

ECONOMIC POLICY SCRUTINY COMMITTEE

WRITTEN QUESTIONS

The Economic Policy Scrutiny Committee has asked the Attorney-General and Minister for Justice the following questions:

Liquor Amendment Bill 2018

Section 19B Amendments

1. The amendment to section 19B is intended to clarify that powers under this section to detect non-compliance with licence conditions applies to police officers in the same way they apply to inspectors, which may create problems in determining whether a police officer is exercising their police powers or their licensing inspector powers.

- (a) *How will police officers identify which powers they are exercising and will this be recorded in case of future legal proceedings?*
- (b) *What would be the impact on legal proceedings if there is not clear evidence of which powers a police officer was exercising?*
- (c) *Will police officers performing these inspector duties be required to have an identity card as per subsection 18(3)?*
- (d) *Will police officers performing these duties be required to comply with directions from the Director-General of Licensing as per subsection 18(2)?*
- (e) *Would a simpler way to achieve the intended outcome be to amend subsection 19(10) to include the powers provided in section 19B?*

Point of Sale Intervention Amendments

2. The Attorney-General explained that the expansion of POSI powers is required because during busy times, a person can enter a premise, purchase alcohol and leave before a police officer or inspector can conduct a POSI.

- (a) *How frequently are these situations occurring?*
- (b) *Is there evidence to suggest that, had a POSI been conducted, the purchases would not have been allowed?*

3. NAAJA stated 'POSI activities should be focused at the pre-purchase stage or, in the event a purchase is made, with clear direction for the refunding of liquor to the consumer. There appears to be no valid reason and no formal, publicly available response as to why this is not the practice.'

- (a) *In the event that an intervention is conducted post purchase, the customer is still in the premise and the alcohol is unopened, why should a refund not be provided to the customer, as opposed to the liquor being seized by a police officer or inspector?*

4. The proposed amendments greatly increase the POSI powers by expanding the definition of customer to include a person in possession of alcohol within the 20 metre boundary, despite the person not entering the licenced takeaway premise, or making a purchase.

(a) *What is the reason for expanding the definition?*

(b) *What evidence is there to suggest that conducting POSI on people who have not entered, and are not intending to enter, a licenced premise will reduce alcohol related harms?*

(c) *How is the infringement on the rights and liberties of individuals justified in these circumstances?*

5. It has been suggested that the proposed amendments create the potential for a person to be subjected to multiple POSI for the same liquor item, either through powers being exercised while a purchase is taking place and then upon leaving the premise, or by passing within 20 metres of a different premise while possessing liquor that was previously subjected to a POSI.

(a) *Will any safeguards be put in place to prevent multiple POSI taking place?*

(b) *If a person 'passes' the first POSI and then 'fails' a subsequent POSI for the same container of liquor, what recourse is available to them to contest a seizure of the liquor as part of the second POSI?*

6. The proposed amendments will allow a police officer or inspector to stop a vehicle if a customer is either the driver or passenger of the vehicle. Given the expanded definition of customer, this could be a person who is in possession of alcohol in a vehicle within the 20 metre boundary who has not entered the licenced premise.

(a) *Why is this amendment necessary?*

(b) *If the intention is to conduct POSI checks on vehicles such as taxis which may be used to supply alcohol to people on the banned drinkers register or into restricted areas, why are existing legislative mechanisms to stop and search vehicles insufficient to achieve this outcome?*

(c) *How is the infringement on the rights and liberties of individuals of a person who has not purchased alcohol justified in these circumstances?*

7. NAAJA expressed concerns that, given reasonable suspicion of the commission of an offence is not required to stop a vehicle, there is potential for the power to be abused to operate as a pretext for unrelated questioning, vehicle checks, or even to conduct searches if during questioning related to a POSI an officer forms a reasonable suspicion based on evidence that would have otherwise been unavailable to them.

(a) *What safeguards will be in place to prevent this from happening?*

Undercover Operations

8. The Bill introduces broad powers for police to conduct undercover operations for the purpose of detecting the commission of an offence against the *Liquor Act*, with the Attorney-General stating 'such undercover operations may occur across the Territory, in both restricted and unrestricted areas, bottle shops and residences.'

(a) *Given that undercover operation powers are generally reserved for serious crimes such as terrorism, organised crime syndicates and drug trafficking, why is it necessary to introduce such powers for detecting offences against the Act?*

(b) *Have there been instances where police operations were unsuccessful because these powers did not exist?*

9. The *Alcohol Policies and Legislation Review Final Report* (Riley Review) did not recommend the introduction of undercover operation powers, instead it recommends that the licensing authority undertake covert 'mystery shopper' programs similar to those used in Queensland.

(a) *What is the rationale for providing undercover operations rather than the 'mystery shopper' program recommended?*

10. The proposed amendments delegate significant power to senior police officers holding the rank of Commander or above to authorise undercover operations with no prescribed limitations on the operations.

(a) *In what circumstances is it anticipated that these powers would be used to detect offences against the *Liquor Act*?*

(b) *What type of offences would require undercover operation power to be used?*

(c) *Are there any safeguards, or will there be any procedural guidelines, to ensure that these powers would not be used for minor offences against the Act?*

11. Is a defence of entrapment available to a person charged as a result of an undercover operation? What safeguards exist against a person being induced to commit a crime in the course of an undercover operation?

Seizure of Property During Undercover Operations

12. The Bill includes a provision which allows a police officer to, without a warrant, seize a thing that the officer reasonably believes to be related to an offence against the Act.

(a) *What is the justification for seizure of property without a warrant issued by a judge or other judicial officer?*

13. Proposed subsection 101ZID states 'A person who owns, or has an interest in, the thing may apply to the Commissioner of Police for its release.'

(a) *To ensure that the provision is sufficiently clear, should this be amended to 'A person who owns, or has an interest in, a thing **seized under section 101ZIB** may apply to the Commissioner of Police for its release', similar to the phrasing in proposed section 101ZIC?*

14. Why is there no requirement for the Commissioner to provide reasons for refusing an application to release a seized thing?

