Federal Court of Australia Amendment (Criminal Jurisdiction) Bill 2008
Senate Standing Committee on Legal and Constitutional Affairs
Questions on Notice

A. Questions on Notice

1. **The NSW Attorney-General submitted that the Bill creates problems of dual jurisdiction which will lead to dissimilar treatment of persons charged with the same offence (at p. 1). Do you agree with this view?**

   Response

   If a person is to stand trial for a serious cartel offence the choice of court will lie between the Federal Court of Australia and the Supreme Court of the appropriate State or Territory. Both courts will apply rules of evidence and procedure that have been developed to ensure that an accused person receives a fair trial.

   There may be differences between the rules of evidence and procedure applied by the two courts but that does not mean that there will be dissimilar treatment of persons charged with the same offence. The fundamental proposition will remain that, before either court, the accused person must receive a fair trial.

   There are already situations where more than one court system has jurisdiction to deal with a Commonwealth matter on indictment. That can occur if, for example, a Commonwealth offence was committed across more than one State. The courts of both States may have jurisdiction to deal with the matter, and there may be differences between the rules of evidence and procedure applied by those courts.

   The Department has seen no evidence to suggest that an accused person has ever failed to receive a fair trial because of the choice of one Australian court system over another.

2. **In your consultations, were any constitutional issues raised by stakeholders, and if so, were these issues incorporated or on what grounds have these concerns been dismissed?**

   Response

   No Constitutional issues were raised by stakeholders.

3. **Proposed subsection 23CE(1) requires the prosecution to give the Accused a copy or details of information if the prosecutor *reasonably* believes that information may be relevant to the Accused's case. His Honour Justice Weinberg told the Committee that the prosecutor should be obliged to make this disclosure and that the word *reasonably* should be deleted from this provision. Why should this aspect of the prosecution's disclosure be qualified?**

Response

The use of the word reasonably is designed to ensure that there is no obligation on the prosecution to speculate about fanciful defences that an accused person may want to run.

It is important to impose an obligation on the prosecution to disclose material that may be relevant to the defence case but the difficulty in doing so is that the prosecution will normally not know what defences the accused plans to run. Except in some limited circumstances, there is no obligation under Australian law on an accused person to disclose their defence. Accordingly the prosecution must do its best to foresee what defences the accused may want to run in order to determine whether material held by the prosecution may be relevant to one of those defences.

The word reasonable makes it clear that prosecution has an obligation to consider all possible lines of defence that are reasonably foreseeable, but that there is no obligation to look beyond the reasonable and speculate about fanciful defences that an accused may run.

It is, of course, open to an accused person who wants to raise an issue which may not be reasonably foreseeable to ask the prosecution to disclose material relevant to that issue. However, if an accused person chooses not to take that option, it should not be open to them to complain if the prosecution fails to disclose material on an issue which was not reasonably foreseeable.

4. **Justice Weinberg stated that an Accused should never have to disclose documents falling within the category of legal professional privilege, even for the limited purposes of pre-trial disclosure. Is His Honour's interpretation of the proposed provisions correct? What is your response to this view?**

Response

The effect of section 23CL is outlined in the Explanatory Memorandum. The provision will have limited operation in relation to an accused person and will not require an accused person to disclose legal advices or communications with their lawyers.

Section 23CL is, in essence, an avoidance of doubt provision. It ensures that if there is an obligation on either the prosecution or the defence to produce material for the purposes of pre-trial disclosure, that obligation will override any objection based on Legal Professional Privilege.

That provision is needed because things like witness statements and expert reports are documents prepared for use in litigation and, on that basis, attract Legal Professional Privilege. If section 23CL did not appear in the Bill, there would be scope for an argument that material of this kind does not have to be disclosed because the Bill does not override Legal Professional Privilege.

It is a standard rule of construction that a court will assume that Legal Professional Privilege applies unless it is overridden expressly or by necessary implication (see Carmody v MacKellar (Full Federal Court, 30 July 1997)).

