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Consent by Coercion

- the administration of Part 7 of the Crimes (Forensic Procedures) Act in NSW prisons

A Captive Databank

Part 7 of the NSW Crimes (Forensic Procedures) Act 2000 provides for the collection of samples from *serious indictable offenders* currently incarcerated in NSW prisons. Serious indictable offenders, as defined by the Act, are those convicted of an offence which could carry a *maximum* sentence of five or more years imprisonment.

Maximum sentences are meant to apply to only the worst instances of a particular offence and as such are rarely imposed in NSW courts. The majority of NSW prisoners subjected to forensic testing have been sentenced to considerably less than five years imprisonment, many to only a few months.

The legislation was introduced last year with much hype, including claims by the Minister of Police that it would 'result in the clear up of 80% of the unsolved crime in NSW' as '90% of crime is committed by 10% of people'. But there is little reason to believe that the mass testing of prisoners will lead to the large scale solution of crime.

Less than half of NSW prisoners reoffend after release and in very few of these cases would DNA evidence be relevant to investigation or prosecution. If risk of offending was to be the criteria for subjecting classes of NSW citizens to compulsory DNA testing possible targets would include men aged 18-30, who commit over 90% of the serious crime detected, and secondary school students, of whom more than half admit to having committed an imprisonable offence for which they were never detected.

Nor is mass testing of prisoners justifiable on cost/benefit grounds.

In spite of a huge increase in the number of laboratories performing forensic DNA testing and massive investment by state governments, the backlog of unanalysed samples in the US stood at over 750,000 in August 2000 and is still growing. While US prison systems continue to submit vast numbers of samples for analysis, police are left waiting for results which are vital to the investigation of serious crime.

There are already signs that NSW authorities have learned nothing from the US experience, with Dubbo police investigating a recent violent home invasion complaining about a two month wait for the results of forensic testing which they believe will identify the offenders.

Although Bob Carr and Peter Ryan announced in February last year that a Forensic Science Institute would be established before mass testing commenced there is still no sign of such an institute. All forensic DNA analysis in NSW is done by a handful of technicians in the Department of Health's Division of Analytical Laboratories, which Nick Cowdery QC has described as the worst forensic service in the world.

The mass testing of prisoners will not result the large scale clear up of unsolved crime and is already delaying the investigation of recent serious offences. So why is there such a rush to invade the bodies of imprisoned NSW citizens and extract their DNA?

The answer might be found in the first stated objective of the 1999 Project Plan for the implementation of the CrimTrac DNA database, which is to "Develop a national system containing a critical mass of DNA profiles which is used by all jurisdictions as soon as possible". (A 'critical mass of DNA profiles' is a reference database of sufficient size to give statistical foundation to the DNA match odds quoted in court.)

Former NSW Attorney General Jeff Shaw seemed to confirm that this was the real reason for collecting DNA from prisoners when he told media, "The proposed legislation will also give police the power to apply to a court to direct that a person already convicted of a serious offence supply a blood sample. These blood samples will provide a DNA databank for forensic matching in later crimes."

Australia's prisons serve as convenient factory-'pharms', enabling DNA data to be harvested from a large number of people on a production line basis with little external scrutiny. Once entered into CrimTrac this data will never be removed, even in the case of prisoners whose convictions are later overturned.

Whether obtained from crime scenes, volunteers, suspects or prisoners, no DNA profile will ever be deleted from the CrimTrac database.

While it would be politically 'courageous' to advocate the compulsory testing of men aged 18 to 30 or school students, few in authority are reluctant to further erode the rights of convicted prisoners. Prisoners are rarely able to speak out for their rights and those few who speak out for them are routinely ignored or silenced. This paper was produced in response to the refusal of the Sydney Institute of Criminology to allow Justice Action to address a forensic DNA seminar about the current treatment of NSW prisoners under the Department of Corrective Services' DNA testing regime.

Australian governments are helping themselves to the DNA of their imprisoned citizens for very simple reasons.

Because they can. Because we let them.

What the law says

The Crimes (Forensic Procedures) Act requires that prisoners be given the opportunity to consent to a buccal swab. If consent is refused a police officer can order a non-intimate sample (usually hair) be taken or apply for a court order authorising the taking of an intimate sample (blood).

Prisoners must be given the opportunity to seek legal advice before giving or refusing consent and Aboriginal prisoners may request the presence of an 'interview friend' during consent and testing.

