

TRANSCRIPT

STANDING COMMITTEE ON THE ECONOMY AND INFRASTRUCTURE

Subcommittee

Inquiry into the legislative and regulatory framework relating to restricted breed dogs

Melbourne — 17 November 2015

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Mr Joshua Morris — Chair

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Witness

Brett Melke, Principal Lawyer, Melke Legal.

The CHAIR — I reopen our Standing Committee on the Economy and Infrastructure public hearing. I will explain to you that we are hearing evidence today in relation to the restricted breed dogs inquiry. All evidence taken at this hearing is protected by parliamentary privilege, therefore you are protected against any action for what you say here today, but if you go outside and repeat the same things, those comments may not be protected by the same privilege. I welcome you, Mr Melke, to our hearing here today.

Mr MELKE — Thank you for inviting me.

The CHAIR — It is certainly a pleasure. I will begin by asking you, just for the record, to state your name and title, and then I ask you to move into your introductory comments.

Mr MELKE — My name is Brett Melke, I am from Melke Legal, and I am a solicitor who has substantial experience both in prosecuting dog matters and in defending them. I understand this is about restricted breeds, so I will partly confine myself to that. In relation to restricted breeds, my experience is that I have not run an enormous number of cases; I ran the first one, *Dudas v. Monash City Council*, that was successful, and thereafter some other restricted breed cases, but not many. That may be due to the fact that, out of the in excess of 200 dog attack cases I have been involved in over the years, only 1 has involved a restricted breed dog. On that occasion it was in fact two restricted breed dogs, but one sat by and just let the attack happen. The other one, in the scheme of things, was actually quite a minor attack. It was a serious injury, and any serious injury is horrible and the experience of any dog attack is horrible. I do get to see these things from the victim's side when I prosecute — it is horrible even if there is not a serious injury. I think it is salient when we are talking about restricted breeds that on this occasion the injuries were only a few stitches, which in the scheme of dog attacks is not a big one. The other restricted breed dog, strangely enough, just sat there, not participating — which, again, is unusual in fact for dogs. From my experience if one dog gets in, it is all in. It is a bit of a pack mentality.

That is part of the reason why I just cannot see a justification for a separate category of restricted breed dogs. In particular that seems to ignore the issue of the persons who are controlling the dogs, and that is the other half of the equation. I am not suggesting that we have restricted breed people, but certainly — —

Ms TIERNEY — I think it has been suggested.

Mr MELKE — Glad you said that!

Ms HARTLAND — That can go on the transcript!

Mr MELKE — I am glad you cannot defame the whole of the public when I say that outside. What I have found over many cases of dog attacks is that the element of the interpersonal relationship with the dog is important. A lot of the attacks involve dog owners who are in sort of two categories. One is the one where the relationship is abusive, and sometimes you will have clients who will kindly pick up a dog from some rescue organisation but find there is a bit of history, and sometimes they will be involved. Perhaps more often is the category of dog owners who love them excessively. I have a lot of cases like that. My worst case actually involved a person who was a lovely person and loved their dog to bits, but there is a thing called resource guarding, which you might have heard from behaviourists. When your most important resource is your owner and that person is everything and you go to concerts with them, you go to restaurants with them, you go everywhere with them and you sleep in their bed, then that can be a problem, because the issue of resource guarding becomes incredibly important to them. That is why I think you have to look at the people involved and why it is inappropriate to be looking at just the breed of the dog.

Of course I deal with behaviourists probably daily — at the least it would be every second day but probably daily — and I hear across the board that there is more variation within a breed than between breeds, and certainly from my experience I see that. Maybe I should tell you a bit about the kind of data I have. The worst dog attack, actually, that I was involved in — single dog attack — involved a kelpie, which is not a restricted breed. The next worst ones would have been, strangely enough, boxers — absolutely the last dog you would think would be involved in an attack because they have a great reputation. They are wonderful dogs. But this is where I would say, from my experience — and from what I have heard from behaviourists too — dog aggression and dog attacks are situational.

