

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA498/2025  
[2025] NZCA 433

BETWEEN                      WEIWEI XING  
   Applicant  
  
AND                              AUCKLAND COUNCIL  
   Respondent

Court:                      French P and Collins J  
  
Counsel:                      T A Hwang for Applicant  
   B V Magill for Respondent  
  
Judgment:                      27 August 2025 at 12 pm  
(On the papers)

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JUDGMENT OF THE COURT

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**The application for leave to bring a second appeal is declined.**

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REASONS OF THE COURT

(Given by French P)

**Background**

[1] Mr Xing pleaded guilty to a charge under s 57(2) of the Dog Control Act 1996 of being the owner of a dog that attacked a person. The District Court Judge, Judge Davenport KC, discharged Mr Xing without conviction under s 106(1) of the Sentencing Act 2002 on the condition that he pay reparation and that Mr Xing's dog, Bi Dong, be destroyed.<sup>1</sup> During the hearing, in response to the Judge's question about

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<sup>1</sup> *Auckland Council v Xing* [2025] NZDC 12271 at [3].

the dog's whereabouts, Mr Xing said he had not seen him since the day of the attack and did not oppose an order being made for his destruction.

[2] Section 57(3) of the Dog Control Act relevantly provides that in a proceeding under s 57(2), the Court must order the destruction of the dog if it has committed an attack unless satisfied that due to "exceptional" circumstances a destruction order is not warranted. In the 2020 decision of *Auckland Council v Hill*,<sup>2</sup> this Court provided guidance as to what is to be taken into account when considering whether there are exceptional circumstances.

[3] This Court has also confirmed in a 2024 decision, *Solicitor-General's reference from CRI-2022-404-212 ([2022] NZHC 31)*, that there is no jurisdiction under s 57(3) to make a destruction order in the absence of a conviction, such as where the dog owner is discharged without conviction.<sup>3</sup>

[4] In reliance on this latter decision, Mr Xing subsequently appealed the destruction order for his dog to the High Court on the grounds of lack of jurisdiction.

[5] On appeal, Wilkinson-Smith J observed that the District Court sentencing notes did not specify the statutory provision under which the Judge was purporting to act.<sup>4</sup> We pause here to interpolate that, in his submissions, Mr Xing contends that it was not open to the Judge to determine that the District Court ordered destruction under the Sentencing Act, instead of the Dog Control Act. However, in our view, that is to misinterpret the High Court decision. The point the High Court Judge was making was that it was uncertain which of the two statutory provisions the District Court Judge was relying on.<sup>5</sup> Arguably, if anything, given that the District Court Judge was making an order under s 106(1), it could be said that it was more likely the order was made under the Sentencing Act.

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<sup>2</sup> *Auckland Council v Hill* [2020] NZCA 52, [2020] 3 NZLR 603.

<sup>3</sup> *Solicitor-General's reference from CRI-2022-404-212 ([2022] NZHC 31)* [2024] NZCA 401, [2024] 3 NZLR 656 at [66].

<sup>4</sup> *Xing v Auckland Council* [2025] NZHC 1874 at [25].

<sup>5</sup> The High Court judgment records that the District Court did not discuss the legislative basis for the destruction order: at [9].

[6] Returning to the High Court decision, Wilkinson-Smith J further held that, although the District Court Judge did not have jurisdiction to make the order under s 57(3) of the Dog Control Act, there was jurisdiction under s 106(3)(c) of the Sentencing Act.<sup>6</sup> Section 106(3)(c) provides:

**106 Discharge without conviction**

...

(3) A court discharging an offender under this section may—

...

(c) make any order that the court is required to make on conviction.

[7] Applying this provision to destruction orders made under s 57(3) of the Dog Control Act, Wilkinson-Smith J held that in the absence of exceptional circumstances, such an order would qualify for the purposes of s 106(3)(c), being an order the Court would have been required to make had Mr Xing been convicted.<sup>7</sup> Unfortunately, s 106(3)(c) had not been raised in the District Court and accordingly there was no evidence or submissions about the existence or otherwise of exceptional circumstances and it was not addressed by the Judge.<sup>8</sup> Wilkinson-Smith J further accepted that, in the District Court, Mr Xing had been labouring under the misapprehension that his agreement to a destruction order was a condition precedent to obtaining a discharge.<sup>9</sup>

[8] Given those circumstances, Wilkinson-Smith J concluded that the most just disposition of the appeal was to quash the order for destruction and remit the case to the District Court for re-consideration of whether an order for destruction of the dog should be made pursuant to s 106(3)(c).<sup>10</sup>

**The application before us**

[9] Mr Xing now seeks leave to appeal the High Court decision to this Court. Leave is required under s 253 of the Criminal Procedure Act 2011 because such an

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<sup>6</sup> At [16]–[17].

<sup>7</sup> At [26].

<sup>8</sup> At [25]–[29].

<sup>9</sup> At [29] and [33]–[34].

