



SCRUTINY OF LEGISLATION COMMITTEE

ALERT DIGEST



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SCRUTINY OF LEGISLATION COMMITTEE MEMBERSHIP

49TH PARLIAMENT, 1ST SESSION

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BILLS EXAMINED BUT NOT REPORTED ON *

NIL

* These bills were considered to raise no issues within the committee's terms of reference

SECTION A

BILLS REPORTED ON

Note: s.14B of the *Acts Interpretation Act 1954* provides that consideration may be given to “extrinsic material” in the interpretation of a provision of an Act in certain circumstances. The definition of “extrinsic material” provided in that section includes:

... a report of a committee of the Legislative Assembly that was made to the Legislative Assembly before the provision was enacted¹

Matters reported on to Parliament by the Scrutiny of Legislation Committee in its alert digests prior to the enactment² of a provision may therefore be considered as extrinsic material in its interpretation.

¹ Section 14B(3)(c) Acts Interpretation Act 1954.

² The date on which an Act receives royal assent (rather than the date of passage of a bill by the Legislative Assembly) s.15 Acts Interpretation Act 1954.

SECTION A – BILLS REPORTED ON**1. POLICE POWERS AND RESPONSIBILITIES AND OTHER ACTS
AMENDMENT BILL 2000³**

1. The Honourable T A Barton MLA, Minister for Police and Corrective Services, introduced this bill into the Legislative Assembly on 17 May 2000.

2. The objects of the bill, as described in the Explanatory Notes, are as follows:

(This bill) completes the process of consolidation and extension of police powers which commenced with the passing of the Police Powers and Responsibilities Act 1997 and was followed by a significant consolidation of police powers in the Police Powers and Responsibilities Act 2000.

Overview of the bill

3. The bill contains provisions dealing with the following subjects:

- Blood and urine testing of persons suspected of committing sexual and other serious offences
- Diversion of persons found drunk in a public place, and minor drug offenders, to respective places and programs
- DNA profiling procedures
- Controlled operations and controlled activities
- Dealing with things in the possession of the police service

4. For reasons of convenience, the committee's comments on this bill are grouped under the subject to which they relate.

***BLOOD AND URINE TESTING OF PERSONS SUSPECTED OF
COMMITTING SEXUAL AND OTHER SERIOUS OFFENCES
(new Chapter 8, Part 5)*****Does the legislation have sufficient regard to the rights and liberties of individuals?⁴**

5. The bill inserts into the *Police Powers and Responsibilities Act 2000* a new Chapter 8, Part 5.

³ The committee thanks Mr Robert Sibley, Barrister-at-law, Senior Lecturer in Law, Queensland University of Technology, for his valued advice in relation to the scrutiny of this bill.

⁴ Section 4(2)(a) of the *Legislative Standards Act 1992* requires legislation to have sufficient regard to rights and liberties of individuals.

6. The new Part 5 (proposed ss.319–330) provides for relief for victims of sexual or other serious assault offences who may be in danger of contracting transmissible disease by allowing the testing of the urine or blood of the defendant. However the sample can only be taken upon order of a Magistrate and an appeal lies to a District Court Judge against that order. At the same time the bill prevents the samples taken from the defendant being used for the purposes of self incrimination and ensures that no records are kept of the fact of the procedures to further protect both the victim and the defendant. The relevant Public Records Legislation and the *Freedom of Information Act 1992* therefore will not apply to this part of the act.

7. The committee considers that these provisions, which authorise the taking of blood and urine samples in stipulated circumstances, adequately protect the interests of both victims and alleged offenders.

DNA PROFILING PROCEDURES (new Chapter 8, Part 4)

Overview of Part 4

8. The bill inserts into the *Police Powers and Responsibilities Act 2000* a new Chapter 8, Part 4, dealing with DNA profiling.
9. The committee considers DNA profiling to be an important investigative tool, but has various concerns about the nature of the profiling powers which the bill confers on police.
10. These concerns are set out below.

