



**THE LAW SOCIETY
OF SOUTH AUSTRALIA**

**SUBMISSION
in relation to the
*Animal Welfare (Jumps Racing) Amendment Bill 2011***

1. The Law Society of South Australia has received a request to comment on the *Animal Welfare (Jumps Racing) Amendment Bill 2011* which, if passed, will amend the *Animal Welfare Act 1985 (SA)* (“the AWA”) to prohibit jumps racing.
2. The question of whether jumps racing should be prohibited is a political and social issue. This advice is confined to a consideration of two legal issues:
 - 2.1. Whether the Bill is in accord with the objects of the AWA.
 - 2.2. Whether, regardless of whether the Bill is passed, jumps racing may be in breach of existing s 13 of the AWA.
3. The *Animal Welfare (Jumps Racing) Amendment Bill 2011* (“the Bill”) proposes to amend the AWA by inserting a provision (s 14A) that prohibits a person from organising, promoting or participating in jumps racing.
4. It is desirable to consider the policy or objects of the AWA. The Act does not contain a statement of objects. Its objects must be derived from the whole of its words, and where appropriate, secondary sources, in accordance with the usual tenets of statutory interpretation.
5. The title of the AWA suggests that it is intended to promote animal welfare, but this is of doubtful assistance in interpretation of an Act.¹ The Second Reading Speech says that the principal object of the AWA is the promotion of animal welfare.² The AWA contains:
 - 5.1. Provisions establishing the Animal Welfare Advisory Committee to advise and report to the Minister on matters including animal welfare (Part 2);
 - 5.2. Various offence provisions (Part 3), discussed below, which prohibit ill treatment of animals,³ but which also include a specific duty to report injury to animals in vehicle accidents (s 15A);

¹ D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (Butterworths, 6th ed, 2006) 153.

² South Australia, *Second Reading Speech*, Legislative Council, 31 July 2007, 347 (Gail Gago).

³ The definition of animal excludes human beings and fish.

- 5.3. Provisions regulating teaching and research involving animals, including provision to establish Animal Ethics Committees (Part 4);
- 5.4. Implementation provisions (Part 5);
- 5.5. Miscellaneous provisions (Part 6).

The provisions of the AWA thus include provisions which may be properly characterised as provisions to promote the welfare of animals, as well as provisions which circumscribe or proscribe some human conduct in relation to animals.

6. The Bill proposes to create a further offence within Part 3 of the AWA. Part 3 creates:
 - 6.1. A general offence of ill-treatment, which requires intent or recklessness (s 13(1));
 - 6.2. A lesser offence of ill-treatment, which is subject to a defence of not failing to take reasonable care (s 13(2), (4) and (5));
 - 6.3. Specific offences limited to defined conduct (ss 14, 15).

The Bill creates a further specific offence limited to jumps racing.

7. Section 13 of the AWA also includes:
 - 7.1. Specific examples of *“ill treatment”* but does not exhaustively define that term. The examples within s 13 illustrate that conduct, which causes unnecessary harm to animals, is ill treatment.
 - 7.2. Section 13(3)(a) provides that a person ill treats an animal if that person intentionally, unreasonably or recklessly causes the animal unnecessary harm.
 - 7.3. *“cause”* is defined as:- *“a person's act or omission causes the death of, or harm to, an animal if the act or omission substantially contributes to the animal's death or harm.”*
8. *“Harm”* is defined in s 3 of the AWA as *“any form of damage, pain, suffering or distress (including unconsciousness), whether arising from injury, disease or any other condition.”*
9. *“Serious harm”* is defined as—
 - (a) *harm that endangers an animal's life; or*

- (b) *harm that results in an animal being so severely injured, so diseased or in such physical condition that it would be cruel not to destroy the animal; or*
- (c) *harm that consists of, or results in, serious and protracted impairment of a physical or mental function;*

10. We turn to a consideration of the terms of the Bill.

10.1. Subject matter of the Bill -

10.1.1. The Bill defines “jumps racing” as “a steeplechase or hurdle race involving the racing of horses”.

10.1.2. This definition is consistent with the activity sought to be prohibited and therefore it is understandable why the Bill proposes no further definition.⁴