Police may use reasonable force if necessary to carry out a forensic procedure or to protect samples. Prisoners who resist a *court ordered* test are liable to 12 months extra imprisonment and 50 penalty points.

Hair samples must be taken using 'the least painful method known' but unlike almost every other Australian jurisdiction and the provisions of the Model Criminal Officers Code, NSW does not require police to remove it one strand at a time. So when sampling prisoners NSW police tear out 6-12 hairs in a single twist.

If a prisoner's conviction is overturned his/her identifying data (excluding the DNA profile) must be deleted from the serious offenders index. However those who consent to a buccal swab will lose this right, as will those giving a non-intimate sample following a police order. Only prisoners tested under s75 of the Act (court ordered forensic samples) will retain the right to have their name removed from the serious offenders index should their conviction be quashed.

What Corrective Services do

Approximately 240 NSW prisoners have been tested per week since January 8 and over 6,000 are expected to be tested by the end of 2001. Premier Carr boasts that this is ahead of schedule.

As was to be expected, NSW Corrective Services has shown far more interest in administrative expediency than the observation of prisoners rights in the collection of DNA samples.

In November 2000 Justice Action began hearing complaints from prisoners who claimed they had been threatened with violence and loss of security classification in connection with testing. We continue to receive them almost daily.

In most cases threats were prompted by nothing more than a stated intent to exercise the right to refuse to consent to a mouth swab in the hope of gaining a court ordered test.

Sometimes threats continued right up to the point at which videotaping of consent proceedings commenced, with one prisoner even being called off video so that further threats could be made.

Inquiries by Justice Action to Corrective Services administration in December confirmed that prisoners could be reclassified following refusal of consent but that it should only occur if an 'intel report' indicated that they were at risk of escaping. The hope was expressed that 'not too many' would be transferred to high security jails in this way.

The first prisoner to be reclassified and shanghai'd in this way lost his work release after the Assistant Superintendent who failed to gain his consent with threats then claimed that the prisoner had "stated that he had committed offences for which he had not been caught".

Corrective Services Operations staff also told Justice Action that prisoners who did not consent to a mouth swab would be forcibly placed in restraints while in their cells, then carried or frogmarched to the testing venue, whether or not they offered physical resistance.

As part of their 'education program' for prisoners, the Department has produced a video and two brochures about DNA testing.

The brochure 'Forensic Procedures - Information for Inmates' (appendix 3) tells prisoners "*If you do not consent to a test, force will be used*". It also misleadingly implies that prisoners who refuse to consent to a mouth swab can be subjected to 12 month extra imprisonment. This brochure has been revised following protests from the Prisoners Legal Service and Justice Action in December, but the new version had still not been distributed by the end of March.

The eight page "Forensic Procedures - Information for Staff and Inmates" also states that force can be used on prisoners who are non-compliant with testing. It helpfully explains that those who do not consent to a mouth swab are to be designated 'non-compliant'.

It further claims that "a DNA profile is simply a numeric code which identifies the owner of the DNA. No further information can be obtained.". Most prisoners are aware that DNA profiles are routinely used to determine paternity and some also know that the profile for an absent person can be obtained by combining the profiles of blood relatives. Those who don't are presumably expected to give their misinformed consent to testing.

Aboriginal prisoners can have an interview friend present, as provided for in the Act, but incur all expenses involved in bringing the 'friend' to the prison. Corrective Services reserves the right to refuse admission to any interview friend it deems unsuitable.

Although the Department has undertaken to make copies of the Crimes (Forensic Procedures) Act available to prisoners before testing, those who have written to Justice Action have told of being unable to get access to the Act until after the consent procedure.

According to Commissioner Keliher, by 23rd March 2001, 2,347 NSW prisoners had been subjected to testing, with 94 refusing to consent to a buccal swab. Only four of these offered physical resistance after an order for a test had been produced. One had submitted to a court ordered blood test.

These figures do not include several prisoners who have been penalised following refusal of consent, as at the time of writing they are yet to be tested. It does not show how many consenting prisoners have done so under duress. It is also not clear whether ACT prisoners who have been tested following 'simple misunderstandings' (see appendix 2) are included in the totals.

What prisoners say

Justice Action began receiving reports from NSW prisoners about their treatment under the testing regime in November last year. By mid-January, DNA testing had supplanted cell searches and visiting procedures as the major cause of complaints to Justice Action by prisoners and their families.

