The Animal Law Institute is a not for profit community legal centre that is dedicated to protecting animals and advocating for their interests through the Australian legal system.
10 July 2015

Mr Joshua Morris MLC
Chair
Economy and Infrastructure Standing Committee
Parliament House
Spring Street
Melbourne VIC 3002

By Email: eic@parliament.vic.gov.au

Dear Mr Morris MLC

SUBMISSION IN REFERENCE TO THE INQUIRY INTO THE LEGISLATIVE AND REGULATORY FRAMEWORK RELATING TO RESTRICTED BREED DOGS

INTRODUCTION

1) The Animal Law Institute (ALI) welcomes the opportunity to make this submission in response to the Inquiry into the Legislative and Regulatory Framework Relating to Restricted Breed Dogs (Inquiry).

2) ALI is a not for profit community legal centre that is dedicated to protecting animals and advocating for their interests through the Australian legal system.

3) ALI submits that it is an interested person (as required by the Terms of Reference),\(^1\) for the purpose of making this submission as:
   a) ALI is an animal welfare organisation (clause 5(d)); and
   b) ALI has had interaction with the current regulatory framework by way of two of its Board Members who were formerly the National Co-ordinator (Anastasia Smietanka) and Deputy National Co-ordinator (Aimee Mundt) of the Barristers Animal Welfare Panel (BAWP). Ms Smietanka and Ms Mundt were involved in:

\(^1\) Terms of Reference, clause 5
i) arranging and co-ordinating legal representation for individuals whose dogs had been declared restricted breed dogs by local councils; and

ii) arranging and co-ordinating the Australian tour of Mr Bill Bruce, Director of the Animal & Bylaw Services at the City of Calgary (see paragraph 67 for further discussion regarding Mr Bruce).

4) ALI supports the Inquiry by the Economy and Infrastructure Committee (Committee) and its review of the current regulatory and legislative framework relating to restricted breed dogs.

5) This submission is focused on legislative and law reform as this is within ALI’s expertise as a community legal centre.

EXECUTIVE SUMMARY

6) ALI respectfully submits that restricted breed legislation has been introduced and amended by subsequent Victorian governments based on a short-term political imperative of needing to be seen to be doing something about ‘dangerous’ dogs.

7) The evidence to date indicates that the current framework has not and is not working to reduce dog attacks. Indeed it has been referred to as an “expensive disaster”, 2 a characterisation that ALI agrees with.

8) In addition to not achieving its stated purposes of reducing dog attacks, the current and historic framework is plagued with significant enforcement problems (paragraphs 15 to 41 below).

9) Importantly, the current framework has significant opposition from local councils implementing the law, council officers, key animal welfare organisations such as the RSPCA (VIC) and peak veterinary associations such as the Australian Veterinary Association. ALI submits that the Committee should view the strong opposition from these bodies and organisations as highly influential.

10) On these bases, ALI respectfully submits that the Committee should recommend that:

a) the restricted breed legislation in Victoria be repealed; and

b) a number of legislative and policy initiatives to the current framework should instead be introduced (see paragraphs 42 to 83 below) based on an evidence supported model of reducing dog attacks such as the Calgary Model in Canada.

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THE CURRENT LEGISLATIVE AND REGULATORY FRAMEWORK

11) The Committee is no doubt familiar with the current legislative and regulatory framework in relation to restricted breed dogs, including the provisions of the *Domestic Animals Act 1994* (Vic) *(Act)*.

12) For this reason, ALI does not intend to provide a comprehensive overview of this legislative and regulatory framework in Victoria.

13) ALI simply notes the following:

   a) What is known as restricted breed legislation is one-method that governments adopt to ‘manage’ dangerous dogs and dog attacks. In Victoria, there is legislation to deal with dogs that attack. In addition, there is legislation that outlaws five breeds of dogs.

   b) The historic legislative and regulatory framework in Victoria dates back to 2001 and the *Animals Legislation (Responsible Ownership) Act 2001* (VIC) which, by way of summary, introduced a definition of a ‘restricted breed dog’, introduced requirements for owners of restricted breed dogs, and introduced the concept of review Panels and declarations. Successive governments introduced a number of changes to this framework including in the *Primary Industries Act (Further amendment) Act 2005* (VIC), which marked the introduction of restricted breed legislation in its current form (i.e. a ‘ban’ on restricted breed dogs in Victoria).

