



SUMMARY OF CONCLUSIONS

***LEGISLATION REVIEW DIGEST* No. 15 of 2005**

29 November 2005

Legislation Review Digest No. 15 of 2005 contains the Legislation Review Committee's consideration of bills introduced into Parliament in the sitting week beginning 15 November 2005 and any reports on regulations since the previous *Digest*.

The Bills reported on include:

- **Commission for Children and Young People Amendment Bill 2005;**
- **Companion Animals Amendment Bill 2005;**
- **Criminal Procedure Amendment (Sexual Offence Case Management) Bill 2005;**
- **Industrial Relations Amendment Bill 2005;**
- **Mine Safety (Cost Recovery) Bill 2005;**
- **Parliamentary Superannuation Legislation Amendment Bill 2005;**
- **State Revenue Legislation Further Amendment Bill 2005;**
- **Terrorism (Police Powers) Amendment (Preventative Detention) Bill 2005;**
- **Transport Administration Amendment (Public Transport Ticketing Corporation) Bill 2005; and**
- **Water Management Amendment Bill 2005.**

SUMMARY OF CONCLUSIONS

SECTION A: Comment on Bills

1. Commission for Children and Young People Amendment Bill 2005

Reversal of onus/procedural fairness: proposed s 33J

- | | |
|-----|---|
| 13. | The Committee notes that the provisions of proposed s 33J place a considerable onus on a prohibited person, by requiring that person to prove that he or she does not constitute a risk to children. |
| 14. | The Committee notes that proposed s 33J is a key recommendation of the <i>Review of the Commission for Children and Young People Act 1998 and the Child Protection (Prohibited Employment) Act 1998</i> , and that its terms effectively codify the existing jurisprudence in this area of the law. |
| 15. | Having regard to the aims of the Bill, the recommendations of the Review, the matters which the Commission or a relevant tribunal may take into account pursuant to s 33J(3), the continuing right to a hearing, the narrow judicial definition of risk, and the public interest in ensuring the safety of children, the Committee does not consider that this reverse onus unduly trespasses upon the rights and liberties of a prohibited person. |

Reversal of onus: proposed s 41

- | | |
|-----|--|
| 22. | The Committee considers that a <i>legal burden</i> of proof should not be placed on a defendant without special justification. |
| 23. | The Committee notes that proposed new s 41 places a legal burden on a defendant to prove any reasonable excuse. |
| 24. | The Committee has written to the Minister to seek her advice as to the need to place a legal rather than an evidential burden of proof on defendants. |
| 25. | The Committee refers to Parliament the question of whether placing a legal burden of proof on a defendant regarding whether he or she has a reasonable excuse for failing to comply with s 41, which carries a maximum penalty of \$5,500, 6 months' imprisonment, or both, is an undue trespass on the rights and liberties of employers. |

Removal of appeal rights: proposed s 33G

- | | |
|-----|--|
| 29. | The Committee notes that a prohibited person found guilty of an offence prescribed by proposed s 33G(1) has no right to make a review application, subject to the exceptions set out in proposed s 33G(2). |
|-----|--|

30. However, having regard to the seriousness of the crimes referred to in proposed s 33G(1) and the paramountcy of the safety of children, the Committee does not consider that this refusal of review rights constitutes an undue trespass on the rights and liberties of persons who are prohibited under the Act.

2. Companion Animals Amendment Bill 2005

Penalty for strict liability offence: Schedule 1 [32], [33], [74] & [85]

11. However, the Committee notes the importance of placing a positive duty on the owners of dangerous and restricted dogs to ensure they do not pose a risk to the public.
12. The Committee also notes that fault liability is one of the most fundamental protections of the criminal law and is concerned that severe penalties are to be imposed in the absence of fault.
13. The Committee has written to the Minister for advice as to the need to impose high monetary penalties and, in the case of s 16(1A) a term of imprisonment, for strict liability offences rather than only imposing severe penalties for offences where intention, recklessness or criminal negligence are involved.

3. Criminal Procedure Amendment (Sexual Offence Case Management) Bill 2005

7. The Committee has not identified any issues under s 8A(1)(b) of the *Legislation Review Act 1987*.

4. Industrial Relations Amendment Bill 2005

Retrospectivity: Schedule 1[7] & [8]

14. The Committee will always be concerned with retrospective legislation that adversely impacts on any person. The Committee notes that these amendments may have an adverse impact on some people (eg, employers).
15. The Committee also notes the public interests in enabling the Commission to consider all relevant agreements when determining if a work contract is unfair and in ensuring that disputes between employers and employees are resolved quickly and cheaply.
16. The Committee also notes the exclusion of proceedings pending in a higher court from the application of these amendments.
17. For these reasons, the Committee is of the view that the retrospective application of the amendments to sections 106 and 179 in Schedule 1[7] and [8] respectively, does not unduly trespass on personal rights or liberties.

