

## **Crimes (Forensic Procedures) Bill 2000 Amendment Proposals**

### **Taking of bodily samples without consent**

Before 1995 NSW citizens were protected under common law against the taking of their bodily materials without consent. It had been considered an assault and a trespass against the person. Following the Fernando case, interim amendments to section 353A of the Crimes Act 1900 were made which extinguished these protections in regard to those in lawful custody under suspicion of a serious indictable offence for which forensic evidence so obtained is likely to be probative. This places NSW in contravention of Article 14 (3) (g) of the International Covenant on Civil and Political Rights. The Crimes (Forensic Procedures) Act seeks to permanently extinguish these rights and extend that extinguishment to those suspected of summary or indictable offences but not in lawful custody and those convicted of a serious offence but not suspected of any unsolved crime.

### **ALTERNATIVE 1.**

All parts of the Act allowing the taking of a forensic sample without consent of the subject to be deleted.

### **ALTERNATIVE 2**

A magistrate may not order that a forensic procedure be carried out without consent, but if satisfied that such a procedure is appropriate (as per Part 5 of the Act), may order that the suspect comply with a request for a forensic procedure. Failure to comply with a request for forensic procedure following such an order would amount to an offence similar to that of 'contempt of court' which is more usually used upon those who refuse to provide evidence subject to a court order. Penalties for such an offence would not include the forcible extraction of bodily material.

### **ALTERNATIVE 3**

The decision as to whether a compulsory forensic procedure is appropriate should not be left up to a police officer. Strike out all parts of the Act which authorise anyone other than a magistrate to authorise such a procedure. This would be a particularly important safeguard to implement during the 18 month trial period so that magistrates might establish suitable guidelines by precedent as to what constitutes "reasonable grounds for suspicion" and "likely to produce probative evidence".

### **Independent investigating authority**

On May 17 the Sydney Morning Herald reported that the government was responding to privacy concerns by implementing an independent body to hold, and when appropriate, destroy forensic samples obtained according to the Act. It is vital that the Act not be implemented without guarantees of such oversight. Laboratories should also be subject to independent oversight to ensure that adequate lab standards and sample/data security are maintained and in order to determine the error rate of the laboratory, which is vital in assessing the evidence.

### **ALTERNATIVE 1**

The bill should be referred to the Legislative Council Standing Committee on Law and Justice to enable expert and public opinion to be sought as to the monitoring, safeguards and oversight necessary to ensure the successful integration of forensic DNA technology into NSW policing, courts and society.

## ALTERNATIVE 2

The Act should not be proclaimed until parliament is satisfied that adequate provision has been made for the monitoring and oversight of its implementation and the establishment of an independent body to test, store, analyse and record evidence obtained from forensic procedures upon persons and at crime scenes, as promised by the Premier and Police Minister in mid-May.

There should also be an independent body to assure that adequate procedures and security are established and maintained in forensic laboratories. Its functions should include defining of standards and monitoring of error rates in laboratories and the accreditation of labs and technicians. It is also important that a single accepted protocol for the calculation of match odds be established in order to discourage prosecutors and defenders from 'shopping' for population geneticists who employ the mathematical models most advantageous to their case. (e.g. the New York 'Castro' case the court was expected to choose between a prosecution expert witness claiming match odds of 300 million to one and a defence expert witness using the same test results to arrive at match odds of 24 to 1. It chose the latter) This body should also be charged with regularly reviewing the cost effectiveness of forensic DNA procedures in NSW and issuing guidelines to police and magistrates as to their use in order to avoid the US experience of a huge backlog of untested forensic samples.

## ALTERNATIVE 3

Further debate upon the bill should be adjourned until the promised independent guardian has been established and the Ombudsmans office has reported as to its capability to carry out the responsibilities imposed upon it by the Act.

### **Decision on classification of volunteers left up to police**

It is left up to police discretion whether profiles obtained from volunteers are placed on the 'limited use' or 'unlimited use' index. In the latter case attempts may be made to match the volunteer's profile with those obtained from scenes of crimes of which the volunteer is not suspected. This will not only serve to discourage people from volunteering samples which might provide important evidence relating to a specific crime, it can also lead to the investigation of volunteers for crimes with which they have no connection, as has recently happened in New Zealand. The bill also allows for the placement of DNA profiles from deceased people to be automatically placed on the unlimited use index regardless of the intent of next of kin.

