Barristers Animal Welfare Panel

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Recommended administrative and legislative solutions

The breed specific legislation reposed in the *Domestic Animals Act* 1994 has manifestly failed. In particular, it has failed to improve community safety. Dangerous or menacing dogs are not confined to one particular breed. RSPCA Victoria conducted a survey in 2011 of larger dogs brought into large metropolitan shelters for a dog bite or incident: of 110 dogs, only 2 were Pit Bull Terriers.

The legislative background to introduction of BSL in Victoria is set out in a brief Appendix to this submission.

The Committee has heard from Mr Bill Bruce, the former leader of what is known as the Calgary Program. The challenge is to provide for a legislative and administrative framework to enable implementation of such a program. Calgary is a unitary council, which administers the needs of a population of some 1.2 million people. Victoria, by contrast, has multiple city, regional and rural municipalities.

The Panel recommends the following:

1. The pivotal, if not confronting, question for the Committee to determine is whether Councils are suitable or fit to administer a Calgary-like model. In the Panel's view, they are not. Most Councils discharge dog -ranging responsibilities and thus view dogs as a matter of animal management rather than welfare, let alone rehabilitation. Indeed, killing of a dog who has engaged in errant behaviour has come to be adopted as a management tool. Councils at large fail to abide by

or understand the maxim that a good owner means a good dog, and a bad owner means a dog at risk. A dog at risk is potentially a risk to community safety.

We are compelled to say that the culture of Councils in Victoria defies the public interest. The culture stems from Councils being uninformed and uneducated in animal welfare. Most Councils would not have the slightest insight into the proven merits of the Calgary program, let alone be ready to implement its measures, whether as part of a local municipal program or otherwise.

2. The Panel strongly recommends establishment of a State-wide specialised agency by way of a statutory authority staffed with persons of, in particular, animal behavioural training and insight. The task of such an agency would be to implement and oversee a State-wide Calgary-like program. If the Committee is resolved to implement a Calgary-like program, then it is unsatisfactory that the quality and rigour of its implementation will differ between municipalities according to the competing merits of administration and insight. This is not to suggest that such a specialised agency should not act through the local municipality in given instances. For example, seizure and retention of a dog could be carried out by a local municipal officer. The agency would need to be empowered to give identified directions to municipal Councils.

3. Plainly, there will need to be an appropriate legislative framework. First, the power of Councils to consider whether a dog should be destroyed under provisions like section 84P(e) should be repealed. Under the Calgary program, no dog may be killed except pursuant to a Court order. Provision for such a Court order has long existed in Victoria: see section 29 (12), *Domestic Animals Act,* 1994. Further, a pattern has emerged where a number of Councils upon prosecution of an owner for a dog's misbehaviour under section 29, DAA 1994, elect not to apply for a destruction order by the Magistrate. This is most unsatisfactory. It substitutes an administrative process for a judicial process, despite powers conferred upon a Court under sec 29(12) , DAA 1994.

4. From the owner's viewpoint (let alone that of the hapless animal) a legal challenge to an administrative decision is infinitely more complex and costly than that of an appeal from a Magistrate's destruction order to the County Court. An appeal to the County Court involves completion and filing of a one page form. The appeal is then heard on its merits by a County Court judge. On the other hand, a dog owner's challenge to an administrative decision by a Council under section 84P(e) (to destroy a dog) will require an expensive application to the Supreme Court of Victoria on complex administrative law grounds. In effect, this confers substantial immunity upon a Council from challenge and de facto shuts down what would otherwise be open by way of an appeal to the County Court.

5. The Committee will find helpful guidance in sections 47 and 48, *Companion Animals Act* 1998 (NSW). In particular, section 48 (3) and (3A) provide as follows:

(3) However, a Court must not make a destruction order unless it is satisfied that the making of a control order, or an order permanently removing the dog from its owner (which the Court is, by this subsection, authorised to make), will not be sufficient to protect the public from any threat posed by the dog.

(3A) A Court must, except in exceptional circumstances, make a destruction order on conviction of the owner of the dog of an offence involving the serious injury or death of a person caused by the dog.

