

# **Guidelines for applications to the Attorney-General to request post- conviction DNA testing**

5 August 2010

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## **Objective of guidelines**

- 1) The purpose of the guidelines is to provide, in rare and exceptional cases, persons convicted of relevant offences but who claim to be innocent, an opportunity to request that DNA testing or re-testing (collectively referred to as 'DNA testing') be conducted in their case, because it is more likely than not that such testing will produce reliable evidence capable of establishing their innocence, having regard to the strength of the rest of the prosecution's case against them.
- 2) The guidelines provide for the roles played by the applicant, the Attorney-General who decides applications, and other entities who are involved in assisting the Attorney-General or who arrange or undertake DNA testing. The Crown Solicitor will also provide assistance to the Attorney-General in relation to the performance of any steps under the guidelines. The Crown Solicitor, at the request of the Attorney-General, will act as a liaison between the applicant, the victim or the family of a victim who is deceased, the Director of Public Prosecutions, the State Coroner's Office and the Queensland Police Service.

## **Costs of DNA testing**

- 3) The costs of DNA testing conducted by Queensland Health Forensic and Scientific Services or an interstate counterpart at the request of the Commissioner of Police, will be met by the Department of Justice and Attorney-General. To remove any doubt, all other costs which are incurred by the applicant or the applicant's representative, including:
  - a) in preparing and lodging an application for DNA testing;
  - b) any independent DNA testing carried out on behalf of the applicant; and
  - c) reviewing any test results,will not be met by the Department of Justice and Attorney-General and are a matter for the applicant or the applicant's representative.

## **Cases to which the guidelines apply**

- 4) An applicant may apply under these guidelines if the applicant can demonstrate:
  - a) he or she has been convicted of an offence carrying (at the time of sentencing) a maximum or mandatory penalty of life imprisonment<sup>1</sup>;
  - b) at the time of the application, the applicant is subject to the sentence imposed on conviction (whether the applicant is in custody or has been released on parole);

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<sup>1</sup> Annexure A is a list of offences carrying the penalty of maximum or mandatory life imprisonment. This list is correct as at 5 August 2010. It is published as a guide and may not reflect the law at the time of the applicant's conviction.

- c) the applicant's appeal avenues have been exhausted in relation to the conviction; and
- d) either:
  - i) no biological material relevant to the applicant's case was previously tested, or the particular exhibit now sought to be tested was not previously subject to DNA testing; or
  - ii) the biological material sought to be tested was previously subjected to DNA testing, but not using the Profiler Plus System of DNA testing. In Queensland, the Profiler Plus System has been used by the John Tonge Centre, now the Queensland Health Forensic and Scientific Services, since 1999.

### **What an application needs to contain**

- 5) In order for the Attorney-General to consider an application it must be in writing and provide the following information:
  - a) a request for DNA testing in the applicant's case;
  - b) the offence of which the applicant has been convicted including details of the court and date of conviction;
  - c) details of the extent to which the applicant has appealed his or her conviction;
  - d) whether the applicant is still subject to the sentence imposed on conviction;
  - e) a statutory declaration by the applicant asserting the applicant's innocence of the offence;
  - f) the applicant's consent to provide a sample of DNA for the purpose of matching results of DNA testing. The sample will be collected in accordance with Chapter 17 of the *Police Powers and Responsibilities Act 2000*;
  - g) grounds which demonstrate that, at first sight:
    - i) the request is not merely speculative; and
    - ii) it is more likely than not that such testing will produce reliable evidence capable of establishing the applicant's innocence, having regard to the strength of the rest of the prosecution's case against the applicant;
  - h) confirmation that either:
    - i) no biological material relevant to the case was previously tested, or the particular exhibit now sought to be tested was not previously subject to DNA testing; or
    - ii) the biological material sought to be tested was previously subjected to DNA testing, but not using the Profiler Plus System of DNA testing; and
  - i) the applicant's consent to the Attorney-General notifying any person the Attorney-General considers has a legitimate interest in knowing about the testing process, of the following:
    - i) that DNA material has been retained from the investigation;
    - ii) that DNA testing is to be undertaken; and
    - iii) the results of any testing (provided the identity of a person other than the applicant or victim to whom the DNA belongs is not disclosed).

**Other information that the Attorney-General will consider in addition to the information in an application**

- 6) (1) The Attorney-General may also seek additional information from relevant government officials or agencies about whether or not:
- a) testing would unnecessarily and adversely affect a victim of the relevant offence or the family of a deceased victim;
  - b) the relevant agency which is to conduct the search for DNA material or the testing of DNA material has sufficient capacity to undertake the search and/or testing at the relevant time; and
  - c) testing would be in the public interest.

(2) Although DNA evidence may have been relevant to an applicant's case, the Attorney-General will take into account the whole of the prosecution's case against the applicant.