## AMEND

- 77 (2) (b) if the volunteer consents to the information to be placed on the volunteers (limited purposes) index of that system-the purpose for which it is to be placed on that index and that the information may be used only for that purpose,
- (c) if the volunteer consents to the information to be placed on the volunteers (unlimited purposes) index of that system-that the information may be used for the purposes of a criminal investigation or any other purpose for which the DNA database system may be used under Part 11 or 12,

90 *volunteers (limited purposes) index* means an index of DNA profiles derived from forensic material taken in accordance with Part 8 or under a corresponding law of a participating jurisdiction from :

- (a) volunteers who (or whose parents or guardians) have been informed that information obtained will be used only for a purpose specified to them under section 77 (2) (b) and have given consent that the information be used for this purpose, and
- (b) from deceased persons whose identity is known whose next of kin been

informed that information obtained will be used only for a purpose specified to them under section 77 (2) (b) and have given consent that the information be used for this purpose, and  
(c) from deceased persons whose identity is known for which a magistrates order has been granted allowing that information obtained will be used only for a purpose

specified under section 77 (2) (b)  
*volunteers (unlimited purposes) index* means an index of DNA profiles derived from material taken:

- (a) in accordance with Part 8 or under a corresponding law of a participating jurisdiction from volunteers who (or whose parents or guardians) have been informed under section 77 (2) (c) that information obtained may be used for the purpose of a criminal investigation or any other purpose for which the DNA database system may be used under this Part or Part 12 and have given consent that the information be used for this purpose, and
- (b) from deceased persons whose identity is known whose next of kin been informed that information obtained will be used only for a purpose specified to them under section 77 (2) (c) and have given consent that the information be used for this purpose, and
- (c) from deceased persons whose identity is known for which a magistrates order has been granted allowing that information obtained will be used for a purpose specified under section 77 (2) (c)

#### **Prohibited Analysis definition**

The definition of 'prohibited analysis' only covers procedures which result in a profile being recorded on a 'DNA database system'. The analysis of illicitly obtained or retained forensic samples should be prohibited regardless of the intended use of the data extracted.

#### **AMEND**

91 (1) *prohibited analysis* means analysis for the purpose of deriving a DNA profile when the forensic material is required to be destroyed by this Act or under a corresponding law of a participating jurisdiction.

#### **Compulsory testing of those imprisoned for serious offences**

The Act is unprecedented in that it allows for those convicted of a serious offence be subject to forcible removal of bodily material which will be used in an attempt to implicate them in unsolved crimes of which they are not suspected of involvement. The majority of serious offenders will never reoffend (i.e. conviction for serious offence does not imply suspicion on 'balance of probabilities' of further offences) and they deserve the same presumption of innocence before the law as any citizen. The sheer number of crossmatches this will entail (6,500 serious offenders per year \* 15,000 crime scene samples = 97.5 million crossmatches) will not only require considerable funding, they will also exceed both the theoretical and practical limits of forensic DNA technology. Having a conviction for serious offence will place the prisoner in a particularly vulnerable position. This is exactly the sort of police 'fishing' expeditions the legislation is meant to avoid. By allowing the removal of the right to bodily integrity of those convicted prior to the act, it embodies a retrospectivity normally avoided in NSW legislation.

#### **AMEND**

Replace all references to 'suspect or serious indictable offender', 'suspect or serious offender' and 'suspect or offender' with 'suspect'.

Part 7 should be rewritten to ensure that serious offenders not suspected of an unsolved crime are only subject to forensic testing with informed consent or

upon finding by magistrate that it is in the public interest to obtain, analyse and record such a sample.

