Legislative Council

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Crimes (Forensic Procedures) Amendment Bill Hansard - Extract

Second Reading

The Hon. CARMEL TEBBUTT (Minister for Juvenile Justice, Minister Assisting the Premier on Youth, and Minister Assisting the Minister for the Environment) [9.53 p.m.]: I move:

That this bill be now read a second time.

I seek leave to have the second reading speech incorporated in *Hansard*.

Leave granted.

I am pleased to introduce the Crimes (Forensic Procedures) Amendment Bill, which contains various amendments to the Crimes (Forensic Procedures) Act 2000 in order to improve the operation of that Act. The bill also makes a related amendment to the Police Service Act 1990. The Crimes (Forensic Procedures) Act 2000 commenced operation on 1 January 2001. The Act regulates the way in which police can conduct forensic procedures on suspects, persons convicted of serious indictable offences, and volunteers. Since the Act commenced last year, DNA profiling of serious indictable offenders has proceeded, with over 7,000 samples taken from inmates in New South Wales. The Act has been subject to a number of reviews, including a review by the Standing Committee on Law and Justice and a review by the Ombudsman.

As a result of the report published by the standing committee in February 2002 and discussions between officers of the Attorney General's Department, New South Wales police and other stakeholders as to the operation of the Act, it has become clear that a number of amendments are warranted. I propose to outline the important features of the bill which will be of interest to honourable members. I will deal, first, with the amendments to the Crimes (Forensic Procedures) Act 2000 which are contained in schedule 1 to the bill.

An important amendment in this bill relates to part 8 of the Act concerning volunteers. Part 8 deals with persons other than a suspect who volunteered to police to undergo a forensic procedure. Part 8 was not proclaimed along with the rest of the Act due to concerns that the definition of the term "volunteer" used in the Act might also apply to a person who is a victim of a crime. The volunteer provisions in part 8 were mainly designed to regulate the testing of volunteers in mass screening situations, such as the mass screening that occurred in Wee Waa in 2000. The provisions were not originally proposed to apply to victims of personal violence offences.

There are formal procedural requirements in part 8 that are inappropriate for victims of personal violence offences, such as a sexual assault, who may be traumatised at the time they are asked to undergo a forensic procedure. An example of this is the requirement in section 57 of the Act that forensic procedures be electronically recorded. Requiring police to comply with all of the provisions of part 8 whenever they deal with a victim of crime would also create an unnecessary administrative and legal burden for police.

There is also concern that the volunteer provisions of part 8 as presently drafted may pose difficulties for police in the investigation of property offences. The fingerprinting of owners or occupiers of property at the scene of a property offence such as a break and enter offence is a common tool of investigation. These fingerprints are taken for the purpose of isolating the alleged offender's fingerprints at the scene of the crime and eliminating the prints of persons legitimately at the scene. I am advised that there are likely to be in the order of 100,000 of these types of crime scene fingerprints taken each year in New South Wales. Again, requiring police to treat all of these people as volunteers under part 8 of the Act will create an enormous and unnecessary administrative burden.

Items [31] and [32] of schedule 1 to the bill address this problem by amending the definition of "volunteers" to exclude from the operation of part 8 victims of offences against the person as found in part 3 and subdivision 2 of division 1 of part 4 of the Crimes Act 1900, and persons who volunteer to provide a sample of their fingerprints for elimination purposes in relation to property offences. These are sensible changes.

My department is presently working with the NSW Police, the Department of Women and the Department of Health to produce a protocol to provide protection for victims of personal violence offences when they are requested to undergo a forensic procedure. The requirements under the protocol will be less formal than the provisions of part 8 but will still ensure that the victim's rights are properly observed by police officers. For example, the protocol will include all of the information that must be given to victims before they provide a sample for DNA testing, including what will happen to the sample. In addition, item [37] of schedule 1 provides that the fingerprint sample taken from persons for elimination purposes in property offences must be destroyed or returned to the person as soon as practicable after the sample has been used to eliminate the person from inquiries in relation to the offence. Part 8 of the Act will be proclaimed

to commence at the same time as the provisions of this bill commence.