(a) *Is there any reason why the Bill should not be amended to require to Commissioner to provide reasons, in writing, for refusing an application?*

15. The process to apply for release of a seized thing reverses the onus of proof.

(a) *What is the justification for this reversal?*

16. The Bill contains a provision that allows the Commissioner of Police to release a seized thing if they are satisfied that the applicant 'knew about the commission of the offence but was not in a position to reasonably prevent the commission of the offence.' NAAJA expressed support for this provision as it recognises the cultural obligations of Aboriginal people.

Section 95 of the Act also provides seizure powers, with subsection 97(5) outlining the criteria for when the Commissioner may release a seized thing to an applicant.

(a) *Is there any reason why this subsection should not be amended to include a similar provision to enable the Commissioner to release a seized thing where the application knew about the commission of an offence but was not in a position to prevent it?*

17. What safeguards exist to prevent the seizure of property, or enable its prompt return, in circumstances where the harm done by the seizure of property is out of proportion with the seriousness of the suspected offence, its connection with the suspected offence, or its evidentiary value?

18. Is a person who owns, or has an interest in, a seized thing able to claim compensation for any losses caused by the seizure, for example, if the seized property is a vehicle or boat used for income generating purposes?

(a) *If not, why not?*

(b) *Do the rights to compensation change if the seizure is later found to be wrongful?*

Answers:

Introductory comment:

The overarching objective of this Bill, as with others before the Legislative Assembly since the Alcohol Policies and Legislation Review Final Report (Riley review), is to seek to reduce alcohol-related harm to the community of the Northern Territory by making amendments to the *Liquor Act 1978* (the Act). The government seeks to do so consistently with the recommendations made by the Riley review. While the government seeks to adopt and implement those recommendations, it is not limited to them.

Section 19B Amendments

1. The amendment to section 19B is intended to clarify that powers under this section to detect non-compliance with licence conditions applies to police officers in the same way they apply to inspectors, which may create problems in determining whether a police officer is exercising their police powers or their licensing inspector powers.

(a) *How will police officers identify which powers they are exercising and will this be recorded in case of future legal proceedings?*

Answer

Section 19B was introduced in to the Act in 2018 to assist in the detection of the sale of liquor into the Northern Territory by retailers located outside of the Northern Territory. Part of its function is to enable inspectors to seek to purchase liquor (mostly in an on-line environment) and test whether the sale will comply with the minimum floor price requirements of Part IXA of the Act (Minimum Pricing Obligations). Section 19B(4) of the Act limits the use of the evidence so obtained to only be used by the Liquor Commission in exercising powers under Part III (Licences) or Part IXA of the Act, or to be used by the Director-General or the Liquor Commission in relation to Part VII of the Act (enforcement provisions for licences and Special Licences). While evidence cannot be led in a criminal investigation, it can be used as intelligence to inform further actions which may in turn lead to the gathering of evidence for bringing charges under the Act.

In the ordinary course of their duties, police officers may exercise powers under a range of different Acts. Standard operating procedures and police practises have been established over many years to assist police officers in the correct identification and use of their powers on a daily basis to enable them to detect, investigate and ultimately prosecute offences.

It is understood that Police officers using a range of powers would necessarily record the use of their powers under those Acts and be accountable for the proper use of such powers in accordance with the ordinary policy and procedures of the Northern Territory Police Force.

- (b) *What would be the impact on legal proceedings if there is not clear evidence of which powers a police officer was exercising?*

Answer

As noted above in the answer to 1(a), the use of evidence gathered in the exercise of this power under section 19B is limited to use by the Liquor Commission in exercising powers under Part III (Licences) or Part IXA (Minimum Pricing Obligations) of the Act, or by either of the Director-General or the Liquor Commission in relation to Part VII of the Act (enforcement provisions for licences and Special Licences).

If there was an occurrence of a lack of clear evidence of the power being exercised by the police officer, the impact would need to be considered on a case by case basis depending on whether it be the Director-General, Liquor Commission or court determining the matter. It may be that a decision will be made to not bring legal proceedings in circumstances where the evidence of the power exercised is not sufficiently clear.

If, which is not agreed, there is the potential for circumstances in a legal proceeding to arise in which it was not clear which power a police officer was exercising at the relevant time, it would ultimately be a matter for the Liquor Commission or court to determine whether to admit or exclude that evidence so gathered. The outcome of that consideration may well depend on what other evidence is available to the Liquor Commission or court and the relevant rules as to the admissibility or exclusion of evidence.

In the circumstances, an amendment to clarify this issue would not be supported.

A police officer might use his or her power under section 19B in order to gain initial intelligence that a particular retailer was not complying with its obligations under the Act. That intelligence could, if the Bill is passed, then found an application being made for an undercover operation to be prepared and executed. The evidence gathered as part of an approved undercover operation would in that case be more likely to be the basis of any subsequent prosecution than the intelligence gathered under section 19B.

- (c) *Will police officers performing these inspector duties be required to have an identity card as per subsection 18(3)?*

Answer

Section 18(1) of the Act enables the Minister to appoint persons as Inspectors of Licensed Premises. Those Inspectors have an identity card issued to them by the Director-General. References to the circumstances in which the use of such an identity card is required under the Act can be found at sections 19(4) (as to licensed premises), 95(5) and (6), 101AN(5) and (6), and 101ZN(3).

There are 16 inspectors appointed under the Act who operate in liquor regulation across Darwin, Katherine, Tennant Creek and Alice Springs. Two of these positions are Director and Manager positions which undertake limited operational activity. These inspectors are also appointed and undertake regulatory compliance activity in respect of the *Tobacco Control Act 2002* and the *Gaming Machine Act 1995*, and other related licensing regimes including private security.

The proposed changes to sections 19A and 19B are to apply those sections to police officers as if they were an inspector, not to appoint the police officers as inspectors. The police officers will not need to be separately appointed by the Minister and they will not have an identity card; they will simply have authority to exercise the powers of inspectors.

Relevant references to police identification and when it is to be produced unless the officer is in uniform, may be found in the Act in sections 120L(1) (giving a banning notice to a person), 120P(4) (directing banned person to leave area or premises), 120U(4) (directing an excluded person to leave a premises or area), and 101ZN(3) for POSI requirements under section 101ZK(2) or (3).

As to the particular example, section 19B(2)(b) is a discrete provision independent of section 19. It excuses an inspector, and so too if the Bill is passed a police officer, from the need to identify themselves while offering or attempting to purchase liquor.

