

Schedule 1

- 1.1 The purpose of Schedule 1 of the Crimes Legislation Amendment (Powers and Offences) Bill (the Bill) is to:
- implement recommendations from the *DNA Forensic Procedures: Further Independent Review of Part 1D of the Crimes Act 1914 Review*¹ (the DNA Review); and
 - increase transparency and reduce complexity contained in provisions governing the collection and use of DNA forensic material in Part 1D of the *Crimes Act 1914* (Cth) (the Crimes Act).

Existing laws and practices

- 1.2 The Crimes Act is Commonwealth legislation that deals with crime, the powers of the authorities to investigate it, and many other related issues including sabotage, treachery, disclosure of information and other issues.
- 1.3 Part 1D of the Crimes Act allows for the collection and use of DNA material by Commonwealth law enforcement agencies for law enforcement purposes.
- 1.4 Part 1D also establishes a scheme for the matching and inter-jurisdictional exchange of DNA profiles between Commonwealth, State and Territory law enforcement agencies.

¹ Australian Government, *The Report of the Independent Review of Part 1D of the Crimes Act 1914*, 30 June 2010.

The DNA Review

- 1.5 The DNA review was tasked with assessing Part 1D of the Crimes Act and examining issues that arose from an earlier review of Part 1D.
- 1.6 It made 32 recommendations, and the Bill proposes implementing in full, or part, 13 of these recommendations.

Proposed legislative amendments

Non-intimate forensic procedures

- 1.7 The Bill proposes that the taking of a sample of blood by a finger prick and the taking of a sample of saliva or sample by buccal swab be reclassified as a non-intimate forensic procedure.
- 1.8 This amendment responds to a recommendation from the DNA Review which noted that collection of a forensic sample via a self-administered buccal swab is the most common and a relatively non-invasive means of collecting a forensic sample.
- 1.9 Legislation in most States and Territories already classifies this method as a non-intimate forensic procedure.
- 1.10 Under current legislation, taking blood via a finger prick, a buccal swab or taking a saliva sample cannot take place unless the suspect has consented or a judge or magistrate has ordered the procedure to be conducted.
- 1.11 The reclassification of these procedures as non-intimate means that they are able to be ordered by a senior police officer once the officer has considered the matters listed in section 23WO of the Crimes Act including:
 - whether there is a less intrusive but reasonably practicable way of obtaining evidence to confirm or disprove the suspect committed the relevant offence;
 - the seriousness of the circumstances surrounding the commission of the relevant offence; and
 - whether carrying out the forensic procedure is justified in all the circumstances.

Presence of a representative during testing of a sample

- 1.12 Under current legislation, a representative of a suspect could be present during testing of a sample when there is insufficient material to be shared with accredited laboratories and where the material is being analysed in the investigation of an offence.
- 1.13 Following concerns from the Australian Federal Police (AFP), the DNA Review made recommendations 13 and 14, suggesting modifications of the conditions under which the suspect's representative could attend and be present during the testing of a suspect's sample.
- 1.14 Under the proposed amendments, the analyst conducting the testing will be able to direct the attendee to leave the premises if they do not comply with the instructions given by the analyst. Failure to comply with the analyst's direction would be an offence of strict liability.

Consent of children and incapable persons

- 1.15 During the DNA Review, the Office of the Privacy Commissioner (Privacy Commissioner) submitted that changes should be made to the Crimes Act enabling children and incapable persons to have greater control over decision making processes.²
- 1.16 The proposed legislation gives children and incapable persons more opportunities to resist or object to the carrying out of the procedure as well as being explicitly told that if they object or resist the procedure, it will not take place.

Accreditation of laboratories

- 1.17 In implementing recommendation 16 of the DNA review, the Bill proposes a definition of accredited laboratory to mean a forensic laboratory accredited by the National Association of Testing Authorities Australia or of a kind prescribed by regulation.
- 1.18 This will apply to all DNA analysis carried out under Part 1D of the Crimes Act whether it is testing for Commonwealth law enforcement agencies or retesting a sample on behalf of suspects and offenders.

² Crimes Legislation Amendment (Powers and Offences) Bill 2011 Explanatory Memorandum, p. 28, Item 49.

