Federal Court of Australia Amendment (Criminal Jurisdiction) Bill 2008

Senate Legal and Constitutional Affairs Committee

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Introduction

The Law Council is pleased to provide a submission on the *Federal Court of Australia Amendment (Criminal Jurisdiction) Bill 2008* (the Bill) and notes that it has previously been consulted by the Attorney-General's Department on drafts of the Bill.

The Law Council draws the Committee's attention to a number of concerns with the Bill, including that some parts of:

- The pre-trial procedures are too onerous for the accused and fail to take account of relevant reviews of such procedures at State and Territory level;
- The bail provisions fail to take account of relevant State and Territory laws, particularly a presumption in favour of bail;
- The jury provisions fail to take account of relevant reviews at State and Territory level;
- The appeal provisions are too prescriptive

The Law Council submits that the Committee should recommend changes to ensure that there is greater consistency between the Bill and relevant State and Territory laws, procedures and reviews of such laws and procedures currently being undertaken. As the Explanatory Memorandum notes the accused will appear in the Federal Court following committal proceedings in State or Territory Courts and the Director of Public Prosecutions will be able to elect to conduct indictable proceedings for cartel offences in either the Federal Court or State or Territory Supreme Courts.[1] In this situation, the Law Council submits that there is a great need for as much consistency as possible with State and Territory laws and procedures in relation to the matters contained in the Bill.

The Law Council notes that the provisions of the Bill are intended to apply only to cartel offences and that the Attorney-General has stated that the Government has no plans to give the Federal Court indictable criminal jurisdiction in other areas.[2] However, some commentators have suggested that the Federal Court will continue to acquire further jurisdiction in criminal matters and the Law Council considers that the provisions of the Bill need to be carefully examined with such a possibility in mind.[3]

[1] Explanatory Memorandum, p 2. The Law Council also notes that concerns about the operation of this provision have been raised in the submission of the Law Institute of Victoria, 15 January 2009.
[2] Second Reading Speech, 3 December 2008
[3] For example, see Justice Weinberg's paper, ' The Current and Proposed Criminal Jurisdiction of the Federal Court' to the Federal Criminal Law Conference, 5 September 2008 at http://www.nswbar.asn.au/docs/resources/lectures/weinberg.pdf

Pre-Trial Disclosure Provisions

The Law Council is concerned that the Commonwealth approach to pre-trial disclosure in the Bill is inconsistent with developments in this area in NSW, Queensland and Victoria, where reviews of pre-trial procedures are being conducted.

The Law Council has particular objections to proposed sub-sections 23CF (a) and (b), which provide that if the accused takes issue with a fact, matter or circumstance disclosed in the notice of the prosecution's case, the accused must disclose the basis for doing so. Such disclosure implies that the defence is required at the pre-trial stage to assert what the true facts are and reveal the client's instructions and the evidence to be led.

Traditionally the accused was not required to disclose his/her defence or even whether s/he intended to lead evidence at all. This reflected the fundamental principle underlying criminal proceedings, namely that the accused has a right to remain silent while the prosecution bears the onus of proof and must discharge this burden with respect to every element of the offence.

While the Law Council supports the policy objective as stated in the Explanatory Memorandum to ensure that the Court is in a position to take control of the proceedings at an early stage and narrow the issues to be dealt with at trial, the Law Council does not consider that this objective should be achieved at the expense of the accused's right to require the prosecution to prove its case before the accused is called on to present his or her defence.[4] The provisions currently in the Bill go too far in requiring the defence to disclose the details of its case and not just the nature of the issues which are in dispute with the prosecution or the general nature of the defence.

The Law Council understands that there have been issues with similar provisions in Victoria which may not be being adhered to in practice.

The Law Council submits that the NSW review has resulted in proposals which allow sufficient judicial control over the pre-trial process but do not overturn the principles of the adversarial process. The Law Council understands that the accused is required to respond to the prosecution's case statement in NSW and the Court will allow the prosecution to summarise its case unless this will cause prejudice to the defence. The NSW proposals enhance the Court's power to narrow the issues but do not require the defence to disclose its case. These proposals better reflect Commonwealth Constitutional principles in s 80 and Chapter III, which have inbuilt due process mechanisms.