(d) *Will police officers performing these duties be required to comply with directions from the Director-General of Licensing as per subsection 18(2)?*

Answer

No.

As noted above, only inspectors are appointed by the Minister under section 18(1) of the Act and it is inspectors who must comply with directions from the Director-General of Licensing. Police Officers are appointed under the usual police processes and follow the directions of their superior officers. It is understood by both police officers and the Director-General of Licensing that the scope and authority of power of police officers is distinct from the power conferred on the police officers under the Act.

(e) *Would a simpler way to achieve the intended outcome be to amend subsection 19(10) to include the powers provided in section 19B?*

Answer

Such a suggestion was considered as part of the drafting process to achieve the desired policy outcome. However it was considered that expressly providing for the application of sections 19A and 19B to police officers would be a more effective amendment.

Section 19A is an offence provision and not about powers of inspectors and so police officers in the way that section 19 is. In the circumstances, it was considered that the use of subsection (2A) was warranted. A separate subsection in section 19B then provides for a consistent approach to the drafting across the sections.

It was also considered that this approach would make the sections themselves more readable with a user not then having to go to section 19(10) for the application of section 19A or 19B to police officers.

Point of Sale Intervention Amendments

2. The Attorney-General explained that the expansion of POSI powers is required because during busy times, a person can enter a premise, purchase alcohol and leave before a police officer or inspector can conduct a POSI.

(a) *How frequently are these situations occurring?*

Answer

Given the short timeframes for a response to the Committee, no direct data other than limited colloquial information was able to be compiled or provided. It is not known whether data is kept that would in fact respond to this question.

However, departmental officers were told that police officers regularly exercise their powers under the Act and the *Alcohol Harm Reduction Act 2017* and prevent people from purchasing liquor. The assumption must be that others are evading the point of sale process and making a purchase that would otherwise have been prevented.

Point of sale intervention powers are found in Part VIII C of the Act. They are unusual powers and with them are found strict liability offences to ensure members of the public comply. The point of sale intervention powers enable a police officer or inspector to interrogate a customer as to who they are, where it is that they intend to consume the liquor and who else will be with them. These are in addition to the requirement for identification to be scanned at the point of sale by the retailer.

The information which officers and inspectors are able to request is of narrow compass and limited to:

- information that is currently available on the Banned Drinkers Register; or
- necessary for detecting the potential secondary supply of alcohol or supply of alcohol into areas where it is restricted or limited, or where laws restrict residents from consuming alcohol.

The point of sale intervention powers complement the Banned Drinker Register and the return of the powers was a recommendation of the Riley Review (see recommendations 3.6.1 – 3.6.5). The powers are intended to assist licensees, inspectors and officers to ensure that those who are prohibited from consuming alcohol, including under a bail condition, are not provided with liquor.

To that end, it should be noted that it is an offence if a person intentionally supplies alcohol to a person who is listed on the banned drinkers register (see section 42 of the *Alcohol Harm Reduction Act 2017*).

While the powers under the Act are vested in both police and licensing inspectors, it is (and always has been) police officers who undertake the point of sale intervention functions. It is currently not possible or contemplated that licensing inspectors will undertake the point of sale functions. If this were to change, inspectors would need to undertake significant additional and specialist training. Operating procedures and equipment would be required to ensure the safety of inspectors.

Most of the takeaway liquor outlets, which are the points of concern, are manned by a single police officer, and since August 2018 by specially trained police auxiliary liquor inspectors. It can be easily understood that (and there are some informal examples of) during busy times, while the police officer is dealing with one or two other customers, a person enters licensed premises and purchases alcohol without being asked the point of sale questions.

The existing definition of customer ('a customer who appears to be purchasing or intending to purchase liquor' (emphasis added)) means that in these situations police officers are unable to make the necessary investigations as to where and by whom the alcohol is to be consumed. It is not hard to imagine that persons determined to evade investigations would work together or take advantage of such situations in order to avoid being subjected to point of sale interventions.

The proposed amendments will enable the officer to ask the person who has already completed their transaction the necessary questions. It is anticipated that this expanded definition will in the future also have a deterrence effect on those who currently seek to evade the point of sale process.

(b) *Is there evidence to suggest that, had a POSI been conducted, the purchases would not have been allowed?*

Answer

Given the short timeframes for a response to the Committee, no direct data other than limited colloquial information was able to be compiled or provided. It is not known whether data is kept that would in fact respond to this question.

However departmental officers were told that police officers regularly exercise their powers under the Act and the *Alcohol Harm Reduction Act 2017* and prevent people from purchasing liquor.

It would be a fair assumption that others must be evading the process and making a purchase that would otherwise have been prevented.

3. NAAJA stated 'POSI activities should be focused at the pre-purchase stage or, in the event a purchase is made, with clear direction for the refunding of liquor to the consumer. There appears to be no valid reason and no formal, publicly available response as to why this is not the practice.'
- (a) *In the event that an intervention is conducted post purchase, the customer is still in the premise and the alcohol is unopened, why should a refund not be provided to the customer, as opposed to the liquor being seized by a police officer or inspector?*

Answer

Seizure and destruction of liquor aside, whether a refund would be offered to a customer is a matter for the licensee making the sale and the usual terms and conditions of the Australian Consumer Law. Police officers or liquor inspectors do not have the power to direct a licensee to provide a refund; it is entirely a matter for individual licensees as to whether a refund would be allowed in these circumstances.

As set out above, the point of sale scheme is designed to *prevent* sales from occurring in which case there is no issue about the provision of refunds. The current provisions set out in section 101ZK contemplate that if the police officer or inspector have a reasonable suspicion that an offence is likely to occur, that is the point at which they may seize the liquor that has actually been purchased and destroy it as soon as is practicable (see section 101ZM(1)). The officer or inspector may also issue a direction to a licensee to not supply alcohol to a person for the remainder of the day.

In circumstances where the intervention occurs post sale then this situation may arise. As noted above it will be a matter for the licensee whether they are willing to offer a refund. Otherwise, in very broad terms, when there is a legitimate seizure by police officer, a person is unlikely to be successful with a civil claim for damages arising from the seizure and destruction of their property. That is the case even where the prosecution might be discontinued or otherwise unsuccessful. Across Australia there is little recognition of any compensation rights in respect of either unsuccessful criminal proceedings or wrongful convictions. It is unlikely that the law regarding civil liability for seizures is likely to be strengthened in the immediate future.