10.1.3. However, we note that the definition as set out in the Bill also appears to be consistent with the definitions found in *The Macquarie Dictionary*:⁵

- a) “jump race” is defined as a “horserace over a course furnished with artificial ditches, hedges, and other obstacles; steeplechase.”⁶
- b) One of the definitions of “hurdle” is “any of various obstacles, as a hedge, low wall, fence, over which horses must jump in steeplechasing, etc.”⁷
- c) “steeplechase” is defined as: “1) jump race; 2) a horserace across country; point-to-point.”⁸

⁴ The controlling body for horseracing in South Australia, Thoroughbred Racing SA, and the Australian Racing Board, have not sought to define these terms within their Rules: Thoroughbred Racing SA Limited, *Local Rules of Racing Limited* (2005) and Australian Racing Board, *Australian Rules of Racing* amended to 1 August 2011.

⁵ Susan Butler (ed), *The Macquarie Dictionary* (Pan Macmillan, 5th ed, 2009). References to the *Macquarie Dictionary* are increasingly common in Australian cases. See, eg, *State Chamber of Commerce and Industry v Commonwealth* (1987) 163 CLR 329 at 348.

⁶ Butler, above n 5, 904.

⁷ *Ibid* 819.

⁸ *Ibid* 1612.

10.1.4. We note that “*steeplechase*” and “*hurdle race*” are commonly understood terms within the racing industry.⁹ Further, the terms, separately defined, have a plain and ordinary meaning¹⁰ and therefore on their face do not seem to require further definition.

10.1.5. We do not understand the Bill to intend to prohibit equestrian events such as The Australian International 3 Day Event. It might be argued that such events, involving timed trials which include jumping, fall within the definition of “*jumps racing*”. While the Society does not share such an interpretation, any uncertainty could be excluded by refinement of the definition if required.

10.2. The activities proscribed by the Bill -

10.2.1. The Bill proposes to prohibit a person from “*organising, promoting or participating in*” jumps racing.

10.2.2. The Society notes that there has been limited judicial discussion of the terms “*organise, promote or participate*”. Although the activities proscribed by the Bill cover a broad range of activities, the Society wonders whether the expressions “*take part in*” or “*engage in*” might usefully be added to the Bill. These latter expressions have received extensive judicial consideration and are utilised in animal welfare legislation in other states.

10.2.3. In relation to comparable animal welfare legislation interstate, “*take part in*” and “*engage in*” are found in the following statutes:

- a) *Animal Welfare Act 1992* (ACT) ss 17 (hunting competitions) and 18 (rodeos);
- b) *Animal Welfare Act 2002* (WA) s 32 (prohibited activity);
- c) *Prevention of Cruelty to Animals Act 1979* (NSW) ss 18A (bullfighting), 19 (trap shooting) and 20 (certain animal catching activities); and
- d) *Animal Welfare Act 2001* (NT) ss 9 (horse firing) and 21 (hunting competitions).

⁹ Racing NSW, *Guide to Racing in NSW: 2011 Reference Manual*, ‘Common Racing Terms’, 16 and 18.

¹⁰ *Cody v J H Nelson Pty Ltd* (1947) 74 CLR 629 per Dixon J at 647; *Maunsell v Olins* [1975] AC 373 at 382 per Lord Reid. Also see Pearce & Geddes, above n 1, ch 4.

