

1 JOHN BARRITT We're not in interrogation. Hopefully, I can take off my coat.
2 SEN DILLAS-WRIGHT Please do. Feel free.
3 JOHN BARRITT How do, how do you wish to begin?
4 SEN DILLAS-WRIGHT Well, what I wanted to do is first of all welcome you. Thank
5 you very much Mr. Barritt for agreeing to look at our terms of reference and also... Well, just
6 things... I'm sure Mr. Barritt has told you. We are a Joint Select Committee that was drafted
7 to look at implementing a random drug testing policy for Parliamentarians and so we will
8 introduce ourselves so that you know who we are; and there's one other person who isn't
9 here and that's Mr. Terry Lister who is MP Independent Lister also. So, if I start here and let's
10 introduce yourself, please.
11 MP Jeff Sousa
12 James Jardine, Independent Senator
13 And I am Joan Dillas-Wright, Independent Senator and
14 Chair Person of this Committee.
15 Eudora Browne-Lister
16 MP Nandi Outerbridge
17 SEN DILLAS-WRIGHT And the ladies who are transcribing.
18 DORIS GOODMAN Doris Goodman, Recording & Transcription Services
19 VERNEIL SIMONS Verneil Simons, Transcriber
20 JOHN BARRITT Well, good afternoon everyone.
21 SEN DILLAS-WRIGHT Thank you very much for agreeing to come. The floor is
22 open to you.
23 JOHN BARRITT Not at all. I thought it was a command performance. Shall I
24 jump straight in?
25 SEN DILLAS-WRIGHT Yes, please do.
26 JOHN BARRITT I've made a few notes based on questions that were
27 advanced, and the notes that I have and that which I am referring to I hope you will find
28 helpful in answering some those questions.

1 share with you a portion, something that they recommended to educational institutions as
2 they exhorted them to adopt drug testing random. It said "Before initiating drug testing
3 activity, a specific written policy on drug testing should be developed, distributed and
4 publicised. The policy should include such information as a clear explanation of the purposes
5 of the drug testing programme, who will be tested and by what methods, and (c) the drugs to
6 be tested for, how often and under what conditions, i.e. announced, un-announced or both
7 and (d) the actions, if any, to be taken against those who test positive".

8 I just share that with you from the NCAA. It reinforces a
9 point that I think I've been trying to make.

10 Now, we as Lawyers are not experts in drawing up drug
11 testing programmes and or drafting drug testing policies.

12 SEN DILLAS-WRIGHT Can I just interrupt you. NCAA is what?

13 JOHN BARRITT The National Collegiate of Athletic Association. Governs all...
14 If you watch channel 9 you'll see March Madness is one that comes right underneath that.

15 SEN DILLAS-WRIGHT Okay, thank you.

16 JOHN BARRITT And so, the drafting of a policy is not in our remit, we're no
17 experts in that, but depending on the policy that you choose and the purpose you state, it
18 could have legal implications. As I think you already know, legal applications arise for sure
19 and some of them I think will feature in whatever programme or policy you choose; and we
20 want to try and address some of these for you here today because I think that's what you're
21 looking for from us and I believe in so doing we'll address some of the questions that you
22 advanced to us in email.

23 First, the easiest course of action - and I'm sure I'm telling
24 you nothing new here - is to have a programme adopted voluntarily. My assumption from
25 all that I've read, I know this is not likely to be the case.

26 Volunteer submission, of course, sweeps away a whole host
27 of potential legal challenges, the first and most important of which I think is found in the
28 Bermuda Constitution Order 1968, Section 7, in that part of the Constitution Order entitled
29 Protection of Fundamental Rights and Freedoms of the Individual.

1 SEN JARDINE Yeah. Assuming the Governor... It's passed in law... the
2 Governor signs it, could somebody then challenge that piece of legislation by reference to
3 this section?