Does the legislation have sufficient regard to the rights and liberties of individuals?⁵

Does the legislation make individual rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review?⁶

◆ clause 300 (consensual samples)

11. Clause 300 provides that any police officer may ask a person to consent to the taking of a DNA sample for DNA analysis. Unlike similar provisions in the Commonwealth *Crimes Act 1914*⁷, the Victorian *Crimes Act 1958*⁸, and the South Australian *Criminal Law (Forensic*

⁵ Section 4(2)(a) of the *Legislative Standards Act 1992* requires legislation to have sufficient regard to rights and liberties of individuals.

⁶ Section 4(3)(a) of the *Legislative Standards Act 1992* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation makes rights or liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review.

⁷ Section 23 WI provides that before requesting consent to a forensic procedure the constable must be satisfied on the balance of probabilities that the person is a suspect and there are reasonable grounds to believe that the procedure is likely to produce evidence tending to confirm or disprove the commission of a relevant offence (**indictable offences**) and the request is justified in all the circumstances. This in turn requires a balancing of the public interest in obtaining evidence against the public interest in upholding the physical integrity of the suspect. Six matters to which the constable must have regard are then provided for.

*Procedures) Act 1998*⁹ there are no criteria whatsoever that has to be satisfied before such a request can be made. For example the person need not be a suspect and it also need not appear that taking the sample will either confirm or eliminate the person as a suspect in an offence. There is also no reference to any type of offence that must be suspected.

12. The committee draws to the attention of the parliament the breadth of the power to request a DNA sample with informed consent.

Does the legislation have sufficient regard to the rights and liberties of individuals?¹⁰

◆ clause 303 (consensual samples)

13. The committee notes that the bill addresses the issue of informed consent in a full and consistent approach to that in other jurisdictions and includes a requirement that where oral the giving of explanations in relation to this be electronically recorded. However, cl.303 provides for a number of matters that must be explained by a police officer in order for a person to give an informed consent to the taking of a sample. 303 (1) (h) provides that it **must be explained** that if the person refuses to consent, the person may be required under Division 4 to provide a DNA sample.
14. The taking of DNA sample is potentially highly probative evidence. The primary power to compel the taking of samples in Division 4 is limited to where a proceeding has been commenced for an indictable offence. This power may be misrepresented to the person with a view to inducing the person to give a sample when they may not be compellable to do so.

15. The committee suggests that to avoid this potential misinterpretation, cl.303(1)(h) be redrafted to specify that the person being asked to consent **must not** be told that they may be required to provide a DNA sample **unless** the provisions of Division 4 clearly apply to them.

Does the legislation have sufficient regard to the rights and liberties of individuals?¹¹

Does the legislation provide appropriate protection against self-incrimination?¹²

◆ Part 4 generally (non-consensual samples)

16. The acquisition of DNA samples without consent is an interference with the fundamental rights of the citizen. It constitutes a trespass to the person and in Queensland is an assault¹³.

⁸ Section 464R provides that a police officer may request a suspect to undergo a forensic procedure only if there are reasonable grounds to believe that procedure would tend to confirm or disprove the involvement of the suspect in an **indictable offence** and is either suspected, charged or summonsed.

⁹ Section 15 provides that a police officer may only ask a person who is under suspicion and there are reasonable grounds to suspect that the forensic procedure may produce evidence of value to the investigation of the suspected offence.

¹⁰ Section 4(2)(a) of the *Legislative Standards Act 1992* requires legislation to have sufficient regard to rights and liberties of individuals.

¹¹ Section 4(2)(a) of the *Legislative Standards Act 1992* requires legislation to have sufficient regard to rights and liberties of individuals.

¹² Section 4(3)(f) of the *Legislative Standards Act 1992* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation provides appropriate protection against self-incrimination.

It is also in discord with the commonly understood notion of a person's right not to be forced to provide evidence against themselves.

17. No power exists at common law to compel a suspect to supply a sample of blood or bodily fluid for the purpose of DNA profiling¹⁴ and the obtaining of such samples in that way would give rise to a judge's power to exclude the evidence at trial¹⁵.
18. Such acquisition may also be in breach of the International Covenant on Civil and Political Rights Article 14 (3) (g) which provides that amongst the minimum guarantees to be enjoyed in the determination of any criminal charge is the right "not to be compelled to testify against himself or to confess guilt"¹⁶.

