

VICTORIAN PARLIAMENT
LAW REFORM COMMITTEE

**FORENSIC SAMPLING
AND
DNA DATABASES
IN CRIMINAL INVESTIGATIONS**

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**Parliament of Victoria
Australia**

Law Reform Committee

Forensic Sampling and DNA
Databases in Criminal Investigations

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TERMS OF REFERENCE

Reference from the Legislative Council, 21 November 2001

That, pursuant to the *Parliamentary Committees Act 1968 (Vic)*, the Law Reform Committee be required to inquire into, consider and report on the following:

The collection, use and effectiveness of forensic sampling and the use of DNA databases in criminal investigations, with particular emphasis on identifying areas and procedures which would more effectively utilise forensic sampling and improve investigation and detection of crime.

Reference reinstated by Order in Council, 17 April 2003

FUNCTIONS OF THE COMMITTEE

Under section 12 of the *Parliamentary Committees Act 2003 (Vic)*:

- (1) The functions of the Law Reform Committee are, if so required or permitted under this Act, to inquire into, consider and report to the Parliament on any proposal, matter or thing concerned with—
 - (a) legal, constitutional or parliamentary reform;
 - (b) the administration of justice;
 - (c) law reform.

CHAIRMAN'S FOREWORD

This is the first report I have presented as Chairman of the Law Reform Committee of the Fifty-fifth session of the Victorian Parliament. This Inquiry, which was referred to the Law Reform Committee of the previous parliamentary session, has been a truly collaborative effort.

Current members of the Law Reform Committee are indebted to our predecessors, and in particular the Chair, Mr Murray Thompson MP, for initiating an extensive program of public hearings and consultative meetings, for establishing the framework for the report, and for generating much of the original data and research collected for this Inquiry.

This Committee has written the final version of the Report, incorporating the latest research presented in other recent reviews, as well as the evidence that it has obtained directly from the 2003 program of public hearings.

I would like to express my personal appreciation to all past and present Committee members for their individual and collective contributions to this Inquiry. I am also particularly pleased to be able to table a report that takes a constructive, open and bipartisan approach to the complex and fascinating issues raised by the use of DNA sampling in criminal investigations. This subject is a matter of lively and ongoing public interest.

The quality of the report owes much to the skill and commitment of the support staff. I would particularly like to thank the Executive Officer, Merrin Mason for her able management of a complex task and her capacity to assist the Committee members to work through difficult issues. Legal Research Officer, Sue Kaufmann has had the prime responsibility for researching and writing the report and has done an outstanding job in moulding this work into an extensive report which not only reflects the current thinking of interested stakeholders but also the consolidated views of the current Committee on this complex area. Jaime Cook has also provided valuable service to the Committee as the Office Manager.

The collection, analysis and use of DNA in criminal investigations have rapidly expanded in recent years. The Committee hopes that this report will make a valuable contribution to further developments in the law and the protocols and procedures used in this area. I commend the Report and its recommendations to all those who have a continuing commitment to developments in this area of the law.

Rob Hudson MP, Chairman

ACKNOWLEDGEMENTS

A parliamentary inquiry, by nature, draws on the submissions and evidence presented to it, and the Committee acknowledges the valuable contribution of those who made submissions or presented evidence at the public hearings. During the course of this Inquiry, the Committee also received a considerable amount of information and assistance from other sources. The Committee acknowledges, in particular, Professor John Scheffer, Dr Peta Stringer and the staff of the Victorian Forensic Science Centre, Dr Ian Freckelton, Barrister and Adjunct Professor of Law, Monash University, and Dr Greg Gardiner, Senior Research Officer, Victorian Parliamentary Library, who produced background papers for the Inquiry.

The Committee expresses its appreciation to Samantha Adrichem, Court Services, Department of Justice; Adrian Bendeler, Librarian, Office of Public Prosecutions; Daniel Hoenig and Natalie Dugandzic, NSW Ministry of Police; Juliet Dimond, New South Wales Ombudsman's Office; Gaby Carney, Australian Law Reform Commission; Robin Napper, University of Western Australia; Dr Alaster Smith, UK Home Office; Alastair Ross and staff at the National Institute of Forensic Science; staff of the Victorian Parliamentary Library. Particular acknowledgement is due to the many members of Victoria Police who provided assistance in this Inquiry, including representatives at the 2002 and 2003 public hearings, as well as members of the Prosecutions Division and the DNA Management Unit. The Committee is also grateful to those organisations, listed in Appendix 3, which hosted fact-finding meetings with Committee members during 2002. Mignon Turpin provided invaluable editorial assistance during the preparation of this report.

ABBREVIATIONS

ALRC	Australian Law Reform Commission
ABS	Australian Bureau of Statistics
DNA	Deoxyribonucleic Acid
MCCOC	Model Criminal Code Officers' Committee of the Standing Committee of Attorneys-General
NATA	National Association of Testing Authorities
VFSC	Victoria Forensic Science Centre (Victoria Police)

Acts referred to in this report are as at 30 September 2003 unless otherwise identified.

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That legislation amending the forensic procedures provisions contained in Subdivision 30A of the Crimes Act 1958 (Vic) not have retrospective effect and therefore not apply to procedures sought and profiles obtained prior to the enactment of the amending legislation.

Recommendation 4.2 A purpose clause 127

That Subdivision 30A of the Crimes Act 1958 (Vic) be amended to insert a ‘purpose clause’, to prevent the use of DNA samples and profiles obtained pursuant to these provisions for purposes other than forensic purposes in criminal investigations.

Recommendation 4.3 Evidence obtained from physical examinations..... 130

That in considering the wider implications of the Australian Law Reform Commission’s report on genetic information for Victoria, the relevance and appropriateness of section 464ZE(6) of the Crimes Act 1958 (Vic) should also be reviewed.

Recommendation 4.4 Destruction of the DNA reference sample 132

That Subdivision 30A of the Crimes Act 1958 (Vic) be amended to provide that a sample obtained pursuant to Subdivision 30A must be destroyed as soon as practicable after a forensic profile has been derived from the sample.

Recommendation 4.5 Protocol for destruction of profiles and related information 138

That the National Association of Testing Authorities, the Victoria Forensic Science Centre (VFSC) and the Department of Justice:

- (i) collaborate to review:
 - (a) the current definition of destruction; and*
 - (b) the processes used by the VFSC to de-identify DNA profiles and related information; and*138*
- (ii) establish a protocol which satisfies the privacy concerns of the donors and is practicable to implement.*

Recommendation 4.6 Prescribed information for donors..... 142

That the Crimes Act 1958 (Vic) be amended to provide that all persons who undergo forensic procedures should receive standard prescribed information as to the nature of the procedure, the investigation(s) for which it will be used, and their legal rights, their entitlements under Subdivision 30A and avenues of complaint or appeal, expressed clearly and simply in a language that the donor can understand.

Recommendation 4.7 Unequivocal indication of donor’s consent..... 144

That the Crimes Act 1958 (Vic) be amended to require an express or unequivocal indication of the donor’s consent.

Recommendation 4.8 Self-administered buccal swab 146

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Recommendation 4.9 Donor’s right to nominate type of procedure used..... 148

That the Crimes Act 1958 (Vic) be amended to provide that a person from whom a DNA ‘reference’ sample is sought has the right to choose the method by which the DNA sample is taken.

Recommendation 4.10 Video-recording of the taking of blood samples 149

That the Crimes Act 1958 (Vic) be amended to require forensic procedures involving the taking of blood samples to be video-recorded.

Recommendation 4.11 Attendance of independent practitioner 151

That the Crimes Act 1958 (Vic) be amended to enable the requirement for an independent medical practitioner to attend when the donor’s chosen practitioner will carry out the procedure, to be waived in exceptional circumstances.

Recommendation 4.12 General rules for the conduct of forensic procedures 152

That Subdivision 30A of the Crimes Act 1958 (Vic) be amended to include the ‘general rules’ for the conduct of a forensic procedure, as set out in Section 23XI of the Crimes Act 1914 (Cth), not already included in Subdivision 30A:

‘A forensic procedure: ...

- (a) must be carried out in circumstances affording reasonable privacy to the suspect; and*
- (b) except as permitted..., must not be carried out in the presence or view of a person who is of the opposite sex to the suspect; and*
- (c) must not be carried out in the presence or view of a person whose presence is not necessary for the purposes of the forensic procedure or required or permitted by another provision of this Part; and*
- (d) must not involve the removal of more clothing than is necessary for the carrying out of the procedure; and*

- (e) *must not involve more visual inspection than is necessary for the carrying out of the procedure.'*

4.13 Obtaining a second reference sample 155

That the Crimes Act 1958 (Vic) be amended to provide that where:

- (i) *it is shown that the first sample was inadequate or insufficient to obtain a profile; and*
- (ii) *reasons are given for the inadequacy of the sample;*

the taking of a second non-intimate reference sample can be authorised on the conditions that:

- (i) *the first sample is destroyed and evidence provided to this effect;*
- (ii) *the same conditions as to the retention, destruction and use apply to the second sample and profile as to the first.*

5. Offenders 161

Recommendation 5.1 Research into repeat offending in Victoria 176

That the Department of Justice fund and initiate research on trends in repeat offending in Victoria to establish the proportion of persons who, having committed minor summary or indictable offences, are subsequently convicted of serious indictable offences, and to develop means of targeting and rehabilitating minor offenders most at risk of recidivism.

Recommendation 5.2 Defining Schedule 8 ('forensic sample') offences 184

That the Crimes Act 1958 (Vic) be amended to re-define 'forensic sample' offences, listed in Schedule 8 of the Crimes Act, as serious indictable offences for which a maximum penalty of five years' imprisonment or more or a life sentence can be imposed.

Recommendation 5.3 Compulsory sampling of adult offenders sentenced to prison term 194

That the Crimes Act 1958 (Vic) be amended to provide that an order for a non-intimate forensic procedure be issued automatically where a capable adult is:

- (i) *found guilty of a serious indictable offence for which a maximum sentence of five years or more or life imprisonment can be imposed; and*
- (ii) *sentenced to a term of imprisonment for that offence.*

Recommendation 5.4 Retention of discretionary court orders for vulnerable offenders 200

- (i) *That orders for all forensic procedures conducted pursuant to section 464ZF involving children and incapable offenders found guilty of serious indictable offences continue to be determined by the courts on a case-by-case basis pursuant to section 464ZF of the Crimes Act 1958 (Vic);*
- (ii) *That the Committee’s proposal in Recommendation 5.2 for a revised definition of an offence for which a forensic procedure may be required on a finding of guilt (a ‘Schedule 8’ or ‘forensic sample’ offence) also apply in relation to orders sought for the sampling of children and incapable offenders.*

Recommendation 5.5 Spent convictions and the destruction of offenders’ profiles..... 201

That the Crimes Act 1958 (Vic) be amended to provide that, in relation to indictable offences for which a sentence of two years or less has been imposed and the offender’s DNA profile has been entered on the Victorian DNA database, the profile must be removed from the database and destroyed following a period of 10 years without a subsequent conviction.

6. Suspects 209

Recommendation 6.1 Application for a relevant suspect order 217

That the Crimes Act 1958 (Vic) be amended to provide that an application for a relevant suspect order under sections 464T(3) or 464U be required to specify whether the crime scene sample has been analysed and, if so, whether it has produced a profile against which the suspect's profile can be compared.

Recommendation 6.2 Factors relevant to orders for compulsory procedures..... 223

That the relevant provisions of Subdivision 30A of the Crimes Act 1958 (Vic) be amended to include the considerations listed in sections 23WO and 23WT of Part ID of the Crimes Act 1914 (Cth) in relation to the grant of an order for a compulsory forensic procedure on a suspect, namely:

- (i) *the background of the suspect: his/her age, physical and mental health, cultural background and religious beliefs and, in the case of indigenous persons, his/her customary beliefs;*
- (ii) *the availability of a less intrusive way of obtaining the evidence;*
- (iii) *the suspect's reasons for refusing consent; and*
- (iv) *any other matter considered relevant.*

Recommendation 6.3 Multiple suspects..... 224

That Subdivision 30A of the Crimes Act 1958 (Vic) be amended to clarify the process for seeking court orders in investigations involving multiple suspects, by requiring each application to indicate the number of applications that are being sought in relation to other suspects.

Recommendation 6.4 Relevant suspect orders for vulnerable persons 232

That section 464T(3) in relation to incapable persons and section 464U(8) in relation to children, of the Crimes Act 1958 (Vic) be amended to provide that, in considering the grant of an order for a compulsory forensic procedure involving an incapable person or a child, ‘the welfare of the person’ be taken into account.

Recommendation 6.5 Re-defining ‘relevant suspect’ offences 244

That the Crimes Act 1958 (Vic) be amended to re-define ‘relevant suspect’ offences for which a court order for a compulsory forensic procedure can be sought, as serious indictable offences for which a maximum term of imprisonment of five years or more or life can be imposed.

7. Volunteers 253

Recommendation 7.1 The retention and use of victims’ and relatives’ profiles 261

That Subdivision 30A of the Crimes Act 1958 (Vic) be amended to provide that:

- (i) the profile obtained from a victim, complainant or a relative of a missing person shall not be stored in or matched against the crime scene index of any DNA database; and*
- (ii) breach of these requirements constitutes a serious breach for the purposes of section 464ZE and renders the DNA evidence inadmissible in criminal proceedings against the donor.*

Recommendation 7.2 Forensic purpose of voluntary sampling 266

That section 464ZGB of the Crimes Act 1958 (Vic) be amended to provide that an adult volunteer may provide a DNA sample only when it is sought in relation to an investigation into the commission of a specified indictable offence, and where crime scene evidence exists against which the DNA profile of a donor can be compared.

Recommendation 7.3 Limited use of volunteers’ DNA 269

That Subdivision 30A of the Crimes Act 1958 (Vic) be amended to provide that the profile obtained from a volunteer shall only be matched against the profile for the crime scene and shall be stored on the volunteers (limited purpose) index.

Recommendation 7.4 Destruction requirements for volunteers' profiles 270

That Subdivision 30A of the Crimes Act 1958 (Vic) be amended to provide that a profile obtained pursuant to section 464ZGB should be destroyed as soon as practicable after:

- (i) the donor has been eliminated from the investigation or*
- (ii) it has been determined that analysis of the donor's profile is not required;*

whichever occurs first

Recommendation 7.5 Volunteer to be present at retention order hearings 282

That the Crimes Act 1958 (Vic) be amended to provide that applications made for the retention of DNA samples and information after consent has been withdrawn must be heard and determined in the presence of the donor of the sample.

8. The Role of Consent in DNA sampling 283

Recommendation 8.1 Evidence of non-consent: admissibility provisions 285

That Subdivision 30A of the Crimes Act 1958 (Vic) be amended to insert a provision, based on section 23XZ of the Crimes Act 1914 (Cth) as follows:

Evidence of a person's refusal or failure to consent, or withdrawal of consent, to a forensic procedure is not admissible in proceedings against the person except to establish or rebut an allegation that a police member or another person investigating the commission of the offence concerned acted contrary to law in carrying out that investigation.

Recommendation 8.2 Confidentiality of volunteers' consent/refusal 286

That Subdivision 30A of the Crimes Act 1958 (Vic) be amended to provide that:

- (i) individuals who do not consent to participate in a mass screening program must not be identified or identifiable to other members of the community; and*
- (ii) the disclosure of information enabling the identification of such persons should be an offence under Subdivision 30A.*

Recommendation 8.3 Broader definition of incapable person 287

That the Crimes Act 1958 (Vic) be amended to incorporate a broader definition of an 'incapable person', along the lines of the definition contained in the Model Bill and Commonwealth provisions, to include persons suffering temporary, as well as permanent, incapacity at the time the DNA sample is sought.

Recommendation 8.4 Review of procedures for identifying incapable people 288

That Victoria Police and the Office of the Public Advocate jointly review current procedures for the identification of incapable persons.

Recommendation 8.5 Exclusion of incapable persons from voluntary sampling 290

That section 464ZGB of the Crimes Act 1958 (Vic), which permits volunteers to undergo forensic procedures by consent, be amended to specifically exclude incapable persons from its operation.

Recommendation 8.6 Court orders to sample persons held at Governor’s pleasure... 291

That Subdivision 30A of the Crimes Act 1958 (Vic) be amended to allow an application to be brought under section 464T or 464ZF for an order for a forensic procedure involving a person held at the Governor’s pleasure or detained after being found not guilty because of mental impairment.

Recommendation 8.7 Review of the role and duties of independent persons 296

That Victoria Police and the Office of the Public Advocate clarify the role and duties of the Independent Third Persons in the administration of the forensic procedures regime.

Recommendation 8.8 Support for indigenous persons..... 297

That the Department of Justice consult with indigenous and legal organisations to determine the most appropriate form of legislative and practical support for indigenous persons whose DNA samples are sought for criminal investigations.

9. Police Powers and Responsibilities 301

Recommendation 9.1 Audit of systems for administration of DNA sampling 308

That the Auditor-General undertake an audit of the systems in place for the ensuring compliance with the requirements of Subdivision 30A and the notification by Victoria Police of critical destruction and retention dates to the forensic laboratory.

Recommendation 9.2 Responsibility for the provision of reports and DNA evidence . 308

That the Crimes Act 1958 (Vic) be amended to provide that where a request is made for a forensic report or a portion of a crime scene sample, the Victoria Forensic Science Centre will be responsible for:

- (i) making the forensic report available; and/or*
- (ii) providing access to the crime scene sample for re-testing.*

Recommendation 9.3 Regulations for the collection of DNA samples 318

- (i) That the National Association of Testing Authorities, the Victoria Forensic Science Centre, Victoria Police and the Victorian Institute of Forensic Medicine (VIFM) collaborate to develop ‘best practice’ procedures to govern the collection and handling of DNA person samples by Victoria Police and the VIFM; and*
- (ii) That these procedures be prescribed as regulations pursuant to section 464ZGJ of the Crimes Act 1958 (Vic).*

Recommendation 9.4 Elimination sampling of Victoria Police members 328

That police members be required to provide a DNA reference sample for elimination purposes, and that the profiles obtained be stored along with profiles of Victoria Forensic Science Centre laboratory staff, on the internal VFSC staff elimination database.

Recommendation 9.5 Guidelines for an elimination sampling policy..... 329

That Victoria Police develop a clear policy on elimination sampling outlining:

- (i) when staff samples and profiles may be destroyed;*
- (ii) the uses to which the profile can and cannot be put; and*
- (iii) policies and procedures for the destruction of this material after employment has changed or terminated.*

Recommendation 9.6 Safeguards and penalties for breach to cover DNA samples and related information obtained from police and laboratory staff 329

That the Crimes Act 1958 (Vic) be amended to ensure that the unauthorised retention or use of DNA samples, profiles and related information, obtained from police members and laboratory staff and stored on an internal staff elimination database, constitutes a breach of Subdivision 30A.

Recommendation 9.7 ‘Best practice’ procedures for collection of crime scene evidence 330

That the National Association of Testing Authorities, the Victoria Forensic Science Centre and Victoria Police collaborate to develop ‘best practice’ procedures to govern the collection, handling and preservation of crime scene evidence containing DNA samples.

10. Laboratory Systems and Services 331

Recommendation 10.1 Notification of destruction of sample 350

That the Crimes Act 1958 (Vic) be amended to require that, when destruction of a forensic sample is required under Subdivision 30A, the Victoria Forensic Science Centre be required to notify the person in writing and report to the Chief Commissioner of Police in writing within 28 days.

Recommendation 10.2 Annual publication of DNA profiling data 351

That data maintained by the Victoria Forensic Science Centre relating to:

- (i) the number of samples received, analysed and destroyed;*
 - (ii) database detections;*
 - (iii) the inculcation and exculpation of suspects; and*
 - (iv) the sampling of volunteers*
- be collated and released annually.*

Recommendation 10.3 NATA Accreditation in forensic science for laboratories 359

That Subdivision 30A of the Crimes Act 1958 (Vic) be amended to provide that in relation to the analysis of forensic samples, only forensic reports produced by laboratories accredited by NATA in the field of forensic science will be admissible in criminal proceedings in Victoria.

Recommendation 10.4 Independent footing for the Victoria Forensic Science Centre 369

That the Victoria Forensic Science Centre should be established on an independent footing, namely:

- (i) managed by an independent Board, to include representatives of client groups;*
- (ii) accountable through annual reports to the Victorian Parliament;*
- (iii) at arm's length from its major clients; and*
- (iv) funded by a body or department separate from Victoria Police.*

11. The Use of DNA Evidence in Criminal Proceedings 373

Recommendation 11.1 The impact of DNA evidence on criminal proceedings 382

That the Department of Justice, Victoria Police Prosecutions, the Office of Public Prosecutions and the Victorian Courts develop an agreed and consistent process for collecting and reporting to Parliament on the impact of DNA evidence on criminal prosecutions/proceedings, specifically including:

- (i) the number of investigations in which DNA evidence is used, indicating the type of offence involved, and specifically identifying serious crimes against the person, sexual offences, assaults, armed robbery, burglary, theft*
- and, in relation to prosecutions involving DNA evidence:*
- (ii) the number of guilty pleas and findings of guilt recorded;*
 - (iii) the number of prosecutions resulting primarily from a DNA database detection;*
 - (iv) the role of the DNA evidence; and*
 - (v) whether the DNA evidence was contested and, if so, on what basis.*

Recommendation 11.2 Defining the forensic report..... 396

That the Department of Justice convene a Working Group to report to the Attorney-General, with representatives from the National Association of Testing Authorities, the Victoria Forensic Science Centre, the Office of Public Prosecutions, the Law Institute of Victoria, Victoria Legal Aid, and the Criminal Bar Association, to develop a comprehensive definition of the content of the forensic report.

Recommendation 11.3 Development of pre-trial guidelines for DNA evidence..... 397

That the Working Group proposed in Recommendation 11.2 above consider a proposal for the development of a protocol or guidelines for the pre-trial preparation and identification of agreed and contested elements of DNA evidence for criminal trials.

Recommendation 11.4 Glossary of technical terms..... 398

- (i) *That the Victoria Forensic Science Centre compile a glossary of scientific and technical terms used in the analysis of DNA evidence in Victoria; and..... 398*
- (ii) *That Victoria Police, through its representation on the CrimTrac Board of Management, propose the adoption of the glossary by all Australian forensic laboratories conducting DNA analysis for criminal investigations.*

Recommendation 11.5 Legal education on presentation of DNA evidence 404

That the Law Institute of Victoria, the National Institute of Forensic Science and other agencies involved in the provision of continuing legal education develop programs on the presentation of forensic evidence for forensic expert witnesses and legal practitioners.

Recommendation 11.6 Legal education on DNA evidence for judicial officers 404

That the Judicial College of Victoria develop legal education programs to assist judicial officers in understanding and giving jury directions on DNA evidence.

12. DNA Sampling and the Principles of Criminal Justice 405

Recommendation 12.1 Admissibility of DNA evidence from other jurisdictions 413

That in determining whether DNA evidence originating in a jurisdiction which is not a participating jurisdiction for data-sharing purposes under section 464 of the Crimes Act 1958 (Vic) should be admissible in any Victorian criminal proceedings, the court be required to take into account whether the collection and analysis of the DNA evidence would have complied with the requirements of Victorian law.

Recommendation 12.2 Increased penalties for unauthorised use of DNA material..... 415

That the penalties prescribed in sections 464ZG(2) and (3) of the Crimes Act 1958 (Vic) for the unauthorised retention or use of forensic material be increased to a maximum of two years, in alignment with penalties imposed in other Australian jurisdictions.

Recommendation 12.3 The defendant's standing in hearings of applications for relevant suspect orders 423

That the Crimes Act (1958) Vic be amended consistent with the provisions of sub-sections 23WX(6) and (6A) of the Crimes Act 1914 (Cth).

13. Post-conviction Reviews (Innocence Projects) 425

Recommendation 13.1 Post-conviction review process on basis of DNA evidence 430

- (i) *That the Attorney-General establish a process to consider applications for post-conviction review from a serious offender serving a term of imprisonment who makes a claim that DNA evidence may exist that calls his or her conviction into question; and*
- (ii) *That this process establish clear criteria for the assessment of applications for post-conviction review, including but not limited to the following:*
 - (a) *the availability of biological evidence which, if analysed, could produce a relevant, meaningful and probative result;*
 - (b) *whether the applicant has consistently maintained his/her innocence; and*
 - (c) *the nature of the evidence relied upon to convict the applicant.*

Recommendation 13.2 Assistance for re-testing DNA evidence 432

That where an application for a preliminary review of the DNA evidence is made through the process developed as proposed in Recommendation 13.1, and meets the specified criteria for a review to proceed, funds be made available through a legal aid allocation for re-testing and analysis of relevant DNA evidence.

Recommendation 13.3 Preservation orders for crime scene evidence 435

- (i) *That the Crimes Act 1958 (Vic) be amended to provide that a serious offender, serving a term of imprisonment, may within one year of the expiry of all appeal periods, apply for a court order for the preservation of relevant crime scene DNA evidence; and*
- (ii) *That the Department of Justice consult with Victoria Police, the Law Institute of Victoria, the Office of Public Prosecutions and the Criminal Bar Association to develop regulations outlining the circumstances in which such applications could be made and granted.*

Recommendation 13.4 Establishment of an accredited crime scene exhibits registry .. 438

That Victoria Police, in consultation with the National Association of Testing Authorities, establish a NATA-accredited Exhibits Registry for the preservation of identified crime scene exhibits.

14. The DNA Database and the Data-sharing Provisions 449

Recommendation 14.1 Defining national minimum standards for data-sharing 456

That to enable data-sharing to commence on the basis of uniform national standards, Victoria advocate that, in the first stage of data-sharing, participating jurisdictions upload onto the national DNA database only data consistent with the Model Bill definitions of offender, suspect and volunteer.

Recommendation 14.2 Audit of DNA database 463

That Victoria, through its representation on CrimTrac, work towards the introduction of a regular, independent audit of the operation of the national DNA database.

Recommendation 14.3 A phased process for entering national DNA database..... 464

- (i) That Victoria's participation in the national DNA database be phased in, to ensure that consistent or agreed minimum standards apply to the data entered and retained on the database; and*
- (ii) that in the first stage, only profiles which, at the time of collection, were provided for indefinite and unlimited use be made available to law enforcement agencies in other jurisdictions under data-sharing arrangements.*

EXECUTIVE SUMMARY

Introduction

This Inquiry was asked to review ‘the collection, use and effectiveness’ of forensic sampling and the use of DNA databases in criminal investigations, with particular emphasis on ways to use forensic sampling more effectively.

DNA profiling involves analysing a DNA sample – collected either directly from a person or from an item on which it was deposited – to produce a profile, which is a sequence of numbers that describe a distinctive pattern in the donor’s DNA. While this pattern or profile is not unique, the chance of another person in the population having exactly the same profile is remote enough for evidence of a ‘match’ between two profiles to constitute compelling evidence that the two DNA samples came from the same source.

This technique is used in criminal investigations primarily to compare DNA deposited on a victim or at a crime scene with the DNA of a person suspected of some involvement in the crime. It is also used to identify unknown victims of crimes and disasters. As the use of DNA profiling has expanded, Victoria, along with other Australian and overseas jurisdictions, has developed a database of DNA profiles which can be compared electronically with the profiles obtained from the victims or evidence of unsolved crimes. Legislation authorising Victoria to share data on the Victorian database with other Australian jurisdictions is in place, but at the time of writing data-sharing through the national DNA database had not yet commenced.

In Victoria the collection and use of DNA samples is regulated through Subdivision 30A of the *Crimes Act 1958 (Vic)*. The Victorian legislation is broadly consistent with model forensic procedures provisions that have been developed by a committee of Commonwealth, State and Territory officers (the Model Criminal Code Officers’ Committee) for enactment in each Australian jurisdiction. The forensic sampling regime in Subdivision 30A provides for procedures to be conducted with the consent of the donor or, in some circumstances where consent is not provided, by court order. There are requirements governing the circumstances in which the DNA sample and profile can be retained and loaded onto the database, and when they must be destroyed. The regime also deals with issues of admissibility arising in relation to expert DNA evidence and prescribes penalties for breach of the various requirements of Subdivision 30A.

The Timing of this Inquiry

The timing of this Inquiry has enabled the Committee to ‘take stock’ of the Victorian regime in the light of the many scientific, legislative and systemic changes that have affected the use of DNA profiling in criminal investigations in recent years.

It is only twenty years since Sir Alec Jeffreys pioneered the technique of DNA profiling and applied it to exclude a suspect from a high-profile murder investigation in England. Over this relatively brief time-span, genetic science and technology have made advances with significant spin-off benefits in the field of forensic DNA profiling. Developments in profiling technology have increased the capacity and the efficiency of the profiling process.

Victoria was one of the first Australian jurisdictions to undertake DNA profiling. In 1989 DNA evidence was used in the investigation of a rape, the Coldrey Committee produced a blueprint for laws to authorise the collection of bodily samples, and the first forensic procedures provisions were enacted. Since then, the Victorian forensic sampling provisions have been periodically amended to keep pace with the escalating use of DNA profiling in criminal investigations.

This Inquiry’s Approach

In this Committee’s view, the time is now ripe to revamp the legislative and administrative framework in which DNA profiling is conducted to ensure that its future development is regulated and supported, but not inhibited, by this framework.

The Committee believes that the current regime provides a comprehensive and generally sound framework for DNA profiling. However, it bears the hallmarks of incremental change: it leaves new areas of activity unregulated but contains provisions which, at the time of enactment, regulated the most exposed elements of the DNA sampling process but which, with the passage of time, prescribe detailed requirements to regulate procedures that are now largely superseded.

What distinguishes this review is the opportunity it has provided to examine the practical effect that the legislative framework has on the use of DNA profiling in criminal investigations. With twenty years’ of DNA profiling in the United Kingdom and more than a decade of experience in Australia, the Committee has been able to take a long-term perspective on the operation of the forensic procedures regime. It has drawn on the data provided by Victoria Police and the findings of inquiries in other comparable jurisdictions to produce a comprehensive review of the operation of Victoria’s regime.

DNA profiling is, unquestionably, a growth area. The recommendations outlined below have been formulated to permit the controlled growth of DNA sampling, without fuelling unrealistic demands and expectations. The Committee was not convinced, from the data available, that a generalised expansion of DNA sampling powers would provide an effective and efficient use of policing powers and resources.

The Committee has concluded, however, that there is scope to expand the use of DNA profiling in criminal investigations by streamlining the way in which procedures are authorised and conducted, and by giving greater legislative and administrative recognition to those responsible for delivering the services.

Reconciling Science and Ethics: Privacy Safeguards

Chapter 3 of this Report identifies advances in genetic science and technology. Scientifically, the human genome project has deepened our understanding of the potential of the DNA sample. A DNA sample contains a person's genetic blueprint and provides personal information not only about the donor but also about his/her past and future relatives.

Prescribing the Purposes for DNA sampling under Subdivision 30A

The Committee therefore considered whether the current safeguards for the retention of DNA material and data and the requirements for its destruction provide adequate protection against the future use of the donor's DNA sample and profile for purposes not authorised, and perhaps not even contemplated, at the time of collection. As the state's collection of DNA samples and profiles grows, so does its potential value to medical research, government and commercial bodies.

The sample may be kept for months or years before being analysed. Generally, a donor's 'reference sample' will not be entirely used up in the analysis; it is likely that some of the original DNA sample will be left over at the end of the process. This is retained by the VFSC unless destruction is required under Subdivision 30A. Likewise, the profile and related information obtained from the analysis is retained unless destruction is required.

With modern techniques, even minute quantities of DNA, previously regarded as unsuitable for analysis, may be usable for forensic purposes. Further, the DNA profiling process uses non-coding regions of the DNA molecule (genomic DNA), dubbed 'junk' DNA, but geneticists are now researching hitherto unsuspected functions performed by these non-coding regions.

These developments suggest that the sample itself and the non-coding regions extracted for DNA analysis may in future reveal genetic information beyond our current appreciation. For the present, the Committee believes that it is vital to public confidence in and cooperation with law enforcement agencies for donors to be assured that their DNA samples and profiles will only be used for the purposes for which they have been initially collected.

The Committee therefore recommends that a purpose clause should be inserted in Victoria's forensic sampling legislation to prevent the use of DNA samples and profiles obtained under those provisions for purposes other than forensic purposes in

criminal investigations (Recommendation 4.2). Likewise, the Committee recommends that legislation amending the forensic sampling provisions not have retrospective effect (Recommendation 4.1).

The wider use of genetic information obtained for medical purposes was exhaustively examined by the Australian Law Reform Commission (ALRC) and this Committee recommends that, in considering the implications of the ALRC's findings for Victoria, the relevance and appropriateness of section 464ZE(6) of the Victorian *Crimes Act*, which deals with the use of evidence from medical examinations in criminal proceedings, should be reviewed (Recommendation 4.3).

Destruction of the DNA Sample

As well as regulating the means by which DNA samples can be obtained, Subdivision 30A regulates the circumstances in which they must be destroyed. Destruction here denotes the physical destruction of the sample; while destruction of the profile involves merely 'de-identification'. The current provisions enable the DNA sample to be retained for as long as the profile is retained. If a date is set for destruction, both the sample and the profile are to be destroyed by that date.

The Committee believes it is desirable to require the destruction of the sample as soon as practicable after the profile has been obtained. The Committee encountered apprehension on the part of some participants about the potential for a DNA sample to be accessed or analysed for unauthorised purposes. The Committee proposes that after the DNA sample has been analysed and a DNA profile has been produced, the sample itself should be destroyed as soon as practicable, on the basis that, should a second sample be required for verification purposes, a second procedure can be authorised (Recommendation 4.4).

Destruction of the Profile

Advances in databasing and communications enable DNA profiles to be readily stored, searched, and transmitted and also give rise to the concern that DNA profiles, once entered on a database, are beyond the effective control of any regulatory agency.

Destruction of the DNA profile by de-identification presents some practical difficulties in determining what constitutes de-identification. De-identification by the removal of all references to a profile, involves a complex and time-consuming search. This method is irreversible. However, it may also compromise the records relating to other unrelated cases or donors. De-identification by removing the link which allows the donor of the profile to be identified is faster, but potentially reversible.

The Committee concluded that this issue is best resolved by examining the actual processes involved in de-identification. The Committee therefore recommends that the National Association of Testing Authorities (NATA), the VFSC and the Department of Justice collaborate to review the current definition of destruction and

the processes used by the VFSC to de-identify DNA profiles and related information. It also recommends that they establish a protocol for destruction which satisfies the privacy concerns of donors and is practicable to implement (Recommendation 4.5).

Information to be provided to Donors

Where the donor is *asked to consent* to a procedure, it is clearly vital for the validity of the procedure and the evidence obtained to ensure that the consent is truly informed and unequivocal. Subdivision 30A therefore prescribes in detail the information which must be provided to suspects and volunteers who are *asked to consent* to forensic procedures. Where a donor is *ordered* to provide a DNA sample, Subdivision 30A provides less guidance on the information to be given to these donors.

The Committee believes that the donor should still be given a clear explanation of the nature, purpose and implications of the procedure. The Committee was concerned at the complexity of the information to be conveyed to donors and recommends that all persons who undergo forensic procedures, whether they are suspects, offenders, or volunteers, receive standard prescribed information explaining the nature, purpose and implications of the procedure clearly and simply and, as already required under Subdivision 30A, in a language that the donor is likely to understand (Recommendation 4.6).

The Committee was also made aware of the importance of ensuring that the donor has really understood what he/she is consenting to. Some other Australian jurisdictions require an express or unequivocal indication of consent. The Committee recommends that this requirement be inserted in the Victorian legislation (Recommendation 4.7).

Streamlining the Conduct of Forensic Procedures

The Committee is proposing a number of measures to ‘fine tune’ these provisions; to streamline the conduct of forensic procedures, and to provide the same level of statutory recognition for the donor’s physical privacy that is available in other Australian jurisdictions.

When DNA sampling began, the most common (and the most reliable) procedure was a blood sample. DNA sampling techniques have since been refined: now a blood sample involves no more than a finger prick, and a donor can take his/her own DNA sample by simply scraping a cotton bud along the inside lining of the mouth. This latter technique, called the buccal swab, is now the preferred sampling method and can be self-administered by donors of any age under the supervision of trained non-medical personnel.

The current provisions distinguish between intimate procedures and non-intimate procedures, with requirements for intimate procedures more stringent than those which govern non-intimate procedures. The buccal swab is currently defined as an

intimate procedure, with those undertaking a self-administered buccal swab exempted from the requirement for the procedure to be video-recorded. The Committee recommends that the self-administered buccal swab be re-defined as a non-intimate procedure (Recommendation 4.8).

Currently the relevant police officer determines what type of procedure will be used to obtain a DNA reference sample. The Committee believes that a donor should have the right to choose the method by which a DNA sample is taken and recommends accordingly (Recommendation 4.9). The Committee also recommends that the 'general rules' for the conduct of forensic procedures contained in the Commonwealth provisions, not already included in Subdivision 30A, also be incorporated in the Victorian provisions (Recommendation 4.12). The enactment of these rules would provide statutory recognition of key privacy principles, and would bring the Victorian legislation into alignment with the Commonwealth provisions.

The Committee proposes a number of recommendations designed to clarify and simplify the requirements for the conduct of forensic procedures. If a DNA reference sample is found to be inadequate for profiling there should be no statutory obstacle to re-sampling. The Committee recommends an amendment to the *Crimes Act* to ensure that there is legislative authority for the police to obtain a second sample where necessary (Recommendation 4.13). The Committee believes that the current requirement for the attendance of an independent medical practitioner at intimate forensic procedures is unduly burdensome and recommends that the *Crimes Act* be amended to enable this requirement to be waived (Recommendation 4.11). Finally, the Committee proposes an amendment to Subdivision 30A to clarify the provisions governing the video-recording of intimate procedures (Recommendation 4.10).

The Sampling of Offenders, Suspects and Volunteers

Offenders

Repeat Offending and the Sampling of Offenders

The provisions for the DNA profiling of serious offenders marked an extension of the original rationale for DNA sampling, accepting that there is a strong likelihood that serious offenders may commit, or may already have committed other undetected offences. The term 'offender' denotes a person found guilty of a 'forensic sample offence' as listed in Schedule 8 of the *Crimes Act 1958 (Vic)* which includes all sexual offences, serious offences against the person, arson, various drug trafficking and cultivation offences, and serious indictable property offences. Indictable property offences that are not currently within the definition of forensic sample offences include theft and threats to destroy or damage property.

The Inquiry considered whether the list of offences in Schedule 8 casts the net widely enough to capture the DNA of repeat offenders. It examined the Victorian data

available on the contribution made by the DNA sampling of offenders and concluded that databasing the DNA profiles of offenders found guilty of forensic sample/Schedule 8 offences has made a significant contribution to the detection of unsolved crimes.

The Committee then examined the available data on recidivism in Victoria and other Australian jurisdictions and found that only a relatively small proportion of minor offenders go on to commit further offences, and only a relatively small proportion of these repeat offenders commit crimes of escalating seriousness.

The Committee observed that strategies to identify those first-time offenders with an increased likelihood of re-offending would enhance the effectiveness of the DNA profiling program. It recommends further research into recidivism, so that the collection of DNA samples can be targeted at those most likely to re-offend (Recommendation 5.1).

The Committee has also concluded that a blanket sampling approach for serious offenders is likely to provide a greater return on the forensic investment than an expanded program for the sampling of the very large number of persons found guilty of relatively minor offences. It considered, however, whether some expansion of the list of forensic sample offences was warranted in the light of the outcomes achieved from offender sampling to date.

The Inquiry reviewed the range of offences for which offender sampling can be conducted in the Model Bill and other Australian jurisdictions, as well as the proposals for reform contained in other recent reviews of these provisions. It found that the majority of the other Australian jurisdictions permit the sampling of ‘serious offenders’ who have been convicted of any indictable offences punishable by a maximum penalty of life or 5 or more years. This approach has the advantage of providing a clear benchmark for determining what constitutes a ‘forensic sample offence’. If adopted in Victoria, it would also expand the range of forensic sample offences currently listed in Schedule 8 to include the common property offence, theft. The Committee proposes that the definition of ‘forensic sample’ or Schedule 8 offences should be revised to include all indictable offences for which a maximum sentence of 5 years or life imprisonment can be imposed (Recommendation 5.2).

Automatic Sampling of Serious Offenders

The Committee proposes that an order for a non-intimate forensic procedure should be issued automatically where a capable adult is found guilty of a serious indictable offence for which a maximum sentence of five years or life can be imposed, and the offender is sentenced to a term of imprisonment for that offence (Recommendation 5.3). The effect of this recommendation, taken in conjunction with Recommendation 5.2, is to remove the need for court orders to authorise the sampling of forensic sample offenders. This measure will reduce the administrative burden of the court order process and streamline the sampling of adult offenders.

Safeguards for Vulnerable Offenders

The only exceptions would be where a ‘forensic sample’ offender is not sentenced to a term of imprisonment or where the offender is a child or incapable person. The Committee believes that the current system of discretionary court orders should remain in place to determine applications for the DNA sampling of child or incapable adult offenders, to ensure that the interests of vulnerable people receive judicial consideration before an order for sampling is made (Recommendation 5.4).

The Committee believes that these measures set in place a simple system to expand and consolidate use of offender sampling for the detection of crimes in this state.

A Spent Convictions Provision

Since the rationale for retaining the profiles of offenders is the likelihood of their re-offending, the Committee concluded that if a substantial period has elapsed without a subsequent conviction the removal of the offender’s profile from the database could be justified, provided that the original offence was of a relatively minor nature. Recommendation 5.5 proposes an amendment to the *Crimes Act* to provide that where a sentence of two years or less has been imposed for an indictable offence and the offender’s profile has been entered on the DNA database, the profile must be removed from the database and destroyed following a period of 10 years without a subsequent conviction.

Suspects

The Sampling of Suspects and DNA Databasing

Whereas the databasing of serious offenders’ profiles is undertaken after the commission of a serious indictable offence has been proven, suspects’ profiles can be entered on the database once he/she has been identified as a suspect and the profile has been obtained. However, the suspect’s sample and profile must be destroyed after 12 months if charges are not laid, the prosecution is abandoned or the defendant is acquitted.

The Scope of the Provisions

The Inquiry considered a range of options for the reform of these provisions. Under the current provisions, a person who is suspected of an indictable offence may be asked to consent to a forensic procedure. If the suspect refuses, and the offence is a relatively serious offence, listed as one for which a ‘relevant suspect’ order can be obtained, then an application may be made for an order for a compulsory procedure. If, however, the offence is not contained within the list of relevant suspect offences, a court order cannot be sought. The list of relevant suspect offences has generally been kept in alignment with the list of forensic sample offences in Schedule 8.

The Committee has recommended that the range of relevant suspect offences be re-defined to include serious indictable offences for which a maximum term of imprisonment of five years or more or life can be imposed.

The Committee believes that it is desirable to have a single consistent definition of offences for which DNA sampling may be required. Further, the Committee notes that theft, which is one of the few indictable offences not yet included in the list of 'relevant suspect' offences, is one where DNA evidence can be collected from crime scenes. It is also an offence that is committed by repeat offenders.

The Committee therefore recommends that the *Crimes Act* be amended to extend the definition of a relevant suspect offence by specifying the same definition as that recommended by the Committee for forensic sample offences. This will include theft as an offence for which an application for a court order to sample a relevant suspect may be made.

The Applications Process for 'Relevant Suspect' Orders

The Availability of a Crime Scene Sample

The Inquiry received evidence of the escalating demand for forensic DNA profiling in criminal investigations. This demand, the Inquiry was informed, is placing a strain on the already stretched resources of the VFSC and delays in the provision of forensic profiling services are affecting the scheduling and management of cases in the Magistrates' Court. The Committee notes that the ever-increasing demand for DNA profiling is a world-wide phenomenon, indicative of the value of this forensic tool.

The Committee considered how the legislation governing the applications process could assist parties and courts in managing the timely provision of DNA evidence. The Committee proposes that, when an application is made to obtain an order for a compulsory procedure involving a relevant suspect, the application should indicate whether the crime scene sample has been analysed and, if so, whether it has produced a profile against which the suspect's profile can be compared (Recommendation 6.1).

Factors relevant in determining Relevant Suspects Orders

The Committee considered an amendment to Subdivision 30A to bring the Victorian provisions into alignment with the Commonwealth legislation. The proposed provision would allow the court to take into account factors such as the background of the suspect and the availability of a less intrusive way of obtaining the evidence in determining an application for a relevant suspect order (Recommendation 6.2).

The Committee also proposes an amendment to Subdivision 30A to provide that in determining an application for a relevant suspect order in relation to an incapable person or a child, the welfare of the person may also be taken into account (Recommendation 6.4).

The Standing of Defendants at Applications Hearings

Under the current Victorian provisions, the defendant may address the court but cannot call or cross-examine witnesses in a hearing for the grant of an order for a forensic procedure. In evidence to this Inquiry, representatives of key Victorian legal organisations concurred in the view that defendants should have the right to test the evidence being presented in support of an application for a ‘relevant suspect’ order. The Committee believes that only in special circumstances, at the discretion of the court and in the interests of justice, the defendant should have a limited right to call and cross-examine witnesses. The Committee reviewed legislation enacted to address these issues in other jurisdictions and favours the Commonwealth’s approach. The Committee therefore recommends that the *Crimes Act* be amended along the lines of the Commonwealth provisions set out in sub-sections 23WX(6) and (6A) of the *Crimes Act 1914 (Cth)* (Recommendation 12.3).

Provision for the Sampling of Multiple Suspects

The Committee also advocates that the *Crimes Act* be amended to require the applicant to indicate whether any other applications for relevant suspect orders are being made in relation to the same investigation and, if so, how many such applications are proposed (Recommendation 6.3). The identity of any other suspects would not be revealed during this process. This proposal is intended to clarify the current provisions, which do not specify how applications made in relation to multiple suspects in a single investigation should be handled.

Volunteers

To date in Victoria the main use of the voluntary sampling provisions has been to obtain the samples of victims, complainants and the relatives of missing persons. In other Australian jurisdictions, the voluntary sampling provisions have also been used to conduct large-scale DNA screening programs, such as the program carried out in Wee Waa in 2002 to identify the perpetrator of a rape.

The Scope of the Voluntary Sampling Provisions

The current regime enables an adult to volunteer to provide a DNA sample, without specifying that the sample is sought for the investigation of an indictable offence or requiring the existence of DNA crime scene evidence against which the volunteer’s DNA with can be compared.

The Committee recommends that the *Crimes Act* be amended to specify that a person may volunteer to provide a DNA sample only in relation to the investigation of the commission of a specified indictable offence where crime scene evidence exists against which the volunteer’s DNA profile can be compared (Recommendation 7.2).

Amendments enacted in 2002 give the donor the right to nominate ‘limited purposes’ for which the sample and profile can be used or to consent to the inclusion of the profile on the ‘unlimited purposes’ index, where it can be compared with the profiles of DNA collected in the investigation of unsolved crimes.

Where a volunteer is not under suspicion and provides a DNA sample essentially for elimination purposes, such as where the donor was a witness or crime scene attendee, the Committee believes that use of the donor’s DNA should be confined to the investigation of the offence for which it was obtained. The Committee believes that the co-operation of members of the public who may be asked to assist in criminal investigations could be jeopardised if such volunteers faced the possibility of their DNA being retained for other investigative purposes. The Committee believes that the current provisions should be amended to limit the use of volunteers’ DNA to the investigation for which the DNA was collected (Recommendation 7.3).

The Volunteers (Limited Purpose) Index

The Committee also recommends that a breach of the requirements limiting the use of the DNA samples and related material obtained from victims, complainants and the relatives of victims or missing persons should constitute a ‘serious breach’ for the purposes of Subdivision 30A and render such evidence inadmissible in any criminal proceedings against the donor (Recommendation 7.1).

Destruction of Volunteers’ Profiles after Elimination from the Investigation

The Committee also recommends an amendment to the *Crimes Act* to require the destruction of a volunteer’s DNA profile as soon as practicable after the volunteer has been eliminated from the investigation or it has been determined that analysis of the donor’s profile is not required (Recommendation 7.4).

The Transition from Volunteer to Suspect

It is possible that a person who provides a DNA sample primarily for elimination purposes or as part of a mass DNA screening program may subsequently be identified as a suspect. Under the current provisions, a court may grant an *ex parte* order for the retention of the donor’s DNA sample and profile. The Committee believes that a voluntary donor, whose consent to the procedure was given prior to being identified as a suspect, should be present at the hearing of the application for retention of his/her DNA (Recommendation 7.5).

Issues of Consent

Reports of the mass DNA screening programs in other jurisdictions have indicated that pressure is often brought to bear on members of the target community to participate in the screening program. While at law an individual community member

is not under any obligation to ‘prove his/her innocence’, the Inquiry noted that in mass DNA screening programs an individual’s refusal to participate can be construed as indicating a guilty conscience and can cause that individual to be placed under suspicion. The Committee considers that a donor’s failure or refusal to consent should not be admissible in proceedings against that person and recommends accordingly. This protection already exists in the legislation of some other Australian jurisdictions (Recommendation 8.1).

For similar reasons the Committee believes that an individual’s decision not to participate in a mass screening program should be confidential and that the release of information by which such an individual could be identified should be expressly prohibited. The Committee therefore recommends that the disclosure of information enabling the identification of a non-participating individual should be an offence under Subdivision 30A (Recommendation 8.2).

Proposals relating to Vulnerable Persons

The Committee considered whether Victorian law should be amended to provide a substitute consent regime for children and incapable persons but concluded that the current arrangements, which require a court order to undertake a forensic procedure involving a child or an incapable person, provide the surest protection for these vulnerable groups. Consistent with this approach, the Committee recommends that the provisions governing the sampling of volunteers be amended to exclude incapable adult persons from being asked to volunteer (Recommendation 8.5).

The provision of legislative safeguards relies on administrative systems and services which allow the prompt identification of vulnerable persons and the provision of the support required. The Committee proposes that the Victoria Police and the Office of the Public Advocate jointly review current procedures for the identification of incapable persons (Recommendation 8.4) and clarify the role and duties of the Independent Third Persons in the administration of the forensic procedures regime (Recommendation 8.7).

Support for Indigenous Persons

Subdivision 30A makes no special provisions for the support of indigenous persons from whom DNA samples are sought in criminal investigations. However, other jurisdictions have enacted provisions which enable the participation of indigenous support groups to assist with the forensic sampling processes. The Committee recommends that the Department of Justice consult with indigenous and legal organisations to determine the most appropriate form of legislative and practical support for indigenous persons whose DNA samples are sought in criminal investigations (Recommendation 8.8).

Persons held at the Governor's Pleasure

The current Victorian provisions are silent as to the position of persons held at the Governor's pleasure. The Committee believes that Subdivision 30A should be amended to allow an application to be brought under section 464T or 464ZF for a court order for the sampling of a person held at the Governor's pleasure after being found not guilty by reason of mental impairment (Recommendation 8.6).

Systems for the Collection and Analysis of DNA Evidence

Police Powers and Responsibilities

Guidelines and Audit Proposals

The Inquiry notes that flawless processes for the collection, submission and analysis of DNA evidence are needed to ensure the validity of the results. To achieve this, the Committee believes that clear guidelines on the collection of DNA evidence – both personal (reference) samples and crime scene evidence – are required. The Committee is recommending the development of regulations for the collection of DNA person samples with the collaboration of NATA, the VFSC, Victoria Police and the Victorian Institute of Forensic Medicine (Recommendation 9.3). It also recommends the development of 'best practice' guidelines for the collection, handling and preservation of crime scene evidence containing DNA (Recommendation 9.6).

The Committee noted that the timely notification of retention orders and destruction dates is crucial for the efficient administration of the database. The Committee therefore proposes that the Auditor-General conduct an audit of the systems used by Victoria Police to manage its statutory responsibilities under Subdivision 30A and for the timely notification of retention orders and destruction dates (Recommendation 9.1).

Elimination Sampling of Police Members

The Committee formed the view that it is necessary for Victoria Police to be able to identify sources of contamination that may occur. For this reason, the Committee believes that the collection of DNA samples from police members should be regarded as an essential element of the quality control regime that operates to guarantee the flawless collection and handling of DNA evidence. The Committee therefore recommends that police members be required to provide a DNA reference sample for elimination purposes (and that the profile be stored along with profiles of VFSC laboratory staff on the internal VFSC staff elimination database (Recommendation 9.4). The Committee also recommends that Victoria Police develop guidelines for such a staff 'elimination sampling' policy (Recommendation 9.5).

To safeguard the security of employees' samples and profiles, the Committee also recommends that a provision be inserted in the *Crimes Act* to ensure that the unauthorised retention or use of DNA samples and related information obtained from police members and laboratory staff for use on an internal staff elimination database, constitutes a breach of Subdivision 30A (Recommendation 14.2).

Laboratory Systems and Services

The VFSC, along with all other Australian forensic science laboratories undertaking DNA profiling for criminal investigations, uses the Profiler Plus system. The Committee examined the limited Victorian case law and the more extensive case law of other Australian jurisdictions to ascertain whether the current legislative framework adequately regulates DNA profiling services in Victoria. The Committee concluded that, while on a case-by-case basis, issues of contamination or the conduct of laboratory processes may arise, the current accreditation requirements and the ultimate evaluation of DNA evidence in criminal proceedings provide an adequate regulatory framework.

Defining the VFSC's Statutory Obligations

The Inquiry noted that the current provisions impose obligations on the Commissioner of Police to ensure the provision of forensic reports as required under the Act and to ensure the timely destruction of DNA samples and profiles as required.

The Committee considered proposals made by the Australian Law Reform Commission in their report for a clearer identification of the person or body responsible for carrying out statutory requirements under Commonwealth forensic procedures law and believes that the same approach should be adopted in Victoria. The Committee recommends that the *Crimes Act* clearly specify that the body responsible for compliance with obligations such as the provision of forensic reports and the destruction of DNA material should be the VFSC (Recommendations 9.2 and 10.1).

Publication of Data on the use of DNA Profiling in Criminal Investigations

The Inquiry undertook a comprehensive search of the literature for hard data on the contribution of DNA profiling to crime detection and criminal investigations. It found a conspicuous lack of data in this area. The VFSC is one of the few forensic laboratories to have sufficient long-term operational experience and data to make a contribution to research in this area. The Committee therefore recommends the regular publication of data maintained by the VFSC to promote the valuable contribution to crime detection already being made by DNA profiling regime (Recommendation 10.2).

NATA Accreditation

The VFSC, which is the only forensic laboratory in Victoria that undertakes DNA profiling for criminal investigations, is accredited in forensic science by the National Association of Testing Authorities (NATA). At the time of writing, most, but not all Australian laboratories undertaking DNA profiling for criminal investigations have NATA accreditation.

With the advent of data-sharing, the Committee is concerned to ensure that DNA evidence originating in other jurisdictions and used in Victorian criminal proceedings conforms to the standards required of a NATA-accredited laboratory. For this reason the Committee recommends that Subdivision 30A be amended to provide that in relation to the analysis of forensic samples, only forensic reports produced by laboratories accredited by NATA in the field of forensic science will be admissible in criminal proceedings in Victoria (Recommendation 10.3).

Proposal for an Independent Forensic Science Laboratory

The Inquiry was made aware of difficulties encountered by defence lawyers in gaining access to forensic services in that small proportion of cases where re-testing or the re-evaluation of expert evidence is sought. Achieving defence access to forensic services is a problem at least partly caused by the smallness of the Australian forensic science community, the heavy workloads of the major laboratories, as well as the logistical problems of access.

The Inquiry also noted a perception that the VFSC and other forensic laboratories are aligned with the prosecution. The Committee believes it essential for stakeholders in the criminal justice system to have confidence that the laboratory is not aligned with the prosecution, and is seen to be in a position to provide truly independent forensic analysis. The Committee accepts the importance of ensuring that forensic DNA profiling services provided by the VFSC are accessible to, and meet the demands of the prosecution and defence alike.

While the Committee acknowledges that, to some extent, this perception will endure whatever administrative arrangements are in place, the Committee nevertheless believes that in Victoria more could be done to facilitate the independent operation of the forensic laboratory. It has surveyed some of the administrative models adopted in other jurisdictions and concluded that the VFSC should be established on an independent footing, managed by an independent board, accountable through annual reports to the Victoria Parliament and at arm's length from its major client groups. The Committee also recommends that the VFSC be funded by a body or department separate from Victoria Police (Recommendation 10.4).

The Use of DNA Evidence in Criminal Proceedings

The Inquiry sought to establish what roles DNA evidence plays in criminal proceedings. It examined the rules governing the presentation of evidence and, specifically, of expert DNA evidence, to determine whether the existing rules and processes are effective in handling the particular demands of DNA evidence. Research in this field is relatively scarce and the Committee was unable to draw clear conclusions, however, on the role played by DNA evidence in the prosecution process. It therefore recommends that the Department of Justice, Victoria Police Prosecutions, the Office of Public Prosecutions and the Victorian Courts develop an agreed and consistent process for collecting and reporting to Parliament on the impact of DNA evidence on criminal prosecutions (Recommendation 11.1).

The Inquiry noted the compelling impact of DNA evidence in criminal trials and especially the common, but false perception, that evidence of a match between two DNA profiles is indicative of guilt. The Inquiry was informed that much care is needed in the presentation of DNA evidence during criminal trials to ensure that the probative value of this type of evidence is correctly understood.

Pre-trial Processes

The early identification of agreed and contested elements of expert DNA evidence is thought to significantly improve the way in which DNA evidence is handled at the trial. The Inquiry notes that Victoria already has pre-trial processes through which such issues can be resolved, and believes that further consultation is needed to establish whether and if so, how pre-trial processes need to be modified to assist with the handling of complex DNA evidence.

The Committee recommends that the Department of Justice convene a Working Group, comprising representatives of the National Association of Testing Authorities (NATA), the VFSC, and key stakeholders of the legal profession, to develop a comprehensive definition of the content of the forensic report (Recommendation 11.2). It proposes that this Working Group also consider a proposal for the development of a protocol or guidelines for the identification of agreed and contested elements of DNA evidence (Recommendation 11.3).

Legal Education

The Committee proposes that legal education courses on DNA evidence be developed to assist forensic experts, legal practitioners and judicial officers in their handling of this form of evidence (Recommendations 11.5 and 11.6).

The Committee also sees merit in the preparation of a glossary of scientific and technical terms used in DNA analysis and recommends that the VFSC compile a glossary. It proposes further that Victoria Police, through its representation on the CrimTrac Board of Management, propose the adoption of the glossary by all

Australian forensic laboratories conducting DNA analysis for criminal investigations (Recommendation 11.4).

Admissibility, Breach and Penalty Provisions

Admissibility Rules and the Data-sharing Provisions

The current Victorian legislation is based on model provisions that assumed the enactment of uniform forensic procedures provisions around Australia. The Committee contemplated the possibility that DNA evidence originating in another jurisdiction may be relevant to Victorian criminal proceedings, but may have been obtained in circumstances which in Victoria would constitute a breach of Subdivision 30A. The Committee was concerned to prevent data-sharing arrangements from undermining the requirements applying to the collection, retention and use of DNA samples in Victoria.

In the absence of consistent Australia-wide forensic sampling provisions, the Committee recommends that, in determining the admissibility in Victorian criminal proceedings of DNA evidence originating in a jurisdiction which is not a participating jurisdiction for data-sharing purposes, the court be required to take account of whether the collection and analysis of the DNA evidence would have complied with the requirements of Victorian law (Recommendation 12.1).

Breach and Penalty Provisions

Under Subdivision 30A the penalty for a serious breach is currently a maximum of one year imprisonment or a level 8 fine of 120 penalty units (\$12000), whereas corresponding laws in other Australian jurisdictions set a higher penalty. In the interests of consistency the Committee recommends that the penalty prescribed in sub-sections 464ZG(2) and (3) for unauthorised retention or use of forensic material be increased to a maximum of two years (Recommendation 12.2).

Post-conviction Reviews (Innocence Projects)

The Inquiry considered the potential of DNA evidence to prove a person's innocence and reviewed the means currently available for DNA profiling to be used for this purpose. DNA profiling has been used to support claims of wrongful conviction in other jurisdictions, such as the UK and the USA, for some time.

The Committee found unanimous in-principle support among the participants in this Inquiry for DNA profiling services to be available to support claims of wrongful conviction. The Committee believes that a procedure should be in place to enable offenders to initiate a post-conviction review in certain circumstances.

The Committee recognises the importance of finality in criminal proceedings and envisages that such a review process would be available only to serious offenders serving a term of imprisonment and governed by clear eligibility criteria. The Committee recommends that the Attorney-General establish a process to consider applications for post-conviction review from a serious offender serving a term of imprisonment who makes a claim that DNA evidence may exist that calls his or her conviction into question. The Committee recommends further that this process establish clear criteria for the assessment of applications (Recommendation 13.1).

If an application meets the eligibility criteria, the Committee believes that funds should be made available through a legal aid allocation for re-testing and analysis of relevant DNA evidence (Recommendations 13.2).

Experience in other jurisdictions has shown that, even after an application for a post-conviction review has been approved and funded, there may be practical obstacles to the review of the relevant DNA evidence. One hurdle frequently encountered by Innocence Projects has been the difficulty of locating the relevant crime scene evidence.

The Committee sees merit in establishing a process to enable a court order to be made for the preservation of crime scene evidence, where a meritorious claim for a post-conviction review is contemplated. The Committee proposes that the *Crimes Act* be amended to make such provision and that the Department of Justice consult with Victoria Police, the Law Institute of Victoria and the Criminal Bar Association to develop regulations outlining the circumstances in which such applications could be made and granted (Recommendation 13.3).

The Committee noted that the preservation of crime scene evidence assists not only offenders seeking to overturn wrongful convictions but also investigators seeking to re-open cold cases with the emergence of relevant DNA evidence not available or amenable to analysis at the time of the original investigation. The Committee proposes that Victoria Police establish a centralised registry to be responsible for the preservation of relevant crime scene evidence and recommends that Victoria Police, in consultation with the National Association of Testing Authorities, establish such a Registry (Recommendation 13.4).

The DNA Database and the Data-sharing Provisions

The Committee supports the commencement of national data-sharing arrangements but is concerned at the lack of consistency between the laws of the participating jurisdictions. It contemplated the real possibility that participating jurisdictions might not enact uniform forensic sampling provisions, and focussed on strategies to ensure that the standards and safeguards contained in Victoria's legislation are not eroded under national data-sharing arrangements.

The Committee proposes that individual participating jurisdictions upload for data-sharing only data consistent with the Model Bill definitions of offender, suspect and volunteer (Recommendation 14.1). Further, when uploading this data, the Committee recommends that participating jurisdictions begin with the uploading and exchange of data which can be retained indefinitely under the forensic sampling provisions (Recommendation 14.4).

Finally, the Committee notes the challenges involved in establishing and administering a national database system that is accessible and accountable to each of its member jurisdictions. The Committee therefore recommends that Victoria, through its representatives on CrimTrac committees, work towards the introduction of a regular independent audit of the operation of the national DNA database (Recommendation 14.3).

PART A: INTRODUCTION

1. THIS INQUIRY

In the public mind, DNA, the blueprint of life, enjoys the status of both truth serum and Delphic Oracle, judge and jury, architect and master builder.¹

This Inquiry has come at a time when worldwide attention is being focussed on recent breakthroughs in understanding the human genome. These developments, though well beyond the scope of the current Inquiry, clearly have a bearing on the framework for laws that permit the collection and use of DNA samples by law enforcement agencies.

In reviewing and proposing the future direction of Victorian legislation in this field it is essential to understand the potential of the scientific and technological discoveries in genetic research. Governments, faced with the need to provide a legislative framework for the use of emerging technologies, need to be able to accommodate scientific research and the development of new technology, while still retaining the capacity to regulate the uses to which that technology is put.

The revelation of the potential contained in a minute sample of DNA is challenging legislatures to assess the effectiveness of current legislation in regulating the use of human tissue. It is provoking legislatures to reconsider the scope of and the limits to the application of this technology in many fields of endeavour. The mapping of the human genome has already opened up questions as to the ownership of our DNA, not to mention the many possibilities for its use. Advances in genetics have enabled the identification of human remains found in war zones, the tracing of the history of populations and species over many hundreds of years, and the identification of genetic causes for many medical conditions.²

1 Gerald Tooth, 'The Courage of Our Convictions - The Claremont Serial Killer', *Background Briefing*, ABC Radio, 25 June 2000, 13-14, <http://www.abc.net.au/rn/talsk/bbing/stories/s146359.htm>.

2 For a discussion of the range of applications for genetic research see the reports produced by the Australian Health Ethics Committee of the National Health and Medical Research Council and Australian Law Reform Commission (ALRC) during its Inquiry into the Protection of Human Genetic Information, namely: ALRC, *The Protection of Human Genetic Information: Issues Paper 26* (2001) 23-104 ('ALRC, *Issues Paper 26* (2001)'); ALRC, *The Protection of Human Genetic Information: Discussion Paper 66*, (2002) ('ALRC, *Discussion Paper 66* (2002)') and ALRC, *Essentially Yours: The Protection of Human Genetic Information, Report 96* (2003) ('ALRC, *Essentially Yours* (2003)').

BACKGROUND TO THE INQUIRY

Forensic Uses of DNA Analysis

In crime detection, the primary purpose of DNA analysis is to identify the source of DNA found on a victim or at a crime scene, so as to identify people who are 'forensically linked' to the crime.

During the course of a criminal investigation, a DNA sample may be obtained from a victim, a crime scene, an unidentified deceased person, or from an item that has been in contact with a missing person. The DNA sample is analysed to produce a DNA profile. A DNA profile is an electronically coded sequence describing certain repeating patterns in the donor's DNA which are particular to the individual. Profiles can be compared visually or electronically with profiles on a forensic database.

A match will indicate a very high probability – but not certainty or proof – that the identity of the source for both profiles was the same. Subject to some provisos as to the conclusions that can be drawn from a match, DNA profiling can be used to exclude a person from an investigation or to indicate their connection to the crime scene.

The world's first forensic use of DNA analysis occurred in September 1984 when the eminent geneticist Professor Sir Alec Jeffreys was able to demonstrate the genetic identity of a teenage boy returning to the United Kingdom from a visit to Ghana, who was denied entry on his return on the basis that he could not prove his identity as a child of his England-based family.³ DNA analysis confirmed his and his natural father's genetic identity. Sir Alec was also involved in the first application of DNA profiling to a criminal investigation when, shortly after publication of his ground-breaking research,⁴ DNA profiling excluded a suspect from an investigation into the rape and murder of a schoolgirl.⁵

The techniques developed to analyse DNA samples for forensic purposes are different to those developed for diagnostic or medical research purposes. While mitochondrial DNA is used for paternity testing, genomic DNA is used for analysis in criminal investigations. The process used to analyse DNA for criminal investigations involves analysing non-coding regions of the DNA molecule. The 'profile' allows features of one genetic strand to be compared with equivalent features of another DNA sample. These patterns do not describe or reveal the donor's genetic make-up; they are fragments of so-called 'junk DNA' sorted by length and analysed at specific points or 'loci' along the DNA strand. While the DNA sample itself is rich in genetic

3 Professor Sir Alec Jeffreys, *1998 Australia Prize*, <http://www.isr.gov.au/events/asuprize/ap98/jeffreys.html>.

4 AJ Jeffreys, V Wilson, SL Thein, 'Hypervariable minisatellite regions in human DNA' (1985) 314 (6006) *Nature* 67-73.

5 Jeffreys, *1998 Australia Prize*, <http://www.isr.gov.au/events/asuprize/ap98/jeffreys.html> 2-3.

information about the donor and his/her past, present and future relatives, the only personal information contained in the DNA profile is the donor's gender.⁶

The Terms of Reference

The Terms of Reference for this Inquiry require the Committee to examine 'the collection, use and effectiveness' of forensic sampling and 'the use of DNA databases in criminal investigations'. Through this, the Committee is to identify 'areas and procedures which would more effectively utilise forensic sampling' and 'improve the investigation and detection of crime'. These Terms of Reference take the scope of the Inquiry well beyond merely a policy review of the current legislation.

Reviewing the *collection* of forensic samples involves not only the legislation which governs when and how DNA samples may be obtained, but also the operation of these provisions: the use that is being made of these provisions to obtain relevant DNA samples for criminal investigations.

Likewise, reviewing the *use* of forensic sampling involves ascertaining not only what use is permitted under the current laws, but also the extent to which DNA sampling is, or could be, used. DNA evidence can be used in a number of different ways: to inculcate or exculpate suspects in criminal prosecutions, to eliminate the DNA deposited at crime scenes by people with legitimate access, to facilitate the detection of unsolved crimes through the DNA database, and to support claims of wrongful conviction, entered without the benefit of relevant DNA evidence.

It is difficult to define exactly what is involved in reviewing the *effectiveness* of forensic sampling. In order to evaluate the effectiveness of the regime it is necessary to appreciate its goals and to have some benchmark of effectiveness. However, the use of forensic sampling in crime detection and prosecution is a relatively recent development and very little data is available to quantify the contribution of forensic sampling in Victoria, or to compare its contribution here with results achieved in other jurisdictions.

Central to this Reference is the notion of *potential*. In requiring the Committee to identify areas or procedures that would improve the investigation and detection of crime, the Inquiry is essentially being asked to consider the potential of DNA sampling, and the extent to which this potential is being exploited or impeded in Victoria under the current forensic procedures legislation ('the forensic sampling regime'). This is a complex issue.

6 For further information see Chapter 3 below, and Victoria Forensic Science Centre (VFSC), *Forensic Sampling and DNA Databases: Background/Issues Paper* (2002) ('VFSC, *Background/Issues Paper* (2002)'); David H Kaye and George F Sensabaugh Jr, *Reference Guide on DNA Evidence* (2nd ed, 2002), [http://air.fjc.gov/public/pdf.nsf/lookup/sciman09.pdf/\\$file/sciman09.pdf](http://air.fjc.gov/public/pdf.nsf/lookup/sciman09.pdf/$file/sciman09.pdf).

Some constraints operate to define the scope of the regime in its totality. Firstly, Victoria's participation in the national DNA database limits the scope for radical legislative change. Secondly, the resources available for DNA sampling need to be managed in the context of Victoria's overall policing strategies and priorities, also bearing in mind the limited pool of forensic scientists available to meet the demand for their services.

Within the forensic sampling regime itself, there are competing policy pressures which have been reconciled to determine how forensic sampling can, and cannot, be used in criminal investigations. The powers granted for law enforcement are balanced by safeguards to protect the individual's privacy interests. The procedures developed for determining when forensic samples can be taken reflect the operation of certain fundamental principles of criminal justice: the privilege against self-incrimination, the right to silence and procedural fairness. The provisions governing the presentation and evaluation of DNA evidence are based on the requirement that guilt be proven beyond reasonable doubt, and on the general rules that apply to evidence in criminal proceedings.

Victoria's capacity to 'give full rein' to DNA sampling, or in fact to any single forensic service used in criminal investigations and prosecutions, is therefore affected by a wide range of policy and operational factors, some external to and some inherent in the forensic sampling regime.

The current forensic sampling regime does not regulate every aspect of the forensic sampling process. This review has endeavoured to identify areas where more, or sometimes less, legislative control might be appropriate, and to pinpoint 'pressure points' where legislative control is or will be essential.

The Conduct of the Inquiry

The Law Reform Committee of the 54th Parliament received this reference on 21 November 2001. In January 2002 the Committee was briefed by the Victorian Forensic Science Centre (VFSC) and subsequently commissioned the VFSC and Victorian barrister, Dr Ian Freckelton, to produce background papers on the scientific and legal background to the Victorian forensic procedures regime.⁷

During January 2002 four members of the Committee travelled to Europe and the United States of America primarily to collect evidence for another of the Committee's inquiries. The Committee was fortunate to meet with representatives of European and US law enforcement agencies and forensic services, obtaining valuable insight into their forensic sampling regimes.⁸

7 Ian Freckelton, *DNA Profiling: Collection, Use and Effectiveness: An Issues Paper* (2002) ('Freckelton, *DNA Profiling: Issues Paper* (2002)').

8 A list of meetings held during the course of this Inquiry is set out in Appendix 3.

Notices inviting submissions were published in newspapers circulating throughout Victoria on 12 June 2002. The Committee received 27 written submissions,⁹ the majority of which were placed on the Committee's website. Public hearings were held in Melbourne on 22 and 23 July 2002 and 27 witnesses, including representatives of 17 organisations, presented their views to the Committee.¹⁰ The transcripts of these hearings were placed on the Committee's website.

Some interstate witnesses attended the public hearings in Melbourne, and a four-member Committee delegation visited Brisbane, Sydney and Adelaide during September 2002 to obtain, first-hand, an understanding of the way in which forensic sampling provisions operate in those states.

The Inquiry lapsed and the Law Reform Committee was dissolved on 3 November 2002 with the announcement of the Victorian election. A new Law Reform Committee of the 55th Parliament was formed by resolution of both Houses in March 2003 and the reference was reinstated by order of the Governor-in-Council on 17 April 2003. The Committee resolved to carry over the submissions and evidence tendered to the previous Inquiry, and held a further day of public hearings on 2 June 2003.

The months prior to the reinstatement of this reference in 2003 were marked by the publication of four reports, the introduction or enactment of legislation amending forensic procedures provisions in two states and administrative changes to the structure of Victoria's forensic services.¹¹ All these developments have had a bearing on the course of this Inquiry, clarifying for the new Committee the national legislative 'backdrop' for the Victorian review, and bringing into focus the major policy and operational challenges facing Victorian forensic services.

OUTLINE OF THE REPORT

Parts A and B of the Report present the policy framework in which DNA sampling laws operate, and the scientific potential of DNA sampling technology. The remaining four parts of the Report review different aspects of the regime, starting in Part C with the laws that govern who may be sampled. The next two parts follow the path of the DNA sample from its collection by Victoria Police and laboratory analysis

9 Appendix 1 lists the submissions received.

10 A schedule of witnesses who appeared at the public hearings is set out in Appendix 2.

11 ALRC, *Essentially Yours* (2003); Tom Sherman et al, *Report of Independent Review of Part 1D of the Crimes Act 1958 1914 (Cth) – Forensic Procedures* (2003), ('Sherman, *Independent Review of Part 1D* (2003)'), released in April 2003; Crime and Misconduct Commission Queensland, *Forensics under the Microscope: Challenges in providing Forensic Science Services in Queensland* (2002), ('Crime and Misconduct Commission, *Forensics under the Microscope* (2002)'),; Victoria Police, *Tracing the Future: Achieving Best Use of Forensic Services, Final Report* (2002) ('Victoria Police, *Tracing the Future* (2002)'). A review of forensic procedures legislation in New South Wales was undertaken by Professor Mark Findlay ('the Findlay Review') in 2002/2003 but had not been released as at 30 September 2003.

(Part D), through to its use as evidence in DNA criminal proceedings (Part E). Part F reviews the laws and arrangements authorising Victoria to share DNA data with other Australian jurisdictions and the Report concludes by evaluating the most effective uses made of DNA sampling to date in Victoria and recommending means to achieve its future development.

Part A: Introduction

The first part of the Report sets the scene for this Inquiry's review of the Victorian forensic sampling regime. The first chapter outlines the forces which combine to shape international and domestic policy in this field, while Chapter 2 provides an outline of the current Victorian forensic sampling laws and introduces the key law reform issues addressed in this review.

Part B: The Science and Ethics of DNA Sampling

Part B begins by considering the forensic potential of DNA analysis. Chapter 3 reviews the 'state-of-the-art' science and technology available for DNA analysis and considers the growth areas which may even further increase the capacity and efficiency of forensic DNA analysis.

Chapter 4 presents the ethical considerations which may affect the use which should be made of this forensic tool. It begins with a survey of the way in which ethical issues affect the taking and use of genetic material generally, and then considers the particular issues that arise in the context of criminal investigations and proceedings. This chapter reviews how the current forensic sampling regime reconciles the grant of powers to law enforcement agencies to conduct the procedures with the privacy interests of the individual donors.

Part C: The Scope of the Current Regime

The next three chapters, which constitute the core of this Report, deal with the provisions governing the DNA sampling of offenders, suspects and volunteers. Each chapter begins by examining the contribution made by forensic sampling of that type of donor to crime detection, reviewing the available data on the extent to which the relevant provisions have been utilised to obtain samples, and the number of 'detections' and prosecutions achieved. There follows a review of the appropriateness of each set of provisions, taking into account the submissions made to the Inquiry and the legislation in force in other Australian jurisdictions. Part C concludes with an examination of the way in which the legal rights and interests of vulnerable people – especially but not exclusively children, incapable persons – are protected under the current legislation. It considers, in particular, whether the current consent provisions should be adapted to provide a substitute consent regime, or whether the current requirement for court-ordered procedures is preferable.

Part D: The Collection, Handling and Analysis of DNA Evidence

Part D follows the DNA samples from the moment of collection from crime scenes, victims or donors to the reception of the DNA evidence at the forensic laboratory. Chapter 9 examines the processes used by Victoria Police to collect and submit DNA reference samples and crime scene exhibits and Chapter 10 reviews the laboratory processes in use at the VFSC.

Part E: DNA Sampling and the Criminal Justice System

Part E considers the way in which evidentiary rules operate in relation to DNA evidence. Drawing on isolated research projects and Australian case law, Chapter 11 reviews the impact of DNA evidence in criminal proceedings, and considers ways in which the presentation of complex expert evidence could be streamlined and clarified.

Chapter 12 reviews the impact which DNA sampling has had on the legal interests of the defendant. It examines the impact of DNA sampling provisions on the operation of the privilege against self-incrimination and procedural fairness. This chapter also examines the provisions which combine to discourage breaches of the statutory obligations on law enforcement agencies involved in the collection and use of DNA evidence. This chapter also reviews the scope and appropriateness of the current provisions governing the admissibility of evidence improperly obtained, and the penalties applying for misuse of that evidence.

Chapter 13 looks at the potential use of DNA evidence to demonstrate innocence, as well as guilt. It examines the work of innocence projects in other jurisdictions and considers whether Victoria might benefit from the establishment of some mechanism to enable persons claiming wrongful conviction to have their cases reviewed, where there is DNA evidence that was previously unavailable or not tested in accordance with current standards and technologies.

Part F: Data-sharing and Future Directions in DNA Sampling

The final part of this Report reviews the current provisions for data-sharing within Australia and considers the implications for Victoria of its participation in CrimTrac. It draws on the extensive and influential use of DNA sampling in the United Kingdom to identify the administrative and operational implications of an expanded commitment to forensic sampling in Victoria and proposes means to ensure that legislative and operational change keep pace.

MANAGING ADVANCES IN SCIENCE AND TECHNOLOGY

Policies to Regulate Use of Genetic Technology

Recognition of the potential of the human genome is found at the highest levels of government. The United Nations Education, Scientific and Cultural Organisation adopted the Universal Declaration on the Human Genome and Human Rights in 1997 and subsequently endorsed guidelines for the implementation of the Declaration.¹² Along the same lines, the Ethics Committee of the Human Genome Organisation released a statement in 1998 outlining its position on the ethical issues raised by the collection, storage and use of human DNA.¹³

In the United Kingdom the Human Genetics Commission was established to consider the wide-ranging implications of research into human genetics. Its report, *Inside Information*,¹⁴ addressed the use and regulation of genetic information in medical research, insurance, employment and forensic investigations.

In Australia the regulation of the use of human genetic material is governed by State and Commonwealth laws. At the State level, genetic material or data which comes within the definition of 'personal information' is covered by the *Information Privacy Act 2000 (Vic)* and 'health information' comes within the ambit of the *Health Records Act 2001 (Vic)*.¹⁵ This legislation applies to public sector agencies and their officers, the Victorian police force, public and private hospitals, as well as other health service providers which collect, hold or use 'health information'.¹⁶ In tandem, these laws provide Victorians with a right of access to, and the correction of, information about themselves, as well as penalties for the misuse of such information.

At the federal level, the National Health and Medical Research Council provides policy leadership. In the 1990s the Council released information and guidelines for Genetic Registers and Associated Genetic Material on the ethics of human genetic testing¹⁷ and the operation of genetic registers.¹⁸

12 UNESCO, *The Universal Declaration on the Human Genome and on Human Rights*, 11 November 1997, at <http://www.unesco.org/ibc/en/genome/index.htm>; and *Implementation of the Universal Declaration on the Human Genome and Human Rights*, adopted at the 25th Plenary Meeting, 16 November 1999, at <http://www.unesco.org/ibc/en/genome/implementation.htm>.

13 Hugo Ethics Committee, *Statement on DNA Sampling: Control and Access* (1998) at <http://www.gene.ucl.ac.uk/hugo/sampling.html>.

14 Human Genetics Commission, *Inside Information: Balancing Interests in the Use of Personal Genetic Data*, May 2002, available at <http://www.hgc.gov.uk/insideinformation/index.htm>.

15 *Information Privacy Act 2000 (Vic)* ss 1(b) and (c).

16 *Health Records Act 2001 (Vic)* ss 10, 11 in relation to public sector and private bodies respectively.

17 National Health and Medical Research Council, *Ethical Aspects of Human Genetic Testing: an Information Paper*, at <http://www.health.gov.au/nhmrc/issues/humangenetics.htm>.

18 National Health and Medical Research Council, *Guidelines for Genetic Registers and Associated Genetic Material*, at <http://www.health.gov.au/nhmrc/issues/humangenetics.htm>

Subsequently, the Australian Law Reform Commission (ALRC) and the Australian Health Ethics Committee of the National Health and Medical Research Council were asked to inquire into the national framework for the Protection of Human Genetic Information. This Inquiry (the ‘ALRC Inquiry’) undertook a comprehensive review of the ethics, laws, social policies and practices involved in the collection and use of human genetic information within Australia. It considered the implications of the many uses of human genetic information and recommended measures to create a coherent, nationally consistent regime for health and privacy law, as well as reforms to address specific issues associated with the different applications of genetic science. One of these applications was the use of DNA profiling in criminal investigations.

Current Australian Forensic Sampling Law

The collection of DNA samples for criminal investigations is already a well-established element of crime detection throughout Australia. All Australian jurisdictions have passed laws to authorise the taking of DNA samples through ‘forensic procedures’. However, each jurisdiction has ‘customised’ draft model provisions developed during the 1990s, with the result that Australian forensic procedures legislation is by no means uniform.

The scope of DNA sampling for use in criminal investigations (reviewed in Part C below) is defined, through the forensic procedures provisions, in terms of:

- who can be sampled;
- who is empowered to authorise or require a person to undergo a forensic procedure; and
- what use can be made of the DNA material in criminal investigations.

The Victorian provisions, which are contained in section 464 and sections 464R-464ZK of the *Crimes Act 1958 (Vic)* (‘Subdivision 30A’ of ‘the *Crimes Act*’), enable offenders, suspects and volunteers to be sampled for criminal investigations. All Australian laws enable the sampling of these three groups, but the definitions of these groups and the circumstances in which DNA samples can be obtained vary between jurisdictions.

Forensic procedures can be ‘intimate’, such as a blood sample or a swab taken from a private part of the body, or ‘non-intimate’, such as a scraping from underneath a fingernail or toenail. The buccal swab, generally defined as an intimate procedure which involves scraping the lining of the mouth with a cotton bud, is now increasingly widely used because it is a convenient, relatively cheap and reliable procedure that the donor can carry out unaided.

Victorian laws, in common with those of most Australian jurisdictions, enable a volunteer or suspect to give consent to a non-intimate forensic procedure. Persons who do not, or cannot, consent to DNA sampling can be ordered by a court to provide a DNA sample, if the court is satisfied that the taking of the sample is justified, as

defined in the Act, for use in the investigation of certain serious indictable offences.¹⁹ No one can be asked to consent, however, to an intimate procedure; such a procedure requires the authority of a court order.

Some jurisdictions, such as the Commonwealth, New South Wales and Tasmania, allow police to authorise a non-intimate procedure on a consenting volunteer, suspect or offender in custody, but require a court order to sample a non-custodial suspect.

The forensic procedures provisions permit the sampling of suspects or volunteers primarily to assist with criminal investigations into the commission of indictable offences. Offenders can also be sampled if they have been found guilty of certain serious offences, whether or not they are currently serving a prison sentence, and their DNA profiles are then included on the Victorian forensic DNA database.²⁰

In specified circumstances, the profiles of volunteers and suspects can also be loaded onto the DNA database. The Victorian legislation, consistent with almost all Australian jurisdictions, now permits the DNA profiles obtained from volunteers, suspects and offenders to be compared with the profiles of unsolved investigations according to specific 'matching rules' contained in the forensic procedures legislation. These rules differentiate between the uses to which the profiles of volunteers, suspects and offenders can be put, restricting the comparisons that can be made in the case of volunteers, and permitting full database comparisons of offenders' profiles.

The forensic procedures provisions also require destruction of the profile and forensic material in certain circumstances. In Victoria, destruction is mandated if a volunteer or suspect has been acquitted or eliminated from an investigation, but the retention of profiles is permitted if a person is found guilty of a relevant offence or suspected of being involved in the commission of another relevant offence.

The History of Forensic Sampling Legislation in Australia

Victoria was the first Australian State to enact laws for the use of DNA sampling in criminal investigations. In 1989 the *Report on Body Samples and Examinations* ('the Coldrey Report')²¹ recommended the introduction of a legislative framework for the collection of forensic DNA evidence, and in the same year the Victorian Government enacted the first provisions enabling the collection of DNA samples from crime scenes and suspects.

19 See Chapter 4 for further discussion on the authority needed to conduct intimate and non-intimate procedures.

20 In New South Wales under the *Crimes (Forensic Procedures) Act 2000 (NSW)* only offenders serving a term of imprisonment for a serious offence can be sampled, while under the *Police Administration Act (NT)* an offender in custody can be sampled after being found guilty for any summary or indictable crime.

21 *Consultative Committee on Police Powers of Investigation, Report on Body Samples and Examinations*, Melbourne, September 1989, 170 ('Coldrey Committee, *Report on Body Samples and Examinations*, 1989').

During the 1990s interest in the forensic potential of DNA profiling snowballed. The impetus for the development of uniform sampling legislation came from the Standing Committee of Attorneys-General, after reviewing the Coldrey Report.²² The Standing Committee established the Model Criminal Code Officers' Committee (MCCOC) which, among other things, was asked to formulate forensic procedures legislation that could be used as the model for the uniform Commonwealth, State and Territory legislation.

There has since been a spate of legislative action around Australia, with almost all Australian jurisdictions enacting some forensic procedures legislation based, to varying degrees, on one of the editions of the Model Bill.²³ The different editions of the Bill have given rise to several 'generations' of legislation. The first draft of a Model Forensic Procedures Bill was released in 1994; revised versions followed in 1995, 1999 and 2000. Most Australian jurisdictions have adopted at least some of its provisions into their forensic procedures legislation.

The Victorian legislation belongs to the 'first generation' of forensic procedures legislation, largely based on the 1995 Model Bill. New South Wales, Tasmania, Western Australia and South Australia also have legislation that derives in part from the Model Bill, though each jurisdiction has included provisions that depart from the Model Bill in some respects. The Commonwealth and the ACT provisions are closely based on the most recent edition of the Model Bill. The Northern Territory legislation stands apart from other Australian regimes, and more closely resembles the *Police and Criminal Evidence Act 1984 (UK)* than the Model Bill.

The Growth of Forensic DNA Databases

No jurisdiction can isolate itself from worldwide developments in genetics. This is especially true in the field of DNA databases, which are developed specifically to facilitate data-sharing.

The format in which the DNA profile is expressed allows for the simultaneous comparison of DNA profiles stored on a genetic database. As the profiles obtained from each new crime scene sample are loaded onto the database, they can be compared with other unsolved crimes, as well as with 'reference' profiles collected from serious offenders, suspects or, in some cases, volunteers. The potential of DNA profiling has inspired law enforcement agencies around the world to establish DNA databases as a key policing strategy.

22 See New South Wales Legislative Council, Standing Committee on Law and Justice, *Review of the Crimes (Forensic Procedures) Act 2000: Report 18 (2002)* 6, 13-17 ('NSW Standing Committee on Law and Justice, *Review of the Crimes (Forensic Procedures) Act 2000 (2002)*').

23 In 2000 Tasmania enacted the *Forensic Procedures Act 2000 (Tas)* and the Australian Capital Territory passed the *Crimes (Forensic Procedures) Act 2000 (ACT)*. In 2001 the Commonwealth inserted Part 1D in the *Crimes Act 1914 (Cth)* with the *Crimes Amendment (Forensic Procedures) Act 2001 (Cth)*.

An International Perspective

During the past decade, the development of forensic DNA databases has been a priority of national and international law enforcement agencies. The European Union Council is encouraging its members to establish national DNA databases 'in accordance with the same standards and in a compatible manner' to enable data-sharing.²⁴ The Council has also urged its members to adopt standardised technology. This policy is reinforced by Interpol, which 'is committed to facilitating the exchange of DNA related intelligence' and is working towards the establishment of 'an international criminal police DNA database'.²⁵ Interpol has adopted a technical standard based on the profiling system used in the United States of America for DNA profiles on the Interpol database.²⁶

Interpol has been monitoring its members' use of DNA profiling for some years and in 2003 published the results of its latest global survey of its members to 'determine the extent of forensic DNA analyses internationally'.²⁷ The survey examined their legislative regimes, the regulation of forensic laboratories, the existence of DNA databases and any restrictions applying to data-sharing. Interpol found that during the 1990s there was a steady increase in the number of DNA sampling regimes. In 1991 approximately 30 countries had introduced forensic sampling for criminal investigations. By 2002, 72 countries were using DNA sampling for forensic purposes.²⁸ A total of 51 countries, including Australia, were recorded as having a national database, while a further 14 were at an advanced stage in planning for the establishment of such a database.²⁹

The Development of Australian Forensic DNA Databases

The nationally-endorsed goal of creating a forensic DNA database has set the agenda for the investment in forensic DNA profiling technology and for Australia-wide legislative reform. The creation of a national DNA database requires co-ordination to ensure the use of standard DNA profiling technology in Australian forensic laboratories, as well as consistent Australia-wide legislation and an operational framework.

24 EUR-Lex, *Community Legislation in Force*, Document 397Y0124(02) Council Resolution of 9 June 1997 on the Exchange of DNA Analysis Results, Official Journal C 193, 24/06/1997, 0002-0003, at http://europa.eu.int/eur-lex/en/lif/dat/1997/en_397Y0624_02.html.

25 Pierre van Renterghem, Rudolf Kaniski and Werner Schuller, 'Global Survey on the Use of DNA Analysis in Criminal Investigations', *First DNA Users' Conference*, 24 November 1999, Lyon, France.

26 Background on the DNA Monitoring Expert Group (DNA MEG) is available on the Interpol website at <http://www.interpol.int/Public/Forensic/dna/Inquiry/Default.asp>.

27 Pierre van Renterghem, Rudolf Kaniski and Werner Schuller, 'Global Survey on the Use of DNA Analysis in Criminal Investigations', *First DNA Users' Conference*, 24 November 1999, Lyon, France. In 2003 Interpol released the final report by Susan Hitchin and Werner Schuller, *Global DNA Database Inquiry: Results and Analysis*, Interpol DNA Unit (2002) available at <http://www.interpol.int/Public/Forensic/dna/Inquiry/Default.asp>.

28 Ibid.

29 Ibid.

In 1997 Australian jurisdictions agreed to adopt the Profiler Plus system for DNA profiling³⁰ to ensure that forensic services analysing DNA material for criminal investigations were capable of reproducing and verifying results obtained in other Australian jurisdictions.³¹

The Legislative Framework for Data-sharing

Establishing the legislative framework for the national DNA database requires firstly, provisions which authorise data-sharing and secondly, consistency, if not uniformity in the forensic sampling laws of the participating jurisdictions.

Almost all Australian jurisdictions now authorise data-sharing with other Australian jurisdictions using a DNA database system.³² Commonwealth, State and Territory governments have been working towards the establishment of a national forensic DNA database for more than a decade.

Some jurisdictions, such as NSW, permit data-sharing with all other jurisdictions. Others, such as the Commonwealth and Victoria, have prescribed regulations enabling data-sharing arrangements to be developed with specified jurisdictions having 'corresponding laws'.³³ At the time of writing, only Queensland and the Northern Territory had not yet incorporated data-sharing provisions in their forensic procedures legislation and Queensland is expected to enact data-sharing provisions in the near future.³⁴

In Australia, criminal law comes within the jurisdiction of State and Territory governments. The vast majority of offences for which DNA sampling may be relevant come under the jurisdiction of the States and Territories, rather than the Commonwealth. The Commonwealth's jurisdiction in criminal law is limited to certain offences set out in the *Crimes Act 1914 (Cth)*, though it also has an interest in the use of DNA profiling for the identification of disaster victims.³⁵ The Commonwealth therefore has a far more limited operational interest in the forensic use of DNA sampling and the DNA databases. Its forensic procedures provisions are a benchmark for comparing and reconciling the legislation enacted in each of the State and Territory jurisdictions.

However, it has a vital co-ordinating role in both establishing the legislative framework and in developing the national forensic databases. CrimTrac, established

30 The Profiler Plus system is a proprietary system of the US company, Applied Biosystems.

31 For background, see VFSC, *Background/Issues Paper* (2002).

32 As at 30 June 2003, Queensland and the Northern Territory had not made provision in their forensic procedures laws for inter-jurisdictional data-sharing, although a Bill amending the *Police Powers and Responsibilities Act 2000 (Qld)* had been prepared. For further background see Sherman, *Independent Review of Part 1D* (2003) 20-21.

33 *Crimes (DNA Database) Regulations 2002* and Regulations prescribed pursuant to Part 1D of the *Crimes Act 1914 (Cth)*, cited in Sherman, *ibid* 20-21.

34 Sherman, *ibid* 20-21.

35 Legislation enabling the use of DNA databases for this purpose was introduced in October 2002 after the Bali bombing.

under Commonwealth legislation³⁶ in 2000, is responsible for developing national forensic databases for fingerprints, the CrimTrac Police Reference System, and a database for DNA profiles. CrimTrac will actually house the DNA profiles contained on the national database and will be responsible for its day-to-day operation.

The Operational Framework: CrimTrac and the National DNA Database

In tandem with efforts to introduce a uniform legislative framework for forensic sampling came moves to establish a national forensic database. The first steps came with the *Easteal Report*,³⁷ presented to the Australian Police Ministers' Council in 1990, and was followed two years later by an implementation report.³⁸ In 1997 the Crime Commissioners' Conference resolved to adopt a national system for DNA profiling³⁹ and the next year the Commonwealth Government announced funding to establish a national forensic database.

CrimTrac will be essentially a forensic 'clearing house', facilitating comparison of profiles from participating jurisdictions according to their particular requirements. Participating jurisdictions will be responsible for uploading to CrimTrac the relevant DNA profiles, while CrimTrac will be responsible for the comparison of profiles on the database.⁴⁰

Ultimately, the national DNA database will permit the national comparison of profiles from unsolved investigations (unidentified deceased persons, missing persons and unsolved crime scenes) with those of offenders, suspects and, with their authorisation, volunteers subject to the matching rules of participating jurisdictions.

Victoria already has its own DNA database which classifies profiles in the same categories or indices and applies the same permissible matching rules as those contained in the Model Bill and the Commonwealth legislation.

While most jurisdictions have legislation which is based to some extent on the Model Bill, the forensic procedures provisions enacted in the nine Australian jurisdictions still differ in fundamental ways. It will therefore be necessary for CrimTrac to establish protocols to establish what data from each of the participating jurisdictions can be shared by each of the other jurisdictions. It is envisaged that each jurisdiction will execute a Memorandum of Understanding, setting out the terms on which data is to be shared through CrimTrac.

36 *Public Service Act 1999 (Cth)*.

37 Model Criminal Code Officers' Committee of the Standing Committee of Attorneys-General, *Model Forensic Procedures Report* (May 1999) i-iii ('MCCOC, *Model Forensic Procedures Report* (1999)').

38 Alastair Ross, *Consideration of the Easteal Report* (1993). A Working Party commissioned by the Australasian Police Ministers' Council made further recommendations to the 1995 Council meeting. See MCCOC, *Model Forensic Procedures Report* (1999).

39 VFSC, *Background/Issues Paper* (2002) 26-27.

40 *Ibid* 27.

The Commonwealth's Crimes Amendment (Forensic Procedures) Act 2001, which came into force in October last year, provides the regulatory framework for the operation of the database, and specific details on storage and use of information, retention, access, sharing of information between jurisdictions, matching rules and penalties for breaches of rules and procedures.⁴¹

At the time of writing, further review of the model provisions remains on the agenda of Australasian Police Ministers; the Memoranda of Understanding have not yet been finalised and the protocols for ensuring compliance with each jurisdiction's requirements were in the developmental stage.

This review of Victoria's forensic sampling laws is therefore undertaken mindful of the need for law reform proposals in this State to support and advance Victoria's participation in the national database.

RECENT DEVELOPMENTS IN VICTORIA

While DNA profiling, technologically, is a product of advances in genetic science, it is also, operationally, just one of the many forensic tools at the disposal of investigators. In reviewing the effectiveness of DNA profiling as a forensic tool in criminal investigations, the Inquiry was aware that its effectiveness cannot be examined in isolation. Other strategies, such as 'intelligence-led policing' and local area policing, as well as the follow-up of detections made by forensic DNA analysis, have an impact on the role and effectiveness of DNA profiling.

The Inquiry therefore reviewed the data available on the extent of crime in Victoria and on the strategies and priorities developed by Victoria Police to prevent and detect crime. The following analysis merely 'scratches the surface'; it does not purport to be a comprehensive or definitive analysis of crime trends in this State. The purpose of including this outline of trends in the incidence of crime is to establish a context in which the prevalence of crime is assessed and the potential contribution of DNA profiling can be determined, taking into account the resources and the range of strategies at the disposal of law enforcement agencies.

Crime Rates and Sentencing Trends

Reported crime statistics indicate only the level of recorded crime, not all criminal activity, and a full appreciation of crime levels and trends requires much deeper analysis than this brief survey. Nevertheless, it is relevant to consider the overall level of crime in Victoria when reviewing the role of one forensic tool in crime detection.

41 Greg Gardiner, *Information Paper: DNA Profiling* (February 2002) 8, at http://192.168.1.1/library/research/papers/Crime/DNA/dna_profiling.htm.

To date the two priorities of forensic sampling in Victoria have been to establish or confirm issues of identity in the investigation of serious property offences and crimes against the person, and to create a database of offenders whose prior criminal activities suggests they may re-offend. The use of DNA sampling in the detection of volume crimes, such as motor vehicle thefts, housebreaking and shop stealing is a key element of Victoria Police's future strategy for crime detection.

