

## **CRIMES (FORENSIC PROCEDURES) BILL**

### **Second Reading**

**The Hon. J. W. SHAW** (Attorney General, and Minister for Industrial Relations) [8.36 p.m.]: I move:

That this bill be now read a second time.

The purpose of the bill is to introduce a regime for carrying out forensic procedures on suspects, serious indictable offenders and volunteers to provide for the use and destruction of material derived from those procedures, and to set out rules for placing and matching profiles derived from forensic material on a national DNA database. In 1995 the Government introduced legislation to enable police to take samples of blood, saliva and hair from a person in lawful custody.

This was an interim measure in response to the decision of the New South Wales Court of Appeal of 29 May 1995 in the unreported case of *Fernando v Commissioner of Police*. In that case, the Court of Appeal held that section 353A of the Crimes Act 1900, although authorising medical examinations, did not authorise the taking of blood samples from accused persons without their consent. The 1995 amendment was limited to taking blood, saliva and hair samples from persons in lawful custody without their consent pending the release of the Model Criminal Code Officers Committee report on forensic procedures and the proposed national DNA database.

The Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General circulated drafts of a Model Forensic Procedures Bill for comment in 1994. 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 and forwarded a proposal to establish a national DNA database to the Australasian Police Ministers Council. A discussion paper titled "Model Forensic Procedures Bill and the Proposed National DNA Database" was released in May 1999 following consultation with the Office of the Commonwealth Privacy Commissioner and the Police Commissioners Working Group.

Extensive background research and consultation has been undertaken to bring this bill before the House and the Government is pleased that the bill reflects the valuable work of numerous officers and experts. In February this year, after further submissions were received in response to the discussion paper, a final report and model bill, setting out a comprehensive legislative regime dealing with forensic procedures and the DNA database, were released.

This 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 have access to the best possible scheme for the carrying out of forensic procedures and the use of the material derived from those procedures to investigate crime. The bill sets out the procedures that may be carried out on suspects, offenders and volunteers. A procedure is categorised as either an intimate forensic procedure, a non-intimate forensic procedure or a buccal swab, that is, a swab of saliva taken from the person's mouth.

It is important to note that the bill covers not just procedures that produce material containing a person's DNA but other forensic procedures, such as the taking of photographs and scrapings from under a fingernail. A buccal swab or an intimate forensic procedure, for example, the taking of a blood sample, may only be carried out on a person suspected of a prescribed offence defined as an indictable offence or any other offence prescribed by regulation. I emphasise at this stage that no other offences will be prescribed by regulation in the first 18 months of the operation of the Act in order to monitor the impact of the legislation on crime solving and

police operations. A forensic procedure may be carried out under the legislation either with the suspect's informed consent by order of a senior police officer or by court order.

Unlike the 1995 amendments, this bill 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. This is because DNA testing and other forensic material have the potential to eliminate an innocent person from suspicion and free up the police to focus on other suspects. The extension of the provisions to suspects is also consistent with the model bill, Commonwealth legislation and legislation in Victoria and South Australia. The bill sets out a number of safeguards to ensure that the rights of suspects, offenders and volunteers are balanced against the need for police to have adequate and effective law enforcement powers.

First, the bill contains special provisions relating to children and incapable persons. A child or incapable person cannot be asked to consent to a forensic procedure. A forensic procedure, no matter how unintrusive, may only be carried out on a child or incapable person with the court's authorisation. 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. In addition to the requirement to seek a court order in respect of children and incapable persons, the bill provides further safeguards for such suspects.

An interview friend, such as a parent, guardian or legal practitioner, must be present at the hearing of an application for a court order and must, if reasonably practicable, be present when a forensic procedure is carried out. Second, there are similar safeguards relating to Aboriginal and Torres Strait Islander suspects. An Aboriginal or Torres Strait Islander suspect must not be asked to consent to a forensic procedure until after a representative of an Aboriginal legal aid organisation has been notified, unless the suspect has waived this right or has engaged another legal practitioner. An interview friend must be present when an Aboriginal or Torres Strait Islander is asked to consent to a forensic procedure during the hearing of an application for a court order and, if reasonably practicable, when a forensic procedure is carried out.

The bill, therefore, takes into account the special needs of the more vulnerable members of our community and makes provision to protect their interests. In addition, the bill sets out various safeguards that apply across the board. All suspects asked to consent to a forensic procedure must be given information about the procedure including its purpose, the offence to which it relates, the suspect's right to refuse consent and the consequences of this refusal, and 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 a suspect not under arrest does not consent to a forensic procedure, regardless of the type of procedure sought, a court order is required before the procedure is undertaken.

If a suspect under arrest does not consent, a non-intimate procedure may be authorised by a senior police officer or a buccal swab or intimate procedure may be ordered by a court. Before requesting consent to a forensic procedure, a police officer must be satisfied that the suspect is not a child or 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, they may ask the suspect to consent to a buccal swab. If the suspect does not consent, a senior police officer may authorise the taking of a hair root sample which, like a buccal swab,

contains DNA material that may be matched against material left at the crime scene.

The senior police officer would have to be satisfied that there are reasonable grounds to believe that the sample might produce evidence tending to incriminate or exculpate the suspect and that carrying out the procedure without consent is justified in all the circumstances. Alternatively, the police may seek an order from the court to take a buccal swab. In this case, the court would similarly have to be satisfied that there are reasonable grounds to believe that the sample might produce evidence tending to incriminate or exculpate the suspect, and that carrying out the procedure is justified in all the circumstances. It is important to emphasise that the senior police officer's ability to order a non-intimate forensic procedure in the absence of consent applies only to suspects who are under arrest. Non-consensual procedures, no matter how unintrusive, may only be carried out on suspects who are not under arrest by court order.