4 JOHN BARRITT That's exactly what I'm saying.

5 SEN. JARDINE That's what I wanted to get across so that... this is in sort of
6 plain English, this is the challenge that they may mount.

7 JOHN BARRITT That is the basis upon which the challenge could be
8 mounted, absolutely, and what you have to look at is, and you have to think about, if you
9 have drug testing in the workplace, bus drivers or you have in the workplace where there's
10 heavy lifting and machinery, it's clear that, that would be reasonably justifiable in the
11 interest of public safety. Now what you have to ask, and the Committee has to consider as
12 they go forward, what's going to be advanced in respect of a random drug testing
13 programme for Parliamentarians? Which category does it fall under there, defence - I don't
14 think so; public safety -I don't know that that's intended. I mean, further work would have
15 to be done on this, of course. I'm flagging this for you. Public Order - there's a lot of
16 disorder in the House - but I don't think it follows under that. Public morality, maybe, maybe
17 now. Maybe.

18 SEN DILLAS WRIGHT Yeah, public health.

19 JOHN BARRITT And I don't think public health. It may be the health of
20 individual members but not necessarily public health. So, that's key; and the reason I
21 underscore these things because these are, if I may lead you there, are important words to
22 have in any policy you develop because that would help in order to advance a programme
23 and put it in a position where it can meet a constitutional challenge.

24 You might also think that if Parliament decides there will be
25 drug testing for members then that's it, Parliament is Supreme. I'm sure the principle that
26 Parliament's supreme, it can decide to do whatever it wants to. Well, that's true but only up
27 to a point. The point that's relevant here is if you look at Section 34 of the Bermuda
28 Constitution Order - and that's a couple of pages in - you'll see that it says quite clearly
29 there, it's highlighted that "Subject to the provisions of this Constitution, the Legislature may
30 make laws for the peace, order and good government of Bermuda". Well, one of the

1 subjects too would be that that part of the Act which respects, in my view, the fundamental
2 freedoms of individuals. I, I also think that that overrides and I won't... I'll just flag it for you
3 now. It's not a big issue.

4 There is a section in the Parliament Act 1957 which we'll
5 come on to which says that "No Court can challenge a decision of the Speaker or the
6 President of the Senate", their jurisdiction is ousted with respect to any Act done pursuant to
7 their powers under the Parliament Act. But again, that's subordinate legislation that can still
8 be challenged. It does not override the Bermuda Constitution, in my view.

9 So Section 7 is a hurdle that will have to be overcome and a
10 test that will have to be met in drafting a policy for Parliamentarians.

11 And there's a smaller but equally important issue that must
12 not be overlooked that arises with respect to how you propose to address offenders, how
13 you propose they be dealt with, those who test positive that is. If naming and shaming is
14 going to be the point, the programme may also be resisted on the basis that a member has a
15 right at law not to incriminate himself, that is to provide evidence which could or could not
16 lead to a criminal prosecution. So, there will have to be something in the policy to address
17 that. Maybe you'll want to grant immunity to people from criminal prosecution.

18 Now, the second major point for consideration is how you
19 propose to implement this policy, by legislation? Which is what Senator Jardine I think
20 prefaced his question, if you pass the law; or by incorporation into the Standing Orders of
21 the House and the Senate, and here, let me just pause here... I am more familiar with the
22 Standing Orders of the House than I am with the Senate, though I will defer to the two
23 Senators on that; and with reference to the Standing Orders, whether you're going to have a
24 Code of... Whether you're going to write provisions into the Standing Orders, which can be
25 done and adopted by the House, or whether you intend to do it by reference to a Code of
26 Conduct for members of the Legislature.

27 Again, being incorporated by reference into the Standing
28 Orders... I'm guessing here but I'm assuming that you're thinking of the latter route as
29 opposed to legislation, although some of the same challenges will apply, I think, with respect
30 to the rules. I thought the rules might be the...

