

CHAPTER 2

PROVISIONS OF THE BILL

Introduction

2.1 The Crimes Legislation Amendment (Forensic Procedures) Bill No 1 2006 (the Bill) seeks to amend the *Crimes Act 1914* (the Act) to ensure that inter-jurisdictional DNA profile matching, using the National Criminal Investigation DNA Database (NCIDD), can be implemented by all corresponding jurisdictions within Australia.¹

2.2 In particular, the bill aims to resolve any outstanding obstacles to the creation of a fully functional national DNA profiling system. As shown in the background section below, most elements of this system are now in place – including CrimTrac, the national agency to administer the NCIDD. However, states and territories consider that current legislation creates technical legal impediments such that 'States and Territories cannot transfer DNA profiles from their DNA databases to the Commonwealth.'² Similarly, the Commonwealth cannot disclose its DNA profile information to the States and Territories.³ The Bill will amend the *Crimes Act 1914* to allow this to occur.

2.3 This chapter briefly sets out the background to the bill; outlines its provisions, and deals with several issues that emerged during the inquiry.

Background to the Bill

2.4 The bill amends Part 1D of the *Crimes Act 1914*, which was originally added to the Crimes Act by the *Crimes Amendment (Forensic Procedures) Act 1998*. Part 1D authorised forensic procedures for the investigation of some Commonwealth offences, and included the collection of fingerprints, blood samples and swabs, including those of genital areas. Part 1D also provided for the storage, use and destruction of the resulting material.

2.5 Part 1D had its genesis in a number of sources, including the implementation of the recommendations of ALRC Report no 2 'Criminal Investigation';⁴ the Fifth Interim Report of the Review of Commonwealth Criminal Law (1991), and model provisions developed by the Model Criminal Code Officers' Committee of the

1 *Senate Hansard*, 21 June 2006, p. 1.

2 *Crimes Act Amendment (Forensic Procedures) Bill 2006* Explanatory Memorandum, Outline, p. 2.

3 *Ibid.*

4 *House Hansard*, 26 March 1997, pp 3068-9 second reading speech by the Hon Daryl Williams, Attorney General.

Standing Committee of Attorneys General. The *Crimes Amendment Forensic Procedures Bill 1997* was the subject of extensive consultation and was also scrutinised by the Senate Legal and Constitutional Legislation Committee.⁵

2.6 In 1998, the Federal Government provided \$50m to establish CrimTrac, a new national law enforcement support agency. CrimTrac⁶ was designed to give police access to information needed to solve crimes, with a national DNA database as a central element. CrimTrac commenced operation in 2000.

2.7 CrimTrac's National Criminal Investigation DNA Database (NCIDD) contains profiles from samples collected at crime scenes and from convicted offenders.⁷ The intention was that each of the nine jurisdictions would enact legislation and enter into Memoranda of Understanding (MOUs) with each other to permit the sharing of information.⁸

2.8 Mr Ben McDevitt, CEO of CrimTrac explained at the Senate Budget Estimates hearings in May 2006 the operation of the NCIDD.⁹

2.9 The NCIDD system contains digital DNA profiles which are supplied by the various police forces. The database contains no identifying material for an individual; when a DNA sample (for example, of a suspect) matches a DNA data profile that is stored on the database, the details are sent to the police service which supplied the database material for identification. Matching takes place in accordance with the legislation of the state or territory which supplied the information.

2.10 Mr McDevitt explained that the system is used 'to differing extents' by each of the jurisdictions: some use it only for intrajurisdictional matching: for example NSW, the Commonwealth, the ACT and Tasmania. Others use it both for intrajurisdictional matching and interjurisdictional matching: for example, the Northern Territory and Queensland. There are separate databases in each jurisdiction.

2.11 There are four conditions governing the jurisdictions' ability to perform inter-jurisdictional matching:¹⁰

- both jurisdictions have to have an endorsed MOU with CrimTrac;

5 Senate Legal and Constitutional Legislation Committee, *Report on the Crimes Amendment Forensic Procedures Bill 1997*, p. 1.

6 Website: <http://www.crimtrac.gov.au/aboutus.htm>. Viewed 26 July 2006.

7 Website: <http://www.crimtrac.gov.au/dna.htm>. Viewed 4 July 2006.

8 Independent Preliminary Audit Of The National Criminal Investigation DNA Database (NCIDD) by the Commonwealth Ombudsman and the Federal Privacy Commissioner viewed on Website 6 July 2006: <http://www.ema.gov.au/agd>

9 *Committee Hansard*, 25 May 2006, p. 122.