   c) The current legislative and regulatory framework is one that restricts ownership of five breeds, with the justification that these five breeds are more inherently ‘dangerous’ to the community than others. In practice, it is understood that there is only one restricted breed that is known to exist in Victoria, the American Pitbull Terrier.

   d) In Victoria, this legislative and regulatory framework is primarily found in the Act, the accompanying *Domestic Animals Regulations 2005* (VIC) *(Regulations)* and the standard for restricted breed dogs in Victoria from 31st January 2014 *(Standard)*.

   e) The framework, in summary, states that any restricted breed dog born after 1 September 2010 has no legal right to exist in Victoria. In addition, dogs who were in Victoria prior to 1 September 2010, and were not registered, can be declared and killed. There is no exemption for a dog that is not aggressive.

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3 The five breeds are listed at section 3 of the *Domestic Animals Act 1994* (VIC) and are the Japanese Tosa, fila Brasileiro, dogo Argentino, Perro de Presa Canario (or Presa Canario) and American Pit Bull Terrier (or Pit Bull Terrier).
f) In addition to the Act and Regulations in Victoria, in 1992 the Federal Parliament introduced a ban on the importation of specific breeds, however being introduced by the Federal Parliament this legislation is not relevant to or subject to the Inquiry.

14) ALI opposes a legislative and regulatory framework that targets specific breeds of dogs and believes that any regulatory and legislative framework should apply equally to all breeds of dogs.

THE INADEQUACIES AND FAILURES OF THE CURRENT LEGISLATIVE AND REGULATORY FRAMEWORK

15) Based on the experience of its Board Member Ms Smietanka and Ms Mundt, ALI submits that there are a number of inadequacies and failures in the current legislative and regulatory framework as outlined below.

Ownership

16) Only an owner of a dog has the ability to apply to VCAT for a review of a decision to declare a dog a restricted breed. The Act defines ‘owner’ as a person who keeps or harbours the animal or has the animal in their care.

17) This is problematic in factual situations where a dog is surrendered to a pound, and the previous owner has not registered the dog as a restricted breed.

18) Ms Smietanka has been involved in a number of instances where pounds assess a dog as a restricted breed dog. In this situation, there is no one who can ‘challenge’ the declaration of the dog as there is no ‘owner’ per se.

19) Thus simply by fact of its surrender, a dog becomes a victim in this framework and has no avenue by which to challenge its declaration.

Impoundment

20) The Act requires councils to hold dogs believed to be restricted breed dogs until the conclusion of any appeal of a declaration to VCAT (section 84L(1)(a)). This results in a situation whereby dogs are impounded during the entire length of legal proceedings.

4 Customs (Prohibited Imports) Regulation 1956 (Cth), schedule 1.
5 Domestic Animals Act 1994 (VIC), section 98(2AA).
21) As the Committee would be aware, there have been a number of high profile cases in Victoria in the last few years in relation to declarations by councils that dogs are restricted breed dogs, which have lasted significant periods of time.

22) One such example is the case of Mylo in which Ms Smietanka of ALI was involved from an initial referral and management perspective in her time with BAWP. Mylo’s case lasted 2 years and 7 months with 3 VCAT hearings and 2 Victoria Supreme Court appeals.⁶

23) ALI submits that this length of impoundment can have negative psychological effects on both owners and dogs. It does not assist rehabilitation and may increase negative behavioural issues.

The Standard

24) As the Committee would be aware, a declaration that a dog is a restricted breed dog must be made in accordance with the Standard.

25) As the Committee would also be aware, the Standard has been revised. The previous standard was gazetted on 1 September 2011 (Previous Standard).

26) ALI submits that the Previous Standard had a number of flaws which resulted in the problematic enforcement of the Previous Standard.

27) Significantly, the Previous Standard gave no direction originally on how it was to be applied for example, what percentage of these characteristics a dog should have and whether some were more important than others.

28) This was clarified by Justice Kaye of the Supreme Court of Victoria in the Dudas and Tarawa-Shearer cases where he held that:

“there must be a substantial, or high, level of correspondence between the material characteristics of the dog and the criteria specified in the Standard”⁷

29) In addition, the Act failed to provide that clarity noting simply that “a dog that falls within an approved standard for a breed of dog ... is taken to be a dog of that breed” (section 3(3)).