#### 90 Definitions

*offender's index* means an index of DNA profiles derived from forensic material taken from:

- (i) a serious indictable offender where informed consent for the retention of the profile has been obtained and not withdrawn
- (ii) a serious indictable offender for which a magistrate has found it to be in the public interest that a DNA profile be retained in accordance with Part 7

91 (3) (c) taken from a volunteer in accordance with Part 8, an offender in accordance with Part 7 or under a corresponding law of a participating jurisdiction, or

94 (3) The responsible person for the DNA database system must remove any identifying information relating to a DNA profile of an offender on the offenders index of the system from the system as soon as practicable after becoming aware that the offender has been pardoned or acquitted of the offence concerned, if the conviction has been quashed, if a magistrate's order for the retention of records has lapsed or been rescinded or if previously obtained consent has been withdrawn.

87 If an order is obtained under Part 7 for the carrying out of a forensic procedure on a serious indictable offender and the offender's conviction is quashed after the making of the order, the police officer who obtained the order (or some other police officer) must, as soon as practicable after the conviction is quashed, ensure that any forensic material obtained as a result of the carrying out of the procedure is destroyed.

Note that this amendment will be necessary even if compulsory testing of serious offenders is retained in order to prevent the retention of offenders index records which have been obtained voluntarily (such as when a voluntary DNA test overturns a conviction) or by order of a police officer.

#### **Definition of serious indictable offender**

The definition of 'serious indictable offender' far is too broad. It includes those who have been convicted in the distant past or another jurisdiction. It is unacceptable that someone with a single serious conviction in another State decades in the past can be made the subject of police inquiries and forced to undergo a medical procedure with no grounds whatsoever for suspicion of involvement in any further offences. The second part of the definition of 'serious indictable offence' allows for the most draconian penalty in a participating jurisdiction to be used as the benchmark, thereby a 3 strikes law in WA or a mandatory sentencing law in NT which would be unacceptable in NSW can be used as the measure of 'serious indictable offence' in this state. It is also not clear whether the penalties used as a benchmark would be those applying now or at the time of conviction for the offence. The removal of the right to bodily integrity of those convicted before the enactment of the legislation represents the retrospective application of a penalty not intended by the sentencing magistrate. Although varying degrees of seriousness of specific crimes are recognised by our legal system in varying sentences handed down by magistrates the bill makes no such distinction. Even a non-custodial sentence is considered indicative of a

serious offence if it could have resulted in 5+ years of imprisonment.

## AMEND

### 3 (1) Definitions

*serious indictable offence*, an indictable offence under a law of the State or of a participating jurisdiction that would be punishable by imprisonment for life or a maximum penalty of 5 or more years imprisonment were it to have been committed in NSW

*serious indictable offender*, means a person currently imprisoned for 5 or more years in NSW for a serious indictable offence for which the person was convicted on a date subsequent to the proclamation of this Act

### "Informed" consent

The Act fails to provide sufficient guarantees that someone who may be subject to a forensic procedure by consent receives sufficient information to enable an informed decision to be made. 13 (j) specifies that a suspect must be told if an order might be made for a nonconsensual procedure, but does not specify that s/he must also be told if no such provision applies. There is also no provision for subjects to be disavowed of any apprehensions gained from the media or statements of the Police Minister as to the infallibility of forensic DNA testing (i.e. 'the innocent have nothing to fear').

### INSERT

13 (8) If a person is not subject to any provisions which may allow for an application for nonconsensual forensic procedures to be carried out s/he must be explicitly informed of this.

13 (9) If the suspect is subject to a procedure which might allow his/her DNA profile to be crossmatched against crime samples s/he must be told that the theoretical and practical limits of DNA profiling may result in him/her being subject to investigation for offences which s/he did not commit.

13 (10) The suspect must be informed that information obtained from his/her DNA profile might also be used as evidence to identify family members and may reveal details of family relationships of which the suspect is unaware.

13 (11) If a DNA sample is requested with the intent that it be used to identify a family member  
or is to be used in evidence relating to an offence for which a family member is a suspect  
the sample provider must be explicitly informed of this.

77 (2) (f) that the DNA profile might be used to aid in the identification of a family member and might

be used in evidence against a family member.

(g) of the theoretical and practical limits of forensic DNA technology and that the volunteer

may become subject to investigation over a crime s/he did not commit.