Appeal/Review Rights: Schedule 1[5]

- | | |
|-----|--|
| 20. | The Committee will always be concerned to identify where a Bill purports to remove or restrict appeal rights. |
| 21. | However, in this case, the Committee notes that the restriction applies to allow the Commission to complete its proceedings and does not exclude appeal to the Court of Appeal on jurisdictional questions or an appeal to the Full Bench of the Commission. |
| 22. | The Committee is of the view that Schedule 1[5] does not unduly trespass on the personal right of a person to appeal. |

5. Mine Safety (Cost Recovery) Bill 2005

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

6. Parliamentary Superannuation Legislation Amendment Bill 2005

- | | |
|----|--|
| 3. | The Committee has not identified any issues under s 8A(1)(b) of the <i>Legislation Review Act 1987</i> . |
|----|--|

7. State Revenue Legislation Further Amendment Bill 2005

Retrospectivity: proposed cl 2(2)

- | | |
|----|--|
| 7. | The Committee will always be concerned to identify the retrospective application of laws that adversely impact on any person. |
| 8. | The Committee notes that allowing a period of time between the introduction of a Bill with provisions preventing duty avoidance and the commencement of those provisions may undermine the intent of those provisions and have other adverse consequences. |
| 9. | The Committee therefore considers that commencing schedule 1[10]-[14] on the date the Bill was introduced into Parliament does not unduly trespass on personal rights and liberties. |

8. Terrorism (Police Powers) Amendment (Preventative Detention) Bill 2005

Right to Liberty; Arbitrary Arrest and Detention: Proposed sections 26D & 26V

- | | |
|-----|---|
| 23. | The Committee is of the view that the right to liberty and the freedom from arbitrary detention are fundamental human rights and as such should not be derogated from except in extraordinary circumstances warranted by compelling public interest considerations and only to the extent necessary to meet those public interest objectives. |
|-----|---|

24. The Committee is also of the view that where legislation provides for derogation from these rights, it should also provide safeguards to minimise the trespass on those rights. The Committee notes that judicial oversight of the PDO regime in this Bill is an important safeguard.
25. The Committee has written to the Attorney General for advice in relation to the following matters:
- why the threshold for granting an interim and final PDO is “reasonable suspicion” and not “reasonable belief”;
 - why the Bill does not prescribe a maximum number of orders that can be made in relation to the same person in order to prevent their being detained for an indefinite period under a PDO or an IPDO; and
 - the justification for setting 14 days, rather than a lesser period, as the maximum period a person may be detained under a PDO.
26. The Committee refers to Parliament the question as to whether the PDO regime unduly trespasses on the fundamental right of a person not to be detained arbitrarily.

Prohibited contact orders: Proposed section 26N

31. The Committee notes that prohibited contact orders impose significant restraints on a person’s enjoyment of their fundamental rights.
32. The Committee notes that the Bill provides that the detained person may ask the Court to revoke a prohibited contact order. However, the Committee also notes that the person may not be able to enforce that right as the Bill does not require them to be notified either of the making of the order or its contents, but expressly provides that they do not need to be so informed when they are arrested under the PDO to which the prohibited contact order relates.
33. The Committee has written to the Attorney General for advice as to why a detained person need not be informed of a prohibited contact order.
34. The Committee refers to Parliament the question of whether the prohibited contact order regime unduly trespasses on personal rights and liberties.

Fair Trial: Proposed sections 26G, 26H, 26I, 26M & 26N

39. The Committee notes that a lack of a hearing process before a court for authorising any form of preventative detention significantly aggravates the trespass on the right to freedom from arbitrary detention and the right to a fair trial.

- | | |
|-----|---|
| 40. | To provide greater protection against a possible trespass on rights caused by the lack of a hearing, the Committee is of the view that the Bill should expressly provide that the Supreme Court must be satisfied that there are urgent circumstances warranting the granting of an interim preventative detention order before it makes such an order. |
| 41. | The Committee has written to the Attorney General for advice as to why the Bill does not so expressly provide. |
| 42. | The Committee refers to the Parliament the question as to whether the lack of a hearing of an application for an interim PDO is an undue trespass on personal rights and liberties. |
| 46. | The Committee is of the view that, for hearings to comply with the right to a fair trial, the Bill should provide that the burden of proof lies on the applicant who, consistent with the serious consequences for the subject of a PDO, must meet the higher criminal standard of “beyond reasonable doubt”. |
| 47. | The Committee has written to the Attorney General for advice as to why the Bill does not so provide. |

