

WESTERN AUSTRALIA POLICE SERVICE



28/01/2010

File No:
0318909FV001

MEMORANDUM

To: OFFICER IN CHARGE
FORENSIC ANALYSIS COORDINATION TEAM

Review of Part 1D of the Crimes Act 1914 – WAPol submission.

Find attached request for WAPol to provide a submission to the Review of *Part 1D of the Crimes Act 1914* being undertaken in ACT by Mr. Peter FORD.

The Terms of Reference of the review are attached along with an extract of the current legislation.

WAPol Legal and Legislative services were requested to provide a legal response consistent with the terms of reference. The report of Mr. Tony BECKER is attached. Legal services advise that there were no outstanding legal issues identified in relation to the matters raised by the review.

Mr. Becker does however raise an issue for comment in relation to potentially taking particulars from Australian nationals/residents who have been convicted of serious offences in other countries. This issue is along the lines of a proposal to the UK parliament dated 11th November 2009 (attached)

The sampling of person for purposes of identifying particulars (including DNA) in Western Australia is governed by the *Criminal Investigation (Identifying People) Act 2002 (CIIP)*. Anecdotally from a Forensic Analysis Coordination Team perspective it is rare that WAPol officers use the Commonwealth legislation with all samples being taken under the state legislation. However clearly the legislation is available for use for offences under investigation where WAPol investigate offences with a federal aspect. (*Crimes Act 1914 - Sect 3AA*).

From a National DNA matching perspective WAPol has only had 27 matches with the ACT via NCIDD. Therefore previous matching of profiles obtained via the *Crimes Act 1914* has been limited and any recommendation to increase the profiles obtained and placed on NCIDD would be welcomed.

The *Statutory review of the Criminal Investigation (Identifying People) Act 2002* by Hon Robert ANDERSON QC was published in April 2009 and Mr. BECKER has

forwarded a copy of that review to Mr. FORD for his information. In particular there are a number of recommendations and other findings in that review which touch on the considerations of the Ford Review, i.e.

- (i) Informed consent – Recommendations 5, 6, 23 and Other Findings 12. (*simplification of the legislation in relation to involved persons*)
- (iii) Mass Screening – Chapter 24 (*no specific Screening legislation recommended*)
- (viii) Matching tables – Recommendation 25 (*WA to adopt the national table*)
- (ix) Inter-jurisdictional Accountability – Other Findings recommendation 3 (*no change to legislation recommended*)

(A copy of the summary of recommendations and other findings is attached).

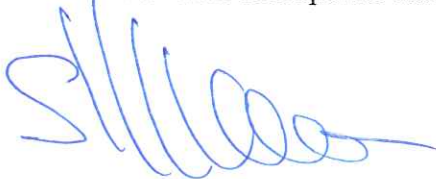
Additionally in relation to the terms of reference at (c) and (e), the *Statutory Review of the Criminal Investigation (Identifying People) Act 2002* recommends (at 30 & 31) oversight and accountability mechanisms for the WA DNA database by creation of both an independent post-conviction review panel and an independent oversight body addressing any civil liberties concerns.

I note this review arises in part from *The Report of Independent Review of Part 1D of the Crimes Act 1914 Forensic Procedures, March 2003, by Tom Sherman AO (the Sherman Report)* which WAPol made a previous submission.

In summary, other than sampling Australian nationals/residents convicted of serious offences overseas, no specific issues for WAPol comment are raised. However the contents of the *Statutory review of the Criminal Investigation (Identifying People) Act 2002* may provide some assistance to the Ford Review.

Forwarded for consideration and submission to Superintendent, Forensic.

Please note WAPol response date is 31st January 2010.



