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Crimes Act Amendment (Forensic Procedures) Bill (No. 1) 2006

Jennifer Norberry
Law and Bills Digest Section

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Crimes Act Amendment (Forensic Procedures) Bill (No. 1) 2006

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House: Senate

Portfolio: Justice and Customs

Commencement: The day after Royal Assent

Purpose

The Bill's aim is to ensure that inter-jurisdictional DNA profile matching for law enforcement purposes using the National Criminal Investigation DNA Database ('NCIDD') can be implemented.

Background

Forensic procedures

At common law, police have no power to compel a suspect to provide samples of their blood, hair, saliva or other bodily matter (forensic material).[1] Absent the suspect's consent, taking such a sample is an assault. A number of Australian inquiries examined how forensic sampling in criminal investigations should be regulated before the Model Criminal Code Officers Committee ('MCCOC') commenced work on model legislation for Australia.[2]

In 1994, MCCOC produced a public consultation draft Model Forensic Procedures Bill, which focused on forensic procedures involving suspects. In 1995 following receipt of comments, the Standing Committee of Attorneys-General ('SCAG') endorsed the Model Bill. Commonwealth legislation based on the 1995 Model Bill was passed in 1998 inserting Part 1D into the *Crimes Act 1914*.[3] The 1998 Commonwealth Act governed the carrying out of forensic procedures on persons suspected of committing Commonwealth offences and provided for the storage, use and destruction of material obtained from those procedures.[4] Other Australian jurisdictions also passed legislation based to varying degrees on the Model Bill and some provided for computerised DNA databases and for the exchange of information between jurisdictions.

At the time the 1995 Model Bill was drafted, a national DNA database was not considered feasible. However, the issue was referred by SCAG to the Australasian Police Ministers' Council ('APMC'). In 1998, APMC advised SCAG that it supported the establishment of a national DNA database and asked that enabling amendments be drafted. As a result, a revised Model Bill was prepared by MCOCC and released in February 2000. Among other things, the 2000 Model Bill provided for DNA profiles to be included on a national DNA

database system. It also contained revised provisions relating to the testing of convicted offenders and new provisions relating to the testing of volunteers.[5]

National DNA database system and the NCIDD

Amendments to Part 1D, based on the 2000 Model Bill were enacted in 2001.[6] The amendments:

- regulated the taking and use of forensic material from volunteers and convicted offenders for law enforcement purposes
- enabled forensic information to be included on a national DNA database system of information that could be contributed to, accessed by and shared between police services in each jurisdiction
- stipulated what information could be stored on the database, how information could be stored, how the database could be interrogated and when information from the database could be disclosed
- provided for indexes of profiles on the database—a crime scene index, a missing persons index, an unknown deceased persons index, a serious offenders index, a volunteers unlimited purpose index, a volunteers limited purpose index, and a suspects index. Rules stipulated which indexes could be compared to find matches—for example, the suspects index can be compared with the crime scene index
- created offences for misuse of the database and breaches of the rules, and
- enabled the Commonwealth to enter into arrangements with participating States and Territories to facilitate the establishment of a national DNA database system.

Forensic sampling encompasses a wide variety of procedures including the taking of fingerprints, blood and saliva samples and dental impressions. However, as an Independent Review of Part 1D pointed out in 2003:

> … the primary aim of Part 1D is to regulate the collection, storage, and use (including comparison) of DNA samples and DNA profiles.[7]

On 20 June 2001, the Prime Minister launched the CrimTrac law enforcement initiative.[8] The CrimTrac Agency is a Commonwealth agency responsible for a number of programs designed to provide national policing information services, investigation tools and national criminal history record checks.[9] It also manages the NCIDD.