Part 7 of the bill provides for the testing of serious indictable offenders serving sentences in New South Wales correctional centres, 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 offences and various offences in the nature of robbery and theft. The rationale for targeting serious indictable offenders is the likelihood that they have committed or will commit other offences. As stated by the Model Criminal Code Officers Committee in its discussion paper, this approach is based on the view that, if a person is convicted of a serious offence, it is reasonable for society to expect that the person be required to give samples to assist with the detection of a repeat offence.

Not only may providing the sample deter an offender from committing further crime; it may assist in clearing up previously unsolved crime. A forensic procedure may be carried out on a serious indictable offender either with the offender's informed consent or by order of a senior police officer or a magistrate. As for suspects, children and incapable offenders are not capable of giving informed consent and any procedure carried out on such offenders must first be authorised by a court. All other serious indictable offenders must be given information about the procedure, including its purpose, the way in which it will be carried out, the offender's right to refuse consent to the procedure, and the consequences of this refusal, and that a profile derived from forensic material may be placed on the DNA database. If a serious indictable offender does not consent to a procedure, a senior police officer may authorise the taking of a hair root sample. Alternatively, the police may seek a court order authorising a buccal swab or a blood sample.

Part 8 of the bill provides for the carrying out of forensic procedures on volunteers. A forensic procedure may be carried out on a 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 the material derived from a forensic sample may be put, and that the volunteer is under no obligation to undergo the procedure. To be valid, the volunteer's consent to undergo a forensic procedure must be given in the presence of an independent person and the consent form must be witnessed by a person not involved in the investigation of an offence.

These safeguards are necessary to ensure that volunteers have confidence in providing samples for DNA analysis. The carrying out of forensic procedures, whether in relation to suspects,

serious offender or volunteers, is governed by legislative requirements to ensure that the procedures are carried out safely and with respect for a person's physical integrity. The bill sets out who may carry out a procedure, depending on what it is. For example, a buccal swab may be taken by an appropriately qualified person, whereas a dental impression may only be taken by a doctor, dentist or dental technician.

A medical practitioner or dentist of the person's choice may be present during the carrying out of certain procedures such as the taking of blood samples. If practicable, most intimate forensic procedures are to be carried out by a person of the same sex as the suspect, serious offender or volunteer. Children have the option of choosing the sex of the person carrying out the forensic procedure on them. Clause 48 of the bill clearly states that the legislation does not authorise the carrying out of a forensic procedure in a cruel, inhuman or degrading manner.

The significance of these various provisions and safeguards becomes evident when one considers the rules regarding the admissibility of evidence obtained from the carrying out of a forensic procedure. This evidence will generally be inadmissible in proceedings against a person if the police fail to comply with the requirements under the legislation. There are exceptions, for instance, where the court finds that the desirability of admitting the evidence outweighs the undesirability of admitting improperly obtained evidence. It is clearly stated that the probative value of the evidence in itself does not justify the admission of improperly obtained evidence.

Members may note that some of the requirements contained in the bill are qualified by the phrase "if practicable". I would like to point out that the burden of proof lies on the prosecution to prove on the balance of probabilities that it was not practicable to do something which was required to be done if practicable. 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 if proceedings against the suspect have not commenced within 12 months of the material being taken, unless a court is satisfied that there are special reasons for extending the 12-month period or where there is an outstanding warrant against the suspect.

Provisions regulating the recording, retention and use of information obtained from forensic procedures 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, which 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. The offences of unlawfully supplying forensic material, improperly accessing information stored on the DNA database and improperly matching profiles attract maximum penalties of two years imprisonment or an \$11,000 fine or both. Clearly, it is in the interests of law enforcement agencies to exercise their powers under the legislation reasonably, judiciously and lawfully.

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 after that period to be tabled in each House of Parliament. 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 Government is committed to clearing up crime and will use this legislation to provide law enforcement agencies with a valuable investigative tool to assist in this process.

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. Furthermore, it will allow for the targeting of crimes that have historically had low clearance rates using only traditional methods of investigation.

This is not to say that the bill constitutes a cure-all. Linking a sample of a person's DNA to a sample found at a crime scene does not necessarily prove guilt; nor does it necessarily prove that the person was present at a crime scene. The popular viewpoint is that forensic evidence is infallible and that if a DNA match has been made, then the culprit has been found and a conviction will follow. This is an oversimplification. DNA testing produces a statistical probability. Care must be taken, not only in handling and analysing samples, but in presenting statistical evidence to a jury. For example, the United Kingdom Court of Appeal in *R v Doheny; R v Adams* [1997] 1 Cr App R 369 held that it is wrong to confuse the match probability, say, one in a million, with the likelihood ratio, such as that the chances of a person other than the defendant leaving the crime scene are one in a million.

The admissibility of forensic evidence will be a matter for the courts to decide and the weight to be given to evidence obtained by the exercise of powers under the bill is a question for the trier of fact in each case. Forensic evidence will generally form only one part of the evidence in a case and the jury will need to consider all the items of evidence in order to determine whether or not the case against the defendant has been proved. Nevertheless, the bill provides police with an effective investigative tool and, in detecting crime, 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 the Hon. J. W. Shaw.**