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Legislation Review Committee

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* Denotes Private Member's Bill

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FUNCTIONS OF THE LEGISLATION REVIEW COMMITTEE

The functions of the Legislation Review Committee are set out in the *Legislation Review Act 1987*:

8A Functions with respect to Bills

- (1) The functions of the Committee with respect to Bills are:
 - (a) to consider any Bill introduced into Parliament, and
 - (b) to report to both Houses of Parliament as to whether any such Bill, by express words or otherwise:
 - (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
- (2) A House of Parliament may pass a Bill whether or not the Committee has reported on the Bill, but the Committee is not precluded from making such a report because the Bill has been so passed or has become an Act.

9 Functions with respect to Regulations:

- (1) The functions of the Committee with respect to regulations are:
 - (a) to consider all regulations while they are subject to disallowance by resolution of either or both Houses of Parliament,
 - (b) to consider whether the special attention of Parliament should be drawn to any such regulation on any ground, including any of the following:
 - (i) that the regulation trespasses unduly on personal rights and liberties,
 - (ii) that the regulation may have an adverse impact on the business community,
 - (iii) that the regulation may not have been within the general objects of the legislation under which it was made,
 - (iv) that the regulation may not accord with the spirit of the legislation under which it was made, even though it may have been legally made,
 - (v) that the objective of the regulation could have been achieved by alternative and more effective means,
 - (vi) that the regulation duplicates, overlaps or conflicts with any other regulation or Act,
 - (vii) that the form or intention of the regulation calls for elucidation, or
 - (viii) that any of the requirements of sections 4, 5 and 6 of the Subordinate Legislation Act 1989, or of the guidelines and requirements in Schedules 1 and 2 to that Act, appear not to have been complied with, to the extent that they were applicable in relation to the regulation, and
 - (c) to make such reports and recommendations to each House of Parliament as it thinks desirable as a result of its consideration of any such regulations, including reports setting out its opinion that a regulation or portion of a regulation ought to be disallowed and the grounds on which it has formed that opinion.
- (2) Further functions of the Committee are:
 - (a) to initiate a systematic review of regulations (whether or not still subject to disallowance by either or both Houses of Parliament), based on the staged repeal of regulations and to report to both Houses of Parliament in relation to the review from time to time, and
 - (b) to inquire into, and report to both Houses of Parliament on, any question in connection with regulations (whether or not still subject to disallowance by either or both Houses of Parliament) that is referred to it by a Minister of the Crown.
- (3) The functions of the Committee do not include an examination of, inquiry into or report on a matter of Government policy, except in so far as such an examination may be necessary to ascertain whether any regulations implement Government policy or the matter has been specifically referred to the Committee under subsection (2) (b) by a Minister of the Crown.

GUIDE TO THE *LEGISLATION REVIEW DIGEST*

Part One – Bills

Section A: Comment on Bills

This section contains the Legislation Review Committee's reports on Bills introduced into Parliament. Following a brief description of the Bill, the Committee considers each Bill against the five criteria for scrutiny set out in s 8A(1)(b) of the *Legislation Review Act 1987* (see page iii).

Section B: Ministerial correspondence – Bills previously considered

This section contains the Committee's reports on correspondence it has received relating to Bills and copies of that correspondence. The Committee may write to the Minister responsible for a Bill, or a Private Member of Parliament in relation to his or her Bill, to seek advice on any matter concerning that Bill that relates to the Committee's scrutiny criteria.

Part Two – Regulations

The Committee considers all regulations made and normally raises any concerns with the Minister in writing. When it has received the Minister's reply, or if no reply is received after 3 months, the Committee publishes this correspondence in the *Digest*. The Committee may also inquire further into a regulation. If it continues to have significant concerns regarding a regulation following its consideration, it may include a report in the *Digest* drawing the regulation to the Parliament's "special attention". The criteria for the Committee's consideration of regulations is set out in s 9 of the *Legislation Review Act 1987* (see page iii).

Regulations for the special attention of Parliament

When required, this section contains any reports on regulations subject to disallowance to which the Committee wishes to draw the special attention of Parliament.

Regulations about which the Committee is seeking further information

This table lists the Regulations about which the Committee is seeking further information from the Minister responsible for the instrument, when that request was made and when any reply was received.

Copies of Correspondence on Regulations

This part of the *Digest* contains copies of the correspondence between the Committee and Ministers on Regulations about which the Committee sought information. The Committee's letter to the Minister is published together with the Minister's reply.

Appendix 1: Index of Bills Reported on in 2005

This table lists the Bills reported on in the calendar year and the *Digests* in which any reports in relation to the Bill appear.

Appendix 2: Index of Ministerial Correspondence on Bills for 2005

This table lists the recipient and date on which the Committee sent correspondence to a Minister or Private Member of Parliament in relation to Bills reported on in the calendar year. The table also lists the date a reply was received and the *Digests* in which reports on the Bill and correspondence appear.

Appendix 3: Bills that received comments under s 8A of the Legislation Review Act in 2005

This table specifies the action the Committee has taken with respect to Bills that received comment in 2005 against the five scrutiny criteria. When considering a Bill, the Committee may refer an issue that relates to its scrutiny criteria to Parliament, it may write to the Minister or Member of Parliament responsible for the Bill, or note an issue. Bills that did not raise any issues against the scrutiny criteria are not listed in this table.

Appendix 4: Index of correspondence on Regulations reported on in 2005

This table lists the recipient and date on which the Committee sent correspondence to a Minister in relation to Regulations reported on in the calendar year. The table also lists the date a reply was received and the *Digests* in which reports on the Regulation and correspondence appear.

SUMMARY OF CONCLUSIONS

SECTION A: Comment on Bills

1. Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2006 & Crimes (Appeal and Review) Amendment (DNA Review Panel) Bill 2006

CRIMES (APPEAL AND REVIEW) AMENDMENT (DOUBLE JEOPARDY) BILL 2006

Fair Trial (Infringing the Rule against double jeopardy): Schedule 1[2]

31. The Committee notes that the double jeopardy rule is a fundamental principle of the common law. The right not to be tried twice for the same offence is also recognised as a fundamental human right under ICCPR and other human rights treaties.
32. The Committee notes that while some features of the Bill appear consistent with the reopening of a trial in exceptional circumstances in a manner compatible with the ICCPR, certain others appear to risk incompatibility with Australia's obligations under that convention.
33. The Committee has written to the Premier for advice as to:
 - (a) whether the Bill can be amended to ensure that it does not provide for the retrial of an offence (as opposed to the resumption or reopening of an original trial) to avoid incompatibility with international human rights standards; and
 - (b) the justification for the provisions removing acquittal as a bar [proposed ss 100(2) & 101(2)] and allowing retrial for an offence different to that for which the person was acquitted [proposed s 100(3)].
34. The Committee refers to Parliament the question of whether the Bill trespasses unduly on a person's right not to be tried twice for the same offence.

Fair Trial (Right to trial without undue delay): Schedule 1[2]

40. The Committee considers that the conduct of the prosecution since the alleged offence, including whether or not the defendant had been put to trial previously, is relevant to the CCA consideration of what the "interests of justice require" in a particular case.
41. The Committee has written to the Premier for advice as to why the conduct of the prosecution has not been included as a matter for consideration by the CCA in determining the interests of justice.
42. The Committee refers to Parliament the question as to whether the Bill, by not providing that the Court must take into account any delays caused by the conduct of the prosecution in its consideration of whether the interests of justice would be served by allowing an application for a retrial, trespasses unduly on personal rights and liberties.

43. The Committee also notes that the Bill allows multiple proceedings to be brought under Division 3.
44. The Committee has written to the Premier for advice as to the justification for allowing more than one proceeding to be brought under Division 3.
45. The Committee refers to Parliament the question as to whether the Bill, by allowing for multiple Division 3 applications to be made, trespasses unduly on personal rights and liberties.

Fair Trial (Prejudice and Media): Proposed s 111

50. The Committee notes that the Bill recognises the need to implement safeguards to prevent the identification of persons subject to investigation, application or order for re-trial.
51. However, the Committee notes that the Bill does not provide that the right to a fair trial is to have priority when considering the interests of justice or that contravention of a prohibition on publication is an offence.
52. The Committee has written to the Premier for advice as to whether the Bill might be amended to provide that, in granting a publication order, the court should be directed to consider the impact that publication of identifying material will have on any subsequent proceedings and that breach of a non publication is a criminal offence rather than a contempt of court.
53. The Committee refers these matters to Parliament.

Fair Trial (The right to legal representation): Schedule 1[2]

60. The Committee is of the view that the right to legal representation is a very important feature of a fair trial. The Committee notes that it is enshrined in the ICCPR.
61. The Committee also notes that in Australia there is no right to be provided with counsel at the public expense, even in trials for serious offences.
62. Notwithstanding this, the Committee is of the view that, given the removal of the prohibition against double jeopardy and the protection it affords a defendant from inequality and abuse of state power, a right to legal representation at a hearing for a retrial of an acquitted person should be expressly guaranteed in the Bill.
63. The Committee has written to the Premier for advice as to why the Bill does not provide for a right to legal representation and its funding, and whether it might be amended to so provide.
64. The Committee refers to Parliament the question as to whether the Bill trespasses unduly on personal rights by failing to expressly provide for legal representation and its funding.