The NCIDD is part of the national DNA database system which includes all DNA databases maintained by the AFP, CrimTrac and the States and Territories. With the exception of the NCIDD, these databases contain both DNA profiles and the identity of the person to whom the DNA relates. Each DNA profile on the NCIDD has a unique identifier and must be associated with an index. The Independent Review of Part 1D succinctly describes how the system is designed to operate:

> It is envisaged that all participating jurisdictions will upload DNA profiles and identifying numbers onto NCIDD from their respective databases and additions and deletions to the respective databases will also be uploaded. While NCIDD will automatically record and report back on any links of DNA profiles, actual identification can only be made on a participating jurisdiction's database. This produces the result that when a link occurs the requesting jurisdiction will need to seek the identity of the holder of the linked profile from the other jurisdiction because the NCIDD contains no personal information.[10]

The NCIDD has grown slowly. It was ready to accept profiles in June 2001. However, by 30 June 2002 only NSW had contributed to the database.[11] As at 30 June 2004, the first year that the number of NCIDD records was published in CrimTrac's *Annual Report*, 50,988 records had been loaded. The number grew rapidly in the next 12 months. As at 30 June 2005, there were 152,594 records on the NCIDD—41,595 crime scene records, 38,288 offender/serious offender records, 58,645 suspects records, 14,064 volunteers (unlimited purpose) records, one volunteers (limited purpose) record and one missing persons record.[12]

As indicated earlier, the NCIDD is intended to enable matching of DNA profiles for law enforcement purposes, in accordance with statutory requirements, across as well as within jurisdictions. The *CrimTrac Annual Report 2004-05* states that intra-jurisdictional matching has been performed on the NCIDD by the ACT, Commonwealth, Queensland, Western Australia and New South Wales. Some inter-jurisdictional matching commenced in June 2005 with matching between Queensland and Western Australia. In May 2006, a Senate Estimates Committee was told that inter-jurisdictional matching had also occurred between Queensland and the Northern Territory and the Northern Territory and Western Australia.[13]

Cross-matching needs to be supported by complementary, consistent Commonwealth, State and Territory laws. State and Territory laws are particularly important because, under Australia's constitutional arrangements, it is the States and Territories that are responsible for most of Australia's criminal laws, especially in relation to crimes against the person and property—in other words, the sorts of crimes which usually give rise to DNA testing.[14] As the Independent Review of Part 1D commented in 2003:

> This means that the great bulk of DNA extraction, analysis and matching occurs at State and Territory level. A broad indication of the importance of the States and Territories in this context is that approximately 90% of the police personnel in Australia are at the State and Territory level.
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> …
>
> This is not to say that the Commonwealth criminal law is unimportant in the context of DNA testing. There is a growing use of DNA testing in narcotics importation investigations and, as DNA extraction and testing techniques improve, there will be a growing use in the Commonwealth fraud area. Also, in recent years, Commonwealth

> criminal law has extended under the external affairs power into very significant areas. Terrorism is probably the best example of this.
>
> …
>
> … the Commonwealth has a major interest in the national database system because it is important that there is a capacity to link DNA profiles across the country and that the national system be of high quality, accountable and have consistent practices. Further, the Commonwealth contributed $50 million to support the establishment and operation of the various CrimTrac systems including the national DNA database.[15]

Action to make the NCIDD fully operational has been time-consuming and complex requiring, among other things:

- the design and construction of databases, a matching engine and an automated jurisdictional Laboratory Information Management System
- the enactment of harmonised legislation by the States and Territories to allow inter-jurisdictional matching to occur
- Commonwealth recognition of State and Territory laws as 'corresponding laws' and State and Territory recognition of the laws of the Commonwealth and other States and Territories as 'corresponding laws'
- the negotiation and implementation of cross-jurisdictional matching agreements and memoranda of understanding, and
- formal notification to CrimTrac by each police agency of their ability to use 'NCIDD with full functionality within their bi-lateral agreements.'[16]

An additional issue that has been raised is whether Part 1D of the Crimes Act needs to be amended.

