonia to subdue an attacking dog was reported on a popular television program.

I. Local Government and Shires Associations Questionnaire

1.17 In June 1986 the Commission sent a set of nine questions to the Local Government and Shires Associations for circulation to their members. Forty seven councils responded to the circular providing information on many aspects of the public control of dogs. A summary of the responses made by the councils follows.

1. Complaints Received by Councils

1.18 Each week councils receive a large number of complaints about dogs. Depending on area and density of population councils reported receiving between one and 50 complaints from the public each week. As could be expected the number of complaints increased with the density of population. In a few areas complaints about dogs made up from one half to three quarters of the complaints received by the council.

2. Cost of Control

1.19 The costs incurred by councils in enforcing the Dog Act are significant, sometimes exceeding the income derived from registration and impounding fees by more than 100% and mostly exceeding it by one third. The average urban council spends between $13,000-$20,000 more than receipts taken for dog control while in country areas councils spend between $l,000-$16,000 beyond the revenue received from registration and impounding fees. Some councils spend substantially more, the costs seeming to relate to whether it is necessary to employ full-time staff to police the Act. Most councils regarded the expenditure on dogs as acceptable, suggesting only increases in registration and impounding fees to redress the problem and not more stringent control provisions.

3. Number of Dogs Involved

1.20 The number of dogs seized by councils each year varied between country and urban areas, from two dogs in one country area to 1801 in Liverpool and 1907 in Penrith. Most councils found it necessary to destroy at least 40% of the dogs they impounded, but again there was a wide variation in rates from 4.26% of dogs impounded in Mosman to 82% in Maitland and 94% in Grafton. No local characteristics or policies seemed to account for these variations.

4. Problems of Enforcement

1.21 A problem consistently identified by councils concerned the difficulties they had in enforcing the provisions of the Dog Act. One concern was the waste involved in often ineffective pursuits of dogs by council officers. Under s10(1) of the Act council officers may seize a dog found uncontrolled in a public place or on private property without the consent of the owner. This provision is difficult to implement because many dogs can avoid capture by retreating to private property, leaving it to the council officer to make inquiries whether the property entered is occupied by the owner of the dog or not. Further problems were created by owners who released their dogs outside working hours so that councils had to employ personnel at overtime rates if they wished to enforce the Act effectively.

1.22 The most significant obstacle identified by councils arises from the present requirement in the Act that penalties for offences can only be recovered in the Local Court. Councils are therefore faced with an extensive commitment of time and resources when attempting to prosecute even minor offences.

1.23 Many councils suggested that the solution to these problems lay in the introduction of a system of on-the-spot infringement notices to enforce the provisions of the Act. This would often remove the need to seize dogs under s10 and would also relieve councils of the rather cumbersome process in which they engage at present of prosecution of offences through the Local Court.

J. Summary

1.24 The Commission's investigations revealed two areas of real concern in relation to the control of dogs. First, it is clear that councils are spending significant amounts of time and money on the enforcement of the Dog Act, yet are not achieving the results they would like. There is also public dissatisfaction with councils' achievements in this area. Most of the problems seem to relate to the control and collection of dogs which stray on public land and to the cumbersome procedures for prosecution of offences.

1.25 The second problem area concerns the question of public access to private land. The complaint of the Police Association, experiences reported by employees of the Sheriff's Office and Australia Post and the survey conducted by the Australian Bureau of Statistics indicate that dogs do pose a considerable hazard for those who must enter private land in the course of their employment. The Bureau of Statistics estimates that 8.8% of its collectors were attacked by dogs, the great majority of attacks occurring on private land. The Bureau also found that nearly 13,000 calls by collectors had to be repeated, abandoned or other means of delivery or collection used, because dogs had hindered or prevented access to the property. Such a level of inefficiency is probably not acceptable in the performance of public functions, but solutions to it are not obvious. The local councils did not see the solution as lying in the enactment of compulsory fencing provisions nor did they report a high level of complaint on the question from the public. Most of the public complaint to the councils was directed at the numbers of dogs allowed to roam free and at the nuisance and mess they created in public places.

1.26 Aggressive behaviour by dogs on and near their owners' properties causes concern to those who must visit private properties regularly. Demands for the reintroduction of criminal penalties for acts occurring on private land are usually supported by reference to the alleged unreasonable behaviour of some owners in continuing to keep a dog which has attacked someone, perhaps a child, in the past. The Police Association complained that when reports are made of serious attacks having taken place on private land the police cannot intervene usefully. Often they risk a further attack on themselves if they do. The complaint is made that the availability of a civil claim in negligence does not adequately address the problem of repeated attacks.

III. THE REFERENCE

1.27 The Commission sought a reference from the Attorney General to review the provisions of the Dog Act in February 1985. The reference was received on 4 August 1985 and was in the following terms:

> 1. whether, and if so the circumstances in which, criminal and/or civil liability, beyond that presently provided for in ss6 and 20 of the Dog Act 1966, should be imposed on an owner or person who has the effective care and control of a dog which causes harm to any person or property;
>
> 2. any related matter.

IV. POLICY CONSIDERATIONS

1.28 The Commission's task has been to review the provisions of the Dog Act and to recommend appropriate legislative changes. However, one thing which has become clear from this review is that the effectiveness of any scheme for the control of dogs relates very much to community values and public understanding of the law. Because of this the Commission recognises that all problems associated with dogs cannot be solved by legislative change alone.

1.29 One theme recurred constantly in the Commission's investigation. Ignorance and lack of understanding on the part of some dog owners is probably the most significant problem encountered in the public control of dogs. The common experience of those concerned with dog control is that many dog owners are unaware of their responsibilities under the Dog Act particularly with respect to such matters as dogs being set free in public areas and dogs fouling streets. Further, obligations which go beyond those imposed by the Dog Act are often overlooked. Many matters, such as the selection, care and training of dogs cannot be adequately addressed by legislation and must remain the responsibility of the owner.

1.30 The Commission is of the opinion that the education of dog owners to gain their understanding and co-operation in the acceptance of responsibility is of equal importance to legislative amendment. While the Commission can recommend legislation to buttress the powers of local councils and provide incentives with respect to dog control, ultimately the solution lies in co-operation between dog owners and complainants.

1.31 Education programs, which not only inform people of their obligations under the Dog Act, but which also address the attitudes of dog owners, are needed. Too often, issues of dog control are reduced to arguments from extreme positions (for example from those who support dog ownership and those who do not) when what should be developed is a climate of greater co-operation. Such programs foster good community relations while also reducing pubic expenditure.

1.32 A number of councils are already conducting such campaigns with success. For instance for a number of years Lane Cove Council has conducted an education program on dog control and care which it reports has had a significant effect in reducing the numbers of dogs impounded and owners prosecuted. Warringah Shire Council has run a series of advertisements in local newspapers encouraging people to take their dogs to obedience classes. In response to this the membership of local dog clubs has more than doubled and new training areas have had to be set up.

1.33 The potentional of education programs run on a larger scale to change public attitudes is illustrated by the success of the litter reduction program which has operated in New South Wales in recent years. There are marked similarities between problems of litter control and dog control. In both cases legislative deterrents can only go part of the way and an effective solution will require co-operation from the public and general recognition that the matter deserves attention. In New South Wales the State Pollution Control Commission has operated an education program on litter reduction known as the “Do-the-right-thing” campaign. Over the eight years that this program has operated, there has been, according to established measurement procedures, a 70% reduction in litter in the Sydney region.

V. ACKNOWLEDGEMENTS

1.34 In preparing its Report the Commission has had assistance from many people. As a consultant on this reference the late Mr Trevor Martin QC has made an invaluable contribution to the deliberations of the Commission in the preparation of this Report. Thanks are due also to the Australian Bureau of Statistics for conducting a special survey for the Commission, the Australian Postal Commission which prepared a lengthy and detailed submission and the Local Government and Shires Association which circulated a list of questions prepared by the Commission to its members. A full list of the names of the many individuals and organisations who have assisted the Commission in its work on the reference appear in Appendix B.

FOOTNOTES

1. *Harden v Ridges* [1983] 2 NSWLR 586.

2. A full list of submissions sought and received appears in Appendix B to this Report.

3. Up to this limit of $5 million the cover extends to all property damage and injury or death to a person occurring as a result of an accident involving a dog - whether occurring in or outside the home insured.

2. The History of the Law Relating to Dogs

I. COMMON LAW

A. Introduction

2.1 In its Report on Civil Liability for Animals in 1970 this Commission said:

> The law as to liability for damage done by animals is a potpourri of special rules of mediaeval origin. These special rules, for the most part, are such as to give rights of action which are additional to the rights of action which, in modern times, lie in respect of damage generally (that is, whether or not the damage was caused by an animal). A person who has suffered damage caused by an animal can frame his action for redress on modern principles - for example, in negligence; or he can frame it under the special rules which are peculiar to liability for damage done by animals; or he can, by including separate causes of action in the one proceeding, get the better of both worlds - modern and mediaeval.[1]

An attempt is made here to briefly describe each of these causes of action relating to liability for injury caused by animals. The special rules referred to above are discussed first, then the torts of negligence and nuisance as appropriate to actions involving damage or injuries caused by dogs. The tort of trespass is also mentioned briefly, although its application to the problems in hand is limited.

B. The Scienter Principle

2.2 The “special rules of mediaeval origin” to which the Commission referred in its 1970 Report are those which are now known under the collective title of the scienter principle. The term “scienter” derives from a latin term used in ancient writs to mean that the act complained of had been done knowingly or wilfully.[2]

2.3 Under the scienter principle the liability of the person responsible for the dog [hereinafter “the owner”] for damage caused by the animal depended upon proof either that the animal belonged to a species or class which was known to be dangerous[3] or that the owner had previous knowledge of the particular animal’s vicious nature or propensity although it belonged to a species not generally regarded as dangerous.[4] The owner of an animal belonging to a species considered dangerous was liable for any harm done by it without proof of scienter. To establish liability in the owner of a “harmless” animal, however, scienter, or proof of knowledge of the animal’s propensities from past experience, had to be shown.[5] As dogs were placed in the class of “tame or harmless” animals scienter had to be proved in relation to each animal, or more precisely, in relation to each act of each animal.

2.4 Normally scienter was proved by showing that, to the owner’s knowledge, the animal had behaved in a similarly vicious way in the past. The principle is encapsulated in the judgment of Willes J in *Cox v Burbidge:*

> As to animals which are not naturally of a mischievous disposition, the owner is not responsible for injuries of a personal nature done by them, unless they are shewn to have acquired some vicious or mischievous habit or propensity, and the owner is shewn to have been aware of the fact. If the animal has such vicious propensity, and the owner knows of it, he is bound to take such care as he would of an animal which is *ferae naturae*, because it forms an exception to its class.[6]

The rule is quite clear. It requires proof of the subjective element that the owner had actual knowledge of the propensities of the particular animal from its past conduct. This subjective test is not satisfied by proof of the generally known characteristics of the species to which the harmless animal belongs. There must be proof that the owner had actual knowledge of the traits of the particular animal, even where the complaint alleges conduct of a type typical of the species.[7]

2.5 The misconduct to be proved must have amounted to something quite serious. The good natured, but boisterous dog which frightens people and other animals by constantly bounding up to them may not be vicious,[8] nor may the dog which displays ferocity when guarding the person or property of its owner.[9] The accepted view seems to be that, in order to be proved vicious, the dog must be shown to have behaved in a way which is “offensive or hostile to man, if not to beast”.[10] Fleming says:

> [A] mere propensity to perpetrate occasional damage because of playfulness or some other non-aggressive characteristic, especially when it is shared by the rest of its species - such as an inclination of horses to shy, of unbroken fillies to be high-spirited, of cats and dogs to chase each other or runnings across traffic - is not sufficient for strict liability.[11]

2.6 The harm for which the owner is liable under the scienter rule must be within the risk contemplated. It is only harm which is attributable to the animal's vicious propensity for which the owner is liable,[12] but where scienter is established liability is imposed even where the owner is shown to have taken every care to avoid the harm, for liability under the rule is strict. Liability is also imposed where it was an unforeseeable act of a third party which caused the harm.[13] The only limit on the liability imposed seems to be that the harm must be "direct and physical".[14]

C. Negligence

2.7 There is little doubt that an action in negligence is available as a remedy for injuries caused by a dog. It is used, not only in cases where the scienter action is not available ("collisions or other accidental injury caused by animals" is how Fleming puts it), but also as a complement to the scienter action.[15]

2.8 The elements of the cause of action in negligence were laid down by Lord Atkin in *Fardon v Harcourt-Rivington* in the following way:

> ... there is the ordinary duty of a person to take care either that his animal or his chattel is not put to such a use as is likely to injure his neighbour - the ordinary duty to take care in the cases put upon negligence.[16]

2.9 The elements of the negligence action have a much broader foundation than those of the scienter action. To prove negligence there is no need to show past vicious behaviour by the particular dog, nor is there any need to show that the harm resulted from an attack or other vicious conduct of a type known to have occurred in the past, although clearly these matters will be relevant to the court's assessment of the foreseeable risks involved in the defendant's conduct. This was summed-up by Pearson LJ in *Ellis v Johnstone:*

> For the action of negligence, it is sufficient if the defendant knew or ought to have known of the existence of the danger, which does not necessarily arise from a vicious propensity of the animal, although perhaps some special propensity is required.[17]

D. Nuisance

1. Public Nuisance

2.10 Salmond defines the tort of public nuisance as:

> a criminal offence . . . [falling] within the law of torts only in so far as it may in the particular case constitute some form of tort also. Thus the obstruction of a highway is a public nuisance; but if it causes any special and peculiar damage to an individual, it is also a tort actionable at his suit.[18]

A common example of public nuisance is conduct which either obstructs a public highway or makes it dangerous for use. Animals may be the cause of either complaint. They may be led or allowed to escape on to the highway in such numbers as to create an obstruction[19] or the conduct of one animal may be such as to make use of the highway dangerous. It may be safely assumed that the tort does not have great application to the matters under discussion.[20]

2. Private Nuisance

2.11 The action for private nuisance clearly has application to the conduct of dogs, although it is limited. The limits are those imposed because of the identification of the action with the protection of private interests in land. As Dixon J (as he then was) said in *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor*

> the essence of the wrong is the detraction from the occupier's enjoyment of the natural rights belonging to ... the occupation of land.[21]

The cause of action is therefore appropriate to resolve disputes concerning noise, smell, disease or disorder caused by the dog but it does not have obvious application to the problems raised by this reference.[22]

E. Trespass

2.12 Trespass is an intentional infliction of harm on a person or an intentional and wrongful entry on the property of another.[23] In both respects the tort of trespass is applicable to the conduct of dogs. The first type of trespass,

trespass to the person, is especially relevant to the person who uses a dog as a guard dog. A person who incites a dog to attack commits at least an assault, and if the dog does attack, a battery. Both are trespasses to the person for which damages may be awarded.[24] There may also be criminal charges laid for assault and battery. Anyone suffering such an attack is free within reason to employ whatever means are at hand in self-defence against the attack. If the attack appears serious enough self-defence by killing or severely injuring the dog is permissible. The liability of the owner does not depend upon knowledge of the dog's previous viciousness. It is sufficient for the incitement to occur without regard to knowledge of the conduct it is likely to produce.[26]

2.13 The person who intentionally drives animals on land occupied by another is liable in trespass as well although the ancient action of cattle trespass has been abolished in New South Wales.[27] The dog owner is not liable in trespass, however, if the dog enters land without incitement from the owner. A dog cannot commit a trespass against the wishes of its owner.[28] Where a dog enters land accidentally there is a right in the owner to enter the land (although not by force) to recover the animal.[29] Of most interest for the purposes of this reference are the rights of landowners when discovering an unwelcome dog on their land. Fleming is quite clear that:

> In defence of property threatened with damage or destruction by marauding animals, the owner may adopt such measures as are necessary and reasonable to avert the danger and, in the last resort, may even shoot to kill.[30]

II. STATUTE LAW

A. Prior to the Dog Act 1966

2.14 The first New South Wales legislation regulating the ownership and control of dogs was the Dog Nuisance Act 1830.[31] The reason for the legislation was stated in the preamble to be:

> the Streets of the Towns of Sydney Parramatta Liverpool and Windsor are infested by the great number of dogs which are allowed to go loose at all hours of the day and night to the danger of passengers as well as to the great annoyance of the inhabitants at large.