Unclear definition: Proposed section 109(2)

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| 69. | The Committee notes that the definition of police investigation under the Bill does not include reference to forms of investigation such as surveillance, use of listening devices and questioning by informers acting under police direction. |
| 70. | The Committee has written to the Premier for advice as to whether the Bill might be amended to expand the definition of police investigation to include such activities . |
| 71. | The Committee has also written to the Premier for advice as to whether the Bill might be amended to include factors relevant to the public interest in proposed s 109(5). |
| 72. | The Committee refers to Parliament the question as to whether the Bill unduly subjects rights and liberties to insufficiently defined administrative powers by excluding surveillance, use of listening devices or questioning by informers acting under police direction from the definition of “police investigation” under the Bill. |

CRIMES (APPEAL AND REVIEW) AMENDMENT (DNA REVIEW PANEL) BILL 2006

Equality before the law: Proposed section 89(3)

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| 94. | The Committee notes the important human rights principle of equality before the law, enshrined in the ICCPR to which Australia is a party. |
| 95. | The Committee considers that the different treatment of similarly situated persons based merely on the date of their conviction, without compelling justification, violates this right. |
| 96. | The Committee has written to the Premier for advice as to the justification for excluding those convicted after 19 September 2006 in light of the fundamental right to equality before the law. |
| 97. | The Committee refers to Parliament the question as to whether the Bill unduly trespasses on personal rights by excluding those convicted after 19 September 2006 from applying to the DNA Review Panel. |

Equality and Fair Trial (Excluding Convicted Person Not Under Sentence): Proposed section 89(5)

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| 102. | The Committee notes that the Bill provides that a convicted person cannot make an application to the Panel unless they are currently subject to the sentence imposed on conviction. |
| 103. | The Committee also notes that an effect of imposing such a limitation is to limit the capacity of an individual who has completed their sentence to obtain information, which might affect their claim of innocence. |
| 104. | The Committee further notes that this limitation may impinge on the right of the unlawfully imprisoned to claim compensation, which is protected by the common law, and Articles 9(5) & 14(6) of the ICCPR. |

105. The Committee has written to the Premier for advice as to the justification for this limitation.
106. The Committee refers to Parliament, the question as to whether preventing a convicted person who has completed their sentence from applying to the Panel unduly trespass is on their right to equality before the law, fair trial and compensation for wrongful imprisonment.

Sunset provision: Proposed section 97

110. The Committee notes that pursuant to the sunset clause in proposed section 97 an eligible convicted person must apply to the Panel before it is abolished.
111. The Committee also notes that no such sunset clause applies to prosecutors wishing to re-try an acquitted person under the *Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2006*.
112. The Committee is of the view that this different treatment of the prosecution and the defence in relation to DNA evidence violates the principle of equality of arms that underscores the right to fair trial protected under common law and the ICCPR.
113. The Committee has written to the Premier for advice as to whether, in order to address this inequality, the Bill might be amended to remove the sunset clause and provide for the ongoing existence of the Panel.
114. The Committee refers to Parliament the question as to whether the Bill unduly trespasses on personal rights and freedoms by providing for the abolition of the Panel after 7 or 10 years, as the case may be.

Fair Trial (Rights of the Defence): Proposed section 96

117. The Committee notes the duty on the police and other state officers to retain relevant biological material under certain conditions to ensure it is available for DNA testing in the circumstances prescribed by the Bill.
118. The Committee is of the view that the exceptions to this rule regarding the person ceasing to be an eligible convicted person and the material having already been subject to DNA testing could inappropriately prevent a convicted person from challenging the conviction using this material.
119. The Committee has written to the Premier for advice as to the justifications for providing these two exceptions.
120. The Committee refers to Parliament, the question as to whether the Bill makes rights, liberties or obligations unduly dependent on insufficiently defined administrative powers by prescribing these exceptions.

Part One – Bills

SECTION A: COMMENT ON BILLS

1. CRIMES (APPEAL AND REVIEW) AMENDMENT (DOUBLE JEOPARDY) BILL 2006 & CRIMES (APPEAL AND REVIEW) AMENDMENT (DNA REVIEW PANEL) BILL 2006

Date Introduced:	19 September 2006
House Introduced:	Legislative Assembly
Minister Responsible:	The Hon Morris Iemma MP
Portfolio:	Premier

While these Bills are being considered together by the Parliament, as they deal with different subject matters and raise different considerations for the Committee, they are discussed separately in this report.

CRIMES (APPEAL AND REVIEW) AMENDMENT (DOUBLE JEOPARDY) BILL 2006

Purpose and Description

1. The principal object of this Bill is to enable the retrial of acquitted persons for very serious offences in certain cases.

Background

2. In his second reading speech, the Premier stated:

The Bill ... provides one of the most significant reforms to the criminal law enacted in Australia in recent times. The ancient rule of double jeopardy provides that a person may not be tried for the same offence twice. Its purpose is to ensure that criminal proceedings can be brought to a conclusion, and the result in a trial can be regarded as final. It protects individuals against repeated attempts by the State to prosecute. The rule encourages police and prosecutors to be diligent and careful in their investigation and to gather as much evidence as possible against the accused. In this sense, it promotes fairness to the accused and justice for the victim and the community.

However, ... there will sometimes be cases where diligent police and prosecutors will still fail to find all the possible evidence. Perhaps it is being concealed from them deliberately, or perhaps developments in forensic technology will reveal new evidence or new conclusions to be drawn from existing evidence. In such cases, there may well be grounds to bring the accused back to trial...

Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2006 & Crimes (Appeal and Review) Amendment (DNA Review Panel) Bill 2006

There are other cases where an acquittal is obtained by subverting the trial by threatening witnesses, by tampering with the jury, or by perjury by defence witnesses. Where such cases come to light the double jeopardy law can stand in the way of justice. For these reasons the Government is proposing reforms to the double jeopardy rule ...

The proposals in this Bill are the result of a long and careful process of consultation with the community... The Government released an exposure draft Bill in 2004 and sought expert advice from Acting Justice Jane Mathews. We also considered models proposed by the national Model Criminal Code Officers Committee, as well as pioneering reforms already enacted in the United Kingdom. The community's views and the view of experts in the field have all been taken into account in drafting this Bill.¹

3. The Committee notes that the NSW Bill is substantially modelled on the United Kingdom reforms, though with some modifications. If enacted, NSW would be the first Australian jurisdiction to reform double jeopardy.

The Bill

4. The Bill amends the *Crimes (Local Courts Appeal and Review) Act 2001* to enable the Court of Criminal Appeal, on application by the DPP:
 - to order an acquitted person to be retried for a *life sentence offence* if satisfied that:
 - there is fresh and compelling evidence against the acquitted person in relation to the offence, and
 - in all the circumstances it is in the interests of justice for the order to be made [cl.100]; and
 - to order an acquitted person to be retried *for an offence punishable for 15 years or more* if satisfied that:
 - the acquittal is a tainted acquittal, and
 - in all the circumstances it is in the interests of justice for the order to be made [cl 101].
5. These powers apply to a person who is acquitted of an offence (whether in New South Wales or not) and who, according to the rules on double jeopardy, would be precluded from being retried for the same offence.
6. The Bill defines “***fresh and compelling evidence***” in cl 102 as follows:

Evidence is ***fresh*** if:

 - (a) it was not adduced in the proceedings in which the person was acquitted; and
 - (b) it could not have been adduced in those proceedings with the exercise of reasonable diligence.

¹ The Hon Morris Iemma MP, Premier, Second Reading Speech, Legislative Assembly Hansard, 19 September 2006.

Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2006 & Crimes (Appeal and Review) Amendment (DNA Review Panel) Bill 2006

Evidence is **compelling** if:

- (a) it is reliable;
- (b) it is substantial; and
- (c) in the context of the issues in dispute in the proceedings in which the person was acquitted, it is highly probative of the case against the acquitted person.

7. The Bill expressly provides that, at the retrial of an accused person, the prosecution is not entitled to refer to the fact that the Court of Criminal Appeal has found that it appears that:
 - there is fresh and compelling evidence against the acquitted person; or
 - that it is more likely than not, that, but for the commission of the administration of justice offence, the accused person would have been convicted [cl106(5)].
8. An acquittal is “**tainted**” if there has been an administration of justice offence (eg bribery²) committed in connection with the acquittal, and it is more likely than not that the accused person would have been convicted but for the commission of that offence [cl 103].³
9. Proposed section 104 provides that:

It is not in the interests of justice to make an order for the retrial of an acquitted person, unless the Court of Criminal Appeal is satisfied that a fair retrial is likely in the circumstances.

In determining this, the Court “is to have regard in particular” to the length of time since the acquittal and whether police or prosecutors have failed to act with reasonable diligence or expedition in connection with the application for the retrial.
10. In addition to allowing the Crown to apply for a retrial of an acquitted person, the Bill also allows the Crown to appeal against an acquittal of a person on a question of law if:
 - the jury was directed to acquit by the trial Judge; or
 - the proceedings were tried by a Judge without a jury.
11. The Bill also provides that:
 - the DPP must authorise a police investigation for the purposes of an application for a retrial [cl 109];
 - not more than one application for a retrial may be made under proposed Division 2 in respect of an acquittal [cl 105];

² These offences are defined in proposed section 98 as bribery, perversion of the course of justice and perjury.

³ If the conviction for the administration of justice offence is quashed on appeal after the Court has ordered the acquitted person to be retried because of the conviction, the person may apply to the court to set aside the order and to restore the acquittal that was quashed, or to the restore the acquittal as a bar to the person being retried for the offence, as the case requires [cl 103(4)].

