



SUMMARY OF CONCLUSIONS

***LEGISLATION REVIEW DIGEST* No. 5 of 2006**

28 April 2006

Legislation Review Digest No. 5 of 2006 contains the Legislation Review Committee's consideration of bills introduced into Parliament in the sitting week beginning 4 April 2006 and any reports on regulations since the previous *Digest*.

The Bills reported on include:

- **Crimes (Sentencing Procedure) Amendment Bill 2006**
- **Crimes (Serious Sex Offenders) Bill 2006**
- **Independent Commission Against Corruption Amendment (Operations Review Committee) Bill 2006**
- **Jury Amendment (Verdicts) Bill 2006**
- **Legal Profession Amendment Bill 2006**
- **Water Management Amendment (Water Property Rights Compensation) Bill 2006***

Correspondence on Bills includes:

- **Crimes (Sentencing Procedure) Amendment (Existing Life Sentences) Act 2005**
- **Motor Accidents Compensation Amendment Bill 2006 and the Motor Accidents (Lifetime Care and Support) Bill 2006**
- **Transport Administration Amendment (Public Transport Ticketing Corporation Bill 2005**

SUMMARY OF CONCLUSIONS

SECTION A: Comment on Bills

1. Crimes (Sentencing Procedure) Amendment Bill 2006

Retrospectivity: Clause 5

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| 9. | The Committee notes that it is a well established right, protected by Article 15 of the International Covenant on Civil and Political Rights, that a person should not suffer a heavier penalty for an offence than the one that was applicable at the time the offence was committed. |
| 10. | The Committee notes that the Bill applies provisions expanding the scope of circumstances of aggravation, which lead to higher penalties, to offences that were committed at any time before the commencement of the Act (unless earlier dealt with). |
| 11. | The Committee notes that the Bill is intended to clarify the existing provisions rather than apply them to circumstances that were clearly outside their original scope. |
| 12. | The Committee refers to the Parliament the question of whether the retrospective application of the amendments in the Bill trespasses unduly on personal rights and liberties. |

2. Crimes (Serious Sex Offenders) Bill 2006

Traditional Justification for Punishment/Deprivation of Liberty: Part 3

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| 26. | The Committee refers to Parliament the question of whether continuing to detain a person or subjecting a person to extended supervision on the basis of an assessment of risk rather than as punishment for an offence committed unduly trespasses on personal rights and liberties. |
| 27. | The Committee also refers to Parliament the question of whether treating a person detained for the objects of safety and protection of the community and rehabilitation (rather than the object of punishment) in the same manner as persons detained for punishment of offences committed unduly trespasses on personal rights and liberties. |
| 28. | The Committee has written to the Minister for advice as to why a person subject to a CDO is to be treated as a convicted inmate under the <i>Crimes (Administration of Sentences) Act 1999</i> when the objects of their detention is safety and protection of the community and rehabilitation rather than punishment. |

Standard of Proof – Departure from ‘Beyond Reasonable Doubt’

33. The Committee refers to Parliament the question of whether the Bill unduly trespasses on rights and liberties by applying a lower standard of proof than the criminal standard of ‘beyond reasonable doubt’ in determining if the person is to be kept in continued detention.

Retrospectivity

39. The Committee refers to the Parliament the question of whether the Bill, by effectively allowing the imposition of a heavier penalty than the one that was applicable at the time when the criminal offence was committed, unduly trespasses on personal rights and liberties.

Double Jeopardy

42. The Committee refers to Parliament the question of whether exposing a person who is the subject of an order under the Bill to what is in effect a second or subsequent sentence for the same offence unduly trespasses on their rights and liberties.

Arbitrary detention

47. The Committee refers to Parliament the question of whether the Bill unduly trespasses on personal rights and liberties by providing for arbitrary detention.

Privileged & confidential communications: Clause 25

57. The Committee is of the view that legal professional privilege is an important common law principle relating to the proper administration of justice and that abrogating it is only justifiable in the public interest in exceptional circumstances.
58. The Committee is also of the view that other forms of professional communications normally afforded confidentiality are also important for the protection of personal rights such as privacy and the ability of the profession to perform its functions. The Committee notes that such communications are sometimes subject to mandatory disclosure in the public interest.
59. The Committee is of the view that if the legislation is intended to abrogate legal professional privilege and to remove any possibility of a “defence” of privilege or confidential communication, such as those between a doctor and patient, it should do so explicitly.
60. Further, the Committee is of the view that the legislation should be explicit so that those who hold information referred to in this clause can know whether privilege has been abrogated or whether applicable confidentiality principles apply. This is especially so given the high penalty prescribed for non-compliance, including imprisonment for 2 years.