Another important amendment in the bill relates to the missing persons index on the DNA database. Part 11 of the Act deals with the DNA database. It provides that the DNA database shall contain a number of indexes including a missing persons index. The missing persons index is defined in section 90 of the Act as "an index of DNA profiles derived from forensic material of persons who are missing and of their blood relatives". DNA profiles on the missing persons index can be matched against all of the other indexes on the DNA database. Unrestricted matching of these profiles is essential given the variety of circumstances that a missing person may be identified using the DNA database.

Concerns have been raised, however, that section 93 of the Act permits DNA profiles obtained from relatives of missing persons to be matched against samples from scenes of unsolved crime. It could be argued that by volunteering samples relatives of missing persons put themselves at risk of being implicated in other crimes. The problem can best be explained by way of example. A woman whose son is missing provides a sample for inclusion on the missing persons index for the purpose of finding her missing son. Her DNA profile can then be matched against any other DNA profile on the crime scene index, including forensic material found at the scene of another crime. As a result the woman may then be implicated in that other crime. There is presently no requirement in the Act that she be warned of that possibility before agreeing to provide the sample.

The amendments in items [33] and [34] of schedule 1 to the bill are intended to address these concerns. Item [33] provides that a person giving a sample for the purposes of the missing persons index must first be told that his or her DNA profile may be matched against all of the other indexes on the database. Item [34] provides that information about a match between that person's profile and any other DNA profile on the database cannot be used in proceedings against that person. If there is a match that implicates the person in the commission of another offence police must carry out a fresh forensic procedure under the provisions of the Act dealing with suspects in parts 3 to 6 of the Act in order to obtain an admissible sample.

This amendment will apply to samples that have already been provided under the Act. Item [43] provides for a person whose profile is placed on the missing persons index to be informed if his or her DNA profile or that of his or her missing relative on the missing persons index matches any other profile on the database. The other amendments in schedule 1 to the bill are intended to clarify some sections of the Act, correct some drafting anomalies in the Act and simplify some aspects of the Act. These amendments will ensure that the Act continues to be an effective tool in the investigation and prosecution of criminal offences.

The Act provides for authorised applicants to make applications to magistrates for an interim, final or second order for the carrying out of a forensic procedure. The class of people who are authorised applicants for an order for the carrying out of a forensic procedure on a suspect include an investigating police officer in relation to an offence. At present the term "investigating police officer" is defined as "the officer in charge of the investigation of the offence". This definition has proved to be too restrictive in practice. It does not recognise the operational realities associated with the conduct of police investigations. In the early stages of an investigation there may not be a designated officer in charge. There may be more than one officer in charge of a large, complex or urgent investigation. Item [2] addresses this problem by extending the definition of "investigating police officer" to include any police officer involved in the investigation of the relevant offence.

The Act provides for a person to act as an interview friend of a suspect or serious indictable offender for the purposes of various provisions of the Act, including when a police officer asks a suspect who is an Aboriginal person or a Torres Strait Islander to consent to a forensic procedure. Section 10 (9) of the Act presently permits police to exclude an interview friend if the interview friend unreasonably interferes with or obstructs the police officer. Item [7] amends section 10 and gives police an additional basis on which they can exclude an interview friend, namely if they believe, based on reasonable grounds, that the interview friend may be a co-offender of the suspect or may be involved in some other way with the suspect in the commission of the alleged offence. Item [7] also provides that if police exclude an interview friend the suspect may then choose another interview friend. If the suspect does not choose another and does not waive his or her right to an interview friend police may arrange for any of the persons referred to in the definition of "interview friend" in section 4 of the Act to attend.

Item [9] extends the circumstances in which a magistrate may make a second order for the carrying out of a forensic procedure to include the situation where the forensic material has been lost or is for any other reason not available for analysis and the carrying out of the forensic procedure for a second time is justified in all the circumstances.

