



27 October 2010

C62  
RB;rp

The Committee Secretary  
Senate Legal and Constitutional Committee  
PO Box 6100  
Parliament House  
CANBERRA ACT 2600

Dear Sir/Madam

***Crimes Legislation Amendment Bill 2010***

I refer to a letter of 8 October 2010, addressed to the Executive Director, and thank you for referring the above Bill to the Society for comment.

The Society's Criminal Law Committee has considered the Bill and accordingly, the Society makes the following comments which relate specifically to Clause 43 - Proposed Insertion of Section 3ZJ(3)(ba).

The Law Society does not support this amendment and recommends that Clause 43 be removed from the Bill.

The current law, as expressed by s3ZJ *Crimes Act 1914*, is that "*identification material*", comprising of a person's prints (hands, fingers, feet or toes), voice recordings, handwriting samples or photographs (including video recordings) may be taken without the consent of a person in lawful custody **with cause** as per s3ZJ(3)(b).

The Bill proposes a significant extension of the power of the police by authorising police to require fingerprints or photographs (including video recordings) **without cause**. The only criteria that must be satisfied is that the person, from which the fingerprints or photographs are to be taken, is in lawful custody and that the offence in respect of which the person is in custody has a maximum penalty of at least 12 months imprisonment (most, if not all offences a person will be in lawful custody for will satisfy this criterion).

The great concern with the amendment is that the State, through this provision, authorises a major trespass on the subject's person without any of the safeguards ordinarily applicable when Parliament requires the taking of forensics from the subject. It is also of considerable concern that the proposed

law is open to misuse and abuse by police (*ie*, knowingly wrongfully arrest/detain a person with a view to obtain identification material).

The problem is magnified when "*lawful custody*" is considered. The term has been the subject of judicial consideration, but is not defined by the *Crimes Act*. Examples of "*lawful custody*" include arrest, pre-charge and obviously pre-conviction, while in prison on remand awaiting trial, while in the charge of the court during a superior court trial and while being detained by police under legislation that provides the right to detain for a set period pre-charge.

The point is that, not only does this Bill propose that forensics be taken from a person **without cause**, but it does so in circumstances where a person may not be convicted or even charged with an offence. Even further, it arguably extends to persons who are detained (*ie*, not even arrested).

The problem is exacerbated because of the lack of safeguards in the Bill. There are no provisions that limit or otherwise define the use to which the fingerprints/photographs are to be put prior to a conviction (*nb* the fingerprints/photographs may be held for at least 12 months without charge: s3ZK).

There may be a public interest in fingerprinting/photographing offenders of a certain minimum level of offending (*ie*, those convicted of an offence), but that is already dealt with by s3ZL. Section 3ZL permits the taking identification material from a convicted person without cause.

There does not appear, therefore, to be a justifiable need for the proposed s3ZJ(3)(ba). The present law allows the compulsory taking of identification material with cause. The law also enables the taking of such material following a conviction (without cause).

Fundamentally, if identification material, which would otherwise constitute an assault, trespass or breach/invasion of a person's privacy/liberties, is to be compulsorily taken from a person prior to conviction, there should be the safeguard of proper cause to do so (as is presently the case).

The proposed s3ZJ(3)(ba) will inevitably lead to the **major risk** of the police inappropriately taking someone in lawful custody with a view to taking fingerprints/photographs. A law which is open to such misuse or abuse by law enforcement authorities should not be permitted.

For these reasons this proposed provision is not supported.

Yours sincerely



Ralph Bönig  
**PRESIDENT**