

# Legal implications for not responding to hoarding complaints

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# Overview

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- + Is hoarding a nuisance?
- + Does Council have a duty to respond and/or take action?
- + What are the risks and legal implications of not responding?
- + Negligence 101 and negligence case law
- + Investigation and Enforcement Process

# Is hoarding a nuisance?

## Potential risks with hoarding:

- + Fire
- + Pest infestations
- + Odour
- + Damaged or non functioning electrical/water/sewerage facilities
- + Illness and injury

## Definition of Nuisance:

- + Section 58 of the *Public Health and Wellbeing Act 2008* (Vic)
- + Are or liable to be, dangerous to health or offensive
- + “Offensive” – noxious or injurious to personal comfort
- + Includes the state of a premises, animals, refuse, water and emissions

# Is hoarding a nuisance?

+ Private or public issue?

+ Section 58(3) states that:

+ regard must not be had to the number of persons affected or that may be affected;  
and

+ regard may be had to the degree of offensiveness.

# Does Council have a duty to respond and/or take action?

- + Section 60 of the *Public Health and Wellbeing Act 2008* (Vic)
  - + A Council has a duty to **remedy** as far as is reasonably possible all nuisances existing in its municipal district.
- + Section 62 (2) of the *Public Health and Wellbeing Act 2008* (Vic)
  - + The Council must **investigate** any notice of a nuisance.
- + Section 62 (3) of the *Public Health and Wellbeing Act 2008* (Vic)
  - + If, upon investigation, a nuisance is found to exist, the Council must (a) **take any action** specified in subsection (4) that the Council considers appropriate or (b) if the Council is of the opinion that the matter is better settled privately, advise the person notifying the Council of the nuisance of any available methods for **settling the matter privately**.
- + Section 62 (4) of the *Public Health and Wellbeing Act 2008* (Vic)
  - + Includes improvement/prohibition notices and Court proceedings.

# What are the risks and legal implications of not responding?

- + Death or injury
- + Coronial inquest
- + Ombudsman complaint
- + Sued for negligence and required to pay damages
- + Employees of Council may be investigated/disciplined
- + Negative publicity for Council and/or officers involved

# How does negligence arise?



Duties and Powers

Knowledge

Failure to Act

# Negligence

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- + To prove an action in negligence, the following would need to be proved:
  - + Council owed the person a duty of care;
  - + Council knew, or ought to have known, that there was a risk of harm/injury;
  - + Council had powers that would allow it to intervene in the situation to prevent the harm/injury;
  - + Council breached that duty by failing to take reasonable care;
  - + Council's breach of duty caused the injury and/or damage; and
  - + The injury and/or damage was not too remote a consequence of the breach of duty.



# Negligence

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In deciding if a public authority has a duty of care or has breached that duty, the Courts consider the *Wrongs Act 1958* (Vic) (sections 83 and 84), including:

- + What resources are available to the Council?
- + What functions are required to be exercised by the Council?
- + How does the Council generally comply with procedures and standards in discharging its responsibilities?
- + Was the act or failure to act by the Council a reasonable exercise of its functions?

# Negligence Case Law

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A public authority may be subject to a common law duty of care when it exercises a statutory power or performs a statutory duty.

*Sutherland Shire Council v Heyman* (1985)

# Negligence Case Law

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## ***Pyrenees Shire Council v Day (1998) (High Court):***

Council became aware of defective brickwork in a chimney posing a risk to the premises and adjoining buildings. Council directed the tenant (and not the owner) not to use the fireplace unless it was repaired. A new tenant moved in and the Council did not reinspect to confirm the repairs had been done. Fire occurred and destroyed the building and part of the adjoining shop.

**Held:** If Council knows or ought to have known about an unsafe premises that poses a risk to public safety and fails to use its powers to address the risk, the Council would be exposed to a claim in negligence. Council knew of the risk, had powers to prevent the risk eventuating, was under a public law duty to enforce compliance and yet Council failed to follow up the requested repairs.

# Negligence Case Law

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## ***Dylan Kuehne By Tutor Peter Kuehne v Warren Shire Council. Peter Kuehne v Warren Shire Council (2011) (NSW District Court)***

In 2006, a 4 year old child was mauled to death by six hunting dogs in a neighbour's backyard. Numerous complaints regarding the dogs had been made to Council but not followed up. Council had not exercised its statutory functions to declare the dogs dangerous.

### **Held:**

- + Council failed to exercise its power properly.
- + Council owed a duty of care to people who lived close to the dogs.
- + Council had to pay damages of \$124k to the plaintiffs as a result of its failure to declare the dogs as dangerous.

# Investigation and Enforcement Process

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If Council receives a report of hoarding/nuisance, Council must:

- + Investigate.
- + If a nuisance is found to exist:
  - + Take action such as issuing an improvement/prohibition notice or issuing proceedings; or
  - + Advise of 'better settled privately' methods (if appropriate).
- + Monitor the nuisance and take further action if necessary.

# Enforcement Considerations

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In considering enforcement options, Council should turn its mind to:

- + What enforcement options are best utilised for each situation?
- + How is Council best to minimise liability – what action and follow up action can/should be taken?
- + Are there mental health issues that need to be disclosed to the Court?
- + Who else in Council should you be working with?
  - + Community Services
  - + Building Department
  - + Fire Prevention Officer
  - + Local Laws Department

# QUESTIONS?

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