Self-Incrimination and the Right to Silence: Proposed section 26ZK

- | | |
|-----|---|
| 56. | The Committee notes that the privilege against self-incrimination is an important rule of law principle and a fundamental human right. |
| 57. | The Committee also notes that the Bill does not protect this right against certain significant intrusions. |
| 58. | The Committee has written to the Attorney General for advice as to why, consistent with the preventative purposes of the Bill, the Bill does not protect this right by: |
| (a) | providing that any statements made by the detainee during preventative detention are inadmissible in subsequent proceedings; or |
| (b) | requiring the detaining officer to caution a detainee that anything they do say may be used against them in legal proceedings; and |
| (c) | expressly excluding questioning by non-police officers. |
| 59. | The Committee refers to Parliament the question as to whether the failure of the Bill to so provide unduly trespasses on a person’s fundamental right to silence. |

Rights to legal representation & to have a lawyer of one’s own choosing: Proposed section 26ZG

- | | |
|-----|--|
| 73. | The Committee notes that the right to have legal counsel of one’s own choosing is an important attribute of the right to a fair trial and a fundamental human right recognised under international law and the common law. |
|-----|--|

74. The Committee also notes that the Bill provides for a person detained under a PDO to have legal representation and to choose his or her own lawyer, subject to some significant restrictions, namely:
- (a) a detained person's entitlement to seek legal advice is limited to seeking advice, and arranging legal representation, in relation to challenging the legality of the preventative detention order or their treatment under that order;
 - (b) the detained person's choice of lawyer may be circumscribed by a prohibited contact order; and
 - (c) all communications between the detained person and their lawyer must be monitored, thereby undermining the right to legal representation.
75. The Committee has written to the Attorney General for advice as to the need to so limit the matters a detained person can discuss with his or her lawyer and the low threshold in the test for a prohibited contact order in relation to a person's lawyer.
76. The Committee refers to Parliament the question as to whether proposed section 26Z unduly trespasses on the fundamental right of a detained person to have legal counsel of his or her own choosing.

Legal Professional Privilege: Proposed sections 26ZI and 26ZQ

86. The Committee notes legal professional privilege is a common law right in Australia that has been acknowledged by the High Court to be a fundamental human right.
87. The Committee also notes that the rationale behind the breadth of protection under the common law is not solely the importance of privacy of communications, but relates more fundamentally to the proper administration of justice.
88. The Committee is of the view that the Bill significantly trespasses on this right by prohibiting contact with a lawyer unless the content and meaning of the communications between the detained person and their lawyer can be effectively monitored.
89. The Committee is also of the view that this requirement substantially diminishes the enjoyment by the detained person of their fundamental right to legal representation.
90. The Committee has written to the Attorney General for advice as to the need to monitor such communications in the manner prescribed by the Bill rather than in a manner that would better protect fundamental rights, such as that used in relation to material seized under search warrant.

91. The Committee refers to Parliament the question as to whether proposed section 26ZI requiring monitoring by the police of all communication between a detained person and their lawyer unduly trespasses on the person's right to legal counsel and legal professional privilege.

Strict Liability: Proposed sections 26T, 26ZC, 26Y, 26Z, 26ZI, 26ZK, 26ZL & 26ZM

98. The Committee has written to the Attorney General for advice as to why proposed section 26ZC does not expressly state the fault element for the offence under that section, especially given that it provides for a term of imprisonment upon conviction.
99. The Committee refers to Parliament the question as to whether proposed section 26ZC unduly trespasses on personal rights or liberties by providing for a term of imprisonment for an offence with no fault element.
102. The Committee notes the important public interest in ensuring police officers comply with the procedural requirements in proposed sections 26Y, 26Z, 26ZI, 26ZK, 26ZL and 26ZM given the vulnerability of persons detained under the Bill and the exceptional powers police officers have over them.
103. The Committee refers to Parliament the question as to whether these proposed sections unduly trespass on personal rights or liberties by providing for a term of imprisonment for an offence with no fault element.

Rights of the Child: Proposed section 26E

106. The Committee notes the particular vulnerability of children and the importance of protecting their rights and notes that a police officer must release a minor from detention "as soon as practicable" after the officer becomes satisfied that the person is a minor.
107. The Committee has written to the Attorney General for advice as to why the Bill does not expressly provide that "as soon as practicable" refers to the ability of the child to be handed over to its parents or guardians and not to the needs of the police officer.

Right to compensation

110. The Committee considers that, while it may be considered necessary for such draconian powers to exist in order to protect community safety, it is not appropriate that an innocent person who suffers damage as a result of the exercise of those powers should be left to bear the cost of that damage.
111. The Committee has written to the Attorney General to seek his advice on the practicability of providing a compensation regime for innocent persons who suffer damage to their liberty, reputation, family life or employment as a result of the exercise of a preventative detention order.