Section 47 (3) provides:

(3) The action that a control order can require the owner of a dog to take includes (without limiting any of the requirements that apply in relation to the dog under section 51 or 56) the following action:

(a) the desexing of the dog,

(b) the behavioural or socialisation training of the dog,

(c) training that is associated with responsible pet ownership.

6. That noted, three things need to be said. First, it is difficult to appreciate how a court may reasonably conclude that a control order or change of ownership "…

will not be sufficient to protect the public from any threat posed by the dog" (see section 48 (3)) before a proper behavioural assessment of the dog in question has been carried out. This is a weakness of NSW's section 48 (3). The question of the threat posed by the dog and its prospects of rehabilitation cannot be determined in an informed manner without a proper behavioural assessment.

7. Second, as to section 48 (3A), a 'serious injury' is defined under Victoria's *Domestic Animals Act* 1994 by section 3 to include 'a laceration', that is to say, a cut. Such a cut may or may not include a puncture. In the case of the dog, Izzy, whose case went to the High Court of Australia, she inflicted only a 1.5 cm cut without puncture. Yet the City of Knox decided she should be destroyed. It is absurd that such a cut should be deemed a serious injury, let alone that such a decision should be made (which was ultimately reversed). The definition of 'serious injury' needs to be revised to accord with the notion of serious injury under Victorian law as it would apply to a person. The threshold at present is way too low.

8. Third, most dogs are capable of rehabilitation. Yet Victorian Councils adopt killing as a management tool. There is rarely an examination of the dog's prospects of rehabilitation on the part of a Council. Suffice to say, the High Court of Australia in *Isbester v Knox City Council* [2015] HCA 20 (10 June 2015) said at [29] in respect of the Council's power under 84P(e) (enlivened were an offence under section 29 (4) or (5) has been found proven against an owner or person in charge), namely:

29.The discretionary powers of the Council under the Act with respect to dogs are broad, consistently with their protective purpose. The question for the Council, and its delegates, in exercising the power under s 84P(e) involves the safety of the public. Matters relevant to the decision would include a dog's propensity for attacking dogs and persons and whether measures other than destruction could be taken without exposing the public to an unacceptable risk of harm, for example whether the animal could be effectively restrained. [emphasis added]

9. Further, the question whether a dog should be destroyed should not turn, if it be the case, on the severity of the injury alone (as provided for under sec 48(3A), *Companion Animals Act* 1998, subject to the proviso however of " *exceptional circumstances"*). Although the severity of the injury or even death is undoubtedly highly relevant, an emphasis should exist too on its prospects of rehabilitation and

thus whether its life after rehabilitation should be preserved because it would not expose the public to an unacceptable risk of harm. Say the hapless animal was kept by an irresponsible owner as a guard dog. Following successful rehabilitation, measures such as secure home containment and a leash and muzzle in public, are further tools in the decision-maker's armoury. Its progress under a Calgary-like model could also be monitored.

Indeed, it is the experience of the Panel that Councils are more often focussed on the risk of their exposure to public liability in the event they release the dog back into the community. Yet there is no exposure to public liability if a Council's decision to release a dog is arrived at in a reasonable manner. It is unreasonable to kill a dog because it will shut down exposure to public liability.

10 Those three things noted, the practical question arises of how in practice proper behavioural assessments of a dog would be undertaken. Three further things occur in this respect to the Panel. First, resources need to be made available by government to enable such behavioural assessments to be undertaken, whether by animal behaviourists on a list prepared by the State-wide agency or engaged by say RSPCA Victoria or Animal Aid. A second alternative would be for Councils to marshal the resources to engage animal behaviourists (approved by the State-wide specialised agency from the list it prepares and adds to over time). Councils exhibit no difficulty in marshalling hundreds of thousands of dollars to fight the case of one dog. A few instances will suffice to illustrate the point. The City of Knox publicly stated that its legal bill in the case of Izzy was $600K. The City of Brimbank spent some $300K in unsuccessfully prosecuting the case that Mylo was a restricted breed dog. The Panel can supply details of like expenditures by other Councils. And third, if the maxim identified in paragraph 1 above about responsible pet ownership is accepted, then the dog should not be the collateral victim of poor ownership. Rehabilitation, and if necessary a court ordered change of owner (as provided for in section 48 (3) *Companion Animals Act* 1998 (NSW)) should be the first tool of management.