This Act introduced strict criminal liability for any attack by a dog occurring on a public street but not for an attack on private property. Section 12 provided that:

> if any dog ... shall be at large and shall attack any person passing in a street of any town or on any highway or turnpike road on foot on horseback or in a carriage the owner or proprietor of such dog shall forfeit and pay a fine

2.15 Further legislation in 1832[32] and 1835[33] extended the strict criminal liability to behaviour of a dog which fell short of attack. Section 8 of the Dog Nuisance Act 1835 provided:

> if any dog shall in any street of the said towns or upon any highway in any part of the said Colony rush at or attack any person or horse or bullock whereby the life or limbs of any person shall be endangered or property injured the owner or keeper of every such dog shall forfeit and pay a penalty ...

Liability was thereby extended to the owner whose dog rushed at but did not attack a person, but the conduct had to be such that "the life or limbs of any person" were "endangered or property injured". There was still no criminal liability imposed for any injury caused by the dog while on private property.

2.16 In 1875 the Dog Act[34] was amended to impose strict civil liability on owners for injury caused by their dogs. Section 9 of that Act read:

> The owner of every dog shall be liable in damages for injury done to any person property or animal by his dog and it shall not be necessary for the party seeking such damages to show a previous mischievous propensity in such dog or the owner's knowledge of such previous propensity or that the injury was attributable to neglect on the part of such owner.

This provision did not distinguish between private and public property. The owner was made liable to pay for all "injury done to any person property or animal" with no requirement that the harm occur on public land.[35] There was also no requirement that the harm should be the result of an attack or other conduct of a dog which normally would be regarded as canine in nature. This was a departure from earlier legislation which had imposed liability only where the dog attacked or rushed at the victim.[36]

2.17 A further provision of the 1875 Act[37] allowed "any person" to destroy a dog "attacking any person or animal . .. if the attack be not on premises belonging to or occupied by the owner or keeper of such dog". In 1898 the law was consolidated into the Dog and Goat Act. That statute regulated the control of dogs in the State until its repeal by the Dog Act 1966.

B. Dog Act 1966

2.18 Two matters preoccupied those debating the dog legislation in the Parliament of 1965. There was concern at the number of dogs wandering uncontrolled in public places. In the course of the second reading speech on the Bill, the responsible Minister advised the Legislative Assembly that the current law was inadequate to deal with "dogs whose owners have either abandoned them or simply do not care that the dog is running loose in the streets".[38] The solution to this problem was thought to be to give the local councils power to seize any dog which was found on public land (or in private property without the consent of the occupier) while "not under the effective control of some competent person".[39] Previously members of the police force had been responsible for the collection of unwanted and nuisance dogs. Under the 1966 Act their authority was to be restricted to seizure and delivery to the council.[40] The other matter of concern which emerges from the debates was protection of the interests of responsible dog owners. Members thought that care should be taken to ensure that these dogs were not seized and destroyed by mistake. Therefore, s11 provided that on delivery to a pound the dog's collar should be examined for the name and address of its owner, or a registration disc which would identify the owner, and notice of its impounding should be given to the owner. The owner was given 14 days in which to collect the dog whereas a dog whose owner had not attached some identification to its collar was to be kept for only seven days before destruction or sale.

2.19 The aim of the 1966 Act was clearly to reduce the nuisance caused by the large numbers of stray dogs found in public places without impinging too much on the rights of responsible dog owners. There was no requirement in the Act that a dog should be contained on private property and no provision was made for restraint of a dog whilst in public places apart from the special provision made for some species which were thought to be dangerous.[41]

2.20 This comparatively relaxed system of control was combined, however, with the strict regimes of civil and criminal liability which had appeared in the earlier legislation. Thus, s6 made the owner guilty of an offence if the dog:

> (a) in or on a public place, attacks or causes injury to a person or animal; or
>
> (b) in or on any other place, attacks or causes injury to a person who is lawfully in or on that other place.

"Owner" of a dog was defined in s4 to include the person by whom the dog was ordinarily kept and the owner or occupier of the premises where the dog was ordinarily kept.[42] In exposing the owner to criminal liability for injury which occurred in places other than public land, s6(b) went beyond the previous law and imposed liability for attacks or injury occurring on private property. The origin of the provision was explained in the second reading speech:

> [It] was particularly requested by the Police Department. Police constables, postmen, tradesmen and other persons who lawfully enter private premises should not be subject to attack by savage dogs, and if a person owns such a dog he should be obliged to keep it under proper restraint.[43]

2.21 The 1966 Act reduced the owner's liability in another respect. The provision which imposed criminal liability in respect of a dog which rushed at a person or animal was not re-enacted in s6, so once again the offence became the attack or causing injury, and no liability was imposed for threatening behaviour.

2.22 The civil liability of the dog owner was not altered by the 1966 Act. In essence s20 of the Act simply carried forward the provisions of s9 of the 1875 Act.[44]

C. Dog (Amendment) Act 1977

2.23 The first change of any significance to the provision imposing absolute civil liability occurred in 1977[45] when s20 was repealed and replaced by the current provision which states:

20. (1) Subject to subsection (2), the owner of a dog shall be liable in damages in respect of -

> (a) bodily injury to a person caused by the dog wounding that person; and

(b) damage to the clothing of a person caused by the dog,

in the course of attacking that person.

(2) Subsection (1) does not apply in the case of -

(a) an attack by a dog occurring on any land, vehicle or premises -

(i) of which the owner of the dog is an occupier; or

(ii) on which the dog is ordinarily kept; or

(b) an attack by a dog which is in immediate response to, and is wholly induced by, intentional cruelty to, or intentional provocation of, the dog by a person other than the owner of the dog, his servants or his agents.

(3) This section does not affect the liability apart from this section of any person for damage caused by a dog.

In addition, ss20A-20B were inserted to cover civil liability for any death caused by the dog's actions and liability for any injury caused to another animal by the dog "attacking, worrying or chasing it".[46] Section 20C was also added to introduce the defence of contributory negligence into the dog legislation.

2.24 These amendments were introduced as a direct result of recommendations made by this Commission in its Report on *Civil Liability for Animals* of 1970.[47] In June 1967, the Commission received a reference:

To review the law relating to damages caused by or to animals and incidental matters.

In its Report the Commission recommended that the special and very technical rules governing liability for animals which had developed over several centuries, such as the scienter action and cattle trespass, should be abolished.[48] It recommended that liability should be imposed under the general principles of tort law.

The essence of our recommendations is that the law relating to liability for animals be brought into harmony with the law relating to liability for damage otherwise caused.[49]

The Commission's recommendations were enacted in the Animals Act 1977 and the Dog (Amendment) Act 1977. Section 7 of the Animals Act provided for the integration of the law of animals into the general law of torts. It provided:

(1) Liability for damage caused by an animal depends on so much of the law relating to liability as does not include the common law abrogated by subsection (2).

(2) Any common law qualification, restriction, exclusion, extension or imposition of liability that had effect immediately before the commencement of this Act and related exclusively to liability for damage caused by an animal is hereby abrogated, whether or not -

(a) it related to the nature or propensity of an animal or any class of animal, or knowledge of any such nature or propensity; or

(b) it applied generally or in the circumstances of escape on to a highway or in any other particular circumstances.

2.25 The Commission was not content for the law relating to dogs to be governed by these general provisions alone. This topic was given special consideration because: "Dogs quite commonly have such size, strength, and other physical attributes as enable them to inflict serious bodily injury upon people and upon animals . . .". Dogs also have "a natural tendency to worry or chase other animals; and animals worried or chased by a dog may suffer physical harm by exhaustion or by injury resulting from panic".[50] The Commission concluded therefore that "there should be some further liability in respect of dogs",[51] and said that it was common in other jurisdictions to impose "some measure of liability, without fault", upon the owner of a dog.[52] But the Commission was concerned to see that any additional liability for dogs would be only for injury and damage caused while they were behaving in a typically canine way. Therefore it recommended the enactment of the restrictive provisions for civil liability which appear in s20 of the Act. These provide that the type of bodily injury for which compensation is payable is limited to wounding caused by an attack and liability for damage to property is confined to damage done to

clothing in the course of an attack on the plaintiff. The section does not apply to attacks which occur on the owner's property.

2.26 The assumption behind these recommendations was obviously that it was acceptable for dogs to roam the streets, subject only to the possibility of seizure and impounding by the local council. The provisions of the 1966 Act also reflected general acceptance of that view with the two exceptions that those species of dogs thought especially dangerous and bitches on heat were not to be permitted to roam unrestrained on public land.[53] The Commission did not recommend any change to the criminal liability imposed by s6 of the 1966 Act. That provision was retained unaltered.

D. Dog (Amendment) Act 1981

2.27 The outstanding inconsistency which remained after the 1977 Amendment Act was that s6 of the 1966 Act continued to impose strict criminal liability for injuries caused on private land, although the amendment to s20 in 1977 had relieved the dog owner of any corresponding civil liability. This anomaly was removed from s6 by the Dog (Amendment) Act 1981. In introducing the legislation to relieve the owner of criminal liability for injuries caused on the owner s property the Minister, the Hon H F Jensen, said:

> It is considered that the offence of attacking and causing injury should only arise in similar circumstances to those in which liability for damages arises under the Act.[54]

In a further amendment in 1981 the courts were given extra powers to deal with dogs which had attacked or caused injury. Section 6(3) was added to allow the court to order the dog's destruction or to "take such other action as the court directs". It was envisaged that this provision would allow the court to order that, for instance, a large dog should be removed from the city.[55]

2.28 The most important aspect of the 1981 Amendment Act was the fundamental change in attitude reflected in its more general provisions. For the first time in the history of the legislation in New South Wales an attempt was made to control the access of dogs to public places. A new s8(1) provided:

> Control of Dogs. The owner of a dog shall, if the dog is in or on a public place and is not under the effective control of some competent person by means of an adequate chain, cord or leash, be guilty of an offence.

This change in policy was said by the Minister to "properly reflect the prevailing attitudes of our community to dogs and to the responsibilities of dog ownership".[56] Other sections in the Amendment Act made provision for local councils to regulate the entry of dogs into public recreational, shopping and school areas and to supervise the types of leashes by which they were to be secured.[57] For the first. time there was a legislative statement that it was unacceptable to allow a dog to go unleashed in a public place. Amendments were also made to ss10 and 11 of the Act to allow council officers and police to seize any dog found in a public place and "not under the effective control of some competent person by means of an adequate ... leash"[58] and owners were made liable for any expenses incurred in destroying the dog and for maintaining it during detention.[59]

FOOTNOTES

1. NSW Law Reform Commission, *Report on Civil Liability for Animals* (LRC 8, 1970) para 5.

2. Williams, *Liability for Animals* (1939) at 273; Wharton's Law-Lexicon (6th ed 1876).

3. Williams, note 2 at 293. Animals such as "a lion, a bear, a wolf .. . an ape or monkey", known in law as *ferae naturae*.

4. Known in law as *mansuetae naturae*, ie of a harmless species, previously unknown to have been of a vicious nature. There are two sub-classes of harmless animals; those which are harmless by nature, like rabbits arid those which have been domesticated like sheep and horses. Dogs fell into the second category. Street, *The Law of Torts* (4th ed 1968) at 263.

5. Such knowledge is presumed in relation to wild animals classed as *ferae naturae*. Williams, note 2 at 292-293, notes that in England in the seventeenth century *ferae naturae* was equated with imported species while *mansuetae naturae* described "beasts that ... break through the tameness of their nature, such as oxen and horses". *R v Huggins* (1730) 2 Ld Raym 1574 at 1583 (92 ER 518 at 524 per Raymond LCJ).

6. (1863) 12 CB (NS) 430 at 439-440 (143 ER 171 at 174).

7. See Williams, note 2 at 287-288; Fleming, *Law of Torts* (6th ed 1983) at 330; Street, note 4 at 264.

8. Erle CJ directed the jury to this effect in *Line v Taylor* (1862) 3 F & F 731 (176 ER 335) but Williams, note 2 at 300 cites Price v Wright (1899) 35 NBR 26 in which a dog which clawed people was held to be vicious.

9. *Sycamore v Ley* (1932) 147 LT 342.

10. These are the words used by Fleming, note 7 at 331.

11. Id at 331-332. The examples Fleming gives are taken from case law.

12. Street, note 4 at 266; Fleming, note 7 at 332.

13. Street, note 4 at 266 cites *Behrens v Bertram Mills Circus Ltd* [1957] 2 QB 1. The liability seems to be the same for animals *mansuetae naturae* as it is for animals *ferae naturae* once scienter is proved.

14. *Ibid*.

