



PARLIAMENT OF NEW SOUTH WALES

LEGISLATION REVIEW COMMITTEE

Parliament of New South Wales · Macquarie Street · Sydney NSW 2000 · Australia

SUMMARY OF CONCLUSIONS

***LEGISLATION REVIEW DIGEST* No. 8 of 2006**

2 June 2006

Legislation Review Digest No. 8 of 2006 contains the Legislation Review Committee's consideration of bills introduced into Parliament in the sitting week beginning 22 May 2006 and any reports on regulations since the previous *Digest*.

The Bills reported on include:

- **Children (Detention Centres) Amendment Bill 2006;**
- **Coal and Oil Shale Mine Workers (Superannuation) Amendment Bill 2006;**
- **Correctional Services Legislation Amendment Bill 2006;**
- **Courts Legislation Further Amendment Bill 2006;**
- **Drug Misuse and Trafficking Amendment (Hydroponic Cultivation) Bill 2006;**
- **Fair Trading Amendment Bill 2006;**
- **Interpretation Amendment Bill 2006;**
- **Liquor Amendment (2006 FIFA World Cup Hotel Trading) Bill 2006;**
- **Local Government Amendment (Waste Removal Orders) Bill 2006;**
- **State Revenue Legislation Amendment Bill 2006;**
- **Statute Law (Miscellaneous Provisions) Bill 2006;**
- **Superannuation Legislation Amendment Bill 2006;**
- **Sydney Cricket and Sports Ground Amendment Bill 2006;**
- **University of Technology (Kuring-gai Campus) Bill 2006*;** and
- **Young Offenders Amendment (Reform of Cautioning and Warning) Bill 2006*.**

Correspondence on Bills includes:

- **Education Legislation Amendment (Staff) Bill 2006;** and
- **Totalizator Legislation Amendment (Inter-jurisdictional Processing of Bets) Bill 2006.**

SUMMARY OF CONCLUSIONS

SECTION A: Comment on Bills

1. Children (Detention Centres) Amendment Bill 2006

Solitary confinement: proposed amended s 21

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| 12. | The Committee notes that the Bill provides for a considerable increase in the amount of time for which a young offender may be held in isolation due to misbehaviour, doubling it from 12 to 24 hours for offenders over the age of 16, and quadrupling it from 3 to 12 hours for offenders under the age of 16. |
| 13. | The Committee also notes that Art 67 of the United Nations <i>Rules for the Protection of Juveniles Deprived of their Liberty</i> expressly forbids the use of solitary confinement for young offenders as a form of cruel, inhuman or degrading punishment. |
| 14. | The Committee has written to the Minister for advice as to whether allowing the isolation of juvenile detainees under section 21 is consistent with the requirements of the United Nations <i>Rules for the Protection of Juveniles Deprived of their Liberty</i> , and, if it is not consistent with those rules, the justification for the inconsistency. |
| 15. | The Committee refers to Parliament whether the increase of the time to which a young offender may be subject to isolation trespasses unduly on the rights of young offenders in detention. |

Medical treatment without consent: proposed s 27

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| 18. | The Committee notes that compelling a person to undergo medical treatment in the absence of his or her consent is a significant trespass to that person's rights and liberties. |
| 19. | The Committee notes, however, that the medical treatment in question can only be given: <ul style="list-style-type: none">- if it is necessary for the purpose of saving life or preventing serious damage to health;- pursuant to a decision by the Chief Executive Officer, Justice Health; and- once the Chief Executive Officer has taken into account the cultural background and religious views of the detainee [proposed new s 27(2)]. |
| 20. | In the circumstances, the Committee does not consider that such compulsory medical treatment unduly trespasses on personal rights and liberties. |

Privacy: proposed s 37J

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| 27. | The Committee notes that mandatory drug and alcohol testing are an invasion of a person's privacy. The Committee also notes that the Bill provides for the collection and testing of urine, which involves a significant breach of a person's privacy. |
| 28. | The Committee further notes that as sanctions may be imposed for failing to submit to a drug or alcohol test, a juvenile justice officer cannot be said to freely consent to the testing. |
| 29. | The Committee also notes the public interest in ensuring that juvenile justice officers are not under the influence of alcohol and prohibited drugs while working. |
| 30. | The Committee refers to Parliament the question whether the Bill unduly trespasses on a juvenile justice officer's right to privacy by providing for mandatory drug and alcohol testing, including urine tests. |

2. Coal and Oil Shale Mine Workers (Superannuation) Amendment Bill 2006**Trespasses on personal rights and liberties [s 8A(1)(b)(i) *LRA*]****Retrospectivity: Clause2**

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| 8. | The Committee notes that if the Bill does not receive assent before 1 July 2006, it has the potential to create uncertainty for mine operators and mine employees. |
| 9. | The Committee notes that the Minister's office has expressed confidence that the Bill will be passed before 1 July 2006. |

