

CRIMES (FORENSIC PROCEDURES) BILL

Bill introduced and read a first time.

Second Reading

Mr WHELAN (Strathfield—Minister for Police) [7.31 p.m.]: I move:

That this bill be now read a second time.

I am pleased to introduce the Crimes (Forensic Procedures) Bill. This bill will reform policing as we know it in New South Wales. DNA is the fingerprint of the twenty-first century. It will allow police to work smarter using forensically driven intelligence to solve crime. The bill introduces into New South Wales a regime for carrying out procedures on suspects, convicted serious indictable offenders and volunteers. The bill also provides for the use and destruction of DNA material taken during the testing. The bill also sets out rules for placing and matching profiles derived from forensic material on the national DNA database CrimTrac.

Let me give a short history of the development of this bill. In 1994 the Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General circulated drafts of a Model Forensic Procedures Bill. Sixty-eight submissions were received in response to the bill. In July 1995 the majority of the Standing Committee of Attorneys-General endorsed the 1995 Model Forensic Procedures Bill. A discussion paper entitled "Model Forensic Procedures Bill and Proposed National DNA Database" was released in May 1999 following consultation with the Office of the Commonwealth Privacy Commissioner and the working group of the Commissioner of Police.

In February this year a final model bill setting out a comprehensive legislative regime dealing with forensic procedures and the DNA database was released by the Commonwealth. The bill is largely based on the model provisions developed by the Model Criminal Code Officers Committee. It has been adapted to ensure that New South Wales law enforcement agencies are the best possible scheme for the carrying out of forensic procedures. The bill sets out the procedures that may be carried out on suspects, offenders and volunteers. The definition of a suspect under the bill includes those persons an officer suspects on reasonable grounds has committed an offence, a person arrested and a person charged in relation to an offence.

A forensic procedure, for example, a DNA test, can be carried out under the legislation either with the suspect's informed consent by order of a senior police officer or by court order. A forensic procedure is characterised as: an intimate forensic procedure, such as the taking of blood; a non-intimate forensic procedure, such as fingerprints; or a buccal swab, that is, a swab of saliva taken from the person's mouth. The bill clearly sets out a number of safeguards for the conducting of these procedures. For example, an intimate forensic procedure, such as the taking of blood, may be carried out only on a person suspected of a prescribed offence, defined as an indictable offence or any other offence prescribed by regulation.

I emphasise at this time that there will be no other offences prescribed in the first 18 months of the operation of the Act. This bill, unlike the Crimes Act 1900, covers suspects who are not necessarily under arrest and in lawful custody. The purpose of this is to allow procedures to be carried out without having to arrest those persons under suspicion in order to bring them within the scope of the provisions. The extension of the provisions to suspects is also consistent with the model bill Commonwealth legislation and legislation in Victoria and South Australia.

It is important to remember that DNA testing and other forensic material can eliminate an

innocent person from suspicion. In fact, the first time that DNA was ever used to solve a crime in the United Kingdom, it freed an innocent man who had confessed to a crime that he did not do. At last count, DNA testing freed 88 people from death row in America. There could be no more horrendous infringement of civil liberties than for a person to be put to death for something that he or she did not do.

Furthermore, a child or incapable person cannot give consent to a forensic procedure—the court's authorisation for the procedure must be gained. An incapable person is defined in clause 3 of the bill as an adult who is incapable of understanding the general nature and effect of a forensic procedure, or who is incapable of indicating whether or not he or she consents to a forensic procedure being carried out. Before requesting consent to a forensic procedure, a police officer must be satisfied of the following: that the suspect is not a child or an incapable person; that there are reasonable grounds to believe that the procedure might produce evidence tending to confirm or disprove that the suspect committed an offence; and that the request for consent is justified in all the circumstances.