- 10.2.4. We note that “*take part in*” and “*engage in*” have also been the subject of judicial discussion and determination. For example, “*take part in*” has been considered by the Courts in the context of drug trafficking,¹¹ management of a corporation,¹² rioting¹³ and racing between vehicles.¹⁴
- 10.2.5. We point out that in Western Australia’s *Animal Welfare Act 2002*, the term “*prohibited activity*” is defined so that it further identifies what might be proscribed or caught by the legislation.
- 10.2.6. Section 32 of the *Animal Welfare Act 2002* (WA) relevantly provides:
(1) A person must not engage in a prohibited activity.
Penalty: Minimum — \$2 000.
Maximum — \$50 000 and imprisonment for 5 years.
(2) Without limiting subsection (1), a person engages in a prohibited activity if the person —
(a) takes part in it;
(b) spectates at it;
(c) organises it;
(d) promotes it;
(e) keeps an animal for the purpose of it;
(f) allows it to occur at a place owned or operated by the person;
- 10.2.7. If the Legislature took the view that it was important for the public to be fully aware of the extent of the ambit of the Bill, it could also include a definition of “*take part in*”. For example, the Legislature may wish to add to section 3 of the AWA (Interpretation section):
“***take part in***” - *for the purpose of this Act to “take part in” jumps racing includes, without limitation:*
(a) to organise;
(b) to promote;
(c) to participate in;
(d) to provide or arrange finance for; or
(e) to provide or permit the use of premises at which a jumps racing event is held.
- 10.2.8. If the language of any definition contains the words “*includes without limitation*” then it will be plain that the activities listed are not exhaustive but are simply examples of conduct which will constitute the prohibited activity.

¹¹ *DPP Reference No. 2 of 1995 (Question of Law Reserved)* (1995) 65 SASR 508; *R v B D* [2001] NSWCCA 184.

¹² *Corporate Affairs Commission (Vic) v Bracht* [1989] VR 821; *Cullen v Corporate Affairs Commission (NSW)* (1988) ACLR 789.

¹³ *R v Poynter, Norman & Parker; ex part AG (QLD)* [2006] QCA 517.

¹⁴ *DPP v Belani, Jumah and Ammoun* (2005) 64 NSWLR 319.

11. We note that in 1991, the Commonwealth Senate Select Committee on Animal Welfare published a detailed and extensive report in relation to the horse racing industry and animal welfare in Australia. The Committee's Report included investigations and evidence in relation to jumps racing.
 - 11.1. By way of background, the Commonwealth Senate Select Committee on Animal Welfare was established in November 1983 to inquire into and report upon the question of animal welfare in Australia.
 - 11.2. In May 1988, the Committee began an inquiry into the animal welfare aspects of the racing industry as part of its more general reference on the question of animal welfare in Australia. The Committee tabled an interim report in June 1990¹⁵ and presented its final report in August 1991.¹⁶
 - 11.3. The Committee found that representatives of the jumps race fraternity did not dispute the high fatality rate in jumps racing.¹⁷
 - 11.4. Further, the Committee found that there was a significant probability of a horse suffering serious injury or death as a result of participating in jumps racing, particularly steeplechasing.¹⁸ This led the Committee to conclude, "*there is an inherent conflict between these activities and animal welfare.*"¹⁹
 - 11.5. The Committee formed the view that "*relevant State Governments should phase out jumps racing over the next three years*".²⁰
12. The Bill appears consistent with the Committee's recommendation.
13. As part of our consideration of the Bill, we have had regard to the position that pertains in other states. Our enquiries and investigations reveal the following:
 - 13.1. New South Wales
 - 13.1.1. New South Wales is the only state in Australia that prohibits jumps racing.
 - 13.1.2. The NSW parliament introduced s 21C to the *Prevention of Cruelty to Animals Act 1979* (NSW) in 1997 and it commenced on 1 February 1998.

¹⁵ Senate Select Committee on Animal Welfare, Parliament of Australia, *Interim Report on The Racing Industry* (June 1990).

¹⁶ Senate Select Committee on Animal Welfare, Parliament of Australia, *Aspects of Animal Welfare in the Racing Industry* (August 1991).

¹⁷ *Ibid* 23.

¹⁸ *Ibid* 24.

¹⁹ *Ibid*.

²⁰ *Ibid* xi.

- 13.1.3. Section 21C of the *Prevention of Cruelty to Animals Act 1979* (NSW) provides:

A person who organises or participates in a steeplechase or hurdle race is guilty of an offence.

Maximum penalty: 250 penalty units in the case of a corporation or 50 penalty units or imprisonment for 6 months, or both, in the case of an individual.