Impetus for the Bill

Although some inter-jurisdictional matching has occurred, there has been some disagreement about whether Commonwealth legislation needs to be amended so that it can occur lawfully. The Minister's second reading speech states:

> The States and Territories have expressed concern that under current legislation it is unclear if they can lawfully transfer DNA profiles from their DNA databases to the Commonwealth. There is also concern that it is unclear that the Commonwealth can disclose DNA profile information that it holds to the States and Territories. The Commonwealth never held these concerns, however, this Bill will clarify, for the States and Territories, that the transfer of information, so that inter-jurisdictional DNA matching can occur, is lawful and thus there can be national DNA profile matching.[17]

It is the legal status of the NCIDD that appears to be a major issue. At a Senate Estimates Committee hearing in May 2006, Mr Ben McDevitt, Chief Executive Officer of CrimTrac, said:

> The question is: is NCIDD itself a Commonwealth database or is it at law recognised as an amalgam of a whole set of jurisdictional databases?[18]

And he indicated that the situation would likely be resolved by amending Part 1D to recognise that the NCIDD is an amalgam of jurisdictional databases.[19] This is the approach taken by the Bill.

Financial implications

The Explanatory Memorandum states that no financial impact is expected.[20]

Main provisions

Item 1 of **Schedule 1** omits the existing simplified outline for Part 1D and inserts in its place a new simplified outline that refers to the Commonwealth DNA database system and State and Territory database systems. It states that Part 1D enables those database systems to be integrated and for information in those database systems to be exchanged and protected.

Section 23YDAC of the Crimes Act defines 'DNA database system' as a database containing specified indexes of DNA profiles.[21] **Item 3** repeals the definition of 'DNA database system.' A number of amendments then define and distinguish the Commonwealth DNA database system, State and Territory database systems and the National Criminal Investigation DNA Database:

- the 'Commonwealth DNA database system' is defined as a database of specified indexes of DNA profiles that relate to material taken or obtained by a Commonwealth agency (**items 2 and 14**). These indexes are a crime scene index, missing persons index, unknown deceased persons index, serious offenders index, volunteers indexes, suspects index, statistical index and any other prescribed index
- **item 18** defines 'State/Territory DNA database system' as a database held by or on behalf of a participating jurisdiction for the purposes of a 'corresponding law'. Section 23YUA of the Crimes Act defines a 'corresponding law' as a law that relates to the carrying out of forensic procedures and DNA databases *and* which is either substantially in compliance with Part 1D or which is prescribed by regulation[22]
- **item 16** defines the National Criminal Investigation DNA Database as the database known by that name that is managed by the Commonwealth. The database is also referred to as 'NCIDD' (**items 16 and 17**)

- **item 20** inserts **new section 23YDACA** into the Crimes Act. It provides that the Commonwealth DNA database system may be integrated wholly or partly with the whole or part of one or more State/Territory DNA database systems or information obtained from one or more of those systems to form part of NCIDD. **Item 20** also clarifies that neither the Commonwealth DNA database system nor any information obtained from it forms part of a State/Territory DNA database system. Similarly, no part of a State/Territory DNA database system forms part of the Commonwealth DNA database system.

Item 20 also provides that, in order to conduct an audit, a participating jurisdiction can access NCIDD to the extent that it consists of the participating jurisdiction's DNA database. This provision will allow audits by State/Territory officials like Privacy Commissioners or Ombudsmen of the parts of the database that relate to their jurisdiction.

Item 22 clarifies that it is a Commonwealth offence, punishable by up to 2 years imprisonment, to misuse information in the Commonwealth DNA database system or in the NCIDD.

Item 42 clarifies that CrimTrac can enter into arrangements on behalf of the Commonwealth.

Many of the amendments replace the expression, 'DNA database system' with the expression 'Commonwealth DNA database system.' This ensures that the regulatory and offence regimes in Part 1D of the Crimes Act apply to the Commonwealth database system, leaving the States and Territories to regulate activities associated with their own DNA database systems (for example, **items 5, 6, 8-12, 15, 19, 21, 22, 24, 27, 30-33, 35, 40 and 46**).

