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Independent Review of Part 1D of the *Crimes Act 1914*

I refer to your letter dated 22 July 2002 inviting the Commission to make a submission to the Independent Review of Part 1D of the *Crimes Act 1914*.

This Commission provides representation in criminal matters to both adults and children. Our Prisoners Legal Service provides legal advice and assistance to prisoners in New South Wales gaols. The Commission's Children's Legal Service provides a visiting legal advice and assistance service to juvenile justice centres. As a result of the Commission's experience providing legal representation in criminal matters and to people in custody, we have a number of concerns about the operation of Part 1D.

Informed consent

Part 1D provides for a DNA sample to be taken from a suspect with the informed consent of the suspect. The legislation requires that the suspect be given a great deal of information about the procedure, and requires that the suspect be given a reasonable opportunity to communicate with a legal practitioner. The information that is required to be provided to suspects before they consent to forensic DNA sampling is reasonable, but is, by its nature, complicated and difficult to comprehend without assistance.

The implications of consenting to providing a sample are of such significance, and of such complexity, that it is appropriate that a suspect have access to legal advice before consenting. However, there are practical limitations on a

suspect's capacity to obtain legal advice. No Australian State or Territory provides a duty solicitor scheme on the model used in the United Kingdom where publicly funded lawyers are available to provide advice to suspects in police custody. In the absence of such a service the right to legal advice before consenting to provide a sample is an illusory right.

The experience of the Commission's criminal solicitors is that the majority of the DNA samples obtained under the New South Wales *Crimes (Forensic Procedures) Act 2000* ("the NSW Act"), which has provisions similar to Part 1D, are obtained by consent. The circumstances in which consent is given is, therefore, significant. There is some anecdotal evidence to suggest that some police officers are advising suspects that if they do not consent to the taking of a buccal swab, the police have the power to use reasonable force to take a sample of growing hairs. This is a misleading statement of the effect of the NSW Act, which mirrors Part 1D in this respect. A DNA sample may only be taken without consent by order of a senior police officer (section 23WM), and only if the senior officer is satisfied as to the matters set out in section 23WO.

The legislation is very complex and includes detailed provisions covering the information which must be provided to suspects, different processes for intimate and non-intimate procedures, and different processes for suspects who consent to the taking of a sample and those who don't. There is a real risk that a police officer attempting to provide accurate information to a suspect may inadvertently mislead the suspect about the extent of the protections provided in the legislation. While this Commission supports the need for the legislation to be very specific and provide very clear guidance to police officers of their obligations, there is a risk that the very detailed provisions have combined to create a complex piece of legislation which is not properly understood by the people who are expected to apply it.

The consent given by a suspect to the taking of a DNA sample can only be considered to be *informed* in any meaningful way if

- the information specified in section 23WJ has been provided prior to the purported consent, and
- the section 23WJ information has not been confused or contradicted by incorrect supplementary information.

Anecdotal evidence suggests that police officers may be unclear about the requirements of Division 3, and may be proceeding to take DNA samples from suspects on the basis of consent which does not fulfil the requirements of informed consent.

The inclusion of a summary of rules relating to authority and time limits for forensic procedures on suspects contained in sections 23WC and 23WCA is a recognition of the fact that the legislation is complicated. An expansion of this approach of providing key information in a table format may help to ensure that police officers do not inadvertently breach the Act.

In addition to the possibility of inadvertent breaches of the legislation, we are concerned about the risk of the deliberate use of improper practices to obtain forensic evidence. We are not satisfied that the exclusionary rules in the Commonwealth legislation provides sufficient protection.

Section 138 of the *Evidence Act 1995* provides a general discretion to exclude improperly or illegally obtained evidence. However the evidence may be admitted if the desirability of admitting it outweighs the undesirability of admitting evidence obtained in the way in which the evidence was obtained.