Prisoners from all over NSW have told of threats of violence and loss of classification against those who indicate that they will not give consent to the testing. Male and female, maximum and minimum security, private and government, metropolitan and regional prisoners; all have related similar tales of disinformation and intimidation. The testing regimes in Silverwater, Goulburn and Lithgow jails in particular have provoked fear and resentment among those subjected to them.

Some prisoners have stood on their right to refuse consent and seen the threats against them put into effect. Many more have signed the consent form and immediately phoned or written Justice Action complaining of duress. In some cases, threats have continued right up to the point at which videotaping of consent has commenced.

Prisoners complain of replies from Justice Action about DNA testing being held for long periods. Some prisoners have received their opened mail from intelligence officers more than a month after it was sent. It seems that others are not receiving them at all. In January one prisoner had a visitor ask Justice Action to send him information as his letters to us had not been answered. They have still not been received either, and we are yet to get a reply to correspondence we have sent him.

Except where noted, the following quotes are taken from letters sent to Justice Action by NSW prisoners during the first three months of testing. Names have been removed for privacy reasons.

1) "A", a long term prisoner, was one of the first to be processed for testing. Following his refusal to consent to a forensic procedure he had his security classification downgraded, his work-release cancelled and was transferred from a low security metropolitan prison to a high security regional one, where he remains. The Department of Corrective Services says that these sanctions were not the result of "A" refusing consent, but because he told Assistant Superintendent "M" that "he had committed offences for which he had not been caught". "A" strenuously denies this.

"I would not consent as I have reservations concerning ... my civil rights, my common law rights and the threats that force would be used..."

"I had been vocal about this for some time..."

"Since .. [learning] .. what my legal rights were ... I was inclined to consent ... on the understanding that a court order was obtained so as to afford me my rights in the future ..."

"I did not tell [Asst Superintendent M] that I had done crimes for which I had not been caught ..."

"[Asst Superintendent M] is angry that someone stood up to the threat of force ... I have never escaped from custody nor do I hold inclinations of escaping, my prison record would show this to be true..."

"At no time have I been given the right to reply to these allegations..."

"[Asst Superintendent M] said he had a squad of 16 to 18 prison officers ready to use force ... that they were not going to allow inmates to obtain a court order ... [and] made sure I knew it would be him and his officers [rather than police] who would be using force..."

"What was done to me was done to scare the rest of the prisoners into compliance..."

"...this has been one hell of a kick up the backside ... denied rehabilitation and reintegration into society after I have been incarcerated [for] 23 years..."

"Everyone seems to think that these 'public servants' have the right to destroy me and any hope I have of making a life for myself upon release."

"B" is imprisoned in NSW for ACT and Federal offences. Inquiries to ACT and Federal authorities had led him to believe that he was not eligible to be tested by NSW police. On hearing that a seminar on DNA testing was to be held by the Sydney Institute of Criminology he wrote the account of his experiences in Appendix 1. His complaints about his treatment resulted in the Canberra Times article in Appendix 2, a stop to the testing of ACT prisoners in NSW and his own shanghai from Junee to Goulburn. In other letters to Justice Action he has written ;

"I must have hit a raw nerve on Monday with that DNA copper ... tipped to Goulburn Friday

AM - told Thursday lunchtime. The excuse was not submitting to psychological treatment. ... the letters to Wagga cops and ... the Canberra Times may have had more to do with it.

"March 5 was a busy day. British Consulate visited, fronted by the deputy governor, over [my] complaints to the Ombudsman ...10:30ish I saw [Senior DCS manager M] ... for a DNA test... 12:20ish I saw the cops, and you know that story...

"The ACT Parole Board has made psychological treatment at Junee a prerequisite for me to become eligible for parole...the treatment is not available here ...

"I haven't received the letters you sent to Junee ... I've written to JCC to try to find out what they've done with my mail...

"I'm being screwed from pillar to post by incompetent bureaucracies. I'm sure they think that ... I'm going to put up and shut up. But too much is going on which has got to be told to someone."

"C" is near the end of a long sentence in a metropolitan womens prison. She has phoned Justice Action several times while on work release to ask about her rights in regard to DNA testing, expressing fear that any inquiries she makes from the prison will result in repercussions for her. The following is reconstructed from notes taken during these phone calls.

"They said I had the right to get legal advice, but they just listen in and use it against you if you do ...

"When I was telling [Officer O] about that New Zealand guy who nearly got done for murder when they messed up his DNA test [Officer T] said it couldn't happen and that some people had been spreading lies about DNA testing in the prison to stir up trouble, but there would be trouble for them instead...

