POLICE POWERS AND RESPONSIBILITIES (DNA) AMENDMENT BILL 2002

EXPLANATORY NOTES

GENERAL OUTLINE

Objective of the Legislation

The *Police Powers and Responsibilities Act 2000* (the Act) represented a comprehensive change in the powers conferred and requirements imposed on police officers in Queensland.

The Act, when it commenced, provided a range of new initiatives included as a result of the *Police Powers and Responsibilities and Other Acts Amendment Act 2000*. One very significant initiative was the introduction of wide ranging DNA sampling powers, in particular the sampling of all prisoners serving a term of imprisonment for an indictable offence. The then Minister for Police and Corrective Services, the Hon. Tom Barton MP, advised the Parliament the initiative "deals with DNA profiling of persons who commit indictable offences", and that "the initiative will also provide for the collection of DNA samples from those persons currently serving periods of imprisonment".

However, an argument has been raised that the scope of the prisoner DNA sampling provisions are limited to the sampling of prisoners who were sentenced in a District or Supreme Court, on indictment, and not summarily in the Magistrates Court.

On 19 March 2002, the High Court of Australia heard an application from several prisoners serving terms of imprisonment, in the matter of *Brogden and Ors v Commissioner of the Police Service* [2002] B42 of 2001, for special leave to appeal to the High Court. The application for special leave was granted by the High Court and this matter is now due proceed to a hearing before that Court. The application to the High Court follows an earlier judicial review application before the Supreme Court of Queensland and then an appeal against the Supreme Court's decision to the Court of Appeal of the Supreme Court of Queensland (the Queensland

Court of Appeal). Both the judicial review application and the appeal were dismissed.

At paragraphs 11 and 12 of his reasons for dismissing the appeal to the Queensland Court of Appeal, de Jersey CJ stated:

> "[11] While s. 305 of the *Police Powers and Responsibilities Act* states rather blandly, as the purpose of the following provisions, laying down, "the circumstances in which a person may be required to provide a DNA sample for DNA analysis", those following provisions demonstrate a legislative intent that in the case of the more serious offending, and alleged offending, a comprehensive DNA database be established: no doubt directed both to facilitating conviction in the case of the crime immediately in question, and as to hitherto unsolved crime, to assist in the identification of offenders and the exclusion of innocent persons wrongly suspected.
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> [12] Accordingly, one sees provisions authorising the taking of DNA samples at all relevant stages: upon arrest (s. 307), upon charging (s 309), and upon a finding of guilt (s. 310). Each provision refers, as appropriate to the context, to "indictable offence": in the former two cases, " a proceeding for an indictable offence", and in the last, a finding of guilt "of an indictable offence". None (nor s. 316 to which I will come) expresses the qualification that the capacity to take, or retain, the sample, be extinguished, or not arise, should the matter proceed summarily. That could easily have been spelt out had it been intended."

With respect to the reference to s. 316 of the Act, de Jersey CJ stated at paragraph 14 of his reasons:

> "[14] The statutory scheme includes provision (s 316) for the destruction of DNA samples in the event that an arrest or charge is discontinued, or the person found not guilty of the indictable offence. As mentioned above, s. 316 does not refer additionally to a situation in which the matter proceeds summarily."

The applicants assert that s. 311 of the Act has no application to prisoners summarily convicted of an indictable offence because of s. 659 of the Criminal Code. Section 659 has the effect that when a person has been summarily convicted of an indictable offence, the conviction is to be deemed a conviction of a simple offence only, and not of an indictable

offence. The applicants argue that they were summarily convicted of indictable offences, which must be regarded as a simple offences, and therefore, were prisoners serving terms of imprisonment for a simple offence. DNA samples may not be taken, under s. 311 of the Act, from prisoners only serving sentences for simple offences.

Since sampling began in prisons in December 2000, DNA samples have been taken from over 4,000 prisoners. The extraction of DNA profiles and the making of comparisons with crime scene samples has already resulted in at least 61 prisoners being linked to 88 offences. DNA samples are continually being added to the system which will allow for increased comparisons with evidence collected from crime scenes. It is expected that prisoner DNA profiles will eventually be included in the national DNA database, which will allow prisoner profiles to be matched against evidence from unsolved crimes across Australia.

Should the applicants be successful in the High Court the DNA sampling of prisoners summarily convicted of an indictable offence may be invalid. A likely consequence of such a decision would be the destruction of those samples already taken. Arguably, the DNA profiles from such prisoner DNA samples could not be used for the identification of suspects for unsolved crimes. Because of these consequences this amendment is essential.

Means of Achieving Policy Objectives

A number of provisions within Chapter 8 (Powers in relation to persons in custody), Part 4 (DNA Procedures) of the Act refer to taking or retaining of a DNA sample, in effect, after a finding of guilt with respect to an indictable offence. The Bill will resolve the issue beyond doubt, by amending each provision to expressly state, that a reference to an indictable offence includes an indictable offence dealt with summarily. The amendments will effectively provide that such a reference was always the intention of the Parliament. Finally, the amendments will validate the DNA sampling that has already occurred.