I see all kinds of dogs, every single dog, involved in attacks. I have had weimaraners involved in some significant ones, staffies and only one Doberman, which is really interesting, given their reputation, and probably only two or three Rottweilers and two or three mastiffs, which is kind of surprising. I have had a lot of Jack Russells, feisty little characters they appear to be. I have even heard of a nasty case involving someone bitten over the eye by a Chihuahua. So it does seem to be situational, plus it covers all breeds. That is, again, why I find it hard to justify a separate category of restricted breed. I just think we should really be integrating restricted breeds into the whole general system for dealing with dogs.

I notice the terms of reference looked at things like dog attacks — incidents of how they are caused and so on — so I will make a couple of comments about that. The most common injuries, I find, are hand injuries, and they seem to occur — not always but a lot of the time — when people, understandably, put their hand in amongst two dogs fighting to try to separate them. It is perfectly understandable behaviour, but that is a very common situation. Strangely enough, quite a lot of bites are to human faces. In terms of dogs, it varies, but they tend to seem to go for the neck.

The most common circumstances of attacks, I think I might have to say on this, are quite instructional. Basically I have rarely — I have, but rarely — come across dogs that appear to be just plain aggressive and have committed an attack without any rhyme or reason to it, and maybe that is simply because we do not understand the situation. A lot of the time it is this situation of one dog off the leash, one dog on the leash. I tell you what, if I were the little dog on the leash I would want to bite out too if I see this big thing coming towards me, or some other dog coming towards me, and I know I cannot flee, so what am I going to do? I have to fight, and they get in first. That is a common scenario. That, I would think, could be addressed in terms of making it maybe compulsory in off-leash areas to have dogs off-leash so you do not have this problem of dogs on leash in the off-leash areas and that inequality of defence — inequality of fight power, the lack of bargaining power, with the one off the leash and one on the leash. It just will not arise.

Also maybe there have to be heavier penalties or more enforcement of the situation with dogs that are meant to be on leash and are not. I know my dog suffered on that account on a couple of occasions when I was just taking them for a walk in an on-leash area. Out comes an off-leash one, and he is so well behaved and such a nice little dog that he would not even understand another dog being aggressive to him and does not go and fight back, but that is just such a dangerous situation. I think that needs to be addressed, because what is happening is that there is too much focus on the severity of injury in attacks. There is too much focus on that. What we have to focus on is the opportunity, because it is not the case that just because a dog attacks severely on one occasion it will attack severely on the next occasion; nor the reverse, that just because it attacks minorly on one occasion it will attack majorly on another. It seems to depend on opportunity and the particular circumstances of what arose on that day — the strange circumstances.

I should note that quite a common situation I have seen is where dogs are surprised. Suddenly a human appears, maybe in a brightly coloured tracksuit or something like that, which seems to be a common trait. Someone appears out of nowhere, or another dog appears out of nowhere, and out of fear they bite. It is kind of understandable. I suppose one of the more common situations is the attack by a dog just outside its house. How many of them do I see! You have a statutory defence in section 29(9) of the Domestic Animals Act, which sets out that it is not a problem if the animal attacks another animal when it is on its own property, but what tends to happen is that dogs do not recognise the legality that the property survey found that in fact the fence line is where you can bite to and after that it is a problem. They do not recognise that. You get lots of attacks happening just on the footpath or just 5 metres away from the boundary. It is quite a common situation. So you can understand why these things happen.

You do get quite a few attacks on cats, and there have been some reported cases in relation to that basically saying that, sadly, an attack by a dog on a cat is a very sad thing — it is an awful thing, and I have represented cat organisations, so I do see how awful that is — but it is something that dogs do as part of what a dog does, unfortunately. There was the case of *Feakes v. Cardinia Shire Council*. It was the first one which recognised that that, unfortunately, is what they do. Then there was *Bird v. Kingston City Council*, which followed up on that a little bit later, which was a case I ran and said basically the same thing — that if you are going to look at how dangerous a dog is, do not look at whether it has attacked or not, because that is what they do if they get the opportunity again. That is the business of a dog being at large. How do we stop dogs being at large? Because that is when incidents happen. They cannot happen if you keep them in your house. Although you do get attacks within the family, they tend not to come to my attention. I can recall only one coming to my attention of an

attack within a family on household premises. So I think the focus on the severity of injuries may be misguided; it is more about focusing on the opportunity for the dogs.