The Law Council suggests that the Committee consider the NSW proposals further as an alternative to what is currently contained in the Bill and also have regard to the Queensland and Victorian reviews.

Bail Provisions

There is a general concern that the bail provisions differ significantly from similar provisions at the State and Territory level. This will mean that the Federal Court will have to consider different matters in determining whether bail should be granted during indictable primary proceedings and criminal appeal proceedings than those considered in a State or Territory

[4] Explanatory Memorandum, p 8

court during committal proceedings for the same offence. As the Explanatory Memorandum points out, there is no provision for a bail order made by a committing magistrate to continue for an accused after he or she appears in the Federal Court and the Court will have to consider the issue afresh.[5]

Proposed section 58DA provides that during indictable primary proceedings or criminal appeal proceedings, the accused can apply for bail. If the Court refuses to grant bail, proposed subsection 58DA(2) provides that the accused *cannot* make a subsequent application *unless* there has been a 'significant change in circumstances' since the refusal.

A similar limitation on bail applications exists in New South Wales[6] and Western Australia,[7] and a less restrictive provision applies in Queensland.[8]

No such provisions exist in other Australian jurisdictions. In contrast in South Australia, the Northern Territory and the Australian Capital Territory, the relevant provisions make it clear that a refusal of bail by a court does not preclude the making of subsequent applications.[9]

The Law Council is concerned that the proposed section 58DA adopts a restrictive approach to bail applications that departs from the approach taken in the majority of Australian jurisdictions.

In New South Wales, the provisions restricting multiple applications for bail have been criticised on the grounds that they trespass unduly on personal rights and liberties, such as the right to liberty and the right to be presumed innocent.[10] The provisions have also been described as eroding the presumption in favour of bail and concerns have arisen that the provisions are leading to delayed and /or lengthy applications for bail and are having a particularly detrimental impact on juvenile offenders. [11]

In respect of the present Bill, no policy reason has been advanced for taking such a restrictive approach to bail applications. There is no suggestion, for example, that the types of offences to which the Bill will apply will lead to an inordinate number of applications for bail, or that there is a risk that unsubstantiated bail applications will be used to delay substantive proceedings. In fact, in jurisdictions such as Queensland, bail applications have no effect on delaying substantive proceedings.

Further, the test proposed in subsection 58DA(2), namely that a '*significant* change in circumstances' must be shown before an application for bail can be made following a previous refusal, appears to place a more onerous burden on the applicant than that currently in operation in NSW or WA.

For example, in NSW a subsequent application for bail can be made where:[12]

- the person was not legally represented when the previous application was dealt with, and the person now has legal representation; or

[5] Explanatory Memorandum, p 63
[6] *Bail Act 1978* (NSW) s22A.
[7] *Bail Act 1982* (WA) s7.
[8] See *Bail Act 1980* (Qld) s10(3).
[9] See *Bail Act 1985* (SA) s12(2); *Bail Act 1982* (NT) s19; *Bail Act 1992* (ACT) s19.
[10] For example see Legislation Review Committee (Parliament of NSW) *Legislation Review Digest* Nor 4 of 2007 (23 October 2007) p. vi.
[11] See Tracey Booth and Lesley Townsley, *Bail as a Punitive Process in New South Wales,* Presentation at the 21st Annual conference on the Australian and New Zealand Society of Criminology, 25-28 November 2008, Canberra.
[12] *Bail Act 1978* (NSW) s22A.

- the court is satisfied that new facts or circumstances have arisen since the previous application that justify the making of another application.

In WA, a subsequent application for bail can be made where: [13]

- new facts have been discovered, new circumstances have arisen or the circumstances have changed since bail was refused; or
- the applicant failed to adequately present his or her case for bail on that occasion.

The Law Council recognises that proposed section 58DA will only apply to bail applications made to the Federal Court, and thus subsection 58DA(2) would not operate to limit applications for bail made to a magistrate at the time of committal.[14] The Council is also aware that subsection 58DA(2) does not preclude an appeal against a decision to refuse bail. However an appeal can be a more costly and involved procedure than a further bail application and may not be the appropriate procedure in most circumstances involving bail.[15]

The Law Council is concerned that the proposed subsection appears to restrict an accused's right to apply for bail in a manner more onerous than that currently applying in other Australian jurisdictions.