On 25 August 2003, Victoria Police reported a drop in Victoria's crime rate representing 'the biggest decrease in reported crime in the past decade', according to the Victorian Chief Commissioner of Police, Christine Nixon.⁴² These figures appear to be part of a trend. In 2001/2002, Victoria's overall reported crime rate decreased by 4 per cent.⁴³ In the last two years, according to Victoria Police, 'the reported crime rate has dropped to a total of 10.4 per cent per 100,000 population'.⁴⁴

'Crime victimisation' (the number of victims of crime per 100,000 population) is generally measured by two indicators: prevalence and incidence. Prevalence refers to the number of persons in the population that have been a victim of a given offence at least once in the reference period, while incidence relates to the total number of incidents that have occurred in that period.⁴⁵ Below is a brief review of the trends in two main areas: property crimes and crimes against the person.

The 2003 Crime and Safety Survey conducted by the Australian Bureau of Statistics reveals that Victoria has the lowest proportion of victims per 100,000 population in Australia, with 'a crime victimisation rate almost 23 per cent below the national average'.⁴⁶ Figure 1.1 sets out the 2002 data on the number of victims recorded, and the victimisation rates for each Australian jurisdiction (number per 100,000 population) for selected offences.

It can be seen that Victoria's victimisation rate was below or on a par with the national rate for almost all the selected offences. Victoria had the lowest victimisation rate in Australia for unlawful entry with intent (UEWI) and assault, and one of the lowest rates recorded for theft, sexual assault and unarmed robbery. The victimisation rates for armed robbery and unlawful entry not involving the taking of property (UEWI-Other) – the two offences which recorded a victimisation rate above the national average – appear to be declining. In 2001 the victimisation rate for armed robbery in Victoria was 86.0, while in 2002 the rate had fallen to 32.2 persons per 100,000. Similarly, in 2001 the victimisation rate for other unlawful entry offences was 375.8, falling slightly to 357.5 in 2002.

42 Victoria Police, *Biggest Decrease in Crime for a Decade*, 25 August 2003, <http://www.police.vic.gov.au/mediaContent.cfm?mediaId=271>.

43 Victoria Police, *Executive Summary of Recorded and Cleared Crime, 2001/2002 Provisional Crime Statistics*, at <http://www.police.vic.gov.au>.

44 Victoria Police, *Biggest Crime Reduction in Eight Years*, July 2002, at <http://www.police.vic.gov.au/showContentPage.cfm?contentPageID=11016>.

45 Australian Bureau of Statistics, *4509.0 Crime and Safety*, June 2003, at <http://www.abs.gov.au>.

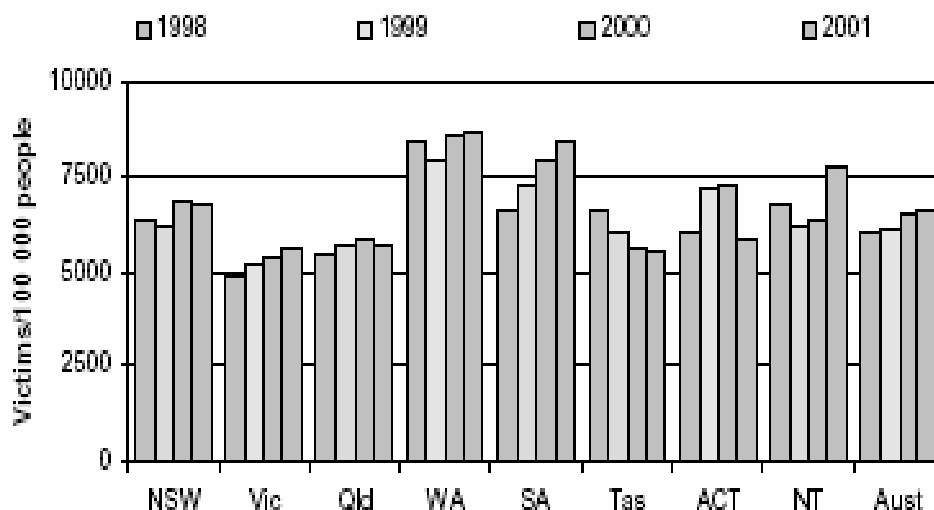
46 Ibid.

Property Crimes

For the year ending June 2002 there was a reported 5.8 per cent decrease in crime against property Australia-wide. The largest reductions in property crime were registered for robberies, burglaries and motor vehicle theft.⁴⁷ In 2003 the ABS released nationwide data indicating that:

The victimisation rate (number of victims per 100,000 population) for unlawful entry with intent (2001 per 100,000 population) and motor vehicle theft (575 per 100,000 population) were the lowest since the commencement of the national Record Crime collection in 1993, while the robbery victimisation rate (106 per 100,000 population) was the lowest since 1995.⁴⁸

Figure 1.1 Victimisation Rates: Crimes against Property, Australia, 1998-2001



Source: Productivity Commission, *Report on Government Services 2003*, Chapter 5, Figure 5.6.

Compared with other Australian jurisdictions, in 2000/2001 Victoria had the lowest victimisation rate for recorded crimes against property in Australia, with an incidence of 1619 victims per 100,000.⁴⁹ In relation to ‘household experience of crime’ (selected common property crimes) Victoria also had the lowest level of victimisation in Australia. In Victoria 7 per cent of households experienced at least one break-in, attempted break-in or motor vehicle theft, while the national average was 9 per cent, with the highest rate of victimisation, approximately 20 per cent, recorded in the Northern Territory.⁵⁰

47 Victoria Police, *2001/2002 Provisional Crime Statistics -Highlights*, at <http://www.police.vic.gov.au/showContentPage.cfm?contentPageId=10760>.

48 Australian Bureau of Statistics, *Recorded Crime, 4510.0*, 29 May 2003 available from ABS website at <http://www.abs.gov.au/ausstats>.

49 Productivity Commission, *Report on Government Services 2001*, 357, at <http://www.pc.gov.au/gsp/2001/>.

50 Australian Bureau of Statistics, *Crime, 4509.0*, 20 June 2003, at <http://www.abs.gov.au/ausstats/abs>.

Table 1.1 Victimisation Rates, Category of Offence, Australia, 2002

	NSW	Vic.	Qld	SA	WA	Tas.	NT	ACT	Aust.
NUMBER									
Homicide and related offences	338	181	232	81	89	11	26	5	963
Murder	98	70	57	29	40	7	15	2	318
Attempted murder	147	52	126	39	20	3	8	1	396
Manslaughter	13	4	18	-	6	1	3	-	45
Driving causing death	80	55	31	13	23	-	-	2	204
Assault	80,028	17,894	20,865	16,540	15,282	3,633	3,322	1,984	159,548
Sexual assault	6,480	2,653	4,740	1,625	1,620	240	312	180	17,850
Kidnapping/abduction	436	96	75	31	36	8	4	10	696
Robbery	11,704	3,176	2,047	1,623	1,969	136	95	211	20,961
Armed Robbery	3,815	1,573	879	521	910	51	32	36	7,817
Unarmed Robbery	7,889	1,603	1,168	1,102	1,059	85	63	175	13,144
Blackmail/extortion	82	115	54	61	31	-	1	-	344
Unlawful entry with intent	141,170	71,039	68,267	33,054	61,474	7,411	5,615	6,344	394,374
UEWI-Involving the taking of property	109,309	53,579	51,639	21,773	41,693	5,838	3,526	5,412	292,769
UEWI-Other	31,861	17,460	16,628	11,281	19,781	1,573	2,089	932	101,605
Motor vehicle theft	41,665	28,891	15,842	11,214	10,487	2,488	(b)763	2,039	113,389
Other theft	211,908	142,025	116,781	79,185	98,252	13,033	(b)8,106	10,170	679,460
RATE PER 100,000 PERSONS									
Homicide and related offences	5.1	3.7	6.3	5.3	4.6	2.3	13.0	1.5	4.9
Murder	1.5	1.4	1.5	1.9	2.1	1.5	7.5	np	1.6
Attempted murder	2.2	1.1	3.4	2.6	1.0	0.6	4.0	np	2.0
Manslaughter	0.2	0.1	0.5	-	0.3	np	1.5	-	0.2
Driving causing death	1.2	1.1	0.8	0.9	1.2	-	-	np	1.0
Assault	1,200.9	366.4	562.6	1,086.6	792.1	767.0	1,660.1	613.1	809.7
Sexual assault	97.2	54.3	127.8	106.8	84.0	50.7	155.9	55.6	90.6
Kidnapping/abduction	6.5	2.0	2.0	2.0	1.9	1.7	2.0	3.1	3.5
Robbery	175.6	65.0	55.2	106.6	102.1	28.7	47.5	65.2	106.4
Armed Robbery	57.3	32.2	23.7	34.2	47.2	10.8	16.0	11.1	39.7
Unarmed Robbery	118.4	32.8	31.5	72.4	54.9	17.9	31.5	54.1	66.7
Blackmail/extortion	1.2	2.4	1.5	4.0	1.6	-	np	-	1.7
Unlawful entry with intent	2,118.5	1,454.7	1,840.7	2,171.4	3,186.4	1,564.7	2,806.0	1,960.5	2,001.4
UEWI-Involving the taking of property	1,640.4	1,097.2	1,392.4	1,430.3	2,161.1	1,232.6	1,762.1	1,672.5	1,485.8
UEWI-Other	478.1	357.5	448.3	741.1	1,025.3	332.1	1,043.9	288.0	515.6
Motor vehicle theft	625.2	591.6	427.2	736.7	543.6	525.3	(b)381.3	630.1	575.4
Other theft	3,180.0	2,908.4	3,148.8	5,201.9	5,092.7	2,751.7	(b)4,050.8	3,142.8	3,448.2

Source: Australian Bureau of Statistics, *4510.0 Recorded Crime*, Australia, 29 May 2002.

Decreases were observed in all burglary categories per 100,000 population this year. Aggravated burglaries fell by 13.2 per cent, residential burglaries decreased by 8.1 per cent, and other burglaries dropped by 11.4 per cent.⁵¹

In Victoria, the incidence of property crime declined for almost all property offences during 2001/2002. The incidence of burglary and motor vehicle thefts decreased by more than 10 per cent during 2001, and the downward trend continued during 2002/2003, with even greater decreases. Aggravated burglary declined by 17.9 per cent, residential burglary was down by 14.5 per cent and motor vehicle thefts per 1000 have reversed the upward trend observed in previous years, with a decrease of 12.0 per cent in 2001/2002 and a further decrease of 23.9 per cent in 2002/2003.⁵²

Going against this trend, the incidence of arson and property damage increased; shop stealing also increased by 21.4 per cent on the 2001 figures, while handling stolen goods offences increased by 6.3 per cent.⁵³

The Victorian Chief Commissioner of Police has attributed the downturn partly to new strategies in policing, notably the regional Embona Taskforce comprising detectives dedicated to robbery investigations.⁵⁴ Local Priority Policing, where local police work in partnership with government agencies and community representatives on Community Safety Plans, was also believed to be contributing to the control of property crime.⁵⁵

Crimes against the Person

While there was a decrease in the crimes against property during 2001/02, the figures for offences against the person were not as consistent. The declining incidence of reported sex offences and robberies was matched by an increase in reported assaults.

The number of robbery offences per 100,000 decreased by 13.3 per cent in 2001/2002, [reversing] the trend from 1997/1998 to 2000/2001, where increases were observed in this category.⁵⁶

There was a 4.9 per cent increase in crimes against the person, including a 13.3 per cent rise in the number of assaults, 'partly attributable to a greater willingness of female victims to report family violence'.⁵⁷ During 2002/2003 there was a decline in

51 Ibid.

52 Victoria Police, *Biggest Decease in Crime for a Decade*, 25 August 2003, at <http://www.police.vic.gov.au>.

53 Ibid.

54 Victoria Police, *Biggest Crime Reduction in Eight Years*, July 2002, at <http://www.police.vic.gov.au/showContentPage.cfm?contentPageId=11016>.

55 Victoria Police, *Victoria Police in 2008: The Critical Issues and Possible Strategic Responses*, July 2002, 9 at <http://www.police.vic.gov.au>.

56 Ibid.

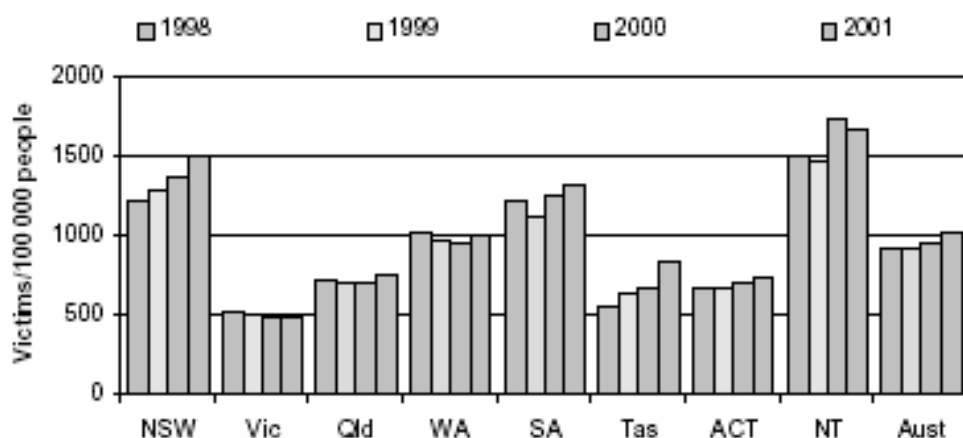
57 Ibid.

the incidence of all major crimes against the person – homicide, rape, sexual offences. The incidence of robbery and assault remained stable.

The broad category of homicides including murder, attempted murder, manslaughter and driving causing death remained constant with no variation per 100,000 population. However, there were ten more homicides recorded in the last financial year.⁵⁸

Compared with other Australian jurisdictions, Victoria has one of the lowest rates of recorded crime against people. In 2001 Victoria had the second lowest victimisation rate in Australia, with 358 victims per 100,000 persons.⁵⁹ Similarly, the 2003 Crime and Safety Survey indicated that while the personal crime victimisation rate increased nationally by 1 per cent to 5.2 per cent in 2002, Victoria still had one of the lowest levels of victimisation for personal crime in Australia.

Figure 1.2 Victimisation Rates: Crimes against the Person, Australia, 1998-2001



Source: Productivity Commission, *Report on Government Services 2003*, Chapter 5, Figure 5.5.

This brief survey of crime trends in Victoria indicates firstly, that Victoria has a relatively low crime rate, compared with other Australian jurisdictions, and secondly, that recent trends are indicating an easing off in the incidence of most offences against property and crimes of violence. In reviewing the role that is currently played, and that potentially could be played by DNA sampling in crime detection, it is important to bear in mind the scale of crime in this state. Taking into account especially the level of commitment needed to maintain forensic DNA sampling services, it is crucial to have a clear indication of the projected demand for these services.

It is also relevant to consider the number of offenders responsible for criminal activity. The effectiveness of DNA databasing, in particular, relies on the identification and databasing of actual and potential re-offenders. To date, the main contributors to the database have been offenders found guilty of serious crimes. Since

58 Victoria Police, *Biggest Crime Reduction in Eight Years*, at <http://www.police.vic.gov.au/showContentPage.cfm?contentPageId=11016>.

59 Productivity Commission, *Report on Government Services 2001*, 357, at <http://www.pc.gov.au/gsp/2001/>.

1998, this group has provided over 3000 DNA samples, which have led to approximately 2500 charges being laid against over 900 offenders. The Inquiry therefore examined Victorian trends in sentencing and imprisonment, to ascertain the number of persons being found guilty, sentenced and imprisoned for criminal offences in Victoria.

Sentencing and Imprisonment Trends

The Committee also considered changes in sentencing policies that have occurred in Victoria in the past few years. In the past five years, the total number of defendants committed to trial in the County or Supreme Court has increased by 20 per cent, from 1917 defendants in 1997/98 to 2299 in 2001/02.⁶⁰ There was a commensurate (23 per cent) increase in the number of defendants sentenced,⁶¹ with 1764 sentenced during 2001/2002. Of these, 999 defendants were sentenced to a term of imprisonment in 2001/2002, representing an increase of 34 per cent on 1997/98 figures.

Imprisonment was the most common type of sentence imposed in the Higher Courts.⁶² Property offences constituted a approximately 47 per cent of *all* charges proven but, offences against the person, which receive heavier sentences than property offences, comprised 60 per cent of the *principal* proven offences.⁶³

Some trends in sentencing reflect trends in the crime rate. For example, an increase in the number of defendants sentenced for robbery in the past five years reflects a corresponding increase in the reported crime figures for this offence.⁶⁴ Similarly, the increased proportion of defendants charged and sentenced with offences against the person over the past five years correspond to an increase in the reported crime rate for this group of offences.⁶⁵

Other trends in sentencing reflect changes in sentencing policies, rather than changes in the crime rate. An increase in the number of defendants sentenced for aggravated burglary, the most serious of the burglary offences, reflects a new definition of this offence introduced in 1997. Until 1997 aggravated burglary involved entering a property while armed with a weapon or explosives. In 1997 the definition was broadened 'to include situations where the burglar entered an occupied building knowing that someone was present, or being reckless as to whether or not a person was present'. In this case, the legislative amendment brought about an increase in the number of aggravated burglary charges coming before the courts.⁶⁶

60 Victoria, Department of Justice, *Sentencing Statistics 1997/1998-2001/02* (2003) vol 1, iii.

61 Ibid.

62 Ibid 20.

63 Ibid 15-17.

64 Ibid iv, 10.

65 Ibid 15-16.

66 Ibid 10-11.

The combined effect of more severe sentencing policies and the current trends in the crime rate would therefore appear to be an increase in the number of persons being sentenced to imprisonment. The majority of these offenders have been found guilty of a crime against the person as their principal proven offence.

Policing Strategies and Priorities

In Victoria, all DNA analysis undertaken for criminal investigations is conducted by the Victoria Forensic Science Centre, which is part of Victoria Police. Victoria Police is currently involved in the development of a five-year plan, undertaking a large-scale process of consultation with the Victorian community. A Position Paper, outlining the issues facing policing in the next five years, was circulated for public comment in July 2002.⁶⁷ The Position Paper refers to the changes in our community that are having an impact on policing and identifies for comment some priorities for the coming years. A significant theme in the Position Paper is the eclectic and multi-faceted approach to policing that is emerging.

A radical shift has occurred in the relationship between the state and civil society. Governance is being re-invented. Governments everywhere are questioning what constitutes their core functions. Non-governmental organisations, agencies and communities are being asked to engage in new partnerships with government, taking on the delivery of what were previously regarded as exclusively governmental responsibilities. And governments are requiring higher standards of accountability and evidence of value for money from the public sector.⁶⁸

Victoria Police has identified three priorities in policing in Victoria: intelligence-led policing; local area policing; and the expanded use of forensic services.⁶⁹ Intelligence-led policing is closely linked to the use of DNA sampling. The DNA database is already a prime source of intelligence in relation to the detection of serious offences and to the identification of repeat offenders. Victoria Police is developing a 'more responsive style of policing at the local level' which will affect the capacity of the police to collect crime scene evidence and to identify priority targets.⁷⁰

Victoria Police is moving towards a more streamlined, focussed and specialised use of forensic services for the detection of volume crime. Assistant Commissioner Noel Ashby observed at the 2003 public hearings:

Whereas Victoria Police had a significant capacity to service the investigation of major crime ... [there were] significant gaps in relation to the way we handled forensic services in Victoria.⁷¹

67 Victoria Police, *Victoria Police in 2008: The Critical Issues and Possible Strategic Responses*, July 2002, 9, available at the Victoria Police website, <http://www.police.vic.gov.au>, 9.

68 Ibid 2.

69 Victoria Police, *Tracing the Future* (2002) 13.

70 Ibid 15.

71 Asst Commissioner N Ashby, *Minutes of Evidence*, 2 June 2003, 7.

The most significant gap was found to be the forensic support (which includes fingerprinting and other forensic tools, as well as DNA analysis) available for the detection of volume crimes.

The vast majority of those volume related crimes had no forensic support whatsoever.⁷²

This Inquiry is confined to the review of the laws and use of one forensic tool. However, to understand the impact of forensic sampling on criminal investigations it is also necessary to be aware of the contribution (actual and potential) of other elements of policing on crime prevention and detection. To assess, for example, the possible benefits of an expanded forensic sampling regime in the detection of volume property crimes, it would be necessary to examine factors such as: the role of crime prevention strategies, the contribution of repeat offenders to the crime rate for property, and the availability and effectiveness of other forensic tools, such as fingerprinting, in the detection of property crimes.⁷³

Forensic analysis complements but does not replace the investigation of volume crimes. Detection is achieved by searching the DNA database for profiles matching that of an unsolved crime scene. The database may connect two unsolved crime scenes, or connect a person to a crime scene, but this intelligence requires prompt follow-up and further investigation for maximum effect.⁷⁴ Representatives of Victoria Police indicated that DNA analysis, in particular, is regarded as a ‘powerful investigative tool’, with the capacity to ‘significantly aid the identification of criminals, criminal groups and criminal behaviour’, but stressed that it ‘can only be efficient if it is used in conjunction with other existing methodologies’.⁷⁵

Clearly, then, the use made of DNA sampling in crime detection is subject to certain operational constraints: the overall demands on policing that vary with crime trends, and the strategies and priorities developed by Victoria Police to reconcile competing demands for its resources.

EMERGING ISSUES

During 2002 the Inquiry received submissions and evidence that reflected sharply divided opinions on the adequacy of the existing forensic procedures regime. While the majority of participants in this Inquiry advocated the retention of the status quo, the Inquiry also received some proposals for a greatly expanded regime.

72 Ibid 7.

73 See Carlos Carcach and Toni Makkai, *Review of Victoria Police Crime Statistics: A Report* (2002).

74 Asst Commissioner P Evans, *Minutes of Evidence*, 2 June 2003, 9.

75 Ibid 11.

The Escalating Demand for Forensic Services

The growing demand for forensic sampling, compounded by the backlog of DNA samples already awaiting analysis, emerged as a key issue confronting this Inquiry. A Victorian magistrate drew public attention to the impact which delays in forensic analysis are having on the administration of criminal trials in this State.⁷⁶ During a recent committal mention in the Melbourne Magistrates' Court,⁷⁷ Magistrate Hannan asked a representative of the VFSC to attend the court:

For the court and the community to be appraised as to what the situation is in relation to forensic testing in this State, why it is the circumstance that defendants remain in custody for extended periods of time without access to material which will form part of the evidence alleged against them.⁷⁸

Magistrate Hannan indicated that delays in DNA analysis were stalling the progress of criminal proceedings, causing increased anxiety on the part of complainants in sexual offence matters, and leading the defendants to seek bail on the basis that the delays represented 'exceptional circumstances' within the meaning of the *Bail Act (1977) Vic.*⁷⁹

While strategies were in place for a reduction of the backlog over the next four years, the lead time for staff recruitment and training meant that these appointments would not begin to have an impact on the backlog of samples awaiting analysis at the laboratory for at least six months.⁸⁰ This problem is by no means confined to Victoria. Other jurisdictions, such as England, the USA and Canada, which rapidly expanded their DNA sampling regimes to meet escalating demand for these services, also encountered backlogs that impeded the progress of criminal investigations and, in some extreme cases,⁸¹ undermined the reliability and impact of DNA sampling.

Changes in the Management of Victoria's Forensic Services

Victoria Police informed the Inquiry that, having examined the changing level of demand for forensic services, it is developing strategies to attempt to meet this demand and to provide the administrative framework and investigative support needed to make best use of forensic analysis.⁸²

76 Magistrate Lisa Hannan, in relation to the unreported case, *The Police v Sebastian Romeo & Ors* (Melbourne Magistrates' Court, Magistrate Hannan, 9 May 2003) reported in 'DNA Test Delays Hit Courts' *Herald Sun*, 10 May 2002. Her Worship appeared at the public hearings on 2 June 2003.

77 'DNA test delays hit courts', *ibid* 17.

78 *The Police v Romeo & Ors*, Transcript, 9 May 2003, 2.

79 Magistrate L Hannan, *Minutes of Evidence*, 2 June 2003, 37.

80 Professor J Scheffer, *Minutes of Evidence*, 2 June 2003, 6.

81 See for example the backlog of casework samples awaiting analysis in the USA, described in Dwight E Adams, Federal Bureau of Investigation, 'The FBI's CODIS Program', *Congressional Statement*, 14 May 2002, at FBI Press Room website, <http://www.fbi.gov/congress>.

82 Asst Commissioner N Ashby, *Minutes of Evidence*, 2 July 2003, 6-7.

Until July 2002, the Forensic Procedures Implementation Team (FPIT) managed these functions. Since 1998 it had undertaken the back-capture of DNA samples from offenders. FPIT was abolished on 30 June 2002, and a DNA Management Unit formed. Victoria Police also initiated a review of its forensic services to establish a blueprint for the future management and provision of its forensic services. The report, *Tracing the Future: Achieving the Best Use of Forensic Services*, was completed in July 2002 and its implementation was announced by the Minister for Police early in 2003. DNA analysis is, in this context, one of the many forensic services provided by the VFSC.

Victoria Police proposes to create a Division of Forensic Services, to be managed by a Board of Forensic Services and assisted by consultative committees. Victoria Police is also considering the potential for 'strategic partnerships' with bodies such as the Victorian Institute of Forensic Medicine and the National Forensic Studies Centre of Excellence.⁸³

The proposed reorganisation of Victoria Police forensic services is expected to entail the appointment of a significant number of additional staff to provide the capacity to reduce the current backlog over the next four years.⁸⁴

The impact that the forensic sampling legislation can have on the operation of the criminal proceedings in Victorian courts has therefore been brought into sharp relief during the course of this Inquiry. Consequently, this review of Victoria's forensic sampling regime considered not only the legal policy implications, but also the operational impact of proposed reforms.

Recent Initiatives in Law Reform

Three states have recently developed legislation that substantially amends their forensic procedures provisions. South Australia has enacted a comprehensive set of amendments to its legislation which came into effect on 4 April 2003.⁸⁵ Tasmania enacted amendments to its forensic procedures legislation which came into effect on 4 June 2003.⁸⁶ The Queensland Government has also prepared amendments to its *Police Powers and Responsibilities Act 2000 (Qld)* which would incorporate data-sharing provisions, certain safeguards, and penalties for breach of the legislation along the lines of the Model Bill.⁸⁷

In November 2002 the Crime and Misconduct Commission released a report on the provision of Queensland's forensic DNA services, focusing on operational and

83 Victoria Police, *Tracing the Future* (2002) 20.

84 Asst Commissioner N Ashby, *Minutes of Evidence*, 2 June 2003, 11.

85 *Criminal Law (Forensic Procedures) (Miscellaneous) Amendment Act 2002*, which came into operation on 4 April 2003.

86 *Forensic Procedures Amendment Act 2003 (Tas)*.

87 *Police Powers and Responsibilities (Forensic Procedures) Amendment Bill 2003 (Qld)*.

technical issues highlighted by the quashing of a rape conviction following a re-examination of the DNA evidence on which the prosecution and conviction were based. Late in 2002 the Tasmanian Children's Commissioner released a review addressing the impact of the forensic sampling provisions on Tasmanian children and young people.⁸⁸

The Commonwealth forensic procedures provisions have been the subject of two recent reviews. The ALRC Inquiry reviewed the forensic procedures provisions in the context of a national legislative, ethical and administrative framework for the use of human genetic material. Another review, chaired by Mr Tom Sherman AO ('the Sherman Review'), commenced in July 2002, and submitted its report in May 2003. It was initiated pursuant to Section 23YV of the *Crimes Act 1914 (Cth)*, which requires an independent review of the operation of the legislation, 'to be undertaken as soon as possible after the first anniversary of [its] commencement'.

Both these reviews proposed initiatives aimed at realising the potential for nationwide use of forensic profiling by 'harmonising' the Commonwealth, State and Territory laws, to align Australian regimes for the collection, handling and forensic uses of DNA material.

The New South Wales legislation provides for three reviews of its forensic procedures provisions: the legislation, the policies, and the operation of the forensic procedures legislation.⁸⁹ The Law and Justice Committee of the NSW Legislative Council completed the first review in February 2002. Another review, examining the appropriateness of the policies underpinning the provisions, is due to be completed shortly.⁹⁰ The New South Wales Ombudsman is also undertaking a review, addressing the implementation of the forensic sampling of offenders in New South Wales prisons due to be completed in 2004.⁹¹

In reviewing Victoria's forensic sampling laws the Inquiry has therefore considered recent developments in other Australian jurisdictions, as well as the proposals for law reform submitted and developed during this Inquiry.

88 Tasmania, Office of the Commissioner for Children, *Forensic Procedures Act 2000: Review of one Year in Operation* (2002).

89 *Crimes (Forensic Procedures) Act 2000 (NSW)*. S 121 requires a review of the implementation of the forensic procedures legislation; s 122 mandates a review of the operation of the Act and Regulations, while s 123 provides for a review of the policies on which the provisions are based.

90 NSW Standing Committee on Law and Justice, *Review of the Crimes (Forensic Procedures) Act 2000* (2002) xi.

91 NSW Ombudsman, *Discussion Paper: The Forensic DNA Sampling of Serious Indictable Offenders under Part 7 of the Crimes (Forensic Procedures) Act 2000* (2001) at <http://www.ombo.nsw.gov.au>.

2. VICTORIAN FORENSIC SAMPLING LAWS

THE DEVELOPMENT OF FORENSIC SAMPLING LAWS

This chapter provides a broad overview of the provisions of Victoria's forensic procedures legislation, contained in Subdivision 30A of the *Crimes Act 1958 (Vic)* and sets out the method used in this Inquiry to evaluate the appropriateness and effectiveness of the current regime. Throughout the Report, references to 'the Act' refer to the Victorian *Crimes Act*.

The case that probably did most to inspire Australian jurisdictions to develop a capacity for forensic sampling was the British investigation into the murder of two teenage girls in 1983. The police carried out a mass DNA sampling of the local community but were unable to match the DNA profile obtained from the crime scene. However, some years later, a man drinking in a hotel revealed that he had taken the test in place of another man, Colin Pitchfork. Pitchfork was then required to provide a DNA sample and, when a matching profile was obtained, was prosecuted and convicted of murder.⁹²

The first use of DNA profiling in Australian criminal proceedings occurred in the ACT in 1989, when DNA evidence linked a suspect to the victim of a sexual assault.⁹³ As noted earlier, the first Victorian forensic procedures provisions⁹⁴ were enacted in 1989 in response to the Coldrey Committee's report on *Body Samples and Examinations*.⁹⁵

The Coldrey Committee addressed the need for law enforcement agencies to have some legislative authority to conduct a procedure that would otherwise constitute an assault. It considered the requirements for and implications of obtaining body samples and conducting physical examinations to assist with investigations into certain serious offences. The Committee envisaged that the procedures would be conducted on persons suspected of some involvement in serious crimes of violence, such as murder, manslaughter and serious sexual offences, which at that time

92 Ben Saul, 'Genetic Policing: Forensic DNA Testing in New South Wales' (July 2001) 13(1) *Current Issues in Criminal Justice* 74, 75.

93 Patricia Weiser Easteal and Simon Easteal, *The Forensic Use of DNA Profiling: Trends and Issues Paper No. 26*, Australian Institute of Criminology (1990) at <http://www.aic.gov.au>.

94 *Crimes (Blood Samples) Act 1989 (Vic)*.

95 Coldrey Committee, *Report on Body Samples and Examinations* (1989).

comprised about 2 per cent of the Major Crime Index.⁹⁶ The Coldrey Committee observed:

The justification for the granting of power to utilise these forensic procedures is grounded not on any quantitative analysis but on the qualitative basis that the proposed techniques have the capacity to play a significant role in the investigation and prosecution of a small number of very serious offences, the solution of which is undeniably in the public interest.⁹⁷

The Coldrey Report set out a comprehensive blueprint for forensic sampling, modelled on the fingerprinting provisions in force at that time. The legislation enacted to implement the recommendations of the Coldrey Committee established the framework that underpins the current Victorian forensic sampling procedures. It provided only for the sampling of suspects of serious crimes of violence. It also contained a 'sunset clause' to restrict its initial operation to one year.⁹⁸ The sunset clause was repealed two years later and the first of a series of amendments was enacted to broaden the scope of forensic sampling.⁹⁹

There followed a gradual expansion of the scope of the forensic sampling provisions.¹⁰⁰ During the 1990s amendments were enacted to:

- increase the range of offences for which suspects could be sampled;
- introduce the provision for the sampling of offenders convicted of certain serious crimes; and
- provide for the sampling of volunteers with their consent.

The 1997 amendments marked a fundamental shift in the rationale for forensic sampling. Whereas initially the forensic procedures had been designed and used to inculcate or exclude suspects from active investigations, the 1997 amendments supported the collection and analysis of DNA samples expressly and solely for inclusion in a forensic DNA database. Offenders found guilty of certain serious offences could be ordered to undergo a forensic procedure and their profiles would be included on the DNA database. Similarly, if a DNA sample had been obtained from a suspect during an investigation and that suspect was ultimately found guilty, the suspect's profile could be retained on the forensic DNA database. These provisions also operated retrospectively to enable offenders detained in custody and previously found guilty of such crimes to be sampled as well. Database searches would compare the offenders' profiles against those obtained from unsolved crimes and record links ('hits') with hitherto unsolved crimes.

96 VFSC, *DNA Handbook* (2000) 8.

97 Coldrey Committee, *Report on Body Samples and Examinations* (1989) xi.

98 Greg Gardiner, *Information Paper: DNA Profiling* (2002) 10.

99 Ibid.

100 Ibid 10-11; Coldrey Committee, *Report on Body Samples and Examinations* (1989) 170; VFSC, *DNA Handbook* (2000) 8. The *Crimes (Amendment) Act 1997 (Vic)* broadened the scope of the forensic sampling regime. These provisions came into effect on 1 July 1998.

From 1 July 1998, when the 1997 amendments came into effect, the sampling and profiling of offenders became a high priority for Victoria Police, and the size of the Victorian DNA database increased dramatically. During 1998/99, 711 court orders for ‘forensic sample’ procedures were made, and in the following year a further 2102 orders had been issued, making a total of almost 3000 orders for the sampling of serious offenders by January 2000.¹⁰¹

To expedite the issue of court orders for the sampling of offenders in custody, the practice of obtaining *ex parte* orders from magistrates in chambers developed. A legal challenge to this practice resulted in a Victorian Supreme Court decision that the making of orders in chambers was not valid.¹⁰² In 2001, the Victorian Government sought to rectify this deficiency by enacting amendments to validate retrospectively the orders already issued.

Subsequent amendments¹⁰³ to the forensic procedures provisions have ‘fine-tuned’ the administration of the forensic procedures by providing a means to enforce orders made for the sampling of non-custodial offenders, to restrict the uses which can be made of volunteers’ profiles, and to permit donors to take their own DNA samples using a buccal swab of the mouth.¹⁰⁴

Significantly, the most recent amendments, enacted in May 2002, established the legislative framework for Victoria to participate in the national DNA database being developed by CrimTrac.¹⁰⁵ Regulations prescribed in December 2002 nominated five jurisdictions – the Commonwealth, New South Wales, Tasmania, Western Australia and the Australia Capital Territory – as having ‘corresponding laws’ for the purposes of the forensic procedures provisions.¹⁰⁶ Victoria is now able to enter into data-sharing arrangement with these jurisdictions; however, at the time of writing it had not concluded any agreements with other jurisdictions or uploaded data onto the national database.

THE SCOPE OF THE FORENSIC PROCEDURES PROVISIONS

As noted above, section 464 of the *Crimes Act 1958 (Vic)* makes a distinction between intimate and non-intimate procedures, and imposes greater controls on the taking of intimate samples. *Intimate samples* include a blood sample, saliva, a scraping from the mouth (a buccal swab), or a sample of pubic hair, and samples from

101 Victoria, Department of Justice, *Orders for Forensic Procedures, 1997/98-2001/02*, provided to this Inquiry in September 2002.

102 *Lednar and Ors v The Magistrates' Court of Victoria and Anor* [2000] VSC 549; A Crim R 396.

103 See the *Crimes (DNA Database) Act 2002 (Vic)*.

104 The 2002 amendments provide for the buccal swab – a mouth scraping – to be self-administered, and for the arrest of a non-custodial offender ordered to undergo a forensic procedure.

105 *Crimes (DNA Database) Act 2002 (Vic)*.

106 *Crimes (DNA Database) Regulations 2002 (Vic)*, 17 December 2002.

the genitalia or anal region of males and females or the breast of a female. A forensic procedure does not include the taking of fingerprints.

The actual conduct of the forensic procedure is to some extent prescribed by legislation. Section 464Z(6)(b) requires the procedure to be conducted in the presence of a member of the police force 'in circumstances affording reasonable privacy'. Under section 464Z, persons from whom a sample is to be obtained may:

- in the case of a scraping from the mouth (a buccal swab), administer the procedure themselves (under supervision); or
- in the case of any other type of sample, have the procedure carried out by, or in the presence of, a medical or dental officer of their choice.

Offenders found guilty of 'forensic sample' offences, as listed in Schedule 8 of the *Crimes Act* (which includes most serious indictable offences), can be ordered by a court to undergo a forensic procedure, whether or not they are serving a prison sentence.

Suspects – persons suspected of being involved in the commission of an indictable offence – may be asked to provide a sample by consent. 'Relevant suspects' – persons suspected of involvement in specified (serious) indictable offences - who do not consent to provide a sample, can be required to do so by order of the court.

Volunteers can be asked to provide a sample for use in the investigation of an indictable offence. They may be asked, for example, to provide a DNA sample for elimination purposes, if it is expected that their DNA may be present in exhibits collected at the crime scene. Relatives of a missing person might also volunteer to provide samples to assist investigators in establishing whether forensic material collected from the scene of a crime, a disaster or from an unidentified person could have originated from that missing person.

Volunteers may refuse to undergo a forensic procedure. If they refuse and are subsequently identified as relevant suspects, the police may apply for a court order to require the person, now identified as a relevant suspect, to undergo a forensic procedure.¹⁰⁷

'Consensual' Sampling Procedures

When volunteers and suspects are asked to consent to a forensic procedure, their consent must be 'informed', which means that the person must be informed of the purpose and nature of the procedure, as well as the use to be made of the profile, and that the consent process must be documented and witnessed or recorded.¹⁰⁸

107 Part C reviews these provisions in detail.

108 Ss 464S(1) and (2) in relation to suspects and s 464ZGB in relation to volunteers.

Special provisions are set out in relation to incapable persons and children. If a person is deemed incapable due to mental impairment, his/her consent to the procedure need not be sought and the police may apply for a court order to require that person to undergo a forensic procedure.¹⁰⁹

Children under 10 years of age cannot be asked to undergo a forensic procedure.¹¹⁰ Applications to obtain DNA samples from children aged between 10 and 17 years must be made to the Children’s Court and the child and a parent or guardian, where possible, are to be served notice of an application for a forensic procedure.¹¹¹

The schedule below summarises the provisions which govern whether a forensic procedure can be authorised by consent or court order.

Table 2.1 Consensual and Court-ordered Procedures: Victorian Provisions

Type of Donor	Consent	Court Order
Volunteer:		
Adult	Permitted	Not applicable
Child/incapable person	Incapable person may volunteer Child may not volunteer	Not applicable
Suspect:		
Adult	Permitted	Permitted
Child/incapable person	Not applicable	Permitted
Offender:		
Adult	Not applicable	Permitted
Child/incapable person	Not applicable	Permitted

Orders for Forensic Procedures

A court order is needed to:

- require a child or incapable person to undergo a forensic procedure;
- require a non-consenting relevant suspect to undergo a forensic procedure;
- authorise the retention of the DNA sample and related information obtained from a volunteer or a suspect who is ultimately found guilty of an indictable offence; or
- require an offender found guilty of a Schedule 8 offence to undergo a forensic procedure.

109 S 464T.

110 S 464U(1).

111 Ss 464U(3) and (5).

If the procedure has been ordered by the court, it must be videotaped, if practicable, or witnessed by an independent person. Reasonable force may be used to carry out the procedures and the donor must be made aware of this provision beforehand.

Relevant Suspects

A person suspected of being involved in the commission of specified serious offences (a 'relevant suspect') may be ordered to undergo a forensic procedure if it can be shown that there are reasonable grounds to believe that the procedure would tend to confirm or disprove his/her involvement in the commission of an indictable offence. The considerations to be addressed by the court in making such an order are set out in detail in section 464T, in relation to adults, and in section 464U, in relation to children. Essentially the applicant for an order (the police informant) must satisfy the court, on the balance of probabilities, that:

- there are 'reasonable grounds to believe that the person has committed the offence in respect of which the application is made';
- material against which the sample can be compared has been found at the crime scene, on an object or person associated with the offence, or on the victim; and
- there are reasonable grounds to believe that the conduct of the procedure on the person 'may tend to confirm or disprove his or her involvement in the commission of the offence'.

Under section 464U(8), when an application is made for an order to sample a child, the court must also consider the seriousness of the circumstances of the alleged offence, the alleged degree of participation of the child and the age of the child.

The police can apply to 'fast track' the process by making a phone or faxed application for an interim order if there is a risk that the DNA evidence would otherwise be lost or destroyed. This permits, for example, a physical examination and the taking of swabs from a suspect who may have traces of evidence on their body which could link that person to a victim or crime scene. An application for a final order, to be heard in the presence of the suspect, will still need to be made before the material can be analysed.

Offenders

Applications can also be made for orders¹¹² for the sampling of offenders found guilty of certain serious 'forensic sample' crimes listed in Schedule 8 of the *Crimes Act 1958 (Vic)*.¹¹³ Applications can be made immediately following a finding of guilt or retrospectively, within certain time limits. If the offender is not in custody at the time when the order is made:

112 S 464ZF.

113 Schedule 8 is included at Appendix 4.

- a notice can be issued requiring the offender to attend a police station to carry out the procedure pursuant to a court order already obtained;¹¹⁴ and/or
- a warrant can be obtained for the arrest of the person in order to carry out the forensic procedure.¹¹⁵

The Use of DNA Profiles in Criminal Investigations

Under the Victorian legislation, court orders are a means of safeguarding the interests of persons whose DNA samples are sought for forensic purposes. Other safeguards apply to govern the use rather than the authority for the procedures. A volunteer who consents to undergo a forensic procedure can elect whether the profile is used for a specified limited purpose or for unlimited purposes. Under section 464ZGB a volunteer:

- (3)(ba) may choose whether the information obtained from analysis of the sample may be used:
 - (i) only for a limited purpose to be specified by the volunteer; or
 - (ii) for the purpose of a criminal investigation or any other purpose for which the DNA database may be used under this Subdivision or under a corresponding law of a participating jurisdiction.

A volunteer who consents under 464ZGB(3)(ba)(i) (the ‘limited purpose’ option) could specify that the profile only be matched against the crime scene profile for the particular investigation during which it was obtained.

A volunteer may withdraw his/her consent at any time and request that the sample and related information be destroyed pursuant to section 464ZGE. However, if the police wish to retain the sample and related information, they are entitled under section 464ZGF(1) to apply for a court order, on the basis that the information ‘has probative value in relation to the indictable offence being investigated’.

While a suspect may consent to undergo a forensic procedure, the suspect does not have the right to choose the purpose(s) for which the DNA profile is used. The profile:

will be placed on a DNA database and may be used for the purpose of a criminal investigation or any other purpose for which the DNA database may be used under this Subdivision or under a corresponding law of a participating jurisdiction.¹¹⁶

In practice, this means that the profiles of suspects, and of volunteers who consent to the unlimited use of their profiles, can be matched against the profiles of any or all unsolved crime scenes on the DNA database. The police may apply to retain the

114 S 464ZFAA.

115 S 464ZFA.

116 S 464S(1)(ea).

DNA sample and related information obtained from a relevant suspect (or a volunteer) who is ultimately found guilty of:

- the offence in respect of which the forensic procedure was conducted;
- any other offence arising out of the same circumstances; or
- any other offence in respect of which evidence obtained as a result of the procedure had probative value.¹¹⁷

The Destruction of Forensic Material

The term ‘forensic material’ is defined to mean any material:

- (a) from which a DNA profile may be derived; and
- (b) which is obtained from samples taken or procedures conducted in accordance with this Subdivision, but does not include a sample taken for the sole purpose of establishing the identity of the person from whom it is taken.¹¹⁸

The profile, the forensic report and any other notes or information capable of identifying the donor of the sample come within the definition of the term ‘related material and information’ in section 464.

Victorian law requires the destruction of forensic material obtained in criminal investigations in certain circumstances. If, for example, a suspect is not prosecuted, proceedings are abandoned or the suspect is acquitted, the forensic material must be destroyed unless a court order for its retention is obtained. ‘Destruction’ means the removal of any means of identifying the donor of the profile. The de-identified profile may be retained on the database for statistical purposes.

Samples and related information are destroyed using the following procedures, as outlined by the VFSC:

The case-notes are shredded or destroyed and the original sample and DNA samples removed for destruction as per guidelines for destroying biological waste. Any reference to the samples is removed from the case-notes. This then provides a break between the original sample and the DNA profile. The profile is removed from the database. Audit trails exist to ensure compliance.¹¹⁹

The forensic laboratory must provide confirmation to the donor once the sample and related information has been destroyed. As far as the profile and related information is concerned, the destruction of the profile involves ensuring that any identifying information relating to a DNA profile is removed from the system under section 464ZGJ.¹²⁰

117 S 464ZFB.

118 S 464, Definitions.

119 VFSC, Submission 23S2.

120 S 464ZGJ.

The Chief Commissioner of Police is required to submit regular reports to the Attorney-General listing the samples taken and destroyed.

Procedural Safeguards

The Victorian legislation includes a number of safeguards to protect the rights and interests of the donor of the sample. Broadly speaking, these safeguards relate to:

- the means by which the procedure can be authorised;
- the conduct of the procedure; and
- the consequences of breaching the forensic procedures provisions.

The requirement that non-consensual procedures be authorised by court orders is a safeguard for the interests of donors. Relevant suspects and non-custodial offenders must be present for the hearing of applications for orders for forensic procedures, and the orders granted must contain the reasons for the decision and specified information as to the nature and purpose of the procedure.

The Victorian provisions require the witnessing or recording of forensic procedures, including the donors' consent, and the provision of information and limited rights of access to forensic material obtained in the investigation.

Breach of the statutory requirements for the conduct of the forensic procedure, including the applications and consent provisions, can be grounds for a court to determine under section 464ZE that the evidence so obtained is inadmissible. Ultimately, the admissibility of the DNA evidence, along with the other evidence submitted, is determined at the discretion of the court.

Section 464ZGH specifies the accepted purposes for which the DNA database may be used and section 464ZGK imposes penalties – up to 12 months' imprisonment or 120 penalty units –for improper interference with database records, such as unauthorised disclosure or use. Breach of the requirements for the use and destruction of the sample and related material can attract penalties prescribed in section 464ZGG of the Act.

THE VICTORIAN DNA DATABASE

The Matching Provisions

A match made between the profile of a person and a profile derived from the scene of the crime under investigation is called a 'warm hit'. This match can be made by visual comparison alone; the profiles of the crime scene and the suspect do not need to be compared on the database. While visual examination is enough to compare two

profiles, the DNA database can be used to compare one profile with numerous other profiles electronically. If, during such a ‘speculative’ search, two profiles are found to match, that match is called a ‘cold hit’.

Victorian law – which is aligned in this regard with the provisions of the Commonwealth and the Model Bill – includes provisions governing what comparisons can be made on the DNA database. The most restrictive rules apply to the use of volunteers’ profiles. Volunteers have the right to specify the use to be made of their profiles. The profiles of volunteers, who have consented to ‘limited purpose’ use, can only be matched to indices consistent with that specified purpose. Fewest restrictions apply to the use of offenders’ profiles; these can be compared on the database with profiles of all unsolved crime scenes, as well as those of suspects, missing persons or unknown deceased persons.

The legislation includes a table specifying the ‘permissible matches’ that can be made on the database. The database contains six indices: the crime scene, missing persons, unidentified deceased persons, suspects, offenders, and volunteers. The Victorian DNA database contains profiles for each of these indices, collected in accordance with Victorian forensic procedures laws. The 2002 amendments to the *Crimes Act* incorporated these provisions into Victorian law and paved the way for the integration of the Victorian data into the national DNA database.

The Data-sharing Provisions

As indicated earlier, Victoria enacted legislation in May 2002 which enables it to participate in data-sharing with other jurisdictions by:

- providing for the use of a DNA Database system, including the permissible matches that can be made;
- permitting the use of forensic material and data obtained from other participating jurisdictions; and
- providing a means to recognise the laws of other jurisdictions as corresponding laws.¹²¹

121 Data-sharing provisions are reviewed in Chapter 14.

Table 2.2 Section 464ZGI: Permissible Matching of DNA Profiles

Profile to be matched	Is matching permitted?						
	Column 1 Crime scene	Column 2 Suspects	Column 3 Volunteers (limited)	Column 4 Volunteers (unlimited)	Column 5 Serious offenders	Column 6 Missing Persons	Column 7 Unknown deceased persons
1. Crime	Yes	Yes	No	Yes	Yes	Yes	Yes
2. Suspects	Yes	No	No	No	Yes	No	Yes
3. Volunteers (limited)	Only if within purpose	No	No	No	Only if within purpose	Only if within purpose	Only if within purpose
4. Volunteers (unlimited)	Yes	No	No	No	Yes	Yes	Yes
5. Serious offenders	Yes	Yes	No	No	Yes	Yes	Yes
6. Missing persons	Yes	Yes	Yes	Yes	Yes	Yes	Yes
7. Unknown deceased persons	Yes	Yes	Yes	Yes	Yes	Yes	Yes

REVIEWING THE FORENSIC SAMPLING REGIME

The attention focussed on the potential of genetic profiling technology, and the ethical implications of genetics has stimulated calls for a review of the foundations of the forensic procedures regime. Not surprisingly, when the current balance of rights and interests is opened up for discussion, the proposals for reform canvass options which were not contemplated when the existing regime was developed.

At one end of the spectrum, law enforcement agencies proposed that police be granted the power to order forensic procedures to be conducted on people suspected of any summary or indictable offence, and that the DNA information be retained indefinitely for unspecified use in any further criminal investigations.¹²² At the other

122 Victoria Police, Submission 18; VFSC, Submission 23. Victoria Police and the VFSC produced separate submissions for this Inquiry and provided the Inquiry with further documentation and supplementary submissions on specific issues which arose during the 2002 and 2003 public hearings. A list of the supplementary submissions provided by Victoria Police and the VFSC is set out in Appendix 1. See also Crime Victims' Support Association, Submission 6.

end of the spectrum, defence lawyers, civil libertarians and organisations advocating on behalf of disadvantaged and vulnerable groups have submitted that the scope of forensic sampling permitted under the current legislation is already too extensive, and have proposed more restrictive laws to govern the taking and use of DNA samples for forensic purposes.¹²³

The Elements of the Current Regime

The current regime has been crafted to reconcile law enforcement goals with the rights and interests of individual citizens by providing a range of safeguards to balance or compensate for the grant of powers. Victoria's legislation, which is at present broadly aligned with the Model Bill and incorporates the uniform DNA database provisions that enable data-sharing through CrimTrac, has been recognised as having 'corresponding laws' by the Commonwealth and New South Wales.

In these circumstances, some caution is needed in approaching the reform of these provisions. The forensic procedures provisions together form a legislative regime composed of a number of inter-related elements. Individual elements of the regime can be 'adjusted' to give priority to certain goals and philosophies.

The charts below identify the way in which checks and balances can operate to moderate the grant of law enforcement powers with safeguards for the personal interests of the donors. At the left end of the spectrum are options which grant police the maximum power to obtain DNA samples and which provide the least regulation of the uses of the forensic material and information obtained from it. At the right end of the spectrum are options which would produce the most restrictive regime for the conduct of forensic procedures and the most regulated provisions for the use of the sample, profile and evidence.

The Model Bill on which the Victorian legislation is based offsets the grant of powers for the conduct of forensic procedures with safeguards restricting the uses of the DNA evidence obtained. For example, the power to order forensic procedures is offset by restrictions on the admissibility of DNA evidence obtained in breach of the legislative provisions.

Authority to Conduct Forensic Procedures

Victoria is alone in requiring a court order for all forensic procedures conducted without the consent of the donor. In other Australian jurisdictions police officers

123 See for example the submissions by Victoria Legal Aid, Submission 15; Criminal Bar Association, Submission 13; Law Institute of Victoria, Submission 21; Liberty Victoria, Submission 27; Privacy Commissioner, Submissions 18, 18S; Mr Michael Strutt, Submission 24; S Nicholson and A Radonic representing YouthLaw, *Minutes of Evidence*, 22 July 2002; and E Hunt, representing the Public Interest Law Clearing House, *Minutes of Evidence*, 23 July 2002.

have the power to order a non-intrusive forensic procedure in certain circumstances. Some jurisdictions permit police to order non-intimate procedures involving capable adult suspects or offenders in custody; some also authorise police to order non-intimate procedures on non-custodial suspects. However, all Australian jurisdictions which allow the conduct of intimate procedures require these to be authorised by the courts.

LAW ENFORCEMENT POWERS		DONORS' INTERESTS
Police powers	Court orders for vulnerable individuals / intimate procedures	Court orders

Offences for which DNA Sampling can be Undertaken

In Victoria, persons suspected of indictable offences can be asked to undergo a forensic procedure. Persons suspected of involvement in a serious indictable offence can be ordered to provide a sample. Offenders found guilty of serious indictable offences (termed ‘forensic sample’ or Schedule 8 offences) can be ordered to provide a DNA sample. Similar provisions apply in the Commonwealth, New South Wales, Tasmania and South Australia.

LAW ENFORCEMENT POWERS		DONORS' INTERESTS
All summary & indictable offences	Indictable Offences	Serious indictable offences (Schedule 8)

In some jurisdictions, such as Queensland and the Northern Territory, persons suspected of or found guilty of summary and all indictable offences can be required to undergo a non-intimate procedure. In the United Kingdom, police may conduct procedures on all persons charged, cautioned, summonsed or suspected of any offence for which fingerprints could be taken.

In prosecutions for summary and minor indictable offences the DNA sample will have minimal forensic utility in the investigation, and the collection of samples in relation to these offences is exclusively for inclusion of these profiles on the DNA database.

Who can be sampled: Volunteers, Suspects and Offenders

The provisions governing who may be sampled and the use that can be made of the DNA evidence reflect the status of the donor: whether the donor is a volunteer, not under suspicion, a suspect or a serious offender. Generally speaking, most

restrictions apply to the use of DNA obtained from volunteers and least restrictions apply to the use of DNA obtained from serious offenders.

LAW ENFORCEMENT POWERS		DONORS' INTERESTS
Volunteer	Suspect	Offender
Not under suspicion:	Under suspicion/charged/arrested:	Guilty of serious offence

The use of a volunteer's profile, for example, may be restricted to the investigation for which the profile was obtained and must be destroyed when the volunteer is eliminated from the investigation, while a serious offender's profile can be retained indefinitely.

Retention and Use of the DNA Evidence

The Victorian regime provides for limited database use of volunteers' profiles on request, less restricted database use of suspects' profiles, and unrestricted database use of offenders' profiles. Most Australian jurisdictions, like Victoria, permit the database use of the suspect's profile during the period of investigation or for 12 months, requiring its removal or destruction on acquittal or a decision not to prosecute, while providing for the retention of the suspect's profile after a finding of guilt or for a further investigation.

LAW ENFORCEMENT POWERS		DONORS' INTERESTS
Unlimited database searches	Specified database searches	Donor's right to specify/ Not loaded on database
Retained on database indefinitely	Retained on database for fixed period during investigation	Destroyed after acquittal/elimination

Some jurisdictions, such as Western Australia, the Northern Territory and Queensland, permit the retention and database use of suspects' profiles even after acquittal, elimination or a decision not to prosecute. At the very extreme, the United Kingdom permits the retention and database use of all profiles obtained, whether from volunteers, suspects or offenders.¹²⁴

¹²⁴ *Police and Criminal Evidence Act 1984 (UK).*

Admissibility of DNA Evidence

The provisions regulating the admissibility of the evidence obtained from forensic sampling can operate as a check on compliance with the statutory requirements for the conduct of forensic procedures. DNA evidence may be excluded for breach of statutory provisions at the discretion of the court. Other jurisdictions, however, have legislated to prevent evidence being admitted in the case of a serious breach of the requirements, such as the unauthorised retention of a sample and profile.

As indicated earlier, the checks and balances contained in the forensic procedures provisions are based on certain fundamental principles of criminal justice and the evidentiary rules of criminal law. These checks and balances have been applied and adapted in certain ways to provide for DNA sampling, but also apply more generally to all forms of evidence used in criminal investigations and proceedings.

LAW ENFORCEMENT POWERS		DONORS' INTERESTS
Judicial discretion	Inadmissible for certain breaches	Evidence inadmissible

The general rules of evidence operate to encourage law enforcement agencies to comply with their obligations, by permitting the exclusion of evidence which has been improperly obtained or which is more prejudicial than probative. These rules and principles also apply to other forms of evidence, such as fingerprinting, chemical analyses and breathalyser testing.

While different types of evidence may be subject to special procedural or evidentiary rules, there are clear policy reasons for maintaining consistency in the approach taken to different forms of expert evidence that may be used in criminal proceedings. In reviewing the current forensic procedures regime this Inquiry has borne in mind that DNA evidence is one of a range of forensic tools and that the provisions governing the collection and use of this evidence should remain consistent with the general principles and rules applying in criminal proceedings.

**PART B: THE SCIENCE AND ETHICS
OF DNA SAMPLING**

3. THE FORENSIC POTENTIAL OF DNA

No man is an island. Genetically speaking, each of us is an archipelago ... [DNA] is personal information about you but also about those related to you by blood ... DNA is ... our fate map.¹²⁵

THE SCIENCE OF FORENSIC SAMPLING: BACKGROUND

A recurring theme in this review is the exponential development of genetic science which is driving technological innovation in the forensic uses of DNA analysis. At the same time, attention is being drawn, globally and domestically, to the impact which DNA sampling can have on the personal privacy and legal interests of the affected donors and their relatives.

The purpose of this chapter is to outline how the process of DNA sampling works.¹²⁶ In order to make an informed assessment of how best to regulate its use, it is essential to understand what DNA profiling can do, and what potential it has to develop. This chapter outlines the analytical laboratory processes involved in DNA profiling and identifies emerging technologies that are likely to increase substantially the sensitivity, speed and efficiency of the profiling process and to open up new forensic uses of DNA material in criminal investigations. The science of DNA profiling is a complex and dynamic field, well beyond the reach of this Inquiry. The background provided here is intended merely to set the context in which laws for the use of DNA sampling are developed.

Forensic profiling can identify the likely traces of body fluids or tissues deposited on a victim, an unidentified person or crime scene evidence where fingerprints are not available and where conventional blood analysis is of limited value. The capacity to use DNA is forensically significant because DNA is found in virtually every cell of the human body and is specific to the individual.¹²⁷

125 P Chadwick, *Minutes of Evidence*, 22 July 2002, 57.

126 A detailed description of the laboratory processes is contained in VFSC, *Background/Issues Paper* (2002) 11-23.

127 DNA is a complex structure, comprising two strands; each strand is composed of a backbone, and sequences of molecules called bases. A person's DNA (ie their genome) is distinctive because the sequence of bases comprising his/her DNA molecules is distinctive. There are four types of base: adenine (A), guanine (G), cytosine (C) and thymine (T). These bases are bonded in pairs: (A) always bonds with (T), and (G) bonds with (C).

DNA can be found in blood, saliva, semen, hair, urine, teeth, bone, body tissue and even fingerprints. DNA samples can be obtained from the crime scene and 'reference samples'. Reference samples 'can consist of any body fluid or tissue from a person'.¹²⁸ In Victoria these are obtained by conducting a forensic procedure as prescribed in Subdivision 30A.¹²⁹ Forensic laboratories prefer to standardise the collection of reference samples and forensic procedures involve taking a sample of blood, saliva or hair.¹³⁰

This is due to the fact that blood and saliva in particular contain abundant, easily accessible DNA. Hair is another easily available source of DNA that can be readily obtained from the body, although the amount of DNA in a single hair is dependent upon the growth phase of the hair.¹³¹

Until recently, probably most forensic procedures carried out in Victoria involved the collection of a blood sample. The buccal swab, a scraping of saliva taken from inside the mouth, is now likely to become the preferred sample, if the person consents to the procedure.¹³² If, however, a sample has been ordered but the donor does not consent to or acquiesce to the forensic procedure, then a blood sample involving a finger-prick will generally be taken.¹³³

Crime scene samples can be derived from many different materials and areas. It is possible to obtain samples of DNA from fabrics, cigarettes, tools and utensils as well as from minute amounts of biological material, even where this material has been deposited many years earlier, has been degraded or is not even visible to the naked eye.¹³⁴

About 99.9 per cent of the DNA molecule is identical between any two individuals. The remaining 0.1 per cent is particular to an individual (identical twins excepted).¹³⁵ This 0.1 per cent contains the genetic material that can be analysed to reveal the donor's physical features, gender, a predisposition to certain illnesses, and can be used to draw inferences about the genetic make-up of the donor's past, present and future relatives. The regions of the DNA strand which contain this type of genetic material are called the 'coding regions'.

128 VFSC, *Background/Issues Paper* (2002) 5.

129 S 464 defines intimate and non-intimate samples, but the term 'forensic procedure' is not defined. *Ibid* 5.

130 *Ibid*. This is primarily to limit the training of personnel involved in the collection of samples and the range of testing methodologies needed for analysis.

131 VFSC, *Background/Issues Paper* (2002) 5.

132 The *Crimes (DNA Database) Amendment Act 2002* ('the 2002 Amendments') now enable DNA sampling to be self-administered, with the subject taking (a buccal swab) under the supervision of a member of the police force. S464Z(3A) of the *Crimes Act 1958 (Vic)*.

133 Detective Inspector D Cowlshaw, *Minutes of Evidence*, 22 July 2002, 14.

134 VFSC, *Background/Issues Paper* (2002) 6. See also Roland AH van Oorschot, Kathryn E Lauder, Swati Baindur-Hudson, John Mitchell, 'Beyond DNA Databases: Physical Identification using DNA', *DNA Evidence - Prosecuting Under the Microscope Conference*, 9-11 September 2001, 1.

135 Kaye and Sensabaugh, *Reference Guide on DNA Evidence* (2002) 491/7.

DNA profiling techniques applied in criminal investigations largely disregard the coding regions. The only genetic marker used in criminal investigations is the marker for gender. DNA profiling analyses the non-coding regions of DNA, dubbed 'junk DNA', because currently it is thought that they contain no genetic information.¹³⁶ DNA profiling involves analysing the repetition of certain sequences at selected loci along the DNA chromosome. At each chosen locus it is possible to detect two 'alleles', in other words two alternative forms, one inherited from the mother and one from the father.

Most people have two copies of each gene at a given locus [a position on the DNA strand] - one from the father and one from the mother. ... A locus where almost all humans have the same DNA sequence is called monomorphic ('of one form'). A locus at which the DNA sequence varies among individuals is called polymorphic ('of many forms').¹³⁷

A DNA profile describes the alleles which appear at nine loci and the marker for gender, amelogenin. The profile can be expressed electronically and entered on a database to be compared with other profiles.

LABORATORY PROCESSES

DNA profiling involves five laboratory processes: extraction, quantitation, amplification, separation and analysis.¹³⁸

Table 3.1 The Process of DNA Analysis

Extraction of the relevant DNA	This is done by dissolving the sample.
Quantitation of the amount of DNA in the sample	This involves separating, cleaning and measuring the quantity and quality of the DNA contained in the sample.
Amplification of the DNA sample to provide enough for analysis	This involves targeting and copying the specific strands of interest within the DNA molecule to provide enough for analysis. (This is called PCR.)
Separation of the fragments of DNA that have been isolated	This involves sorting the pieces (strands) according to size and measuring the size of the strands. Separation involves the process of electrophoresis.
Determining the DNA Profile	This involves determining the sequence of numbers that constitutes the DNA profile.

Source: The information in this chart has been derived from VFSC, *Background/Issues Paper* (2002) 11.

136 NSW Standing Committee on Law and Justice, *Review of the Crimes (Forensic Procedures) Act 2000* (2002) 4-5.

137 and Sensabaugh, *Reference Guide on DNA Evidence* (2002) 491/8.

138 VFSC, *Background/Issues Paper* (2002) 11-23; VFSC, *DNA Handbook* (2000) 3.

Table 3.1 above, based on information provided to the Inquiry by the VFSC, sets out the stages used in the creation of a DNA profile. Each of these processes also involves quality management to verify the processes and results obtained.

Extraction

The forensic laboratory has a range of tests that can be applied to crime scene exhibits firstly, to establish the presence of DNA evidence, and then to amplify trace quantities for analysis.¹³⁹ There are both organic and non-organic methods. The chelex method is a common non-organic means of extracting DNA. It involves boiling the sample in a chelex solution and may require the purified DNA to be quantitated before amplification.

Blood and saliva samples are collected on FTA® paper, which is treated with a proprietary formula that prevents the growth of bacteria and inactivates organisms. This paper removes the need for quantitation and is used to collect reference samples in Victoria and many other Australian and overseas jurisdictions.¹⁴⁰

Techniques for the extraction of DNA from very small samples and exhibits have improved dramatically in recent years. DNA can now be extracted from exhibits that contain only small traces, or a degraded sample of DNA, or that have been handled by more than one person.

Forensic scientists at the VFSC have succeeded in extracting DNA from traces left on items that have been handled either regularly (their briefcase, car key), for a known duration (for example, a mug, glass, knife handle), or for varying durations (ranging from 10 minutes to 5 seconds).¹⁴¹ This applies to objects such as door handles, 'held by multiple individuals' and to objects, such as keys, which are generally handled only by their owner.¹⁴²

The capacity to produce a profile from trace quantities of DNA has produced 'a new array of previously not contemplated possibilities of linking a particular person to a crime scene or the implements of crime'.¹⁴³ Representatives of VFSC noted:

With recent developments in the ability to obtain profiles from touched objects and even single cells it is now possible to acquire probative profiles more regularly from burglaries and stolen vehicles.¹⁴⁴ ... Simple things like drink bottles, and who was holding a knife in a stabbing, can now be potentially resolved. [Extracting] DNA from plastic bags or gloves at clandestine laboratories was something in the past we never thought we could do, but we can now. In fraud, you could be looking at stamps

139 Details of these tests are contained in VFSC, *Background/Issues Paper* (2002) 6-9.

140 Ibid 13. See Also Whatman Asia Pacific Pty Ltd, Submission 14.

141 Ibid.

142 Ibid.

143 Ibid.

144 Ibid.

or envelopes that might have been licked – the saliva on that can provide us with DNA.¹⁴⁵

However, the more sensitive the extraction method is, the higher the risk of contamination. The exhibits need to be handled with great care, but the investigator may not even be aware of, or able to detect their forensic potential. A sensitive process will also reveal mixtures of DNA from multiple sources, complicating the analysis of the profile.

Future Developments: Refined Extraction Processes

Technology is becoming available to extract DNA from minute, even invisible sources of DNA. Researchers in Queensland have developed a technique to extract DNA from a single cell.¹⁴⁶ It is claimed that whereas the extraction of trace DNA from pens, keys etc still either requires a relatively large amount of DNA or is less discriminating and less reliable, this technique requires only a single cell and uses six forensic short tandem repeat (STR) markers.¹⁴⁷

Researchers at the Australian Genome Research Facility are applying this new technique to the analysis of rape cases involving multiple assailants, where only a single sperm may be available for analysis, as well as single cells from contaminated or degraded samples.¹⁴⁸

A project in Western Australia is developing a method to obtain DNA profiles from fingerprints or handprints.¹⁴⁹ Here researchers are using a technique called Genomic Matching Technique (GMT) for forensic DNA analysis. This project involves extracting DNA from fingerprints and examining the potential to construct GMT profiles from these fingerprints. The project will also be examining the application of GMT profiling for the speedy elimination of volunteers in mass DNA sampling programs.¹⁵⁰

Advances in the extraction and analysis of such minute quantities of DNA also require equally careful interpretation. The more sensitive the analytical technique, the more complex the analysis becomes. Further research is also being undertaken into the interpretation of results from this type of DNA profiling.¹⁵¹

145 Professor J Scheffer, *Minutes of Evidence*, 2 June 2003, 3.

146 I Findlay, A Taylor et al, 'DNA fingerprinting from a single cell' (1997) 389 *Nature* 555-556.

147 Ibid.

148 I Findlay, 'DNA identification from extreme samples such as single cells and difficult samples', *International Symposium on Forensic DNA Technologies*, 19-20 September 2003, 273, at http://medweb.uni-muenster.de/institute/remed/ISFDNAT2003/Abstracts_ISFDNAT2003.pdf.

149 Teresa Tran, Silvana Gaudieri and Ian Dadour, *Mass Screening using the Genomic Matching Technique*, University of Western Australia, at www.forensicscience.uwa.edu.au/downloads/Tran.ppt.

150 Ibid.

151 Peter Gill, 'Application of Low Copy Number DNA Profiling' (2001) 24(3) *Croatian Medical Journal* 229-232, at www.cmj.hr.

Quantitation

Quantitation involves separating and measuring the amount of DNA contained in a sample or exhibit. A certain quantity of DNA is required for the profiling process and quantitation determines if enough DNA is present. The Quantiblot Human DNA Quantitation Kit is a common method of quantitation. The method uses a probe which is inserted into the sample and produces a blue precipitate in proportion to the amount of DNA in the sample.

DNA quantitation is particularly important for Profiler Plus™ amplifications, where optimal results are obtained using a range of typically 1-2.5 nanograms of starting DNA.¹⁵² If too much or too little DNA is present, the amount of PCR product (see below) may be outside the range of the instruments used during amplification.¹⁵³

Amplification

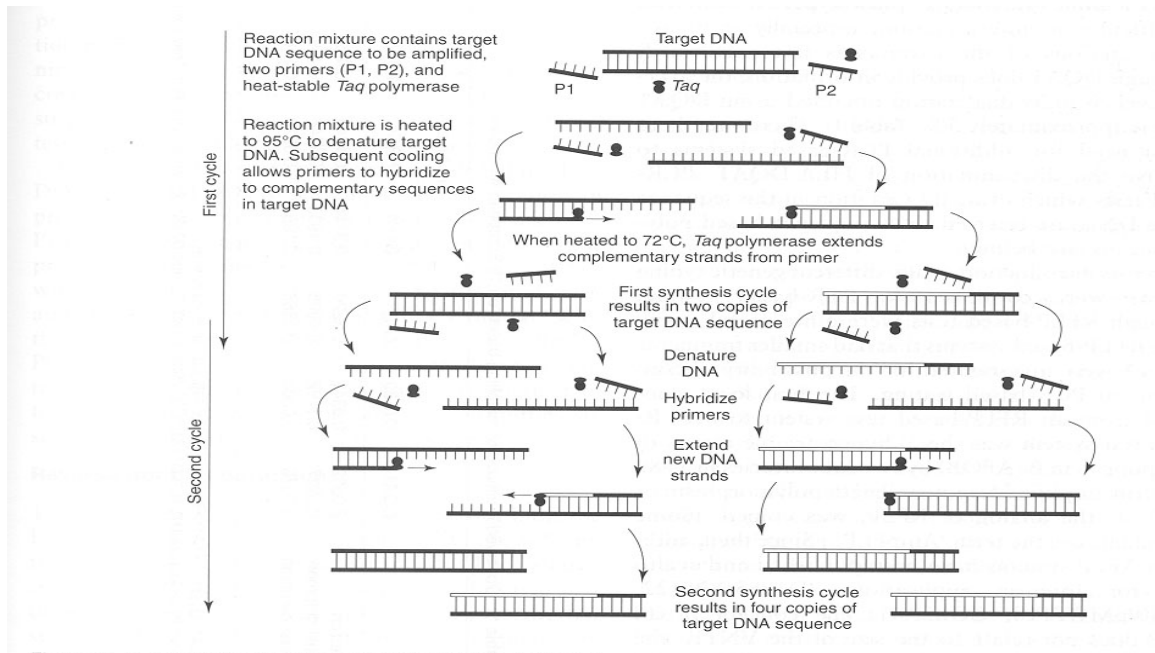
Once the amount available has been quantified, it is possible to amplify the quantity using a technique known as the polymerase chain reaction (PCR). This is essentially a reaction using enzymes which replicate or amplify the DNA to produce the amount required for analysis. PCR technology has had a profound impact on the capacity of forensic laboratories to process a large number of samples simultaneously.

Amplification involves subjecting the sample to cycles of alternating temperatures to produce a series of reactions in which the target DNA is doubled during each cycle. Ten primers (one for each locus including the locus for gender) are used, with each primer having a distinctive fluorescence so that the fragments at each locus can be identified in the separation process.

Figure 3.1 below shows how the PCR works to reproduce the target DNA sequence to obtain a greater amount of DNA for analysis. After two cycles, four copies of the target DNA have been produced by this method.

152 VFSC, *Background/Issues Paper* (2002) 15.

153 Ibid 16.

Figure 3.1 The Polymerase Chain Reaction (PCR) Process

Source: VFSC, *Background Paper*, June 2002, 20.

Separation

Separation involves separating the fragments occurring at each locus, using dyes, which emit their maximum fluorescence at different wavelengths. It is therefore possible to distinguish the data by colour and then, using ABI® Genescan Analysis Software, to analyse the data mathematically.¹⁵⁴

Determining the DNA Profile

Only selected portions of the DNA strand are used to compose a DNA profile. A DNA strand contains coding regions (the genes) and non-coding regions. Whereas coding regions do not seem to vary between individuals, non-coding regions are highly variable.¹⁵⁵ Non-coding regions can therefore distinguish between individuals. Among the different types of non-coding regions, repetitive DNA has proved most useful in the profiling process. It is possible to identify certain distinctive types of repetitive DNA – short tandem repeats – that occur in large quantities in the strands of DNA.

154 Ibid 21.

155 'An introduction to DNA Profiling', *Prosecuting Under the Microscope Conference*, 9-11 September 2002, Adelaide.

Throughout the human genome there are certain DNA sequences shown as short tandem repeats (STRs). These are sequences of DNA that are repeated numerous times. [D]ifferent individuals have different numbers of the tandemly repeated core base sequences allowing the discrimination of individuals by DNA testing.¹⁵⁶

The Profiler Plus System

The Profiler Plus system, developed by Applied Biosystems, which is ‘the system of choice’¹⁵⁷ for all Australian laboratories involved in DNA analysis for criminal investigations, is a multiplex system. This means that it can analyse multiple loci at a time, resulting in a faster and more discriminating analysis than a singleplex system.¹⁵⁸ It uses nine loci and the gender identifier, amelogenin. The VFSC explained the reason that Profiler Plus was preferred:

There were other DNA technologies available at that time (eg restricted fragment length analysis). However, these methods required more sample, were less discriminating and could not test as many loci at one time as PCR-based DNA analysis technologies.¹⁵⁹

This system uses some of the loci profiled with other systems and therefore makes it possible for Australian forensic laboratories to share data with those in jurisdictions where other compatible or comparable systems are used.¹⁶⁰

From the thousands of available variable STR loci the forensic community has identified a small number of core loci (13) for use in constructing profiles for inclusion in DNA databases. Adoption of a selection of these core loci by different jurisdictions worldwide allows for inter-jurisdictional comparisons/exchanges, thus further exploiting the tool of DNA databases.

An example of a DNA profile is provided in Figure 3.2 below. The pairs of numbers in the profile above relate to the pairs of alleles found at each locus. One number relates to the allele of the mother, and the other number, relates to the father’s allele. Where only one allele is present, such as Allele 17 at locus D3S1358 in the profile above, each of the person’s parents contributed the same allele to the child.¹⁶¹

The VFSC, along with other Australian laboratories, use a software package called ABI Prism™Genotyper ® to analyse and interpret the DNA data.

Computer programs are then developed to exploit this numerical representation of different DNA types. They then compare a series of numbers from a DNA profile to another set of numbers from another profile(s).¹⁶²

156 VFSC, *Background/Issues Paper* (2002) 17.

157 Ibid 11.

158 Ibid.

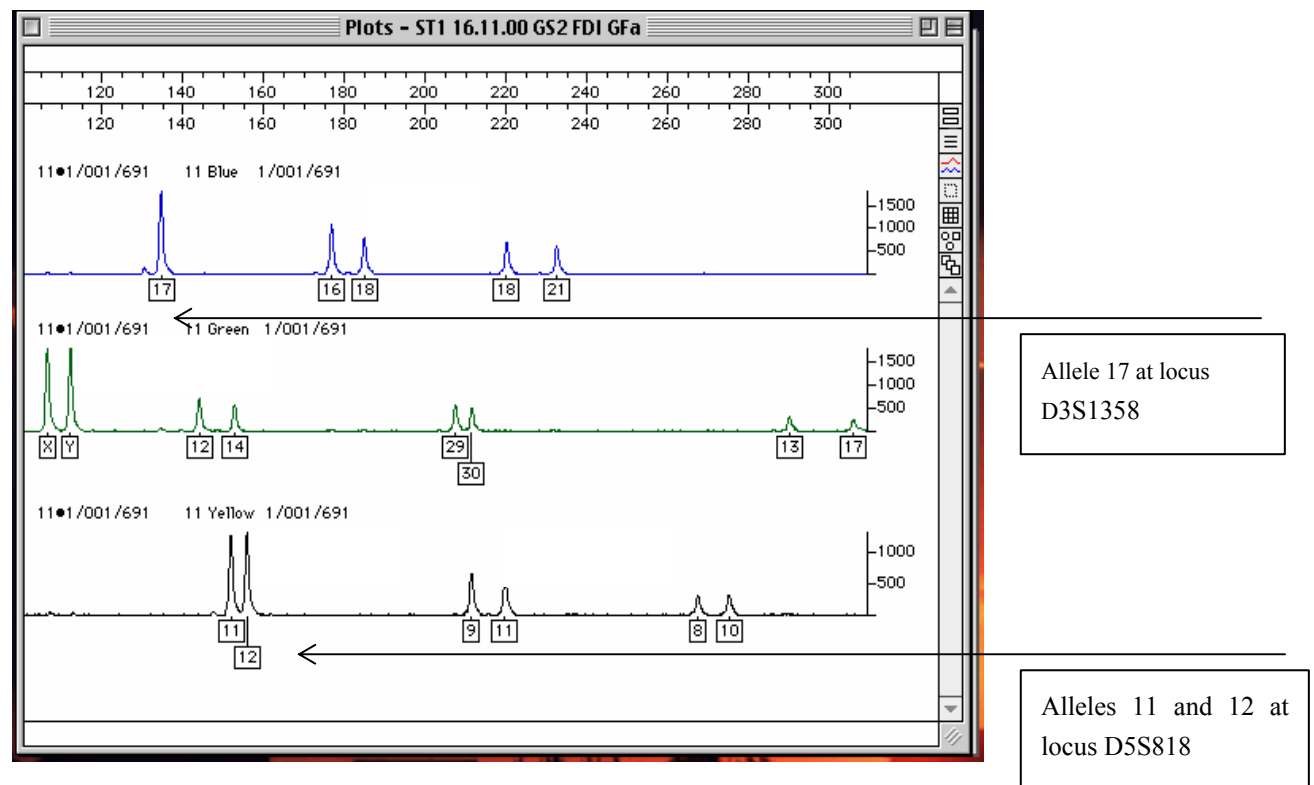
159 Ibid.

160 van Oorschot et al, 'Beyond DNA Databases: Physical Identification using DNA' (2001) 1.

161 VFSC, *Background/Issues Paper* (2002) 23.

162 VFSC, Submission 23, 2.

Figure 3.2 A DNA Profile



Source: VFSC, *Background Paper*, 22.

Once the loci have been selected and the alleles distinguished, a profile describing the genetic pattern of repetitions is produced. This code, which describes a certain recurring pattern within the DNA molecule, can be quickly entered into a database and matched against other codes on the database.

Additional Loci and Analytical Techniques

The loci selected using the Profiler Plus system overlap to some extent with loci used by other multiplex kits, and most closely correlate with the loci used in more recent profiling systems, such as Power Plex 16 and SGM Plus.¹⁶³

New loci have been added over time to the base Profiler Plus system. These products include cofiler, identifyler and promega power plus. In general the Profiler Plus loci are the base with the additional loci being made available for typing.¹⁶⁴

Since the Profiler Plus system was introduced, another generation of more discriminating systems has been developed with the capacity to analyse up to six new loci.¹⁶⁵ These systems could assist in cases where a very high level of discrimination

163 'An Introduction to DNA Evidence Interpretation', *DNA Evidence - Prosecuting under the Microscope Conference*, Adelaide 9-11 September 2001, slide 'Overlap between different Multiplex Kits'.

164 VFSC, Submission 23S2, 3.

165 Ibid.

between profiles was required, such as cases involving siblings. However, given the investment in the current Profiler Plus™ system, a change of system is not contemplated.¹⁶⁶ The VFSC has considered the costs and benefits of developing these systems but has concluded:

that for general casework the discriminating power of the Profiler Plus system is sufficient for the purposes of the Victorian and Australian population. If ever required, the database is configured in such a way as to accommodate any extension of the Profiler Plus system.¹⁶⁷

The VFSC was asked whether it would be desirable to employ these new products in Victorian DNA profiling. It responded that:

the cost (both for consumables and resources) is expensive. Any new system must be fully validated and population figures generated. This can take a considerable amount of time and people to ensure the validation is completed satisfactorily. The VFSC is currently satisfied with the level of discrimination achieved by the Profile Plus system.¹⁶⁸

Some laboratories augment the database system with other testing kits for particular purposes.¹⁶⁹ Single Nucleotide Polymorphisms (SNPs) are a new type of marker that ‘may be considered a more practical/efficient type of marker for generating genetic profiles in the future’.¹⁷⁰ Mitochondrial DNA typings are used to determine parentage and with exhibits where DNA is difficult to obtain, such as bones, teeth, hair shafts and very old samples.¹⁷¹ Y-chromosome STR typings are useful in distinguishing female from male samples, and to differentiate between male samples in mixtures. Finally, STR multiplex systems are extremely discriminating, and ‘can virtually provide each person with an individual “barcode”’.¹⁷² The VFSC indicated that there has already been a considerable reduction in the time required for DNA analysis.

When DNA was first introduced in Victoria it was taking months to get results. That was just the technical side of it. However, today, if we need it, we can potentially get a result within up to 48 hours.¹⁷³

166 VFSC, *Background/Issues Paper* (2002) 11; and van Oorschot et al, ‘Beyond DNA Databases: Physical Identification using DNA’ (2001) 1-2.

167 VFSC, Submission 23S2, 3. This conclusion has reportedly been confirmed by Professor Bruce Weir, population geneticist, who has recently completed a study of the Victorian and Australian systems.

168 Ibid 3.

169 See van Oorschot et al, ‘Beyond DNA Databases: Physical Identification using DNA’ (2001) 2.

170 Ibid.

171 See also Kaye and Sensabaugh, *Reference Guide on DNA Evidence* (2002) 10/494.

172 van Oorschot et al, ‘Beyond DNA Databases: Physical Identification using DNA’ (2001) 2.

173 Professor J Scheffer, *Minutes of Evidence*, 2 June 2003, 3.

Future Developments: Portable DNA Laboratories

In the USA, the Research and Development Working Group of the National Institute of Justice has completed a report on *The Future of Forensic Testing*, which predicts a quantitative leap in the speed, flexibility and sensitivity of the profiling process.

Within ten years we expect portable, miniaturised instrumentation that will provide analysis at the crime scene with computer-linked remote analysis. This should permit rapid identification and, in particular, quick elimination of innocent suspects.¹⁷⁴

The US Working Group has predicted:

While the genetic markers used in database searching are expected to remain fairly constant over this time period, the means to analyse them are undergoing a revolution.¹⁷⁵

It is expected that further refinement and automation of the profiling processes will allow them to accommodate an increased demand for their services. US researchers have formed the view that forensic laboratories are on the threshold of a major leap in efficiency, with automated profiling and searching software. The Inquiry notes that in the USA:

the US Department of Justice is currently funding a number of research projects to develop portable microchip DNA profiling devices to be used in the field. Reservoirs for PCR amplification primers, reaction chambers and capillary electrophoresis channels have been manufactured onto the surface of microchips. PCR amplification and STR analysis of a small DNA sample can be achieved on the microchips in a matter of minutes as opposed to the hours that current PCR STR analysis systems take.¹⁷⁶

These developments would have a significant impact on the capacity of the forensic laboratories and would be expected to permit the timely analysis of crime scene and reference samples at an early stage of investigations.¹⁷⁷

In fact this prediction is already being fulfilled. Early in 2000 the New York Police Department began to trial portable DNA laboratories. According to a US commentator, Troy Duster, there will be no technical impediment to sampling a suspect on the spot and obtaining an immediate database search on the profile:

The police take a buccal swab ... and place it on a chip the size of a credit card. They then put this card through a machine no larger than a hand-held compact disc player, where the DNA is read via a laser in two minutes, isolating about 13 DNA markers to

174 National Institute of Justice, National Commission on the Future of DNA Evidence, *The Future of Forensic DNA Testing – Predictions of the Research and Development Working Group* (2000) 3-4.

175 Ibid.

176 CrimTrac, *DNA Profiling – Recent Developments and Future Directions*, at <http://www.crimtrac.gov.au/dnadevelopments.htm>.

177 See also National Institute of Justice, National Commission on the Future of DNA Evidence, *The Future of Forensic DNA Testing: Predictions of the Research and Development Working Group* (2000) 3-4.

create a profile of the suspect. When this task is completed, the police can then transmit these data to a central database, where it currently requires about twelve minutes to determine if there is a 'match' with a sample.¹⁷⁸

English researchers have predicted similar improvements in the speed of DNA profiling.

The potential application of microchip technology is expected to reduce analysis time considerably, with UK experts predicting that the current rate of 30 samples in 3 hours could become 5,000 in minutes in the near future.¹⁷⁹

THE USE OF POPULATION GENETICS IN DNA PROFILING

Once the profile has been obtained, it is compared with another profile and conclusions are drawn about the similarities or differences between the two profiles. The interpretation of the results of the profiling process is in itself an 'art form'; statistical models have been developed to calculate and explain the significance of a match between two profiles.

It is accepted that every individual, other than an identical twin, has a unique genetic make-up, determined by his/her unique genetic inheritance. However, a DNA profile is not obtained from the coding regions of the DNA molecule containing the unique genetic material, and therefore it cannot be assumed that the profile is unique.

If two profiles are found to be a perfect match, then the significance of the match needs to be explained. Statistical evidence is required to show that the match was not merely coincidental; that the probability of a coincidental match was so remote that the two profiles were likely to have been obtained from the same source.

To do this, population geneticists have used population databases containing DNA profiles to estimate the frequency of each possible combination of alleles at a given locus. As the DNA databases may contain only a small proportion of the DNA profiles of the general population, it has been necessary to develop statistical models to extrapolate from this small database the frequency of each possible combination of alleles in the population at large.

From even a small population database such as this, it has been possible to derive calculations of match probability that can apply to the whole population of a country.¹⁸⁰ Using techniques such as the 'Basic Product Rule'¹⁸¹ or Equation 4.10 (a

178 Troy Duster, 'The inexorable expansion of the DNA forensic database and the looming spectre of an early 21st century phrenology' 2, in David Lazer (ed), *The Technology of Justice: DNA and the Criminal Justice System* (2002) <http://www.ksg.harvard.edu/dnabook/>

179 Chris Hadkiss, 'The Strategic Use of DNA Profiling in Intelligence Policing - the National DNA Database of England and Wales', *INPALMS Conference*, Melbourne, 2001, 49.

180 For details see Kaye and Sensabaugh, *Reference Guide on DNA Evidence* (2002) 38-48, 50-53.

181 Ibid 41.

modified version of this rule),¹⁸² probabilities were calculated on the basis of large populations and subgroups. Some landmark cases in the USA, England and Australia challenged the validity of the assumptions made and the conclusions drawn from these statistical operations; over time, the statistical methods have been modified and the databases enlarged.¹⁸³

To calculate the possibility of a perfect match of all alleles at all nine loci, the probability of a match at each loci is multiplied out. This typically gives a figure suggesting that the probability of a coincidental match is in the order of 1 in 98 million, for example, in Victoria.

To account for the fact that only probability, not certainty is being expressed, population geneticists apply a 'confidence interval'.¹⁸⁴ This term denotes the degree of confidence about the conclusions, given the size and composition of the database.

A confidence interval (CI) of 95% is often used; meaning that it is assumed that 95% of the time this interval will contain the true value. The larger the database, the more confident we can be that it accurately reflects the true population, and the CI reduces accordingly.¹⁸⁵

Family members will have some matching loci in their DNA profiles. As noted earlier, identical twins have matching profiles, and the probability of other relatives having matching profiles is far higher than for unrelated members of the community. Dr Peta Stringer of the VFSC explained:

The probability that a person's full sibling has the same DNA profile is $\frac{1}{4}$. This is the figure for same sex siblings. Using Profiler Plus, siblings of different sexes would be distinguished by the results obtained for the sex determining locus, Amelogenin. The more distant the relationship, the smaller the probability that the person and the relative would have the same profile. For half siblings the probability is $\frac{1}{8}$; for cousins, the probability drops to $\frac{1}{16}$.¹⁸⁶

The similarity between the profiles of close relatives makes it possible to establish whether certain forensic material matches the profile of a specified person by profiling the DNA of the closest living relatives. Dr Stringer explained how this can be done:

It is possible to determine the profile of known relatives of the person and from those profiles determine if the biological material found could have originated from the missing person. The 'best' relatives to use are the biological mother and the biological father. From their DNA profiles it can be established whether the

182 Ibid 44-45.

183 *Doheny and Adams v The Queen* [1997] 1 Cr App R 369 (UK); *The People v Castro* 545NYS.2d985 (Sup Crt 1989) (USA); *R v Tran* (1990) 50 A Crim R 233; *R v Pantoja* (1996) 88 A Crim R 554.

184 'An Introduction to DNA Evidence Interpretation', *DNA Evidence - Prosecuting under the Microscope Conference*, Adelaide 9-11 September 2001, slide 'Overlap between different Multiplex Kits'.

185 Ibid.

186 VFSC, Submission 23S2, 2.

biological material could have come from a child of these parents. The closer the relative the better for this type of testing.¹⁸⁷

This technique has been used, for example, to identify victims of disasters such as September 11 and the Bali bombing, as well as to identify victims or suspects in criminal investigations.¹⁸⁸

It is possible, but exceedingly rare, for a coincidental match to be discovered. One such match occurred in the United Kingdom:

An incorrect match was made between a DNA sample found at a burglary scene and an innocent suspect whose DNA profile had been stored on the national database. The incorrect match was said to have a probability of one in 37 million.¹⁸⁹

As far as could be ascertained, there have been no Australian cases where a match used in evidence in criminal proceedings has ultimately been found to have been a coincidental match.

Future Developments: The Growth of Forensic Databases

English and US authorities have already considered the possibility of using forensic DNA databases for research purposes. In some US jurisdictions, access to the DNA database, CODIS, is already permitted for 'law enforcement or improvement of the criminal justice system'.¹⁹⁰ The National Commission on the Future of DNA Evidence contemplated the possibility of research into the possible links between genetic features and criminal behaviour.¹⁹¹

As the database enlarges and if it is broadened to include persons convicted of a larger variety of crimes, it might be possible that statistical studies of the databases could reveal useful information. Inventive researchers may glean useful information of a statistical sort. At the same time, there would need to be protection against misuse or use by unauthorised persons.¹⁹²

In the United Kingdom the prospect of accessing the database developed for the human genome project is already under consideration.¹⁹³

187 Ibid.

188 Sherman, *Independent Review of Part 1D* (2003) 1, regarding the introduction of Division 11A in Part 1D of the *Crimes Act 1914 (Cth)* to permit 'inter-jurisdictional co-operation' to assist with the identification of victims of the Bali bombing.

189 ALRC, *Discussion Paper 66* (2002) 406.

190 Summary of Proceedings, *Second Annual National Conference on Science and the Law*, 10-14 October 2000, May 2002, 22; <http://www.ojp.usdoj.gov>.

191 Ibid.

192 National Commission on the Future of DNA Evidence, *The Future of Forensic DNA Testing: Predictions of the Research and Development Working Group* (2000) 36.

193 Hadkiss, 'The Strategic Use of DNA Profiling in Intelligence Policing - the National DNA Database of England and Wales' (2001) 47.

Potential Forensic Uses of the DNA Sample

Compiling a 'DNA Portrait'

The ALRC Inquiry considered the potential of forensic sampling and DNA databases in the context of the wider trends in the use of human genetic information.¹⁹⁴ The ALRC contemplated, among other things, pressure being brought to bear on authorities to 'expand the scope of DNA analysis to include identification of physical and behavioural traits'.¹⁹⁵

In fact, research has already commenced into the potential use of the DNA sample in compiling a portrait of the donor. Forensic scientists in Australia have identified the goal that is driving the current research: to produce a 'DNA portrait' of an unknown suspect from a biological sample found at the crime scene.

[I]t would be helpful to investigating police to know some physical characteristics of the person that left the biological sample as they would help define the suspect pool. ... The sort of physical traits that would be most useful in painting a 'DNA portrait' are those that are common, relevant in most individuals, and that 'any person in the street' could identify.¹⁹⁶

Research is already underway to isolate physical traits, such as gender, hair colour, skin colour, identifying conditions, such as colour blindness, a bent finger; and behavioural traits so as to narrow down the search for a potential suspect.¹⁹⁷ It is already possible to identify gender, and to draw some conclusions about hair, eye and skin colour.¹⁹⁸ In the United Kingdom, researchers are attempting to devise tests 'to determine the physical characteristics of the source of a crime stain', to provide a 'video facial fit'. A system 'that detects 85% of red heads' was launched in June 2001.¹⁹⁹ Some work has already been done to identify the genes related to height, weight and baldness.²⁰⁰ Research is already underway in relation to the Y chromosome markers.

Genetic Propensity Research: Identifying 'Criminal Tendencies'

In the USA some research is underway to establish whether DNA analysis can be used to identify criminal tendencies, and researchers have already begun to search for genes for violence.²⁰¹ The English police forces are also interested in the potential of

194 ALRC, *Essentially Yours* (2003) 39.59, 987.

195 Ibid.

196 van Oorschot et al, 'Beyond DNA Databases: Physical Identification using DNA' (2001) 1-2.

197 Ibid 2.

198 Ibid.

199 Hadkiss, 'The Strategic Use of DNA Profiling in Intelligence Policing – the National DNA Database of England and Wales' (2001) 47.

200 van Oorschot et al, 'Beyond DNA Databases: Physical Identification using DNA' (2001) 1-2.

201 Llori Andrews, *Second Annual National Conference on Science and the Law*, 10-14 October 2000, Summary of Proceedings, May 2002, 21, at <http://www.ojp.usdoj.gov>.

developing a database compiled by connecting surnames with paternal inheritance genes, such as the Y chromosome, to connect genetic identification data with family names/profiles for sections of the population.²⁰²

This type of research could be used for a number of purposes: to identify people, at an early age, who might be genetically predisposed to violent behaviour, or to explain or mitigate the conduct of a person accused of committing a criminal offence. Research on the XYY genetic syndrome involving the sampling and analysis of children is being undertaken as part of a 'violence prevention program'.²⁰³

Scholars in the field of criminal law are now beginning to consider the possible impact on the basic hypothesis upon which criminal law and punishment are built ... of the discovery of genes which influence behaviour.²⁰⁴

Defence counsel in a recent US murder case²⁰⁵ sought to have the genetic family history of the accused admitted as evidence of a genetic predisposition to retardation and bizarre sexual behaviour.²⁰⁶ The court held that this information was not admissible as a mitigating factor. However, it is expected that this will not be the last attempt to use genetic family profiles to explain, mitigate or excuse aberrant conduct.

This raises the prospect of further genetic propensity research and the possibility of 'gene therapy', both controversial issues. The Hon Justice Michael Kirby observed:

For a long time, criminal law has recognised the relevance of genetic disorders which affect the mental processes of the accused. But whereas a genetic disorder affecting the capacity of the subject to reason and to perceive the wrongness of his or her conduct may be taken as relevant to criminal culpability, no court would entertain as an excuse the simple plea that the accused was a male victim of his genes.²⁰⁷

Further Uses for 'Junk DNA'

In relation to the profile derived from the DNA sample, research is examining ways to increase the information that can be obtained or inferred from the profile. The profiles derived through laboratory analysis of the samples could be subjected to analysis that is at present beyond the scope of our understanding.

202 Hadkiss, 'The Strategic Use of DNA Profiling in Intelligence Policing – the National DNA Database of England and Wales' (2001) 50-52.

203 Ibid 22.

204 The Hon Justice Michael Kirby, 'The Future of Criminal Law – Some Big Issues: Human Genome and Culpability,' *Justice Kirby's Papers*, at http://www.lawfoundation.net.au/resources/kirby/papers/19990628_crimin29june999.h

205 *Mobley v State of Georgia*, 455 S.E. 2d 61 Ga. 1995.

206 Deborah Denno, *Second Annual National Conference on Science and the Law*, 10-14 October 2000, Summary of Proceedings, May 2002; 21, at <http://www.ojp.usdoj.gov>.

207 Kirby, 'The Future of Criminal Law – Some Big Issues: Human Genome and Culpability,' *Justice Kirby's Papers* (2001).

It was put to the Inquiry that what is now labelled ‘junk’ may well reflect the limits of our understanding, rather than the limited information actually contained in those portions of the DNA molecule.

The science of genetics is developing and in ways that may make today’s certainties less obvious tomorrow and tomorrow’s discoveries perhaps more challenging to lawmakers than today’s knowledge might seem. Any DNA databases built now may in future take on far greater public policy significance.²⁰⁸

If the Privacy Commissioner’s prediction came true, then the DNA samples collected for DNA profiling might have another forensic use not contemplated or provided for at the time of sampling.

Identification of Population Subgroups

The US Working Group predicts that computer-based analysis will provide, with greater statistical confidence, ‘the calculation ... that a DNA sample is derived from a donor descended from a particular ancestral geographic origin’.²⁰⁹ This suggests that forensic evidence might also be used to indicate the racial origin of a suspect. The Working Group predicted that research into this possibility would begin with research into the physical characteristics and determination of ancestral geographic origin, and move towards the identification of general physical characteristic markers for investigative purposes.²¹⁰

Brain Fingerprinting

This Inquiry received a submission which, while not related to DNA sampling technology, advocated further investigation of a forensic technique being developed in the United States of America. This technique, known as ‘brain fingerprinting’, has been developed by Lawrence Farwell,²¹¹ and was presented to this Inquiry by Mr John Magill,²¹² whose daughter was the victim of a violent crime.