I notice in the terms of reference you are wanting to look at how effective the current system is. I suppose recidivism is generally probably a pretty good measure of how well a system is operating. If you were to measure the system in that way, it is going reasonably well because it is pretty rare that I have a dog where it has attacked previously. It does happen, and I have got a few on my files at the moment. I did not do any count, but I suspect it is probably at the most about 10 per cent — around about that kind of mark — where you have a dog that has attacked previously. I get comments from magistrates all the time along the lines of, 'Ah, yes, I know. So the dog hasn't attacked before. There is no history we know, yeah'. They are quite bored with the comment that the dog has not attacked before because that is the normal situation. It is normally some particular peculiar situation in which the dog has attacked, and it is not just the one kind of breed doing it.

The pity is that sometimes councils do not prosecute, and that can lead to problems. There was a case I had which was probably the worst case, not in terms of severity of injury, but there were three instances of attack within about six months by this particular dog. It ranged from attacks on other dogs to attacks on humans — plural — and the council had not prosecuted, so it just kept on happening. I could not believe it. When we went to argue in court we actually prevented the dog from being destroyed. It was declared dangerous. I was quite surprised. That went on all day, fighting over that. Then about a month later the dog attacked a council worker, and that was game over. That to me was instructional. You have got to prosecute. You have got to deal with them straight up. You cannot just let it be.

That may not be in the form of an actual prosecution, I suppose, but in terms of the council getting involved and ensuring that these people have proper control of the dog. It might be as simple as getting them some training on how to control the dog. Quite often I will send people off to a behaviourist, and the behaviourist will say, 'Not really a problem with the dog here. The problem is the person does not know how to control them'. This gets back to the whole issue, which Calgary has obviously been good at, of educating people. Educating people is a wonderful thing to make sure that they know what are the likely scenarios where they could be attacked, what to do in those situations and how to best control their dog.

Then I suppose in terms of how the system is running, VCAT is just running beautifully in terms of how it deals with dogs, because they have taken a long time to develop a set of principles. They have got about 9 or 10 basic principles they follow, and they apply them consistently, as far as I have seen in recent years. They are sensible principles. I am finding that it is getting to a point where I must not say we can predict the outcome, but you are getting close to really understanding what is going to happen in court and being able to prepare properly for the cases. It has got to a point where finally we are starting to settle some of these matters, because the other practitioner also knows how the court is going to deal with it and what outcome is likely. It is a sensible set of principles that they have got to deal with.

The problem is that in the Magistrates Court magistrates do not have reported cases on these matters that are run through the Magistrates Court to deal with. They do not have a whole history of decisions and principles that have been developed to deal with the issue of dog attacks. It might well be that it could be useful for them to have some kind of principles to follow when they deal with destruction decisions. They do have the power to order menacing dog declarations in certain circumstances, and maybe they should have some kind of principles because at the moment it is fairly ad hoc. They are brighter people than me, but if they do not have a system to work in, then it is going to be a little bit problematic. They have got to have a system to work in. At the moment it is just ad hoc decision after decision. We are not going to fix that up by there being a lot of reported cases that practitioners can then turn around and say, 'Oh well, okay, here are some principles to follow'. We are not going to have that because people tend not to appeal on to the County Court from the Magistrates Court. That is normally a financial thing. VCAT, I think, is working well. The Magistrates Court we could fix up with something. Also we could maybe even have some kind of statement like there is in the Sentencing Act about how you should not send someone to jail unless certain conditions are met and basically no alternative is reasonably possible. Maybe that should be a principle involved with destruction cases in the Magistrates Court.