For example, if the police arrest a suspect for a sexual assault offence, provided the suspect is not a child or incapable person, the police may ask the suspect to consent to a buccal swab. If the suspect does not consent, the police officer could seek the order of a senior officer to conduct an alternative non-intimate procedure such as the taking of a hair sample, or go to court to seek the order of a magistrate to gain a buccal swab. Both these procedures will produce a DNA profile that could be matched against material left at the crime scene. The senior police officer and the court would have to be satisfied that there were reasonable grounds to believe that the procedure might produce evidence tending to incriminate or exculpate the suspect, and that carrying out the procedure without consent was justified in all the circumstances.

All suspects asked to consent to a forensic procedure must be given information about the procedure. Suspects must be advised of the purpose of the test, the offence to which it relates, their right to refuse consent and the consequence of this refusal, and also the use to which any DNA profile derived from forensic material may be put. Suspects are also to be given a reasonable opportunity to communicate or attempt to communicate with a legal practitioner if they wish. The police may also apply to a court for an interim order authorising the carrying out of a forensic procedure on a person suspected of committing an indictable offence in cases where the probative value of the evidence is likely to be lost or destroyed if the carrying out of the procedure is delayed.

This would be particularly useful, for example, if there is a danger that the suspect will wash away or otherwise dispose of material on his or person linked to a victim or to the weapon used to commit a crime. This bill regulates more than procedures for obtaining DNA; it includes the taking of such samples as deposits or residue on clothing or skin, not just a suspect's personal DNA. For example, gunshot residue may be needed which is present on a suspect's skin or clothes. The bill contains a number of significant safeguards that will guide the police officers utilising this important new operational tool.

The bill, for instance, sets out certain safeguards for Aboriginal and Torres Strait Islander suspects. For example, an Aboriginal or Torres Strait Islander suspect must not be asked to consent to a procedure until after a representative of an Aboriginal legal aid organisation has been notified. Of course, the suspect can waive this right or engage another legal practitioner. The bill allows two hours for the carrying out of forensic procedures. For suspects under arrest, this is in addition to the detention after arrest period provided under part 10A of the Crimes Act 1900. The imposition of time periods for undertaking forensic procedures will ensure that

suspects are not detained for a longer period than is necessary to carry out the procedure.

Part 7 of the bill allows for the testing of convicted serious indictable offenders serving a sentence of imprisonment, whether convicted before or after the legislation comes into force. A serious indictable offender is defined as a person convicted of an offence carrying a maximum penalty of five or more years imprisonment. This includes homicide, sexual assault and various offences such as robbery and theft. Currently about 5,400 such people are in New South Wales correctional institutions. This will be the first group the police will start testing when the Act commences in January 2001.

Why? Evidence from overseas has shown that less than 10 per cent of the population is responsible for over 90 per cent of crime committed. Studies have shown that a large percentage of criminals by their very nature tend to be recidivists. When the United Kingdom tested its prisoner population and placed the profiles on its national database the matches to crimes almost doubled. The Government is committed to clearing up crime and will use this legislation as a tool to assist in this process.

It is important to note that DNA will be only one tool in the police officer's kit. They will still need to assemble a brief of evidence against the offender; DNA alone will not convict! A forensic procedure may be carried out on prisoners, either with their informed consent or by order of a senior police officer or a magistrate. As with suspects, children and incapable offenders who are prisoners are not capable of giving informed consent and any procedure carried out on such offenders must first be authorised by a court. All prisoners must also be given information about the forensic procedure, including its purpose, the way in which it will be carried out, their right to refuse consent to the procedure, the consequences of this refusal and that a profile derived from forensic material may be placed on the DNA database. If they do not consent, a senior police officer may authorise a non-intimate procedure. Alternatively, the police officer may seek a court order authorising a buccal swab.