30) There has been significant public criticism in relation to this poor legislative drafting. The Mayor of Monash has critiqued that “courts continue to scratch their heads as to” how the laws are to

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⁷ Dudas v Monash City Council; Tarawa-Shearer v Darebin City Council [2012] VSC 578 at [98].
be applied. As a result of such poor drafting, a significant amount of money and time has been lost in legal challenges.

31) ALI acknowledges that the revised Standard has provided more certainty regarding these issues. However, ALI respectfully submits that there continues to be and will always be an element of subjectiveness and hence uncertainty in the application of the Standard.

32) This is because any assessment of breed is inherently subjective. Due to cross breeding, it is difficult to accurately visually identify any breed. Studies in the US and the UK have warned of the inaccuracy of visual breed identification. This is particularly important in Victoria, as the law is intended to apply to cross breeds as well as pure bred dogs.

33) This subjectivity was acknowledged by Justice Kay in his observation that “it is clear that the assessment of a dog by an authorised officer will often be open to debate ...” Councils have also agreed that there is an element of uncertainty in visual identification of a dog using any standard based on the “inherently subjective nature” of visual identification.

Costs, time and the court system generally

34) ALI submits that the current framework is costly and expensive.

35) There is significant public opposition to this system on this basis from those who are meant to be implementing this system. Under the current system, the Minister for Agriculture has dedicated responsibility for enforcement of the laws to local councils. The responsibility for enforcement comes burdened with the cost of enforcement. For example, the Mayor of Monash has publically noted that in relation to two cases the costs have been more than $200,000.00 to ratepayers. The language used by local councils is not mild; it is of strong discontent – “failing Victorians” and “these are not our laws”.

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11 Dudas v Monash City Council; Tarawa-Shearer v Darebin City Council [2012] VSC 578 at [89].
13 Ibid.
14 Ibid.
36) One particular case, Mylo, in relation to Brimbank Council, lasted 2 years and 7 months with 3 VCAT hearings and 2 Victoria Supreme Court appeals.15

Effectiveness of breed specific legislation

37) ALI submits that if the purpose of restricted breed legislation is to reduce the number of dog attacks, there is no evidence that these laws are working.

38) For example, it is reported that between 2011 and mid-2014, 48 dogs were euthanised by Hume Council on the basis of their ‘restricted breed’ status.16 However, it is also reported that the number of dog attacks in Hume went from 141 in 2011 to 148 in 2013.17

39) Similarly, it is also reported that Monash Council euthanised 10 restricted breed dogs in that time frame, however, the number of dog attacks was reported to be 70 in 2011 and 68 in 2013, a very insignificant difference.18

40) The Age reports that in relation to nine councils contacted, only two councils reported drops in dog attacks since the amendments to restricted breed legislation were introduced in 2011.19

41) ALI has no veterinary or dog behavioural expertise and beyond noting the lack of clear statistical evidence to support an argument as to the current framework’s effectiveness, ALI does not propose to comment on the link between breed and dog bites and attacks. ALI does note that the committee should find it highly influential that the peak veterinary association of Australia, the Australian Veterinary Association is opposed to breed specific legislation.20 ALI notes the following comments by the Australian Veterinary Association on the topic:

a) “The Australian Veterinary Association is opposed to breed-based dog control measures because the evidence shows that they do not and cannot work. National veterinary

17 Ibid.
18 Ibid.
19 Ibid.
associations of Britain, the United States and Canada, and major animal welfare organisations internationally also hold this view”. 21

b) “Breed on its own is not an effective indicator or predictor of aggression in dogs”. 22

c) “It is not possible to precisely determine the breed of the types of dogs targeted by breed-specific legislation by appearance or by DNA analysis”; 23

d) “Breed-specific legislation ignores the human element whereby dog owners who desire this kind of dog will simply substitute another breed of dog of similar size, strength and perception of aggressive tendencies”. 24

RECOMMENDATIONS FOR REFORM

42) ALI submits that breed specific legislation is inherently flawed and on this basis it submits that restricted breed legislation should not be the method by which the Victorian Government manages ‘dangerous’ dogs.

43) However, ALI acknowledges that the Committee may recommend that breed specific legislation be the method by which the Victorian Government continues to manage ‘dangerous dogs’, albeit with amendments.