4. The proposed amendments greatly increase the POSI powers by expanding the definition of customer to include a person in possession of alcohol within the 20 metre boundary, despite the person not entering the licenced takeaway premise, or making a purchase.
- (a) *What is the reason for expanding the definition?*

Answer

As noted above in response to question 3(a), most of the takeaway liquor outlets which are the points of concern, are manned by a single specially trained police officer. It can be easily understood that (and there are some informal examples of) during busy times, while the police officer is dealing with one or two

other customers, a person may enter licensed premises and purchases alcohol without being asked the point of sale questions.

The policy intention of the amendment is aimed at customers who have perhaps deliberately evaded the point of sale interventions, completed a purchase and is in the process of exiting the premises. The intention is to capture those who are leaving more than entering. The policy intent is not to enable the police officers to ask questions of someone who is simply passing within 20 metres of a licensed premises, unless that is there is some known fact or circumstance about them which might indicate that an alcohol related offence was about to occur.

The reference to 'within 20 metres of' is within the existing definition of customer. The only proposed change is the second limb of section 101ZK(1)(b)(ii), of having liquor in their possession. The policy intent is to better capture those who are being handed or passed liquor once purchased to enable the police officers to ask them questions about and conditions which they may be subjected to and their intent for the liquor. These are in addition to powers which a police officer has if a person intentionally supplies alcohol to a person who is listed on the banned drinkers register (see section 42 of the *Alcohol Harm Reduction Act 2017*).

The point is that the police officers are not likely to seek to stop someone who is simply walking past the licensed premises unless there is some other reason or circumstance for them to suspect that there is an alcohol related offence may occur.

(b) *What evidence is there to suggest that conducting POSI on people who have not entered, and are not intending to enter, a licenced premise will reduce alcohol related harms?*

Answer

Given the short timeframes for a response to the Committee, no direct data other than limited colloquial information was able to be compiled or provided. It is not known whether data is kept that would in fact respond to this question.

The policy intention of the amendment is aimed at customers who have managed to evade the point of sale interventions and are in the process of exiting the premises. The policy intent is not to enable the police officers to ask questions of someone who is simply passing within 20 metres of a licensed premises, unless that is there is something else about them which might indicate that an alcohol-related offence was about to occur. The intention is to capture those who are leaving more than entering.

(c) *How is the infringement on the rights and liberties of individuals justified in these circumstances?*

Answer

The proposed amendment will not cause any further infringement on the rights or liberties of individuals than the Act as in force.

When the point of sale interventions were introduced into the Act, it was noted that there would be an infringement on human rights. The strict liability offences in this part of the Act are regulatory in nature and are intended to act as a deterrent to behaviour that would compromise the ability of police officers or inspectors to control supply of liquor to persons who should not be permitted to purchase or consume liquor, and the ability of officers and inspectors to obtain accurate information from persons within the vicinity of a licensed premises.

A person failing to comply with a requirement issued by a police officer or inspector to answer a question, provide identification or provide information is a strict liability offence. The offence will only apply if the officer is in uniform, the officer or inspector displays their identification or identity card if asked and if, before issuing a requirement, the officer or inspector warns the person that failing to comply with a requirement is an offence. The defence of honest and reasonable mistake of fact remains available to the customer (see sections 43AN and 43AX of the Criminal Code).

Strict liability offences are used in circumstances such as this where there is a public interest in ensuring that regulatory schemes are observed and it can reasonably be expected that the person was aware of their duties and obligations.

As noted above, the information required by the police officer or inspector is limited to information that is available to the Banned Drinkers Register or necessary for detecting potential offences such as secondary supply. Examples include the supply of liquor to those on bail conditions or on a sentence with alcohol restriction conditions.

5. It has been suggested that the proposed amendments create the potential for a person to be subjected to multiple POSI for the same liquor item, either through powers being exercised while a purchase is taking place and then upon leaving the premise, or by passing within 20 metres of a different premise while possessing liquor that was previously subjected to a POSI.

(a) *Will any safeguards be put in place to prevent multiple POSI taking place?*

Answer

There is no current intention to amend the Act to prevent multiple point of sale interventions from taking place as clearly there are circumstances in which they will be justified. If an amendment was to be made to put further provisions in place, the provisions would be complex to draft given the foundational points would need to include an awareness of a previous intervention, any material change in facts or knowledge between each intervention and other operational matters.

Operationally, the police advise that there are already safeguards in place to prevent multiple point of sale interventions taking place with the same customer in the same or different locations with the same liquor. It was advised that police officers regularly communicate with each other about the interventions taking place with customers or other relevant matters which they observe. For this reason, namely the sharing of information about customers, and the distances between liquor outlets, the likelihood of a customer being subjected to multiple point of sale interventions for the same liquor item is very low.

There are occasions where, in the view of the police officers, it is necessary to conduct a second point of sale intervention on a particular customer if there is or was observed to be a substantial change in their circumstances. For example, a customer who has successfully passed an initial point of sale intervention may be observed in the vicinity of the licensed premises passing liquor to other people. This may raise a suspicion on reasonable grounds that an alcohol-related offence may be occurring which would enable the police officer to conduct a second point of sale intervention with the customer.

There are also occasions where a customer may pass an initial point of sale intervention but later is observed leaving the licensed premises with what is determined to be an excessive quantity of liquor, unlikely to be for personal consumption. A second point of sale intervention may then need to be conducted.

In the event that the police officer engages in unnecessary investigations, then the usual processes for review of police conduct are available which may include a complaint to the Ombudsman.

(b) *If a person 'passes' the first POSI and then 'fails' a subsequent POSI for the same container of liquor, what recourse is available to them to contest a seizure of the liquor as part of the second POSI?*

Answer

The response is the same as for 5(a) above. There will be occasions where, in the view of the police officers, it is necessary to conduct a second point of sale intervention on a particular customer if there is or was observed to be a substantial change in the situation.