**Attorney-General's first decision – whether to request a search for DNA material**

- 7) In determining whether a search for DNA material should be requested, the Attorney-General will take into account the matters outlined in (4) to (6) and may seek the Crown Solicitor's advice on those matters, and whether a search for DNA material should be requested.
- 8) The Crown Solicitor is to inform the Commissioner of Police of the application. The Crown Solicitor is to take into consideration views expressed by the Commissioner of Police in formulating the Crown Solicitor's advice as to whether a search for DNA material is warranted and may also liaise with other relevant agencies as the Crown Solicitor considers necessary.
- 9) Once the Attorney-General receives any advice from the Crown Solicitor under (7), the Attorney-General may decide whether or not a request for a search of DNA material is warranted. Before the Attorney-General decides a search is not warranted, written notice will be provided to the applicant that the Attorney-General is so minded, setting out the reasons why that is so, and offering the applicant an opportunity to make submissions about those reasons.
- 10) If the Attorney-General decides such a search is warranted, the Attorney-General may request the Commissioner of Police, Queensland Health Forensic and Scientific Services, the State Coroner's Office or an interstate agency for information about the existence of any biological material or exhibits.
- 11) Once the Attorney-General receives the information requested under (10), the Attorney-General is to advise the applicant; the victim or the family of a victim if the victim is deceased; whether biological material or exhibits exist.

**If exhibits exist, the applicant will be asked to obtain and provide a legal opinion on his or her case**

12) Where biological material or exhibits exist, the applicant will be asked to obtain and provide to the Attorney-General a legal opinion as to the merits of conducting DNA testing in the applicant's case, by reference to whether it is more likely than not, that testing will produce reliable evidence that is capable of establishing the applicant's innocence, having regard to the strength of the remainder of the prosecution's case against the applicant.

**Attorney-General's second decision – whether to request DNA testing**

13) The Attorney-General may request from the Commissioner of Police information about:

- a) recommended DNA testing;
- b) recommended laboratory for DNA testing;
- c) estimated costs associated with DNA testing; and
- d) whether division of the biological material for the purposes of independent testing would compromise the State's ability to conduct any further or future DNA testing of the biological material.

14) The Attorney-General will pass on to the Crown Solicitor any information received from the Commissioner of Police and any legal opinion received from the applicant. The Attorney-General may then seek advice from the Crown Solicitor as to: whether it is more likely than not that DNA testing will produce reliable evidence capable of demonstrating the applicant's innocence, having regard to the strength of the rest of the prosecution's case against the applicant; and therefore, whether biological material should be tested; and if so, how much testing should be conducted.

15) The Crown Solicitor will liaise as necessary with relevant agencies, such as the Director of Public Prosecutions, Queensland Health, the State Coroner and the Queensland Police Service in formulating advice as to the merits of the application, and inform the Commissioner of Police of the grounds identified by the applicant in any legal opinion provided, as to the merits of conducting DNA testing in the case.

16) The Crown Solicitor will provide advice to the Attorney-General in response to any request by the Attorney-General for advice under (14).

17) Upon receipt of the Crown Solicitor's advice, the Attorney-General may:

- a) request the Commissioner of Police to: conduct DNA testing that is considered appropriate; or request that a National Association of Testing Authorities accredited interstate counterpart to Queensland Health Forensic and Scientific Services conduct the DNA testing where that is considered appropriate; and
- b) request that the Commissioner of Police provide a DNA sample to the applicant for independent testing where division of the biological material for the purposes of independent testing would not compromise the State's ability to conduct any further or future DNA testing of the

biological material, and provided the applicant undertakes to provide a copy of the results of the testing to the Attorney-General.

However, the Attorney-General may decline to make a request of the Commissioner of Police under (a) or (b).

18) Before making a final decision to decline to make a request to the Commissioner of Police under (17)(a) or (b), the Attorney-General will provide written notice to the applicant that the Attorney-General is minded to do so, setting out the reasons why that is so, and offering the applicant an opportunity to make submissions about those reasons.

### **Commissioner of Police arranges for DNA testing**

19) Upon receiving a request from the Attorney-General under (17), the Commissioner of Police may:

- a) authorise DNA testing to be conducted; or
- b) request a National Association of Testing Authorities accredited interstate counterpart to the Queensland Health Forensic and Scientific Services to conduct the DNA testing; and
- c) authorise a DNA sample be provided to the applicant for independent DNA testing or request an interstate counterpart to do the same, where division of the biological material would not compromise the State's ability to conduct any further or future DNA testing, and provided the applicant undertakes to provide a copy of the results of the testing to the Attorney-General.

20) Where independent DNA testing is to take place, it is to be conducted at a National Association of Testing Authorities accredited laboratory.

21) The Commissioner of Police is to advise the Attorney-General of the Commissioner's authorisation or request under (19).

22) The Attorney-General is to inform the applicant, the victim or the family of a victim who is deceased and the Director of Public Prosecutions of the Attorney-General's decision to request DNA testing be conducted. However, if after a reasonable search the victim or the family of the victim cannot be located, the testing can proceed.