The National Criminal Investigation DNA Database

- 1.19 The National Criminal Investigation DNA Database (NCIDD) is established under Part 1D of the Crimes Act. It has seven indices of DNA profiles. These indices are:
- crime scene index;
 - missing persons index;
 - unknown deceased persons index;
 - serious offenders index;
 - volunteers (unlimited purpose) index;
 - volunteers (limited purpose) index; and
 - suspects index.
- 1.20 DNA profiles are provided by Commonwealth, State and Territory law enforcement agencies and are uploaded onto an index that corresponds to the purposes for which the profile was collected and analysed. A profile is then able to be matched against other uploaded profiles in accordance with matching rules that have been agreed by all jurisdictions.
- 1.21 The Bill proposes that the NCIDD will be utilised as the sole database for any participating jurisdiction for the purpose of national exchange and matching of DNA profiles.
- 1.22 The Bill will also provide express statutory authority for a number of matters:
- the AFP can respond to an inquiry from a foreign law enforcement agency as to whether there is a match with a profile held by a foreign agency;
 - a law enforcement agency of a participating jurisdiction can initiate international matches through the AFP; and
 - subject to the requirements of the *Mutual Assistance in Criminal Matters Act 1987* (Cth), the AFP can develop, in consultation with the Privacy Commissioner, procedural rules governing the sharing of information with a foreign law enforcement agency. The AFP should report to the Minister for Justice on whether agreement has been reached with the Privacy Commissioner and the legislation should require that the rules be tabled in Parliament.

- 1.23 Additionally, the Bill proposes an amendment that all volunteer DNA profiles are for a 'limited purpose' and that all volunteers are to be informed of this. This arose from the findings of the DNA Review which found that most volunteer profiles were being placed on the 'unlimited purpose' index.
- 1.24 The aim of this amendment is to ensure that an individual's rights are protected when they voluntarily provide a DNA sample and may also lead to more people providing voluntary samples.

Information provided to persons

- 1.25 A range of proposed amendments will implement recommendation 8(a) of the DNA Review regarding seeking informed consent to a forensic procedure:
- from a suspect;
 - from a suspect who is an Aboriginal person or a Torres Strait Islander person;
 - from an offender; and
 - from a volunteer or the parent or guardian of a volunteer.
- 1.26 The proposed amendments will make a change to how a suspect is provided with information during the process under which their consent is sought. This includes the provision of interpreters to persons from a non-English speaking background.
- 1.27 This will not reduce the amount of matters that a suspect would need to be informed but looks to provide this information in a more appropriate and streamlined manner.
- 1.28 Further consultation will take place to develop an appropriate set of procedures that will create a set of written and oral notifications to ensure that suspects are able to gain a better understanding of what their consent means.

Other minor and technical amendments

- 1.29 Schedule 1 of the Bill will make a number of minor and technical amendments to the Crimes Act. The proposed amendments will simplify the language used in various sections of the Act and rectify a number of technical drafting issues and inconsistency of terminology.

Issues raised in consultation

- 1.30 The amendments confer authority on a senior police officer instead of a magistrate to order a DNA test.
- 1.31 The AFP assures the Committee that this amendment was not sought due to problems with access to the judicial system.³ The AFP views the buccal swab and finger prick procedures as being ‘simple, relatively non-invasive DNA sampling techniques,’ and as such, senior police officers should have the authority to order them.⁴
- 1.32 As noted above, this reclassification will align Australian laws not only with the approach taken under most State and Territory laws but also with other jurisdictions such as the United Kingdom.⁵
- 1.33 Currently, ordinary police officers already have authority to carry out these procedures under the Crimes Regulations 1990 (Cth).⁶
- 1.34 The amendments are not granting the police officers any additional powers. They only seek to change who can grant authority to carry out these procedures.⁷

Committee comment

- 1.35 The Committee notes the expertise and thoroughness of the DNA Review, which conducted extensive consultation with Commonwealth, State and Territory law enforcement agencies, government departments and civil liberty and privacy advocates. The Committee supports the implementation of its findings.
- 1.36 The Committee conducted an inspection of a forensic facility and saw for itself that the buccal swab is a self administered, painless and non-invasive process, similar to brushing one’s teeth.
- 1.37 The conferral of authority on a senior police officer to order a DNA test is in line with other Australian and other national jurisdictions. The Committee therefore finds this amendment appropriate, especially as it does not grant ordinary police officers any additional powers.

3 Australian Federal Police, *Submission 10*, p. 1.

4 Australian Federal Police, *Submission 10*, p. 1.

5 Australian Federal Police, *Submission 10*, p. 1.

6 Australian Federal Police, *Submission 10*, p. 2.

7 Australian Federal Police, *Submission 10*, p. 1.

- 1.38 The Committee notes the importance of safeguards to ensure privacy and protect individual rights. The Committee also notes that law enforcement agencies act in the public interest, and require tools to effectively and efficiently carry out their functions. In this instance, the Committee considers that an appropriate balance between these two objectives has been achieved.
- 1.39 In particular, the Committee supports the inclusion of greater opportunities for children and incapable persons to object to DNA testing, including being told that if they resist, the procedure will not take place. Similarly, the Committee supports the increase in the availability of interpreters.

Recommendation 1

- 1.40 **The Committee recommends that Schedule 1 of the Crimes Legislation Amendment (Powers and Offences) Bill 2011 be passed by the House of Representatives.**