- there is a presumption in favour of bail if an acquitted person is arrested for the purposes of an application for retrial under the Part [cl 110];
- the publication of any matter for the purpose of identifying an acquitted person who is the subject of a police investigation in relation to an application for a retrial, or any information about police investigations, applications for retrial and retrials under the Part is prohibited, unless the Court has approved it [cl 111];
- other appeal and review rights are unaffected by the amendments; and
- the proposed new Part 8 is to be reviewed after 5 years.

Issues Considered by the Committee

Trespasses on personal rights and liberties [s 8A(1)(b)(i) *LRA*]

Fair Trial (Infringing the Rule against double jeopardy): Schedule 1[2]

12. The principle relating to double jeopardy has been described as a “fundamental rule of the common law”.⁴ Double jeopardy, like the right to silence, has a broad application, offering a bundle of rights and remedies that can be raised by defendants at the pre-trial, trial and appellate stages of criminal proceedings.⁵ The Bill does not abolish the common law rule, but rather modifies some aspects of it in order to permit retrial (in defined circumstances) despite a previous acquittal.
13. Double jeopardy is represented as an ‘800 year rule’. In Australia, the common law rule has been significantly expanded through development of the abuse of process doctrine. Following the High Court case of *R v Carroll*,⁶ the common law provides remedies against ‘collateral attacks’ on verdicts of acquittal. In this case, the accused had been acquitted of murder following a successful appeal against his conviction at trial. Following new evidence many years later pointing towards his guilt, the accused was prosecuted and convicted for an administration of justice offence (perjury) arising out of his testimony at trial. His conviction for perjury was quashed by the High Court as an abuse of process. The value of the ruling in *Carroll* has been defended by many lawyers, including Kirby J who highlighted the many important functions of the existing rule, including the principle of finality.⁷
14. The Committee is of the view that there is a real issue as to whether this Bill is compatible with the rule against double jeopardy, as provided for in the International Covenant on Civil and Political Rights (ICCPR) and related human rights treaties. Kirby J has suggested that substantial revision to this fundamental rule of the

⁴ M Kirby, ‘Carroll, Double Jeopardy and International Human Rights Law’ (2003) 27 *Criminal Law Journal* 231 at 235

⁵ “‘Double jeopardy’ is an expression that is not always used with a single meaning. It is an expression used in relation to several different stages of the process of criminal justice: prosecution, conviction and punishment” *Island Maritime Limited v Filipowski; Kulkarni v Filipowski* [2006] HCA 30 (15 June 2006) at para 41.

⁶ (2002) 213 CLR 635

⁷ *Ibid.*

Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2006 & Crimes (Appeal and Review) Amendment (DNA Review Panel) Bill 2006

common law mooted in Australia (and elsewhere) may be incompatible with the ICCPR.⁸

15. Article 14 of the ICCPR deals with the right to a fair trial. As an attribute of the fair trial, the rule appears to be expressed in absolute terms. Article 14(7) provides:

No-one shall be liable to be tried or punished again for an offence for which he [or she] has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.
16. However, a review of the UN Human Rights Committee General Comments and relevant international human rights case law reveals a more nuanced application of the rule against double jeopardy. A key distinction in relation to the application of double jeopardy emerges between two types of proceedings:
 - retrial for an offence for which the defendant has been finally acquitted, which is prohibited by the rule against double jeopardy in Article 14(7) of the ICCPR; and
 - resumption or reopening of an original trial, which in exceptional circumstances, does *not* violate the principle against double jeopardy in Article 14(7) of the ICCPR.
17. In relation to the latter proceedings, relevant international human rights case law suggests that a verdict of acquittal may be annulled by supervisory review under national law, leading to the proceedings being recommenced. This type of proceeding does *not* fall within the scope of retrial for the original offence since the defendant has not been ‘finally convicted or acquitted’ (see Art 14(7) of the ICCPR). As the Model Criminal Code Officers Committee has noted, on one view, all that double jeopardy reform achieves is a re-definition of this term ‘finally’.⁹
18. The distinction between the two types of proceedings set out above is favoured by the UN Human Rights Committee, which in General Comment 13 on the fair trial, stated:

19. In considering State reports differing views have often been expressed as to the scope of paragraph 7 of Article 14. Some States parties have even felt the need to make reservations in relation to procedures for the resumption of criminal cases. It seems to the Committee that most States parties make a clear distinction between a resumption of a trial justified by exceptional circumstances and a re-trial prohibited pursuant to the principle of *ne bis in idem*¹⁰ as contained in paragraph 7. This understanding of the meaning of *ne bis in idem* may encourage States parties to reconsider their reservations to article 14, paragraph 7.¹¹
19. The *Convention for the Protection of Human Rights and Fundamental Freedoms* (the ECHR) does *not* include a provision dealing with double jeopardy. However, it does provide more generally for a fair hearing under Article 6 (1). The rule against double jeopardy is, however, contained in Article 4 of the Seventh Protocol to the Convention:

⁸ Kirby, above n 3, at 243–244.

⁹ Model Criminal Code Officers' Committee, Discussion Paper, above n 2, pp 1-2.

¹⁰ “*Ne bis in idem*” refers to the principle that a person cannot be tried twice for the same offence.

¹¹ CCPR, General Comment, *Equality before the courts and the right to a fair and public hearing by an independent court established by law* (Art 14) (Twenty-first session 1984).

Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2006 & Crimes (Appeal and Review) Amendment (DNA Review Panel) Bill 2006

1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.

2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.¹²

20. Article 4(2) provides some clarification on the scope of the principle and the correct interpretation of the phrase “finally convicted or acquitted” in Article 14(7) of the ICCPR. The preservation of a power to reopen a case in “exceptional circumstances” reflects the central place and long tradition of supervisory review in civil law countries.

21. The European Court of Human Rights (ECtHR) has recently considered the meaning and scope of Article 4(2), and the ‘exceptional’ circumstances where a case may be reopened.¹³ In a leading case in 2004, the ECtHR reviewed Russian criminal procedure law that allowed a case to be reopened, even though a final decision had been given, on the grounds of new or newly discovered evidence or a fundamental defect. The ECtHR held (para 45-46) that this Russian law did *not* violate the principle of double jeopardy:

Article 4(2) of Protocol No. 7 expressly envisages the possibility that an individual may have to accept prosecution on the same charges, in accordance with domestic law, where a case is reopened following the emergence of new evidence or the discovery of a fundamental defect in the previous proceedings...

The subject matter of such proceedings remained the *same criminal charge and the validity of its previous determination*. If the request was granted and the proceedings were resumed for further consideration, the ultimate effect of supervisory review would be to annul all decisions previously taken by courts and to determine the criminal charge in a new decision. To this extent, the effect of supervisory review is the same as reopening, because *both constitute a form of continuation of the previous proceedings*. The Court therefore concludes that for the purposes of the *non bis in idem* principle supervisory review may be regarded as a special type of reopening falling within the scope of Article 4 § 2 of Protocol No. 7.¹⁴

22. In summary, acquittals may be reviewed and annulled and a new trial ordered without breaching the principle of double jeopardy under international human right law, provided these exceptional proceedings meet these conditions:

¹² The UK is a signatory to the ECHR (which is implemented primarily through the *Human Right Act 1998*). It must be noted that the UK did *not* sign or ratify the Seventh Protocol dealing with double jeopardy. See NOTE below, p 9. Note also that Recent ECtHR case law (*post* 2004) did not influence the drafting of the UK reforms upon which the NSW Bill is largely modelled. The Law Commission gave some consideration to earlier ECtHR case law concerning the Seventh Protocol in shaping its recommendations. It is not inconceivable that the legislation will be challenged through the procedures in the *Human Rights Act 1998* (UK) as being incompatible with the right to a fair hearing in Article 6 of the ECHR. There has only been one case, in which the accused has pleaded guilty (11 September 2006) under these procedures and is awaiting sentencing. See Adam Fresco, ‘Murderer makes legal history in double jeopardy case’ *The Times* (11 September 2006).

¹³ *Nikitin v. Russia*, no. 50178/99, ECHR 2004-VIII; *Bratyakin v. Russia* (dec.), no. 72776/01, 9 March 2006. *Fadin v. Russia*, no. 58079/00, 27 July 2006; *Savinskiy v. Ukraine*, no. 6965/02, 31 May 2005

¹⁴ *Nikitin v. Russia*, no. 50178/99, ECHR 2004-VIII, para 45 (emphasis added).

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- the proceedings are concerned with the same charge and the validity of previous determinations; and
 - the proceedings constitute a continuation of the previous proceedings.
23. The Committee notes that the Bill uses the term “retrial” and “retried”, consistent with the terminology applied in the UK Act. However, the Committee is of the view that the terminology used does not, on its own, determine the character of the proceedings and whether the Bill allows a retrial of the same offence (which is prohibited) or the reopening of the trial (where annulment of an acquittal and new trial may be ‘exceptionally’ permitted).
24. The Committee notes that some features of the Bill are more consistent with reopening of a trial and thus compatible with the rule against double jeopardy. These features include:
- The power of the Court of Criminal Appeal (hereafter ‘the CCA’) to order retrials is limited only to ‘life sentence’ offences (in cases where there is fresh and compelling evidence) or ‘15 years or more’ offences (in cases involving a tainted acquittal).
 - The CCA in granting an order for retrial must consider the “interests of justice” [cl 104]. This safeguard is *in addition* to being satisfied that the evidence is fresh and compelling or that the acquittal is tainted.
 - The power of the CCA extends to quashing the original acquittal and making associated declarations [cls 100(2), 101(2) and 105(8)].
 - There is an express limitation that only one application for retrial is permitted under Division 2 [cl 105].
 - There is a two month time-limit on the presentment of the new indictment after retrial order has been made, with reinstatement of the original acquittal if prosecution does not act with reasonable expedition, etc [cl 106].
 - There is a provision imposing restrictions on publishing material that can identify an acquitted person who is subject to investigation or retrial under Division 2.
 - There is a provision imposing restrictions on police investigation of acquitted persons. Under cl 109 they cannot proceed without the consent of the DPP.
25. However, the Committee notes that other features of the Bill point in the opposite direction. For example, the Bill gives the CCA the power to quash the acquittal or “remove the acquittal as a bar” [cls 100(2) & 101(2)]. The latter technical removal of a ‘bar’ does not annul or vacate the earlier verdict of acquittal. As noted above, this quashing of the original legal decision is an important aspect of supervisory review, and due consideration should be given to requiring the CCA to quash an acquittal in *every* case.
26. Another concern is that the Bill does not confine the new proceedings to retrial on the same offence (ie, the offence that had been the subject of the original acquittal) [cls 100(3) & 101(3)]. Under the Bill, a person may be retried for a life sentence offence,

even though the original acquittal related to manslaughter or a lesser offence [cl 100(3)]. Similarly, a person may be retried for a 15 years or more sentence offence, even though the acquittal related to a lesser offence [cl 101(3)].

