

NSW Prisoners and the DNA Laws

On July 28 the NSW parliament passed into law the Crimes (Forensic Procedures) Bill 2000 in the face of detailed objections from many professional, political and community groups. These included the Aboriginal Legal Service, the Bar Association, the NSW Privacy Commission, the Ethnic Communities Council, several NSW parliamentary crossbenchers, the Law Society, CRC Justice Support, the Council for Civil Liberties, the Positive Justice Centre and, of course, Justice Action.

Extraordinarily, the chief drafter of the bill and its sponsor in the Legislative Council, (ex-)Attorney General Jeff Shaw was not present for the passage of the legislation. In an act reminiscent of Pontius Pilate he announced his resignation from parliament while the bill was being debated.

The main purpose of the new law is to allow the voluntary or forcible extraction of DNA samples from wide sections of the NSW public and the retention of the resulting genetic profiles, whether or not the sample donor is suspected, convicted or completely exonerated of any offence.

These profiles have become marketable commodities over the past decade and are routinely on sold to private corporations overseas. The bill provides the framework for the harvesting and eventual privatisation of the genetic code of all NSW citizens but, as usual, it is prisoners who will bear the brunt of its most draconian provisions.

Any NSW prisoner convicted of an offence anywhere in Australia at any time which could have carried a penalty of five or more years imprisonment is considered a 'serious indictable offender' under the act and is subject to forcible DNA extraction, whether or not they are suspected of further offences. The profiles will be used in police fishing expeditions in an attempt to link prisoners with unsolved crimes.

Prisoners must first be asked to consent to a test. If consent is not given within a few days either a police officer will order a hair sample be taken or a court order will be sought for a mouth swab or blood test. Although a court ordered DNA test provides far more protection to the sample donor than one volunteered or taken on police say so, few prisoners will be given this option. Police will almost certainly seek to cut through redtape and prisoners' rights by simply insisting on a hair sample without recourse to the courts, and in most cases the legislation grants them the power to do this. However all prisoners have the right to seek legal advice before consenting to a test and Justice Action recommends that you do so.

Why worry? Surely the innocent have nothing to fear?

Unfortunately they do, as a New Zealand assault victim recently discovered when botched DNA testing made him a suspect in two Wellington gang murders.

Forensic DNA technology has great potential for solving crime, freeing the wrongly convicted and eliminating false suspects. But it is not fingerprinting.

Fingerprints are relatively easy to gather and interpret and very difficult to fake. DNA testing requires great care and expertise in collection, analysis and interpretation while the planting of evidence is so simple it could even be done accidentally by a police officer who had recently questioned a suspect.

In 1998 a US Justice Department inquiry found that FBI DNA labs regularly distort the results of DNA testing to the benefit of the prosecution, including one technician who falsified the results of any tests he did on Afro-Americans in an attempt to gain convictions.

Independent testing of DNA labs in the US has shown error rates of between 1% and 2.2%, mostly false positives. This might not sound like much, but when an expert witness stands up in court to claim DNA matches with 'million to one' certainty it is worth remembering that the labs mess it up completely at least once every one hundred times. Each of the 5000+ prisoners to be tested in NSW will be matched against over 15,000 crime scene samples, more than 75 million attempted matches. Plenty of room for error there. Especially as NSW forensic labs are 'the worst in the world' according to DPP chief Nicholas Cowdery QC.

Although the NSW law will grant police greater powers than their US or UK counterparts there are few of the provisions for oversight and monitoring of lab procedures which exist overseas. While the Premier and Police Minister have promised an independent 'guardian' of DNA information no such requirement has been written into the legislation and there is still no sign of it. However the Ombudsman is required to 'keep under scrutiny' the actions of the police during the first two years of operation of the new laws. Those who wish to lay complaints against the way police handle seeking consent, collecting samples or protecting the results should write to the Ombudsman at the address below. Justice Action would also be interested in any observations prisoners may have about enforcement of DNA legislation.

There is little provision in the new laws for those who may want to use DNA testing to prove their innocence. Suspects and prisoners are not guaranteed access to DNA samples which may exonerate them unless the sample came from their own body and there is 'sufficient material' left after testing. Recent announcements by the Premier of a DNA "Innocence Project", based on the high profile Californian model started by OJ Simpson lawyer Barry Scheck, are meaningless in the absence of legal access to the evidence.