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| 19. The committee draws this interference with fundamental rights to the attention of the Parliament. |
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Does the legislation adversely affect rights and liberties, or impose obligations, retrospectively?¹⁷

◆ **clause 311**

20. Clause 311 applies to any prisoner who is serving a term of imprisonment for an indictable offence. They may be detained and taken to an appropriate place where a DNA sample can be taken. There are no restrictions on the exercise of this power. At the time of their imprisonment it was unlawful to take a DNA sample from these prisoners without their consent, and as such the clause retrospectively affects their rights and liberties.

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| 21. The committee draws the attention of Parliament to the retrospective operation of this provision. |
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Does the legislation make individual rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review?¹⁸

¹³ Section 245 *Criminal Code* defines an assault as the application of force directly or indirectly by any means whatever without consent.

¹⁴ Waight PK, Williams CR, *Evidence Commentary and Materials* 1998 LBC 586.

¹⁵ Heydon JD, *Cross on Evidence* Sixth Aust Edn 2000 Butterworths at 225095 and 27245.

¹⁶ In reference to the Covenant Justice Kirby remarked "These provisions reflect notions with which Australian law is generally compatible. To the fullest extent possible, save where statute or established common law authority is clearly inconsistent with such rights the common law in Australia when it is being developed or re-expressed, should be formulated in a way that is compatible with such international and universal jurisprudence" (*R v Swaffield* [1998] 192 CLR 159 at 214).

¹⁷ Section 4(3)(g) of the *Legislative Standards Act 1992* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation does not affect rights and liberties, or impose obligations, retrospectively.

¹⁸ Section 4(3)(a) of the *Legislative Standards Act 1992* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation makes rights or liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review.

◆ **clause 307**

22. Clause 307 allows a commissioned officer to order the further detention of an adult person against whom a proceeding has been started for an indictable offence to allow the taking of a compulsory DNA sample from the person. The compulsory taking of a sample of saliva is an intimate and intrusive act that would otherwise constitute an assault. It will potentially provide highly incriminating evidence against the person. In the three other Australian jurisdictions referred to above such a power is only exercisable by a Stipendiary Magistrate¹⁹. Even under this bill, in the case of a compulsory blood or urine sample taken to protect the victim of crime and which must be destroyed and cannot be used in evidence, an application must be made to a Magistrate pursuant to cl.322. So too in the case of a child an application must be made to the Children's Court for an order to take DNA pursuant to s.312.
23. In the case of detention to allow compulsory DNA samples to be taken no review of the decision of the commissioned police officer by a judicial officer is available. This also is unlike the position under the bill with respect to compulsory blood and urine samples where an appeal from the Magistrates decision lies to the District Court pursuant to cl.326.

24. The committee draws to Parliament's attention this wide and intrusive power, exercisable by police officers, to order the further detention of persons for the purpose of compulsorily obtaining a DNA sample.
25. The committee seeks information from the Minister as to why the bill does not provide an avenue for review of these orders.

Is the legislation unambiguous and drafted in a sufficiently clear and precise way?²⁰◆ **clauses 307(5) and 308(4)**

26. Subsection (5) of cl.307 requires that before a commissioned police officer approves detention for a compulsory DNA sample he or she must "*have regard to the rights and liberties of the person and the public interest*".
27. Similarly cl.308 allows a commissioned officer to authorise a written DNA sample notice. He or she cannot do so "*unless satisfied, having regard to the rights and liberties of the person and the public interest, taking the sample is reasonably necessary in the particular circumstances*" [subsection 4]
28. There is no guidance in the bill as to how someone exercising this intrusive and potentially highly incriminating power should have regard to those matters. The committee notes that this is a power being exercised during the accusatory stage of the criminal justice system

¹⁹ Commonwealth *Crimes Act 1914* s.23WJ(3) and (4) and ss.23WM and WN; Victoria *Crimes Act 1958* s.464T; South Australia *Criminal Law (Forensic Procedures) Act 1988* s.18.