Dr Farwell claims that the technique, which is similar to a polygraph, is able to detect a person’s knowledge by testing electronic brain responses to questions which test for ‘concealed information’ that only the perpetrator of a crime would possess. The Inquiry understands that this technique has already been used in criminal proceedings in the USA.²¹³

208 Privacy Commissioner, Submission 19, 35.

209 National Commission on the Future of DNA Evidence, *The Future of Forensic DNA Testing: Predictions of the Research and Development Working Group*, (2000) 555.

210 Ibid Table D, 555-556.

211 Dr Farwell’s work is outlined at the website of Brain Fingerprinting Laboratories Inc, at <http://www.brainwavescience.com/AboutFarwell.php>.

212 Mr John Magill, Submissions 20, 20S.

213 Ibid.

The Inquiry was not able to consider the application of this technology under its Terms of Reference.

CONCLUSIONS: THE FORENSIC POTENTIAL OF DNA

DNA profiling first achieved public recognition for its contribution to the detection of perpetrators in high-profile unsolved crimes of violence. It received intense legal scrutiny in circumstantial cases where heavy reliance was placed on the DNA evidence, but where conflicting expert evidence was presented as to the interpretation of the results.

Paradoxically perhaps, the emerging strength of DNA profiling is its capacity to analyse and compare a very large number of consistent reference samples with a high degree of reliability. While the validity of the Profiler Plus system and the statistical models used to interpret the results was tested in relation to complex cases involving serious offences against the person, the profiling techniques that are now being developed seem best suited to the routine analysis of samples obtained according to certain standard specifications.

Portable profiling kits and massive DNA databases permit the rapid collection, exclusion or inculcation of suspects in investigations, providing fast intelligence to advance an investigation. The rapidity and the reliability of this use of DNA profiling provide clear benefits to police in active investigations of volume crimes, where timely detection is crucial.

The development of more sensitive techniques for the extraction and analysis of minute quantities of DNA enables investigators to collect a far greater amount of DNA evidence at crime scenes. It may also impose greater demands on the laboratory for very discriminating and complex analysis. When investigators collect samples which are minute or even invisible, greater reliance is placed on the forensic laboratory to select the samples most relevant for analysis and to have at its disposal a wide range of specialised analytical tools for this purpose.

Implications for Law Reform

The use of DNA profiling has challenged the legal system to handle a new form of complex expert evidence, which has a high probative value and a limited but sometimes crucial role in circumstantial cases. However, the challenges posed by the emergence of a new form of evidence are ones which the criminal justice system has already adapted to in other areas, such as psychological profiling. Procedures for the taking of DNA samples and rules for the presentation and evaluation of DNA evidence have been developed within the parameters of the existing legal system.

The use of DNA databases, however, presents quite a different challenge to the legislature. Within a single investigation DNA analysis may serve to inculcate or

exculpate identified suspects from a specific investigation, but DNA databasing enables mass detection of unsolved crimes on the basis of forensic evidence alone.

The forensic benefit of a DNA database is driving an expanding use of DNA sampling. In jurisdictions such as England, where the use of DNA sampling is most developed, the forensic procedure is being applied for the secondary purpose of fuelling the database, as much for the primary purpose of criminal investigation. Database detection, where the 'suspects' are the pool of donors whose profiles have been uploaded, places new strains on the privilege against self-incrimination, the principle of double jeopardy and the rules of evidence that form the backbone of the criminal justice system.

4. THE ETHICS OF DNA SAMPLING

[O]ur criminal law and procedure operate in a society where ordinarily the state has no right to intrude into the lives of individuals without just cause.²¹⁴

ETHICAL ISSUES IN FORENSIC SAMPLING: AN OVERVIEW

This chapter explores the law enforcement goals which have provided 'just cause' for intruding into the physical privacy of selected individuals to collect and retain DNA samples for criminal investigations. It considers firstly what justification and limits ethical principles do and should play in defining the scope of forensic sampling. One of the driving ethical principles affecting the scope of forensic sampling is recognition of the donor's personal privacy. This chapter examines how the forensic utility of the DNA evidence is and can be weighed against the capacity of the evidence to be used or misused for other purposes.

The second aspect of this ethical review is therefore what entitlements the donor has, or should have, to information about the procedure and information gained from the procedure. It balances the entitlements of the donor to information about the procedure and its use against the interests of law enforcement agencies in the control of this information.

Finally, this chapter examines the extent to which forensic sampling impinges on the physical privacy of the donor. In this context it considers not only what safeguards are needed to minimise the intrusiveness of the procedure, but also the law enforcement powers needed and available to ensure that the procedure is in fact carried out smoothly and efficiently.

Ethical Considerations influencing the Scope of Forensic Sampling

The provisions of the current regime already reconcile the public interest in detecting and prosecuting criminal offences with the public interest in the fair administration of justice. They also reconcile the interests of victims and their families in bringing the

214 The Hon Justice Michael Kirby, 'DNA Evidence: Proceed with Care' (2000) 12(8) *Judicial Officers' Bulletin* 57; also in (2001) 33 *Australian Journal of Forensic Sciences* 9, 20-21.

perpetrators to justice²¹⁵ with the legal and privacy interests of persons who are to be presumed innocent until proven guilty.

The Terms of Reference ask the Committee to identify ‘areas and procedures which would more effectively utilise forensic sampling and improve investigation and detection of crime’. However, some participants in this Inquiry questioned the extent to which DNA sampling and databasing could justify the collection and use of such personal information. The Victorian Privacy Commissioner, for example, asked:

Why should the state be taking DNA data from its citizens without good cause and without the Parliament establishing the bar at a reasonably appropriate level ... [I]t is up to Parliament and others to balance rights, in this case security and law enforcement, against privacy and individual liberty.²¹⁶

The Privacy Commissioner urged the Inquiry to consider the breadth and the limits which should apply to the power to take DNA samples for criminal investigations.

It is acknowledged that an extensive DNA database can be a useful and powerful tool for crime detection. However, overly broad powers of intrusion have the potential to be used as instruments of oppression.²¹⁷

The Criminal Bar Association was concerned to ensure that the powers granted for DNA sampling were subject to judicial scrutiny through the legal system.

Coercive powers that have been granted to law enforcement agencies need to be balanced with the very important principle that the right to privacy and other human rights are not infringed without proper process.²¹⁸

The Law Institute of Victoria stressed the importance of establishing processes which prevented law enforcement powers from being abused.

Section 464ZF of the *Crimes Act* allows for orders empowering police to take samples which would otherwise be a serious unlawful assault. The most stringent procedures need to be in place to ensure that this power is not abused.²¹⁹

The Institute also perceived the need to balance the exercise of the power to obtain samples against the actual need for this evidence. In the same way that the Institute urged care ‘to ensure that samples are not sought gratuitously’,²²⁰ the Privacy Commissioner considered that ‘the level of intrusion should be linked to the nature of the crime being investigated’ and that sampling should be restricted to what is ‘reasonably necessary for law enforcement’s functions’.²²¹ Mr Dan Meagher, Lecturer in Law at Deakin University, was also concerned that in equipping police

215 Crime Victims’ Support Association, Submission 6; N Halvagas and N McNamara, *Minutes of Evidence*, 23 July 2002, 116-122.

216 P Chadwick, *Minutes of Evidence*, 23 July 2002, 63.

217 Privacy Commissioner, Submission 19S, 5.

218 Victoria Legal Aid, Submission 15, 2.

219 Law Institute of Victoria, Submission 21, 2.

220 Ibid.

221 Privacy Commissioner, Submission 19, 11-12.

with the technology for crime detection, perhaps the possible infringement of an individual's privacy had been 'lost in the mix'.²²² Victoria Legal Aid concurred, indicating:

For individuals suspected or charged with minor offences, it [DNA sampling] is a disproportionate invasion of their personal liberty.²²³

Reconciling Law Enforcement and Privacy Interests

Accordingly the Inquiry has considered the ethical considerations which should be taken into account in defining the scope and limits to the use of forensic sampling in criminal investigations. Ethical principles which operate as constraints on DNA sampling include the principles that:

- the uses of the sample and information should be clearly stated when the original authority (consent or court order) for collection of the sample is sought;
- use of personal samples and information should be restricted to those for which authority is given at the time of collection; and
- the retention of the sample and information should be limited to that required for the authorised use to be achieved.

Ethical Justification for Law Enforcement Powers

Ethical considerations do not operate only as a restraint on law enforcement powers. The grant of powers to law enforcement agencies is also based on the notions of civic duty and the obligations of citizens to comply with the laws. It is in the public interest to ensure that powers providing for the collection of relevant forensic evidence are adequate and enforceable.

For victims of crime and their families, law enforcement brings finality to the trauma of the event, ensuring that justice is done, providing for the punishment of the offender, and ensuring that the offender's opportunity to re-offend is limited. Mr Nick Halvagas, himself related to a crime victim, described the urgent need for closure experienced by people whose lives and families have been affected by crime:

We have in this room a few people who have been affected by crime. ... All we are looking for is to tie these crimes up as quickly as possible ... We want it to be tidied up and we want to put the murder or the act outside, away from us, which is why we are trying to help the police as much as possible. The use of DNA testing is a tool that will help police to close these crimes.²²⁴

222 D Meagher, *Minutes of Evidence*, 23 July 2002, 164.

223 Victoria Legal Aid, Submission 15, 1-2.

224 N Halvagas, *Minutes of Evidence*, 23 July 2002, 117.

Mr Noel McNamara, Chairman of the Crime Victims Support Association, urged legislators to ‘get aggressive and pursue the technology innovations to protect our people’. The Support Association recommended universal sampling²²⁵ to assist in crime detection, believing that the privacy issues involved could be resolved and managed.²²⁶ Mr McNamara saw the expanded use of DNA profiling as a means of:

empowering and equipping our law enforcement officers with the tools, the technology, so that we can substantially reduce the crime that now plagues our society.²²⁷

Granting investigative powers to law enforcement agencies involves sacrificing individual rights and freedoms for the public safety of the community. Fingerprinting, phone-tapping and surveillance are all examples of intrusions into the privacy of the individual, which have been sanctioned, subject to judicial supervision, in the interests of crime detection and law enforcement.²²⁸

Function Creep and Retrospectivity

Commentary on the forensic procedures regime has noted the ‘creep’ of state powers in forensic sampling, comparing the gradual expansion of the regime to a ‘slippery slope’. It is claimed that if the slide is not checked at the top of the slope, the momentum will be too great to control the erosion of personal rights and interests in the future.²²⁹ This phenomenon, called ‘function creep’, was seen to be a product of the technological ease with which the sample can be analysed, stored and searched.²³⁰

Apprehensiveness about the strength of the safeguards and the protections for individual rights and privacy is founded in the observation that safeguards introduced in earlier generations of legislation have been eroded as the sampling powers have been expanded. Victoria Legal Aid representatives were concerned that the material collected now might be used, at some future date, for a purpose not contemplated by the donor.

We could set up a very carefully safeguarded system, but it is easy for those safeguards to be dismantled at a future time, and it then leads to a very large body of information about people which a select few will have control of.²³¹

225 Crime Victims’ Support Association, Submission 6, 1.

226 N McNamara, *Minutes of Evidence*, 2 June 2003, 33.

227 N Halvagas, *Minutes of Evidence*, 23 July 2002, 116-117.

228 Professor Tony Coady, Centre for Applied Philosophy and Public Ethics (CAPPE), Submission 26, 1.

229 Tim McBride, ‘State Surveillance – the Slippery Slope?’, (1997) 4 *Privacy Law and Policy Reporter* 71, at <http://www.austlii.edu.au/cgi-bin/disp.pl/au/journal.../41html?query=%7e+dna+and+privac>. See also Kirby, ‘DNA Evidence: Proceed with Care’ (2000) 57; and Ray Gibson, ‘Police Powers to take Body Samples’, (1998) 72(5) *Law Institute Journal* 55-57.

230 Chapter 2 described some recent advances in DNA profiling which have produced quantum leaps in the capacity and efficiency of forensic DNA analysis.

231 V Stojcevski, *Minutes of Evidence*, 23 July 2002, 147.

In the United Kingdom amendments to the *Police and Criminal Evidence Act* (the *PACE Act*) passed in 1997 in the *Criminal Justice and Police Act 2001 (UK)* retrospectively authorised the retention and use of profiles which had been kept in breach of requirements for their destruction. DNA samples and profiles collected from US military personnel, initially collected for the stated purpose of identification of personnel missing or killed in action, have recently been uploaded onto the national criminal DNA database. Section 464ZF, enacted into the Victorian provisions in 1997, authorised the sampling of offenders solely for inclusion on the DNA database, and had retrospective effect.

The Privacy Commissioner noted ‘a temptation’ for governments ‘to use the information for purposes not now imagined’ and predicted that this temptation would grow with the database.²³² One aspect of function creep that was drawn to the attention of this Inquiry was the enactment of retrospective legislation. The Privacy Commissioner considered the implications for public policy if the terms on which samples are taken from members of the community can be altered retrospectively.

When individuals have voluntarily provided their samples on the basis that it would be destroyed after a particular use, they have a legitimate expectation that the destruction proceed as foreshadowed. To do otherwise would constitute a gross breach of trust and risks undermining the legitimacy of the forensic sampling scheme and the willingness of volunteers to come forward in future to assist in criminal investigations.²³³

The Committee therefore concluded that the sensitive nature of the DNA sample and the multitude of purposes to which it could be applied warrant a safeguard to ensure that the terms on which the sample is originally provided are complied with. For this reason, the Committee recommends that legislation amending Subdivision 30A not have retrospective affect.

Recommendation 4.1 Non-retrospective provisions

That legislation amending the forensic procedures provisions contained in Subdivision 30A of the Crimes Act 1958 (Vic) not have retrospective effect and therefore not apply to procedures sought and profiles obtained prior to the enactment of the amending legislation.

The Potential for Intrusion

Concerns as to the ethical foundations of the regime frequently reflect apprehensions about the potential for intrusion. While some of these concerns relate to systemic issues, such as the arrangements to secure the storage or disclosure of the material obtained, others relate to processes which can be quite easily modified.

232 Privacy Commissioner, Submission 19, 16, 27.

233 Privacy Commissioner, Submission 19S, 10.

Physically, taking a DNA sample is an intrusive act. To compel a person to submit to a forensic procedure, without legal authority or the donor's consent, would constitute an assault and battery.²³⁴ However, while some forensic procedures remain intimate and intrusive, through the use of a simpler, more refined technology, a donor can now take his/her own DNA reference sample unassisted and with minimal discomfort by merely scraping the inside lining of the mouth with a cotton bud.²³⁵

The use of the sample and the information obtained from it is potentially a more intrusive invasion of a donor's privacy interests and legal rights than the actual procedure. When a donor provides a DNA sample, the donor is providing material which contains his/her genetic blueprint and personal information concerning the donor's past, present and future relatives. However, DNA profiling in its current form uses only the non-coding or 'junk' DNA, which as yet is not thought capable of revealing personal genetic information about the donor, and restrictions can be placed on the types of analyses conducted.²³⁶

Strategies for Regulating the Collection and Use of DNA

Two quite different approaches to the regulation of the collection and use of DNA emerged during this Inquiry. Both acknowledged the need for careful regulation, but each focussed on different stages of the process.

One view was that the focus of regulation should be on the *collection* of DNA. This approach advocated limiting the circumstances in which DNA sampling is authorised, specifying at the outset the purposes for which the DNA material and information can be analysed and used. The Victorian Privacy Commissioner, for example, recommended that the collection of DNA be confined to circumstances where the proposed use was clearly articulated, where the evidence obtained was forensically necessary, and its value was proportionate to the intrusiveness of the procedure.²³⁷

Another view was that the powers of collection should not be 'tied up in red tape', but that the *use* of the material should be clearly prescribed. Dr Gans favoured a regime which permits the collection of DNA but closely scrutinises the use that is made of it.

The effective way of stopping government intrusions into people's privacy is ensuring that those intrusions that do happen have an adequate and comprehensive regulatory scheme and policy base.²³⁸

234 Coldrey Committee, *Report on Body Samples and Examinations* (1989) 58.

235 See Whatman Asia Pacific, Submission no.14. Whatman Asia Pacific provided a submission describing its FTA paper and sampling kits, which are used by Victoria Police.

236 When a DNA profile is loaded onto a forensic database, the capacity to link a person with a crime scene, without any other evidence identifying that person as a suspect, also affects the operation of fundamental criminal law doctrines, such as the test of reasonable suspicion, the privilege against self-incrimination and the right to silence, discussed in Chapter 12 below.

237 Privacy Commissioner, Submission 19S, 3-4.

238 Dr J Gans, *Minutes of Evidence*, 2 June 2003, 29.

Dr Gans recommended establishing a regulatory process to discourage and punish abuses rather than ignoring or under-utilising the potential for the collection of DNA evidence. He observed:

Fighting every new change at the threshold and saying, ‘It is the thin end of the wedge’, is not an effective way of stopping government intrusions into people’s privacy.²³⁹

In weighing up the need for law reform in this area, the Inquiry considered the extent of the potential risk and detriment of any unauthorised use or disclosure of the material collected as well as the practicality of enforcement.

PRIVACY PRINCIPLES, DNA AND THE *CRIMES ACT*

The Inquiry briefly reviewed the extent to which the privacy regime affects the operation of Subdivision 30A. This subject is extensively addressed in the ALRC’s final report.

The statutory regimes in place to regulate the collection and use of ‘human genetic information’ and data distinguish between the sample or genetic material and ‘information’. Genetic information comes under the *Information Privacy Act 2000 (Vic)* and the *Health Records Act 2001 (Vic)*. These two Acts provide a regime for regulating the collection and use of personal information. They apply generally to genetic information collected under the *Crimes Act* but where there is an inconsistency the provisions of the *Crimes Act* prevail.

While genetic information is dealt with in some detail in the *Crimes Act* and in information privacy legislation, statutory regulation of the use of forensic material is much less developed. The ALRC formed the view that the privacy regime does not cover genetic material. In these circumstances, the collection and use of genetic material in criminal investigations is probably wholly defined by the provisions of Subdivision 30A.

The Information Privacy Regime

The Victorian *Information Privacy Act 2000 (Vic)* governs rights, use and access to ‘personal information’, which is defined to include:

information or an opinion (including information or an opinion forming part of a database), that is recorded in any form and whether true or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion, but does not include information of a kind to which the *Health Records Act 2001* applies.²⁴⁰

239 Ibid.

240 *Information Privacy Act 2000 (Vic)* s 3.

This Act sets out Information Privacy Principles which govern the collection and use of ‘personal information’. Some of these Information Privacy Principles apply unilaterally, with no exemption for law enforcement agencies. They oblige agencies to:

- collect no more personal information than is necessary; [or]
- collect personal information in a manner that is lawful, fair and not unduly intrusive.²⁴¹

Law enforcement regimes are exempt from certain other obligations, ‘where non-compliance is reasonably believed to be necessary’. The exemption operates to override privacy principles to the extent of the inconsistency.²⁴² The law enforcement power overrides the operation of privacy principles where the law enforcement power ‘specifies permissible uses and disclosures for personal information’; or ‘includes provisions that are inconsistent’ with any provision of the *Information Privacy Act*.

According to the Privacy Commissioner, the main effect of this regime on forensic procedures legislation will be to require legislation giving powers to law enforcement agencies to ‘articulate with precision’ the permissible uses of the information collected:

particularly where these purposes are not related to the reason information is originally collected or might be reasonably anticipated by the individuals whose DNA is being extracted.²⁴³

The *Crimes Act*

Victorian Criminal Proceedings

The *Crimes Act*, following the Model Bill, separately defines ‘forensic material’ and ‘related material and information’. The definition of ‘forensic material’, as set out in Chapter 2, includes any material from which a DNA profile can be derived.

The definition of ‘related material and information’ is very broad, and seems to be intended to cover any material or information that relates to the sample. Section 464 provides that ‘related material and information’ comprises:

- (a) in relation to any sample taken in a forensic procedure conducted in accordance with sections 464R to 464ZA or section 464ZF, means notes and video-recording made of the forensic procedure and any information which may identify the person contained in any record of or report relating to the forensic procedure and in any copy of a record or report;

241 Privacy Commissioner, Submission 19S, 3.

242 *Information Privacy Act 2000 (Vic)* s 6.

243 Privacy Commissioner, Submission 19S, 3.

- (b) in relation to any sample voluntarily given by a person in accordance with sections 464ZGB to 464ZGD, means notes and video-recording (if any) made of the procedure to take the sample and any information which may identify the person contained in any record of or report relating to the taking of the sample and in any copy of a record or report.

Under Subdivision 30A separate provisions apply in relation to use. If a provision authorises the retention of DNA evidence, it is expressed in terms of the retention of ‘the sample and related material and information’. While the Subdivision therefore has the potential to make separate provisions for the destruction of the sample and profile, it has not actually done this. For example, destruction of the ‘sample and related material and information’ is required at a certain time or the expiry of a certain period. The provisions do not contemplate, for example, the destruction of the sample but the retention of the profile. However, provisions which concern data-sharing refer only to ‘information’ contained in the DNA database system.

Data-sharing Provisions

Sections 464ZGL-464ZGO set out the provisions applying to inter-jurisdictional enforcement and data-sharing. They appear to permit the sharing of forensic material as well as data. The collection of reference samples is authorised by section 464ZGM, which enables the conduct of forensic procedures pursuant to orders made elsewhere. Section 464ZGO permits the ‘taking, retention and use’ of forensic material obtained pursuant to the laws of another jurisdiction.

In relation to information or data obtained from the sample, section 464ZGN authorises the Minister to enter into arrangements to transmit ‘information from the DNA database system’ of Victoria and participating jurisdictions ‘for the purpose of the investigation or proceedings in respect of an offence’.

Conclusion

It is important to distinguish between the DNA sample and the DNA profile because they are stored, analysed, used, transferred and destroyed in entirely different ways. The DNA sample has a greater potential to divulge personal information. The profile, while not capable of revealing personal information, can be more easily disclosed and re-used. While the current provisions of the *Crimes Act* permit different treatment of the sample, the profile and related information, this Inquiry believes that the current provisions fail to take account of the quite different potential of the sample and profile. The implications for law reform are considered below.

‘FORENSIC MATERIAL’: REGULATING THE DNA SAMPLE

The Potential of the Sample

Probably the most frequently expressed concern about the operation of the forensic procedures provisions was the potential for the sample or the profile to be misused in some way.²⁴⁴ Chapter 3 revealed the current and predicted capacity of DNA sampling technology and foreshadowed future forensic applications of genetic science in this field. In considering the potential impact on privacy laws, it should be noted that the personal information contained in the DNA sample relates not only to the donor, but to the donor’s past, present and future relatives.²⁴⁵

Participants in the Inquiry raised the possibility that the sample collected for DNA profiling could also be used:

- to obtain other personal information, such as the donor’s appearance or genetic predisposition, for criminal investigations;²⁴⁶ or
- for other purposes, such as research, employment or insurance related matters, not authorised when the DNA sample was obtained.²⁴⁷

Some participants were also apprehensive that DNA samples obtained outside the ambit of the Subdivision 30A – such as for medical or research purposes, or pursuant to other law enforcement powers – could be accessed and used for criminal investigations without the donor’s knowledge or consent.

Chapter 3 revealed that research is already underway to produce a physical ‘DNA portrait’ of a donor from his/her DNA sample for use in criminal investigations. There is also the apprehension that the forensic sample could be accessed and analysed to obtain personal information that may be relevant to employment, insurance or government agencies.²⁴⁸

The Committee therefore inquired into the extent of the risk under the Victorian regime that samples could be used for completely unrelated purposes at a later date.

244 Privacy Commissioner, Submission 19, 11-12.

245 The implications for relatives are particularly relevant in criminal investigations, where the absence of a person sought in relation to an investigation might lead to relatives being asked to donate their DNA to obtain a partial profile of that person.

246 Liberty Victoria, Submission 27.

247 Privacy Commissioner, Submissions 19, 19S and P Chadwick, *Minutes of Evidence*, 22 July 2002, 57 et seq.

248 D Keays, ‘The Legal Implications of Genetic Testing: Insurance, Employment and Privacy’, (1999) 6(4) *Journal of Law and Medicine* 347 cited by Saul, ‘Genetic Policing: Forensic DNA Testing in New South Wales’ (2001) 87; Margaret Otlowski, ‘Genetics and Privacy’, *Communications Law Centre Privacy Conference*, Melbourne, 5-26 June 2001. See Kristine Barlow-Stewart, *Opportunities and Threats from the Human Genome Project for Australian Society*, at www.lawsocnsw.asn.au/uploads/library/1021087814821_0.6906777658451164.pdf, 1. See also ALRC, *Essentially Yours* (2003).

Between collection of the sample and its submission to the laboratory there is in theory potential for part of the sample to be retained. Where a forensic procedure is conducted pursuant to an order issued in another jurisdiction, there is limited opportunity for the originating jurisdiction to control the conduct of the procedure. In these circumstances, it is possible that part of the forensic material could be retained by the law enforcement agency enforcing the procedure.

The VFSC has indicated that once the reference sample has been analysed, very little remains. The remaining sample is, however, retained and stored at the VFSC. VFSC representatives informed the Inquiry that the risk of ‘planting’ DNA samples retained after analysis would be very slight or negligible.

The Inquiry has concluded that after analysis, the only significant risks to which the stored DNA sample is exposed are the possibilities that the sample is provided to another agency and/or re-analysed for a different purpose.

The Inquiry considered four ways in which the use of the sample could be regulated and, particularly, limited to the purposes for which it was originally collected. These were:

- requiring that the *purpose* for which a DNA sample may be collected, including the analysis that can be undertaken, is clearly specified;
- regulating *forensic access to and use* of DNA samples obtained for other purposes;
- requiring the *destruction of the sample* once the original purpose has been achieved; and/or
- regulating or prohibiting the *transfer of forensic material* to other agencies or jurisdictions.

The sections below consider each of these means of regulating the use of DNA samples, the profiles and related information.

A Purpose Clause

The ALRC Inquiry doubted whether the privacy regime regulated ‘the collection, use, storage, disclosure or destruction of forensic bodily samples’ because genetic samples are unlikely to fall within the *Privacy Act*’s definition of ‘personal information’. The ALRC therefore recommended that privacy protection be extended to genetic samples as well as genetic information.²⁴⁹

While Subdivision 30A contemplates the DNA sample only being used to derive a profile for matching purposes, it should be borne in mind that DNA technology will soon outpace this limited use. In these circumstances, the legislature needs to

249 ALRC, *Essentially Yours* (2003) Recommendation 41-9, 1038.

consider how the law can accommodate the expected changes in DNA technology and the increasing range of uses to which the sample and profile can be put.

Some jurisdictions are already considering whether forensic sampling laws need to define the forensic uses to which DNA samples can be put. In the United States of America, the Federal Department of Justice recommends that State legislatures specify clearly the purposes for which DNA sampling can be undertaken and the DNA database can be used.²⁵⁰ Model DNA provisions, prepared to assist state legislatures to enact consistent forensic sampling legislation, contain a statement of 'legislative intent', inserted 'to emphasise the law enforcement only use of the DNA database'.²⁵¹

The *Police and Criminal Evidence Act 1984 (UK)* specifies that the DNA sample 'can only be used for criminal investigations', but this purpose clause would nevertheless permit the use of genetic information in the DNA sample for forensic purposes other than merely deriving a DNA profile.

It shall not be used by any person except for purposes related to the prevention or detection of crime, the investigation of an offence or the conduct of a prosecution.²⁵²

The ALRC Inquiry proposed an exclusionary statement to prevent the use of the DNA sample for purposes other than DNA profiling. The ALRC also canvassed the insertion of a provision to restrict analysis of DNA samples collected under the forensic procedures provisions for use in criminal investigations to the non-coding regions.²⁵³

Conclusion

The Inquiry considers that a purpose clause would restrict the use of DNA samples to the forensic purpose for which DNA sampling was authorised. The Committee believes that if further forensic or non-forensic uses of the DNA sample are contemplated in the future, it would be appropriate for this to be determined after public debate on this issue.

The Inquiry concluded that the use of DNA samples for any purpose other than the purpose disclosed to the donor at the time of sampling is and should be beyond the permissible uses for DNA samples and profiles obtained under the forensic procedures provisions of the Victorian *Crimes Act*.

The Committee believes that the purpose for which DNA sampling is currently conducted in Subdivision 30A is, and should continue to be, limited to the forensic

250 See for example the Model DNA Database provisions provided to this Inquiry, prepared for the assistance of State legislatures by Dawn Herkenham, *Model DNA Database Provisions*.

251 Ibid 3.

252 *Police and Criminal Evidence Act 1984 (UK)* s 64(3AB).

253 ALRC, *Discussion Paper 66* (2002) Proposal 36-8; ALRC, *Essentially Yours* (2003) 41.102-41.105, 1027-1028.

purposes of criminal investigations. The Committee concluded that it is desirable to insert a 'purpose clause' in Subdivision 30A, to prescribe the use to which samples and profiles obtained pursuant to Subdivision 30A can be put.

Recommendation 4.2 A purpose clause

That Subdivision 30A of the Crimes Act 1958 (Vic) be amended to insert a 'purpose clause', to prevent the use of DNA samples and profiles obtained pursuant to these provisions for purposes other than forensic purposes in criminal investigations.

Genetic Material not obtained under Subdivision 30A

During the Inquiry two issues arose which turned attention to the possible use in criminal investigations of biological samples collected for health and medical purposes. The Inquiry received a submission from the Microbiological Diagnostic Unit of the University of Melbourne drawing attention to the legal and ethical issues raised when law enforcement officers seek access to biological samples received at the Unit. The Inquiry also noted media coverage of debate as to the access available to Victoria's collection of Guthrie cards, the neonatal screening tests conducted on newborn infants.

Biological Samples

Associate Professor Geoff Hogg, Director of the Microbiological Diagnostic Unit, University of Melbourne,²⁵⁴ brought to the Committee's attention a question concerning the rights and responsibilities of laboratory administrators receiving biological material for diagnostic purposes. Professor Hogg indicated that from time to time the laboratory might be asked to provide a state, federal or other authority with such specimens containing DNA for the purpose of forensic analysis.

They may be human, or non-human but containing traces of DNA from those who have handled the specimen.²⁵⁵

Professor Hogg sought clarification of the authority or mechanism under which a law enforcement agency may make such a request and the laboratory's options and obligations.

Guthrie Cards

Guthrie cards are the cards which contain blood samples taken from the heel-prick screening test on newborn infants, originally carried out to detect phenylketonuria

254 Microbiological Diagnostic Unit, University of Melbourne, Submission 11, 1.

255 Ibid.

(PKU) and cystic fibrosis and now capable of detecting a number of other genetic conditions. During the course of this Inquiry, the potential use of Guthrie cards for forensic purposes received media attention.²⁵⁶ The Victorian Privacy Commissioner raised the issue as to whether Victoria's collection of Guthrie cards (dating back to the late 1960s) and other genetic registers or tissue banks should be available for law enforcement purposes.

The Inquiry was informed that a Memorandum of Understanding between Victoria Police and the Murdoch Institute permits the use of Guthrie cards in certain defined circumstances. Law enforcement agencies require a warrant to access these records. Dr Freckelton contemplated the possibility that access to genetic registers such as this might be sought in the course of a criminal investigation.

Police might endeavour to obtain the Guthrie Card from the Victorian State Screening Laboratory at the Royal Children's Hospital by virtue of an application to a magistrate for a search warrant on the basis of there being a 'reasonable ground to believe' that [the card] will afford evidence as to the commission of an indictable offence. Probably a further warrant would be needed to test the DNA on the card.²⁵⁷

Media reports suggested that police have only accessed this registry twice for forensic purposes.²⁵⁸ Professor John Scheffer of the VFSC explained:

The police do not have access to those Guthrie spots and can only achieve access to them generally through the coroner for the purpose of investigating missing persons and the identification of missing persons situations. They are not accessed by police for normal investigations.²⁵⁹

Dr Freckelton observed that:

Such an application appears plausible and constitutes a further example of usage of DNA samples that only a few years ago was not even contemplated.²⁶⁰

He suggested that if parents considered it possible that these samples might later be used for forensic purposes they might be discouraged from authorising the collection of these samples in the first place.

When parents of newborns consent to the blood test, the furthest thing from their mind is any measured judgement of the potential use by the state, through the police or otherwise, of their child's DNA. Individuals may be less inclined to seek a genetic test or to provide a tissue sample if the genetic register or tissue bank becomes a pool of data into which police may routinely dip.²⁶¹

256 Kelly Ryan, Jeremy Kelly and Shelley Hodgson, 'Alarm over DNA secrets', *The Australian* 27 June 2003.

257 Freckelton, *DNA Profiling: Issues Paper* (2002) 29.

258 Ryan et al, 'Alarm over DNA secrets', *The Australian* 27 June 2003.

259 Professor J Scheffer, *Minutes of Evidence*, 23 July 2002, 102.

260 Freckelton, *DNA Profiling: Issues Paper* (2002) 29.

261 Privacy Commissioner, Submission 19S, 34.

The ALRC considered the issues arising from access to personal genetic information in a broader context, and advocated the development of nationally consistent guidelines in which access by law enforcement agencies could be permitted. It recommended that these guidelines permit disclosure only with either:

- (a) the consent of the donor or a person authorised to consent on his or her behalf; or
- (b) pursuant to a court order.²⁶²

The Privacy Commissioner recommended that the permissible uses of material such as the Guthrie cards should be publicly debated and resolved transparently by the legislature²⁶³ and was reported as advocating that ‘any arrangement between police and the custodians of genetic information should be subject to public and parliamentary scrutiny’.²⁶⁴

Access to Biological Samples for Criminal Investigations: Conclusions

This Inquiry, which has reviewed the forensic sampling provisions of Subdivision 30A, is not in a position to conclude on the broader issue of access by law enforcement agencies to genetic material not collected in accordance with the provisions of the *Crimes Act*.

Two issues have emerged: firstly, whether the *Crimes Act* leaves open the possibility for DNA samples to be obtained for criminal investigations other than under the provisions of Subdivision 30A, and secondly, whether the terms and circumstances in which biological samples are obtained for health and medical purposes do, and/or should permit their use in criminal investigations.

The Inquiry takes the view that Subdivision 30A of the *Crimes Act* should ‘cover the field’ as far as the collection of DNA samples from persons in Victoria for the investigation of criminal offences is concerned. While exceptional circumstances may arise, the provisions of Subdivision 30A, devised specifically for the collection of genetic samples for criminal investigations, should be the sole legislative authority for the collection of samples for law enforcement purposes.

Evidence from Physical Examinations

The Committee notes in this context the provisions of section 464ZE(6), which is contained in the section dealing with the admissibility of forensic DNA evidence. Section 464ZE(6), governing ‘evidence relating to forensic procedures’, provides:

262 ALRC, *Essentially Yours* (2003) Recommendation 19-2.

263 Privacy Commissioner, Submission 19S, 34.

264 Ryan et al, ‘Alarm over DNA secrets’, *The Australian* 27 June 2002, 2.

Evidence obtained as a result of a physical examination conducted in good faith on a person for the purposes of medical or dental treatment is admissible in proceedings against that person for an offence.

The term ‘physical examination’ is defined to mean ‘an examination of the external part of a person’s body requiring touching of the person or removal of the person’s clothing’. It is not clear whether a physical examination also includes the taking of material from the external part of a person’s body. No submissions on this provision were received, but the Inquiry notes that in the context of access to genetic information and material obtained for purposes other than criminal investigations, the effect of this provision is also relevant.

The question of access to biological samples obtained for other purposes raises broader questions of consent and privacy that were beyond the scope of this Inquiry. The issues of access raised in this Inquiry encapsulate some of the broader ethical and legal questions that were highlighted in the ALRC’s report on the protection of human genetic information. This Inquiry has identified a need to clarify the position of genetic samples held by Victorian health and medical research organisations. It sees a need for this to be part of a wider, co-ordinated response to the findings of the ALRC.

Recommendation 4.3 Evidence obtained from physical examinations

That in considering the wider implications of the Australian Law Reform Commission’s report on genetic information for Victoria, the relevance and appropriateness of section 464ZE(6) of the Crimes Act 1958 (Vic) should also be reviewed.

The Destruction of the DNA Sample

The current provisions of Subdivision 30A enable the sample to be retained for as long as the data obtained from it is retained. The *Crimes Act* defines the actual means of destroying the sample and the data differently, however. ‘Destruction’ denotes, in relation to the DNA sample, physical destruction. In relation to the profile, it means de-identification: removing the means of identifying the donor. This Inquiry considered whether it is necessary and desirable for the sample to be retained once the profile has been derived.

Policy Issue: Utility v Privacy

The Inquiry considers it crucial that members of the public are willing to provide DNA samples by consent on request. Public co-operation with law enforcement agencies might be jeopardised if members of the public believed that their DNA samples could be retained and used for purposes other than that for which they were collected. To ensure confidence in the integrity of the DNA sampling regime, and in the security of the material provided, this Inquiry formed the view that clear provision needs to be made for the destruction of the sample when it is no longer required.

This would preclude the use of the sample for unauthorised purposes and simplify the accountability requirements for retention of forensic material. The potential for intrusion into the privacy of the donors remains for as long as the sample, in particular, is retained. For this reason, the Inquiry considered whether it would be feasible to require the destruction of a reference sample once the DNA profile has been obtained.

Where reference samples are taken solely for the inclusion of the profile on the database, the Inquiry can see no forensic need to retain the sample. Similarly, where a reference sample is obtained from a volunteer to compile a profile of a missing person, or for elimination purposes, there is no forensic need to retain the sample once the profile has been produced.

While the retention of the sample may be desirable for quality assurance, the destruction of the sample would simplify the requirements on the laboratory. The long-term retention and storage of DNA samples has implications for storage and security, and involves establishing and monitoring procedures to guarantee their integrity. The physical destruction of the sample would eliminate the need for those requirements.

In the case of voluntary and database sampling, the perceived risks associated with retaining the samples are far greater than those which may result from their destruction. The Inquiry therefore favours the physical destruction of the sample once the profiling process has been completed. Where a person is a relevant suspect or defendant in criminal proceedings, the retention of the sample until the conclusion of the investigation or proceedings would be desirable.

The Committee formed the view that it is practicable to dispose of the DNA sample once the profile has been obtained, without compromising the forensic potential of DNA profiling. It is the profile, not the sample, which is compared with the profile obtained from the crime scene, and which is entered into the DNA database.

Approaches in Other Jurisdictions

While Canada, the United States of America, England and France have legislation which permits the retention of DNA samples, New Zealand, Sweden, Denmark and the Netherlands all require the destruction of the DNA sample once the profile has been obtained.²⁶⁵

Most other Australian jurisdictions still have in force provisions based on the Model Bill. However, both the ALRC and the Sherman Review have proposed law reform in this area. The Sherman Review was concerned at the prospect that DNA samples may in future be usable for purposes which are beyond the capacity of current technology:

265 ALRC, *Essentially Yours* (2003) 41.128-130, 1034.

The Review is conscious that the technology in this area is improving at a rapid rate and there may emerge in the future applications of DNA sampling which were not contemplated at the time of enacting.²⁶⁶

The Sherman Review recommended that ‘both destruction as well as de-identification of person samples as defined in Part 1D (either physically or by appropriate computer de-linking) should occur immediately the statutory time limits expire’.²⁶⁷ The ALRC reached a similar conclusion. In its 2002 *Discussion Paper* the ALRC proposed:

Forensic procedures legislation should provide that forensic material taken from a suspect, and any information obtained from its analysis, must be destroyed as soon as practicable after the person has been eliminated from suspicion, or police investigators have decided not to proceed with a prosecution in relation to that investigation.²⁶⁸

The main disadvantage was found to be that some investigations remain open for many months or years, and samples retained until the conclusion of the investigation could be subject to unauthorised use for a long or indefinite period. In its final report, the ALRC recommended that:

Forensic material obtained pursuant to Part 1D must be destroyed as soon as practicable after a DNA profile has been obtained from the material.²⁶⁹

For matching purposes, for the preparation of the forensic report and even for verification purposes, it is not necessary to retain the sample. Should another sample be required for verification purposes at a later date, the legislation could provide for a second forensic procedure to be undertaken.²⁷⁰ On balance, the privacy protection afforded the suspect by destruction of the reference sample would outweigh the burden of undergoing a second procedure, on the same basis, at a later stage.

The Committee believes that apprehensions as to the possible misuse of the DNA sample are best removed by providing that the sample be destroyed as soon as practicable after the profile has been obtained. Chapter 10 addresses the issue of compliance and considers means to ensure the proper and timely destruction of samples.

Recommendation 4.4 Destruction of the DNA reference sample

That Subdivision 30A of the Crimes Act 1958 (Vic) be amended to provide that a sample obtained pursuant to Subdivision 30A must be destroyed as soon as practicable after a forensic profile has been derived from the sample.

266 Sherman, *Independent Review of Part 1D* (2003) 3.148, 47.

267 Ibid Recommendation 6, 108.

268 ALRC, *Discussion Paper 66* (2002) Proposal 36-11, 869.

269 ALRC, *Essentially Yours* (2003).

270 This proposal is taken up in Chapter 5.

Sharing Forensic Material

Section 464ZGO provides for the ‘taking, retention and use of forensic material authorised by laws of other jurisdictions’. It validates the taking, retention and use of forensic material ‘for investigative, evidentiary or statistical purposes’²⁷¹ in Victoria, even if this would otherwise contravene a provision of the other participating jurisdiction and vice versa: the taking, retention and use of forensic material in another jurisdiction, even if this would contravene a Victorian law.

Regulating the use of DNA material or data which can be shared by other jurisdictions is possibly the most problematic issue to resolve, because the material or data, once released, is largely beyond the reach of the original jurisdiction.²⁷² Recommendation 4.4, if implemented, would remove the potential for the sample to be shared or used for an unauthorised purpose.

The Inquiry considered whether this could impede the functioning of the inter-jurisdictional data-sharing arrangements and concluded that the national DNA database can operate to its full potential, and inter-jurisdictional data-sharing could be achieved without sharing or transferring the DNA sample itself.

Conclusion

The Inquiry concluded that the current provisions and arrangements need clarification. It formed the view that forensic material should not be shared or transferred, because the jurisdiction or agency which collected the sample is not in a position to ensure its security and use by others. Current legislation or ministerial agreements should specify that the sharing of data and information through the database excludes the sharing or transfer of the DNA sample itself. This would not preclude, of course, the conduct of forensic procedures in execution of orders issued by another jurisdiction.

THE PROFILE, RELATED MATERIAL AND INFORMATION

Unlike the sample, the DNA profile on its own is not capable of revealing personal information about the donor. The retention of a DNA profile and its use – without any personal identifier – on a national DNA database has quite different implications from those that result from the retention of the sample. Concerns about the use of the DNA profile related mainly to:

- the possibility that inaccurate data may be retained without authority and used to the detriment of the subject;²⁷³ and

271 Ss 464ZGO(1)-(2).

272 Chapter 14 reviews the data-sharing provisions in the *Crimes Act* and focuses on the extent to which Victoria retains the capacity to control the use to which the material or data is put.

273 G Connellan QC, *Minutes of Evidence*, 23 July 2002, 169; Dr J Gans, *Minutes of Evidence*, 2 June 2003, 26-27; S Nicholson and A Radonic, *Minutes of Evidence*, 22 July 2002, 75, 77.

- the apprehension that DNA profiles, once entered into a database, are beyond the effective control of any regulatory agency.²⁷⁴

The Inquiry received a number of submissions which raised, as a major concern, the potential value to the state of the personal information contained in a DNA database.

Victoria needs to be conscious at all times of the unique power of DNA data. ...It should not become a kind of broad, imprecise slogan that can be said to justify the steady extension of the collection and use of DNA data from the population.²⁷⁵

One of the concerns implicit in the submissions made on this subject was the impetus which the existence of the DNA database gave to the collection of personal samples. Some participants indicated that the capacity of the database to handle a large volume of DNA profiles seemed to be displacing the forensic value of the material as the primary consideration in the collection of DNA samples. As noted in Chapter 3, the efficiency with which the database can compare DNA profiles has prompted proposals to expand the collection of DNA samples.

The possibility that forensic databases could be used for other purposes has also been the subject of some attention.²⁷⁶ There are two scenarios which raise ethical issues: firstly, that the state or national forensic DNA database could be accessed for other purposes at a later date; and secondly, that the de-identified profiles stored on the population index of the Victorian database could be sold, transferred or re-identified for other research or non-forensic purposes.

This information can be stored in a paper file or a computer and is easily preserved. Appreciating the distinctiveness of the sample and the information derived from it is important: for example, even if the sample from which the DNA is obtained is destroyed, any information derived from it still exists and could be passed on to others, irrespective of what has happened to the original sample.²⁷⁷

Forensic Use of Genetic Information: Statutory Provisions

The genetic information contained in DNA samples collected for medical purposes would come within the definition of 'health information' contained in the *Health Records Act 2001 (Vic)*. Section 3 defines 'health information' as including, among other things:

- personal information collected in connection with the donation, or intended donation, by the individual of his or her body parts, organs or body substances;²⁷⁸ [and]

274 Privacy Commissioner, Submissions 19, 11; and P Chadwick, *Minutes of Evidence*, 22 July 2002, 61-64.

275 Privacy Commissioner, Submission 19, 11.

276 In relation to discrimination see Tim Smyth, 'Protecting human genetic information and its use', (2002) 10(6) *Australian Health Law Bulletin*, 64.

277 Margaret Otlowksi, 'Genetics and Privacy', *Communications Law Centre Privacy Conference*, 25-26 June 2001, 2.

278 *Health Records Act 2001 (Vic)* s 3(c).

- genetic information about an individual in a form which is or could be predictive of the health (at any time) of the individual or of any of his or her descendants²⁷⁹.

Sections 464ZGH and 464ZGK of the *Crimes Act* permit the use and disclosure of ‘information stored on the DNA database system’ for specified purposes. Information here denotes ‘identifying information’ and excludes information which ‘cannot be used to discover the identity of any person’. As noted above, the ALRC concluded that ‘the plain and ordinary meaning of the word ‘information’ is unlikely to extend to a genetic sample’.²⁸⁰

Under section 464ZGK, permissible purposes of the genetic information include database use, data-sharing authorised by ministerial agreements or legislation,²⁸¹ coronial investigations, the administration of the database and in response to a request or complaint by the donor of the genetic material. Chapter 14, which addresses the data-sharing provisions, considers the implications of this provision.

De-identification of the Profile

While destruction, in relation to samples, is taken to mean physical destruction, the term ‘destruction’ in relation to DNA profiles and information, denotes merely ‘de-identification’. Section 464ZFD(2) provides that:

Information (other than information which may identify the person on whom a forensic procedure was conducted) obtained from the analysis of samples taken or procedures conducted in accordance with this Subdivision may be retained and included in a DNA database for statistical purposes.

The reason for this distinction is that a DNA profile, once it has been removed from the DNA database, is included on a non-forensic population database that is maintained for statistical purposes. Genetic population databases contain profiles obtained from many sources – not merely forensic databases – and are used to refine statistical models of the genetic composition of populations, and to calculate the likelihood of chance repetitions of genetic profiles. As noted in Chapter 2, forensic scientists rely on this research to refine and validate the statistical assumptions on which likelihood ratios are calculated in DNA analysis for criminal investigations.

Issues

Some commentators believe that de-identification of profiles is not adequate protection against future use or misuse; that de-identification may still enable the

279 Ibid s 3(d).

280 ALRC, *Essentially Yours* (2003) 41.115.

281 Such as data-sharing in accordance with the *Mutual Assistance in Criminal Matters Act 1987 (Cth)* or extradition agreements and provisions.

profiles to be re-identified, and then used or disclosed for purposes not contemplated or authorised by the donor. The New South Wales Privacy Commissioner indicated to the NSW Law and Justice review that he doubted whether de-identification could be permanently assured:

While there is talk about eventually de-identifying material that is on the database, it is my view that almost any material can, at some stage, be re-identified in terms of a new sample that is taken that is matched against something that was allegedly de-identified, but is clearly not re-identified.²⁸²

Dr Freckelton considered the position of ‘innocent’ persons whose DNA profiles were retained on the database. He observed:

The problematic components of the ‘de-identified’ database are those consisting of persons who have not been charged, whose charges have not been proceeded with, who have voluntarily supplied samples and who have been found not guilty of criminal offences. The question is whether the de-identification process is meaningful and whether an arm of the state should be permitted to retain such potentially identifying information about members of the community against whom no adverse finding has been made.²⁸³

Circumstances could arise, for example, in which the presence of a donor’s sample on the forensic DNA database can be identified or could be taken as an indication of a prior criminal history. The Committee believes it is essential to have a definition and process of destruction which can demonstrably satisfy the concerns of those who donate DNA samples for forensic purposes.

The VFSC outlined the background to the current provisions governing the destruction of samples and related material and information under Subdivision 30A. It indicated that:

Earlier versions of the legislative destruction requirements essentially required that the link between the individual and the sample person information be destroyed. In complying with this the VFSC destroyed all actual samples taken from the person or generated from analysis of samples, and destroyed various paperwork and electronic records of data and paperwork.²⁸⁴

However, the complete destruction of all records and references to them has implications for future reference. It would be difficult, as the VFSC observed, to re-create the links destroyed and it would be impossible to re-test the evidence once the sample has been destroyed.²⁸⁵ According to the VFSC, this form of destruction is time-consuming. As a result of the decision by Gillard J in *Lednar’s case* in 2001²⁸⁶, the VFSC was required to destroy records relating to the data obtained from the plaintiffs. The effect of that decision was to require ‘a higher level of destruction than

282 Quoted in Freckelton, *DNA Profiling: Issues Paper* (2002) 31. NSW Standing Committee on Law and Justice, *Review of the Crimes (Forensic Procedures) Act 2000* (2002) 6.62, 154.

283 Freckelton, *DNA Profiling: Issues Paper* (2002) 31.

284 VFSC, Submission 23, 11.

285 Ibid.

286 *Lednar & Anor v The Magistrates’ Court of Victoria* [2000] VSC 549.

previously legislated'. The VFSC reported that the destruction of records relating to the sampling of two persons required 15 working days to complete.²⁸⁷ The VFSC indicated:

This data on its own could not have been interrogated to re-establish the link with the individual for comparison with unsolved crimes without significant access to a multitude of databases.²⁸⁸

The laboratory also noted that destruction of some records can also compromise other unrelated cases, because of 'the manner in which the raw data software is configured'.²⁸⁹

Conclusions

The VFSC recommended that for the purposes of Subdivision 30A destruction be defined as action:

*which destroys the link between ... any sample taken and notes and video recording made of the forensic procedure and any information which may identify the person contained in any record of or report relating to the forensic procedure and in any copy of a record or report.*²⁹⁰

The ALRC, which also addressed the policy issues relating to de-identification and destruction, recommended that 'destruction' should be re-defined to involve 'permanent and irreversible de-identification of profiles'.²⁹¹

The issues canvassed above require, in this Committee's view, a range of different strategies to ensure that the DNA profiles loaded onto a DNA database are secure from re-identification and from further collateral use. At this stage, the Inquiry has concluded that legislative amendment of the definition of destruction in relation to profiles is not immediately necessary, but that administrative action to vouchsafe the integrity of the national database system is an important and urgent priority. Preservation of de-identified profiles – which is essential for research into population genetics – involves issues of database security. These are addressed in Chapter 14 in relation to the administration of the DNA database system.

The Committee recommends, therefore, that NATA, the VFSC and the Department of Justice collaborate to review the current definition of destruction and the processes used by the VFSC to de-identify DNA profiles and related information, to establish a protocol which satisfies the privacy concerns of the donors and is practicable to implement.

287 These records were destroyed in January 2001 following the decision in *Lednar & Ors v The Magistrates' Court of Vic and Anor*, *ibid*, 12.

288 *Ibid*.

289 VFSC, Submission 23, 12.

290 *Ibid*.

291 ALRC, *Essentially Yours* (2003) Recommendation 41-10, 1044.

Recommendation 4.5 Protocol for destruction of profiles and related information

That the National Association of Testing Authorities, the Victoria Forensic Science Centre (VFSC) and the Department of Justice:

- (i) collaborate to review:***
 - (a) the current definition of destruction; and***
 - (b) the processes used by the VFSC to de-identify DNA profiles and related information; and***
- (ii) establish a protocol which satisfies the privacy concerns of the donors and is practicable to implement.***

INFORMATION PRIVACY ISSUES

Information about the Forensic Procedure

So far this chapter has reviewed the privacy implications of collecting and using the DNA sample and profile, and concluded that further statutory protection is needed to ensure that the sample is not retained or used for purposes other than those for which it was originally obtained. This section considers the information that should be provided to the donor to give meaning to the donor's entitlement to know what information has been collected and held and, if the donor is authorising the conduct of the procedure by consent, to make an informed decision as to the terms on which the sample is provided. Under Subdivision 30A donors are already entitled to:

- information regarding the nature, purpose and proposed use of the material and data obtained; and
- access to the forensic material and information obtained from the procedure.

In the Victorian legislation different information is provided depending on whether the person from whom the sample is sought is a suspect, a volunteer, or an offender, and on whether the procedure is consensual or court-ordered.

Table 4.1 illustrates how the legislation prescribes most information for volunteers, who consent to a procedure, and least for offenders, who are ordered to undergo it. Consenting suspects are also provided with more information on the implications of the procedure than suspects sampled pursuant to court orders. It shows that more information is provided to donors who are eligible to consent to the procedure than to donors whose procedures are ordered by the court.

Table 4.1 Information and Consent Provisions in Subdivision 30A

Volunteers - S464ZGB(3)	Consenting Suspects - S464S(1)
<p>464ZGB(3). Samples given voluntarily A person consents in accordance with this section only if, in the presence of an independent person, he or she consents after a member of the police force has informed the person in language likely to be understood by that person:</p> <ul style="list-style-type: none"> (a) that any sample that is given will be analysed; (b) the information obtained from the analysis will be placed on a DNA database and may be used for the purpose of a criminal investigation or any other purpose for which the DNA database may be used under this Subdivision or under a corresponding law of a participating jurisdiction; (ba) that the person may choose whether the information obtained from analysis of the sample may be used - <ul style="list-style-type: none"> (i) only for a limited purpose to be specified by the volunteer; or (ii) for the purpose of a criminal investigation or any other purpose for which the DNA database may be used under this Subdivision or under a corresponding law of a participating jurisdiction; (bb) that the information obtained from the analysis could produce evidence to be used in a court; (c) that the person is under no obligation to give a sample; (d) that if the person consents to give a sample, he or she may at any time before the sample is taken, withdraw that consent; (e) that the person may consult a legal practitioner before deciding whether or not to consent to give a sample; (f) that the person may at any time (including after he or she has been charged with an offence) withdraw his or her consent to the retention of the sample; (g) that where the person withdraws his or her consent to the retention of the sample, a member of the police force may nonetheless apply to a court for an order to retain the sample and any related material and information; (h) that the person may request that the sample be taken by or in the presence of a medical practitioner, nurse or dentist of his or her choice. 	<p>464S. Informed Consent (1) A person gives informed consent to a request to undergo a forensic procedure if he or she consents to the request after a member of the police force informs the person in language likely to be understood by the person -</p> <ul style="list-style-type: none"> (a) of the purpose of the procedure; (b) of the nature of the procedure to be conducted; (c) that the person may request that the procedure be conducted by or in the presence of a medical practitioner of nurse of his or her choice or, where the procedure is the taking of a dental impression, a dentist of his or her choice; (d) of the offence of which the person is [suspected/charged/summonsed]; (e) that the procedure could produce evidence to be used in a court; and (ea) that information obtained from analysis of forensic material obtained by the procedure will be placed on a DNA database and may be used for the purpose of a criminal investigation or any other purpose for which the DNA database may be used under this Subdivision or under a corresponding law of a participating jurisdictions; and (f) that the person may refuse to undergo the procedure; (g) where the sample or examination sought may be obtained by a compulsory procedure and the person refuses to undergo the procedure, that an application may be made to the Magistrates' Court for an order authorising the conduct of the procedure.
Court Orders: Suspects and Offenders S464T(7) and S464ZF(9)	
<p>464T [Suspect] (7) If the Magistrates' Court makes an order under sub-section (3), it must:</p> <ul style="list-style-type: none"> (a) give reasons for its decision; (b) state the evidence on which it is satisfied of the matters referred to in sub-section (3); and (c) cause a note of the reasons to be entered in the records of the Court; and (d) inform the person ordered to undergo a compulsory procedure that a member of the police force may use reasonable force to enable the procedure to be conducted. 	<p>464ZF [Offender] (9) If a court makes an order under sub-section (2) or (3), it must-</p> <ul style="list-style-type: none"> (a) give reasons for its decision and cause a copy of the order and reasons to be served ... (b) inform the person ordered to undergo a compulsory procedure that a member of the police force may use reasonable force to enable the procedure to be conducted.

The Privacy Commissioner suggested that suspects be given notice of an application for an order and that they be informed at an early stage of the process – when first asked to consent – that the sample may be forcibly obtained.

Where an order is sought to compulsorily take a sample from an adult or child suspect, they should be informed much earlier about the possibility of using reasonable force ... [and] of the possibility of a retention order being sought if they are found guilty and the consequent inclusion on the national DNA database. These matters might affect their exercise of their limited right to be heard at the hearing of the application.²⁹²

The current provisions do not ensure that donors are made aware of all their entitlements under Subdivision 30A. For example, under the current provisions a consenting suspect is entitled to receive:

- a copy of the executed consent form²⁹³ or endorsed order;
- a copy of any video-recording made pursuant to the *Act*;²⁹⁴
- a part of the forensic material taken from the crime scene, where available,²⁹⁵ and
- a copy of the forensic report.²⁹⁶

However, there is no statutory requirement for the donor to be informed of these entitlements. The effect of this omission is likely to be that some donors remain unaware of their entitlements and by default, may forego them. Bearing in mind that non-compliance with the procedural requirements in ss464R-ZA, ss464ZF-ZB, ss464ZGB-GD and s464ZGF can result in the exclusion of the evidence obtained, the donors' awareness of their entitlements when the procedure is conducted can have a bearing on the exercise of their legal rights later in criminal proceedings.

Standard Prescribed Information for Donors

As noted above, the legislation does not require the same basic information on the nature, purpose and implications of the procedure to be provided to volunteers, suspects and offenders alike. Victoria Legal Aid recommended:

All persons, but particularly disadvantaged individuals, should be personally informed by the court, where they are ordered to undergo a procedure, of the meaning and implications of the forensic procedure.²⁹⁷

292 Privacy Commissioner, Submission 19, 23.

293 S 464S(2).

294 Ibid.

295 Ss 464ZC(1) and (2).

296 S 464ZD.

297 Victoria Legal Aid, Submission 15, 1.

For procedural requirements to be effective, the person undergoing the procedure must be aware of his/her entitlements, and a nominated person or agency must be responsible for compliance.

The Sherman Review recommended that the information to be provided to donors should be prescribed in regulations made pursuant to the *Crimes Act 1914 (Cth)*.²⁹⁸ The ALRC recommended that:

The prescribed information about the nature, purpose and consequences of a forensic procedure should be given to a suspect, serious offender or volunteer in a form that is capable of being easily understood by the person receiving the information.²⁹⁹

The Committee endorses the principle that all persons who are to undergo a forensic procedure should receive the prescribed information on the nature and purpose of the procedure, the use to be made of the results, and their entitlements and obligations, regardless of whether the procedure is authorised by consent or order. The Committee recommends measures to recognise that all donors of DNA samples for forensic purposes are entitled to certain information and rights in the conduct of the procedure. This would include measures to ensure that they are aware of their entitlements; have the means to exercise these rights; and the means to make complaints or appeals in relation to the conduct of the procedure. The Committee therefore proposes that the *Crimes Act 1958 (Vic)* be amended as set out in Recommendation 4.6 below.

Unfortunately, the effect of these proposals is to add to the volume of information to be made available to the donor before the procedure is conducted. Having identified certain information which should be provided to donors it is also necessary to ensure that the information is presented clearly and simply.

The NSW Department of Corrective Services has produced a video to give a plain English explanation of the forensic procedures regime to offenders from whom DNA samples are sought.³⁰⁰ Both the ALRC³⁰¹ and the Sherman Review³⁰² also recommended that the documents providing information to donors involved in forensic procedures be presented clearly and simply and that interpreters or other assistance be provided to ensure that the information is presented in a language that the donor can understand. The Committee endorses these recommendations.

298 Sherman, *Independent Review of Part 1D* (2003) Recommendation 2.

299 ALRC, *Essentially Yours* (2003) Recommendation 41-2(a), 1014.

300 New South Wales Ombudsman, *Discussion Paper: The Forensic DNA Sampling of Serious Indictable Offenders under Part 7 of the Crimes (Forensic Procedures) Act 2000* (2001) 4.

301 ALRC, *Essentially Yours* (2003) Recommendation 41-2, 1014.

302 Sherman, *Independent Review of Part 1D* (2003) Recommendation 2, 107.

Recommendation 4.6 Prescribed information for donors

That the Crimes Act 1958 (Vic) be amended to provide that all persons who undergo forensic procedures should receive standard prescribed information as to the nature of the procedure, the investigation(s) for which it will be used, and their legal rights, their entitlements under Subdivision 30A and avenues of complaint or appeal, expressed clearly and simply in a language that the donor can understand.

Support and Legal Advice for Donors

In view of the legal consequences of a suspect's decision to consent or refuse to take a forensic procedure, it has been proposed that more support and advice be made available to prospective donors. The NSW Law and Justice Committee recommended, for example, that a 24-hour telephone legal advice hotline be funded to provide legal advice on the question of consent.³⁰³

This Inquiry has recommended measures to recognise the entitlements of all donors to prescribed information and to make the presentation of this information as clear as possible. It recognises, too, that there are many processes involved in criminal investigations which require a person to provide information or physical evidence to police, and that these are already the subject of standard requirements and procedures. The Inquiry concluded that the current statutory provisions entitling a person to obtain legal advice are adequate to cover the particular requirements of persons from whom forensic procedures are sought.

Providing Informed Consent

Victoria Police have developed a standard consent form, VP Form F1 to obtain consent from suspects and another form, VP Form F13, to 'record advice for samples given voluntarily'.³⁰⁴ The suspects' and volunteers' consent forms contains 'bullet point' statements, setting out the information as required under sections 464S and 464ZGB respectively. The donor must acknowledge that he/she has understood the information provided. A volunteer may specify any limited use restrictions to be imposed. The forms then pose the following questions:

Do you understand all this information? [REPLY]

Do you wish to comment on any of this information? [REPLY]

The donor is clearly being given a considerable amount of complex information. Without prior knowledge of the forensic sampling provisions it would be difficult for

303 NSW Standing Committee on Law and Justice, *Review of the Crimes (Forensic Procedures) Act 2000* (2002) Recommendation 27, 111.

304 A third consent form, VP Form F14, is used to record the donor's consent to the taking of a supervised mouth scraping.

a donor expected to make a prompt decision to appreciate the consequences of consenting or refusing to undergo the forensic procedure.³⁰⁵

Some participants in this Inquiry suggested that, in view of the volume of information provided, and the legal consequences of the donor's decision, a more explicit form of consent should be required. The Criminal Bar Association observed:

The current provisions do not go far enough - look at other provisions of s464. [From] an exchange between questioner and respondent a 'simple yes'...you cannot be confident that they understand what is being asked of them.³⁰⁶

The Association recommended that, in line with the provisions applying to the taking of fingerprints:

the recipient of the request should be required to respond in language which indicates that the information was understood and that the recipient was in a position to make a choice.³⁰⁷

A recent New South Wales case, *Kerr v Commissioner for Police*,³⁰⁸ considered the meaning of informed consent, following a challenge to the validity of a procedure conducted on a suspect in a murder investigation. Of relevance here is the way in which the consent was sought and given. The transcript of interview revealed palpable confusion on the part of the interviewee. The request for consent, preceded by a reading of the relevant documents, involved the following exchange:

Do you consent to the procedure?

What did the other sheet of paper say about it?

This, are you referring to this sheet of paper?

No, there's another ...

That's an order made by a magistrate, that if you don't consent to the procedure carried out it will be carried out anyway.

Well in that case then, I consent.

You do?

Yeah.³⁰⁹

305 S 464S(3)(b) stipulates that if a suspect fails to reach a decision within 24 hours after the information required under the consent provisions has been provided, consent is deemed to have been refused.

306 R Punshon SC, *Minutes of Evidence*, 23 July 2002, 72.

307 Criminal Bar Association, Submission 13, 4. See also the evidence of P Chadwick, *Minutes of Evidence*, 22 July 2002, 84.

308 *Kerr v Commissioner of Police and Ors* [2001] NSWSC 637, 27 July 2001, Studdert J.

309 *Ibid* para 17.

Given the significance of consent, and the volume and complexity of the information that the donor is to receive, the Inquiry concluded that an unequivocal indication of the donor's consent, indicating that the information has been understood, is necessary. The recently amended South Australian provisions require that a persons consents if he/she:

- (a) expressly consents to the procedure orally or in writing: or
- (b) gives some other unequivocal indication of consent.³¹⁰

The Committee believes that this provision would meet the concerns raised in this inquiry. The Committee therefore recommends that the *Crimes Act* be amended to require an express or unequivocal indication of consent.

Recommendation 4.7 Unequivocal indication of donor's consent

That the Crimes Act 1958 (Vic) be amended to require an express or unequivocal indication of the donor's consent.

Access to Personal Material and Information

The Information Privacy Principles recognise an individual's right of access to records of their personal information. The Victorian legislation already provides for suspects to have access to the forensic report,³¹¹ and forensic material obtained from the crime scene or victim, if sufficient is available for analysis.³¹² The Inquiry is also recommending measures to ensure that the forensic reports and any relevant laboratory materials are available in time to allow pre-trial procedures for the identification of agreed and disputed facts.

Victoria Legal Aid proposed that donors be given a reference sample, as in the case of donors providing blood samples in relation to drink driving charges.³¹³ The Sherman Review also considered whether a donor should have an entitlement to a portion of their own reference sample, provided either at the time of collection or kept for future reference at the forensic laboratory. That review concluded that a donor has a right to part of the sample collected, if sufficient is available, and if not:

That a person giving a sample be entitled to receive a further sample for their own use at the same time as the giving of the primary sample, the second sample to be packaged and identified in the same manner as the primary sample.³¹⁴

While a donor's access to the forensic report and to the crime scene evidence depends on a statutory requirement, the donor's access to his/her own DNA is assured. The

310 *Criminal Law (Forensic Procedures) Act 1998 (SA)* s 13C(2).

311 S 464ZD.

312 Ss 464ZC(1) and (2).

313 Victoria Legal Aid, Submission 15, 2.

314 Sherman, *Independent Review of Part 1D* (2003) Recommendation 4, 41.

Inquiry takes the view that no statutory provision is needed to enable a donor to obtain another DNA reference sample for re-testing at any time.

PRIVACY CONSIDERATIONS IN FORENSIC PROCEDURES

The DNA sampling provisions provide in some detail for the actual conduct of forensic procedures. This section focuses on the principles and rules which apply or, in the Committee's view, should apply to the conduct of all forensic procedures. These principles and rules relate to not only the donors' rights, entitlements and obligations, but also to the powers available to law enforcement agencies to ensure that the procedure can be conducted smoothly, reliably and validly to produce the evidence sought.

From the law enforcement perspective, the validity and utility of the procedure require accurate identification of the donor, the capacity to ensure the donor's compliance, and adherence to medical and procedural protocols for the taking of the sample. The Inquiry reviewed the adequacy of the existing provisions to achieve these goals and recommended some legislative reform in this area. This section therefore considers how the current provisions reconcile the law enforcement objectives of the procedure with recognition of the donor's physical privacy interests.

Defining Intimate and Non-intimate Procedures

Under the Victorian legislation, forensic procedures are classified as either 'intimate' or 'non-intimate'. This distinction is fundamental to the forensic procedures provisions, as it is used to determine what safeguards apply to the conduct of the procedure. As noted in Chapter 2, *non-intimate procedures* involve taking hairs (except pubic), material collected from under a finger- or toe-nail, and a swab, washing or sample taken from a non-intimate part of the body. Non-intimate procedures can be undertaken with the consent of the donor. Police members may assist with the conduct of non-intimate procedures.³¹⁵

Intimate samples include a blood sample, saliva, a buccal swab (a scraping from the inside of the mouth), or a sample of pubic hair and samples from the genitalia or anal region of males and females or the breast of a female. Section 464Z(3) requires medical personnel to carry out intimate procedures and authorises police officers, as well as medical personnel, to conduct non-intimate procedures.³¹⁶

315 Ss 464Z(1) and (1A).

316 Part 1D of the *Crimes Act 1914 (Cth)* requires an intimate procedure to be authorised by order of a magistrate (Division 5) or by consent (Division 3). The *Criminal Investigation (Identifying People) Act 2002 (WA)* distinguishes between intimate and non-intimate procedures, but authorises a senior police officer to order an intimate procedure. At the time of writing s 296(a) of the *Police Powers and Responsibilities Act 2000 (Qld)* only permitted non-intimate forensic procedures - hair pulling or buccal swabs.

While the buccal swab continues to be defined as an intimate procedure, the 2002 amendments to the Victorian legislation permit a donor to administer the buccal swab him/herself, under the supervision of a police member. The effect of this amendment is to enable a buccal swab to be taken without a court order. It can therefore be used to take the samples of suspects and volunteers who consent to a forensic procedure.

Most Australian jurisdictions, including the ACT, Western Australia, Tasmania and the Northern Territory, define the buccal swab as a non-intimate procedure.³¹⁷ South Australia, which classifies procedures as intrusive or non-intrusive, as well as intimate/non-intimate, defines the buccal swab as a non-intrusive procedure,³¹⁸ and under New South Wales law, the buccal swab is in a special category.³¹⁹ For all relevant purposes, the self-administered buccal swab is now treated as a non-intimate procedure. The Inquiry takes the view that a buccal swab should be re-defined as a non-intimate procedure when self-administered, but continue to be defined as an intimate procedure when it is not self-administered.

Recommendation 4.8 Self-administered buccal swab

That section 464 of the Crimes Act 1958 (Vic) be amended to provide that the buccal swab, when self-administered, is a non-intimate procedure.

Choosing the Forensic Procedure

The choice of forensic procedure is determined initially by the forensic purpose of the sample. Section 464T contemplates two main scenarios:

- obtaining forensic material from the suspect where there is a belief that forensic material (eg DNA from saliva, fingernails, blood, etc) belonging to a victim or missing person may be present on the body or clothing of the suspect (an ‘investigative’ sample); or³²⁰
- the sampling of a suspect to compare the suspect’s DNA profile with the profile of DNA obtained from the crime scene or victim (a ‘reference’ sample).³²¹

For the first purpose – obtaining an investigative sample – the procedure would be nominated by the police member to obtain the relevant evidence. For the second

317 *The Police Administration Act (NT)* s 4 provides definitions of intimate and non-intimate procedures that are consistent with the Model Bill provisions. S 145 governs the conduct of intimate procedures, while ss 145A, 145B and 146 govern the conduct of non-intimate procedures. S 95B of the *Prisons (Correctional Services) Act 1998 (NT)* only provides for the use of buccal swabs to sample prisoners.

318 *The Criminal Law (Forensic Procedures) Act 1998 (SA)* s 3(1) distinguishes between ‘intrusive and non-intrusive’ procedures, and requires a court order for intrusive procedures.

319 *The Crimes (Forensic Procedures) Act 2000 (NSW)* requires a court order to authorise intimate forensic procedures.

320 S 464T(3)(c)(ii).

321 S 464T(3)(c)(i).

purpose – obtaining a reference sample – there may be discretion for the donor to nominate a procedure.

The forensic procedure provisions do not specify, in general terms, who nominates the procedure to be conducted. When a court order is sought, the applicant specifies the type of procedure required and the court grants the order at its discretion. Section 464T(2)(c) requires that applications for court orders in relation to relevant suspects ‘specify the type of compulsory procedure sought to be conducted’. Section 464ZF(2) (in relation to offenders) provides that a member of the police force:

may apply to the court for an order directing the person to undergo a forensic procedure for the taking of a sample from any part of the body and the court may make an order accordingly.

Detective Inspector Cowlshaw indicated that in some cases, however, the court specified the type of procedure that was ordered.

If it was specific, eg hair, then no choice can be given. If it says ‘Intimate’ then [Victoria Police] Force policy was to take blood. ... If the order allows us to take other samples, we will. But unfortunately, a lot of the judges and magistrates will actually write on the order what sample you can take.³²²

Under the consensual sampling provisions that apply to volunteers³²³ and suspects³²⁴, the donor has no explicit right to nominate the procedure; the police member has the discretion to propose a self-administered buccal swab if he/she ‘considers it appropriate for the person to do so’. Section 464Z(3A) provides:

Nothing in sub-section (3) prevents a person from whom a scraping from the mouth is to be taken from taking the scraping himself or herself under the supervision of a member of the police force authorised in accordance with sub-section (1A) if:

- (a) the [police] member considers it appropriate for the person to do so; and
- (b) the person consents to taking the scraping and the consent is recorded ...

Victoria Police indicated that, prior to the 2002 amendments, the preferred method of sampling had been the blood sample, because it was thought to be the most reliable method of obtaining an adequate sample.

We originally took blood and were the only jurisdiction in Australia to do that. The reason we did that is that blood gives a 100 per cent result. ... With, say, saliva, where you remove cells from inside your mouth, it is around about ... 98 out of 100 that you will get that are okay.³²⁵

Detective Inspector Cowlshaw indicated, however, that if the person consented to the forensic procedure, the preferred method would be the self-administered buccal swab.

322 Detective Inspector D Cowlshaw, *Minutes of Evidence*, 22 July 2002, 13.

323 S 464ZGB.

324 S 464S.

325 Detective Inspector D Cowlshaw, *Minutes of Evidence*, 22 July 2002, 13.

I think as an operational policeman I would much prefer self-administration, for health and safety purposes, because previously we have had to use a medical practitioner and I suggest that under current legislation if you did it that way you would need a nurse or a doctor.³²⁶

The Committee considered whether there is a forensic or law enforcement reason to justify the procedure being determined by the police member rather than the donor, especially when the self-administered buccal swab is a convenient, relatively painless and un-intrusive alternative to hair pulling or a blood sample.

The ALRC considered this issue in its recent inquiry and concluded that a consistent approach to the nomination of the procedure should be adopted, regardless of whether it is authorised by a court order, a police order or the consent of the donor. It recommended that:

once the appropriate authority has made an order for a compulsory forensic procedure, the person who is the subject of the order should be able to choose the method by which the sample is taken.³²⁷

The Committee supports the option of supervised self-administration wherever possible, and encourages the legislature to make provision for the generalised use of this procedure in DNA sampling. The Committee recommends therefore that the *Crimes Act 1958 (Vic)* be amended to provide that a person from whom a DNA 'reference' sample is sought has the right to choose the method by which the DNA sample is taken..

Recommendation 4.9 Donor's right to nominate type of procedure used

That the Crimes Act 1958 (Vic) be amended to provide that a person from whom a DNA 'reference' sample is sought has the right to choose the method by which the DNA sample is taken.

Intimate Procedures

Section 464Z(6)(b) requires generally that the forensic procedure or physical examination be conducted 'in circumstances affording reasonable privacy to the person from whom the sample is to be taken or who is to be examined'. The conduct of an intimate procedure requires a court order and is regulated by additional provisions intended to minimise its intrusiveness and ensure strict compliance with the order. The donor is entitled to nominate the medical practitioner, nurse or dentist of his/her choice to conduct or be present at the procedure,³²⁸ while the police member

326 Ibid.

327 ALRC, *Essentially Yours* (2003) Recommendation 41-1, 1012.

328 S 464ZA(3) with respect to children and s 464ZA(4) with respect to adults.

and any person assisting the police member should be of the same sex as the person on which the procedure is being conducted.³²⁹

Video-recording Intimate Procedures

All court-ordered procedures, other than the buccal swab if self-administered, must be video-recorded if possible, or ‘witnessed by an independent person’. Section 464ZA(4) provides that:

The taking of an intimate sample (other than a blood sample or a scrape from a person’s mouth taken by that person) ...

- (a) must be video recorded if practicable and if the person on whom the procedure is conducted consents; ...

Section 464ZA(5) applies the same requirement to all other court-ordered procedures. Associate Professor David Wells of the Victorian Institute for Forensic Medicine explained the practical difficulties experienced under the current provisions.

There is some confusion in the interpretation of this section. For instance if a Court Order for DNA is obtained and the suspect declines to take their own mouth swab, then the swab must be taken by a doctor or nurse and it must be video recorded or witnessed by an “independent” medical practitioner or nurse. Yet if it was a blood sample being taken, it neither has to be video-recorded nor witnessed by an independent medical practitioner. This seems a somewhat anomalous situation.³³⁰

However, the taking of a blood sample is, in the Committee’s view, appropriately defined as an intimate procedure under the current legislation. The taking of a blood sample is the preferred option where the donor’s compliance with the procedure is not assured. In these circumstances, especially where the procedure has been ordered by the court, it is desirable that a video-recording of the procedure be taken.

Recommendation 4.10 Video-recording of the taking of blood samples

That the Crimes Act 1958 (Vic) be amended to require forensic procedures involving the taking of blood samples to be video-recorded.

The Role of Medical Personnel

The collection of non-intimate samples can be supervised by police members, but the collection of intimate samples must be undertaken or supervised by a medical practitioner. Medical personnel from the Victorian Institute for Forensic Medicine (VIFM) collect samples from victims, crime scenes, deceased persons, and suspects.

A person who is undergoing an intimate forensic procedure may request that a medical practitioner of his/her choice attend or carry out the procedure. However, if

329 S 464ZA(6)(ab).

330 Victorian Institute of Forensic Medicine, Submission 12, 1.

the chosen practitioner carries out the procedure, an ‘independent’ medical practitioner must also attend.³³¹ VIFM personnel are asked to attend procedures as the independent medical practitioner.

Dr Wells noted that the term ‘independent’ medical practitioner is not defined and alerted the Inquiry to a second, practical difficulty involved in complying with this provision. VIFM submitted that ‘arranging for a suspect, police and two doctors to be present at the same place and time has proven to be largely impossible’.³³² Victoria Police agreed, indicating that in non-metropolitan areas, especially after business hours, it was difficult to arrange for two practitioners to attend. It proposed that exceptions to this requirement be permitted:

Legislation should permit exceptions to the requirement that an independent medical practitioner, nurse or dentist be present for each sampling occasion.³³³

However, the Privacy Commissioner favoured retaining this requirement. The Privacy Commissioner considered, on balance that:

The difficulties that may be encountered in country areas of ensuring the presence of an independent medical practitioner, nurse or dentist are not sufficient to outweigh the importance of having the safeguard. In country Victoria, distances are not impossibly great nor, in this context, is time so critical that the procedure cannot await the presence of an appropriately qualified independent witness.³³⁴

However, the Commissioner conceded that:

In extraordinary circumstances, an independent witness without the relevant qualifications may suffice, such as a pharmacist or school principal. The presence of an independent witness is important to accountability and confidence.³³⁵

The Law Institute indicated that:

The taking of forensic samples, including mouth swabs, is most appropriately conducted by a doctor or nurse or at least in their presence. Sampling can be an invasive process. The independence of forensic material is essential and it is inappropriate for samples to be taken by either party in an adversarial system. For the same reason, forensic procedures should, where possible, be conducted at an independent venue such as a doctor’s surgery.³³⁶

The Committee appreciates the value of an independent medical witness to an intimate procedure, but also recognises the practical difficulties of arranging for a second practitioner to be present in some circumstances. The Committee believes there is a good case for modifying this requirement where compliance is impracticable. The Inquiry therefore recommends that the *Crimes Act* be amended to

331 S 464ZA(4)(b).

332 Victorian Institute of Forensic Medicine, Submission 12, 1.

333 Victorian Police, Submission 18, Recommendation 13, 7-8.

334 Privacy Commissioner, Submission 18S, 12.

335 Ibid.

336 Law Institute of Victoria, Submission 21, 3.

enable the requirement for an independent medical practitioner to attend when the donor's chosen practitioner will carry out the procedure to be waived in exceptional circumstances.

Recommendation 4.11 Attendance of independent practitioner

That the Crimes Act 1958 (Vic) be amended to enable the requirement for an independent medical practitioner to attend when the donor's chosen practitioner will carry out the procedure, to be waived in exceptional circumstances.

General Privacy Considerations

Subdivision 30A requires that the forensic procedure or physical examination be conducted 'in circumstances affording reasonable privacy'³³⁷ to the person involved. The Victorian provisions are based on the Model Bill, developed before the enactment of the national privacy laws. Some jurisdictions which have recently introduced or overhauled their forensic procedures laws have more comprehensive privacy guidelines for the conduct of forensic procedures than the current Victorian provisions.

The Commonwealth legislation seems to make the clearest provision for the general rules which should apply to the conduct of all forensic procedures. These rules protect the donor's personal privacy and regulate the intrusiveness of the procedure, by limiting the number and gender of people present, the amount of clothing to be removed, and the opportunity for visual inspection. Section 23XI sets out five 'general rules' which require that a forensic procedure:

- (a) must be carried out in circumstances affording reasonable privacy to the suspect; and
- (b) except as permitted..., must not be carried out in the presence or view of a person who is of the opposite sex to the suspect; and
- (c) must not be carried out in the presence or view of a person whose presence is not necessary for the purposes of the forensic procedure or required or permitted by another provision of this Part; and
- (d) must not involve the removal of more clothing than is necessary for the carrying out of the procedure; and
- (e) must not involve more visual inspection than is necessary for the carrying out of the procedure.

The Inquiry considers that the Commonwealth provisions provide more comprehensive recognition of the donor's physical privacy interests, and clear guidance for those involved in the conduct of forensic procedures. The Committee

337 S 464Z(6)(b).

therefore recommends that Subdivision 30A incorporate those general privacy guidelines, along the lines of section 23XI of the *Crimes Act 1914 (Cth)* for the conduct of forensic procedures, which are not already included in Subdivision 30A.

Recommendation 4.12 General rules for the conduct of forensic procedures

That Subdivision 30A of the Crimes Act 1958 (Vic) be amended to include the 'general rules' for the conduct of a forensic procedure, as set out in Section 23XI of the Crimes Act 1914 (Cth), not already included in Subdivision 30A:

'A forensic procedure:

- (a) must be carried out in circumstances affording reasonable privacy to the suspect; and***
- (b) except as permitted..., must not be carried out in the presence or view of a person who is of the opposite sex to the suspect; and***
- (c) must not be carried out in the presence or view of a person whose presence is not necessary for the purposes of the forensic procedure or required or permitted by another provision of this Part; and***
- (d) must not involve the removal of more clothing than is necessary for the carrying out of the procedure; and***
- (e) must not involve more visual inspection than is necessary for the carrying out of the procedure.'***

ENFORCEMENT ISSUES

The provisions for the conduct of forensic procedures recognise not only the privacy interests of donors, but also the responsibilities of police to enforce, if necessary, orders for the taking of DNA samples. Four aspects of the forensic procedure which are currently not regulated under these provisions were brought to the Inquiry's attention:

- the means available to confirm the donor's identity;
- the need, on occasion, for a second sample to be taken;
- the need to enforce the conduct of the procedure, where the behaviour of the donor or a third party hinders this;
- the desirability of enforcing orders made in respect of persons who have since died.

The Inquiry considered whether powers were already available to police under other provisions of the *Crimes Act* or whether special provision was warranted under Subdivision 30A.

Confirming the Donor's Identity

Victoria Police proposed that it be granted the power to take fingerprints at the time of a forensic procedure. It recommended:

Legislation should authorise the taking of fingerprints on every occasion that a DNA sample is obtained to confirm the identity of the owner.³³⁸

Sections 464K-Q of the *Crimes Act* set out the provisions relating to the taking of fingerprints. These provisions differ in significant respects from the provisions governing the taking of DNA samples, with police having generally wider powers to take fingerprints than DNA samples, but more restricted powers to retain fingerprints.³³⁹

Throughout this Report, parallels are drawn between the forensic sampling and the fingerprinting provisions, to provide a point of comparison in evaluating the current forensic sampling provisions. There are clear points of convergence and divergence in the way that fingerprinting and DNA sampling are undertaken and used. While the Inquiry has taken into account the provisions already in place for the collection and evaluating of other forms of forensic evidence, including fingerprints, it is beyond the scope of this Inquiry to consider whether other regimes should be aligned to the forensic sampling provisions.

Victoria Police also recommended that a new offence be created to discourage donors from giving false personal details to police at the time of the procedure.

Legislation should create an offence for providing a false name or particulars when providing a forensic sample.³⁴⁰

Section 456AA of the *Crimes Act* imposes an obligation on a person to state his/her name and address when asked, and creates a summary offence punishable by a maximum fine of five penalty units (up to \$500) for a refusal or failure to comply. The Committee believes that section 456AA adequately answers the need identified by Victoria Police.

Obtaining a Second Reference Sample

Under the current provisions, there are two circumstances in which police may require a second sample from a donor. The first is when the original sample is inadequate and a full DNA profile cannot be obtained; the second is when a match is registered with a crime scene profile on the database and a suspect is identified for further

338 Victoria Police, Submission 18, Recommendation 12, 7.

339 Fingerprints can be obtained from persons suspected, charged or summonsed for any indictable or summary offence referred to in Schedule 7, but fingerprinting would not be permitted in the circumstances where DNA samples can be obtained from volunteers and Schedule 8 offenders.

340 Victoria Police, Submission 18, Recommendation 20, 9.

investigation. Victoria Police representatives construe the current legislation as preventing police from taking a second sample in these circumstances, and have proposed that the legislation be amended to make it clear that a second sample can be taken in both these circumstances. Victoria Police recommended:

legislation should provide for a further sample if the initial sample is corrupted; [and] legislation should permit the taking of a new evidentiary sample when a reference sample is already stored on the DNA database.³⁴¹

Inadequate Reference Samples

The police preference for taking a blood sample, even when a buccal swab or other non-intimate technique was available, reportedly arose because: ‘there was no legal power to get a second sample if the first did not produce a profile’.³⁴² Clearly, it is necessary for police to be able to arrange the taking of a second sample, if the first sample is not adequate. It is not clear, however, how the current provisions would preclude this.

Evidentiary Samples

Victoria Police also indicated that it is current practice to obtain an ‘evidentiary sample’ if, following a database detection, a person is linked to an unsolved crime scene. The second sample is taken and analysed to confirm the results of the database match. Representatives of Victoria Police informed the Inquiry that:

when a convicted offender or suspect matches to a crime on the DNA database, an application is made for a relevant suspect sample. This is done to ensure identity and because database samples are taken for a reference sample only.³⁴³

The Inquiry notes that the policy of obtaining a second evidentiary sample is being implemented under the current provisions. A reference sample can be obtained for inclusion on the database from Schedule 8 offenders (pursuant to section 464ZF), or following the grant of retention orders.

The Inquiry considered whether it would be necessary or desirable to reinforce the current practice by creating a new statutory power or process. While an evidentiary sample may be required in some cases, the need might not arise in others. One of the benefits of a database is its capacity to reduce duplication, by maintaining an accessible, searchable record of the previous analysis. The practice of routinely seeking an evidentiary sample will result in the duplicate sampling of suspects and offenders, and could create an administrative burden in recording, analysing and then destroying the duplicate sample.

341 Ibid 5.

342 Victoria Police, Submission 18S2, 2-3.

343 Ibid 3.

Reports of the administration of the English forensic sampling regime indicated difficulties faced by the forensic laboratory as a result of duplicate sampling. Routine requests for evidentiary samples meant that police records of the forensic procedures undertaken were difficult to maintain, and laboratory time was fruitlessly spent analysing samples that had already been profiled for other investigations.³⁴⁴

In view of the increasing demand for forensic services for active investigations and the preparation of forensic reports for ongoing criminal proceedings, the practice of routinely requiring a second, evidentiary sample might merit review. A selective approach, where evidentiary samples are sought only if the DNA detection is challenged, might be preferable.

The Inquiry could not identify any provisions which prevented the taking of a second sample in the circumstances outlined by Victoria Police and therefore concluded that this samples could be obtained, where necessary, without further legislative action.

However, in view of the Committee's recommendation that the *Crimes Act* be amended to require a DNA sample to be destroyed once the profile has been obtained, the Committee considers it appropriate to specify that a second non-intimate sample can be obtained, provided that the first sample is destroyed and that the same conditions apply to the retention, destruction and use of the second sample and profile as to the first.

4.13 Obtaining a second reference sample

That the Crimes Act 1958 (Vic) be amended to provide that where:

(i) it is shown that the first sample was inadequate or insufficient to obtain a profile; and

(ii) reasons are given for the inadequacy of the sample;

the taking of a second non-intimate reference sample can be authorised on the conditions that:

(i) the first sample is destroyed and evidence provided to this effect;

(ii) the same conditions as to the retention, destruction and use apply to the second sample and profile as to the first.

Obstructing the Conduct of a Forensic Procedure

Victoria Police has proposed that the legislation be amended to create the offence of hindering the conduct of a forensic procedure, whether by the person undergoing the procedure or a third party.

344 United Kingdom, Home Office, Alaster Smith, *DNA Expansion Program: Evaluation Report Phase One (April 2000-March 2001)* (2001).

Legislation should provide an offence for a third party who seeks to hinder or obstruct the taking of a sample.³⁴⁵

Section 23XWA of the Commonwealth legislation, following the Model Bill, provides penalties for hindering the conduct of forensic procedure.

Where DNA sampling is conducted with the donor's consent, issues of compliance are unlikely to arise. Where a procedure is authorised by court order, the order permits the use of reasonable force to obtain the required sample. The Inquiry was informed that the use of force has rarely been required in the Victorian DNA sampling program. As noted in Chapter 5, reasonable force was required in only four instances over the past five years.

The proposed provision would also cover the conduct of a third party, as well as the donor. Subdivision 30A permits or requires other persons, such as a parent or guardian, an independent person, or a medical or dental practitioner nominated by the donor, to attend the procedure. The Committee found it difficult to envisage a situation in which a person whose presence was required for the conduct of the procedure could also be liable for obstructing this procedure.

An alternative approach, adopted in South Australia,³⁴⁶ is to provide that if a person obstructs or resists the conduct of a forensic procedure, evidence of the person's obstruction or resistance is admissible 'subject to the ordinary rules of evidence' against that person in criminal proceedings. This approach would not be consistent, however, with the Committee's proposals to limit the evidentiary use that can be made of the donor's response to a request for a DNA sample.

The Committee would be concerned if police did not have sufficient powers to enforce orders for forensic procedures. However, the Committee notes that resisting, obstructing, hindering or delaying a member of the police, or any person lawfully assisting a police member in the execution of his/her duty is already an offence under section 52 of the *Summary Offences Act 1966 (Vic)*. Likewise, it is an offence to incite or encourage another person to resist or obstruct a police member.

On balance, the Committee concluded that police members have sufficient powers under existing provisions to enforce the conduct of forensic procedures where necessary.

The Forensic Sampling of Deceased Persons

Victoria Police proposed to this Inquiry that 'provision be made under Victorian legislation for forensic procedures to be conducted on deceased persons, where there

345 Victoria Police, Submission 18, Recommendation 21, 10.

346 *Criminal Law (Forensic Procedures) Act 1998 (SA)* s 45.

is an outstanding order against them for such a procedure'. Outstanding orders could relate to a Schedule 8 finding of guilt or to a relevant suspect investigation.

The effect of this proposal would be to authorise DNA sampling of a deceased person for investigation of any indictable offence, or for the inclusion of the deceased's DNA profile on the forensic database. Such a proposal would affect the existing powers of the Coroner and the operation of the privacy and health information regimes.

Existing Powers of the Coroner

Under the *Coroners Act 1985 (Vic)* the Coroner has the power to investigate a death and, associated with this power, the power to order the exhumation of a body if the Coroner reasonably believes that it is important for the investigation of a death.³⁴⁷ The current law therefore already permits the exhumation of a deceased person for the purposes of a coronial inquiry into the death of that person or another person.

A recent coronial inquiry in New South Wales illustrated the use of coronial powers and DNA profiling for this purpose. The investigation into the death in 1984 of Stacey Lee Kirk found that the victim had been strangled and suffocated by Ian Raymond Sargent, now also deceased. Sargent was killed in a car crash in 2002. Blood taken from his body after his death was analysed and matched against a profile of seminal fluid from the victim.³⁴⁸

Coronial powers can also be used to access and analyse biological samples containing DNA in relation to a coronial inquiry. Recent media reports have confirmed that DNA contained in Guthrie samples have, on occasion, been used in coronial investigations.³⁴⁹

However, the Coroner does not have the power to exhume a body for the investigation of a criminal offence not involving a death, in which the deceased may be a suspect. As criminal proceedings cannot be brought against a deceased person, the conduct of a forensic procedure in these circumstances could have no legal outcome. Even if DNA evidence revealed a match between the profile of the deceased suspect and the crime scene, the existence of inculpatory DNA evidence would not necessarily 'prove' the guilt of the deceased. At most, it could connect the deceased to the crime scene, but a DNA match in itself is unlikely to be conclusive evidence of the guilt of the deceased.

The conclusion of a criminal investigation is an important part of recovery for the victim and his/her family, even if a definitive finding of guilt cannot be obtained. The Coroner observed:

347 *Coroners Act 1985 (Vic)* s 30(1).

348 '19-year murder mystery solved', *The Australian*, 6 August 2003, http://www.theaustraliannews.com.au/common/story_page/0,5744,6873730%5E1702.

349 Kelly Ryan, Jeremy Kelly and Shelley Hodgson, 'Alarm over DNA secrets', *The Australian*, 27 June 2003, http://www.theaustralian.new.com.au/common/story_page/0,5744,6660123%5E421,

The prospects of the DNA belonging to a person other than Sargent are fewer than one in 10 billion. Sargent is now dead and it is not my function to try him in absentia. I simply have to be satisfied as to manner and cause of death of Stacey Kirk, to the balance of probabilities – and I am comfortably satisfied.³⁵⁰

Relatives of the deceased suspect also have an interest in the conduct and outcome of the inquiry. In the Kirk inquiry, consent for the forensic procedure was reportedly provided by Sargent's de facto partner. It is arguable, however, that since the DNA sample obtained from a donor contains information relevant to that donor's blood relatives their consent to the forensic procedure should be sought.

Amendments enacted to the Western Australian provisions in 2002 provide the Coroner with the power to authorise 'the taking of identifying particulars' from deceased people for purposes other than the investigation of reportable deaths.³⁵¹

Conclusions

While the Committee recognises the interests of victims and their families in the resolution of unsolved crimes, the Committee is also aware of the competing priorities for DNA sampling. Bearing in mind that the Coroner already has the power to authorise DNA profiling if required for coronial inquiries, and taking into account also the implications for other law enforcement activities, the Committee believes that no legislative action is necessary at this time.

350 Ibid.

351 *Criminal Investigation (Identifying People) Act 2002 (WA)* s 21.

**PART C:
THE SCOPE OF THE CURRENT
REGIME**

5. OFFENDERS

INTRODUCTION TO THE ISSUES

Overview of the Schedule 8 Regime

Provisions permitting the forensic sampling of *suspects* were first enacted in 1989, but it was not until 1997 that amendments were enacted to permit the forensic sampling of *offenders*.³⁵² The term ‘offender’ denotes a person found guilty of a ‘forensic sample offence’ as listed in Schedule 8 to the *Crimes Act 1958 (Vic)*.³⁵³ Initially Schedule 8 contained serious offences against the person and some serious property offences. Over the years the Schedule has been expanded. Recent additions include hoax and terrorism offences, added in the aftermath of September 11, as well as drug and drug trafficking offences, added in June 2003.³⁵⁴ Now Schedule 8 includes:

- sexual offences;
- serious offences against the person – murder, manslaughter, rape, aggravated assault, kidnapping;
- property crimes, such as burglary, robbery and housebreaking;
- arson; and
- various drug trafficking and cultivation offences.

Indictable property offences that are not within the definition of forensic sample offences include theft, and threats to destroy or damage property. Two indictable offences against the person not included in Schedule 8 are causing injury either intentionally or recklessly.

An application can be made for an order requiring an offender to undergo a forensic procedure on or after a finding of guilt for a Schedule 8 offence. The order is not granted automatically. Under section 464ZF(8) a court has the discretion to grant or refuse an application; it must be satisfied that, in all the circumstances, the making of

352 The *Crimes Amendment Act 1997 (Vic)* introduced section 464ZF, which provided for the sampling of offenders.

353 Schedule 8 is reproduced at Appendix 4.

354 These were added by the *Criminal Justice Legislation (Miscellaneous Amendments) Act 2002 (Vic)*.

the order is justified, and the legislation provides some guidance as to the factors which the court should consider. Orders can be granted prospectively³⁵⁵ in relation to proceedings concluded after the commencement of section 464ZF in July 1998, and retrospectively,³⁵⁶ where a finding of guilt was entered in relation to a Schedule 8 offender before July 1998 and that offender is in custody.

The court order – including the reasons for granting the order and a statement indicating that reasonable force may be used – must be served on the offender. In the case of a child offender, notice of the application must be given to the child and his/her parent or guardian. However, there is no requirement for the offender to be present at the hearing of the Schedule 8 application.

In determining applications made prospectively the offender is present in court to receive the jury's verdict. The Prosecutor will generally make an application for an order for a forensic procedure once the finding of guilt has been entered, and the application is heard and determined in the presence of the offender.³⁵⁷ It is Victoria Police policy to seek an order for a forensic procedure in every case where a Schedule 8 offence is proven.³⁵⁸

In determining applications made retrospectively during the 'back-capture' – ie for the sampling of offenders already in custody on the basis of a prior finding of guilt – the practice developed of magistrates granting orders *ex parte* and in chambers, with the custodial offender notified of the order when arrangements were made to carry out the forensic procedure. In December 2000, following a challenge mounted on behalf of three offenders whose samples had been obtained in this way,³⁵⁹ Gillard J of the Victorian Supreme Court declared these orders invalid.³⁶⁰ The *Crimes (Validation of Orders) Act 2001 (Vic)* retrospectively validated the *ex parte* orders made by magistrates in chambers.

Implementation of the Offender Sampling Provisions

Stage 1: Offenders in Custody (the 'back-capture')

The initiative to undertake the forensic sampling of offenders in custody with convictions for Schedule 8 offences comprised two parts:

- the back-capture – the sampling of offenders pursuant to s464ZF(3) who had been convicted of a Schedule 8 offence *prior to* 1 July 1998; and

355 S 464ZF(2).

356 S 464ZF(3).

357 Victoria Police, Submission 18S5.

358 Ibid.

359 *Lednar and Ors v Magistrates Court and Anor*, [2000] VSC 549, 12 December 2000, Gillard J.

360 Ibid.

- the sampling of offenders under s464ZF(2) who were found guilty of Schedule 8 offences *after* the introduction of the offender sampling regime.