27. A new trial for murder (following the quashing of an acquittal for manslaughter) may be justifiable. However, these two proceedings relate broadly to the same offence since the offences of murder and manslaughter have identical physical elements, and substantial overlap in terms of fault elements. Indeed, in many jurisdictions these offences are accommodated within a single law of culpable homicide – thus, new proceedings for murder (following an acquittal of manslaughter) would likely amount to a resumption of the ‘same criminal charge’.
28. The Committee is of the view that, beyond the special case of homicide, the review of an acquittal for a (lesser) offence, which proceeds to trial on a different, more serious offence, is likely to violate the principle outlined above. Such proceedings would not fall within the permissible category of resumption of proceedings in respect of the *same* criminal charge.
29. Given these matters, the Committee is of the view that several features in the Bill appear to be incompatible with the ICCPR.
30. The Committee notes that reframing the Bill to emphasise the *exceptional* character of this form of review and stress the *continuity* with earlier proceedings might avoid incompatibility with an important treaty obligation. For example, new proceedings should be restricted to serious offences, which are the same as the ones charged at the original trial (subject to the homicide exception outlined above). Furthermore, effective procedural safeguards, especially full protection of the defendant’s right to a fair trial, must accompany any process of review of earlier decisions.

31. **The Committee notes that the double jeopardy rule is a fundamental principle of the common law. The right not to be tried twice for the same offence is also recognised as a fundamental human right under ICCPR and other human rights treaties.**
32. **The Committee notes that while some features of the Bill appear consistent with the reopening of a trial in exceptional circumstances in a manner compatible with the ICCPR, certain others appear to risk incompatibility with Australia’s obligations under that convention.**
33. **The Committee has written to the Premier for advice as to:**
 - (a) **whether the Bill can be amended to ensure that it does not provide for the retrial of an offence (as opposed to the resumption or reopening of an original trial) to avoid incompatibility with international human rights standards; and**
 - (b) **the justification for the provisions removing acquittal as a bar [proposed ss 100(2) & 101(2)] and allowing retrial for an offence different to that for which the person was acquitted [proposed s 100(3)].**

34. The Committee refers to Parliament the question of whether the Bill trespasses unduly on a person's right not to be tried twice for the same offence.**Fair Trial (Right to trial without undue delay): Schedule 1[2]**

35. Under the Bill, an order for retrial on the basis of fresh and compelling evidence or a tainted acquittal can only be made when 'in all the circumstances it is in the interest of justice for the order to be made.'¹⁵ It is not in the 'interests of justice' to make an order for the retrial of an acquitted person unless the CCA is satisfied that a fair retrial is likely in the circumstances.¹⁶ In particular, the Court is expressly directed to have regard to the length of time since the person allegedly committed the offence.¹⁷
36. At common law in Australia there is no right to a speedy trial.¹⁸ Delay, even of an extraordinary length, will not form the basis for a stay in proceedings unless it can be shown that to proceed to trial would be unfair to the accused, or to continue the trial would be oppressive.¹⁹ The High Court's decision in *Jago* provides useful guidance to the CCA in considering the issue of delay in relation to orders for retrial. In that case, the Court considered the circumstances in which delay will give rise to an unfair trial. Justice Deane identified a list of five factors:²⁰
1. Length of delay.
 2. Reasons behind the delay.
 3. Extent to which the accused is responsible for the delay.
 4. The risk of prejudice to the accused.
 5. The public interest in the conviction of those guilty of serious crimes, and in the resolution of criminal charges.
37. The Committee notes that the Bill is silent as to other legal processes that contribute to delay and place unfair burdens on defendants. For example, it does not address those cases where an individual may have been indicted on the same offence several times before finally being acquitted.²¹ For this reason, the CCA should be directed to consider not merely the time since the original alleged offence, but also the conduct of the prosecution in the intervening period, including whether or not the defendant had been put to trial previously.
38. The Committee notes the important safeguard in the Bill that prevents more than one application for a retrial under Division 2 [cl 105(1)]. However, the Committee notes that this limitation does not apply to retrials following an appeal on questions of law alone under Division 3. The effect of this is that some verdicts of acquittal may be

¹⁵ Proposed sections 100 & 101.¹⁶ Proposed section 104.¹⁷ Proposed section 104(3)(a).¹⁸ *Jago v District Court of New South Wales* (1989) 168 CLR 23.¹⁹ *Ibid* 60.²⁰ *Ibid* 60-61.²¹ For example, where prosecutors to enter *nolle prosequi* to nullify an indictment before a verdict has been reached (possibly in anticipation of an unfavourable outcome) and then seeking subsequent indictments in relation to the same alleged illegality.

impugned more than once (ie, after an unsuccessful application under Division 2 the Attorney General or DPP may appeal on a question of law under Division 3 seeking a retrial). There are no limitations in the number of appeals on questions of law that may be made.

39. To minimise potential abuse of process and unfairness, especially caused by multiple proceedings under Division 3, the Committee is of the view that further safeguards are needed. The Bill should place limits on Division 3 appeals on questions of law in similar terms to Division 2. The power to order a retrial under Division 3 should be granted only once, following an evaluation of whether it is in the “interests of justice” (cl 104).

- 40. The Committee considers that the conduct of the prosecution since the alleged offence, including whether or not the defendant had been put to trial previously, is relevant to the CCA consideration of what the “interests of justice require” in a particular case.**
- 41. The Committee has written to the Premier for advice as to why the conduct of the prosecution has not been included as a matter for consideration by the CCA in determining the interests of justice.**
- 42. The Committee refers to Parliament the question as to whether the Bill, by not providing that the Court must take into account any delays caused by the conduct of the prosecution in its consideration of whether the interests of justice would be served by allowing an application for a retrial, trespasses unduly on personal rights and liberties.**
- 43. The Committee also notes that the Bill allows multiple proceedings to be brought under Division 3.**
- 44. The Committee has written to the Premier for advice as to the justification for allowing more than one proceeding to be brought under Division 3.**
- 45. The Committee refers to Parliament the question as to whether the Bill, by allowing for multiple Division 3 applications to be made, trespasses unduly on personal rights and liberties.**

Fair Trial (Prejudice and Media): Proposed s 111

46. The Committee notes that there is significant potential for excessive and invasive media interest in double jeopardy cases. The Committee also notes that the Bill recognises the need to implement safeguards to prevent the identification of persons subject to investigation, application or order for re-trial under Division 2. Proposed section 111 restricts publication of material that identifies an acquitted person who is under investigation, the subject of an application for a retrial or who is the subject of an order for retrial, unless authorised by the CCA or the court before which the retrial occurs. Breach of these prohibitions is punishable as contempt of court [cl 111(7)].
47. An order to permit identification is made only where the Court is ‘satisfied’ that it is in the ‘interests of justice’ to do so [cl 111(2)]. However, the interests of justice appear

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to the Committee to include both minimising the impact of prejudice on trials and maintaining public confidence in the system by upholding principles of open justice.

48. The Committee is of the view that the scope of the restrictions in proposed section 111 should be clarified. Specifically, in granting an order under the section, the court should be directed to consider the impact that publication of identifying material will have on any subsequent proceedings (including a re-trial which may potentially arise as a result of a police investigation in relation to which the publication order is sought).
49. Further, the seriousness of a breach of the restrictions on publication would be better conveyed if it was framed as a criminal offence rather than as contempt of court.

50. **The Committee notes that the Bill recognises the need to implement safeguards to prevent the identification of persons subject to investigation, application or order for re-trial.**
51. **However, the Committee notes that the Bill does not provide that the right to a fair trial is to have priority when considering the interests of justice or that contravention of a prohibition on publication is an offence.**
52. **The Committee has written to the Premier for advice as to whether the Bill might be amended to provide that, in granting a publication order, the court should be directed to consider the impact that publication of identifying material will have on any subsequent proceedings and that breach of a non publication is a criminal offence rather than a contempt of court.**
53. **The Committee refers these matters to Parliament.**

Fair Trial (The right to legal representation): Schedule 1[2]

54. The right to obtain legal representation is an important feature of a fair trial. Under article 14(3)(b) of the ICCPR, an accused has the right to “communicate with counsel of his own choosing”.
55. In Australia there is no right to be provided with counsel at the public expense, even in trials for serious offences.²² However, in *Dietrich* the High Court held that if persons charged with a serious offence are unable to obtain representation and request a stay of proceedings until they are able to obtain counsel, the trial should be so adjourned or stayed.²³ Assuming that the inherent powers to prevent an abuse of process are not affected by these reforms, it will be open to accused who are re-tried under the proposed legislation to seek an adjournment until they are able to secure representation. Failure to grant an adjournment under these circumstances may result in the trial being unfair, and any resulting conviction being unsafe.²⁴
56. The Bill does not contain an express right to legal representation for an acquitted person who is subject to an order for re-trial under Division 2 or in relation to appeals

²² *Dietrich v The Queen* (1992) 177 CLR 292.

