



SUMMARY OF CONCLUSIONS

LEGISLATION REVIEW DIGEST No. 11 of 2005

10 October 2005

Legislation Review Digest No. 11 of 2005 contains the Legislation Review Committee's consideration of bills introduced into Parliament in the sitting week beginning 19 September 2005 and any reports on regulations since the previous *Digest*.

The Bills reported on include:

- **Confiscation of Proceeds of Crime Amendment Bill 2005**
- **Crimes Amendment (Road Accidents) Bill 2005**
- **Criminal Procedure (Prosecutions) Bill 2005**
- **National Parks and Wildlife Amendment (Jenolan Caves Reserves) Bill 2005**
- **Public Sector Employment and Management Amendment (Ethanol Blended Fuel) Bill 2005***
- **State Emergency and Rescue Management Amendment Bill 2005**

Correspondence on Bills includes:

- **Gaming Machines Amendment Bill 2005**
- **Road Transport (General) Bill 2004**

Summary of Conclusions

SECTION A: Comment on Bills

1. **Confiscation of Proceeds of Crime Amendment Bill 2005**

Strict Liability: Clause 59

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| 29. | The Committee is of the view that, except in extraordinary circumstances, it is inappropriate for an offence of strict liability to be punishable by a term of imprisonment. While it is important to ensure that the Public Trustee and the Commissioner can fulfil their obligations in relation to a freezing notice, it is not apparent to the Committee that this is an extraordinary circumstance justifying a prison term for a person not intending to commit the offence. |
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30. The Committee has written to the Attorney General for clarification as to the need to prescribe a term of imprisonment for this strict liability offence.
31. The Committee refers to Parliament the question as to whether providing for imprisonment for this offence trespasses unduly on personal rights and liberties.

Self-incrimination/Right to Silence: proposed s 51A

39. The Committee notes that the right against self-incrimination (or “right to silence”) is a fundamental right, which should only be eroded when overwhelmingly in the public interest.
40. The Committee is of the view that requiring a person to give certain information about property that is the subject of a freezing order is in the public interest and that abrogating the right to silence is not unwarranted.
41. The Committee also notes that abrogation of the right should only be to an extent necessary to achieve the public interest aim and should be proportionate to that aim. For this reason, the Committee is of the view that information given under compulsion should not normally be able to be used against the person in criminal or civil proceedings, directly or derivatively.
42. The Committee notes that proposed s 51A provides that the statement cannot be used in criminal proceedings against the person but provides no limit on its use in civil proceedings or derivatively in criminal proceedings.
43. The Committee has written to the Attorney General to seek his advice as to why there is no restriction on the use of self-incriminating information in civil proceedings or its derivative use in criminal proceedings.
44. The Committee refers to Parliament the question of whether proposed s 51A constitutes an undue trespass on the personal right against self-incrimination.

Discrimination & Appeal Rights: Clause 2, proposed Division 2 of Part 7

57. The Committee is of the view that it is a trespass on a person’s fundamental rights:
 - to authorise the state to take over management of a person’s property and affairs without compelling justification and adequate safeguards of the person’s rights;
 - to discriminate against a person on the ground of mental illness, and
 - to fail to provide the right to appeal against the making of a damages supervision order (DSO).
58. The Committee is also of the view that these rights, while not absolute, should only be displaced by compelling public interest justifications and only to the extent necessary to achieve the competing public interest objective.

59. The Committee notes the public interest in ensuring that an award of damages for non-economic loss is used for the purpose for which it was awarded, namely medical and related costs arising out of the injury.
60. The Committee also notes that a court can only make a DSO if satisfied that it is in the best interests of the person concerned.
61. The Committee has written to the Attorney General for advice as to the public interest justifications for enabling a court to order a DSO in respect of a person who is able to manage their own affairs and property and failing to provide for a right of appeal against a DSO.
62. The Committee refers to Parliament the question of whether proposed Division 2 of Part 7 and proposed section 54D unduly trespass on personal rights and liberties.

