

Regulatory Impact Statement

Policing (Youth Identifying Particulars) Amendment Bill

Agency disclosure statement

This Regulatory Impact Statement has been prepared by New Zealand Police.

It provides an analysis of options to address issues that have arisen with the operation of the Policing Act 2008 in relation to the retention and use of identifying particulars (IP) for youth. The Policing Act 2008 significantly narrowed the set of instances where Police may retain youth identifying particulars when compared to the provisions in the Police Act 1958. This arose through drafting rather than any policy decision that the Police should not retain the IP of young offenders where the charge had been proved in the Youth Court under section 283 of the Children, Young Persons and their Families Act 1989.

The Bill creates no significant policy shift from what was intended when the Policing Act 2008 was enacted but seeks an amendment to reinstate the Police's ability to retain youth IP as previously provided for in the Police Act 1958.

None of the options in this Bill will impose any material increase in compliance costs for business.

None of the options considered in this Statement are likely to override fundamental common law principles.



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Catherine Petrey, Acting National Manager Policy
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Status quo and problem definition

The Policing Act 2008 permits identifying particulars (IP) to be taken from a person in two situations:

- When a person is in lawful custody (section 32)
- When a constable has good cause to suspect an offence and intends to bring proceedings (section 33).

Section 34 of the Policing Act 2008 provides that IP must be destroyed as soon as practicable, after a decision has been made not to bring proceedings against the person in respect of the offence for which the particulars were taken, and after the completion of proceedings, unless there is a conviction, a discharge without conviction under section 106 of the Sentencing Act 2002, or an alternative resolution by the court where the offence is admitted, such as diversion.

Police was unaware that the Policing Act 2008 changed the position with respect to retaining IP from that which existed under the Police Act 1958. This is because the narrowing of Police's ability to retain youth IP was unintended rather than a result of a specific change in policy. Police had assumed that the circumstances under which IP could be taken under the Police Act 1958 had been carried over to the Policing Act 2008. Police only recently became aware that the scope for retaining youth IP had changed.

Crown Law confirmed that under the Police Act 1958 Police was able to retain the IP for youth where the case was proved and an order made under section 283(a) – (o) of the CYPF Act 1989. Crown Law also confirmed that from October 2008 Police should have destroyed IP for youth subject to an order under section 283(a) - (n) because under the Policing Act 2008 Police is only able to retain youth IP following a conviction. Only an order under section 283(o) of the CYPF Act 1989 constitutes a conviction.

Police has taken immediate action and put in place identification and tracking systems and processes to ensure Police is legally compliant with regard to the ongoing management of youth IP. All IP that were retained unlawfully by Police from October 2008 have been destroyed.

There are about 1,200 proven outcomes in the Youth Court each year where an order is made pursuant to section 283 (a) – (n) of the CYPF Act 1989, and the inability to retain the youth IP has significant implications for Police's investigation of youth offences. Any further offending by that young person will be more difficult to detect as their IP cannot be compared to IP found at the crime scene. This situation is not in the public interest as it is recognised that the majority of serious adult offenders have a history of offending that is dealt with by the Youth Court. Early identification of young repeat offenders is vital if intervention to prevent ongoing future offending is to be effective.

With regard to historic cases from 1 October 2008 to the date of the situation being rectified, Crown Law advises that it is open to a young person to challenge a conviction based on improperly retained fingerprint evidence. The success of the appeal will depend on the outcome of the balancing exercise under section 30 of the Evidence Act 2006. One of the things that the court will consider is the nature of the impropriety, and in particular whether it was deliberate, reckless or done in bad faith. If the Judge finds that the evidence has been improperly obtained, the next step is to consider whether or not the exclusion of the evidence is proportionate to the impropriety by means of a balancing process that gives appropriate weight to the impropriety but also takes proper account of the need for an effective and credible system of justice. If the evidence should have been excluded the court may confirm the conviction, set the conviction aside, or amend the conviction. If the fingerprint evidence was the only evidence justifying conviction, then it may follow that the conviction will be set aside. If, however, there were other evidence justifying conviction, then the Court may, nevertheless, confirm the conviction. Each case will turn on its own facts.