15. Fleming, note 7 at 334; but see the comments of the High Court in *Simpson v Bannerman* (1932) 47 CLR 378 referred to in para 3.18.

16. (1932) 48 TLR 215 at 217.

17. [1963] 2 QB 8 at 29-30 cited in *Draper v Hodder* [1972] 2 QB 556 at 572 per Edmund-Davies LJ.

18. Salmond, *The Law of Torts* (15th ed 1969) at 64-65. This definition was approved in *Lewys v Burnett* [1945] 2 All ER 555 at 560 and *Trevett v Lee* 1955 1 All ER 406 at 409.

19. *State Government Insurance Commission v Trigwell* (1979) 142 CLR 617 at 638 discusses this type of public nuisance; see also *Pitcher v Martin* [1937] 3 All ER 918.

20. The relationships between nuisance and the actions arising under the principles in the two cases, *Rylands v Fletcher* and *Searle v Wallbank* are not pursue ere as it is outside the terms of reference. The topics are discussed in NSW Law Reform Commission, *Report on Civil Liability for Animals* (LRC 8, 1970) paras 15-22.

21. (1937) 58 CLR 479 at 507.

22. The examples given appear in Fleming, note 7 at 384-385.

23. The old action of cattle trespass is not discussed here. It was abolished in New South Wales by the Animals Act 1977 s4(1). The ordinary law of trespass to land in its application to dogs was not altered by the Act, see s10(2)(b).

24. Luntz, Hambly and Hayes, *Torts: Cases and Commentary* (2nd ed 1985) para 12.4.08; Fleming, note 7 at 23.

25. By analogy with self-defence against an attack made by a human, the means of defence used would depend upon the circumstances of the case. Fleming, note 7 at 78.

26. Luntz, Hambly and Hayes, note 24.

27. See note 23; Fleming, note 7 at 37.

28. Williams, note 2 at 141-146.

29. Fleming, note 7 at 86. This is an application of the principle which allows the owner to enter land to recover chattels which have accidently come to be on another person's land.

30. *Id* at 81.

31. 11 Geo IV No 8.

32. Dog Nuisance Act 1832 (2 Wm IV No 8).

33. Dogs Nuisance Act 1835 (6 Wm IV No 4).

34. Dog Act Amendment Act (No 2) 1875 (39 Vic No 6).

35. An identical section in the Dog and Goat Act 1898 was interpreted in *Simpson v Bannerman* (1932) 47 CLR 378 at 383 to imposed liability without condition or qualification". However, the High Court thought that the every generality of the terms in which the liability was imposed would tempt later courts to give a restrictive interpretation to the provision.

36. Criminal liability only was imposed by the earlier legislation. This extension to non-canine acts was taken from the English Dogs Act 1865 s1.

37. Dog Act Amendment Act (No 2) 1875 s10.

38. NSW Parliamentary Debates Vol 59 at 2165, Mr P H Morton MLA, Minister for Local Government and Minister for Highways (18 November 1965).

39. Dog Act 1966 s10(1).

40. Ibid. Members of the police force shared this power with "any other person" and they were given no rights superior to any other person to destroy a dog which "attacks or causes injury to any person". See s13.

41. Sections 7 and 8 require that some species, greyhounds for example, be muzzled and confined on leashes when in public places.

42. Section 4(3) makes the employer liable where the dog was ordinarily kept on the premises of an employee.

43. Note 38 at 2166.

44. Section 9 of the 1875 Act had appeared as s19 of the consolidation which occurred in the Dog and Goat Act 1898.

45. Dog (Amendment) Act 1977.

46. Section 20B(1).

47. NSW Law Reform Commission *Report on Civil Liability for Animals* (LRC 8, 1970) Appendix B.

48. *Id* at paras 13,18 and 26.

49. *Id* at para 33.

50. *Id* at para 35.

51. *Id* at para 34.

52. *Ibid*. The other jurisdictions mentioned in the Report were the United Kingdom, New Zealand, some provinces of Canada, other States of Australia, including South Australia, Tasmania, Victoria and Western Australia and the Australian Capital Territory.

53. Sections 7-9, which contained these restrictions, were not amended in 1977.

54. NSW Parliamentary Debates Vol 159 at 3892 (27 November 1980) The Hon H F Jensen was Minister of Local Government and Minister for Roads.

55. *Ibid*.

56. *Id* at 3886.

57. Dog Act 1966 ss9 and 10.

58. Section 10(1).

59. Section 11(8).

3. The Current Law in New South Wales

I. INTRODUCTION

3.1 The following is a summary of the law, common law and statutory provisions, applying in New South Wales at present.

II. ABOLITION OF SCIENTER ACTION

3.2 The common law action based on the principle of scienter is no longer available in New South Wales. For all practical purposes it was abolished by the Dog Act Amendment Act 1875. By imposing strict civil liability and dispensing with the need to show previous mischievous propensity and knowledge of it s9 of that Act rendered the scienter action obsolete [para 2.16]. Technically, however, the action was not abolished until 1977 when the Animals Act was passed, stating in s7(2)(a):

> Any common law qualification, restriction, exclusion, extension or imposition of liability that had effect immediately before the commencement of this Act and related exclusively to liability for damage caused by an animal is hereby abrogated, whether or not - it related to the nature or propensity of an animal or any class of animal, or knowledge of any such nature or propensity ...

This Commission recommended an amelioration of the strict liability imposed by the 1875 Act in its Report on Liability for Animals in 1970. Its recommendations were introduced by the Dog (Amendment) Act 1977. The terms of s20 of the 1977 Act are set out above [at paras 1.4 and 2.23]. Under the Act liability is limited to harm caused by a dog while attacking a person or while attacking, worrying or chasing another animal.

The plaintiff who cannot show that the harm was caused during the course of an attack cannot recover under the statute [para 1.5].

III. DUTY TO CONTAIN AND CONTROL

A. Registration of Dogs

3.3 All dogs in New South Wales must be registered and should carry a registration disc on their collars. The responsibility to register falls on the owner, defined in s4 of the Dog Act 1966, as amended in 1981, to include both the person by whom the dog is ordinarily kept and the person who is the occupier of land or premises on which the dog is ordinarily kept. It is an offence not to register a dog [s5].

B. Containment on Private Land

3.4 An obligation is imposed on the owner to contain a dog within private property for it is an offence to allow a dog to go unattended outside the owner's property or to enter certain designated public places such as school yards, playing fields and swimming areas [ss8 and 9]. Section 8(4) does contemplate, however, that councils will dedicate areas to which these restrictions do not apply so that dogs may be set free by their owners on some occasions. Any dog that wanders unattended is liable to be seized and impounded by a council officer [s10] [paras 2.18, 2.19, 2.28]. The impounded dog may be sold or destroyed by the council after seven days, unless the name and address of its owner appears on its collar, in which case no action to sell or destroy may be taken until 14 days after the owner has been given notice of its seizure [s11].

C. Control in Public

3.5 While outside its owner s property in a public place a dog must be kept under the "effective control of some competent person by means of an adequate chain, cord or leash" [s8] and faeces deposited by the dog in a public place must be removed promptly if the owner is to avoid committing a further offence [s9B(4)] [para 2.28].

IV. LIABILITY FOR BEHAVIOUR ON PUBLIC LAND

A. Offence of Attacking or Causing Injury

3.6 Section 6 of the Act makes it an offence for a dog to attack or cause injury to a person or animal on public land or on land on which the dog is not ordinarily kept. There is no corresponding criminal liability imposed for attacks occurring on the land, vehicle or premises on which the dog is ordinarily kept or of which the owner is an occupier [para 2.27]. It is a defence to show that the attack was provoked by anyone other than the owner or his agent or servant [s6(2)(b)]. On finding the offence proved the court may direct the owner to take such steps as it

deems necessary to prevent a recurrence of the conduct [s6(3)(e)] [para 2.27]. It may also order that the dog be destroyed [s6(3)(c)(d)].

B. Civil Liability Imposed by Statute

3.7 As amended in 1977, s20 of the Dog Act allows damages to be recovered in respect of "bodily injury to a person caused by the dog wounding that person .. . in the course of attacking that person". Section 20A extends the owner's liability to a death which ensues from this conduct. Damages may also be recovered for "damage to the clothing of a person caused by the dog in the course of attacking that person" [s20(1)(b)] and for injuries caused to another animal by the dog's "attacking, worrying or chasing it" [s20B]. To recover under these statutory provisions, however, the plaintiff must be able to show that the conduct occurred while the dog was away from the place where it is ordinarily kept for, as under s6, no liability is imposed for attacks occurring at home.

C. Civil Liability at Common Law

3.8 The common law complaints of negligence, public nuisance and trespass to the person are all available to compensate for injury and damage caused by a dog. These complaints may be used in preference to the cause of action provided by s20 and they allow recovery for a wider range of injuries. Under s20 damages may be recovered only when the injury is the result of an attack causing wounding or damage to clothing. The common law complaints allow claims to be made for indirect or consequential damage as well as for injuries occurring as a result of a direct assault on the victim [paras 2.7-2.12]. There can be little doubt that the common law action of negligence does apply in New South Wales although the High Court was not clear on the point in *Simpson v Bannerman* in 1932.[1] The action in trespass may broaden the scope of the owner's liability by allowing recovery for threatening behaviour intended by the owner when setting the dog on the plaintiff although not inciting an attack [paras 2.12-2.13]. It is likely that this type of injury could also be compensated by an action in negligence for nervous shock.

V. LIABILITY FOR BEHAVIOUR ON THE LAND OF OTHERS

A. Dog Act 1966

3.9 Both ss6 and 20 of the Dog Act 1966, as amended in 1977 and 1981, apply to injuries and damage occurring on land occupied by someone other than the owner of the dog so long as it is not a place in which the dog is ordinarily kept [para 2.27].

B. Trespass

3.10 The common law action in trespass is available to land owners who believe that a dog has been sent in to their property deliberately by its owner [paras 2.12-2.13]. Of more importance are the defences to which the action in trespass gives rise. Even where the dog is not thought to be trespassing, in that its owner has not released it on the property deliberately, the land owner may take such steps as are reasonable to prevent the dog causing harm while there. As a last resort the land owner is entitled to kill the dog. Section 12 of the Dog Act also allows for the destruction by the occupier of any dog which attacks or is reasonably believed to be about to attack or molest stock on inclosed land as that term is defined in the Inclosed Lands Protection Act 1901. The Inclosed Lands Protection Act 1901, s3, defines inclosed land to mean "any lands, either public or private, inclosed or surrounded with any fence, wall or other erection ... or by some natural feature ... by which the boundaries ... may be known or recognised".

VI. LIABILITY FOR BEHAVIOUR ON OWNER'S PROPERTY

A. Dog Act 1966

3.11 As amended in 1977 and 1981 the Dog Act imposes no liability for injuries or damage caused by dogs while on the land, premises or vehicles of their owners as defined in the Act [ss6 and 20] [para 2.27].

B. Common Law

3.12 Legal proceedings may be brought under the common law in negligence, private nuisance and trespass to the person. Such actions are available for injuries occurring on private land but it is often alleged that liability may be difficult to establish where the case concerns the conduct of owners on their own property [paras 2.7-2.13, 3.18].

VII. INADEQUACIES IN THE LAW

A. Duty to Contain and Control

3.13 The regime provided by the Dog Act requires that dogs be kept off public land unless on a leash and that those found unattended on public land may be seized and impounded. Both council officers and police have authority to seize, but the police function ends when the dog is handed to a council officer. If a dog attacks anyone while outside its owner's property it may be destroyed by these officers or anyone else.[2]

3.14 One gap in their powers reported by these officers relates to the inefficiency and waste of time involved in chases which end on private land. Once a dog enters its owner's land the powers of the collection officers to seize and impound are said to end and no effective action can be taken against the owner to ensure that the dog is restrained in future. In addition, the procedure for prosecution of offences under the Act is unwieldy and expensive in council time and money. Many councils suggest that a system of on-the-spot infringement notices may be an answer to this problem of enforcement.

B. Behaviour on Public Land

1. Criminal Liability

3.15 The regulation of the activities of dogs while on public land is both comprehensive and precise. While on public land dogs are to be restrained on leashes by their owners and any faeces left by them must be removed promptly.

3.16 If a dog attacks anyone on public land an offence is committed under s6, and s13 gives power to "any person" to destroy the dog. Detailed provisions exist in s6(3) to allow the court hearing charges in relation to an attack to make orders for the future control of the dog or its destruction.

3.17 Dogs which are loose on public land and which threaten attack are not specifically covered by these provisions. The problems presented by these dogs may be resolved by seizure and impounding. Despite substantial investment of public funds few councils seem satisfied with their performance in the control of dogs in public places. Currently there is no provision for members of the public to take action against these dogs, short of the s13 power to destroy a dog which is attacking, or by reporting the matter to the council.

2. Civil Liability

3.18 The limited application of s20 has already been discussed [paras 1.5, 3.7] as have the problems involved in use of the standard negligence claim in this area [paras 2.9, 3.8]. The most significant gaps in civil liability arise from difficulties of proof. In relying on the statutory definitions of ownership s20 overcomes one of the major problems arising in the use of a negligence claim. In effect it casts the onus on the defendant chosen to show that he or she is not the owner rather than requiring the plaintiff to prove ownership. Section 20 also relieves the plaintiff of the evidentiary burden imposed in a negligence action of showing want of care on the part of the defendant owner. However, as pointed out above, s20 is limited in its application and plaintiffs are forced to resort to the negligence claim where something other than an attack causing wounding is involved. The evidentiary problems with which plaintiffs are faced in the negligence action can make that action unattractive. Proving negligence on the part of a dog owner requires an examination of all the surrounding circumstances with the accompanying need to present a great deal of evidence and often to call a large number of witnesses. The conduct of such litigation can be expensive. Furthermore, court proceedings are more likely to result because there are additional grounds on which the common law action can be contested.

3.19 There is another problem identified by those who responded to the Commission's requests for information which the Dog Act does not address. On many occasions it is the threatening behaviour of the dog which causes the injury and not an attack. This is a significant problem for those who regularly use the suburban streets. Amongst the regular users at risk are postmen, milk vendors, children, cyclists and motor cyclists, joggers and all those involved in home deliveries and collections as well as people exercising their dogs on leashes. The Commission has not been made aware of evidence that attacks by dogs causing injury are a very serious problem, but it has become aware of some weight of opinion which calls for stricter control of dogs which are a nuisance and threaten to attack or otherwise hinder the enjoyment of public places. The great majority of councils which responded to the Commission s survey reported substantial problems with stray dogs but only a few thought that the problem was getting out of control.