The reason why section 23CL will have limited impact on an accused person is because of the limited nature of the material that an accused can be required to disclose under the pre-trial regime.

The only material an accused person can ever be compelled to produce is a copy of any expert report the defence intends to rely on at trial and copies of any material the defence plans to rely on to prove a defence based on alibi or mental impairment.

That material will not include legal advices or communications by the accused with their lawyers. It follows that section 23CL does not have the potential to require an accused person to disclose legal advices or communications with their lawyers.

5. **In respect of leave to appeal (proposed section 30AB (1)), Justice Weinberg considered it odd that leave could be required from only a single judge. Is this unusual for legislation of this type, and if so, what is the reason for this departure from normal practice?**

Response

Section 30AB(1) is based on the existing section 25(2) of the *Federal Court of Australia Act 1976* which deals with applications for leave to appeal in civil cases and in those criminal cases where the Court currently has power to hear an appeal (eg: an appeal from a decision made by a single judge in a summary criminal matter).

Under section 25(2) an application for leave or special leave to appeal may be heard by a single judge or by the Full Court. There is no apparent reason why that model should not be followed for the new indictable criminal jurisdiction or why there should be different procedures on this aspect between civil and criminal cases.

Section 25(2) will be amended by Item 60 of the Bill but not in a way that affects this issue.

6. **The Bill provides for an Accused to apply to the Attorney-General for consent to appeal. Justice Weinberg likened this to a Director of Public Prosecution's Reference and suggested that the provision was superfluous given that the prosecution already represents the Crown. Do you agree, and should proposed section 30AD remain within the Bill? Is this in fact a proper role for the Attorney-General?**

Response

Section 30AD is designed to assist the Attorney-General deal with an application for the prerogative of mercy in a case where the application is made by a person who was convicted before the Federal Court and who raises questions which, in the Attorney-General's opinion, should be considered by the Federal Court.

The applicant may, for example, claim that a conviction is unsafe because additional evidence has come to light which, it is claimed, shows that the accused was wrongly convicted. The Attorney-General may take the view that this an issue best considered by the Federal Court rather than by the Governor-General.

Similar provisions appear in the laws of other jurisdictions (eg: section 77 of the NSW *Crimes (Appeal and Review) Act 2001* and section 584 of the Victorian *Crimes Act 1958*.)

Section 30AD has been drafted in a form that provides a further level of appeal, rather than in a form that gives the Federal Court power to provide an advisory option. That ensures that the provision is consistent with Chapter III of the Constitution.

Section 30AD does not deal with reference appeals by the prosecution. They are dealt with under section 30CB.

7. In evidence to the Committee, His Honour Justice Weinberg was particularly critical of proposed paragraph 30AI(1)(c) allowing the Court to take further evidence on appeal if satisfied that it is *in the interests of justice* to do so. His Honour described this as a significant departure from established law, and an attempt to retry the issues. What is your response to this claim? Are the provisions of the Bill unique and if so, why have they been included in the Bill?

Response

The standard practice in criminal cases is that a court will only allow additional evidence on appeal if the evidence if fresh and compelling. Section 30AI is designed to reflect that practice.

The note at the end of section 30AI(1) reinforces that point by saying:

> Paragraph (c) does not require the Court to receive further evidence. For example, if the failure to adduce the evidence during the trial is not satisfactorily explained.

8. Proposed section 30AJ(2) allows the Court under certain conditions to dismiss an appeal if satisfied that there has not been a substantial miscarriage of justice. The Law Council of Australia suggested this might deprive an Accused of the right to appeal (at p. 9), and Justice Weinberg gave evidence that the provision is shortly to be eliminated in Victorian law. Can you tell the Committee why this provision is included in the Bill?

Response

Section 30AJ is in the same basic form as the appeal provisions in all Australian jurisdictions. This is one of the few areas in criminal procedure where there is a consistent national model. The Bill follows that model.

If section 30AJ did not follow the national model the Federal Court would not be able to rely on the extensive case law which has been developed in applying the national model. The new provision would have to be interpreted afresh by the Court.