Part 8 of the bill provides for the carrying out of forensic procedures on volunteers. A forensic procedure may be carried out on any volunteer, other than a child or incapable person, with the volunteer's informed consent. A forensic procedure may be carried out on a volunteer who is a child or incapable person either with the informed consent of a parent or guardian or by court order, unless the child or incapable person resists undergoing the procedure. The bill sets out certain safeguards in relation to carrying out forensic procedures on volunteers. For example, the police must inform the volunteer of various matters, including the way in which the procedure will be carried out, the use to which a sample may be put, and that the volunteer is under no obligation to undergo the procedure. For the test to be valid, the volunteer's consent to undergo a forensic procedure must be given in the presence of an independent person. Furthermore, the consent form must be witnessed by a person not involved in the investigation of an offence. These safeguards will ensure that volunteers have confidence in providing samples for DNA analysis.

Part 9 of the bill deals with the admissibility of evidence. In the event of a failure to comply with the provisions in the legislation for carrying out procedures and using evidence of forensic material, this evidence is generally inadmissible in proceedings against a person. However, there are exceptions—for instance, where the court finds that the desirability of admitting the evidence outweighs the undesirability of admitting improperly obtained evidence. The bill provides for the destruction of forensic material obtained from a person who is acquitted or whose conviction is quashed. It also ensures that forensic material taken from a suspect is to be destroyed 12 months after the material is taken, unless a court is satisfied there are special reasons for extending the

12-month period. An example of this is where the court proceedings have not commenced against the alleged offender, or where there is an outstanding warrant against the suspect.

Provisions regulating the recording, retention and use of information obtained from forensic procedures and placed on the DNA database system are set out in part 11 of the bill. There are specific provisions for the permissible matching of DNA profiles against indexes contained in the database. For example, DNA profiles taken from suspects and offenders may be matched against the crime scene index. The crime scene index contains profiles taken from unsolved crime scenes. By contrast, DNA profiles taken from volunteers for limited purposes may be matched only against the crime scene in respect of which the volunteer has freely provided his or her DNA.

Part 11 also creates offences relating to the supply and use of forensic material. These offences carry maximum penalties of two years imprisonment or an \$11,000 fine or both. Offences include: intentionally or recklessly supplying forensic material for analysis when the material was required by law to be destroyed; improperly accessing information stored on the DNA database, and matching profiles on the database for impermissible purposes. The bill specifically provides for the Ombudsman to monitor the exercise of police powers under the legislation for a period of 18 months and to prepare a report. In addition, the legislation is to be reviewed after 18 months following the date of assent to determine whether its policy objectives remain valid and whether its terms remain appropriate for securing those objectives.

The bill provides a comprehensive regime regulating the taking and use of forensic material for the purposes of criminal investigation. It involves striking a balance between the need to enable police to effectively investigate crime and the civil liberties of suspects. The bill confirms the Government's commitment to addressing crime and improving the operation of the criminal justice system in New South Wales. It will enable law enforcement agencies to identify or exclude suspects by comparing forensic material taken from them with material found at crime scenes. It will link seemingly unrelated crimes by comparing DNA profiles found at different crime scenes. This legislation has the potential to assist victims of crime in New South Wales by encouraging guilty pleas and hence avoiding often traumatic and lengthy court proceedings.

It should also help clear up some of the State's worst unsolved crimes. For example, in the United Kingdom DNA evidence has helped to solve 34 homicides that the police had not been able to solve using traditional policing methods. There is no reason why the UK experience cannot be repeated in New South Wales. It is hoped that this legislation will assist police in New South Wales to revisit some serious crimes that remain unsolved, such as the murders of Donna Hicks and Rachel Campbell. This is not to say that the bill constitutes a cure-all. The admissibility of forensic evidence will be a matter for the courts to decide, and the weight given to evidence obtained by the exercise of powers under the bill is a question for the court. Nevertheless, the bill provides police with an effective investigative tool for detecting crime and will assist in deterring offenders from re-offending, thereby making the community safer. I commend the bill to the House.

Debate adjourned on motion by Mr R. H. L. Smith.