Section 23XX provides that where evidence has been obtained from a forensic procedure, and there has been a failure to comply with Part 1D, the evidence will be inadmissible, unless the defendant does not object or the court is satisfied on the balance of probabilities of matters that, in the court's opinion, justify the admission of the evidence. The matters to be considered by the court in determining whether to admit the evidence include the probative value of the evidence, the reasons given for the failure to comply, the gravity of the failure to comply, whether the failure to comply was intentional or reckless, and the nature of the offence concerned.

This Commission would argue strongly that there should be a presumption that improperly obtained forensic evidence is inadmissible. DNA evidence can be considered of such importance that some police officers may seek to obtain it in circumstances which fail to conform to the procedures established by the legislation, and the courts may be reluctant to exclude it because of its probative value.

Part 1D and the corresponding forensic procedures legislation in the States and Territories provides a regime for the collection of genetic evidence, including protections for suspects. However, compliance with the legislation can only be ensured by making it clear that failure to comply will result in the exclusion of any improperly obtained evidence.

Interview friends

Part 1D, as well as the NSW Act, provides additional safeguards for suspects who are Aboriginal persons or Torres Strait Islanders. If a police officer believes on reasonable grounds that a suspect is an Aboriginal person or a Torres Strait Islander, the suspect can only be asked to provide a DNA sample if an interview friend is present or the suspect has "expressly and voluntarily" waived his or her right to have an interview friend present (section 23WG(3)b)). Part 1D also provides that an interview friend is not required if the police officer believes on reasonable grounds that the suspect is not at a disadvantage in relation to the request to consent by comparison with members of the Australian community generally (section 23WG(3)(c)). This provision is not included in the NSW Act.

This Commission is of the view that the New South Wales legislation is to be preferred in omitting this provision. It is not appropriate that the suspect's right to this protection should depend on a judgement by the police officer of the suspect's degree of disadvantage. The disadvantage experienced by Aboriginal and Torres Strait Islander suspects in their dealings with the police is not necessarily something that would be readily apparent to a police officer.

Part 1D also makes provision for an interview friend to be present while a forensic procedure is carried out on a suspect who is a child or an incapable person, or on an Aboriginal person or a Torres Strait Islander, unless the Aboriginal or Torres Strait Islander suspect waives his or her right to have an interview friend present (sections 23XQ and 23XR).

This Commission is concerned that the presence of an interview friend, either when the suspect is asked to consent to providing the sample or during the actual taking of the sample, will not provide any protection to the suspect if the interview friend does not have the necessary knowledge, experience or confidence to appropriately advise and support the suspect. If the interview friend is a relative or friend it is quite likely that their presence will not do anything to protect the suspect's rights. In such a case the interview friend may actually be a detriment to the suspect, as his or her presence creates a false impression that the suspect has received appropriate support and advice when deciding to consent to provide a sample. We would argue that it is particularly important that these particularly vulnerable people should have access to legal representation throughout the process.

Volunteers

Division 6B provides for the carrying out of forensic procedures on volunteers. This Commission has concerns about the use of mass population screening programs to identify suspects.

This process places great pressure on affected individuals to consent. People who decline to participate may come under unreasonable suspicion. Innocent people may decline to participate for a number of reasons, including a concern to retain the privacy of their genetic information, or concerns about how the samples may be used.

There is also a problem associated with the media coverage that such mass screenings receive. This coverage could have prejudicial effect on any suspect charged following the screening program. The cost and time expended on the screening program could create a strong impression on the public that the person identified through the screening is the offender, even though the DNA evidence is not conclusive evidence of guilt.

A volunteer has a choice as to whether genetic information obtained from the sample he or she provides is stored on the volunteers (limited purposes) index or the volunteers (unlimited purposes) index, and must agree as to the length of time that the information will be retained on the index (section

23XWR). We have some concerns that the information which the police officer must provide to the volunteer before the volunteer gives his or her consent, and the requirement that an independent person be present, does not provide sufficient protection to the volunteer. This Commission is of the view that the information should be provided in writing and the volunteer should be referred to a legal practitioner for advice, rather than simply being informed of their right to consult a legal practitioner.