Other amendments reflect changes in terminology where appropriate. These amendments include:

- replacing the expression 'stored on the DNA database system' with the expression, 'stored on the Commonwealth DNA database system or NCIDD' to clarify that information on the Commonwealth DNA database system or on the NCIDD can be accessed for administrative purposes, under Commonwealth law and under arrangements entered into between the Commonwealth and the States/Territories (**items 23 and 36**)
- replacing the expression 'a DNA database system' with 'the Commonwealth DNA database system or NCIDD' to provide that unauthorised disclosure of information on the Commonwealth DNA database or on the NCIDD (which is managed by the Commonwealth) is a Commonwealth offence (**items 35, 36 and 44**). State and Territory laws will govern offences related to State/Territory DNA database systems
- replacing the phrase 'DNA database system' with the phrase 'Commonwealth DNA database system or a State/Territory DNA database system' to clarify that these

systems can be accessed under arrangements entered into by the Commonwealth and a State/Territory (**items 26, 39, 45 and 47**)

- replacing the phrase 'DNA database system of the participating jurisdiction' with the phrase 'the State/Territory DNA database of the participating jurisdiction' in order to reflect new terminology (for example, **item 41**).

They also:

- correct drafting errors (**items 28 and 29**)
- permit prison officers to be present if allowed under State or Territory law while a forensic procedure is carried out on a suspect (**item 7**). 'The aim of this amendment is to ensure the safety and security of those who carry out forensic procedures.'[23]

Endnotes

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1. Crimes Amendment (Forensic Procedures) Bill 1995, *Bills Digest No. 24 of 1995/96*.
2. MCCOC was established by the Standing Committee of Attorneys-General and consists of criminal law officers from most Australian jurisdictions. Its primary purpose has been to develop a Model Criminal Code—so far, 9 chapters have been drafted. MCOCC has also worked on associated tasks such as model forensic procedures legislation.
3. *Crimes Amendment (Forensic Procedures) Act 1998*.
4. Explanatory Memorandum, Crimes Amendment (Forensic Procedures) Bill 1997, p. 2.
5. See the summary in Chapter 2 of the *Report of the Independent Review of Part 1D of the Crimes Act 1914—Forensic Procedures*, p. 1 (or 'Sherman Report'). Section 23YV of the Crimes Act requires the Minister for Justice and Customs to establish an independent review of Part 1D as soon as possible after the first anniversary of the commencement of the *Crimes Amendment (Forensic Procedures) Act 2001* (20 June 2002). The Sherman Report is accessible at:

   http://www.ag.gov.au/agd/WWW/criminaljusticeHome.nsf/Page/Part1D_Publications_Report_of_Independent_Review_of_Part_1D_of_the_Crimes_Act_1914_-_Forensic_Procedures.
6. *Crimes Amendment (Forensic Procedures) Act 2001*.
7. Sherman Report, op. cit., p. 1.
8. Minister for Justice and Customs, Media Release, 'CrimTrac's new crime fighting system switched on', *Media Release*, 20 June 2001. http://www.crimtrac.gov.au/media/EllisonMediaRel129_01.htm
9. These include the National Automated Fingerprint Identification System, CrimTrac Police Reference System and the National Criminal History Record Checking Services.
10. Sherman Report, op. cit., p. 9.
11. *CrimTrac Annual Report 2001-02*, p. 26.
12. *Crimtrac Annual Report 2004-05* accessible via: http://www.crimtrac.gov.au/corpinfo.htm

13. Senate, Legal and Constitutional Legislation Committee, Estimates Committee, *Hansard*, 25 May 2006.
14. Sherman Report, op. cit., p. 9.
15. ibid, pp. 10, 11.
16. CrimTrac 2004-05, op. cit., p. 20.
17. Minister for Justice and Customs, Crimes Act Amendment (Forensic Procedures) Bill (No. 1) 2006, Senate, *Hansard*, 21 June 2006, p. 1.
18. Senate, Legal and Constitutional Legislation Committee, Estimates Committee, *Hansard*, 25 May 2006.
19. ibid.
20. Explanatory Memorandum.
21. That is, the crime scene index, missing persons index, unknown deceased persons index, serious offenders index, volunteers indexes, suspects index, statistical index and any other prescribed index
22. Section 23YUA, Crimes Act.
23. Explanatory Memorandum, p. 4.

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