44) For this reason, ALI sets out its recommendations for reform in two sections: one section relating to a repeal and one section proposing an amended restricted breed framework

Amendments to restricted breed legislation

45) Should the Committee recommend (and the Victorian Government agree) that restricted breed legislation continue in Victoria, ALI submits that the following amendments be made to the current legislative framework.

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22 Ibid.

23 Ibid.

24 Ibid.
Ownership – standing to challenge a declaration

46) As outlined at paragraph 16, only owners have the standing to challenge a declaration that a dog is a restricted breed dog.

47) This results in a situation where dogs who are surrendered into the pound system have no avenue of appeal.

48) ALI recommends that the Act be amended so that any person can apply to VCAT for an order of guardianship over a dog in a pound or shelter to enable them to challenge a declaration. Such a provision should provide for a summary procedure for obtaining a VCAT order, and the relevant pound or shelter should be prevented from euthanasing the dog pending this appeal.

49) In addition, the Act should allow for an owner to 'surrender' a dog to an appropriately appointed guardian during any stage of the proceedings.

Impoundment

50) As outlined at paragraph 20, the Act allows for councils to impound dogs while the court proceedings challenging a declaration are pending.

51) ALI submits that this provision be repealed and instead a provision be inserted which:
   a) gives Councils the discretion as to whether a dog should be impounded during the entire length of court proceedings;
   b) states the factors a Council must take into consideration when exercising this discretion including whether there has been an attack;
   c) gives an owner (or guardian as appointed by VCAT) a right of appeal (based on merits review) against Council’s decision via a summary procedure; and
   d) allows a Court to require an owner or guardian to sign an undertaking to the Court with specified conditions in relation to how the dog must be kept during the length of the court proceedings.

Exemption for non-aggressive dogs

52) Under the current framework, there is no exemption from ‘death’ for a dog that is not aggressive. ALI submits that the mandating the euthanasia of non-aggressive dogs based solely on their breed does not go towards community safety.
53) One example is a dog by the name of Kerser. Kerser (now ‘free’) was declared dangerous and this declaration was challenged successfully by his owner. Kerser was impounded at an RSPCA shelter during his legal proceedings. The former CEO of the RSPCA described Kerser as a “really lovely dog, well-socialised and good-natured”. According to Ms Mercurio, “from where we stand, there’s no reason to euthanize him, it goes against all the principles we believe in. Putting Kerser down is not going to make the community any safer”.26

54) In contrast to Victoria, lawmakers in the United Kingdom have introduced an exemption to the law. Pursuant to 1997 amendments to the Dangerous Dogs Act 1991, if a justice or sheriff is satisfied that a dog will not constitute a danger to public safety, then the dog will not be required to be destroyed.

55) Prior to the 1997 amendments, the United Kingdom had provisions similar to those in Victoria, outlawing certain breeds of dogs based wholly on their breed - for example, the outlawing of the pit-bull.

56) Critically, data on dog attacks and dog bites pre and post implementation of restricted breed legislation indicates that there has been no difference in the incidence of dog bites, with 73% of all bites requiring medical attention before and after implementation of the legislation.28

57) ALI supports the introduction of a provision in Victoria vesting courts with a similar discretion as exercised by the United Kingdom with regards to non-aggressive dogs.

**Standard**

58) ALI submits, because of the problems described above, that any Standard should not apply to cross breeds.

**Repeal of restricted breed legislation**

59) ALI recommends that restricted breed legislation be repealed in Victoria. ALI does not support breed specific legislation in any form.

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26 Ibid.
27 Dangerous Dogs Act 1991 (UK), section 4B(2).
60) ALI submits that the Committee should take as very influential the opposition by the following peak and key organisations regarding breed specific legislation:
   a) RSPCA (VIC);
   b) RSPCA (Australia); and
   c) Australian Veterinary Association.29

61) As noted above, ALI opposes breed specific legislation on the bases that it:
   a) does not reduce dog attacks; and
   b) legally, it is a system which is inherently difficult to enforce.

62) The failure of the current breed specific laws is evidenced perfectly by the following description of them from the Mayor of Monash who is responsible for enforcing them - “clumsy, unscientific and subjective”.30

63) ALI recommends the repeal of breed specific legislation and the introduction of the below legislative and policy provisions which focused instead on responsible ownership.