C. Behaviour on Land of Others

3.20 The dog which strays on private land occupied by someone other than its owner causes different problems depending on whether it is in a country or urban area. In country areas a straying dog may threaten stock on neighbouring properties. This was not identified as a serious problem by the councils which responded to our

request for information. Most thought the power to destroy contained in s12 of the Dog Act to be both appropriate and adequate to the farmer's needs.[3]

3.21 In urban areas the dog which strays on to a neighbour s land may create problems of a different type. The criminal sanctions of s6 apply to attacks occurring on private land other than the owner's but as on public land there is no provision in the Act to curb the dog which worries or frightens its neighbours. Nor is there provision to deal with the dog which causes property damage or other annoyance on the neighbour's land, s20 imposing civil liability only for personal injury amounting to wounding and for damage to the clothing of a person attacked. If a remedy exists it must lie in the common law actions of nuisance, trespass and negligence. Of course, the neighbour may always choose to resolve the problem by requesting seizure by the council under s10(1)(b) while the dog is outside its owner's property.

3.22 The "owner" of a dog is defined in the Act to include not only the registered owner but also, the occupier of land on which the dog is ordinarily kept. As a result of this definition people who tolerate a neighbour's dog on their land may find that the dog has so entrenched itself that it may be held to belong to their. Service of process under the Dog Act, and involvement in criminal and civil actions concerning the dog, may be the result, at least to the point where the onus of proof imposed by s4(2A)(a) is discharged by satisfying the court that the dog is "ordinarily kept by some other person of or over the age of 18 years". The possibility that a dog may be found to have more than one owner cannot be discounted.[4]

D. Behaviour on Owner's land

3.23 The only liability imposed on the owner while the dog is on the property where it is ordinarily kept is that imposed under the common lah. Objections to these actions as the sole bases of liability have been discussed above [paras 2.9, 3.8, 3.18]. The provisions of the Noise Control Act 1975 may assist neighbours in containing the noise of a dog by use of a noise abatement order or direction.[5] Other nuisance caused by the dog (for instance rushing at the dividing fence, growling, and smell and litter) must be resolved under the common law. Excessive numbers of dogs kept on an urban block may attract the attention of the local council,[6] but where the annoyance is caused by only one or a few dogs the common law provides the only legal recourse for the troubled neighbour.[7]

3.24 The most serious problem caused by dogs on their owner's land, which has been brought to the Commission's attention, occurs where the animals behave as watchdogs, behaviour either intended or unintended by the owner. Those affected by the problem fall into two categories. There are people whose employment requires and entitles them to enter private land uninvited. Members of the police force and those employed by other statutory authorities such as the Australian Postal Commission, the Metropolitan Water Sewerage and Drainage Board, the Australian Telecommunications Commission, local councils and the Sheriff's Office must all enter private property unannounced on occasions. The second group comprises children and other innocent trespassers who may also enter unexpectedly and fall victim to a dog kept on the premises. The interests of the first group can be addressed by a system of warnings left by the owner. Those who seek to use dogs to hinder or prevent entry to their land may be required to take special measures to warn lawful entrants, but the child trespasser is not so easily protected. Security fencing would seem to be the only sure way of guaranteeing their safety. Conceptually, the interests of these two groups can be considered together, however, because they require thought to be given to means of preventing or avoiding attacks. Suggestions for systems of warnings to be provided by owners, notices of intention to gain access by statutory officers and acceptable methods of self-defence are considered in Chapter 4.

FOOTNOTES

1. (1932) 47 CLR 378 at 385 per Starke J where *Fardon v Harcourt-Rivington* (1930) 47 TLR 25 was relied upon. The statement by Starke J connecting statutory and common law liability was said by Adam J in *Trethowan v Capron* [1961] YR 460 at 465 to "re-echo" views put in *Wilkins v Manning* (1897) 13 WN (NSW) 220.

2. Section 13.

3. Section 12 allows the occupier to destroy a dog which molests or nay molest stock.

4. Even a registered owner may disclaim an interest under s4(2A)(b) meaning that a transfer of ownership could take place on a very informal basis.

5. Noise Control Act 1975 ss52 and 59; Noise Control Regulations part VII.

6. Councils have power to regulate the keeping of animals under Local Government Act 1919 s289(e).

7. These neighbourhood problems may be more appropriately resolved by mediation at a Community Justice Centre.

4. Proposals for Reform

I. TWO MAJOR AREAS OF COMPLAINT

4.1 Two major areas of complaint have been identified during the Commission's inquiries. These are the complaint that the existing legislation offers no protection to the person who makes a lawful entry on private land and the complaint that there is no sufficient civil remedy available to those who are injured by a dog while on public land.

II. INJURY AND DAMAGE OCCURRING ON THE OWNER'S PROPERTY

4.2 The shortcomings in the law were identified earlier in the Report [paras 3.23-3.24]. There is no criminal liability imposed by the Dog Act 1966 for injuries occurring on the owner's land [para 2.27] and the civil liability is limited to that imposed by the general law of negligence and occupier's liability [paras 3.11-3.12]. Those who must enter private property as part of their employment claim they are entitled to greater protection than is offered by the current legislation. It is also claimed that the interests of other lawful entrants are not well served by the Dog Act 1966.

A. Balancing the Interests

4.3 The Commission is conscious that there is a balance of interests to be struck in its recommendations for reform. First, the dog owner's right to privacy as an owner or occupier of property must be respected. However, members of the public also have an interest in being able to enter private property unharmed.

4.4 The balancing of these interests is a question which has been addressed by the law of torts already in the principles expounded in relation to occupier's liability. Those principles were extended to the activities of all animals including dogs by the Animals Act 1977. Section 8 of that Act says:

> Where damage results from a danger to a person entering premises, being a dancer due to the state of the premises or due to things done or left undone on the premises, the liability (if any) of a person as an occupier of the premises in respect of the damage depends only on the law relating to the liability of occupiers, notwithstanding that the danger is, or is associated with, the presence or behaviour of an animal in or on the premises.

4.5 Section 8 was passed at the suggestion of this Commission, along with the amendments made to the Dog Act in 1977. In the *Report on Civil Liability for Animals* the Commission recommended that the law imposing liability on dog owners should not be fully assimilated into the general law of animals.[1] Thus, s20 of the Dog Act, as amended in 1977, imposed strict liability upon the dog owner for acts occurring on public land but left the general law of tort, as set out in the Animals Act, including that relating to occupier's liability, to apply to acts occurring on private property, including acts occurring in the owner's motor vehicle.[2]

B. The "Right" to Have a Watchdog

4.6 In making the distinction between liability imposed on the owner's land and that imposed elsewhere, the Commission was influenced by what it regarded as a "right" to have a watchdog. In acknowledging the interests of those who saw a need to keep a watchdog, clearly the Commission did not intend to confer a licence on occupiers to keep dangerous or potentially dangerous species on their properties, without liability for any harm caused. To do so would have been inconsistent with the requirements of reasonableness demanded by the law of occupier's liability.

4.7 The Commission believes that it is still appropriate to consider the rights of dog owners in the context of the general laws of property and of occupier's liability. Basic to these laws are the rights to use and enjoy property without interference and to exclude others. But these rights are not exercisable without restraint. There is a compromise to be made between the individual's right to make full use of private land and the entitlement of neighbours and others to be protected from dangerous and annoying uses of that land. This compromise has been set for the general law by the law of occupier's liability.

4.8 The common law was recently restated by the High Court in *Australian Safeway Stores Pty Ltd v Zaluzna*.[3] The ditty of care owed by the occupier of land to an entrant was said there to be a question to be decided under the ordinary principles of to be a question to be decided under the ordinary principles of negligence, reasonable foreseeability of a real risk of injury being the "touchstone" of the evidence of the duty while "the recourse of the discharge of the duty" was said to be the response expected of a reasonable man to the risk. This means that the dog owner would have to be conscious of the danger offered by the dog to all who may be reasonably expected

to enter the property. Thus, one can imagine that if a Telecom pole stood in the owner's garden, precautions would have to be taken to ensure that a dangerous dog did not come into contact with those who enter to service the wiring. An occupier who allows ready access to, say, the front garden of the property would be expected to so fence the property that casual visitors are not confronted by a vicious dog on entry. It is likely therefore that those who wish to keep a savage dog will be forced to provide secure fencing to restrain it from coming into contact with people entering the property. Where the intention is to exclude all from the property except invited guests, it will be open to the owner to do so by appropriate fencing. It may also be possible for an owner to so train the dog that fencing is not necessary to prevent interference with people entering the land. In such a case it will be a question for the court to decide whether, in all the circumstances, it was reasonable for the occupier not to fence. Where, for instance, a child is attacked by a watchdog on private land it will be for the court to assess whether the owner had a duty to fence so as to protect such innocent trespassers from the dog.

C. Rights of Entry

4.9 There are many people in the community who have been given, by statute or common law, the right to enter properties owned or occupied by others and there are others who may claim lawful access although not given any express legal authority. The interests of the two groups give rise to different considerations.

D. Entrants as of Right and Other Lawful Entrants

4.10 Those described here as entrants as of right are those who enter under authority given either by the common law or by statute. At common law, for example, members of the police force may enter private property in pursuit of a criminal or to prevent an affray.[4] Under the Fire Brigades Act 1909 members of the fire brigade are given authority to enter property where a fire has occurred and to stay in possession for a reasonable time, presumably until they have controlled the fire.[5] There are also others who seek safe entry to private premises for legitimate purposes. Amongst these we may number process servers, employees of gas and oil companies who service tanks attached to private houses, postmen and others who must deliver mail and goods to the door. Many others can be listed who have a need to approach the property without prior express permission, but who do not have statutory or other direct legal authority to do so.

4.11 If there is a distinction to be made between the two types of entrants it is perhaps that which the law itself makes. In the case of the entrant as of right a policy decision has been made already that they should be permitted to enter private land for certain purposes. In view of that decision perhaps it is also incumbent on those granting the authority to ensure that it nay be exercised with relative safety. Where no public authority has been given for the entry the same justifications for invading the privacy of occupiers cannot be used. An example of the distinction may be helpful. Where a member of the police force needs to enter private property to secure the arrest of a dangerous criminal the law makes the entry lawful. Where, however, the police officer enters to make inquiries or to seek information, there is no legal way of securing the entry uninvited. In this case, the absence of any provision to allow the entry is as much a matter of public policy as is the authority granted to enter in the first example.

E. Right of Self-Defence

4.12 There is another principle of common law to be taken into account when considering the rights of the lawful entrant. This is the right to defend oneself against attack. The right can be simply stated. It is a right to inflict such injury on the dog as is reasonably necessary for the defence of a person or property. The degree of force used must be in proportion to the harm apprehended. The Prevention of Cruelty to Animals Act 1979 makes it an offence to kill an animal "unreasonably, unnecessarily or unjustifiably"[6] but justification is to be found in the Dog Act 1966 and under the common law. The two defences are very similar. Section 13 of the Dog Act 1966 allows "any person" to destroy a dog that "attacks or causes injury to anti person or animal". This power is subject to two qualifications. The killing must be carried out within the terms of s18 so as to allow the dog to "die quickly and without unnecessary suffering" and the power to destroy does not extend to a dog which attacks or causes injury on land or premises occupied by the owner of the dog or on which the dog is ordinarily kept.[7] Thus s13 does not provide power to defend oneself on the dog's home territory, but the common law may provide a remedy. It permits the use of reasonable force in self-defence. If an attack is made or threatened the victim may use such force as is reasonably necessary to ward it off. In some circumstances this may extend to the destruction of the dog.[8] Although s13 could be interpreted so as to abolish the right to destroy in self-defence on the owner's land it cannot be interpreted to affect the wider right to ward off attacks and if the dog is killed in the process of warding of an attack, the common law could accommodate that so long as the killer had acted on an honest belief, held on reasonable grounds, that the killing was necessary to protect person or property from attack or injury.[9] However, the killing must have taken place while the danger of attack continued. It would not be justified simply because a vicious dog has attacked when there is little likelihood of a repeat of the attack.[10] The proportion of the retaliation is judged in the circumstances of the case, including the place of the attack, the size of the dog and

the danger presented by it.[11] In that s13 is directed at destruction of the dog *per se* it seems that it would be unreasonable to interpret it so as to abolish part of this common law right of self-defence.

F. No Guidance as to Balance

4.13 Neither the dog legislation nor the case law gives clear guidance as to the balance of interests which should be made between the dog owner and a person entering private property. Some guidance is offered by the existing laws which regulate rights of entry on private land. A statutory authority to enter which includes a right to use force would seem to grant the power to dispose of a dog which is hindering access, by injuring or killing it if necessary. The person who acts pursuant 10 a statutory or common law right of entry should have power to do so without incurring injury from dog attack. The force necessary to avoid the attack is already well regulated by the common law and allows the courts a discretion to assess the proportion of the force used on a case to case basis.

4.14 Less licence should be extended to those who enter private property without authority.[12] Be they trespassers or uninvited callers, it would seem that the principle most appropriate to their conduct is that which regulates voluntary assumption of risk rather than that which allows the blameless victim to avoid injury. The most cogent point which can be made about these unlimited entrants is that if they are aware of the risks they should not enter. Thus the person who calls to read the meter, the person who wishes to sell to the householder, the unexpected friend and the trespasser should not be heard to say that they have acted in self-defence when the risks of entry were apparent before the gate was opened.

4.15 This does not address the situation where no warning is given of the possibility of attack. Where the uninvited or unauthorised entrant are not aware of the risks before entry, it would seem sensible to settle the rights of self-defence by reference to the same guidelines as are used to assess the occupier's liability for the harm caused. The notice warning of the dog's presence and temperament, and the stout gate to prevent accidental or unintended entry, may become very relevant to the liability to be imposed on the occupier. They should also be relevant to the question of whether the victim should be held to have voluntarily assumed the risk taken. The interests of the child trespasser, who cannot be forewarned of the danger, are also adequately addressed by the law of occupier's liability, for the common law does cast a responsibility on the dog owner to secure the safety of any child who may reasonably be expected to enter, or to prevent their entry.