Division 6B provides for a parent or guardian of a child or incapable person to volunteer on behalf of that child or incapable person to the taking of a DNA sample from the child or incapable person. The parent or guardian may also agree as to the period of time that information obtained from the sample is to be retained on the DNA database. We have some concerns about this procedure, and recommend that a DNA sample should only be taken from a child or incapable person by order of a magistrate.

Serious and prescribed offenders

Division 6A relates to the taking of forensic samples from serious and prescribed offenders. This is misleading, as the DNA sampling of convicted offenders is not limited to serious offenders. A prescribed offender is defined in Part 1D as a person under sentence for an offence punishable by a maximum penalty of imprisonment for life or two or more years. A serious offender is defined as a person under sentence for an offence punishable by a maximum penalty of imprisonment for life or five or more years.

The corresponding provisions in the NSW Act have caused confusion and anger among inmates. Many have asked the Commission's Prisoners Legal Service why they have to give a sample when they are only serving a sentence of six months or less for a relatively minor offence, such as shoplifting or a minor assault.

The Prisoners Legal Service has been advising inmates to require a police order before complying with a request to provide a DNA sample. Some inmates have reported to the Prisoners Legal Service that they have been told by Department of Corrective Services staff that if they follow this advice and require a police order, their failure to consent to the procedure will be regarded by the Department of Corrective Services as an indication that they are a security risk, and they will be transferred to another gaol and their classification increased. We have some concerns that this type of comment will undermine the effectiveness of providing the information required under section 23XWJ.

The NSW Act provides that in determining whether to order the taking of a DNA sample from an offender, the police officer must take into account whether the Act would authorise the taking of the sample in the absence of the order (section 71). Part 1D goes beyond this and required the police officer to take into account the seriousness of the circumstances surrounding the offence committed by the offender, whether taking the sample could assist

law enforcement and whether the carrying out of the forensic procedure without consent is justified in all the circumstances (section 23XWL). This Commission is of the view that the Commonwealth legislation is to be preferred in this respect. However, the greater protection offered by section 23XWL makes it even more important to ensure that any consent given by an offender to the taking of a DNA sample is a genuinely informed consent given free of the influence of threats, intimidation or misrepresentation of the effect of the legislation.

Destruction of forensic material

Division 8 provides for forensic material taken from a suspect to be destroyed if the suspect is acquitted or if 12 months have elapsed and proceedings have not been instituted. It also provides for forensic material taken from an offender to be destroyed if their conviction is quashed. This Commission is of the view that forensic material taken from a suspect should be destroyed immediately when a decision is taken not to proceed with a prosecution. There is no justifiable reason for retaining the material for 12 months if the information obtained from the sample has excluded the suspect.

Subsection 23WA(5) provides that forensic material has been destroyed if any means of identifying the forensic material with the person from whom it was taken have been destroyed. That is, it is sufficient to “de-identify” the sample. Once a sample is required to be destroyed, section 23YDAG requires any identifying information to be removed from the DNA database.

This Commission is of the view that DNA samples should be destroyed rather than de-identified. De-identification is not sufficient because of widely held fears about the possibility that a person’s identity may somehow be reassigned to the sample, and concerns about why the samples are being kept. Many people have strong concerns about government authorities having access to their genetic information, and are entitled to the assurance that the genetic material and any profiles or analysis obtained from the material will be destroyed once they are of no further forensic use.

There is some confusion in the legislation as to when DNA samples taken from volunteers will be destroyed. Section 23XWR provides that information obtained from a DNA sample taken from a volunteer will be retained on the DNA database system only for such period as the Police Commissioner and the volunteer agree. However, section 23XWR does not address the destruction of the sample, and samples provided by volunteers are expressly excluded from the operation of Division 8. The legislation would benefit from a table setting out the time limits for the destruction of forensic samples.

National DNA database

The legislation governing the collection of genetic material from suspects and offenders differs widely between jurisdictions.