²⁰ Section 4(3)(k) of the *Legislative Standards Act 1992* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation is unambiguous and drafted in a sufficiently clear and precise manner.

because the power only arises after a proceeding has been started by a police officer by arrest, notice to appear or complaint and summons.

29. How a police officer is able to make a judgement about the relevance of the rights and liberties of the person and the public interest before exercising the power seems to be left entirely up to them by the bill. The police officer is not required to state or record any reasons for the decision. Because no criteria are spelled out in the bill and no reasons need be given it would seem to be a very difficult exercise for a court to review the decision when considering, for example, the admissibility of the evidence at trial.
30. In contrast to this the other Australian jurisdictions referred to above stipulate that there must be a balancing of the public interest in obtaining evidence tending to confirm or disprove the commission of the offence and the public interest in upholding the physical integrity of the suspect and criteria are spelled out in relation to this balancing exercise.
31. For example, under the Commonwealth *Crimes Act 1914* in the case of a senior constable ordering a **non** intrusive procedure without consent and also in the case of a magistrate ordering an intrusive procedure [which includes saliva] without consent each must be satisfied²¹ on the balance of probabilities that:
- There are reasonable grounds to believe that the suspect committed the relevant offence
 - That there are reasonable grounds for believing that the evidence will tend to confirm or disprove the suspects guilt
 - The carrying out of the procedure is justified in all the circumstances
32. To determine if the procedure is justified in all the circumstances they **must balance** the public interest in obtaining the evidence tending to prove or disprove against the public interest in upholding the physical integrity of the suspect.
33. Further the act provides that they must have regard to:
- The seriousness of the offence
 - The degree of participation of the suspect in the offence
 - The age physical and mental health, cultural background etc
 - Customary beliefs if Aboriginal person or Torres Strait Islander
 - Whether there is a less intrusive but reasonably practicable way of obtaining the evidence
 - The reasons the suspect gives for refusing consent
 - The period the person has been detained
 - The reasons for any delay in proposing to carry out the procedure

²¹ Sections 23 WO and 23WT.

34. In each case reasons have to be given for the decision to make the order.
35. Similar considerations in s.26 of the South Australian Act apply to guide the court. The Victorian Act in s.464T also addresses the criteria that the court must be satisfied of on the balance of probabilities.
36. In each case the person has a right to be present and reasons must be given by the court.
37. The committee draws to the attention of Parliament the lack of clarity and precision in the drafting of the power under clauses 307 (5) and 308 (4).

Is the legislation unambiguous and drafted in a sufficiently clear and precise way?²²

◆ clause 309

38. Clause 309 allows a court to order the taking of a DNA sample **in a proceeding against an adult charged with an indictable offence**. The wording in bold type may be contrasted with that of **starts a proceeding or continues a proceeding for an indictable offence** in cls.307 and 308. The explanatory memorandum does not indicate when it is intended this power is to be exercised by a court. The wording suggests that it is a power available during a trial and possibly a committal hearing, sentencing proceeding or even an appeal. “Proceeding” is not defined in the Dictionary nor is it defined in the Criminal Code, Justices Act or Penalties and Sentences Act. “Criminal proceeding” is defined in the Bail Act 1980 to include a hearing, trial or appeal in relation to an offence and “hearing” includes a summary trial, a committal proceeding and a sentencing proceeding.
39. The power is exercisable by a court if it is “satisfied it is reasonably necessary, having regard to the rights and liberties of the person and the public interest”. There is no indication in the bill what the purpose is in giving such a power to a court. The Explanatory Memorandum states that it is available “if satisfied that evidence of a person’s involvement in the commission of an indictable offence may be obtained.”
40. If the power were to be exercised during a trial it would often be after the Crown and defence have joined issue and the accused and their representatives have made decisions on what issues the trial will be fought upon and even whether to go to trial or plead guilty.
41. As with the wording in cls.307 and 308 there is no guidance as to how regard is to be had to the rights and liberties of the person and the public interest.