It appears from Justice Weinberg's evidence that Victoria may be about to depart from the national model. Justice Weinberg did not express a view on whether the new Victorian provisions would be better or worse than the national model.

I note that the submission by the Law Council of Australia does not articulate what concerns the Council has with section 30AJ and does not suggest an alternative model.

B Other issues raised by Justice Weinberg

9 Section 23AB

Justice Weinberg queried whether the Federal Court will have jurisdiction for dealing with proceeds of crime.

Response

This is covered in Item 111 of the Bill. The *Proceeds of Crime Act 2002* will be amended to give the Court jurisdiction to make conviction based orders in cases where criminal proceedings are being conducted before the Court.

10 Section 23BC(1)

Justice Weinberg queried the use of the phrase expedient in the interests of justice.

Response

The phrase has the same meaning as appropriate in the interest of justice. In the context of section 23BC(1) the phrase could not reasonably be read a meaning anything else.

The phrase expedient in the interests of justice is used in various places in State and Territory law including section 574 of the Victorian *Crimes Act 1958.* It is not a new concept.

11 Section 23BD

Justice Weinberg queried the use of the phrase pursuit of a single purpose.

Response

Section 23BD is based on section 567(2) of the Queensland Criminal Code which provides:

> (2) Charges for more than 1 indictable offence may be joined in the same indictment against the same person if those charges are founded on the same facts or are, or form part of, a series of offences of the same or similar character or a series of offences committed in the prosecution of a single purpose.

The purpose is to ensure that charges can be joined in an indictment if they form part of one course of action. There does not appear to be any ambiguity in the wording of the provision.

12 Section 23CE

Justice Weinberg queried whether the phrase relevant to the accused case should be defined.

Response

This issue is covered in Item 48 of the Bill. Item 48 will add a definition of "relevant to the accused case" to section 4 of the Federal Court of Australia Act.

13 Section 23DQ

Justice Weinberg suggested that the footnote referring to the *Disability Discrimination Act 1992* should be removed.

Response

The footnote will make it clear that the amendments made to the Federal Court of Australia Act do not override the Disability Discrimination Act and will avoid any doubt on the issue.

That means that, when deciding whether a person is capable of performing the duties of a juror to a reasonable standard, the Sherriff must consider the objective facts of the case, and whether the person can be provided with aids or facilities to perform duties. Nothing in the Disability Discrimination Act will require the Court to allow a person to perform jury duties if they are genuinely incapable of doing so.

14 Section 23EC

Justice Weinberg suggested that the section include a reference to transcript as well as copy documents.

Response

There is no reason, in principle, why the provision could not refer to transcript as well as copy documents. However the more examples that are given, the more the scope there is for suggesting that something which is not referred to was not meant to be covered.

Section 23EC is designed to give the trial judge the widest possible power to ensure that the jury has any material it reasonably requires in order to properly consider the issues before it.

15 Section 23FI(3)

Justice Weinberg suggested that the word may be replaced by must, if appropriate.

Response

The word may is designed to achieve the same result as the words suggested by Justice Weinberg. It is difficult to see how the proposed change of wording could achieve a different outcome.

16 Section 23FK

Justice Weinberg queried why there needs to be a provision which says that a person who has been found not guilty by a jury must be acquitted and discharged by the Court. Traditionally a verdict of not guilty has been seen as being as self-effecting.

Response

The provision has been included as a matter of caution to ensure that there is no uncertainty surrounding the effect of a jury verdict or the status of an acquitted defendant.

The provisions also makes the point that an acquittal is a judgement of the Court, which has consequences for the appeal regime given the way the appeal provisions are structured (eg: section 30AA(1)(a) gives a convicted person a right to appeal against the judgement that convicts them).

The definition of "judgment" in section 4 of the Federal Court of Australia Act will be amended under Item 42 to include a sentence and a conviction.