11. Councils and the State-wide specialised agency should take steps for dog owners to socialise pups at 7 to 15 weeks of age. Further, consideration could be given to providing an incentive for owners to attend training programs such as, for example, by a substantial reduction in registration fees upon certified completion of such a training program.

12. We turn once again to the role of the State-wide specialised agency, noting again that it should be empowered to administer a Calgary-like model, and to give identified directions to Councils, whether acting as its delegate or otherwise. Ideally, any independent statutory authority should be responsible for animal welfare across –the- board so that administration of animal welfare is removed from the Department of Agriculture which, like Councils, has little insight into animal welfare. The former Bureau of Animal Welfare was recently abolished and its offices redistributed by the Victorian Department of Agriculture on the pretext of its merger with the Department of Environment. The Bureau had been in existence for some thirty years and comprised about a dozen officers. The creation of a State-wide specialised agency with a similar number of officers with an insight into animal behaviour would seem sufficient to begin with. It must be empowered in addition to deal with rescue groups direct so that where foster care or rehoming may be required, the precautionary principle shifts for the benefit of the animal's welfare and preservation. The Department of Agriculture as the department responsible for the administration of animal welfare adopts a culture of policing such organisations. Indeed, the Department of Agriculture should have no influence over the establishment or conduct of a State-wide specialised agency. The Department of Agriculture simply does not 'get' animal welfare. This is easily explained. All Departments of Agriculture view themselves as the 'friend of industry'. There is nothing wrong with that. But it can be readily contended that it gives rise to a supervening conflict of interest and lack of sympathy for animal welfare objects.

13. If the imprimatur of the Victorian parliament is to be conferred on a serious public interest question like this, then it would be more appropriate for the appointment of officers of the State-wide specialised agency to be made by the

Premier for the time being or his delegate from within the Department. This would also send an unmistakable signal to Councils that the Victorian government (on a bipartisan issue) expects Councils to help assist in the implementation of a Calgary program by the State-wide specialised agency. It would not be just another administrative measure.

14. According to the transcript, a few Committee members have expressed concern about how to secure urgent protection of children pending the full implementation of a Calgary-like model. The bad owners (and dogs at risk) need to be identified. This is vital intelligence for intervention prior to any attack or menacing of a child. A free telephone number should be identified and well publicised to encourage neighbours to report a bad owner. The agency could then have the dog seized if need be (by direction to the local Council); arrange for an animal behaviourist to assess the dog, including its prospects of rehabilitation; and, very importantly, assess the merits of the owner as a responsible pet owner. Powers should exist, as in Calgary, to compel the owner to place the dog with an animal behaviourist for extended rehabilitation. As stated above, resources need to be marshalled to enable this pivotal task. It enables early intervention, a key plank in child protection in any event. If no or insufficient resources are conferred, a key plank of the Calgary model would fail.

15. If the owner is thought to be not a responsible pet owner, then power could be conferred on the State-wide agency to change ownership of the dog (subject to its review by a body such as VCAT upon challenge by the owner), alternatively, by application to a court under a revised DAA 1994 providing for a power to change ownership, such as that found in section 48 (3) *Companion Animals Act* 1998 NSW.

16. Finally , the training of children at schools (through the Department of Education) as to what to do when a dog takes an interest ("stand like a tree, lie like a log") is central. . The training of children is a vital component of the successful Calgary model.

17. The foregoing is consistent with the fundamental cultural change required, namely, to shift responsibility before the event to the owner of a dog at risk rather than later killing the dog as a quick, cheap and convenient management tool after the event. The dog should not be the collateral victim of poor ownership, unless assessed to be beyond rehabilitation or simply an aggressive dog.

    The key here is to maximise the scope for early intervention.

18. A Calgary-like program could be formulated for Victoria within 3 months following the establishment of the specialised agency (fully staffed) and the legislative framework. To this end, Mr Bill Bruce for example, could be engaged for a period of 3 months to head the specialised agency. Part of its function would be to urgently instruct Councils on the administration of the program and the role they should play, and to begin the work of changing the Council culture.

