

## *Criminal Investigation (Identifying People) Amendment Bill 2012*

### **EXPLANATORY MEMORANDUM**

This Bill deals with various recommendations emanating from the Statutory Review of the *Criminal Investigation (Identifying People) Act 2002* (the Act).

#### **1. DEFINITION OF IDENTIFYING PARTICULAR**

##### **Recommendation 2 (Future directions in Biometrics)**

*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.*

Recommendation 2 is about future proofing the Act to enable the Act to apply to new types of identifying particulars as they become available. The Bill addresses this by enabling new types of identifying particulars to be prescribed in regulations.

##### **Recommendation 21 (Consistency in approach between charged and uncharged suspect)**

*The definition of identifying particulars in section 47 should be amended to replicate the definition of that term in section 34.*

Currently there is a difference between the types of identifying particulars that can be taken from charged and uncharged suspects. The review found that there was no good reason for this disparity and recommended that the definitions be aligned. This Bill makes changes to sections 34 and 47 to provide that under both Parts the following identifying particulars may be obtained -

- Prints (hands, feet ears etc)
- Photographs
- Measurements
- Impressions
- Hair
- DNA
- Prescribed (Future methods)

## **2. CONVICTED PERSONS**

### **Recommendation 4 (Identifying Particulars from Convicted Persons)**

*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.*

The Review identified that it was somewhat curious as to why the Act does not have a power to take 'identifying particulars' from convicted persons, given that there is a database index for this category of person and most other Australian jurisdictions have an equivalent power. This Bill addresses this recommendation by inserting a new Part providing power for police to obtain 'identifying particulars' from a person who is convicted of a serious offence (12 months imprisonment or more). The power is limited to apply for 6 months after the conviction and only fingerprints photographs and DNA may be obtained.

## **3. CHARGED SUSPECTS**

### **Recommendation 22 (FORENSIC PURPOSE)**

*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.*

The Bill addresses recommendation 22 by amending section 49 of the Act to remove the requirement for an officer to reasonably suspect that any or all of a charged suspects identifying particulars '...are not or may not be held by the WA Police; or (b) are or may be needed to verify the person's identity with identification particulars already held by the WA Police.

### **Recommendation 23 (Consent)**

*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.*

The Bill does not make amendments entirely in line with recommendation 23. Instead, it retains the consent provisions, but simplifies them and enables officers to bypass the consent process when it is not practicable to obtain consent. It also fine tunes the process to enable information to be provided to the charged suspect in written form and removes the unnecessary requirement to record all responses of the charged suspect.

## 4. JUVENILES

### **Recommendation 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.*

This recommendation identified a flaw in the legislation in that there was no provision in the Act to apply to juvenile uncharged suspects when a responsible person could not be found or there was no responsible person. Currently the Act only provides a trigger to obtain a warrant for a child suspect when the responsible person for the child suspect does not consent or withdraws consent. The Bill addresses this issue by amending section 40 and 42 of the Act to provide that a warrant may be applied for in the following circumstances –

- When there is no responsible person;
- A responsible person cannot be found within a reasonable time; or
- It is impractical to request the consent of a responsible person.

## 5. MISSING PERSONS AND UNKNOWN DECEASED PERSONS

### **Recommendation 8 (Taking samples from deceased persons)**

*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.*

Section 8 of the Act sets out how DNA profiles may be obtained from a person. It essentially provides that when taking DNA, a less intrusive method must be attempted before a more intrusive method is preferred. In the case of deceased persons, it currently provides that a sample of bodily tissue can be taken from the person. The reviewed considered that this may not include teeth or bone samples that may be the only option to obtain DNA in the case of victims of explosions, fires, or bodies where all tissue has decayed due to exposure. The Bill addresses this issue by providing that the term tissue includes a reference to teeth and bone.

## 6. REMOVAL OF HEADGEAR FOR IDENTIFICATION PURPOSES

### Recommendation 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.*

The Bill contains amendments to section 16 of the Act that will enable police to request a person to remove headwear or do other things to facilitate the officer being able to confirm a person's identity. This amendment stems out of NSW case where a women wearing a burqa was not able to be identified as being the person who made a false report to police.