²³ *Ibid.*

²⁴ *Ibid.*

on questions of law only under Division 3. Where a question of law alone is submitted to the CCA for determination without affecting an acquittal [cl 108], a person charged at trial or affected by the decision is entitled to be heard and to be represented (if necessary at the expense of the Crown). This is because of the broader 'public interest' in resolving these questions of law, which transcends the interests of the particular defendant. It seems incongruous that a guarantee of legal representation should be provided at an appeal where there is no risk of an acquittal being quashed, but where acquittals may be set aside and the defendant subject to retrial, there is no right to legal representation.

57. Applications under Division 2 must be considered at a hearing: cl 105(4). The defendant has a right to be 'present and heard at the hearing', though the Bill does not contain an express right to be legally represented at the hearing. Since many defendants may rely on Legal Aid, which is not guaranteed, there is a serious risk of defendants being unrepresented at a hearing in which new evidence and complex legal argument will be evaluated by the CCA. The disadvantage here is compounded by the power of the CCA to proceed to determination in the defendant's absence (provided that a 'reasonable opportunity' to be present has been provided).
58. In light of these considerations, there is a strong argument that a right to legal representation at the hearing should be expressly guaranteed in the Bill, and furthermore, that this legal representation should be funded at public expense. The arguments supporting this application of *Dietrich* to hearings under Division 2 and appeals on question of law under Division 3 are as follows:
 - these proceedings involve the prospect of setting aside an acquittal and indicting the defendant for a very serious offence (by its nature, a conviction following retrial would likely result in imprisonment); and
 - the defendant has already been subject to a trial and it would be unfair for him or her to bear the cost of representation on a second trial since it is the DPP who seeks to quash the existing verdict.
59. A significant aspect of the rationale for the rule against double jeopardy is the protection of individuals from the abusive exercise of State power, with all the resources that the State commands. If this rule is to be modified in exceptional cases careful consideration should be given to the equality of arms principle and the critical role that legal representation plays in ensuring that defendants receive a fair hearing.

60. **The Committee is of the view that the right to legal representation is a very important feature of a fair trial. The Committee notes that it is enshrined in the ICCPR.**
61. **The Committee also notes that in Australia there is no right to be provided with counsel at the public expense, even in trials for serious offences.**
62. **Notwithstanding this, the Committee is of the view that, given the removal of the prohibition against double jeopardy and the protection it affords a defendant from inequality and abuse of state power, a right to legal representation at a hearing for a retrial of an acquitted person should be expressly guaranteed in the Bill.**

- 63. The Committee has written to the Premier for advice as to why the Bill does not provide for a right to legal representation and its funding, and whether it might be amended to so provide.**
- 64. The Committee refers to Parliament the question as to whether the Bill trespasses unduly on personal rights by failing to expressly provide for legal representation and its funding.**

Insufficiently defined administrative powers [s 8A(1)(b)(ii) *LRA*]

Unclear definition: Proposed section 109(2)

65. Under the Bill, police investigations in relation to a retrial under Division 2 can only commence with the written consent of the DPP [cl 109(3)]. In addition, before seeking DPP consent, the Commissioner or Deputy Commissioner of Police must be satisfied that the evidence has been or is likely to be obtained by the investigation. These restrictions operate as reasonable limitations on the wide scope of police discretion that otherwise applies to investigations.
66. The Committee notes that the definition of ‘police investigation’ in proposed section 109(2) is restricted to the exercise of powers of arrest, questioning or search of that person and use of forensic procedures or search or seizure of property. It follows that other forms of investigation (for example, surveillance, use of listening devices or questioning by informers acting under police direction) may be excluded from this definition. The Committee is of the view that ‘police investigation’ should be broadly defined to include the use of surveillance devices, and to extend to investigation by undercover police officers and their informers.
67. Another administrative power that requires clarification relates to the DPP’s consent to the investigation. Under cl 109(5), consent may not be granted unless two conditions are satisfied:
- (i) that there is, or the investigation is likely to result in, “sufficient new evidence” to warrant the investigation; and
 - (ii) it is in the ‘public interest’ for the investigation to proceed.
68. The Committee notes that the public interest factors in authorising an investigation are different from those used to guide prosecution discretion.²⁵ For this reason, the Committee is of the view that the Bill should include a clear definition of public interest in this context. Alternatively, the Bill should direct that the DPP develop new guidelines, in consultation with the police and other stakeholders, on how the public interest should be applied, which could be appended to the existing DPP Prosecution Guidelines. Factors potentially relevant to a determination of the public interest by the DPP include:
- the time lapsed since the first proceeding leading to an acquittal;
 - the prior conduct of the police investigation; and

²⁵ See <http://www.odpp.nsw.gov.au/guidelines/guidelines.html>

- the propriety and legality of the previous and proposed police methods of gathering the evidence.

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| <p>69. The Committee notes that the definition of police investigation under the Bill does not include reference to forms of investigation such as surveillance, use of listening devices and questioning by informers acting under police direction.</p> <p>70. The Committee has written to the Premier for advice as to whether the Bill might be amended to expand the definition of police investigation to include such activities .</p> <p>71. The Committee has also written to the Premier for advice as to whether the Bill might be amended to include factors relevant to the public interest in proposed s 109(5).</p> <p>72. The Committee refers to Parliament the question as to whether the Bill unduly subjects rights and liberties to insufficiently defined administrative powers by excluding surveillance, use of listening devices or questioning by informers acting under police direction from the definition of “police investigation” under the Bill.</p> |
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CRIMES (APPEAL AND REVIEW) AMENDMENT (DNA REVIEW PANEL) BILL 2006

Purpose and Description

73. The principal object of this Bill is to establish a DNA Review Panel in connection with reviews of existing convictions.

Background

74. In his second reading speech, the Premier stated:

The main point of this Bill is to establish the DNA Review Panel replacing the defunct Innocence Panel that the Hon. Mervyn Findlay QC found should be established by legislation. This Bill is intended to supplement existing mechanisms that allow the soundness of a conviction to be investigated and any doubts about unsafe convictions to be considered and resolved. These existing mechanisms include appeals and applications under part 13A of the Crimes Act, which allow the Attorney General or the Supreme Court to refer a conviction to the Court of Criminal Appeal for reconsideration at any time.²⁶

75. DNA analysis is used in criminal investigations in three main ways:
- comparison of DNA deposited on a victim or crime scene with a sample taken from a suspect;
 - DNA deposited on a victim or crime scene compared with a database containing DNA profiles of convicted offenders; and
 - DNA deposited on a victim or crime scene compared with DNA samples volunteered by all members of a locality in a mass screening.

²⁶ Second Reading Speech.

76. The comparison of DNA samples involves the creation of a 'profile' of each sample. In Australia, forensic laboratories use a standard system – Profiler Plus – to generate a profile of a sample, which can then be compared. Rather than comparing the entire DNA code in any sample, the standard kit profiles the sample at nine sites along the DNA molecule. It is possible that two DNA profiles could match at all 9 loci by a coincidence – however, the likelihood of this occurring at random ('match probability') is extremely remote. However, as the Director of the UTS Innocence Project, Kirsten Edwards, has observed, raw 'match probability' statistics do not incorporate the likelihood of laboratory error and cross-contamination in the process of analysing and cross-matching DNA profiles.²⁷ She argues that contamination and human error are widespread phenomena, which impact significantly on the reliability of DNA profiling.
77. The Australian Law Reform Commission (ALRC) has noted that match probability can be a problematic concept in criminal evidence for a number of reasons. For example, a match probability calculated on the basis that a suspect's DNA matches that of a randomly selected and unrelated person may be unfairly prejudicial to the accused if it is likely that the actual offender and the suspect are more closely related.²⁸ That is, it is misleading to suggest that the chances of a coincidental match are extremely remote if in fact the offender and the suspect are likely to be related or from the same ethnic group. John Buckleton, a forensic scientist with the UK database, has emphasised the importance of factoring-in relatives when calculating match probabilities:
- It is important...to point out the crucial importance of relatedness. When we considered 4 or 6 loci relatedness was of some importance. But with the move towards 10 or 13 loci it is becoming apparent that most matches (of the few that may remain) will be between related people. A match probability of 1 in a billion may translate to 1 in 10,000 for a pair of brothers. This issue is now crucial in DNA interpretation.²⁹
78. The ALRC in its report on the uses of human genetic material also questioned the capacity of juries to evaluate evidence 'fairly and critically' in the face of infinitesimally small 'match probability' statistics presented by prosecutions.
79. There have been instances in which DNA profiles used in criminal investigations have matched coincidentally, where there was no possibility that the matching individual could have been the actual offender. One of the most frequently cited is a case in the United Kingdom in which a man was charged with breaking-and-entering on the basis of a crime scene DNA profile. The man was wheelchair-bound and unable to drive – the offence in question took place 200 miles from his home, on the second floor of an apartment building. More detailed testing (at 10 loci rather than the initial 6) confirmed the obvious conclusion that he was not the culprit.

