



SUMMARY OF CONCLUSIONS
LEGISLATION REVIEW DIGEST No. 8 of 2007
4 December 2007

Legislation Review Digest No. 8 of 2007 contains the Legislation Review Committee's consideration of Bills introduced into Parliament in the sitting week beginning 25 November 2007 and any reports on regulations since the previous *Digest*.

The Bills reported on:

- Casino, Liquor and Gaming Control Authority Bill 2007
- Civil Liability Amendment (Offender Damages) Bill 2007
- Child Protection (Offenders Registration) Amendment Bill 2007
- Commission for Children and Young People Amendment Bill 2007
- Courts and Other Legislation Amendment Bill 2007
- Crimes (Administration of Sentences) Amendment Bill 2007
- Gene Technology (GM Crop Moratorium) Bill 2007
- Health Legislation Amendment Bill 2007
- Law Enforcement and Other Legislation Amendment Bill 2007
- Liquor Bill 2007
- Miscellaneous Acts (Casino, Liquor and Gaming) Amendment Bill 2007
- Motor Accidents Compensation Amendment (Claims and Dispute Resolution) Bill 2007
- Occupational Health and Safety Amendment Bill 2007
- Road Transport (General) Amendment (Heavy Vehicle User Charges) Bill 2007
- Road Transport Legislation (Breath Testing and Analysis) Bill 2007
- World Youth Day Amendment Bill 2007

The Regulations reported on include:

- Criminal Procedure Amendment (Briefs of Evidence) Regulation 2007

SUMMARY OF CONCLUSIONS

SECTION A: Comment on Bills

1. Casino, Liquor and Gaming Control Authority Bill 2007

Self-incrimination: Part 4

18. The Committee will always be concerned if a Bill removes or restricts a person's right against self-incrimination. The Committee notes that the right against self-incrimination is enshrined in the *International Covenant on Civil and Political Rights*.
19. However, the Committee acknowledges that in some cases this right may be modified if there is a significant public interest in obtaining the information and where the use of that information is restricted. The Committee accepts that there is a public interest in ensuring compliance with the gaming and liquor legislation.
20. The Committee notes the existence of some safeguards in the Bill regarding the use of any information that may incriminate the person providing that information. However, it is questionable whether the limitation on the way in which this information may be used is adequate.
21. Accordingly, the Committee considers that the Bill may trespass on rights and liberties and thus asks Parliament to consider whether the modification of the right against self-incrimination contained in the Bill unduly trespasses on the rights and liberties of individuals.

Commencement by proclamation: Clause 2

24. The Committee will usually be concerned if a Bill is to commence on proclamation rather than on assent. However, given the extensive reforms proposed and the likely need for time to allow administrative arrangements to be made, the Committee believes that providing for the Bill to commence on proclamation is an appropriate delegation of legislative power. However, it notes that a timeframe regarding the likely date of commencement has not been provided.

2. Child Protection (Offenders Registration) Amendment Bill 2007

Issue: Retrospectivity – Proposed section 3F (1) (a) and (1) (b) Child protection registration orders made in relation to foreign offences and offences committed before 15 October 2001 (unless the person was a child at the time that the offence was committed) of Schedule 1 [11]; and proposed section 3F (5) an offence in respect of which a person has been found guilty is spent does not prevent the making of an order under this section.

Issue: Retrospectivity – Schedule 1 [37] of Other Amendments - changes to the definition of *corresponding registrable person* extend to persons who have reporting obligations imposed under a foreign law before the commencement of the changes, and the new types of child protection registration orders may be made in respect of persons found guilty of offences committed before the commencement of the relevant provisions.

22. The Committee will always be concerned with any retrospective effect of legislation which impacts on personal rights. However, the Committee notes the safeguard provided in the proposed subsection (2) of 3F: a local court may make an order only if it is satisfied that the person poses a risk to the lives or sexual safety of 1 or more children, or of children generally. The Committee also considers the best interests of children and one of the aims of the Child Protection Register as providing a deterrent to re-offending. Accordingly, the Committee is satisfied that the retrospectivity of the proposed section 3F (1) (a) and (1) (b) and 3F (5) does not, in this case, unduly trespass on individual rights. Similarly, the Committee is satisfied that the retrospectivity of the proposed amendment of Schedule 1 [37] to insert savings and transitional provisions as a consequence of the enactment of the proposed Act, does not unduly trespass on individual rights.