The back-capture was so called because it involved implementing a retrospective provision to capture the profiles of Schedule 8 offenders who were in Victorian prisons (though not necessarily for those offences) in July 1998 when s464ZF came into effect.

For Victoria Police the ‘back-capture’ – the sampling of Schedule 8 offenders already in custody – was a high priority. Victoria Police established a Forensic Procedures Implementation Team (FPIT) to co-ordinate the back-capture over the period July 1998-June 2002. Table 5.1 indicates the number of orders for Schedule 8 procedures granted in the Magistrates’ Court. The number rose dramatically between 1998/99 and 1999/2000.

Table 5.1 Orders for Forensic Procedures (s 464ZF): 1998/99-2001/02

Section 464ZF (Offenders)	1998/99	1999/00	2000/01	2001/02
Number of orders for forensic procedures (Magistrates’ Court of Victoria)	711	2,102	2,545	2,427

Source: Victoria, Department of Justice, *Orders for Forensic Procedures, 1997/98-2001/02*, September 2002.³⁶¹

Since July 1998 over 7000 orders have been granted and over 3500 orders executed on offenders in Victorian prisons. By September 2002 it was reported that forensic DNA samples had been collected from 3775 prisoners in jails.³⁶²

Table 5.2 shows the total number of Schedule 8 orders sought, refused, granted and executed by Victoria Police since February 2000. Approximately three-quarters of the orders received have been executed. Most of these orders would have been executed in Victorian prisons, as the provision for warrants to execute orders against non-custodial offenders was only introduced in 2002. The number of applications refused –1800 – should not be interpreted to indicate that these applications were never granted. It is possible for an application to be re-submitted and re-considered when it has been initially rejected. The reasons behind a relatively low initial success rate for Schedule 8 applications are considered later in this chapter.

361 Victoria, Department of Justice, 18 October 2002. Orders for forensic procedure were available on Courtlink, the data management system, from 20 August 1998 and are reported here from September 1998. This analysis assumes that there will be one order made per defendant.

362 Victoria Police, Submission 18S4.

Table 5.2 Orders for Forensic Procedures (s 464ZF): Offenders, Orders Received, Pending, Refused and Executed, 1 February 2000–24 October 2003

Orders received, pending, refused and executed	Total for 2002/2003
464ZF(3) Orders to be voided	1067
464ZF(3) Orders recorded for Week	1
464ZF(2) Orders recorded for Week	144
464ZF(2A) Orders recorded for Week	461
TOTAL ORDERS RECEIVED	606
Orders Executed (464 Samples Taken)	0
Prison Testing	452
Samples taken at Regions	272
TOTAL ORDERS EXECUTED	724
464ZF(3) Applications before Melbourne Magistrates' Court awaiting consideration	0
464ZF Application Refusals	363
Samples taken - Force Used	3

Source: Victoria Police, Submission 18S5.

Stage 2: Non-custodial Offenders

Stage 2 – the sampling of offenders not in custody – began on 2 September 2002.³⁶³ On this date Victoria Police announced the commencement of an initiative to enforce court orders requiring non-custodial Schedule 8 offenders to undergo a forensic procedure. Offenders who are not in custody include those who have been released on parole, or after serving a term of imprisonment, as well as those who received non-custodial or suspended sentences. Victoria is one of the few Australian jurisdictions to permit the sampling of non-custodial offenders.³⁶⁴

363 John Silvester, 'Criminals forced to give DNA samples', *The Age*, 2 September 2002, 1, <http://newscentre.../ProfileArticleDisplay.jspandprofileID=2763andfolderId=740anduserXYZ=55>.

364 Detective Inspector D Cowlshaw, *Minutes of Evidence*, 2 June 2003, 20.

The 2002 Amendments introduced section 464X, which provides for warrants to be issued, if necessary, for the arrest of a non-custodial offender in order to undergo a forensic procedure. Once a court order has been granted, the offender is notified and is required to attend a specified police station to undergo the forensic procedure within one month of the date of the order. If the offender fails to attend as required, a warrant can be issued for his/her arrest to undergo the forensic procedure.

The Rationale for the Sampling of Serious Offenders

The provisions authorising the sampling of offenders marked a departure from the original ‘investigative’ purpose of DNA sampling. Under the first generation of forensic procedures provisions, a person had to be identified as a suspect to justify an order for a compulsory forensic procedure; there had to be grounds to believe that the person had been involved in the commission of the offence. The inclusion of offenders’ profiles on the database places offenders, forensically, in a pool of suspects for unsolved crimes.

The rationale for sampling serious offenders as a class was the belief that, having committed one serious offence, they may re-offend or they may have already committed other undetected offences. As MCCOC explained:

This rationale has more to do with the fact the person belongs to a class of people likely to offend rather than the specific circumstances of the person. ... [It is] very much to do with the likelihood that they have or will again commit other crimes.³⁶⁵

The principle that a class of persons should, solely on the basis of their prior conduct, be placed under ‘generalised’ suspicion and accordingly be required to provide a bodily sample was challenged by some participants in this Inquiry. Father Peter Norden, Director of Jesuit Social Services, put the view that the current regime for the sampling of offenders was discriminatory:

By making the presumption of testing everyone in custody you are discriminating against people. Because they have a prior criminal conviction of a serious nature does not mean that they are then necessarily seen as suspects – even people in prison – for some unknown, unidentified future or past crime.³⁶⁶

Michael Strutt, former spokesperson for Justice Action, observed that:

Prisoners should not be required to provide DNA simply because they are prisoners. ...If someone has been found guilty of a serious offence and a court has determined that they are high risk of re-offending upon release in a manner which may lend itself to DNA based investigation, it may be appropriate for a court to order a DNA test *as part of the sentencing procedure*.³⁶⁷

365 MCCOC, *Model Forensic Procedures Report* (1999) 31-32.

366 Fr P Norden, *Minutes of Evidence*, 23 July 2002, 149.

367 Mr Michael Strutt, Submission 24, 34.

These views resonated with the position taken by the NSW Privacy Commissioner, who indicated to the Sherman Review that ‘a slight and speculative probability that a sample taken from one inmate will, on the basis of its accumulation with samples from other inmates, solve other offences for which samples are held’ did not represent ‘appropriate justification’ for the collection of these samples.³⁶⁸

Offender sampling provisions are now so embedded in the criminal law of all Australian jurisdictions that this rationale is effectively beyond review. While ‘the die has been cast’ as far as the offender sampling provisions are concerned, the Inquiry considered the implications of this principle in its review of the provisions which govern the database use of profiles from suspects and volunteers, whose guilt has not been proven.

Although the rationale of offender sampling is embedded in Victoria’s forensic sampling provisions, the role and potential contribution of this regime to crime detection and prosecution is reviewable. Data collected in the five years since its inception provides a basis for evaluating the effectiveness of DNA sampling in the identification of repeat offenders and, thereby, in the detection of unsolved crimes. This Inquiry was therefore in a position to evaluate the contribution that offender sampling has already made to crime detection in Victoria, and to evaluate proposals for law reform in the light of the demonstrated impact of the regime to date.

Offender Sampling Issues in this Inquiry

In this Inquiry the Committee reviewed submissions and evidence on:

- the types of offences included in Schedule 8, which defines the offences for which forensic procedures can be ordered after a finding of guilt;
- the current role of the courts in granting orders for forensic procedures involving Schedule 8 offenders; and
- the means used to carry out forensic procedures involving offenders detained in Victorian prisons.

Building on the intensive effort devoted to the DNA sampling of Schedule 8 offenders, Victoria Police proposed measures that would radically shift the foundations of this regime: a significant increase in the range of offences included in Schedule 8, and the removal of the courts’ discretionary power to grant or refuse applications for compulsory offender sampling.

This met with opposition from legal bodies, civil liberties groups and the Privacy Commissioner, who advocated retaining the system of discretionary court orders, and suggested reforms which bolstered the safeguards provided by the current regime.

³⁶⁸ Sherman, *Independent Review of Part 1D* (2003) 3.50, 31.

Alignment with Other Australian Jurisdictions

In reviewing these quite divergent proposals, the Inquiry also considered the implications for Victoria's participation in data-sharing through the national DNA database. Inconsistencies in the provisions governing the sampling of offenders in individual jurisdictions have been identified as a major obstacle to the commencement of national data-sharing arrangements. The ALRC Inquiry, while making no specific recommendation on how 'forensic sample offences' should be defined, recommended in general terms the adoption of 'national minimum standards' for data-sharing.³⁶⁹ The Sherman Review proposed that participating jurisdictions align their laws with the provisions set out in the Model Bill.³⁷⁰

In these circumstances the Inquiry has reviewed firstly, the range of offences for which a Schedule 8 order can be made and secondly, the discretion available to the courts to determine applications for these orders. Against a policy imperative of keeping Victoria aligned with other Australian jurisdictions, the Inquiry has examined the extent to which patterns in repeat offending, and the contribution of the DNA database, justify any modification of the current laws.

Ethical Considerations

Retrospective Provisions for Schedule 8 Procedures

As indicated in Chapter 4, this Inquiry takes the view that retrospective provisions are generally an inappropriate means of amending criminal laws and are particularly inappropriate in the case of forensic sampling provisions.

Victoria Police submitted two proposals for the expansion of offender sampling which would have retrospective effect: a proposal that 'legislation should authorise the sampling of a prisoner as a condition of release on parole,³⁷¹ and that provision be made for the execution of orders against non-custodial offenders found guilty of a Schedule 8 offence before July 1998.³⁷²

The first proposal would capture the DNA of offenders in custody for offences not included in Schedule 8. It would require the sampling of minor offenders who, at the time of their conviction, were not liable to undergo a forensic procedure under section 464ZF. The Committee takes the view, developed further in this chapter, that an expansion of offender sampling is warranted. However, the Committee believes that this expansion must be achieved in accordance with the fundamental principles of criminal justice, and does not support the enactment of retrospective legislation, for this purpose.

369 See Chapter 14 below.

370 Sherman, *Independent Review of Part 1D* (2003) Recommendation 21, 6.80-6.85.

371 Victoria Police, Submission 18, Recommendation 5, 3.

372 Ibid Recommendation 11, 6.

The second proposal is intended to capture the DNA of persons who had been found guilty of a Schedule 8 offence before July 1998 but were not in custody for that or any other offence at that time. The Committee believes that the forensic value of obtaining DNA samples from offenders in this category is limited: if they are not in custody this signifies that they have not been found to have re-offended, and may be rehabilitated. In these circumstances, the Committee considers that the enactment and execution of retrospective legislation is not justifiable.

Procedural Fairness

The Victorian legislation already strikes a balance that affords offenders' rights and interests less protection than it provides for the interests of suspects and volunteers. Along with the liability that serious offenders, as a group, face as a consequence of their guilt, there are also the procedural provisions for *ex parte* orders, which limit the offenders' opportunities to have their interests represented. Offenders (unlike suspects) are not offered the opportunity to undergo the procedure with consent. Offenders (unlike suspects) are not entitled to notice of an application for an order. Schedule 8 orders may be made *ex parte*, while suspects must be present when an application for a compulsory order is heard. The procedural fairness of the forensic sampling provisions, and the interplay between these provisions and legal principles and presumptions applying in the criminal justice system, are considered in Chapter 12.

SCHEDULE 8 ('FORENSIC SAMPLE') OFFENCES

Reviewing the Definition of Schedule 8 Offences: Proposals

Victoria Police has proposed a significant expansion of the forensic sampling regime to place the taking of DNA samples on the same basis as fingerprinting, (though the forensic procedures provisions permit the retention of DNA samples in circumstances where fingerprints could not be retained).³⁷³ This chapter reviews the current provisions for the sampling of offenders, while Chapter 6 addresses the proposal as it affects persons identified as *suspects* in criminal investigations.

The Definition of Schedule 8 Offences: Implications for data-sharing

Achieving nationwide consistency in the definition of a forensic sampling offence has been problematic. However, the offenders' index is one of the most significant indices on the DNA database and a consistent approach to the sampling of offenders is required for inter-jurisdictional data-sharing. The Sherman Review identified the

373 Ibid 2.

‘different treatment of serious offenders’ as one of the major ‘areas of concern’, ‘which have the potential to undermine the integrity of the national scheme’.³⁷⁴

The differences in definition makes the various serious offender databases quite different in character in a context where the law should be authorising the matching of like with like. This also produces the result that what might be an offence in relation to a database in one jurisdiction will not be an offence in another.³⁷⁵

The Commonwealth, New South Wales and ACT provisions, aligned to the latest edition of the Model Bill, authorise the conduct of forensic procedures on serious offenders.³⁷⁶ Section 23WA of the *Crimes Act 1914 (Cth)* defines a ‘serious offender’ as a person who is under sentence for an offence under Commonwealth law ‘punishable by a maximum penalty of imprisonment for life or 5 or more years’.³⁷⁷

Queensland, South Australia, Western Australia, Tasmania and the Northern Territory definitions have provisions which are wider than the Model Bill.³⁷⁸ The widest definition of forensic sample offences is contained in the Queensland legislation. Under Section 312 of the *Police Powers and Responsibilities Act 2000 (Qld)* offenders convicted of any indictable offence, including an indictable offence dealt with summarily, can be ordered to undergo a forensic procedure. The Act was amended in 2002 to specify that indictable offences include indictable offences dealt with summarily.³⁷⁹ The Western Australian legislation enables offenders convicted of serious crimes (punishable by 12 months or more imprisonment) to be sampled.³⁸⁰

Victoria’s Schedule 8, while in fact broadly aligned with the Model Bill, lists each ‘forensic sample’ offence instead of establishing criteria for the inclusion of offences in Schedule 8. During the development of the Model Bill, MCCOC reviewed the Victorian approach, but decided that it was preferable to rely on ‘more general criteria’ than to have ‘the complication and artificiality of a list’.³⁸¹

374 Sherman, *Independent Review of Part 1D* (2003) 6.83-6.84, 98.

375 Ibid.

376 It should be noted, however, that the Commonwealth provisions strike the balance of rights and powers in a different way to the current Victorian provisions. The Commonwealth provisions (Division 1) enable the offender to consent to the order. The orders under Commonwealth legislation are not made *ex parte*; by contrast, orders made under Victorian provisions can be made *ex parte*.

377 *Crimes Act 1914 (Cth)* s 23WA. A ‘prescribed offender’ is a person under sentence for an offence punishable by a penalty of life or 2 or more years.

378 Sherman, *Independent Review of Part 1D* (2003) 6.81, 97.

379 The person to be sampled may be detained in custody or required to report for sampling within 7 days of the order. Samples may also be obtained from a prisoner in custody. The validity of these provisions was challenged in relation to forensic procedures carried out on five prisoners convicted of summary offences. The Queensland Supreme Court upheld the validity of the legislation and leave was granted to appeal to the High Court. Amending legislation, retrospectively validating the procedures, was enacted on the eve of the High Court hearing. See *Brogden and Ors v Commissioner of the Police Service* [2001]QCA 185 per Wilson J; *Brogden v CPS* [2001] QSC 123. Legislation scuppers DNA challenge’, *ABC News Online*, 24 June 2002.

380 *Criminal Investigation (Identifying People) Act 2001 (WA)* ss 17 and 25-44.

381 MCCOC, *Model Forensic Procedures Report* (1999) 35.

If the national DNA database accepted offenders' profiles from jurisdictions with a very wide definition of a forensic sample offence, data-sharing arrangements could undermine the provisions enacted in the Model Bill compliant jurisdictions. In the USA, which has a similar legislative framework for data-sharing on its national database, there has been a gradual increase in the range of 'forensic sample' or qualifying offences, in response to similar pressures from participating jurisdictions.³⁸²

The Sherman Review therefore recommended that the development of consistent/uniform provisions for the sampling of offenders be a priority in harmonising the legislation of jurisdictions wishing to participate in the national database. To reconcile these widely different definitions the Sherman Review recommended that the Model Bill provisions be adopted Australia-wide.³⁸³

Options for Law Reform

Noting pressures from legal stakeholders to retain the range of offences currently included in Schedule 8 and from Victoria Police to expand the range significantly, the Inquiry considered two options for law reform. Option A is a slightly modified definition of Schedule 8, which broadly retains the current range of offences. Option B is the Police proposal for a significantly expanded regime.

Option A: The Commonwealth/Model Bill option

Define 'Schedule 8 offences' as those attracting a maximum penalty of five or more years' or life imprisonment;

Option B: The Victoria Police (fingerprinting) option

Define 'Schedule 8 offences' as indictable offences and summary offences listed in Schedule 7 of the *Crimes Act 1958 (Vic)*.

These options are canvassed below.

A: Serious Indictable Offences (five or more years' maximum sentence)

This option is a close approximation to the status quo. All the offences currently listed in Schedule 8 would be retained, with the addition of theft. This definition would establish a clear criterion for the inclusion of offences in Schedule 8.

Schedule 8 has been incrementally expanded over the past decade in an ad hoc manner. Schedule 8 is no longer based on a consistent criterion for the inclusion of

382 Dawn Herkenham, 'DNA Database Legislation and Legal Issues', (February 2002) *Profiles in DNA* 6-7, at www.pomega.com.

383 Sherman, *Independent Review of Part 1D* (2003) Recommendation 21, 98.

offences. Ad hoc amendment of Schedule 8 makes it difficult to predict or plan its future development. Victoria's use of a Schedule, not based on specified criteria, may cause difficulties in harmonising Victorian provisions with those of other jurisdictions. These difficulties can be easily overcome without affecting the range of offences currently included in Schedule 8.

The adoption of the Commonwealth/Model Bill approach would result in the inclusion of relatively few offences not currently incorporated in Schedule 8. Theft is one minor property offence that would be included. The maximum sentence that can be imposed for theft, the 'lowest' of the property offences contained in the *Crimes Act*, is 10 years' imprisonment. Mr Alastair Ross indicated that there were strong grounds for the inclusion of theft in Schedule 8:

Car theft is often involved with more serious crime such as armed robbery and it affects a significant proportion of the community. It is also a crime with a degree of recidivism and the DNA database in the United Kingdom is having success in reducing the level of stolen motor vehicles.³⁸⁴

While the range of options covered by Schedule 8 would not differ significantly from those covered by the Commonwealth option, this option would have the advantage of bringing a consistent rationale to the definition of offences for which forensic procedures can be conducted after a finding of guilt.

B: Indictable and Schedule 7 Summary Offences

The effect of this proposal, as stated above, would be to authorise a forensic procedure to be conducted whenever a fingerprint can be taken. Indictable offences and the summary offences included in Schedule 7 of the *Crimes Act 1958 (Vic)* include a substantially larger group of offences than those which come within the scope of either the provisions relating to offenders or those relating to relevant suspects.³⁸⁵ Schedule 7, listing the Summary Offences for which a person may be fingerprinted, includes:

- a summary offence where the maximum penalty (whether for a first or subsequent offence) is or includes a period of imprisonment;
- offences relating to drugs, weapons, police conduct and the treatment of animals contained in legislation such as the Drugs, Poisons and Controlled Substances Act 1981, the Control of Weapons Act 1990, the Police Regulation Act 1958 and the Prevention of Cruelty to Animals Act 1986.

This proposal, if implemented, would be a significant expansion of DNA sampling in Victoria. The range of offences for which sampling could be undertaken far exceeds those for which the presence of DNA will be an issue in future investigations. This

384 Mr Alastair Ross, Submission 22, 1.

385 Schedule 7 is at Appendix 4. A summary offence – which is triable by a magistrate in the absence of the accused – is defined as one punishable by level 7, 8 or 9 imprisonment or a fine. This represents a maximum of two years' imprisonment or a maximum fine of \$24,000.

option would place Victoria very close to the UK model in terms of qualifying offences. No other Australian jurisdiction currently allows sampling for such a wide range of offences.

The proposed expansion of Schedule 8 to include all indictable and Schedule 7 offences is based on the expectation that a significant proportion of the minor offenders will go on to commit serious crimes. The inclusion of the profiles of most offenders at the time of their first conviction is seen as directly aiding the detection of other crimes, including other future crimes committed by those offenders.

The Inquiry took the view that if the rationale for offender sampling is the detection of repeat offenders and the offences they commit, the scope of the sampling program should be determined in the light of the data available on repeat offending. The Inquiry therefore considered the two options presented above in the light of the data available on general trends in repeat offending and the contribution already made by the DNA database to the detection of crimes committed by serious offenders.

Repeat Offending: The Rationale for Databasing

Essentially, the DNA database is expected to contribute to a reduction in crime in three ways: detection, incapacitation and deterrence.³⁸⁶ Database detection should increase the clear-up rate for unsolved crimes on the database. The detection and imprisonment of offenders 'incapacitates' the offender, and removes, at least temporarily, the opportunity for the offender to re-offend. It is claimed that the detective power of DNA sampling operates as a deterrent to prospective offenders.

It was beyond the scope of this Inquiry to undertake any research in this field, but some understanding of recidivism is essential to appreciate the potential contribution of the DNA database. The Inquiry tried to establish a pattern to crime trends in Victoria, and in particular, the number and proportion of offenders being found guilty of serious crimes which, under the current laws, attract an order for DNA sampling.³⁸⁷ The Inquiry hoped to be able to ascertain the proportion of offenders who are, or who are likely to become re-offenders. It also sought to understand patterns in repeat offending: the proportion of re-offenders who go on to commit crimes of escalating seriousness, compared with the proportion who repeatedly commit the same types of

386 In the same way that the perpetrators of most criminal activity are believed to be a small minority of repeat offenders, there also appear to be 'chronic victims', who are vulnerable targets for offenders engaged in 'volume' crimes such as car theft and burglary. It has been claimed that 4 per cent of households suffer 35-40 per cent of crime. In the UK the victims of crime are concentrated in 10 per cent of 'the worst areas' and suffer 40 per cent of recorded crimes. See United Kingdom, Home Office, Research Development and Statistics Directorate, Jon Simmons, *Crime in England and Wales*, (2002) at Crimestats.rds@homeoffice.gsi.gov.uk.

387 Simmons, *ibid*. The development of the UK database reflected the perception that the detection of crime would be greatly enhanced if efforts could be concentrated on identifying repeat offenders. There have been regular and comprehensive studies of the patterns of crime in the UK, providing detailed analyses into the perceptions as to the level of actual crime, the extent to which it is recorded by law enforcement agencies.

minor offences. From this type of data, it was hoped that the Inquiry could ascertain, in general terms only, the scale of the sampling program required to bring about a significant improvement in the detection of crimes committed by repeat offenders in this state.

Repeat Offending and its Impact on the Crime Rate

The disproportionate contribution of repeat-offenders to the crime rate seems to be undisputed. The Minister for Police recently presented the following assessment of recidivism in Victoria:

It is known that criminals, particularly in volume crime, are recidivist. It is estimated that approximately 6 per cent of the population are responsible for 66 per cent of the crime and that this may be an overestimate ie as low as 1-2 per cent being responsible.³⁸⁸

Similar patterns have been observed in other jurisdictions. The South Australian Police Force has found that less than half the offences detected in 2000/2001 were first offenders.³⁸⁹ Repeat offenders were responsible for the overwhelming majority of robberies, motor vehicle crimes and serious criminal trespass offences. Approximately 90-93 per cent of robberies and 88 per cent of sexual offences were committed by offenders with prior convictions.³⁹⁰

Young offenders were found to be responsible for a disproportionate number of minor property offences. The patterns of juvenile re-offending seem, from a cursory survey of the literature, to be different from those characteristic of their adult counterparts. A brief outline of the pattern of re-offending found amongst juveniles is provided later in this chapter. This Inquiry believes that the provisions relating to the sampling of vulnerable offenders – namely children and incapable persons – should be tailored to meet the particular needs of these groups, and are therefore considered separately from the provisions relating to capable adult offenders.

Serious Offenders and Recidivism: Prior Undetected Offences

Offenders found guilty of serious crimes are likely to have already committed minor offences which may not have been detected. A Western Australian Inquiry³⁹¹ noted research which suggested that armed robbers, burglars and sex offenders ‘feature high on the list of recidivism’.

388 The Hon Andre Haermeyer MLA, Minister for Police, *Media Release*, 2 September 2002.

389 South Australia, ‘Repeat Offenders Strategy hits the target’, *Police Newsletter*, (2002) 10.

390 South Australia Police, Business Information Section, *Recidivism in South Australia* (2003).

391 Western Australia, Legislative Council, Legislation Committee, *Forensic Procedures and DNA Profiling: Report 48* (1999) 50-51.

It has been estimated that 90 per cent of sex offenders have prior convictions for volume crime offences.³⁹² A Western Australian study of sex offenders between 1975 and 1989 found that:

Of the 238 rape offenders able to be followed up, 96 had returned to prison at least once following their rape offence, and of these 10 had committed rape again. A further 10 had committed other sex offences by the survey date.³⁹³

In relation to prior detected offences, the study found that 60 cases 'had records of imprisonment for violent offences either before or after their imprisonment'.³⁹⁴ A New Zealand study of 32 intruder rapists found that 13 were 'serial offenders' and 12 of these had previous rape convictions.³⁹⁵

The South Australian Office of Crime Statistics and Research has embarked on a long-term study of repeat offending. Using an offender- and victim-tracking database, the Office is planning to 'measure the level of re-entry of individuals into the criminal justice system over a 10-year period'.³⁹⁶ The study will examine the 'criminal careers' of adult defendants, comparing the paths of those who were adults, and those who were juveniles at the time of their first contact with the criminal justice system.³⁹⁷ More data is needed generally, and specifically relating to Victoria, to ascertain whether the findings set out above apply in relation to the serious offences included in Schedule 8.

Minor Offenders: Predicting Repeat Offenders

Successive reports on crime in the UK³⁹⁸ have indicated that a relatively small number of offenders are responsible for the vast majority of volume crimes. In the UK it is reported that about 20 per cent of criminals commit 80 per cent of crimes.³⁹⁹

Studies of recidivism generally start with the serious offenders and investigate the patterns of prior convictions. There is undisputed data on the significant contribution of re-offenders to the crime rate. It can also be shown that a substantial proportion of serious offenders have prior convictions for minor offences. However, little is known about the proportion of those found guilty of minor offences who re-offend and whether those re-offenders commit crimes of escalating seriousness.

The DNA database is claimed to be useful in pre-emptively detecting re-offenders:

392 VFSC Submission 23, 2.

393 WA Legislation Committee, *Forensic Procedures and DNA Profiling* (1999) 51.

394 Ibid.

395 Ibid.

396 South Australia, Attorney-General's Department, Office of Crime Statistics and Research, <http://www.ocsar.sa.gov.au/about.html>.

397 Ibid.

398 See for example Home Office, Smith, *DNA Expansion Program: Evaluation Report* (2001) 41.

399 Hadkiss, 'The Strategic Use of DNA Profiling in Intelligence Policing - the National DNA Database of England and Wales' (2001) 12.

DNA databases allow for the detection of recidivist offenders. By obtaining DNA samples from offenders for volume crime the ability to solve not only other volume crime but also serious indictable offences, is enhanced.⁴⁰⁰

While ‘most serious offenders have prior convictions of a relatively minor nature’,⁴⁰¹ it does not necessarily follow that most minor offenders will go on to commit serious crimes. Minor offenders may re-offend; they may commit either more minor offences or serious crimes, or they may never re-offend. The scant evidence that is available seems to suggest that a relatively small proportion of all minor offenders are re-offenders, and not all of these re-offenders will commit crimes of escalating seriousness. As Dr Freckelton noted:

It is relatively unusual for a person to commit a serious offence without having previously committed a minor offence. However, the majority of minor offenders never graduate to major offending.⁴⁰²

An offender’s criminal history will provide some indication of the likelihood of his/her having committed, or committing other undetected crimes. The information presented above suggests that the current regime, which enables the database sampling of serious offenders, is likely to have a decided impact on crime detection.

The question arises as to the likely impact of the sampling of minor offenders; offenders who are either at the beginning of their criminal career, or who have committed a ‘one-off’ offence and can be diverted from further criminal activity. If only a small proportion of minor offenders are likely to re-offend, then it would be desirable to identify and target that group for database sampling. As there are significantly more minor than serious offenders, a blanket sampling policy for minor offenders would result in the fruitless collection of a large number of samples. The higher the likelihood of re-offending, the greater the benefit of database sampling will be.

Conclusions

Optimising the Forensic Return on DNA Sampling

There is clearly a balance to be struck to ‘optimise the forensic return’ from DNA sampling. As Dr Freckelton expressed it:

A balance needs to be found in respect of the categories of offences which are likely to be useful in terms of the investigation of future offences and keeping to a minimum the encroachment on people’s liberties constituted by being placed upon a DNA database.⁴⁰³

400 VFSC Submission 23, 2.

401 Dan Meagher, ‘The Quiet Revolution- A Brief History and Analysis of the Growth of Forensic Police Powers in Victoria’ (2000) 24 *Criminal Law Journal* 76, 82.

402 Freckelton, *DNA Profiling: Issues Paper* (2002) 35.

403 Ibid.

The Committee is satisfied, on the basis of the information available on patterns of recidivism, that the sampling of serious offenders is likely to generate a strong return in terms of crime detection. The Committee believes, however, that further research is needed to establish the proportion of minor offenders who re-offend and to target potential re-offenders in the early stages of their contact with the criminal justice system.

Research into Recidivism in Victoria

Victoria, along with other Australian jurisdictions, needs to compile and review data on the extent of recidivism within the criminal justice system.⁴⁰⁴ The Committee believes there is a need for further research on the nature of recidivism in the Victorian criminal justice system and, in particular, further study on the connection, if any, between the commission of minor offences by first time and minor offenders, and the commission of serious offences against the person by adults.

The Committee therefore recommends that the Department of Justice fund and initiate research on trends in repeat offending in Victoria to establish the proportion of persons who, having committed minor summary or indictable offences, are subsequently convicted of serious indictable offences, and to develop means of targeting and rehabilitating minor offenders most at risk of recidivism.

Recommendation 5.1 Research into repeat offending in Victoria

That the Department of Justice fund and initiate research on trends in repeat offending in Victoria to establish the proportion of persons who, having committed minor summary or indictable offences, are subsequently convicted of serious indictable offences, and to develop means of targeting and rehabilitating minor offenders most at risk of recidivism.

The Contribution of Offender Sampling to Crime Detection

The Inquiry reviewed the Victorian data available to gauge the impact of offender sampling on the detection of crimes in this State, noting from the Australia-wide research that repeat offenders are generally responsible for a disproportionate number of crimes.

The database detections achieved by the sampling of offenders already provides a clear indication of the contribution that repeat offenders are making to the Victorian crime rate. The Inquiry examined data showing the number of detections recorded through the sampling of offenders and the types of offences detected through the sampling of offenders. It also reviewed the data available on the outcomes of these

⁴⁰⁴ See for an example of a comparable US study, Bureau of Justice Statistics, *Special Report: Recidivism of Prisoners Released in 1994* (2002) NCJ 193427.

database detections: investigations, prosecutions and admissions of guilt which followed the inclusion of serious offenders' DNA profiles on the database.

The VFSC maintains records of the 'matches' made against the profiles of serious offenders on the Victorian database. In the text below these are referred to as 'database detections'. The operational arm of Victoria Police maintains records of the investigations mounted, the charges laid and admissions made in relation to all offences alleged against an offender initially detected by a database match. In the text below, these are referred to as 'investigations aided'. The figures for investigations aided are therefore significantly higher than the figures for actual database detections.

Database Detections: Overview

The Committee found that databasing the profiles of serious offenders in Victoria has generated a significant number of 'matches'. The Victorian data confirms the contribution made by serious offenders to the Victorian crime rate through repeat offending. It also indicates that database detections linking offenders to volume property crimes such as burglary and theft can be used to further investigations into other related offences.

Types of Offences Detected

Like the more general research into repeat offending, the Victorian data shows that serious offenders have also committed a significant number of undetected minor offences. Property offences such as burglary are the most common offences detected through the sampling of serious offenders in Victoria.

Table 5.3 lists the number of database detections recorded for the major offences. It reveals that property crimes accounted for approximately 90 per cent of all database detections.

Table 5.3 Database Detections, Offenders: Most Common Offences Detected, Cumulative, December 2000-June 2002

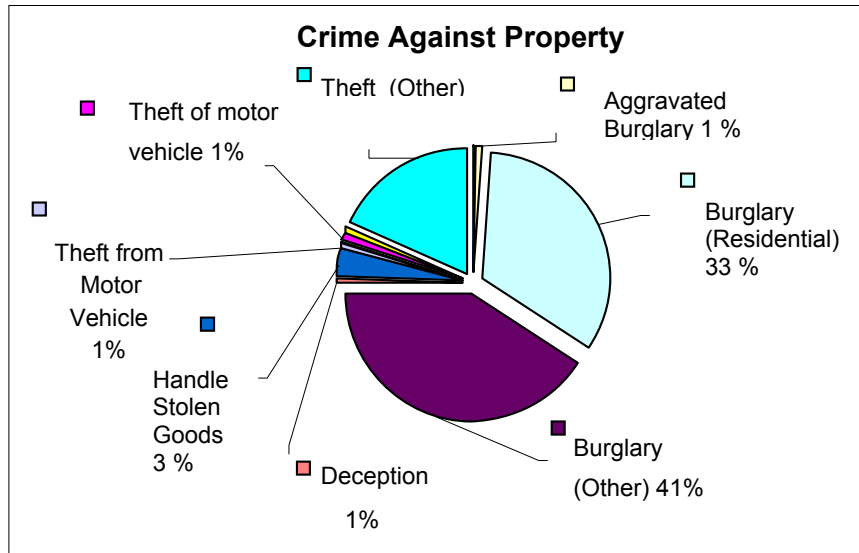
Type of Offence	Dec-00	Mar-01	Jun-01	Sep-01	Dec-01	Jan-02	Mar-02	Jun-02
PROPERTY OFFENCES								
Aggravated burglary	1	5	7	10	13	13	14	17
Burglary	124	216	291	322	362	373	396	431
Attempted burglary								1
Theft of motor car	8	10	10	14	16	17	19	22
Theft	1	4	5	6	11	12	15	19
CRIMES AGAINST THE PERSON								
Homicide	4	5	5	5	6	6	6	6
Rape/attempted rape	8	10	11	12	14	14	16	17
Aggravated rape							1	1
Armed robbery	6	12	15	22	24	24	31	31
Robbery				1	1	1	2	2
Assault	4	4	5	5	6	7	8	8
Causing serious bodily injury			1	2	2	1	2	3

Source: VFSC, Submission 23S1.

Figure 5.1 below shows the breakdown of database detections for property offences. Burglaries and car thefts were the most common property offences detected. Aggravated and residential burglary accounted for 33 and 41 per cent of all property offence detections, while a further 19 per cent related to theft. This does not include theft of a motor vehicle, which accounted for 1 per cent of property offence detections.

Crimes against the person accounted for less than one per cent of all database detections relating to Schedule 8 offenders. Table 5.3 indicates that out of a total of 2712 offences detected, only 70 (0.02 per cent) were for crimes against the person. Of these, the offences which recorded the greatest number of database detections were sexual offences and assaults.

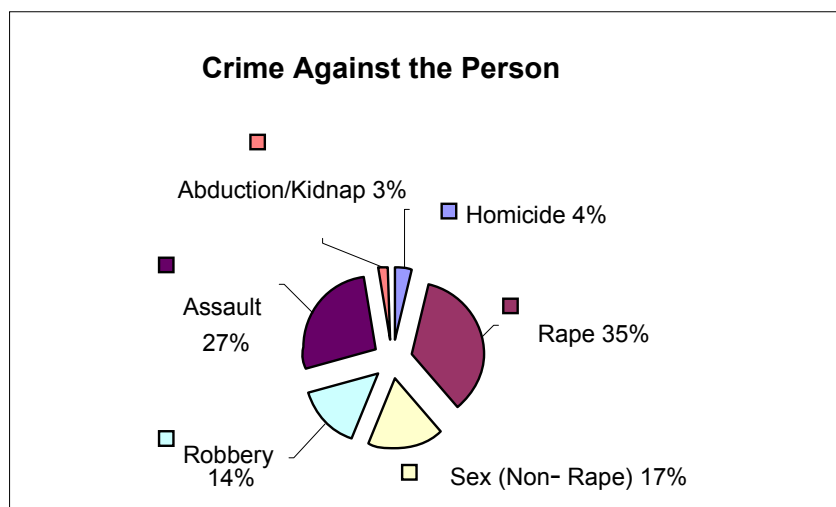
Figure 5.1 Database Detections and Investigations Aided, Offenders: Crimes against Property – Type of Offence, Cumulative, 1 February 2000-24 October 2003



Source: Victoria Police, Submission 18S5.

Figure 5.2 shows that rape and other sexual offences comprised approximately half the database detections recorded for crimes against the person, while assaults comprised approximately 27 per cent of detections relating to crimes against the person. Robberies constituted the next most commonly detected offence.

Figure 5.2 Database Detections and Investigations Aided, Offenders: Crimes against the Person – Type of Offence, Cumulative, 1 February 2000-24 October 2003



Source: Victoria Police, Submission 18S5.

While relatively few drug offence detections were recorded during 2001/2002, by October 2003 a total of 94 drug-related detections had been recorded, suggesting an increased use for DNA profiling in the detection of drug offences.

Trends in Database Detections

Table 5.4 below indicates trends in database detections for the period December 2000 to June 2002. There was a steady and significant increase in the number of burglaries and motor vehicle thefts detected. The total number of burglaries detected increased by 347 per cent over the whole period, with an average quarterly increase of 21 per cent. This was affected by the dramatic increase in detections over the period December 2000 to June 2001. For the following twelve months, the number of database detections for burglary steadied, averaging an increase of approximately 8 per cent per quarter. While a smaller number of car thefts have been detected through the database, there has been a steady rate of detection since December 2000.

In contrast to the increasing number of property crimes detected, the number of detected crimes against the person has remained fairly stable. While numerically the contribution of the database to the detection of crimes against the person may not be as significant as it is for property offences, the impact of the detection of perpetrators of these serious offences on victims and the general public should not be underestimated.

Investigations Aided

The effectiveness of database detections is affected by the amount of investigative support that detections receive. The VFSC refers details of matches made through the DNA database to the operational arm of Victoria Police, which disseminates the relevant files for further investigation.

Table 5.4 below shows the number of investigations aided for each of the major types of offences detected on the database. It can be seen that the initial detections for volume property offences, such as burglary (including housebreaking) have led to the investigation of multiple other offences of which a single offender is suspected.

Table 5.4 shows the outcome of these investigations. Since February 2000, a total of 539 offenders have been charged with a total of 2712 offences as a result of matches made to unsolved crime scenes through the DNA database.⁴⁰⁵ A guilty plea or a full admission was made for all but seven of these detections.⁴⁰⁶ The detection of these crimes also led to additional charges being laid in relation to non-DNA offences.⁴⁰⁷

405 Victoria Police, Submission 18S6.

406 Detective Inspector D Cowlshaw, *Minutes of Evidence*, 2 June 2003, 18-19.

407 Ibid.

Table 5.4 Investigations Aided and Charges Laid, Offenders: 1 February 2000-24 October 2003

Matches recorded from the sampling of Offenders under s464AF	Total for 2002/2003	Aggregate Total 1/2/00-24/10/03
Preliminary DNA Matches as received from VFSC		
DNA Database Convicted Offender Matches	343	1325
Crime Scene to Crime Scene Matches (Links)	116	567
Total Database Detections		1892
Disseminated Files completed following investigation		
Total Offenders Charged through DNA Match Reports	99	539
Offences (Preliminary DNA Match)	198	1016
Total Charges for Offenders (Including Non DNA Matches)	217	2712
Admitted Offences / Guilty Pleas		
Guilty	161	594
Not Guilty	1	8

Source: Victoria Police, Submission 18S5.

Once crime scenes are linked to each other or to an offender's profile, the resulting prosecutions and charges may significantly add to the charges laid directly as a result of the database detections. Table 5.4 indicates the contribution that the database makes not only by linking offenders to crimes scenes, but also by identifying a forensic connection between multiple unsolved crime scenes. This assists with the detection and prosecution of repeat offenders, by enabling investigators to clear up a number of unsolved volume crimes with the identification of the person responsible.

Table 5.5 Database Detections and Investigations Aided, Offenders: Types of Offences and Number of Detections Recorded, 1 February 2000-24 October 2003

TYPE OF OFFENCE	NUMBER OF OFFENCES INVESTIGATED
Crime Against The Person	
Homicide	3
Rape	24
Sex (Non-Rape)	12
Robbery	10
Assault	19
Abduction / Kidnap	2
Subtotal: Crime Against The Person	70
Crime Against Property	
Arson	1
Property Damage	10
Burglary (Aggravated)	20
Burglary (Residential)	816
Burglary (Other)	1006
Deception	13
Handle Stolen Goods	85
Theft from Motor Vehicle	14
Theft (Shop Steal)	2
Theft of Motor Vehicle	28
Theft of Bicycle	10
Theft (Other)	462
Subtotal: Crime Against Property	2467
Drug Offences	
Drug (Cultivation, Manufacture, Trafficking)	45
Drug (Possess, Use)	49
Subtotal: Drug Offences	94
Other Crime	
Going Equipped to Steal	48
Justice Procedures	6
Behaviour in Public	1
Other	26
Subtotal: Other Crime	81
TOTAL	2,712

Source: Victoria Police, Submission 18S5.

As at 24 October 2003 Victoria Police had charged 539 offenders with a total of 2712 offences. More than half of these offences (1892), related to offences detected on the database. A total of 1325 detections had been made, linking Schedule 8 offenders to unsolved crime scenes while a further 567 matches linked DNA profiles obtained from unsolved crimes.

Table 5.5 shows the number of investigations that were carried out in connection with database detections involving serious offenders. It provides a breakdown, by the type of offence, of the investigations which were carried out in connection with database detections. This data illustrates the value of the DNA database in detecting volume property crimes committed by serious offenders. The number of offences includes not only offences detected through matches on the database, but also other related offences investigated.

Whereas database detections were recorded in relation to 1016 offences, the total charges laid amounted to 2712. The compelling nature of DNA evidence in these investigations is revealed by the number of admissions and guilty pleas recorded. As at 24 October 2003, a total of 594 admissions had been recorded. These outcomes provide compelling evidence of the impact of offender profiling, and indicate that the immediate benefits of detection are being translated into prosecutions and admissions of guilt.

Conclusion: Re-defining Schedule 8 ('Forensic Sample') Offences

The rationale for sampling an offender following a finding of guilt is the general purpose of 'crime detection', served by the inclusion of the profile obtained on the DNA database. This contrasts with the primary purpose of sampling a suspect, which is to investigate the connection between that suspect and the crime scene.

The Committee notes the evidence available to indicate that by including offenders found guilty of serious crimes on the DNA database the detection of further serious crimes, and previous undetected crimes can be assisted. Victoria Police data on the database detections and prosecutions already made between the profiles of Schedule 8 offenders and unsolved crimes bears out the effectiveness of profiling serious offenders to assist with the detection of unsolved property crimes, in particular. A high percentage of the offenders profiled for the database have been linked, as a result of the sampling program, to other unsolved crimes. As at 4 July 2003, 440 offenders had been linked to unsolved crimes.

In considering whether Schedule 8 should be amended, as proposed by Victoria Police, to include indictable and Schedule 7 offences the Inquiry noted that the remaining stakeholders participating in this Inquiry favoured the status quo. Given, too, the desirability of keeping the Victorian provisions aligned with those of the Commonwealth and Model Bill, the Inquiry considered that Victoria should not significantly expand the current list of offences in Schedule 8 unless a compelling case could be made out for clear detection advantages.

This Inquiry does not have evidence on the extent of the possible contribution to be made from the widening of the range of qualifying offences. In fact, the analysis of the available research on recidivism suggests that a small proportion of minor offenders are repeat offenders, and of these repeat offenders, a small proportion will go on to commit crimes of escalating seriousness. Database detection will then only

be achievable if the offender commits further crimes and these unsolved crimes are on the database; that is they give rise to crime scenes from which DNA evidence can be collected.

The Committee therefore recommends that Schedule 8 be redefined, along the lines of the Commonwealth provisions and the Model Bill, to comprise serious indictable offences for which a maximum penalty of five years' imprisonment or more or a life sentence can be imposed. The proposed re-definition of Schedule 8 offences on its own will broaden the range of forensic sample offences to include theft. It recognises that the sampling of serious offenders is based on the likelihood of their re-offending, and still ensures that Victoria's provisions remain aligned with the definitions adopted in Model Bill compliant jurisdictions.

Recommendation 5.2 Defining Schedule 8 ('forensic sample') offences

That the Crimes Act 1958 (Vic) be amended to re-define 'forensic sample' offences, listed in Schedule 8 of the Crimes Act, as serious indictable offences for which a maximum penalty of five years' imprisonment or more or a life sentence can be imposed.

DISCRETIONARY POWERS AND THE ROLE OF THE COURTS

This section examines the evidence as to the role of the courts in determining applications for Schedule 8 orders, to ascertain whether the exercise of the judicial discretion to grant or refuse orders has had an impact on the extent of the sampling conducted on offenders.

Victoria Police proposed two measures to restrict the court's discretion in its determination of Schedule 8 orders:

Legislation should remove the discretion in Sections 464ZF(8) and 464ZFB(2) of the Crimes Act 1958 that enables a court to decline to order a conviction sample pursuant to sections 464ZF(2), 464ZF(3) or 464ZFB:⁴⁰⁸ [and]

Legislation should restrict the adding of conditions to an order.⁴⁰⁹

The combined effect of the Police proposals would be to remove the court's discretion altogether, and require the court to approve all applications for post-conviction orders. Victoria Police submitted that it was inappropriate or unnecessary for a court to be empowered to determine that a forensic procedure should not be conducted in these circumstances.

408 Victoria Police, Submission 18, Recommendation 9.

409 Ibid.

The Inquiry therefore reviewed the role that Victorian courts have played to date in the consideration of applications for forensic procedures made after a finding of guilt for a forensic sample offence.

In this context, the Inquiry noted that other Australian jurisdictions retain provisions for the sampling of offenders to be authorised on a discretionary basis, but provide for police to have that discretion. Whereas the court must order non-intimate forensic procedures in Victoria, in some Australian jurisdictions, such as the Commonwealth and New South Wales, senior police have the authority to order non-intimate procedures, although a court order is required to undertake an intimate procedure.⁴¹⁰

The Director of Public Prosecutions recommended ‘the sheer practicality’ of this proposal. Mr Coghlan indicated that currently there are, however, ‘very few instances where an order is not made’, suggesting that removing the opportunity for exercising discretion in the grant of orders would not have a significant effect on the number of orders granted.

The one matter, I suppose, in relation to the question of what happens on conviction might be consideration being given to orders being automatic on conviction for certain offences rather than us going through the process of making the application for the order, the judge then needing to consider it after receiving submissions and so on, leading, however, to very few instances where an order is not made.⁴¹¹

Representatives of legal bodies representing defendants emphasised the importance of maintaining a fair and accountable judicial process for the exercise of a discretionary power. The current system of court orders was supported by the majority of the individuals and organisations that participated in this Inquiry. Judicial exercise of the discretionary power was seen as a safeguard for the personal liberty of the individual, and as a buffer against abuse of discretionary powers by police. The Law Institute of Victoria advocated the retention of court orders on the basis that:

Ordering of samples must remain subject to judicial process since this is the only safeguard currently offered to protect civil liberties.⁴¹²

The Public Interest Law Clearing House and Jesuit Social Services also recommended the retention of court orders for the conduct of forensic procedures on persons found guilty of Schedule 8 offences.⁴¹³

Some participants in the Inquiry expressed concern at police being in a position to exercise discretionary power, when they had an interest in the outcome. The Criminal Bar Association, YouthLaw and the Privacy Commissioner observed that police members are not in a position to weigh the interests of law enforcement against the interests and rights of individuals, when their primary responsibility is for crime

410 *Crimes Act 1914 (Cth) s 23XWK; Crimes (Forensic Procedures) Act 2000 (NSW) Part 7.*

411 P Coghlan QC, *Minutes of Evidence*, 23 July 2002, 131.

412 Law Institute of Victoria, Submission 21, 1.

413 E Hunt, *Minutes of Evidence*, 23 July 2002, 154-156; and Fr P Norden, *Minutes of Evidence*, 23 July 2002, 149-151.

detection and law enforcement. Representatives of YouthLaw indicated that it would be inappropriate for police to authorise forensic procedures:

It should be a magistrate who makes a decision and not a police officer, because that would lead to a blurring of roles of the police for them to be seeking the order and making that decision for themselves.⁴¹⁴

In fact, some participants in this Inquiry – the Privacy Commissioner and the Criminal Bar Association – advocated greater protection for the rights and interests of offenders in the determination of orders for compulsory procedures. The Privacy Commissioner observed:

There should be no dilution of the court's discretion. On the contrary, courts should be given greater guidance on exercising their independent discretion to promote fair and open procedures in relation to the extraction of DNA samples from individuals - particularly where (as in the case of serious offenders) there is no right to be heard at a hearing, or even notified of an application, where police seek the court's authority to extract individuals' DNA.⁴¹⁵

The Criminal Bar Association supported the retention of court orders and, in relation to offenders convicted of Schedule 8 offences, recommended that the provisions be amended to enable the offender 'to appear at the hearing, be represented, make submissions and test any evidence that might be called in support of the application'.⁴¹⁶

Victoria Legal Aid strongly asserted the principle of judicial supervision:

Judicial supervision of the process is fundamental to engendering confidence in the forensic process and is appropriate given the extent of the intervention of individual liberty. ... [T]he need for procedural fairness and judicial supervision in criminal matters far outweighs any arguments related to speeding up the approval process for sampling.⁴¹⁷

All legal stakeholders in the current regime indicated a strong preference for the retention of court orders in determining applications for Schedule 8 offences.

The Inquiry sought to understand how the current system of court orders operates, to ascertain its impact on the number of orders granted. The Inquiry reviewed the number of applications made and granted, and the factors considered by the courts in determining applications for Schedule 8 orders.

414 A Radonic, *Minutes of Evidence*, 22 July 2002, 74.

415 Privacy Commissioner, Submission 19S, 12.

416 Criminal Bar Association, Submission 13, 3.

417 Victoria Legal Aid, Submission 15, 2.

Prosecution Policy: ‘Automatic’ Applications for Schedule 8 Orders

Following the commencement of offender sampling in Victoria, Police adopted the policy of seeking a Schedule 8 order routinely when a finding of guilt was entered in relation to a forensic sample offence.

Since the commencement of s464ZF, the Victorian Director of Public Prosecutions (DPP) has issued standing instructions to prosecutors to apply for an order under the section whenever the basic requirements are met.⁴¹⁸

The records management system used by the Prosecutions Division of Victoria Police automatically identifies Schedule 8 offences and produces a standard application form to be filed if a finding of guilt is entered. The courts’ database has also been adapted to facilitate the recording of these orders.⁴¹⁹

Judicial Consideration of Schedule 8 Applications

Section 464ZF outlines the process that governs applications and orders for forensic procedures on offenders found guilty of a ‘forensic sample offence’. Section 464ZF(8) provides the basis for judicial consideration of applications. It requires the court to consider ‘the seriousness of the circumstances’ of the offence and to be satisfied that making the order ‘is justified in all the circumstances’.

- (8) A court hearing an application under sub-section (2) or (3) –
- (a) must take into account the seriousness of the circumstances of the forensic sample offence in determining whether to make the order under sub-section (2) or (3); and
 - (b) must be satisfied that, in all the circumstances, the making of the order is justified; and
 - (c) may make such inquiries on oath or otherwise as it considers desirable.

The discretion is clearly a broad one. The phrase ‘in all the circumstances’ is not qualified or defined, and the term ‘the seriousness of the circumstances’ goes beyond the ‘seriousness of the offence’, which could be inferred simply from the inclusion of the offence in Schedule 8. It has been up to the courts to interpret this provision and since July 1998, when the sampling of offenders commenced, magistrates have developed a set of criteria to assist in determining applications for Schedule 8 orders.

The early ruling by Kelly J in *R v Simeth-Hackling*⁴²⁰ was influential in the courts’ consideration of applications for forensic procedures orders. His Honour underlined

418 Shaun Ginsbourg, ‘Forensic samples under s464ZF of the *Crimes Act*’ (December 1998) *Law Institute Journal* 50, 51.

419 Ibid.

420 *R v Simeth-Hackling* (County Court of Victoria, Kelly J, 6 July 1998).

the responsibility of the courts in balancing competing freedoms and restraints. ‘An appropriate balance between law enforcement and the need to maintain necessary safeguards which preserve individual liberty ... is achieved through judicial supervision’.⁴²¹

The process of weighing calls for a value judgment by the court in which the general opinions of the judge must play a more than usually large part. ... The orders sought [under s 464ZF] would make lawful that which otherwise would be a serious unlawful assault. The justification for the restraint is that it may deter the respondents from committing a crime, or may aid in their apprehension and punishment should they do so, thus enlarging the freedom of others.⁴²²

Since that time magistrates have stressed their intention to exercise the judicial discretion under s464ZF as appropriate, and emphasised that ‘the court should not rubber stamp applications’.⁴²³ Courts have been critical of the policy of routinely seeking an order for forensic sampling without advancing supporting evidence⁴²⁴ and have expected applicants to support their applications by addressing the considerations listed in s464ZF. In *R v Faure*⁴²⁵ and *R v Jackson*⁴²⁶ Hampel J affirmed that applicants for orders ‘should make a case for exercise of the discretion’.⁴²⁷ Hampel J noted that ‘it should not be taken that such orders will be made as a matter of course’.⁴²⁸ Harper J also adopted this approach in *R v Lagona*,⁴²⁹ noting ‘the danger is that the police will apply as a purely routine matter and pressure will be placed upon the courts for a routine response’.⁴³⁰

In a more recent ruling, Wodak J insisted on the need to support an application with proper material, and not merely recite the type of offence committed and any prior convictions.⁴³¹ Finally, in *R v Abebe*,⁴³² an unreported case in the Supreme Court, Harper J refused an application for the grant of a Schedule 8 order on the ground that:

In this case the application is not supported by any material of any kind. If the conviction for murder is not itself sufficient, the position therefore is that I have nothing upon which to be satisfied in all the circumstances the making of the order is justified.⁴³³

This ruling has been influential in the courts’ consideration of Schedule 8 applications.

421 Ibid.

422 Ibid.

423 *R v Bloom* (County Court of Victoria, Hassett J, 13 July 1998).

424 *R v Drommel* (County Court of Victoria, Dyett J, 24 February 1999); and *R v Bloom* *ibid.* See also *R v Lipp, Zerna and Wills* (County Court of Victoria, Campbell J, 1 October 1998).

425 *R v Faure* (Supreme Court of Victoria, Hampel J, 15 December 1998) 546.

426 *R v Jackson* (Supreme Court of Victoria, Hampel J, 16 December 1998).

427 Ibid.

428 *R v Faure* (Supreme Court of Victoria, Hampel J, 15 December 1998) 546.

429 [1998] VSC 220.

430 Ibid para 24.

431 *R v Galdamez* (County Court of Victoria, Wodak J, 15 May 2001).

432 [2000] VSC 148, 18 August 2000, Charles JA, Callaway JA, Coldrey AJA.

433 Ibid.

Recidivism: The Likelihood of Re-offending

Victorian authorities have cited the high rate of recidivism or repeat offending as the main justification for its extensive sampling of its prison population, and this is reflected in the drafting of the legislation. It is implicit in the special requirements prescribed for the sampling of offenders, and for the diminished rights provided to this group of persons.

Victoria Police suggested in their submission to this Inquiry that the judicial discretion to refuse applications for Schedule 8 orders should be removed, on the basis that insufficient weight was being given to the likelihood of recidivism in cases where a person had no similar prior convictions. Victoria Police proposed that the discretion of the court to amend or refuse a Schedule 8 application should be removed, because courts were exercising that discretion. Victoria Police reported that:

Anecdotal evidence suggests that on occasions Magistrates are declining to issue orders and basing this on the ground that the person has not similar previous convictions. This assessment process is contrary to the spirit of the legislation.⁴³⁴

The Chief Magistrate made some observations on the way in which the judicial discretion had been exercised and, in particular, on the way in which the issue of recidivism had been addressed. His Honour stated:

We note that it is asserted that Magistrates are refusing orders on the basis that the person has no similar prior convictions. We note that the question of recidivism is one of a number of relevant matters, but rarely the sole determinative factor. We note the contents of the Director of Public Prosecutions policy in relation to these applications, which acknowledges the role of discretion. If the community is to have confidence in these procedures the Court has an important role to play.⁴³⁵

The criteria developed to determine Schedule 8 applications relate quite explicitly to the rationale for the collection of forensic samples from offenders: recidivism. Magistrates have taken into account the likelihood of the offender re-offending and the utility of the procedure in crime detection, and to society in law enforcement in considering whether the making of the order is justified.

In *R v Simeth-Hackling*, Kelly J determined that the primary consideration should be the ‘real likelihood of re-offending, with a view to the seriousness of the circumstances’ - ie factors pointing to recidivism or the commission of other offences of relevant seriousness. Subsequently, courts have accepted that the likelihood of re-offending is relevant, but differed on the extent of the probability required. In *R v Simeth-Hackling* Kelly J required a ‘real likelihood of recidivism’; Nixon J followed this approach in *R v Oudenyk*.⁴³⁶ In both cases the application was rejected on the

434 Victoria Police, Submission 18, 8.

435 Chief Magistrate Ian Gray, Letter dated 13 August 2002, to Executive Officer, Victorian Parliament Law Reform Committee.

436 County Court of Victoria, Nixon J, 8 February 2000.

basis that the nature of the crime and the offender meant there was no real likelihood of re-offence, or that re-offending would be ‘so childlike and blatant’ that detection would not be an issue. The same type of reasoning was applied by Rendit J in *R v Sampson and Poliness*⁴³⁷ before granting the order and in *R v Stimpson* where the application was rejected. Here the court took the view that the facts and circumstances before the court did not support a ‘real expectation of future serious offences’.⁴³⁸

The Utility of the Procedure

As well as considering matters relating to the commission of the offence, courts have considered factors related to the purpose of the forensic procedure. The courts have examined the likely ‘utility’ of the procedure in detecting future offences, and in detecting other prior offences committed by the offender.

In *R v Fowler*⁴³⁹, Coldrey J determined in that case that an order was justified, bearing in mind the ‘potential utility of the DNA record’, including its ‘social utility’ as an investigative tool. Coldrey J also applied this approach in more recent cases, such as *R v Skeiner*,⁴⁴⁰ where His Honour considered the potential utility of the forensic procedure for investigative purposes. In *R v Lagona* His Honour refused to grant the order, noting that the deportation of the defendant after his imprisonment meant that ‘the fact that an intimate sample has been taken from him will not be of any benefit to the Australian community’.⁴⁴¹

The Seriousness of the Circumstances of the Offence

The requirement that the court consider not merely the seriousness of the offence but, more broadly, the seriousness of ‘the circumstances of the offence’ has allowed courts to take into account factors such as the state of mind of the offender when committing the offence, as well as the type of offence committed. One application was rejected because the offender had stolen only three bottles of milk; another because the offender, suffering an intellectual deficit, had committed blatant robberies.⁴⁴²

In cases where the offence was serious, even where the likelihood of the person re-offending was minimal, courts have generally granted applications for Schedule 8 orders.⁴⁴³ Where an offender is found guilty of murder, manslaughter, a sexual

437 County Court of Victoria, Rendit J, 18 September 1998.

438 County Court of Victoria, Rendit J, 8 February 2000.

439 *R v Fowler* (Supreme Court of Victoria, Coldrey J, 28 August 1998).

440 [2000] VSC 371 Coldrey J.

441 [1998] VSC 220 Harper J.

442 *R v Bloom* (County Court of Victoria, Hassett J; 13 July 1998; *R v Pham* (County Court of Victoria, Ross J, 9 October 1998).

443 See for example *R v Fishman* (Supreme Court of Victoria, Hedigan J, 23 October 1998).

offence, or where the conviction was one of many, courts have generally granted applications for Schedule 8 orders.⁴⁴⁴

Applications Made and Granted: The Impact of Judicial Discretion

With the assistance of the DNA Management Unit (DNAMU)⁴⁴⁵ and Victoria Police Prosecutors, it has been possible to gain some insight into the role the Magistrates' Court has played in the implementation of the post-conviction sampling regime. Table 5.6 below, based on statistics provided by Victoria Police Prosecutions, shows the number of Schedule 8 applications made and granted for most of the period from July 2000 to August 2002.⁴⁴⁶

Table 5.6 Orders for Forensic Procedures (s 464ZF) Adults: Applications Made and Granted, July 2000-June 2001; November 2001-August 2002

	Jul-00	Aug-00	Sep-00	Oct-00	Nov-00	Dec-00	Jan-01	Feb-01	Mar-01	Apr-01	May-01	Jun-01
Applications granted	25	108	106	174	168	133	122	36	191	148	148	156
Applications refused	110	79	35	94	121	64	68	28	600	172	173	138

	Nov-01	Dec-01	Jan-02	Feb-02	Mar-02	Apr-02	May-02	Jun-02	Jul-02	Aug-02
Applications granted	116	236		132	127	111	154	119	138	171
Applications refused	66	183		101	88	42	98	67	75	102

Source: Victoria Police, Submission. 18S1. Data tabulated from monthly returns provided to the Inquiry.

- Notes: 1) Data for the period July-October 2001 was not collected due to industrial action.
 2) Data for the months November 2001 and January 2002 is incomplete owing to data processing errors at the time of recording.

Figures for the period immediately after the introduction of the post-conviction regime showed marked fluctuations in the approval rate. In July 2000 only 25 out of 135 applications (less than 20 per cent) made in respect of adult offenders were granted, while in the next month 108 of the 223 applications (almost 50 per cent) were granted. It appears that while there were some administrative hurdles to overcome in the early stages of offender sampling, there has generally been little difficulty in obtaining orders for forensic procedures, especially in cases which involved a degree of physical violence or sexual assault.⁴⁴⁷

444 See *R v England* (County Court of Victoria, Kellam J, 1998); *R v Odgers* (Supreme Court of Victoria, Coldrey J, 30 October 1998); and *R v Fishman* *ibid*.

445 Formerly the Forensic Procedures Implementation Team (FPIT).

446 For the months between July and November 2001, industrial disputes disrupted the collection of data.

447 Victoria Police, Submission 18S1.

In the four years since the commencement of the sampling of Schedule 8 offenders, more than 3,000 orders have been granted. During the ‘teething period’ of the new provisions, the granting of orders was affected by the need for prosecutors, defence counsel and magistrates to gain some experience with the operation of the new provisions. However, from the information available to this Inquiry, it does not appear that the courts have ignored or under-valued the relevance of recidivism in their consideration of Schedule 8 applications. It is clear from the outline above that, using the broad discretion provided under section 464ZF(8), the courts have developed a coherent set of criteria against which to assess applications for Schedule 8 orders. These criteria – the seriousness of the circumstances, the likelihood of the offender re-offending, and the utility of the procedure – are, moreover, directly connected to the rationale for the sampling of those found guilty of serious crimes.

It would seem that, while courts do not ‘rubber stamp’ applications for Schedule 8 orders, they limit their rejection to cases in which the circumstances suggest that the likelihood of the offender re-offending is low, or that the difficulty of detecting the crime would be low. In the cases presented above, which were probably exceptional to merit the explanations given by the courts for their rulings, the decision not to grant the application was reached on the basis of an assessment of the prospect of recidivism in the case of that particular offender.

The Committee therefore takes the view that the criteria applied by the courts in considering applications for Schedule 8 orders have enabled a balanced assessment to be made, on a case-by-case basis, of the utility or value of the DNA sample in detecting likely recidivism. The Committee concluded that the process for the applications and their judicial consideration did not impede the collection of DNA samples from serious offenders.

Alternatives to Discretionary Court Orders

Police Powers for Compulsory Sampling of Offenders

The Inquiry reviewed the provisions operating in other Australian jurisdictions to ascertain what alternative processes were available for the sampling of convicted offenders. Under section 23XWL of the Commonwealth legislation, a constable can authorise a non-intimate procedure, and a magistrate can grant orders for intimate procedures, or procedures involving children and incapable persons. For example, a senior police officer can order hair pulling; but a court order is required to obtain a blood sample.⁴⁴⁸ In New South Wales, offenders are first asked to consent to a buccal swab procedure.

448 Andrew Haesler, ‘An Overview of DNA Testing and the New *Crimes (Forensic Procedures) Act 2000*’, *Use of DNA in the Criminal Justice System*, Australian Institute of Criminology Seminar, 11 April 2001, revised June 2003, at <http://www.lawlink.nsw.gov.au/pdo.nsf/pages/DNA>.

If consent is not given to the taking of a sample by way of a buccal swab a senior police officer may issue an order for the taking of a sample of hair (other than pubic hair) pursuant to s70.⁴⁴⁹

In Model Bill compliant jurisdictions, the authorising police officer is required to take into account:

- whether the procedure would be authorised ‘in the absence of the order’; and
- the seriousness of the circumstances surrounding the offence committed by the offender; and
- whether the carrying out of the forensic procedure could assist law enforcement, whether Federal or otherwise; and
- whether the carrying out of the forensic procedure without consent is justified in all the circumstances.⁴⁵⁰

The Crime Victims Support Association indicated, in general terms, that it advocated police having the powers and tools needed to ensure the speedy conclusion of investigations.⁴⁵¹ Mr Alastair Ross, then Director of the National Institute of Forensic Science (NIFS), was in favour of giving a senior police officer the authority to order a forensic procedure involving an offender, subject to certain accountability and review provisions:

In order to simplify and speed up the approval process, a police officer of the rank of Inspector or above should be able to order a suspect or convicted offender to be sampled.⁴⁵²

As a safeguard, to provide for transparency and accountability in the exercise of this power by police, Mr Ross recommended an annual independent review of compulsory Schedule 8 procedures authorised by police.

However, there should be sufficient documentation to allow for an independent review of this process on an annual basis. The review could be conducted under the auspices of, for example, the Ombudsman or the Chief Magistrate.⁴⁵³

A Non-discretionary Requirement for the Sampling of Serious Offenders

The Inquiry also considered whether the evidence available on the prior criminal activity of serious offenders justified the imposition of a requirement for a compulsory forensic procedure to be conducted automatically after a finding of guilt had been entered in relation to a serious indictable offence.

449 Natalie Dugandzic, ‘Inmate Testing; *Crimes (Forensic Procedures) Act 2000*’, 7, in *Institute of Criminology, Use of DNA in the Criminal Justice System* (2001) 9.

450 Note that in Victoria offenders cannot be asked to consent.

451 Crime Victims’ Support Association, Submission 6, 1.

452 Mr Alastair Ross, Submission 22, 1.

453 Ibid.

The large proportion of offenders whose undetected criminal activity has been revealed by offender databasing provides strong evidence of the value of database sampling for serious offenders. The Inquiry considered whether a finding of guilt alone could be considered sufficiently indicative of prior or future criminal activity as to warrant the imposition of an automatic requirement for DNA sampling. The Committee noted that within a specified offence, such as burglary or assault, the seriousness of the offence can vary considerably. The particular circumstances of the commission of an offence may combine to make it relatively minor or very serious. The Committee concluded that a finding of guilt for a serious indictable offence, on its own, would not be sufficient indication of repeat offending. The Committee noted that the seriousness of the offence is reflected in sentencing decisions.

The Committee took the view that the imposition of a prison sentence in relation to a Schedule 8 offence was an appropriate benchmark at which to set the requirement for the compulsory sampling of offenders. The Committee therefore recommends that the *Crimes Act 1958 (Vic)* be amended to require that a capable adult offender found guilty of a serious indictable offence and sentenced to a term of imprisonment be automatically required to undergo a forensic procedure.

Conclusions: The Sampling of Adult Offenders

The effect of this recommendation, taken in conjunction with Recommendation 5.2, is to ensure that the forensic sampling of offenders is targeted at those who have committed offences serious enough to justify the imposition of a term of imprisonment. The Committee therefore recommends that an order for a non-intimate forensic procedure be issued automatically, without the requirement for a court order, where a capable adult is found guilty of a serious indictable offence for which a maximum sentence of 5 years or more, or life can be imposed, where the offender is sentenced to a term of imprisonment for that offence.

The Committee proposes that if a person is found guilty of a forensic sample offence but is not sentenced to a term of imprisonment, then the current provisions of section 464ZF should apply; a court order for a forensic procedure may be sought and determined by the court at its discretion under section 464ZF(8).

Recommendation 5.3 Compulsory sampling of adult offenders sentenced to prison term

That the Crimes Act 1958 (Vic) be amended to provide that an order for a non-intimate forensic procedure be issued automatically where a capable adult is:

- (i) found guilty of a serious indictable offence for which a maximum sentence of five years or more or life imprisonment can be imposed; and***
- (ii) sentenced to a term of imprisonment for that offence.***

DNA SAMPLING OF VULNERABLE OFFENDERS

Children and Young People

In Victoria, the most common charges proven against children are theft, traffic offences and burglary, which together comprised almost two-thirds of all principal proven offences.

Juvenile Recidivism Patterns

The Contribution of Repeat Offenders to Juvenile Crime

The Inquiry sought to understand whether juvenile patterns of repeat offending replicated those of adults. The findings set out below are indicative only of some of the research being conducted in this area, as it was beyond the scope of this Inquiry to research this subject. There is strong evidence to suggest that juveniles are disproportionately involved in the commission of minor property offences. South Australian research has revealed that young offenders were responsible for a disproportionately large number of detected crimes.

Young offenders (aged ten to seventeen years) are clearly over-represented in the criminal justice system. While they represent less than 13 per cent of the total population aged over ten, they were responsible for 20 per cent of all crimes detected.⁴⁵⁴

Young offenders were found to be responsible for approximately one-third of the serious criminal trespass and illegal use offences, about 40 per cent of detected robberies, and more than half of all detected arsons.⁴⁵⁵

Within this group of young offenders, a small number of chronic re-offenders were responsible for most of the alleged offences. Chronic juvenile re-offenders, who had been apprehended six or more times, while constituting only 11 per cent of juveniles apprehended, were alleged to be responsible for almost 40 per cent of the offences detected.

Almost half the young people apprehended in 2000 were only apprehended once. If these first offenders are diverted from criminal behaviour at this stage, it will dramatically reduce the proportion of young people in contact with the criminal justice system, and will also make a significant impact on the number of charges laid.⁴⁵⁶

454 South Australia, Police, Business Information Section, *Recidivism in South Australia* (2003) 10.

455 Ibid.

456 South Australia, Attorney-General's Department, Office of Crime Statistics, (2002), *Repeat Contact with the Juvenile Justice System, Apprehensions by Police: Report no 30*, 3-7.

Juveniles and Serious Crime

Long-term trends in juvenile crime seem to bear out the observation that juveniles committing minor property offences do not necessarily go on to commit crimes of escalating seriousness.⁴⁵⁷ On a national level, the proportion of juveniles involved in the commission of violent crimes corresponds to the proportion of juveniles in the population. However, juveniles commit a disproportionately large proportion of property crimes, and a relatively small proportion (6–7 per cent) of juvenile offenders would seem to be responsible for a large share of all crimes.

Whereas it is thought that certain types of adult repeat offenders commit crimes of escalating seriousness, this does not appear to be characteristic of juvenile re-offending. An analysis of juvenile recidivism in New South Wales has found that:

the majority (about 86 per cent) of offences for which juveniles appear and re-appear in the Children's Court are property offences and not crimes of violence.⁴⁵⁸

The study found that juveniles who re-offend, including persistent offenders, 'do not escalate to more serious and violent crimes'. When they re-offended, juvenile re-offenders, even those juveniles who first committed a violent offence, were more likely to commit a subsequent property crime.⁴⁵⁹

Identifying Prospective Juvenile Re-offenders

Whereas most recidivism research has focussed on the prior criminal records of serious offenders, this NSW research considered whether it is possible to identify the characteristics of juvenile re-offenders prospectively. It found that there were four main predictors of juvenile re-offending, relating to: the age of the young person at the time of the first offence, the type of offence, the location of the young person, and the type of treatment received in the justice system. The study concluded that:

It is possible to identify and target high-risk juveniles at first appearance [and expected that] there is every indication to believe that the findings of this research are equally applicable to juvenile justice administrators in other states and territories.⁴⁶⁰

Policy Considerations in the Sampling of Young Offenders

For the past decade, Victoria's juvenile imprisonment rate has been by far the lowest in Australia. The rate of detention in Victoria has been consistently and substantially

457 Satyanshu Muckherjee, *Juvenile Crime: Overview of Changing Pattern*, Paper presented at Juvenile Crime and Juvenile Justice Conference, 1997, Australian Institute of Criminology, 6.

458 Michael Cain, *An Analysis of Juvenile Recidivism*, Paper presented at Australian Institute of Criminology Conference, *ibid* 7.

459 *Ibid*.

460 *Ibid*.

lower than in any other state or territory for more than 10 years. Custodial sentences are imposed in less than 3 per cent of cases where a finding of guilt is entered.⁴⁶¹

During the 1990s, Victoria's juvenile imprisonment rate remained at between 10-15 per 100 000 persons aged between 10 and 17 years, while for the same period New South Wales had an imprisonment rate which ranged from 38 to 57 per 100 000, and the national rate ranged from 34 to 31 per 100 000 in 2000.

One explanation for this quite different pattern of imprisonment was the commencement of the *Children and Young Persons Act 1989 (Vic)*, which reflects the rehabilitative focus of sentencing in relation to juveniles, and enshrines the philosophies of 'home and family preservation' and 'constructiveness'.⁴⁶² The Act diverts young offenders into rehabilitation programs and away from custodial sentences. The rationale for this diversion program, and a driving policy force underpinning the children's criminal justice system, is the primary role of rehabilitation for young offenders. As a result, custodial sentences are imposed in less than 3 per cent of cases where a finding of guilt is entered.⁴⁶³

Current Victorian Provisions

A child under the age of 10 must not be requested or ordered to undergo a forensic procedure.⁴⁶⁴ Apart from this, section 464ZF applies to children as it does to adults, with the additional requirement in section 464ZF(5) that notice of an application must be served on the child and a parent or guardian of the child.

Section 464ZGA specifies, however, that the sample and related information obtained from a forensic procedure carried out on a child shall be destroyed when the child turns 26 years old and the record expunged, provided that the young person has not been subsequently found guilty of any further offences. This provision recognises that children may commit 'one-off' offences and may reform, and that if they do so, their earlier record should be erased.

Implementation of the Forensic Sampling Provisions

The Inquiry sought background on the operation of the Schedule 8 sampling provisions in relation to children. The Committee noted evidence received at the public hearings, which indicated that Schedule 8 orders involving children were being routinely sought on a finding of guilt for a Schedule 8 offence.⁴⁶⁵ Judge Jennifer Coate, President of the Children's Court, informed the Inquiry that:

461 Children's Court of Victoria, *Criminal Division – Sentencing* last accessed 22 August 2003, 11.3. In 1998/99 custodial sentences accounted for only 2.5 per cent of cases.

462 Ibid.

463 Ibid.

464 S 464U(1).

465 A Radonic, *Minutes of Evidence*, 22 July 2002, 74-81.

In the wake of the introduction of s464ZF of the *Crimes Act*, applications for retention of DNA samples in the wake of findings of guilt commenced in the Children's Court of Victoria as they did in the adult jurisdictions. The prosecution commenced making these applications after a finding of guilt based only on the offences being 'forensic sample offences'.⁴⁶⁶

The Children's Court required the prosecution to produce 'more than the bare finding of guilt' for a 'forensic sample offence' to have a real prospect of success. The Court requires the statutory matters set out in section 464ZF(8) to be addressed in the application, as outlined by Harper J in *R v Abebe*.⁴⁶⁷ Following *Abebe's* case, a finding of guilt alone is not sufficient to justify the making of the order. Judge Coate indicated:

The prosecution were put on notice as to the current state of the law. They were further put on notice that s464ZF(8) would of course be read in the context of the *Children and Young Persons Act*.⁴⁶⁸

While the back-capture commenced in July 1998, the first orders for forensic procedures to be carried out on Schedule 8 offenders convicted in the Children's Court were granted in June 2001. Data provided by Police Prosecutions suggests that approximately one-quarter of applications made were granted: 37 applications were granted out of 146 applications made.⁴⁶⁹ Judge Coate held discussions with the Victoria Police and it was made clear that while:

some applications could be supported by the agreed summary of facts the prosecution relied on, together with an agreed prior history of the young person's offending, each prosecutor would have to make that assessment bearing in mind the statutory considerations and what Harper J said in *Abebe*.⁴⁷⁰

Judge Coate indicated that, since these initial discussions, the number of applications being brought has been small, and the majority are 'based on the most serious offences and serious examples of those offences, and in particular where the young person has some prior history'.⁴⁷¹

In relation to children, while the age of the offender is not specified as a factor to be taken into account, this matter is likely to be relevant to considerations as to the circumstances of the commission of the crime, the likelihood of the child re-offending and, therefore, the utility of the sample.

466 Children's Court of Victoria, Submission 29, 1.

467 (2000) 1 VR 429.

468 Children's Court of Victoria, Submission 29, 2.

469 Victoria Police, Submission 18S5.

470 Children's Court of Victoria, Submission 29, 2.

471 Ibid.

One of the few cases that came to the attention of the Inquiry in relation to children concerned the contest of a retention order in the Children's Court. In *R v Trajanoski and Trajanoski*,⁴⁷² Power J set out clearly the interests being balanced:

the privacy of the individual in not having her DNA on a public database for police investigative purposes, against the rights of the community to have the widest possible forensic assistance to police officers investigating crime⁴⁷³

Incapable Persons

While the capacity of the defendant was not identified as the critical issue in any of these rulings, the exercise of the judicial discretion protected the interests of a vulnerable defendant without, in the view of the magistrate, adversely affecting law enforcement or crime detection.

Some of the applications for Schedule 8 orders which were rejected by the courts involved defendants who suffered from an intellectual deficit, a psychiatric condition or a drug dependency. In *R v Bloom*⁴⁷⁴ Hassett J rejected the application. The defendant was found guilty of armed robbery in circumstances which led the court to believe that re-offending was unlikely. In *R v Pham*,⁴⁷⁵ Ross J determined that the defendant's intellectual deficit and the triviality of the offence made an order inappropriate. No order was granted in *R v Drommel*,⁴⁷⁶ where the defendant suffered a psychiatric condition which led him to commit minor, 'blatant' offences that posed no challenge to detection.

Conclusions: Safeguards for the Sampling of Vulnerable Offenders

The Committee believes that applications for orders to sample child offenders and incapable adult offenders should continue to be determined by the courts on a case-by-case basis. The Committee endorses and affirms the principle that judicial scrutiny, on a case-by-case basis, is essential for the determination of sampling orders in relation to vulnerable groups. In the case of children, where patterns of re-offending are not typical of their adult counterparts, the requirement for a forensic procedure needs to be taken into account in the context of the general considerations that apply in the sentencing and rehabilitation of child offenders.

472 *R v Trajanoski S and Trajanoski SL* (Children's Magistrates' Court, Magistrate Power, 29 January 2001).

473 *Ibid.* See *Wilson and Anor v Children's Court of Victoria and Anor* [2002] VSC 75 in relation to an order for a compulsory procedure under the relevant suspect legislation.

474 *R v Bloom* (County Court of Victoria, Hassett J, 13 July 1998).

475 *R v Pham* (County Court of Victoria, Ross J, 9 October 1998).

476 *R v Drommel* (County Court of Victoria, Dyett J, 24 February 1999).

Likewise, in the case of vulnerable adults, the Committee believes that the likelihood of the offender having committed or committing undetected offences should be considered on a case-by-case basis, taking into account the particular circumstances of the individual offender.

In view of the Committee's recommendation that sampling be required automatically when a capable adult is found guilty and sentenced to a prison term for a serious indictable offence, it is vital that applications relating to vulnerable offenders are identified and determined on a case-by-case basis. In Chapter 8 the Committee recommends a range of measures intended to safeguard the interests of vulnerable persons. These include broadening the definition of incapacity used in the forensic sampling provisions and reviewing the way in which vulnerable people are identified.

Recommendation 5.4 Retention of discretionary court orders for vulnerable offenders

- (i) That orders for all forensic procedures conducted pursuant to section 464ZF involving children and incapable offenders found guilty of serious indictable offences continue to be determined by the courts on a case-by-case basis pursuant to section 464ZF of the Crimes Act 1958 (Vic);***
- (ii) That the Committee's proposal in Recommendation 5.2 for a revised definition of an offence for which a forensic procedure may be required on a finding of guilt (a 'Schedule 8' or 'forensic sample' offence) also apply in relation to orders sought for the sampling of children and incapable offenders.***

RETENTION AND USE OF OFFENDERS' PROFILES

As noted earlier in this Report, an offender's profile can be retained indefinitely on the DNA database and matched against any other index, except for the volunteers' limited and unlimited purposes indices.

YouthLaw and the Privacy Commissioner suggested that Victoria introduce provisions to enable DNA records to be destroyed if convictions are spent. The Victorian Privacy Commissioner noted that Victoria, unlike some other Australian jurisdictions,⁴⁷⁷ lacks 'spent conviction' legislation. Spent conviction legislation enables a person's conviction to be expunged if he/she completes a designated period of crime-free behaviour.⁴⁷⁸ While special provisions apply to children and young people whose matters are heard in the Children's Court, young people who plead guilty to minor offences in the Magistrates' Court are not eligible to have their convictions expunged.

477 See for example the *Spent Convictions Act 2000 (ACT)*.

478 Ibid.

There is no *Spent Convictions Act* in Victoria, so if at seventeen they steal a Mars Bar from a shop and go and plead guilty in the Magistrates' Court they are labelled forever as a thief.⁴⁷⁹

There is, however, provision under section 464ZGA for the destruction of juveniles' forensic information if, at the age of 26, the person has not been found guilty of 'any further offence'. The Privacy Commissioner considered that while privacy may give way to public interest in the investigation, prosecution and punishment of a crime, it does not necessarily give way 'completely and forever'.⁴⁸⁰ The Commissioner suggested that:

Consideration should be given to constraining the exercise of the power of compulsory collection, particularly given the absence of natural justice safeguards, to guard against unnecessary collection where a person is convicted of a one-off crime committed long ago, with little chance of re-offending, and is detained by police for a trifling offence.⁴⁸¹

The Committee believes that, as the rationale for the retention of DNA profiles on the database is the possibility of repeat offending, a spent convictions provision should apply to all donors whose profiles are stored on the offenders' index.

Recommendation 5.5 Spent convictions and the destruction of offenders' profiles

That the Crimes Act 1958 (Vic) be amended to provide that, in relation to indictable offences for which a sentence of two years or less has been imposed and the offender's DNA profile has been entered on the Victorian DNA database, the profile must be removed from the database and destroyed following a period of 10 years without a subsequent conviction.

THE SAMPLING OF OFFENDERS IN VICTORIAN PRISONS

Current Provisions and Implementation Arrangements

The Role of Medical Personnel

The Victorian legislation provides that:

This Subdivision does not compel any medical practitioner, nurse or dentist to take a sample from a person nor to conduct a physical examination of a person, nor to be present when a sample is taken or an examination is conducted.⁴⁸²

479 S Nicholson, *Minutes of Evidence*, 22 July 2002, 81.

480 Privacy Commissioner, Submission 19, 13-14.

481 Ibid.

482 S 464Z(8).

The intent of the legislators was to address concerns by medical professionals who, for ethical or safety reasons, will not undertake procedures on a non-compliant subject.⁴⁸³ Detective Inspector Cowlshaw explained that Victoria Police owes a duty of care to medical practitioners engaged to conduct these procedures, and therefore is concerned to ensure that the means available for enforcement of orders are adequate.

The problem we have there, particularly with using a medical practitioner, is that the legislation allows you to use reasonable force. ... We have a duty of care to the medical practitioners, we have to protect them, so usually they immobilise the prisoner to protect the medical practitioner.⁴⁸⁴

Risk to personal safety is not the only consideration, however. The VIFM highlighted the ethical issues, as well as the practical difficulties raised if medical personnel are required to take a sample from a donor by force:

On ethical grounds the medical profession (and, I suspect the nursing profession) may decline to be involved in taking samples in cases requiring the use of force (i.e. without the subject's consent).⁴⁸⁵

Associate Professor David Wells informed the Inquiry:

A large number of others from my profession and I would decline to be involved in such cases. That caused a fair amount of heartache with Victoria Police officers when they realised that the Act that tied them to medical practitioners and the profession as a whole was saying, 'Well, we are not going to do this'. I suspect the change to the Act may have reduced that dependence, but whether it has changed the ethical issues I am not sure.⁴⁸⁶

The difficulty which arises is that, if the medical practitioner in attendance declines to carry out a forensic procedure on a non-compliant person, there is no one under the current provisions, who would be authorised to carry out a procedure. A medical officer is required to take a blood sample and a buccal swab cannot be taken from a non-compliant donor. The only option that remains is to take a hair sample. Associate Professor Wells suggested that this may make enforcement of orders problematic:

There is however, a potential for some problems if the suspect refused to self-sample and medical or nursing personnel declined to take the sample in that situation. Clearly this raises some difficulties if suspects were to become aware that the legislation may not be able to be enforced if they were to refuse.⁴⁸⁷

However, the Committee concluded that while taking a hair sample from a non-compliant donor is not the optimum method of conducting a forensic procedure, the

483 See MCCOC, *Model Forensic Procedures Report* (1999) 29. Clause 95 of the Model Bill (December 1999) provides that experts, including medical practitioners, nurses, etc, are not obliged to carry out forensic procedures.

484 Detective Inspector D Cowlshaw, *Minutes of Evidence*, 22 July 2002, 14.

485 Associate Professor D Wells, *Minutes of Evidence*, 22 July 2002, 68.

486 Ibid.

487 Ibid.

legislation makes adequate provision for enforcement of orders. As the self-administered buccal swab is a simple and convenient procedure, the Committee takes the view that when faced with the range of methods available, most donors will be willing to take a buccal swab.

The Use of Reasonable Force

The Victorian Provisions

Under Section 464ZA(1) the use of reasonable force is permitted under Victorian legislation, as it is in all other Australian jurisdictions:

A member of the police force with such assistance as he or she considers necessary, may use reasonable force to assist a medical practitioner, nurse, dentist or person authorised under section 464Z to conduct the procedure.

Section 464ZF(9) requires that the order specify that the use of reasonable force is permitted. However, to date there has been no definition of what constitutes 'reasonable force' by the legislature or the courts. Victoria Police was asked to define its understanding of reasonable force and the circumstances in which it would be used.

Reasonable force has a very wide meaning which most police interpret as the minimum force necessary to obtain the sample.⁴⁸⁸

Victoria Police training documents on the use of force in carrying out a forensic procedure require the Divisional Supervisor to be contacted to undertake a risk assessment. Where reasonable force may be required, a blood sample is to be taken by a custodial nurse, and a cell extraction team will be available on request if required.⁴⁸⁹

Clauses 35-37 of the Model Bill, taken up in the Commonwealth legislation, provide guidance on the use of force, detailing how hair can be pulled and prohibiting the use of cruel and inhuman methods.⁴⁹⁰ No definition could be located, either in Victorian forensic sampling provisions or in materials submitted to this Inquiry, as to what constitutes reasonable (or unreasonable) force in the taking of a bodily sample through a forensic procedure.

488 Victoria Police, Submission 18S2, 4.

489 Victoria Police, Submission 18S4.

490 Cl 35(1)(a) and (b) The Model Bill permits the use of reasonable force 'to enable a forensic procedure to be carried out' or 'to prevent loss, destruction or contamination of any sample'. See also Crimes Act 1914 (Cth) s 23XO.

Cell Extraction Teams

Victoria Police described the process of enforcing orders on non-compliant persons. Representatives of Victoria Police described how, in the back-capture, ‘cell extraction teams’ – prison officials – were used to restrain the prisoners ‘to the point where they can’t hurt the medical practitioner’.⁴⁹¹ Where force is used, ‘buccal swabs are not an option’, and either hair or blood samples are obtained.

What we ask of the prisons is, ‘You bring them from where you have them incarcerated to a safe place where we can take this test’, and that is what we ask them to do. We see with the prisons in doing this that once they ask them to accompany them to the place where we take the test then you get into prison discipline areas and not complying with the lawful instruction of a prison officer. So the actual teams have not had to use any force on these people at all. No-one has ever been injured in a forced test.⁴⁹²

It should be noted here that prison staff, not mentioned in the forensic procedures legislation, are involved in the administration of the forensic procedures conducted in prisons. It was put to the Committee by Victoria Police that their role needs clarification. Victoria Police recommended:

Legislation should specifically authorise and oblige a prison officer/employee to assist in the sampling of prisoners.⁴⁹³

The Sherman Review, noting that few offenders were convicted of ‘forensic sample offences’ under Commonwealth law, and that some of these are held in state prisons, reviewed the current arrangements for the conduct of forensic procedures on Commonwealth offenders. It recommended:

That the Police and correctional authorities should examine the feasibility of correctional services carrying out serious offender testing on behalf of the police service in the relevant jurisdiction as well as for other jurisdictions where appropriate.⁴⁹⁴

It recommended that this might be achieved ‘through cooperation between the respective national police and correctional service forums,⁴⁹⁵ while emphasising that ‘it will also be important to ensure that these arrangements include appropriate training and accountability and oversight regimes’.⁴⁹⁶

491 Detective Inspector D Cowlshaw, *Minutes of Evidence*, 22 July 2002, 14.

492 Ibid.

493 Victoria Police, Submission 18, 10.

494 Sherman, *Independent Review of Part 1D* (2003) Recommendation 9, 57.

495 Ibid.

496 Ibid.

The Actual Use of Force

The Inquiry noted a Victoria Police ‘crime-stoppers’ report on the operation of the Forensic Procedures Implementation Team (FPIT) describing the ‘back-capture’ of samples from offenders at Bendigo prison.

In March 2000 the team (FPIT) went to Bendigo Prison for the inaugural mass testing of the entire prison population. Samples were obtained from 63 prisoners with seven refusals. Samples from prisoners who refuse will be compulsorily obtained at a later date, using reasonable force if necessary. When reasonable force is required the FPIT utilise fully equipped and trained Force Response Unit Cell Extraction Teams. Force has been required in less than 1 per cent of cases.⁴⁹⁷

The Inquiry sought information from Victoria Police on the number of occasions on which force was used, and on how it interpreted the provisions. Victoria Police reported that force had been used on 14 occasions during the back-capture.

Of those 14 only 6 required any measure of force at all. The other ones, when they refused they said, ‘I am refusing and I am not going to do it; take it anyway, but I am telling you I am not consenting to it’, we would call that a forced one as well. Of the other six, various degrees of force have been used. Force is used as a last resort and a 48-hour cooling off period is employed. Any means available [are used] to convince the donor or prisoner to give the sample.⁴⁹⁸

Implementation Issues

The Inquiry received submissions expressing concern at the amount of force reportedly used in the back-capture. The Public Interest Law Clearing House (PILCH) drew attention to an SBS TV report which documented the force used in Victorian prisons during the back-capture.⁴⁹⁹ It showed Victorian authorities employing ‘capsicum spray, shackling of prisoners, use of dogs and police in riot gear’.⁵⁰⁰

We submit that without some guidance in the Act as to what constitutes reasonable force then excessive force may well be used on particularly vulnerable people. Police are in a relatively powerful position when it comes to disenfranchised groups, for example prisoners, children and people with disabilities.⁵⁰¹

PILCH recommended that attention be given to the definition of reasonable force, with ‘proper scrutiny and clear boundaries’ to apply to the use of force in forensic sampling.

497 Crimestoppers Victoria, http://www.vic.crimestoppers.com.au/invest_archives5.html.

498 Detective Inspector D Cowlshaw, *Minutes of Evidence*, 22 June 2002.

499 ‘Taken by Force’, *Insight*, Special Broadcasting Service, 7 June 2001.

500 E Hunt, *Minutes of Evidence*, 23 July 2002, 155.

501 *Ibid.*

We have been quite concerned about the lack of a definition of what constitutes reasonable force in the taking of a sample.⁵⁰²

Representatives of the Law Institute of Victoria also expressed their concern at the discretionary use of force to administer forensic procedures.

We have heard of instances where police have come in with capsicum spray and subdued an offender and there have been some quite violent scenes involved. If the court has ordered that the sample should be taken and reasonable force be used, it should still be governed and scrutinised very carefully.⁵⁰³

The Victorian Ombudsman submitted that, while that office has jurisdiction to investigate ‘complaints about the propriety of the manner in which a sample is actually obtained, for example, a complaint of excessive force by police or prison staff’, to date there had been no significant problems reported with the administration of the actual forensic sampling procedure.

My experience of the current arrangements for the taking of samples from prisoners and suspects is that there have been surprisingly few complaints concerning the manner in which samples are taken or the manner in which the information is retained and used.⁵⁰⁴

Encouraging Compliance with Orders for Forensic Procedures

Experience in other Australian Jurisdictions

There has been minimal sampling of offenders under the Commonwealth provisions⁵⁰⁵ since the commencement of the sampling program. A total of 294 offenders have been sampled, of which 286 procedures were undertaken with consent and seven by court order.⁵⁰⁶

New South Wales has undertaken the most extensive offender sampling program of any Australian jurisdiction. The New South Wales Ombudsman is currently reviewing the implementation of the forensic sampling regime by the NSW police force and it is expected that the use of force will be examined in that review. The NSW Ombudsman canvassed means to encourage compliance with orders for forensic procedures. One such means was to ensure that adequate notice is given of a procedure. NSW police have instituted a procedure for a ‘cooling off period’ to ease the enforcement of orders for forensic procedures on offenders within the prison

502 Ibid.

503 D Laschko, *Minutes of Evidence*, 22 July 2002, 90.

504 Ombudsman Victoria, Submission 8.

505 The *Crimes Act 1914 (Cth)* contains very few offences for which forensic sampling would be relevant. Commonwealth offenders are located in State, and well as Commonwealth, prisons.

506 ALRC, *Essentially Yours* (2003) 39.25, 979. One matter is still unresolved, awaiting an appeal.

system. The NSW Ombudsman has indicated that the cooling off period has been helpful in reconciling offenders to testing and in reducing the need for force.⁵⁰⁷

Conclusions: The Sampling of Serious Offenders in Victorian Prisons

Victoria Police has advocated an expanded role for prison staff in forensic sampling. However, public interest advocacy groups and legal bodies expressed concern at the use of force in the sampling of offenders in custody. The Committee noted that, in five years' of offender sampling, very few instances have arisen in which force was used. The Committee noted, too, that whereas unreasonable force may be identified, guidance on the use of reasonable force is difficult to define and then to apply in those exceptional circumstances when it may be required.

The Committee therefore examined ways to minimise the incidence of non-compliance and has proposed a range of measures to achieve this. In Chapter 4 the Committee recommended measures to apply to all donors, and which should assist in enlisting the compliance of offenders: enabling offenders to self-administer the buccal swab, and ensuring that offenders, including those whose orders have been granted *ex parte*, are informed in advance of the nature and implications of the procedure.

Finally, the Sherman Review considered the possibility of delegating Commonwealth responsibilities to state corrective services where Commonwealth offenders are accommodated. The provisions relating to inter-jurisdictional enforcement of orders enable law enforcement agencies in one jurisdiction to enforce orders from other participating jurisdictions, once the ministerial agreements and administrative arrangements have been put in place. These provisions are considered in Chapter 14.

507 NSW Ombudsman, *Discussion Paper: The Forensic DNA Sampling of Serious Indictable Offenders* (2001) 18.

6. SUSPECTS

INTRODUCTION

An Overview of the 'Relevant Suspect' Provisions

This chapter deals with the provisions governing the sampling of suspects. The current provisions enable the police to ask an adult suspected of committing or being involved in the commission of an indictable offence to undergo a forensic procedure.⁵⁰⁸ If the suspect consents, the sample is used for the purposes of the investigation for which it was taken, or any other investigation for which it is relevant. This means, in practice, that the profile can be entered on the DNA database and compared with the profiles from unsolved crimes.

If the suspect refuses, and is, for the purposes of the Act, a 'relevant suspect', the police may apply for a court order to require a forensic procedure to be conducted.⁵⁰⁹ A relevant suspect is a person charged or suspected of having committed or attempted to commit any offence against the person or certain specified indictable offences. These offences include robbery, armed robbery, burglary (but not theft), arson, drug offences and offences relating to the contamination of goods and bomb hoaxes.

It was envisaged that applications for this type of order would sometimes be made urgently, when delay might compromise the investigation. For this reason, the legislation also provides a 'fast track' application process, to allow police to obtain DNA samples from suspects with the minimum of delay. Section 464V(2) provides that interim orders, for samples other than blood samples, can be sought if the applicant (the police member) has a belief:

on reasonable grounds that the sample or evidence sought ... is likely to be lost if the procedure is delayed until the final determination of the application.

Under section 464W, applications can be made in person or by telephone, in which case the applicant must prepare an affidavit setting out the grounds on which the order

508 S 464T(3) in relation to capable adults.

509 A 'relevant suspect' is defined in s 464 as a person either suspected of or charged with an indictable offence against the person at common law or specified indictable offences in the *Crimes Act 1958 (Vic)* and the *Drugs, Poisons and Controlled Substances Act 1981 (Vic)*.

is sought, but may make the application before the affidavit has been sworn.⁵¹⁰ Before granting the order, the court must be satisfied:

that the sample ... is likely to be lost if the procedure is delayed ... and on the evidence, whether sworn or unsworn, before it at that time, it appears to the court that there may be sufficient evidence to satisfy it of the matters set out [in the relevant sections].⁵¹¹

If an interim order is made, and the sample obtained, a further hearing – at which the subject of the order is present – must be conducted. At that hearing, a final determination of the order is made. The sample cannot be analysed until after the final order has been made.⁵¹²

The suspect's sample and related material and information can be retained for 12 months, and if proceedings have commenced by then, they can be retained until the proceedings have concluded and any appeal periods have expired. If no proceedings eventuate, the charges are withdrawn, or the person is acquitted, the sample, related material and information must be destroyed, unless a court order authorising the retention of the sample and profile is obtained. A retention order may be sought if during the investigation of one offence, the suspect's profile is matched on the database against another offence.

If the suspect is prosecuted and found guilty of an offence for which the DNA evidence was relevant, the police may apply for a court order to retain the sample and profile (indefinitely).⁵¹³

Emerging Issues

Victoria Police proposed a range of legislative changes that would give police members the power to obtain DNA samples from suspects, that would broaden the range of offences for which DNA sampling could be undertaken and permit the indefinite retention of suspects' profiles on the DNA database.

Representatives of legal bodies, on the other hand, advocated restrictions on the use of suspects' profiles unless and until a finding of guilt is entered against them, to prevent their inclusion on searchable indices of the DNA database. Some participants in this Inquiry queried the appropriateness of relying on a suspect's consent to provide a DNA sample in the context of criminal investigations, while others sought more safeguards to protect the interests of suspects in hearings of applications for relevant suspect orders.