(h) that the information obtained from forensic DNA testing might reveal details about family relationships of which the volunteer is unaware.

77 (3) If the police officer intends forensic evidence gained from the volunteer to be used in

identification of a family member the volunteer must be explicitly informed of this.

### **Magistrates orders for forensic procedures upon children and the incapable**

Clauses 80 & 81 are extraordinary in the grounds they allow for granting a Magistrate's order upon a child or incapable person. Not only does inability to 'reasonably obtain' the consent of parent or guardian constitute sufficient grounds, the fact that the parent or guardian may be a suspect is considered grounds for ordering the compulsory testing of a child. Having a parent give consent then withdraw it may also lead to such an order. This seems to be designed to allow police to build up the DNA profile of a subject by recourse to testing the subject's family when grounds do not exist for ordering a test of the subject himself/herself.

### **DELETE**

Clause 81.

### **AMEND**

80 (1) A Magistrate may order the carrying out of a forensic procedure on a child or incapable person if:

- (i) the child or incapable person is a suspect, and
- (ii) the forensic procedure is likely to produce evidence tending to confirm or disprove that he or she committed the offence of which he or she is suspected

### **Use of reasonable force to prevent destruction of forensic evidence**

Clause 37 authorises the use of 'reasonable force' by police to prevent the destruction of forensic evidence while waiting for the determination of an interim order yet there are no warning or recording requirements. It is also not clear in the legislation that only evidence subject to an interim order (which requires written justification of 'reasonable grounds') can be protected by force. Police may also deny a suspect private access to a legal representative on these grounds.

### **AMEND**

37 (1) A police officer may, while waiting for the application seeking an interim order to be determined, use minimum practicable force to prevent the suspect destroying or contaminating evidence for which the application has been made.

48 Procedures relating to collection or protection of forensic evidence are not to be carried out in cruel, inhuman or degrading manner Nothing in this Act authorises the carrying out of a forensic procedure, or actions taken in order to prevent the destruction or contamination of evidence to be carried out in a cruel, inhuman or degrading manner but the carrying out of a forensic procedure on a suspect in accordance with this Act is not of itself taken to be cruel, inhuman or degrading to the suspect.

### **INSERT**

9 (3) (ii) &

10 (8) (ii) As soon as practicable following the denial of private communication with a legal representative in accordance with 9 (3) (i) the responsible police officer must make record of the grounds for belief that the suspect may attempt to destroy evidence.

Note: should probably be made to give the reason to the suspect and/or legal representative as well

33 (9) Upon application for an interim order the authorised applicant

must caution the suspect to the effect that force may be used to prevent the contamination or destruction of the evidence for which an interim order has been applied.

37(3) As soon as practicable following the use of force to prevent contamination or destruction of forensic evidence the senior police officer must make record of

- (i) The grounds for belief that the suspect would have contaminated or destroyed evidence had force not been applied.
- (ii) The basis whereby the degree of force employed was considered necessary to ensure protection of evidence.

37 (4) Nothing in this section allows for a suspect to be forcibly prevented from carrying out actions consistent with the reasonable maintenance of personal hygiene.

#### **Classification of buccal swabs**

The Crimes (Forensic Procedures) Act differs from the SCAG 2000 model in that it does not classify buccal swabs as 'intimate forensic samples'. They are treated under the act in all ways as 'intimate forensic samples' except that police officers are authorised to carry out buccal swabs without the suspect having the right to have a medical practitioner present and subjects need only be suspected of a summary offence before a buccal swab may be ordered.

#### **AMEND**

All references in the Act to "intimate forensic procedure or buccal swab" to be replaced with "intimate forensic procedure".

3 (1) Definitions

*Forensic procedure* strike out "(c) the taking of a sample by buccal swab"

(d) strike out "except the mouth"

*Intimate forensic procedure* (c) strike out "(otherwise than by buccal swab)"

19 Replace all references to 'sample by buccal swab' with 'non-intimate forensic sample'

Note: this will also ensure that a suspect has been given the option to consent to a non-intimate sample before forcible sampling can be ordered

98 (2) (b) strike out ", or taking of a sample by buccal swab from,"

#### **DELETE**

12 (f), 13 (2) (b), 13 (6), 13 (7), 25 (e), 50 (4) row 3, 53 (b), 61 (3), 64, 69 (4), 70 (2), 74 (3)

#### **Liability arising from forensic procedures**

Clause 107 is far too broad in its exemption from liability for those carrying out forensic procedures in an irresponsible manner.