Issue: Provide the executive with unfettered control over the commencement of an Act – Clause 2 – Commencement by proclamation.

24. Although there may be good reasons why such discretion is required such as allowing time for appropriate administrative arrangements to be made, the Committee has concerns about commencement by proclamation and asks Parliament to consider whether this Bill, other than the exceptions as provided by subsections (2) and (3), to commence by proclamation rather than on assent, is an inappropriate delegation of legislative power.

3. Civil Liability Amendment (Offender Damages) Bill 2007

Retrospectivity: Schedule 1[8] to [10]

15. The Committee will always be concerned to identify the retrospective effect of legislation that may adversely impact individuals.

16. By applying certain provisions of the Act to an award of damages made against a protected defendant before commencement of the relevant clauses, the Bill has the potential to adversely affect the damages rights of individuals, as the offender damages trust funds provisions contained in Division 6 of Part 2A of the *Civil Liability Act* may be invoked.
17. However, the Committee notes that retrospective application of the relevant clauses already applies in the Act as it currently stands. The Bill seeks to remove any doubts as to their retrospective application and thus end legal challenges to the application of the offender damages trust fund provisions.
18. Accordingly, the Committee asks Parliament to consider whether the retrospective application of certain clauses in the Bill unduly trespasses on the rights of individuals.

4. Commission for Children and Young People Amendment Bill 2007

Issue: Privacy – Schedule 1 [9] – proposed section 39 (2):

20. The Committee notes that the current legislation already requires employers to notify the commission of the name and other identifying particulars of an employee against whom relevant employment proceedings have been completed, and given the public interest in protecting children, the Committee is of the view that, on balance, the proposed section 39 (2) of Schedule 1 [9] does not unduly trespass on the right to privacy.

5. Courts and Other Legislation Amendment Bill 2007

Commencement by proclamation: Clause 2

28. Although there may be good reasons why such discretion is required, such as allowing time for appropriate administrative arrangements to be made, the Committee has concerns about commencement by proclamation and asks Parliament to consider whether schedules 2, 4 and 5 of the Bill commencing by proclamation rather than on assent is an inappropriate delegation of legislative power.

6. Crimes (Administration of Sentences) Amendment Bill 2007

Issue: Property and Rule of Law – Proposed section 76A of Schedule 1 [4] – Inmates' money:

16. The Committee is concerned that the proposed section 76A of Schedule 1 [4] is made with respect to money that if the inmate had not entered into custody, would have otherwise lawfully belonged to the inmate or the inmate would have been lawfully entitled to. The amendment is being made with respect to money that is lawfully or legally available to the inmate, and not any proceeds from crime. This also contrasts significantly with the current legislation which relates to the confiscation of property (including money) that is unlawfully in the possession of an inmate (current section 75 of the Act), and with respect to sale of unclaimed property and unclaimed money (current section 76). The Committee is concerned that this amendment is unduly trespassing individual rights to property, and refers it to Parliament.
18. The Committee has concerns that the above amendment also infringes the rule of law by seeking to legislate its way out of the ordinary trust rules and obligations which could likely be imposed by the court on the Department of Corrective Services, especially since the Crown Solicitor has advised that the matter is not entirely free from doubt. The Committee is concerned that this may conflict with the laws on trust and also undermine the rule of law and trespass unduly on personal rights and liberties, and refers it to Parliament accordingly.

Issue: Retrospectivity - Proposed section 97 of Schedule 1 [12] to be inserted after the current Part 11 of Schedule 5 – Inmates' money:

19. This will extend to any inmates' money that had been surrendered, paid or received, before the commencement of the amended section. The Committee will always be concerned where the law is changed retrospectively in a manner that adversely affects any person, and considers this proposed section trespasses unduly on personal rights and refers this to Parliament.

Issue: Oppressive Official Powers – Proposed new section 141 (3) of Schedule 1 [7] – Decision following review:

21. The Committee notes that certainty is required for any inmate who has been determined by the Parole Authority as to their right to be released on parole, including the actual day for release. The Committee has concerns that the proposal is to be determined administratively (according to the Department's timing and resources), rather than is currently the situation of fixing the actual day of release, and is of the view that the proposed new section 141 (3) unduly trespasses individual rights and liberties and refers this to Parliament.