510 S 464V(2) provides that Interim orders cannot be made in respect of blood samples.

511 Ss 464V(5)(a) and (b).

512 S 464V(8).

513 The 2002 amendments permit retention orders to be granted on a finding of guilt in a superior court. Under the previous legislation, retention orders could only be made in the Magistrates' Court, requiring a separate hearing of the application once the finding of guilt had been entered.

This Inquiry has therefore reviewed each of the main elements of the provisions governing the sampling of suspects:

- the current means available – consent or court orders – to authorise DNA sampling of suspects;
- the offences for which DNA sampling powers should be available; and
- the provisions governing the database use that can be made of the suspect’s DNA profile.

AUTHORITY TO CONDUCT FORENSIC PROCEDURES

As noted above, the current Victorian provisions permit DNA sampling of suspects either with the consent of the donor or with the authority of a court order. In response to submissions received on this matter, the Inquiry has reviewed the appropriateness of the consent provisions and the court order system, and considered a proposal for police also to be authorised to order suspects to undergo forensic procedures.

The Consent Provisions

Only adult suspects can consent to undergo a forensic procedure under the Victorian provisions.⁵¹⁴ Forensic procedures involving children and incapable persons can only be conducted if authorised by a court order; no substitute consent arrangements apply.⁵¹⁵ In this respect the Victorian provisions are broadly aligned with the Model Bill and the legislation adopted in most other Australian jurisdictions. Almost all Australian jurisdictions currently enable a non-intimate forensic procedure to be authorised with the consent of a capable adult suspect, though some jurisdictions have developed substitute consent arrangements for children and incapable persons.⁵¹⁶

The Appropriateness of the Consent Provisions

In Chapter 4 the Committee set out its proposal for statutory recognition of the privacy principles that should apply to the conduct of forensic procedures and recommended that all donors have certain entitlements consistent with those provisions. It is envisaged that these entitlements should apply regardless of whether the procedure is authorised by consent or order, and regardless of whether the donor is a volunteer, suspect or offender. This chapter considers whether consent itself is a valid and appropriate authority for a forensic procedure involving an identified suspect in a criminal investigation.

514 S 464R.

515 S 464S requires a police member to obtain a court order for the sampling of a person who is a relevant suspect but who is a child (s464U) or incapable of providing informed consent.

516 For a comparison of Australian provisions, see Sherman, *Independent Review of Part 1D* (2003) 88-99.

Consent plays a somewhat circumscribed role in the sampling of suspects. It is only in relation to a minor property offence that a suspect could refuse to consent and no court order would be available. If a suspect consents to the procedure, the profile is used in the investigation for which it was obtained, and entered on the database, under the same provisions as those applying to relevant suspects subject to court orders.

A relevant suspect who refuses to consent to a request for a forensic procedure is made aware that a court order for a compulsory forensic procedure can be sought.⁵¹⁷ The use made of the DNA evidence obtained is identical, regardless of whether the procedure is authorised by consent or court order.

It was put to the Inquiry that the current provisions do not guarantee the suspect's voluntary and informed consent, and contained an element of coercion.⁵¹⁸ Dr Gans and the Victorian Privacy Commissioner observed that under the current provisions the suspect has no real alternative but to consent. Refusal could be taken to indicate a guilty mind and, in the case of a relevant suspect, can be overridden by a court order.

Dr Gans suggested that in these circumstances it is unsafe to rely on the suspect's consent as the authority for the procedure. He considered that if consent is relied on in an investigation, 'there will always be an argument about whether a consent was real or not', leaving open the possibility of a legal challenge as to the validity of the donor's consent and, therefore, the admissibility of the evidence.⁵¹⁹ Dr Gans believed that originally the rationale for the consent provisions was to validate the taking of a bodily sample which would otherwise constitute an assault,⁵²⁰ but that now the availability of orders removed the need for consensual sampling. He recommended:

Compulsory orders should be made the exclusive basis for obtaining DNA samples when the investigative purpose is to test whether or not the person sampled has committed a crime. ... The ... Act should be amended to abolish the use of requests for consent to DNA sampling in circumstances where compulsory orders are available.⁵²¹

The ALRC considered the relevance of consent in its Inquiry. It concluded that the coercive nature of the consent process and the fact that under the Commonwealth provisions, the suspect can be ordered to undergo a compulsory procedure, rendered the consent provisions inappropriate. The ALRC ultimately recommended that the Commonwealth should consider amending the *Crimes Act 1914 (Cth)* to 'remove the consent provisions in relation to suspects',⁵²² while retaining the current provisions empowering police to make orders for non-intimate procedures, or a magistrate for intimate procedures.

517 Under s 464T in relation to adults and s 464U in relation to children.

518 Dr J Gans, *Minutes of Evidence*, 2 June 2003, 26.

519 Ibid 25.

520 Coldrey Committee, *Report on Body Samples and Examinations* (1989).

521 Dr Jeremy Gans, Submission 16, 12.

522 ALRC, *Essentially Yours* (2003) Recommendation 41-1, 1012.

By contrast, the Sherman Review recommended the retention of consensual sampling and focussed on ways of ensuring the accountability of law enforcement agencies implementing the forensic procedure provisions.

Conclusions: Consent and the Sampling of Relevant Suspects

The Committee acknowledges an element of coercion in a request by police for a suspect's consent to a forensic procedure and notes that the personal information contained in a DNA sample puts the DNA sample in a special category of evidence.

While consent does not, and could not have the same force in a criminal investigation as it would in the context of medical treatment, for example, asking for the donor's consent recognises the donor's personal integrity and interests in the procedure. The Committee considers the alternative to consent – an order – is a more coercive option and therefore less desirable when a DNA sample is first sought.

There are other parallels in criminal investigations, where a suspect may be asked to co-operate with police. As a general rule, a person's willingness to co-operate with police may be taken into account at the conclusion of any ensuing criminal proceedings.

The Committee believes that the collection of DNA samples should not depart from established procedures in this respect. The Committee therefore recommends that the current provisions be retained, permitting a capable adult suspect in the investigation of an indictable offence to be asked to consent to a non-intimate forensic procedure.

'RELEVANT SUSPECT' ORDERS: THE ROLE OF THE COURTS

The police may apply to the court for an order to require a non-consenting adult relevant suspect to undergo a forensic procedure. While any capable adult suspected of being involved in the commission of an indictable offence can be asked to consent to a forensic procedure, court orders can only be obtained where a person is identified as a relevant suspect (that is, in relation to specified serious indictable offences).

The Application Process

It was put to the Inquiry that, on the one hand, the judicial consideration of applications for orders for forensic procedures – and the discretion to reject the application or qualify the orders given – was an essential safeguard for the rights and interests of the suspect.⁵²³ On the other hand, Victoria Police submitted that the

523 See generally the submissions by Victoria Legal Aid, Submission 15; the Law Institute of Victoria, Submission 21; the Privacy Commissioner, Submissions 18, 18S; and the Criminal Bar Association, Submission 13.

exercise of the judicial discretion was not necessary and proposed that the police have the power to order forensic procedures at the time of arrest.

The Inquiry therefore sought to ascertain the use made of relevant suspect orders: the number of applications for compulsory procedures sought and granted, the reasoning applied by the courts in determining applications, and some indication of the turnaround time taken. The Chief Magistrate observed:

464T (compulsory procedures) applications are in most cases heard on the day they are first listed. ... There is no evident trend towards these applications being contested. ... In relation to 464T, the defendant has no right to cross-examine and can only make submissions in relation to the matters set out in section 464T(3). Such submissions are generally very short. The court has not had any problems with implementation ... We have not developed protocols or guidelines and do not believe these are necessary.⁵²⁴

Several witnesses expressed strong opposition to the grant of powers to the police to order forensic procedures on suspects, favouring the existing safeguard provided by judicial scrutiny under the current regime, and advocating even further safeguards on the uses to which the sample and related information could be put. The Director of Public Prosecutions (DPP) Mr Paul Coghlan QC, also indicated that he had not experienced difficulties with the administration of the regime by the courts.

It does not strike us as there being much problem with an application being made to a court for an order that a sample be provided in situations where there is a refusal to [consent to] provide the sample, and it works reasonably well.⁵²⁵

According to Mr Coghlan, very little preparation and court time has been required for these applications, as police informants, prosecutors and courts have become more familiar with the processes involved:

The usual procedure, I understand, is that the police notify us if they want to make an application. It is usually an urgent one. One of the solicitors who regularly appears at the Magistrates' Court would get the job of appearing on the application. In between, if there are questions that need to be raised and there is time to do it, there is access to either me or one of the Crown prosecutors to make a judgment about whether it would succeed. Quite often the police may come to the prosecutor's chambers and get advice about whether it is thought to be enough to warrant the making of an application beforehand.⁵²⁶

Representatives of the Law Institute of Victoria and YouthLaw also believed the current processes were working smoothly. Mr David Laschko, representing the Criminal Law Section of the Law Institute of Victoria, indicated:

I have spoken to a number of members of our profession. The point on the number of applications that we have seen is, it is not something that is occurring every day. Is it

524 Chief Magistrate Ian Gray, Letter dated 13 August 2002, to Executive Officer, Victorian Parliament Law Reform Committee.

525 P Coghlan QC, *Minutes of Evidence*, 23 July 2002, 131.

526 Ibid 137.

really a situation where the police are being hampered in their current investigations or do they simply wish to be unfettered in terms of just simply requesting a sample in the same way as they do with fingerprints?⁵²⁷

Similarly, YouthLaw observed the value of judicial involvement in the sampling of suspects, noting that the applications process had had very little effect on the workload of the court or practitioners.

[H]aving these rights for young people has not bogged down the courts in contesting all these matters ... – the vast majority of young people in the Children's Court end up pleading guilty –... they should be able to exercise their rights at every stage of the process as older offenders or defendants do at the moment.⁵²⁸

Mr Coghlan noted that even if a first application is refused, the police may re-apply when more material in support of the application is available. Mr Coghlan referred to a case which received media attention during the Inquiry, involving a contested application for a compulsory procedure in relation to a murder investigation. The initial decision on the application was appealed and further applications made.

An example of that in recent times was an issue where the police go before the court and a magistrate finds that there is insufficient material for the provision of a sample at that stage for the order of the sample. Some additional work is done. There is nothing to prevent the police making a fresh application. They make a fresh application to the court and an order is granted.⁵²⁹

Mr Dan Meagher, Lecturer in Law, saw the processes used to resolve this application as ‘a classic example of the system working properly’ and did not believe that court processes could be held responsible for difficulties or delays in obtaining DNA evidence.⁵³⁰

In two weeks there were three separate applications and also a Supreme Court hearing regarding the granting of an application. For the initial ones there were not reasonable grounds that he committed the offence. Notwithstanding that they granted the application, it went to the Supreme Court and they overturned it. The whole process - four hearings - was done in two weeks. It seemed to me to be a classic example of the system working properly.⁵³¹

Relevant Considerations in Determining Applications for Orders

Section 464T(3)⁵³² prescribes essentially three basic prerequisites for the grant of an order for a compulsory procedure (also referred to here as a relevant suspect order):

- the existence of a crime scene sample for matching purposes;⁵³³

527 D Laschko, *Minutes of Evidence*, 22 July 2002, 90.

528 S Nicholson, *Minutes of Evidence*, 22 July 2002, 79.

529 Ibid 131.

530 D Meagher, *Minutes of Evidence*, 23 July 2002, 165.

531 Ibid 164.

532 S 464U(3) for children.

- the utility of the evidence in the current investigation – reasonable grounds to believe that the conduct of the procedure may tend to confirm or disprove involvement in the commission of the offence;⁵³⁴ and
- the person is a ‘relevant suspect’ and, on the balance of probabilities, there exist ‘reasonable grounds to believe that the person has committed the offence in respect of which the application is made’.⁵³⁵

If granted, the order enables the police to use the information obtained from the procedure for two distinct purposes: to be matched with the crime scene profile in that investigation and in any other investigation for which it has probative value.⁵³⁶ An application for a ‘relevant suspect’ order must be in writing, must be supported by evidence on oath or by affidavit, and must specify the type of compulsory procedure sought. The application must also indicate if the person to whom the application refers is a detained or ‘protected person’.⁵³⁷

The Inquiry reviewed the three factors relevant to the grant of an order for a compulsory procedure: the availability of a crime scene DNA sample; reasonable grounds to suspect the subject of the application; and the utility of the DNA evidence in that investigation.

The Availability of a Crime Scene Sample

Under the Victorian legislation, the collection of DNA from suspects is tied to the availability of crime scene evidence against which it can be compared. Mr Connellan observed that the collection of reference samples should always be considered in the light of the utility of the procedure in the criminal investigation for which it is sought.⁵³⁸ The Inquiry considered the practical arrangements made to ensure that usable DNA evidence collected from the crime scene is available.

The Inquiry was informed that, as a result of a policy decision by the VFSC, crime scene exhibits are not analysed until a suspect has been identified and a reference sample obtained. Then the DNA evidence for the whole case is examined together.⁵³⁹ The effect of this decision is that when an application for a compulsory procedure is being considered, a crime scene exhibit has generally been obtained, but not analysed. It is not known at the time of collection whether the analysis will produce a full profile capable of being matched to a suspect’s profile. Approximately 30 per cent of attempted matches are inconclusive and, in some of these cases, the cause is the

533 S 464T(3)(c)(i).

534 S 464T(3)(c)(iv).

535 Ss 464T(3)(a)-(h) generally.

536 This essentially means that for the duration of the investigation and proceedings the suspect’s profile can be matched on the database against unsolved crime scenes.

537 S 464T(2)(b).

538 G Connellan QC, *Minutes of Evidence*, 23 July 2002, 168-173.

539 Professor J Scheffer, *Minutes of Evidence* 2 June 2003, 14. See also *Director of Public Prosecutions v Devaldez* [2003] VSCA 29.

quality of the crime scene sample. Between January 2000 and June 2002 the VFSC recorded a total of 423 analyses which produced inconclusive results. If a crime scene sample does not produce a DNA profile against which the suspect's profile can be compared, the collection of the suspect's DNA has no direct forensic benefit to that investigation.

The collection and analysis of the suspect's DNA is a fruitless and needlessly intrusive procedure if there is no crime scene profile for it to be compared with. There is also a possibility that a crime scene sample could be collected, even where its forensic utility was limited or negligible in order to support an application for a relevant suspect order.

The NSW Law and Justice Committee also considered this difficulty with the implementation of a corresponding provision in that jurisdiction. In its review of the NSW provisions, the Law and Justice Committee recommended:

that the Attorney General consider amending the *Crimes (Forensic Procedures) Act 2000* to prohibit forensic procedures on suspects unless evidence producing a DNA profile has been found at the crime scene or on the victim.⁵⁴⁰

The Committee considers that the current provision does not go far enough to ensure that, before a suspect is sampled for a criminal investigation, relevant, usable crime scene evidence is available for comparison. The Committee recognises that it would be impracticable to require crime scene samples to be tested before relevant suspect orders were sought. The Committee proposes, however, that in applications for relevant suspect orders the applicant be required to indicate whether the crime scene sample has been analysed.

Recommendation 6.1 Application for a relevant suspect order

That the Crimes Act 1958 (Vic) be amended to provide that an application for a relevant suspect order under sections 464T(3) or 464U be required to specify whether the crime scene sample has been analysed and, if so, whether it has produced a profile against which the suspect's profile can be compared.

The Forensic Utility of the Procedure in the Investigation

The requirement for the DNA evidence to be useful in the investigation is crucial in the operation of the 'relevant suspects' regime. It provides the justification for subjecting the suspect to a possibly intrusive procedure, and it restricts de facto the range of offences which can be covered by the current provisions. The justification for conducting a forensic procedure is, under the current legislation, the relevance or utility of the DNA evidence obtained from the procedure.

540 NSW Standing Committee on Law and Justice, *Review of the Crimes (Forensic Procedures) Act 2000* (2002) Recommendation 12, xv1.

The Victorian Privacy Commissioner referred to this as the ‘necessity’ and ‘effectiveness’ of the procedure. Mr Chadwick stressed that it should be shown that the procedure is warranted, on the basis that the evidence obtained would tend to confirm or exclude the suspect's involvement in the offence. The Privacy Commissioner's views were reiterated by a number of other witnesses. The Criminal Bar Association described it as ‘detection relevance’ and explained:

Section 464R, the section dealing with the taking of samples from suspects, requires that the procedure, if undertaken, would tend to confirm or deny involvement in a crime. So there needs to be an issue of relevance there.⁵⁴¹

This requirement is not only the theoretical justification for the procedure; it also operates on a practical level to limit the range of offences for which a compulsory procedure can be ordered. The probative value of DNA evidence is only powerful within a tightly circumscribed area: DNA evidence might link a suspect to a crime scene, but it cannot date or explain the suspect's presence there. It therefore has probative value to confirm identity, where identity is an issue, but for a large percentage of cases which reach the stage of criminal proceedings, identity is not the main issue being contested.

Further, it should be noted that the exclusionary effect of DNA evidence can be more powerful than its inclusive power. If a suspect's profile does not match that obtained from a crime scene, such evidence will exculpate the suspect; but if a suspect's profile matches the crime scene profile, further evidence is needed to prove the suspect's guilt.

To date priority has been given to DNA profiling in serious cases, such as rape, murder and burglary, where the nature of the offence makes it imperative to obtain all relevant evidence. In these cases, however, DNA evidence is likely to be only one element of the case against the accused. In this context the low level of use of the relevant suspect provisions might reflect the limited utility of the profile in investigations.

Reasonable Grounds for Suspicion

A number of witnesses drew attention to the importance of ensuring that reasonable grounds exist for the identification of a person as a suspect in a criminal investigation. As the legislation currently stands, this question is to be considered by the court before granting an application for an order for a compulsory procedure. However, it is not considered if the donor consents to undergo the forensic procedure, as no application for a court order is then required.

The definition of reasonable suspicion is a threshold question. It was put to the Inquiry that the breadth of the term ‘belief on reasonable grounds’ gave considerable

541 R Punshon SC, *Minutes of Evidence*, 22 July 2002, 83.

discretion to those invested with the power to order a compulsory procedure. This discretion could permit ‘suspects’ to be identified at a very early stage of the investigation. A representative from PILCH put the view that it was premature to require a DNA sample of suspects who had not been charged with an offence. Co-executive Director of PILCH, Emma Hunt noted:

There are many examples where suspects are taken in for questioning and ultimately not charged or convicted, and it would seem to go against that basic tenet that somebody should be forced to give DNA in those circumstances.⁵⁴²

Other witnesses also noted with concern the breadth of this provision. Dr Jeremy Gans observed:

It is also difficult to define when a ‘reasonable suspicion’ ceases. Compare the case with offenders, whose status can only change if they are acquitted on appeal or are pardoned by the executive.⁵⁴³

Dr Gans’ concern was that if a broad definition of reasonable suspicion were applied, police would be able to propose/authorise forensic procedures on individuals on ‘flimsy grounds’.

Allowing the mere criterion of ‘reasonable suspicion’ to be a basis for taking a ‘cold hit’ sample will give police officers an incentive to expose individuals to coercive powers, such as arrest and search, on the basis of dubious levels of suspicion.⁵⁴⁴

Having obtained the suspect’s DNA sample, the profile can be retained and matched against other crime scenes for which that person has not been identified as a suspect. In Dr Gans’ view, this use of the sample could expose the investigation process to legal challenge.

The legal definition of ‘suspect’ is unclear and hard to define. Accordingly, if cold hits are founded on a compulsory order applicable to a ‘suspect’, then they will be susceptible to later legal challenge. ... The attachment of such serious consequences to the concept of ‘reasonable suspicion’ may lead the courts to develop a restrictive definition of this concept. This will hamper the legitimate use of other police powers that also depend on the ‘reasonable suspicion’ criterion.⁵⁴⁵

Judicial Consideration of ‘Belief on reasonable grounds’

In *Walsh v Loughnan*⁵⁴⁶ the Victorian Supreme Court considered the ‘reasonable suspicion’ test and held that it was confined to the existence of evidence which is sufficient to give reasonable grounds for a belief of the suspect’s involvement in the commission of the offence. The evidence which gives rise to this belief does not need

542 E Hunt, *Minutes of Evidence*, 23 July 2002, 154.

543 Dr Jeremy Gans, Submission 16, 14-16.

544 Ibid.

545 Ibid.

546 [1991] 2 VR 351; and *Loughnan v Magistrates Court of Victoria sitting at Melbourne and Anor* [1993] 1 VR 671.

to satisfy tests of admissibility and is not advanced on the basis of its truth but as material which gives rise to the applicant's belief.⁵⁴⁷ The court noted that the legislation 'seeks to strike a balance between two competing interests':

that which the community has in the detecting and investigating of crime and in the efficient gathering of reliable evidence and its presentation in court; and that of the individual in resisting unnecessary harassment and invasion of privacy by state investigating authorities.⁵⁴⁸

The court held that a court is not required to consider 'the whole of the material which might, at trial, be put before the court on the issue of guilt'.⁵⁴⁹ The court need only be satisfied 'that there are grounds for the belief in question and that those grounds are reasonable'. The court noted that the existence of reasonable grounds 'for believing that the suspect has committed the offence':

is not necessarily inconsistent with the fact that other possibilities exist too, based upon further and different material.⁵⁵⁰

The court construed the purpose of the provisions as being 'to make a particular investigative tool available, subject to appropriate safeguards'. The court concluded that 'these applications should be dealt with briefly' and was concerned to limit 'the potential for enlarging the scope of the enquiry beyond what ... was the intention of the legislation'.⁵⁵¹

The approach taken in *Walsh v Loughnan* was affirmed in *Iskra v Police*⁵⁵² – one of four recent South Australian cases which considered similar issues.⁵⁵³ The court alluded to the 'capability of abuse' of the relevant South Australian provision, and stressed that the hearing 'involves completely different considerations from those which might arise on the hearing of a complaint, or information or on a preliminary examination'. The court concluded that the hearing and the respondent's opportunity to cross-examine should be confined 'to evidentiary matters which have a bearing upon whether or not a case has been made out for an order'.⁵⁵⁴

It appears, therefore, that in construing the test for suspicion in applications for relevant suspect procedures, the courts are establishing a relatively low threshold test.

547 *Loughnan v Magistrates Court of Victoria*, *ibid* 692.

548 *Walsh v Loughnan*, [1991] 2 VR 351.

549 *Ibid*.

550 *Ibid*.

551 *Ibid*.

552 *Iskra v Police* [2003] SASC 50 Perry J.

553 *Police v Beck* (2001) 79 SASR 98; *George v Rocket* (1990) 170 CLR 104; *BJM v Police* [2002] SASC 333.

554 *Iskra v Police* [2003] SASC 50 Perry J, paras 76-77.

Conclusion

The three factors identified in section 464T combine to require that the compulsory collection of a suspect's DNA sample be justified on the basis of its necessity in a specific investigation of a serious indictable offence. In other words, the primary purpose of the DNA sampling of suspects has been its investigative value. The inclusion of a suspect's profile on the DNA database has been a secondary use of the profile. This has also served to establish that inclusion of a profile on the suspects' index of the database only occurs if a person has already been identified as a suspect in the investigation of an indictable offence.

Additional Relevant Factors

The Inquiry was urged to review the factors to be considered by a court in making a compulsory order under the 'relevant suspect' provisions. It was put to the Inquiry that the court should balance the likely probative value of the DNA evidence against the intrusiveness of the procedure in determining a relevant suspect order.

When determining whether to grant an order for a DNA test, the court should consider whether the evidence obtained from it is likely to be admitted as probative if the case goes to trial and whether the public interest in obtaining such evidence outweighs the expense and infringement of rights involved in obtaining it.⁵⁵⁵

The Privacy Commissioner noted that safeguards included in Clause 8(3)(c) of the Model Bill – factors such as the suspect's age, physical and mental health and cultural background – are not, but should be, included in the Victorian provisions. The Privacy Commissioner recommended that the legislation specifically require the court to consider:

Whether there are less intrusive ways of obtaining evidence to confirm or disprove the suspect's involvement in the commission of the offence.⁵⁵⁶

The Law Institute of Victoria, the Criminal Bar Association and Victoria Legal Aid, as well as Liberty Victoria, all recommended that explicit weight be given to the derogation of individual privacy rights which forensic procedures involve.⁵⁵⁷ The Privacy Commissioner emphasised the importance of ensuring that the use of the forensic procedure was in proportion to the need for it.⁵⁵⁸ He proposed:

The *Crimes Act* should be amended to expressly require police and courts to balance the relevant public interests in privacy and criminal investigation.⁵⁵⁹

555 Mr Michael Strutt, Submission 24, 2.

556 Privacy Commissioner, Submission 19, 12.

557 See generally Law Institute of Victoria, Submission 21; Criminal Bar Association, Submission 13; Victoria Legal Aid, Submission 15; and Liberty Victoria, Submission 27.

558 Privacy Commissioner, Submission 19, 16.

559 *Ibid.* The Committee noted the possible implications for relatives of persons identified as relevant suspects and the significance consequently attached to the criteria by which orders for forensic procedures are determined. In the United Kingdom, a suspect's relatives have been

The Committee accordingly reviewed the provisions developed in other Australian jurisdictions,⁵⁶⁰ focussing in particular on the safeguards included in the Commonwealth regime, set out in Part 1D of the *Crimes Act 1914 (Cth)*. Sections 23WO(3)(c)-(g) (for senior police constables) and 23WT(3)(c)-(g) (for magistrates) set out the relevant matters.

One factor not included in the Victorian provision is whether the carrying out of the forensic procedure without consent is justified in all the circumstances. Also, the Commonwealth legislation gives clear guidance as to the circumstances which should be taken into account here. Two competing public interests are to be balanced: the public interest in obtaining evidence against the public interest in upholding the physical integrity of the suspect.⁵⁶¹ In so doing, the senior constable/magistrate is required to have regard to:

- circumstances relating to the commission of the offence: the gravity of the offence, the seriousness of the circumstances, and the degree of the suspect's alleged participation (broadly similar provisions are contained in the Victorian legislation);
- the background of the suspect: his/her age, physical and mental health, cultural background and religious beliefs and, in the case of indigenous persons, his/her customary beliefs;
- the availability of a less intrusive way of obtaining the evidence;
- the suspect's reasons for refusing consent; and
- any other matter considered relevant.

The final four factors are not included in the current Victorian provisions. The Committee considers that within a regime of court orders, the factors listed above in sections 23WO and 23WT of the Commonwealth legislation would satisfy the concerns of the witnesses mentioned above. The Committee further considers that a court, unlike a constable, would be in a position to weigh up the 'privacy-related' considerations against the factors going to the forensic utility of the sample. The Committee therefore recommends that the *Crimes Act 1958 (Vic)* be amended to incorporate these provisions.

requested to provide a sample in the absence of the suspect, in order to ascertain the likelihood of the suspect's involvement in the crime under investigation. See the announcement by the Forensic Science Service at www.forensic.gov.uk/forensic/entry.htm.

560 The grounds on which a forensic procedure may be ordered vary between jurisdictions. In Western Australia, for example, charged suspects may be required to undergo a procedure on reasonable suspicion that particulars 'may not be held' or 'may be needed' by the police. The provisions of the Model Bill require the police officer or the magistrate (as applicable) to consider a range of factors for forming the belief that the suspect committed the offence.

561 *Crimes Act 1914 (Cth)* s 23WO(2).

Recommendation 6.2 Factors relevant to orders for compulsory procedures

That the relevant provisions of Subdivision 30A of the Crimes Act 1958 (Vic) be amended to include the considerations listed in sections 23WO and 23WT of Part 1D of the Crimes Act 1914 (Cth) in relation to the grant of an order for a compulsory forensic procedure on a suspect, namely:

- (i) the background of the suspect: his/her age, physical and mental health, cultural background and religious beliefs and, in the case of indigenous persons, his/her customary beliefs;**
- (ii) the availability of a less intrusive way of obtaining the evidence;**
- (iii) the suspect's reasons for refusing consent; and**
- (iv) any other matter considered relevant.**

Multiple Suspects

The legislation does not specify how many people could be identified as relevant suspects in a single criminal investigation. Nor is this a factor to be considered by the court when hearing an application for an order requiring a suspect to undergo a compulsory procedure. It is conceivable that applications seeking orders to sample a number of suspects could be brought and granted without judicial consideration of this approach. The Director of Public Prosecutions, Mr Paul Coghlan QC, discussed this issue:

If you are at the point where you can demonstrate somebody is a relevant suspect, you can get their DNA. If it is somebody who is already on the database, you can use their DNA. I think probably the only area that is probably not open at the moment is if you have the DNA from a series of suspects. You may not be able to use that for any comparator purposes until such time as you have reached the conviction stage. ... Given that [the grant of an order] is a court-based thing, and having got that sample, I do not see huge problems with saying that it is material that should be made available to the police.⁵⁶²

For example, the New South Wales case, *R v Jarrett*,⁵⁶³ concluded an investigation into the murder of an elderly woman. Investigators identified and sampled 17 men who had attended her house in the period shortly before her death and, by elimination, identified one suspect who was charged with her murder.

The Inquiry was informed of one Victorian investigation in which multiple suspects were sampled. In the investigation of the Easey Street murders, eight suspects were sampled and ultimately excluded from the investigation.

⁵⁶² P Coghlan QC, *Minutes of Evidence*, 23 July 2002, 137.

⁵⁶³ (1994) 73 A Crim R 160; also referred to in Freckelton, *DNA Profiling: Issues Paper* (2002) 24.

[H]omicide detectives had, I think, eight suspects in mind. They thought the offender would come from those eight suspects. For 20 years those people were suspects and were regularly visited as the case was opened and remained unsolved. When the DNA technology came in the investigators reopened it and asked the eight to give samples under the volunteer section and all of the eight did — which surprised the investigators, to start with. You might say that the reason the eight of them gave those samples is that they were not involved in it. The DNA was able to show that the whole eight were not involved.⁵⁶⁴

Dr Gans submitted that legislation should clarify whether more than one relevant suspect can be identified for testing in a single investigation.

Compulsory sampling to test suspected links with particular crimes should be permitted on all members of a defined group of up to 10 people where investigators have a reasonable suspicion that one of the group has committed a crime, but are unable to narrow that suspicion to a particular individual. For especially serious crimes (i.e. homicide and rape), consideration should be given to a similar power to compulsorily DNA sample groups of up to 1000.

The Committee considered the complexities of the current provisions when used in relation to multiple suspects. It formed the view that the provisions should accommodate the identification and sampling of multiple suspects in a single criminal investigation. However, it took the view that the court should be made aware of this when determining each of the applications. The Committee therefore recommends that the *Crimes Act* be amended to clarify the process for seeking court orders in investigations involving multiple suspects, by requiring each application to indicate the number of applications that are being sought in relation to other suspects.

Recommendation 6.3 Multiple suspects

That Subdivision 30A of the Crimes Act 1958 (Vic) be amended to clarify the process for seeking court orders in investigations involving multiple suspects, by requiring each application to indicate the number of applications that are being sought in relation to other suspects.

Court Orders: Conclusions

The legal bodies which participated in this Inquiry gave unanimous support for the continued role of the courts in authorising forensic procedures. Representatives of the Criminal Bar Association, Victoria Legal Aid, the Law Institute of Victoria, the Public Interest Law Clearing House, Liberty Victoria, YouthLaw and the Director of Public Prosecutions all affirmed the importance of continued judicial involvement. Victoria Legal Aid supported judicial scrutiny on account of the intrusiveness of the procedure.

564 Ibid 11.

Victoria Legal Aid considers that the current provisions with respect to forensic sampling should stay in place. ... Judicial supervision of the process is fundamental to engendering confidence in the forensic process and is appropriate given the extent of intervention to individual liberty.⁵⁶⁵

Similarly, the Law Institute of Victoria indicated that the judicial process served as a safeguard to protect the interests and liberties of the individual.

The Institute firmly believes that police powers should not be extended, as proposed, to routine sampling of all people suspect, charged [or convicted] of a crime. Ordering of samples must remain subject to judicial process since this is the only safeguard currently offered to protect civil liberties. The fact that judicial scrutiny makes it more inconvenient for police to obtain DNA samples takes into account the importance of this protective role.⁵⁶⁶

The Public Interest Law Clearing House noted that judicial supervision protects the interests of the disadvantaged members of society from a possible abuse of police powers.

We also believe judicial scrutiny of the process by which DNA is taken should be protected, particularly to make sure that people who are disempowered and in a marginalised position in society are not subject to potential abuse of police power.⁵⁶⁷

The Director of Public Prosecutions likened the procedure to that applying to other 'intrusory processes', such as telephone intercepts and listening devices, and considered that, as in these processes, judicial supervision was warranted.⁵⁶⁸ The Criminal Bar Association also 'strongly favoured the retention of the present system, which requires court approval' for the sampling of relevant suspects.⁵⁶⁹ The Association observed that the involvement of the courts provided an assurance to the community that forensic sampling processes would be administered fairly and honestly.

Firstly, it seemed to us that it keeps the system and the process honest to have that checking mechanism to ensure that the preconditions for the taking of a sample have been met. Secondly, ... a system of court orders is likely to encourage people to cooperate.⁵⁷⁰

The Victorian Privacy Commissioner also cautioned against removing judicial scrutiny over a regime where consent might not be strictly voluntary. He stressed the importance of judicial oversight to limit the potential for coercion and indicated that the authorisation of procedures by police, rather than by courts, would increase the possibility of coercion on those from whom DNA samples are sought.

565 Victoria Legal Aid, Submission 15, 2.

566 Law Institute of Victoria, Submission 21, 1; and D Laschko, *Minutes of Evidence*, 22 July 2002, 83.

567 E Hunt, *Minutes of Evidence*, 23 July 2002, 155.

568 P Coghlan QC, *Minutes of Evidence*, 23 July 2002, 131.

569 R Punshon SC, *Minutes of Evidence*, 22 July 2002, 83.

570 Ibid.

There was evident concern, as outlined elsewhere in this Report, at the prospect of Victoria Police members having the power or discretion to authorise forensic procedures. The basis for this concern was the ambivalent position in which it placed police officers, who would be required to consider the interests of the relevant suspect in addition to the interests of the investigation. Mr Dan Meagher, Lecturer in Law at Deakin University, expressed concern at the potential conflict of interest that could arise if police were required to reconcile their interests in crime detection and law enforcement with the suspect's legal rights and privacy interests. Mr Meagher observed:

If you had a situation where police – notwithstanding how senior the police officer might be – were effectively judge and jury in their own case, the kind of train of events we had in the Mangione applications could not occur because this [application] would be granted in the first instance. ... I think it is important to have that buffer between the police and the public.⁵⁷¹

A number of participants in this Inquiry recommended measures to strengthen the role of the courts, and the status of the suspect in the applications process. The Criminal Bar Association recommended that the suspect be made a party to the application and the Public Interest Law Clearing House advocated further consideration of the observations made by Gillard J on the issues of procedural fairness and the execution of orders.⁵⁷² The Privacy Commissioner sought additional considerations to be taken into account by a magistrate on hearing an application for a compulsory order.

Applying the ethical principles discussed in Chapter 4, this Inquiry has formed the view that, while the procedure is not highly intrusive on a physical level, it obtains personal information which clearly has the potential to affect the donor's personal privacy. The Inquiry recognises that the forensic use of DNA is different in fundamental ways to the use of DNA, at the request of the donor, for health or diagnostic purposes. In these circumstances, especially where the DNA evidence can be used in criminal proceedings against the suspect, the Inquiry concludes that it is desirable to retain court orders for the authorisation of compulsory procedures involving relevant suspects.

POLICE POWERS AND COURT ORDERS

The Victoria Police Proposal

Victoria Police submitted a proposal for a substantial expansion of police powers which, if implemented, would give Victoria one of the most comprehensive forensic sampling regimes in Australia. Victoria Police sought the power to order forensic

571 D Meagher, *Minutes of Evidence*, 23 July 2002, 164.

572 These proposals are considered in Chapter 12, dealing with the impact of the forensic sampling provisions on legal principles and rights in criminal proceedings.

procedures involving suspects and those charged, arrested or summonsed in relation to indictable and Schedule 7 summary offences.⁵⁷³ In this section, the proposal is considered as it relates to the expansion of police powers. The implications of the proposed expansion to the range of relevant suspect offences are addressed later in this chapter.

Provisions in other Jurisdictions

Victoria is the only Australian jurisdiction that does not provide for any police-ordered procedures. The Model Bill originally provided only for court orders, but a provision for police-authorized procedures was added in later versions of the Bill. Most other Australian jurisdictions permit police to order non-intimate forensic procedures on suspects in custody. However, as noted in Chapter 2, most jurisdictions require court orders for forensic procedures involving non-custodial suspects, incapable persons and children, and all intimate procedures.

Australian jurisdictions which make a distinction between intimate and non-intimate procedures generally require a court order to authorise an intimate procedure.⁵⁷⁴ The Commonwealth, the ACT and now, the NSW provisions, adopt the Model Bill provisions.⁵⁷⁵ The ALRC also supported distinguishing between custodial and non-custodial suspects, and recommended that ‘where a suspect is not in custody, only a court should be authorised to make a compulsory order.’⁵⁷⁶

The Northern Territory provisions make no distinction between suspects and offenders in their legislation, but contain different provisions for the conduct of procedures depending on whether or not the person is in custody. The Superintendent of Police may authorise a non-intimate forensic procedure to be conducted on a suspect or person charged with an offence punishable by imprisonment.⁵⁷⁷

In Queensland, a commissioned police officer can order the conduct of a forensic procedure at any stage in proceedings for an indictable offence.⁵⁷⁸ The recently enacted amendments to the Western Australian legislation sets up a regime that is unique within Australia. The provisions authorise a senior officer not involved in the

573 Victoria Police Submission 18, Recommendations 1 and 2, 1-2. This proposal also included authority to sample offenders held in Victorian prisons in relation to offences under Commonwealth law.

574 Queensland legislation only permits the taking of buccal swabs and hair samples and does not therefore differentiate between intimate and non-intimate procedures.

575 In the *Crimes Act 1914 (Cth)*, Division 4 relates to police orders for non-intimate procedures, while Division 5 relates to orders for intimate procedures to be made by a magistrate.

576 ALRC, *Essentially Yours* (2003) 41.4-32, 1011.

577 Under the *Police Administration Act (NT)*, s 145A authorises the conduct of non-intimate procedures, while s 156 deals with the conduct of non-intimate procedures on persons in custody.

578 *Police Powers and Responsibilities Act 2000 (Qld)* Division 4.

investigation to require a forensic procedure to be conducted on a charged or uncharged suspect.⁵⁷⁹

Submissions Received

Support for Police Discretionary Powers

Representatives of the Crime Victims Support Association recommended, in the longer term, blanket sampling of citizens to establish a DNA database comprising all citizens' profiles.⁵⁸⁰ Mr Noel McNamara advocated, ultimately, 'a national database for criminal investigations ... on a global scale',⁵⁸¹ In the context of the current review, the Association put the view that the overriding importance of crime detection warrants a derogation of the protection for individual rights of suspects in criminal investigations. Mr Nick Halvagas indicated:

We need to give the police the tools they need.⁵⁸²

Alastair Ross favoured expanded police powers to authorise the sampling of relevant suspects, while retaining court orders for procedures involving children.

In order to 'simplify and speed up the approval process', a police officer of the rank of Inspector or above should be able to order a suspect or offender to be sampled. ... In the case of children aged 10-17 years, it should remain that application is made to the Children's Court.⁵⁸³

Dr Gans supported granting police the power to order forensic procedures on custodial suspects, but to prohibit database use of the suspect's DNA. However, Dr Gans advocated the retention of court orders to obtain DNA samples from non-custodial suspects.

A court order (and continuing court supervision) ought to be a prerequisite for taking a DNA sample from people who are not in lawful custody (including people who 'voluntarily' attend at a police station), where the sample is to be used to test whether or not that person committed a crime.⁵⁸⁴

This proposal rested, however, on a corresponding limitation on the use to which suspects' profiles could be put. Dr Gans advocated that suspects' profiles only be used for the investigation for which they are obtained, and recommended clear restrictions on their use for any database purposes. Dr Gans also indicated that, if

579 *Criminal Investigation (Identifying People) Act 2001 (WA)* ss 66 and 67.

580 Crime Victims' Support Association, Submission 6.

581 N McNamara, *Minutes of Evidence*, 2 June 2003, 33.

582 N Halvagas, *Minutes of Evidence*, 23 July 2002, 117.

583 Mr Alastair Ross, Submission 22, 1.

584 Dr Jeremy Gans, Submission 13, 18-19.

suspects' profiles were available for use on the database, judicial authorisation of the collection of DNA samples would be necessary.⁵⁸⁵

Opposition to Police Powers

While the Inquiry had not specifically canvassed this issue at the commencement of the Inquiry, legal bodies, public interest groups and advocates for disadvantaged groups expressed a strong and generalised concern at the grant of discretionary powers to police in relation to DNA sampling. Similarly, the Director of Public Prosecutions, the Privacy Commissioner, representatives of the Law Institute of Victoria, the Criminal Bar Association, YouthLaw and Victoria Legal Aid all expressed their strong support for the continued role of the courts to authorise the DNA sampling of suspects.

Conclusions

In weighing up the options for police or court orders, the authorised use of the samples and profiles so obtained is clearly relevant. If, as Dr Gans proposes, police were only authorised to use the sample and profile for purposes relating to the investigation for which the sample was obtained, and if the reliability and admissibility of the resultant DNA evidence were subject to judicial scrutiny in any ensuing criminal proceedings, the implications of permitting police authorised procedures would be limited.

However, if, as applies under current Victorian law, the sample and profile could be compared with unsolved crime scenes for the duration of the investigation and after a finding of guilt, the implications of permitting the original procedure to be authorised by police rather than the courts are far greater. In this context the Director of Public Prosecutions observed:

If we are using a court-based system and somebody is found to be a proper suspect by a court making an informed decision, keeping the sample is not such an affront. I would have more difficulty if it was a judgment simply made by a police officer at a police station who had a sample taken and kept that forever. The balance that exists in that process may not be the same as if a court were involved in the first place.⁵⁸⁶

The Committee accepts that judicial supervision of the sampling of suspects provides a buffer between the suspect and the law enforcement agency. It ensures that the interests of law enforcement are weighed against the rights and interests of the defendant impartially.

The Committee also believes that the considerations taken into account by courts in determining relevant suspect applications achieve the purpose of judicial supervision

585 Ibid.

586 P Coghlan QC, *Minutes of Evidence*, 23 July 2002, 135.

of this process: they ensure that the taking of the sample occurs where there are grounds for suspicion that the person has been involved in the commission of a serious indictable offence. The Inquiry notes that the requirements do not impose onerous burdens of proof on the police applicant, as the 'reasonable suspicion' test is lower than would apply in criminal trials.

From a public policy perspective, the Inquiry sees the current system of court orders as affirming a connection between the taking of the sample and its forensic utility in a specific investigation. This serves to ensure that the primary purpose of DNA sampling of suspects remains the detection of offences for which they have already been identified as suspects. Finally, the Inquiry notes that as relatively few orders are sought, the court order system does not impose administrative or resource burdens on the court or on investigators. The Inquiry therefore recommends that the current provisions in relation to the requirement for court orders for compulsory forensic procedures involving relevant suspects be retained.

THE SAMPLING OF VULNERABLE SUSPECTS

While adult capable suspects can be asked to consent to a forensic procedure, a court order is required for the sampling of child suspects and for persons who are incapable of giving informed consent. Applications for relevant suspect orders involving incapable persons are governed by the relevant suspect provisions of section 464T. Applications for relevant suspect orders involving children aged 10 years and over but under 17 years must be made in the Children's Court. The applications process is substantially the same as for adults, except that applications are heard in the Children's Court. Where notice is given to a child, however, notice must also be given to the child's parent or guardian, and in determining an application involving a child suspect, additional considerations may be taken into account.⁵⁸⁷

Chapter 8 reviews the adequacy of the existing statutory and operational safeguards and considers the broader issues of whether the forensic sampling regime should allow for substitute consent arrangements to be made on behalf of vulnerable persons. This section is confined to considering the provisions and processes involved specifically in obtaining orders for the forensic sampling of vulnerable *suspects*. The Inquiry received no data on the use being made of the current provisions for the sampling of vulnerable persons. Submissions on the use of the provisions for the sampling of child suspects are reviewed below.

587 S 464U sets out the provisions relating to relevant suspect procedures involving children.

The Sampling of Child Suspects

Policy Issues

There was general consensus among participants who made submissions in relation to children, that the system of court orders should be retained. Representatives of YouthLaw attested to the particular vulnerability of children and young people in their dealings with police and the legal system. Ms Sarah Nicholson observed, on the basis of her experience with young people:

If young people were asked in a police interview whether or not they agreed to a sample being taken, our experience is that they would not seek advice about whether to do that and would just consent to the order being made without thinking about what the longer-term implications of that might be.⁵⁸⁸

Section 464U(8) requires the Children's Court to take into account certain additional factors in relation to children, namely:⁵⁸⁹

- the seriousness of the circumstances surrounding the commission of the offence; and
- the alleged degree of participation by the child in the commission of the offence; and
- the age of the child.

YouthLaw recommended that, applying the principles contained in the United Nations Convention on the Rights of the Child, section 464U(8) be revised to require the court to take into account the best interests of the child.⁵⁹⁰

Section 23WT(3)(e) of the Commonwealth legislation, following the Model Bill, specifies that if the suspect is a child or an incapable person, 'the welfare of the child' must be considered by a magistrate in deciding whether to order a forensic procedure. The Committee considers that a criminal investigation should consider the *welfare* of the child or incapable person on account of their particular vulnerability, but that it may not be possible or desirable to reconcile the donor's *best interests* with the interests of law enforcement.

588 S Nicholson, *Minutes of Evidence*, 22 July 2002, 75.

589 S 464U(7) sets out the grounds for the court to be satisfied on the balance of probabilities to make an order.

590 S Nicholson, *Minutes of Evidence*, 22 July 2002, 79.

Conclusions

The Sampling of Child Suspects

The Committee considers that the overriding priority in the forensic sampling of children is for this evidentiary tool to be integrated into the processes already in place for the recognition and protection of children's interests and needs in the criminal justice system. Therefore, while recognising the need to ensure law enforcement goals are met, and met efficiently, the Inquiry also recognises the need for the process of crime detection and prosecution to be tailored to take account of the youth or incapacity of the suspect. The Inquiry therefore supports the introduction of a parallel provision to section 23WT(3)(e) into section 464U(8) in relation to children.

The Sampling of Incapable Adult Suspects

Similarly, special protection is required in criminal investigations and proceedings, to recognise and support persons who are incapable of providing informed consent, in view of the potential for their will or interests to be overborne.

The Committee is of the view that the authorisation of forensic procedures involving incapable adults should remain under the protection of the courts. The Committee considered that the proposed reform of section 464U(8), providing for the welfare of the child to be considered in relation to the grant of orders for compulsory forensic procedures should also apply in relation to incapable persons, for the same reasons.

The Committee therefore recommends that section 464T(3) in relation to incapable persons and section 464U(8) in relation to children of the *Crimes Act 1958 (Vic)* be amended to provide that, in considering the grant of an order for a compulsory forensic procedure on a child or an incapable person, 'the welfare of the person' be taken into account.

Recommendation 6.4 Relevant suspect orders for vulnerable persons

That section 464T(3) in relation to incapable persons and section 464U(8) in relation to children, of the Crimes Act 1958 (Vic) be amended to provide that, in considering the grant of an order for a compulsory forensic procedure involving an incapable person or a child, 'the welfare of the person' be taken into account.

THE SCOPE OF THE SUSPECTS DNA SAMPLING REGIME

Victoria has a two-tiered regime for the sampling of suspects. A person suspected of involvement in the commission of an indictable offence can be asked to consent to a forensic procedure. However, a court order requiring a compulsory procedure to be undertaken can only be sought in relation to specified indictable offences, listed in section 464 in the definition of a 'relevant suspect'. In the current legislation, the list of 'relevant suspect' offences has been aligned with the list of 'forensic sample'

offences contained in Schedule 8, for which court orders for the sampling of offenders can be sought.

In reviewing the scope of the current provisions the Committee considered, firstly, whether the range of offences for which consensual procedures could be undertaken was appropriate and secondly, whether any reform of the definition of ‘relevant suspect’ offences was warranted.

Before considering the proposals submitted to the Inquiry for reform of these laws, it is necessary to understand how they are being used at present. As foreshadowed earlier, this section reviews the contribution which DNA sampling of suspects has made to the detection of unsolved crimes.

The Use of the Current Provisions

The Inquiry sought information from Victoria Police, the police forensic laboratory (the VFSC) and Court Services, Department of Justice, on the use of these provisions. In particular, the Committee sought information on:

- the extent to which the provisions were being used;
- the results obtained in investigations where suspects’ DNA profiles were obtained; and
- the impact of database detections obtained from suspects profiles on the clear-up of other unsolved crimes.

This section reviews the use made of the consensual sampling provisions and relevant suspect orders to obtain DNA samples from identified suspects for use in active criminal investigations. The database use of suspects’ samples to detect other unsolved crimes – for which the donors had not been identified as suspects – is considered later in this chapter.

Consensual Procedures

Very little information is available on the use, if any, made of the consent provisions for relevant suspects. The operational arm of Victoria Police informed the Inquiry that it kept no records of the operation of the provisions for the conduct of forensic procedures on relevant suspects with their consent.⁵⁹¹ The Victorian Privacy Commissioner recommended to this Inquiry that:

Statistics showing the number of times police seek consensual samples, for which offences, and the number of consents given, should be tabled annually in Parliament⁵⁹²

591 Detective Inspector D Cowlshaw, *Minutes of Evidence*, 22 July 2002, 2-20, and Victoria Police, Submission 18S2.

592 Privacy Commissioner, Submission 19, 12.

The Committee could not avoid the conclusion that reform of the current arrangements is required. One of the elements of the reformed process should be a legislative obligation on the Victoria Police to maintain records and provide reports to the Minister and the Victorian public, through the Parliament, on the operation of the provisions and, particularly, on the exercise of powers pursuant to those provisions.

‘Relevant Suspect’ Orders for Compulsory Procedures

Victoria Police representatives indicated at the public hearings for this Inquiry that the relevant suspect provisions were rarely used.⁵⁹³ The Committee was informed that Victoria Police did not specifically collect information on the grant of orders for compulsory procedures under the 'relevant suspect' provisions.⁵⁹⁴ Police Prosecutors who were contacted to obtain anecdotal background on the use made of these provisions confirmed this perception, responding that few 'relevant suspect' applications had been made recently; when sought, very few were opposed.⁵⁹⁵

This impression is further corroborated by the statistics produced for this Inquiry by Court Services, Department of Justice, set out in Table 6.1 below.

Table 6.1 Orders for Forensic Procedures (s 464T), 1997/98-2001/02

	1997/98	1998/99	1999/00	2000/01	2001/02
Number of orders for compulsory forensic procedures (relevant suspects) (Magistrates' Court of Victoria)	24	39	75	103	100

Source: Victoria, Department of Justice, *Orders for Forensic Procedures, 1997/98-2001/02*, September 2002

Since July 1997, a total of 341 orders for compulsory (relevant suspect) procedures have been issued in the Magistrates' Court. This figure indicates that orders were made in respect of 341 different suspects; no information is available on the number of offences involved. During the same period, the Magistrates' Court dealt with over 350,000 principal proven offences. The compulsory procedure orders constituted only a miniscule percentage - 0.16 per cent - of the principal proven offences.

While the total number of orders made was relatively small, there has clearly been a steady increase in the use of compulsory orders over the past five years. In 1997-98 a total of 24 orders were made - an average of two per month. During 2001-2002, 110 orders were made; an average of approximately eight per month.⁵⁹⁶

To date the forensic procedures regime has targeted the use of DNA evidence in the investigation of serious indictable crimes, rather than volume crimes. Serious

593 Detective Inspector D Cowlshaw, *Minutes of Evidence*, 22 July 2002, 13.

594 Victoria Police, Submission 18S2.

595 Victoria Police, Submission 18S5.

596 It is also assumed that the offence listed first on the charge sheet is the most significant offence.

indictable offences comprise a small but significant minority of criminal proceedings. In these cases, as shown in the analysis above, DNA evidence has contributed to the inculpation or exculpation of over 1,000 individual suspects. The value of DNA evidence varies between investigations; whereas in some cases the DNA evidence may be pivotal, in others it may be more peripheral to the prosecution or defence case.

Database Use of Suspects' Profiles

The forensic value of DNA sampling in the detection and prosecution of serious crimes is undisputed. Where a suspect has been identified on the basis of some connection with the offence, the capacity of DNA sampling to inculpate or exculpate the suspect is generally acknowledged.

Where a suspect is found guilty of an offence for which the DNA evidence was relevant, the retention of the profile is based on similar arguments to those used to support the sampling of serious offenders. The inclusion of offenders' DNA profiles on the forensic database is based on the belief that there are reasonable grounds for concluding that the offender, having already been found guilty of serious crime, may have already committed other undetected crimes, or may be likely to re-offend.

While in relation to serious offenders there is general acceptance of this 'investigative' use of DNA sampling, the inclusion of suspects' DNA profiles on the forensic database is more controversial. Current Victorian laws permit the database use of suspects' profiles during the period of the investigation. Destruction is required, however, if the suspect is acquitted, not charged or eliminated. Some participants in this Inquiry⁵⁹⁷ advocated restricting database use of suspects' profiles, only loading these profiles on the database after a finding of guilt has been reached. Others⁵⁹⁸ advocated a more permissive regime, to allow suspects' profiles, once uploaded, to be retained on the database indefinitely, regardless of the outcome of the investigation.

Primary (Investigative) and Secondary (Database) Purposes

The issues are highlighted if the DNA evidence obtained from suspects is not relevant to any specific investigation or prosecution, and is undertaken solely for inclusion on the DNA database. Victorian legislation does not provide for the sampling of suspects exclusively for their secondary use in crime detection on the DNA database. However, in the United Kingdom,⁵⁹⁹ for example, a suspect may be ordered to

597 Dr Jeremy Gans, Submission 16; the Privacy Commissioner, Submissions 19 and 19S; and the Criminal Bar Association, Submission 13 were among those advocated restricted use of suspects' samples prior to conviction. See below.

598 Victoria Police, Submission 18; Crime Victims' Support Association, Submission 6.

599 The *Police and Criminal Evidence Act 1984 (UK)* empowers the police to compel suspects to undergo forensic procedures and to retain and use the samples and related information for unlimited purposes in future criminal investigations.

undergo a forensic procedure, even though DNA evidence is not necessarily relevant to the investigation or the charges laid. If, for example, a suspect has been summonsed or charged with a minor offence, such as shoplifting, abusive language or affray, police are authorised to obtain a DNA sample, although the DNA evidence would not be relevant to the detection of that offence. In that type of case the DNA sample is collected exclusively for a secondary purpose: its inclusion on the DNA database.

The Impact of the DNA Sampling of Suspects in Victoria

In order to evaluate the effectiveness of the current regime for the sampling of 'relevant suspects', it is essential to know the use already made of the results of the forensic procedures on this class of donors. Below is an analysis of the use made of the DNA profiles obtained from relevant suspects in Victorian criminal investigations. This analysis examines:

- the use of DNA evidence in the actual investigation for which the procedure was undertaken; and
- the use of the results to investigate other unsolved crimes.

Single Purpose Investigations

Table 6.2 records the number of direct comparisons made between profiles obtained from relevant suspects and the crime scene for the offence under investigation. It records the number of individual suspects inculpated and exculpated from investigations, and the number of attempted matches which proved inconclusive. It should be noted that there may be more than one suspect per crime scene, so these figures should not be taken to indicate the number of crime scenes or offences investigated.

In total, approximately 800 suspects over two and a half years have been directly inculpated or exculpated by DNA profiling. Up to to June 2002, 308 out of 835 suspects were exculpated from specific investigations, and 527 were inculpated.

The large number of suspects excluded during the period June-September 2000 was the result of a mass sampling program conducted during a criminal investigation at a Victorian factory. In that case, the employees at the factory were DNA tested to identify the perpetrator of a threat to contaminate the product made at the factory.⁶⁰⁰ Excluding the results for June – September 2000, approximately 30 per cent of suspects were exculpated by the DNA evidence.

600 See Chapter 7 for further details.

Database Detections

The VFSC maintains results of matching profiles obtained from relevant suspects on the DNA database. Table 6.3 below shows the range of offences matched by forensic profiling against unsolved crime scenes in the eighteen months since December 2000. The matches count the number of suspects matched against crime scenes. One suspect, matched against eighteen different crime scenes, is counted as eighteen matches on this table.⁶⁰¹

Table 6.2 Analysis of Suspects' DNA Samples ,January 2000-June 2002

Period	Inculpated	Exculpated	Subtotal:- Inculpated and Exculpated	Inconclusive	TOTAL
Jan-Mar 00	53	28	81	68	149
Apr-Jun 00	48	21	69	45	114
Jul-Sep 00	48	111	159	27	186
Oct-Dec 00	36	18	54	18	72
Jan-Mar 01	48	21	69	38	107
Apr-Jun 01	65	11	76	32	108
Jul-Sep 01	43	13	56	56	112
Oct-Dec 01	62	30	92	35	127
Jan-Mar 02	61	34	95	42	137
Apr-Jun 02	63	21	84	62	146
TOTAL	527	308	835	423	1258

Source: Victoria Forensic Science Centre, *Answers to Supplementary Questions*, 18 September 2002.

While it is not possible to ascertain clear trends on such limited data, the number of suspects matched against property crime scenes is increasing, while the number of matches for crimes against the person is remaining fairly constant.

Property offences - and particularly burglary and armed robbery – comprised most of the matches between suspects and crime scenes, representing 125 out of a total of 165 cold hits made. The number of hits has doubled over this period, from 58 in December 2000 to 125 in June 2002. The property offence registering the greatest number of hits was burglary.

Investigations and Prosecutions

The DNA Management Unit indicated that it followed up the results of speculative matches by referring the files to regional offices for further investigation. When a match is obtained between a crime scene and an offender or relevant suspect, the file

⁶⁰¹ VFSC, *Background/Issues Paper* (2002) 36.

is referred to operational police for further investigation. Once a suspect has been identified through a speculative match or hit, an application is made for a compulsory order under the relevant suspect provisions.

It is policy that when an offender or suspect matches to a crime on the DNA Database, an application is [made] for a relevant suspect sample. This is done to ensure identity and because database samples are taken for a reference sample only to place on the database.⁶⁰²

The DNA Management Unit kept a tally of the files disseminated in this way. At 30 August 2002, a total of 473 files had been disseminated to the regions for further investigation, and the regions had returned 230 files to the DNA Management Unit.⁶⁰³

Table 6.3 DNA Database Detections and Investigations Aided, Suspects, December 2000-June 2002

Type of Offence	Dec-00	Mar-01	Jun-01	Sep-01	Dec-01	Mar-02	Jun-02
Property Offences							
Burglary	46	59	78	80	88	93	98
Armed Robbery	7	9	12	12	12	14	14
Aggravated burglary	1	2	2	2	2	2	2
Theft	1	3	4	4	4	4	4
Theft of motor car	3	3	4	5	5	6	7
Subtotal	58	76	100	103	111	119	125
Offences against the Person							
Cause serious bodily injury				1	1	1	1
Suspicious death			2	2	2	2	2
Murder	1	2	2	2	3	3	4
Assault	1	1	1	1	1	1	1
Abduction	1	1	1	1	1	1	1
Sub-total	3	4	6	7	8	8	9
Sex Offences							
Sexual Assault	1	1	1	1	1	1	1
Rape	2	3	4	6	6	6	7
Sub-total	3	4	5	7	7	7	8

Source: VFSC, Submission 23S1.

602 Victoria Police, Submission 18S1.

603 DNA Management Unit weekly statistical return, 30 August 2002 in Victoria Police, Submission 18S1.

The Victoria Police Proposal

Victoria Police has also recommended that the current range of offences be expanded, to align DNA sampling with the provisions for fingerprinting, so that a forensic procedure could be ordered to be carried out on any persons suspected of, charged, cautioned, to be summonsed for, or convicted of an indictable offence or a summary offence included in Schedule 7.⁶⁰⁴ As noted earlier, Schedule 7 comprises a wide range of offences, including:

- a failure to provide name and address details to authorised officers under the *Court Security Act 1980*;
- forging a prescription or order for certain prescribed poisons under the *Drugs Poisons and Controlled Substances Act 1981*;
- impersonating a police officer under the *Police Regulation Act 1958*; and
- summary offences for which the maximum penalty (whether for a first or subsequent offence) is a term of imprisonment.

The inclusion of Schedule 7 offences would represent a significant expansion of the current regime, making the scope of the Victorian forensic sampling regime - in terms of the extent of police powers and the range of persons who could be required to undergo a forensic procedure – one of the broadest in Australia.

The proposal that forensic procedures be conducted primarily for the collection of profiles for the database, rather than for the use of the profile in a specific investigation was strongly opposed by the Privacy Commissioner, who indicated:

Police should not be authorised to collect DNA samples from offenders and accused, irrespective of the gravity of the offence and the utility of the sample for solving that crime, where the underlying purpose is simply to build up a national DNA database so that it can reach its full potential.⁶⁰⁵

Offences under Commonwealth Law

Victoria Police also proposed that it be given legislative authority to conduct forensic procedures on persons suspected of involvement in the commission of offences under Commonwealth law, who are being investigated by Victorian police.⁶⁰⁶

The Inquiry notes that Subdivision 30A already provides for ‘inter-jurisdictional’ enforcement of orders obtained in other participating jurisdictions and concludes that no further provision is required. It notes, too, in this context that the Commonwealth legislation already provides for the conduct of forensic procedures in relation to

604 Ibid.

605 Ibid.

606 Victoria Police, Submission 18, Recommendation 2, 2.

offences under the *Crimes Act 1914 (Cth)* and a review of the operation of Part 1D is currently under consideration by the Commonwealth Government. For these reasons, the Committee does not support the proposal to incorporate provisions relating to the conduct of forensic procedures for offences under Commonwealth law.⁶⁰⁷

Criteria for Defining Offences for the Sampling of Suspects

The Committee considered:

- the extent to which forensic profiling will assist in the investigation of an expanded range of offences;
- the forensic benefit of the secondary (database) use of this data; and
- whether the overall gains to crime detection would match the cost in terms of the resources and intrusiveness of the large scale sampling program proposed by Victoria Police.

Investigative or Detection Relevance

The proposals considered by this Inquiry for the expansion of the sample of suspects have advocated increasing the range of offences for which forensic procedures can be conducted, and obtaining suspects' DNA profiles for indefinite retention as early as possible in the criminal investigation.

The value of these proposals has been questioned, in this Inquiry as in other reviews of forensic procedures legislation in Australia and overseas.

Care must be taken to ensure that samples are not sought gratuitously in order to build, if you like, a database of future forensic criminals. When a forensic sample is not necessary to prove a current charge, it should not be allowed for the purpose of building up a genetic database.⁶⁰⁸

A position put strongly to this Inquiry by Victoria Legal Aid, the Criminal Bar Association, Liberty Victoria and the Victorian Privacy Commissioner was that the justification for including a profile on the database should be the utility of the profile for the investigation in which it is obtained. As noted by the Criminal Bar Association and Victoria Legal Aid, the use of the DNA reference sample should be related to the purpose for which it was collected.

607 In the Inquiry undertaken by the NSW Ombudsman it transpired that there had been some confusion in the implementation of the NSW provisions, and that prisoners held in NSW prisons in relation to Commonwealth offences had, in some, cases, been mistakenly required to undergo forensic procedures. NSW Ombudsman, *Discussion Paper: The Forensic DNA Sampling of Serious Indictable Offenders* (2001) 10-11.

608 Law Institute of Victoria, Submission 21, 2.

At present, the forensic sampling of suspects is justified on the basis that the evidence obtained is relevant to the actual investigation of the offence for which the suspect has been identified. The legislature has, to date, justified forensic sampling of suspects on the basis of its utility in crime detection, and the requirements listed above reinforce the limited purpose envisaged for the forensic sampling of relevant suspects. Under the Victorian privacy regime, legislation must clearly specify the purpose(s) for which personal information is sought.

The investigation of many, if not most of the indictable offences and summary offences listed in Schedule 7, might not be aided by forensic profiling. In these cases, the purpose of conducting the forensic procedure could not be related to the investigation of the offence. The collection of a DNA sample from suspects in these types of offences would be first and foremost for database searching, and would permit the sampling of persons without any evidentiary basis on which to suspect that person of involvement in a criminal offence.

However, to justify using the results of a forensic procedure for a purpose unrelated to a particular criminal investigation involves assessing the utility of the procedures from a different perspective. It involves weighing up the extent to which forensic sampling of this class of offenders will have an impact on the clear-up of unsolved or future crimes against the impact of the proposed regime on the rights and interests of the donors affected.

Alignment with other Australian Jurisdictions

The current provisions establish a two-tiered system defining the scope for the sampling of suspects in Victorian criminal investigations. They permit consensual sampling of persons suspected of an indictable offence while court orders can only be sought in relation to specified indictable offences, listed in the definition of a 'relevant suspect' in section 464.

In other Australian jurisdictions, the range of offences for which a suspect can be sampled is the same, regardless of whether the procedure is authorised by consent or by order. As noted earlier in this chapter, there is some diversity between the provisions of individual jurisdictions. Those jurisdictions that are largely compliant with the Model Bill generally enable the sampling of persons suspected of an indictable offence, with particular safeguards for the sampling of non-custodial or vulnerable suspects.

The range of offences provided in Victorian legislation is, at present, broadly consistent with the provisions of some, but not all other Australian jurisdictions. In assessing Victoria's consistency with other jurisdictions, priority is given to our consistency with jurisdictions that already largely comply with the Model Bill provisions.

Defining the Scope of the Suspect Sampling Regime

Submissions Received

Members of the Crime Victims Support Association, which advocated that police be authorised to order forensic procedures in relation to a wider range of offences than under the current legislation, focussed their attention on violent, or potentially violent crimes. Mr Noel McNamara recommended that:

Police should be able to take DNA tests and fingerprints for every suspect [including child suspects] brought into a police station for housebreaking and violence. Even those not charged with a crime should be DNA'd. By doing this the police can be one hundred per cent certain about the identification of a person in custody. The DNA could be kept indefinitely and added to the database.⁶⁰⁹

Some participants indicated that they favoured the retention of the current range of 'relevant suspect' offences. The Director of Public Prosecutions was satisfied with the current definition of an offence for which a sample could be sought:

The general range of those required seems from a prosecutorial basis to be quite reasonable as the matter presently operates.⁶¹⁰

Victoria Legal Aid believed that the current range of offences should be retained, considering that a broadening of the range of offences would constitute 'a disproportionate invasion of their personal liberty.'⁶¹¹ The Victorian Privacy Commissioner proposed that the range of 'relevant offences' for which suspects could be sampled be restricted:

The committee is urged to consider whether s464R should be amended to narrow the range of indictable offences for which consensual collection can be sought, for example by having regard to whether the offence is triable summarily, by placing the focus on the seriousness of the crimes against persons, or by adding a Schedule.⁶¹²

This Inquiry took the view that the current factors to be considered by courts in determining applications for relevant suspect orders combine to ensure that the direct forensic utility of the sample in the investigation is assessed in conjunction with other relevant factors.

609 N McNamara, *Minutes of Evidence*, 2 June 2003, 33.

610 P Coghlan QC, *Minutes of Evidence*, 23 July 2002, 131.

611 Victoria Legal Aid, Submission 15, 2.

612 Privacy Commissioner, Submission 19, 12.

Conclusions: Defining the Scope of the Sampling of Suspects

The Consensual Sampling Provisions

The Inquiry formed the view that the DNA sampling of suspects must be justifiable on the basis of the utility of the DNA sample to a specific investigation. The threshold test of suspicion adopted in Subdivision 30A is one that is not onerous for the applicant to satisfy: it is set below the standard required of evidence in a criminal trial.

The Committee believes that the expansion of the range of offences as proposed by Victoria Police would enable the sampling of suspects in investigation of minor offences, including summary offences, where the DNA evidence would have no forensic utility. The Committee reviewed the offences included within the rubric of indictable offences and concluded that the current provisions do not inhibit the collection of DNA samples from suspects in offences for which DNA evidence would have forensic utility.

The Committee is concerned that if the sampling of suspects could be authorised in investigations where the DNA sample had no direct utility, the way would be open for the collection and use of DNA samples from a range of persons, nominally suspects, in respect of whom no specific evidence on which to base a suspicion of criminal activity has been obtained. The Committee therefore has concluded that the current range of offences for which a donor may be asked to consent to a non-intimate forensic procedure – namely all indictable offences – should remain unchanged.

Relevant Suspect Orders

However, the Committee is concerned at the possibility that under the current provisions, if a person is suspected of an indictable offence for which a court order cannot be sought, the police may be denied the opportunity to collect relevant forensic evidence. The Committee notes that theft, which is one of the few indictable offences not yet included in the list of ‘relevant suspect’ offences, is one where DNA evidence can often be collected from crime scenes. It is also an offence that is committed by repeat offenders.

The Committee noted that the current definition of ‘relevant suspect’ offences in section 464 essentially replicates the list of offences in Schedule 8 for which court orders for the sampling of offenders can be sought. The Committee has recommended (Recommendation 5.2, Chapter 5) that the range of forensic sample offences be re-defined to include all indictable offences for which a maximum term of imprisonment of five years or more or life can be imposed.

The Committee believes that it is desirable to have a single consistent definition of offences for which compulsory DNA sampling may be required. The Committee therefore recommends that the Crimes Act be amended to define the ‘relevant

suspect' offences for which a court order for a compulsory forensic procedure can be sought to include all indictable offences for which a maximum term of imprisonment of five years or more or life can be imposed.. This will have the effect of expanding the current list of offences to include theft and will also keep the definition of 'relevant suspect' offences aligned with the definition of 'forensic sample' offences, recommended by this Committee to determine when the compulsory sampling of offenders can be ordered.

Recommendation 6.5 Re-defining 'relevant suspect' offences

That the Crimes Act 1958 (Vic) be amended to re-define 'relevant suspect' offences for which a court order for a compulsory forensic procedure can be sought, as serious indictable offences for which a maximum term of imprisonment of five years or more or life can be imposed.

DATABASE USE OF SUSPECTS' PROFILES

Current Provisions and Arrangements

The Victorian legislation permits use of the suspect's profile for a period of twelve months from the date of the forensic procedure. This means that for twelve months the profile can be compared not only to the crime scene for the investigation for which it was obtained, but can be compared on the database with the profiles of other unsolved crimes.

At the end of the twelve-month period, the profile must be destroyed or a court order obtained for its retention. A court order can be granted for the retention of the suspect's profile on the database, if:

- the suspect has been found guilty of an offence for which the DNA evidence was relevant; or
- the taking of the sample may include or exclude the person from an investigation in relation to an indictable offence.

If a retention order is granted, the reference sample and related information may be retained on the database as specified in the order.⁶¹³ A retention order cannot be sought after the suspect has been acquitted, eliminated from the investigation, or if charges are not laid or withdrawn.

613 S 464ZFB.

Background to the Current Provisions

As noted above, the use of the suspect's DNA profile on the DNA database is termed a 'secondary' use of the profile, to be distinguished from the primary or 'investigative' use of the profile within the investigation for which it was obtained.

Initially, the draft Model Bill applied the principle that the secondary or database use of profiles should only be authorised 'post-conviction'. The rationale for this, as for the sampling of offenders, was that the commission of a serious offence justified the retention of the DNA profile, and indicated a real possibility that other offences had been or would be committed. MCCOC apparently considered alternative provisions to define the use that could be made of a suspect's profile. Following consultation, the Model Bill was altered, to enable the sample and profile to be retained for a maximum of twelve months.

The ALRC has recommended that the sample and related material and information be destroyed:

as soon as practicable after the person has been eliminated from suspicion or police investigators have decided not to [prosecute]; or, in any event, no later than twelve months after the material was taken or the information obtained; or the period stipulated in an order made under [the relevant provisions of the Act].⁶¹⁴

Implementation

The Inquiry has not obtained any data on the number of suspects' profiles retained as a result of retention orders. It understands that applications for retention orders are made automatically when a finding of guilt is entered for an offence where a DNA sample has been obtained.

The Director of Public Prosecutions and Victoria Police Prosecutors have indicated that the process for making applications for retention orders has been streamlined in recent times. Before 2002, only the Magistrates' Court was able to make retention orders. Since the 2002 Amendments came into effect, applications for retention orders can be heard in the County Court or the Supreme Court, as well as the Magistrates' and Children's Courts. This facilitates the hearing of applications for retention orders at the conclusion of a trial.

Recidivism and the Retention of Suspects' Samples

As the rationale for inclusion on the database is the likelihood of the suspect re-offending, the Inquiry reviewed the literature available to ascertain what percentage of suspects are believed likely to re-offend. While detailed research is beyond the scope

614 ALRC, *Essentially Yours* (2003) 43.23, Recommendation 43-1, 1077.

of this Inquiry, the Committee reviewed in general terms the outcome of prosecutions. The Inquiry hoped to ascertain what proportion of suspects were excluded from investigations, were not charged or were charged and acquitted.

Recidivism – the possibility that those who are suspected of petty criminal behaviour are, or will also be involved in offences that are more serious – is one justification for the databasing of suspects' profiles. The development of DNA databases is often supported by claims that it is necessary to have a large, minimum number of profiles included on the database to reach the point where the database has achieved its potential - to recognise the large majority of offences, committed by a small number of recidivists.⁶¹⁵

US research has examined the impact of DNA sampling on the identification and exclusion of suspects during sexual assault investigations. It has found a steady exclusion rate of about 25 per cent in relation to sexual assault cases, the type of offence where investigators typically require DNA sampling. Neufeld and Scheck found, writing in 1996:

Every year since 1989, in about twenty per cent of the sexual assault cases referred to the FBI where results could be obtained, the primary suspect has been excluded by forensic DNA testing.⁶¹⁶

The National Institute of Justice obtained similar results when it analysed the results obtained from the forensic sampling of suspects undertaken in private forensic laboratories. Scheck and Neufeld concluded from this that:

Post arrest and post-conviction DNA exonerations are tied to some strong, underlying systemic problems that generate erroneous accusations and convictions.⁶¹⁷

VFSC data on the exclusion of suspects in Victorian investigations, cited above, also suggests an exclusion rate of 20-30 per cent.

The Inquiry therefore considered what proportion of suspects might be ultimately charged, prosecuted and found guilty of the offences. In relation to the twenty-five most common charges finalised in the Magistrates' Court during 2001-2002, approximately 23.7 per cent were struck out.⁶¹⁸ Of the 42,076 charges relating to theft that were laid, approximately 13.2 were struck out. Approximately 16.6 per cent of the 8,846 charges laid in relation to burglary offences were struck out, as were 6.1 per cent of the 8,199 charges laid in relation to unlawful assault.⁶¹⁹

615 See NSW Standing Committee on Law and Justice, *Review of the Crimes (Forensic Procedures) Act 2000* (2002) 4-5.

616 Peter Neufeld and Barry Scheck in Edward Connors, Thomas Lundgren, Neal Miller and Tom McEwen, *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to establish Innocence after Trial* (1996) xxviii.

617 Ibid xxiv.

618 Magistrates' Court of Victoria, *Annual Report 2001-2002*, 31.

619 Ibid.

Nationwide acquittal rates indicate that, overall, approximately 92 per cent of adjudicated defendants were proven guilty and the remaining 8 per cent were acquitted.⁶²⁰ The proportion of acquittals varied across offences. While only 2 per cent of defendants charged with drug and related offences were acquitted, approximately 25 per cent of those charged with sexual assault and related offences were acquitted.⁶²¹ In the light of these findings it is clear that a significant proportion of suspects are eliminated from investigations or are subsequently not prosecuted or found guilty of the offences of which they were initially suspected. In these circumstances, the Inquiry believes due caution is needed in authorising the retention of DNA material and data from this group.

Policy Issues

Retention after a Finding of Guilt

A number of the legal organisations participating in this Inquiry, including the Criminal Bar Association, Victoria Legal Aid and the Law Institute of Victoria supported the current Victorian provisions, permitting the retention of suspects' profiles after a finding of guilt. An essential feature of this process was that the retention was determined by the courts on a case-by-case basis, to ensure that the profiles of innocent persons are not retained for unlimited matching against unsolved crimes.

Participants in this Inquiry generally seemed to accept, in principle, that the profiles of those found guilty of indictable offences may be retained and included on the DNA database. Several participants qualified this by requiring that the retention be determined, as it currently is, by the courts on a case-by-case basis.

Database Use before Elimination/Acquittal/Conviction

The Inquiry received two submissions advocating a restriction on the period for which profiles can be retained (and used) after collection. Victoria Legal Aid proposed that:

The possession of personal information for at least 12 months is far too extreme given that the person is not charged with any crimes. Volunteers and persons not charged should have their DNA samples destroyed after one month, unless application is made to the court for extension.⁶²²

The Criminal Bar Association compared the provisions governing the retention of DNA material with those governing the retention of fingerprints. The Association observed that, in the case of fingerprints, destruction is required within six months in

620 Australian Bureau of Statistics, AusStats 4513.0, Criminal Courts Australia, 2.

621 Ibid.

622 Victoria Legal Aid, Submission 15, 3.

the event of no charge or conviction arising out of the investigation. An application can be made to retain a suspect's fingerprints for six months. This in effect caps the period for which a suspect's fingerprints can be retained to twelve months: 6 months in the first instance with an 'extension' of 6 months subject to the approval of the court.

The then Chairman of the Association, Mr Roy Punshon SC, believed that a parallel requirement should apply to DNA samples and profiles obtained in criminal investigations:

Currently fingerprints are destroyed if no charge or conviction results within six months. I do not see any of those safeguards in relation to the taking of DNA samples.⁶²³

Mr Dan Meagher submitted that the current provisions enabling database use of the suspects' profile during the period up until the conclusion of the criminal proceedings, failed to distinguish between permissible and impermissible uses during this period. The relevant suspect provisions enable the DNA sample to be analysed and used for 12 months or until the completion of any criminal proceedings without offending against the provisions of section 464ZG(8) and (9). These provisions make it an offence to 'knowingly fail to destroy or use or permit to be used a sample or related material required by this section to be destroyed'.

However, since destruction is only required after twelve months from the date of the procedure, it is unclear from the current provision how *any* use of the forensic material within that period could breach sub-sections 464ZG(8) and (9), provided that the material was destroyed as required after twelve months. According to Mr Meagher this permits a breach to occur:

as long as they do it in the first 12 months and destroy the sample according to the Act after the 12 months they cannot offend subsections (8) and (9) [the breach provisions].⁶²⁴

Both the ALRC and the Sherman Review recommended continuing to permit unrestricted matching of suspects' profiles while under investigation.⁶²⁵ The Sherman Review recommended:

That Part 1D be amended to permit the matching of suspects to suspects; and the matching of unknown deceased persons to unknown deceased persons;⁶²⁶

In the case of a suspect whose innocence is presumed but not yet established, until the conclusion of the investigation or criminal proceedings, secondary use of the profile is permitted. The effect of these provisions is, according to the ALRC, that:

623 R Punshon SC, *Minutes of Evidence*, 22 July 2002, 144.

624 D Meagher, *Minutes of Evidence*, 23 July 2002, 164.

625 Sherman, *Independent Review of Part 1D* (2003) 3.199, Recommendation 8, 55.

626 *Ibid.*

Despite being eliminated from suspicion the person's DNA profile currently could remain on the suspects' index of the DNA database system for a period of 12 months – during which time it could be subject to unlimited matching against the crime scene index.⁶²⁷

Some participants in this Inquiry went further, proposing that not only should the profile be destroyed as soon as the suspect is eliminated or acquitted, but also that during the twelve month investigative period, no secondary use of the profile be permitted.

Father Norden of Jesuit Social Services recommended:

The taking of a sample should be related to the police investigating a particular crime and particular suspects.⁶²⁸

Dr Jeremy Gans recommended that profiles obtained from relevant suspects be used solely for matches against crime scenes in relation to which the suspect is under suspicion.

My view is that there is no rational policy basis for exposing anyone suspected of a crime to DNA sampling for the purpose of detecting unsuspected criminality. This is because mere suspicion provides no basis for likely recidivism. Moreover, the use of a criterion of mere suspicion as the basis for taking a cold hit sample will have important negative effects.⁶²⁹

Dr Gans submitted that if suspects' profiles were to be matched for cold hits, the definition of suspect be restricted to include only those charged with relevant offences.

Suspects should not be sampled for the purpose of testing unsuspected links between the suspect and unsolved crimes. The database should not be used to compare suspect profiles and profiles from crimes for which that person is not a suspect. If, contrary to this suggestion, such speculative sampling and matching is permitted on suspects, then it should be restricted to suspects who have been charged with a 'forensic sample' offence. ... Using the criterion of 'charging' at least brings some measure of accountability into the selection of suspects for cold hit sampling and reduces (but does not eliminate) the possibility that innocent people will be exposed to investigation for unsuspected crimes.⁶³⁰

Dr Gans observed in this context that if a suspect's profile is to be destroyed on exculpation/acquittal/non-prosecution, but the use of the profile establishes a connection between the suspect and another crime scene, a question arises as to the consequences for the suspect.

627 ALRC, *Essentially Yours* (2003) 43.10, 1074.

628 Fr P Norden, *Minutes of Evidence*, 23 July 2002, 149.

629 Dr Jeremy Gans, Submission 13, 15.

630 Ibid.

A difficult question will arise as to what should happen if a suspect is subsequently cleared of the crime for which they were suspected, but a cold hit has been discovered in the meantime.⁶³¹

In Dr Gans' view, there is a clear connection between the way in which the procedure can be authorised and the extent of the use to which the data can be put.

[but if as currently applies in Victoria] all suspects are liable to be sampled, not only for the purpose of investigating that crime, but investigating all crimes, then the situation changes and it becomes crucial to get that decision spot on the first time it is made, and it would become quite appropriate for people to challenge at the moment of the decision.⁶³²

Database Use after Elimination or Acquittal

Victoria Police advocated amendments to provide that the suspect's sample and profile, obtained at the caution or arrest stage, should be retained on the database for unlimited purposes indefinitely. It recommended:

Legislation should permit the retention on the database of voluntary samples and samples taken from persons found not guilty, or where charges are not proceeded with; [and]⁶³³

Legislation should authorise the long-term retention of suspect samples in those instances when a suspect becomes unavailable.⁶³⁴

Victoria Police indicated some concern as to whether, under the current provisions, retention orders could be obtained to retain a suspects' sample indefinitely. Victoria Police explained:

It is anticipated that there will be a number of situations, especially during convoluted investigations, where it will be necessary to retain relevant suspect samples for extended periods of time. ... There is no mechanism for the permanent retention of the sample unless the suspect is charged and subsequently convicted of the relevant offence.

The Act provides for repeated applications for extension periods to be made, but is not explicit on the procedure if a suspect dies or moves overseas.⁶³⁵

The Police proposal bears some similarities with the provisions for the use of DNA profiles obtained from suspects under the *PACE Act 1984 (UK)*. The *PACE Act* provides for the results of the forensic procedure to be used in a 'speculative search', defined as 'a check against other fingerprints or samples, or against information

631 Ibid.

632 Ibid.

633 Victoria Police, Submission 18, Recommendation 6, 4.

634 Ibid. Recommendation 17, 9.

635 Ibid.

derived from other samples' in any of the domestic and international law enforcement agencies to which the police have access.⁶³⁶

This proposal is based on quite different principles to the current provisions. The current provisions reflect the notion that the secondary use of the profile is justified by some suspicion, however generalised, that the donor has committed, or is likely to commit an undetected offence.

The collection and indefinite retention of DNA samples and profiles from persons suspected, but not necessarily charged with, or found guilty of, summary or indictable offences would alter the rationale currently applied to justify the inclusion of profiles on the DNA database. It would in effect remove the need for the police to have a suspicion that a person has committed an undetected crime before collecting or retaining DNA material.

Representatives of the legal bodies participating in this Inquiry recommended that the use of the profile for unlimited matching purposes on the database be restricted.

This Inquiry notes that both recent reviews of the Commonwealth legislation upheld the principle that the secondary (database) use of the profile should not be permitted after the suspect's innocence has been established. Both the ALRC and the Sherman review sought to ensure that destruction of the suspect's profile, including its removal from the DNA database, occurred as soon as possible after the suspect had been eliminated from the investigation, or acquitted, if this occurred within the twelve months allowed in the legislation.

In its final report the ALRC recommended a package of reforms that were based on the principle that, once a suspect had been eliminated from the investigation for which the sample had been obtained, the forensic material should be destroyed.⁶³⁷ The ALRC observed, in relation to the secondary matching of suspects' profiles against crime scene profiles that:

While recognising the public interest in the resolution of crime, the Inquiry notes that this form of index matching is in fact a secondary use of suspects' forensic material, unrelated to the purpose for which it was collected.⁶³⁸

The ALRC sought to maintain the certainty afforded by stipulating a fixed destruction date, while also providing the benefit of destruction earlier than the destruction date, if practicable. The ALRC envisaged that the DNA database would provide notice of an impending destruction date, to be followed up by the laboratory. Unless the laboratory is notified of further investigations or a pending prosecution, it will destroy the forensic material at the due date. If the suspect is eliminated from suspicion before the expiry of the twelve month period, the onus would fall on the police investigator to notify the laboratory accordingly.

636 Speculative search is defined in s 65(1).

637 ALRC, *Essentially Yours* (2003) Recommendation 43-1, 1077.

638 ALRC, *Discussion Paper 66* (2002) 868.

Conclusions: Database Use of Suspects' Profiles

The Committee has considered proposals for the indefinite retention and unrestricted use of a suspect's profile on the database, whether or not a finding of guilt is entered in relation to the investigation, as well as for a more restrictive use of a suspect's sample prior to the conclusion of the investigation for which the DNA profile was obtained. The Committee has concluded that the current provisions effectively recognise the desirability of making forensic use of the DNA evidence available from the investigation while also providing safeguards against the retention and use of profiles belonging to persons who have been eliminated from the investigation or who have been acquitted of the charges laid. The Committee therefore recommends no change to the current Victorian provisions.

7. VOLUNTEERS

OVERVIEW OF THE VOLUNTARY SAMPLING PROVISIONS

So far, this review has examined the provisions for the sampling of offenders who have been found guilty of Schedule 8 offences, and whose profiles may lead to the detection of unsolved crimes on the DNA database. The purpose of sampling of Schedule 8 offenders is to include their profiles on the database, because, having already committed a serious offence they are, as a class, under a ‘generalised suspicion’. They may also have committed other undetected offences, or they may re-offend.

The Inquiry has also considered the provisions which permit the sampling of suspects reasonably believed to be involved in the commission of indictable offences, where the suspect’s profile may be compared with the profile obtained from crime scene evidence. The purpose of sampling a suspect is primarily for the investigation of a designated offence, for which crime scene evidence is available and the DNA evidence is believed to have probative value.

This chapter examines the provisions which govern the sampling of volunteers who agree to assist police by providing DNA samples. Section 464ZGB provides for the conduct of forensic procedures on volunteers as follows:

464ZGB. Samples given voluntarily

- (1) A person of or above the age of 17 years may volunteer to give a sample (whether an intimate or non-intimate sample) to a member of the police force.
- (2) A sample may only be given under this section if the person volunteering to give it consents in accordance with this section and that consent is not withdrawn prior to the giving of the sample.

The Scope of Section 464ZGB

In isolation, section 464ZGB gives very little indication of the intended purpose for seeking a DNA sample from a volunteer. Section 464ZGB permits a person 17 years or older ‘to volunteer to give a sample’, provides that ‘the sample will be analysed’, and cautions that ‘the information obtained from the analysis could produce evidence

to be used in a court'.⁶³⁹ It does not require that the sample be used for the investigation of any specific offence, whether indictable or summary.

Database Use of the Profile

The 2002 amendments authorise the inclusion of volunteers' profiles on the DNA database. The amendments provided that the volunteer's profile will be placed on a DNA database 'for the purpose of a criminal investigation or any other purpose for which the DNA database may be used' as specified in Subdivision 30A or the relevant legislation of another participating jurisdiction.⁶⁴⁰ The volunteer is now given a choice as to which index on the DNA database the profile is entered on. It can be used only for a limited purpose,⁶⁴¹ or for 'unlimited purposes', in which case it can be matched against other indices of the database.⁶⁴²

Unlimited Purposes

Section 464 explains that the 'volunteers (unlimited purposes) index' contains:

DNA profiles derived from forensic material taken from volunteers, under section 464ZGB or a corresponding law of a participating jurisdiction, who have chosen that the information obtained from analysis of the material may be used for the purpose of a criminal investigation or any other purpose for which the DNA database may be used.⁶⁴³

Section 464ZGI, which sets out the 'permissible matches' that can be made on the DNA database, indicates that volunteers who authorise their profiles to be used for unlimited purposes are permitting their profiles to be matched with those of crime scenes, missing persons, unknown deceased persons and serious offenders.

Limited Purposes

While the permissible matches on the volunteers (unlimited purpose) indicate the use that can be made of these profiles, no such guidance is available to indicate what comes within the meaning of 'limited purposes'. Section 464 indicates only that the volunteers (limited purposes) index contains:

profiles of DNA material taken from volunteers ... who have chosen that the information obtained from analysis of the material may be used only for a limited purpose that is specified by the volunteer and noted on the index.⁶⁴⁴

639 Ss 464ZGB(3)(a), (3)(bb).

640 S 464ZGB(3)(b).

641 S 464ZGB(3)(ba)(i).

642 S 464ZGB(3)(ba)(ii).

643 S 464 Definitions.

644 Ibid.

Retention Orders

A volunteer may withdraw consent before or after the procedure has been conducted. If consent is withdrawn before the sample is taken, it is expected, but not stated, that the procedure would not be conducted. If, however, the volunteer withdraws consent after the procedure, police are able to seek a court order for the retention of the sample. The order can be determined without notice and in the absence of the volunteer on the basis that the volunteer has been identified as a suspect in the commission of an indictable offence. A volunteer's willingness to consent could be relevant to investigators in identifying possible suspects.

The volunteer's DNA sample and related information can be kept for twelve months, or until the completion of any relevant proceedings instituted. At this time, if no proceedings have commenced, or the volunteer has been eliminated or acquitted, the sample must be destroyed. Police are entitled, however, to seek an extension of time for the retention of the sample and related information.

Background to the Voluntary Sampling Provisions

Section 464ZGB was originally enacted in 1997. The then Attorney-General explained the purpose of the proposed provision as follows:

Overseas experience has demonstrated a readiness for persons to volunteer a forensic sample for inclusion on a DNA database. Significantly, this group includes individuals with a prior criminal history but who have a marked desire to integrate back into society. The preparedness to provide such a sample serves to highlight its marked potential as an important rehabilitative aid.⁶⁴⁵

Eight years earlier the Coldrey Report, which created the blueprint for Victoria's forensic sampling laws, had proposed provisions to permit the sampling of a person 'suspected of committing an offence in circumstances which do not justify his or her arrest', but did not propose provisions to permit sampling of volunteers who did not meet the threshold test of suspicion.⁶⁴⁶

The 1997 Victorian voluntary sampling provisions were used by MCCOC in preparing the second edition of the Model Bill. The provisions in the 1995 edition provided only for the sampling of serious offenders and suspects, but the 1999 edition drew on section 464ZGB 'to regulate the taking of samples from non-suspects'. MCCOC observed that 'if governments see fit to regulate the consensual taking of samples from suspects ..., it is also important to regulate the taking of samples from non-suspects'.⁶⁴⁷

645 Parliament of Victoria, Legislative Assembly, *Crimes (Amendment) Bill 1997*, the Hon Jan Wade MLA, *Second Reading Speech*, 9 October 1997, 429.

646 Coldrey Committee, *Report on Body Samples and Examinations* (1989) 266.

647 MCCOC, *Model Forensic Procedures Report* (1999) 91.

MCCOC envisaged that the voluntary sampling provisions would complement the provisions applying to suspects. MCCOC acknowledged that there was ‘nothing to stop police from persuading a whole town or suburb to consensually give forensic samples for the purpose of DNA testing.’⁶⁴⁸ It concluded that specific provisions were needed to regulate the sampling of volunteers, to prevent the requirements for the sampling of suspects from being ‘side-stepped’.⁶⁴⁹

Volunteers would include victims, persons ‘in a large pool for comparison purposes’ and ‘potential suspects’, where ‘suspicion is based on a hunch but not on reasonable grounds’.⁶⁵⁰ MCCOC considered defining volunteers to exclude suspects, but decided against this, because:

There is a clear procedure in relation to them [suspects] elsewhere in the Model Bill. Where someone is identified as being a suspect, those procedures should be followed.⁶⁵¹

Provisions were inserted – based on Victoria’s retention orders – to cover the possibility that a volunteer might later be identified as a suspect, and that the forensic sample would then have probative value in the investigation. A court could grant an *ex parte* order for the retention of a volunteer’s sample and related information if there were grounds to believe that the person was a relevant suspect in the commission of the offence.⁶⁵²

Emerging Issues

Section 464ZGB, in stark contrast to the provisions that apply to offenders and suspects, does not specify a purpose for which the sample is sought, and does not require the collection of the DNA sample from a volunteer to be relevant or necessary for the investigation of a particular offence. The breadth of section 464ZGB gives it the flexibility to accommodate DNA sampling for different purposes.

People may ‘volunteer’ to assist police for a variety of reasons, and the term ‘volunteers’ covers, broadly speaking, three categories:

- victims, complainants and the relatives of missing or deceased persons who may have been victims of crime;
- the elimination sampling of persons with legitimate access to the crime scene whose DNA may have been deposited on crime scene evidence;
- potential suspects - people who have not been formally identified as suspects – including community members participating in mass screening programs.

648 Ibid.

649 Ibid.

650 Ibid 61.

651 Ibid 63.

652 Ibid 73.

People in the first two categories are generally not under suspicion at the time that their sample is sought. Potential suspects may already be persons of interest, but may not have been made aware of this.

The distinction between a suspect and a non-suspect is not always clear-cut. A volunteer who is initially sampled for elimination purposes may subsequently be identified as a suspect. Equally, a potential suspect may later be eliminated from the investigation.

This Inquiry, along with other recent reviews, received submissions which indicated that Victoria's voluntary sampling provisions, drafted to accommodate the sampling of suspects and non-suspects alike, were not effectively serving either purpose. It was put to the Inquiry that the current provisions are too cumbersome for the sampling of non-suspect volunteers, but not stringent enough for the sampling of potential suspects.

The Privacy Commissioner and Dr Gans were among those who submitted that the current safeguards do not adequately protect the legal interests of a potential suspect who provides DNA samples voluntarily and whose consent to the procedure is relied on although it may have been obtained under pressure and provided before the donor was identified as a relevant suspect.⁶⁵³

Victoria Police submitted that the requirements for informed and witnessed consent were too onerous to facilitate the sampling of volunteers whose DNA is required purely for elimination purposes.

Trends in the Use of the Voluntary Sampling Provisions

Except for the sampling of victims and complainants, the Victorian voluntary sampling provisions have, in fact, been rarely used.⁶⁵⁴ Between January 2000 and June 2002 a total of 938 samples obtained under the voluntary sampling provisions were received and analysed.⁶⁵⁵ Approximately 90 per cent of these samples were provided by victims: complainants provided 602, and 252 were obtained from deceased persons.⁶⁵⁶ Other volunteers – such as relatives, witnesses and other persons sampled for elimination purposes⁶⁵⁷ – provided a total of 85 samples.⁶⁵⁸

Investigators in other jurisdictions also seem to be making very little use of the voluntary sampling provisions for sampling non-suspect volunteers, but are showing

653 See Submission 19, 18-19; and Dr J Gans, *Minutes of Evidence*, 23 July 2002, 27-28 respectively.

654 Detective Inspector D Cowlshaw, *Minutes of Evidence*, 22 July 2002, 6-7; Victoria Police, Supplementary Submission 18S3.

655 VFSC, Submission 23S1.

656 Ibid. Samples obtained from deceased persons were obtained pursuant to the Coroner's powers.

657 Ibid.

658 Ibid. It excludes reference samples obtained from laboratory staff for elimination purposes.

increasing interest in using these provisions to obtain samples from ‘potential suspects’, especially through mass DNA screening programs.

This Inquiry, like other recent inquiries, has received many submissions which question the appropriateness of this strategy. There is some apprehension that expanded use of the voluntary sampling provisions to obtain DNA samples from potential suspects is a way of by-passing the more stringent requirements of the provisions governing the sampling of suspects. Representatives of legal bodies participating in this Inquiry expressed concern that mass screening programs impinge on the voluntariness of the donor’s participation and may result in the potential suspect unwittingly compromising his/her legal position by providing DNA evidence without the benefit of the safeguards that apply to suspects under sections 464S and 464T.

Voluntary Sampling Laws in other Jurisdictions

Other Australian jurisdictions have recently proposed or enacted voluntary sampling provisions that diverge from the Model Bill, in an attempt to tailor the provisions for consent and use of the volunteer’s DNA to the different forensic purposes of the procedure.

The South Australian provisions distinguish between suspects and non-suspects and make provisions for the limited use of DNA profiles obtained from non-suspect volunteers.⁶⁵⁹ The South Australian legislation creates two categories of volunteers: Category 1 provides for the sampling of a volunteer who is not under suspicion, and whose DNA profile is not to be stored on the DNA database system. Category 2 covers the sampling of a volunteer who is not under suspicion, but whose DNA profile may be stored on the DNA database, which includes the volunteers’ (limited purpose) and (unlimited purposes) indices.

These approaches resonated with the ALRC Inquiry. The ALRC identified five categories of volunteers: potential suspects, victims, relatives of missing or deceased persons, police and other persons sampled for elimination purposes.⁶⁶⁰ It recommended:

Separate provision for the collection, use, storage, index matching and destruction of forensic material, and profiles obtained from that material, for each main category of volunteer, whether by amending Part 1D of the *Crimes Act* or through regulations.⁶⁶¹

659 Ss 13E and 13F of the *Criminal Law (Forensic Procedures) Act 1998 (SA)* set out the provisions defining the categories of volunteers..

660 ALRC, *Essentially Yours* (2003) 41.63, 1018.

661 Ibid Recommendation 41-4, 1018.

This Inquiry's Approach

This Inquiry sees volunteers as dividing broadly into two categories: suspects and non-suspects. The Inquiry reviewed the effectiveness of the current provisions in facilitating the sampling of both these groups.

It reviewed the current provisions to ascertain whether, in fact, they facilitated the collection of samples from non-suspects and whether there was scope to tailor the provisions to better suit the purposes of this form of voluntary sampling.