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Western Australia

*Criminal Investigation
(Identifying People) Act 2002*

Statutory Review

April 2009

Summary of recommendations

#	Recommendation	Paragraph	Page
1	The Act should be amended to authorise police to detain for a reasonable time (or for not longer than a specified time) a person who has been lawfully requested to provide his or her personal details and who has provided details which are reasonably suspected to be false.	116	37
2	The definition of identifying particulars should be broadened to allow for the use of new methods of identification as new methods are developed and become recognised as unique identifiers. This provision should be made retrospective so that new technologies and/or identifying procedures can be applied to both crime scene samples and reference samples.	128	42
3	Regulation 4 of the <i>Criminal Investigation (Identifying People) Regulations 2002</i> should be amended to include in sub-regulation (1), special constables and police staff members.	201	58
4	The Act should be amended to authorize police to acquire identifying particulars from convicted persons. The purpose should be to make a record of the offender in relation to the crime for which he or she was convicted and to keep criminal records. There should also be a notification procedure to the database manager when a suspect is convicted, to enable the suspect's profile to be upgraded from the suspects index to the offenders index. This provision should be retrospective.	249	71
5	In order to simplify the Act, consideration should be given to the removal of the protected persons provisions from Part 4 Division 2.	269	75

Statutory Review of the *Criminal Investigation
(Identifying People) Act 2002*

#	Recommendation	Paragraph	Page
6	In order to simplify the Act, the rules regulating the doing of identifying procedures on victims and witnesses who are adults and not under a disability should be removed from Part 5. These people should be treated as volunteers who are provided for in Part 4 Division 2.	275	77
7	The Act should be amended to allow the DNA profile of a deceased person obtained from a source other than the body of the deceased person to be put in a database and compared with other information in the database.	292	83
8	For avoidance of doubt, the reference to tissue in section 8 should be amended to expressly include teeth and bone. This provision should be made retrospective so that teeth and bone samples from people already deceased (but as yet unidentified) are included.	295	84
9	The matching table in section 78 should be modified to delete the reference <i>See s.63</i> in the seventh line and to insert instead the word <i>Yes</i> in columns A, B, D E, F and G. This provision should be made retrospective so that existing DNA profiles from unknown deceased persons can be analysed under the new matching arrangements.	303	86
10	The reference to volunteers who are relatives by blood in the definition of missing persons index in section 76 should be removed.	318	89
11	The Act should be amended to provide that a magistrate may issue a warrant authorizing an officer to enter premises to obtain an identifying particular with respect to a person who has been reported missing for not less than 48 hours.	324	90

#	Recommendation	Paragraph	Page
12	The Act should be amended to provide that identifying particulars lawfully obtained under the law of another jurisdiction may be retained and used in Western Australia in accordance with the <i>Criminal Investigation (Identifying People) Act 2002</i> as if the particulars had been lawfully obtained in Western Australia. This provision should be made retrospective so that existing DNA profiles – or the DNA profiles generated in the future from the analysis of exhibits from old cases – can be received and used in Western Australia.	329	92
13	Consideration should be given to whether the present laws and inter jurisdictional arrangements would enable Western Australia to deal effectively with victim identification after any mass catastrophe, whether terrorist, accidental or the result of a natural disaster, that may occur within Western Australia.	336	93
14	Guidelines should be developed to regulate familial searching in order to protect family privacy and guard against unnecessary interference in private lives.	351	97
15	Section 22 and section 64, which provide that the identifying information of police officers may be collected by order of the Commissioner, should be repealed. The sections are not fully utilised and are of uncertain application and are probably unworkable.	362	102
16	The Act should provide for a special elimination DNA database to be created for police officers and police staff and other people working with or for police (including private contractors), whose duties may involve a risk of contamination of crime scenes or exhibits.	388	110

Statutory Review of the *Criminal Investigation
(Identifying People) Act 2002*

#	Recommendation	Paragraph	Page
17	The Act should be amended to provide that it should be compulsory for relevant persons to give a sample from which a DNA profile can be derived for inclusion in the police elimination DNA database.	391	110
18	The Act should be amended to require that the manager of the police elimination database retain elimination DNA profiles, and the sample from which each profile is derived, indefinitely.	401	112
19	A special elimination database for forensic workers should be created. This provision should be made retrospective to ensure that current forensic workers can be sampled.	409	114
20	The manager of the forensic workers elimination DNA database should be required to retain forensic worker elimination profiles, and the samples from which each is derived, indefinitely.	412	114
21	The definition of identifying particulars in section 47 should be amended to replicate the definition of that term in section 34.	417	116
22	Section 49 should be amended to remove the requirements that before an officer may request a charged suspect to consent to an identifying procedure being done on the suspect, the officer must reasonably suspect that the identifying particulars are or may not be held by WA Police, or may be needed to verify the person's identity with identification particulars already held by the WA Police.	437	121