²⁷ Kirsten Edwards, 'Ten things about DNA contamination that lawyers should know' (2005) 29 *Criminal Law Journal* 71, 72.

²⁸ ALRC, *Essentially Yours: The Protection of Human Genetic Material*, (Report No 96, 2003) 1097

²⁹ J Buckleton, "The Interpretation of Scientific Evidence", Paper given at DNA Prosecuting under the Microscope, International Conference, Adelaide, 9 – 11 September 2001, p 3 quoted in Legislative Council Report at paragraph 3.48.

80. DNA profiling is an extremely useful and statistically accurate tool in matching suspects to victims and crime scenes. However, a DNA match gives rise to a number of hypotheses – it establishes a link between the sources of the matching samples, but is not of itself evidence of criminal conduct.³⁰ Both the processes of collecting and analysing DNA samples and the results generated by profiling are not infallible, nor does the information provided by DNA matching provide conclusive evidence of guilt or innocence. However, DNA evidence has been extremely useful both in linking offenders to their crimes and in providing exculpatory evidence where a person is accused of an offence that they did not commit.

The Bill

81. The Bill inserts a new Part 7 into the Principal Act to establish the “DNA Review Panel”. The new Part also deals with related provisions dealing with the review of convictions and sentences following a petition to the Governor or application to the Supreme Court, which are transferred from existing Part 13A of the *Crimes Act 1900* by this Bill. New Part 7 allows applications to the DNA Review Panel by eligible convicted persons [cl 99]. A person is an eligible convicted person if:
- the person was convicted before the introduction of this Bill into Parliament of an offence punishable by imprisonment for life or for 20 years or more or punishable by a lesser period if the Panel considers that there are special circumstances;
 - the person is still in custody or released on parole (or subject to detention or supervision under the *Crimes (Serious Sex Offenders) Act 2006*) in connection with the offence; and
 - if the person’s claim of innocence may be affected by DNA information obtained from biological material specified in the application.
82. The Bill establishes the DNA Review Panel. Unlike the earlier, purely administrative, NSW Innocence Panel, the Bill places the proposed review body – the DNA Review Panel – on a statutory footing, reporting to the Attorney-General. In contrast to the UK Criminal Cases Review Commission, the Review Panel will not have a wide-ranging remit to consider different types of miscarriage of justice, but will instead focus on cases that can be affected by DNA evidence. Its functions and powers are:
- to consider applications from eligible convicted persons whose claim of innocence may be affected by DNA information obtained from biological material;
 - to arrange searches for biological material specified in the application and its DNA testing;
 - to refer cases to the Court of Criminal Appeal for a review of conviction following the receipt of DNA test results; and

³⁰ Jeremy Gans and Gregor Urbas, ‘DNA identification in the criminal justice system’ *Australian Institute of Criminology Trends and Issues* (AIC No 226, 2002) 3.

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- to report to the Minister on systems, policies and strategies for using DNA technology to assist in the assessment of claims of innocence).
83. If the Panel is satisfied that the applicant is an eligible convicted person, it may arrange for appropriate searches of specified biological material and DNA testing and prepare a report on its findings [cl 92]. If the Panel is of the opinion that there is reasonable doubt as to the guilt of the convicted person, it may refer the case to the Court of Criminal Appeal for the consideration of whether the conviction should be set aside [cl 94].
84. The Panel is required to inform the applicant and registered victims of the offence of the decision to search for and test biological material for DNA and of its determination of the application.
85. Under the Bill, members of NSW Police and other State authorities are under a duty to retain physical evidence comprising or containing biological material obtained in connection with the investigation or prosecution of the offences for which eligible convicted persons were convicted (i.e. offences punishable by imprisonment for life or 20 years or more).³¹ It is an offence to destroy or tamper any such material, with a maximum penalty of imprisonment for 10 years [cl 96].
86. The Panel has a limited life and will cease to operate seven years after its establishment. However, there is provision for it to be extended for a further three years following a statutory review of its operation. The review is to be conducted five years after the Panel commences operation.

Issues Considered by the Committee

Trespasses on personal rights and liberties [s 8A(1)(b)(i) *LRA*]

Equality before the law: Proposed section 89(3)

87. The Bill provides that a convicted person is only eligible to make an application to the Panel if they were convicted before 19 September 2006 and the conviction was for a relevant offence [cl 89]. Convictions occurring after that date will not be subject to review by the Panel, even if in the next 7–10 years (the proposed lifespan of the Panel) DNA information comes to light which could affect their claim of innocence.
88. The Bill is drafted on a premise that in contemporary criminal trials, DNA evidence is routinely collected, analysed and used where that evidence is material to the case. On this view, situations are unlikely to arise in which biological material is available, but is not subject to DNA analysis, and a convicted person would later request that the material be analysed for the purpose of DNA profiling. However, the Committee notes that this limitation does not address the possibility of a DNA profiling error occurring after 19 September 2006, which could result in a miscarriage of justice. Nor does it contemplate future developments in DNA profiling techniques and technology which

³¹ The Bill provides for some exemptions from this duty, for example, where a court requires the material to be returned to the owner, the size and nature of the material make it impracticable to retain or the sentence of the convicted person expires.

may render previously tested biological material more useful to a convicted person in proving a claim of innocence.

89. The Committee is of the view that the different treatment of similarly situated persons based on the date of their conviction (before or after 19 September 2006) without compelling justification violates the right to equality before the law as well as impacting on the right to a fair trial. There is no basis in law to make a distinction between a person convicted on the 18 September 2006 and a person convicted on or after the 19 September 2006.
90. Article 14 of the ICCPR provides for equality before law stating that:
All persons shall be equal before the courts and tribunals.
91. The Panel, constituted under legislation, with specific powers affecting a previous legal determination, would likely fall within the broad definition of “tribunal”. The Bill arguably fails to achieve this minimum human rights standard with respect to access to the Panel. If the opportunity, in already limited circumstances, to obtain and present DNA evidence in support of a claim of innocence is to be provided to convicted persons by the DNA Review Panel, it should be available to all persons convicted of a ‘relevant offence’ irrespective of the date of their conviction.
92. The Committee is of the view that removal of this temporal restriction would not automatically result in the creation of an additional right of appeal for individuals convicted in the future, because under cl 93 of the Bill, the Panel is directed to refuse to consider or deal with an application:
- where it appears that the matter has been fully dealt with in the proceedings giving rise to the conviction (including appeals) [cl 93(2)(a)(i)]; and
 - where the Panel is not satisfied that there are any special facts or special circumstances to justify the taking of further action [93(2)(b)].
93. Thus, where the DNA evidence in question had been canvassed at trial or on appeal and results in a conviction, the Panel must not consider the application. It is only in exceptional cases in which the evidence in question was either not adduced at trial or at the appeal stage, *or* there are special facts or circumstances to justify the taking of further action that the Panel could consider the application.

- 94. The Committee notes the important human rights principle of equality before the law, enshrined in the ICCPR to which Australia is a party.**
- 95. The Committee considers that the different treatment of similarly situated persons based merely on the date of their conviction, without compelling justification, violates this right.**
- 96. The Committee has written to the Premier for advice as to the justification for excluding those convicted after 19 September 2006 in light of the fundamental right to equality before the law.**

97. The Committee refers to Parliament the question as to whether the Bill unduly trespasses on personal rights by excluding those convicted after 19 September 2006 from applying to the DNA Review Panel.

Equality and Fair Trial (Excluding Convicted Person Not Under Sentence): Proposed section 89(5)

98. By virtue of proposed section 89(5) a convicted person cannot make an application to the Panel unless they are currently subject to the sentence imposed on conviction (either in custody or released on parole) or is subject to supervision or detention as a sex offender in connection with their conviction. Thus there is no capacity for an individual who is no longer under sentence to apply to the Panel for the purpose of clearing his or her name by proving that they were wrongly convicted.

99. The Explanatory Note offers no justification for limiting the application to persons under sentence. Given the finite resources available to the Panel, it is justifiable to restrict its work to the most serious cases, namely, those in which individuals are currently subject to deprivation of their liberty as a result of a conviction. An effect of imposing such a limitation, however, impacts on the capacity of an individual who has completed their sentence to obtain information which might affect their claim of innocence. This may impinge on the right of the unlawfully imprisoned to claim compensation, which is protected by the common law, as well as under Article 9(5) of the ICCPR:

Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

100. This right is further developed in Article 14(6), which provides:

When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

101. The need to remedy injustice should not be limited by purely administrative or financial considerations. This provision creates potential for great injustice, in that individuals who would otherwise be able to clear their name and attempt to restore their standing in the community may not be able to do so without the assistance of the Panel in obtaining and compelling disclosure of relevant DNA information. Indeed, the common law recognises that the duty to rectify a miscarriage of justice extends beyond the sentence, and indeed, even beyond the death of the defendant.³²

102. The Committee notes that the Bill provides that a convicted person cannot make an application to the Panel unless they are currently subject to the sentence imposed on conviction.

³² In *R v Bentley* [1998] EWCA Crim 2516, the English Court of Appeal recognized that family members of a convicted person had standing to bring an appeal, and that a conviction resulting from a miscarriage of justice may be quashed posthumously.