Strict Liability: proposed section 54G

66. The Committee is of the view that, except in extraordinary circumstances, it is inappropriate for an offence of strict liability to be punishable by a term of imprisonment.
67. The Committee has written to the Attorney General for clarification as to the need to prescribe a term of imprisonment for this strict liability offence.
68. The Committee refers to Parliament the question as to whether providing for imprisonment for this offence trespasses unduly on personal rights and liberties.

Reversal of onus of proof: proposed sections 193B, 193C & 193D

76. The Committee notes that the reversal of the onus of proof may be inconsistent with the presumption of innocence, which is recognised as a fundamental human right.
77. The Committee also notes that this right is not absolute and that provisions which shift the burden of proof, subject to reasonable limits, have been held not to be incompatible with the presumption of innocence.
78. The Committee has written to the Minister for advice on the need to place a legal burden of proof on a defendant in relation to these matters rather than leaving the burden of proof with the prosecution or placing an evidential burden on the defendant.
79. The Committee refers to Parliament the question of whether reversing the onus of proof and requiring a defendant to bear a legal burden of proof unduly trespass on the person's right to be presumed innocent.

Strict Liability: proposed section 193C

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| 83. | The Committee is of the view that, except in extraordinary circumstances, it is inappropriate for an offence of strict liability to be punishable by a term of imprisonment. |
| 84. | The Committee has written to the Attorney General for clarification as to the need to prescribe a term of imprisonment for this strict liability offence. |
| 85. | The Committee refers to Parliament the question as to whether providing for imprisonment for this offence trespasses unduly on personal rights and liberties. |

Discrimination; Right to property: Clause 5, proposed Part 3

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| 93. | The Committee is of the view that treating a person who has been found not guilty of a crime as if they had been convicted of that crime is a trespass of that person's fundamental rights. |
| 94. | The Committee notes that there is a public interest in ensuring that people cannot benefit from murder. The Committee also notes that the person who is the subject of a forfeiture application order under proposed section 11 has been found not guilty of murder. |
| 95. | The Committee further notes that the forfeiture rule can only be applied to a person found not guilty of murder because of mental illness if the Supreme Court is satisfied that it is in the interests of justice. |
| 96. | The Committee has written to the Attorney General for advice as to the public interest justification for extending the forfeiture rule to a person who has been found not guilty of murder because of mental illness. |
| 97. | The Committee has also written to the Minister for advice as to why the Bill gives no guidance to the Court on the circumstances in which justice might require the Supreme Court to apply the forfeiture rule to a person who has been found not guilty of murder because of mental illness. |
| 98. | The Committee refers to Parliament the question as to whether the application of the forfeiture rule to a person who has been found not guilty of murder because of mental illness under the Bill unduly trespasses on that person's rights. |

2. Crime Amendment (Road Accidents) Bill 2005

Objective mens rea standard: proposed s 52AB and s 70:

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| 14. | The Committee considers that, as a general rule, objective mens rea standards should only be imposed when clearly in the public interest, and the severity of punishment should reflect the lack of criminal intent. |
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15. The Committee notes the benefit of preventing drivers escaping criminal liability for failing to stop by claiming they were not aware of an injury or death arising from their driving in circumstances where a reasonable person ought to have known of that injury or death.
16. The Committee has written to the Attorney General to seek clarification on the liability of a driver, whose vehicle causes injury or death, leaving the scene of an accident under some mental incapacity.
17. The Committee refers to Parliament the question of whether the adoption of an objective standard in the proposed amendments constitutes an undue trespass on personal rights and liberties.

Aggravated offences

23. The Committee notes that the maximum penalties for failing to stop and assist under s 52AB(1) and (2) are the same as the penalties for dangerous driving occasioning death or grievous bodily harm under s 52A (1) and (3) respectively with a view to removing an incentive to flee the scene of an accident to avoid a more severe penalty.
24. The Committee notes that s 52AB makes no distinction between a driver whose dangerous driving caused the accident and a driver who was not responsible for the accident where both leave the scene. Both would face maximum penalties of 10 or 7 years imprisonment.
25. The Committee has written to the Attorney General to seek his advice as to why the more severe penalties in s 52AB may apply to drivers who did not drive in a dangerous manner rather than being limited to some circumstance of aggravation, such as dangerous driving.
26. The Committee refers to Parliament the question of whether the severe penalties in s 52AB, which does not require that a driver be responsible for the impact occasioning death or grievous bodily harm, unduly trespasses on personal rights and liberties.