#### **ADD**

107 (2) Nothing in this act exempts from liability any person who employs excessive force or negligently endangers health in:

- (i) the performance of forensic procedures or,
- (ii) preventing the contamination or destruction of forensic evidence

#### **'Fishing' clauses**

The phrasing of several clauses in the Act serve to provide loopholes whereby police might 'go fishing' in absence of any reasonable suspicion of an offence. For example, Clause 12 (c) (iii) would seem to allow police to request a forensic procedure on the basis of "providing

evidence which would tend to disprove that the suspect committed the Wanda Beach murders".

## DELETE

12 (c) (iii), 12 (d) (iii), 12 (e) (iii), 12 (f) (iii), 20 (c) (iii), 25 (b) (iii), 25 (c) (iii),  
25 (d) (iii), 25 (e) (iii), 49 (a) (iii)

### **Meaning of 'reasonable grounds'**

The Act makes much recourse to the expression 'reasonable grounds' when attempting to quantify the basis upon which a police officer might request or order a forensic procedure, yet there is no indication as to what might constitute these. The NSW police apparently had 'reasonable grounds to suspect' every male in Wee Waa of the rape of Rita Knight, while knowing that no more than one of them had committed the offence. Belief on the balance of probability provides a more exact definition while also retaining some measure of presumption of innocence. The provision for denying private access to a legal practitioner is so broadly worded it would allow such a denial should the police 'suspect' that someone 'might' attempt to contaminate forensic evidence at any time, regardless of whether the private consultation would offer any such opportunities.

## AMEND

### 3 (1) Definitions

*suspect* (a) a person whom a police officer believes on  
balance of probability to have committed an offence,

9 (3) If the suspect is under arrest, the police officer need not allow the suspect to communicate, or attempt to communicate, with the legal practitioner in private if the police officer believes on balance of probability that it would lead to the destruction or contamination of any evidence that might be obtained by carrying out the forensic procedure.

10 (8) If a suspect covered by subsection (6) or (7) is under arrest, the police officer need not allow the suspect to communicate, or attempt to communicate, with the legal practitioner, or the suspect's interview friend or legal representative, in private if the police officer believes on balance of probability that it would lead to the destruction or contamination of any evidence that might be obtained by carrying out the forensic procedure.

20 (c) there are grounds to believe on balance of probability that the suspect committed:

25 (b) if the forensic procedure concerned is an intimate forensic procedure, on the evidence before the Magistrate there are grounds to believe on balance of probability that the suspect committed:

(c) if the forensic procedure concerned is a non-intimate forensic procedure other than the taking of a sample of hair other than pubic hair, on the evidence before the Magistrate, there are grounds to believe on balance of probability that the suspect committed:

(d) if the forensic procedure concerned is the taking of a sample of hair other than pubic hair, on the evidence before the Magistrate, there are reasonable grounds to believe that the suspect committed:

(e) if the forensic procedure concerned is the taking of a sample by buccal swab, on the evidence before the Magistrate, there are

reasonable grounds to believe that the suspect committed:

- 67 (2) The police officer must allow the offender to communicate, or attempt to communicate, with the legal practitioner in private unless the police officer believes on balance of probabilities that it would lead to the destruction or contamination of any evidence that might be obtained by carrying out the forensic procedure.

**Note.** Section 103 states that the burden lies on the prosecution to prove on the balance of probabilities that a police officer had a belief on balance of probability.

- 80 (b) the parent or guardian of the child or incapable person refuses consent to the carrying out of the forensic procedure and the Magistrate is satisfied that there are grounds to believe on balance of probability that:

#### 103 Proof of belief on balance of probability

In any proceedings, the burden lies on the prosecution to prove on the balance of probabilities that a police officer had a belief on balance of probability or suspected on reasonable grounds, as to a matter referred to in this Act.