The amendments to section 16 also provide an explicit power of detention while the person complies with the request and to enable the officer to verify the person's identity. This amendment is consistent with the intent of recommendation 1 of the review

## 7. INDEX DEFINITIONS

The *Criminal Investigation (Identifying People) Amendment Act 2011* deleted the matching table in section 78 and consequently the index definitions contained in section 76 of the Act are only referenced in the Act in the definition of DNA Database.

The definition of 'DNA database' is currently controlled by reference to the various index definitions in section 76. These definitions clearly limit the types of profiles that can be placed on each index and thereby limit what information can be placed in the 'database' as a whole. The main purpose of the index definitions was to control the permissible matches that may occur on the database. The passing of the *Criminal Investigation (Identifying People) Amendment Act 2011* has removed the need to define indexes for the purposes of DNA comparison and so the remaining references to the of the index definitions relate to –

- restricting what can be put in a DNA Database (section 79) and thereby restricting what information can be transmitted to other jurisdictions (section 91); and
- to identify what type of DNA database must be managed by a person approved by the Minister (section 80).

Clause 28 of the Bill amends the definition of 'DNA Database' to include a regulation making power to enable the DNA Database index definitions to be contained within the *Criminal Investigation (Identifying People) Regulations 2002*.

## **Part 1 Preliminary**

### **Clause 1. Short Title**

Cites the short title of the Act as the *Criminal Investigation (Identifying People) Amendment Act (No 2) 2011*

### **Clause 2. Commencement**

Clauses 1 and 2 come into operation on Assent.

Clause 28 of the Bill comes into operation on a day fixed by proclamation. Clause 28 has been separated out in this clause so that it can come into operation after regulations, that will prescribe the relevant DNA Database index definitions, have come into force. If section 28 was to come into force before the regulations, it would delete the current index definitions in the Act leaving an anomaly in the definition of DNA Database.

The remainder of the Act comes into operation on the day after the Act receives Royal Assent.

## **Part 2 – Criminal Investigation (Identifying People) Act 2002 amended**

### **Clause 3. Act amended**

Clause 3 specifies that the amendments contained in Part 2 of the Bill are amendments to the *Criminal Investigation (Identifying People) Act 2002*.

### **Clause 4. Section 3 amended**

- 4(1)** This subclause amends the definition of identifying feature to include in its examples a reference to 'iris or retina'. This is specifically to clarify that 'iris' or 'retina' scanning can be conducted under the Act when exercising a power to photograph an 'identifying feature' of the person. This is part of amendments to address recommendation 2 to expand the definition of 'identifying particular'.
- 4(2)** This subclause amends the definition of 'identifying information' to remove a reference to 'Schedule 1' of the Act. This has no effect on the legislation as it just removes an outdated reference. Schedule 1 was repealed in 2006.
- 4(3)** This subclause amends the definition of 'identifying particular' to remove a reference to 'Schedule 1' of the Act. This has no effect on the legislation as it just removes an outdated reference. Schedule 1 was repealed in 2006.
- 4(4)** This subclause forms part of amendments to address recommendation 2 to expand the definition of 'identifying particular'. This amendment complements amendments to sections 17, 23, 34, 47 and 52A by enabling a procedure necessary to obtain a

prescribed 'identifying particular' to be categorised as an 'intimate identifying procedure'.

#### **Clause 5. Section 7A inserted**

This clause inserts a new section 7A to apply throughout the Act that clarifies how a person may be informed under the Act. This is part of amendments to address recommendation 23 by simplifying the consent process.

#### **Clause 6. Section 7 amended**

This clause inserts a new subsection (ba) to section 7. It forms part of amendments to address recommendation 23 to simplify the consent process. It addresses situations where a person orally advises an officer that they will consent to a procedure but will not comply with reasonable requests that facilitate the conduct of the procedure. For example, an officer may request a charged suspect to provide identifying particulars and in order to conduct the procedures, the charged suspect needs to attend at the local police station. If the charged suspect refuses to attend at the station he will be deemed by the proposed amendment to have not consented to the procedure.