4.16 The interests of those who must enter for a public purpose, but who have not been granted statutory or common law power to do so, may be met by a practice already adopted by many government agencies. Rating authorities and those providing private services are accustomed to the problem of the threatening dog. Instead of entering on their first call they often adopt a practice of leaving a calling card requiring the occupier to make alternative secure arrangements for their next visit. Where a service is to be supplied to the occupier this method is usually convenient for all involved. Greater ingenuity is required where the visit is to result in an account for services already rendered, like the reading of water and electricity meters. On these occasions, where repeated requests to provide safe access have not met with success, appaiently some agencies have adopted a practice of estimating the fee to be charged. Other entrants are not so easily accommodated. The process server, the welfare officer and service personnel from public authorities which have installations on private property may have no statutory or common law right of entry, yet may well have a legitimate need for reasonably expeditious access. The regulation of their rights, beyond what is proposed for all other uninvited entrants, is beyond the scope of this inquiry, as it involves an assessment of matters of wider concern than the control of dogs. Such an assessment would be better made in a study of statutory rights of entry or during an inquiry into the powers of the particular agency involved.

4.17 There is, however, some assistance to be offered to statutory officers who have a duty to enter private property. A more formal means of securing their interests could be created. The Commission can envisage a system whereby the officer involved could approach a magistrate to secure a warrant for lawful entry. The magistrate could order the dog to be kept under control by the owner or if necessary subdued or destroyed by council officer experienced in the handling of dogs. It must be pointed out, however, that the Commission would regard use of such a procedure as exceptional, to be resorted to only where repeated attempts at securing safe entry, by use of oral and written requests to the owner to control the dog, had failed. The typical situation in which the Commission would envisage that use of the procedure would be appropriate is where a person was using a dog for an intentionally disruptive purpose such as to avoid arrest or service of process. Such a power of entry does not seem to be implied by s24 of the Dog Act. This provision allows council employees to enter land "for the purposes of this Act". Those purposes do not currently include entry to assist another statutory officer in the execution of an official duty. Therefore a new provision of the type described will be needed to give the power to control during entry.

4.18 One means of introducing such a procedure would be to insert a provision similar to 512(1) of the Tasmanian Law of Animals Act 1962 into the Dog Act. Section 12(1) provides as follows:

> Upon complaint that a dog is dangerous and is not kept under proper control, any two justices may, whether the dog was found at large or not, make an order commanding the owner of the dog to keep it under proper control and that if he make default the dog shall be destroyed or, if the justices are satisfied that the circumstances so require, that the dog be destroyed forthwith by such person or in such manner as they may direct.

Such a provision would also be of assistance where savage and repeated attacks occur on private land [discussed at 4.19-4.21 below] but would not necessarily meet the needs of statutory officers who may require more urgent entry. Consistently with the policy outlined above, the Commission recommends that those who can provide evidence of lawful authority to enter private premises may apply to a magistrate for an order to assist the entry. The provision suggested to implement this recommendation appears as cl 24A in the draft legislation in Appendix A. The order would be made on evidence that previous attempts to effect entry had failed because of the savage behaviour of the dog or because the officer feared that the dog would become savage if an entry were made. The Commission is of the view that a fairly high standard of proof should be required in relation to these matters to ensure that before seeking the order the officer had used all methods to secure the entry which were reasonable in the circumstances. Thus, if there was no critical urgency in making the entry, the officer would be required to have made approaches to the owner, by telephone or through the letter box if necessary, to have the dog controlled. It would only be on evidence of consistent refusal by the owner to respond to these requests for control that the magistrate would make the order. The order would require the owner to control the dog during the officer's entry and throughout the period required to complete the activity for which entry was authorised. On default by the owner the order would authorise the officer to seek assistance from a council officer to restrain the dog during the entry or to destroy it if necessary. The Commission envisages that both orders would be contained in the one document. The officer would return to the property with a council officer in attendance, present the owner with the order to control, and instruct the council officer to proceed under the second order if the owner did not comply with the first. In order to ensure proper use of the orders, the Commission would require the officer effecting the entry to make a written report on the manner in which it was used to the magistrate who made it.

III. SAVAGE AND REPEATED ATTACKS

4.19 Concern has been expressed to the Commission that there is no criminal sanction provided in the Dog Act 1966 for savage or repeated attacks and that no action can be taken against the offending dog where the attack occurs on the owner's private property.

4.20 The Commission is reluctant to suggest the creation of further criminal offences, especially where they are to be enforced on private as well as public property. The criminal sanction is well described as "the law's ultimate threat" and as such should be "reserved for what really matters".[13] However, there is one situation which has caused considerable concern within the Commission. This relates to the dog which is deliberately kept for its vicious character. The maximum penalty of a $200 fine available of offences under s6 does not adequately reflect the seriousness of the offence committed when such a dog is set on someone who has not provoked it or where the dog which is not under proper control attacks and causes very serious injury. The Commission recommends the introduction of a new offence into the Dog Act directed toward the owner of a vicious dog which causes very serious injury. The crime of negligently causing grievous bodily harm in s54 of the Crimes Act goes some way towards satisfying the terms of the offence the Commission believes should be enacted. That crime can be committed by negligent act or omission and applies where really serious injury is inflicted.[14] In order to be convicted under s54 the accused must be shown to have been so negligent as to have disregarded the safety of others in a manner which goes beyond establishing civil liability for negligence and amounts to a criminal offence.[15] Doubt has been expressed whether a dog owner could be successfully prosecuted under s54. Accordingly the Commission recommends the creation of a new specific offence in the Dog Act. The new offence would impose criminal liability for serious injury which the owner or person responsible for control of the dog foresaw would occur but against which no reasonable precautions were taken. Such a crime would clearly be committed where it could be shown that the dog was savage and the owner encouraged or directed it to attack. It would also be proved where the owner of a savage dog did not exercise effective control over it although aware of its capacity to attack and cause injury. As guilt can be established only on proof of foresight by the owner and deliberate or reckless disregard of the consequences foreseen, the Commission believes there is no objection to extending the application of the crime to private as well as public property. The owner of a guard dog would not be exposed to criminal liability unless the circumstances of the dog's management were such as to expose members of the public to the risk of savage attack. Such risks will be avoided by reasonable attention to fencing and notices warning of the dangers of forced entry. Where the management of a guard dog does not involve care taken to avoid foreseeable harmful contact between the dog and the public, the Commission believes the owner should be subjected to criminal liability even on private property. The Commission does not wish to outlaw the responsible use of a guard dog however. Therefore, we recommend that the defence of self-defence of person or property be made expressly applicable to the offence. The new offence appears as cl 6A in the draft legislation in Appendix A, the defence in cl 6A(2). The Commission recommends that the new crime carry a penalty equivalent to that imposed under the Crimes Act s35 for the offence of malicious wounding, that is, a maximum of seven years imprisonment. The charge could be heard on indictment or summarily on consent of the accused person

[see Crimes Act 1900, s476 (2), (6), (7)]. This amalgam of the offences under ss3S and 54 has been chosen deliberately by the Commission to reflect the seriousness of the offence intended while avoiding the pitfalls of applying the concept of intended while avoiding the pitfalls of applying the concept of wounding to offences under the Dog Act. We intend that the new offence will be triggered by injury more serious than the simple dog bite which could amount to a wounding.

4.21 The question of control of the dog is not covered by this offence and is not adequately covered by the control provisions discussed above at paragraphs 4.17-4.18. The Commission recommends that there be introduced into the Dog Act a procedure similar to that contained in s12 of the Tasmanian Law of Animals Act. This would provide that wherever it is found, upon complaint that a dog is dangerous and not kept under proper control, a magistrate may order the owner of the dog to keep it under control or order that the dog be destroyed. Such a provision offers a remedy currently not available under the Dog Act but which the Commission believes ought to be available generally to members of the public. It should be available to those seeking redress in relation to behaviour of dogs both on private and public land and will provide a remedy in the following types of situations:

> to control the dog which is offering a threat to neighbours although contained within its own grounds. The Commission has in mind the dog which lunges at a dividing fence alarming neighbours at the possibility of escape;
>
> to control the dog which is on private land but not adequately fenced in that access is not denied to small children and others who cannot read warning signs. This could require a lock to be placed on a gate or a fence to be repaired or raised to a greater height to prevent access;
>
> to control the dog which roams public streets although regarded as a threat to the public. The remedy would allow the question of the dog's potential for harm to be put in issue in legal proceedings, thereby providing a self help remedy to the public when other means of resolving the issue had failed;
>
> to allow a control order to be made where the victim would prefer not to lay criminal charges in respect of injury which has occurred. There are many victims who would be satisfied with reassurance that the incident with not occur again without resorting to criminal or civil proceedings.

It may also be that the possibility of destruction of the dog will provide a more effective deterrent to many dog owners than the threat of a fine.

IV. DEFINING PRIVATE PROPERTY

4.22 At present the distinction the Dog Act makes between private and public property is based on occupation by the owner with no reference to its availability to and frequency of use by the public. This has led to provisions which have been interpreted to exempt the owner of a dog from liability so long as the harm caused occurs on property which is occupied by the owner. The property may include areas which are also readily available to the general public. Thus, there is no clear view whether under the Dog Act the open tray of the owner's truck, the deck of the owner's boat, the tarmac of the owner's service station or the floor of the owner's shop are to be regarded as private or public premises or places, although all are open to the public, indeed sometimes intended for public use. The Commission believes the definitions of private and public property in the Dog Act should be capable of distinguishing between areas which are secured from entry by the general public by the owner of the dog and those which are not. For the purposes of the Act a public place should include private property to which the general public has ready access. Liability would be assessed by reference to use by the public rather than to the occupation or title of the owner. The definition of public place used in s4(1) of the Offences in Public Places Act 1979 would seem adequate. This defines "public place" as a place or a part of premises:

> that is open to the public, or is used by the public, whether or not on payment of money or other consideration, whether or not the place or part is ordinarily so open or used, and whether or not the public to whom it is open consists only of a limited class of persons . .

4.23 We believe the definition of "public place" suggested in the legislation in Appendix A achieves these aims. It centres attention on the use made by the public of the place concerned, in that it defines "public place" as somewhere which is "open to the public, or is used by the public".[16] This definition (and the subclauses which extend the term so that it is not qualified by reference to admission fee, ordinary use or the extent of public use) seek to ensure that the provisions of the Act imposing liability for harm and nuisance caused by dogs operate in places where members of the public are likely to be inconvenienced or placed in danger by them. In settling the definition we were guided in particular by indications in the case law that the courts will refer to the purposes of the legislation when determining the meaning of the term in any statute.[17] Thus, the expression "public place" will not only extend to places dedicated for public use. The term will also cover private land which is open to the

public, whether deliberately for purposes of business or leisure, or de facto because of use made by the public with the acquiescence, although not necessarily the clear approval of, the owner or occupier.

4.24 The other situation in which the general law of occupier's liability may not provide a completely satisfactory answer arises where the dog is being carried in a vehicle used by its owner. As currently defined in the Dog Act the private property of the owner includes a vehicle "of which the owner...is an occupier" or "on which the dog is ordinarily kept" [ss6(2) and 20(2)]. This clearly exempts the owner from liability where the victim trespasses on the vehicle in which the dog is kept, even if the vehicle is in a public place. Such an exemption is acceptable where the dog is secured within the vehicle. However, unnecessarily technical questions could arise as to whether the dog is 'on the vehicle" where it is being carried on the back of an open vehicle.

4.25 The Commission sees merit in making a distinction between dogs which are restrained and those which are not in these cases. The same distinction is made in s8 between those dogs which are acceptable on public land and those that are not. The only exceptions to the requirement that a dog be controlled on a leash while on public land appear in s8(3) and (4). Dogs engaged in obedience trials, driving cattle and those being exhibited for show purposes need not be on a leash, nor need those which are on land set aside for their use.

Except where on specially designated public land, all these exceptions apply to situations where the dog is under the effective physical control of its owner. Dogs on the platform of an open vehicle which are not chained in any way are very often not under the effective control of their owners. They should therefore be subjected to the same constraints as any other dogs in a public place. The Commission recommends that the provisions of s5 be extended to dogs in or on open vehicles. This would require an amendment to the definition of vehicle so as to exclude those vehicles from which the dog can escape unassisted. The amendment suggested appears as cl 4(7) in Appendix A.

4.26 The Commission does not intend to affect the operation of ss6(2) and 20(2) in relation to injuries occurring on private land not owned or occupied by the owner of the dog. At present those provisions operate to impose strict liability for attacks and injuries caused by the dog while outside the owner's land. They cover situations where the injury occurs while the dog is wandering on the property of a neighbour or other landowner within the vicinity. The provisions would also impose strict liability on the owner where the dog attacked while at a friend's house or in business premises the owner was visiting. We recommend that such liability continue and that therefore no amendment be made to affect the operation of ss6(2) or 20(2) in this regard.

V. LIABILITY ON PUBLIC LAND

A. The Issue of Strict Liability

4.27 In its Consultative Memorandum on *Civil Liability in Relation to Animals*[18] the Scottish Law Commission sought guidance on the question whether the rises presented by dogs were of such magnitude as to warrant the imposition of strict civil liability for harm caused by them. The response received by the Commission was "all but unanimous that dogs, as a class, constitute a special risk, and that strict liability should be imposed for every form of injury or damage which they cause".[19] This was a view which the Scottish Commission found to be "widely shared" in all jurisdictions which had considered the problem.[20] It therefore recommended that the owner should be liable for any harm caused which was "directly referrable to" the "physical attributes or habits" of the dog as a species.[21] Such attributes were to include biting, savaging, attacking and harrying[22] but liability was not to extend to harm caused by mere presence in a road or other place.[23]

4.28 The route the Scottish Law Commission took in arriving at these recommendations is very similar to that taken by this Commission in 1970. It examined the types of civil liability possible and reached the conclusion that if strict liability was to be imposed it must be in response to a special risk. The special risk identified in relation to dogs lay in their propensity to attack. As there was still general public acceptance of the right of owners to allow their dogs to roam in public the Scottish Law Commission thought the special risk of attack could be addressed properly only by the imposition of strict civil liability [or attacks occurring on public land.[24]

4.29 This Commission has reached the conclusion that a far more comprehensive system of liability is necessary to meet the hazards presented by dogs roaming unattended in public places. The existing penalties and council powers to seize and impound do not appear to have reduced the problem significantly and while dogs continue to roam free in public they will continue to cause harm for which the owner should be held responsible.

B. Regulation of Dogs in Public

4.30 The Commission makes two primary recommendations on the regulation of dogs in public places. The first gives council officers powers to impose on-the-spot infringement notices [discussed 4.31-4.36] while the second

alters the law in relation to the civil liability imposed for harm occurring while the dog is away from its owner's property [discussed 4.39-4.44].