Section 32 of the Act provides for the making of an interim order authorising the carrying out of a forensic procedure on a suspect where such an order is urgently required. An interim order operates until a magistrate, at a hearing, confirms the interim order or disallows the interim order. The amendments contained in items [10] to [20] of schedule 1 to the bill are intended to improve the provisions in the Act dealing with applications for interim orders for forensic procedures.

Item [10] clarifies the effect of a person's consent on an interim order for the carrying out of a forensic procedure on that person. Item [11] clarifies the conditions to be met before an interim order can be confirmed by a magistrate. Item [12] makes it clear that it is only an authorised applicant who may apply for an interim order. Item [14] requires that applications for interim orders should be made in person unless impracticable, in which case it must be made by facsimile or, if that is not available, by other means of

communication. Item [13] removes the requirement to support an application for an interim order by evidence on oath or affidavit in the case where an application is by any means other than in person. Item [15] provides that in such cases the application must be supported by evidence on oath or by affidavit as soon as practicable after the making of the application and before the making of any final order.

The amendments in items [16] to [20] of schedule 1 simplify the recording requirements for the making of interim orders. The amendments also make special provision for the recording of applications and interim orders where the application is not made in person or reduced to writing. Item [22] makes it an offence for persons to give information that they know is to be false or misleading in an application for an order to carry out a forensic procedure. This amendment will protect the integrity of the application process. Section 44 (a) of the Act provides that a forensic procedure should not be carried out in the presence or view of a person who is of the opposite sex to the suspect, except as permitted by the Act. This requirement, however, is quite unnecessary in cases where the suspect self-administers a buccal swab to the mouth. Item [23] therefore exempts self-administered buccal swabs from this requirement.

Section 89 of the Act provides that evidence relating to a forensic procedure found by a court to be inadmissible must be destroyed as soon as practicable. Item [38] of schedule 1 amends section 89 of the Act and provides that this evidence should not be destroyed until after the end of all of the relevant proceedings, including any appeal period or any retrial—for example, following a hung jury or appeal. Item [42] simplifies procedures under the Act by permitting police to use a telephone interpreter service where they are required to use an interpreter under the Act. Items [5], [6], [24], [25], [28], [35], [36], [40] and [41] of schedule 1 contain a number of amendments intended to correct some drafting anomalies and clarify some sections in the Act.

The final important amendment in schedule 1 to the bill relates to the Ombudsman's review of the Act. Under section 121 of the Act the Ombudsman is required to report upon the exercise of functions conferred on police officers under the Act. That requirement expires on 5 July 2002. Item [46] extends the period in which the Ombudsman must monitor the exercise of police powers under the Act for a period of a further 18 months from the date of the commencement of part 8.

Schedule 2 to the bill contains an amendment to the Police Service Act 1990 and a consequential amendment to the Crimes (Forensic Procedure) Act 2000. At present it is the practice of New South Wales police to take fingerprints and palm prints from persons who apply to be police officers. This is done in order to check their criminal history and determine their suitability for employment. This information is then placed on the New South Wales police operations database and the national automated fingerprint identifications system. There is some concern that this practice may also be caught by the volunteer provisions in part 8 of the Act. Schedule 2 addresses this concern by exempting this practice from the operation of part 8 of the Act. Schedule 2 also amends the Police Service Act 1990 and authorises the Commissioner of Police to require an applicant for appointment as a police officer to provide a fingerprint or handprint before an application is accepted. Before the print is taken from the applicant, the applicant must be informed that the print may be retained and used for law enforcement purposes. The print must be destroyed if the applicant is not appointed a police officer. A person who stops being a police officer may ask that his or her prints be destroyed.

The amendments in the bill address a number of the concerns raised in the report of the Standing Committee on Law and Justice on the Act, published in February this year. My department is presently conducting a review of the entire Crimes (Forensic Procedures) Act 2000. That review is being conducted pursuant to section 122 of that Act. The report in relation to that review must be tabled in both Houses of Parliament no later than 5 January 2003. The amendments in the bill will improve the operation of the Act. They will ensure that the Act continues to provide police with an effective investigative tool, as well as provide adequate safeguards to individuals who may be subjected to a forensic procedure under the Act. I commend the bill to the House.