In relation to potential suspects sampled under section 464ZGB, the Inquiry compared the provisions permitting the 'voluntary' sampling of 'potential' suspects with those applying to the sampling of identified suspects. It considered, in particular, the implications of using the Victorian voluntary sampling provisions for the conduct of mass DNA screening programs. The Inquiry focussed on the adequacy of the current provisions governing the use of DNA material obtained from a volunteer who may later be identified as a suspect in the investigation.

'NON-SUSPECT' VOLUNTEERS

Victims and Complainants

Victims and complainants may undergo forensic procedures to obtain DNA evidence that might identify the perpetrator of the crime. The victim's DNA profile will be determined in order to eliminate it from mixtures which may contain the DNA of the victim and the perpetrator. Section 464 of the Victorian provisions defines the crime scene index as:

an index of DNA profiles derived from forensic material found or other material found--

- (a) at any place (whether within or outside Victoria) where an offence (whether under the law of Victoria or of a participating jurisdiction) was, or is reasonably suspected of having been, committed; or
- (b) on the victim of the offence or on anything reasonably believed to have been worn or carried by the victim when the offence was committed; or
- (c) on an object or person reasonably believed to have been associated with the commission of the offence;

Where the sample obtained from the crime scene or the victim is a mixture the profile could, in theory, be placed on either the crime scene or the volunteers' (limited purposes) index. The ALRC Inquiry, which considered similar provisions in the Commonwealth legislation, recommended, among other things, 'that all reasonable

measures be taken to ...separate the DNA belonging to a victim of crime from a crime scene sample where the latter contains mixed samples'.⁶⁶²

In Victoria the VFSC regards profiles obtained from victims' DNA samples 'as within the volunteers, limited purpose category'.⁶⁶³ This ensures that the victim's profile is not matched against any other index. If the victim's profile were included in the crime scene index, it could be matched against offenders' and suspects' profiles and against the profiles from other crime scenes.

Relatives of Victims or Missing Persons

The fact that a person's genetic make-up is inherited from their parents means that there are strong similarities between the profiles of close relatives. This has enabled investigators to derive a partial profile of a missing person, for example, from the profiles of that person's close relatives. The 'missing persons index' is defined under section 464 as:

an index of DNA profiles, derived from forensic material, of--

- (a) persons who are missing; and
- (b) volunteers who are relatives by blood of missing persons.

The Victorian provisions, aligned with the Model Bill and most other Australian jurisdictions, enable the profiles from the missing persons index to be matched against all other indices on the DNA database. As the ALRC noted:

Relatives of missing and deceased are treated as 'volunteers' for the purpose of collection of genetic samples, but not for the purpose of storage or matching their profiles on a DNA database system. ... If relatives' profiles are held in the missing persons index of a DNA database system, they may be lawfully subjected [to matching against other indices of the database].⁶⁶⁴

The ALRC recommended that the legislation governing the use of profiles of relatives stored in the volunteer's limited purpose database 'restrict the index matching to the specific purpose for which the sample was collected'.⁶⁶⁵

662 ALRC, *Essentially Yours* (2003) Recommendation 41-5, 1022.

663 VFSC, Submission 23S2, 5.

664 ALRC, *Essentially Yours* (2003) 1057.

665 Ibid. The NSW Standing Committee on Law and Justice also recommended that the legislation provide that evidence obtained from the collection of these samples cannot be used against the donor. NSW Standing Committee on Law and Justice, *Review of the Crimes (Forensic Procedures) Act 2000* (2002) Recommendation 44, 1.

Conclusions: The Voluntary Sampling of Victims and their Relatives

Effective law enforcement relies on victims and their relatives being willing to report crimes and submit to forensic examinations. Law enforcement agencies rely on community co-operation, and the effectiveness of the voluntary sampling provisions reflects the extent of public confidence in the integrity of Victoria's DNA sampling processes. If DNA samples provided by victims or their families could be used in other investigations, or could result in the prosecution of the volunteer for other unrelated offences, they may be deterred from co-operating with the police. Dr Gans noted:

If victims or relatives of missing persons come to realise what the legislation allows they might be discouraged from participating in the system, and that would be disastrous. Their cooperation is needed to make the system work.⁶⁶⁶

The Committee believes that the samples obtained from victims and their relatives should only be used in the investigation for which they are collected, and should not be stored in or matched against the crime scene index of a database.⁶⁶⁷ The Committee therefore recommends that the current legislation be amended to ensure that the DNA profiles of victims, complainants and their relatives are not included in, or matched against the index of crime scenes on the DNA database. To ensure, in the interests of community confidence, that samples from these donors are used exclusively for the purpose for which they are collected, the Committee further recommends that any breach of these requirements should result in the DNA evidence being inadmissible, under section 464ZE in any criminal proceedings against the donor.

Recommendation 7.1 The retention and use of victims' and relatives' profiles

That Subdivision 30A of the Crimes Act 1958 (Vic) be amended to provide that:

- (i) the profile obtained from a victim, complainant or a relative of a missing person shall not be stored in or matched against the crime scene index of any DNA database; and***
- (ii) breach of these requirements constitutes a serious breach for the purposes of section 464ZE and renders the DNA evidence inadmissible in criminal proceedings against the donor.***

⁶⁶⁶ Dr J Gans, *Minutes of Evidence*, 22 July 2002, 23.

⁶⁶⁷ The Inquiry is aware that in some circumstances it may be difficult to separate the profiles of the victim and the perpetrator and that some consideration has been given to this by the ALRC and the NSW Law and Justice Committee. See ALRC, *Discussion Paper 66* (2002) 849-856 and NSW Standing Committee on Law and Justice, *Review of the Crimes (Forensic Procedures) Act 2000* (2002) 90-93.

Elimination Sampling: Persons with Legitimate Access

A second group of persons who may volunteer their DNA to assist with criminal investigations are those sampled for elimination purposes. Here 'elimination sampling' is taken to mean the elimination of the donors of extraneous DNA traces deposited at the crime scene, or on the victim. If crime scene evidence contains traces of DNA from a number of sources then it may be necessary to identify and 'eliminate' the DNA shed by persons with legitimate access to the crime scene. Persons whose DNA might have been deposited on crime scene evidence include witnesses, those attending the crime scene, and investigators.

It is possible, of course, that a volunteer whose sample is obtained 'for elimination purposes' is subsequently identified as a suspect. The position of this group, and the provisions applying to volunteers who become suspects are considered in the second part of the chapter.

Elimination Sampling under Section 464ZGB

Victoria Police representatives put the view that the current provisions do not permit the conduct of forensic procedures on volunteers for elimination purposes.

Under the present legislation there is nothing that allows us to take elimination DNA for the purpose of eliminating, whether they be a police officer or just someone involved in the investigation, from the offence.⁶⁶⁸

This interpretation was rebutted in the strongest terms by Dr Jeremy Gans, Senior Lecturer in Law at Melbourne University.

The idea that there could be samples at a crime scene which are mystery samples, which the police have to assume could be perpetrator or involved-person samples but actually turn out to be from Officer Plod, and the possibility that they will do a crime-scene-to-crime-scene match, get a match, think it is due to a common criminal performing both crimes when in fact it is the same Officer Plod in each crime is just insane: the fact that the legislation is a bar to doing that kind of elimination sampling is just insane. Equally insane, I would argue, is the police's objection to providing those samples for elimination purposes.⁶⁶⁹

The Committee cannot see any statutory impediment to the collection of samples for elimination purposes. The broad terms of section 464ZGB could not be construed to exclude elimination sampling.

Police members' concerns about the inclusion of their profiles on the DNA database stemmed from the belief that a database used for criminal investigations was not the appropriate place to store DNA profiles from innocent people. Detective Inspector Cowlshaw conveyed the reluctance of police members to have their profiles included

668 Detective Inspector D Cowlshaw, *Minutes of Evidence*, 22 July 2002, 6.

669 Dr J Gans, *Minutes of Evidence*, 22 July 2002, 22.

on a database used for criminal investigations when they were not suspected or guilty of any offence.

The database has been set up for the purpose of finding out who has committed crimes and putting criminals on it. ... [T]hey have committed no offence themselves, ... and they have been asked to go on a database ...[whereas] people who have committed crimes such as thefts, theft of motor cars and those sorts of offences, which by community standards are considered to be serious offences, do not have to go on a database.⁶⁷⁰

Innocent members of the community could share this concern as to the implications of having their DNA profiles stored on such a database. The Committee notes that the 2002 amendments, which give the volunteer the right to limit the use made of the sample, improve the position of the non-suspect volunteer.

Having taken the position that elimination sampling was either not covered, or not appropriately covered by section 464ZGB, Victoria Police proposed that the collection of elimination samples should be exempted from the requirements of section 464ZGB. Victoria Police recommended:

Legislation should permit samples to be taken in order to eliminate persons from an inquiry, without being subject to the voluntary sample provisions in section 464ZGB.⁶⁷¹

Victoria Police claimed that it was 'unduly onerous' to take volunteers' samples in accordance with the current provisions; that obtaining the donors' consent could be 'an enormous undertaking' in a large investigation.

There is a volunteers section within the Act, and you have to have an independent third person, you have to have a videotape, and you have to have their consent ... You can ask them to come in and do it, but you have to go through filling out about four or five forms with independent persons.⁶⁷²

The Committee believes however, that the sampling of volunteers for elimination purposes is, and should be, covered by section 464ZGB. Elimination sampling is vital in maintaining effective quality control over the DNA collection and sampling processes. Samples collected initially to eliminate a person who had legitimate access to the crime scene may also inculcate that person in the commission of the offence at a later stage of the investigation.

The collection of DNA from volunteers assisting with criminal investigations needs to be subject to some form of statutory regulation, not only to specify the terms on which the DNA sample is provided, and the legal implications for the donor, but also to specify the obligations of the police in relation to the use and destruction of this evidence.

670 Detective Inspector D Cowlshaw, *Minutes of Evidence*, 22 July 2002, 6.

671 Victoria Police, Submission 18, 4.

672 Ibid 6-7.

Implications for Police Members

The Inquiry received a number of submissions advocating that police members, like members of the general public, should be prepared to volunteer their profiles for elimination purposes. The Criminal Bar Association, the Law Institute of Victoria and Dr Gans supported the principle that the laws which applied to volunteers generally should also apply to police members.⁶⁷³ The Victorian Privacy Commissioner recommended that, if the elimination sampling was considered necessary, and if elimination sampling provisions were applied to police:

Any extension of legislation protection for police members should also apply to samples obtained for elimination purposes from other persons present at the crime scene or involved in the handling or analysis of DNA material.⁶⁷⁴

The elimination sampling of laboratory staff is already an accepted quality control procedure at the VFSC. The VFSC already maintains a voluntary staff elimination database, and supported the inclusion of police members' profiles on this database.⁶⁷⁵

Elimination samples are provided by VFSC biology staff on a voluntary basis [for quality control]. As the samples are voluntary and a search is conducted against every profile generated, they are not searched against the DNA database or held on that database.⁶⁷⁶

Provisions for the elimination sampling of police have been introduced in other jurisdictions. In Western Australia, the Chief Commissioner of Police has the discretion to require a police member to undergo a forensic procedure. Section 22 of the *Criminal Investigation (Identifying People) Act 2002 (WA)* provides that:

- (1) The Commissioner of Police may require a person who at the time is appointed under Part I, III or IIIA of the *Police Act 1892* to undergo an identifying procedure for or in connection with the forensic purposes prescribed by the regulations for the purposes of this subsection.
- (2) The powers in this section may be exercised as often as the Commissioner of Police thinks is necessary.

In the UK police are encouraged, but not required to provide DNA samples for elimination purposes. The UK Human Genetics Commission noted that there had been 'considerable reluctance on the part of police officers to provide samples for this database' and canvassed a proposal for compulsory sampling of investigators.⁶⁷⁷ In Tasmania, the State Government has initiated a campaign to obtain forensic samples from all Tasmanian police officers for inclusion in a police elimination database.⁶⁷⁸

673 Dr J Gans, *Minutes of Evidence*, 22 July 2002, 22.

674 Privacy Commissioner, Submission 19, 14.

675 Professor J Scheffer, *Minutes of Evidence*, 23 July 2002, 113.

676 VFSC, Submission 23S2, 4.

677 Human Genetics Commission, *Inside Information: Balancing Interests in the Use of Personal Genetic Data*, May 2002, available at <http://www.hgc.gov.uk/insideinformation/index.htm>, 151.

678 'Tasmania Police asked to provide DNA samples', 11 February 2002, at <http://abc.net.au/news/justin/weekly/newsnat-11feb2002-94.htm>.

The Committee concluded as a matter of public policy that police members, like members of the general community and staff of the VFSC, should be included in provisions enabling the sampling of volunteers for elimination purposes. In fact, the Committee takes the view that police members in contact with crime scene evidence have a particular obligation to provide these samples for quality assurance purposes.

The Committee acknowledges, however, that police members and staff of the VFSC are placed in a special position and thus have specific concerns relating to the use that could be made of their DNA samples by their employer. Issues relating to the implementation of this policy are addressed in Chapter 9.

Voluntary Sampling of Non-suspects: Proposals for Law Reform

In the light of the limited use being made of the Victorian voluntary sampling provisions for elimination sampling, and the criticisms made by Victoria Police, the Inquiry reviewed the practicality of the current provisions for the sampling of non-suspect volunteers. The Inquiry considered whether the current provisions facilitate or impede the collection of DNA samples from non-suspect volunteers, and whether the unrestricted use of this material permitted under section 464ZGB is necessary and desirable.

The Statutory Purposes Voluntary Sampling

Section 464ZGB does not define or restrict the purposes for which voluntary sampling can be conducted. Any restrictions applying to the use made of the sample and related information are imposed by the volunteer prior to giving consent.⁶⁷⁹

By contrast, the provisions governing the sampling of suspects stipulate that the evidence obtained from the forensic procedure must have forensic utility in the investigation of a specific indictable offence; it must ‘tend to confirm or disprove’ the suspect’s involvement in the commission of the offence.⁶⁸⁰ There must be DNA material found on the victim or at the scene of the offence against which the donor’s DNA profile can be compared.⁶⁸¹

The background to the development of the voluntary sampling provisions suggests that the scope of section 464ZGB was left wide to allow the forensic sampling of volunteers for a variety of purposes. However, the Committee formed the view that the breadth of the current provisions leaves open the possibility that samples obtained for quite specific forensic purposes could later be used for other purposes not contemplated by the donor at the time of the procedure. In Chapter 4, the Committee

679 S 464ZGB(3)(ba).

680 S 464R(1).

681 S 464T(3)(c)(i).

indicated that the use to be made of the DNA sample should be specified at the time of the procedure and the terms of the original consent adhered to.

The New South Wales Legislative Council Law and Justice Committee reviewed a corresponding provision and recommended an amendment to stipulate that the sample must be relevant ('likely to be useful') in the investigation of a 'prescribed' (indictable) offence.⁶⁸²

The Committee believes that the collection of DNA samples from volunteers, even more than suspects, must be undertaken for a specific forensic purpose – the investigation of a particular indictable offence. It must also be justified by the existence of DNA evidence against which the volunteer's sample will be compared. The Committee therefore recommends that section 464ZGB be amended to provide that an adult volunteer may provide a DNA sample only when it is sought in relation to an investigation into the commission of a specified indictable offence, and where crime scene evidence exists against which the DNA profile of a donor can be compared..

Recommendation 7.2 Forensic purpose of voluntary sampling

That section 464ZGB of the Crimes Act 1958 (Vic) be amended to provide that an adult volunteer may provide a DNA sample only when it is sought in relation to an investigation into the commission of a specified indictable offence, and where crime scene evidence exists against which the DNA profile of a donor can be compared.

Permissible Uses of Volunteers' Profiles

Limited and Unlimited Use on the DNA Database

The Committee also considered the appropriateness of the current provisions, which give the volunteer the choice as to which database index the profile is entered on. The Committee considered whether volunteers, especially non-suspect volunteers are in a position to make an informed choice.

The ALRC, and some participants in this Inquiry, advocated that volunteers have the right to determine the use to which their DNA is put. Others advocated that the use of volunteers' DNA should be defined and limited by legislation, and not left to the individual volunteer to determine. The ALRC recommended:

682 NSW Standing Committee on Law and Justice, *Review of the Crimes (Forensic Procedures) Act 2000* (2002) Recommendation 21, 93. A 'prescribed offence' under s 3 of the *Crimes (Forensic Procedures) Act 2000 (NSW)* is 'an indictable offence or any other offence under a law of the State prescribed by the regulations'.

Persons who are not suspects or offenders, and who are willing to provide DNA samples voluntarily to assist investigations or other inquiries, should have the final say on the uses to which their sample can be put.⁶⁸³

This approach reflects the primacy of a donor's right, in the medical context, to nominate the use to be made of donated organs or other biological material. In the medical context, the use made of the donor's biological material will not adversely affect his/her interests. However, in a criminal investigation, the unlimited use of the volunteer's profile may indeed affect the donor's future legal rights and options in a criminal prosecution.

This Inquiry therefore considered firstly, whether the volunteer was in a position to make an informed choice as to the use made of the DNA sample and secondly, whether it was reasonable to permit the unlimited database use of samples provided voluntarily by persons not identified as suspects in a criminal investigation.

The NSW Law and Justice Committee inquired as to how volunteers determined the use to be made of the DNA profile. In evidence to the NSW Committee, the NSW Police Service indicated that, since under NSW law the police member makes the request, the police member would generally ask the volunteer to consent to the inclusion of the profile on the unlimited purposes database.

Accordingly, if a volunteer does not consent to the placing of his or her profile on the unlimited database, then it will not be placed on that database. In most circumstances, the police officer has a choice of then requesting consent to the carrying out of the procedure and placing the profile on the limited database.⁶⁸⁴

The NSW Committee doubted that, on the information currently provided, the volunteer would be able to make an informed choice.⁶⁸⁵ This Inquiry also received submissions that suggested the volunteer was not in a position to make a real choice and that the voluntary nature of the donor's participation was questionable. Dr Gans, the Privacy Commissioner and representatives of the major legal bodies⁶⁸⁶ all questioned the voluntariness of the donor's co-operation in providing a DNA sample. The Committee concluded that a volunteer would not be in a position to make an informed decision as to the use which should be made of their DNA.

The Inquiry also considered whether the choice was, from the volunteer's perspective, a real choice. The Committee found it difficult to conceive of a situation in which a volunteer would elect for their DNA to be retained on a forensic DNA database used exclusively to detect criminal activity.⁶⁸⁷ To elect to have the profile placed on the

683 Sherman, *Independent Review of Part 1D* (2003) 3.63, 33.

684 Ibid 94.

685 NSW Standing Committee on Law and Justice, *Review of the Crimes (Forensic Procedures) Act 2000* (2002) Recommendation 22, 95. It recommended that more information be provided to assist volunteers with this decision.

686 The issue of voluntariness is taken up more fully later in this chapter.

687 It has been suggested that an offender on release might elect to volunteer a DNA sample to avoid being identified as a suspect in future investigations. However, with the provisions now

unlimited purposes index, without appreciating the legal consequences of this choice, could affect the volunteer's future rights in any criminal proceedings that might ensue. Relying on a donor's consent to do something against the donor's interests could also expose the procedure to challenge, as noted by Dr Gans.⁶⁸⁸

The Committee concluded that it is not appropriate for profiles obtained from non-suspect volunteers to be placed on searchable indices of the DNA database and proposes that the existing provisions be amended to remove this possibility. The Committee considered an alternative to the current provisions which has been incorporated in the corresponding South Australian forensic procedures provisions.

Non-database Use of the Profile

The Committee considered the approach taken in South Australia, which provides that the profiles of Category 1 volunteers shall not be included on the DNA database system at all. This approach has the advantage of limiting the use that can be made of the volunteer's profile to the investigation for which it was obtained and precludes the future use of the profile for other purposes. The data-sharing provisions allow for inter-jurisdictional data-sharing and validate the use of DNA data that is consistent with the laws of a recipient jurisdiction, even if not permitted by the laws of the jurisdiction in which the sample was collected.

However, non-database use would also need to be regulated to ensure that the sample and profile are destroyed as required. The authorisation of non-database use might leave open the possibility of less regulated use than would occur if the profile were entered on the volunteers' (limited purposes) index.

By including the profile on the limited purposes index, it is subject to all the provisions applying to regulate access and punish unauthorised use of the DNA database. On balance, the Committee favours the inclusion of the volunteer's profile on the limited purposes index because this provision keeps the voluntary sampling regime within the existing framework of Subdivision 30A.

Conclusions

In the Committee's view, the inclusion of a volunteers' profile on a searchable index of the database should, at the very minimum, be based on a suspicion that the person has been involved in the commission of an indictable offence. Under the existing forensic sampling provisions, this test is set well below the standard that would apply in criminal proceedings: in the case of offenders, it represents a generalised suspicion that the offender may commit, or may have committed other offences, and in the case of suspects, a 'reasonable belief' is sufficient.

688 applying to the forensic sampling of serious offenders, it is doubtful whether this scenario, on its own, justifies the provision for unlimited database use of volunteers' samples.
Dr Jeremy Gans, Submission 16, 8-9.

The Committee recommends that, when a volunteer is asked to consent to a forensic procedure for use in the investigation of an indictable offence, the profile obtained shall only be matched against the profile for the crime scene under investigation.

Recommendation 7.3 Limited use of volunteers' DNA

That Subdivision 30A of the Crimes Act 1958 (Vic) be amended to provide that the profile obtained from a volunteer shall only be matched against the profile for the crime scene and shall be stored on the volunteers (limited purpose) index.

Provisions for the Destruction of Volunteers' DNA

The Committee recommended in Chapter 4 that, as a general rule, a reference sample be destroyed once the profile has been obtained. A number of participants advocated that a volunteer's DNA material should be destroyed once the person has been eliminated from the investigation for which it was collected. Mr Alastair Ross indicated that DNA obtained from volunteers should only be used for the purpose for which it is taken:

The underlying principle that a sample can only be used for the purpose for which it is taken must apply. Where a sample is provided for limited purposes, for example, for a particular case, any means of identifying the sample must be destroyed once the analysis is complete and the donor is cleared of any crime related to that particular use.⁶⁸⁹

Victoria Legal Aid,⁶⁹⁰ the Privacy Commissioner⁶⁹¹ and the Criminal Bar Association⁶⁹² also supported this principle. The Crime Victims Support Association also indicated that 'if a person volunteers to assist police in investigations' and is excluded from the investigation, 'the DNA should be destroyed'.⁶⁹³

In practice, it can be difficult to determine whether a person has been eliminated from an investigation until the case has been prosecuted. Some investigations may remain open for years. For example, the Western Australian investigation into the 1997 Claremont killings remains open and the DNA material donated by volunteers has been retained accordingly. Western Australian cab drivers who volunteered their DNA to assist police with the investigations obtained an undertaking, at the time of the sampling, that their DNA would be destroyed once a suspect had been identified.⁶⁹⁴ These volunteers are reportedly concerned at the indefinite retention of their DNA and the possibility that their profiles could be placed on the volunteers (unlimited purposes) index and searched against the State and national DNA database of unsolved crimes.

689 Mr Alastair Ross, Submission 22, 1.

690 Victoria Legal Aid, Submission 15, 1.

691 Privacy Commissioner, Submission 19, 11-12.

692 Criminal Bar Association, Submission 13, 3-4.

693 N McNamara, *Minutes of Evidence*, 2 June 2003, 32.

694 Tooth, 'The Courage of our Convictions - The Claremont Serial Killer' (2000) 13.

The Committee considers that all volunteers' profiles should be stored on the volunteers (limited purposes) index. The Committee believes that this provision would go some way towards alleviating the concerns of donors participating in inconclusive criminal investigations.

Where a volunteer can be definitively excluded from an investigation or the investigation has been concluded, the Committee believes that the profile should be destroyed. In Chapter 6 the Committee affirmed the principle that the profiles of suspects who had been eliminated or acquitted should be destroyed as soon as possible, and the Committee takes the view that the same principle should also apply to voluntary sampling. The Committee therefore recommends that That Subdivision 30A of the *Crimes Act 1958 (Vic)* be amended to provide that a profile obtained pursuant to section 464ZGB should be destroyed as soon as practicable after the donor has been eliminated from the investigation or it has been determined that analysis of the donor's profile is not required, whichever occurs first.

Recommendation 7.4 Destruction requirements for volunteers' profiles

That Subdivision 30A of the Crimes Act 1958 (Vic) be amended to provide that a profile obtained pursuant to section 464ZGB should be destroyed as soon as practicable after:

- (i) the donor has been eliminated from the investigation or***
 - (ii) it has been determined that analysis of the donor's profile is not required;***
- whichever occurs first.***

Simplified Consent Provisions for Non-suspect Volunteers

If the recommendations proposed above were adopted, the concerns of police and community members about the use of their DNA would be alleviated. The caution and consent requirements could be simplified. The current provisions require the donor's informed and witnessed consent because the volunteer's DNA could be used for database matching or in criminal proceedings against the donor. If a donor's sample is destroyed once the profile is obtained, if the profile is retained on the volunteers' (limited purposes) index, and the profile is destroyed once its forensic purpose in the investigation has been achieved, the non-suspect volunteer would not need the comprehensive consent provisions that currently apply.

VOLUNTEER OR SUSPECT: THE 'POTENTIAL SUSPECT'

In Victoria it would seem that to date little use has been made of the voluntary sampling provisions to sample potential suspects. Representatives of Victoria Police indicated that one investigation, into a case of product contamination at a Victorian factory, involved the voluntary sampling of a number of employees. Their DNA

profiles were matched against the profile derived from saliva on the back of a stamp used on an envelope relevant to the investigation.

In other Australian jurisdictions, police have made use of the voluntary sampling provisions to mount high-profile, large-scale DNA screening programs targeted at a community rather than an identified pool of suspects. The UK police force inspired Australian interest in mass DNA screening programs when Colin Pitchfork was identified as the perpetrator of two rapes in Leicestershire, England.⁶⁹⁵

The first Australian mass DNA sampling was carried out by Western Australian police investigating the disappearance of three women in the Claremont region during 1996-97.⁶⁹⁶ When the body of one of the victims was found, police announced that they strongly suspected a cab driver was responsible for the murders. Local cab drivers, 'faced with a massive decline in business and the odium that they were harbouring a serial killer in their midst', formed Cabbies Against Crime, and volunteered for DNA testing to exculpate their members.⁶⁹⁷ This investigation is still open.

More recently, New South Wales Police mounted a mass screening program in the small community of Wee Waa, to identify the perpetrator of a rape involving an elderly woman.⁶⁹⁸ In April 2000, about 600 men aged between 18 and 45 volunteered DNA samples.⁶⁹⁹ A male person from that community confessed after undergoing a forensic procedure, but before the results of DNA profiling were known.

Queensland Police conducted their first mass DNA screening in Bundaberg, following the suspicious death of 19 year-old British backpacker Caroline Stuttle. It was reported that over 150 males within the age range and location thought to fit the perpetrator of this crime were asked to 'volunteer' their samples.⁷⁰⁰

This Inquiry received several submissions questioning the voluntariness of a potential suspect's agreement to provide a DNA sample, especially during a mass DNA screening. If voluntary sampling provisions are used to collect DNA evidence from potential suspects, equivalent safeguards must apply to vouchsafe the integrity of the procedure, and hence the evidence collected. Participants in this Inquiry have suggested that the current voluntary sampling provisions do not provide sufficient safeguards. Mr Michael Strutt, for example, noted:

695 In this screening it was, ironically, Pitchfork's attempt to evade detection by having another person take his place that identified him. No DNA matches were detected through the screening. However, Pitchfork came to the police's attention when they discovered that he had asked another person to give a sample in his place.

696 Tooth, 'The Courage of our Convictions - The Claremont Serial Killer' (2000) 13.

697 Ibid 13.

698 Saul, 'Genetic Policing: Forensic DNA Testing in New South Wales' (2001) 74.

699 Mike Head, 'Wee Waa: A test case for mass DNA sampling', 20 April 2000 at http://www.wsws.org/articles/2000/apr2000/dna-a20_prn.shtml, NSW Standing Committee on Law and Justice, *Review of the Crimes (Forensic Procedures) Act 2000* (2002) 4-5.

700 Jamie Walker, *The Australian*, 2 September 2002, 1.

It also seems likely that 'volunteers' who are eventually charged will contest the legality of their 'volunteering' in court. Volunteering should be subjected to the same procedures and oversight as consenting.⁷⁰¹

The ALRC observed that 'in practice, the delineation between a suspect and a potential suspect is often fuzzy'.⁷⁰² Michael Strutt concurred, noting in his submission to this Inquiry that:

there seems little reason to doubt that potential suspects will be intimidated into 'volunteering' forensic samples in order to reduce the paperwork etc which would flow from asking their 'consent' as a suspect.⁷⁰³

The Committee formed the view that the inherent difficulty with regulating the use of large-scale screening programs is the blurred distinction made between a volunteer and a suspect. For this reason the Committee examined the provisions governing the sampling of volunteers and suspects, to compare the protection afforded the donor's legal rights and interests, and to ascertain what difference the use of the voluntary sampling provisions may make to a volunteer who is later identified as a relevant suspect.

The provisions to enable the retention and use of DNA material obtained initially from a non-suspect volunteer provide the key to a satisfactory transition from voluntary to suspect sampling. This section compares the provisions applying to 'potential suspects' sampled under section 464ZGB with the provisions applying to identified 'consenting' or 'relevant' suspects sampled under sections 464R or 464T. It considers, too, the adequacy of the provisions which enable a volunteer to be treated as a suspect if inculpated in the investigation after the sample has been obtained.

Mass DNA Screenings under the Voluntary Sampling Provisions

Voluntariness in Criminal Investigations

In criminal proceedings, incriminating evidence obtained from an accused, such as a confession, is inadmissible if it is found that the evidence was obtained from the accused 'involuntarily' – if, for example, the will of the accused was overborne. For this reason, as discussed in Chapters 4, 6 and 8, the provisions governing the consensual sampling of suspects require 'informed consent' and set out in some detail what must be done to ensure the validity of the procedure, and therefore the evidence, obtained.

701 Ibid.

702 ALRC, *Essentially Yours* (2003) 41.83, 1023.

703 Ibid.

The Possibility of Coercion

The Inquiry received a number of submissions which took issue with the voluntary sampling provisions on the basis that, the provision of a DNA sample in the context of a mass screening cannot be said to be truly voluntary. Dr Ian Freckelton outlined how mass screenings can put pressure on individuals to co-operate in an investigation when they are under no legal obligation, and it is against their interests, to do so.

A mass screening, particularly where it is accompanied by considerable publicity, places pressure upon persons who are not individually properly to be classified as suspects and calls upon persons to prove their innocence, to a degree thereby qualifying the entitlement of a citizen to decline any form of co-operation with state authorities until such time as they fall within the category of suspects who by law can be compelled to submit to investigative procedures.⁷⁰⁴

Dr Gans also queried the voluntariness of participation in mass screening programs, such as Wee Waa.

The situation in Wee Waa described by the police before was called voluntary but in my view was not voluntary at all. ... Bear in mind that in that Wee Waa case the guilty man gave his sample. He convicted himself by giving his sample. That is a sign that he knew that this was not about choice. This was not about acting voluntarily. He knew, as the police themselves said, that the police would regard the people who said 'no' as now prime suspects.⁷⁰⁵

Victoria Police noted that the success of a mass screening program relies on the full support of the community, and this in turn requires the backing of the media.⁷⁰⁶ It is generally acknowledged that the support of the media is crucial to enlist the co-operation of community members. Public figures may be used to promote compliance with the screening program, and to diminish the concerns and credibility of those who are reluctant to consent.

In Wee Waa, for example, it has been suggested that the underlying purpose of the mass screening was to put pressure on the perpetrator to confess to the crime. Before the mass screening was undertaken the police had already identified twelve 'targets' - including the person eventually charged - 'who they considered possible suspects for the rape'.⁷⁰⁷ According to Dr Gans:

The police's main agenda in asking all 500 residents of Wee Waa to participate in DNA database surveillance was to place maximum, generalised pressure on the real targets, rather than to exclude the other residents'.⁷⁰⁸

704 Freckelton, *DNA Profiling: Issues Paper* (2002) 23.

705 Dr J Gans, *Minutes of Evidence*, 22 July 2002, 27.

706 Detective Inspector D Cowlshaw, *Minutes of Evidence*, 22 July 2002, 16.

707 Jeremy Gans, 'A Critique of the Police's Right to Ask for DNA', *Use of DNA in the Criminal Justice System*, Paper presented at Institute of Criminology Seminar, (2001) 34, 36.

708 *Ibid* 37.

A Test of Voluntariness: The Consequences of Refusal

The Privacy Commissioner contemplated the possibility that ‘by exercising your choice not to consent or volunteer ... you thereby become a suspect’.⁷⁰⁹ Participants in the Inquiry were concerned at the possibility that refusal to participate in a mass screening program is likely to be taken as an indication of a guilty conscience, and may result in further investigation or an application to obtain the sample from the volunteer compulsorily. Dr Freckelton also observed that a volunteer’s refusal to provide a sample may be used as evidence relevant to the investigation of the offence.

If [the volunteer’s] behaviour reveals any sign of disinclination to participate, this may be construed as fear of incrimination, rendering the person immediately a suspect in the investigation. In turn this can constitute evidence for police to contend that the person should be coercively tested under the powers relating to suspects. Thus, hesitation to participate in a mass testing, which might have been caused by any number of factors consistent with innocence, can itself constitute a ground for involuntary testing.⁷¹⁰

Representatives of Victoria Police were asked about consequences of withholding consent. Commander Hornbuckle suggested that:

The consent would be factored into the record of interview; the interview process that is recorded and retained for the purpose of presenting it to the court.⁷¹¹

An example of how a volunteer’s refusal to consent to DNA sampling can be construed as an indication of a guilty conscience was provided by Victoria Police. The volunteer provisions were used during an investigation at a factory which had been threatened with food tampering. Shortly before the threat was made, two employees had been dismissed, and it was considered likely that someone who was, or had been, employed at the factory had committed the offence. About 190 people were sampled during the investigation. Those who refused to consent to forensic procedures in the Victorian factory investigation were identified as suspects and investigated further.

[T]hey got all the people to volunteer the samples...As it turned out, five refused. What normally happens then is that you would expect those five to become your suspects. Of those five, after speaking to them, all but one submitted. The one that it turned out to be in the end - we had a sample off the back of a stamp that was on the envelope - it turned out to be someone totally different. In fact the two people they suspected of doing it were eliminated from the Inquiry.⁷¹²

The Committee accepts that in a mass screening program there is a real possibility that a volunteer may be pressured into providing a sample when to do so is not in the donor’s legal interests. In these circumstances, the Committee considers it vital that adequate safeguards are available, at the point when the volunteer is identified as a

709 P Chadwick, *Minutes of Evidence*, 22 July 2002, 60.

710 Freckelton, *DNA Profiling: Issues Paper* (2002) 24.

711 Cmdr P Hornbuckle, *Minutes of Evidence*, 22 July 2002, 13.

712 Detective Inspector D Cowlshaw, *Minutes of Evidence*, 22 July 2002, 15.

suspect, for the protection of the suspect's legal interests. Other Australian jurisdictions have provisions which limit the use of 'evidence' as to a donor's consent or non-consent in future criminal proceedings. The adequacy of the Victorian provisions relating to the admissibility of evidence of consent is considered in Chapter 8 below.

The Transition from Volunteer to Suspect: Retention Orders

The provision which operates as a means of re-identifying the volunteer as a suspect is the retention order provision. If a volunteer consents to the procedure but later withdraws consent to the retention of the sample and related information, the withdrawal of consent can be overridden if a police member obtains a court order to retain the sample and related information. This application, as noted above, can be made without notice to the volunteer and can be heard *ex parte*. By contrast, while a retention order can be heard and granted under section 464ZGF *ex parte*, the provisions governing the hearing of relevant suspect orders require the attendance of the defendant, permit him/her legal representation and provide the defendant with limited rights of address. Hence a person initially identified as a relevant suspect may have greater protection than a person initially sampled as a volunteer and subsequently identified as a suspect.

The criteria to be considered in determining an application for a retention order under section 464ZGF broadly replicate those which apply to the grant of relevant suspect orders. There must be DNA evidence from the crime scene against which the volunteer's profile can be compared,⁷¹³ and the volunteer's sample and profile must have been retained.⁷¹⁴ The applicant must 'reasonably believe' that the evidence has probative value in the offence under investigation,⁷¹⁵ and the court must be satisfied that 'there are reasonable grounds to believe' that the person has committed the offence.⁷¹⁶

No date needs to be specified for the expiry of the order, but the term of this original order is effectively limited to twelve months. If, after twelve months from the date of the court order, the person has been eliminated from the investigation, charged but not prosecuted, or acquitted, then the sample and related information must be destroyed.⁷¹⁷ The police may still apply for an extension of the original 'retention' order under section 464ZE(6). This application can be made *ex parte*, and there is no guidance as to what considerations apply to applications for extensions. Nor is there any explicit requirement for the court to set an expiry date for the extension period. Section 464ZE(6) provides that:

713 S 464ZGF(1)(a).

714 S 464ZGF(1)(d).

715 S 464ZGF(1)(b).

716 S 464ZGF(2).

717 Ss 464ZGE(3)(b) and (c). The final date for destruction is one month after the proceedings have ended and any appeal periods have expired.

If the court makes such an order [pursuant to s464ZE(6)], the reference to the period in sub-section 3(b) or 3(c) [the date by which the material must be destroyed if the extension order is not granted] is a reference to that period so extended.

It is not clear whether an application can be made for the indefinite retention of the sample and related material.

The Safeguards of the Relevant Suspect Regime

Those who queried the 'voluntariness' of voluntary sampling were concerned at the potential erosion of the suspect's rights once the suspect, as a volunteer, had provided forensic 'evidence' to the investigation. This section compares the safeguards available to consenting or relevant suspects under sections 464R and 464T with the safeguards available to volunteers under section 464ZGB and related provisions.

The Availability of DNA Crime Scene Evidence

The Committee has recommended that the forensic sampling of volunteers for criminal investigations should not be conducted unless suitable crime scene evidence is available against which the donors' DNA profiles can be compared. The Committee believes that this requirement is particularly relevant when the mass sampling of volunteers is contemplated.

The Committee strongly discourages the use of the voluntary sampling provisions to collect the samples of volunteers if this evidence has limited probative value in the investigation. This strategy would undermine public confidence in the integrity of the mass DNA screening processes.

'DNA Request Surveillance'

Several submissions alerted the Committee to the potential - exploited in the case of the Wee Waa investigation - to make use of the donor's reaction to the request, or of information obtained during the forensic procedure, as evidence of suspicious or guilty conduct.⁷¹⁸ Dr Gans has dubbed this practice 'DNA request surveillance'.

If a person is identified as a suspect, cautioned and informed of the right to seek legal advice, the suspect is in a position to decide what, when and how to communicate with investigators. However, in a voluntary sampling program, relevant information can be sought not through a formal, recorded interview, but through other means developed especially for use in the mass screening program.

718 See Jeremy Gans, 'Something to Hide: DNA Database, Surveillance and Self-incrimination', (November 2001) 13(2) *Current Issues in Criminal Justice*, 168-184.

For example, the Wee Waa screening involved a door-knock of every home. Volunteers were fingerprinted and photographed, interviewed and asked to complete a questionnaire to elicit their feelings and responses to the commission of this violent crime.⁷¹⁹ The questionnaire asked for details of the respondent's neighbours, sought details of the respondent and invited the respondent to indicate 'whether they were the rapist and what they thought should be done' to the rapist. The reactions of the respondents were observed, and unusual reactions noted. Police officers remarked on the 'shaky hands' and 'slow response' of the person subsequently charged with the crime.⁷²⁰

The NSW Privacy Commissioner indicated, in evidence provided to a NSW inquiry, that taking photographs and administering questionnaires to volunteers who were expecting only to provide a sample was 'grossly dishonest and entirely improper'.⁷²¹ Mr Puplick did not support the use of mass screenings as:

an opportunity to put citizens under pressure either to be photographed or to answer questions for the police to enable the police to build up profiles about people and their attitudes which, under other circumstances, they would not have access to.⁷²²

The Committee recognises that a person's conduct during an investigation will be relevant to investigators and considers that there would be real difficulties in seeking to restrict this form of investigation. However, the Committee believes that some consideration of the admissibility of the donor's consent or refusal to provide a DNA sample is warranted, and this issue is considered further in Chapter 8.

The Consent Provisions

Under section 464ZGB(1) any person aged 17 years or over may volunteer their DNA. The volunteer must consent to the procedure in the presence of an 'independent person' after being informed of certain prescribed information by a member of the police force.⁷²³ The form of consent required is not stipulated; the volunteer may give oral consent, but a record of the consent must be made, signed by the donor and witnessed by an independent person.⁷²⁴ The consent provisions which apply to volunteers are slightly different to those applying to suspects (section 464R), but nevertheless seem to be modelled on the informed consent provisions of section 464R.⁷²⁵

As noted earlier, Victoria Police recommended removing the statutory regulation of voluntary sampling on the basis that the consent requirement was onerous. Police

719 Ibid 168.

720 Ibid.

721 Mr Chris Puplick, quoted in NSW Standing Committee on Law and Justice, *Review of the Crimes (Forensic Procedures) Act 2000* (2002) 96.

722 Ibid 96.

723 Ss 464ZGB(2)-(3).

724 Ss 464ZGB(3)-(4).

725 Table 4.1 sets out these provisions in full.

authorities have expressed reservations at the comprehensive consent requirements since the introduction of voluntary sampling provisions.⁷²⁶ The Committee accepted that, if the purpose and use of the non-suspect volunteers' DNA were more narrowly defined, simpler consent procedures could be used.

However, when DNA material is collected from a volunteer who is a potential suspect, the donor's uncertain position makes it imperative that full consent provisions apply here. As the Coldrey Report commented:

It is important, however, to ensure that both the police officer and the citizen are aware of their rights and responsibilities. This should avoid any subsequent allegation of bluff or trickery which might affect the admissibility of the evidence obtained as a result of any of the procedures. ... It is equally desirable to limit the potential for assertions of intimidation or harassment.⁷²⁷

The Committee therefore considered whether the current caution and consent provisions adequately protect the interests of a volunteer-cum-suspect.

The Caution

Section 464ZGB does not specify the reasons for which a volunteer may provide a sample. The form used by Victoria Police to record a volunteer's consent to provide a DNA sample replicates the contents of section 464ZGB. The consent form provides a space for any limited use restrictions to be recorded, but gives no guidance on what type of restriction might be made. However, the volunteer is informed:

- that the information obtained 'could produce evidence to be used in court';
- that if consent is withdrawn (including after being charged with an offence) 'a member of the police force may nevertheless apply to a court for an order to retain' the DNA evidence; and
- of the entitlement to consult a legal practitioner before deciding whether to consent.

By contrast, suspects who are asked to consent to a forensic procedure must be formally cautioned. Section 464Y requires a person sampled by consent or court order under the 'relevant suspect' or Schedule 8 provisions to be cautioned. This involves being informed by a member of the police force that:

he or she does not have to answer any questions asked by the registered medical practitioner, nurse or other person conducting the procedure but that anything the person does say may be given in evidence.⁷²⁸

726 Victoria Police, Submission 18, 7.

727 Coldrey Committee, *Report on Body Samples and Examinations* (1989) 186.

728 S 464Y(1). The police member must record the caution and the person's response, and provide the donor with a copy.

Conclusions: Consent and Caution Provisions in Voluntary Sampling

In relation to non-suspect volunteers the Inquiry found that the consent provided by victims, relatives of victims or missing persons and those from whom elimination samples are sought should not involve consent to the forensic use of the evidence in any proceedings against the voluntary donor. The consent form could be simplified to provide that the sample and profile would be used only in the investigation for which it was sought.

In relation to ‘potential suspects’ the Committee concludes that the full caution and the information provided to ‘suspects’ should also be provided to potential suspects whose samples are sought under the voluntary sampling provisions.

Conclusions: Regulating the DNA Sampling of Potential Suspects

The Committee accepts that voluntary screening programs conducted under s464ZGB could adversely affect the interests of donors who are subsequently identified as suspects in that investigation. The pressure that can be applied to members of the community to volunteer their DNA for criminal investigations, particularly in mass DNA screening programs, provides law enforcement agencies with the opportunity to obtain information which may later affect the donor’s legal rights in those proceedings, and undermines the voluntary nature of the donor’s consent. This may affect the admissibility of the DNA evidence obtained.

The Committee believes that it is desirable to strengthen the protection afforded to volunteers once they have been identified as suspects without inhibiting the collection of DNA from volunteers. It considered various proposals for greater judicial scrutiny of the process of collection of DNA samples from volunteers, and also explored the possibility of providing enhanced protection for volunteers once they are identified as relevant suspects.

Proposals for Judicial Scrutiny of Voluntary Sampling Programs

Participants in this Inquiry, along with other recent reviews of these programs, considered three ways in which mass DNA screenings could be regulated: court orders, guidelines or regulations prescribing criteria for the conduct of these programs, or police orders.

A number of submissions advocated special provisions to regulate the conduct of mass DNA screening programs. These submissions reflected a common concern that the legal rights and interests of the volunteer could be affected by these sampling programs, which prevailed on members of the community to co-operate with the police, without the volunteers being aware of the legal consequences.

The ALRC proposed guidelines for the conducted of mass DNA screening programs,⁷²⁹ while the NSW Legislative Council Standing Committee on Law and Justice also concluded that mass screening programs should be subject to a court order.⁷³⁰

The Sherman Review favoured administrative and operational processes, rather than judicial scrutiny, on the basis that court orders ‘may prove cumbersome, even unworkable’.⁷³¹ The review took the view that:

Courts are not suited to spelling out the administrative and operational processes and circumstances in which mass screenings might take place.⁷³²

Father Peter Norden, Director of Jesuit Social Services, noted:

I do not see any objection to people voluntarily wanting to submit a DNA sample if they want to prove their innocence or if they decide that they want to waive their protection, but I do believe that the court should supervise these matters.⁷³³

The Victorian Privacy Commissioner advocated clear guidance on the criteria to be used in determining whether a mass screening program was justified, and recommended that a court order be required to implement this type of program.⁷³⁴

It ought to be that the police require an order of the court to conduct a mass screening, that they would need to show, in effect, that three broad criteria are met - proportionality, necessity and effectiveness. It has got to be proportionate to the crime. It has got to be necessary in the sense that other law enforcement mechanisms are not able more swiftly to be pursued ... And with effectiveness, you are looking to find out whether or not already there exists a sample against which to test the mass screening.

Victoria Legal Aid and Dr Gans also advocated court supervision of voluntary mass DNA screenings, proposing that a special court order be required.⁷³⁵ Dr Gans envisaged that the police could be required to meet a threshold test of reasonable suspicion, modified to apply to a particular group, rather than an individual.⁷³⁶ Police would be required to indicate a ‘reasonable suspicion’ aimed at a particular group who share certain characteristics which police believe that the likely perpetrator will possess.⁷³⁷

729 Ibid.

730 NSW Standing Committee on Law and Justice, *Review of the Crimes (Forensic Procedures) Act 2000* (2002) Recommendation 23, 98.

731 Sherman, *Independent Review of Part 1D* (2003) 3.81-3.82, 36.

732 Ibid 3.81-3.82, 36.

733 Fr P Norden, *Minutes of Evidence*, 23 July 2002, 151.

734 P Chadwick, *Minutes of Evidence*, 22 July 2002, 58.

735 Dr Jeremy Gans, Submission 16, 18-20.

736 Ibid.

737 Dr J Gans, *Minutes of Evidence*, 22 July 2002, 27.

The Privacy Commissioner expressed particular concern at the opportunity presented for the discriminatory targeting of particular communities or subgroups, especially vulnerable or marginalised members of the community.⁷³⁸

There is scope for the discriminatory practice of profiling on grounds of ethnicity - a matter for serious consideration and a practice that must be prevented.⁷³⁹

In a submission to another review, the New South Wales Aboriginal Land Council submitted that the mass testing of entire communities ‘promotes vigilantism’ and creates the environment for social alienation’.⁷⁴⁰ Dr Greg Gardiner noted the potential for the sampling of a particular community or ethnic group to distort or over-represent certain groups on the DNA database. This could have the effect of perpetuating any bias present in the original identification of a target group.⁷⁴¹

The Committee concluded that while guidelines and court orders would regulate the conduct of mass screening programs, neither of these options would add to the protection of individual volunteers who are later identified as suspects. The Committee therefore considered the possibility that the retention order process, which is the provision that accommodates a donor’s transition from volunteer to suspect, might be reformed to provide for closer judicial scrutiny.

The Retention Order Process: A Proposal for Reform

The Committee was concerned that the large-scale use of the voluntary sampling provisions, might affect the validity of the consent of donors not fully aware of the implications of the process. The Committee was also concerned at the possibility that, in the minds of the general public, the pressure placed on individual members of the community could be construed as requiring members of the public to prove their innocence, rather than as requiring investigators to assemble evidence which might incriminate a person.

The primary difficulty with the current provision seems to be that the volunteer’s consent - however involuntary that might have been – is relied upon to validate the collection of the DNA material. Whereas orders for the compulsory sampling of suspects are considered by the court in the presence of the suspect, orders for the retention of a sample provided voluntarily can be heard and determined *ex parte*. The provision for *ex parte* retention orders relies on the assumption that the donor’s

738 In the United States of America there are reports of police authorities targeting Afro-American males, for example, on the basis of tentative visual identification evidence by victims. For details, see Rebecca Sasser Petersen, ‘DNA Databases: When fear goes too far’ (2000) 37 *American Criminal Law Review* 1219; and Troy Duster, ‘The inexorable expansion of the DNA forensic database and the looming spectre of an early 21st century phrenology’ (2002).

739 P Chadwick, *Minutes of Evidence*, 22 July 2002, 51.

740 NSW Standing Committee on Law and Justice, *Review of the Crimes (Forensic Procedures) Act 2000* (2002) 95, also referred to in Freckelton, *DNA Profiling: Issues Paper* (2002) 24.

741 Greg Gardiner, *DNA Forensic Procedures: Potential Impacts on Victoria’s Indigenous Community* (2002) 11, at http://192.168.1.1/library/research/papers/Crime/DNA_profiling.htm.

original consent is sufficient authority for the collection of the DNA sample. However, a retention order is sought when the volunteer has withdrawn consent.

The position of this volunteer-cum-suspect is directly comparable to the position of a suspect who has refused to consent to a procedure. In that case, the application for the compulsory order must be heard and determined in the presence of the suspect, and the suspect has some limited rights at that hearing. In the view of this Committee, once a volunteer has withdrawn consent and is identified – for whatever reason – as a suspect, that suspect should be present at the hearing of the application for the retention of the sample and related material. The lack of clarity as to the period for which retention orders can be obtained in relation to volunteers confirms the Committee's view that the suspect should be present for the hearing of the retention order application.

The Committee believes that, once a person has been identified as a suspect, an application for the retention of the DNA sample and information obtained from it should be heard, in the presence of the suspect, in accordance with the provisions of sections 464T or 464U that apply to relevant suspects. The Committee therefore recommends that the *Crimes Act 1958 (Vic)* be amended to provide that applications made for the retention of DNA samples and information after consent has been withdrawn must be heard and determined in the presence of the donor of the sample.

Applying this principle to mass voluntary sampling programs, the Committee takes the view that in each case where the retention of the sample of a volunteer is sought, an application should be brought under the amended section 464ZGF as if it were a relevant suspect application under section 464T. The Committee considers that this reform will obviate the need for specific guidelines or orders in relation to mass screening programs, because it ensures judicial scrutiny of the process by which any volunteer is subsequently redefined as a suspect.

Recommendation 7.5 Volunteer to be present at retention order hearings

That the Crimes Act 1958 (Vic) be amended to provide that applications made for the retention of DNA samples and information after consent has been withdrawn must be heard and determined in the presence of the donor of the sample.

8. THE ROLE OF CONSENT IN DNA SAMPLING

THE CONSENT PROVISIONS

The Role of Consent in the Victorian Regime

Within the Victorian forensic sampling regime, the consent provisions have been pivotal. In developing the framework for the original Victoria provisions, the Coldrey Committee decided that it was preferable for the donor to have the opportunity to consent, rather than merely be required to comply with an order for a forensic procedure.

The appropriateness of this approach has been questioned both in relation to suspects, who may be ordered to undergo a procedure if they fail to consent and in relation to volunteers, whose refusal to consent may cause them to be identified as suspects. While the Committee recognises that the force of consent in the context of a criminal investigation is more circumscribed than in medical treatment or research, the Committee has nevertheless concluded, in Chapters 6 and 7, that a capable adult suspect or volunteer should still have the opportunity to consent to a forensic procedure.

Because the validity of the procedure rests on the donor's consent, the consent provisions regulate in some detail the way that the donor's consent is to be obtained.⁷⁴² The requirements for certain information to be given to the donor, for the donor's consent to be witnessed and recorded, and for the results to be provided to the donor are means of ensuring the validity of the procedure by which the DNA evidence is obtained. As the Coldrey Report noted:

In order to limit the possibility of disputes as to the genuineness of consent and assertions of intimidation or harassment, the consent of a suspect to participate in a forensic procedure should be acknowledged in writing or electronically recorded.⁷⁴³

742 Ibid 3. The consequence of obtaining evidence from bodily samples without authorisation was 'the judicial discretion to exclude unlawfully or unfairly obtained evidence'. Section 464ZE of the forensic procedures provisions makes provision to enable DNA evidence to be excluded on the basis of a breach of the provisions.

743 Coldrey Committee, *Report on Body Samples and Examinations* (1989) xii.

Chapter 4 considered the validity of consent as a means of authorising the collection of DNA samples and the appropriateness of the requirements currently imposed to ensure that the donor's consent is truly informed. In Chapter 4, the Committee affirmed that all donors should be fully informed about the nature and purpose of the procedure as a matter of principle, even if the procedure is authorised by court order and not consent. The Committee has therefore recommended a range of measures to standardise the information provided to donors and to simplify its presentation.

In Chapter 7, the Committee noted the close connection between the scope of the proposed use of the DNA sample and safeguards needed to obtain the donor's consent. The Committee noted that if the purposes for which non-suspect volunteers' samples could be used were more narrowly defined, simplified consent arrangements could be introduced. The Committee also noted that potential suspects sampled under the volunteer provisions should be given the same formal caution as identified suspects sampled under section 464R.

This chapter begins by reviewing the legal consequences under Subdivision 30A of a donor's decision to refuse to provide a DNA sample. In Chapter 6 the Inquiry was informed of investigations where a refusal to provide a DNA sample placed the person under suspicion. As noted in Chapter 7, the Inquiry received submissions which reported that community members who refused to co-operate in voluntary sampling programs suffered intense police media and community attention as a result. The Inquiry therefore considered the adequacy of the current laws governing the admissibility of evidence of a donor's non-consent to a forensic procedure in subsequent criminal proceedings.

Evidence of Non-Consent: Admissibility Issues

Subdivision 30A is silent on the admissibility of evidence of a suspect's non-consent in subsequent criminal proceedings. It was suggested that there could be many reasons, consistent with innocence, for a donor not to consent to the provision of this form of personal information and that the giving of consent is not truly voluntary if one of the legal consequences of a refusal is that the refusal itself can be admitted as evidence in criminal proceedings.

The Commonwealth provisions, based on the Model Bill, provide that evidence of a donor's refusal or failure to consent to a forensic procedure may not be admitted in any criminal proceedings. Section 23YZ of the *Crimes Act 1914 (Cth)* expressly provides that:

Evidence of a person's refusal or failure to consent, or withdrawal of consent, to a forensic procedure is not admissible in proceedings against the person except to establish or rebut an allegation that a police officer investigating the commission of the offence concerned acted contrary to law in carrying out the investigation.

The Western Australian provisions provide that:

- 81(1) Evidence that a person refused or did not consent, or withdrew consent, to an identifying procedure is not admissible in proceedings against the person except:
- (a) in proceedings against him or her for an offence alleged to have been committed while the identifying procedure was being done on him/her; [or]
 - (b) to establish or rebut an allegation that an officer investigating the commission of an offence acted contrary to law in doing the investigation.⁷⁴⁴

The Committee takes the view that evidence of a donor's refusal to consent should not be admissible because it inhibits the donor's free will to make this decision. As legal consequences already ensue for a suspect who fails to consent, and as a volunteer who refuses to participate in a voluntary screening program may risk being identified as a suspect on that basis, the Committee believes that it is appropriate to limit the evidence that can be adduced from merely the donor's non-consent.

The Committee proposes that the *Crimes Act* be amended to provide that evidence of a refusal or failure to consent should not be admissible in any criminal proceedings against that person in relation to that investigation or any other related investigations. The Committee believes that this provision would go some way towards reducing the coercive implications of the consensual provisions and recommends accordingly.

Recommendation 8.1 Evidence of non-consent: admissibility provisions

That Subdivision 30A of the Crimes Act 1958 (Vic) be amended to insert a provision, based on section 23XZ of the Crimes Act 1914 (Cth) as follows:

Evidence of a person's refusal or failure to consent, or withdrawal of consent, to a forensic procedure is not admissible in proceedings against the person except to establish or rebut an allegation that a police member or another person investigating the commission of the offence concerned acted contrary to law in carrying out that investigation.

The Committee also considered the particular consequences that can flow from a person being identified as not participating in a mass screening program. For essentially the same reasons that applied to the use of evidence of non-consent in criminal proceedings, the Committee took the view that an individual's decision not to participate in a mass screening program should be confidential and that release of this information should be expressly prohibited. A community member is under no legal obligation to participate in a mass screening program, and is entitled at law to refuse to participate. There could be many reasons, consistent with innocence, for not participating. Media and community pressures on individuals, which can be intense, should not be used to the detriment of a community member who has not been charged with any offence. The Committee recommends, therefore, that the release of details of non-participating members of the community should be expressly prohibited.

744 *Criminal Investigation (Identifying People) Act 2002 (WA)* s 81.

Recommendation 8.2 Confidentiality of volunteers' consent/refusal

That Subdivision 30A of the Crimes Act 1958 (Vic) be amended to provide that:

- (i) individuals who do not consent to participate in a mass screening program must not be identified or identifiable to other members of the community; and***
- (ii) the disclosure of information enabling the identification of such persons should be an offence under Subdivision 30A.***

SAFEGUARDS FOR VULNERABLE PERSONS

The second part of this chapter considers the position under Subdivision 30A of people who, because of their age or incapacity, are not in a position to give informed consent to a request for a DNA sample.

Two trends in law reform converge here. While on one level the appropriateness of relying on a donor's consent has been questioned, on another level there are moves to expand the scope of the consensual sampling provisions, to enable young or incapable persons to participate in decisions under modified consent arrangements.

Several participants in this Inquiry advocated a review of the safeguards provided for the sampling of disadvantaged and vulnerable members of the community. Representatives of the Crime Victims Support Association put the view that 'adequate protection should be provided to anyone who is mentally impaired or poorly educated'⁷⁴⁵, while the Public Interest Law Clearing House and Victoria Legal Aid also emphasised the need to safeguard the interests of the disadvantaged and the marginalised.

The main source of protection for the legal rights of these donors lies in the requirement under sections 464T and 464U for court orders to authorise the sampling of persons who were unwilling or unable, due to their age or incapacity, to consent to forensic sampling. The Inquiry reviewed the adequacy of the current safeguards provided to protect the interests of vulnerable persons who may be asked to undergo a forensic procedure. It considered in particular which individuals are deemed to be vulnerable and to require special protection under Victorian law, how vulnerable people are identified, and whether the current level of legislative and practical support available to vulnerable donors is adequate.

745 N McNamara, *Minutes of Evidence*, 23 July 2002, 116.

Incapable Persons

Defining 'Incapable Persons'

Under section 464T(1) an incapable person is defined as ‘a person incapable of giving informed consent by reason of mental impairment’. The Committee considered the definitions of incapable persons used in other Australian jurisdictions. The Commonwealth and the NSW provisions have a broader definition of an incapable person, including people who might be temporarily incapable, due to a psychiatric condition, for example. Under section 23WA(1) of the *Crimes Act 1914 (Cth)*, an incapable person is broadly defined as an adult who:

- (a) is incapable of understanding the general nature and effect of [and purposes of carrying out]⁷⁴⁶ a forensic procedure, or
- (b) is incapable of indicating whether he or she consents or does not consent to a forensic procedure being carried out.⁷⁴⁷

It would seem that the purpose of the provision is to prevent consent from being obtained from a person in circumstances where that person could not make an ‘informed’ decision to consent. The circumstances in which a forensic procedure may be sought – a criminal investigation, in which a donor’s provision of DNA might link him/her with the scene of a crime – mean that the donor’s decision to consent or refuse has legal consequences. The fact that the person is not in a position to give informed consent is probably more significant than the reason for this incapacity – whether it be a permanent intellectual disability or the effect of a psychiatric condition. To take a narrow view of the term ‘incapable’ could lead to challenges to the validity of the consent obtained, and could undermine the operation of the consent provisions.

The Committee has formed the view that the current definition of ‘incapable person’ is too narrow to cover people who may be incapable of making an informed decision under the complex consent provisions.

Recommendation 8.3 Broader definition of incapable person

That the Crimes Act 1958 (Vic) be amended to incorporate a broader definition of an ‘incapable person’, along the lines of the definition contained in the Model Bill and Commonwealth provisions, to include persons suffering temporary, as well as permanent, incapacity at the time the DNA sample is sought.

746 This phrase appears in s 23WA(1) of the *Crimes Act 1914 (Cth)* and in the Model Bill.

747 See also *Crimes (Forensic Procedures) Act 2000 (NSW)* s 3.

Identifying Incapable Persons

Implied in the provisions setting up safeguards for children and incapable persons is the accurate identification of people belonging to these groups at the time when the request or order for a forensic procedure is first mooted. Children to whom the safeguards apply can be identified by their age, but incapable persons must be identified in other ways. The safeguards afforded by the legislation will not be effective unless the vulnerable individuals are being reliably identified. The Committee's recommendation that the definition of an incapable person be amended, to be brought into line with the Commonwealth provision, will have the effect of broadening the current definition to include persons who are temporarily, as well as permanently, incapable of making an informed decision.

The Committee notes that in New South Wales there have been some discrepancies in the identification of incapable persons within the prison system. Whereas an estimated 12-13 per cent of the NSW prison population inmates were found to have an intellectual disability, only 17 people (0.22 per cent) of the inmates had been deemed 'incapable' during the sampling of serious offenders in NSW prisons.⁷⁴⁸

In this Inquiry, the Public Advocate stressed the importance of clarifying how a member of Victoria Police would determine that a person is 'incapable of giving informed consent by reason of mental impairment'.⁷⁴⁹ Representatives of Victoria Police indicated that the Police followed the procedures already in place for the identification of vulnerable individuals.⁷⁵⁰ The Public Advocate noted a provision in the Police Operating Procedures for generally obtaining advice where 'there is doubt as to a person's mental or intellectual state' and recommended the use of Independent Third Persons who have been trained to undertake this responsibility.⁷⁵¹

The Committee therefore recommends that the Public Advocate and Victoria Police jointly review the current procedures for the identification of incapable persons.

Recommendation 8.4 Review of procedures for identifying incapable people

That Victoria Police and the Office of the Public Advocate jointly review current procedures for the identification of incapable persons.

Substitute Consent or Court Orders: Issues and Options

The Public Advocate has identified an anomaly in the current forensic sampling provisions.⁷⁵² The provisions for the sampling of suspects stipulate that a court order

748 Ibid.

749 Mr Julian Gardner, Public Advocate, Submission 7, 2.

750 Snr Sgt A O'Connor, *Minutes of Evidence*, 2 July 2002, 16.

751 Provision 4.6.3.2 of Victoria Police Operating Procedures, quoted in Public Advocate, Submission 7, 2.

752 Public Advocate, Submission 7, 2.

can be sought to conduct a forensic procedure involving a relevant suspect ‘who is incapable of giving informed consent by reason of mental impairment’. The voluntary sampling provisions appear to permit the sampling of incapable persons with consent; they neither exclude incapable persons nor do they make provision for substitute consent to be given. Section 464ZGB appears to apply to all persons aged seventeen years or older, regardless of their capacity.

Part 4A of the *Guardianship and Administration Act 1986 (Vic)* grants the Public Advocate decision-making powers in relation to an incapable person’s health care and accommodation, but not in relation to forensic sampling. The *Crimes Act* does not provide an equivalent power to the Advocate in relation to DNA sampling for forensic purposes.

The Public Advocate outlined a recent case where an incapable person was asked to consent under the voluntary sampling provision to an intimate procedure for elimination purposes and indicated that the current law needs to be clarified. Either a substitute consent regime needs to be established for the purposes of Subdivision 30A, or incapable persons need to be expressly excluded from the operation of the voluntary sampling regime under section 464ZGB.⁷⁵³

The Public Advocate observed that Part 4A of the *Guardianship and Administration Act 1986 (Vic)* could serve as a model for the creation of a substitute consent regime for the DNA sampling of incapable persons in the course of criminal investigations. The Public Advocate also considered the option of excluding incapable persons from the voluntary sampling regime altogether. Noting that the implications of consent in criminal investigations were quite different from those operating in relation to medical treatment the Public Advocate suggested:

Given the criminal context of forensic sampling, the potential ramifications for an individual of any sample, (despite whether a sample is voluntarily given), and the intrusive nature of the sampling procedures, a court order should be required for this purpose.⁷⁵⁴

Courts Orders for Procedures involving Incapable Persons

The Law Institute of Victoria, the Privacy Commissioner, the Public Interest Law Clearing House, YouthLaw and Victoria Legal Aid all submitted that court orders provide a necessary safeguard for the interests of a vulnerable person, whose will could be easily overborne in these circumstances. The importance of judicial authorisation for procedures involving vulnerable people is compounded by the complexity and legal implications of consent under Subdivision 30A.

753 Ibid.

754 Ibid.

Substitute Consent and a Right of Veto

The South Australian forensic procedures legislation as recently amended now provides a substitute consent regime for incapable persons.⁷⁵⁵ Under these provisions the closest next of kin of a protected person may consent on that person's behalf to provide a DNA sample as a volunteer. If however, the donor withdraws consent during the procedure, the procedure must cease immediately and the DNA sample is not collected. In effect, this provision combines a substitute consent arrangement with a right of veto by the protected person. The Victorian Privacy Commissioner supported the introduction of this type of safeguard.

Conclusions

In the light of these misgivings about the operation of consent procedures generally, the Committee considered that it might be preferable, and consistent with the existing provisions, to require a court order to authorise the DNA sampling of an incapable person. The Committee believes that the potential disadvantages to the incapable donor that can flow from the procedure, outweigh the benefits of involving the donor and the donor's next of kin in the decision-making process.

The Committee believes that it is undesirable for any uncertainty to exist as to the application of the volunteer provision to incapable persons and therefore recommends that the legislation be amended specifically to exclude incapable persons from the operation of section 464ZGB, the voluntary sampling provision.

Recommendation 8.5 Exclusion of incapable persons from voluntary sampling

That section 464ZGB of the Crimes Act 1958 (Vic), which permits volunteers to undergo forensic procedures by consent, be amended to specifically exclude incapable persons from its operation.

Persons held at the Governor's Pleasure

Victoria Police has sought the power to order forensic procedures involving persons found not guilty because of mental impairment who are held at the Governor's pleasure.⁷⁵⁶

The Privacy Commissioner supported this proposal in principle, subject to consultation with stakeholders and representative groups, subject to judicial oversight and with the involvement of the Public Advocate.⁷⁵⁷

755 See s 13C(1)(b)(ii) in relation to incapable persons, and s 13C(1)(b)(i) in relation to children, of the *Criminal Law (Forensic Procedures) (Misc) Amendment Act 2002 (SA)* amending the *Criminal Law (Forensic Procedures) Act 1998 (SA)*.

756 Victoria Police, Submission 18, Recommendation 3, 3.

757 Privacy Commissioner, Submission 19S, 8.

Consistent with the recommendations made in relation to incapable persons, the Committee takes the view that, should the legislature determine that the collection of samples and related information from this small group was in the public interest, forensic procedures should be subject to court orders. The risk of the detainee re-offending is, however, low and there is a high probability that the detainee may ultimately not be prosecuted or convicted. The Committee appreciates that the forensic sampling of such persons may assist in the detection of unsolved crimes, and thereby bring closure to the victims of these crimes, even if the prosecution of the case may not be possible.

Recommendation 8.6 Court orders to sample persons held at Governor’s pleasure

That Subdivision 30A of the Crimes Act 1958 (Vic) be amended to allow an application to be brought under section 464T or 464ZF for an order for a forensic procedure involving a person held at the Governor’s pleasure or detained after being found not guilty because of mental impairment.

CHILDREN AND YOUNG PEOPLE

The forensic sampling of children aged between 10 and 17 years is subject to certain safeguards. A court order is required for the conduct of all forensic procedures involving children. The child’s parent or guardian must be given notice of an application for an order, and the child and parent/guardian must be present for an order to be made.⁷⁵⁸ A spent convictions provision also applies to DNA material obtained from child offenders, except in relation to certain specified offences. Under section 464ZGA, if the child has not been found guilty of any further offence by the age of 26, the DNA sample and related information must be destroyed.

Defining ‘Children’

The Act expressly prevents children under 10 years from being asked to undergo a procedure. In Victoria, a child aged 10 to 17 years can only undergo a forensic procedure by order of the Children’s Court.⁷⁵⁹ Forensic procedures involving a person aged 17 years or over are governed by the provisions relating to adults. The relevant provisions are set out in full below.

464U. Forensic procedure on child

- (1) A member of the police force must not request a child to undergo a forensic procedure or request that a compulsory procedure be conducted on the child if the child –
 - (a) is under the age of 10 years; and

758 S 464U.

759 S 464U(1).

- (b) is suspected of having done or omitted to have done any act which would have constituted an offence had the child been of the age of criminal responsibility.
- (2) A member of the police force must not request a child aged 10 years or more but under 17 years who –
 - (a) is suspected of having committed; or
 - (b) has been charged with; or
 - (c) has been summonsed to answer to a charge for –

an offence, whether indictable or summary, to undergo a forensic procedure or request that a compulsory procedure be conducted on the child unless the Children's Court has made an order ...

Representatives of YouthLaw and the Victorian Privacy Commissioner advocated raising the age in the Victorian legislation to 18 years, consistent with the Commonwealth provisions and the Model Bill.⁷⁶⁰ The Privacy Commissioner explained:

Consideration should be given to following the Model Bill's definition of child ("under 18"). This would limit collection to what is necessary and give regard to the different treatment usually afforded to children.⁷⁶¹

The Privacy Commissioner also suggested that the provisions specify the time at which a child's age is calculated. He proposed that, consistent with the *Children and Young Persons Act 1989 (Vic)*, the age of the child should be calculated as at the time of the offence. This would ensure that the provisions applying to the conduct of the sample are tied to the age of the suspect/offender at the time of the offence. Representatives of YouthLaw observed that even young people aged over 17 were not necessarily capable of exercising their rights readily. Ms Nicholson observed:

Young people in police stations do not readily exercise their rights. ... While 10-15 year olds are a particularly vulnerable group, anybody from 15 to 23 can also be a vulnerable young person in the same sense. Any safeguards that are put in place should cover [this age range] or a court should be given discretion to invoke those safeguards.⁷⁶²

The Inquiry noted that the provisions relating to the sampling of children and other vulnerable groups vary between jurisdictions and that reconciling these differences has been identified as a priority for all Australian legislatures.⁷⁶³ The current Victorian provisions are, at present, consistent with other definitions applying to children involved in Victorian criminal proceedings and the Committee advocates no change to these provisions at this stage. If the definition of a child were to be amended the Committee would favour the adoption of a nationally consistent standard.

760 S Nicholson, *Minutes of Evidence*, 22 June 2002, 78; Privacy Commissioner, Submission 19, 20.

761 Privacy Commissioner, *ibid* 20.

762 S Nicholson, *Minutes of Evidence*, 22 July 2002, 74.

763 Sherman, *Independent Review of Part 1D* (2003) 98.

Involving Children in Decision-making: Consent Issues

In other Australian jurisdictions there has been some debate about the extent to which older children should have some rights, even if not exclusive rights, to consent or refuse to consent to a forensic procedure. The NSW Inquiry⁷⁶⁴ and the ALRC Inquiry⁷⁶⁵ have considered the position of older children with the maturity to have some appreciation of the decision that is being made. The ALRC noted that for genetic research the informed consent of both the child and the parents is required. It recognised that in criminal investigations a child's and parents' interests might not necessarily converge, and that a child may be susceptible to some pressure in these circumstances. The ALRC nevertheless recommended that a procedure involving a child aged 12 years may be conducted with the consent of both the child and his/her parent or guardian.⁷⁶⁶

The Sherman Review largely supported the ALRC's position. It also recommended that a child's and parent's consent be required for the sampling of children aged 10 and over (instead of 12 and over as proposed by the ALRC), but took the view that the sampling of children under 10 should also be permissible with parental consent.⁷⁶⁷ A recent review of the provisions applying to children under Tasmanian laws advocated that the existing requirement, for both the child's and parents' consent, be retained.⁷⁶⁸ In NSW it was recommended that children aged 15 years or over be able to consent to a procedure without the additional consent of a parent or guardian.

The Victorian Privacy Commissioner envisaged cases where children may wish to assist police in their investigations and proposed that children should be consulted about the procedure so that their views can be taken into account.⁷⁶⁹

While the Committee accepts the importance of involving children and young people in decisions that directly affect them, on balance the Committee favours the retention of the current regime, where the forensic sampling of children may only be undertaken pursuant to a court order. The Committee takes the view that these provisions afford the maximum protection for children.

764 NSW Standing Committee on Law and Justice, *Review of the Crimes (Forensic Procedures) Act 2000* (2002) 126-130.

765 ALRC, *Discussion Paper 66* (2002) 845-949.

766 Ibid.

767 Sherman, *Independent Review of Part 1D* (2003) Recommendation 3, 2.64-2.71, 35.

768 At present the provisions require a court order or the consent of both a parent and the child for the sampling of child suspects. See generally Tasmania, Office of the Commissioner for Children, *Forensic Procedures Act 2000: Review of One Year in Operation* (2002).

769 Privacy Commissioner, Submission 19, 10.

ACCESS TO INDEPENDENT SUPPORT AND ADVICE

The Needs and Interests of Vulnerable Donors

It was put to the Inquiry that the current provisions, while contemplating the presence of a parent, guardian, or independent person, do not necessarily result in the child or incapable person receiving informed and independent support and advice. In some instances the parent, guardian or independent person may not actually be in a position to make a decision that is ‘in the best interests of the child’ in this area of law. As the Privacy Commissioner observed:

In the present context [with rapid developments in genetic science] very few child suspects or their parents or guardians will have more than vague knowledge of the implications of genetic information’.⁷⁷⁰

Similarly, Sarah Nicholson, Director of YouthLaw, noted:

I think there is a misconception that children’s rights are inherently in conflict with parents’ rights. My view on that is that the model we should be using is the one contained in the Convention on the Rights of the Child, which says that the ‘best interests of the child’ come first.⁷⁷¹

Ms Nicholson went on to indicate the importance of ensuring that young people were supported in the first contact with police by sound legal advice. Representatives of YouthLaw indicated the difficulties that can result from the young person being advised by parents or independent persons who lack the legal knowledge to provide the necessary support and advice to the young person.⁷⁷²

The Role of Independent Third Persons

While the Victorian provisions do not stipulate a role for Independent Third Persons specifically in relation to the conduct of forensic procedures, their role is provided for in the *Crimes Act* and *Police Procedures*. Independent persons can be appointed for the protection of vulnerable persons who are interviewed or from whom bodily samples, fingerprints etc are taken during an investigation. The reason for adopting special safeguards, such as the presence of an independent person, is the general requirement of voluntariness. In *Collins v R*⁷⁷³ Brennan J observed that:

the concepts of voluntariness, fairness, and public policy are integral to the operation of our criminal justice system. They are designed to ensure that any finding of guilt arrived at, on the basis of confessional evidence, is not only reliable but that the evidence itself has been obtained in a socially acceptable fashion, ... [and] that any

770 Ibid.

771 S Nicholson, *Minutes of Evidence*, 23 July 2002, 78.

772 Ibid 78.

773 (1980) 31 ALR 257, 307.

such finding is not surrounded by an aura of possible injustice which compromises both the system and the society which supports it.⁷⁷⁴

As a result, special procedures have been adopted for the procedures involving children, intellectually disabled persons and persons ‘whose ethnic background may place them at a significant disadvantage to other members of the community’.⁷⁷⁵ Section 464K(8)(a) of the *Crimes Act*, for example, requires the presence of an ‘independent person’ for the fingerprinting of a child, if a parent or guardian cannot be located and section 464E(1)(a) imposes a similar requirement in relation to questioning or investigation.

The Committee was also informed about uncertainty as to the effectiveness of independent third persons under the current operating procedures of Victoria Police. Ms Emma Hunt, a Co-executive Director of the Public Interest Law Clearing House (PILCH) put the view:

Provisions might need to be strengthened to ensure that an independent third party is present for people with disabilities.⁷⁷⁶

YouthLaw agreed, recommending that ‘a trained independent person’ should be available to put the best interests of the child first.⁷⁷⁷ The training and expertise of this person was essential if adequate support was to be available. The Committee was made aware of the difficulty in ensuring that the independent person available is able to provide the necessary support and advice to the young or vulnerable person. YouthLaw indicated that a scheme for the training of independent persons to act in the best interests of young people would assist.⁷⁷⁸ The Public Advocate recommended that:

Procedures be more specific in articulating the role and tasks that are anticipated in facilitating communication during any request or procedure relating to the taking of forensic samples.⁷⁷⁹

The Committee considers that a vulnerable person will need support if an application is sought for an order for a forensic procedure. The Committee noted, however, the concerns of some participants as to the effectiveness of the current arrangements and believes that the role and of Independent Third Persons in the forensic sampling process should be clarified. The Committee recommends that there be further consultation between Victoria Police and the Office of the Public Advocate to clarify the role and duties of the Independent Third Persons in the administration of the forensic procedures regime.

774 Ibid.

775 Ibid 679-682, Phillips CJ, Hampel and Vincent JJ.

776 E Hunt, *Minutes of Evidence*, 23 July 2002, 155.

777 S Nicholson, *Minutes of Evidence*, 22 July 2002, 78.

778 Ibid.

779 Public Advocate, Submission 7, 2.

Recommendation 8.7 Review of the role and duties of independent persons

That Victoria Police and the Office of the Public Advocate clarify the role and duties of the Independent Third Persons in the administration of the forensic procedures regime.

The Needs of other Vulnerable Groups

While the Victorian provisions relate only to children and incapable persons, other jurisdictions have introduced provisions to protect the interests of other vulnerable groups in the criminal system: indigenous persons and those of a non-English-speaking background. Some jurisdictions make special provision for the support of indigenous and non-English-speaking people when they are asked to consent to a procedure and/or when the procedure is carried out. These are considered below.

Indigenous Persons

The Victorian forensic sampling regime does not make special provision for indigenous people. However, in other jurisdictions explicit provision is made for the identification and support of indigenous people asked or ordered to undergo forensic procedures. The Commonwealth and the NSW provisions entitle an Aboriginal or Torres Strait Islander person to have an interview friend or legal representative present when asked for consent and during the forensic procedure.⁷⁸⁰ The Commonwealth legislation expressly provides for the term 'interview friend' to include 'a representative of an Aboriginal legal aid organisation'.⁷⁸¹ After the request, the suspect must be able to communicate with the interview friend and legal representative.

During the procedure, an interview friend, or a lawyer, must be present, unless the right to a friend is waived.⁷⁸²

Commonwealth legislation requires the police to ensure that a compulsory procedure involving an indigenous suspect is carried out within two hours of the grant of the order.⁷⁸³ The New South Wales provisions require that an Aboriginal or Torres Strait Islander must not be asked to consent until after a representative from an Aboriginal legal aid organisation has been notified, or the suspect has waived this right or engaged another legal representative.⁷⁸⁴ An interview friend must be present when consent is sought, during the hearing of an application for a court order and, if reasonably practicable, for the procedure itself.⁷⁸⁵

780 *Crimes Act 1914 (Cth)* s 23WB; *Crimes (Forensic Procedures) Act 2000 (NSW)* ss 4, 10, 55.

781 Ss 23BW(2) and (3).

782 Greg Gardiner, *Information Paper: DNA Profiling* (2002) 8.

783 *Crimes Act 1914 (Cth)* s 23XGB. A time limit of two hours applies to the conduct of procedures involving non-indigenous capable adults under s23XGB(1)(b).

784 Ss 10(4) and (5).

785 Ss 10(3), 30(3) and 55(2). If, however, the police form the view that the presence of the interview friend may 'prejudice the investigation', that person may be removed.

Some difficulties have been reported in the implementation of these requirements. In NSW, the initiative rests with the indigenous person to request support. The NSW Ombudsman found that only one of more than 500 indigenous suspects entitled to request an interview friend actually made such a request and had a witness present for the conduct of the procedure.⁷⁸⁶ Indigenous legal and welfare organisations would also need to be informed of their role and resourced to cope with the requests they may receive. The Committee therefore recommends careful consultation within indigenous and legal organisations to determine the most appropriate form of support.

Recommendation 8.8 Support for indigenous persons

That the Department of Justice consult with indigenous and legal organisations to determine the most appropriate form of legislative and practical support for indigenous persons whose DNA samples are sought for criminal investigations.

People of non-English-speaking Background

The Victorian consent provisions stipulate that the consent information is to be conveyed ‘in a language likely to be understood’ by the donor. While the Inquiry received no data on the sampling of people from a non-English-speaking background, it did receive proposals to recognise their language needs. The Crime Victims Support Association indicated that support should be available for people with English language difficulties.⁷⁸⁷

Other Australian laws require the provision of information and consent documents in the donor’s language, and require an interpreter to be provided, if required. South Australian legislation, for example, provides for the assistance of an interpreter to be available.⁷⁸⁸

The Committee is of the opinion that further consultation with bodies catering for the needs of people of non-English-speaking background within the criminal justice system is needed to ascertain whether suitable arrangements are in place to obtain informed consent from donors not fluent in English.

786 NSW Ombudsman, *Discussion Paper: The Forensic DNA Sampling of Serious Indictable Offenders* (2001) 15.

787 Crime Victims’ Support Association, Submission 6, 2.

788 S 13G(2) provides if a person whose informed consent is sought is not reasonably fluent in English, then the statement informing the donor of the consent provisions must be read with the assistance of an interpreter.

**PART D:
THE COLLECTION, HANDLING AND
ANALYSIS OF DNA EVIDENCE**

9. POLICE POWERS AND RESPONSIBILITIES

INTRODUCTION

Part D examines the collection of DNA evidence by operational police, and its analysis at the forensic laboratory. This chapter focuses on the processes involved in the handling of DNA evidence, from the collection of DNA samples at the crime scene through to the submission of the crime scene and reference DNA samples to the VFSC. Chapter 10 reviews the techniques and processes used to obtain a DNA profile and to interpret the significance of a match between two profiles.

This aspect of the review is undertaken with two goals in mind. The first is to identify the statutory responsibilities imposed on Victoria Police and the forensic laboratory and to establish what mechanisms are in place to achieve and monitor compliance with these responsibilities.

The second goal is to review the laws, procedures and operational systems in place to guarantee and monitor the integrity of the DNA sample throughout the sampling processes. The Inquiry sought to identify vulnerable stages in the sampling process which may affect the quality of the evidence obtained and to consider what means are available – operational as well as statutory – to protect the integrity of the sampling process.

In reviewing Victoria's forensic procedures regime the Inquiry therefore examined the extent to which the procedures for the collection and handling of DNA evidence are regulated under Subdivision 30A, and identified statutory responsibilities which the regime imposes on the police and the forensic laboratory.

Where the police and the forensic responsibility are subject to statutory requirements, the Inquiry considered whether this form of regulation has provided effective scrutiny of the processes involved. Where standards or procedures have not been defined by legislation, the Inquiry also considered whether they were subject to some other form of verification, such as accreditation reviews, audits or judicial scrutiny.

PROCEDURAL REQUIREMENTS UNDER SUBDIVISION 30A

Subdivision 30A sets out the process for obtaining DNA samples and in so doing, imposes certain procedural obligations on Victoria Police. Chapter 4 reviewed the donor's entitlements under the current legislation and recommended measures to ensure donors are aware of their entitlements. This chapter begins by reviewing how the day-to-day implementation of these statutory obligations is regulated, achieved and monitored.

The Provision of Documents and Forensic Material to the Donor

Documents

As noted in Chapter 4, the forensic procedures provisions set out a number of requirements for the conduct of the procedure. Subdivision 30A requires police to inform donors of their rights and caution them as to the legal consequences of the procedure. Police must furnish donors with certain documents relating to the conduct of the procedure and provide access to forensic material in certain circumstances. While the legislation does not always specify who is responsible for fulfilling these obligations, in practice the investigating officer would be responsible for:

- seeking and recording the donor's consent as required by s 464S(2);
- giving the donor a caution pursuant to ss 464Y(1) and (2);
- witnessing and/or recording the procedure and providing the donor with a copy as required by ss 464ZA(4)(5) and (6A); and
- providing the donor (or their parent or guardian) with a copy of any relevant application, notice or order pursuant to ss 464U(5), 464W(9), and 464ZF(5).

The Inquiry considered whether these provisions were sufficient to identify who is responsible for implementing these provisions, to provide the donor of the sample with the forensic material and documents to which he/she is entitled, and whether the Victorian provisions make the operational procedures sufficiently clear and workable.

Monitoring Compliance with Statutory Obligations

Where the provision of documents leads to or occurs during criminal proceedings against the donor of the sample, compliance with these statutory obligations is relevant to the proceedings and falls within the supervision of the courts. Section 464ZE provides that non-compliance with specified statutory requirements for the collection of DNA samples may result in the exclusion of the evidence obtained. The admissibility provisions establish that – with the exception of defects in court orders –

such evidence is inadmissible unless the court determines, in the exercise of its discretion under the Act, that it can be admitted.⁷⁸⁹

The Law Institute of Victoria drew the Inquiry's attention to difficulties encountered in obtaining orders as required. The Institute indicated that:

the profession's confidence in the system has already been undermined by administrative problems, such as failure to provide Orders despite repeated requests'.⁷⁹⁰

Lednar's case⁷⁹¹ as noted in Chapter 5, concerned the validity of *ex parte* orders made by magistrates in chambers and considered, among other things, a failure to provide documents to offenders pursuant to court orders. There have been other isolated cases since then where the failure to provide notice or orders to the defendant was at issue.⁷⁹² The Inquiry is in no position to form a conclusion about the significance of this problem. Issues of non-compliance which arise in the course of criminal proceedings are dealt with in that context.

However, if the donor is a volunteer or a consenting suspect, and no charges are laid, compliance with the requirements set out in the forensic procedures provision may not be subject to judicial examination. In order to ascertain whether donors and consenting suspects are receiving the documents to which they are entitled, administrative processes are required to record the provision of this data. It would be necessary to have records of, at least:

- the number of procedures conducted involving volunteers (under s 464ZGB) and consenting suspects (ss 464R and 464S);
- the provision of records of consent, and witnessed documents or recordings of the procedures as appropriate; and
- the number of cases in which the donor's consent was withdrawn, and the action subsequently taken by Victoria Police (to either destroy the sample and any related information or to seek a court order for its retention).

The Inquiry sought from Victoria Police data on the number of procedures conducted under the voluntary sampling (s 464ZGB) and consensual sampling (s 464S) provisions, with a view to establishing how compliance with the statutory obligations was achieved and monitored. The VFSC maintains data on: the number of voluntary/elimination (person) and suspects' samples received, analysed and

789 S 464ZE.

790 Law Institute of Victoria, Submission 21, 2.

791 *Lednar and Ors v The Magistrates' Court of Victoria and Anor*, [2000] VSC 549, Gillard J.

792 See *Kirsch v Dolman* [2001] VSC 234, Gillard J, 19 July 2001, which concerned the failure of the police informant to give the suspect notice of the hearing of an application for a forensic procedures, and *Director of Public Prosecutions v Devaldez*, [2003] VSCA 29, , Phillips CJ, Vincent JA, Cummins AJA, 11 April 2003, where DNA evidence was not tested until shortly before the commencement of the trial, depriving the defendant of notice and time to re-examine the evidence.

destroyed.⁷⁹³ The operational arm of Victoria Police informed the Inquiry that no separate data on the use of the consensual procedures was maintained.

Conclusions

The collection of DNA samples by consent is achieved with the co-operation of members of the public and is founded on community faith in the integrity of the process. In these circumstances there is, or should be a policy imperative, as well as a statutory obligation, to ensure that the requirements of the forensic sampling provisions are met.

Critical Dates for the Retention or Destruction of Reference Samples

While some obligations are imposed by the forensic procedures legislation, others are implied by the way that the process is administered. The legislation authorises the collection of samples from volunteers and suspects primarily for use in an active investigation. If the volunteer or suspect is eliminated – whether through the DNA sampling process, further investigation or criminal proceedings – the sample and related information must be destroyed. The Victorian provisions are devised to require destruction by a certain date, unless an order for the retention of the sample is made. For these provisions to have effect, clear communication of critical dates is essential. Table 9.1 below sets out some of these ‘critical dates’, showing the statutory provision and the requirement it imposes.

The destruction of the sample and related information is undertaken by the VFSC. However, the trigger for these events is often a date related to criminal proceedings, which must be provided by the Prosecution or operational police. The VFSC will initiate destruction at the expiry of the twelve-month period unless notified otherwise, and the onus is on the police member (prompted by the VFSC) to make a timely application if the retention of the sample and related information is desired.

Failure to notify the VFSC of an order for the retention of the sample, or of an amended court date or appeal period, can result in the premature destruction of the sample or its unauthorised retention. In *R v Ryan*⁷⁹⁴ the forensic sample and related material were destroyed prior to the expiry of an appeal period. This precluded re-examination of the forensic evidence and prevented the Prosecution’s appeal from proceeding.

793 VFSC, Submission 23S4.

794 [2002] VSCA 176, 1 November 2002, Ormison J, Vincent and Eames JJA.

Table 9.1 Critical Dates in the DNA Sampling Process

Critical Date	Requirement
<p>A volunteer’s (limited purpose) sample obtained. The volunteer may elect to donate the sample for ‘limited use’. A date may be set for expiry of authorised use.</p> <p>s464ZGB</p>	<p>The sample and related material and information must be used/destroyed in accordance with the donor’s specifications.</p>
<p>The volunteer withdraws consent and requests destruction of the sample.</p> <p>S464ZGE(2), (3), (8)</p>	<p>The sample and related material and information must be destroyed within 28 days.</p> <p>The person must be notified within 14 days of request that destruction has occurred (unless a retention order is granted);</p> <p>OR</p> <p>If a retention order is granted:</p> <ul style="list-style-type: none"> • the sample and related information must be destroyed after 12 months; or • 1 month after the expiry of any appeal periods.
<p>A suspect’s sample is obtained by consent.</p> <p>The suspect has not been charged: 12 months from the date of the procedure</p> <p>The suspect is charged but prosecution does not proceed: 12 months from the date of the procedure</p> <p>The suspect is charged but acquitted: 12 months from the date of the procedure, and one month after expiry of the appeal period</p> <p>s464ZG(3), (4)</p>	<p>The sample and related material and information must be destroyed.</p> <p>The person must be notified within 14 days of request as to whether destruction has occurred.</p>
<p>An interim order is confirmed by grant of a final order.</p> <p>s464V</p>	<p>An interim order authorises the taking of the sample, but must be confirmed by a final order made in the presence of the suspect before the sample can be analysed.</p>
<p>A suspect is found guilty of an offence for which the DNA evidence was relevant: within 6 months of the expiry of appeal period</p> <p>ss 64ZFB(1) and 464ZFC(1)</p>	<p>An order can be sought for retention of the sample and related information.</p> <p>If granted, the DNA sample and profile can be retained indefinitely.</p> <p>If rejected, the person must be notified within 14 days that destruction has occurred.</p>
<p>A child offender whose sample has been retained turns 26 years: no subsequent findings of guilt since commission of offence; the offence is not a serious offence exempted from this provision (eg murder)</p> <p>s464ZGA(1)</p>	<p>The sample and related material and information must be destroyed.</p>

The legislation also operates to penalise the unauthorised retention of the sample and related material after the due date for destruction. If a sample were to be retained after its due date for destruction and used in further criminal investigations, the evidence provided by the sample would be inadmissible in future prosecutions against the donor of the sample.⁷⁹⁵ However, where destruction depends on notification of the elimination of a person from an investigation or a decision not to proceed with the charges, it is more difficult to establish when that event or decision occurs and, therefore, to ensure that it is communicated to the forensic laboratory.

Moreover, these provisions affect the retention and use of samples obtained from ‘innocent’ volunteers or suspects: those who have been eliminated from the investigation or who have not been charged or prosecuted.

The Criminal Bar Association emphasised the importance of providing transparent processes to ensure that destruction requirements are complied with. It advocated ‘strict procedures’:

to ensure that samples that have been provided for a limited purpose, or samples that have been taken and concerning which no order for retention has or can be made, must be destroyed. Records detailing the continuity of such samples and confirming their destruction need to be readily accessible. There needs to be a chain of responsibility to confirm this process has been complied with.⁷⁹⁶

Reports and audits from other jurisdictions have revealed difficulties in establishing a process which triggers and audits the prompt destruction of samples from donors eliminated during an investigation, rather than at the conclusion of criminal proceedings.

In the United Kingdom, following legal challenges to the use of DNA profiles that had retained after their due date for destruction, an audit of the Forensic Science Service revealed that thousands of profiles had been retained without due authorisation. The UK audit found that a lack of communication with the forensic laboratory was the prime cause of the unauthorised retention of profiles.⁷⁹⁷

Some investigations may remain open for some years, and the retention of samples and profiles for the duration would represent an unwarranted intrusion into their privacy. Taxi drivers who volunteered for forensic procedures to exculpate them from the investigation into deaths and disappearances in Claremont, Western Australia, are

795 S 464ZE.

796 Criminal Bar Association, Submission 13, 4.

797 United Kingdom, Home Office, David Blakey, *Under the Microscope: Thematic Inspection Report on Scientific and Technical Support* (2000) 14-18. The unauthorised retention of DNA profiles subsequently used in criminal investigations and its implications for the admissibility of the evidence obtained was considered in two English cases – Weir’s case and Baker’s case, and gave rise to a reference to the House of Lords to determine this question. See Attorney-General’s Reference No. 3 of 1999 [21000] 2 Cr App R 416 (CA); [2001] Cr App r 475 (HL).

still waiting for their DNA samples and profiles to be destroyed, several years after the procedures were undertaken.⁷⁹⁸

The Sherman Review identified weaknesses in the capacity of the CrimTrac database to ensure compliance with destruction dates. The ALRC Inquiry also found it difficult to establish a means of setting clear dates for the destruction of forensic material belonging to persons eliminated from investigations.⁷⁹⁹ Ultimately it recommended that formal policies and procedures be developed to establish a process:

for persons to obtain confirmation that their forensic material and any information obtained from it, has been destroyed.⁸⁰⁰

It is clearly important, as a matter of public policy, that the destruction of samples and profiles of this group occur as required and that protocols to enable compliance are monitored and reviewed.

Conclusions

The Inquiry concludes that the current provision, which sets a maximum period for the retention of samples from volunteers and consenting suspects, is the most reliable and efficient method of ensuring their retention or destruction at the critical dates. The weakest point in this regime is the difficulty of ensuring that amended dates are communicated to the laboratory as required. As the current regime defaults to the destruction of DNA material, failure to notify the laboratory of critical dates is, as in *Ryan*'s case, likely to jeopardise the retention of relevant profiles on the database.

Data Management and Compliance Audits

This Inquiry was concerned at the lack of information and, underlying this, the lack of data management systems to monitor the 'paperwork' associated with the collection of DNA reference samples from suspects and volunteers. The Committee regards the full and transparent compliance with provisions governing the consensual sampling of volunteers and suspects as a crucial element of the regime, because on it hinges the future co-operation and confidence of the general public in its law enforcement agency.

The Committee therefore recommends that the Auditor-General undertake an audit of the systems in place for ensuring compliance with the requirements of Subdivision 30A and for the notification by Victoria Police of critical destruction and retention dates to the forensic laboratory. The Committee envisages that this audit would establish or adjust procedures and set a benchmark for Victoria Police to monitor its compliance with the relevant provisions.

798 Tooth, 'The Courage of Our Convictions - The Claremont Serial Killer' (2000) 13-14.

799 ALRC, *Essentially Yours* (2003) 41-12.

800 Ibid Recommendation 41-12(b).

Recommendation 9.1 Audit of systems for administration of DNA sampling

That the Auditor-General undertake an audit of the systems in place for the ensuring compliance with the requirements of Subdivision 30A and the notification by Victoria Police of critical destruction and retention dates to the forensic laboratory.

Forensic Material and Reports

After the analysis has been completed, section 464ZD requires a copy of the forensic report to be provided to the relevant suspect (or in the case of a child, his/her parent or guardian). A relevant suspect is also entitled to request a portion of a DNA sample obtained from a victim or crime scene, where there is sufficient remaining for the analysis.⁸⁰¹

The current legislation does not allocate responsibility for providing the forensic report and access to forensic material. Initially the Victorian provisions made this obligation the responsibility of the VFSC, but subsequently amendments were enacted to return responsibility to operational police.⁸⁰²

Conclusion

The Committee believes that the provision of forensic material and the forensic report to the defendant should be the responsibility of the VFSC, as it has the technical expertise, the protocols and the NATA review process to ensure compliance with these requirements. The Committee therefore recommends that the *Crimes Act* be amended to provide that where a request is made for a forensic report or a portion of the crime scene sample, the VFSC will be responsible for making the forensic report available and/or providing access to the crime scene sample for re-testing.