<sup>10</sup> At [33]–[37].

appeal would be a second appeal. In order to obtain leave, Mr Xing must satisfy us that his proposed appeal raises a question of general or public importance or that a miscarriage of justice may have occurred, or may occur unless the appeal is heard.<sup>11</sup>

[10] Mr Xing argues that test is met because his proposed appeal raises the issue of whether a dog destruction order qualifies as a mandatory order for the purposes of s 106(3)(c).

[11] If that were an arguable issue, we accept it would indeed be a question of general importance. But in our view, it is not. The basis for the argument Mr Xing seeks to advance on appeal is that because conviction has now been confirmed as a necessary pre-condition to a dog destruction order under s 57(3), then this precludes or ousts any power under s 106(3)(c) to make such an order. However, that would render s 106(3)(c) meaningless. The provision is premised on there being no conviction. Further, Mr Xing's reliance on *Solicitor-General's reference* is misplaced. The reasoning in that decision is confined to the provisions of the Dog Control Act and there is no suggestion that it was intended to impact on the Court's discretion under s 106(3)(c). Indeed, on the contrary, the judgment refers without comment to the fact that the High Court Judge, having held that a conviction was a condition precedent to making an order under s 57(3) of the Dog Control Act, nevertheless went on to consider the making of such an order under s 106(3)(c).<sup>12</sup>

[12] The proposed appeal in this case also faces the insuperable barrier that dog destruction orders are indistinguishable from other types of orders, such as disqualification orders under the Land Transport Act 1998, which are indisputably within the scope of s 106(3)(c).<sup>13</sup> In both cases, the orders are mandatory on conviction — that is to say, they are required in every case, or in the absence of a prescribed exception. In the case of disqualification orders, the principal prescribed exception is the existence of a special reason relating to the offence.<sup>14</sup> In this case, the

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<sup>11</sup> Criminal Procedure Act 2011, s 253(3).

<sup>12</sup> *Solicitor-General's reference from CRI-2022-404-212 ([2022] NZHC 31)*, above n 3, at [11].

<sup>13</sup> Other examples are orders for confiscation of motor vehicles under s 129(3) of the Sentencing Act 2002 and forfeiture orders under the Fisheries Act 1996. See *Fountain v Auckland Council* [2018] NZHC 591, [2018] 3 NZLR 216 at [40].

<sup>14</sup> Land Transport Act 1998, s 81(1).

prescribed exception is the existence of exceptional circumstances.<sup>15</sup> Absent exceptional circumstances, the order must be made.

[13] In our view, the approach taken by the High Court Judge in this case is unarguably consistent with the authorities,<sup>16</sup> as well as with the wording of s 106(3)(c) and the public safety policy of the Dog Control Act. We are unable to discern any arguable issue of statutory interpretation, principle or policy that would possibly justify rejecting the established position.

[14] At the risk of stating the obvious, we add that the process required under s 106(3)(c) is for the sentencing Court to first consider whether the order is one that it would have been required to make on conviction. In the context of this case, that means determining whether the prescribed exception (the existence of exceptional circumstances, as defined in *Hill*) is satisfied. If there are found to be exceptional circumstances, then the order would not have been required to be made on conviction and, in turn, that means 106(3)(c) does not apply, and no destruction order can be made.

[15] Conversely, if the finding is there are no exceptional circumstances, as defined in *Hill*, that does not, of itself, mean a destruction order must automatically follow as it would had the person been convicted. Otherwise, the existence of the discretion under s 106(3)(c) would be meaningless. The discretion contained in s 106(3)(c) is intended to enable a broader range of factors to be taken into account than those driving the conclusion that the statutory exception is not met. Thus, although public safety concerns will still be relevant, pre-attack and post-attack history may, for example, be taken into account at this stage of the inquiry.

[16] For completeness, we also observe that there are no grounds for arguing the risk of a miscarriage of justice if leave is not granted. The only aspect of the remittal

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<sup>15</sup> Dog Control Act 1996, s 57(3).

<sup>16</sup> See, for example, *Adams v South Taranaki District Council* [2021] NZHC 3254 at [44]; *Fountain v Auckland Council*, above n 13, at [40]–[43]; and *Snodgrass v Kapiti Coast District Council* [2014] NZHC 1333, [2014] NZAR 834 at [54]. Our review of the caselaw has identified only one High Court decision contrary to the approach taken by Wilkinson-Smith J in this case and, in any event, it involved an obiter statement based on a mistaken assumption about the absence of any exceptions to mandatory disqualification orders under the Land Transport Act. See *Ingle v Auckland Council* [2020] NZHC 1164 at [110]–[111].

relates to the dog destruction order. Mr Xing still retains the benefit of a discharge without conviction. And, he is still able to provide evidence and submissions in support of his contention that a destruction order should not be made.

[17] For all these reasons, the application for leave to bring a second appeal is declined.

### **Outcome**

[18] The application for leave to bring a second appeal is declined.

Solicitors:  
Queen City Law, Auckland for Applicant