- 103. The Committee also notes that an effect of imposing such a limitation is to limit the capacity of an individual who has completed their sentence to obtain information, which might affect their claim of innocence.**
- 104. The Committee further notes that this limitation may impinge on the right of the unlawfully imprisoned to claim compensation, which is protected by the common law, and Articles 9(5) & 14(6) of the ICCPR.**
- 105. The Committee has written to the Premier for advice as to the justification for this limitation.**
- 106. The Committee refers to Parliament, the question as to whether preventing a convicted person who has completed their sentence from applying to the Panel unduly trespass is on their right to equality before the law, fair trial and compensation for wrongful imprisonment.**

Sunset provision: Proposed section 97

107. Under proposed section 97, the Panel will be abolished after either 7 years or, subject to Ministerial determination, after 10 years. In conjunction with the requirement that eligible persons must have been convicted before 19 September 2006, this has the effect of making the Review Panel a temporary measure. It appears designed to address any existing cases that could be affected by DNA information, but not to provide a permanent mechanism to assist convicted persons under sentence who wish to challenge their convictions on the basis of DNA evidence.
108. The Committee notes that the *Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2006* does not have a sunset clause affecting the reopening of an acquittal under Division 2 or 3. Under that Bill, prosecutors have unlimited time in which to challenge acquittals on the basis of fresh and compelling DNA evidence. However, under this Bill, persons who wish to access DNA evidence for purposes of appeal against their conviction must, because of this sunset clause, make their application to the panel before it is abolished. This is in addition to the requirement that they were convicted before 19 September 2006 to be eligible to apply to the Panel.
109. The Committee is of the view that this different treatment of the prosecution and the defence in relation to DNA evidence violates the principle of 'equality of arms' that underscores the right to fair trial protected under common law and the ICCPR. To address this inequality, the sunset clause should be removed and the Panel should not be abolished.

- 110. The Committee notes that pursuant to the sunset clause in proposed section 97 an eligible convicted person must apply to the Panel before it is abolished.**
- 111. The Committee also notes that no such sunset clause applies to prosecutors wishing to re-try an acquitted person under the *Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2006*.**

- 112. The Committee is of the view that this different treatment of the prosecution and the defence in relation to DNA evidence violates the principle of equality of arms that underscores the right to fair trial protected under common law and the ICCPR.**
- 113. The Committee has written to the Premier for advice as to whether, in order to address this inequality, the Bill might be amended to remove the sunset clause and provide for the ongoing existence of the Panel.**
- 114. The Committee refers to Parliament the question as to whether the Bill unduly trespasses on personal rights and freedoms by providing for the abolition of the Panel after 7 or 10 years, as the case may be.**

Insufficiently defined administrative powers [s 8A(1)(b)(ii) *LRA*]

Fair Trial (Rights of the Defence): Proposed section 96

- 115. Proposed section 96 imposes a duty on the police and other state officers to retain relevant biological material under certain conditions. This duty does not apply in defined circumstances [cl 96(3)]. Two of these circumstances raise concern for the Committee. The first is that the duty to retain the material ends when the person ceases to be an eligible convicted person [cl 96(3)(e)]. This means that the material may then be destroyed. This is unduly restrictive and would prevent a convicted person (no longer under sentence) from challenging a conviction using this material.
- 116. The second concern is that the duty to retain the material ends when the ‘material has already been subject to DNA testing and the testing indicates that it relates only to the eligible convicted person concerned’. This assumes the infallibility of current DNA testing, both scientifically and forensically. A convicted person should be in a position to access material which has been subject to earlier DNA testing in order to cast doubt on the reliability of the testing in light of subsequent development of scientific methods. The loss of evidence in these cases restricts the rights of the defence in relation to an appeal, and impinges on the right to a fair trial (which underscores the whole criminal process including the appeal).

- 117. The Committee notes the duty on the police and other state officers to retain relevant biological material under certain conditions to ensure it is available for DNA testing in the circumstances prescribed by the Bill.**
- 118. The Committee is of the view that the exceptions to this rule regarding the person ceasing to be an eligible convicted person and the material having already been subject to DNA testing could inappropriately prevent a convicted person from challenging the conviction using this material.**
- 119. The Committee has written to the Premier for advice as to the justifications for providing these two exceptions.**
- 120. The Committee refers to Parliament, the question as to whether the Bill makes rights, liberties or obligations unduly dependent on insufficiently defined administrative powers by prescribing these exceptions.**

Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2006 & Crimes (Appeal and Review) Amendment (DNA Review Panel) Bill 2006

The Committee makes no further comment on this Bill.

Appendix 1: Index of Bills Reported on in 2006

	Digest Number
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Apiaries Amendment Bill 2006	10
Appropriation Bill 2006	9
Appropriation (Budget Variations) Bill 2006	6
Appropriation (Parliament) Bill 2006	9
Appropriation (Special Offices) Bill 2006	9
Bail Amendment (Lifetime Parole) Bill 2006	12
Business Names Amendment Bill 2006	11
Careel Bay Protection Bill 2006*	2
Channel 7 Former Epping Site Protection Bill 2006*	10
Child Protection (International Measures) Bill 2006	2
Children and Young Persons (Care and Protection) Amendment (Parent Responsibility Contracts) Bill 2006	11
Children and Young Persons (Care and Protection) Bill 2006	7
Children (Detention Centres) Amendment Bill 2006	8
Civil Liability Amendment Bill 2006	7
Coal and Oil Shale Mine Workers (Superannuation) Amendment Bill 2006	8
Community Protection (Closure of Illegal Brothels) Bill 2006*	12
Constitution Amendment (Governor) Bill 2006	7
Conveyancers Licensing Amendment Bill 2006	7
Correctional Services Legislation Amendment Bill 2006	8
Courts Legislation Amendment Bill 2006	4
Courts Legislation Further Amendment Bill 2006	8
Crimes and Courts Legislation Amendment Bill 2005	1
Crimes Amendment (Apprehended Violence) Bill 2006	11
Crimes Amendment (Murder of Police Officers) Bill 2006*	7
Crimes Amendment (Organised Car and Boat theft) Bill 2006	4
Crimes (Appeal and Review) Amendment (DNA Review Panel) Bill 2006	13
Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2006	13
Crimes Legislation Amendment (Gangs) Bill 2006	10
Crimes (Serious Sex Offenders) Bill 2006	5
Crimes (Sentencing Procedure) Amendment Bill 2006	5

Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2006 & Crimes (Appeal and Review) Amendment (DNA Review Panel) Bill 2006

	Digest Number
Crimes (Sentencing Procedure) Amendment (Gang Leaders) Bill 2006*	3
Deer Bill 2006	10
Duties Amendment (Abolition of State Taxes) Bill 2006	9
Drug Misuse and Trafficking Amendment (Hydroponic Cultivation) Bill 2006	8
Education Amendment (Financial Assistance to Non-Government Schools) Bill 2006	9
Education Legislation Amendment (Staff) Bill 2006	6
Electricity Supply Amendment (Protection of Electricity Works) Bill 2006	6
Environmental Planning and Assessment Amendment Bill 2006	2
Environmental Planning and Assessment Amendment (Reserved Land Acquisition) Bill 2006	4
Fair Trading Amendment Bill 2006	8
Fair Trading Amendment (Motor Vehicle Insurance and Repair Industries) Bill 2006	11
Fines Amendment (Payment of Victims Compensation Levies) Bill 2006	2
Firearms Amendment (Good Behaviour Bonds) Bill 2006*	2
Fisheries Management Amendment Bill 2006	2
Freedom of Information Amendment (Open Government-Disclosure of Contracts) Bill 2005	1
Health Legislation Amendment (Unregistered Health Practitioners) Bill 2006	12
Independent Commission Against Corruption Amendment (Operations Review Committee) Bill 2006	5
Industrial Relations Amendment Bill 2006	3
Interpretation Amendment Bill 2006	8
James Hardie (Civil Liability) Bill 2005	1
James Hardie (Civil Penalty Compensation Release) Bill 2005	1
James Hardie Former Subsidiaries (Winding up and Administration) Bill 2005	1
Judicial Officers Amendment Bill 2006	6
Jury Amendment (Verdicts) Bill 2006	5
Land Tax Management Amendment (Tax Threshold) Bill 2006	2
Law Enforcement (Controlled Operations) Amendment Bill 2006	3
Law Enforcement Legislation Amendment (Public Safety) Bill 2005	1
Legal Profession Amendment Bill 2006	5
Liquor Amendment (2006 FIFA World Cup Hotel Trading) Bill 2006	8
Local Government Amendment (Miscellaneous) Bill 2006	6
Local Government Amendment (Waste Removal Orders) Bill 2006	8

	Digest Number
Motor Accidents Compensation Amendment Bill 2006	3
Motor Accidents (Lifetime Care and Support) Bill 2006	3
Motor Vehicle Repairs (Anti-steering) Bill 2006*	4
National Parks and Wildlife (Adjustment of Areas) Bill 2006	2
Parliamentary Electorates and Elections Amendment Bill 2006	10
Pharmacy Practice Bill 2006	7
Pipelines Amendment Bill 2006	7
Police Amendment (Death and Disability) Bill 2005	1
Police Amendment (Police Promotions) Bill 2006	10
Police Integrity Commission Amendment Bill 2006	10
Professional Standards Amendment (Defence Costs) Bill 2006	12
Protection of the Environment Operations Amendment (Waste Reduction) Bill 2006	3
Public Sector Employment Legislation Amendment Bill 2006	3
Road Transport (General) Amendment (Intelligent Access Program) Bill 2006	11
Road Transport Legislation Amendment (Drug Testing) Bill 2006	12
Royal Rehabilitation Centre Sydney Site Protection Bill 2006*	3
Security Industry Amendment (Patron Protection) Bill 2006*	7
Smoke-free Environment Amendment (Removal of Exemptions) Bill 2006*	4
Snowy Hydro Corporatisation Amendment (Parliamentary Scrutiny of Sale) Bill 2006	9
Snowy Hydro Corporatisation Amendment (Protect Snowy Hydro) Bill 2006	9
State Property Authority Bill 2006	7
State Revenue and Other Legislation Amendment (Budget Measures) Bill 2006	9
State Revenue Legislation Amendment Bill 2006	8
Statute Law (Miscellaneous Provisions) Bill 2006	8
Succession Bill 2006	12
Summary Offences Amendment (Display of Spray Cans) Bill 2006	7
Superannuation Legislation Amendment Bill 2006	8
Sydney Cricket and Sports Ground Amendment Bill 2006	8
Threatened Species Conservation Amendment (Biodiversity Banking) Bill 2006	9
Totalizator Legislation Amendment (Inter-jurisdictional Processing of Bets) Bill 2006	6
Transport Administration Amendment (Travel Concession) Bill 2006	9
University of Technology (Kuring-gai Campus) Bill 2006*	8
Valuation of land Amendment Bill 2006	7

Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2006 & Crimes (Appeal and Review) Amendment (DNA Review Panel) Bill 2006

	Digest Number
Water Management Amendment (Water Property Rights Compensation) Bill 2006	5
Workers Compensation Legislation Amendment Bill 2006	4
Workers Compensation Legislation Amendment (Miscellaneous Provisions) Bill 2005	1
Young Offenders Amendment (Reform of Cautioning and Warning) Bill 2006*	8

Appendix 2: Index of Ministerial Correspondence on Bills

Bill	Minister/Member	Letter sent	Reply received	Digest 2005	Digest 2006
Children (Detention Centres) Bill 2006	Minister for Juvenile Justice	02/06/06	27/06/06		8, 9
Commission for Children and Young People Amendment Bill 2005	Minister for Community Services	25/11/05	25/08/06	15	10
Companion Animals Amendment Bill 2005	Minister for Local Government	25/11/05	15/12/05		1
Confiscation of Proceeds of Crime Amendment Bill 2005	Attorney General	10/10/05	23/11/05	11	1
Correctional Services Legislation Amendment Bill 2006	Minister for Justice	02/06/06			8
Crimes Amendment (Road Accidents) Bill 2005	Attorney General	10/10/05	12/12/05	11	1
Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2006 & Crimes (Appeal and Review) Amendment (DNA Review Panel) Bill 2006	Premier	26/09/06			13
Crimes Legislation Amendment (Gangs) Bill 2006	Minister for Police	05/09/06			10
Crimes (Sentencing Procedure) Amendment (Existing Life Sentences) Bill 2005	Attorney General	23/05/05	19/04/06	6	5
Crimes (Serious Sex Offenders) Bill 2006	Minister for Justice	28/04/06			5
Drug Misuse and Trafficking Amendment (Hydroponic Cultivation) Bill 2006	Attorney General	02/06/06	02/08/06		8,9
Education Legislation Amendment (Staff) Bill 2006	Minister for Education and Training	09/05/06	23/05/06		6,8
Fair Trading Amendment Bill 2006	Minister for Fair Trading	02/06/06	07/06/06		8,12
Local Government Amendment (Waste Removal Orders) Bill 2006	Minister for Local Government		09/06/06		8,9
Motor Accidents Compensation Amendment Bill 2006 and Motor Accidents (Lifetime Care and Support) Bill 2006	Minister for Commerce	24/03/06	26/04/06		3,5
Smoke-free Environment Amendment Bill 2004	Minister for Health	05/11/05	12/01/06		2
State Revenue Legislation Amendment Bill 2005	Treasurer	20/06/05	03/01/05	8	1
Terrorism (Police Powers) Amendment (Preventative Detention) Bill 2005	Attorney General	25/11/05	16/05/06	15	7
Totalizator Legislation Amendment (Inter-jurisdictional Processing of Bets) Bill 2006	Minister for Gaming and Racing	09/05/06	24/05/06		6,8
Transport Administration Amendment (Public Transport Ticketing Corporation) Bill 2005	Minister for Transport	25/11/05 28/04/06	05/04/06	15	5

Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2006 & Crimes (Appeal and Review) Amendment (DNA Review Panel) Bill 2006

Bill	Minister/Member	Letter sent	Reply received	Digest 2005	Digest 2006
Vocational Education and Training Bill 2005	Minister for Education and Training	04/11/05	28/11/05	13	1
Water Management Amendment Bill 2005	Minister for Natural Resources	25/11/05	05/09/06	15	11

Appendix 3: Bills that received comments under s 8A of the Legislation Review Act in 2006

	(i) Trespasses on rights	(ii) insufficiently defined powers	(iii) non reviewable decisions	(iv) delegates powers	(v) parliamentary scrutiny
Careel Bay Protection Bill 2006*	R				
Channel 7 Former Epping Site Protection Bill 2006*	R				
Children (Detention Centres) Amendment Bill 2006	R, C				
Community Protection (Closure of Illegal Brothels) Bill 2006*	R				
Correctional Services Legislation Amendment Bill 2006	R, C				
Crimes Amendment (Apprehended Violence) Bill 2006	R				
Crimes Amendment (Murder of Police Officers) Bill 2006*	R				
Crimes (Appeal and Review) Amendment (DNA Review Panel) Bill 2006	R, C	R, C			
Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2006	R, C	R, C			
Crimes Legislation Amendment (Gangs) Bill 2006	R, C				
Crimes (Sentencing Procedure) Amendment Bill 2006	R				
Crimes (Serious Sex Offenders) Bill 2006	R, C				
Drug Misuse and Trafficking Amendment (Hydroponic Cultivation) Bill 2006	R, C				
Education Legislation Amendment (Staff) Bill 2006	R, C	R, C	R, C	R, C	R, C
Electricity Supply Amendment (Protection of Electricity Works) Bill 2006	R				
Environmental Planning and Assessment Amendment Bill 2006	R				

Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2006 & Crimes (Appeal and Review) Amendment (DNA Review Panel) Bill 2006

	(i) Trespasses on rights	(ii) insufficiently defined powers	(iii) non reviewable decisions	(iv) delegates powers	(v) parliamentary scrutiny
Fair Trading Amendment Bill	R, C				
Fair Trading Amendment (Motor Vehicle Insurance and Repair Industries) Bill 2006					N
Fines Amendment (Payment of Victims Compensation Levies) Bill 2006	N				
Fisheries Management Amendment Bill 2006	R				
Health Legislation Amendment (Unregistered Health Practitioners) Bill 2006	R				
Jury Amendment (Verdicts) Bill 2006	R				
Law Enforcement (Controlled Operations) Amendment Bill 2006	R				
Law Enforcement Legislation Amendment (Public Safety) Bill 2005	R				
Local Government Amendment (Waste Removal Orders) Bill 2006	R		R		
Motor Accidents (Lifetime Care and Support) Bill 2006	R, C		R, C	R	R
Motor Accidents Compensation Amendment Bill 2006	R, C		R, C		
Motor Vehicles Repairs (Anti-steering) Bill 2006	R				
Parliamentary Electorates and Elections Amendment Bill 2006	R				
Pipelines Amendment Bill 2006			R		R
Police Amendment (Police Promotions) Bill 2006				R	
Royal Rehabilitation Centre Sydney Site Protection Bill 2006*	R				
Security Industry Amendment (Patron Protection) Bill 2006*	R				

	(i) Trespasses on rights	(ii) insufficiently defined powers	(iii) non reviewable decisions	(iv) delegates powers	(v) parliamentary scrutiny
Threatened Species Conservation Amendment (Biodiversity Banking) Bill 2006				R	
Totalizator Legislation Amendment (Inter-jurisdictional Processing of Bets) Bill 2006		R, C			
Transport Administration Amendment (Travel Concession) Bill 2006				R	
University of Technology (Kuring-gai Campus) Bill 2006*	R				

Key

- R Issue referred to Parliament
 C Correspondence with Minister/Member
 N Issue Noted

Appendix 4: Index of correspondence on regulations reported on in 2006

Regulation	Minister/Correspondent	Letter sent	Reply	Digest 2006
Centennial Park and Moore Park Trust Regulation 2004	Minister for Tourism and Sport and Recreation	29/04/05	19/01/06	1
Companion Animals Amendment (Penalty Notices) Regulation 2005	Minister for Local Government	12/09/05	21/12/05	1
Electricity (Consumer Safety) Regulation 2006	Minister for Fair Trading	28/04/06	20/06/06	9
Environmental Planning and Assessment Amendment (Infrastructure and Other Planning Reform) Regulation 2005	Minister for Planning	12/09/05	24/12/06	3
Health Records and Information Privacy Regulation 2006	Minister for Health	28/04/06	27/06/06	9
Hunter Water (General) Regulation 2005	Minister for Utilities	04/11/05	09/01/06	1
Motor Accidents Compensation Regulation 2005	Minister for Commerce	28/04/06	24/07/06	9
Protection of the Environment Operations (Waste) Regulation 2005	Minister for the Environment	04/11/05	29/11/05	1
Stock Diseases (General) Amendment Regulation 2005	Minister for Primary Industries	12/09/05	07/02/06	1
Photo Card Regulation 2005	Minister for Roads	26/04/06 25/08/06	21/08/06	9
Road Transport (Driver Licensing) Amendment (Interlock Devices) Regulation 2003	Minister for Roads		03/08/06	9
Workers Compensation Amendment (Advertising) Regulation 2005	Minister for Commerce	12/09/05	28/11/05	1