112. The Committee refers to Parliament the question of whether the lack of a compensation regime for innocent persons who suffer damage as a result of the enforcement of a preventative detention order trespasses unduly on personal rights and liberties.

Review Mechanisms: Proposed sections 26ZS, 26ZN & 26ZO

121. The Committee notes the importance of mandatory independent review for legislation which confers extraordinary powers that significantly trespass on rights in order to address specific circumstances.
122. The Committee considers that the acceptability of such extraordinary powers is in part dependent on:
- the duration for which the powers will exist;
 - the frequency of their review; and
 - the level of independence of any body undertaking their review.
123. The Committee refers to Parliament the question of whether the length of the period before which the sunset clause takes effect and the frequency and independence of the review of the powers is appropriate given the extraordinary nature of the powers provided by the Bill and the extent of their trespass on personal rights and liberties.

9. Transport Administration Amendment (Public Transport Ticketing Corporation) Bill 2005

11. The Committee is of the view that the right to privacy is an important right that should only be modified or abrogated on clear public interest grounds and only to the extent necessary to achieve those public interests.
12. The Committee notes that the conversion of the PTTC into a State-owned corporation under proposed s 35ZM would result in the PTTC not being subject to privacy safeguards in regard to its handling of personal information, apart from the disclosure restrictions in proposed 35Y in Schedule 11.
13. The Committee also notes that the Minister's office has advised that the PTTC will, prior to its conversion into a State-owned corporation, establish policies and procedures for the ongoing protection of personal information. The Committee notes, however, that administrative protections offer more limited protection than statutory-based protections.
14. The Committee has written to seek the Minister's 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 the PTTC as an authority to be opted into the Federal *Privacy Act 1998*.

- | |
|---|
| 15. The Committee refers to Parliament the question of whether the limited nature of the safeguards for personal information held by the PTTC as a State-owned corporation unduly trespasses on the right to privacy. |
|---|

10. Water Management Amendment Bill 2005

Compensation

Changes to plans by an Act

- | |
|--|
| 9. The Committee notes that the Bill removes any right to compensation arising from amendments to management plans made by any Act. |
| 10. The Committee notes that such amendments include amendments to plans under the Bill to allow the Minister to provide for the floodplain harvesting of water. |
| 11. The Committee refers to Parliament the question of whether removing any right to compensation for amendments to management plans by an Act unduly trespasses on personal rights and liberties. |

Risk assignment framework

- | |
|---|
| 13. The Committee does not consider that the future exclusion of access to compensation for reductions in allocations arising from natural causes, or for reductions of 3% or less over 10 years as a result of improved scientific knowledge of environmental needs, trespasses unduly on personal rights and liberties. |
|---|

Acts or omissions prior to commencement of a management plan: proposed s 87AB

- | |
|---|
| 15. The Committee notes that the purpose of proposed s 87AB is to remove any right to compensation of those affected by the amendment of certain inland groundwater plans before their commencement. |
| 16. The Committee notes that a structural adjustment package is to be paid to groundwater irrigators and communities affected by those amendments. |
| 17. The Committee also notes that the removal of compensation for acts and omissions before the commencement of a plan applies generally and is not limited to the five groundwater plans mentioned in the second reading speech. |
| 18. The Committee refers to Parliament the question of whether proposed s 87AB unduly trespasses on the right to compensation for any act or omission occurring before the commencement of a management plan. |

Presumption of innocence: proposed section 341(1A)

- | | |
|-----|--|
| 23. | The Committee has written to the Minister to seek his advice as to whether it is necessarily the case that a licensee who has nominated a water supply work under s 71W that is controlled by another person is responsible for all the water taken by that work and, if not, why proposed section 341(1A) makes a licensee necessarily criminally liable for water taken by that work rather than establishing a rebuttable presumption regarding such liability. |
| 24. | The Committee refers to Parliament the question of whether proposed section 341(1A) trespasses unduly on the right to the presumption of innocence. |

Validation of management plans: Schedule 1 [50]

- | | |
|-----|--|
| 29. | The Committee notes that a purpose of validating all water management plans at the commencement of schedule 1 [50] is to validate certain plans whose commencement was deferred and which were subject to appeal and consequent amendment. |
| 30. | The Committee notes that this validating provision would remove the right to appeal the validity of any management plan or amendment of a management plan that was in its judicial review period at the commencement of the provision. |
| 31. | The Committee refers to Parliament the question of whether schedule 1 [50] unduly trespasses on the right to review management plans and amendments to management plans. |

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.

Copies of *Legislation Review Digests* are available from www.parliament.nsw.gov.au/lrc/digests.
Subscriptions to the *Digest* are available by contacting the Committee Secretariat on 02 9230 3418 or legislation.review@parliament.nsw.gov.au.

Mr Allan Shearan MP
Chairman