42. The committee seeks information from the Minister as to the intended use of this power by a court.

Is the legislation unambiguous and drafted in a sufficiently clear and precise way?²³

²² Section 4(3)(k) of the *Legislative Standards Act 1992* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation is unambiguous and drafted in a sufficiently clear and precise manner.

◆ **clause 310**

43. Clause 310 gives an unfettered power to a court after conviction to order a DNA sample. There appears to be no guidance for the court as to when such a power should be exercised.

44. The committee seeks information from the Minister as to the intended use of this power by a court after conviction.

Is the legislation unambiguous and drafted in a sufficiently clear and precise way?²⁴**clause 312**

45. Clause 312 requires an application to the Children's Court for a DNA order in the case of a child. Some indication is found in subclause (4) as to what the court should be satisfied of before making an order but unlike the cases of the decision of a commissioned officer and a court in a proceeding for an indictable offence there is no reference to the rights and liberties of the child *vis a vis* the public interest.

46. The committee seeks information from the Minister as to why consideration of the public interest, which is required under proposed ss.308 to 310 of the bill in relation to adults, is not referred to in proposed s.312 (which deals with children).

Is the legislation unambiguous and drafted in a sufficiently clear and precise way?²⁵◆ **clause 316 (dealing with DNA samples and records)**

47. The committee commends the requirement that DNA samples and analysis results must be destroyed in the cases outlined in cl.316. The committee observes that subclause (3) is difficult to read. However it is concerned that it may be construed, by the use of the words "the commissioner **may** destroy the results", that there is a discretion to retain the DNA database information while destroying the sample and results. This may not be the intention but the clause requires more precise drafting.

48. The committee draws this imprecisely drafted provision to the Minister's attention.

CONTROLLED OPERATIONS AND CONTROLLED ACTIVITIES
(new Chapter 5)

²³ Section 4(3)(k) of the *Legislative Standards Act 1992* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation is unambiguous and drafted in a sufficiently clear and precise manner.

²⁴ Section 4(3)(k) of the *Legislative Standards Act 1992* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation is unambiguous and drafted in a sufficiently clear and precise manner.

²⁵ Section 4(3)(k) of the *Legislative Standards Act 1992* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation is unambiguous and drafted in a sufficiently clear and precise manner.

Overview of Chapter 5

49. The bill inserts into the *Police Powers and Responsibilities Act 2000* a new Chapter 5. Chapter 5 implements a strict regime to protect investigative authorities who of necessity may have to engage in criminal activity in order to detect and prosecute serious criminal activity. Such a legislative regime was recognised as necessary in the Commonwealth context by members of the High Court²⁶ for otherwise the courts would exclude the evidence so obtained and may permanently stay the proceedings.
50. The committee regards the provisions of the new Chapter 5 as being generally positive, but has some comments and concerns about specific provisions of the Chapter. These are set out below.

Does the legislation confer immunity from proceeding or prosecution without adequate justification²⁷

◆ Chapter 5 generally

51. Chapter 5 provides for the immunity from civil and criminal liability for a wide range of people involved with controlled operations. This extends to the commission of serious criminal offences. Such a legislative initiative appear to have been recognised as necessary by some members of the High Court in *Ridgeways case* [refer footnote 1]. It was specifically recommended by Commissioner Carter QC in his *Report on Commission of Inquiry into Operation Trident* in 1993 and a draft Act was included in Appendix 10 of the report.

52. The committee draws to the attention of Parliament this conferral of immunity from proceedings or prosecution.

Does the legislation allow delegation of administrative power only in appropriate circumstances and to appropriate persons²⁸

◆ clauses 176 and 183

53. Clauses 176 and 183 require the approving officer of a controlled operation to refer urgent applications approved by he or she and urgent variations approved by he or she to the Controlled Operations Committee. The Committee are to consider the applications as if the approval had not been given and make recommendations which, under cl.172, may be that the approving officer refuse the application. However subclauses (5) of 175 and 183 provide that the approving officer is not bound by the recommendations of the Controlled Operations Committee in those cases.

²⁶ *Ridgeway v R* [1994-1995] 184 CLR 19 at 19 at 43 and 44 per Mason CJ, Dean and Dawson JJ and 53 and 54 per Brennan J.