Many aspects of forensic DNA testing are considered controversial by the scientific community. None more so than the statistical methods used to generate the 'match odds' used in court.

Cases in the US have seen different expert witnesses give match odds varying from less than 1 in 100 to more than 1 in 100 million from the same test results. All too often it is a case of 'he who has the most expensive expert wins'. There have been no additional funds provided to NSW Legal Aid to cover the huge costs of challenging DNA evidence.

Prisoners can be subject to blood tests, hair sampling or mouth swabs with their consent. If consent is not given, a magistrate may order any of the tests or a police officer can order a hair sample be taken. As DNA testing is actually done on the root of the hair, it must be pulled out rather than cut. The hair is meant to be taken by the 'least painful' method available.

Prisoners in the US have developed various methods of attempting to foil DNA testing, including spitting into each other's mouths prior to a mouth swab. While these techniques have been known to spoil individual samples, they are not likely to lead to an incorrect profile being recorded. Usually prisoners will simply be required to provide another sample, perhaps by blood testing instead.

Section 87 of the bill calls for the destruction of samples and identifying data of prisoners who later have their convictions quashed, but ONLY if the testing was done as the result of a magistrate's order. Prisoners who have consented to be tested, or who have had hair samples taken according to a police order do not have the right to demand destruction of their samples and records, even if the test results overturn their convictions.

However there are allowances for Aboriginal people, Torres Strait Islanders and those less than 18 years old to request the presence of an 'interview friend' (e.g. a relative or legal representative) when being informed of the test and an independent medical or legal practitioner during the actual testing.

Even those innocent of any crime who remain eligible to have their names removed from the database will not be able to get their DNA profile erased.

The NSW government will keep all profiles whether from prisoners, suspects or volunteers. It will not be an offence in NSW to sell this data to pharmaceutical companies or private investigators once identifying information has been removed. Australian law even allows for the private patenting of DNA sequences found in Australian citizens, without requiring their knowledge or permission.

So what should NSW prisoners do when they come to harvest your genes?

1. Prisoners must be given the opportunity to consult a legal advisor before giving or refusing consent. Do not give consent without seeking legal advice as to how this will affect your individual case. Aboriginal prisoners have the right to have a relative or legal advisor present when consent is being sought and should not give up this right unless they are absolutely sure they wish to. If you do give consent, non-police witness must be present to countersign your consent form.

2. If you refuse consent you will be liable for compulsory testing and it will be up to the police officer whether to order a hair sample be taken or to request a court order for a blood test. If you have had legal advice that a court order is required before you can be compelled to give a sample you should seek such an order as it is the only way you will retain the right to have samples destroyed should your conviction be overturned. Generally only prisoners conducting an appeal or currently under investigation will be given this option.

3. How to respond to lawful testing will be your decision. But keep in mind that police are explicitly authorised to use as much force as they consider 'reasonable' in taking and protecting forensic samples. If a court order has been obtained for testing, attempting to interfere with the test carries 12 months prison and 50 penalty units. Police do not require a court order to take hair samples.

4. Aboriginal prisoners and those under 18 have the right to the presence of an interview friend or legal representative during the actual test (as well as when consent is being sought). Non-Aboriginal prisoners will not usually be given this right but should ask if it is possible to have someone other than police present when testing is done.

Corrective Services will soon make copies of the Crimes (Forensic Procedures) Bill 2000 available in prison libraries. Few lawyers are familiar with the new laws yet, so it will ultimately be up to prisoners themselves to find out what rights they retain under the bill.

If you want further information on DNA testing or prisoners' rights under the new legislation, please write to "DNA Information", c/o Justice Action, PO Box 386, Broadway NSW, 2007. If you wish to register a complaint about your treatment or that of fellow prisoners resulting from the new laws, write to the NSW Ombudsman (3rd Floor, 580 George St, Sydney 2000, ph: 9286 1000 or 1800 451 524), the Office of the Inspector-General of Corrective Services, PO Box K1313, Haymarket, 1240 or Justice Action.