1 SEN DILLAS-WRIGHT Easiest

2 JOHN BARRITT ... easier route. I could be wrong on that. You'll have a
3 better sense than I will from your discussions. It would appear on the face of it that any such
4 programme would weave in nicely with the current rules of the Standing Orders, on the basis
5 that they would fit into the Committee system that's currently there and some of the rules
6 that can be evoked... invoked, I beg your pardon, with respect to breaches, but I still think
7 you'll be met with the Section 7 challenge even if you go that route.

8 Now, Section 45 (1) of the Bermuda Constitution - which I
9 hope I've also marked... Yes I have... says that "Subject to the provisions of this Constitution"
10 again, that brings in the challenge that could be made under the fundamental rights and
11 freedoms, "each House may make rules of procedure for the regulation and orderly conduct
12 of its own proceedings". Now I pause here to note that the reference is to rules of procedure
13 for the regulation and orderly conduct of proceedings. Notice the focus on conduct of
14 procedures, and again, depending on how the policy is crafted i.e. its purpose, it may or may
15 not qualify as a matter that falls within the definition of regulating orderly conduct in the
16 House. That's a hurdle that's got to be met as well, in my view, because if you take a close
17 look at the Standing Orders of the House of Assembly with which I'm most familiar, the
18 Speaker has the power, indeed the duty, to ensure that there's order in the House under the
19 Standing Order 10, and he has powers to deal with that. Slight members, have them sit out
20 for the day or worse still. He has a duty and rules to ensure proper conduct in the House
21 under Standing Order 11, and that the proper orders, proper rules of debate, be followed
22 under Standing Order 19.

23 I'm not sure that we can say with any certainty that a
24 positive test goes to conduct such that a member could be disciplined for same. The rule as
25 currently drafted addresses behaviour... Okay, we'll come back to this... They address
26 behaviour. Behaviour as it's exhibited on the floor of the House or in the precincts or even
27 outside the Chamber, it's a fine, but perhaps an important distinction, in my view, that could
28 be taken up by any member who wishes to resist or challenge random drug testing.
29 However, the Parliament Act 1957 - and now you'll go to that copy - you'll see that in
30 Section 28... Is it 28 (1)? Yes, I've highlighted it there, that the Speaker has his duty, subject

1 someone brings a Motion, they realise and they know that if any time you want to take a
2 member to task for his or her conduct, you have to bring a Substantive Motion. You're not
3 even supposed to be allowed to do it on the floor of the House. I think when you're leading a
4 full frontal charge, that's the case and you might make some comment in passing, obviously,
5 the way someone's made a decision or conducted themselves but, really, it's meant to be a
6 Substantive Motion. The member gets named and then you have a debate where the
7 Speaker makes a decision; and I suspect that you want to modify that if you bring it into the
8 rules, because that seems a little over blown. However, it might be something you want to
9 consider if you're at the stage where someone you're thinking of suspending or expelling a
10 member. I don't know that you actually have the power to expel a member, but suspend for
11 any length of time. But again, even when it talks about breaches of privilege, it talks about
12 the Motion imputes the conduct of the member. Everything seems to be focused on
13 conduct, so you're treading on, you know...

14 SEN DILLAS-WRIGHT Thin ice

15 JOHN BARRITT ... new ground maybe. You're forging new ground. I don't
16 think it easily fits under what we currently have. And, you know, one has to query then
17 whether random drug testing could be incorporated into the rules of the Legislature.

18 And there is another, as I am sure you know, Joint Select
19 Committee, which has reported... Are you on that one as well [to Jeff Sousa] with respect to
20 Management of the Legislature.

