NSW Legislative Assembly Hansard

Crimes (Forensic Procedures) Amendment Bill

Extract from NSW Legislative Assembly Hansard and Papers Thursday 28 September 2006.

Second Reading

Mr PAUL McLEAY (Heathcote—Parliamentary Secretary) [12.40 p.m.], on behalf of Mr Bob Debus: I move:

That this bill be now read a second time.

The Government is pleased to introduce the Crimes (Forensic Procedures) Amendment Bill 2006. The bill proposes a significant number of amendments to the Crimes (Forensic Procedures) Act 2000. Those amendments do three things: first, clear the way for New South Wales to participate in the national DNA database; second, enable DNA backcapture, meaning that police can take a sample from a person who has previously served a gaol sentence for a serious offence but is not yet on the DNA database, if the person is subsequently charged with another indictable offence; and third, implement a wide range of reforms to the Crimes (Forensic Procedures) Act arising from reviews of that Act.

I will speak to each of the changes in turn. First, the bill will enable New South Wales to participate in the national DNA database system. New South Wales has a large and powerful DNA database, consisting of samples from more than 25,000 people. Allowing New South Wales to connect to a functioning, effective national DNA database that contains samples from over 110,000 people will increase still further the array of samples available for matching. It will also increase the efficiency of police investigations and allow more offenders to be identified and prosecuted. However, the road to a national DNA database has been a difficult one. CrimTrac, the Federal Government agency, is charged with establishing the national database and facilitating the exchange of DNA information between jurisdictions. But the legislative framework established by the Federal Government has failed to enable the sharing and matching of DNA profiles across different State jurisdictions.

For most of the five years since its inception the national database has been dormant, and when it has been active it has only been so in the most piecemeal fashion. New South Wales, through the Standing Committee of Attorneys-General, has taken a leading role in addressing the problems of the national DNA database and making interjurisdictional matching a reality. The biggest problem the Government faced arose from doubts about the legal basis of the national DNA database. The Government received extensive advice from the Crown Advocate, which raised serious concern in that regard. The fact that the legal basis of the national database had not been clarified meant that the use of DNA matches and other results received from CrimTrac in criminal trials would have created an unacceptable risk. Prosecutions could be undermined or appealed, and criminals would walk free.

Fortunately, following the Standing Committee of Attorneys-General process, led by New South Wales, the Commonwealth has agreed to amend its legislation to clarify that the national DNA database is legally a combination of each of the different databases of the States and Territories and the Commonwealth. The Commonwealth's amending bill is before Federal Parliament now. The bill now before the House amends relevant sections of the Crimes (Forensic Procedures) Act—cognate with the Commonwealth's reforms—to put it beyond doubt that the Minister may enter into arrangements with the Commonwealth for CrimTrac to run the national DNA database incorporating New South Wales DNA information. The changes to the New South Wales Act will ensure that those arrangements will be lawful under New South Wales law.

The national DNA database will operate under the strictest standards of propriety and security. CrimTrac will be bound by the laws and standards that apply to the Division of Analytical Laboratories, the operator of the New South Wales DNA database, in maintaining the security of the New South Wales DNA profiles it holds. In addition, CrimTrac will not hold the names of any of the persons whose profiles are placed on the national DNA database. Those names will continue to be held by New South Wales and so may only be released by New South Wales authorities once they are satisfied that a request from another jurisdiction is genuine and lawful.

The second major reform of the bill is to make provision for DNA backcapture by incorporating a new part in the Crimes (Forensic Procedures) Act. This reform represents the fulfilment of a promise by the Government to allow DNA samples to be taken from offenders who were released from prison in respect of a serious offence before testing began in January 2001, if they are charged with another indictable offence. This process is known as DNA backcapture. Community protection dictates that prior serious offenders should provide a DNA sample that will allow any subsequent offending to be detected and prosecuted more easily. Persons who have served terms of imprisonment have been proven to have significantly higher rates of subsequent offending than the general community. However, at the moment, the Act only allows for persons currently serving a sentence to be ordered to provide a sample.

