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

Questions for response by Monday 24 July 2006

(1) What is the status of crime scene evidence preservation and DNA evidence preservation by jurisdiction? In other words, what is the length of time which that evidence must be preserved following final appeal?

Section 23YD(3) of the Commonwealth Crimes Act 1914 requires that forensic material, including DNA evidence, must be destroyed, in the sense of no longer being able to be identified, as soon as practicable after:

- 12 months have elapsed with the forensic material was taken and proceedings have not been instituted against the suspect;
- the suspect is convicted but no conviction is recorded;
- the suspect is acquitted and no appeal is lodged against the acquittal; and
- the suspect is acquitted and an appeal is lodged against the acquittal and the acquittal is confirmed or the appeal is withdrawn.

With minor variations, the above is generally the status of the law in other Australian jurisdictions. For example, in New South Wales, the Crimes (Forensic Procedures) Act 2000 requires forensic samples to be destroyed after:

- a suspect is acquitted (no longer considered a suspect, or found not guilty at trial);
- the trial proceedings are discontinued;
- a year has elapsed since taking the sample and no proceedings have been commenced;
- or a prisoner's conviction is quashed.

The main exception to generally uniform treatment of DNA evidence occurs in the Northern Territory where the Police Administration Act 1978 allows DNA evidence to be retained at the discretion of the Police Commissioner.

The applicable laws in other jurisdictions, which have provisions similar to the Commonwealth and New South Wales are:

- Victoria - Crimes Act 1958
- Queensland - Police Powers and Responsibilities Act 2000
- Western Australia - Criminal Investigation (Identifying People) Act 2002
- South Australia – Criminal Law (Forensic Procedures) Act 1998

- Tasmania - Forensic Procedures Act 2000
- Australian Capital Territory - Crimes (Forensic Procedures) Act 2000.

(2) Is the Commonwealth intending to investigate this area given the possible changes to the law of double jeopardy as arising out of COAG? If so, please specify how and by what process the government is intending to do so.

(3) With regards to the changes in double jeopardy law, identified as desirable by COAG, please outline whether the model adopted for dealing with this issue will include a phase of public consultation?

- Please identify whether this phase will include submissions and/or public inquiry.
- Please identify whether the Australian Law Reform Commission will be involved in the process? If not, why not?

On 14 July 2006 State and Federal Governments agreed to establish a Council of Australian Governments (COAG) Senior Officials' working group to progress double jeopardy law reform. It is difficult to be definitive about whether the working group will examine the need to preserve evidence, including DNA evidence, but it might be a matter of interest to the Working Group.

The COAG Senior Officials' working group will include representatives from the officer-level group that supports the Standing Committee of Attorneys-General (SCAG), and therefore will include representatives of the States and Territories. This working group will report to SCAG and COAG by the end of 2006.

COAG has not agreed to changes in the double jeopardy laws, rather COAG has agreed that the reform of the rule against double jeopardy is an important criminal law policy reform that merits nationally-consistent treatment. A COAG Senior Officials' working group will investigate this matter and report to SCAG and COAG by the end of 2006. The exact nature of this investigation is yet to be determined as the first meeting of the COAG Senior Officials' working group is not scheduled for 2 August 2006. The COAG Senior Officials' working group will use the Model Criminal Code Officers' Committee recommendations as a basis to progress double jeopardy reforms.

(4) 'The states were given the opportunity to comment on the bill and some did so two months later was introduced into the parliament without further consultation. The identified problems have still not been fixed.'

A draft of the Crimes Act Amendment (Forensic Procedures) Bill (No 1) 2006 (the Bill) was circulated to representatives of the States and Territories, including Mr Len Armsby, on 6 June 2006. The States and Territories were advised that the Commonwealth intended to introduce the Bill in the Winter Session of Parliament,

which ended on 22 June 2006, and the States and Territories were asked to provide comments by 8 June 2006.

Although this timeframe was short, the Bill was based on a considerable amount of preceding work. The Report of Independent Review of Part 1D of the Crimes Act 1914 – Forensic Procedures noted, as long ago as March 2003, that a national DNA database for law enforcement purposes was "not yet operational". After a considerable amount of work, involving representatives of the States and Territories, the Standing Committee of Attorneys-General, at its meeting of 11-12 April 2006, resolved that the Commonwealth would develop legislative amendments, in consultation with the States and Territories, to clarify that the proposed national DNA database will be "an amalgam of the Commonwealth DNA database and all States and Territories' DNA databases". The draft Bill which was circulated contained these amendments. Further amendments, on the advice of the States and Territories, including Mr Len Armsby, were subsequently incorporated into the final Bill which was introduced into Parliament on 21 June 2006.

(5) Overall the bill insufficiently delineates between NCIDD and the Commonwealth DNA database. The rules which apply to the NCIDD (re access and the offence regime) ought also to apply to the Commonwealth DNA database and they don't.

Item 20 of Schedule 1 of the Bill defines NCIDD as containing the whole of a part of the Commonwealth DNA database and the whole or a part of the DNA databases of the States and Territories. It is therefore clear that NCIDD and the Commonwealth DNA databases are distinct, it is also clear what the relationship between the two is. Many other items in the same schedule also differentiate between these two databases. These two databases, because they are different, do indeed have different access and offence regimes applying to them.

(6) Several items which he considered need attention. Examples include the definition of a Commonwealth Agency as 'an authority of the Commonwealth' (Item 14); and the possibility of Commonwealth rules in relation to the unauthorised disclosure of material on the database overriding those of the states. (Items 35 to 39).

NCIDD will be administered by a Commonwealth agency, namely Crimtrac. The purpose of this definition is merely to remove all doubt that Crimtrac can deal with NCIDD with the full authority of the Commonwealth. The Commonwealth has a responsibility to make it an offence to misuse confidential information under the Commonwealth's control. As stated in the Explanatory Memorandum relating to the Bill, for example in relation to item 35, the States and Territories remain "responsible for offences … associated with the State/Territory DNA database systems."

(7) To what extent will the integrity and effectiveness of the NCIDD be compromised by the failure of the states and territories to contribute fully to it?

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.

(8) Have the states and territories resolved their internal reservations about the end use of the material they contribute to NCIDD and if not, how soon can this be achieved?

NCIDD is an amalgam of the Commonwealth and State and Territory DNA databases. The States and Territories determine regulations for the end use of material on their DNA databases and all the States and Territories have legislation in place dealing with DNA.

(9) Are the other jurisdictions satisfied with the integrity provisions for the protection of information in the NCIDD?

No jurisdiction has suggested that there are not enough safeguards concerning the Commonwealth protecting DNA information on NCIDD against misuse.