For these reasons, the Law Council submits that proposed subsection 58DA(2) should be removed from the Bill.

If there remain legitimate policy concerns regarding the prospect of vexatious or frivolous bail applications, the Law Council submits that subsection 58DA(2) be replaced with a provision allowing the Court to refuse to entertain applications on those grounds.[16]

Proposed section 58DB provides that the Court may grant bail after considering certain matters but is silent as to whether there is any presumption in favour of bail, as exists in a number of State and Territory jurisdictions.

At common law an accused has a prima facie right to be at liberty until conviction so that the preparation of his or her case can be as full, thorough and unfettered as possible.[17] This right, coupled with the common law principle of being presumed innocent until proven guilty, has lead to a general presumption in favour of bail. This presumption is also consistent with international human rights law, which provides as a general rule that persons awaiting trial shall not be detained in custody (see Article 9(3) of the International Covenant on Civil and Political Rights).

This human rights principle is reflected in the ACT *Human Rights Act 2004* and the Victorian *Charter of Human Rights and Responsibilities Act 2006*, for example s18 of the ACT Act provides:

(5) Anyone who is awaiting trial must not be detained in custody as a general rule, but his or her release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, if necessary, for execution of judgment.

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[13] *Bail Act 1982* (WA) s7.
[14] Subsection 68A(4) of the *Judiciary Act* will give the magistrate the power to grant bail to the person committed to trial in the Federal Court. See Explanatory Memorandum p. 63.
[15] See the comments of Doyle CJ in See also *Webster v SA* (20003) SASC 347 at [41] and [44].
[16] For example see *Bail Act 1982* (NT) s19(4).
[17] *R v Light* [1954] VLR 152; *R v Wakefield* (1969) 89 WN Pt 1 (NSW). See also Encyclopaedic Australian Legal Dictionary; Halsbury's Laws of Australia .

Under the statutory schemes that now regulate bail applications in every jurisdiction, depending on the offence, there may be:

- a right to release on bail
- a presumption in favour of bail
- no presumption in favour of bail
- a presumption against bail

While disparate, these provisions appear to recognise the continued existence of a general presumption in favour of bail. The majority of jurisdictions specifically identify the type of offences (or particular circumstances of offending) that justify a reversal of the presumption in favour of bail.

For example, the South Australian approach provides that, subject to the *Bail Act 1985*, the bail authority should grant bail, unless, having regard to a set of listed factors, the bail authority considers that the person should not be granted bail.[18]

As the Bill's provisions are intended only to apply in respect of cartel offences, which are offences of a category where bail would be expected to be granted given that the accused is unlikely to present a threat to the community, it is difficult to see why a presumption in favour of bail has not been included in the Bill and the Law Council submits that such a presumption should be included.

It is interesting to note that the Explanatory Memorandum refers to the fact that proposed subsection 58DB (4) has been included to ensure that the section does not override sections of the *Crimes Act 1914* which provide a presumption against bail in relation to certain offences, such as terrorism offences, in case jurisdiction is ever conferred on the Federal Court in relation to such offences.[19] The existence of such a sub-section seems to reinforce the desirability of having a stated presumption in favour of bail for all other offences.

Proposed subsection 58DB(2) sets out the criteria that the court must consider when deciding whether to grant bail. These criteria differ significantly from those used in some jurisdictions.

For example, in some jurisdictions, the criteria the bail authority must consider include:

- The character, antecedents, background and/or community ties of the accused;
- The strength of the evidence against the accused;
- The period that the person may be obliged to spend in custody if bail is refused;
- The accused's previous failure to appear;
- The nature and seriousness of the offence.

Such provisions provide greater scope for the Court to consider the multiplicity of factors relevant to a grant of bail.

The Law Council submits that the Bill should include such provisions in order to achieve greater consistency with State and Territory legislation.