#### **Clause 7. Section 8 amended**

Section 8 of the Act sets out how DNA profiles may be obtained from a person. It essentially provides that when taking DNA, a less intrusive method must be attempted before a more intrusive method is preferred. In the case of deceased persons, it currently provides that a sample of bodily tissue can be taken from the person.

- 7(1)** In line with recommendation 8, clause 7(1) of the Bill amends section 8 by providing that the term tissue includes a reference to teeth and bone.
- 7(2)** The amendments in clause 7(2) form part of amendments to address recommendation 2. The inserting of subsection 4 to section 8 simply makes provision to write regulations that will apply the concept in section 8 to some future method of obtaining identifying particulars.

#### **Clause 8. Section 9 amended**

Clause 8 replaces the definition of sample for the purpose of the section. The effect of this is to enable the provisions of section 9 to apply to newly prescribed 'identifying particulars' that are prescribed under section 17, 23, 34, 47 or 52A. This forms part of the amendments addressing recommendation 2 to expand the definition of 'identifying particular'.

#### **Clause 9. Section 11 amended**

Clause 9 inserts a new subsection (f) that will facilitate the addition of types of 'identifying particular' for the purposes of that section. This forms part of the amendments addressing recommendation 2 to expand the definition of 'identifying particular'.

#### **Clause 10. Section 16 amended**

Clause 10 amends section 16 to enable officers with power under the section to request that a person remove any headwear or do any other thing that is reasonably necessary to enable the officer to see the person's face/head for the purposes of identifying the person. This section also applies to police officers exercising powers under other legislation to obtain personal details so long as the request is made for a forensic purpose as defined by section 3 of the Act. That is –

- investigating an offence or a suspected offence or offences generally;
- investigating the death of a person or identifying a deceased person; or
- investigating the whereabouts of or identity of a missing person.

The amendments also provide officers an explicit power to detain a person for the purpose of facilitating compliance with the request and to enable the officer to verify the correctness of any personal details given.

#### **Clause 11. Section 17 amended**

Clause 11 inserts a new subsection (f) in the definition of 'identifying particular' that will facilitate the addition of types of 'identifying particular' for the purposes of this Part of the Act. This forms part of the amendments addressing recommendation 2 to expand the definition of 'identifying particular'.

#### **Clause 12. Section 19 amended**

Clause 12 deletes subsection 3 of section 19. This has no effect on the legislation as the same provision is now included in proposed section 7A that is inserted by clause 5 of this Bill.

#### **Clause 13. Section 23 amended**

Clause 13 inserts a new subsection (f) in the definition of 'identifying particular' that will facilitate the addition of types of 'identifying particular' for the purposes of this Part of the Act. This forms part of the amendments addressing recommendation 2 to expand the definition of 'identifying particular'.

#### **Clause 14. Section 34 amended**

14(a) This subclause inserts a new type of 'identifying particular' that may be obtained from uncharged suspects being a measurement of an identifying feature. This forms

part of the amendments to address recommendation 21 to install consistency between the types of 'identifying particulars' that can be obtained from uncharged and charged suspects.

- 14(b) This subclause inserts a new subsection (f) in the definition of 'identifying particular' that will facilitate the addition of types of 'identifying particular' for the purposes of this Part of the Act. This forms part of the amendments addressing recommendation 2 to expand the definition of 'identifying particular'.

#### **Clause 15. Section 38 amended**

Clause 15 amends section 38 to correct a drafting anomaly. Part 6, by virtue of section 35 only applies to serious offences, but section 38 appears to apply to any offence. The amendment brings section 38 in line with the intent of Part 6.