As Police could be required to defend a number of challenges rather than rely on a precedent established by the first decision, the cost to government (Police and Crown Law) could be considerable. An average of 1,200 youth per year have their IP taken when they are arrested, and go on to be charged with an offence that is proved in the Youth Court and an order made under section 283(a) - (n) of the CYPF Act 1989. Of these, around 775 cases per year have their IP matched to IP found at a subsequent crime scene. It is highly likely that some of these 775 cases resulted in Youth Court orders or convictions based solely on the matches to IP evidence that should have been destroyed.

Over the two year period from October 2008, there would have been a minimum of 1550 cases where youth IP was matched to the IP at a subsequent crime scene. If just 20% of these cases were appealed it would cost government (Police and Crown Law) a total of around \$6.2 million assuming \$20,000 per case.

An ongoing series of challenges to Police processes in historic cases will also impact negatively on the trust and confidence in Police.

Objectives

The purpose of the Policing (Youth Identifying Particulars) Amendment Bill is to reinstate Police's ability to retain youth IP where there is a proven outcome in the Youth Court, and an order made under section 283 of the CYPF Act 1989, as was previously provided for in the Police Act 1958.

Regulatory impact analysis

There are only two options, the status quo or the preferred option of an amendment to the Policing Act 2008 (most probably section 34).

Alternative Option - Status Quo

The issues associated with the status quo have been discussed above. In summary there are significant implications for Police in terms of the impact on the investigation of youth offences. If the status quo is retained, the youth IP from over a thousand cases that are proved each year in the Youth Court will not be able to be retained by Police. The inability of Police to retain youth IP is not in the best interest of the public.

There is no evidence of any policy decisions being made to reduce Police's ability to retain youth IP.

Preferred Option

There is no evidence of a policy decision being made during the development of the Policing Act 2008, to reduce the circumstances under which Police may retain youth IP, from that provided for in the Police Act 1958. The problem seems to have arisen from the unintended consequences of how section 34 of the 2008 Act was drafted.

As such, the preferred option is to seek an amendment to the Policing Act 2008 (most likely section 34) that specifically sets out that the IP of young people may be retained where there is a proven outcome in the Youth Court, and an order made under section 283 of the CYPF Act 1989. This will allow for the retention of youth IP in the full set of circumstances previously provided for in the Police Act 1958.

Police is seeking to amend the legislation to reflect the original policy position of the Police Act 1958. If Police is unable to retain the IP for the majority of the young people who have a proven outcome in the Youth Court, and an order made under section 283 of the CYPF Act 1989, any further offending by that young person will be more difficult to detect. Early identification of young repeat offenders is vital if intervention to prevent ongoing future offending is to be effective.

Retrospective legislation is sought to avoid the cost to Police of having to defend any future challenges to subsequent convictions based on evidence that included youth IP that should have been destroyed, and the possible negative impact this could have on trust and confidence in Police.

Consultation

The following government agencies have been consulted: Ministry of Justice, Ministry of Social Development, Treasury, Department of Corrections, the State Services Commission and the Office of the Privacy Commissioner. The Department of the Prime Minister and Cabinet was informed. The Chief Youth Court Judge and the Commissioner for Children have been informed of this proposal.

Conclusion

The Policing (Youth Identifying Particulars) Amendment Bill will make no substantial change to the Policing Act 2008. The Policing Act 2008 will be amended (most probably section 34) in order to reinstate the scope for the retention and use of youth IP provided for in the Police Act 1958 and that was intended to apply to the 2008 Act.

There is no evidence of a policy decision during the development of the Policing Act 2008, to reduce the circumstances under which Police could retain youth IP. Sections 32 to 34 of the 2008 Act aimed to allow Police to collect a range of personal information from suspected offenders for the primary purpose of identification prior to charge or summons. This information is to be destroyed unless a conviction is secured following criminal proceedings, or the offender's guilt is otherwise established. The legislation was drafted in this way to ensure that Police did not have the ability to build up personal information on people who were detained but who were later established not to have committed an offence.

The amendment sought is consistent with the original intention of the Policing Act 2008, in that it seeks to retain the youth IP once the charge against the young person has been proved.

As such there does not appear to be any specific reasons for not reinstating the provisions of the Police Act 1958.

Retrospective legislation is sought to avoid the cost to Police of having to defend a series of challenges to subsequent convictions based on evidence that included youth IP that should have been destroyed, under the provisions of the Policing Act 2008.

Implementation

Approval is being sought for the Bill to proceed under urgency. If the Bill is passed, Police will return to retaining the IP for youth who are made subject to an order under section 283 of the CYPF Act 1989, as was provided for in the Police Act 1958.