10 *Ibid.*

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- jurisdictions need to provide CrimTrac with the relevant interjurisdictional matching table;
 - their ability to commence interjurisdictional matching via the NCIDD requires an endorsed bilateral agreement after which the NCIDD must be notified that they are ready to commence matching;
 - they need to have entered all of their data onto the NCIDD.

2.12 Several jurisdictions have commenced interjurisdictional matching: Queensland matches with Western Australia, and also with the Northern Territory; Western Australia matches with the Northern Territory.

Emerging difficulties in implementation

2.13 Since its inception, various legal difficulties have inhibited full participation in the database – and hence limited the benefits available for the states and the Commonwealth. In 2001, Jonathan D Mobbs of CrimTrac observed in a paper presented at the 4th National Outlook Symposium on Crime in Australia that 'Unfortunately the extent of divergence under current laws is such that the level of permissible DNA matching across jurisdictions is below optimum'.¹¹

2.14 In 2003, the joint report of the Australian Law Reform Commission and the Australian Health Ethics Committee (AHEC) and the National Health and Medical Research Council (NHMRC) noted CrimTrac's advice that inter-jurisdictional index matching would not occur until the agreements via MOUs with the participating jurisdictions had been finalised.¹²

2.15 A review of Part 1D by Tom Sherman AO in 2003 identified 'the major deficiency' in Part 1D. Observing that at that time there was no operational national system, and that NSW was the only jurisdiction to load profiles on to NCIDD, the Report called for 'redoubled efforts on the part of the Commonwealth, the States and Territories to move quickly to negotiate the relevant arrangements which are necessary to make the system fully operational'.¹³

2.16 The Sherman Report conceded that the differing arrangements in each jurisdiction reflected a diversity of views on 'the balance between law enforcement requirements and civil liberties/privacy issues'. However for a national database of the kind contemplated by the NCIDD a degree of consistency higher than that which exists is essential if the resource is to operate nationally.

11 Mobbs, Jonathan D. *Crimtrac - Technology and Detection*, p. 7.

12 ALRC Report 96: *Essentially Yours: The Protection of Human Genetic Information in Australia* (2003)

13 *Report of Independent Review of Part 1D of the Crimes Act 1914 - Forensic Procedures* March 2003.

2.17 In 2004, a report by the ANAO noted that CrimTrac had faced 'significant challenges' in the implementation of the NCIDD, and that 'Cross-jurisdictional DNA matching is yet to occur, because of legislative and jurisdictional processes'.¹⁴ The basis for the system, the Model Code, has been departed from in varying degrees in the jurisdictions. No single jurisdiction has adopted the Model Code unchanged.

2.18 By the time the Senate Budget estimates hearings took place in May 2006, the situation had evolved to the following extent:

- Queensland, Western Australia and the Commonwealth perceive no legal impediment to functioning of the NCIDD.
- NSW and South Australia are developing legislative amendments to address the outstanding issues.
- Victoria still needs to develop legislation to address the perceived legal barriers to exchanging DNA data on a national level;
- Tasmania is considering the changes required.
- The Northern Territory is not at present considered to be a jurisdiction that can use NCIDD because its laws appear to operate in quite a different way from those of the Commonwealth.¹⁵

2.19 In the context of this history, the current bill constitutes a further development in the long evolution of the NCIDD scheme, which is still to be fully implemented.

Provisions of the Bill

2.20 Item 1 of Schedule 1 replaces the existing simplified outline for Part 1D and inserts a new simplified outline that refers to the Commonwealth DNA database system and state and territory database systems. The revised Part 1D enables those database systems to be integrated and for information contained in them to be exchanged and protected.¹⁶

2.21 Item 7 of the bill is an amendment to allow prison officers to be present while a forensic procedure is carried out on a suspect (subject to the relevant state or territory law). This is designed to provide safety for those carrying out the procedure.

2.22 Items 2 and 14 (referring to existing section 23YDAC of the Crimes Act) define 'DNA database system' as a database containing specified indexes of DNA profiles relating to material taken or obtained by a Commonwealth agency. The indices include a crime scene index, missing persons index, unknown deceased

14 The Auditor-General, Audit Report No.53 2003-2004, *The Implementation of CrimTrac*, p. 2.

15 Published correspondence dated 13 July 2006 (in amplification of a response at Budget Estimates on 25 May 2006), between Minister Ellison and the Secretary of the Senate Legal and Constitutional Committee.