Note that the reference to suspicion on reasonable grounds remains applicable to several procedures under the act.

#### **Use of force in performing a forensic procedure**

The definition of 'reasonable force' is too broad to be applied to the yanking of hair or the shoving of a swab into a mouth.

#### AMEND

- 47 (1) Subject to subsection (2) and section 48, a person authorised to carry out a forensic procedure on a suspect, or a police officer, may use the minimum force practicable:

#### ADD

- 47 (3) Any person employing force in order to carry out a forensic procedure authorised by this Act must as soon as practicably record the circumstances justifying the degree of force employed.
- 47 (4) Due care must be observed in ensuring that all forensic procedures are carried out in a manner which minimises the pain and risk of injury to the subject.

#### **Destruction of forensic material after conviction quashed**

The bill allows for the taking of forensic materials from serious offenders with their consent, following a police order or following a magistrates order. A serious offender may also have had a sample taken during the course of an investigation. However, should the conviction be quashed, clause 87 only allows for the destruction of forensic evidence taken by magistrates order under clause 75.

#### AMEND

#### **87 Destruction of forensic material taken from offender after conviction quashed**

If a forensic procedure has been carried out on a serious indictable offender or a suspect who is later convicted and the conviction is quashed the police officer who requested the procedure (or some other police officer) must, as soon as practicable after the conviction is quashed, ensure that any forensic material obtained as a result of the carrying out of the procedure is destroyed.

#### **Sharing of data obtained from forensic procedures**

Clause 97 allows information from the NSW DNA database to be shared with the Commonwealth, other States and Territories which have laws which 'substantially correspond' to Part 11 of the NSW bill (which does not include provision for the destruction of samples). The Northern Territory and Western Australian laws have received much criticism for their failure to protect samples and data, particularly that of volunteers. The proposed Queensland legislation has received similar criticism from the Parliamentary Scrutiny of Legislation Committee. The definition of 'substantial correspondence' will presumably be left to the Minister of the day. The wording of 97 (2) would seem to allow the retention of data after the destruction of forensic material is required if it would not be used to discover the identity of a person (e.g. commercial or research purposes) or if the participating jurisdiction does not have currently enacted laws mandating the destruction of such material.

## AMEND

### 95 Definitions

*corresponding law* means a law relating to the carrying out of forensic procedures and DNA databases that substantially corresponds to this Act.

97 (2) Information that is transmitted under this section must not be recorded or maintained in any database of information at any time after this Act requires the forensic material to which it relates to be destroyed.

## ADD

97 (3) Before entering into an arrangement for the sharing of DNA database information with a participating jurisdiction the Minister must be satisfied that :

- (i) the corresponding laws of the participating jurisdiction does not allow the data to be shared with any party which would not be considered a participating jurisdiction under this Act
- (ii) the participating jurisdiction does not permit the information to be used for purposes not permitted under this Act

### 'Any other purpose prescribed by regulations'

Clause 92 (2) (j) allows access to DNA database information for 'any other purpose prescribed by the regulations', yet the purposed prescribed by the regulations are defined in the rest of 92 (2). This would seem to serve little purpose but opens the act to possible loopholes.

## DELETE

92 (2) (j)

### Matching for purposes of 'administering an DNA database'

Clause 93 (4) would seem to allow normally impermissible matches to be made for the purpose of 'administering' the database. It is unclear what possible administrative purpose could be served by allowing such matches. This would represent an increased risk of corruption on the part of database administrators able to 'privately' perform normally prohibited analyses.