²⁷ Section 4 (3) (h) of the *Legislative Standards Act 1992* provides that whether legislation has sufficient regard to the rights and liberties of individuals depends on whether the legislation does not confer immunity from proceeding or prosecution without adequate justification.

²⁸ Section 3 (3) (c) of the *Legislative Standards Act 1992* provides that whether legislation has sufficient regard to the rights and liberties of individuals depends on whether the legislation allows the delegation of administrative power only in appropriate cases and to appropriate persons.

54. The committee seeks information from the Minister why in those particular cases the approving officer is not bound by the Controlled Operations Committees recommendations as is the usual case under cl.177.

Does the legislation have sufficient regard to the rights and liberties of individuals?²⁹

◆ **Chapter 5 generally**

55. The committee also notes that there appears to be no mechanism for the monitoring and review of the use of such operations and questions why the Controlled Operations Committee is not required to report in some way to the Minister or Parliament as recommended by Commissioner Carter QC³⁰.

56. The committee also notes that there appears to be no specific provision for access to the approved application document³¹ or approved application for variation of approval document³² after the controlled operation is over as recommended by Commissioner Carter QC³³ and seeks information from the Minister as to why this is not considered necessary.

***DEALING WITH THINGS IN THE POSSESSION OF THE POLICE SERVICE
(new Chapter 11, Part 3)***

Does the legislation have sufficient regard to the rights and liberties of individuals?³⁴

◆ **clauses 424 and 426**

57. The bill inserts into the *Police Powers and Responsibilities Act 2000* a new Chapter 11, Part 3, dealing with things in the possession of the police service. Clause 424 requires anyone who claims a legal or equitable interest in anything that has been in police possession for more than 30 days or has been used in the commission of an offence to apply to a magistrate for an order that the thing be delivered to that person. Where there is a dispute as to the ownership of a thing a police officer may apply to a magistrate under cl.425 for a declaration as to ownership.

58. However under cl.426, in the case of things seized as evidence or to prevent a person using it to cause harm or to prevent a breach of the peace, a police officer need only apply to a Justice of the Peace (Magistrates Court) [or a Magistrate] for an order about the use or return

²⁹ Section 4(2)(a) of the *Legislative Standards Act 1992* requires legislation to have sufficient regard to rights and liberties of individuals.

³⁰ *Report on Commission of Inquiry into Operation Trident 1993* Appendix 10 p 9, 31 & 32.

³¹ Clause 173.

³² Clause 180.

³³ *Report on Commission of Inquiry into Operation Trident 1993* Appendix 10 p 3,7,8,21,22 ,23.

³⁴ Section 4(2)(a) of the *Legislative Standards Act 1992* requires legislation to have sufficient regard to rights and liberties of individuals.

of the thing. Amongst the orders that can be then made is an order to have the thing dealt with in a proceeding under cls.424 or 425 ie by a Magistrate.

59. The committee seeks information as to why in the case of the person claiming an interest in a thing an application has to be made to a magistrate whereas a police officer need only apply to a Justice of the Peace even though one of the orders that may result is that it be the subject of a proceeding before a magistrate.

Is the legislation unambiguous and drafted in a sufficiently clear and precise way?³⁵

◆ clause 432 (Destruction of Dangerous Drugs following analysis)

60. Clause 432 provides that where drugs have not been destroyed and have been analysed a police officer **may** give a person from whom drugs were seized a written destruction notice advising that they may require the commissioner to provide a part of the drugs for independent analysis. If no such requirement is made by the person within 30 days of service the commissioner may destroy the drugs. The Explanatory Memorandum states at p 32 that an application for forfeiture under s.32 of the *Drugs Misuse Act 1986* is to be made if a destruction notice cannot be served on the person. However there is no such requirement under cl.432 and the section appears to make the service of the notice by the police officer discretionary in any event. Thus it appears that if no notice is given at all or it cannot be served the commissioner is able to destroy the drugs thereby preventing the person from contesting the analysis or quantity of the drugs. In that event the government analyst's certificate is conclusive evidence.
61. If it is the intention, as expressed in the Explanatory Memorandum, that a forfeiture order will be made pursuant to s.32 of the *Drugs Misuse Act 1986* where the destruction notice cannot be served the clause should say so clearly.³⁶ The committee is also of the view that the clause should require that a police officer **must** give the person from whom a drug is seized a destruction notice.