Recommendation 9.2 Responsibility for the provision of reports and DNA evidence

That the Crimes Act 1958 (Vic) be amended to provide that where a request is made for a forensic report or a portion of a crime scene sample, the Victoria Forensic Science Centre will be responsible for:

- (i) making the forensic report available; and/or***
- (ii) providing access to the crime scene sample for re-testing.***

ESTABLISHING THE INTEGRITY OF DNA EVIDENCE

Responsibility for the collection of DNA evidence rests primarily with the operational arm of Victoria Police. As noted above, reference samples are collected by medical

801 Ss 464ZC(2)-(4).

802 See VFSC, Submission 23, 11.

personnel from the Victorian Institute of Forensic Medicine (VIFM) or under the supervision of authorised police officers. The collection of crime scene evidence, including any DNA material, is generally the responsibility of police investigators although, in some serious cases, specialised VFSC laboratory staff may attend. To utilise scarce staff efficiently, the VFSC has limited its attendance at crime scenes to the most serious crimes.⁸⁰³

All DNA analysis for criminal investigations is undertaken by the VFSC, the only Victorian laboratory accredited by the National Association of Testing Authorities (NATA) in the field of forensic science.⁸⁰⁴ The VIFM, while not accredited for the analysis of DNA samples for criminal investigations, can review the expert evidence for criminal investigations and proceedings.⁸⁰⁵

The reliability and utility of DNA profiling depends on the flawless collection of DNA evidence. The integrity of the DNA sample is paramount. As the VFSC observed:

It must be remembered that DNA profiling results will only be as good as the potential source from which they were acquired. Poor treatment of exhibits leading either to their degradation or destruction, and inadequate labelling of exhibits has the potential to minimise the value of any forensic testing that may be applied to them.⁸⁰⁶

Where doubts as to the continuity of the chain of custody of a DNA sample are shown to be justifiable, the value of the evidence may be diminished or the evidence may even be excluded. Australian case law provides examples of prosecutions where gaps in the chain of continuity meant that the possibility that the evidence was contaminated or tampered with could not be ruled out.⁸⁰⁷

A New South Wales case, *R v Lisoff*⁸⁰⁸ illustrates how issues with the continuity of collection procedures can cast doubt on the reliability of the DNA evidence.⁸⁰⁹ In this case, the defendant was charged with an assault, and the prosecution relied on DNA evidence to support a largely circumstantial case. Justice Goldring of the NSW Court of Appeal summarised the relevant facts extra-curially as follows:

The only evidence against Mr Lisoff was some minute blood spots on trousers and a boot that he had been wearing at the time of an assault. He denied being involved in the assault, but voluntarily surrendered the clothing to police, who had it in their custody from the day of his arrest until the day of the trial. After the assault the victim was taken to hospital and given a blood transfusion.⁸¹⁰

803 Professor J Scheffer, *Minutes of Evidence*, 23 July 2002, 108.

804 This requires accreditation in relation to ISO/IEC 17025.

805 The VIFM is accredited for paternity testing.

806 VFSC, *Background/Issues Paper* (2002) 9.

807 *R v Lisoff* [1999] NSWCCA, 364.

808 *Ibid.*

809 V Stojcevski, *Minutes of Evidence*, 23 July 2002, 141.

810 His Honour Justice Goldring, 'DNA Evidence - The Way Forward?', (August 2000) 12(7) *Judicial Officers' Bulletin* 49.

The bloodstained clothing revealed, on analysis, a mixture of DNA. The DNA profile of the accused matched a profile on the bloodstained clothing. However, the DNA profile obtained from the victim's DNA sample was taken after the blood transfusion and also showed a mixture of DNA. Eight months later, profiles derived from fresh DNA samples of the victim showed no mixture of DNA.

The defence suggested that the DNA sample obtained from the victim could have been tampered with and planted on the victim's clothing. It was held at first instance that there were sufficient doubts about the integrity of the sample to acquit the accused.⁸¹¹ In an article on this case, Justice Goldring subsequently elaborated on the issue of the integrity of the crime scene material from which the DNA was extracted.⁸¹²

[I]n my view the real issue in this case was the integrity of the material from which the DNA was extracted. The police evidence was that, for about ten days, both the accused's clothing and the victim's blood sample were stored in an exhibit room at a police station. This room, in theory, was kept locked and access was restricted, but it appeared that it was often left unlocked for the whole of a working day, and that many police, other than the forensic examiners, in fact had access to it and went into it from time to time. To me, it was not an unreasonable hypothesis, consistent with the innocence of the accused, that someone had put the spots of post-transfusion blood on the clothing, and I acquitted him.⁸¹³

The Prosecution successfully appealed this decision.⁸¹⁴ Nevertheless, the 'Lisoff scenario' still highlighted that maintaining the integrity of the DNA is essential to the reliability of the evidence in subsequent proceedings.

The Regulatory Framework

The forensic procedures legislation contains no provisions specifically to ensure the integrity of the DNA evidence collected.⁸¹⁵ As far as DNA reference samples are concerned, while regulations could be made to set the standards required for the collection and handling of samples, no such regulations have been prescribed. Within the forensic procedures regime there are no provisions which deal with the collection of DNA crime scene evidence.

Criminal proceedings would provide some opportunity to review the adequacy of the current processes. When DNA evidence is relied on in criminal proceedings, the opportunity arises, as in *Lisoff's* case, to identify evidence that has been compromised by contamination or doubtful continuity.

811 *R v Lisoff* [1999] NSW CCA 364.

812 Goldring, 'DNA Evidence - The Way Forward?' (2000) 49-51.

813 *Ibid* 50.

814 *R v Lisoff* [1999] NSW CCA 364.

815 Here DNA evidence includes crime scene exhibits and samples from victims, as well as 'reference samples' obtained from offenders, suspects and volunteers.

Victoria Police representatives indicated that it regularly audits its operations, but this Inquiry was not able to ascertain whether the procedures and documentation applying to the collection of DNA samples by operational police had ever been audited.⁸¹⁶

The Integrity of DNA Collection Procedures

Not only must the security of the DNA evidence be impeccable, but it must also be *seen* to be impeccable. Public and professional confidence in the integrity of the collection and handling processes is crucial. As the VFSC noted in its submission to the Inquiry, if the original sample is contaminated, further testing may be required to identify and exclude the contaminant or the validity of final results may be compromised.

The lack of satisfactory collection protocols can expose the samples to the risk of contamination and to allegations of tampering.⁸¹⁷

The use made of the forensic sampling provisions depends to some extent on the cooperation of volunteers and suspects. If volunteers and suspects are asked to consent to DNA sampling, they have to have confidence that their samples will be secure, that the collection and handling processes will be conducted with propriety, that the analysis will be accurate, and that the undertakings given as to the use to be made of the evidence will be honoured.

Likewise, a perception that police collection and handling processes are vulnerable will prompt close scrutiny of DNA evidence in criminal proceedings. The Criminal Bar Association stressed the importance of compliance and ‘strict accountability’ in the implementation of the forensic procedure provisions. It identified the following requirements:

Records detailing the continuity of such samples and confirming their destruction need to be readily accessible. There needs to be a chain of responsibility to confirm this process has been complied with.⁸¹⁸

In the course of this Inquiry, the Committee received a number of submissions and heard evidence from witnesses who expressed concern at the possibility of DNA evidence being compromised during the process of collection and analysis. The two major risks to the integrity of the DNA evidence were thought to be contamination and tampering.⁸¹⁹

816 Asst Commissioner N Ashby, *Minutes of Evidence*, 2 June 2003, 9.

817 VFSC, *Background/Issues Paper* (2002) 9.

818 Criminal Bar Association, Submission.13, 4.

819 See for example the submissions of Ms Patricia Farnell, Submissions 28, 28S1.

Continuity: Excluding the Possibility of Tampering

Father Peter Norden, Director of Jesuit Social Services, emphasised the importance of ensuring that:

particular investigative practices such as DNA testing can be managed in such a way that we can be assured that it is not going to be easily manipulated or tampered with by particular investigators.⁸²⁰

Representatives of the Law Institute of Victoria, the Criminal Bar Association, Liberty Victoria and Victoria Legal Aid had reservations about the reliability and security of the current arrangements.⁸²¹

Mr Greg Connellan QC, Vice-President of Liberty Victoria, expressed concern at the possibility that, if police were able to obtain DNA samples without judicial scrutiny, there would be 'no external means of ensuring the order for taking a sample is obtained after a DNA sample has been found at the crime scene rather than before it is found'.⁸²² Mr Connellan raised the prospect of a new form of 'verballing' – planting DNA at crime scenes' – and observed:

It is the easiest thing in the world to plant DNA evidence at a crime scene. It is only a matter of stealing somebody's comb or picking up off the bar the glass of somebody else that you want to frame, or whatever, and leaving it at the crime scene, and you have their DNA at the crime scene. Of course, proper investigation might reveal to the investigators that that piece of DNA evidence should not be properly considered part of the crime scene. It might. But the wider the net that is applied to those people that are on the DNA database ... the easier it is to frame somebody, to corrupt an investigation process by the use of planted evidence.⁸²³

Victoria Legal Aid drew the Inquiry's attention to cases where defects in continuity meant that the possibility of tampering could not be excluded and urged the Inquiry to review the adequacy of existing procedures for the collection and handling of DNA evidence.⁸²⁴ Dr Freckelton also stressed the importance of removing the potential for tampering:

Given that on occasions DNA evidence may itself be sufficient to support a conviction, where for instance the presence of DNA at a crime scene is unexplained and inconsistent with innocence, the potential for DNA to be falsely located so as to inculcate a suspect is a matter of the utmost seriousness.⁸²⁵

820 Fr P Norden, *Minutes of Evidence*, 23 July 2002, 149.

821 Mr Connellan predicted that police-ordered procedures would be 'the first step in the process of reducing DNA sampling to a behind doors, police controlled, routine physical invasion of 'suspects'. G Connellan QC, *Minutes of Evidence*, 23 July 2002, 169.

822 Liberty Victoria, Submission no. 27, 1.

823 G Connellan QC, *Minutes of Evidence*, 23 July 2002, 169.

824 V Stojcevski, *Minutes of Evidence*, 23 July 2002, 142.

825 Freckelton, *DNA Profiling: Issues Paper* (2002) 20.

Minimising the Possibility of Contamination

The Criminal Bar Association observed that the most vulnerable and most challenged aspect of the process was the reliability of the collection and continuity protocols. The Association noted:

It is the experience of the Association that in cases where reliance is placed on a DNA match by the Prosecution, the match is usually of a high order. A challenge to the odds is rare. It is much more likely that the match would be challenged on other bases, such as procedure, contamination or continuity.⁸²⁶

The risk of contamination can be minimised, but not completely eliminated. The Law Institute asked for: ‘improved and very close controls over sampling, testing and administration, along with public accountability about their use’.⁸²⁷

Victoria Legal Aid stressed the importance of ensuring that forensic samples and DNA databases were made ‘absolutely secure’⁸²⁸ and urged the Inquiry to ascertain ‘how often has security of the samples and profiles broken down and what practices or technologies can be put in place to maximise the security of samples’.⁸²⁹

THE COLLECTION OF REFERENCE SAMPLES

The Committee therefore considered what mechanisms might be needed to ensure not only the reliability of the police procedures for the collection and handling of DNA evidence, but also that professional and public confidence in these procedures is warranted and maintained.⁸³⁰ Although it was beyond the Terms of Reference of this Inquiry to audit the operation of the forensic sampling regime, the Inquiry has considered what gaps there may be in regulating the collection of DNA reference and crime scene samples.

Statutory Requirements

Section 464Z(1) provides that the Chief Commissioner of Police may authorise a ‘person’ to take non-intimate samples or conduct non-intimate physical examinations and, with the 2002 amendments, to supervise the self-administered buccal swab.⁸³¹ Subdivision 30A does not, however, prescribe standards or protocols for the collection

826 Criminal Bar Association, Submission 13, 6.

827 Law Institute of Victoria, Submission 21, 3.

828 Victoria Legal Aid, Submission 15, 4.

829 Ibid.

830 The impact of these observations was heightened by media reports on the prosecution of police officers belonging to the Victorian Drug Squad in relation to the misuse of drug exhibits obtained by the Squad. The Inquiry also noted the instigation of reviews and inquiries in other Australian jurisdictions concerning similar issues.

831 S 464A(1A).

and handling of the DNA material obtained, although section 464ZE(1)(b) provides, among other things, that:

evidence obtained as a result of a forensic procedure ... is inadmissible as part of the prosecution case in proceedings against that person for any offence if ... (b) the procedure was not conducted in accordance with the prescribed standards, if any.

Victoria Police has developed internal procedures to regulate the collection of DNA reference samples.⁸³² These procedures stress the paramount importance of sample integrity and specify the way in which samples are to be obtained, handled, stored and submitted to the forensic laboratory.

Victoria Police procedures for the transmission of samples differentiate between database samples and arrest or evidentiary samples. 'Arrest samples' – reference samples obtained from relevant suspects following detection through an investigation or a DNA database match – are transmitted to the VFSC under full continuity procedures.⁸³³ Offenders' samples, obtained under section 464ZF solely for inclusion on the database, are to be sealed at the place of collection and may be forwarded by DX mail to the VFSC.⁸³⁴

As noted in Chapter 4, if a match is made on the database and an investigation is conducted, a second 'evidentiary' sample will be obtained from the suspect. The evidentiary sample would be transmitted according to full continuity requirements.

Sample Security Issues

Victims' Samples

The VIFM indicated to the Inquiry that in his opinion the security of DNA samples taken from victims or complainants fell short of the standards applied to other comparable evidence. Associate Professor David Wells provided the Committee with a sample kit used for taking a buccal swab. The sample container was a plastic bag closed by a snap-shut seal and containing a slip-in pocket on the outside of the bag into which an identification label could be inserted. Professor Wells commented:

In the majority of major offences, a considerable amount of emphasis is placed on the security of the various potential exhibits that may be collected. This does not occur with DNA collection.⁸³⁵

Dr Wells found this unsatisfactory and indicated that it was possible, and desirable, to ensure that DNA evidence was collected in a secure manner. Dr Wells concluded that:

832 Victoria Police, Submission 18S3, July 2002.

833 VFSC, Submission 23, 18.

834 Ibid.

835 Associate Professor D Wells, *Minutes of Evidence*, 22 July 2002, 68.

[t]he current security of samples leaves much to be desired; there are no safeguards to prevent or detect interference with samples.⁸³⁶

In some cases the time frame in which a sample can be obtained from a complainant or victim is very brief, so it is all the more important to ensure that the DNA evidence obtained from a victim or complainant is collected and handled impeccably, to minimise the risk that the evidence will be unusable or unreliable. Professor Wells submitted that, given the fact there is a limited time frame in which a specimen can be obtained from a complainant, and given also the seriousness of the offences involved, ensuring the security of the collection process is vital.

If something goes wrong with the sample, if it is handled inappropriately or tampered with or interfered with, there is no opportunity to go back and do it again. If you are collecting DNA from an individual, a suspect, then that can be repeated tomorrow, next week or next month if someone raises some doubt about it. However, intriguingly in this State we have no sample security provisions in place.⁸³⁷

Representatives of the forensic laboratory, when shown this sample bag, observed:

Generally speaking, that type of swab is not what is currently used for taking a person's sample. That swab would be used perhaps by a medical practitioner to take a genital swab in, say, a rape case, and it would be placed into that container by the medical practitioner. In general terms, they fold that down, put a label across it and sign it.⁸³⁸

Representatives of the VFSC indicated that a sample contained in a bag such as the VIFM exhibit would be accepted 'if it was brought by a police member under full continuity rules', but that it would not accept an unsealed bag.

It would have to be sealed, and it would be sealed at the laboratory before the laboratory would receive it.⁸³⁹

Victoria Legal Aid drew the Inquiry's attention to a Victorian case where the adequacy of current arrangements for sample security was raised.⁸⁴⁰ This case illustrated the difficulties involved in maintaining the security of moist DNA samples, such as buccal swabs. A buccal swab needs to be exposed to the air to prevent mould. This can either be done by leaving the sample in the container, open with the 'head' of the swab 'chopped off' or by taking the swab out of the container, and once it is dried, leaving it inside an envelope. If the swab is left in the tube, the tube can be sealed, but a gap remains which is not covered by the seal. This presents a risk that the swab could be removed from the tube.

836 Victorian Institute of Forensic Medicine, Submission 12, 1.

837 Ibid 1.

838 Professor J Scheffer, Dr P Stringer, *Minutes of Evidence*, 23 July 2002, 108.

839 Ibid 106, 108.

840 *Director of Public Prosecutions v Devaldez* [2003] VSCA 29, 11 April 2003, Phillips CJ, Vincent JA, Cummins AJA; also *Director of Public Prosecutions v Devaldez* (County Court of Victoria, Stott J, 30 April 2002).

The Committee formed the view that further consultation between the VFSC, the Victorian Institute of Forensic Medicine, Victoria Police and NATA is required to ensure that the sample bags and handling arrangements used for the collection of victims' and reference samples, conform to best practice in this area.

Regulation and Audit Provisions

As noted earlier in the chapter, this Inquiry detected a generalised concern for the integrity of these exhibits expressed by most of the legal organisations participating in this Inquiry, although no specific complaints about continuity issues were made.⁸⁴¹

Recent reviews of forensic services and laws have all stressed the importance of having the processes in place to justify confidence in police processes for the collection of DNA reference samples and recommended ways to make the collection and handling processes transparent and accountable.

The ALRC considered the transparency and accountability of the current procedures and recommended a range of measures which, together, would increase the level of regulation of the collection of DNA samples. It proposed a provision to prohibit the collection of samples other than as authorised under the *Act*,⁸⁴² to extend the limitations on the use of genetic data to the forensic material itself⁸⁴³ and more stringent controls over the destruction of the sample and related information.⁸⁴⁴

The Sherman Review also examined the adequacy of existing practices to ensure the security of DNA samples and proposed a 'sound accountability framework' with a range of audit and appeal mechanisms to review DNA sampling procedures.

The taking of samples of human material and the uses to which it may be put raise fundamental issues about the rights of individuals versus the rights of the State. Public confidence in the collection and use of DNA for law enforcement purposes is bolstered by the existence of accountability mechanisms. The Review therefore considers that existing practices in other areas where intrusive powers are exercised and the importance of maintaining public confidence in the use of DNA for the public good, demand a sound accountability framework is in place.⁸⁴⁵

Maintaining reliable procedures requires provisions to verify and review protocols on a regular basis. In the regulation of day-to-day procedures, it is as important to establish systems which ensure that minimum standards are routinely met, as it is to provide the means to review and rectify instances where conduct falls short of these standards.

841 See submissions by PILCH, the Criminal Bar Association, Liberty Victoria, the Law Institute of Victoria, Victoria Legal Aid in Submissions 5, 13, 27, 21 and 15 respectively.

842 ALRC, *Essentially Yours* (2003) Recommendation 41-13.

843 Ibid Recommendation 41-9.

844 Ibid Recommendation 41-10.

845 Sherman, *Independent Review of Part 1D* (2003) 5.17, 65.

The 2002 Inquiry received a submission from Dr Perry, Ombudsman and the Deputy Ombudsman (Police Complaints). Dr Perry noted:

My experience of the current arrangements for the taking of samples from prisoners and suspects is that there have been surprisingly few complaints concerning the manner in which samples are taken or the manner in which the information is retained and used.⁸⁴⁶

Dr Perry indicated that the lack of complaints could reflect ‘the adequacy of the current provisions’ or ‘ignorance, indifference or cynicism’ and concluded:

Whatever the reason for it, the lack of complaints to this Office should not be seen as an indicator that these issues should not be revisited.⁸⁴⁷

Conclusion

The Committee formed the view that further investigation of the level of security provided by the current protocols is required. Internal police audit and controls should detect problems such as the inadequate arrangement for the handling of moist samples. Further, it should be possible in part to rectify this problem with modifications to the sampling containers and provision for the witnessing of all occurrences where a sample is transferred.

The Committee is not in a position to draw conclusions about the security of the reference samples collected by Victoria Police. The Committee is concerned, however, at the possible and perceived risks to the security of the sample because of the design or handling of the sampling kits.

While judicial scrutiny, and the prospect of judicial scrutiny, will encourage compliance with established protocols, the Committee would like to see more generalised auditing and review of the way in which Victoria's forensic procedures regime is being implemented on a day-to-day basis. It is accepted that Victoria Police has protocols for the collection and handling of crime scene evidence, and the security of this evidence is examined in criminal proceedings. On an operational level, however, it is relevant to inquire whether the procedures can be verified or monitored to control compliance, and remedy any instances of non-compliance.

The Committee believes that further consideration should be given to developing procedures – such as improved sample collection methods, which provide a greater level of sample security than currently exists – or to instituting a monitoring process when samples in this condition are being handled.

846 Ombudsman Victoria, Submission 8, 1.

847 Ibid.

Recommendation 9.3 Regulations for the collection of DNA samples

- (i) That the National Association of Testing Authorities, the Victoria Forensic Science Centre, Victoria Police and the Victorian Institute of Forensic Medicine (VIFM) collaborate to develop ‘best practice’ procedures to govern the collection and handling of DNA person samples by Victoria Police and the VIFM; and**
- (ii) That these procedures be prescribed as regulations pursuant to section 464ZGJ of the Crimes Act 1958 (Vic).**

The Unauthorised Collection of DNA Samples

Subdivision 30A regulates the collection, use, storage and destruction of DNA material obtained through forensic procedures. These provisions enable DNA samples taken through forensic procedures to be compared with evidence containing DNA that has been collected from victims and crime scenes.

However, DNA is being shed with every human contact, and investigators could collect a DNA sample deposited by a suspect, for example, on an item of clothing, a cup or a cigarette but without conducting a forensic procedure. This DNA sample would be neither a reference sample obtained pursuant to Subdivision 30A nor a crime scene sample.

According to Dr Gans, there is nothing in the Act to prevent the ‘informal’ or unauthorised collection and use of DNA evidence.

The Crimes Act’s regulation only covers the obtaining of DNA samples by ‘forensic procedures’ (ie the removal of bodily samples directly from an individual’s body). However, investigators can also obtain DNA samples by gathering bodily samples that are no longer part of a person’s body. ... This gathering can either be done entirely lawfully (eg where the sample is left in a public place, such as a rubbish bin or the street) or using non-forensic investigative powers, such as search warrants or random breath tests.⁸⁴⁸

The ‘informal’ or unauthorised collection of DNA samples leaves open the possibility that a DNA sample can at some stage be placed at a crime scene or used at a later date to provide incriminating evidence against a suspect. This is the type of scenario described by Mr Connellan as a ‘new form of verballing’.⁸⁴⁹ Police conceivably could collect personal genetic information about a suspect without either the donor’s consent or the court’s authority.

A recent application for an order for a compulsory procedure provided an example of the type of scenario contemplated by Dr Gans and Mr Connellan.⁸⁵⁰ Victoria Police

848 Dr Jeremy Gans, Submission 16, 3.

849 Liberty Victoria, Submission 27, 1.

850 *R v Mangione* (Melbourne Magistrates’ Court, 10 July 2002).

sought an order to obtain a reference sample from the defendant, suspected of the murder of a Williamstown resident earlier this year. Prior to seeking the order, during a search of the accused's home, Victoria Police had obtained and had tested DNA material left on a shoe belonging to the accused.

Mr Paul Coghlan QC, the Director of Public Prosecutions, provided the Committee with background on the case.

What happened ... was the police had seized from the suspect some shoes at the time they had gone to his house pursuant to some search warrant, because they were looking at matching footprints and so on that were found at the scene. They then caused an analysis to be made for DNA material inside the shoes. They were able to extract some information. That matched, but did not prove the true connection, but it then became the basis on which to add to the question of whether [he] was a suspect for the purpose of getting the order from the Magistrates Court.⁸⁵¹

In this case, the shoes were obtained pursuant to a search warrant. In a recent New South Wales case,⁸⁵² a DNA sample deposited by a suspect on a styrofoam cup was collected and analysed, after the suspect refused to consent to a forensic procedure. In another NSW case, *R v Daley*,⁸⁵³ police arranged for a suspect to be stopped for an ostensibly random breathalyser test to obtain a DNA sample covertly.

The ALRC considered the implications of the unauthorised collection of DNA samples for the privacy of the individuals affected. It upheld the proposition that:

The Australian community has a right to expect that the private and sensitive information contained within their genetic samples is used only as specifically permitted by legislation or other court authority.⁸⁵⁴

It noted that, in relation to the Commonwealth law, the forensic procedures provisions provide 'a detailed regulatory framework for obtaining a genetic sample' and concluded that:

allowing police to obtain a sample outside this framework could significantly undermine not only adherence to the framework but also the procedural and other safeguards existing within it.

The ALRC was concerned that the unauthorised collection of DNA samples would enable investigators to bypass the legislation enacted to govern the collection of reference samples. Its final report proposed an amendment to the current legislation to make it clear that DNA samples can only be collected as authorised under the forensic procedures provisions.

The Commonwealth should amend the *Crimes Act* to provide that, with the exception of crime scene samples, law enforcement officers may collect genetic samples only

851 P Coghlan QC, *Minutes of Evidence*, 136.

852 *R v Nicola* (NSW Court of Criminal Appeal, Spigelman CJ, Barr and Bergin JJ, 11 March 2002).

853 (NSW Supreme Court, Simpson J, 14 September 2001).

854 ALRC, *Essentially Yours* (2003) 41.210-212, 1052.

from:(a) the individual concerned, pursuant to Part 1D; or (b) a stored sample, with the consent of the individual concerned (or someone authorised to consent on his or her behalf), or pursuant to a court order.⁸⁵⁵

The Inquiry was concerned at the possibility that DNA samples could be collected and analysed outside the ambit of Subdivision 30A, without the knowledge of the suspect, and without judicial scrutiny.

While there is no specific prohibition on the unauthorised collection and analysis of DNA samples, there is provision for the exclusion of evidence which has been obtained in breach of the forensic procedures provisions. Admissibility rules operate as a check on the unauthorised or improper collection of evidence generally. In relation to DNA evidence specifically, the admissibility provisions contained in section 464ZE require the exclusion of evidence retained in breach of Subdivision 30A, but are silent as to the admissibility of DNA evidence not collected under forensic procedures authorised by subdivision 30A. The adequacy of the current admissibility provisions is considered in detail in Chapter 12. Victorian case law on this issue is as yet undeveloped; to date, no Victorian cases directly on this point have been decided.⁸⁵⁶

Should further constraints be required, procedural checks on the informal collection of DNA evidence could also be instituted. A regulation could be prescribed pursuant to section 464ZJ requiring evidence submitted to the forensic laboratory to indicate the statutory provision under which the sample was collected, and preventing the analysis of a DNA sample obtained from a suspect not in accordance with the relevant provisions. However, this would not address the potential for covertly collected DNA to be placed at the crime scene.

The Committee concluded that the current admissibility rules applying in criminal proceedings offer the scope to exclude this type of evidence and that a specific prohibition on the collection of covert DNA samples is not required at this stage.

THE COLLECTION OF CRIME SCENE EVIDENCE

While the collection of DNA evidence from victims and crime scenes is not regulated under Subdivision 30A, the integrity of these processes is the linchpin of the DNA sampling regime. Scientifically, if the crime scene samples are not suitable for analysis, they cannot be compared with the profiles of individual suspects or with profiles on the DNA database. Legally, the application for an order to sample a relevant suspect must be able to demonstrate that the procedure would have forensic

855 Ibid Recommendation 41-13, 1053.

856 The most relevant Victorian case is that of *R v Phuc and Van* [2000] VSC 242, discussed in Chapter 12, which concerned the collection of DNA evidence relating to Victorian criminal investigations from persons located outside Australia.

utility: that there is a DNA sample collected from the crime scene or victim with which the suspect's sample can be compared.⁸⁵⁷

At present, most crime scene collection is undertaken by police investigators, whose duties are outlined below.

For most of the serious crimes the police attend, the initial action by police attending a scene is to protect the scene from any likelihood of contamination, pending the arrival of the experts from the forensic science laboratory.⁸⁵⁸ ... Samples are collected by operational members of the police force. The collection process is covered by the procedures contained in the section on "Collection of exhibits from crime scenes" in the detective training school notes. The collection procedures are relevant to all types of crime scene material.⁸⁵⁹

The significance of careful crime scene collection can be appreciated by considering the number of investigations where it was not possible to obtain a conclusive result from DNA analysis. The Inquiry did not locate any data specifically indicating the proportion of crime scene samples tested, and showing the number of samples from which a profile could not be obtained. The best indication available as to the 'success rate' of crime scene analysis was the data provided in Table 6.2 (Chapter 6).

Table 6.2 revealed that approximately 30 per cent of analyses of suspects' samples produced inconclusive results. A number of factors might lead to inconclusive analyses. If a crime scene sample is degraded, or contaminated, it may be impossible to derive a full profile. The main cause of the inconclusive results is thought to be the quality of the original crime scene sample. The collection of DNA samples at crime scenes is complicated by the fact that potential DNA evidence may be too small to be visible to the naked eye, or may have been contaminated before the crime scene was located. The integrity and utility of crime scene evidence may not necessarily be evident at the time of collection, and may only be apparent after analysis has been undertaken.

On arrival at the VFSC, casework samples are directed to either the Biological Examinations Branch ('BEB') of the Biology Division, or the Forensic DNA Database Team ('FDDT'), DNA Science Branch. Table 9.2 shows the number of cases and items received at the VFSC and the number of DNA samples analysed. It indicates the number of items submitted and the number which are examined and analysed.

It is clear from this table that there can be a wide variation in the number of items involved in the analysis of any single case. For example, in the quarter April–June 2001 the Biological Examinations Branch received 292 cases, which resulted in 679 items being examined. In the next quarter, by contrast, 343 cases rendered 1057 items

857 Ss 464T(8) and 464U(8).

858 Cmdr P Hornbuckle, *Minutes of Evidence*, 22 July 2002, 10.

859 Law Reform Committee site visit to the VFSC, 15 August 2002.

for examination. The examination of case-work evidence is clearly both time-consuming and unpredictable, depending on the complexity of the crime scene.

Table 9.2 Crime Scene Exhibits submitted for DNA Analysis, January 2000–June 2002.

Period	Cases In		Items In		Items Examined		DNA Samples
	BEB*	FDDT**	BEB	FDDT	BEB	FDDT	
Jan-Mar 00	345	386	1588	758	993	-	-
Apr-Jun 00	355	498	1493	1340	886	-	663
Jul-Sept 00	434	532	1624	1238	1159	1124	1537
Oct-Dec 00	333	561	1336	1596	738	1858	2402
Jan-Mar 01	406	701	1639	1251	682	1249	2165
Apr-Jun 01	292	671	1631	1456	679	778	1631
Jul-Sept 01	343	658	1095	1154	1057	765	1609
Oct-Dec 01	236	493	1190	1062	904	700	1776
Jan-Mar 02	194	647	1525	1350	767	879	1660
Apr-Jun 02	220	494	1322	1066	718	767	1613

*Biological Examination Branch

**Forensic DNA Database Team, DNA Science Branch

Source: VFSC, Submission 23S1.

There has been a steady rise in the number of DNA samples analysed by the VFSC since January 2000. While the number of cases submitted has fluctuated, the number of DNA samples analysed rose from 663, recorded for the period April-June 2000 to 1613 in April-June 2002.

At the time of writing, DNA crime scene samples have been obtained mainly from the scenes of serious offences. The proposed collection of DNA evidence from volume crime scenes would clearly have an impact on the workload and priorities of the forensic laboratory. The Committee considered the experience of the UK Police Forces and Forensic Science Service in managing the expanded collection of DNA evidence from crime scenes, to gain an understanding of the implications of this initiative for Victorian forensic services.

Changing Priorities: Forensic Services for Volume Property Crimes

Until late 2002, the collection of DNA evidence has largely been limited to serious property crimes and serious offences against the person. Even so, the capacity of forensic experts to attend crime scenes is stretched, and limits have been imposed to accommodate the shortage of skilled staff.

To some extent, the limited forensic resources and the priorities established at the VFSC have affected the practices of operational police in determining if and when, to submit DNA evidence to the laboratory. For example, Victoria Police investigators, aware of the priority given to crime scene evidence once a suspect has been identified, will endeavour to identify a relevant suspect to gain priority for the analysis of the crime scene samples.⁸⁶⁰

As noted earlier, *Tracing the Future*, the review of forensic services completed by Victoria Police in 2002, found gaps in the provision of forensic services, particularly in relation to volume crimes, such as motor vehicle theft and house burglary. Victoria Police now proposes to address volume related crimes as a priority. Assistant Commissioner Noel Ashby explained:

One of the key gaps was that there was a whole range of volume-related crimes, which have a significant impact on the perception of the public regarding their own safety, which simply were not being addressed from a forensic perspective.⁸⁶¹

Operational Arrangements and Protocols

Specialised Crime Scene Attendance

At the 2002 public hearings representatives of the VFSC indicated that Victoria Police was considering 'more specialisation of crime scene attendance'.⁸⁶² Victoria Police shortly afterwards completed a review of its forensic services⁸⁶³ which set out a blueprint for the development of Victoria's forensic services and recommended, among other things, intensive resourcing of crime scene collection generally.⁸⁶⁴

At the 2003 public hearings, the Inquiry was informed that a pilot project, Project Clarendon, was under way in Darebin and Shepparton.⁸⁶⁵ The final report of the project team had not been released at the time of writing, but Victoria Police representatives indicated that, given the preliminary success of the project, a state-wide roll-out would proceed.

Crime scene examination is to be carried out by specially trained Regional Crime Scene Officers (RCSOs). It is envisaged that 155 Officers will be appointed across Victoria in the next two years. They will be responsible for attending crime scenes, as well as for submitting the evidence to the forensic laboratory for analysis. Assistant Commissioner Ashby outlined the main roles and duties of the RCSOs:

860 See *Director of Public Prosecutions v Devaldez* (County Court of Victoria, Stott J, 30 April 2002).

861 Asst Commissioner N Ashby, *Minutes of Evidence*, 2 June 2003, 7.

862 Victoria Police, *Tracing the Future* (2002) 104.

863 Ibid 92.

864 Ibid.

865 Asst Commissioner P Evans, *Minutes of Evidence*, 2 June 2003, 10.

One Crime Scene Officer will go to a scene, take reports, speak to neighbours, check for fingerprints and DNA and for any other evidence that might be there. They will deal with the victim and all those issues. So there will only be one person looking after the victim. All the intelligence then will flow back to the local criminal investigation unit.⁸⁶⁶

Crime Scene Attendance and the Forensic Detection of Volume Crimes

The experience of the UK police forces is relevant here. The British DNA sampling program is vast, and the investment that has been made in these services has been subjected to periodic review.⁸⁶⁷ The UK has given priority to the detection of volume crimes in the past two years and, as Victoria Police is now proposing to do, recruited volume crime scene examiners to provide a focal point for crime scene forensics. According to a report by Her Majesty's Inspector, David Blakey in June 2002, their impact 'cannot be overstated'.

The appointment of fourteen 'Assistance Scenes of Crime Officers' in one force resulted in vehicle crime scene attendance rising from 7,000 to 16,000 in twelve months. There has been a commensurate increase in marks and DNA material recovered, although improvement in outcomes is yet to be evaluated.⁸⁶⁸

Volume crimes typically 'yield' a relatively low proportion of DNA samples compared to the number of crime scenes attended. Only 3 per cent of domestic burglary crime scenes attended yielded a DNA sample, and the highest yield for volume crime scene attendance was recorded for motor vehicle theft, with a yield of 11.8 per cent.⁸⁶⁹ Therefore, when priority was given to forensic services for the detection of volume crime scenes, the increase in the number of usable DNA samples reflects a substantial increase in the number of volume crime scenes attended.

While the yield from volume crime scenes is relatively low, its forensic utility is high. In volume crimes, such as burglary or motor vehicle theft, the identity of the perpetrator is often at issue, and forensic evidence, possibly one of the few sources of evidence, is relied on. For this reason, a relatively high proportion of the samples collected from volume crime scenes (approximately 90 per cent) is submitted for analysis.⁸⁷⁰

866 Asst Commissioner N Ashby, *Minutes of Evidence*, 2 June 2003, 8.

867 Home Office, Blakey, *Under the Microscope* (2000); Home Office, Alaster Smith, *DNA Expansion Program: Evaluation Report* (2001); United Kingdom, Home Office, David Blakey, *Under the Microscope Refocused: A Revisit to the Thematic Inspection Report on Scientific and Technical Support* (2002); Avon and Somerset Constabulary, *Scientific Investigations: Best Value Review Inspection Report* (2002), National Audit Office, *Improving Service Delivery: The Forensic Science Service* (2003).

868 Blakey, *Under the Microscope – Refocused* (2002) *ibid* 3.

869 Home Office, Smith, *DNA Expansion Program: Evaluation Report* (2001) 20-21. The yield for other burglary was 6.4 per cent, and for theft from a motor vehicle, 7.0 per cent.

870 *Ibid*.

Contamination Issues

When priority was given to the collection of DNA evidence for the investigation of 'volume crimes' such as car thefts and burglaries, strict adherence to crime scene collection protocols was harder to achieve. It has been conceded that, while precautions are taken in investigations into more serious crimes:

It is accepted that avoidance of contamination may not be the prime consideration in other circumstances.⁸⁷¹

However, the Forensic Science Service indicated that a relaxation of protocols introduces the risk 'that where anything less than full precautions are taken, there are possible implications for the integrity of the evidence'.⁸⁷²

Producing fully effective crime scene attendance and screening policies continue to present difficulty.⁸⁷³

Only two of the 10 forces reviewed by Blakey in 2002 had developed a means of targeting or prioritising crime scene attendance.⁸⁷⁴ The effect of this omission was a somewhat indiscriminate collection of crime scene evidence, resulting in a higher proportion of inconclusive, and therefore wasted, analysis.

Impeccable care is also required to collect usable exhibits. If crime stains are contaminated during collection, the profile obtained will be unreliable, and efforts and resources devoted to the collection and analysis of the original stain and of suspects' reference samples will be fruitless. The first Evaluation of the UK DNA Expansion Program found that:

Contamination caused by the crime scene collectors limited the utility of the crime stains collected.⁸⁷⁵

The UK experience, though reflecting a much larger scale of DNA sampling than the Victorian regime, provides a clear indication of the operational 'pressure points' that appear when the scale of crime scene attendance is rapidly increased to cover volume crimes. Increasing the volume of crime scene samples collected will have an immediate effect on demand for forensic services, a likely effect on the quality of crime scene samples obtained and, possibly, a less discernible impact on the yield derived from crime scene attendance.

While the laboratory's vetting process cannot overcome defects in the continuity or quality of the DNA sample, it can at least detect these. Forensic analysis can operate as a control or check on the processes used for the collection and submission of the

871 R K Bramley, 'Quality Assurance in DNA Profiling', *1st International DNA User's Conference*, Lyon, 24-26 November 1999, at <http://www.interpol.int/Public/Forensic/dna/conference/QualityAssurance01.asp>, 1-2.

872 Ibid.

873 Home Office, Blakey, *Under the Microscope – Refocused* (2002) vii.

874 Ibid 12.

875 Home Office, Blakey, *Under the Microscope* (2000) 79.

DNA reference samples and evidence. It can identify contaminants and a mixture of profiles, including those of persons with legitimate access to the samples during the sampling process.⁸⁷⁶

The forensic laboratory is in a position to assess the extent to which DNA evidence is contaminated through the collection and handling processes. Contamination can be detected by analysis but such analysis would only be conducted in response to a request or some indication that the sample might have been contaminated.

A sample transferred from a test tube to another item will contain a preservative which can be detected using a specific test. This test would indicate, in a Lisoff scenario, whether a bloodstain contained blood from a test tube. Testing for the presence of a preservative or for the identification of contaminants is not routinely undertaken but may be requested.⁸⁷⁷

The presence of DNA deposited by an investigator, witness or laboratory staff member can be detected and that profile eliminated in the interpretation of the analysis results. However, the Profiler Plus system is not generally calibrated to detect extreme proportions of DNA mixtures. This limits the vulnerability of the analytical processes, but it also means that contaminants or unequal mixtures may not be detected.

In some cases, it may not be necessary or feasible to proceed with such testing. Nevertheless, laboratory feedback on the utility of the crime scene DNA evidence is a valuable tool with which to monitor the effectiveness of crime scene collection. The Inquiry therefore proposes that the VFSC provide a regular report on the proportion of DNA crime scene samples suitable for analysis to crime scene investigators, to monitor the effectiveness of crime scene collection processes.

Legitimate Access Issues and Elimination Sampling

To identify the profile of a possible suspect involves eliminating from crime scene samples the DNA deposited by those with legitimate access and eliminating all possible sources of contamination. Those with legitimate access include investigators, as well as witnesses or suspects who are able to demonstrate a legitimate reason for the presence of their DNA at the crime scene.

Legitimate Access Issues: the UK Experience

UK reviews⁸⁷⁸ have found legitimate access outcomes to be problematic. A legitimate access outcome is when the forensic evidence – the fingerprint or DNA sample – was deposited, or allegedly deposited, in lawful circumstances.

⁸⁷⁶ Professor J Scheffer, *Minutes of Evidence*, 23 July 2002, 114.

⁸⁷⁷ Law Reform Committee, Site visit to the VFSC, 18 August 2002.

⁸⁷⁸ Home Office, Smith, *DNA Expansion Program: Evaluation Report* (2001) 9.

DNA matches from those with ‘legitimate access’ cause many problems. Crime scene stain testing and proper elimination work needs to be completed to avoid wasting time.⁸⁷⁹

The 2002 Blakey Report also expressed concern at the number of samples for which ‘legitimate access outcomes’ are being recorded. It noted that:

There is a growing belief amongst the scientific support community that the ratio of ‘legitimate access’ outcomes to identifications is unacceptably high.⁸⁸⁰

Of 10 forces reviewed, only one was able to produce information on the proportion of legitimate access outcomes.⁸⁸¹ The Blakey review considered the possible causes of the large number of ‘legitimate access outcomes’ and attempted to discover the extent to which police forces were aware of the problem.

A high ratio of legitimate access outcomes against a low ratio of detections ... may prompt a closer examination of interviewing practices. A low ratio of detections to identifications/matches may prompt a closer examination of intelligence processes.⁸⁸²

One factor identified in the UK reviews was the possibility that crime scene investigators were contaminating the collection process. There have been instances in the UK where a match actually connected the same investigating officer to several crime scenes. While the UK police forces operate a voluntary elimination database for police investigators, the conduct of elimination testing was reportedly frustrated by the reluctance of police officers to provide DNA samples for the elimination database.⁸⁸³

Elimination Sampling of Police Members

In Chapter 7 the Committee concluded that elimination sampling was a valid and necessary use of the voluntary sampling provisions. It found that police members had the additional responsibility to supply their DNA as a means of monitoring the quality of the DNA collection and sampling processes. Where crime scene evidence is collected by designated, specialised officers, the capacity to eliminate their DNA profiles from crime scene evidence is simplified.⁸⁸⁴ In these circumstances, the Committee sees the sampling of Victoria Police members who have access through the course of their duties to DNA crime scene and reference samples as integral to the management of contamination protocols. The fingerprints of Victoria Police members are already collected for this purpose.

The Committee acknowledges, however, that while police members should provide DNA samples for elimination purposes as required, the position of police members,

879 Ibid.

880 Home Office, Blakey, *Under the Microscope – Refocused* (2002) 10.

881 Ibid 11.

882 Ibid.

883 Ibid. 79.

884 Asst Commissioner P Evans, *Minutes of Evidence*, 2 June 2003, 16.

like laboratory staff, is different to the position of other volunteers. The Committee recognises that as employees, police members and laboratory staff not only have particular obligations but also particular concerns about the disclosure of personal genetic information to their employer.

The Committee therefore recommends that police members be required to provide a DNA reference sample for elimination purposes, and the DNA profiles collected from Victoria Police members for elimination purposes be stored on the internal VFSC staff elimination database along with the profiles of VFSC laboratory staff.

Recommendation 9.4 Elimination sampling of Victoria Police members

That police members be required to provide a DNA reference sample for elimination purposes, and that the profiles obtained be stored along with profiles of Victoria Forensic Science Centre laboratory staff, on the internal VFSC staff elimination database.

The Committee considered the additional concerns that were raised in submissions by staff of the VFSC.⁸⁸⁵ The VFSC outlined its practice in relation to the collection, use and destruction of laboratory staff profiles.

Elimination samples are provided by VFSC biology staff on a voluntary basis. This is to ensure that the correct interpretation is placed on each generated profile, ie quality control. As the samples are voluntary and a search is conducted against every profile generated, they are not searched against the DNA database or held on that database. Upon request, the samples are no longer compared to the generated profiles. This also applies upon resignation.⁸⁸⁶

Some participants in this Inquiry were concerned about the potential use of the information stored in the sample or the DNA profile by their employer. Victoria Police, as the employer, would be in a position to use or misuse the DNA information, or to obtain other information, including physical characteristics, from staff DNA samples when new technology allows this.⁸⁸⁷ The Inquiry was informed that current policies did not cover all the issues raised by proposed sampling of Victoria police members and staff. For example, it did not indicate whether:

The presence of contamination [should] be made known to the court.⁸⁸⁸

Dr Henry Roberts, a forensic scientist at the VFSC, recommended that guidelines be developed covering, among other things, a staff member's liability for disciplinary or legal consequences, and on the permissible use of the staff member's sample and profile.⁸⁸⁹

885 See Mr Glen Dower, and Dr Henry Roberts, Submissions 9 and 10 respectively.

886 VFSC, Submission 23S2, 5.

887 Dr Henry Roberts, Submission 10, 1.

888 Ibid.

889 Ibid.

The Committee believes that careful consideration needs to be given to the way in which elimination sampling is managed and that this needs to be done in consultation with the staff. Clear information needs to be provided to police and laboratory staff providing voluntary samples for elimination purposes, about the possible uses of their DNA sample and profile. Safeguards are needed to ensure enduring compliance with the terms on which the DNA sample is originally provided.

There needs to be a clear policy outlining the arrangements for storage, use and destruction. It would need to cover matters such as the consequences of a staff member's profile being detected as a contaminant, and the provision made, if any, for the destruction of the sample and profile on the resignation or transfer of a staff member.

Recommendation 9.5 Guidelines for an elimination sampling policy

That Victoria Police develop a clear policy on elimination sampling outlining:

- (i) when staff samples and profiles may be destroyed;***
- (ii) the uses to which the profile can and cannot be put; and***
- (iii) policies and procedures for the destruction of this material after employment has changed or terminated.***

With the inclusion of police and laboratory staff members' profiles on an internal elimination database and the provision for the use of volunteers' profiles to be restricted to the investigations for which they are obtained, the Committee believes legislative amendment is required to ensure that the unauthorised use or retention of DNA samples, profiles and related material obtained from police and laboratory staff constitutes a breach of Subdivision 30A.

Recommendation 9.6 Safeguards and penalties for breach to cover DNA samples and related information obtained from police and laboratory staff

That the Crimes Act 1958 (Vic) be amended to ensure that the unauthorised retention or use of DNA samples, profiles and related information, obtained from police members and laboratory staff and stored on an internal staff elimination database, constitutes a breach of Subdivision 30A.

PRESERVATION OR DISPOSAL OF CRIME SCENE EVIDENCE

Existing Police Procedures

This section considers the processes used for the preservation of crime scene exhibits before and after analysis. Once the objects are collected at the crime scene they are returned to the police station where they are kept either in a locked refrigerator if

required, or the station property office, which is also locked. The station property book records details of evidence deposited or withdrawn from the property office.⁸⁹⁰

VFSC representatives indicated that the DNA samples taken from crime scene exhibits were retained at the laboratory, but that the remaining exhibits were returned to the police informant. Victoria Police representatives explained the arrangements in place for the storage or destruction of crime scene exhibits after criminal proceedings have concluded. Once cases have been completed, the evidence need not be retained.

There is an Exhibit Management Unit (EMU) within the police which stores and deals with court exhibits. Once a case is completed, property can be returned to the owner, donated to charity or destroyed. There are procedures for determining how various property will be dealt with. The prosecution can also ask the court for a forfeiture order.⁸⁹¹

For unresolved cases, practice is not consistent across the Force. Property is sometimes kept for many years; in other cases it is returned or disposed of. The processes for retaining such material used to be much less developed, and in some cases, property will have been kept by the detective investigating the case.⁸⁹²

The Committee believes that clear criteria and arrangements are needed to ensure that, where requested, crime scene samples containing DNA evidence are retained on a long-term basis.

Chapter 13 considers issues relating to post-conviction uses of DNA profiling and the Committee recommends a range of measures to provide for the preservation, security and accessibility of crime scene evidence as required. As a first step in this direction, the Committee recommends that, in tandem with the development of ‘best practice’ procedures for the collection of reference samples, as proposed in Recommendation 9.2 above, NATA, the VFSC and Victoria Police develop ‘best practice’ procedures for the collection, handling and preservation of crime scene samples containing DNA evidence.

Recommendation 9.7 ‘Best practice’ procedures for collection of crime scene evidence

That the National Association of Testing Authorities, the Victoria Forensic Science Centre and Victoria Police collaborate to develop ‘best practice’ procedures to govern the collection, handling and preservation of crime scene evidence containing DNA samples.

890 Victoria Police, Submission 18S3.

891 Ibid.

892 Victoria Police, Submission 18S2.

10. LABORATORY SYSTEMS AND SERVICES

Chapter 9 addressed the implementation of the forensic procedures regime within the operational arm of Victoria Police. This chapter, which concludes Part D, examines the processes and services employed by the forensic laboratory, the VFSC, in the analysis of DNA evidence. The work of the laboratory is quite clearly crucial to the effectiveness of the forensic sampling regime.

Chapter 10 begins by considering the means by which the laboratory processes are currently regulated or reviewed. The Inquiry was urged to review ‘the scientific debate about the accuracy and reliability of various sampling processes, and the relative risks of contamination of samples’.⁸⁹³ This chapter surveys relevant case law to identify which aspects of DNA evidence are being challenged in criminal proceedings. In evaluating the effectiveness of the current regulatory regime, the Inquiry has drawn on experience in other jurisdictions to consider the most appropriate mix of regulatory strategies – statutory requirements, audits and accreditation reviews, and the scrutiny afforded by criminal proceedings.

The VFSC has played a leading role in the development of forensic services throughout Australia. The VFSC is currently involved in peak scientific and forensic management bodies internationally and domestically. It is a member of the DNA Monitoring Expert Group (DNA MEG) convened by Interpol,⁸⁹⁴ is represented on CrimTrac’s management and officers’ committees, and is a member of the peer assessment panel formed by the National Association of Testing Authorities (NATA).

The contribution made by VFSC staff to research in the field of forensic science is notable: a significant proportion of current Australasian research projects listed by the National Institute of Forensic Science are being undertaken at the VFSC, and the research is at the cutting edge of DNA analysis.⁸⁹⁵

The chapter then examines the findings of Australian, and particularly Victorian, courts on the validity of the DNA evidence presented in criminal proceedings. It concludes with recommendations intended to create the regulatory and administrative

893 Victoria Legal Aid, Submission 15, 3.

894 See Chapter 1 for further background. See also D Gidley, ‘DNA MEG Update’, (June 2001) *The Forensic Bulletin* 14.

895 National Institute of Forensic Science website at <http://www.nifs.com>.

environment needed to ensure the provision of independent forensic services in Victoria.

THE REGULATION OF FORENSIC DNA SERVICES

Victorian Legislative Requirements

The impact of forensic sampling depends in large part on the quality of the analysis provided. The quality of the analysis depends, in turn, on the integrity of pre-analysis collection and handling processes. As the Coldrey Committee observed in the first Australian report on the forensic sampling issues:

In canvassing the role of forensic science in the criminal justice system it is assumed that the end product of the scientific process will be reliable. It is perhaps apposite to sound a cautionary note that no matter how accurate a scientific test may be, and no matter what degree of probability it determines for implicating a suspect, the value of the result obtained depends on the chain of evidence being established, the reasonableness of the conclusion that the presence of the sample is consistent with presence at the crime scene at the relevant time and the skill and ability of the person carrying out the test.⁸⁹⁶

Laboratory and Proficiency Standards

Subdivision 30A, following the Model Bill,⁸⁹⁷ provides a framework to regulate forensic services, but does not directly regulate the operations of the Victoria Forensic Science Centre. The only clear legislative requirement on the laboratory is that a sample:

must be analysed:

- (a) in accordance with the prescribed standards, if any; and
- (b) by an analyst authorised under this section, if the regulations so require.⁸⁹⁸

Failure to meet prescribed standards of analysis shall result in the evidence obtained being inadmissible. Section 464ZE sets out the circumstances in which non-compliance can render DNA evidence inadmissible. It stipulates, among other things, that:

- (1) Evidence obtained as a result of a forensic procedure conducted on a person, or from a sample voluntarily given by a person in accordance with sections 464ZGB to 464ZGD, is inadmissible as part of the prosecution case in proceedings against that person for any offence if- ...

896 Coldrey Committee, *Report on Body Samples and Examinations* (1989) 51.

897 The Model Bill does not provide for the direct regulation of forensic laboratories.

898 S 464ZB(1).

- (c) any sample taken was not analysed-
 - (i) in accordance with the prescribed standards, if any; or
 - (ii) if the regulations so require, by an analyst authorised under section 464ZB.

Section 464ZJ(1) enables the Governor in Council to make regulations with respect to the following matters:

- (a) accreditation of experts giving forensic evidence in a court; and
- (b) testing of the proficiency of experts in conducting procedures about which an expert gives forensic evidence; and
- (c) the application and use of statistical analysis to data the subject of forensic evidence; and
- (d) standards for conducting forensic procedures in accordance with this Subdivision and the analysis of any samples taken; and
- (e) generally prescribing any other matter or thing required or permitted by this Subdivision to be prescribed or necessary to be prescribed to give effect to this Subdivision.

The Minister may authorise persons ‘whom the Minister considers to be appropriately qualified’ to carry out analyses, set any standards for the services and reports to be provided, or require the review of the laboratory operations or services.⁸⁹⁹ No standards or regulations have yet been prescribed.

To date the regulation of forensic services in Victoria has been achieved by the accreditation process. The review of these services has been achieved largely, if not exclusively, through scrutiny of the evidence presented in criminal proceedings. Such scrutiny may address general issues regarding the validity of the processes and techniques used in DNA analysis, as well as the actual processes employed in obtaining the results presented in the individual proceedings.

THE RELIABILITY OF LABORATORY PROCESSES

DNA profiling is unusual ... in that its potential for error is remarkably low provided that testing is carried out flawlessly.⁹⁰⁰

This observation encapsulates the strengths and vulnerabilities of DNA profiling. Its strengths come from the technology used in the profiling process: the DNA extraction and analysis technology is acutely sensitive, the validity of the profiling system has been largely upheld and the unique capability of this forensic tool attested.

899 S 464ZB(2).

900 Ian Freckelton and Hugh Selby, *Expert Evidence: Law, Practice, Procedure and Advocacy* (2nd ed 2002) 490.

With the increased capacity and efficiency of laboratory processes there comes an increased volume of profiling and a greater chance of error or contamination.

The nature of DNA analysis lends itself to a wide variety of potential accidents and mistakes, including mislabelling and mixing up samples, running the same sample twice instead of running the sample from a defendant against the crime scene sample, contaminating samples by exposure to other biological material, and misinterpreting results.⁹⁰¹

Victoria Legal Aid representatives stressed the importance of keeping the issues of reliability in mind when the role and impact of forensic sampling is being reviewed. Mr Stojcevksi sought ‘ongoing debate’ about the efficacy of some DNA sampling and of the techniques of interpretation of DNA sampling.⁹⁰² Representatives of the Law Institute of Victoria outlined some aspects of the forensic profiling processes that required standardisation and verification. These included:

standardisation of techniques, records are to be kept of the analysis, that there be cross-checking in testing materials, controlled tests, measurements to be verifiable, that there are alerts in relation to contamination, human error to be procedurally guarded against and routine checks and procedures of quality assurance.⁹⁰³

In order to evaluate the reliability of the processes involved in DNA sampling, and to identify gaps or duplications in the regulatory regime, the Inquiry has reviewed relevant Australian case law. The main evidentiary issues that have emerged in recent years have related to:

- the validity of the Profiler Plus system;
- the integrity of processes for the collection, submission and handling of DNA evidence; and
- the interpretation of DNA results.

This chapter reviews the case law and literature relating to the validity of the DNA profiling techniques and system used at the VFSC, as well as the submissions and evidence available on the operation of the current services. In so doing, the Inquiry seeks to identify pressure points in the provision of forensic DNA analysis and areas where the operations of the laboratory require more, or less, or a different form of regulation.

The Reception and Vetting of DNA Evidence

The reception and initial vetting of DNA evidence at the forensic laboratory is not subject to any statutory or subordinate regulation, but it is a crucial stage in the

901 Margaret A Berger JD, ‘Raising the Bar’, (March 2002) V *Perspectives on Crime and Justice: 2000-2001 Lecture Series* 95.

902 V Stojcevksi, *Minutes of Evidence*, 2 June 2003, 45.

903 D Laschko, *Minutes of Evidence*, 22 July 2002, 91.

sampling process. At this stage the condition of the DNA evidence is examined and documented. The evidence is packaged according to laboratory protocols, referred to the relevant branch of the laboratory, vetted, and items are selected for analysis.

Flaws in the process of selecting items for analysis can comprise the validity of the DNA evidence produced. The Queensland case of *R v Button*, where ultimately Buttons' conviction for rape was quashed, illustrated how selective analysis of crime scene evidence could skew the prosecution and undermine the trial process.

Button's Case

Frank Button was convicted of rape and spent some 10 months in custody. When the original DNA evidence was re-examined, it was found that DNA evidence deposited on some key crime scene exhibits – a mattress and bed linen – had not been analysed or presented at the trial. DNA analysis of these exhibits revealed that the DNA deposited at the crime scene did not match the profile of Frank Button and did match the profile of a person not suspected or prosecuted in connection with this offence. Button successfully appealed his conviction when crime scene items not analysed for the original trial were found to exculpate him. When questioned as to why the bedding had not been tested before the trial, the forensic scientist indicated:

It would not be of material assistance in identifying the appellant as the perpetrator of the crime.⁹⁰⁴

It was inferred that:

Queensland police originally instructed the John Tonge Centre ... to look for inculpatory but not exculpatory evidence when performing those tests.⁹⁰⁵

The Queensland Court of Appeal expressed concern at the possibility that only evidence likely to support the prosecution case was being subjected to forensic examination. The Court of Appeal issued a strongly worded judgement insisting on the importance of ensuring that the DNA evidence available from the crime scene is analysed for both inculpatory and exculpatory purposes.

What is of major concern to this Court is the fact that that evidence was not adduced at the trial. ... The DNA testing has a twofold purpose: that of identifying the perpetrator of a crime and secondly, that of excluding a possible offender.⁹⁰⁶

The Queensland Crime and Misconduct Commission was asked to review the systems involved in the submission of DNA evidence to the laboratory. In Queensland, the forensic laboratory, the John Tonge Centre, comes under the responsibility of the Queensland Department of Health. The Commission identified some systemic concerns and made recommendations to improve the submission of DNA evidence to

904 [2001] QCA 133, per Williams JA, White and Homes JJ, 120 April 2001.

905 Dr L Weathered, *Minutes of Evidence*, 22 July 2002, 43.

906 *The Queen v Frank Allen Button* [2001] QCA 133, Williams JA, 133.

the laboratory and to formalise and streamline communication between police and the forensic laboratory.

A major focus of the inquiry was to identify strategies to ‘make the number of items submitted for forensic testing more manageable’.⁹⁰⁷ One of the issues that arose in the Button case was the difficulty of determining which, of the many items submitted, should be analysed. Difficulties with the breadth of the instructions given to the laboratory and unclear communication between police and laboratory staff were reported. These resulted in duplication, unnecessary sampling and uncertainty.⁹⁰⁸ The Commission recommended procedures to prevent the ‘indiscriminate collection of items’ and to ensure clear communication between police and forensic scientists.⁹⁰⁹

Another systemic issue considered by the Commission was defining the lines of communication and decision-making protocols used to select evidence for analysis. The Commission recommended that a working party be established to ‘explore efficient work practices’ and other issues. This was especially directed at ascertaining how decisions as to which exhibits are analysed are made (and recorded).⁹¹⁰ It also recommended that the Queensland Police Service (QPS) and the Queensland Health Department (QHSS):

collaborate on the preparation of protocols and guidelines to ensure the most prompt, transparent and effective means of relaying requests from the QPS to QHSS, and to develop strategies that will make the number of items submitted for forensic testing more manageable.⁹¹¹

The Commission identified a need for a review mechanism ‘to evaluate decision-making’, to provide evidence of the rationale for the selection of certain items for forensic examination.⁹¹²

In the light of the issues identified through the Button case, the Inquiry asked representatives of Victoria Police and the VFSC for background on the way in which crime scene evidence is collected, submitted and selected for analysis in Victoria.

The Reception of DNA Evidence

The Vetting Process

The VFSC provided the Inquiry with the ‘Casework Information Sheet and Vetting Checklist’, which indicate the details recorded on reception of items for analysis at the laboratory. A notification form is to be completed for a sample to be accepted by the

907 Crime and Misconduct Commission, *Forensics under the Microscope* (2002) xii.

908 Ibid xi.

909 Ibid.

910 Ibid.

911 Ibid Recommendation 1, xii.

912 Ibid xi.

VFSC.⁹¹³ This form requires specification of the legislative authority for the taking of the sample, as well as whether any limited use restrictions apply and the critical dates of conviction, appeal periods and expiry. The background provided by the police informant includes the type of offence, details of the relevant parties, and summaries of the offence according to the complainant/police and the suspect. The VFSC indicated the importance of clearly identifying the examination ‘that is essential to the case’. It noted that:

Failure to comply with the nominated standards of information to be provided will impede if not halt further analysis being conducted.⁹¹⁴

Items are vetted and documented at reception for quality control purposes.

The condition of the item itself forms part of the initial examination, and such information is recorded in the case-notes. Many parts of the case-notes are included in statements prepared for the Courts.

The VFSC stressed the importance of ensuring, at the point of reception, that the evidence has not been compromised at collection and indicated that it would not accept an item that did not meet VFSC continuity and handling standards.

If an item was presented in a state unacceptable to the VFSC (specifically relating to continuity) it would be rejected and therefore not form part of the examination and hence the statement.⁹¹⁵

The VFSC indicated that the laboratory staff seal the item on presentation, in the presence of the courier.

Upon arrival at the VFSC, the item is placed into a sealed bag (generally paper) with labels depicting the continuity. Such a process prevents the VFSC evidence tracking staff (those receipting the item) from entering the continuity chain as the item is sealed in the presence of the courier. If the seal is disturbed the case manager will note the inconsistency and seek further advice but it is likely that the item will be rejected.⁹¹⁶

The Biology Shopfront

In a report on the future of Victoria’s forensic services, *Tracing the Future*, Victoria Police outlined a proposal for a reorganisation of the Biological Evidence Section at the VFSC. It proposed that the VFSC create a Biology Shopfront, merging the Biological Evidence Section with the Biological Analysis Unit, for the reception of exhibits.

913 Victoria Police, Submission 18S4.

914 VFSC, Submission 18S2, 5.

915 Ibid 1.

916 Bramley, ‘Quality Assurance in DNA Profiling’ (1999) 2.

Tracking Evidence through the Laboratory Processes

In order to demonstrate continuity it is necessary to be able to identify and trace the progress of DNA sampling through the analytical processes. As yet, this cannot be achieved but is, according to Magistrate Hannan, a goal towards which the VFSC is working. This issue was brought to the Inquiry's attention by Magistrate Hannan, who outlined difficulties involved in managing criminal proceedings due to delays in the laboratory processes.

We were told that various new measures would be put in place in terms of an ability to track evidence through VFSC – that every exhibit would have a bar code, that the prosecution and the defence could ring with the bar code and they would know where the forensic testing was at.⁹¹⁷

Submission Policies and Practices

Victoria Police were asked whether all crime scene evidence is submitted for analysis, what guidelines were in place regarding the submission of evidence to the laboratory and what arrangements were made for the storage or destruction of items not sent. However, the Inquiry was not able to ascertain what submission policies or practices applied prior to the review of Forensic Services in 2002, outlined in the report, *Tracing the Future*. *Tracing the Future* acknowledged that the submission of DNA evidence to the forensic laboratory was problematic. *Tracing the Future* found that over-servicing by the VFSC had resulted in 'needless analysis and examinations'. This was attributed largely to:

no application, or a poor application, of a test of essentiality by operational members.⁹¹⁸

The report observed that there had been 'low awareness' of the potential impact of forensic sampling.

This low awareness, when combined with wide discretion that operational police have in using forensic services, results in little critical consideration of the samples submitted or the adequacy of the information provided to scientists.⁹¹⁹

It was envisaged that, while the appointment of Regional Crime Scene Officers (RCSOs), discussed in Chapter 9, would create an increased demand for forensic services, the submission of evidence will be rationalised and vetted. The RCSOs will be required to complete a Request for Analysis form and encouraged to be selective in their submission of evidence 'to limit the number of exhibits being presented at the VFSC to only those deemed of value.'⁹²⁰

917 Magistrate Hannan, *Minutes of Evidence*, 2 June 2003, 39.

918 Victoria Police, *Tracing the Future* (2002) 119.

919 Ibid 41.

920 Ibid 63.

Mr Wallace, Acting Director of the VFSC, indicated that the laboratory expected the RCSOs to improve communication with the laboratory and to assist in the laboratory's selection of crime evidence for analysis. The VFSC indicated that instances of 'just in case' submission were significantly reducing,⁹²¹ and at the 2003 public hearings, Mr Wallace noted:

The training Crime Scene Officers will receive is in relation to ensuring that the exhibits that actually come to the Centre are evaluated exhibits, to try to eliminate what we call the 'just in case' scenario.⁹²²

Liaison between Police and the Forensic Laboratory

The close co-operation between the police member and the forensic laboratory, while necessary for the efficient collection and analysis of the DNA Prosecution evidence, arouses concern on the part of the defence as to the independence of the forensic analysis.

Victoria Police indicated that if VFSC staff members do not attend the crime scene, the investigator collects the relevant forensic evidence and submits it to the laboratory.

Once at the VFSC, a discussion between the investigator and biology staff occurs in order to establish the issues surrounding the case and therefore assist in providing a relevant examination of the exhibits.⁹²³

Professor Scheffer indicated that, prior to analysing crime scene samples for a complex investigation, a case conference is held. He explained that:

We discuss what is pertinent to the case and what the issues are, and then we can scientifically advise them [the police] as to whether it is required or not.⁹²⁴

The case conference is intended to enable 'value-added decision-making'. The decision concerning the sampling of crime scene items presented 'is based on what is at issue between the various parties, and not what is agreed to, although in some instances the impact of what is agreed to may affect other results and therefore must be considered'.⁹²⁵

VFSC representatives indicated that:

The issues raised in the Button inquiry are considered to be very low risk at the VFSC. The communication strategy continues throughout the process including input from the OPP and defence counsel. This ensures that essential work is completed so that the Court can ultimately consider all. ... It is stressed that no undue influence to perform certain tests, or perhaps more importantly not to perform those tests, is

921 VFSC, Submission. 18S4, 5.

922 J Wallace, *Minutes of Evidence*, 2 June 2003, 10.

923 Victoria Police, Submission 18S2.

924 Professor J Scheffer, *Minutes of Evidence*, 2 June 2003, 14.

925 VFSC Submission 18S4, 1.

exerted. Decisions are always made on the scientific integrity of the tests to be conducted and the scientist's integrity.⁹²⁶

The amount of time available for analysis of crime scene evidence has a bearing on the selectivity of forensic scientists in choosing items for analysis. Professor Scheffer indicated that, if the DNA analysis commences close to court deadlines, there is less opportunity to analyse crime scene samples selectively. A selective approach to crime scene analysis involves close liaison with investigators and may require re-analysis of evidence at a later stage. Professor Scheffer explained:

If we are working far too close to court deadlines we are more likely to over-service because we do not have the time to go back and repeat the testing.⁹²⁷

Issues of Independence

Several submissions to this Inquiry highlighted the significance which decisions concerning the collection and submission of DNA evidence have on the conduct of the prosecution and defence cases. Victoria Legal Aid, the Law Institute of Victoria, and the Criminal Bar Association perceived that the close co-operation between police investigators and the VFSC affected the 'independence' of the VFSC. Liberty Victoria explained that at present:

An accused person's ability to examine the crime scene is limited by the numerous discretionary decisions made (to record, collect, photograph or not do these things) by police and prosecution forensic scientists.⁹²⁸

These issues are considered at the conclusion of this chapter, in the context of a revised administrative structure for the provision of independent forensic services in Victoria.

The Profiler Plus System

Over the years different methods have been developed to isolate non-coding regions of DNA for analysis. The choice of DNA profiling system reflects a trade-off between sensitivity and utility. If a DNA profiling system is highly sensitive and discriminating, the process will detect minute quantities of contaminants and mixtures. This level of discrimination requires pristine conditions and further examination to eliminate the contaminants and the profiles of other DNA contributors. At the other extreme, a relatively indiscriminating system might also fail to distinguish sufficient differences between profiles to satisfy the evidentiary requirements of the courts.

926 Ibid.

927 Professor J Scheffer, *Minutes of Evidence*, 2 June 2003, 14.

928 Liberty Victoria, Submission 27.

The early DNA profiling systems, though recommended for their reliability, were found to be insufficiently discriminating. These systems, which analysed only four or six loci and the sex determinant, occasionally produced a coincidental match in criminal investigations.

Forensic DNA technology has changed dramatically over the past thirteen years. It is now apparent that early claims for accuracy in relation to FRLP analysis were inflated and that an unacceptable degree of subjectivity of interpretation pervaded results. However, it is generally acknowledged now that the potential for false positive results and erroneous matches is extremely low.⁹²⁹

Australian cases have considered not only the validity of the profiling system, but also its capacity to deal with mixtures, small quantities of DNA evidence and profiles of different genotypes. Some of the issues that have emerged in Australian cases are discussed below.

The Validity of the Primer Sequences

The validity of the Profiler Plus system, used in all the NATA accredited Australian forensic laboratories, was a recurring issue in Australian criminal proceedings during the 1990s. The springboard for the examination of its validity was a ruling in a US court to the effect that the Profiler Plus system could not be validated on the information available. The main hurdle for the Profiler Plus system was the lack of published validation data. The manufacturer, Perkin Elmer Biosystems, chose not to release the data produced by its in-house validation tests, with the result that the 'scientific reliability' of the system could not be tested according to criteria laid down in the leading US case, *Daubert v Merrell Dow Pharmaceuticals*.⁹³⁰

As the legal challenges snowballed, the manufacturer offered to release its data to expert witnesses in some of the leading US cases under a confidentiality agreement.⁹³¹ Similar issues arose in Australian cases. In *R v Gallagher*⁹³² a New South Wales case, a jury was discharged after it was held that the Profiler Plus kit would not satisfy the general acceptance test. Applied Biosystems then tendered three documents to assist the court in demonstrating the basis on which the system was validated.⁹³³ Independent validation studies were also conducted with the participation of

929 Freckelton, *DNA Profiling: Issues Paper* (2002) 21.

930 125 L Ed 2d 469 (1993). In the USA, two tests of admissibility have emerged: the Frye test - assessing whether the method 'is sufficiently established to have gained general acceptance in the particular field in which it belongs'; and the Daubert test - assessing the 'scientific reliability' of the method using five criteria. These were whether the testability of the scientific theory or technique; whether the theory or technique had been subjected to peer review and publication; the known or potential rate of error; the existence or non existence of maintained standards and whether the theory or technique has general acceptance in a relevant scientific community.

931 Quoted in Liesl Chapman, 'Recent Judgments on the Admissibility of DNA Evidence', *Prosecuting under the Microscope*, conference papers, Adelaide, 7-11 September 2001, 4. *R v Gallagher* [2001] NSW SC 462, Barr J, 4 May 2001.

932 Ibid.

933 Ibid.

laboratories using the Profiler Plus system around the world.⁹³⁴ In *R v McIntyre*⁹³⁵ Bell J admitted DNA evidence based on the Profiler Plus system after consideration of the reliability of the system. His Honour held that the Profiler Plus system was by then generally accepted within the Australian forensic science community.⁹³⁶

To a large extent the reliability of the Profiler Plus technology has been settled by a landmark South Australian case, *R v Karger*,⁹³⁷ probably the most extensive consideration of the validity of the system in Australian courts. After a long-running voir dire on the admissibility of the expert evidence in relation to the Profiler Plus system, Mullighan J found that the system had achieved general acceptance within the Australian forensic community, despite the lack of published information on its primer sequences and validation data. His Honour found:

The evidence overwhelmingly established that the Profiler Plus system is generally accepted throughout the forensic science community as reliable and accurate in DNA analysis for the purposes of human identification, including with low levels of DNA.⁹³⁸

In Victoria, the Profiler Plus system was most recently reviewed in *R v Juric*,⁹³⁹ where some of the contested analyses had been undertaken at an early stage in the use of this system. In this case, the court excluded the DNA evidence based on tests conducted in 1998. The expert witnesses at the trial did not agree on the interpretation of the results. While this alone might not have caused the exclusion of the evidence, the court found that it was not possible for the jury to evaluate the conflicting evidence presented because:

There was no underlying basis of fact or science which would enable a reasonable jury to adequately assess the strength of an opinion.⁹⁴⁰

The court observed that:

It is not the complexity of the area of opinion which takes it beyond the competence of the jury; rather it is the lack of an evidential foundation for the opinion expressed.⁹⁴¹

The judgment in *R v Juric*,⁹⁴² handed down in May 2002, contrasts with the findings in *R v Karger*. While the decision in *Juric's* case stands out amongst recent Australian decisions, it is likely that the approach taken in *Karger's* case will prevail,

934 See the validation study undertaken by the National Institute of Forensic Science and referred to in *R v Gallagher*, *ibid* paras 52-55.

935 [2001] NSWSC 462, 4 May 2001, Barr J.

936 The *Evidence Act 1975 (NSW)* s 79, unlike the Victorian legislation, specifies certain criteria for the admissibility of expert evidence, including a 'general acceptance' test.

937 *R v Karger* [2001] SASC 64, 29 March 2001, Mullighan J. See also Chapman, 'Recent Judgments on the Admissibility of DNA Evidence' (2001) 4.

938 *R v Karger*, *ibid*, para 64.

939 *Juric v The Queen* [2002] VSCA 77. Freckelton, *DNA Profiling: Issues Paper* (2002) 16-17.

940 *Juric v The Queen* *ibid*.

941 *Ibid*.

942 *Ibid*.

as it considered the general issues relating to the reliability and validity of the process, and not merely the reliability of a specific set of what are, by now, old results. The case law in Australia would seem to confirm the conclusion submitted to this Inquiry by Alastair Ross, Director of the National Institute of Forensic Science (NIFS), that:

The DNA profiling system, Profiler Plus, used in Australia is used in many other countries and is accepted as being robust and reliable.⁹⁴³

Artefacts of the Profiler Plus System

While issues as to the validity of the Profiler Plus system have largely been resolved in Australian courts, issues still arise in relation to the interpretation of DNA analyses, especially where small quantities of DNA, mixtures of profiles or particular samples of genotypes are involved. ‘Artefacts’ are features of the system which can produce anomalous results. Case law has revealed a number of features of the Profiler Plus system which can result in ambiguity or uncertainty in the resultant profiles. Mullighan J noted that:

Artefacts are generated by both the PCR process and the fluorescent detection method and it is essential that an analyst understands what type of artefacts and how they may be recognised and distinguished from true alleles.⁹⁴⁴

This appears to be a random effect and can cause different results to be obtained from repeated testing. Mullighan J indicated that when a sample has a very low level of DNA, an incorrect profile might be obtained because ‘one allele is seen strongly and the other weakly, or perhaps only one allele is seen’.⁹⁴⁵

The NSW case, *R v Rees*,⁹⁴⁶ involved the analysis of DNA evidence obtained from a small sample and considered the reliability of the evidence so obtained. It was noted that, as in *Karger*’s case, the analysis of small quantities was undertaken without adhering to the Profiler Plus kit guidelines; but it was also found that no Australian laboratories adhered to these particular guidelines.⁹⁴⁷

R v McIntyre involved DNA evidence where problems arose with the interpretation of a mixture of DNA profiles and with a result that could be explained as a ‘stutter’.⁹⁴⁸ It was found that when a sample contains a level of DNA higher or lower than that for which the electropherogram is calibrated, the accuracy of the analysis might be affected.⁹⁴⁹

943 Mr Alastair Ross, Submission 22, 1.

944 *R v Karger* [2001] SASC 64, para 117.

945 *Ibid* paras 131-132.

946 [2000] NSW SC 544, Bell J.

947 *Ibid*.

948 ‘Stutter’ can arise where there is slippage during the amplification process, and there is one enzyme less than its associated allele.

949 *R v McIntyre*, [2001] NSW SC 311 Bell J, paras 28-29.

The Analysis of Mixtures

There are well-documented cases of issues arising with the interpretation of mixtures following analysis with the Profiler Plus system. It can be difficult to detect mixtures, if the proportionate contribution of each individual is extreme.

For example, if over 90 per cent of the mixture derives from one individual, the system may not detect a second DNA component in the mixture. This is because the sensitivity of the system is calibrated to screen out contaminants (components constituting less than 10 per cent), from the analysis. Typically the instruments are calibrated to detect a dominant DNA source. If there are two mixtures of greatly differing proportions, the presence of the second source may not be detected.⁹⁵⁰

This situation arose in the case of *Devaldez*, where a swab taken from the breast of the complainant was on analysis found to contain only the DNA of the suspect, and not that of the complainant herself. It was explained that:

It was an artefact of the Profiler Plus testing method that it would focus in on the majority depositor and ignore results from a minor depositor.⁹⁵¹

This anomalous result raised doubts about the accuracy of the sampling process and the possibility that it was not the victim's swab but a saliva swab from the suspect that had been analysed.⁹⁵²

Another difficulty that arises is that, as was indicated in Chapter 2, a profile may have only one allele at a certain locus if the alleles for the mother and father were the same. When a mixture is analysed it can be difficult to ascertain whether the peaks at a particular locus are the product of two or more than two people. As explained in a US Reference Guide on DNA Evidence:

The chance of detecting a mixture by finding extra alleles depends on the proportion of DNA from each contributor as well as the chance that the contributors have different genotypes at one or more loci. As a rule, a minor contributor to a mixture must provide at least five per cent of the DNA for the mixture to be recognised.⁹⁵³

Australian cases which confronted this problem included the case of *R v Renton*,⁹⁵⁴ where DNA evidence as to the number of profiles revealed in the analysis was disputed. In that case, DNA evidence of a mixture of profiles on a balaclava found in a getaway car used in a bank robbery played a crucial role in the trial. The defence contested the interpretation of the mixture presented by the prosecution and argued that the mixture may have originated from three, rather than two people, and that if so, the results of the profiling obtained were inconclusive.⁹⁵⁵

950 VFSC, *Background/Issues Paper* (2002) 3.

951 J McLoughlin, *Minutes of Evidence*, 2 June 2003, 45.

952 *Director of Public Prosecutions v Devaldez* (County Court of Victoria, Stott J, 30 April 2002).

953 Kaye and Sensabaugh, *Reference Guide on DNA Evidence* (2002) 24, 27.

954 [2001] QCA 403 (25 September 2001).

955 See also Felicity Hampel and Alastair Ross, 'Trust Me I'm a Scientist, DNA Testing and Fallibility in the wake of *Lisoff and Renton*', (December 2002) *The Forensic Bulletin* 20 regarding the controversy over this case.

A highly discriminating analysis will provide the additional discrimination at a cost: uncertainty as to whether a faintly present allele is in fact an allele or a stutter. There is clearly room for dispute in the interpretation of such a mixture.

One extreme is to admit every bump as a possible allele, but if no one is excluded this is too conservative to be useful. The opposite extreme is to follow a policy that alleles below a standard threshold of signal strength are ignored, but partial allelic dropout at a few loci can ‘exclude’ a suspect notwithstanding that the evidence at other loci may intuitively be compelling that he contributed.⁹⁵⁶

Scientific literature on the interpretation of mixtures accepts that:

DNA mixtures offer many problems.⁹⁵⁷ ... When evaluation of a mixture is unavoidable, some sort of numeric assessment of the evidential strength is necessary. In deciding on a calculation, care and objectivity are necessary to avoid overstating the strength of the evidence against the suspect.⁹⁵⁸

The ALRC considered the capacity of Profiler Plus to analyse mixtures and concluded:

Where a DNA sample contains a mixture of several persons' samples and the forensic scientist does not detect this, the resulting DNA profile may be incorrect. ... The chance of detecting a mixture by finding extra alleles at a locus depends on the proportion of DNA for each contributor and the chance that the contributors have different genotypes at one or more loci.⁹⁵⁹

Conclusions: The Profiler Plus System

Australian forensic laboratories involved currently in DNA analysis for criminal investigations have accepted the Profiler Plus system. Mullighan J considered various sensitivities in the system, and concluded that ‘there is no basis in the evidence to suggest that the system lends itself to abuse’. His Honour noted that the Profiler Plus system has standards for maintenance and servicing of the instruments, that it must be operated by trained scientists and that their work must be checked and reviewed. His Honour concluded that the system ‘is as “fail safe” as any scientific procedure with human involvement’.⁹⁶⁰

However, expert witnesses from laboratories that do not use this system play a significant role in the presentation of expert evidence in criminal proceedings. Australian forensic procedures legislation is silent on the processes to be used for the

956 Kaye and Sensabaugh, *Reference Guide on DNA Evidence* (2002) 275.

957 C Brenner, ‘Approaching and Avoiding DNA Mixtures’, International Symposium on Forensic DNA Technologies, 19-20 September 2003, Munster, 275 at medweb.uni-muenster.de/institute/remed/ISFDNAT2003/, last accessed 23/11/03.

958 Ibid 275.

959 ALRC, *Discussion Paper 66* (2002) 883. See also Kaye and Sensabaugh, *Reference Guide on DNA Evidence* (2002) 505-6 and the Victorian cases, *R v Juric* [2002] VSCA 77 Winneke P, Charles and Chernov JJA, 29 May 2002; *Director of Public Prosecutions v Devaldez* [2003] VSCA 29.

960 *R v Karger* [2001] SASC 64, Mullighan J, para 188.

analysis of DNA samples in criminal investigations. This opens up the possibility that other jurisdictions may at some time begin to use laboratories that are not accredited for the operation of the Profiler Plus system. The Committee believes that it is important to set and maintain standards for laboratory services, but has formed the view that statutory recognition of the Profiler Plus system is not warranted. The Committee considers other options for ensuring that, especially when forensic data is obtained from other jurisdictions, minimum laboratory standards are met for the handling and analysis of DNA evidence.

Contamination Issues

Sample mishandling, mislabelling or contamination, whether in the field or in the laboratory, is more likely to compromise a DNA analysis than an error in genetic typing.⁹⁶¹

This observation, made in the context of American forensic sampling practice, applies equally to Australian processes. While this chapter has revealed some difficulties associated with the performance and interpretation of DNA profiling results, probably the major risk in the process is the possibility of compromise caused by contamination and human error.

The importance of having strict protocols – and confidence in the strictness of these protocols – was repeatedly stressed in this Inquiry. The Law Institute of Victoria elaborated on some of the risks:

Specimens may be contaminated; minute quantities of DNA can contaminate reagents and material used in analysing a number of samples; reagents themselves may be defective or there may be something unusual about the item upon which a sample is found, such as fabric dye, which can give misleading results. Human error also cannot be ruled out.⁹⁶²

Contaminants may be present, for example, in a probe that is inserted during the amplification stage.⁹⁶³ Contamination may occur when there is an overflow from adjacent lanes in the separation process, or from the allelic ladder.⁹⁶⁴ Kaye and Sensabaugh noted the possibility of contamination arising during amplification ‘if amplification products of one typing reaction are carried over into the reaction mix for a subsequent PCR reaction’.⁹⁶⁵

While the speed and efficiency of the profiling process encourages the analysis of samples in batches, the batching of samples increases the potential for contamination.

961 Kaye and Sensabaugh, *Reference Guide on DNA Evidence* (2002) 28.

962 Law Institute of Victoria, Submission 21, 3.

963 Freckelton and Selby, *Expert Evidence: Law, Practice, Procedure and Advocacy* (2002) 541-542.

964 *R v Karger* [2001] SASC 64.

965 Kaye and Sensabaugh, *Reference Guide on DNA Evidence* (2002) 31.

It has been found that the risk of cross-contamination is greater if samples from the same investigation are analysed or batched together.

In New Zealand, doubts as to the reliability of DNA evidence resulted in an inquiry into the laboratory processes used by the ESR forensic laboratory.⁹⁶⁶ DNA analysis conducted as part of a murder investigation indicated that the profile of a crime scene sample was found to match the profile of the victim of an assault in another part of New Zealand, which coincided with the murder.⁹⁶⁷ The assault victim could not, in any way have been connected with the murder, as he was reporting the assault to police at the time of the murder. Although the cause of the false match was not conclusively identified, it was thought that the samples may have become contaminated when examined at the laboratory.

In Victoria, the coronial investigation into the death of Jaidyn Leskie is considering evidence as to the possibility of contamination occurring in the analysis of DNA samples obtained from the deceased child's clothing.

In Victoria, the laboratory protocols require samples from the same investigation to be batched separately.⁹⁶⁸ The VFSC outlined its protocols for the minimisation and control of contamination, and noted the requirements of NATA in respect of the laboratory quality control procedures. Safeguards to ensure an unbroken chain of evidence include strict sample handling procedures, independent manual checks of all sample transfers and independent checks of data transfers.⁹⁶⁹ The risks are reportedly reduced with automation – reducing the level of human intervention.

The higher the level of automation, the greater the consistency, the lower the chance of errors, and the higher the quality assurance.⁹⁷⁰

Nevertheless, as representatives of the VFSC observed:

Whilst procedures and protocols are in place to minimise such contamination it can nevertheless not be guaranteed that such contamination has been fully eliminated.⁹⁷¹

This should not be taken as a reflection on the controls or procedures in place at the laboratory, but rather on the sensitivity of the system, the delicacy of the processes and the impossibility of ever ensuring complete sterility. The VFSC indicated that contamination may occur if a staff member:

- passes by the unprotected item when it is being examined;
- touches reagents used in the preparation of the DNA; or

966 New Zealand Ministry of Justice, V Sim and R Guzman, *DNA Evidence – The Need for ESR Reporting Protocols* (1999).

967 Rt Hon Sir Thomas Eichelbaum, and Professor Sir John Scott, *Report on DNA Anomalies* (1999).

968 Ibid.

969 Bramley, 'Quality Assurance in DNA Profiling' (1999) 2.

970 Ibid 2.

971 VFSC, Submission 23S2.

- sheds DNA during another examination at the same location.⁹⁷²

The VFSC noted that:

With the increasing sensitivity of DNA testing it is possible to detect this DNA on exhibits containing trace amounts of other DNA. Therefore, there is an unlikely, but possible chance that a person's DNA could be found on an exhibit when they have had no formal contact with that exhibit.⁹⁷³

Given the vulnerability of the evidence during laboratory analysis, the VFSC keeps the profiles of staff members to check for this form of contamination during analysis.

Contamination in the DNA process is usually detected as a foreign DNA profile in one of the control samples routinely used in DNA testing. All DNA profiles are compared to the DNA profiles of VFSC Biology staff members before final release. The provision of such samples from staff is totally voluntary, but is a recognised quality standard in most laboratories worldwide. Less than ten of almost 10,000 tests conducted at the VFSC over the last two years have been shown to have contained some form of contamination from staff members and each of these instances have not been repeated. Thus no systemic contamination exists, rather one-off occurrences.⁹⁷⁴

The Committee concluded that to provide assurance of the reliability of laboratory processes involves:

- maintaining accredited systems and controls, subject to stringent external monitoring and review; and
- disclosure of the condition of exhibits on arrival, contamination detected before or during the laboratory processes, tests undertaken to identify and account for the contamination, and an explanation of the effect of such contamination on the validity of the results.

In this context, the Committee recommends that consideration be given to a requirement specifying tests (if any) undertaken to detect or identify contaminants in the DNA samples submitted for analysis. The Committee believes, therefore, that when preparing, presenting and interpreting forensic reports for criminal proceedings full disclosure of the processes, including whether tests for contamination were done, should be made. This proposal is taken up in Chapter 11, which examines DNA evidence in criminal prosecutions and, in particular, addresses the broader issues of disclosure and pre-trial examination of expert DNA evidence.

Destruction Protocols

The current provisions do not require physical destruction of the sample, rather they require only de-identification of profiles. Chapter 4 considered the privacy

972 Ibid 5.

973 Ibid.

974 VFSC Submission no. 23, 10.

implications of DNA sampling and the privacy risks associated with de-identifying, as opposed to destroying DNA samples and related material and information.

Reporting Requirements

In Chapter 4 the Committee recommended amendments to the current provisions to require the destruction of the sample once the profile has been obtained, and considered ways in which the opportunity for unauthorised retention or use of the profile could be minimised. This section reviews the current reporting requirements imposed on the VFSC under Subdivision 30A.

Section 464ZFE requires the Chief Commissioner of Police to make quarterly reports to the Attorney-General on the samples obtained and destroyed. This report must contain:

- (a) a list that identifies by a unique identifying number every sample taken in accordance with this Subdivision within the period to which the report relates; and
- (b) the date on which every sample listed in the report was taken; and
- (c) information on whether any of the samples listed in the report or in any previous report submitted under this section have been destroyed within the period to which the report relates; and
- (d) if a sample has been destroyed, the date of destruction and the name of the person who has destroyed it.

Conclusions

As noted in Chapter 9, in relation to police procedures, the legislation is framed to require destruction, unless notification of an order for the retention of the sample and related material and information is issued. The statutory exclusion of evidence retained in breach of Subdivision 30A and the penalties which can be imposed for unauthorised use or retention of such evidence reinforce the importance of compliance with the destruction requirements. Compliance with the current destruction requirements is monitored by the reporting requirements of section 464ZE and actual compliance and can be checked through the NATA review processes.

The Committee considered it desirable, however, to amend the *Crimes Act* to specify that it is the VFSC which is responsible for providing notification of the destruction of the forensic sample. Currently s464ZD requires the report to be provided but does not specify who is responsible for compliance.

Recommendation 10.1 Notification of destruction of sample

That the Crimes Act 1958 (Vic) be amended to require that, when destruction of a forensic sample is required under Subdivision 30A, the Victoria Forensic Science Centre be required to notify the person in writing and report to the Chief Commissioner of Police in writing within 28 days.

Data Management

The data collected by the VFSC has proven to be an invaluable source of information on the contribution of DNA profiling to criminal investigations in this state. Laboratory records such as these have the potential to inform debate on the future development of forensic services not only in Victoria but also in other comparable jurisdictions. The VFSC records, which provide data on the samples received, analysed and destroyed since January 2000, can provide insight into the effectiveness of DNA collection and submission practices and trends in demand for forensic services. This data can also be used to set targets and benchmark progress in increasing the turnaround time for the provision of forensic services, and in tackling the backlog.

The Inquiry was unable to locate comparable published data for any other Australian jurisdictions, but noted that the research projects underway in New South Wales and Queensland are likely to generate data on the contribution of forensic DNA analysis to criminal investigations. There is already an extensive and expanding literature reviewing the operation of the UK Forensic Science Service and its relationship with the UK police forces.

In the light of the data available locally and internationally, the Inquiry believes there is the capacity within Victoria to draw on the performance data already generated by forensic sampling here to plan its future development. The VFSC is well placed to contribute to research in this field and the Committee believes that the VFSC could take a leadership role in producing consistent national data on the contribution of DNA profiling to criminal investigations.

This is consistent with the Committee's overall view that the VFSC should establish itself and its work on a more independent basis. The evidence provided to this Inquiry in relation to the level of independence of the VFSC is considered later in this Chapter.

The Committee recommends that data maintained by the VFSC relating to the number of samples received, analysed and destroyed and the outcome of the analyses in terms of database detections, inculpation and exculpation of suspects, the sampling of volunteers, be collated and released annually.

Recommendation 10.2 Annual publication of DNA profiling data

That data maintained by the Victoria Forensic Science Centre relating to:

- (i) the number of samples received, analysed and destroyed;**
 - (ii) database detections;**
 - (iii) the inculcation and exculpation of suspects; and**
 - (iv) the sampling of volunteers**
- be collated and released annually.**

THE STATISTICS OF DNA PROFILING

When a reference profile matches the profile of a crime scene sample, it is necessary to interpret the significance of this match. Chapter 2 outlined the methods used to describe the statistical significance of a match between two profiles. In Victorian criminal proceedings, the standard form of expressing this significance, in statistical terms, is as follows:

A statistical evaluation of the DNA result obtained from the blood on the swabstick in the holder labelled 'A' was conducted and the following two propositions considered:

1. the blood originated from the donor of the reference sample labelled 'B'; or
2. the blood originated from another male chosen at random from the Victorian Caucasian population.

I estimate that the match between the DNA profiles obtained from the blood on the swabstick in the holder labelled 'A' and the reference sample 'B' is at least 98 million (98,000,000) times more likely if the blood came from 'B' than if it came from another male chosen at random from the Victorian Caucasian population.

An alternative way of expressing this result is to say that the chance of a second male selected at random from the Victorian Caucasian population having the same DNA profile as 'B' is expected to be less than one in 98 million.⁹⁷⁵

When probability is expressed as a likelihood ratio of '1 in 98 million' it is almost inevitable that in Victoria, with a population of approximately 4.6 million, the probability will be translated into a near certainty. What may seem contradictory and confusing is the fact that the DNA evidence, while identifying the likely source of the sample with a high degree of certainty, is *not* on its own an indicator of guilt.

Establishing the meaning of the probability statistics by which the results are explained is vital. The statistical models on which calculations of likelihood ratios are based have therefore been repeatedly challenged and refined in recent years. A brief

975 VFSC, Submission 23S1.

outline of the approaches developed and tested in criminal cases is set out below to indicate firstly, the basis on which the Victorian calculations are made and secondly, to illustrate the difficulties which the interpretation of DNA evidence can produce in criminal proceedings. This is relevant to the discussion in Chapter 11 of the rules and processes used for the evaluation of DNA evidence in criminal trials.

The Reliability of Match Probability Statistics

One of the difficulties with match probability evidence is the impression of absoluteness that it conveys.

There appears to be a fairly widespread misconception that there is a real ‘statistical probability’ to be assigned to a profile but this is not the case. There is an infinite range of ways of carrying out the calculation that underlies the figure given. The method chosen in the individual case must be seen to be as much a matter of opinion as one given in other areas of forensic science.⁹⁷⁶

While various methods have been devised to calculate the likelihood that a match could be achieved by coincidence, they all rely, however, on certain assumptions about the frequency at which profiles occur in the general population.⁹⁷⁷

The Development and Use of Population Databases

Mullighan J in *R v Karger*⁹⁷⁸ considered what is required to demonstrate the validity of the population database for the calculation of DNA likelihood ratios in criminal proceedings. His Honour indicated that firstly, the databases must be shown to be valid; secondly, that the method of calculating the match probability is shown to be valid, and thirdly, that the expert must be shown to have sufficient expertise to interpret the results correctly.⁹⁷⁹ The VFSC provided this description of the statistical approach it uses:

The Victoria Forensic Science Centre (VFSC) has a database for each locus that tells us approximately what frequency each DNA type occurs in the population. This information, along with data about the degree of relatedness between individuals in the population, makes it possible to statistically evaluate a match found between two DNA profiles.⁹⁸⁰

976 Ian Evett, et al, ‘DNA Profiling: A Discussion of Issues Relating to the Reporting of Very Small Match Probabilities’, (2000) *Criminal Law Review* 341, 346.

977 Two ways of calculating match probabilities have been used in criminal proceedings. By the ‘match probability’ method, the probability that ‘a randomly selected, unknown, unrelated person would have the same DNA profile as the suspect, is calculated’. The second method is to calculate a ‘likelihood ratio’, which compares the probability of the two profiles coming from the one person, to the probability that they come from different people. See ALRC, *Discussion Paper 66* (2002) 886.

978 *R v Karger* [2001] SASC 64.

979 *Ibid* para 664.

980 VFSC, Submission 23S3, 5.

The population databases used by most Australian forensic laboratories involved in forensic DNA profiling have recently been validated by Dr Bruce Weir, a world authority on population genetics.⁹⁸¹ Dr Weir calculated, for these databases, the likelihood of a chance match at each and every locus tested with the Profiler Plus system. While some profiles matched at up to 7 loci, no two profiles matched at all 9 loci used in the Australian laboratories. These calculations justify the conclusion that the DNA database being used by the VFSC is robust.⁹⁸²

Small Population Databases

These population databases are relatively small. Early Australian cases challenged the validity of the likelihood ratios on the basis that the databases were too small to produce reliable calculations of the frequency of alleles occurring in the population at large. The database used in New South Wales for the case, *R v Milat*⁹⁸³ contained over 200 profiles and was found to contain a range of patterns comparable with those found in other databases.⁹⁸⁴ It was asserted in this case that a database comprising 100-150 profiles would be sufficient, provided that the confidence interval was adjusted accordingly.⁹⁸⁵ With time, the size and composition of these population databases has expanded. A more recent New South Wales case, *R v McIntyre*, considered and affirmed the validity of a database comprising 358 profiles obtained from suspects, victims and partners of victims.⁹⁸⁶

As more refined and specific population databases are developed, the significance of matches calculated in respect of a small population has been questioned. As a general principle, the smaller the relevant population the higher the number of matching loci needs to be, or some allowance factored in for the smallness of the population and the possibility of a coincidental match.

Ethnic Databases

DNA evidence is becoming more controversial as databases based on race are developed. The validity of statistical evidence has been challenged in cases where the accused is not Caucasian. Some doubts have been cast on the attempts made to date to identify race as a distinguishing factor in databases, and to calculate the probability of a coincidental match with another person of the same race. In criminal investigations where DNA evidence is being used to establish the identity of the perpetrator, it is unlikely that the ethnic origin of the perpetrator can be known with

981 Ibid.

982 Ibid.

983 *R v Milat* (1996) 87 A Crim R 446; Chapman, 'Recent Judgments on the Admissibility of DNA Evidence' (2001) 5.

984 Ibid. 5.

985 The confidence interval is the range in which the calculation can be confidently applied.

986 *R v McIntyre* [2001] NSW SC 311, Bell J. By January 2000, the NSW database had increased from 358 to 739. A recent Victorian case, *Juric v The Queen* [2002] VSCA 77, 7, involved DNA samples analysed shortly after the introduction of the Profiler Plus system in Victoria, and challenged the validity of the small population database in use at that time.

such certainty that a population subgroup would be used. The possibility that the complainant might be mistaken in a visual identification of a perpetrator's ethnicity has raised concerns about the potential capacity of DNA testing and DNA databases to amplify racial disparities in the criminal justice system.⁹⁸⁷

The general proposition that genetic profiles can be distinguished on the basis of race is still unresolved.⁹⁸⁸ Isolated Australian cases have considered the validity of using a general population database where that database might not comprise or reflect profiles of the ethnic origin of the accused. In one case,⁹⁸⁹ the use of the general population database was held to be inappropriate; in another,⁹⁹⁰ the DNA evidence was admitted, having been found to be based on proper scientific principles which were reliable and accepted by the scientific community.