This limitation creates a gap, which DNA backcapture will fill. The reform works in a reasonable and proportionate way, so that those who have finished their sentences, have been fully rehabilitated, and pose no further risk to society will not be affected. DNA backcapture laws will only require a former serious offender to provide a sample when that person is charged with a fresh indictable offence. Police cannot simply walk up and demand a DNA sample from a former offender who is not suspected of any further wrongdoing. In this way, the DNA backcapture scheme strikes an appropriate balance between protecting the community and promoting the rehabilitation of former offenders. It is proposed that DNA backcapture be implemented by inserting a new part 7A into the Crimes (Forensic Procedures) Act.

The provisions of this new part largely mirror the existing part 7 of the Act that allows for DNA sampling of serious offenders who are currently serving a sentence. Appropriate procedural changes are made to reflect the fact that untested former offenders, as they are referred to in the part, may not necessarily be in custody. The third category of reforms made by the bill represents the implementation of a raft of changes proposed by reviews conducted of the operation of the Crimes (Forensic Procedures) Act. The Act has been the subject of extensive review since it commenced in January 2001. The Legislative Council Standing Committee on Law and Justice published a review on it. Subsequently, Professor Mark Findlay of the University of Sydney conducted the statutory review of the Act with the assistance of the Attorney General's Department.

In addition, the Ombudsman has published one volume of a proposed multi-volume review of the Act, and the issues raised in the first volume remain under consideration. In order to progress the wide array of recommendations made by these reviews, the Attorney General's Department convened an interagency working group. The reforms to the Act made in this bill have been refined through that working group. The large number of changes made in the bill arise from the reviews and the work of the working group. It is not possible to refer to each of them in this speech. I refer honourable members to the explanatory note accompanying the bill for a full explanation of all of the reforms proposed in the bill.

The nature of the amendments is not to fundamentally change our law regulating forensic procedures but, rather, to make the operation of the Act clearer, more workable and easier to understand. I will provide a few examples of the many refinements made in the bill. For the first time, the Act will give statutory guidance to magistrates on the criteria to take into account when deciding whether to order a forensic procedure against a suspect. Matters such as the seriousness of the offence for which the person is a suspect, and the personal circumstances of the suspect, are specifically to be taken into account. To remove unnecessary complexity in the current drafting of the Act and make the process clearer, the bill redrafts the law regulating when a police officer may ask a suspect to consent to a forensic procedure.

Buccal swabs are the simplest and easiest way of getting a bodily sample for the purpose of generating a DNA profile. The Act currently deals with buccal swabs as an anomalous category. They are neither intimate forensic procedures nor non-intimate forensic procedures. This approach is inefficient and adds unnecessary complexity to the Act. The bill reforms the Act to state that a buccal swab administered by another person is an intimate forensic procedure, and a buccal swab that is self-administered is a non-intimate procedure. All forensic procedures will now fall into one of these two categories, creating a simpler system.

The bill tightens the definition in the Act of what constitutes "destruction" of a forensic sample, to ensure that once a sample is required to be destroyed, it can never again be used to identify the person from whom it was taken—while still allowing the Division of Analytical Laboratories to maintain proper records of its activities. The information that must be given to volunteers when they consent to providing a forensic sample is currently less than the information that must be given to suspects and serious offenders. The bill corrects this anomaly and ensures that full information is given to volunteers about why their sample is being sought and what it may be used for.

Currently the Act leaves some uncertainty about whether persons who are serving a sentence of imprisonment in a place other than a correctional centre—in particular those doing home detention—can be required to provide a sample under the serious offenders part of the Act. The Ombudsman raised this ambiguity in the first volume of its report on the Act. The bill amends the Act to remove any doubt that all offenders serving a sentence, including home detainees, can be required to provide a sample under the serious offenders provisions of the Act. I commend the explanatory note to honourable members for an explanation of the array of other worthy process reforms made by the bill. The reforms as a whole will make the New South Wales forensic procedures legislation simpler, fairer, more efficient and more effective. I commend the bill to the House.