#### **Clause 16. Section 40 amended**

Clause 16 amends section 40 of the Act to address recommendation 24 of the Review. It inserts a new subsection 4, that in conjunction with amendments to section 42, will provide that where a juvenile uncharged suspect is requested to consent to an identifying procedure, a warrant may be applied for in the following additional circumstances –

- Where there is no responsible person;
- Where a responsible person cannot be found within a reasonable time; or
- Where it is not practicable to request the consent of a responsible person.

#### **Clause 17. Section 42 amended**

Clause 17 makes amendments to section 42 to accommodate the purpose of clause 16. See the explanation at clause 16 above.

#### **Clause 18. Section 47 amended**

- 18(1)(a) This subclause inserts a two new types of 'identifying particular' that may be obtained from charged suspects, being impressions of identifying features and hair samples. This forms part of the amendments to address recommendation 21 to install consistency between the types of 'identifying particulars' that can be obtained from uncharged and charged suspects.

- 18(1)(b) This subclause inserts a new subsection (e) in the definition of 'identifying particular' in relation to suspects charged with serious offences that will facilitate the addition of types of 'identifying particular' for the purposes of this Part of the Act. This forms part of the amendments addressing recommendation 2 to expand the definition of 'identifying particular'.



- 18(2) This subclause inserts a new subsection (d) in the definition of 'identifying particular' in relation to suspects charged with offences other than serious offences, that will facilitate the addition of types of 'identifying particular' for the purposes of this Part of the Act. This forms part of the amendments addressing recommendation 2 to expand the definition of 'identifying particular'.

#### **Clause 19. Section 49 amended**

- 19(1) This subclause addresses recommendation 22 by amending section 49 of the Act to remove the requirement for an officer to reasonably suspect that any or all of a charged suspects identifying particulars '...are not or may not be held by the WA Police; or (b) are or may be needed to verify the person's identity with identification particulars already held by the WA Police...'

This sub-clause also addresses recommendation 23 by adding an element of practicability to whether an officer seeks consent or not, before proceeding to do the procedure against the suspects will.

- 19(2) This subclause amends subsection 49(2)(f) in line with the new procedures set out in amendments to section 51. (See Clause 21)

#### **Clause 20. Section 50 amended**

- 20(1)(a) This subclause corrects a drafting anomaly. Section 50 is intended to apply to all officers who exercise powers under this Part, not just police officers as it current reflects.
- 20(1)(b) This subclause deletes the requirement to record the suspect's responses to any of the information that is provided during the consent process. This amendment forms part of amendments to simplify the consent process in response to recommendation 23.
- 20(2)&(3) This subclause inserts a new subsection into section 50 that complements the amendment to section 49 that allows for consent to be bypassed where it is not practicable. This new subclause logically requires the officer who bypasses the consent process to record the reasons why it was not practicable.

#### **Clause 21. Section 51 amended**

This clause makes amendments to section 51 to alter the process that an officer goes through after seeking consent to the procedure. It removes the preliminary step of ordering the charged suspect to undergo the procedure and incorporates the circumstance that may occur when it is impracticable to seek consent. The effect of the amendments at clause 19 and 22 are as follows:

- A person charged with an offence may be requested to provide identifying particulars.

- If the person does not consent or it is impractical to seek consent an officer has the power to arrest the suspect (if not already under arrest) and take the particulars against the suspect's will.

These amendments are part of amendments to address recommendation 23 in terms of simplifying the consent process for charged suspects.

#### **Clause 22. Part 8A inserted**

Clause 22 addresses recommendation 4 of the review by introducing a power to obtain identifying particulars from persons who are convicted of serious offences.

The new Part 8A provides a power for police to obtain 'identifying particulars' from a person who is convicted of a serious offence (12 months imprisonment or more). The power is limited to apply for 6 months after the conviction and only fingerprints, photographs and DNA may be obtained.

The power is modelled on Part 7 in that an officer must first attempt to seek consent from the 'serious offender'. If the serious offender does not consent or it is impracticable to seek consent, the officer may arrest the person and take the identifying particulars against the serious offender's will.