- 13.1.4. The amendment was introduced by the Hon. R. S. L. Jones in the NSW Legislative Council.²¹ At the time of the amendment, jumps racing was apparently a rarity in NSW.²² When the amendment was put to a vote, the Legislative Council was divided. The vote saw the amendment pass 19-17.²³

- 13.1.5. The Legislative Assembly passed the amendment on 27 June 1997 without any further debate.²⁴

- 13.1.6. We draw to the attention of the Legislature that NSW provides an exemption in its Regulations for persons who organise or participate in show jumping events.²⁵ The Regulations provide:

(1) A person who organises or participates in a steeplechase or hurdle race to which this clause applies is exempt from the operation of section 21C of the Act in relation to that race.

(2) This clause applies to a steeplechase or hurdle race that is organised in such a way that no horse in the race can approach or attempt to jump a particular obstacle or hurdle at the same time as any other horse in the race.

- 13.1.7. The Legislature might see fit to include a comparable exemption in the Bill.

13.2. Victoria

- 13.2.1. There is no legislative ban prohibiting jumps racing in Victoria.

- 13.2.2. In 2008, Racing Victoria Limited commissioned a report from retired County Court Judge David Jones into jumps racing in Victoria.²⁶ The

²¹ New South Wales, *Parliamentary Debates*, Legislative Council, 26 June 1997, 11210 (Richard Jones).

²² *Ibid.*

²³ *Ibid* 11212.

²⁴ New South Wales, *Parliamentary Debates*, Legislative Assembly, 27 June 1997, 10821 (Paul Whelan).

²⁵ *Prevention of Cruelty to Animals (General) Regulations 2006* (NSW) reg 13.

²⁶ Judge David Jones, *Review of Jumps Racing in Victoria*, Commissioned by Racing Victoria Limited, (November 2008).

Report reviewed the safety performance of Victorian jumps racing and included economic factors and implications.²⁷

13.2.3. The review was commissioned against a background of government and public concern about the safety to horses and riders of jumps racing in Victoria.

13.2.4. The Report found that the number of horse fatalities in jumps racing in Victoria in 2008 totalled 10 until 30 June 2008 - twice the rate of fatalities to starters for 2006 and 2007 and significantly higher than the percentage for all years from 2001.²⁸

13.2.5. Prior to 2008, the Victorian Racing Club and Racing Victoria Limited commissioned reviews into jumps racing in Victoria in 1994, 1998, 2002 and 2005.²⁹

13.3. Tasmania

13.3.1. There is no legislative ban on jumps racing in Tasmania.

13.3.2. Jumps racing ceased in Tasmania on or about 28 April 2007. The decision was made by the Tasmanian Thoroughbred Racing Council due to the declining popularity of jumps races and the declaration that it was not economically viable.³⁰

13.4. Queensland

13.4.1. There is no legislative ban on jumps racing in Queensland.

13.4.2. Queensland was one of the first states to cease jumps racing.³¹ In the 1890s, the combination of an economic downturn and the effects of a serious flood negatively affected the racing industry in Queensland.³²

13.4.3. Jumps racing briefly reappeared in Queensland in the 1980s with an annual exhibition hurdle,³³ although some suggest the last event occurred in 1903.³⁴

²⁷ Ibid 15.

²⁸ Ibid 14.

²⁹ Cited in Jones, above n 26, 18-28.

³⁰ Tony Burke, 'Tasmania Calls End to Jumps Racing', *The Age (Melbourne)* (online), 28 April 2007 <<http://www.theage.com.au/news/horse-racing/tasmania-calls-end-to-jumps-races/2007/04/27/1177459980505.html>>. Also see: Jones, above n 26, 17.

³¹ Jenny Barnes, 'History of Jumps Racing in the States of Australia', *Virtual Formguide*, 10 May 2009 <<http://formguide.cyberhorse.com.au/index.php/200905106137/South-Australia/History-of-Jumps-Racing-in-the-States-of-Australia.html>>.

³² Ibid.

³³ Ibid.