**Issue: Excessive Punishment – Proposed new section 235G of Schedule 1 [10]
– Functions of Departmental compliance and monitoring officers and
proposed section 205A of Schedule 2 [2] – Testing for alcohol and drugs:**

23. Under the proposed section 235G (6) (c), offender also means an offender referred to in Part 8 of the *Crimes (Sentencing Procedure) Act 1999*, which includes those sentenced to a good behaviour bond. This involves matters of a lesser nature or less serious or minor summary offences. The Committee is of the view that the new proposal of the extended functions of a compliance and monitoring officer to conduct the testing for the presence of alcohol or drugs (with the power to use such force as is reasonably necessary), on those on a good behaviour bond, may be excessive punishment in certain circumstances, especially since alcohol is not an illicit drug. The Committee considers the application of the proposed section 235G (2) (f) to enable the compliance and monitoring officers to conduct drug or alcohol testing on those sentenced with a good behaviour bond under the proposed section 235G (6) (c), appears to be excessive punishment and unduly trespasses personal rights and liberties, and refers this to Parliament.
24. Proposed section 205A of Schedule 2 [2] allows for the testing for alcohol and drugs where an offender is suspected to be under the influence of alcohol or other intoxicating substance, if in attendance at a work site or attendance site. The proposed amendment is silent on the level of consumption or quantity of alcohol. The Committee is concerned that the testing of alcohol (which is not an illicit substance), is allowed for those on community service orders and those on parole especially if the conditions of the order do not prohibit them from consuming alcohol or if the offences that they had committed, were not related to alcohol or drugs. The Committee regards this amendment as unduly trespassing individual rights and liberties, and refers it to Parliament.

**7. Gene Technology (GM Crop Moratorium) Amendment Bill
2007**

**Issue: Exclude judicial and merits review – Proposed Section 7A (11) of
Schedule 1 [6]**

25. The Committee notes that in some instances policy considerations may determine that an appeal or review is not necessary. However, the Committee will be concerned when legislation seeks to exclude review of a decision, even to exclude review of a failure or refusal to make a decision, unless there is a strong public interest in doing so.
26. The Committee is of the view that the proposed section 7A (11) is very broad and draws Parliament's attention to the fact that individual rights and liberties appear to be unduly dependent on non-reviewable decisions.

Issue: Provide the executive with unfettered control over the commencement of an Act - Clause 2 - Commencement by proclamation.

28. Although there may be good reasons why such discretion is required such as allowing time for appropriate administrative arrangements to be made, the Committee has concerns about commencement by proclamation and asks Parliament to consider whether the Bill, other than Schedule 1 [16], to commence by proclamation rather than on assent, is an inappropriate delegation of legislative power.

8. Health Legislation Amendment Bill 2007

Commencement by proclamation: Clause 2

5. Although there may be good reasons why such discretion is required, such as allowing time for appropriate administrative arrangements to be made, the Committee has concerns about commencement by proclamation and asks Parliament to consider whether schedule 2.13[4] commencing by proclamation rather than on assent is an inappropriate delegation of legislative power.

9. Law Enforcement And Other Legislation Amendment Bill 2007

Issue: Excessive Punishment – Proposal to omit section 59A (4) assault during public disorder of Schedule 1.2 Crimes Act 1900 No 40 of Schedule 1 [6]:

23. The Committee notes from the Second Reading speech and the Ombudsman's review that the emergency powers in Part 6A of Schedule 1 have been rarely used except for once. The Committee considers that there is little deterrent value from allowing for the above maximum penalties during a large scale public disorder, given the rarity of such public disorders. The Committee is concerned with the disproportionate severity of the above penalties compared to the general penalty for the same types of assault occurring in a non-public disorder context, and considers it as excessive punishment that unduly trespasses individual rights and liberties, and accordingly, refers this to Parliament.

Issue: Excessive Punishment – Proposed section 8D of Schedule 1.3 Bail Act 1978 No 161 of Schedule 1 [6]:

25. The Committee is concerned with the disproportionate severity of the above amendment compared to the general presumption for bail for other similar types of assault offences occurring in a non-public disorder context, and considers it as excessive punishment and undermines the right to be treated as innocent, which unduly trespasses individual rights and liberties, and refers this to Parliament.