21 JEFF SOUSA Yes

22 JOHN BARRITT They have recommended a Code of Conduct and this is
23 something that might dove-tail nicely with them in terms of developing a Code of Conduct
24 that members are expected to adhere to, and you could... And now I'm moving probably
25 beyond just legal advice into political, but the safer course of action, of course, would be you
26 set up this Code of Conduct. You implement random drug testing. A member gets called
27 before it, does or does not participate, and those who do not participate do so at their own
28 political peril, and you wait until... Sorry, you don't wait. The House in its normal wisdom
29 waits until there's some egregious conduct that requires the sanctions or measures that
30 already exists on the rules to deal with. That is worth exposing, I guess for the transcript, if a

1 member was exhibiting really bizarre behaviour that led you to believe that it was a result
2 and could be the result of something, then you would deal with the behaviour rather than,
3 than what the cause is, in terms of dealing with his or her continued participation in the
4 House of Assembly.

5 SEN JARDINE As you said earlier, John, if it was volunteer, apparently it
6 would not be an issue at all.

7 JOHN BARRITT Correct, at least not for this House, the next House,
8 someone... You could always challenge it, but presumably if you incorporate it and it became
9 part of a Code of Conduct, like a lot of things, it would become to be accepted as good for
10 practice - good practice and good policy.

11 Those are the comments that I wanted to make to start with.
12 I know there're probably some questions... I know there are some questions I haven't
13 answered. I had the paper, had it somewhere... Here they are.

14 Yes, some individuals believe that if their activities don't
15 affect the job performance then it's none of the employer's business. Well, I think I've
16 answered that. Where it does become, and in this case who is your employer? Well, we
17 could argue that one until the cows come home. Some people would argue that the people
18 are the employer but, that's how you get elected, but I think once you are... Once you are
19 there, you are your own employer. Arguably, you are your own employer.

20 SEN JARDINE You're self employed.

21 JOHN BARRITT That's right

22 SEN DILLAS-WRIGHT Absolutely.

23 JEFF SOUSA Serving of the people is supposed to be a service.

24 SEN DILLAS-WRIGHT Thank you.

25 JOHN BARRITT Well, absolutely. That's our duty and that's what you
26 probably owe under your social contract as an elected member and your constituents are, I
27 suppose in one sense, your employer, but the fact of the matter is, you're self employed, and
28 Edmund Burke's famous quote was, "You employ me for my judgment, not just that I would
29 slavishly follow whatever you wish to do" and that's what a member's always trying to do in

1 the political party is balance between the two, and they often come out with that which is
2 best for the Country.

3 Can Parliamentarians appeal to the Courts or the Human
4 Rights Commission for any aspect of the programme? I've addressed this. Surely, they can
5 go to the Courts - members could as a group do that with respect to a challenge.

6 The Human Rights Commission? We looked at that and we
7 couldn't see the basis upon which you could mount a Human Rights challenge because
8 presumably everyone's going to be treated equally under this policy, whether they're PLP,
9 OBA, male, female, short, tall, fat, thin.

10 JESSICA FAIELLA The only Human Rights thing at all potentially, from what I
11 can see, whereas the self incrimination, is the right to a fair trial, but the actual wording of
12 that says that if a criminal offence is pending. So you would have needed to be charged
13 already, and then have a fair trial. So, it's not just speculation that if I do this drug test I
14 might have criminal proceedings against me. So it doesn't really fall into that; but that's the
15 only thing about self incrimination and the right to have a fair trial.

16 JOHN BARRITT And finally, someone asked the question with respect to
17 Medical Marijuana with Parliamentarians who have been prescribed Medical Marijuana be
18 exempt from *drug test*. Well, I think that's a matter for you to incorporate in the policy. I
19 would think if Medical Marijuana has been made legal, then so be it. The one thing about
20 that, I have to tell you, is that now that more and more jurisdictions are legalising marijuana,
21 you've got another challenge too that has to be addressed...