3. Correctional Services Legislation Amendment Bill 2006**Right to receive medical care: proposed s 72B(2)**

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| 18. | The Committee notes that the right to adequate medical care is an internationally-recognised human right. |
| 19. | The Committee also notes that this right is expressed in section 72A of the <i>Crimes (Administration of Sentences) Act 1999</i> . |

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20. The Committee notes that it is common medical practice for a post-pubertal male who has been diagnosed with cancer to be offered the option of having semen stored, in case the treatment renders that person sterile, thereby preserving the person's reproductive health as much as possible. The Committee also understands that the ongoing cost of storing sperm is usually a private expense.
 21. The Committee considers that the provision in the Bill denying a "serious indictable offender" the right to have his or her reproductive material stored prior to treatment likely to render him or her infertile or when otherwise medically advised is a trespass on the right to adequate medical treatment.
 22. The Committee has written to the Minister to seek his advice as to the justification for this trespass.
 23. The Committee refers to Parliament the question as to whether this constitutes an undue trespass on the personal rights of "serious indictable offenders".

Right to freedom from interference with, and to found, a family: proposed s 72B(2)

30. The Committee notes that respect for family life and the right to found a family are internationally-recognised human rights.
31. The Committee also notes that, in considering the application of the respect for family life to prisoners, the European Court of Human Rights has allowed Governments to limit its applicability on a case-by-case basis, having regard to the maintenance of public confidence in the penal system, and the welfare of any child conceived as a result of artificial insemination and, therefore, the general interests of society as a whole.
32. The Committee also notes that the European Court of Human Rights made it clear that there is no place in a system where tolerance and broadmindedness are the acknowledged hallmarks of democratic society, for automatic forfeiture of rights by prisoners based purely on what might offend public opinion.
33. The Committee notes that the Bill provides for a blanket restriction on the access of a "serious indictable offender" to artificial insemination facilities, without any consideration of individual circumstances.
34. The Committee considers that this is a trespass on the individual rights of "serious indictable offenders".
35. The Committee has written to the Minister to seek his advice as to the justification for this trespass.
36. The Committee refers to Parliament the question as to whether this blanket restriction on reproductive rights constitutes an undue trespass on the individual rights of "serious indictable offenders".

Double jeopardy: proposed s 72B(3)

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| 42. | The Committee notes the importance of the double jeopardy rule within the common law tradition and as an internationally-recognised human right. |
| 43. | The Committee is strongly of the view that any weakening of the double jeopardy rule should only be allowed if overwhelmingly in the public interest. |
| 44. | The Committee notes that the Bill's blanket denial of reproductive rights could be considered as constituting a further punishment in addition to that which the "serious indictable offender" received on judicial sentencing. |
| 45. | The Committee refers to Parliament the question as to whether this exposure to a further penalty constitutes an undue trespass on the individual rights of "serious indictable offenders". |

4. Courts Legislation Further Amendment Bill 2006

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| 4. | The Committee has not identified any issues under s 8A(1)(b) of the <i>Legislation Review Act 1987</i> . |
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5. Drug Misuse and Trafficking Amendment (Hydroponic Cultivation) Bill 2006

Reversal of onus of proof: Clause 8, Proposed section 23A

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| 12. | The Committee notes that proposed s 23A places the onus of proof regarding whether a child was endangered, which is the essence of the offence, on the defendant. |
| 13. | The Committee notes that reversing the onus of proof is inconsistent with the presumption of innocence, which is a fundamental human right. |
| 14. | The Committee notes that while reversing the onus of proof may be appropriate in certain circumstances, proposed s 23A appears to fall outside the Commonwealth guidelines for such provisions. |
| 15. | The Committee has written to the Minister for advice as to the justification for reversing the onus of proof regarding whether a child was endangered. |
| 16. | The Committee refers to Parliament the question whether proposed section 23A trespasses unduly on the right to the presumption of innocence by reversing the onus of proof. |

6. Fair Trading Amendment Bill 2006

Right to Silence: Clause 20(1)(c) and (d)

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| 9. | The Committee notes that the privilege against self-incrimination is a fundamental right expressed in the International Covenant on Civil and Political Rights and the common law. The Committee considers that a bill should not abrogate the right to silence unless such abrogation is justified by, and in proportion to, an object in the public interest. |
| 10. | The Committee notes the importance of consumer protection legislation and ensuring that persons comply with the <i>Fair Trading Act 1987</i> . |
| 11. | The Committee also notes that the Act makes information compelled to be given by a notice under section 20 inadmissible in criminal proceedings but provides no limitations on the use of that information in civil proceedings or indirectly in criminal proceedings. |
| 12. | The Committee has written to the Minister for advice as to why investigating complaints that do not involve breaches of the legislation, or researching and conducting investigations into laws in force, justifies, and is in proportion to, the abrogation of the right to silence under the Bill. |
| 13. | The Committee refers to Parliament the question of whether the Bill's abrogation of the right to silence for the purposes of investigating complaints that do not involve breaches of the legislation, or researching and conducting investigations into laws in force, trespasses unduly on personal rights. |