The recourse that is available to a customer to contest the seizure of liquor as part of a point of sale intervention whether it occurs on a first or second occasion is the same. That is to avail themselves of their civil rights to complain if they take the view that the seizure is unlawful or in misuse of police powers.

6. The proposed amendments will allow a police officer or inspector to stop a vehicle if a customer is either the driver or passenger of the vehicle. Given the expanded definition of customer, this could be a person who is in possession of alcohol in a vehicle within the 20 metre boundary who has not entered the licenced premise.

(a) *Why is this amendment necessary?*

Answer

The policy intent of the amendment is to allow police officers and inspectors to stop vehicles for the purpose of conducting a point of sale intervention, in the same manner as they would with pedestrians walking into a licensed premise.

A number of point of sale intervention locations in the Northern Territory are 'drive through' liquor outlets where police officers may be required to stop vehicles, either before they enter the licensed premises or while in the actual drive through

part of the premises. As noted above in the other examples, a single officer may, due to a large number of customers, be unable to conduct interventions before all transactions are completed. The officer may then need to make those inquiries when the vehicle is in the process of leaving the licensed premises. The existing provisions of the Act do not expressly give police officers or inspector powers to do any of these things.

A further policy objective of the amendment is to enable a point of sale investigation to occur with a customer who has not been investigated prior to purchase but enters a vehicle. The officer will then be able to detain the car and undertake the investigation process. Or it might be that the customer has been investigated and then enters a vehicle that is of interest to the officer, perhaps carrying passengers have been prevented from purchasing liquor that day. That would be sufficient circumstances for the officer to seek to investigate those passengers in the vehicle.

- (b) *If the intention is to conduct POSI checks on vehicles such as taxis which may be used to supply alcohol to people on the banned drinkers register or into restricted areas, why are existing legislative mechanisms to stop and search vehicles insufficient to achieve this outcome?*

Answer

The policy intent of the amendment is to allow police officers and inspectors to stop vehicles for the purpose of conducting a point of sale intervention, in the same manner as they would with pedestrians walking into a licensed premise.

The points made in answer to 6(a) are also relevant here.

- (c) *How is the infringement on the rights and liberties of individuals of a person who has not purchased alcohol justified in these circumstances?*

Answer

The proposed amendment would not cause any further infringement on the rights and liberties of individuals than the Act as in force does.

The policy intent of the amendment is to allow police officers and inspectors to stop vehicles for the purpose of conducting a point of sale intervention, in the same manner as they would with pedestrians walking into a licensed premise.

7. NAAJA expressed concerns that, given reasonable suspicion of the commission of an offence is not required to stop a vehicle, there is potential for the power to be abused to operate as a pretext for unrelated questioning, vehicle checks, or even to conduct searches if during questioning related to a POSI an officer forms a reasonable suspicion based on evidence that would have otherwise been unavailable to them.

(a) *What safeguards will be in place to prevent this from happening?*

Answer

The policy intention for the amendment is that the power to stop and give reasonable directions would only occur in the context of section 101ZK of the Act, that is as set out in subsections (5) and (6) where ‘the officer or inspector suspects on reasonable grounds that an alcohol-related offence is likely to occur’.

If the Committee is minded to suggest that the introductory words to proposed new section 101ZK(7) be amended to include the following, this would be supported by the department:

‘If the officer or inspector suspects on reasonable grounds that an alcohol-related offence is likely to occur, the officer or inspector may do either or both of the following:...’

Having said that, the proposed amendment gives police officers and inspectors legislative power to stop vehicles only for the purpose of exercising a power under ‘this section’, being section 101ZK of the Act. Police officers exercising this power are obliged to exercise it responsibly in the same manner as they exercise a wide range of other policing powers.

It is accepted there may be situations where a vehicle stopped under the proposed amendment may lead to the police officer receiving further information than may not otherwise be available to them. An example may be that a police officer may become aware of domestic violence or a potential breach of a domestic violence order during a routine vehicle stop. In those situations, police are obliged to act on the information received as required by the relevant legislation. It would be expected that the police officer would be cognisant of those duties to act on information received when stopping a vehicle under section 101ZK of the Act.

Undercover Operations

Introductory comments:

The Riley Review noted that the practices of selling alcohol without a liquor licence (sly-grogging) or carrying alcohol into a designated dry community (grog running) was a problem in many communities across the Northern Territory.

Further the Riley Review noted that ‘Often community patrol workers know the identity of individuals undertaking this illegal activity but feel powerless to do anything about it. There is also the risk of payback or retaliation for the informant, so patrol workers are reluctant to complain given the limited successful outcomes.’

Undercover or covert operations require the gathering of intelligence, detailed planning and the intensive use of resources in order to be successful. As with all police matters, in order for the operation to result in the minimisation of harm to the community and a successful prosecution, the operation needs to be supported by evidence and credible reliable witnesses.

8. The Bill introduces broad powers for police to conduct undercover operations for the purpose of detecting the commission of an offence against the *Liquor Act*, with the Attorney-General stating ‘such undercover operations may occur across the Territory, in both restricted and unrestricted areas, bottle shops and residences.’

(a) *Given that undercover operation powers are generally reserved for serious crimes such as terrorism, organised crime syndicates and drug trafficking, why is it necessary to introduce such powers for detecting offences against the Act?*

Answer

As considered in detail in the Riley Review, the excessive consumption of liquor in the Northern Territory is a significant and pervasive social and economic issue. The harm it does across the community has been well documented and will not be repeated here.

The secondary supply or ‘resale’ of liquor is an insidious part of that process whether it is done from the back of a car in a suburban street or from a van in a remote ‘dry’ community. People engage secondary supply by purchasing a quantity of liquor from a licenced premises for example a case of beer or six packs of beer and giving false information to the licensee. The secondary supplier will then locate a group of people who for various reasons are unable to purchase liquor, they may already be inebriated and or be subject to a banned drinker order. The secondary supplier will sell the beer to those persons at highly inflated prices – sometimes at 3 or 4 times the retail price.

The purchasers who are involved in such transactions are often amongst the more vulnerable in the community who find it challenging to give the evidence needed by a court to prove an illegal sale. That challenge can arise from a combination of being inebriated at the time of purchase, cognitive difficulties from long term alcohol abuse or that the purchaser is living in an itinerant or transient situation. In addition to the difficulties in giving evidence, their personal circumstances make them vulnerable to retaliation by those reselling them the liquor or others who want that resale process to continue.