[18] *Bail Act* (SA), s 10
[19] Explanatory Memorandum, p 64

Proposed section 58DD provides that the Court must stay a bail order if the prosecutor requests such a stay pending an appeal. This section also conflicts with any presumption in favour of bail and with practice in other jurisdictions, such as Queensland, where bail is generally continued until the appeal court makes a decision whether to revoke it or not. The section also provides that if the prosecutor files a notice of appeal within 48 hours, the accused is remanded in custody for the entire period until the appeal is disposed of.

The Law Council considers that these provisions are far too prescriptive and should instead allow a general discretion for the Court to consider whether a bail order should be stayed pending an appeal.

The possible harsh consequences of this section as it stands are recognised to some extent in the Explanatory Memorandum, which states that the Director of Public Prosecutions (DPP) is likely to use the provision sparingly.[20] This statement reinforces the Law Council's concern that the section should not be so prescriptive.

The Bill currently does not include any express prohibition on examination or cross-examination in bail proceedings as to the offence with which the person is charged, as is the case in other jurisdictions, such as Queensland.[21] The Law Council suggests that such a provision should be included in order to preserve the traditional rights of the accused.

The Bill also does not include any provisions allowing the Court to take into account matters agreed between the prosecution and the accused, as occurs in other jurisdictions, such as Queensland.[22] The Law Council suggests that such a provision be included as it would also be consistent with the Bill's aim to narrow the issues between the parties as soon as possible in the course of the proceedings.

There is also no provision for the Court to provide reasons as to why bail is refused. This is a requirement in a number of jurisdictions (eg Victoria and South Australia) and the Law Council submits that such a requirement should also be included.[23]

Juries

The Law Council has a number of general concerns with the provisions of the Bill that deal with juries.

Proposed section 23DE provides that if, when the jury is asked to retire to consider its verdict, there are more than 12 jurors, a ballot must be taken to select at random 11 of the jurors, who together with the foreperson, will consider the verdict. This process in practice can become cumbersome. Rather than ballot on 11 jurors – the surplus should be balloted off.

Proposed section 23DI lists those people who, by reason of a past or current conviction and sentence, are disqualified from serving on a jury. The Law Council is concerned that these provisions are too broad in their reach. For example, subsection 23DI(1)(d) disqualifies, for a period of ten years, anyone who has been convicted of an offence and sentenced to a period of imprisonment, regardless of how serious the offence or the period of imprisonment ordered.

[20] Explanatory Memorandum, p 65
[21] See Bail Act 1980 (Qld) s 15
[22] ibid
[23] See Bail Act 1985 (SA) s 12; Bail Act 1977 (Vic) s 12

Proposed subsection 23DI(1)(a)(ii) disqualifies for life anyone who has been sentenced to period of imprisonment of more than twelve months Implicit in this lifetime disqualification, which takes no account of the nature of the offence, is an assumption that certain offenders are beyond full rehabilitation and reintegration into the community.

Proposed subsection 23DI(1)(c)(ii) disqualifies from jury service for life anyone who has been ordered to be detained for a period of more than twelve months in a hospital or detention facility following a criminal trial. Proposed sub-section 23DI(1)(e)(ii) disqualifies such persons from jury service for a period of ten years, if the ordered period of detention is less than 12 months.

These provisions are assumed to apply to people who are found unfit to plead or acquitted on grounds of insanity. It is not appropriate to treat people in this category as though they have been tried and convicted. If such a person is no longer detained and not excused from jury service on grounds of incapacity, he or she should not be disqualified from service on the basis of the outcome of a criminal trial at which he or she was not convicted.

Proposed section 23DJ lists those people who, by reason of their profession or public position are not qualified to serve as a juror. The list does not take account of the recent research and report of the NSW Law Reform Commission on this topic (see Report 117 of 2007), which recommended inter alia that:

- The exclusion of people whose duties are connected with the administration of justice should be more tightly defined
- The exclusions in the Commonwealth *Jury Exemption Act 1965* should be reviewed to confine them to those who have an integral and substantial connection with the administration of justice or perform special or personal duties to Government[24]

It is important that juries are drawn from an appropriately wide pool and that their composition is reflective of the broader community. Jury composition and eligibility is a topic of significant current debate and interest and it is unfortunate that the Bill does not take account of current proposals. The Law Council submits that the Committee should reconsider these provisions in the light of these proposals.