Use of Self-Incriminating Evidence: Proposed s 20(1)(c) and (d)

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| 16. | The Committee considers that, unless clearly justified, when a bill abrogates the privilege against self-incrimination, information that would otherwise have been subject to this privilege should not be used in any proceedings (including proceedings of a criminal, civil, administrative or disciplinary nature) against the individual, except for proceedings relating to the falsity of the information provided. |
| 17. | The Committee notes that the Bill provides the power to obtain self-incriminating information in relation to complaints under section 9(1)(c) or investigations under 9(2) but does not provide any restriction on the use of that information in civil proceedings or indirectly in criminal proceedings. |
| 18. | The Committee has written to the Minister to seek her advice as to why there is no restriction on the use of such self-incriminating information in civil proceedings or indirectly in criminal proceedings. |

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| 19. | The Committee refers to parliament the question of whether allowing self-incriminating information compelled to be produced under the Bill to be used against the person providing the information in civil proceedings or indirectly in criminal proceedings trespasses unduly on personal rights and liberties. |
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7. Interpretation Amendment Bill 2006

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| 3. | The Committee has not identified any issues under s 8A(1)(b) of the <i>Legislation Review Act 1987</i> . |
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8. Liquor Amendment (2006 FIFA World Cup Hotel Trading) Bill 2006

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| 6. | The Committee did not identify any issues arising under s 8A(1)(b) of the <i>Legislation Review Act 1987</i> . |
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9. Local Government Amendment (Waste Removal Orders) Bill 2006

Procedural fairness: Schedule 1[3]

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| 11. | The Committee notes the important public interest this Bill seeks to address and the important right of a person to procedural fairness, including the right to be heard. |
| 12. | The Committee also notes the advice it has received from the Minister's office on this matter. |
| 13. | The Committee refers to Parliament the question whether proposed s 23A unduly trespasses on the personal rights by removing the right to be notified of, and be heard in relation to, a waste removal order. |

Removal of review rights: Schedule 1[4] & [8]

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| 18. | The Committee is of the view that review of administrative decisions, especially external review, is an important mechanism to ensure the appropriate exercise of executive power. The Committee is of the view that it is especially important if the person who is the subject of the decision has been denied an opportunity to make representations on their own behalf prior to the making of the decision. |
| 19. | The Committee notes the purpose of waste removal orders and the important responsibility of local government to protect public health. The Committee also notes the advice in the second reading speech that the current review process under the Act is lengthy and, therefore, may be inappropriate in dealing with urgent matters of public health and safety. |
| 20. | The Committee also notes that some appeal rights to the Land and Environment Court remain, including appeal on the ground that a waste removal order was not lawfully made. |

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| 21. The Committee refers to Parliament the question whether the Bill unduly trespasses on personal rights by removing all possibility of review of the making of a waste removal order. |
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10. State Revenue Legislation Amendment Bill 2006

Retrospectivity: Part 12 - Proposed amendment to the Pay-roll Tax Act 1971

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| 6. As the employee share scheme amendments do not appear to have a detrimental affect on any person but are to the benefit of employers, the Committee does not consider that their retrospective application trespasses on personal rights or liberties. |
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11. Statute Law (Miscellaneous Provisions) Bill 2006

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

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| 3. The Committee has not identified any issues under s 8A(1)(b) of the <i>Legislation Review Act 1987</i> . |
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13. Sydney Cricket and Sports Ground Amendment Bill 2006

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| 3. The Committee has not identified any issues under s 8A(1)(b) of the <i>Legislation Review Act 1987</i> . |
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14. University of Technology (Kuring-gai Campus) Bill 2006*

Compulsory acquisition of land not on just terms: Clause 6(5)

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| 7. The Committee is of the view that requiring owners of land and those with an interest in land to be compensated when a government compulsorily acquires that land is an important safeguard for the right to property. Given its importance, the Committee is of the view that it should always apply unless there are exceptional circumstances. |
| 8. The Committee is unclear as to what, if any, exceptional circumstances apply in this case to warrant compulsory acquisition without just compensation. |
| 9. The Committee refers to Parliament the question whether the Bill unduly trespasses on personal rights by providing for compulsory acquisition of land and interests in land without compensation |

15. Young Offenders Amendmnt (Reform of Cautioning and Warning) Bill 2006

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| 3. 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

16. Education Legislation Amendment (Staff) Bill 2006

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| 8. The Committee thanks the Minister for her reply. |
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17. Totalizator Legislation Amendment (Inter-jurisdictional Processing of Bets) Bill 2006

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| 6. The Committee thanks the Minister for his reply. |
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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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