C. On-the-Spot Infringement Notices

4.31 The Commission recommends that council officers be given the power to issue on-the-spot infringement notices against people who commit offences under the Act. The grant of this power will allow more efficient enforcement of the provisions of the Act. The offences provided for in the Act are all of a relatively minor nature, dealing with such matters as dogs which are unregistered, those which are found in prohibited places and dogs which foul footpaths.

4.32 At present, s22 of the Dog Act provides that penalties for offences under the Act can only be recovered by prosecution in the Local Court. Inquiries made by the Commission have revealed that this requirement is a source of continual frustration to councils in their efforts to control dogs. Prosecution through the courts is an onerous procedure. Current procedures involve preparation of written statements, instruction of a solicitor, the service of summonses and attendances at court. All are considered to involve an excessive commitment of time and to be too expensive, when only minor offences are involved.

4.33 As the fines and costs awarded generally do not cover the costs incurred by councils, prosecutions are confined to extreme cases. Further, magistrates have on a number of occasions commented adversely on the fact that such minor matters take up the time of the court as well as that of legal personnel, council staff and defendants.

4.34 These findings persuade the Commission to the view that a more effective enforcement procedure is called for and the introduction of a system of on-the-spot infringement notices is recommended. Such a system will relieve councils of much of the work involved in enforcement of the Act. Court proceedings will be necessary only where the person served with an on-the-spot notice refers the matter. It is also thought that once provided with an effective method of enforcement councils will become more active in the field and that their activity will serve a public education as well as an enforcement function. Public acceptance will be encouraged by the reduction in unnecessary costs incurred in court proceedings.

4.35 The introduction of a system of on-the-spot infringement notices may also remedy the difficulties encountered by councils with use of their powers under s10 of the Act. As the power to seize dogs under s10 is limited to seizure on land other than that occupied by the owner, dogs can often avoid capture by retreating to their owner s property. One problem with the on-the-spot notice system proposed is that it may allow council officers to serve notices on householders who are not the owners of the offending dog. The definition of owner contained in s4 gives rise to the possibility that someone who is not the owner of the dog, but to whose property the dog has retreated, may be served with an on-the-spot notice. Under 54(1) "owner" includes the occupier of land on which the dogs ordinarily kept. "Ordinarily kept" has been interpreted to include those who come into temporary possession of a stray dog brought home and fed by children.[25] Thus the definition of owner would appear to allow a council officer to serve an on-the-spot infringement notice on the occupier of the property to which the dog retreated in the reasonable expectation that the recipient is its owner.[26] The person served with a notice who denies ownership would have to raise one of the defences provided in s4 to shift responsibility to someone else.[27]

4.36 The power to issue on-the-spot notices will supplement the existing power of councils to seize, impound and destroy dogs and it is to be hoped that the more effective enforcement procedure will lead to a reduction in the use of the seizure and impounding powers.

D. Injury and Damage Caused on Public Property

1. Criminal Liability

4.37 The Commission has received no complaints about either the criminal liability or the penalties imposed by s6 of the Dog Act. Section 6 makes the owner guilty of an offence punishable by a maximum fine of $200 if the dog "attacks or causes injury to a person or animal" on any land other than that occupied by the owner. It also provides for destruction or other disposal of the dog to ensure that it does not attack again in the future.[28]

4.38 One aspect of s6 which has drawn comment is the wording of the defences of intentional cruelty and intentional provocation which appear in s6(2). It is a defence to the s6 offence if the owner can show that the attack was an "immediate response" to and was "wholly induced by, intentional cruelty to, or intentional provocation of, the dog by a person other than the owner of the dog, his servants or his agents". These defences have been criticised at two levels. First it is suggested that the owner is protected where provocation or cruelty is offered by a relative or close associate, although not a servant or agent, of the owner. Secondly, the provision

seems to be inconsistent with the policy of the Act, as expressed in s8, that no dog should be on public land unless under "the effective control of some competent person". The point is made that the public is entitled to assume that provocation and intentional cruelty will be avoided by the handler and that the dog should not be taken into public if provocation is likely and the dog is susceptible to it. Consistent with that policy the Commission recommends that the defences of intentional cruelty and provocation should be available only if offered by the victim or someone associated with or acting on behalf of the victim. Thus, at present if a dog led by its owner were to be provoked by one person so that it attacked another, the owner could avoid liability by using the s6(2) defence. If the provision was amended in accordance with the Commissions recommendation, the defence would no longer be available to the owner in this situation, unless the person offering the provocation was found to be acting on behalf of the victim. The Commission believes that this extension of the s6 liability strikes the correct balance between the interests of the owner being permitted to have the dog in a public place and the right of a pedestrian to make full and safe use of the same public place.

2. Civil Liability

4.39 As suggested in para 4.27, the Commission believes that the special risk of harm presented by dogs which go unattended in public places, requires a systematic response. In the foregoing the means by which criminal sanctions can be applied to redress the problem were canvassed. It was found that the Dog Act already contains provisions which penalise the owner of a dog which goes unattended or attacks or causes injury on public land. Both are offences of strict liability meaning that the owner has no defence available other than as provided in the Act. Thus in response to a charge of allowing a dog to go unattended on public land under s8 it is not open to the owner to show that the dog escaped through the intervention of a third party or by an unavoidable accident. When charged under s6, in respect of an attack, the owner cannot plead contributory negligence or voluntary assumption of risk by the victim except as those defences appear in the statutory forms of intentional cruelty and provocation.[29]

4.40 The Commission recommends that such strict liability should also be applied in civil claims for damages.[30] This would mean that, consistently with the policy of the Act, the owner would be liable for all harm caused by the dog once outside the confines of its owner's property. Under the Commission's proposals liability would extend to all harm caused by the dog while in public and not just harm attributable to the exercise of its canine characteristics. Thus damages would be payable in respect of injuries and damage caused by the mere presence of the dog in a public place. There would be no need to prove that the harm was caused "in the course of an attack" as s20 provides at present. Nor would liability be restricted to the product of an attack which is described in s20(1)(a) as "bodily injury caused by the dog wounding" the person and "damage to the clothing". All personal injury and property damage caused by the dog would be covered, the only possible limit being imposed by the need for satisfactory proof of causation. If causation could be proved the liability would also extend to harm caused by way of nervous shock. Section 20 also limits liability to injuries which are inflicted on the person attacked. This restriction should be removed to allow bystanders who have become involved, and others who may have intervened to assist the victim, to he compensated for their losses.

4.41 The reasons for recommending the imposition of strict civil liability should be made express. The major reason has been mentioned already [para 4.27]. This is that by their mere presence in public places dogs do present a special risk to the community. That assessment having been made, it is open to suggest that strict civil liability should be imposed on the owner to compensate the community for the risk.

4.42 The Commission was influenced by the following consideration in reaching the conclusion that strict civil liability should be imposed.

(a) The risk

Although precise statistics are not obtainable it is clear that dogs are responsible for a significant amount of harm in the community. This may range from the nuisance involved in clearing up after a garbage bin has been disturbed by a dog to the very serious injuries which may be caused in traffic accidents. Dogs behaving quite normally and unaggressively have the capacity to cause great harm in a busy city street. they may also inflict serious injury when behaving aggressively. The public inconvenience and loss incurred through dogs warrant the strong approach which the imposition of strict civil liability represents.

(b) Consistency in the law

The imposition of strict civil liability is consistent with the policy pursued by the law of New South Wales since 1875. The amendments made to the Dog Act in 1977 were the first occasion on which strict civil liability had been confined in its scope. The existing s20 is also inconsistent with those other provisions of the Act which impose strict criminal liability. Consistency between the civil and criminal liability

imposed is desirable for the public education effect it has as well as for the clarity of purpose which it demonstrates.

(c) Allocation of risk and distribution of loss

It is well established legal theory that the primary aim of any compensation scheme is to allocate risk and redistribute loss.[31] The correct allocation of risk in this case would seem to be to assign responsibility to the person who introduces the risk to the community and who derives the benefits from it. The beneficiary is clearly the owner. The loss incurred by the victim is also properly redistributed to the owner of the dog for it is the owner who is in the best position to reduce the risk it presents and to spread the loss throughout the community by insuring against loss caused by the dog. In practical terms this means that the owner will pay tor the benefit of having a dog and for any loss caused by it. Most household policies offer insurance cover against loss caused by animals owned by the insured, and most now cover the person insured for harm caused away from the insured property. The owner therefore has ready means available to avoid personal loss and by using insurance indirectly achieves a spread of the loss throughout the community. If insurance premiums should rise owners may be persuaded to be more responsible in the handling of their dogs.

(d) Owner responsibility

In practice it can be predicted that the imposition of strict civil liability may offer some of the necessary incentive for owners to contain their dogs within private property. It is the owners alone who have the capacity to control their dogs' behaviour. Every incentive should be offered to them to do so. Those who are careful to ensure that their dog is properly controlled should not be troubled by the new regime.

3. Defences to Strict Liability

4.43 The Commission is of the view that the current defences to the action in strict liability should continue. These are the defences appearing in s20(2)(6) that the attack was in immediate response to, and wholly induced by, intentional cruelty or intentional provocation. As in regard to s6, the Commission further recommends that the defence be confined to cruelty or provocation offered by the victim or a person acting in concert with or at the direction of the victim. It should also continue to be open to dog owners to reduce their liability by showing that the victim contributed to the loss. These defences should allow the reasonableness of the victim's conduct to be taken into account in assessing the distribution of the loss between the parties.

4.44 Where the damage is due partly to the negligence of the plaintiff this will constitute contributory negligence. The Commission is of the view that in such cases Part 3 of the Law Reform (Miscellaneous Provisions) Act 1965 should replace s20C which currently governs contributory negligence under the Dog Act. Section 20C provides:

> Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage.

As the Commission believes the purpose of s20C can be Letter achieved under Part 3 of the 1965 Act it recommends that s20C be repealed in favour of s20(5) and (6) as they appear in Appendix A.

VI. INJURY AND DAMAGE OCCURRING ON THE LAND OF OTHERS

4.45 The Commission can see no reason why strict liability for both personal injury and property damage should not apply to the behaviour of dogs on all property other than the private property of the dog owner or the land on which tie dog is ordinarily kept.

4.46 This means that should a dog escape to the private property of a neighbour and cause injury or damage the owner of the dog will be strictly liable for its actions. The Commission recognises that neighbours may also ie concerned with other problems such as noise which may be caused by dogs, however, such matters cannot be dealt with within the scope of this reference. They are best left for consideration within the more general reference on relationships between neighbours which is before the Commission.

FOOTNOTES

1. NSW Law Reform Commission, *Report on Civil Liability for Animals* (LRC 8, 1970) paras 34-40.

2. Animals Act 1977 s6; Dog (Amendment) Act 1977 s20(2)(a), where “premises” is defined to include motor vehicles.

3. (1987) 61 ALJR 180; 69 ALR 615. The majority of the High Court approved the statement of the law made by Deane J in *Hackshaw v Shaw* (1984) 155 CLR 614 at 662-663.

4. Leigh, *Police Powers in England and Wales* (1975) at 172. Leigh also lists some situations in which private individuals are authorised by the common taw to entec private property. See also Watson and Purnell, *Criminal Law in New South Wales* (1971) Vol 1 para 3048.

5. Fire Brigades Act 1909 s20(e).

6. Prevention of Cruelty to Animals Act 1979 ss4(2), (3), 5(1) and 6(1). Section 19(1) of the Dog Act 1966 also makes it an offence to destroy any dog “contrary to the provisions of this Act”.

7. Dog Act 1966 s13 as amended in 1981.

8. Fleming, *The Law of Torts* (6th ed 1983) at 77-78.

9. Deeps v Cook (1938) 55 WN (NSW) 115 at 116-117 per Jordan CJ. The case concerned the killing of a dog which was attacking sheep.

10. *Morris v Nugent* (1836) 7 C & P 572 (173 ER 252 at 253).

11. Hanwa v Boultbee (1830) 4 C & P 350 (172 ER 735). Such principles can be extracted from the discussions of the facts in *Morris v Nugent* and *Hanway v Boultbee* although they are not made explicit in the judgments.

12. The High Court considered the implied invitation to enter private property when it is not fenced in *Halliday v Nevill* (1985) 59 ALJR 124 at 126. Brennan J in dissent at 131-132.

13. Packer, *The Limits of the Criminal Sanction* (1968) at 250.

14. *DPP v Smith* [1961] AC 290.

15. The most recent statement of the standard of negligence required appears in D (1984) 14 A Crim R 198 at 202 per Yeldham J for the Court of Criminal Appeal.

16. In *R v Wellard* (1834) 14 QBD 63 at 67 Grove J said:

A public place is one where the public go, no matter whether they have a right to go or not. The right is not the question.

17. *R v Wellard* (1884) 14 QBD 63 at 66, *Roberts v O'Sullivan* [1950] SASR 245 at 246, *Ward v Marsh* [1959] VR 26 at 28, 35 and *Semple v Carson* (1985) 35 SASR 589 at 593.

18. Scottish Law Commission, *Civil Liability in Relation to Animals* (Consultative Memorandum No 55, 1982) paras 5.2-5.7.

19. Scottish Law Commission, *Obligations: Report on Civil Liability in Relation to Animals* (Scot Law Coin No 97, 1985) para 3.15.

20. *Id* para 3.16. The other jurisdictions mentioned by the Commission at this point were Ireland (Animals Act 1985) and New South Wales (Dog (Amendment) Act 1977).

21. *Id* para 4.4; Appendix A, Animals (Scotland) Bill cl 1(1).

22. *Id* cl l(3)(a).

23. *Id* cl 1(5).

24. See the arguments presented by the Scottish Commission in the Report, note 17, paras 3.16-3.18, 4.24-4.26 and in the Consultative Memorandum, Note 16, paras 5.2-5.7.

25. *Porter v Cook* [1971] 1 NSWLR 31d at 319.

26. Occupier is defined in s4(4) to mean “the person who is entitled to occupy [the land] as owner or mortgagee in possession or under a lease, license or permit”. Service on one occupier of a group would seem to be covered by Interpretation Act 1897 s21(b) which allows the singular to include the plural.

27. The defences are set out in s4(2A), (2B) and (3). Note also that s4(2A)(a) prevents adults shifting responsibility for ownership to their children.

28. Section 6(3)(c), (d) and (e).

29. These are the defences to common law actions in which proof of scienter is required. Discussed by the Scottish Law Commission in its Report, note 17 para 1.16.