Comments on provisions dealing with appeals

Proposed section 30AA outlines the appellate jurisdiction of the Federal Court in criminal proceedings, including jurisdiction to hear appeals against interim judgments and decisions. However, proposed subsection 30AB (2) provides that such appeals on interim judgments and decisions can only be heard with leave from the judge who made the judgment or decision. The Law Council considers this type of leave provision to be too restrictive as the trial judge often does not see merit in an appeal against his or her decision even if the Court on appeal later does.

Proposed section 30AJ sets out the grounds for allowing appeals, including a proviso in relation to allowing appeals against conviction on the grounds that a jury verdict is unreasonable or cannot be supported by the evidence or that the judgment is based on a wrong decision of a question of law. The proviso states that the Court may dismiss such

[24] See http://www.lawlink.nsw.gov.au/lawlink/lrc/ll_lrc.nsf/pages/LRC_r117toc

appeals if there has not been a substantial miscarriage of justice. The Law Council suggests that the Committee consider closely the terms of this section to ensure that an accused does not lose the chance of an acquittal or a new trial due to its operation.

Proposed section 30AD provides an additional means for an accused to appeal if he or she satisfies the Attorney-General that there is a doubt or question about the conviction or sentence. As the Explanatory Memorandum notes, the provision gives this additional power to the Attorney-General to consent to such an appeal in order to deal with cases where there may have been a miscarriage of justice and the power is only likely to be exercised if all other avenues of appeal have been exhausted.

The Law Council supports such a provision as an important part of the criminal justice system to ensure that miscarriages of justice, which continue to occur despite the usual appeal mechanisms, can be corrected. The Law Council suggests that the provision could be extended to also allow the accused to approach the Court directly (as in NSW) and/or to allow the accused to seek a determination as to whether or not refusal by the Attorney to consent to the appeal is "manifestly unreasonable".

Recommendations

The Law Council recommends that:

1. The pre-trial disclosure provisions in proposed Division 1A of Part III should be reconsidered in the light of relevant reviews in NSW, Queensland and Victoria.

2. The requirement for the accused to disclose the basis for taking issue with a fact, matter or circumstance in proposed subsections 23CF (a) and (b) should be removed.

3. Proposed subsection 58DA (2) restricting the right to make subsequent bail applications unless there has been a significant change in circumstances should be removed from the Bill or should be replaced with a provision that the Court has a discretion to refuse a subsequent application on the grounds that it is frivolous or vexatious.

4. A presumption in favour of bail should be inserted into the Bill

5. The factors to be considered in deciding whether to grant bail in proposed section 58DB should be expanded to include all such factors in State and Territory legislation.

6. Proposed section 58DD should be replaced with a provision that the Court has a general discretion in relation to staying bail pending an appeal.

7. A prohibition on examination or cross-examination as to the offence with which the person is charged should be included in proposed Part VIB dealing with bail.

8. A provision allowing the Court to take into account matters agreed between the prosecution and the accused should be included in proposed Part VIB dealing with bail.

9. A provision for the Court to provide reasons why bail is refused should be included in proposed Part VIB dealing with bail.

10. Proposed section 23DE should be amended to provide that surplus jurors should be balloted off.

11. Proposed sections 23DI and 23DJ should be reconsidered in the light of the review of jury selection by the NSW Law Reform Commission.

12. Proposed sub-section 30AB (2) should be removed so that the granting of leave to appeal against an interim judgment or decision is not restricted to the trial judge.

13. Proposed subsection 30 AJ (2) relating to the grounds on which appeals may be allowed should be reconsidered.

14. The additional means of appeal in proposed section 30AD should be extended to allow an accused to approach the Court directly and/or to seek a determination that any refusal of consent for appeal by the Attorney-General is manifestly unreasonable.

15.

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 50,000 Australian lawyers, through their representative bar associations and law societies (the "constituent bodies" of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- Australian Capital Territory Bar Association
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society of the Australian Capital Territory
- Law Society of the Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar Association
- The Victorian Bar Inc
- Western Australian Bar Association
- LLFG Limited (a corporation with large law firm members)

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.