

Barking dogs – Are they still a nuisance?

By Peter Gillett

On 1 November 2013, a number of substantial amendments to the *Dog Act 1976* (WA) came into effect. Those amendments included significant changes to the nuisance provisions contained in section 38 of the Act. The amendments, while presumably intended to make it easier for local governments to deal with barking dogs in Western Australia, may have had the opposite effect.

What is nuisance barking?

Prior to the amendment of the Act, the definition of nuisance commonly relied upon by local governments for ascertaining whether or not a dog was causing a nuisance by barking was contained in s.38(2)(b) of the Act, which provided:

“A dog shall be taken to be a nuisance for the purposes of this section if it creates a noise, by barking or otherwise, which persistently occurs or continues to a degree or extent not normally habitual in dogs and has a disturbing effect on the state of reasonable physical, mental or social well-being of a person.”

In order to show that a dog was being a nuisance within the meaning of that definition, it was necessary to call expert evidence to show that the barking of the dog was persistently occurring or continuing to such a degree or extent not normally habitual in dogs and to call a witness (usually a neighbour) to give evidence that the barking had had a disturbing effect on their physical, mental or social wellbeing.

As a result of the amendments to s.38, the definition previously contained in s.38(2)(b) is now contained in s.38(1)(a) and has been amended to read:

“For the purposes of this section a dog is a nuisance if the dog makes a noise, by barking or otherwise, that persistently occurs or continues to such a degree or extent that it unreasonably interferes with the peace, comfort or convenience of any person in any place.”

Pursuant to s.38(1)(c), a dog is also a nuisance if it makes a noise by barking or otherwise that exceeds a prescribed noise level or if the barking exceeds a prescribed number of times of occurrence during or over a prescribed period of time. Currently, however, there are no prescribed noise levels or number of occurrences.

For practical purposes, the most notable change to the definition is the removal of the requirement that the barking must occur or continue to an extent not normally habitual in dogs. At first glance, that would appear to do away with the necessity to call expert evidence in order to prove an offence under s.38. However, if a person charged with a dog nuisance offence called an expert witness to give evidence that the amount of barking by the dog was within what would be considered normal and a local government had no expert evidence to the contrary, a court may be reluctant to find a charge proved on

the basis that 'normal' barking by a dog could not be considered to unreasonably interfere with the peace, comfort or convenience of any person.

In the writer's view, while the amended definition of nuisance, as it currently stands without prescribed levels or numbers, may have been intended to make it easier for local government by removing the requirement to show that the barking is not normal, without expert evidence to that effect, a court may not be satisfied the barking is unreasonably interfering with the peace, comfort or convenience of any person.

Controlling nuisance barking

Perhaps the most significant change to the nuisance provisions is the removal of the offence for being the occupier of premises where a dog causing a nuisance is kept. Prior to the amendments, an occupier of premises where a dog was kept committed an offence if the dog was a nuisance. That offence no longer exists.

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In order to now commit an offence for a barking nuisance, a person must first be issued with an order under s.38(3) of the Act requiring them to prevent the behaviour that is alleged to constitute the nuisance. An offence is only committed if the person fails to comply with the order within the time specified in the order.

While many local governments would only commence prosecution proceedings for a barking nuisance offence after an abatement notice had been given under the old provisions, the giving of an abatement notice was not a prerequisite to commencing prosecution proceedings and it was not necessary to show that barking had continued after the abatement notice in order to prove an offence. That was because evidence of the nuisance barking which led to the giving of the abatement notice would normally have been part of the evidence led to prove the charge, provided it was within the 12 month limitation period for the offence.

Under the amended provisions, commencing a prosecution for nuisance barking is now a 3 step process. First, a local government must first be satisfied that a nuisance exists. Second, an order must be given to a person liable for the control of the dog requiring that person to prevent the nuisance. Finally, if the order is breached, the local government can prosecute for that breach. However, it is only the evidence of the nuisance barking after the order is given that would establish that an offence was committed.

The new process creates a number of difficulties for local government. First, a complainant will likely have been required to keep diaries of the barking over a period of time in order to satisfy the local government that a nuisance exists and that an order should be given. If the barking continues after an order is given, a complainant will likely be required to keep further records and diaries in order to satisfy the local government that the order has been breached and the nuisance continues. In the writer's experience, that additional requirement is likely to strain the relationship between the local government and a complainant who just wants the problem fixed and often cannot understand why more diaries must be kept.

Second, the process requires that a valid order is given and that the order is properly served. In order to be valid, an order must clearly specify the nuisance complained of and the action required to prevent the behaviour that is alleged to constitute the nuisance. That may not be as straightforward as it sounds and may result in additional difficulties if the

person liable for the control of the dog takes the action specified in the order but the nuisance continues.

To ensure an order is enforceable, a local government must also be able to show that the order was in fact received by the person liable for the control of the dog. That may not be possible if the order is not served personally. While postal service will suffice if the local government receives a response from the person given the order, postal service will not of itself be sufficient to prove service if the person liable for control of the dog says they never actually received the order.

Finally, whilst the penalties for failing to comply with an order given under s.38(3) are greater than the previous penalties, there is no longer a specific daily penalty for a nuisance dog which is not a declared dangerous dog. Given that an offender must now be given a formal order clearly setting out the nuisance complained of and the action to be taken, it would seem appropriate that a daily penalty would apply where a person fails to comply with that order, whether the dog is dangerous or not. Indeed, it is difficult to understand why the penalties are not the same for nuisance barking by a declared dangerous dog and a dog that has not been declared dangerous.

Conclusion

The change to the definition of nuisance is unlikely to result in any significant change for local government in dealing with nuisance barking. That may change if noise levels and perhaps more importantly, numbers of occurrence of barking, are prescribed by regulation in the future. The significant change for local government, however, is that a barking dog is now only really a nuisance if it continues to bark and cause a nuisance after the person liable for its control is given an order under s.38(3) of the Act.

For further information in regard to the above, contact Peter Gillett on 9424 6229 or pgillett@mcleods.com.au. The information contained in this update should not be relied upon without obtaining further detailed legal advice in the circumstances of each case.