The elements of the offences in the Act can make prosecution difficult. Section 115 of the Act makes it an offence if a person sells liquor without a licence. An important component of the offence is to prove that the person who provides the liquor gains a benefit in return. That requires evidence of the transaction to be available to the court. If the purchaser is inebriated or is otherwise an unreliable witness then evidence of the transaction may not reach the relevant standard of proof.

While police officers have their general powers available to them including surveillance, they report that it is difficult to conduct surveillance of these sorts of transactions. Police conducting undercover operations to detect such secondary supplies will be more persuasive and reliable witnesses increasing the likely successful prosecution of such offences.

The offences under the Act can be contrasted with offences relating to the supply of drugs, where there is no need to prove that the person making the supply gained a benefit in return. As liquor is in the majority of circumstances and locations a legal substance available for sale, it is not sufficient to simply provide evidence of the supply or possession of the item.

While generally it is correct to say that undercover operation powers are used for terrorism, organised crime syndicates and drug trafficking, identical undercover powers to those proposed have existed in the Northern Territory since 1990 when section 32 of the *Misuse of Drugs Act 1990* came into force. Initially the power to approve an undercover operation was given to a member of the police force above the rank of Sergeant, and then in June 1992 the rank was raised to that of Commander with an added requirement that the authorisation be done in writing¹.

Section 101ZIA is modelled on section 32 of the *Misuse of Drugs Act 1990*. It is to be expected that the changes would have a deterrent effect on those engaging in the illegal supply once the community has been made aware that undercover operations are in place.

Without this amendment, it is unclear that undercover operations will be able to be undertaken. Under the *Police (Special Investigative and other Powers) Act 2015* controlled operations may be conducted, if authorised, in relation to a relevant offence being an offence against a law of the Territory punishable by a maximum term of imprisonment of three years or more or as prescribed by regulation.

When the minimum floor price and associated changes were introduced, the penalty was increased for section 115 in order to enforce the floor price, particularly against non-compliant interstate retailers. It had been anticipated that review of the enforcement powers and offences and penalties in the Act would form part of the broader review of the Act. However due to stakeholder concerns, it was considered necessary to make changes to the compliance strategy as part of that process. As a result the penalty for section 115 was raised to three years and the financial penalty raised from 250 to 300 units.

While it is now possible for a covert operation under the *Police (Special Investigative and other Powers) Act 2015* to be instigated for breaches of section 115 of the Act, the requirements are more onerous and are not immediately suited to prosecutions under the Act.

¹ The order of police ranks in descending order is: Commissioner, Deputy Commissioner, Assistant Commissioner, Commander, Superintendent, Senior Sergeant, Sergeant, Senior Constable 1st class, Senior Constable, Constable 1st class or Constable

(b) *Have there been instances where police operations were unsuccessful because these powers did not exist?*

Answer

No, as without the legislative power police officers are not able to conduct such undercover operations.

There have been occasions on which information has come to the police which may have led to an undercover operation being considered, however without this specific power it could not be progressed and therefore was not unsuccessful or successful.

With this power in place and education to the public about it, it is anticipated that the public will provide information to the police officers which they can use to consider arranging an undercover operation.

9. The *Alcohol Policies and Legislation Review Final Report* (Riley Review) did not recommend the introduction of undercover operation powers, instead it recommends that the licensing authority undertake covert 'mystery shopper' programs similar to those used in Queensland.

(a) *What is the rationale for providing undercover operations rather than the 'mystery shopper' program recommended?*

Answer

Both recommendations 2.7.8 and 2.8.5 of the Riley Review refer to 'mystery shopper' programs. The Riley Review discusses and makes such a recommendation in the context of compliance and enforcement of responsible service of alcohol provision across a range of licensed venue types and environments, including entertainment precincts and suburbs.

A 'mystery shopper' program would have the effect of assisting to identify whether there are breaches of the responsible service of alcohol policies by licensees, for example night clubs or sporting and social clubs serving persons who are already intoxicated.

As set out above in the discussion about section 19B such 'mystery shopper' programs that may lead to compliance actions ranging from education to disciplinary action by the Director-General or the Liquor Commission.

The powers which are proposed by the Bill and requested by police officers are for criminal enforcement of the Act, not consumer protection or disciplinary matters. What is proposed to be targeted by police officers is the secondary supply issues referred to in other answers above which occur outside liquor outlets or licensed premises.

While the Riley Review may not have recommended this particular change it did recommend a review and re-write of the Act to remove inconsistencies and to increase the ability of police officers to enforce its terms and government is not limited to only fulfil its recommendations.

10. The proposed amendments delegate significant power to senior police officers holding the rank of Commander or above to authorise undercover operations with no prescribed limitations on the operations.

(a) *In what circumstances is it anticipated that these powers would be used to detect offences against the Liquor Act?*

Answer

It is anticipated that police would seek to use these powers in order to detect secondary supplies and check licensees who are not abiding by their licence conditions. Generally that would include the following offences:

- Section 31A – Contravening requirement about identification system
- Section 110 – Breach of licence condition
- Section 115 – Sale of liquor not authorised by licence
- Section 116 – Purchase of liquor when sale not authorised by licence

(b) *What type of offences would require undercover operation power to be used?*

Answer

As is listed in answer to 10(a) subject always to the discretion of police officers involved from time to time.

(c) *Are there any safeguards, or will there be any procedural guidelines, to ensure that these powers would not be used for minor offences against the Act?*

Answer

As observed above, the harmful impact of liquor on the Northern Territory community has been recognised in a number of reports including the Riley Review. While certain offences may be considered 'minor', the impact of minor offences can have a cumulative effect which is often significant.

Undercover operations are resource and labour intensive and would not be entered into without extensive planning and consideration of the impact of successful outcomes. The procedural steps for the approval of such an operation would be sufficient safeguards to ensure they will not be used without due consideration. For example as the authorisation for such an operation is at the Commander level, the police officer seeking approval will in accordance with police procedures be responsible for putting forward an Action Plan or Full Operation Order for approval.