Under the NSW Act, the taking of a sample of saliva by buccal swab is defined as a “non-intimate forensic procedure”. Under Part 1D a buccal swab is defined as an intimate forensic procedure.

Under the NSW Act, before requesting a suspect to consent to the taking of a DNA sample a police officer must be satisfied that there are reasonable grounds to believe that the forensic procedure *might* produce evidence that the suspect has committed a prescribed (indictable) offence (section 12). Under Part 1D the police officer must be satisfied that there are reasonable grounds to believe that the procedure *is likely to* produce evidence that the suspect has committed a relevant (indictable) offence (section 23WI). This Commission is of the view that the “might” test is inappropriate and supports the higher test contained in the Commonwealth legislation.

Under both the NSW Act and the Commonwealth legislation, a sample may only be taken from a person suspected of committing an indictable offence. Under the corresponding South Australian legislation, the *Criminal Law (Forensic Procedures) Act 1998*, a sample may be taken from a person who is suspected of having committed any offence except a summary offence that is not punishable by imprisonment.

Under the Commonwealth legislation a person convicted of an offence punishable by a maximum penalty of two or more years may be required to consent to the taking of a DNA sample (Division 6A). The offender must be in prison or otherwise “under sentence”, that is, on parole or subject to some other form of order that forms part of their sentence. Under the NSW Act a sample can only be taken from an offender convicted of a serious offence punishable by a maximum penalty of five or more years of imprisonment. More significantly, in New South Wales the taking of a DNA sample is limited to offenders who are currently serving their sentence in prison for that serious offence (Part 7). Under the South Australian legislation a DNA sample may be taken from an offender convicted of an offence punishable by a maximum penalty of five or more years imprisonment if the court orders it. In deciding whether to make such an order the court must take into account the seriousness of the offence and any established propensity of the offender to engage in serious criminal conduct. There is no provision for taking a sample by consent.

The Commonwealth and New South Wales legislation are broadly similar as both these jurisdictions, together with the ACT, based their legislation on the Model Forensic Procedures Bill 2000 developed by the Model Criminal Code Officers Committee. The other jurisdictions either adopted the Model Bill in some respects only (Tasmania, Victoria and South Australia) or do not follow the Model Bill at all (Queensland, Northern Territory and Western Australia). Major differences are found throughout the legislation covering a range of matters including the collection of forensic samples, how those samples may be used, and when they must be destroyed.

The National Criminal Investigation DNA Database will contain DNA profiles from all participating States and Territories, as well as the Commonwealth, collected according to the regime applying in the relevant jurisdiction. As discussed above, the regimes vary considerably between jurisdictions.

This Commission is strongly of the view that in order to have access to a national database, participating jurisdictions should be required to adhere to national standards for the collection, use and destruction of DNA samples. As things currently stand, a law enforcement agency in one State may have access to forensic information obtained in another jurisdiction to which they would not have had access if they were limited to information collected, used and destroyed in accordance with their own State legislation. This may occur because the sample would not have been collected, or because it would have already been destroyed, or because it would have been included on a limited purpose index which could not be accessed for the relevant purpose.

This Commission is of the view that this situation is unacceptable. It undermines the protections provided by those jurisdictions which have adopted legislation providing appropriate levels of protection to people from whom forensic samples are taken.

One of the areas in which the lack of uniformity in the legislation is most pronounced is the use which can be made of information obtained from the samples taken. The different jurisdictions have adopted different categories of indexes and different rules as to permissible matching. Because of the variations in indexes and permissible matching there are numerous types of matching which are lawful in some jurisdictions but not in others. With the confusion arising from such a situation there is a real risk that a match will be made which is not permitted under the law of the relevant jurisdiction.

Further information

Thank you for the opportunity to comment on this issue which is a matter of ongoing concern to the Legal Aid Commission. If you require any further information please contact Sally McAtee, Senior Solicitor in the Commission's Legal Policy Unit on telephone (02) 9219 5034, facsimile (02) 9219 5806 or e-mail sally.mcatee@legalaid.nsw.gov.au.

Yours faithfully

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