30. Mr Russell Scott, Deputy Chairman of the Commission, dissents from this recommendation. His view is that the presence of a dog in a public place should not be sufficient *of itself* to provide the basis of unavoidable civil legal liability upon the owner or keeper. Mr Scott does not agree to this recommendation because it allows a dog owner no opportunity to offer a defence on the merits. In his opinion there is wide community support for the ownership and keeping of dogs and wide community acceptance of reasonable consequent risks, he objects to the possibility that unlimited liability under this recommendation could attach to a dog owner automatically, if, for example, a third person entered the dog owner’s land without the owner’s knowledge and deliberately or even maliciously released the dog from its normal safe containment. Mr Scott also expresses the view that legislation on this subject should not contain an unusual or unnecessarily wide definition of “public place”.

31. This is argued by the Scottish Law Commission in the Consultative Memorandum, note 16, para 5.6.

5. Conclusion and Recommendations

A. Introduction

5.1 In this final chapter the Commission sets forth its recommendations and views on all provisions of the Dog Act. By doing so it hopes to provide a point of easy reference for those reading the Report. Detailed discussion of the recommendations appears in other sections of the Report.

B. Definition of Owner, ss4 and 5

5.2 Apart from the amendment to the definition of "Public Place" in s4, (discussed below at 5.3) the Commission makes no recommendations for the amendment of the definitions of owner contained in ss4 and 5 of the Dog Act. The definitions provided are comprehensive and suit the needs of the new scheme the Commission is suggesting in that they tie ownership to registration or occupation of property. Suitable defences are provided in s4(2A) for those occasions on which the definitions allow attribution of ownership to more than one person. The provisions of this subsection properly cast the onus on the defendant to satisfy the court that some other person is the owner of the dog. The approach taken by the Court of Appeal in *Porter v Cook*[1] to the question when a stray has been reduced to possession is consistent with the policy of the Act and accords with the Commission's intention.

C. Definition of Private Property

5.3 At present the Act makes a distinction between the liability imposed for acts occurring on private and public land by reference to the owner's occupation of the property. Owners are exempted from the criminal and civil liability imposed under ss6 and 20 when the harm occurs on property occupied by them. That property includes any land, vehicle or premises occupied by the owner or on which the dog is ordinarily kept [ss6(2), 20(2)]. The Commission believes that this distinction should be based on the access the dog has to the public and not on the occupation of property by the owner. Thus dogs in parts of private premises which the public in fact uses should be regarded as being on public land. Dogs in open vehicles from which they have access to the public should also be regarded as being on public land. The Commission recommends that dogs in places to which the public has access, although in private premises or vehicles, should be subject to the provisions of the Act which require them to be suitably controlled and which expose their owners to full liability for harm occurring in public.

D. Criminal Liability for Attacks

5.4 At present, the Act provides in s6 for an offence of strict criminal liability where a dog causes injury to a person while it is outside its owner's property. The Commission does not recommend an extension of this strict criminal liability to cover incidents occurring on the owner's private land. Recommendations are made for amendment to the defences provisions in s6(2)(b) so that the defence of intentional cruelty and provocation is available only where the provocation or cruelty are offered by the victim or someone closely associated with the victim. The Commission also recommends that a new offence be created to counter the problem of serious attacks by dogs. This offence would only apply in circumstances where the owner had been reckless in the control of a savage dog. As the Commission regards this as a serious offence it recommends that the maximum penalty should be equivalent to that imposed under s35 of the Crimes Act for the offence of malicious wounding. This would mean that the offence would be an indictable offence triable summarily with the consent of the accused person and subject to maximum penalties of $2000 fine or 2 years imprisonment under Crimes Act 1900, s476 (2), (6), (7). However, it is further recommended that the defence of self-defence of person or property be made expressly applicable to this offence.

E. Control of Dogs on Public Land, ss7-l0

5.5 Sections 8 and 9 are well designed to give wide powers to councils to regulate the activities of dogs in public places. No changes are recommended, although their application will be extended by the changes to the definition of "public place" proposed in para 5.3. Section 8 establishes the general rule that no dog is permitted in a public place unless restrained on a leash and s9 makes provision for councils to prohibit their entry into sensitive public areas such as children's playgrounds, schools and swimming and shopping areas. The needs of dog owners are met by s8(4) which allows councils to designate areas where dogs may run freely. The owners ' responsibility to ensure that public places are kept clean after use by their dogs, which is imposed by s9B, seems reasonable in view of the inconvenience and hazards to health which dogs present to the community. The Commission did not receive any submissions on ss7 and 9C, which impose special restrictions on greyhounds, and makes no recommendations on these provisions.

F. Seizure, Impounding and Destruction, ssl0 and 11

5.6 A number of councils claimed that the provision requiring an unregistered dog to be kept for seven days before destruction [s11(5)] imposes an unnecessarily heavy financial burden on councils. Some pointed to low collection rates for these dogs and suggested that it would be more reasonable if they were required to retain the dog for only four days. It was also suggested that the retention time for registered dogs and those carrying identification should be reduced from 14 to seven days. Most councils responding to our request for information were more resigned to the costs involved in the control of dogs, and although they supplied figures which showed that the rate of destruction was about 40% of the dogs impounded, they did not call for a shortening of the retention period. In view of these inconclusive results the Commission does not recommend that the periods for which councils are required to retain dogs before destruction should be reduced. The costs to dog owners whose animal may be destroyed by mistake or without notice are too high.

G. Destruction of Dogs ss12, 13, 18 and 19

5.7 The Commission has not been made aware of problems with the operation of these provisions. The provisions would appear to contain a useful consolidation of the common law. The Commission makes no recommendations for change to ss12 and 13. No evidence was presented to the Commission of failure to comply with s18 which regulates the manner in which dogs are to be destroyed. Those councils which commented on their practices indicated that they employed qualified veterinarians to destroy impounded dogs.

H. Registration of Dogs, ss14-17 and 21

5.8 The Commission makes no recommendations in relation to the registration provisions contained in ss14-17 and s21.

I. Guide Dogs, s17A

5.9 The Commission makes no recommendations on s17A.

J. Statutory Civil Liability for Injury, Damage and Death, ss20-20C

5.10 The Commission recommends that s20 of the Dog Act be repealed.[2] In its place there should be enacted a provision which imposes strict civil liability in respect of all harm caused by a dog while outside its owner's property. As such causes of action would extend to relatives of the victim under the Compensation to Relatives Act 1897 consequential amendments to s20A would be necessary following the repeal of s20. Section 20B extends the s20 type of limited liability to cover injuries inflicted on animals. As the new s20 will extend to all property damage s20B becomes unnecessary. It should be repealed. Currently, the defence of contributory negligence recommended in Chapter 4 appears in s20C [4.43]. The Commission recommends that this provision be repealed and replaced by the general scheme of contributory negligence provided by the Law Reform Commission (Miscellaneous Provisions) Act 1965.

5.11 In Chapter 4 [4.43-4.44] the recommendation was made that where contributory negligence exists, s10(1) of the Law Reform (Miscellaneous Provisions) Act 1965 should apply. The Dog Act in its present form allows also for the defences of intentional cruelty or provocation [in s20]. These should continue, but the Commission recommends that the defences of intentional cruelty or provocation should be available only if the cruelty or provocation was offered by the victim or someone associated with or acting on behalf of the victim.

K. Civil Liability on the Owner's Land

5.12 The Commission recommends that the common law of negligence continue to apply to harm caused by dogs on their owner's land [4.13-4.15]. There seems no reason to offer an exemption from liability to the occupier for injury caused by a dog. The Commission is not persuaded that the right to have a watchdog justifies such an exemption.

L. General Control

5.13 The Commission makes a number of recommendations which it considers will assist in the general control of dogs. The first arises out of the view expressed by many of the councils which wrote to the Commission that the enforcement mechanisms provided by the Act (collection and impounding and fining after court proceedings) were ineffective. They suggested that a system of on-the-spot infringement notices be introduced citing in support success in the use of such notices in anti-litter campaigns. The Commission is attracted to this suggestion for it has the virtue of "user paying". At present a significant proportion of the funds councils devote to the control of dogs is spent on the enforcement of the provisions of the Act. Councils must employ staff to collect and impound stray dogs and much of their time is wasted on unproductive chases. The costs of operating a pound and of providing for the destruction of dogs by qualified veterinarians are also high. The fees recovered by councils through their registration systems meet less than half of these costs. While most councils accept these costs

there seems no reason why those who require the services provided should not make a more significant contribution towards them. Introduction of on-the-spot notices would go some way towards ensuring that those who introduce the problem into the community pay. It would also be a more efficient means of enforcing compliance with the Act because on many occasions it would relieve rangers of the task of catching the dog before it returns to its owner's land. The ranger could simply follow the dog home and issue the householder with an enforcement notice. Defences already available in ss4 and S of the Act would allow the householder to shift responsibility where wrongly identified as the owner. The Commission recommends that council officers be given power to issue on-the-spot infringement notices for offences under the Dog Act.

5.14 The Commission's recommendation concerning the general control of dogs provides a remedy where dogs pose a threat to members of the public because they are not kept under proper control [4.19-4.21]. This would arise in situations where a dangerous dog is allowed to roam free on public land or where it is inadequately fenced or contained on private land. The Commission recommends that a provision be inserted in the Dog Act which would allow a magistrate upon complaint that a dog is dangerous and is not kept under proper control, to order the owner of the dog to keep it under control or to order that these dog be destroyed. The problems encountered by statutory officers seeking lawful entry to private land are better dealt with by separate provisions [4.17-4.18]. To this end the Commission recommends that those seeking lawful entry to private land whose previous attempts have been thwarted because of actual or likely savage behaviour by a dog, be able to apply to a magistrate for an order to assist their entry. Such an order would allow restraint of the dog by a council officer if required.

FOOTNOTES

1. [1971] 1 NSWLR 318. The Court interpreted "kept" to require examination of the measure of control exercised over the dog and the failure to chase it away. The act of providing food for the dog, although only scraps from the table, was "a positive act of attaching the dog to the premises

2. The Deputy Chairman of the Commission, Mr Russell Scott, dissented from this recommendation. His reasons appear in Ch 4, note 30.

Appendix A - Draft Legislation

Dog (Amendment) Bill 1988 Crimes (Dogs) Amendment Bill 1988
DOG (AMENDMENT) BILL 1988

NEW SOUTH WALES

[STATE ARMS]

TABLE OF PROVISIONS

DOG (AMENDMENT) BILL 1988

NEW SOUTH WALES

(STATE ARMS]

A BILL FOR

An Act to amend the Dog Act 1966 for the purpose of making further provision for the control of dogs and for related purposes.

See also Crimes (Dogs) Amendment Bill 1988.

The Legislature of New South Wales enacts:

Short title

1. This Act may be cited as the Dog (Amendment) Act 1988.

Amendment of Dog Act 1966, No. 2

2. The Dog Act 1966 is amended as set out in Schedule 1.

SCHEDULE 1 - AMENDMENTS

(Sec. 2)

(1) Section 4 (Interpretation) -

(a) Section 4 (1) - After the definition of “Dog”, insert:

“Goods” includes livestock and other animals.

(b) Section 4 (1), definition of “Owner”-

(i) From paragraph (a) omit “on any land or”.

(ii) From paragraph (a) omit “that land or”.

(c) Section 4 (1) -

After the definition of “owner”, insert:

"Premises" includes any structure, building and vehicle and any parcel of land, whether built on or not, and also includes a part of a structure, building, vehicle or any such parcel.

(d) Section 4 (1) -

Omit the definition of "Public place", insert instead:

"Public place" means any premises or other place (including an area of water) that is open to the public, or is used by the public, whether or not- - -

(a) payment for admission to the premises or place is required to be made; or

(b) the premises or place is ordinarily so open or used; or

(c) the public to whom the premises or place is open, or by whom the premises or place is used, consists only of a limited class of persons.

(e) Section 4 (1) -

After the definition of "Public place", insert:

"Public vehicle" means a vehicle that is being used to carry passengers or goods, or both passengers and goods, for hire or reward.

(f) Section 4 (1) -

After the definition of "Shire", insert:

"Vehicle" means any form of land, sea or air transport designed to be used to carry persons or goods, or both persons and goods.

(g) Section 4 (2A) (a) -

Omit "any land or".

(h) Section 4(4) -

(i) Omit "land or", where first occurring.

(ii) Omit "that land or".

(i) Section 4 (7) -

After section 4 (6), insert:

(7) If -

(a) a dog on or within a vehicle, other than a public vehicle, is confined or restrained in such a way as to ensure that no part of the dog protrudes from the vehicle; and

(b) either -

(i) the owner of the dog is the owner, lessee or hirer of, or is in charge of, the vehicle; or

(ii) the dog is on or within the vehicle with the consent of the vehicle's owner, lessee or hirer or the person in charge of the vehicle,

then, for the purposes of this Act, the dog shall be regarded as being on premises of which the owner of the dog is an occupier, even though the vehicle may be in a public place or may be on premises that are not in the occupation of that owner.

(2) Section 5 (Liability of owners of dogs) -

Section 5 (2)(d) -

Omit “on land or”.

(3) Section 6 (Dogs attacking or injuring persons or animals) -

Section 6 (2), (2A) -

Omit section 6 C2, insert instead:

(2) Subsection 1 does not apply to an attack by, or an injury caused by, a dog if -

(a) the attack or injury occurs wholly within premises that are not a public place and -

(i) the owner of the dog is an occupier of those premises; or

(ii) the dog is ordinarily kept on those premises; or

(b) in the case of an attack on, or an injury to, a person - the attack or injury is in immediate response to, and is wholly induced by, intentional cruelty to, or intentional provocation of, the dog -

(i) by the person attacked or injured; or

(ii) by a person acting at the direction of,

or in concert with, that person; or

(c) in the case of an attack on, or an injury to, another animal - the attack or injury is in immediate response to, and is wholly induced by, an attack made on the dog by the animal.

(2A) If in proceedings for an offence under subsection 1 a question arises as to whether that subsection applies to a particular attack by, or a particular injury caused by, a dog, the onus of establishing that that subsection applies to the attack or injury lies on the prosecutor.

(4) Section 6A -

After section 6, insert:

Setting a dog on a person or inflicting grievous bodily harm

6A. (1) A person who, having charge or control of a dog -

(a) sets the dog on another person; or

(b) intentionally or recklessly does or omits to do any act which causes the dog to inflict grievous bodily harm on another person,

is guilty of a felony and liable to imprisonment for a term not exceeding 7 years.