Section 101ZII requires the annual tabling in the Legislative Assembly by the Minister of a report to the Minister which specifies the number of applications made, authorisations granted and charges laid for offences as a result. The public scrutiny of that report will provide an appropriate measure of review to safeguard the misuse of the power.

The most serious offence with the highest penalty under the Act is the offence of sale of liquor not authorised by a licence under section 115 which is 300 penalty units or three years imprisonment. Other offences which are likely to be investigated using the undercover powers would include section 31A – Contravening requirement about identification system for which the penalty is 100 penalty units; section 110 – Breach of licence condition for which the penalty is 100 penalty units and section 116 – Purchase of liquor when sale not authorised by licence for which the penalty is 100 penalty units.

There are other offences under the Act which attract lower rates of penalty units of either five, 20 or 50 penalty units.

11. Is a defence of entrapment available to a person charged as a result of an undercover operation? What safeguards exist against a person being induced to commit a crime in the course of an undercover operation?

Answer

No, there is no longer a substantive defence of ‘entrapment’ in Australia.

In *Ridgeway v The Queen* (1995) 184 CLR 19, the High Court held that evidence obtained by Police acting unlawfully should have been excluded from a prosecution on the grounds of public policy, rendering the conviction improper. The public policy discretion was the subject of the High Court’s earlier decision in *Bunning v Cross* (1978) 141 CLR 54.

The public policy discretion to exclude evidence is now enshrined in section 138 of the *Evidence (National Uniform Legislation) Act 2011*, which provides that:

- (1) Evidence that was obtained:
 - a. improperly or in contravention of an Australian law; or
 - b. in consequence of an impropriety or of a contravention of an Australian law,

is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.

Section 138(3) sets out various matters which the Court may take into account in applying section 138(1).

The proposed new provision section 101ZIA is designed to remove, at the least, the condition necessary for the exclusion of the evidence, namely that it was obtained in contravention of law, or in consequence of contravention.

The courts will obviously retain their discretion to determine the other factors relevant to the admission or otherwise of evidence obtained in such undercover operations.

Proposed section 101ZIA uses the words ‘acquire’, ‘supply’ and ‘possess’ in relation to liquor. However, the Act does not use the term ‘acquire’ in relation to liquor; it uses the term ‘purchase’ (see, for example, section 116). Further,

while the Act uses the term 'supply', it also uses the term 'sell' (see, for example, section 103) and also uses the cognate term 'sell or otherwise supply' (see, for example, section 102). It would be better to ensure that the terms of section 101ZIA are consistent with the language of the Act.

If the Committee is minded to request an amendment to substitute the words 'purchase, sell or otherwise supply' for the words 'acquire, supply and possess', the Department would support the change.

Seizure of Property During Undercover Operations

12. The Bill includes a provision which allows a police officer to, without a warrant, seize a thing that the officer reasonably believes to be related to an offence against the Act.

(a) *What is the justification for seizure of property without a warrant issued by a judge or other judicial officer?*

Answer

The justification for the power set out in proposed new section 101ZIB is that the seizure power proposed is no greater than already exists in the Act, and it is proposed to be applied to a different regulatory function. Inspectors and police officers have powers to enter, examine, inspect and seize certain items under the general powers granted in section 19 of the Act. The effect of section 19(10) of the Act is that all powers granted to an inspector may also be carried out by a police officer.

Under section 95 in relation to a general restricted area an inspector may, without warrant, seize a thing found that the inspector reasonably believes to be related to a relevant offence. More specifically under section 95(2) in relation to a general restricted area, an inspector may without a warrant on a random basis for the detection of a relevant offence that has been, or is being or likely to be, committed:

- stop, enter, search, remove and retain a vehicle;
- stop, detain and search a person; and
- seize a thing that the inspector reasonably believes to be related to a relevant offence.

Similar powers are found in section 101AN(1) and 101AN(2) in relation to a special restricted area.

Police officers, and not inspectors, have powers to seize containers believed to contain liquor under section 101AB in relation to a public restricted area, under 101M in relation to restricted premises and under section 101Y(1) in relation to regulated places under section 101Y(1).

The proposed power in new section 101ZIB is limited to seizure of things reasonably believed to be related to an offence. In undercover operations, that may include liquor, containers and may also include money, telecommunication device, cars and other crime used property.

The absence of such a specific seizure power directly in relation to undercover operations would prevent police from being able to seize and secure evidence in order to support a prosecution. This will also prevent potential loss or destruction of evidence.

13. Proposed subsection 101ZID states 'A person who owns, or has an interest in, the thing may apply to the Commissioner of Police for its release.'
- (a) *To ensure that the provision is sufficiently clear, should this be amended to 'A person who owns, or has an interest in, a thing **seized under section 101ZIB** may apply to the Commissioner of Police for its release', similar to the phrasing in proposed section 101ZIC?*

Answer

Section 101ZID is drafted to be as consistent with the other release of seizure provisions in the Act as possible in order to ensure consistency across similar provisions within the Act. The words to limit the thing seized to that particular part of the Act do not appear in the other seizure provisions listed above in answer to question 12(a).

It is suggested that as a matter of statutory interpretation such words are not required or desirable.

14. Why is there no requirement for the Commissioner to provide reasons for refusing an application to release a seized thing?
- (a) *Is there any reason why the Bill should not be amended to require to Commissioner to provide reasons, in writing, for refusing an application?*

Answer

The Committee's question relates to section 101ZID(4) which is in significantly similar terms to existing provisions of the Act in sections 97(4) and 101AP(4). The two existing provisions do not require that the Commissioner of Police provide written reasons for refusing an application to release a seized thing.

In the short period of time for response, the department was not able to ascertain the current practice of the Commissioner under those provisions and whether or not he or she, even though not required to, ordinarily does or does not provide written reasons when refusing an application. Not having to hand data on the number of applications or likely refusals, it may be that such a requirement to provide written reasons would impose an onerous administrative burden on the Commissioner.

The Act in its form pre 2007 did not require that the court of summary jurisdiction which then had relevant jurisdiction for the return of the seized items to provide reasons for its decisions to return or otherwise. Again insufficient time was available to enquire as to the practice of the court at that time, although it is thought likely that the court would provide short extemporaneous reasons on deciding the application. Notably the Minister was not obliged to provide reasons for the release of vehicles, vessels or aircraft under (now repealed) section 100A.