#	Recommendation	Paragraph	Page
23	The Act should be amended so that, in the case of charged suspects (whether or not charged with a serious offence), police officers should not be required to obtain the suspect's consent to perform an identifying procedure if the identifying procedure is not an intimate identifying procedure and does not involve the taking of a DNA sample.	451	125
24	The Act should be amended to provide that, where an identifying procedure is sought to be done on a child suspect and police are unable to identify a responsible person in relation to the child suspect, police may apply to a JP (in the case of a non-intimate procedure) or a magistrate (in the case of an intimate procedure) for an IP warrant authorising the doing of the procedure.	457	126
25	Western Australian should adopt the nationally agreed matching table for comparison of lawfully obtained DNA profiles and section 78 should be amended accordingly. This provision should be made retrospective so that all existing DNA profiles can be matched under the new matching rules.	472	132
26	Whether or not the nationally agreed matching table is adopted, suspect to suspect searching should be allowed in the State DNA database. This provision should be made retrospective so that all existing suspect profiles can be matched against each other.	480	134
27	The Act should be amended to expressly require that, subject to sensible weeding rules, biological samples collected from a crime scene and the reference sample from the person subsequently convicted should be kept indefinitely. This provision should be made retrospective, to apply to all existing samples.	504	141

Statutory Review of the *Criminal Investigation
(Identifying People) Act 2002*

#	Recommendation	Paragraph	Page
28	The Act should be amended to permit police to obtain identifying information by covert means on the authority of a judge of the Supreme Court in cases where the officer reasonably suspects that if a request were made of the person to consent to undergo an identifying procedure, or if the person was ordered to do so, the investigation of the offence concerned would be prejudiced.	516	145
29	The Act should be amended to authorize a judge of the District or Supreme Court to order that DNA information obtained by chance may be used within the meaning of section 74(2), in cases of doubtful legality. This provision should be made retrospective, to apply to all existing samples.	520	146
30	An independent, post-conviction DNA Evidence Review Panel should be established to review possible miscarriages of justice and to decide if they should be referred to an appeal court in respect of any person convicted of a crime on the basis of DNA evidence and sentenced to a term of imprisonment, whether or not that term has already been served.	547	157
31	An independent body should be established to oversee the management and operation of forensic databases in Western Australia. The functions of the body should include quality assurance, policy, consideration of ethical, social, scientific and forensic issues, coordination between relevant agencies and best practice considerations.	553	160

Other findings

#	Other finding	Paragraph	Page
1	Section 157 of the <i>Criminal Investigation Act 2006</i> requires the Minister to carry out a review of the operation and effectiveness of that Act after it has been in operation for five years, i.e., less than three years hence. That requirement may afford the opportunity to consider whether there is merit in including Part 9 of the <i>Criminal Investigation Act 2006</i> as part of the <i>Criminal Investigation (Identifying People) Act 2002</i> to become a single forensic procedures Act.	51	15
2	There is no impediment in the Act to sending articles or samples obtained from people to laboratories in other jurisdictions, or even overseas, for testing, profiling and analysis. Provided that the sample was obtained in accordance with the requirements of the Act, a DNA profile derived from the sample may be put in the State DNA database wherever the scientific work was done. The Reference Group does not therefore see a need to recommend any amendment to the Act in order to expressly permit testing to be done outside Western Australia.	70	21
3	Subject to the continued active participation of Western Australia in the NCIDD Forum, the formal arrangements for Australian inter-jurisdictional sharing of forensic intelligence are satisfactory and no other initiatives can be taken by Western Australia to further facilitate the process.	98	32
4	Western Australia may not have legislative competence to enact laws to provide for international sharing of forensic information.	102	34