Duty of care

31. The Committee notes that the Bill places an obligation on the driver of a vehicle involved in an impact occasioning death or injury to provide any assistance that may be necessary, and that is in his or her power to give, regardless of whether the driver was responsible for that impact.
32. The Committee notes that no such obligation is placed upon other witnesses to the accident or, for example, any pedestrian who may have caused the accident.
33. The Committee also notes that, while the second reading speech stated that common sense judgement will be required in the application of the offences, the actual terms of the Bill appear to place a fairly onerous requirement of assistance, that goes beyond that which is merely reasonable.

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| 34. | The Committee has written to the Attorney General to seek his advice as to why drivers who are not responsible for their vehicle's impact occasioning death or injury are under a duty to assist while other persons at the scene, who may or may not have had some responsibility for the accident, have no such duty. |
| 35. | The Committee has also written to the Attorney General to seek his advice as to why the duty to assist is not put in terms of what is reasonable, and within a person's power, if that is the level of duty intended. |
| 36. | The Committee refers to Parliament the question of whether the duty placed upon drivers to provide any assistance that may be necessary and within their power unduly trespasses on personal rights and liberties. |

3. Criminal Procedure Amendment (Prosecutions) Bill 2005

Clause 2: Retrospectivity

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| 10. | As the retrospective validation of proceedings in the circumstances does not operate unfairly against any person, the Committee does not consider that Schedule 1 [3] trespasses unduly on personal rights and liberties. |
| 13. | The Committee notes that the retrospective commencement of the Bill may affect any proceedings already in progress and presumes that courts will have regard to the Bill before Parliament before it becomes law. |
| 14. | However, given that the Bill only remedies a technical deficiency in indictments and does not result in any substantive unfairness against an accused or convicted person, the Committee does not consider that the retrospective commencement unduly trespasses on personal rights and liberties. |

4. National Parks and Wildlife Amendment (Jenolan Caves Reserves) Bill 2005

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| 2. | The Committee has not identified any issues under s 8A(1)(b) of the Legislation Review Act 1987. |
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5. Public Sector Employment And Management Amendment (Ethanol Blended Fuel) Bill 2005*

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| 2. | The Committee has not identified any issues under s 8A(1)(b) of the Legislation Review Act 1987. |
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6. State Emergency and Rescue Management Amendment Bill 2005

Reversal of onus of proof: proposed s 63B(3)

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| 11. | Proposed s 63B(3) of the Bill imposes a legal burden of proof on a defendant regarding whether their conduct was for public entertainment or was done with a reasonable excuse. |
| 12. | The Committee notes that the reversal of the onus of proof may be inconsistent with the presumption of innocence, which is recognised as a fundamental human right. |
| 13. | The Committee also notes that this right is not absolute and that provisions which shift the burden of proof, subject to reasonable limits, have been held not to be incompatible with the presumption of innocence. |
| 14. | The Committee has written to the Minister for advice on the need to place a legal burden of proof on a defendant in relation to these matters rather than leaving the burden of proof with the prosecution or placing an evidential burden on the defendant. |

SECTION B: Ministerial Correspondence — Bills Previously Considered

7. Gaming Machines Amendment Bill 2005

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| 4. | The Committee thanks the Minister for his response. |
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8. Road Transport (General) Bill 2004

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| 8. | The Committee thanks the Minister for his response. |
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The Legislation Review Committee reports on whether each bill introduced into Parliament:

- (i) trespasses unduly on personal rights and liberties, or
- (ii) makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, or
- (iii) makes rights, liberties or obligations unduly dependent upon non-reviewable decisions, or
- (iv) inappropriately delegates legislative powers, or
- (v) insufficiently subjects the exercise of legislative power to parliamentary scrutiny.

Those bills marked with an * are sponsored by Private Members.

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The Hon Peter Primrose MLC
Chairman