"[Officer O] says she thinks it sucks too, how they're trying to scare everyone into shutting up and signing the consent. But she says there's nothing anyone can do anyway and I should just go along with it if I want to keep my work release..."

"Everyone is scared of being forced and only me and one other girl are game enough to refuse to sign. I'm not scared of a bashing, I've had lots of them in my time. But I don't want to lose my classo over this."

"D" has written numerous letters to Justice Action, HREOC, the NSW Privacy Commission and the Council for Civil Liberties about DNA testing. He actually approves of forensic DNA testing because he believes it may lead to the overturn of his conviction. However he knows that his name will not be removed from the serious offenders index if he consents to testing and had intended to refuse consent in the hope of gaining a court ordered test. The threats he received upon making this known forced him to reconsider and he eventually signed the consent form.

"Whilst waiting to be called into this forensic procedure I was warned by a DCS officer that the police were removing hair from inmates on the spot for not consenting ..."

"[I was put] in a no-win situation with the gathering of 3 male corrective services officers in the visiting area and 4 police officers in the management area."

"Under the circumstances I unwillingly consented ... to avoid conflict between officers and myself as well as ... future retribution from the Department of Corrective Services."

"E" is due for parole in April, 2001. He too had planned to refuse consent to a mouth swab and hoped to legally challenge the right of police to take a sample without a court order. However in January he wrote ;

"[Several DCS officers] told me if I do not consent to the mouth swab I will be non-compliant and I will not get parole until after I am tested..."

"If I do not consent I will not get tested until later this year, and I am supposed to be out of here in April ..."

"I know it is a matter of principle and I still have not decided [whether to give consent] but [the principle] is not important enough to spend another 6 months in here."

"F" is determined to retain the right to have his name removed from the database if exonerated. He has refused to consent to a mouth swab and shaved all hair from his head and body to avoid a police ordered hair test. In March he phoned Justice Action saying -

"They laughed and said it didn't matter. That they were just going to come back and hold me down and take my blood and there was no way I was getting a court order."

Justice Action told "F" that he should demand to see a court order if anyone tries to take his blood but advised against physical resistance whether or not they produced one.

"G" is a Federal prisoner in a NSW jail. In March he phoned Justice Action saying that police officers had interviewed him demanding a mouth swab. When he refused they held him and took hair on the spot. They did not identify themselves and he is unsure as to whether they were NSW or Federal police. At the time of writing Justice Action is yet to receive a reply from "G" to a letter asking for written details of the incident.

"H" had phoned Justice Action about forensic testing and received the advise that he should not consent to a mouth swab but should not resist a police or court ordered test. In February he wrote

"Maybe you think that we've got the right to refuse a swab test, but let me tell you thats not how it works in Goulburn ..."

"It is clear what will happen to me to me if I refuse and complaining to [outside agencies] won't change anything ..."

"I haven't done anything I can be punished more for so I'd rather just do the test and avoid the hassles."

In December "J" phoned Justice Action from Goulburn prison about the way information about the Crimes (Forensic Procedures) Act was being disseminated by Corrective Services. In his opinion, the Department was deliberately stirring up trouble between Aboriginal and other prisoners, particularly those of Pacific island descent, about the different provisions in the Act relating to ATSI prisoners.

He feels that this was being done to discourage Aboriginal prisoners from exercising any of the rights available specifically to them under the Act. He warned that it was getting completely out of hand and "if Goulburn goes up soon, you'll know why".

A few weeks later, Justice Action received a list of greivances signed by 53 Goulburn prisoners (around 10% of the prison population) which said in part;

"Are you aware of the growing disparity between the non-Aboriginal and Aboriginal prison population - ... the last 3 legislative changes to DNA testing for one provides an exclusive right to Aborigines to have a friend to quote the provision - friend being a family

friend or legal advisor ... no other inmate in this country has such special status or privilege."

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References

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"DNA lag leaves thugs on loose", Frank Walker, Sun-Herald, 18-Feb-2001

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DNA Testing and Criminal Justice, Gareth Griffith, NSW Parliamentary Library Research Service, April 2000

Appendices

A1- Letter from Prisoner "B"

A2 - *Police to Destroy ACT prisoners DNA*, Danielle Cronin, March 2, 2001, Canberra Times.

A3 - Corrective Services information brochure *"Forensic Procedures - Information for Inmates"*

A4 - Justice Action information brochure *"DNA Testing and NSW Prisoners"*