23) If DNA testing is to occur, the Attorney-General will inform the applicant and the Director of Public Prosecutions of the place of testing.

24) The Commissioner of Police is to arrange for any testing to be conducted for the State, by Queensland Health Forensic and Scientific Services or a National Association of Testing Authorities accredited interstate counterpart and will provide the results of the testing to the Attorney-General. The results of any independent testing conducted by the applicant must be forwarded by the applicant or the applicant's representative to the Attorney-General, who may advise persons with a legitimate interest, of the results.

### **The results of the DNA testing**

25) The Attorney-General will provide the results of the testing, conducted for the State, to the applicant; the Director of Public Prosecutions; and where practicable, the victim or the family of a victim who is deceased, and any other person whom the Attorney-General considers has a legitimate interest in the matter. However, if a test result indicates the DNA material does not belong to the applicant, for privacy reasons, the test results can only be provided if the identity of the person to whom the DNA belongs is not disclosed.

### **What does the applicant do with the results?**

26) The applicant will be advised that they must seek their own legal advice in relation to the results of the DNA testing, and any avenues they may have for challenging the conviction.

## ANNEXURE A

**LIST OF OFFENCES IN THE QUEENSLAND CRIMINAL CODE CARRYING A MAXIMUM OF LIFE IMPRISONMENT OR MANDATORY LIFE IMPRISONMENT (This is a list of offences carrying the penalty of maximum or mandatory life imprisonment. This list is correct as at 5 August 2010. It is published as a guide and may not reflect the law at the time of the applicant's conviction.)**

Section	Title	Circumstances (if applicable)
54A	Demands with menaces upon agencies of government	
61	Riot	If the offender causes grievous bodily harm to a person, causes an explosive substance to explode, or destroys or starts to destroy a building, vehicle or machinery
80	Piracy	
124	Perjury	If the offender commits the crime in order to prove the conviction of another person for a crime punishable by imprisonment for life
131	Conspiracy to bring a false accusation	If the offence is such that a person convicted of it is liable to be sentenced to imprisonment for life
208	Sodomy	If the offence is committed against a child under 12 years, or a child or person with an impairment of the mind who the offender knows is either of lineal descent or under the offender's care
213	Owner etc permitting abuse of children on premises	If the child is under 12 years and the proscribed act is either sodomy or carnal knowledge
215	Carnal knowledge with or of children under 16 years	If the child is under 12 years or the child is under the offender's care
216	Abuse of intellectually impaired persons	If the person is under the offender's care, and the offender had or attempted to have carnal knowledge



<b>Section</b>	<b>Title</b>	<b>Circumstances (if applicable)</b>
219	Taking child for immoral purposes	If the child is under 12 years and the proscribed act is either sodomy or carnal knowledge
222	Incest	
229B	Maintaining a sexual relationship with a child	
305	Murder (note – mandatory life)	
306	Attempt to murder	
307	Accessory after the fact to murder	
310	Manslaughter	
311	Aiding suicide	
313	Killing unborn child	
315	Disabling in order to commit indictable offence	
316	Stupefying in order to commit an indictable offence	
317	Acts intended to cause grievous bodily harm and other malicious acts	
318	Obstructing rescue from unsafe premises	
319	Endangering safety of a person in a vehicle with intent	
349	Rape	
352	Sexual assaults	<p>If:</p> <ul style="list-style-type: none"> <li>- the offender is, or pretends to be, armed or in company with another person; or</li> <li>- the indecent assault includes the person who is assaulted penetrating the offender or another person's vagina, vulva or anus with a thing or a part of the person's body that is not a penis</li> </ul>

<b>Section</b>	<b>Title</b>	<b>Circumstances (if applicable)</b>
411	Robbery	If the offender is or pretends to be armed, is in company with other persons, or uses personal violence
412	Attempted robbery	If the offender is armed or uses a weapon to cause personal violence to any person
415	Extortion	Where the demand is carried out with a threat that would be likely to cause serious personal injury to a person, or would cause substantial economic loss in an industrial or commercial activity
417A	Taking control of aircraft	If the offender uses actual violence, is armed, in company, or takes control by any fraudulent trick device or other means
419	Burglary	If the offender enters by means of a break, uses violence, is armed, in company, damages property, commits the offence at night or commits an offence in the dwelling
421	Entering or being in premises and committing indictable offences	If the offender gains entry to the premises by any break and commits an indictable offence in the premises
461	Arson	
467	Endangering the safe use of vehicles and related transport infrastructure	
469	Wilful damage	If the property is: <ul style="list-style-type: none"> <li>- a premises, the destruction is caused by explosion, and either anyone is in the premises when the explosion happens or the destruction actually endangers anyone's life</li> <li>- is a bank or wall of the sea or inland water, or a work relating to a port or inland water, and the destruction causes an actual danger of inundation or damage to</li> </ul>

Section	Title	Circumstances (if applicable)
474	Communicating infectious diseases to animals	land or a building.