16 Bill Digest: *Crimes Amendment (Forensic Procedures Bill no 1 2006*, p. 8.

persons index, serious offenders index, volunteers indexes, suspects index, statistical index and any other prescribed index.¹⁷

2.23 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.

2.24 A number of items in the bill (for example, items 5, 6, 8-12, 15, 19, 21, 22, 24, 27, 30-33, 35, 40 and 46)¹⁸ clarify that the DNA database referred to is the Commonwealth DNA database. The Bills Digest explains that 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.¹⁹

2.25 Items 16 and 17 also provide clarification and definition, by identifying 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”’.²⁰

2.26 A ‘State/Territory DNA database system’ is defined in item 18 of the bill. The Bill Digest explains the provision as follows: ‘...such a database is held by or on behalf of a participating jurisdiction for the purposes of a ‘corresponding law’. The definition of a ‘corresponding law’ may be found in existing section 23YUA of the Crimes Act: 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.’²¹

2.27 A new section – 23YDACA – of the Crimes Act is proposed by item 20 of the bill. The Explanatory Memorandum indicates that the section supports ‘the national character of NCIDD and will allow inter-jurisdictional matching of DNA profiles’.²² The section provides that:

- the NCIDD consists of the whole or the part of the Commonwealth DNA database and the whole or the part of the various state/territory DNA databases;
- the various Commonwealth, state and territory portions of NCIDD retain their individual character;

17 Explanatory Memorandum, p. 4; Bill Digest, p. 8.

18 Bill Digest: *Crimes Amendment (Forensic Procedures Bill no 1 2006*, p. 7.

19 Ibid.

20 Ibid.

21 Bill Digest, p. 6.

22 Explanatory Memorandum, p. 7

- the State/Territory portions of NCIDD may be accessed by state/territory officials, such as, Privacy Commissioners and Ombudsmen and others with audit-like functions, in accordance with the relevant state/territory laws.

2.28 Misuse of the information in the Commonwealth DNA database system or in the NCIDD is covered by item 22, which clarifies that it is a Commonwealth offence, punishable by up to 2 years imprisonment.²³

2.29 As noted in the Bills Digest, 'other amendments reflect changes in terminology where appropriate'. The 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).²⁴

2.30 Item 42 of the bill authorises CrimTrac to enter into arrangements on behalf of the Commonwealth.

2.31 Items 28 and 29 correct drafting errors in two tables which appear in the Act.

Issues

2.32 As noted in the introduction, the principal purpose of the Bill is to resolve remaining doubts as to the legal status of the NCIDD, and the ownership of the data.

23 Bill Digest, p. 8.

24 Bill Digest, p. 7.

The key question for the committee therefore, is whether the Bill is successful in this undertaking.

Legal status of the National Criminal Investigation DNA Database

2.33 In his evidence to the Budget Estimates committee, Mr McDevitt explained that one of the major issues is the legal status of the NCIDD: '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?'²⁵ The proposed legislation is intended to finalise the latter position.

2.34 This was also noted by Senator Abetz in his second reading speech, when he explained that the states and territories held two major concerns about the legislation as it stands:

- it is unclear if DNA profiles from state databases can lawfully be transferred to the Commonwealth; and
- it is unclear that the Commonwealth can disclose DNA information it holds to the states and territories.

2.35 He indicated that these concerns were not shared by the Commonwealth but the bill will clarify for the state and territories, that the transfer of information to enable inter-jurisdictional DNA matching is lawful.²⁶ The Minister for Justice and Customs also stated that from the Commonwealth's perspective, the legislation is not necessary at all, but 'in the interests of moving it along', the Commonwealth was ready to go down that path.²⁷

2.36 The committee has no reason to doubt that the bill will achieve its intended effect. The Bill itself stems from consultation with the states, and the states have not raised any concerns on this issue in the context of this inquiry.

Data

2.37 The second issue focuses on the ownership access and storage of NCIDD.

2.38 In her submission to the inquiry, Chief Commissioner Nixon of the Victoria Police generally supported the bill, but was concerned that the ownership of the NCIDD, and therefore of the information on the database, is not clear.

2.39 The committee notes that item 20 of schedule 1 to the bill inserts a new section, 23YDACA, into the Act. The section sets out the constituent parts of the NCIDD, which include:

25 *Committee Hansard*, 25 May 2006, p. 122.

26 *Senate Hansard*, 21 June 2006, p. 1.

27 *Ibid.*

- the whole or the part of the Commonwealth DNA database and
- the whole or the part of the various state/territory DNA databases.