22 SEN DILLAS-WRIGHT I know. We've talked about that.

23 JOHN BARRITT ... and that is people who, you know, go to Washington on
24 the West Coast and actually...

25 VOICES [Amsterdam]

26 JOHN BARRITT ... imbibe or smoke and still have the...

27 SEN DILLAS-WRIGHT Have it in their hair.

28 JOHN BARRITT ... done something legal and still have the residue, or... I
29 have a friend in Canada who is prescribed Medical Marijuana and much to my shock the first
30 time, he lit up when we were driving in the car in Toronto, and I thought 'gee, you know, I'm

1 JOHN BARRITT But if you read me right, if I explained myself well, I think you
2 really first need to devise the policy and what you as a Committee think should be in the
3 policy, then we can look at some of the... And you could know going in, these are some of the
4 legal challenges which can arise. You tell people that in your report, and you buttress it as
5 best you can to make the argument that this is something that falls within public morality
6 and you make the case. I've given you some key words here and the preamble and your
7 purpose of policy and you set it up and then you decide as you go along. I think you're in
8 some difficulty if you get into 'name and shame' because it starts to look like it is purely, for
9 the purposes of which...

10 SEN DILLAS-WRIGHT Well, that was in... Certainly, that policy, it was written in
11 that policy but that's never been our position.

12 JOHN BARRITT Okay. I knew I read it somewhere.

13 SEN DILLAS-WRIGHT That's not our policy at all – 'name and shaming' - and we
14 would want it to be totally confidential, and we also feel our recommendation will be that it
15 be managed by an external body.

16 JOHN BARRITT Okay, yes, with the oversight, presumably, of a committee of
17 the House of the Members.

18 SEN DILLAS-WRIGHT Absolutely.

19 JOHN BARRITT Who are themselves...

20 SEN DILLAS-WRIGHT We are going to have discussions around that. It's
21 important, you know.

22 JOHN BARRITT It's not going to be easy but I think it'll be easier if you do
23 the policy and then someone who does drug testing is involved in another drug testing
24 programme can help you craft that. That is, the nuts and bolts of how you do it, when you
25 do it, what you're looking for, etc. That will stand up, I think, better to public scrutiny and
26 debate, and then you deal with the legal aspect of the matter someone refuses. Say, well, I
27 think you need to change this, drop that, put it this way. And that's the way I would
28 proceed.

29 JEFF SOUSA Many of us agree that, you know, as Legislators, we should
30 be leading by example, but at the end of the day the Constituents are judge and jury.

1 JOHN BARRITT Well, that's right. So if you had something and the member
2 wasn't conducting himself or herself well and you had a Code of Conduct and they appeared
3 to be in breach of it and you were adhering to the random drug testing, that's a plus for you
4 come re-election. If another member isn't, then his opponent will take advantage.

5 JEFF SOUSA Just as an example, John, I received an email yesterday at 11-
6 o'clock, and at 11:30 I did a random drug test.

7 JOHN BARRITT Yeah. But again, even if you have that policy, the other
8 members who feel strongly that it's an invasion may still challenge it on the basis that you're
9 doing something that goes beyond the pale.

10 SEN DILLAS-WRIGHT Any further comments or questions? It's been very, very
11 helpful.

12 SEN JARDINE The Constitution side of it was the issue that really, I think...
13 That's why I asked the question about, if legislation is passed, it's now effectively in law, it's
14 been signed by the Governor, etc., etc., but at the end of the day it comes back to the
15 Constitution

16 JOHN BARRITT I've often wondered, the Governor has the right... I paused
17 earlier and I said, the Governor himself is expected, part of his duty is to review legislation to
18 make sure it is not unconstitutional, contrary to the Constitution. So, I'm not aware of any
19 time that's happened although I know that one piece of legislation was once stalled for a
20 period of time but that can happen, because the Bermuda Constitution Order, of course, is
21 an Order. It's an act of the UK Parliament, subject to their approval and review.

22 SEN DILLAS-WRIGHT I think we will follow up with the suggestion of contacting
23 the Commonwealth Parliamentary Association though just to see if they have any
24 information.

25 SEN. JARDINE (?) Yeah, I mean, the only one I could find was Australia. I
26 mean, other people have talked about it but, because they tried to wrap it up with social
27 reform and review, it never got anywhere. The only country that ever actually drafted any