64) These suggestions would recognise a shift from animal ‘control’ to responsible pet ownership.

65) This is not a comprehensive list of all measures which should be introduced to amend the Act and Regulations, but key suggestions relevant to breed specific legislation.

Compulsory registration

66) ALI notes that the Act already provides for compulsory registration of dogs over three months old (section 10(1)). ALI commends this provision as one which recognises the link between responsible pet ownership and dog attacks.

67) Currently however, it has been ALI’s experience that the enforcement of this legislation varies from Council to Council. ALI notes that the success of such provisions depends very much on the positive enforcement. ALI therefore recommends the following initiatives which are based on the Calgary Model and suggested by Mr Bruce:
   a) following up on all licence non-renewals;
   b) park patrols;
   c) 6 months free registration for adopted dogs and cats;
   d) waived registration fees for seniors and those on health care cards;

e) mandatory registration of dogs and cats that enter the pound system.

68) The Calgary model is supported by the RSPCA.31

Education

69) ALI submits that the success of any legislative reform will depend upon complimentary public education programs, which would benefit the public at large but children in particular.

70) The “Prevent-a-Bite” program, an educational program for primary school aged students in metropolitan Sydney, illustrates the impact that educational programs can have on primary school aged children.

71) An experiment that followed the advent of the “Prevent-a-Bite” program (a program which included, for example, teaching children “do’s and don’ts” of behaviour around dogs, and correct patting methods), revealed that children who took part in the educational displayed appreciably greater precautionary behaviour than the children who did not received such education.32

72) According to the data obtained in the study, only 9% of the children who partook in the educational program patted the dog, compared to 79% of children in the control group who tried to excite the dog and patted the dog without hesitation.33

73) ALI submits that such educational programs should be made available free of charge in primary schools, community centres and adult education centres to achieve similar aims for children and adults alike.

Mandatory behavioural sessions

74) ALI acknowledges that a punishment based system may be burdensome on local councils with limited and varying financial resources, and submits that an incentive based system could be employed to alleviate financial strains associated with enforcement.

75) An incentive based system could be used for owners who enrol dogs in behavioural programs. For example, councils may wish to run weekly behavioural training sessions at prominent dog parks. Session fees (if charged at all) could be significantly reduced for owners who pre-pay for weekly

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33 Ibid.
sessions in advance, encouraging regular attendance rather than sporadic or one-off attendance. In addition to this, owners who attend ten sessions a year and are able to evidence this with certificates or receipts could have their pet registration fees waived or reduced by council, which would further encourage enrolment in behavioural classes.

**Mandatory de-sexing**

76) As contended by the RSPCA, male entire dogs pose a greater risk of aggression than male neutered dogs, and female entire dogs add to this risk by attracting entire males.\

77) In their 2012 report, “Dangerous dogs: a sensible solution”, the Australian Veterinary Association refer to a frequently cited US study conducted by Gershman, Sacks and Wright which found that male entire dogs are 2.6 times more likely to bite than those that are spayed or neutered.
78) ALI submits that such risk could be greatly reduced by imposing compulsory spaying and neutering requirements on owners and sellers of non-breeding dogs, and that the spaying and neutering of non-breeding dogs is one of the key prevention strategies for dog attacks.
79) The implementation of de-sexing legislation in the ACT serves as an illustration of this, with the introduction of a de-sexing requirement resulting in a 47% decrease in dog attacks evident within 3 years of the implementation of de-sexing legislation.
80) The notion of an incentive-based system was discussed in paragraphs 74 and 75, and ALI submits that in addition to introducing mandatory de-sexing requirements, councils could encourage owners to spay and neuter their dogs by providing incentives for doing so. For example, councils could consider subsiding spaying and neutering fees, or offering subsidised council-run dog behavioural classes for owners who spay or neuter their dogs.

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Distinction between injury to other animal and person

81) The Act and Regulations do not distinguish, in terms of consequences, from an injury to a person or animal.

82) For example, the Act gives an authorised officer the power to destroy a dog if they reasonably believe that a dog is behaving in a manner or in circumstances that will result in imminent serious injury to a person or other animal (section 84TB).

83) ALI submits that the Act should distinguish in terms of consequences between injury to a person or animal.

Yours sincerely

The Animal Law Institute Inc.