#	Other finding	Paragraph	Page
5	The provisions of the <i>Criminal Investigation (Identifying People) Act</i> which regulate the use of photographs as an identifying particular afford adequate protection of private rights and are in accordance with national and international best practice.	156	47
6	The need for a compulsory dental database to aid in disaster victim identification is not sufficiently pressing to warrant the erosion of privacy that would be involved in a compulsory dental databasing system.	186	53
7	Subject to Recommendation 3 (that the definition of “authorized person” extends to special constables and police staff members) the Reference Group does not consider that the present limitations on who may request a person to undergo a forensic procedure should be relaxed.	217	62
8	In sexual assault cases, where the DNA profiles of the victim and the victim’s consensual partner can be identified, these profiles should be eliminated from investigation and should not be uploaded either to the State DNA database or to NCIDD.	227	65
9	The Act should not be amended to provide that the taking of a buccal swab should be treated as an intimate procedure.	233	68
10	The restrictions in the Act on the powers to obtain bioinformation from volunteers and the limitations on the powers to retain such information are in accordance with best practice.	262	74
11	Familial searching may lead to the solving of some serious cases but the Reference Group does not believe that there is any impediment to it in the Act and therefore does not consider that an amendment is required in order to permit it.	350	97

#	Other finding	Paragraph	Page
12	The consent provisions with respect to uncharged suspects should not be repealed.	444	123
13	The system of IP warrants intended to safeguard the interests of people from whom identifying information is sought without their consent, including children and persons under a disability, provides adequate protection of private rights.	462	128
14	The indefinite retention of identifying information of offenders is a legitimate aspect of the duty of government to keep proper records and to assist in the protection of the public from criminal activity, and is in accordance with best practice.	498	140
15	The Act should not be amended to provide police with more power to obtain identifying particulars from suspects who are charged but not arrested. The powers in section 51 are ample.	529	150

BECKER Tony [PD86321]

From: BECKER Tony [PD86321]
Sent: Wednesday, 6 January 2010 10:35
To: THOMPSON Stevie [PD11042]
Cc: CLARK Chris [PD82901]
Subject: Request for comment on stat review of Part 1D of the Crimes Act 1914

Hi Steve

I refer to a memorandum (File No: eA856273) dated 15 December 2009 from yourself to Chris Clark, Legal and Legislative Services Branch requesting that advice regarding the statutory review of Part 1D of the *Crimes Act 1914* (Cwth) be provided by 15 January 2009.

It is understood that this request arises from correspondence dated 17 November 2009 from Peter Ford, Consultant, Part 1D Review Committee Secretariat, Criminal Justice Division, Commonwealth Attorney-General's Department to the Commissioner of Police inviting him to comment on the statutory review of Part 1D of the *Crimes Act 1914* (Cwth).

In response, I can advise that Legal and Legislative Services has scanned its records from the State Solicitor on any matter related to Part 1D of the *Crimes Act 1914* and no outstanding issues were identified.

Nevertheless, to better inform the Part 1D Review Committee Secretariat about the current statutory review of the *Criminal Investigation (Identifying People) Act 2002* in regard to its possible impact upon any proposed amendments to the Federal legislation, a copy of the Report by the Reference Group on the Statutory Review of the *Criminal Investigation (Identifying People) Act 2002* has been forwarded to Mr Ford.

In addition, a matter has been identified for comment – and that is providing Part 1D of the *Crimes Act 1914* with the power to take identifying particulars (which in WA would include photographs, fingerprints and non-intimate DNA samples etc) without consent from Australian nationals or residents convicted of serious offences abroad at any time. In WA, in accordance with the definition for serious offence in the *WA Criminal Investigation (Identifying People) Act 2002*, a serious offence is one which carries an imprisonment period of 12 months or more.

The provision of such a power would address the situation where an Australian national or resident has committed a serious offence abroad then that Australian national or resident on returning to Australia would have their identifying particulars taken and the relevant jurisdictions would be notified.