Breed specific legislation is not working

19. This question has been addressed in other submissions. We will therefore be brief. BSL is a political solution which does not make communities safer. A particular breed of dog, the American Pit Bull Terrier, was demonised in an emotive reaction to the tragic death of the child Ayen Chol in mid-August 2011. Such demonisation of a breed has occurred in the past, for example, the Rottweiler, and in the 1970s the German Shepherd for a period was subject to an import prohibition.

20. The BSL provisions of the *Domestic Animals Act* 1994 should be repealed. A Calgary-like model should be implemented. The Calgary model has been well tested for in excess of 20 years in the city of Calgary, Canada. It is directed to prevention. Community safety is best advanced by the patient spadework of a program directed to responsible owner education; training and socialisation of <u>all</u> dogs, if possible from an early age; education of children; and early intervention (by exercise of appropriate powers) where a dog shows signs of errant behaviour (which usually progresses in stages if unchecked). In Calgary, in a 20-year period prior to 2001, dog incidents declined to a mere fraction of what they were in 1991. During this time Calgary's population almost doubled from 600,000 to over 1.1

million. Importantly, American Pit Bull Terrier ownership, not surprisingly, doubled. These figures are powerful testimony as to the merits of such a program. Plainly, such a program applies to all dogs, not just to one breed. In this respect, we refer again to the RSPCA Victoria's statistic set out in paragraph 1 above, namely, that only 2 of the 110 dog incident dogs were Pit Bull Terriers.

21. The Calgary model would require an investment of resources and a radical change of culture. This can be readily justified on grounds of enhancement of community safety, better protection of children, and better and more responsible pet owners, and informed treatment of our pets. The change of culture will not be achieved if responsibility for dog issues remains with municipal Councils. Breed specific legislation requires little investment of resources by the state government because responsiblity is delegated to municipal Councils for its administration and enforcement. The Victorian government's financial aid was largely confined to advancing monies to some 8 or so municipal Councils to defray the cost of waging legal battle against owners of declared restricted breed dogs. Yet Council officers were not properly trained in evaluation of a restricted breed dog, which is why in nearly all cases of declarations challenged in VCAT by owners, they were successful and the relevant declaration was quashed.

22. Breed specific legislation in particular stands as a sad indictment of the department of agriculture's indifference in large part to animal welfare. Under Victoria's *Prevention of Cruelty to Animals Act* 1986 even an application by an RSPCA officer to a magistrates Court to obtain a search warrant in urgent circumstances must have the prior approval of the Head of the department of agriculture: see section 24G(1). So much for the separation of powers. The agriculture department's solution, and that of its then Minister Peter Walsh, was to wave a big stick rather than invoke a proven model such as the Calgary model. Indeed, no examination whatever was made of the Calgary model. The Calgary model would require an investment of resources and a radical change of culture. The change of culture can be achieved by the removal from municipal councils of key decision-making responsibility on dog (and cat) issues. Breed specific legislation on the other hand was directed to delegating responsibility to

municipal councils of enforcement and doing so by way of conducting a legal battle rather than a program to enhance community safety in respect of responsible pet ownership.

As stated, nearly all dogs declared to be restricted breed dogs by a Council officer were released back to their owners by VCAT order where the owners challenged the declaration. Hundreds of declared dogs however were killed because the owners were intimidated by the prospect of a protracted and expansive legal battle. Councils, assisted substantially by State government funds, were amply resourced with solicitors and barristers to wage battle against the hapless owner. The City of Hume in particular was zealous. It intimidated owners with a letter of demand that, in relevant respects, was untrue, namely, a liability in the owner for pound costs during the dog's incaraceration, which was only so if the owner did not challenge, or do so successfully.

23. Frustrated at the degree of success of owners in VCAT, the then Minister of Agriculture Peter Walsh reversed the onus of proof (so that it was cast upon the owner) and shortened the period in which a VCAT application could be made to 14 days from the date of the Council officer declaration. These made no difference to the outcomes at VCAT. The changes were lobbied for by different Councils. The difficulty was not the onus of proof: it was the original assessment by the Council officer that the dog was a restricted breed dog. Council officers erred on the side of making the declaration, incarcerating the dog and arguing the point later with the ample resources of a legal team.

