



SUMMARY OF CONCLUSIONS

***LEGISLATION REVIEW DIGEST* No. 13 of 2006**

26 September 2006

Legislation Review Digest No. 13 of 2006 contains the Legislation Review Committee's consideration of the:

- **Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2006; and**
- **Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2006.**

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]

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| 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 |

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| (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]

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| 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

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| 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]

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| 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

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| 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. |
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| 111. | The Committee also notes that no such sunset clause applies to prosecutors wishing to re-try an acquitted person under the <i>Crimes (Appeal and Review) Amendment (Double Jeopardy) Bill 2006</i> . |
| 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

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| 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. |

The Legislation Review Committee reports on whether each bill introduced into Parliament:

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

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

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