Internationally, this power has been proposed by the Rt Hon Alan Johnson, the Secretary of State for the Home Department in the United Kingdom. His full statement is set out in the following attachment, and the matter referred to above is found at "Point 14 – Additional powers."

I understand that the above comments may form part of the formal response being coordinated by the Superintendent, Forensic Services. Would you please arrange for a copy of the final submission to Mr Ford be forwarded to Chris Clark?

Finally, should you wish to discuss the matter further, please call me on 9263 2503.

06/01/2010

Kind regards

Tony Becker
Legal and Legislative

WRITTEN MINISTERIAL STATEMENT – 11 November 2009
HOME OFFICE – United Kingdom

DNA and Fingerprint Retention

The Secretary of State for the Home Department (Alan Johnson)

- 1) I am announcing today proposals on a new retention framework for DNA and fingerprints to be introduced through primary legislation as soon as Parliamentary time allows. I am also today publishing on the Home Office website and placing in the Library of the House the responses to the consultation exercise on earlier proposals published in May 2009. I will also be placing on the Home Office website at www.homeoffice.gov.uk/documents/cons2009dnadatabase/ a review of the research carried out in this area.

Background

- 2) The UK has been at the forefront of using DNA in the detection of crime for many years, and it has played a key role in the conviction of numerous individuals for the most serious of crimes over the years; some 832 matches to the National DNA Database were made in cases of murder, manslaughter or rape in 2008/9 alone. The Government is determined that DNA and fingerprints should continue to play a key role in public protection and the prevention and detection of crime.
- 3) In December 2008 the European Court of Human Rights (ECtHR) judgment in the case of *S and Marper* found that the blanket retention of DNA profiles and fingerprints indefinitely where there had been no conviction represented a breach of Article 8 of the European Convention on Human Rights.
- 4) The Government undertook to give effect to the judgment and to amend domestic law accordingly. We published proposals in May 2009 in a Consultation Paper "Keeping the Right People on the DNA Database." The consultation period ended in August and some 500 responses, the majority from individuals, were received. We have considered those responses carefully before bringing forward the proposals below.
- 5) The retention of biometric data remains a sensitive issue. Such data helps in the detection and conviction of criminals and may also be used for identification purposes outside the criminal justice context. There is less argument about the retention of biometric information in respect of those who have been convicted of a criminal offence than there is in respect of those who have been arrested and had their DNA and fingerprints taken but were not subsequently cautioned or convicted. Achieving the appropriate balance between privacy and public protection, in a way which satisfies the ECtHR judgment, has been our objective.

Research

- 6) Since the publication of the Consultation Paper we have sought to further the evidence base through additional research. The research lends support to the public protection case for retaining the DNA of those who have been arrested for but not convicted of criminal offences. It suggests that we can go some way to reduce the retention periods originally proposed without compromising public protection, indicating that the chance of re-arrest, following an arrest with no further action, of individuals with no previous convictions remains higher than the chance of arrest in the general population for 6 years following the initial arrest.

Proposals

- 7) DNA Samples

The ECtHR judgment highlighted the particular sensitivity of retaining DNA samples as distinct from the profiles taken from them which are held on the National DNA Database (NDNAD). Although not required by the judgment, we continue to believe that there is scope for destroying samples not only of those arrested but not convicted and but also of those who have been convicted. We propose that samples should not be retained beyond a 6 month maximum, which is needed to ensure satisfactory loading of the profile taken from the sample onto the NDNAD. We do, however, propose to bring forward a power for the police to take a further sample should the defence of an accused person challenge the authenticity of the results of the analysis of the destroyed sample.

- 8) Convicted adults

We propose the indefinite retention of DNA profiles of convicted adults in line with the Consultation Paper. This would also apply to people who are given a caution, warning or reprimand.

