



ASSISTANT COMMISSIONER
CRIME AND SUPPORT SERVICE

: Your Ref

HQ2009/2057 : Our Ref

Part 1D Review Committee Secretariat
C/- Criminal Justice Division
Attorney General's Department
3-5 National Circuit
BARTON ACT 2601

Dear Peter Ford

**REVIEW OF PART 1D OF THE CRIMES ACT 1914
SUBMISSION OF NORTHERN TERRITORY POLICE**

I refer to your letter addressed to the NT Department of Justice seeking submissions for the review of Part 1D of the *Crimes Act* 1914.

General

It is submitted that, even taking into account the generally detailed nature of Commonwealth legislation, Part 1D is complex and restrictive. It contains unnecessary formalities which do not, in the broader picture of law enforcement protect people or enhance their civil rights and the intrusion on a person's liberty is relatively small. The reason for conducting a forensic procedure on a person is to obtain evidence of their identity and to link them with other people, places and substances. In many cases allows a person to be excluded from an investigation and exonerate them.

It is not in the interests of justice to have processes which tend to deter police officers from obtaining forensic evidence. For instance, the requirement in s.24WT for a Magistrate's order for a forensic procedure to be carried out on an adult seems unnecessary, this is a decision could be made by a senior police officer. Complex and detailed legislated procedures for obtaining evidence invite legal challenge on technicalities, when in fact, it is more important to ensure the integrity of the subsequent process of analysis and the chain of evidence.



Northern Territory Government

NAB House 71 Smith Street Darwin Northern Territory Australia 0800
PO Box 39764 Winnellie Northern Territory Australia 0821
Telephone 61-8-8901 0267 Facsimile 61-8-8901 0250

It is submitted that Part 1D should expressly allow the use and admissibility of forensic evidence, including DNA evidence, which has been obtained lawfully under the laws of the State or Territory concerned. If a person consents to a DNA test in the NT, and the procedure under the NT legislation is followed, the resulting DNA profile or other evidence ought to be admissible in a prosecution of a Federal Offence.

Complexity of Informed Consent

The provisions for informed consent are unnecessarily complex and appear to equate a forensic procedure with a confession, rather than the gathering of evidence. If a person is willing to consent, a procedure should be conducted with the minimum of formality. It should not be necessary to legislate for a 'balancing test' before requesting consent to a procedure nor for the precise information to be provided to the subject, nor to tape or otherwise record the process of providing that information and giving consent. The information prescribed does not actually explain what a DNA profile is, nor how it will be used and retained, so it is of questionable value in terms of genuine informed consent. The requirement of s.23XZ – making a refusal to provide forensic evidence automatically inadmissible - could be left as a matter for the discretion of the courts. Additionally, it does not appear justifiable to treat people of Aboriginal and Torres Strait Islander descent differently from other adults who have language barriers, or cultural issues or negative expectations.

Victims of Crime Index

It is submitted that having a victim's index on the National database is would be of doubtful value. A victim's profile can be compared with material from the relevant crime scene without retaining it on a database. Once identified, profiles derived from the victim can be removed from the crime scene index. Unlike a suspect, a victim's identity is usually known, or can be ascertained by other means. A victim would rarely, if ever, need to be identified from the NCIDD and there is little or no intelligence value in retaining victim profiles on a database. If a victim has been killed, or has disappeared, then the unknown deceased persons or the missing person's indexes may be used to retain their profile. Alternatively, if victim profiles need to be retained, they may be treated as a limited purpose volunteers.

Protocols for mass screenings

It has not yet been found necessary to legislate or develop protocols for mass screening in the Territory. If a mass screening were contemplated, then each individual would be regarded as a limited purpose volunteer and their consent would be sought.

Voluntary Buccal Swabs as non-intimate procedures

Most mouth swabs are self-administered by the subject and involve only a small intrusion into the subject's privacy, equivalent to eating or brushing teeth. It is not necessary to have a dentist or medical practitioner present while a person is providing a buccal swab. Treating buccal swabs as a non-intimate procedure has not been an issue in the NT and it is submitted that the definition of non-intimate forensic procedure should be revised to include both volunteer and suspect buccal swabs.

Evidentiary Provisions

It is desirable for State and Territory police to be able to operate under their own jurisdiction's procedures for the collection of DNA and other evidence. It may not be practicable to predict at the time of collecting crime scene evidence, whether offences will have a Federal aspect for which the more complex and restrictive Commonwealth procedures must be applied.

It is acknowledged that in most cases, after an initial link has been made between a suspect and an individual's profile on the NCIDD, a second, confirmatory DNA sample would be taken later for use in court, often after the suspect has been detained, interviewed and charged. This second sample could be taken under the *Crimes Act* regime if necessary. However, it is also inefficient, likely to generate errors and generally undesirable for police officers to be obliged to operate under two different forensic procedure regimes.

It would be desirable, therefore, for Part 1D to contain a provision allowing the use and declaring the admissibility of any forensic material obtained lawfully under the laws of the NT (or any other corresponding State or Territory jurisdiction) even where this law differs substantially from that of the Commonwealth. This would allow legislative diversity and prevent evidence being excluded owing to procedural differences.

Matching Tables

Although NT Police is moving towards further categorising DNA profiles uploaded onto the NCIDD, this is for administrative convenience to differentiate between matches made with identifiable individuals and crime scene samples. This can be achieved administratively and it is not proposed to legislate for these categories. It is submitted that the detailed legislation of database indexes under the Commonwealth model legislation which formed the basis for Part 1D was one of the main causes of the delay in making the NCIDD operational and the regime should be simplified.

Legislative change to support inter-jurisdictional accountability

It is submitted that the police services should remain accountable to their respective State and Territory accountability bodies, not to those of other jurisdictions. Accountability bodies may wish to review their own legislation to share information.

Minimum requirements for membership of the national scheme (NCIDD)

The NT Police submission is that sharing information for law enforcement purposes is generally desirable, so that 'law enforcement' should be the criterion for membership of the national scheme. Whilst new members of the national scheme would use the NCIDD to make links with DNA profiles they have obtained, filters would remain in place to ensure that identifying information and intelligence held by police jurisdictions was used for permitted law enforcement purposes only. It would be released to non-police members only if permitted by the law of the jurisdiction holding the information.

Use of Force

The capacity to use reasonable force in carrying out a forensic procedure should be retained. The existence of the power to use force often obviates the need to use it. In practice, NT Police have seldom needed to use force in the context of DNA buccal swabs, but the need has arisen from time to time in relation to fingerprints.

I hope this short submission is of some assistance. If you would like to discuss any part of it, or invite further comment on other specific issues, please contact me, or the Director of NT Police Forensic Science Section, Andy Telfer on (08) 8922 3001 or Alison Worsnop on (08) 8985 7004.

Yours sincerely



Mark McAdie
Assistant Commissioner
Crime and Support Service

21st November 2009