The last thing that is very commonly part of my practice is temperament assessments. They can be good and they can be bad. Of course scientifically they are probably of low predictive quality. That is what I hear from the top behaviourists: they are of fairly low predictive quality. They might well tell you what the general nature of the dog is, but in terms of telling you whether it is going to attack, again it is a matter of situational

opportunity and interaction with the person who owns the dog or who is in control of the dog, so it is hard to predict. Sometimes I think there is a bit too much reliance on the temperament assessment. I have heard things said like, 'Well, you will need a really good temperament assessment or this dog will be destroyed'. It is not as simple as that as far as I can see in terms of how assessing how dangerous a dog is.

With temperament assessments, different assessors do them different ways. With what we are getting, we are not comparing like with like. We are not assessing the dangerousness of the animals on the same basis. We have got some who will assess the dangerousness of a dog by basically taking one dog across the street from it and seeing if it reacts to that dog across the street, and others who will do all kinds of things and do it really well. They will bring up to the cage wall various dogs of different sorts, different breeds, different sexes, different demeanours and see what happens. But I think if we are going to be using temperament assessments, there needs to be a standardisation of that process. At the moment really it is very uneven and therefore unfair all the way around, and it does not inform a court or a tribunal particularly well.

That is the only thing I could say could be improved with VCAT — to have some kind of standardised temperament assessment. They have practice notices for everything; they have practice notices for how to scratch your nose in there. But you need a practice notice for a temperament assessment, I would have thought, if you are going to have so many other practice notices. Especially if they rely on them so much, it would be good to have a standardisation of it. There was one really good case where a very good barrister, Phil Brown, did attack a particular behaviourist and did quite serious damage to this person's testimony by working out the assumptions underlying the way this behaviourist did the report and showing that it really was not up to scratch. I think that is why we need to have some standardisation of temperament assessments.

Do you want any comments about the Calgary model, which I am sure is being — —

The CHAIR — Yes. We might move into some questions at this point, and then we can follow through.

Mr MELKE — Yes, I have rattled on far too long. My apologies.

The CHAIR — No, it has been very worthwhile, but we might move on to some questions.

Ms HARTLAND — A comment you made was that if a dog has attacked once it is unlikely to attack again, or it would be probably be the case in 10 per cent of cases. My concern with that is: can we then actually trust that animal and what happens if the second attack is on a child? Obviously this legislation has come out of the death of a child. It is obviously not working, but how do we make sure that we have legislation that works but also protects people at the same time? That is the thing as a legislator that really concerns me — how we get that balance.

Mr MELKE — Yes, that is very difficult when you have so many variables involved, not just the variables of the natures of the dogs and the natures of the people owning or controlling them. There is the other problem that, from what I hear from behaviourists, a dog is more likely to attack full stop if it is attacked once, but whether it is going to be a serious or minor attack is a whole different issue. There is no link, I understand, between a dog attacking a dog and a dog attacking a human — just because it attacks a dog does not mean that it is aggressive towards humans. In fact I see a lot of this where animals are aggressive towards other dogs but not aggressive towards humans, but if there has been a prior human attack, you just have to look at the situation and how it occurred. You cannot trust a dog where someone provokes it. That is not the dog's fault either when the dog has been provoked or teased, where the wrong situation has arisen. Leaving little children with dogs is probably not the best thing to do, and I do see magistrates react interestingly to submissions by people I see sometimes who say, 'My dog is wonderful around little children', and immediately the magistrate thinks, 'This is a serious matter; it is going to be around children'. That is a bad submission to make.