24. The then Minister of Agriculture, Peter Walsh, then brought in a new *Standard* pursuant to which dogs were to be assessed or determined to be a restricted breed dog. Under section 3, *Domestic Animals Act* 1994 the *Standard* was intended to be no more than an instrument of evaluation. Section 3(3) and (4) provide as follows:

(3) A dog that falls within an approved standard for a breed of dog specified in a paragraph of the definition of ***restricted breed dog*** *is taken to be a dog of that breed.*
(4) For the purposes of subsection (3) an approved standard is a standard that has been approved by the Minister and published in the Government Gazette.

So, the legislature intended that the task of assessing or determining whether a dog fell within the approved *Standard* was a matter for the Council officer, VCAT or in the case of an appeal, a Court. Notwithstanding this, the Minister's new Standards sought by its very terms to determine whether a dog was a restricted breed dog according to how many criteria were satisfied in three categories. This was beyond power. However no owner had the resources to run the gauntlet of challenging the validity of the *Standard* (or relevant parts) in the Supreme Court of Victoria.

25. Further, high profile dogs such as Mylo and Kerser were declared under the previous standard. But when the new *Standard* was gazzetted, it was determined by VCAT that the owner's challenge to the declaration should be determined according to the new *Standard.* Accordingly, the goal posts for assessment and determination was shifted from that under which the original Council officer made the assessment and declaration. Such an outcome was also due to the lengthy period of pound incarceration of the dogs whilst legal proceedings were on foot. Mylo was incarcerated for some two years and seven months before his release. Kerser was incarcerated for some two years. Once having made the declaration, Councils were intransigent in fighting the legal proceedings. The City of Brimbank incurred legal costs in respect of Mylo of some $300,000, for example. Such intransigence is yet another unsatisfactory feature of Council culture and an insight into their readiness to fight expensive legal battles rather than marshall resources for investment in a Calgary –like program.

26. In short, breed specific legislation has been a recipe for legal battle. It has not improved community safety. Yet a better alternative lies at hand and the Panel urges its recommendation by the Committee.

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APPENDIX

Legislative background

- Originally, there was a grace period of two years in which a council could register a dog as a restricted breed dog if the dog was in Victoria before commencement of the *Domestic Animals Amendment (Dangerous Dogs) Act* 2010 in September 2010.

- The amnesty period was shortened by its cessation on 30 September 2011, that is, it expired on 29 September 2011. This arose from the tragic death of the child Ayon Choll by reason of a dog attack. This shortening of the amnesty period was brought about by section 4 of the *Domestic Animals Amendment (Restricted Breeds) Act 2011.* It also removed the two year amnesty for an owner of a restricted dog not to be liable for the offence of keeping a restricted dog. Section 41 EA, *Domestic Animals Act 1994,* operates to prohibit the keeping of a restricted breed dog, save where the dog was in Victoria before 1 September 2010 and registered by 30 September 2011. Put another way, from 30 September 2011, only restricted breed dogs that were in Victoria immediately before the commencement of the *Domestic Animals Amendment (Dangerous Dogs) Act 2010,* and which were registered before 30 September 2011, can be registered as restricted breed dogs.

- Restricted breed dogs which were not registered by 29 September 2011 are liable to be seized under section 79, *Domestic Animals Act 1994*. Councils destroy these dogs rather than, for example, keep them for 10-15 years.

- Section 17 (1A), *Domestic Animals Act 1994*, in its relevant terms, provides:

A Council may register a dog as a restricted breed dog if –

(a) the dog was in Victoria immediately before the commencement of the Domestic Animals Amendment (Dangerous Dogs) Act 2010; and

(b)the dog was registered in Victoria immediately before the commencement of the of the Domestic Animals Amendment (Restricted Breeds) Act 2011. The expression "the dog was in Victoria immediately before the commencement…" also appears in section 41EA. [emphasis added]

- As a matter of statutory construction, it may be contended that that expression or its equivalent should be construed as a matter of legislative intent to exclude pups born after September 2010 from being registered