## DELETE

93 (4)

### Sufficient material to share

Clause 58 purports to ensure that a suspect will have access to forensic evidence which may exonerate him/her, but it only applies to material taken from the suspect himself/herself (i.e. it excludes material taken from a crime scene which may serve to implicate or exonerate a subject). It only allows for sharing of material if any remains following analysis for investigation

but gives no indication as to how many such analyses may be performed (i.e. the sample may be used up). There is also no provision in the bill for guaranteed access of the already convicted to forensic samples which may exonerate them. The experience in US states where such guarantees do not exist is that only well resourced and determined convicts have been able to gain access to such evidence even though there are now almost 100 cases where a conviction has been overturned on the basis of DNA evidence. Virginia executed Joseph Roger O'Dell while he was still in the process of trying to gain access to such evidence. NSW Police continue to sit on hair samples taken from the Belangalo forest which may cast doubt on the conviction of Ivan Milat if even a tiny amount was made available for mitochondrial DNA analysis (i.e. they may show that the hair clutched in the hand of one of the victims did not come from anyone in either the victim or Milat's family). Note that other Acts also need to be amended to ensure that appeals can be mounted on the basis of such evidence even if normal appeal channels have been exhausted.

## AMEND

58 (1) This section applies to a sample taken from a suspect or convicted offender under this Act or any other sample taken which might produce evidence tending to confirm or disprove that the suspect or convicted offender committed a prescribed offence if there is sufficient material to be analysed both in the investigation of the offence and on behalf of the suspect or convicted offender.

- 58 (2) (a) a part of the material sufficient for analysis is made available to the suspect or convicted offender as soon as practicable after the procedure has been carried out, and
- (b) reasonable care is taken to ensure that the suspect's or convicted offender's part of the material is protected and preserved until the suspect receives it, and
- (c) reasonable assistance is given to the suspect or convicted offender to ensure that the material is protected and preserved until it can be analysed.

## ADD

58 (2) (d) no tests upon a sample are carried out beyond those necessary for the investigation of the offence would this result in insufficient material being made available to the suspect or convicted offender for independent analysis.

### **Distinction between samples, data and identifying information**

The bill maintains the fiction that destroying identifying data on an index equivalent to destroying all records, even though the actual profile remains on the database. Not only can identification be reestablished later (e.g. "hey, this suspect has a profile identical to one already on the offenders index"), the data itself has become a saleable asset. Destroying identifying information while keeping the data would serve to irrevocably remove control of this data from the person who supplied it. Under the act it would not appear to be an offence for a database administrator to onsell such data.

## DELETE

60 (3), 89 (2), 92 (3)

## AMEND

Replace all instances of "any identifying information" with "any information" in clause 94

### **Suitability of police to carry out forensic procedures**

NSW police, by and large, have little training in the safe carrying out of medical procedures, however the act is far from explicit in assuring that police charged with such procedures will have sufficient

qualifications and training to do so.

#### AMEND

##### 3 (1) Definitions

*appropriately qualified*, in relation to carrying out a forensic procedure, means having suitable professional qualifications or experience to carry out the forensic procedure in a safe and reliable manner

##### **DNA testing of those suspected of summary offences**

Summary offences are rarely serious enough to warrant the expense of DNA testing and even more rarely would forensic evidence be necessary in their investigation or prosecution. The inclusion of summary offenders among those subject to DNA testing will not only allow for police abuse of civil liberties in cases of what would normally be minor offences, it would also result in increased demand for DNA testing services and the possibility of a US-style backlog of untested serious crime samples.

#### REPLACE

All instances in the bill of 'indictable or summary offence' with 'indictable offence'

#### AMEND

##### 3 Definitions

*prescribed offence* means an indictable offence under a law of the State prescribed by the regulations for the purposes of this paragraph.

##### **Mass testing of those not suspected of any crime**

Police should not be able to subject communities to the "Wee Waa" treatment in order to obtain 'volunteers' for mass DNA screening simply upon their own initiative. If inability to solve a crime has driven police to such an invasive and expensive act it would seem reasonable that a magistrate should be required before volunteers are requested to supply samples in order to exonerate them of crimes for which they are not a suspect.

#### ADD

76 (5) A police officer may only request the provision samples from volunteers on the basis that they may provide evidence which will implicate or exonerate them of a crime for which they are not suspect after having obtained an order from a magistrate to do so

- (6) In granting an order in accordance with 76 (5) a magistrate must:
- (i) have reasonable grounds to believe that the samples so obtained will provide evidence conducive to the investigation of a specific offence
  - (ii) that the provision of such evidence is of sufficient public interest to warrant the expense and disruption that such testing would entail