Alternative Means of Achieving Policy Objectives

The certainty of DNA sampling provisions cannot be achieved in any way other than the amendments proposed in the Bill.

Estimated Cost of Implementation for Government

There will be no costs of implementing the Bill, as the amendments reflect the current state of the law, as determined by the Queensland Court of Appeal, and current DNA sampling procedures.

Consistency with Fundamental Legislative Principles

While the amendments sought to the Act are straightforward, their possible retrospective effect may breach the fundamental legislative principles that are described within the *Legislative Standards Act 1992*.

The proposed amendments are consistent with the finding by the Queensland Court of Appeal that the operation of s. 311 of the Act currently extends to prisoners summarily convicted of indictable offences. Consequently, if the High Court agrees with the finding of the Queensland Court of Appeal, or decides not to further consider the matter, there will be no change to a person's rights, liberties or obligations, either prospectively or retrospectively. However, if the High Court, upon hearing the appeal, finds that s. 311 of the Act currently only allows the DNA sampling of prisoners convicted on indictment the Bill will retrospectively affect the rights, liberties or obligations of a prisoner.

Consultation conducted in Development of the Bill

The proposed amendment was one of a number of proposed amendments contained in a consultation paper titled, '*Consultation Paper - Weapons and Another Act Amendment Bill 2002*'. This paper was forwarded to relevant Government Departments, external organisations and interest groups on 16 May 2002. The paper requested that all written comments be received by 31 May 2002. Entities consulted include the Queensland Council for Civil Liberties, the Victims of Crime Association of Queensland and the Queensland Law Society Incorporated. Only Government Departments provided responses to the Police Service about the proposed amendments. All responses supported the proposed amendments.

NOTES ON PROVISIONS

Short title and Act amended

Clauses 1 and 2 are preliminary in nature, specifying the short title of the Bill, and that it amends the *Police Powers and Responsibilities Act 2000*. There is no commencement clause. Consequently, the Bill will commence on assent.

Amendment of s 310 (Taking DNA sample after conviction of adult)

Clause 3 amends the heading for s. 310 by replacing the reference to "conviction of adult" with "finding of guilt". Section 310 allows a court to order the DNA sampling of a person found guilty of an indictable offence. The section operates without requiring a conviction, only the guilt of the person with respect to the indictable offence. The amendment makes the section heading more consistent with the body of the section.

Clause 3 also amends s. 310 by inserting two new subsections. A new subsection (4) will achieve the primary object of the Bill by declaring that a reference in s. 310 to an indictable offence includes an indictable offence dealt with summarily. Consequently, s. 659 of the Criminal Code will have no impact on the operation of s. 310 of the Act. Also, the new subsection effectively provides that such a reference was always the intention of the Parliament.

Finally, a new subsection (5) puts the status of DNA samples, already taken under a court order, beyond doubt by validating the exercise of the sampling power under s. 310 with respect to indictable offences dealt with summarily.

Amendment of s 311 (Taking DNA sample from prisoner)

Clause 4 amends s. 311, in the same way that *clause 3* amends s. 310, by inserting two new subsections. Section 311 allows the DNA sampling of a prisoner serving a term of imprisonment for an indictable offence. As in the case of s. 310, a new subsection (4) will achieve the primary object of the Bill by declaring that a reference in s. 311 to an indictable offence includes an indictable offence dealt with summarily. Consequently, s. 659 of the Criminal Code will have no impact on the operation of s. 311 of the

Act. Again, the new subsection also effectively provides that such a reference was always the intention of the Parliament.

Finally, a new subsection (5) puts the status of prisoner DNA samples, already taken under this section, beyond doubt by validating the exercise of the sampling power under s. 311 with respect to prisoners serving custodial sentences for indictable offences dealt with summarily.

Amendment of s 316 (When DNA samples and results must be destroyed)

Clause 5 amends the destruction requirements with respect to DNA samples taken under the Act. Section 316(1) requires the destruction of a DNA sample, taken under the Act, in certain circumstances such as when a person is found not guilty of an indictable offence. Section 316(2)(b) relieves the requirement to destroy a DNA sample if the relevant person has in the past been found guilty of another indictable offence. Similarly, *clause 5* inserts a new subsection (5) declaring that a reference in s. 316(2)(b) to an indictable offence includes an indictable offence dealt with summarily. Again, the new subsection also effectively provides that such a reference was always the intention of the Parliament. Consequently, s. 659 of the Criminal Code will have no impact on the operation of the DNA sample destruction requirements. Otherwise, it could be argued that the destruction requirement is relieved only if the relevant person was found guilty of an indictable offence on indictment.