61. The Committee also notes that the clause is extremely broad and provides no threshold to distinguish a justified order from an unjustified one.
62. The Committee has written to the Minister for advice on the following matters:
- (i) whether it is intended that the Bill abrogate legal professional privilege and remove any possible “defence” of privilege or confidential communication on other grounds;
 - (ii) if abrogation from the privilege is intended, whether the Bill can be amended to make that explicit in the interests of fairness; and
 - (iii) the justification for the breadth of clause 25 in applying to “any sex offender” at any time, without any connection to proceedings or orders made under the Bill.
63. The Committee refers to Parliament the question of whether clause 25 unduly trespasses on personal rights.

Safeguards

68. The Committee notes the additional safeguards found in comparable legislation in Victoria, Queensland and Western Australia, namely expressly providing that:
- the prisoner is entitled to obtain an independent assessment report by a psychiatrist or psychologist;
 - the prisoner may file material at a preliminary hearing for an application for a CDO or ESO;
 - the prisoner is entitled to appear at a preliminary hearing, in addition to the other hearings arising out of the operation of the Act;
 - the Supreme Court must provide detailed reasons for making any order under the Bill;
 - the Supreme Court must conduct an annual review into the ongoing detention of a person under a CDO;
 - psychiatrists ordered by the Supreme Court at a preliminary hearing to examine a prisoner must make a report that contains specified information and that copies of those reports be given to the offender and the Attorney General within a specified period.
69. The Committee has written to the Minister for advice as to why the Bill does not contain these safeguards.

3. Independent Commission Against Corruption Amendment (Operations Review Committee) Bill 2006

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| 6. The Committee has not identified any issues under s 8A(1)(b) of the <i>Legislation Review Act 1987</i> . |
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4. Jury Amendment (Verdicts) Bill 2006

Majority verdicts - right to fair trial: proposed s 55F

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| 15. The Committee notes that trial by jury is a central feature of the Australian criminal justice system, which helps to protect the rights of accused persons. The Committee further notes that the High Court has consistently maintained that unanimity is an essential feature of the right to trial by jury for criminal offences under the Commonwealth Constitution. |
| 16. The Committee also notes that the right to be presumed innocent until proved guilty beyond reasonable doubt is a fundamental personal right. The Committee further notes that a dissenting juror objectively suggests the existence of reasonable doubt regarding a person's guilt and allowing a conviction in such circumstances increases the risk of convicting the innocent. |
| 17. The Committee notes the assertion that majority verdicts should reduce the incidence of retrials. |
| 18. The Committee also notes that the Bill purports to mitigate any adverse impact on personal rights by requiring that a majority verdict be made by 11 of 12 jurors and only after a minimum of 8 hours of deliberation during which it has not been possible to reach a unanimous verdict. |
| 19. The Committee brings to Parliament's attention the opinion of the High Court which stated, inter alia, that " <i>a verdict returned by a majority of jurors, over the dissent of others, objectively suggests the existence of a reasonable doubt and carries a greater risk of conviction of the innocent than does a unanimous verdict.</i> " The Committee refers to Parliament the question of whether majority verdicts unduly trespass on the right to be presumed innocent until proved guilty beyond reasonable doubt. |

5. Legal Profession Amendment Bill 2006

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| 2. The Committee has not identified any issues under s 8A(1)(b) of the <i>Legislation Review Act 1987</i> . |
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6. Water Management Amendment (Water Property Rights Compensation) Bill 2006*

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| 12. The Committee has not identified any issues under s 8A(1)(b) of the <i>Legislation Review Act 1987</i> . |
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SECTION B: Ministerial Correspondence — Bills Previously Considered

7. Crimes (Sentencing Procedure) Amendment (Existing Life Sentences) Act 2005

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| 8. | The Committee notes that the Attorney General has not answered the question as to whether the Act contravenes Australia's obligations under the UN Convention on the Rights of the Child, and if so, the justification for that contravention. |
| 9. | The Committee thanks the Attorney for his reply. |

8. Motor Accidents Compensation Amendment Bill 2006 and the Motor Accidents (Lifetime Care and Support) Bill 2006

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| 6. | The Committee thanks the Minister for his reply. |
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9. Transport Administration Amendment (Public Transport Ticketing Corporation) Bill 2005

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| 9. | The Committee thanks the Minister for his reply. |
| 10. | The Committee has again written to the Minister for further advice as to why administrative protections are preferable to statutory protections such as making the PTTC subject to NSW privacy law in the Bill itself or prescribing PTTC as an authority to be opted into the <i>Federal Privacy Act 1998</i> . |

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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