In 2007 the new provisions were inserted in the Act by the *Liquor Legislation Amendment Act 2007*, which put the process into the hands of the Commissioner. The second reading speech referred to the insertion of new provisions in a similar form to the ones proposed in the Bill which were to improve the process from the pre-2007 one which had involved a slow process for the Licensing Commission and the Minister to be informed about the offence and whether the applicant had been implicated in it.

15. The process to apply for release of a seized thing reverses the onus of proof.
- (a) *What is the justification for this reversal?*

Answer

The Committee's question relates to section 101ZID(6) which requires the Commissioner of Police to be satisfied that the applicant owns or has an interest in the thing sought to be returned. This is in significantly similar terms to existing provisions of the Act in sections 97(5) and 101AP(5).

It is not accepted that there is a reversal of any onus of proof of ownership or, if there has, it occurred more than 12 years ago. The Act in force before 2007 required, once an item was seized and not required for a prosecution, that the Chairperson issue a notice under section 98 to 'require the person from whom the thing was seized or a person appearing to the Chairperson to be the owner of the thing to claim delivery to him of the thing seized' (emphasis added). If the person proceeded to make a claim for delivery of the thing, the Chairperson was to 'refer the claim to a court of summary jurisdiction which may deal with the claim in all respects as if it were a claim made by a claimant of property under section 130B of the Justices Act'. Section 130B (which is now 130B of the *Local Court (Criminal Procedure) Act 1928*) contained an element that the court be satisfied that the person appeared to the court to be the owner of the property. No doubt the court would require then, as it would now, a level of proof by the applicant of ownership of the thing.

It is not usual for a party in proceedings to be asked to establish ownership of a thing. While it is not agreed that there is a reversal of any onus of proof, the threshold to be met is not high, that is the Commissioner is to be satisfied. Clearly that is a lower test than beyond reasonable doubt and arguably may be a lower test than the civil test of on the balance of probabilities.

As to the second limb of the test, that the applicant did not know or could not reasonably have known about the commission of the offence has also been a component of the process since the amendment of the Act in 2007 by the *Liquor Legislation Amendment Act 2007*. Those provisions also required that the applicant did not know or could not reasonably have known about the commission of the offence.

16. The Bill contains a provision that allows the Commissioner of Police to release a seized thing if they are satisfied that the applicant 'knew about the commission of the offence but was not in a position to reasonably prevent the commission of the offence.' NAAJA expressed support for this provision as it recognises the cultural obligations of Aboriginal people.

Section 95 of the Act also provides seizure powers, with subsection 97(5) outlining the criteria for when the Commissioner may release a seized thing to an applicant.

- (a) *Is there any reason why this subsection should not be amended to include a similar provision to enable the Commissioner to release a seized thing where the application knew about the commission of an offence but was not in a position to prevent it?*

Answer

The Committee is understood to be referring to section 101ZID(6)(a)(ii). The Attorney-General thanks NAAJA for its support for this provision. Both section 97(5)(b) and section 101AP(5) deal with the release of things seized and then held by the Commissioner of Police.

The Committee may be aware that the government in undertaking a larger project to review and amend the Act. These amendments to section 97(5)(b) and section 101AP(5) and any other ancillary changes to include those components in each provision could either be made as part of this Liquor Amendment Bill 2018 or be taken up as part of the larger review and rewrite project.

17. What safeguards exist to prevent the seizure of property, or enable its prompt return, in circumstances where the harm done by the seizure of property is out of proportion with the seriousness of the suspected offence, its connection with the suspected offence, or its evidentiary value?

Answer

As noted above the power to seize property already exists in the Act without any requirement for the police officer to give consideration to such issues as the 'harm done by the seizure' and whether it is in proportion or otherwise to the seriousness of the suspected offence. This is not a test which a police officer would be expected to carry out in the execution of their daily duties.

Further this is not a test which immediately lends itself to execution in the field requiring as it does some subjective test to be carried out with the owner of the property to determine the potential harm to be done.

As to the release of the property, the Committee is respectfully referred to section 101ZID(9) which allows for a review of the conditions on which a thing is released by the Commissioner and to section 101ZIE which enables the Local Court to make orders for the release or disposal of the thing.

As noted in the answers above, an undercover operation leading to a seizure will only be made when a senior police officer has given consideration to and approval of the operation. That would ensure only necessary steps are taken to execute the particular operation.

The provisions do not seek to limit or oust any other civil or administrative actions which the owner of the property may otherwise seek to pursue, for example under section 130B of the *Local Court (Criminal Procedure) Act 1928*. The Bill does not seek to amend or affect any existing rights to civil or administrative action or compensation. If there is a current right to such compensation that will continue once the Bill is in force.

18. Is a person who owns, or has an interest in, a seized thing able to claim compensation for any losses caused by the seizure, for example, if the seized property is a vehicle or boat used for income generating purposes?

(a) *If not, why not?*

Answer

The Bill does not seek to amend or affect any existing rights to civil or administrative action or compensation. If there is a current right to such compensation that will continue once the Bill is in force.

Otherwise it may be a matter for the person to take advice on from a legal practitioner and the outcome will depend on each set of circumstances.

If the property is an income generating one, there may be a policy of insurance that responds to any losses, for example a business interruption clause. In general terms insurance policies often exclude claimants from seeking a payout for losses suffered as the result of their own criminal acts. It may be that a policy will respond to a claim for losses suffered because of another person's criminal act.

In very broad terms, a person is unlikely to be successful with a civil claim as a result of a legitimate seizure by Police, even where the prosecution might be discontinued or otherwise unsuccessful. Across Australia there is little recognition of any compensation rights in respect of either unsuccessful criminal proceedings or wrongful convictions. It is unlikely that the law regarding civil liability for seizures is likely to be strengthened in the immediate future.

As a general principle, it is in the interests of all in the community that the crimes be prosecuted and such steps taken as would be required to bring such a prosecution about (including seizing evidence).

(b) *Do the rights to compensation change if the seizure is later found to be wrongful?*

Answer

The Bill does not seek to amend or affect any rights to compensation. If there is a current right to such compensation then that will continue once the Bill is in force.