C Response to other matters raised in the hearing

17. To what extent does section 23CM of the Bill vary from the precedent in NSW law?

Response

Section 23CM deals with the consequences of a party not complying with a pre-trial disclosure obligation. The section gives the trial judge power to make such orders as he or she thinks appropriate and sets out example of orders the judge can potentially make including:

- that particular evidence not be admitted;
- a party not be allowed to call an expert witness;
- a party be allowed to tender a document as evidence of its contents;
- the accused not be able to take issue with a fact, matter or circumstance; and
- granting an adjournment.

Section 23CM gives the trial judge power to make orders of this kind, it does not require that such orders be made. Section 23CM does not derogate from the primary obligation of the trial judge to ensure that an accused person receives a fair trial.

Section 23CM is based on section 148 of the NSW *Criminal Procedure Act 1986*. A copy of that section is at **Attachment A.**

The main differences from the NSW model are that there is no provision in section 23CM for the trial judge or a party to comment on a failure to comply with a pre-trial obligation and there is provision in section 23CM to cover the situation where an accused fails to comply with an obligation to set out the basis for taking issue with a fact, matter or circumstance.

The first change was made for policy reasons which have already been outlined to the Committee. The second change was made because the NSW pre-trial disclosure regime does not out include a requirement for an accused to set out the basis for taking issue with a fact, matter or circumstance and, accordingly, there is nothing in the NSW sanction regime to cover a failure to comply with an obligation of that kind.

18 Defence disclosure

Is too much required of the accused in relation to the pre-trial disclosure provisions in comparison with other legislative approaches?

Response

It is worth noting that the United Kingdom *Criminal Procedure and Investigations Act 1996* now includes disclosure provisions which go beyond what is proposed in the Bill.

Under section 5 of the UK Act an accused person can, in appropriate cases, be required to make compulsory disclosure. If so, section 5(5) provides that the accused must give a defence statement to the court and the prosecutor.

Section 5(6) provides that a defence statement is a written statement:

(a) setting out in general terms the nature of the accused's defence,
(b) indicating the matters on which he takes issue with the prosecution, and
(c) setting out, in the case of each such matter, the reason why he takes issue with the prosecution.

The relevance of this provision for present purposes is that the UK Act draws a clear distinction between a statement setting out the nature of the accused's defence (which is covered by section 5(6)(a)) and a statement setting out the reasons why an accused takes issue with a matter (which is covered by section 5(6)(c)).

The UK Act makes it clear that the two concepts are not the same. A requirement for an accused person to indicate what matters are in dispute and to indicate, in general terms, the reasons for the dispute is not the same as a requirement that the accused person disclose their proposed defence.

Attachment A

Extract from NSW *Criminal Procedure Act 1986*

Sanctions for non-compliance with pre-trial disclosure requirements

148 Sanctions for non-compliance with pre-trial disclosure requirements

(1) **Exclusion of evidence** The court may refuse to admit evidence in any criminal proceedings that is sought to be adduced by a party who failed to disclose the evidence to the other party in accordance with pre-trial disclosure requirements.

(2) **Dispensing with formal proof** The court may allow evidence to be adduced by a party to criminal proceedings without formal proof of a matter if the evidence was disclosed to the other party and the other party did not disclose an intention to dispute or require proof of the matter as required by the pre-trial disclosure requirements.

(3) **Adjournment** The court may grant an adjournment to a party if the other party seeks to adduce evidence in the criminal proceedings that the other party failed to disclose in accordance with pre-trial disclosure requirements and that would prejudice the case of the party.

(4) **Comment to jury** The judge or, with the leave of the court, any party may comment on a failure by a party to comply with pre-trial disclosure requirements in any criminal proceedings. However, the comment must not suggest that an accused person failed to comply because the accused person was, or believed that he or she was, guilty of the offence concerned.

(5) **Application of sanctions** Without limiting subsection (6), the powers of the court may not be exercised under this section to prevent an accused person adducing evidence or to comment on any non-compliance by the accused person unless the prosecutor has complied with the pre-trial disclosure requirements.

(6) **Regulations** The regulations may make provision for or with respect to the exercise of the powers of a court under this section (including the circumstances in which the powers may not be exercised).