Issue: Retrospectivity - Proposed insertion of Part 3 to amend Schedule 2 of Schedule 3.1 [23]:

26. This amends Schedule 2 to apply the amendments made by this proposed Act to offences committed before the commencement of this proposed Act and to persons subject to orders before that commencement. The Committee will always be concerned where the law is changed retrospectively in a manner that adversely affects any person, and considers this proposed amendment trespasses unduly on personal rights and liberties, and refers this to Parliament.

Issue: Procedural Fairness and Access to Justice - Proposed section 26ZA (3A) compliance with obligation to inform – Schedule 4.1 [7] *Terrorism (Police Powers) Act 2002* No 115:

31. The Committee notes the High Court in *Ebatarinja and Anor v Deland and Ors* (1998) 194 CLR 444 at 454, has held that “If the defendant does not speak the language in which the proceedings are being conducted, the absence of an interpreter will result in an unfair trial.” The Committee also notes that courts have the power to safeguard against an unfair trial by ordering a stay of the proceedings (*Dietrich v The Queen* (1992) 177 CLR 292).
32. The Committee takes into account the Evidence Act, the reasoning behind the High Court and the court’s power to safeguard against unfairness as referred to above when expressing concerns for the same principles of fairness for access to justice and procedural fairness in relation to the proposed section 26ZA, which if enacted, would remove the requirement to arrange for an interpreter for a person under preventative detention, and the Committee considers this as unduly trespassing personal rights, and refers this to Parliament.

Issue: Provide the executive with unfettered control over the commencement of an Act - Clause 2 - Commencement by proclamation.

34. Although there may be good reasons why such discretion is required such as allowing time for appropriate administrative arrangements to be made, the Committee has concerns about commencement by proclamation and asks Parliament to consider whether the Bill, other than Schedule 1.1 [6], 1.2 and 1.3, to commence by proclamation rather than on assent, is an inappropriate delegation of legislative power.

10. Liquor Bill 2007

Strict liability: Clauses 7, 8, 9, 11, 106, and 117

20. Numerous clauses in the Bill provide for strict liability offences. The imposition of strict liability may give rise to concern as the prosecution is not required to prove that the defendant intended to commit the offence, and may be seen as contrary to the right to the presumption of innocence. However, in some circumstances, the imposition of strict liability may be warranted after considering the community impact of the offence, the availability of defences and safeguards, and the type of penalty that may be imposed.
21. The Committee notes that terms of imprisonment are generally considered inappropriate in relation to strict liability offences. However, it notes the public interest in ensuring compliance with the terms of the Bill, and the threat of imprisonment may serve as an effective deterrence for those tempted to breach its provisions.
22. Accordingly, the Committee considers that the Bill may trespass on rights and liberties and thus asks Parliament to consider whether the Bill unduly trespasses on the rights and liberties of those charged with certain strict liability offences.

Reverse onus of proof: Clauses 73, 77, 113, 117 and 120

32. The Committee notes that these offences place the onus of proof on the defendant in relation to a number of offences stipulated by the Bill. These relate to key elements of the offences.
33. The Committee notes that the presumption of innocence is a fundamental right. Reversing the onus of proof is inconsistent with this right.
34. However, the Committee notes that a reversal of the onus of proof may be appropriate in some circumstances particularly where knowledge of the factual circumstances is in the possession of one party.
35. Accordingly, the Committee considers that the Bill may trespass on rights and liberties and thus asks Parliament to consider whether the reversal of the onus of proof in these circumstances unduly trespasses on rights and liberties.

Right to privacy: Clause 115

40. The declaration of a restricted alcohol area may extend to the consumption of alcohol in the home and other private premises. This may interfere with the right to privacy, a fundamental human right.
41. However, the Committee notes that such a declaration may only be made if the Minister is satisfied that it is in the public interest and has the support of the majority of the community likely to be affected by it.

42. Accordingly, the Committee considers that the Bill may trespass on rights and liberties and thus asks Parliament to consider whether cl 115 unduly trespasses on the privacy rights of persons within the affected area.