2.40 The Explanatory Memorandum indicates that the various Commonwealth, state and territory portions of NCIDD 'retain their individual character, and the State/Territory portions of NCIDD may be accessed by state/territory officials, such as, but not only, Privacy Commissioners and Ombudsmen and others with audit-like functions, in accordance with the relevant state/territory laws'.²⁸

2.41 In the committee's view, it is clear from this provision that the separate state, territory and Commonwealth databases that constitute the NCIDD remain separate entities and the ownership and control of the information remains with those jurisdictions. This is also reflected in the practical arrangements for inter-jurisdictional data matching, which requires the release of identity information from the home state database rather than NCIDD. The committee is confident that this issue is adequately addressed by the legislation.

2.42 The Privacy Commissioner of New South Wales also drew the committee's attention to the aspect of item 20 of the bill, which provides for access to the data for the purposes of conducting an audit by, but not only by, Privacy Commissioners, Ombudsmen and others with audit like functions, in accordance with the relevant State/Territory laws.²⁹ Proposed subsection 23YDACA(2) states:

(2) For the purposes of conducting an audit, a participating jurisdiction, or an authority of a participating jurisdiction, may access NCIDD to the extent that it consists of:

- (a) the whole or a part of the State/Territory DNA database system of the participating jurisdiction; or
- (b) information obtained from the State/Territory DNA database system of the participating jurisdiction.

2.43 The Commissioner states that its difficulty with the provision is that many state agencies having normal and legitimate oversight and enforcement functions will not be using the database for 'audit' but for other purposes such as investigation. The examples cited include the (NSW) Independent Commission Against Corruption (ICAC), the Ombudsman, and the Police Integrity Commission (PIC). This appears to limit the exercise of the states' powers.

2.44 The committee agrees with the Privacy Commissioner of NSW that the word 'audit' in this context seems inappropriately restrictive, and could act to limit access for agencies with a legitimate need to use the database. Accordingly the committee makes the following recommendation:

28 Explanatory Memorandum, p. 5.

29 Submission 2, p. 1.

Recommendation 1

2.45 The committee recommends that Item 20 (proposed new subsection YDACA(2)) be amended to clarify the access rights for investigating agencies to the NCIDD.

Other issues: storage of data and procedural requirements

2.46 While not directly related to the provisions of the bill, Senator Ludwig sought information concerning the storage and destruction regime for forensic data.

2.47 The committee was advised by the Attorney General's Department³⁰ that subsection 23YD(3) of the Commonwealth *Crimes Act 1914* governs the destruction of forensic material. Briefly, where no proceedings have been instituted after 12 months have elapsed and there are no proceedings on foot, the forensic material must be destroyed after 12 months. Where a person is convicted without the conviction being recorded, or is acquitted, and there is no appeal, the material must be destroyed as soon as practicable. The section also provides for an extension of time in certain circumstances.

2.48 The Department also advised the committee that the position is similar with minor variations in all jurisdictions, with the exception of the Northern Territory, where the material may be retained at the Police Commissioner's discretion.

2.49 Overall, by carefully differentiating between the NCIDD, a Commonwealth DNA database, and state and territory DNA, the regime has clear requirements for the disposal of material on the databases. Material on the NCIDD database is not identified (see above) except through the state which supplies it. When the state destroys information, any record left on the NCIDD database would be meaningless. Accordingly the states have control over the material which they contribute, and may deal with it according to their state laws.

Conclusion

2.50 The committee concurs with the purposes of the bill and considers that the provisions of the bill will successfully resolve any lingering legal impediments to the transfer of information to and from the NCIDD. The bill is careful to define and delineate the DNA database systems and the arrangements for sharing information.

2.51 The committee notes and endorses the comments of the Chief Commissioner of the Victoria Police, who states in her submission that information sharing between police and jurisdictions is dependent upon complementary legislation being enacted by the states.³¹ This was reinforced by the Attorney General's Department which said:

30 Submission 4, p. 2.

31 Submission 3, p. 1.

If the States and Territories do not commit fully to NCIDD then Australia will not have national DNA profile matching, and it is entirely conceivable that suspects detained in one jurisdiction might not face questioning regarding their DNA being recovered from crime scenes in other jurisdictions.³²

2.52 Five years have elapsed since the NCIDD was established, and as late as October 2005, the participation rate remained limited. These amendments will assist in clarifying the Commonwealth's role and its responsibilities, but unless the states and territories follow quickly, the effectiveness of the national database will be limited.

Recommendation 2

2.53 Subject to the technical recommendation above, the committee recommends that the bill be passed.

Senator Marise Payne

Committee Chair

32 Submission 4, p. 4.