62. The committee recommends that the bill be amended: (a) to expressly deal with the matter of a forfeiture order under s.32 of the *Drugs Misuse Act*; and (b) to require the police officer to give to the person from whom a drug is seized a destruction notice.

Is the legislation unambiguous and drafted in a sufficiently clear and precise way?³⁷

³⁵ Section 4(3)(k) of the *Legislative Standards Act 1992* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation is unambiguous and drafted in a sufficiently clear and precise manner.

³⁶ Section 4 (3) (k) of the *Legislative Standards Act 1992* provides that whether legislation has sufficient regard to the rights and liberties of individuals depends on whether the legislation is unambiguous and drafted in as sufficiently clear and precise way.

³⁷ Section 4(3)(k) of the *Legislative Standards Act 1992* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation is unambiguous and drafted in a sufficiently clear and precise manner.

Does the legislation make individual rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review?³⁸

◆ **clause 434**

63. Clause 434 allows a police officer to deliver a weapon that has not been forfeited to the State if he or she is satisfied that the person to whom it is delivered is the owner or would be lawfully entitled to possess it. However under subclause (2) the weapon may only be delivered if the person satisfies the police officer that they may lawfully possess the weapon. The clause provides no criteria that may be met in order to satisfy the police officer that the person may lawfully possess the weapon. The decision appears to be left to the unfettered discretion of the police officer. The clause provides no avenue for review of the decision of the unsatisfied police officer. If the weapon is not delivered within 30 days it is forfeited to the State pursuant to subclause (3).

64. The committee draws to the attention of Parliament the lack of clarity in the drafting of this clause and the absence of appropriate review of the decision of the police officer who has custody of the weapon.

Does the legislation have sufficient regard to the rights and liberties of individuals?³⁹

◆ **clause 436**

65. Clause 436 allows the commissioner to dispose of a perishable thing in a way that does not cause an actual or apparent conflict of interest in the commissioner or someone in a position to influence how the thing may be disposed of. However under subclause (3), if the commissioner reasonably suspects that it is impracticable to dispose of the thing in that way, he or she must simply dispose of the thing in a way that does not cause danger to anyone.

66. The committee draws to the attention of Parliament the power to dispose of perishable things in circumstances where there is an actual or apparent conflict of interest.

Is the legislation unambiguous and drafted in a sufficiently clear and precise way?⁴⁰

◆ **clause 441(3)(c)**

67. The committee notes that cl.441(3)(c) appears to contain an incorrect reference to s.440.

³⁸ Section 4(3)(a) of the *Legislative Standards Act 1992* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation makes rights or liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review.

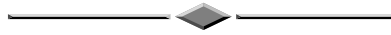
³⁹ Section 4(2)(a) of the *Legislative Standards Act 1992* requires legislation to have sufficient regard to rights and liberties of individuals.

⁴⁰ Section 4(3)(k) of the *Legislative Standards Act 1992* provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation is unambiguous and drafted in a sufficiently clear and precise manner.

68. The committee draws this matter to the attention of the Minister.

SECTION B – COMMITTEE RESPONSE TO MINISTERIAL CORRESPONDENCE

No ministerial correspondence is responded to in this Alert Digest.



This concludes the Scrutiny of Legislation Committee's 7th report to Parliament in 2000.

The committee wishes to thank all departmental officers and ministerial staff for their assistance in providing information to the committee office on bills dealt with in this digest.

Linda Lavarch MLA
Chair

1 June 2000

APPENDICES

- Appendix A – Ministerial Correspondence
- Appendix B – Terms of Reference
- Appendix C – Meaning of “Fundamental
Legislative Principles”
- Appendix D – Table of bills recently considered

APPENDIX A - MINISTERIAL CORRESPONDENCE

NIL

APPENDIX B – TERMS OF REFERENCE

The Scrutiny of Legislation Committee was established on 15 September 1995 by s.4 of the *Parliamentary Committees Act 1995*.