#### **Clause 23. Section 56 amended**

The amendments to section 56 form part of amendments to address recommendation 2 to expand the definition of 'identifying particular'

The insertion of subsection 2 enables new types of 'identifying procedures' to be prescribed for the purpose of obtaining an 'identifying particular' prescribed under the powers provided at sections 17, 23, 34, 47 or 52A. Once a new procedure is prescribed, it will also enable the category of qualified person that must undertake the procedure, to also be prescribed.

#### **Clause 24. Section 59 amended**

Clause 24 amends section 59 to accommodate the changes in Part 7 and the insertion of Part 8A. In these parts a charged suspect or serious offender may now be required to undergo a procedure without first being requested and so the changes made to section 59 will now accommodate those circumstances and allow procedures to be repeated in the manner consistent with the original intent of the Act. This amendment is part of amendments to address recommendation 23 in terms of simplifying the consent process for charged suspects.

#### **Clause 25. Section 63 amended**

Clause 25 amends section 63 (concerning the use of identifying information of deceased persons) to make it clear that if technology changes and further types of identifying particular can be extracted from previously obtained identifying information, then that further identifying particular can be obtained lawfully. In the case of deceased persons this can

only occur if the Coroner authorises it to occur via an authorisation given under section 21. This amendment is part of amendments to address recommendation 2 to expand the definition of identifying particular. Specifically, it addresses the retrospective application of any future prescribed identifying particulars.

#### **Clause 26. Section 67 amended**

- 26(1) Clause 26(1) amends section 67 (concerning the use of identifying information of charged suspects) to make it clear that if technology changes and further types of identifying particular can be extracted from previously obtained identifying information, then that further identifying particular can be obtained lawfully. This amendment is part of amendments to address recommendation 2 to expand the definition of identifying particular. Specifically, it addresses the retrospective application of any future prescribed identifying particulars.
- 26(2) Clause 26(2) amends subsection 67(2) to make the wording consistent with new provision 68A(3). The intent of both these sections is to ensure that the rules that apply to identifying information taken under the relevant Parts of the Act also apply to other lawfully obtained identifying information that was previously obtained from the relevant class of person.

#### **Clause 27. Section 68A inserted**

Clause 27 inserts a new section 68A into Part 9 of the Act. This section is required to provide direction on how identifying information of serious offenders obtained under the proposed Part 8A is dealt with. This section will also apply to identifying information that was obtained from serious offenders under previous schedule 1 of the Act.

It allows for identifying information of serious offenders to be dealt with in the same manner as is the case for charged suspects in that the information may be –

- compared with other information as soon as it is obtained;
- put in a forensic database;
- must be destroyed if the person ceases to be a serious offender (conviction overturned etc); and
- similar to the amendments to section 63 and 67, the identifying information of serious offenders may be used to obtain a further (different) identifying particular from the same information.

#### **Clause 28. Section 76 amended**

Clause 28 deletes most index definitions from the Act and amends the definition of DNA Database so that the indexes may be prescribed in regulations. The Statistic Index definition is retained in the Act as it is the only one that is still referenced in another section of the legislation (section 77).

### **Part 3 – Criminal Investigation Act 2006 amended**

#### **Clause 29. Act amended**

Clause 3 specifies that the amendments contained in Part 3 of the Bill are amendments to the *Criminal Investigation Act 2006*.

#### **Clause 30. Section 102 amended**

This clause corrects a drafting error. The reference to the term 'identifying procedure' that currently appears in section 102(4) should have always been a reference to a 'forensic procedure'.

#### **Clause 31. Section 132 amended**

Clause 31 amends the definition of 'arrestable person' for the purpose of the section to remove a reference to the person having to be arrested under a warrant issued under the *Criminal Investigation (Identifying People) Act 2002*. This is to accommodate the amendments to Part 7 and the insertion of Part 8A. The effect of this amendment is that if a person is able to be arrested under Part 7 or Part 8A of the *Criminal Investigation (Identifying People) Act 2002*, then the officer will also have the power under section 132 of the *Criminal Investigation Act 2006* to enter property for the purpose of effecting the arrest.

---