How do you stop that? I think a lot of it is educating people that you do not leave little kids around dogs — any dog, be it a Chihuahua or be it my lovely black labrador. I would not trust my black labrador with little kids. Even though he is the nicest, loveliest dog with the sweetest nature, the wrong situation — if little kid pulls his tail, he might well turn around and do something horrible. Any dog. Again and again and again what I hear is, 'My dog will be fine with little kids'. I do hear that a lot, and I think, 'If you are lucky'. You just do not know, and it is not the dog's fault. Most of the time it is not the dog's fault, but it is going to happen where you have the wrong factors involved, you have little kids with dogs. You saw it.

So I think education is a great thing — and also that people do not come to dogs from the top. That is a simple thing to learn. You do not go to pat a dog from the top; that is obviously going to be frightening for the dog. There are all kinds of ways, and behaviourists are much better than me at telling you about how people should be educated in how to deal with dogs. I think that is the way we can most protect people, but as for guaranteeing that any dog will not attack again, I do not think you can guarantee any dog. I would not guarantee my dog either, unfortunately. It is such a hard problem to solve.

Ms TIERNEY — With the current legislation, do think it might be more workable if a restricted breed dog declaration was able to be revoked?

Mr MELKE — That is an interesting idea. I suppose, putting aside my belief that there should not be a restricted breed category — I will put that to the side when I am answering this question — I think that would be a good idea if you can provide evidence to the contrary or evidence that the dog is particularly well behaved, has a great temperament assessment or has other factors that mean that the restrictions on it should not be applied, with the onus upon the dog owner to show that. That would be very interesting idea, and certainly not one I have thought of.

Ms TIERNEY — I am interested in getting more of a sense of your view about the Calgary model.

Mr MELKE — The education part of it, excellent. I think things like the lower registration fees is important because that should, you would think, encourage more people to register their dogs, though a lot of the time it seems people just do not seem to be aware of the need for registration. That might seem stupid, but actually I remember as a very young 21 or 22-year-old I was not aware of that. It was lucky that it was not actually me owning the dog. I think that is useful, but it is of limited use because I think there are other reasons people do not register their dogs. People just do not seem to think of it or consider it something amongst their priorities. I do not think there are a lot of them I have come across where it has really just been a financial issue.

I have a similar comment in relation to the idea of a lower differential between registration fees for intact and desexed dogs — useful, but it is not going to be a great answer. With Calgary you also have things like more education, which is a great thing. I love the I Heart My Pet program, the rewards program, where you have that loyalty card. I think that is just fantastic for people because I would think it would encourage people to buy more products that can help with looking after their dog properly, and a well-looked-after dog is more likely to not be involved in these things, I would think.

They have got these increased off-leash areas. That is fine, but I think you just have to bear in mind the issue of on-leash dogs and off-leash dogs in an off-leash area. I think that is a potential problem if you increase off-leash areas. But, on the other hand, providing you do something like that, off-leash areas do provide socialisation, and socialisation for dogs just seems to be, from what I have seen, such an important thing because so many of the dogs that are very owner-centric have not been socialised with dogs much, and then when they meet dogs they are a problem, they do not know how to socialise. I think the increased off-leash areas is a good idea. As for the business of no mandatory neutering, which they have over there, I am concerned about that just because the statistics I have seen show that neutered dogs do not attack as much, so it would seem that that would fly in the face of those statistics. I am sure you people will have seen a lot more statistics than I have — I have only briefly looked at these things — but it seems that no mandatory neutering is probably not a good idea for that reason alone.

Calgary has a business of returning the pet at large to the owner. I think that is a great thing because all kinds of the issues arise when you get pets that wander off and they are at large, they are picked up by the council pound and then they are stuck in the pound and the person actually has to go and get them and may face certain hurdles in getting them back. It takes a lot of council time and effort, I would think, and money involved in that process of then dealing with the dogs rather than just sending them back to the owner. I think that is quite a good idea. I cannot quite work out with the Calgary model whether they have been increasing enforcement or not, because part of the time they are saying that they are increasing enforcement and then they say that they are not punishing people into compliance, so I am not quite sure what has happened with that forensically.