- 9) Unconvicted Adults

In setting a proportionate retention period for the DNA profiles of unconvicted adults which does not compromise public protection, we have taken account of the improved evidence base and responses to the proposals in the original Consultation Paper. We propose a 6 year retention period for the profiles of unconvicted adults, irrespective of the seriousness of the crime for which they were arrested. Although the ECtHR suggested that the seriousness of the alleged offence should be a factor in determining what length of retention was proportionate, the best available evidence indicates that the type of offence a person is first arrested for is not a good indicator of the seriousness of offence he might subsequently be arrested for or convicted of in future. As the retention of the DNA of innocent people is not punitive, but rather a measure to facilitate the detection of future offences, the Government therefore concludes it is appropriate to have a single retention period.

- 10) Juveniles

While the evidence base does not support shorter retention periods for juveniles, we have, in setting a proportionate retention regime for juveniles, whether convicted or unconvicted, given weight to the comments in the ECtHR judgment on juveniles, the United Nations Convention on the Rights of the Child and the responses to the Consultation Paper.

- 11) Convicted Juveniles

We propose that the DNA profiles of convicted juveniles should be retained indefinitely for serious offences, and for 5 years for the first minor offence, with indefinite retention for a second conviction. This recognises that for many young people involvement in crime in their teenage years is often an isolated and minor incident. However, we also recognise that, for some young people, involvement in crime in their teenage years is a strong indicator of risk of further criminal activity into adulthood. We believe, therefore, that a limited retention period for a single conviction, with indefinite retention in the case of any further conviction, strikes the appropriate balance.

12) Unconvicted juveniles

We propose that, where 16 and 17 year-olds are arrested for but not subsequently convicted of a serious offence, their DNA profile would be retained for 6 years (as for adults), taking account of the ages at which peak offending occurs. For all other juveniles, we propose a 3 year retention period for DNA of those who have been arrested but not convicted whatever the offence for which they were arrested, and at whatever pre-18 age they were arrested at. This corrects a possible anomaly with the original proposal, identified by consultation respondents, that an individual arrested at age 10 might have had their DNA retained for 8 years, whereas someone arrested at age 17 might have had their DNA retained for only 1 year. It also provides an appropriately more lenient approach to juveniles who are arrested but not convicted, compared with those who do receive a conviction.

13) Fingerprints (Adult and Juveniles)

We propose that, in all cases, the same regime should apply to the retention of fingerprints as for DNA profiles. The ECtHR judgment implied that fingerprints were a lesser intrusion of privacy, but we are not aware of evidence which suggests we should propose a different retention policy.

14) Additional powers

In line with our aim to ensure that the right people are on the database our proposals in this area will, as we set out in the May consultation document, include **giving the police the power to take fingerprints and non-intimate samples without consent from UK nationals or residents convicted of specified serious offences abroad at any time** (*my emphasis*); to remove the existing statutory bar (in the Criminal Evidence (Amendment) Act 1997) on taking non-intimate samples from persons convicted of serious offences before 10 April 1995 who have been released from prison; and to give the police the power to take non-intimate samples and fingerprints post-arrest where the initial sample has proved inadequate for analysis even though a person is no longer in police detention.

15) Destruction of DNA and fingerprints profiles before the end of retention period

Currently, Chief Officers may consider the exceptional destruction of DNA and fingerprints under the exceptional case procedure. We propose to introduce greater transparency by setting out in statute more clearly defined criteria where deletion would be appropriate. This should bring greater clarity to the public and also the police.

16) Governance

It is important that, in addition to putting in place the proportionate regime for the retention of DNA and fingerprints set out above, we are also able to promote public confidence in the operation of that regime. We therefore propose to strengthen governance arrangements by placing the national DNA Database Strategy Board on a statutory footing and by introducing to it a wider independent membership.

17) Terrorism and National Security

Material taken under any regime (including the Terrorism Act 2000) would be able to be retained beyond the 6 year point where there is a case for doing so on the basis of a case-by-case review on national security grounds. This would require a review by a senior police officer every two years – although data would be deleted if it became clear between reviews that its retention would no longer be necessary. The policy for juveniles would be similar but would take account of the differential treatment proposed for juveniles more generally.