13.4.4. However, jumps racing was seen as uneconomical as the necessary equipment, jockeys and horses had to come from Victoria.³⁵

13.5. Northern Territory

13.5.1. There is no legislative ban on jumps racing in Northern Territory.

13.5.2. It would appear that the Northern Territory has never held jumps races and it was therefore never the subject of a “ban” or otherwise.³⁶

13.6. Australian Capital Territory

13.6.1. There is no legislative ban on jumps racing in the ACT.

13.6.2. There was a once an annual hurdle race in the 1980’s. However, due to a race scandal over the event, interest waned and jumps racing ceased in 1989.³⁷

13.7. Western Australia

13.7.1. There is no legislative ban on jumps racing in Western Australia.

13.7.2. A steeplechase was held in Perth in 1877 and hurdle racing appeared on a regular basis in the 1890’s. However, during the 1930’s, jumps racing slowly declined.³⁸

13.7.3. The last jumps race was held in Western Australia in 1941.³⁹

14. Investigations conducted by the Commonwealth Senate Select Committee,⁴⁰ Judge David Jones in Victoria⁴¹ and various statistics and findings,⁴² comprise a considerable body of evidence that identifies the risk of injury that jumps racing poses to horses.

³⁴ Animal Liberation South Australia, *Jumps Racing* (2010) 4; South Australia, *Parliamentary Debates*, Legislative Council, 8 June 2011 (Tammy Franks).

³⁵ See also, Lisa Thomas, ‘Comment: Jumps Racing - Legal Cruelty?’ (2011) 11(7) *3rd Degree* (13 May 2011) <<http://3degree.ecu.edu.au/articles/3732>>.

³⁶ Barnes, above n 31.

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ Judge Jones, above n 26, 17.

⁴⁰ Referred to above at paragraph 11; Senate Select Committee, above n 16.

⁴¹ Referred to above at paragraph 13.2; Judge Jones, above n 26.

⁴² James E Harrison, Leigh Roeger and Denzil O’Brien, *Safety of jumping races*, Research Centre for Injury Studies, Flinders University, Adelaide (September 2008); Dr Lisa Boden, *Risk Factors Associated with Racetrack Casualties in Thoroughbreds: Victoria, Australia 1989 – 2005*, Australian Government, Rural Industries Research and Development Corporation (June 2008); C Bailey, S Reid, D Hodgson, J Bourke and R Rose, ‘Flat, hurdle and steeple racing: risk factors for musculoskeletal injury’ (1998) 30 *Equine Veterinary Journal* 498; See also the scientific reports set out by Judge Jones, above n 26, 29-46.

15. If the body of evidence identified in the previous paragraph is correct, then subject to the terms of s 13(1) and (2), and the defence in s 13(5), it may be that those currently involved in jumps racing are in breach of s 13(1) or (2) of the AWA.
16. In particular, we refer to specific terms of s 13 of the AWA:
 - 16.1. A person may be guilty of aggravated ill treatment (s 13(1) of the AWA) where serious harm or death results and the person intends or is reckless as to that consequence.
 - 16.2. Alternatively, if a person ill-treats an animal, and does not prove the offence did not result from any failure to take reasonable care to avoid commission of the offence (s 13(5)), a person may be guilty of the lesser offence in s 13(2).
 - 16.3. A person ill-treats an animal if the person intentionally, recklessly or unreasonably causes the animal unnecessary harm (s 13(3)(a)).
 - 16.4. "*Recklessness*", in other contexts, is ordinarily defined or interpreted to mean that a person is aware that there is a risk that death or serious harm may result as a consequence of his/her conduct but nevertheless engages in that conduct.
17. If that is so, arguably there is no need for the Bill. However, one advantage of the Bill is that it clarifies the position so as to remove any uncertainty as to the status of jumps racing, particularly where there is likely to be a number of stakeholders with varying interests and degrees of involvement in this activity, albeit by creating a definite prohibition where none now exists.
18. Conclusion
 - 18.1. The proposed Amendment Bill provides a further prohibition of conduct, similar to the existing prohibitions in ss 14 and 15 of the AWA. The prohibited conduct has been identified as involving risk of injury to horses. It can thus be said to be consistent with the existing objects of the AWA.
 - 18.2. Arguably jumps racing offends the existing s 13(1) or (2) of the AWA. The same can be said of animal fighting, which is specifically prohibited by existing s 14. If the Legislature wishes specifically to prohibit jumps racing, it will clarify the issue in favour of prohibition.

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