The CHAIR — Mr Melke, in terms of VCAT decisions and the like, we have certainly heard a lot of testimony from councils and other groups that have indicated that the balance, if you will, is favouring the dog rather than, say, a council that is trying to ensure that what they perceive as a restricted breed dog is designated

in that way. What is your view on where the balance is in terms of the capacity for councils to implement the legislation as it stands at the moment?

Mr MELKE — I think it is well balanced at the moment. I think the problem is that councils will often bring cases that are simply doomed to failure, a little bit trigger-happy in bringing cases where there has been a very minor incident and they decide they are going to declare the dog dangerous or menacing. I think that is where they think that they are being hard done by. I come to this from both sides, and I think it is pretty well balanced because the principles they are using are good. I think, however, that there are too many cases brought by councils where they do not have a good hope of winning. I do think that in terms of destruction there are too many where they are a little bit trigger-happy on them too. But I will just confine myself to your question, sorry. The VCAT decisions, I think it is perfectly well balanced, and I think councils are just a bit disappointed because they are taking on cases that probably should not be taken on.

The CHAIR — It is interesting to hear you say that, because the councils are saying that in fact they are only prosecuting a small proportion of what they possibly could, because these are the ones that they are very sure are indeed restricted breed dogs. We hear from you that there are a large number of these that are coming before that are not. It is interesting to hear that juxtaposition.

Mr MELKE — Sorry, I was talking about VCAT decisions generally, not specifically restricted breed.

The CHAIR — Right, okay. You were talking more broadly about all the VCAT decisions.

Mr MELKE — Yes, I was talking more broadly — sorry. Then in terms of restricted breed, the ones that I have seen, I think some of them, they really have had difficulties, and the ones I have seen, some of them I have thought, ‘Yes, they just don’t have any hope’. One that really comes to mind was one where it was actually a really awful attack, probably up there with the worst, and it was claimed by the council that it was a restricted breed dog. We ran it in VCAT, and basically the barrister and I knew all along we were going to win that one, and we did, and the council persisted with it regardless. I do not think they are just taking the best cases. In particular some of the councils seem to have issued a large number. I suppose there are lots of councils that are responsible about this, and they do only bring the cases that look good, so I suppose, yes, there are some councils that are doing it really well, and then there are some other councils that just have a go. I suppose those councils that just have a go are the same ones in relation to other issues of dangerous dog declarations or menacing dog declarations and so on that just have a go.

The CHAIR — You are talking about that particular incident where there was quite a nasty dog attack. The council tried to have the dog declared a restricted breed. In your view would that council have been better to have that dog designated as a dangerous or menacing dog?

Mr MELKE — Yes, that is what they should have done, instead of just ploughing ahead with trying to restricted breed it. In the end that is what happened; it was declared dangerous. But that was after, I cannot remember how long, but at least one and a half years of litigation, and it could have been sorted out right at the start. We in fact offered it, I think, right at the start. It was a waste of time.

The CHAIR — What proportion of cases would you say you work as a — what do I describe it as? — a defendant of dogs or a prosecutor of dogs?

Mr MELKE — Quite a bit of my work I would have to say, though, with prosecution of dog matters is when I am prosecuting domestic animal businesses, running kennels and breeding establishments. The vast majority of my work is defence, but I prosecute for Casey council in relation to sometimes dog attacks and sometimes, probably even more so, domestic animal businesses. Over the years I have prosecuted quite a few, though, and have been involved in fact in matters where dogs have been destroyed by the prosecution. I am not an animal activist — however much I wanted to be a zoologist first-up in life — but I am accepting that sometimes a dog will need to be destroyed if it is just out of control, and I have been involved in that. But the vast majority of my work is defence, yes.

The CHAIR — Mr Melke, I thank you for your evidence here today. I remind you that you will be provided with a transcript of today’s evidence for your proofreading, which you can return to the committee, and then that evidence will be placed upon the committee’s website. At that point I will thank you again for your testimony here today, and I will suspend our hearing. Thank you.

Mr MELKE — Thank you very much.

Witness withdrew.