(2) Nothing in subsection (1) limits the operation of the rules of the common law relating to self-defence, the defence of others and the defence of property.

(5) Section 7 (Muzzling of greyhounds and other species or kinds of dogs -

Section 7 (2) (a) -

Omit the paragraph, insert instead:

(a) while it is within premises that are not a public place and

(i) the owner of the dog is an occupier of those premises; or

(ii) the dog is ordinarily kept on those premises; or

(6) Section 8A -

After section 8, insert:

Power of Local Court to make an order requiring the owner of a dog to keep the dog under effective control

8A. (1) Any person may lodge with a Local Court a complaint that a specified dog is, because it is not kept under effective control, a danger or threat to that person or other persons who are likely to come into contact with it.

(2) On the hearing of a complaint lodged under subsection (1), the Local Court concerned shall, if satisfied that the dog is, because it is not kept under effective control, a danger or threat to the complainant or other persons---

(a) order the owner of the dog to place it under effective control by such means as are, and by such date as is, specified in the order and thereafter to keep it under effective control by those means; or

(b) if that Court is satisfied that the circumstances of the case so require -

(i) order that owner to destroy the dog or cause it to be destroyed; or

(ii) order the dog to be destroyed by some person authorised by that Court; or

(iii) order that owner to take such other action as that Court directs, being action which is, in the opinion of that Court, necessary to prevent, or reduce the likelihood of, the dog continuing to be a danger or threat to the complainant or other persons,

within such period as is specified in the order.

(3) If a Local Court makes an order under subsection (2) (b) (ii), it may also order the owner of the dog concerned to take, within such period as is specified in the order, such action as is, in the opinion of that Court, necessary to enable the order to be carried out.

(4) An order made under subsection (3) may include an order for the payment of costs incurred in carrying out the action specified in the order.

(5) If a Local Court makes an order under subsection (2) (b) (ii) for the destruction of a dog, the person authorised by the order may destroy the dog but only in accordance with the order.

(6) A person who -

(a) neglects or fails to comply with an order under subsection (2) (paragraph (b) (ii) excepted) or an order under subsection (3); or

(b) intentionally obstructs or attempts to obstruct the carrying out of an order under subsection (2) (b) (ii),

is guilty of an offence and liable to a penalty not exceeding $200.

(7) If an order has been made under subsection (2) (a) or (b) and later, on the application of the complainant on whose complaint the order was made, it appears to the Local Court which made the order that a provision of the order has not been complied with within the period specified in the order, that Court may make an order or a further order under subsection (2) (b).

(8) A Local Court may impose a penalty under subsection (6) in respect of a matter in addition to making an order or further order under subsection (2) (b) in respect of the same matter.

(7) Section 10 (Seizure of dogs) -

(a) Section 10 (1) (b) -

Omit “on land or within premises of which the owner of the dog is not the occupier”, insert instead “within premises that are not in the occupation of the owner”.

(b) Section 10 (1) (b) (i) -

Omit the subparagraph, insert instead -

(i) is within those premises without the consent of their occupier; and

(8) Section 13 -

Omit the section, insert instead:

Destruction of attacking dog

13. (1) Any person may destroy a dog that is attacking or has attacked, or is causing or has caused injury to, a person or an animal.

(2) Subsection (1) does not apply if the attack or injury occurs or occurred on premises that are not a public place and -

(a) the owner of the dog is or was, at the time of the attack or injury, an occupier of those premises; or

(b) the dog is or was, at the time of the attack or injury, ordinarily kept on those premises.

(9) Section 14 (Mode of registration) -

Section 14 (1) (c) -

Omit “land or”.

(10)Section 16 (Records to be kept) -

Section 16 (2) (b) -

Omit “land or”.

(11) Section 17A (Guide dogs) -

(a) Omit “building or” wherever occurring.

(b) Omit ‘transport” wherever occurring, insert instead “vehicle”.

(12) Sections 20 - 20C -

Omit the sections, insert instead:

Civil liability for damage etc. caused by dogs

20. (1) Subject to this section, if a dog directly or indirectly causes a person to suffer bodily injury or causes damage to or the destruction of a person’s property, the owner of the dog is liable to that person in damages for the injury, damage or destruction.

(2) Subsection (1) does not apply to bodily injury, damage or destruction caused by a dog if, at the time when the injury, damage or destruction occurs, the dog is wholly within premises that are not a public place and -

(a) the owner of the dog is an occupier of those premises; or

(b) the dog is ordinarily kept on those premises.

(3) If -

(a) the death of a person is caused directly or indirectly by a dog; and

(b) the person would, had death not ensued, have been entitled under subsection (1) to bring proceedings against, and to recover damages from, the owner of the dog in respect of bodily injury caused by the dog,

the injury, damage or destruction shall, for the purposes of the Compensation to Relatives Act 1897, be treated as a wrongful act such as would, if death had not ensued, have entitled that person to bring proceedings against, and to recover damages from, the owner of the dog in respect of the injury, damage or destruction.

(4) It is a defence to proceedings brought under subsection (1) or (3) that the bodily injury, damage or destruction in respect of which the proceedings were brought was in immediate response to, and was wholly induced by, intentional cruelty to, or intentional provocation of the dog -

(a) by the person attacked or injured; or

(b) by a person attacking at the direction of, or in concert with, that person.

(5) If -

(a) a dog causes bodily injury to a person, or damage to or the destruction of a person's property, that gives rise to a liability on the part of the owner of the dog to pay damages under subsection (1); and

(b) the injury, damage or destruction is partly attributable to contributory negligence on the part of the person who suffered the injury or whose property was damaged or destroyed,

the injury, damage or destruction shall, for the purposes of Part 3 of the Law Reform (Miscellaneous Provisions) Act 1965, be regarded as having been suffered or sustained partly as the result of the fault of the owner of the dog and partly as the result of the fault of that person.

(6) Subsection (5) does not affect the operation of Part 3 of the Law Reform (Miscellaneous Provisions) Act 1965 in respect of any liability for bodily injury to a person, or for damage to or the destruction of a person's property, caused by a dog that arises otherwise than under subsection (1).

(7) This section does not affect the liability, apart from this section, of any person for damage caused by a dog.

(8) In this section -

"bodily injury" includes illness arising wholly or in part from mental or nervous shock.

(13) Section 22 -

Omit the section, insert instead:

Proceedings for of fences

22. Proceedings for an offence against this Act shall be dealt with summarily before a Local Court constituted by a Magistrate sitting alone except in the case of an offence arising under section 6A.

(14) Section 22A -

After section 22, insert:

Penalty notices

22A. (1) In this section -

"prescribed offence" means an offence against this Act, other than an offence under section 6A;

"prescribed officer" means a person who holds an office prescribed for the purposes of this section.

(2) If it appears to a prescribed officer that a person has committed a prescribed offence, the officer may serve on the person a notice -

(a) alleging that the person has committed the offence and giving the prescribed particulars in relation to the offence; and

(b) specifying the prescribed penalty in respect of the offence; and

(c) stating that -

(i) if the person prefers not to have the matter dealt with by a court, the person may, within the period specified in the notice (being a period that is not less than 21 days), pay to the authority specified in the notice the amount of the prescribed penalty; and

(ii) if, within that period, the person pays the prescribed penalty to the authority specified in the notice, no further action will be taken against the person in relation to the prescribed offence.

(3) A notice under subsection (2) may be served personally or by post.

(4) A person alleged to have committed a prescribed offence has the right not to be dealt with under this section in respect of the offence.

(5) A person who fails to pay the prescribed penalty -

(a) within the period specified in a notice served on the person under subsection (2); or

(b) within such further period as may in any particular case be allowed,

shall be regarded as having exercised the right not to be dealt with under this section.

(6) If the amount of the penalty prescribed for an alleged offence is paid in accordance with a notice served under subsection (2), then, subject to subsection (9), no person is liable to any further proceedings for the alleged offence.

(7) Payment of the amount of a prescribed penalty in accordance with a notice served under subsection (2) shall not be regarded as an admission of liability for the purpose of, nor in any way affect, any civil proceedings arising out of the same occurrence.

(8) The prescription for the purposes of this section, for a prescribed offence, of a penalty that exceeds the maximum amount of penalty which could be imposed for the offence by a court is void.

(9) If a notice served under subsection (2) relates to an offence constituted by a failure to do a particular act or thing -

(a) the obligation to do the act or thing continues despite the service of the notice or the payment of the prescribed penalty for the offence; and

(b) subsection (6) does not prevent further proceedings for an alleged offence relating to a continued failure to do that act or thing.

(10) Except as provided by subsections (6) and (9), this section does not affect the operation of any provision of this or any other Act in relation to the institution of proceedings for of fences that are prescribed of fences.

(15) Section 24 (Power of entry) -

Omit “upon any land or premises”, insert instead “any premises”.

(16) Section 24A -

After section 24, insert:

Orders facilitating the entry of public officers to land etc. where dogs are kept

24A. (1) In this section -

“public Officer” means a person who is the holder of an office established by or under an Act.

(2) If -

(a) a public officer is empowered by an Act to enter premises that are in the occupation of another person; and

(b) the public officer claims to have made reasonable attempts on at least 2 occasions to enter those premises and to have been unable to gain entry to those premises wholly or partly because of the presence there of a dog which the officer fears will attack or harm the officer should the officer make a further attempt to gain entry,

the officer may apply to a Local Court for an order under subsection (4).

(3) An application under subsection (2) may be made without serving a copy of the application on the occupier of the premises concerned and without giving the occupier of those premises an opportunity to be heard in relation to the application.

(4) On the hearing of an application made by a public officer under subsection (2), the Local Court concerned may, if satisfied that -

(a) the officer has attempted to enter the premises to which the application relates on at least 2 occasions; and

(b) there is kept within those premises a dog which is likely to attack or harm the officer should the officer make a further attempt to gain entry to those premises,

make an order -

(c) requiring the occupier of those premises to keep the dog under effective restraint while the officer enters those premises and carries out the purpose for which the officer is empowered to enter those premises;

(d) if such a requirement is not complied with, empowering a person experienced in handling dogs who is a servant of the council in whose area those premises are located -

(i) to enter those premises in the company of the officer; and

(ii) to seize the dog and keep it under effective restraint while the officer carries out the purpose for which the officer is empowered to enter those premises or, if in the opinion of that person it is necessary to do so, to destroy the dog; and

(e) providing for such ancillary matters as the Court considers necessary for the purpose of giving effect to the order.

(5) Even though an order has been made under subsection (4), the power referred to in paragraph (d) of that subsection is not exercisable unless -

(a) the officer concerned has attempted to enter the premises to which the order relates after the order was served on the occupier of those premises; and

(b) on the occasion of that attempt, that occupier has neglected or refused to comply with the requirement referred to in paragraph (c) of that subsection.

(6) A servant of a council who enters premises in the company of a public officer in accordance with an order made under subsection (4) may, if of the opinion that any dog found within the premises cannot be restrained effectively while the officer carries out the purpose for which the officer has entered those premises, destroy that dog.

(7) A person who -

(a) neglects or fails to comply with a requirement of an order made under subsection (4); or

(b) intentionally obstructs or hinders a public officer or servant of a council in the exercise of a power conferred by the order,

is guilty of an offence and liable to a penalty not exceeding $200.

(8) As soon as practicable after a public officer has entered premises in accordance with an order made under subsection (4), the officer must make to the Local Court that made the order a report in writing giving -

(a) particulars of the entry and of the activities engaged in by the officer in carrying out the purpose for which the entry was sought; and

(b) where the officer was accompanied by a servant of the relevant council, particulars of the activities that the servant carried out for the purpose of giving effect to the order.

CRIMES (DOGS) AMENDMENT BILL 1988

NEW SOUTH WALES

[STATE ARMS]

TABLE OF PROVISIONS

CRIMES (DOGS) AMENDMENT BILL 1988

NEW SOUTH WALES

[STATE ARMS]

A BILL FOR

An Act to amend the Crimes Act 1900 for the purpose of extending the range of indictable of fences punishable summarily with the consent of the accused.

The Legislature of New South Wales enacts:

Short title

1. This Act may be cited as the Crimes (Dogs) Amendment Act 1988.

Commencement

2. This Act commences at the commencement of the Dog (Amendment) Act 1988.

Amendment of Crimes Act 1900, No. 40.

3. The Crimes Act 1900 is amended as set out in Schedule 1.

SCHEDULE 1 - AMENDMENTS

(Sec. 3)

Section 476 (Indictable of fences punishable summarily with consent of accused) -

(1) Section 476 (6) (ga) -

After section 476 (6) (g), insert:

(ga) any offence mentioned in section 6A of the Dog Act 1966;

(2) Section 476 (6) (i) -

After “(g)”, insert “, (ga)”.

Appendix B - Submissions Received

Individuals

Mr T J Martin QC

Alderman Harold C W Scruby

Mrs Pauline Williams (and 7 others)

Organisations

Insurance Council of Australia Limited

Local Government Energy Association of New South Wales

Local Government and Shires Association of New South Wales

NRMA Insurance Limited

Police Association of New South Wales

Government Bodies

Australian Bureau of Statistics

Australian Postal Commission

Department of Local Government

Government Insurance Office

Macquarie County Council

Metropolitan Water Sewerage and Drainage Board

Office of the Sheriff of New South Wales

Sydney County Council

Traffic Authority of New South Wales

Local Government

Armidale City Council

Ashfield Municipal Council

Bankstown City Council

Bathurst City Council

Baulkham Hills Shire Council

Bellingen Shire Council

Blayney Shire Councfl

Byron Shire Council

Campbelltown City Council

Cessnock City Council

Coffs Harbour Shire Council

Cowra Shire Council

Dubbo City Council

Eurobodalla Shire Council

Graftor. City Council

Greater Lithgow City Council

Gunnedah Shire Council

Hastings Municipal Council

Hay Shire Council

Holroyd City Council

Hornsby Shire Council

Inverell Shire Council

Lake Macquarie City Council

Lane Cove Municipal Council

Leeton Shire Council

Lismore City Council

Liverpool City Council

Maclean Shire Council

Maitland City Council

Mosman Municipal Council

Narromine Shire Council

Newcastle City Council

Oberon Shire Council

Penrith City Council

Queanbeyan City Council

Ryde Municipal Council

Scone Shire Council

Shoalhaven City Council

Strathfield Municipal Council

Sutherland Shire Council

Sydney City Council

Tenterfield Shire Council

Tumbarumba Shire Council

Waverley Municipal Council

Wingecarribee Shire Council

Wollondilly Shire Council

Wollongong City Council