

RESPONSE TO THE STANDING COMMITTEE ON LAW AND JUSTICE'S RECOMMENDATIONS IN RELATION TO THE *CRIMES (FORENSIC PROCEDURES) ACT 2000*

INTRODUCTION

The *Crimes (Forensic Procedures) Act 2000* (the "Act") gives police the power to conduct forensic procedures upon suspects, serious indictable offenders and volunteers. The Act, which commenced in January 2001¹, replaced sections 353A (3A) and (3B) of the *Crimes Act 1900* with a more extensive regime for the collection of forensic evidence from individuals. The types of forensic procedures, which are provided for by the Act, include but are not limited to collecting DNA samples. The Act regulates the use and destruction of that material and provides for its comparison with other material including that on a national DNA database. Certain offences are created related to unauthorised access, recording and retention of identifying information on the DNA database system.

The Act provides for a number of statutory reviews by the Standing Committee on Law and Justice, the Ombudsman and the Attorney General's Department. These reviews have different completion dates and different objectives.

On 7 February 2002 the Standing Committee on Law and Justice (the "Committee") published a report² of its findings following a review of the operation of the Act (the "Report").

The Committee made 56 recommendations. Forty-two of those recommendations related to proposals for amendment to the Act.

RECOMMENDATIONS BY THE STANDING COMMITTEE BEING CONSIDERED DURING THE DEPARTMENTAL REVIEW OF THE ACT THIS YEAR

Section 122 of the Act requires the Attorney General's Department to:

1. Conduct a review of the Act this year; and
2. Table a report in relation to that review in both Houses of Parliament no later than 5 January 2003.

Section 122 of the Act states that the purpose of the Attorney General's Department's review is to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.

As a review of the Act is presently being conducted by the Attorney General's Department the response at this point in time to all of the Committee's recommendations (other than those set out below) is that the question of implementation is still being considered in the Attorney General's Department's current review of the Act.

¹ With the exception of Part 8 which deals with volunteers. Part 8 was not proclaimed on 1 January 2001 due to concerns that the definition of volunteers used in the Act would apply to victims of crime.

² Report 18 - February 2002

OTHER RECOMMENDATIONS

RECOMMENDATION NO 6

The Committee recommends that the Judicial Commission provide training of judicial officers in relation to the forensic use of DNA, its accuracy and the interpretation of DNA evidence.

This recommendation has been referred to the Judicial Commission for consideration. Dr Ross Vining, Director of the Division of Analytical Laboratories ("DAL") the agency responsible for maintaining the DNA database system has offered the assistance of DAL scientists in relation to developing such training.

RECOMMENDATION NO 7

The Committee recommends the inclusion of courses in interpreting DNA evidence in Practical and Continuing Legal Education for solicitors, and as part of the Reading Period and Continuing Legal Education for barristers

This recommendation has been referred to the Law Society and New South Wales Bar Association for consideration. As for recommendation number 6 above, scientists from DAL are available to assist with such courses if needed.

RECOMMENDATION NO 8

The Committee recommends that the Attorney General seek to have guidelines for directions to juries about DNA evidence incorporated into the relevant judicial bench books including such matters as

- *The potential for fabrication and*
- *The possibility of match errors*

This recommendation has been referred to the Judicial Commission for consideration.

RECOMMENDATION NO 19

The Committee recommends that the Crimes (Forensic Procedures) Act 2000 be amended after consultation with stakeholders to incorporate specific provisions for forensic procedures on victims of crime.

The Crimes (Forensic Procedures) Act Amendment Act 2002 (the "Amending Act") seeks to address this problem by excluding victims of personal violence offences from the definition of volunteers and the operation of Part 8 of the Act.

The Attorney General's Department is working with NSW Police, the Department of Health and the Department of Women to formulate a protocol to ensure that victims are protected at the time they are asked to undergo a forensic procedure.

RECOMMENDATION NO 20

Proclaim the volunteer provisions as a matter of priority.

This will be done after the amendments referred to in 19. above have commenced.

RECOMMENDATION NO 34

The Committee recommends that the Attorney General consider amending the Crimes (Forensic Procedures) Act 2000 to provide criteria upon which a suspect or offender's interview friend may be rejected by police. That in any case where an interview friend has been rejected, an alternative interview friend should attend before procedures continue.

This amendment will be made by the Amending Act which amends section 10 of the Act to permit police to exclude an interview friend of an Aboriginal person or Torres Strait Islander if they form a belief, based on reasonable grounds, that the presence of the interview friend may be prejudicial to the investigation of an offence because 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 offence.

If an interview friend is excluded on that basis then the suspect may choose another person to act as an interview friend. If the suspect does not waive their right to have an interview friend present and does not choose another person then a police officer may arrange for another person who may act as an interview friend under section 4 of the Act to be present as an interview friend.

RECOMMENDATION NO 35

The Committee recommends that the Attorney General consider amending section 55(3) of the Crimes (Forensic Procedures) Act 2000 to clarify that the waiving of rights to an interview friend does not prevent the attendance of a legal representative, and that the waiving of rights to a legal representative does not prevent the attendance of an interview friend.

This amendment was made by the Amending Act.

RECOMMENDATION NO 43

The Committee recommends that the Attorney General amend the following sections of the Crimes (Forensic Procedures) Act 2000:

- *Section 51 - to clarify that a buccal swab is not required to be carried out by a person of the same sex as the subject*
- *Section 57 - to clarify that a suspect may object to both an audio and video recording of a procedure*
- *Sections 69 and 70 - to clarify that only a senior police officer may order a forensic procedure on a serious indictable offender*
- *Section 98(1) - to allow a telephone interpreter service to be used where an interpreter is required.*

These amendments were made by the Amending Act.

RECOMMENDATION NO 44

The Committee recommends that the Attorney General seek to address the problem of matching and crime scenes and DNA profiles of relatives of missing persons.

The Amending Act seeks to address the problem of matching crime scenes and DNA profiles of relatives of missing persons by amending the Act to:

- Require that a person giving a sample for inclusion on the missing persons index be told that their profile may be matched against all of the other indexes on the database;
- Provide that information about a match between that sample and any other DNA profile on the database cannot be used in proceedings against that person. In that event a fresh forensic procedure would have to be carried out under the provisions of the Act dealing with suspects. This will apply to samples given before the amendment as well as after;
- Provide for a person whose profile is placed on the missing persons index to be informed if their DNA profile or that of their missing relative on the missing persons index matches any other profile on the database.

CONCLUSION

The regulation of the collection and use of DNA information in law enforcement is an evolving area of law. Given the number of ongoing reviews of this area by the Attorney General's Department and the Ombudsman's office it is sensible to defer implementation of a number of the Committee's recommendations at least until after the Attorney-General's Department has an opportunity to complete its review of the Act.