Terms of Reference

22.(1) The Scrutiny of Legislation Committee’s area of responsibility is to consider—

- (a) the application of fundamental legislative principles⁴¹ to particular Bills and particular subordinate legislation; and
- (b) the lawfulness of particular subordinate legislation;

by examining all Bills and subordinate legislation⁴².

(2) The committee’s area of responsibility includes monitoring generally the operation of—

- (a) the following provisions of the *Legislative Standards Act 1992*—
 - section 4 (Meaning of “fundamental legislative principles”)
 - part 4 (Explanatory notes); and
- (b) the following provisions of the *Statutory Instruments Act 1992*—
 - section 9 (Meaning of “subordinate legislation”)
 - part 5 (Guidelines for regulatory impact statements)
 - part 6 (Procedures after making of subordinate legislation)
 - part 7 (Staged automatic expiry of subordinate legislation)
 - part 8 (Forms)
 - part 10 (Transitional).

⁴¹ “Fundamental legislative principles” are the principles relating to legislation that underlie a parliamentary democracy based on the rule of law (*Legislative Standards Act 1992*, s.4(1)). The principles include requiring that legislation has sufficient regard to rights and liberties of individuals and the institution of Parliament.

* The relevant section is extracted overleaf.

⁴² A member of the Legislative Assembly, including any member of the Scrutiny of Legislation Committee, may give notice of a disallowance motion under the *Statutory Instruments Act 1992*, s.50.

APPENDIX C - MEANING OF "FUNDAMENTAL LEGISLATIVE PRINCIPLES"

- 4.(1) For the purposes of this Act, "fundamental legislative principles" are the principles relating to legislation that underlie a parliamentary democracy based on the rule of law.⁴³
- (2) The principles include requiring that legislation has sufficient regard to—
1. rights and liberties of individuals; and
 2. the institution of Parliament.
- (3) Whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation—
- (a) makes rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review; and
 - (b) is consistent with the principles of natural justice; and
 - (c) allows the delegation of administrative power only in appropriate cases and to appropriate persons; and
 - (d) does not reverse the onus of proof in criminal proceedings without adequate justification; and
 - (e) confers power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer; and
 - (f) provides appropriate protection against self-incrimination; and
 - (g) does not adversely affect rights and liberties, or impose obligations, retrospectively; and
 - (h) does not confer immunity from proceeding or prosecution without adequate justification; and
 - (i) provides for the compulsory acquisition of property only with fair compensation; and
 - (j) has sufficient regard to Aboriginal tradition and Island custom; and
 - (k) is unambiguous and drafted in a sufficiently clear and precise way.
- (4) Whether a Bill has sufficient regard to the institution of Parliament depends on whether, for example, the Bill—
- (a) allows the delegation of legislative power only in appropriate cases and to appropriate persons; and
 - (b) sufficiently subjects the exercise of a delegated legislative power to the scrutiny of the Legislative Assembly; and
 - (c) authorises the amendment of an Act only by another Act.
- (5) Whether subordinate legislation has sufficient regard to the institution of Parliament depends on whether, for example, the subordinate legislation—
- (a) is within the power that, under an Act or subordinate legislation (the "**authorising law**"), allows the subordinate legislation to be made; and
 - (b) is consistent with the policy objectives of the authorising law; and
 - (c) contains only matter appropriate to subordinate legislation; and
 - (d) amends statutory instruments only; and
 - (e) allows the subdelegation of a power delegated by an Act only—
 - (i) in appropriate cases and to appropriate persons; and
 - (ii) if authorised by an Act.

⁴³ Under section 7, a function of the Office of the Queensland Parliamentary Counsel is to advise on the application of fundamental legislative principles to proposed legislation.

APPENDIX D – TABLE OF BILLS RECENTLY CONSIDERED

(Appendix D is not reproduced in this Alert Digest – copies of the Appendix can be obtained from the Committee’s Secretariat upon request.)