Right to liberty of movement: Clause 77

47. The Committee notes that cl 77 may intrude on the right of a person to liberty of movement if the person has been refused admission or turned out of licensed premises because of intoxication, and/or violent, quarrelsome or disorderly conduct.

48. However, given the public interest in ensuring that certain persons are precluded from entering the vicinity of licensed premises, that the time in which they may be excluded is limited to six hours, and that provision is made for their re-entry into the vicinity if there are safety concerns, the person needs to obtain transport, or if they reside in the area, the Committee concludes that the Bill does not unduly trespass on the right to freedom of movement.

Commencement by proclamation: Clause 2

51. The Committee will usually be concerned if a Bill is to commence on proclamation rather than on assent. However, given the extensive reforms proposed and the likely need for time to allow administrative arrangements to be made, the Committee believes that providing for the Bill to commence on proclamation is an appropriate delegation of legislative power. However, it notes that a timeframe regarding the likely date of commencement has not been provided.

11. Miscellaneous Acts (Casino, Liquor and Gaming) Amendment Bill 2007

Commencement by proclamation: Clause 2

9. The Committee will usually be concerned if a Bill is to commence on proclamation rather than on assent. However, given the extensive reforms proposed and the likely need for time to allow administrative arrangements to be made, the Committee believes that providing for the Bill to commence on proclamation is an appropriate delegation of legislative power. However, it notes that a timeframe regarding the likely date of commencement has not been provided.

12. Motor Accidents Compensation Amendment (Claims and Dispute Resolution) Bill 2007

Commencement by proclamation: Clause 2

- | |
|---|
| 6. Although there may be good reasons why such discretion is required, such as allowing time for appropriate administrative arrangements to be made, the Committee has concerns about commencement by proclamation and asks Parliament to consider whether the Bill commencing by proclamation rather than on assent is an inappropriate delegation of legislative power. |
|---|

13. Occupational Health and Safety Amendment Bill 2007*

- | |
|---|
| 16. The Committee has not <i>identified any issues under s 8A(1)(b) of the Legislation Review Act 1987.</i> |
|---|

14. Road Transport (General) Amendment (Heavy Vehicle User Charges) Bill 2007

- | |
|---|
| 15. The Committee has not <i>identified any issues under s 8A(1)(b) of the Legislation Review Act 1987.</i> |
|---|

15. Road Transport Legislation (Breath Testing and Analysis) Bill 2007

Issue: Clause 2 - Commencement by proclamation - Provide the executive with unfettered control over the commencement of an Act.

- | |
|--|
| 14. Although there may be good reasons why such discretion is required such as allowing time for appropriate administrative arrangements to be made, the Committee has concerns about commencement by proclamation and asks Parliament to consider whether the Bill (subject to certain exceptions), to commence by proclamation rather than on assent, is an inappropriate delegation of legislative power. |
|--|

16. World Youth Day Amendment Bill 2007

Issue: Exclude judicial and merits review – Proposed Section 44H of Schedule 1 [8] – Protection of exercise of certain functions:

- | |
|--|
| 21. The Committee notes that in some instances policy considerations may determine that an appeal or review is not necessary. However, the Committee will be concerned when legislation seeks to exclude review, unless there is a strong public interest in doing so. |
| 22. The Committee is of the view that the proposed section 44H is very broad and draws Parliament's attention to the fact that individual rights and liberties appear to be unduly dependent on non-reviewable decisions. |

Issue: Henry VIII clause – which allow amendment of Acts by a regulation – proposed section 58 (2)(f) and (g) regulations of Schedule 1 [10] – requiring persons to submit to searches etc and excluding persons who refuse to submit to such searches:

24. The Committee is concerned that allowing regulations to exclude people from the World Youth Day venue or facilities, and allowing regulations to be made in relation to searches of persons and their articles, vehicles or vessels, appear to be a significant delegation of legislative power.
25. The Committee also notes that the ability of Parliament to effectively scrutinise the pre-conditions or criteria for the proper exercising of such search and exclusion powers is dependant on Parliament sitting. Therefore, the Committee considers that this constitutes an inappropriate delegation of legislative power, and refers it to Parliament. The Committee is also of the view that such search powers, would be more appropriate to be made in the principal Act by an amending legislation rather than through the regulations.