Some jurisdictions have discrete databases for ethnic groups. In the USA, the UK, New Zealand and some Australian jurisdictions, the DNA database relating to the ethnic population subgroup of which the accused is a member can be taken into account in calculating the likelihood ratio.⁹⁹¹ The VFSC indicated that:

the ethnicity of the suspect is not relevant to any calculation performed to determine the evidential value of matching DNA profiles.⁹⁹²

Where the ethnicity of the true offender is known, then the likelihood ratio will be based on a calculation using that population database. Knowing the ethnicity of the true offender can be problematic. While complainants and witnesses may give evidence as to the ethnicity of the offender this evidence alone may not necessarily be an accurate indication of ethnicity. For database purposes, a detailed understanding of a donor's ethnic background is needed to ascertain the donor's ethnicity. Reliance on evidence as to the ethnicity of the true offender in order to calculate the likelihood ratio could be unsafe.

987 Greg Gardiner, *DNA Forensic Procedures: Potential Impacts on Victoria's Indigenous Community* (2002) 11, at http://192.168.1.1/library/research/papers/Crime/DNA_profiling.htm.

988 VFSC, Submission 23S3, 5.

989 *Latcha v R* (1998) 127 NTR 1, Kearney, Mildren and Bailey JJ. The database was said to be based on 'the general population of the Northern Territory excluding full blood Aboriginals'. It was held that this database was inappropriate, because it was based on only a part of the Northern Territory population, and did not include the whole population.

990 *R v Kami and Kami* (District Court of New South Wales, Shadbolt J, 14 May 2001).

991 The UK has two population subgroup databases for the Afro Caribbean and Indo-Pakistani subgroups and claims the ability of these databases to distinguish between Caucasians and Afro-Caribbeans in nearly 85 per cent of cases. See Duster, 'The inexorable expansion of the DNA forensic database and the looming spectre of an early 21st century phrenology' (2002) 9. The USA has subgroup databases for certain ethnic groups while New Zealand maintains subgroup databases for the Eastern Polynesian, Western Polynesian and Asian populations. New Zealand authorities also obtain detailed background on the ethnic origin of donors of forensic DNA samples, while the VFSC does not identify the donor's ethnicity. The New Zealand authorities have 'detailed ethnic information which indicates racial pedigree over a period of four generations.' See S A Harbison, J F Hamilton and S J Walsh, 'The New Zealand DNA Databank', *First International Conference on Forensic Human Identification*, London, 23-26 October 1999, Conference papers, 4.

992 VFSC, Submission 23S3,2.

Where the offender's true ethnicity is not known, the VFSC therefore uses the Victorian Caucasian database on the basis that this group is the largest in the Victorian community and the offender is most likely to originate from this group.⁹⁹³

The New South Wales Law and Justice Committee's review of the NSW forensic procedures provisions proposed the establishment of a State Institute of Forensic Sciences and recommended that it undertake further research into the calculation of DNA matches. While this Inquiry makes no comparable recommendation for Victoria, it notes that any proposed use of DNA profiles to ascertain personal or ethnic characteristics would require public debate and specific legislative consideration.

ACCREDITATION, AUDITS AND REVIEW MECHANISMS

While Australian forensic procedures legislation has left the operations of the forensic laboratories largely unregulated, in other jurisdictions overseas and in other areas of Australian law which make use of forensic DNA analysis, laboratory standards have been established by law. The following part examines possible models for the regulation of laboratory standards used in other jurisdictions and in other fields of law.

Quality Assessment

Quality assessment of laboratory services operates at many levels, from inbuilt methods to verify the accuracy of results, to systemic reviews of the services provided. This Inquiry, while noting that there are internal controls on the accuracy of the DNA analyses, has focussed on the external means available to monitor the reliability of DNA profiling services.⁹⁹⁴ The three means available under existing arrangements are: NATA accreditation requirements and reviews, the scrutiny afforded DNA evidence in criminal proceedings, and the potential already provided by section 464ZB(1) to prescribe regulations setting laboratory standards and authorising laboratory analysts. The effectiveness of these methods of monitoring laboratory services is considered below.

993 VFSC, Submission 23S3, 2.

994 The Profiler Plus system incorporates methods to check the accuracy of the results obtained during analysis. For example, during amplification a second sample, an 'amplification positive sample' of a known genotype is tested alongside the sample to be analysed, 'to confirm that for a particular amplification batch that the correct genotypes are obtained'. Similarly, during fragment separation, a dye is used as an 'international lane size standard'. See VFSC, *Background/Issues Paper* (2002) 19-21.

NATA Accreditation

In the USA the Federal Government has driven and co-ordinated the accreditation of forensic services used for criminal investigations. As at 1 January 2001, 64 per cent of US laboratories were accredited by an official organisation, most of these by the American Society of Crime Lab Directors - Laboratory Accreditation Board.⁹⁹⁵ The FBI issues standards for forensic laboratories undertaking analysis for criminal investigations and federal funding is attached to compliance with the standards.⁹⁹⁶

By contrast, the Model Bill contained provisions enabling laboratory standards to be prescribed, but falling short of actually requiring forensic laboratories to adopt specified, consistent standards or to be accredited in the field of forensic science. Nevertheless, in Australia, most forensic laboratories involved in DNA profiling for criminal investigation are accredited by NATA. The VFSC is one of eight forensic laboratories around Australia accredited by NATA to undertake DNA profiling for forensic purposes, and the only one accredited in Victoria.⁹⁹⁷ The Inquiry therefore examined the extent to which accreditation requirements could serve to set and ensure compliance with appropriate laboratory standards.

Accreditation Requirements

NATA co-ordinates and manages the accreditation of organisations, laboratories, corporate entities and industry groups involved in the whole gamut of scientific and technical processes. NATA provided submissions and evidence to this Inquiry and presented the following outline of its functions and organisation:

The National Association of Testing Authorities (NATA) has been providing laboratory accreditation since 1947 and is recognised as the national authority through a formal Memorandum of Understanding with the Australian government. The accreditation program covers a variety of fields of testing, including forensic science.

NATA accredits laboratories to the internationally recognised standard, ISO/IEC 17025, "General requirements for the competence of testing and calibration laboratories". This standard incorporates both management and technical requirements. ISO/IEC 17025 was implemented by NATA in September 2000 and replaced the previous laboratory accreditation standard, in use since the early 1990's, ISO Guide 25.⁹⁹⁸

ISO/IEC 17025 guidelines cover 24 separate management and technical requirements including:

995 Greg W Steadman, 'Survey of DNA Crime Laboratories, 2001' (January 2002) *Bureau of Justice Statistics Bulletin*.

996 Federal Bureau of Investigation, *Congressional Statement: Quality Assurance Standards for Offender DNA Databasing Laboratories* (2002) at <http://www.fbi.gov/congress/congress02/datastd.htm>.

997 VFSC, Submission 23, 7-8. The VIFM is engaged in the review of forensic reports, but not in DNA profiling for criminal investigations.

998 NATA, Submission.17, 1.

- confidentiality and undue influence;
- sample handling, including chain of custody requirements;
- complaints, corrective and preventive actions;
- document control, record control and control of non-conforming testing work;
- internal audits, management reviews;
- personnel employment and training; and
- testing methods, measurement traceability.⁹⁹⁹

NATA, through its various specialist committees and panels, accredits and reviews forensic laboratories involved in DNA analysis for criminal investigations, conducts training for laboratory staff, investigates complaints and is involved in the review and development of new processes and technology.¹⁰⁰⁰

Proficiency Training and Assessment

Proficiency training and assessment are integral to the NATA accreditation process. Analysts are required to complete annual proficiency tests to demonstrate not only their own competence, but the reliability of the laboratory processes.¹⁰⁰¹ The laboratory maintains a diagnostic and corrective action program to report and respond to errors.

This involves the reporting of the error through line management, investigations as to how the error occurred and why it was not detected at the time, examination of current procedures and processes with a view to modifying them to prevent recurrence of the problem, and re-examination of affected casework, re-testing and re-reporting if required.¹⁰⁰²

Special Audits

NATA also convenes Proficiency Review Committees which review performance reports and may institute sanctions. The Committees classify discrepancies into three categories, and may impose requirements on laboratories whose performance falls below acceptable levels. The Committees may recommend training, modification of procedures or, in the case of severe or persistent problems, 'sanctions affecting accreditation status'.¹⁰⁰³

NATA indicated that it undertakes two-yearly accreditation reviews, conducted by a panel of peers from the forensic science community. A representative of NATA, Ms Maritta Parsell, informed this Inquiry that NATA will also undertake special audits at

999 M Parsell, *Minutes of Evidence*, 23 June 2002, 126-127.

1000 See Jennifer Evans, 'NATA Update', (June 2001) *The Forensic Bulletin* 12-13.

1001 VFSC, Submission 23, 8.

1002 Ibid.

1003 Ibid 8-9.

the request of the laboratory itself or a third party. This enables a party with an interest in the outcome of a service provided by the laboratory to request an audit.

The review undertaken by the Crime and Misconduct Commission of Queensland¹⁰⁰⁴ revealed the way in which NATA reviews can operate. The John Tonge Centre, administered by the Department of Health, was accredited for health pathology and scientific services. A NATA audit conducted in 2001 identified management and technical requirements for further action and, by September 2002, was satisfied that these requirements had been met.¹⁰⁰⁵

Conclusions: Accreditation Requirements for Forensic Laboratories

In its final report the ALRC recommended that the Commonwealth provisions be amended to require forensic analysis to be conducted only by laboratories accredited by NATA in the field of forensic science.¹⁰⁰⁶ Likewise, the Sherman Review accepted the ALRC approach and also recommended that the Commonwealth provisions require forensic analysis to be conducted by NATA-accredited laboratories.¹⁰⁰⁷

Regulations made pursuant to the *Family Law Act 1984 (Cth)* which govern the use of paternity testing in family law cases, also require that the parentage testing procedure be carried out by a NATA accredited laboratory and in accordance with standards applied by NATA for accreditation.

As the VFSC is already NATA-accredited, it might not appear necessary to introduce a legislative requirement to ensure that only a NATA-accredited laboratory provided forensic analysis for use in criminal proceedings. However, the enactment of legislation that permits data-sharing via CrimTrac between 'participating jurisdictions' means that the admissibility of evidence produced at non-accredited laboratories interstate may become an issue in future Victorian criminal proceedings.

The Committee takes the view that the data-sharing envisaged when CrimTrac becomes fully operational will require a minimum benchmark to be set at a standard that ensures the provision of reliable, consistent and verifiable forensic analysis throughout Australia. The Committee therefore recommends that Subdivision 30A of the *Crimes Act 1958 (Vic)* be amended to provide that only the forensic analysis of forensic DNA samples conducted by laboratories accredited by NATA in the field of forensic science be admissible in criminal proceedings in Victoria.

1004 Crime and Misconduct Commission, *Forensics under the Microscope* (2002) 19.

1005 Ibid.

1006 ALRC, *Essentially Yours* (2003) Recommendation 41-7, 1038.

1007 Sherman, *Independent Review of Part 1D* (2003) Recommendation 7, 3.185-3.187, 53.

Recommendation 10.3 NATA Accreditation in forensic science for laboratories

That Subdivision 30A of the Crimes Act 1958 (Vic) be amended to provide that in relation to the analysis of forensic samples, only forensic reports produced by laboratories accredited by NATA in the field of forensic science will be admissible in criminal proceedings in Victoria.

Prescribing Laboratory Standards

As noted above, there is provision under Subdivision 30A for regulations to be prescribed setting laboratory standards and proficiency requirements for laboratory analysts. The Inquiry considered whether the framework within Subdivision 30A to prescribe laboratory standards would assist in regulating the systems required to conduct flawless forensic profiling.

The effect of prescribing standards for laboratory processes operates by way of the admissibility provisions. Non-compliance with a standard prescribed pursuant to section 464ZJ renders the evidence inadmissible under section 464ZE(1)(c). This form of breach is one that is not subject to the exercise of judicial discretion under section 464ZE(2A).

To the extent that such standards would replicate NATA accreditation requirements, they would be unnecessary. To the extent that they differed from NATA requirements, there could be difficulties in achieving full compliance. If standards were prescribed it is possible that DNA evidence would be disputed on the basis of technical compliance or non-compliance, rather than on the basis of its actual reliability and validity. Australian cases have indicated that evidentiary issues arise even in cases where full compliance with laboratory processes has been achieved. There is scope for experts to disagree on the interpretation of results, to query the integrity of collection processes or to establish flaws in the execution of the sampling procedures.

It is also conceivable that this form of regulation could reinforce an adversarial approach to DNA evidence that pre-trial processes and the full disclosure of laboratory analysis are designed to reduce. Prescribing standards in a scientifically dynamic environment, such as DNA profiling, could also have a stultifying effect on innovation and change in laboratory processes.

Given that the laboratory processes are already subject to review through NATA's accreditation program, and that the evidence relied on in criminal prosecutions can be tested in the courts, the Inquiry concludes that no additional form of statutory regulation is necessary or desirable.

Conclusions: Strategies for the Regulation of Forensic Profiling Services

This Inquiry has examined the way in which the collection, submission and analysis of DNA is regulated under the current provisions, as well as through the accreditation process and the scrutiny given to DNA evidence in criminal proceedings. The Committee recognises that both these forms of review have limitations.

Criminal proceedings can only review cases as they arise and are unable to address systemic or recurrent issues that arise. While the courts have demonstrated a capacity to identify critical issues in DNA profiling, the capacity of the courts to review or reform the systems by which DNA evidence is collected and analysis is limited. As the Sherman Review observed:

It is not ordinarily the role of courts to examine the integrity of systems which underpin the evidence gathering process. They examine matters on a case-by-case basis and usually only examine the means of obtaining evidence when a specific challenge or criticism is made. This means that the great bulk of DNA testing and analysis is never scrutinised by the courts.¹⁰⁰⁸

Similarly, the accreditation regime, while providing scrutiny of laboratory processes, does not assist with management and service delivery issues such as turnaround times and backlogs.¹⁰⁰⁹ Biennial NATA accreditation reviews cannot be expected to prevent or rectify issues on a case-by-case basis, although the potential for NATA to conduct a special audit exists.

However, while no form of regulation can entirely prevent flaws or errors in these processes, the combined effect of accreditation reviews and judicial scrutiny provide the opportunity to review the reliability of analytical processes used in profiling and the interpretation of results. Accreditation requirements monitor the adequacy of laboratory protocols, compliance and proficiency standards. The courts are able to review, on a case-by-case basis, the reliability of the evidence obtained.

The one stage of the DNA sampling process which occurs at the laboratory, but which neither NATA requirements nor criminal proceedings can easily monitor, is the reception and selection of DNA evidence for analysis. This process, at which crucial decisions are made as to which items shall be analysed, is a particularly delicate stage of the process. The Button case indicated the importance of ensuring that, consistent with the obligations of prosecutorial disclosure, the decision-making processes are transparent and well-documented. The Inquiry considered the conflicting pressures on the laboratory at this stage of the process and especially, the implications of its collaboration with investigators.

1008 Sherman, *Independent Review of Part 1D* (2003) 5.9, 64.

1009 Victoria Police, *Tracing the Future* (2002) 48-49.

PROVIDING 'INDEPENDENT' FORENSIC DNA SERVICES

It is important that the relevant experts should not be entirely within the employ of the State. Effective facilities [should be] provided to suspects to permit them a secure, independent scientific scrutiny of DNA samples alleged to relate to them.¹⁰¹⁰

The VFSC's Mission Statement and Executive Instruction include 'the provision of services to the justice system including accused persons or the general public'.¹⁰¹¹ Representatives of the VFSC indicated, however, that the demand for this service has been slight, noting that 'since the introduction of section 464 legislation (June 1990) there have only been a handful of requests for sample re-testing'.¹⁰¹² Mr McLoughlin of Victoria Legal Aid concurred, observing that cases 'where there is a contest about the DNA evidence' constitute only a very small proportion of cases.¹⁰¹³ It is common practice however for defendants to refer case-notes to another forensic scientist for a second opinion.

In Victoria, where the VFSC is the only NATA-accredited laboratory, re-testing must be done at an interstate laboratory that has the facilities to undertake DNA profiling using the Profiler Plus System. Case-notes can be referred either to an interstate laboratory or to the Victorian Institute of Forensic Medicine, which does not use the Profiler Plus system.¹⁰¹⁴

A number of legal organisations expressed concern at the difficulty of obtaining independent verification or re-testing of forensic DNA results. These difficulties, it was submitted, were systemic. The Inquiry was informed that the cost and logistics of obtaining forensic analysis interstate, the smallness and cohesion of the forensic science community and the close relationship between the VFSC and operational police, combine to frustrate defendants' access to non-prosecution forensic services.

Constraints on the Operational Independence of Forensic Laboratories

A Perceived Alignment between the VFSC and the Prosecution

It was put to the Committee that the smallness of the Australian forensic science community made it difficult for defendants to obtain truly independent forensic services. Staff mobility between laboratories limited the extent to which peer review and services provided by other laboratories were not aligned with the prosecution or other forensic services. Dr Freckelton observed that:

1010 Kirby, 'DNA Evidence: Proceed with Care' (2000) 9.

1011 VFSC, Submission 23, 4.

1012 Ibid 5. The VFSC indicated, however, that the demand for laboratory case notes was common.

1013 J McLoughlin, *Minutes of Evidence*, 2 June 2003, 48.

1014 VFSC, Submission 23, 4.

The reality in Victoria, as in many other jurisdictions, is that the pool of available experts in DNA profiling is shallow and almost exclusively to be found within the State facility. For defendants who wish a re-analysis they have had little choice but to seek assistance from one scientist who formerly worked at the Forensic Science Centre and is currently employed at the Victorian Institute of Forensic Medicine or to seek advice interstate, most often in South Australia. For a range of reasons, this can be logistically and financially problematic.¹⁰¹⁵

Representatives from Victoria Legal Aid concurred, observing that the peer evaluations conducted by NATA, the development of technical guidelines and the close communication between forensic laboratories resulted in a probably unavoidable uniformity between the accredited laboratories engaged in forensic profiling for criminal investigations.¹⁰¹⁶

Some legal organisations participating in this review perceived the VFSC to be aligned not only with other forensic laboratories interstate but also with the interests of Victoria Police and the prosecution. The Law Institute of Victoria commented that the VFSC was perceived to be ‘an organ or a command of the police’:

A sample is taken, the analysis from the forensic expert from the science laboratory is put down in a statement form and that is presented by a brief which is presented by the prosecution to the defence.¹⁰¹⁷

Liberty Victoria also perceived the forensic laboratory to be aligned to the prosecution, and commented that the relationship between the prosecution and the forensic laboratory made reliance on prosecution forensic scientists, either in Victoria or elsewhere, ‘highly inappropriate’.¹⁰¹⁸

The Inquiry asked VFSC to comment on the findings of the Crime and Misconduct Commission in relation to the relationship between police and the John Tonge Centre in Queensland, as well as the relevance of questions of independence in Victoria. The VFSC responded by indicating that it believed there was a very low risk of a similar scenario in Victoria and noted:

The VFSC whilst being part of Victoria Police has significant autonomy in the conducting of the scientific examination of items involved in crime investigation.¹⁰¹⁹

Facilitating Defence Access to DNA Profiling

The Inquiry considered whether it would be possible to make operational changes to the way in which DNA evidence is prepared to facilitate timely defence access to forensic services.

1015 Freckelton, *DNA Profiling: Issues Paper* (2002) 33.

1016 Ibid.

1017 D Laschko, *Minutes of Evidence*, 22 July 2002, 91.

1018 Liberty Victoria, Submission 27, 1.

1019 VFSC, Submission 23S4, 6

Arrangements for Defence Access to Forensic Services

When the Queensland Crime and Misconduct Commission reviewed liaison between police and the John Tonge Centre, in response to the issues raised in the Button case, it proposed a number of measures to increase access by defence counsel to forensic science services. The Commission suggested providing defence counsel with direct access to laboratory staff, instituting pre-trial discussions between the defence, the DPP and the forensic scientists, and providing the defence with access to the laboratory database.

The Committee believes that these proposals are worthy of further consideration in this jurisdiction, too. However, it does not believe that these measures, alone, are likely to make a substantial difference to the access available by defendants to unaligned forensic services.

The Prohibitive Cost of DNA Profiling Services

The Inquiry was informed that the cost of DNA profiling makes it prohibitive in many cases. The funds available for DNA analysis will influence the level of use by defendants. Mr McLoughlin observed that the DNA profiling was ‘so expensive that it is very difficult to get access’,¹⁰²⁰ but indicated that lack of funding had not precluded him obtaining independent testing when this was sought.

In cases where there is a contest about the DNA evidence – which is only a very small proportion of cases – it is expensive – the budgetary pressures are so great that there has to be a very high degree of necessity shown ... before they will agree to fund that kind of testing.¹⁰²¹

Liberty Victoria suggested that the lack of funding impeded the capacity of defendants to secure a fair trial, ‘denying accused persons the right to instruct their lawyers to test the evidence in the way the accused person considers appropriate to secure a fair trial’.¹⁰²² Access, Mr Connellan observed, required not only the availability of an independent service,¹⁰²³ but also the availability of funds to pay for this service.

It is likely that the demand for case-notes, rather than for re-testing, is related to the cost of the forensic services. Budgets for legal assistance are already over-stretched. This situation leads to an ‘inequality of arms’ between prosecution and defence. The Committee suggests that account be taken of the expense of DNA forensic procedures when decisions concerning legal aid funding are being considered.

1020 J McLoughlin, *Minutes of Evidence*, 2 June 2003, 96.

1021 Ibid 48.

1022 Liberty Victoria, Submission 27.

1023 Ibid 3.

Structural and Financial Independence

Clearly, the volume of cases submitted by the Prosecution and the close working relationship required between the laboratory and the police informant means that, to some extent, administrative structures to provide financial and managerial independence might not have a significant impact on day-to-day work practices. Participants in this Inquiry acknowledged that close collaboration between investigators and the forensic laboratory on a day-to-day basis may to some extent be inevitable, but proposed that the forensic laboratory be structurally and financially 'independent' of Victoria Police. The Criminal Bar Association, Liberty Victoria, Victoria Legal Aid and the Law Institute of Victoria all advocated that the VFSC be independent of Victoria Police.

The Criminal Bar Association supported the creation of an independent forensic sampling and analysis panel. It envisaged that:

The establishment of a forensic sampling and analysis panel or body that was independent of the police and prosecution would assist in ensuring that matches relied on in court met acceptable standards.¹⁰²⁴

Victoria Legal Aid saw merit in the proposal for an 'independent and separate body', to provide 'proper access for all sides' to forensic DNA services.

The solution may be to take the sampling and storage of DNA out of the hands of the police authorities altogether, and reassign it to an independent collecting service. In such a situation, police would have to go to court to get permission for the sample and then have to go to the independent service for the collection of it. The independent service would be authorised to take three (3) samples - one for the police, one for the donor or person charged and one to be kept for a prescribed period of time. On the face of it, this appears a better way of maintaining the integrity of the DNA collection and profiling system.¹⁰²⁵

Liberty Victoria advocated the establishment of a national forensic institute for defendants:

It is essential in the interests of the integrity of the justice system for a dedicated institute for accused persons be established and funded by the government in order to provide the expert basis for an accused person's preparation for trial.¹⁰²⁶

The then President of the Law Institute, Mr David Faram, noted that there is a perception that the laboratory, even if independent, 'would nonetheless be a creature of the state'.¹⁰²⁷ The Institute stressed the risk of both human and technical error in DNA sampling and sought 'improved and very close controls over sampling, testing and administration, along with public accountability about their use'.¹⁰²⁸

1024 Criminal Bar Association, Submission 13, 7.

1025 Victoria Legal Aid, Submission 15, 3; J McLoughlin, *Minutes of Evidence*, 2 June 2003, 49.

1026 Victoria Legal Aid, *ibid* 1.

1027 V Stojcevski, *Minutes of Evidence*, 92.

1028 Law Institute of Victoria, Submission 21, 3.

This Inquiry has concluded that, while at the day-to-day operational level it may be difficult to distance prosecution and forensic services, at the management level, the forensic laboratory should be at arms' length from its major client groups. The Inquiry considered what options were available to establish the VFSC on a more independent footing.

The VFSC: Organisational Structure proposed by Victoria Police

The Victoria Police report, *Tracing the Future*, proposed a new organisation structure for Victorian forensic services. The structure involved the creation of a Department of Forensic Services, to be managed by a Board with the assistance of a number of consultative committees. While the Forensic Services Department would provide corporate leadership, strategic direction and scientific advice, it would still be within the administration of Victoria Police.

The Board would comprise 'high level representation for Victoria Police, the judiciary, academia, the private business sector, Government and the community'.¹⁰²⁹ Consultative committees would be formed to provide advice in areas such as Ethics, Education, Quality, Information and Technology and Research and Development. This organisational structure is modelled on that adopted in New Zealand by the Institute of Environmental Science and Research (ESR) and the Victorian Institute of Forensic Medicine.¹⁰³⁰

Self-financing Models from Other Jurisdictions

Environmental Science and Research Limited (ESR), New Zealand

The New Zealand laboratory enjoys financial independence as well as administrative independence. Environmental Science and Research Limited (ESR), 'operates as a commercial entity under an independent board of directors'.¹⁰³¹ It enters into contracts with the police to provide forensic services, for which police are charged scheduled fees. The New Zealand government has authority 'to seek a return on its investment from ESR', but it has to date preferred to allow ESR to reinvest surplus funds in its operations.¹⁰³²

The Forensic Science Service (FSS)

The United Kingdom has an independent Forensic Science Service which essentially is contracted to serve the UK police forces. The FSS manages a large database and is

1029 Victoria Police, *Tracing the Future* (2002) 20.

1030 Ibid 21.

1031 Crime and Misconduct Commission, *Forensics under the Microscope* (2002) 20.

1032 Ibid 20.

responsible for most but not all the forensic DNA analysis conducted for criminal investigations in the UK. A recently completed audit of the FSS outlined its status:

Since 1999 the Forensic Science Service has been an Executive Agency of the Home Office and its Chief Executive advises the Home Secretary on forensic science matters. On 1 April 1999 the Agency became a Trading Fund and is required to cover its costs from fees charged to users of its services and deliver a return on capital employed. ... Over 91 per cent of income (£117 million in 2001-02) is from the 43 police forces of England and Wales. The remaining nine per cent (£11 million) comes mainly from HM Customs and Excise and the Crown Prosecution Service.¹⁰³³

Recent studies of the implementation of the forensic procedures regime in the UK have highlighted the difficulties encountered in ensuring that the police forces follow up the matches obtained through the DNA database. The separation of the forensic service from the operational police force, combined with the size of each organisation, has made it difficult to co-ordinate forensic analysis and investigations. The FSS has pointed to the difficulty of obtaining statistics on the use made of results produced through the DNA database, and the operational police forces have indicated the difficulties presented by delays in analysis.

The FSS, which serves England and Wales, and the South Australian forensic laboratory are both also governed by a board, and are separate organisational entities. According to the Queensland CMC:

Board-governed models have perceived independence but, being separate entities, may not have the financial security of forensic science units located in larger, more highly funded government departments.¹⁰³⁴

Conclusions

The Committee accepts the importance of ensuring that the forensic services provided by the VFSC are accessible to prosecution and defence alike, are not prohibitively expensive and that they present and analyse the DNA evidence submitted with objectivity. The cost and the highly persuasive nature of DNA evidence reinforce the obligation on forensic laboratories to provide independent services as required.

The Western Australian review of forensic procedures provisions, conducted before the introduction of forensic sampling legislation, considered the advantages and disadvantages of integrating forensic services with the police force.¹⁰³⁵ The Western Australian review sought 'functional autonomy and operational independence' for its forensic services, 'to be reinforced by financial independence'.¹⁰³⁶ Against a background of plans for the co-location of operational police and police-operated forensic services, the Legislation Committee recommended nevertheless:

1033 National Audit Office, *Improving Service Delivery: The Forensic Science Service* (2003) 17.

1034 Ibid 21.

1035 WA Legislation Committee, *Forensic Procedures and DNA Profiling* (1999) 210.

1036 Ibid.

In the event that DNA analytical facilities are to be co-located ... with other police facilities, the Committee considers that it is highly desirable for the functional autonomy and operational independence of forensic services to be reinforced by financial independence from the police service.¹⁰³⁷

The Western Australian Legislation Committee stressed the importance of ensuring that funding for forensic services is provided directly to the forensic services, and not channelled through the police service.¹⁰³⁸

Similarly, the NSW Legislative Council Law and Justice Committee supported the establishment of a State Institute of Forensic Sciences. This Institute, proposed as a joint initiative by the NSW Police Service, the Attorney-General and the Department of Health¹⁰³⁹ would be responsible for overseeing 'the organisation and management of forensic sciences and the use of technology in criminal investigations and prosecutions'.

Proposal: An Independent Victorian Forensic Service

This review of the VFSC's systems and services has revealed that the Profiler Plus system is accepted in Australian courts, that the processes used at the VFSC are subject to periodic audits, and that the VFSC has itself initiated research and development to advance the use of DNA profiling technology. These achievements underpin the contribution of DNA profiling to Victorian criminal investigations.

The single most exposed, least audited and least regulated aspect of the collection and sampling of DNA evidence appears to be the process for the submission, selection and disclosure of crime scene evidence for analysis. Flaws in the protocols used at this stage of the DNA sampling process have caused some notable miscarriages of justice. *Lisoff's* case indicated the potential for contamination when gaps occur in the continuity chain; the *Button* case illustrated the consequences of forensic sampling decisions made to assist the prosecution. A series of convictions entered in US cases, referred to in Chapter 13, were ultimately overturned when it was discovered that a forensic scientist had consistently presented misleading DNA evidence to assist the prosecution. The landmark US case, the *People v Castro*,¹⁰⁴⁰ revealed the impact of the prosecution's failure to disclose exculpatory DNA evidence obtained from DNA profiling.

Flaws in the processes for the submission, selection and disclosure of crime scene evidence cast doubt on the objectivity of the forensic scientists. In this context, the consistent submissions from legal organisations participating in this Inquiry for the establishment of an independent forensic service warrant close attention. On the one

1037 Ibid 215.

1038 Ibid 34.

1039 NSW Standing Committee on Law and Justice, *Review of the Crimes (Forensic Procedures) Act 2000* (2002) Recommendation 1, 33.

1040 *The People v Castro* 545NYS.2d985 (Sup Crt 1989) (USA).

hand, the smallness and cohesion of the Australian forensic science community facilitate the establishment of uniform DNA profiling systems and encourages compliance with accreditation requirements. On the other hand, however, it militates against the engagement of unaligned forensic scientists, and in the accreditation panels comprising representatives of the accreditation agencies' major clients.

In these circumstances the Committee believes that it is particularly important to ensure that the provision of forensic services is not dependent on policy directions or funding decisions made by the laboratory's major client: the police. Participants in this Inquiry have identified some financial and operational obstacles that stand in the way of defendants obtaining timely access to forensic services.

While, as the Queensland review of forensic services found, it may be possible to make operational changes that improve liaison between the defence, the forensic laboratory and the prosecution in the preparation of DNA evidence, the opportunities for such change are limited while the priorities in forensic sampling are determined by Victoria Police alone.

Other agencies, such as the State Coroner's Office, have developed an arms' length relationship with Victoria Police that recognises the financial and administrative independence of the Coroner's Office, while nevertheless facilitating a close collaborative working relationship. The Committee regards this as an appropriate model for the relationship between the VFSC and Victoria Police.

The Committee notes that in jurisdictions where the forensic laboratory is funded separately from the police service, priorities adopted by police in the collection of DNA samples must be reconciled with the priorities established by the forensic laboratory. As noted in Chapter 1, the VFSC is facing the challenge of meeting increasing demands for its forensic DNA services from the courts as well as from police. While the VFSC is exclusively answerable to Victoria Police it is not in a position to reconcile competing demands from other clients. These difficulties are likely to be exacerbated as demand for DNA profiling increases.

The Committee has therefore concluded that Victorian criminal investigations would best be served by a separate forensic service, seen to be autonomous in its operations and accessible to prosecution and defence. The Committee considers that the VFSC should be established on an independent footing:

- managed by an independent Board; to include representatives of client groups;
- accountable through annual reports to the Victorian Parliament;
- at arm's length from its major clients; and
- funded by a body or department separate from Victoria Police.

Recommendation 10.4 Independent footing for the Victoria Forensic Science Centre

That the Victoria Forensic Science Centre should be established on an independent footing, namely:

- (i) managed by an independent Board, to include representatives of client groups;***
- (ii) accountable through annual reports to the Victorian Parliament;***
- (iii) at arm's length from its major clients; and***
- (iv) funded by a body or department separate from Victoria Police.***

PART E:
DNA SAMPLING AND THE CRIMINAL
JUSTICE SYSTEM

11. THE USE OF DNA EVIDENCE IN CRIMINAL PROCEEDINGS

‘I had,’ said he, ‘come to an entirely erroneous conclusion which shows, my dear Watson, how dangerous it always is to reason from insufficient data.’

The Adventure of the Speckled Band, Arthur Conan Doyle.

INTRODUCTION

Part C reviewed the way in which DNA evidence is collected by operational police and analysed by the forensic laboratory. It revealed the vulnerability of DNA evidence during both collection and analysis, and indicated the importance of establishing and adhering to strict controls at each stage of the sampling process. It also demonstrated the complexity of the technical processes and the statistical methods used to interpret the significance of a match between two profiles.

Chapter 5 considered the impact of the DNA database in linking unsolved crime scenes to offenders. It was found that the inclusion of offenders’ profiles on the DNA database has produced links between offenders and unsolved crime scenes. These links, or detections, require further investigation to establish whether there is sufficient evidence to lay charges. Chapter 6 considered the impact of DNA profiling in criminal investigations in which a suspect has been identified.

This part of the Report examines the way in which DNA evidence is used in the next stage of the investigation, the criminal proceedings. This chapter focuses on the role of DNA evidence in criminal prosecutions and examines how the rules governing evidence generally and expert evidence in particular, have been applied to DNA evidence. It considers whether the current pre-trial processes are effective in identifying the common ground and contested elements of the DNA evidence, and whether the conventional techniques of presentation and cross-examination are effective in clarifying the evidentiary issues for the jury.

Chapter 12 continues this review of DNA evidence in criminal proceedings, with an examination of the provisions governing the admissibility of DNA evidence. These provisions have a crucial role in the operation of the forensic sampling regime, by providing for the exclusion of evidence collected or retained in breach of the forensic sampling provisions, and by establishing penalties for certain serious breaches. The Inquiry considers whether these provisions are, in fact, adequate to regulate the proper collection and use of DNA evidence in Victorian criminal investigations.

Chapter 12 concludes by considering the effect which DNA sampling has had on the operation of certain fundamental principles and notions of criminal justice: procedural fairness and the test of reasonable suspicion. Participants in this Inquiry drew the Committee's attention to ways in which DNA sampling, and particularly DNA databasing, have affected the operation of these fundamental principles. The Inquiry accordingly considered whether the current regime makes sufficient provision for the principles of natural justice to apply.

The final chapter in this Part examines the potential of DNA analysis to advance the cases of offenders claiming wrongful conviction. It considers whether the current legal and administrative processes provide the opportunity for DNA evidence to be used in this way in Victoria and recommends ways to advance the exculpatory use of DNA profiling.

OVERVIEW: THE USE OF DNA IN CRIMINAL PROCEEDINGS

Emerging Issues

This Chapter considers the next stage of the investigation – the prosecution of persons charged with offences for which DNA evidence is relevant. DNA evidence is relevant in a relatively small proportion of criminal proceedings. In cases where the identity of the perpetrator is not at issue, DNA evidence is not relevant. There also continue to be a number of cases where crime scene has not yielded DNA evidence. Even where DNA evidence is relevant, it may be just one of a number of facts to be weighed by the jury in evaluating the strength of the prosecution case.

Data showing the actual number of criminal trials in which DNA evidence has been used is not available. However, some indication of the extent to which it is used in trials can be obtained from the following figures. During 2001/2002, the Magistrates Court committed 2299 persons for trial in the County or Supreme Courts.¹⁰⁴¹ Table 6.2, on page 221, indicates that, over the same period, 422 suspects' samples were analysed, with 229 being inculpated by the results.¹⁰⁴²

While the number of cases in which DNA evidence is relevant may still be relatively small, the impact of DNA evidence in those cases where it is available is much vaunted. Even where the probative value of the DNA evidence is limited, it is believed that its presence will strengthen the prosecution's case. Findlay and Grix found that prosecutors relied on 'the compelling nature of DNA,' especially in cases that relied largely on circumstantial evidence.

1041 Magistrates Court of Victoria, *Annual Report 2001/2002* (2002) 25.

1042 VFSC, Submission 23S1. See also table 6.2 above. It should not be inferred that the proceedings conducted during 2001/2002 related to the cases involving the 229 suspects whose DNA was analysed during that period. The figures are presented merely to indicate the relative number of cases in which DNA evidence is relevant.

[T]he compelling nature of DNA gives it a special relevance for a circumstantial case. A Crown Prosecutor has commented to the review that without the inclusion of DNA evidence, the circumstantial case in question would not have been prosecuted. The inference is that DNA becomes the centrepiece of a circumstantial case and only requires corroboration of the slightest form to confirm its significance.¹⁰⁴³

While DNA evidence may have a compelling effect in criminal trials, caution must be exercised firstly, to ensure that the evidence is clearly presented and fully comprehended and secondly, to ensure that its effect is not disproportionate to its probative value.

The presentation of DNA evidence in trials can be problematic for all participants in the legal process: for expert witnesses required to explain complex material in lay terms, for counsel are required to elicit complex evidence through cross-examination, and for magistrates required to frame appropriate directions to the jury; and for juries evaluating the evidence. Literature on the impact of DNA evidence on criminal prosecutions has revealed some disquiet as to the capacity of the legal system to deal with the complexity and implications of the DNA evidence presented. A recent survey of Australian judges on their handling of all forms of expert evidence has revealed that:

70 per cent of judges conceded that on occasion, they had not understood expert evidence in cases before them and 50 per cent had heard evidence which they could not evaluate because of its complexity.¹⁰⁴⁴

Dr Freckelton observed:

Expert evidence ... can be extremely complex – to a point where it is problematic for lay jurors to be able to assimilate the nuances of disagreement within the scientific community and amongst expert statisticians. The fear is that juries may be confused by statistics and by statements framed in terms of high level probabilities.¹⁰⁴⁵

In relation to DNA evidence in particular, Australian case law provides a number of examples of cases where the admissibility of expert DNA evidence was at issue because of the complexity of the material and the challenges it posed to juries in evaluating conflicting testimony.¹⁰⁴⁶

1043 Mark Findlay and Julia Grix, 'Challenging Forensic Evidence? Observations on the use of DNA in certain criminal trials', (March 2003) 14(3) *Current Issues in Criminal Justice* 269, 272.

1044 Hampel and Ross, 'Trust Me I'm a Scientist, DNA Testing and Fallibility in the wake of *Lisoff and Renton*', (2002) *The Forensic Bulletin* 20.

1045 Freckelton, *DNA Profiling: Issues Paper* (2002) 15.

1046 *R v Keir* [2002] NSWCCA 30, 28 February 2002, Giles JA, Greg James and McClellan JJ. See *R v Karger* [2001] SASC 64, 29 March 2001, Mullighan J; *R v Mitchell* 130 ACTR 48, 18 November 1997, Higgins J; and *R v Gallagher* [2001] NSWSC 462, 4 May 2001, Barr J, where DNA evidence was ultimately admitted, but the complexity and admissibility of the contested evidence was considered.

The Use of DNA Evidence in Criminal Prosecutions

The Inquiry has therefore reviewed the data available on the impact of DNA evidence during criminal prosecutions, beginning with the literature available on the role DNA evidence may play in determining whether a case goes to court and in influencing a defendant's plea.

The first part of this chapter deals with the impact of DNA evidence in pre-trial stages of an investigation: the inculcation or exclusion of suspects, the decision as to whether to proceed to trial and the impact of DNA evidence on a defendant's plea.

The second part of this chapter examines the provisions, rules and case law which govern the way in which DNA evidence is presented and evaluated in trials and considers proposals to streamline and clarify the presentation of this form of expert evidence.

It is difficult to assess the use and impact of DNA evidence on the outcome of criminal proceedings. Within Australia, very little research in this field has been attempted. The Sherman Review wrote to all Australian Directors of Public Prosecutions seeking information on the impact of DNA evidence on criminal prosecutions and was unable to obtain any relevant data. The Review observed that 'more information is needed in this area' and recommended, in relation to the Commonwealth regime:

the establishment of some information gathering system ... to contribute to assessing the effectiveness [of the forensic procedures legislation].¹⁰⁴⁷

The Victorian Office of Public Prosecutions indicated to the Sherman Review that no data was collected by that Office.¹⁰⁴⁸ The Inquiry has therefore had to rely on data collected in other Australian jurisdictions to get some indication of how DNA evidence is being used in criminal prosecutions.¹⁰⁴⁹

With the exception of an early Victorian study, research on the impact of DNA evidence is only just beginning.¹⁰⁵⁰ Michael Briody, a member of the Queensland Police Service, is researching the effects of DNA evidence in criminal prosecutions in Queensland.¹⁰⁵¹ Another unpublished research project in Queensland focussed on the general impact of DNA profiling on the criminal justice system.¹⁰⁵² In New South Wales, Professor Mark Findlay of the Institute of Criminology, University of Sydney,

1047 Ibid 62.

1048 Sherman, *Independent Review of Part 1D* (2003) 61.

1049 Ibid.

1050 J Taupin, *Impact of DNA Profiling on the Criminal Justice System*, Master of Arts Thesis, Department of Criminology, University of Melbourne (1994). See also Henry Roberts, Jane Taupin and Tony Raymond, *The Role of DNA Profiling in Criminal Investigation*.

1051 Michael Briody, 'The Effects of DNA Evidence in Sexual Offence Cases in Court', (November 2002) 14(2) *Current Issues in Criminal Justice* 19.

1052 See J Davies, *The Impact of Forensic DNA Profiling Technology in the Australian Criminal Justice System: A Critical Evaluation*, Honours Thesis, Faculty of Science, Griffith University, 1999.

has recently conducted a review of the New South Wales regime which included a study of the impact of DNA evidence on a cross-section of NSW criminal cases heard during 2002.¹⁰⁵³ Finally, a postgraduate research program is being undertaken by Simon Walsh at the University of Technology, Sydney, which is designed to evaluate the role and impact of DNA profiling in the criminal justice system of major Australian jurisdictions, compared with selected overseas jurisdictions.¹⁰⁵⁴

Anecdotal evidence and case law would suggest that DNA evidence is being used primarily in proceedings relating to offences against the person, especially sexual offences. Findlay and Grix observed in New South Wales:

With the advent of technological advances in this field, we have seen a heightened reliance on DNA evidence in the investigation, as well as the prosecution of criminal offences. ... Particularly with reference to rape (sexual assault), DNA evidence is becoming the pathway to conviction.¹⁰⁵⁵

Briody's recent research in Queensland involves the analysis of several hundred cases taken to finality in Queensland courts. It examines the role of the evidence at the various stages of the process: during the investigation, on arrest, and in court.¹⁰⁵⁶ The preliminary findings indicate that approximately 2 per cent of proceedings relating to sexual offences and less than 2 per cent of those for serious assaults, involved DNA evidence.¹⁰⁵⁷ This tends to confirm the earlier research and anecdotal evidence that DNA's relevance in serious crimes of violence is most relevant in cases where identity is an issue. In this relatively small proportion of cases, the DNA evidence may assume a crucial role in the identification and prosecution of the suspect.

Australian researchers have focussed almost exclusively on the use of DNA evidence in the prosecution of serious offences.¹⁰⁵⁸ Jurisdictions such as the United Kingdom, which have already developed large DNA databases, have then typically widened the range of offences for which DNA samples can be obtained, and experimented with the application of DNA databases to the detection of minor property offences. As far as could be ascertained by this Inquiry, no firm data is yet available – overseas or in Australia – to document the impact of forensic sampling on the prosecution of volume crimes.

1053 Findlay and Grix, 'Challenging Forensic Evidence? Observations on the use of DNA in certain criminal trials' (2003) 269.

1054 See Simon Walsh, 'Evaluating the Role and Impact of Forensic DNA profiling on the Criminal Justice System', Submission to the Independent Review of Part 1D (Forensic Procedures at <http://www.ag.gov.au/clrc/part1D/> and also, www.dnprint.com/news_australia.html, last accessed 22/11/03, for details of the research being undertaken by Simon Walsh, a post-graduate student at the University of Technology, Sydney.

1055 Findlay and Grix, 'Challenging Forensic Evidence? Observations on the use of DNA in certain criminal trials' (2003) 280.

1056 To date Briody has analysed about 200 sexual offence cases, relying on case files from the forensic laboratory and police archives comparing those in which DNA evidence.

1057 Briefing provided at Committee meeting with Queensland Police, 19 September 2002, 4.

1058 Briody, however, will also be researching the use of DNA evidence in volume crime prosecutions, but no published results were available at the time of writing.

DNA EVIDENCE AND THE PROSECUTION PROCESS

Cases Reaching Court: From Investigations to Prosecutions

The Inquiry considered the possibility that the mere prospect or existence of DNA evidence affects the way investigations are conducted, and can affect whether the investigation leads to a prosecution. During the developmental stage of DNA profiling in Australia, DNA profiling was not expected to have a significant impact on a large volume of criminal prosecutions.

It should be noted that the potential power of DNA profiling in criminal investigations should not necessarily be reflected in the numbers of court cases. Much of its impact is behind the scenes; excluding suspects and reducing court load through plea changes and bargaining.¹⁰⁵⁹

A Victorian research thesis¹⁰⁶⁰ which examined the use of DNA profiling in sexual offence cases during 1989-1991, found that only 97 of the 621 cases in which DNA samples were submitted were ultimately analysed. The study revealed that the use of DNA evidence in these cases was not always relevant; if consent and not identity was at issue, the DNA evidence was not required. In the cases analysed, approximately equal numbers of suspects were included and excluded.¹⁰⁶¹ The study examined the role of the DNA evidence in the sexual offence cases and concluded:

The main value of DNA profiling is in the earlier stages of an investigation, before the trial. It is a powerful investigative tool for excluding people falsely suspected of involvement in a crime. It can provide very strong evidence of involvement, and this is often enough to induce the defendant to plead guilty, or to fight the case on consent.¹⁰⁶²

In Victoria, over the period January 2000 to June 2002, DNA analysis inculpated 527 persons in active investigations and excluded the donors of 348 out of approximately 1200 samples analysed.¹⁰⁶³

In relation to sexual offences, assaults and murder, Briody tested the proposition that a higher proportion of cases reach court where prosecutors present DNA evidence.¹⁰⁶⁴ Briody found that DNA evidence 'was a significant predictor of more cases reaching court'. It appears that sexual offence or assault cases with DNA evidence were twice as likely to reach court as those without, and murder cases with DNA evidence were

1059 Patricia Weiser Eastal and Simon Eastal, 'The Forensic Use of DNA profiling', *Trends and Issues Paper 26* (1990) Australian Institute of Criminology, at <http://www.aic.gov.au>, 3.

1060 Jane Taupin, *Impact of DNA Profiling on the Criminal Justice System*, Master of Arts Thesis, Department of Criminology, University of Melbourne. See also Henry Roberts, Jane Taupin and Tony Raymond, *The Role of DNA Profiling in Criminal Investigation*.

1061 Roberts et al, *ibid* 4.

1062 *Ibid* 6.

1063 VFSC, Submission 23S1.

1064 Michael Briody, 'The Effects of DNA Evidence in Sexual Offence Cases in Court', (November 2002) 14(2) *Current Issues in Criminal Justice* 19.

six times more likely to go to court.¹⁰⁶⁵ This confirms the results of other studies which found that cases with DNA evidence ‘tend to go to trial a greater percentage of the time’.¹⁰⁶⁶

However, Briody found that while DNA evidence might be a predictor, it was not necessarily a deciding factor in whether a case proceeded to trial. A number of other factors were found to be equally important in determining whether a case reached court. Decisions not to proceed to court took into account factors such as the likely impact of the proceedings on the victim, any delay in reporting the offence, instances where the complainant was intoxicated, or where the defendant had made no statement to police.¹⁰⁶⁷

In relation to property offences, Briody’s findings suggest that the proportion of prosecutions which used DNA evidence was slightly lower. Less than one per cent of proceedings relating to burglaries and motor vehicle thefts involved DNA evidence. The study tentatively concluded that the role of DNA was ‘primarily to confirm the arrest decision and strengthen the case against the defendant’.¹⁰⁶⁸ No other data is available on the use of DNA evidence in prosecutions for property offences. Even in the United Kingdom, where the DNA database has been used for the detection of suspects in property offences for some years, neither the Forensic Science Service nor the individual police forces have been able to quantify the impact of database detections or investigative sampling of suspects on prosecutions and convictions.¹⁰⁶⁹

While hard data is not available on the extent to which prosecutors rely on DNA analysis, anecdotal evidence suggests an increasing reliance on it. In Victorian criminal proceedings, Magistrate Hannan noted an increasing reliance on DNA evidence, but queried whether this was always justified.

There is the increased use of DNA and other forensic testing as an investigative and prosecutorial tool. ... One sometimes wonders whether there are circumstances where the prosecution has a good case without it, but is now reluctant to proceed when they are aware that DNA might be available and might bolster their case.¹⁰⁷⁰ ... There are certainly cases that come before the court where it would appear to be a strong case even in the absence of the DNA.¹⁰⁷¹

The Victorian Office of the Director of Public Prosecutions essentially confirmed this impression, indicating to the Sherman Review that:

The inclusion of DNA evidence in prosecution briefs in superior courts is now standard rather than exceptional. In all cases where biological material is found at the scene of an alleged offence, and where the identity of the offender is an issue, we

1065 Ibid 7-8.

1066 Ibid. 12, quoting Peterson et al, 1984: xxiii.

1067 Ibid. 13.

1068 Ibid.

1069 See for example, National Audit Office, *Improving Service Delivery: The Forensic Science Service* (2003) 6.

1070 Magistrate Hannan, *Minutes of Evidence*, 2 June 2003, 38.

1071 Ibid 41.

would expect that biological material to be subjected to DNA analysis. However, it will be unusual for the DNA evidence to be the only evidence linking an individual to the crime.¹⁰⁷²

DNA Evidence and Guilty Pleas

The existence of DNA evidence is said to have an influence on the admissions made by suspects in criminal investigations. A Western Australian report on forensic sampling was informed that:

DNA profiling techniques in the United Kingdom has also lead to pleas of guilty – when suspects are told that a link exists between them and an unsolved crime, they tend to admit to the crime rather than take it through to trial.¹⁰⁷³

The Sherman Review accepted the possibility that where there is evidence of a DNA match, more often than not a plea of guilty will ensue'.¹⁰⁷⁴ The Sherman Review was unable to substantiate this, however, finding that no prosecutors in Australian jurisdictions were able to identify the number or types of cases where DNA evidence had an impact on pleas or convictions.¹⁰⁷⁵ In the UK, where a considerable investment in forensic science has been accompanied by periodic audits, data is still not available on the impact of forensic analysis in 'furthering criminal justice'.¹⁰⁷⁶

It is difficult to ascertain how influential DNA evidence is in determining the defendant's plea.¹⁰⁷⁷ Victoria Police indicated to this Inquiry that out of the 414 links or matches made between offenders and unsolved crime scenes, 407 resulted in admissions of guilt.¹⁰⁷⁸ Without further details it is not clear what part the DNA analysis played in the offences investigation or in the admissions made.

In Queensland, Briody's research in relation to sexual offences, assault and murder cases found that the existence of DNA evidence made 'no significant difference' to the likelihood of a guilty plea.¹⁰⁷⁹ Fewer than half the cases surveyed by Briody resulted in a guilty plea. Briody's preliminary conclusion on the impact of DNA evidence in sexual offence cases indicates that:

DNA evidence did not act as a precursor of guilty pleas in sexual offence cases and did not reduce court costs. Rather, its inclusion was associated with cost increases.¹⁰⁸⁰

1072 Sherman, *Independent Review of Part 1D* (2003) 61.

1073 WA Legislation Committee, *Forensic Procedures and DNA Profiling: Report 48* (1999).

1074 Sherman, *Independent Review of Part 1D* (2003) 4.4, 59.

1075 *Ibid* 4.12-4.16, 61.

1076 National Audit Office, *The Forensic Science Service: Improving Service Delivery* (2003).

1077 *R v Galli* [[2001] NSWCCA 504, 12 December 2001, Spigelman CJ, Sully and Adams J; *DPP v Weis* [2002] VSC 23, Cummins J 7 February 2002. See also *R v Mesken* [2000] QCA 139, 28 April 2001, Davies and Thomas JJA, Wilson J.

1078 Detective Inspector D Cowlshaw, *Minutes of Evidence*, 2 June 2003, 19.

1079 Michael Briody, 'The Effects of DNA Evidence on Arrests and Investigations in Sexual Offence Cases in Court', (November 2002) 14(2) *Current Issues in Criminal Justice* 19.

1080 *Ibid* 19.

Conclusions

While there is a clear perception that DNA evidence is having a powerful, sometimes disproportionately strong influence on the cases which reach court, the lack of data makes it difficult to draw any firm conclusions as to the role, impact or effectiveness of DNA sampling in the prosecution process. The forensic laboratory has maintained comprehensive data on the contribution made by DNA analysis to crime detection and criminal investigations, but there is no corresponding data on the impact of DNA evidence on criminal prosecutions.

This type of research has considerably more than academic utility. This Inquiry has found that there is an increasing demand for DNA analysis to detect and prosecute crime, and that this increasing demand is affecting the capacity of the VFSC to meet court deadlines for forensic services. To some extent the VFSC's capacity for expansion is capped by the infrastructure needed and by the scarcity, locally and internationally, of qualified forensic scientists.

In order to plan the provision of forensic services and to reconcile the priority afforded crime detection (through the profiling of samples for the database), criminal investigations (through the timely analysis of DNA evidence for ongoing investigations) and criminal proceedings, data is needed on the extent of the demand for each of these types of services.

Victoria is not the only jurisdiction to encounter this problem. Reviews of UK forensic services have consistently recommended the collection of data on the impact of DNA detections on criminal prosecutions. Within Australia, the Sherman Review recommended that:

Commonwealth and participating State/Territory DPPs [Directors of Public Prosecutions] should record and report publicly on the number of prosecutions in superior courts of record in which DNA was admitted into evidence and on any particular issues or problems which emerged in the courts in relation to the use of DNA evidence.¹⁰⁸¹

Similarly, the NSW Law and Justice report recommended that 'an independent agency, such as the Bureau of Crime Statistics', be funded to collect data and report on the role of DNA in law enforcement success and the impact of DNA evidence in criminal trials.¹⁰⁸²

This Committee also advocates the introduction of systems to collect and report on the use of DNA evidence in criminal proceedings, to enable informed decisions to be made in relation to the effectiveness of current collection and investigative policies and the priority to be given to the forensic services required for these proceedings.

1081 Sherman, *Independent Review of Part 1D* (2003) Recommendation no. 13, 5.110-5.118.

1082 NSW Standing Committee on Law and Justice, *Review of the Crimes (Forensic Procedures) Act 2000* (2002) Recommendations 3 and 4, 58-59.

Recommendation 11.1 The impact of DNA evidence on criminal proceedings

That the Department of Justice, Victoria Police Prosecutions, the Office of Public Prosecutions and the Victorian Courts develop an agreed and consistent process for collecting and reporting to Parliament on the impact of DNA evidence on criminal prosecutions/proceedings, specifically including:

(i) the number of investigations in which DNA evidence is used, indicating the type of offence involved, and specifically identifying serious crimes against the person, sexual offences, assaults, armed robbery, burglary, theft,

and, in relation to prosecutions involving DNA evidence:

(ii) the number of guilty pleas and findings of guilt recorded;

(iii) the number of prosecutions resulting primarily from a DNA database detection;

(iv) the role of the DNA evidence; and

(v) whether the DNA evidence was contested and, if so, on what basis.

DNA EVIDENCE IN CRIMINAL TRIALS

DNA evidence is one form of expert evidence, and Australian courts have applied the general principles governing expert evidence to the emerging sciences of DNA profiling and population genetics. In reviewing the role and impact of DNA evidence on criminal proceedings, the Inquiry was conscious of the need to maintain, as far as possible, consistency between the treatment of DNA analysis and other expert evidence.

It is not unusual, as new forms of evidence develop, for the evidence to be tested and contested until experts and courts have evolved a means of presenting and evaluating the evidence. In reviewing the legislative basis for the forensic sampling regime, and especially in the context of the expanded use of this evidence, the Inquiry focussed on whether forensic sampling laws need to provide clearer guidance to courts on the evaluation of DNA evidence.

The Probative Value and Impact of DNA Evidence

In criminal proceedings, courts have the discretion to exclude evidence which is held to be more prejudicial than probative. Participants in this Inquiry have indicated that DNA evidence can be so compelling, that it may be necessary to take special precautions to ensure that its value is not over-stated.

There appears to be a predisposition to regard DNA evidence as highly probative, even where it has a limited role in the prosecution case. In an early Victorian case,¹⁰⁸³ Hampel J observed that ‘DNA testing is widely regarded as extremely reliable and discriminating’, adding however, that:

Its limitations and particularly limits as to the conclusions which can be drawn from the tests are not generally appreciated.¹⁰⁸⁴

While trial research on the impact of DNA evidence is still in its infancy, a national survey of jurors is currently underway, with the aim of ascertaining the ways in which the presentation of DNA evidence affects jurors.¹⁰⁸⁵ It will examine the impact of DNA evidence on jurors, using surveys, analysis of courtroom proceedings, discussion groups and research into the conduct and outcome of cases involving DNA evidence.

The Impact of Statistical DNA Evidence

Statistics do not prove guilt or innocence, ... but the misuse of statistics can distort or affect the evaluation of evidence in ways which may have an impact upon the outcome of the trial. If they are not questioned or assessed correctly, they may be left simply as ‘compelling’. This is not the correct place for statistics.¹⁰⁸⁶

The significance of a match needs to be clearly appreciated. As outlined in Chapter 10, this involves firstly, establishing the statistical significance of the match and secondly, determining its evidentiary role in the case. The first step involves examining expert evidence outlining the statistical assumptions behind the calculation of the ‘likelihood ratio’ – the possibility that the match was coincidental. In Victorian criminal proceedings, the likelihood of a chance match between two profiles is given as 1 in 98 million. The figures are so large, and the possibility of a coincidental match so remote, that it would be easy for an uninformed person to jump to the conclusion that the donor’s guilt was a certainty. However, this is not the case. As the VFSC observed:

The use of DNA for inculpatory purposes must involve probabilistic reasoning and assessments, which are critical steps in assisting in the determination of identity. There is always a chance that another person is the true offender, and that the suggested offender just happens to have the same DNA profile by chance. This is why the propositions used in the likelihood ratio calculation have particular significance.¹⁰⁸⁷

1083 *R v Lucas* [1992] 2 VLR 109.

1084 *Ibid.*

1085 The survey is being conducted by Rhonda Wheate, a postgraduate at the Australian Defence Force Academy campus of the University of New South Wales, with the support of the National Institute for Forensic Science and Dr Freckelton. See ‘Judging Juries’ (Parts 1 and 2), *The Law Report*, ABC Radio National, 20, 27 August 2002, at <http://www.abc.net.au/rn/talks/8.30/lawrpt/stories/s658458.htm>.

1086 John S Croucher, ‘Assessing the Statistical Reliability of Witness Evidence’, 2003 (23(2)) *Australian Bar Review* 173, 181.

1087 *Ibid.*

The Criminal Bar Association and the Law Institute of Victoria¹⁰⁸⁸ alluded to the danger of these statistical statements being misconstrued. The Association observed that this type of evidence ‘often has quite an overwhelming effect on the listener’. Representatives of the Association indicated:

We regard it as very important that this sort of evidence be given in clearly understandable terms and that what the odds mean in the context of any case needs to be explained very clearly.¹⁰⁸⁹

As noted in Chapter 10, Australian courts have already faced the difficulties involved in appreciating the statistical significance of a match. In some jurisdictions, jury directions have been developed to assist juries in appreciating what conclusions can be drawn from this form of evidence. Mr Greg Connellan QC, representing Liberty Victoria, proposed the development of jury directions in Victoria, and this suggestion is addressed later in this chapter.

The Probative Value attributed to DNA Evidence

The second step in evaluating the significance of a match is to determine the significance of the DNA evidence in relation to the other evidence presented at the trial. This is the responsibility of the jury. As the VFSC indicated:

It is thought by some that matching DNA evidence proves that the suspect was the perpetrator. This is not true.¹⁰⁹⁰

A match between a DNA profile derived from a crime scene or victim’s sample and the profile of a defendant in a criminal prosecution, connects a person to a victim or crime scene, but does not establish the defendant’s guilt. There could be an explanation that was consistent with the defendant’s innocence. For example, it could be claimed that the defendant, or an item containing the defendant’s DNA, was innocently left at the crime scene before or after the crime was committed.¹⁰⁹¹

While the impact of DNA evidence may not yet have been quantified, it is nevertheless undisputed. Findlay and Grix found that juries came to trials with high expectations about the importance and relevance of DNA evidence.

It became very clear that the majority of jurors went into trials with some understanding of and expectations about DNA. Irrespective of whatever the judges said – all judges in every trial we observed said this - that DNA evidence is no more significant than any other evidence in a circumstantial case, the majority and in some cases all jurors said it was more significant.¹⁰⁹²

1088 Law Institute of Victoria, Submission 21, 2.

1089 R Punshon SC, *Minutes of Evidence*, 22 July 2002 85.

1090 VFSC, Submission 23, 5.

1091 ALRC, *Discussion Paper 66* (2002) 821.

1092 Findlay and Grix, ‘Challenging Forensic Evidence? Observations on the use of DNA in certain criminal trials’ (2003) 277, 285.

Jurors had preconceptions about the significance of DNA evidence, even if it played a relatively minor role in the criminal proceedings.

Interestingly, even in cases where DNA did not have a crucial complement part to play in the verdict, all agreed that there should be more DNA evidence presented and that powers to DNA sample should be increased.¹⁰⁹³

The Prosecutor's Fallacy

A common misrepresentation of this evidence has been dubbed 'the Prosecutor's Fallacy', so called because it favours the prosecution case by overstating the implications of a match.¹⁰⁹⁴ This issue became a focus in academic literature when an English court examined the logical fallacy sometimes committed in experts' interpretations of the significance of a match.¹⁰⁹⁵

In explaining the significance of the matching profiles, there are two questions which might be asked in the light of the DNA evidence.

1. What is the probability that the defendant's DNA profile matches the crime sample profile, given that he is innocent?
2. What is the probability that the defendant is innocent, given that his DNA profile matches the profile from the crime sample?¹⁰⁹⁶

The first question assumes the innocence of the defendant, and asks about the chances of getting a match. This is an appropriate question for an expert to answer. The second question assumes that the defendant's profile matches the crime scene profile, and asks about the guilt or innocence of the accused. In order to answer it, it is necessary to have some knowledge about the accused, to have formed a belief on the basis of what else is known about the suspect. 'What else is known about the suspect' might include an alibi, and whatever conclusions the jury might draw about the credibility of the accused's defence. These matters are not ones on which the expert witness can or should express an opinion. The combined 'other knowledge' which a jury brings to bear is termed the 'prior odds'.¹⁰⁹⁷

The Prosecutor's Fallacy is committed when an attempt is made to conclude that a particular defendant is the source of the DNA on the basis of the expert evidence. It is not valid to draw such a conclusion from the statistical evidence of the likelihood of a coincidental match between two DNA profiles.

1093 Ibid.

1094 David J Balding and Peter Donnelly, 'The Prosecutor's Fallacy and DNA Evidence', (1994) *Criminal Law Review*, 711, 713.

1095 *Doheny and Adams v The Queen* [1997] 1 Cr App R 369 (UK).

1096 Balding and Donnelly, 'The Prosecutor's Fallacy and DNA Evidence' (1994) 713.

1097 John Buckleton, 'The Interpretation of Scientific Evidence', *DNA Evidence - Prosecuting Under the Microscope*, Conference, Adelaide, 7-11 September 2001.

Current and Emerging Issues in DNA Profiling Evidence

In view of the persuasiveness of DNA evidence, the Inquiry considered whether unresolved or complex evidentiary issues warranted legislative guidance.

It has been suggested, on the one hand, that major challenges to the validity and reliability of DNA evidence have been resolved. Victoria Police has recommended the introduction of a deeming provision for DNA evidence, on the basis that the general reliability of this evidence has been demonstrated in Australian courts.¹⁰⁹⁸

It has also been suggested, however, that there are still unresolved issues affecting the reliability of DNA evidence. Michael Strutt, for example, observed that:

Although some commentators declared the ‘DNA wars’ between proponents and critics of forensic DNA theory and methodology to have ended in broad consensus in the mid-1990s there continues to be spirited expert debate in forensic science journals over calculation methods used for match odds, validation standards for laboratories and DNA test kits, applicability of Bayes Theorem to match likelihood ratios, verification methods for DNA databases, subpopulation theory and presentation of results in court.¹⁰⁹⁹

The Inquiry therefore reviewed the major unresolved issues arising in recent cases that have relied on DNA evidence in order to assess whether, in the long-term, difficulties with the evaluation of DNA evidence are likely to endure. As noted in Chapter 10, three aspects of DNA evidence, examined there from a technical perspective, are still unresolved in the courts: the interpretation of statistical evidence, the interpretation of DNA results involving mixtures, artefacts and small quantities of DNA, and issues of continuity and compliance with collection and analysis protocols.

The analysis of mixtures using the Profiler Plus system has been shown to be open to interpretation, with experts reaching divergent conclusions as to the number of sources of DNA. Technologically, this is an area where scientific advances are likely to contribute by enabling a more discriminating analysis of very small quantities of DNA. However, the smaller the quantities of DNA extracted from crime scene evidence, the greater the difficulties of contamination-free collection and analysis. Analysis that is more discriminating may also produce results that are more complex, with opportunities for experts to disagree in their interpretation of the profiles obtained.

It is conceivable that, as DNA evidence becomes a ‘more regular and predictable feature’ of criminal proceedings, the initial difficulties which courts faced in evaluating this form of evidence will be overcome in time. In the same way that the validity of the Profiler Plus system was contested until eventually validated to the satisfaction of the courts, the currently contested elements of DNA evidence may also be resolved without legislative intervention.

1098 Victoria Police, Submission 18, Recommendation 18, 9.

1099 Mr Michael Strutt, Submission 24, 38.

While the science and technology of DNA analysis may be validated at the theoretical level, the validity and reliability of any set of results still depends on the flawless conduct of these processes. Streamlined and more automated laboratory processes will assist in tracking samples during the various stages of analysis. Nevertheless, it is likely that issues of continuity will continue to arise in criminal proceedings, because of the vulnerability of DNA evidence, even when stringent collection and handling protocols are applied.

It seems likely, therefore, that DNA evidence will continue to be challenged in criminal proceedings in the foreseeable future. In view of the tendency of Australian courts to admit rather than exclude complex or contradictory evidence, the Inquiry has considered ways in which the consideration of this form of expert evidence could be enhanced.

Presenting Expert DNA Evidence in an Adversarial Legal System

The Inquiry received some evidence as to the difficulties involved in understanding and presenting DNA evidence effectively, identifying the prejudicial effect that undue emphasis on DNA evidence may have,¹¹⁰⁰ and urging further consideration of the way in which DNA evidence is presented and evaluated in criminal trials. The Inquiry therefore considered whether the general evidentiary rules and procedures that apply to guide the jury in the evaluation of expert evidence are adequate. Not only is it important to obtain a balanced view of the potential value of DNA evidence; it is also essential for the community, as potential jurors, to develop an awareness of what DNA can and cannot reveal in criminal proceedings.

While some of the evidentiary issues arising from DNA analysis are particular to this form of evidence, others reflect more general difficulties that may arise when expert evidence is presented in legal proceedings. Appeals against wrongful convictions involving expert forensic evidence have highlighted problems in the way that expert evidence was presented or cross-examined.

What miscarriages of justice ... have demonstrated is the failure of lawyers to make cross-examination an effective means of rendering expert witnesses accountable for what they have said and not said.¹¹⁰¹

Some of these difficulties have been attributed to a certain incompatibility between the scientific and legal approaches to the presentation and evaluation of evidence.

The conflict between various forensic experts, population geneticists and statisticians on 'the meaning of a match' is a prime example of how science and the law sometimes do not mesh.¹¹⁰²

1100 Law Institute of Victoria, Submission 21, 2.

1101 Freckelton, quoted in Hampel and Ross, 'Trust Me I'm a Scientist, DNA Testing and Fallibility in the wake of *Lisoff* and *Renton*' (2002) 20.

In a recent article Hampel and Ross considered the pressures on forensic scientists providing expert evidence in criminal proceedings, and drew attention to systemic shortcomings within the legal system which reduce the effectiveness of the process of examination and cross-examination of expert witnesses.¹¹⁰³ The authors considered the danger that an expert witness can be regarded as part of the ‘prosecution team’ and ‘the perceptions of partiality and bias’ that this can produce. They suggested that the adversarial system had a tendency to distort the presentation of DNA evidence.

Citing a propensity for media reports to present a one-sided perception of the forensic evidence, and a lack of understanding of forensic science within the legal profession, Mr Ross observed that input from forensic scientists could assist in improving the presentation of expert evidence in criminal courts. He noted:

Forensic scientists are in a sound position to comment on aspects of the presentation of expert evidence which can and should improve. Examples of improvements to the presentation of expert evidence in the civil courts are numerous. However, such initiatives are slow to find their way into the criminal courts. Indeed most never arrive.¹¹⁰⁴

It is beyond the scope of this Inquiry to consider general issues relating to the presentation of expert evidence in criminal trials, but the Committee notes that some of the difficulties encountered in the presentation of expert DNA evidence are symptomatic of the more general issues arising when complex technical evidence is adduced in criminal proceedings.

The Duty of Prosecutorial Disclosure

Prosecutorial disclosure of the forensic DNA evidence is a critical element in the identification of contested evidentiary issues and in the presentation of the agreed facts to the jury. The *Button* case highlighted the relevance of this principle in relation to DNA sampling. Here the failure to test all the available crime scene evidence resulted in the omission of analysis that would have exculpated the defendant. As Findlay and Grix observed:

Convenient and comprehensive disclosure by the prosecution is of the utmost importance in order to provide the defence with every opportunity to prepare and develop a case using what is still relatively novel, potentially prejudicial and often extremely complex scientific evidence.¹¹⁰⁵

In a recent extra-curial article on the impact of DNA evidence, Justice Wood noted that the use of DNA evidence in prosecutions must be consistent with the

1102 Ronald S Reinstein, in Connors at al, *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to establish Innocence after Trial* (1996) xxii.

1103 Hampel and Ross, ‘Trust me, I’m a scientist’, *DNA Testing and Fallibility in the wake of Lisoff and Renton*, (2002) 19-20.

1104 *Ibid.*

1105 Findlay and Grix, ‘Challenging Forensic Evidence? Observations on the use of DNA in certain criminal trials’ (2003) 277.

prosecution's obligations to disclose. Justice Wood outlined these obligations as they apply to DNA evidence.

The prosecution is obliged to disclose evidence which is capable of excluding a suspect, and not to conceal or refrain from testing crime stains 'out of fear that they may exclude a suspect'.¹¹⁰⁶

The Victorian criminal justice system already has procedures to streamline the preparation for criminal trials and the identification of contested issues. *The Crimes (Criminal Trials) Act 1999 (Vic)* makes provision for pre-trial procedures to ensure that issues are clarified before the trial. The Act requires full and complete disclosure of the prosecution's opening and the defence's response.¹¹⁰⁷

The Law Institute of Victoria proposed that protocols be introduced to guide courts in evaluating DNA evidence.¹¹⁰⁸ Similarly, representatives of the Criminal Bar Association and Liberty Victoria addressed the difficulties which counsel, juries and judicial officers face in the evaluation of DNA evidence.

Some courts have considered pre-trial processes as a means to dilute the adversarial flavour of expert evidence and to encourage full and timely disclosure of the prosecution's case. The Inquiry's attention was drawn to a series of landmark cases which have advocated that:

- forensic reports contain full disclosure of the laboratory process; and
- pre-trial processes be developed for the early consideration and identification of evidentiary issues arising out the forensic DNA analysis.¹¹⁰⁹

In the USA, for example, the judgment of Sheindlin J in *The People v Castro*¹¹¹⁰ set out guidelines for the future evaluation of DNA evidence. The 'Castro Guidelines', proposed by Sheindlin J, involved a routine pre-trial conference with a requirement that the party proposing the evidence be required to give discovery of specified matters.¹¹¹¹ These included full details of:

- laboratory books, data, graphs and notes;
- details of the method used to calculate the population's allele frequencies, the data pool for each locus, and certification of the rule used to declare a match and determine allele frequency;
- a statement detailing contaminants, observed defects or laboratory errors, reasons for these, and any tests conducted to detect them; and

1106 Justice J R T Wood, 'Forensic sciences from the judicial perspective' (2003) 23(2) *Australian Bar Review* 137, 152, 4.

1107 Ss 6, 7.

1108 Law Institute of Victoria, Submission 21, 2.

1109 In the UK case, *Doherty and Adams v The Queen* [1997] 1 Cr App R 369 (UK) the Court of Appeal identified assumptions to be tested in the evaluation of DNA evidence.

1110 *The People v Castro* 545NYS.2d985 (Sup Ct 1989) (USA).

1111 Freckelton and Selby, *Expert Evidence: Law, Practice, Procedure and Advocacy* (2002) 502.

- a chain of custody for the documents.¹¹¹²

In New Zealand, following a case in which anomalies in the analysis and reporting of DNA profiling had a profound impact, two reviews of the procedures and systems involved were conducted. These reviews both recommended the introduction of pre-trial processes to identify and explore evidentiary issues. The report noted the desirability of prosecution and defence counsel being supplied with sufficient information 'to allow any issues about interpretative judgements made by ESR analysts to be identified at an early stage'.¹¹¹³

Full documentation, to be made available to the defence, was thought to be necessary for each crime investigation. It was recommended that forensic reports contain more information as to the procedures utilised during the profiling process, as well as notes, peer review comments and other supporting documentation produced during analysis. Both reviews recommended that the laboratory make available a 'trail' documenting adherence to standard procedures as well 'possible alternative explanations for DNA profiles'.¹¹¹⁴

Defining the contents of the Forensic Report

A critical document in the disclosure of the prosecution case is the forensic report. Section 464ZD requires a forensic report to be provided to the donor of the sample. While the legislation does not define the 'forensic report', the VFSC currently provides a forensic report in a standard format, which covers the following items:

1. The qualifications of the analyst.
2. Items Examined.
3. Results.
4. Statistical Analysis.
5. Conclusion.¹¹¹⁵

The standard wording of the conclusion (which may be varied depending on the particular database used) is:

In my opinion these findings, when considered in isolation from other information, provide extremely strong support for the proposition that the blood on the swab-stick in the holder labelled 'A' and the reference sample 'B' have the same source.

Representatives from Victoria Police and the Victoria Police Forensic Science Centre recommended that a definition of 'forensic report' be inserted in Subdivision 30A,¹¹¹⁶

1112 Ibid.

1113 Eichelbaum and Scott, *Report on DNA Anomalies, Counsel Report* (1999) para 5.

1114 Ibid para 31.

1115 VFSC, Submission 23S1.

noting that the lack of definition of the forensic report created difficulties for those required to prepare the report.

In section 464ZD, where the legislation requires us to disclose certain matters to the defence ... it talks about a forensic report. Unfortunately the forensic report does not appear to be defined anywhere in that Act, so that is difficult for us to comply with, to provide a copy of something when we don't really know what it is.¹¹¹⁷

Legal associations whose members represent defendants in criminal proceedings advocated that more information be provided in the forensic report.¹¹¹⁸ Representatives of the Law Institute of Victoria observed that conflicting expert evidence is inevitable, given the number of variables involved in DNA analysis.¹¹¹⁹ Mr Faram proposed that the agreed facts be presented to the jury and advocated openness in the provision of expert evidence, analytical notes etc to the defence. He canvassed the possibility of a panel of expert witnesses being established, to enable both the prosecution and defence to have access to this expertise, and suggested that:

a number of expert witnesses governed by strict procedures, rules, rights, duties and obligations become member[s] of a specific DNA forensic panel, and their opinions and their analyses can be utilised quite freely by both police and members of the profession.¹¹²⁰

To guard against a perception of inter-dependence between the police and the forensic laboratory, Mr Faram suggested that agreed DNA evidence be presented independently and that there be:

A requirement for judges to make it known to a jury early on that this evidence was being presented independently for and on behalf of both sides.¹¹²¹

Similarly, Mr Ross agreed that there is a need for more liaison, pre-trial, to identify and reconcile differences of opinion or interpretation between expert witnesses where possible.

In a written report and in presenting evidence to the court, the onus is on the scientist to clearly spell out the weight and significance of their findings, including any limitations. ... Not enough is done, pre-trial, with the prosecutor or defence counsel, to discuss the findings and opinions of forensic scientists.¹¹²²

Findlay and Grix have also supported the development of an 'agreed facts' approach between the prosecution and the defence, while warning that there is also the potential

1116 Victoria Police, Submission 18, Recommendation 19, 9-10.

1117 Snr Sgt A O'Connor, *Minutes of Evidence*, 22 July 2002, 14.

1118 It would appear that in the early years of forensic sampling in Victoria, a more restricted understanding of what was to be communicated in the forensic report was applied. According to a Western Australian inquiry, in the absence of a definition of the forensic report, Victoria Police provided a statement: 'that blood was taken from a particular prisoner on a particular date'. See WA Legislation Committee, *Forensic Procedures and DNA Profiling: Report 48* (1999) 154.

1119 D Laschko, *Minutes of Evidence*, 22 July 2002, 90.

1120 Ibid 92.

1121 D Faram, *Minutes of Evidence*, 22 July 2002, 92-3.

1122 Mr Alastair Ross, Submission 21, 2.

‘to foster a familiarity’ that might induce complacency about the quality of the DNA evidence presented.¹¹²³ The Inquiry therefore reviewed the steps taken in other jurisdictions, and in other branches of law, to define the contents of the forensic report and to establish a process for identifying agreed and contested facts in a less adversarial way.

Guidelines for Disclosure and Pre-trial Procedures

It was put to the Inquiry that the current adversarial proceedings have a tendency to polarise the positions taken by experts while, in a less adversarial context the expert witnesses might identify common ground or misapprehensions that have given rise to conflicting interpretations of the results. Mr Ross recommended pre-trial conferences to assist in identifying and resolving controversial or conflicting evidence.

Pre-trial conferences, perhaps under the auspices of the trial judge, would be particularly useful where there are scientists with opposing views appearing for the prosecution and defence.¹¹²⁴

Reducing the adversarial nature of expert testimony would reap particular benefits in the field of DNA analysis. As noted in Chapter 10, a difficulty faced in the evaluation of expert evidence currently is the small pool of experts available to re-examine DNA evidence. Further, in Victoria the VFSC is the only laboratory which uses the Profiler Plus system, making it difficult for an alternative local expert to be found with equivalent expertise in the system on which the evidence is based.

Pre-trial Conferences

Pre-trial conferences and the identification of agreed facts by expert witnesses clearly depend, above all, on the timely provision of a well-documented forensic report. The early involvement of the defence in decisions as to the selection of items for analysis and the conduct of tests for elimination purposes would also increase the possibility of identifying agreed facts once the forensic analysis has been completed. The Inquiry therefore regards the involvement of defence and prosecution representatives at an early stage of the forensic analysis as essential in the development of guidelines and documents for the streamlined presentation of DNA evidence in criminal trials.

Expert Testimony and the Hearsay Rule

Recent Australian cases have reinforced the application of the hearsay rule to expert evidence relating to the forensic laboratory analysis of DNA samples. In *R v Sing*,¹¹²⁵ evidence as to the processes actually used to carry out the DNA analysis was required from the staff responsible for undertaking these processes. It was held that the

1123 Findlay and Grix, ‘Challenging Forensic Evidence? Observations on the use of DNA in certain criminal trials’ (2003) 281.

1124 Mr Alastair Ross, Submission 21, 2.

1125 *R v Sing* [2002] NSWCCA 20, Hodgson JA, Levine and Howie JJ, 13 February 2002.

evidence of the supervising scientist was confined to the established procedures for testing samples. The failure of the prosecution to call the laboratory staff who undertook the actual processes represented ‘a serious gap in the prosecution case’, and left open the possibility that the defendant lost ‘a realistic chance of either having the DNA material excluded, or at least significantly weakened’.¹¹²⁶

Similarly, in the Victorian case, *R v Ryan*¹¹²⁷ the prosecution relied on expert evidence from the leading forensic scientist at the laboratory. The witness indicated that his evidence was based on computer-generated printouts, the value of which was not put before the jury. The court held that the evidence was inadmissible, as it was:

dependent upon a factual substratum of work and investigations about which no evidence was adduced before the jury.¹¹²⁸

In both these cases, the gaps in the expert testimony would have been filled, if more comprehensive documentation had been available prior to the trial. The full disclosure of the prosecution’s DNA evidence at an early stage in the pre-trial process removes or reduces the possibility that full supporting evidence is not produced at the trial.

Existing Regulations and Guidelines on DNA Evidence: Other Jurisdictions

In *Latcha v The Queen*¹¹²⁹ the Northern Territory Court of Appeal produced guidelines for the presentation of data required to identify and resolve evidentiary issues using pre-trial procedures. Under the *Latcha* guidelines the Crown is required to present detailed data on the results and on the methods and calculations used in the analysis, and any disputes in relation to the DNA evidence are to be resolved using the pre-trial procedures available in the Northern Territory.

Another feature of the *Latcha* guidelines that warrants consideration in the context of Victorian criminal trials is the requirement for expert DNA evidence to be presented and, where possible, issues to be identified and resolved in pre-trial processes. The Guidelines are set out in full below.

Latcha v The Queen (The ‘Latcha Guidelines’)

1. Whenever DNA evidence and statistical evidence based thereon is to be adduced, the Crown should serve on the defence prior to the committal hearing a statement or statements from the expert or experts the Crown intends to call, which provide details of the DNA testing carried out, the nature of the matching DNA characteristics between the DNA in the crime sample and the DNA obtained from the defendant, and details as to how the calculations of the likelihood ratios have been carried out which are sufficient for the defence to scrutinise the basis of the calculations.

1126 Ibid.

1127 [2002] VSCA 176.

1128 Ibid.

1129 (1998) 127 NTR 1.

2. Provided that the expert has the necessary data, it may then be appropriate for it to be indicated how many people with the matching characteristics are likely to be found in Australia, or in a more limited relevant subgroup, for instance, the sexually active males in the Darwin area, depending on the circumstances of the case.
3. If the Crown intends to supplement or change the DNA evidence or the statistical evidence based thereon, after the committal hearing, it should serve such additional statements as are necessary to comply with guideline (1) in sufficient time prior to the trial for the defence to be able to meet that evidence.
4. The forensic section of the Northern Territory Police Department should make available to a defence expert, if requested, the databases on which the calculations have been based (but not information which identifies particular individuals included in the databases). Any failure to do so in time for the defence expert to be available to assist the defence at the trial may lead to the exclusion of any statistical evidence at the trial.
5. Wherever possible, sufficient of the crime scene sample should be kept by the forensic section of the Northern Territory Police Department for re-testing, and made available to the defence for that purpose, upon request.
6. It is not necessary for the Crown to lead evidence from an expert in population genetics or from another scientific expert as to the statistical validity of the databases kept by the forensic section of the Northern Territory Police Department where the defence notifies the Crown that this is not in issue, or where objection is not taken at the trial.
7. A scientist other than a population geneticist or an expert in a statistical discipline may have sufficient qualifications derived from professional experience and personal familiarity with the data on the relevant database and published population statistics to be permitted to give evidence of the likelihood ratios in the relevant population. If the Crown proposes to adduce evidence of this kind from such a scientist, the Crown should serve on the defence in accordance with guidelines (1) or (2) a statement of the scientist's qualifications and experience.
8. Disputes as to the admissibility at trial of DNA and statistical evidence, including the qualifications of witnesses, should be determined wherever possible by utilising the procedure provided for in s 26L of the Evidence Act 1939 (NT).
9. Experts called to give statistical evidence should be led by the Crown as to any assumptions made in their calculations which, even though widely accepted, are not supported by empirical research, including:
 - (a) Hardy-Weinberg equilibrium;
 - (b) where the offender is of a racial group or subgroup for which there is no valid database and a general database has been used which does not take that fact into account, that fact.

10. Experts should not give evidence as to the likelihood that it was the defendant's DNA found at the crime scene or use terminology suggesting that he or she is expressing such an opinion.¹¹³⁰

The Family Law Act 1984 (Cth)

Consistent with the development of pre-trial guidelines is the approach taken under the *Family Law Act* in relation to paternity testing reports. Forensic laboratories engaged in DNA analysis for family law proceedings are governed by a more detailed statutory regime than those engaged in DNA analysis for criminal investigations.

The *Family Law Act* prescribes both the content of the forensic report and the procedures for the pre-trial 'negotiation' of evidentiary issues. Forensic laboratories engaged in DNA analysis for family law proceedings are also subject to regulations made pursuant to the *Family Law Act*. These regulations set out the requirements for forensic laboratories and the contents of forensic reports. Regulation 21M requires reports to be produced in accordance with a specified format (set out in Form 5, Schedule 1) and states that a report not provided in accordance with this regulation 'is taken to be of no effect'.¹¹³¹

The Committee sees merit in further examining the approach adopted in the *Family Law Act*.

Conclusions

While the guidelines will assist in the early identification of contested evidence and in the preparation of the defence case, the production of such detailed reports is likely to add to the workload of the forensic laboratory. At present, this level of documentation is available to defence on request but is not included in the forensic report. The VFSC has indicated that further documentation has been sought in relation to only a small proportion of cases using DNA evidence, and that re-testing is rarely sought.¹¹³²

It is difficult to ascertain whether the lack of opportunity or lack of need underlies the limited challenges to DNA evidence in Victorian trials. The provision of more detailed reports may lead to the identification of evidentiary cases, where currently lack of timely access has precluded this path of inquiry.

1130 Freckelton, *DNA Profiling: Issues Paper* (2002) 19.

1131 Division 2 of the Regulations prescribes in some detail who may conduct the procedures, the standards required to ensure the sterility and security of the procedure, and the time frame for completion of the analysis. Regulation 21L requires the laboratory to complete the blood group and tissue typing testing with 6 and 3 days respectively and, in the case of DNA typing, requires the procedure to be completed 'within a reasonable time'. Regulation 21G, for example, requires a syringe to be sterilised and disposable, while Regulation 21I prescribes the way the sample container is to be sealed and the witnessing of the procedure.

1132 VFSC, Submission 23, 4-5.

The Inquiry is reluctant to propose the introduction of guidelines for all cases involving DNA evidence, when issues may arise in only a small proportion of these cases. However, the Inquiry has also formed the view that, in the long term, the early and full disclosure of the DNA evidence is likely to reduce and clarify the DNA evidentiary issues in criminal trials.

The Committee has therefore concluded that the *Latcha* guidelines represent a sound starting point for the development of appropriate protocols for Victorian criminal proceedings. The Committee favours the introduction of guidelines to clarify the content of the forensic report and to achieve, as far as possible, pre-trial agreement on the expert evidence and on the issues to be contested. As the *Latcha* guidelines relate to the Northern Territory criminal justice system, Victorian guidelines would need to take into account the particular legislation and pre-trial processes already available within the Victorian criminal justice system.

The case law and submissions made to this Inquiry reiterate the need for more comprehensive reports of the DNA analysis undertaken for criminal proceedings. Despite some divergence in rulings as to the admissibility of DNA evidence, there is striking uniformity in the calls for greater pre-trial disclosure of the DNA evidence and its methodological and scientific bases.

The Inquiry therefore recommends that a Working Group, comprising all the relevant stakeholders in the presentation of DNA evidence in criminal trials, be convened to determine a definition of the forensic report and guidelines for the conduct of pre-trial procedures which will provide the information needed to evaluate the DNA evidence at the trial.

Recommendation 11.2 Defining the forensic report

That the Department of Justice convene a Working Group to report to the Attorney-General, with representatives from the National Association of Testing Authorities, the Victoria Forensic Science Centre, the Office of Public Prosecutions, the Law Institute of Victoria, Victoria Legal Aid, and the Criminal Bar Association, to develop a comprehensive definition of the content of the forensic report.

The Use of Accreditation Reports in Criminal Proceedings

In reviewing what should, and what need not be included in the forensic report, the Inquiry considered the implications of requiring accreditation reports to be available as evidence of laboratory processes. In a recent article the then Director of NIFS, Alastair Ross, highlighted the implications for forensic laboratory management of permitting the use of laboratory accreditation reports to be used in criminal proceedings. Mr Ross noted that laboratories should be encouraged to become accredited and to submit to the periodic reviews that are required as part of the accreditation process. However, if accreditation assessment reports are used to cast doubt on the validity of the results obtained in individual cases, laboratories will be reluctant to proceed with accreditation. Ms Hampel and Mr Ross observed that:

Accreditation assessment reports used by laboratories are being selectively used by legal counsel to undermine the integrity of the laboratory and its processes and procedures. A system that selectively attacks the improvements it demands is a system with some problems.¹¹³³

The Inquiry recognises the public interest in achieving the accreditation of forensic services. Against this must be weighed the importance of ensuring that relevant evidence is available in criminal proceedings for the fair and efficient administration of justice. The Committee considers it appropriate that the Working Group consider whether accreditation documents should be available for scrutiny in criminal proceedings.

Recommendation 11.3 Development of pre-trial guidelines for DNA evidence

That the Working Group proposed in Recommendation 11.2 above consider a proposal for the development of a protocol or guidelines for the pre-trial preparation and identification of agreed and contested elements of DNA evidence for criminal trials.

Terminology

The Law Institute of Victoria stressed the importance of standardising the terminology used in forensic reports and in developing some guides to the interpretation of DNA typings. It noted that ‘this could become a useful tool not only for scientists in labelling samples and describing tests consistently but also for legal representatives in interpreting results’.¹¹³⁴ It recommended the preparation of a table of standard terminology, setting out common identifiers and their implications and proposed:

[t]hat protocols for appropriate terminology be developed so that scientific jargon is minimised, perhaps with sanctions for failure to adhere to them.¹¹³⁵

The Criminal Bar Association also observed, along the same lines:

A complaint experienced by the Association concerning the use of DNA evidence is that the evidence is sometimes presented in language that is very difficult to understand. This may not always be of benefit to the prosecution or defence. It is important that evidence of a DNA match be presented in language that is easily comprehended.¹¹³⁶

The Committee supports the proposal by the Law Institute and Criminal Bar Association to take steps to increase the uniformity of the terminology and presentation of expert DNA evidence in criminal trials. As noted in the previous chapter, the Committee supports the encouragement of uniform Australia-wide

1133 Hampel and Ross, ‘Trust Me I’m a Scientist, DNA Testing and Fallibility in the wake of *Lisoff* and *Renton*’, (2002) 19-20.

1134 Law Institute of Victoria, Submission 21, 2-3.

1135 Ibid 2-3.

1136 Criminal Bar Association, Submission 13, 7.

provisions regulating the standards and processes adopted in forensic DNA analyses for criminal investigations.

Recommendation 11.4 Glossary of technical terms

- (i) That the Victoria Forensic Science Centre compile a glossary of scientific and technical terms used in the analysis of DNA evidence in Victoria; and***
- (ii) That Victoria Police, through its representation on the CrimTrac Board of Management, propose the adoption of the glossary by all Australian forensic laboratories conducting DNA analysis for criminal investigations.***

Presenting Forensic DNA Evidence by Certificate (Deeming Provisions)

Victoria Police proposed that a deeming provision be inserted in the Victorian forensic sampling provisions, perhaps modelled on deeming provisions that apply to the chemical analyses of drugs. It was proposed that:

Legislation should allow scientific evidence from VFSC staff to be given by certificate.¹¹³⁷

On the other hand, as noted above, there were also calls for more detailed forensic reports and indications that issues of continuity and laboratory procedures were still unresolved. Representatives of Victoria Legal Aid observed:

One of the problems with the certificate is that it increases the likelihood that a court would leap from whatever high number of probability is in the certificate to that being a probability that the accused is guilty.

Section 149AB(2) of the *Evidence Act 1958 (Vic)* already provides that if a fact is an ‘agreed fact’, defined under section 149AB(1) as one ‘that the parties to a proceeding have agreed is not, for the purposes of the proceeding, to be disputed’, evidence is not required to prove the existence of that fact. This provision applies generally to evidence.

Queensland has inserted a deeming provision dealing specifically with DNA evidence. Section 2 of the amended *Evidence Act 1977 (Qld)* now provides that:

A certificate, in the approved form, purporting to be signed by a DNA analyst and stating any of the following matters is evidence of the matter -

- (a) that a stated thing was received at a stated laboratory on a stated day;
- (b) that the thing was tested at the laboratory on a stated day or between stated days;
- (c) that a stated DNA profile has been obtained from the thing;
- (d) that the DNA analyst -

1137 Victoria Police, Submission 18, Recommendation 18.

- (i) examined the laboratory's records relating to the receipt, storage and testing of the thing, including any test process that was done by someone other than the DNA analyst; and
- (ii) confirms that the records indicate that all quality assurance procedures for the receipt, storage and testing of the thing that were in place in the laboratory at the time of the test were complied with.

Under section 95A(6) a party may seek leave to challenge a matter stated in the certificate, but the discretion of the court to grant leave is limited. It must be satisfied that 'an irregularity may exist in the receipt storage or testing' or that 'it is in the interests of justice that the person be called to give evidence'. The Queensland provision therefore does not rule out the possibility of a challenge to the evidence submitted by the prosecution; the opportunity still remains for the defence to cross-examine the expert witnesses on their evidence.¹¹³⁸

The results of DNA analysis can be open to differing interpretations.¹¹³⁹ For example, experts differed in their opinions as to the number of contributors whose DNA is present in a mixed sample.¹¹⁴⁰ In *R v Lisoff* experts contested the significance attributed to bands occurring in DNA analyses undertaken using the silver staining technique.¹¹⁴¹ While refinements in profiling technology and the resolution of problems associated with the presentation of complex evidence may reduce the range of contested evidentiary issues, it is unlikely that these issues will ever be entirely eliminated. From a technical perspective, even with technological advances, the possibility of flawed execution, differences of interpretation and the disputed significance of the results will remain.

Recent Australian case law indicates the courts are requiring more rather than less evidence as to the actual processes used in DNA analysis. The Committee noted the considerable attention given to the validity of DNA evidence by Victorian courts. In two of the most recent Victorian cases, *DPP v Devaldez* and *R v Juric*, the challenge to the validity of the evidence resulted in a complex and lengthy examination of the processes used to obtain the relevant DNA profiles. Similarly, *Sing's* case and *Ryan's* case indicated that testimony from laboratory staff could be crucial in completing the prosecution's DNA evidence.

1138 Similarly, it has been argued that DNA evidence could be treated in the same way as evidence of blood alcohol content in drink-driving cases. However, there are certain fundamental differences between the role of these types of forensic evidence. Whereas the blood alcohol content is the key element required to prove a drink-driving offence, the significance of matching DNA profiles depends on the circumstances of the individual case. And whereas the test for blood-alcohol content reveals only the results sought for that occasion, the DNA sample can be put to other uses in that and other criminal investigations. The analogy between DNA profiling and breathalyser test results raises the same issues as were canvassed in relation to blood and chemical analysis.

1139 For a more detailed discussion of these issues see Chapters 10 and 11.

1140 See for example *R v Renton* [2001] QCA 403 (25 September 2001) Williams JA, Chesterman and Mullins JJ.

1141 *R v Lisoff* [1999] NSW CCA 364.

The Inquiry was informed that the forensic report, in its present short form, did not necessarily provide sufficient information for the defence to assess the reliability of the results, thereby postponing the evaluation of DNA evidence until cross-examination can take place. Dr Freckelton observed:

A number of presentational matters related to the statistical and biological base of DNA profiling results, highlighted by English decisions, continue to be important for the fair presentation of DNA evidence by prosecutors. Often DNA reports are short-form and not easily evaluated, the accessibility of the evidence depending substantially on the oral presentation in court of the scientific evidence.

Recent reviews of the provisions applying in the Commonwealth and New South Wales have emphasised the need to improve the understanding and evaluation of DNA evidence in criminal trials. The ALRC recommended legislative amendment to the Commonwealth provisions to specify that:

The prosecution has a duty to provide defendants with reasonable pre-trial notice of all relevant crime scene samples in order to give them an opportunity to have such samples independently analysed.¹¹⁴²

The ALRC and the NSW Legislative Council Standing Committee on Law and Justice both proposed that jury directions be instituted,¹¹⁴³ and recommended further legal education for judicial officers and counsel in DNA analysis.¹¹⁴⁴

Taken together, these recommendations reveal a tendency to require forensic reports to provide more information, and at an earlier stage of proceedings than is currently the practice. They reflect a recent trend in Australian courts to ascertain not merely the protocols or standards applying to the conduct of forensic DNA analysis, but also the actual steps taken. Australian courts have proceeded beyond their initial concern as to the validity of the profiling system, to inquire into the validity of the specific processes used to obtain the evidence at issue.

A deeming provision might have the effect of delaying or closing off, rather than ventilating the consideration of the DNA evidence, and of reducing the opportunities to reach pre-trial agreement on any contested elements of the evidence. The Committee concluded that deeming provisions relating specifically to DNA evidence were not appropriate at this stage for two reasons. Firstly, as noted above, under the *Evidence Act 1958 (Vic)* facts relating to DNA evidence which have been agreed by the parties need not be proven at the trial. Secondly, the Committee believes that it would not be appropriate or desirable to ‘deem’ the evidence produced by DNA sampling to be incontrovertible when there remain a number of grounds on which the reliability of the evidence may be contested.

1142 ALRC, *Essentially Yours* (2003) Recommendation 44-4.

1143 Ibid Recommendation 44-2. NSW Standing Committee on Law and Justice, *Review of the Crimes (Forensic Procedures) Act 2000* (2002) Recommendation 8, 67.

1144 ALRC, *ibid* Recommendation 44-1, 44-3.

Jury Directions

Australian case law is divided on whether complex, conflicting expert evidence should be admitted and, if so, whether a warning or direction should be given to the jury to assist it in evaluating the evidence presented.

In cases where the basis on which the expert evidence conflicted was clear, albeit complex, the evidence has generally been admitted. In *R v Karger*, complex and conflicting expert evidence on the validity of the Profiler Plus system and on the reliability and interpretation of DNA profiles obtained from very small quantities of DNA was put to the jury.¹¹⁴⁵

In *R v Juric*¹¹⁴⁶, however, the Victorian Supreme Court excluded some of the DNA evidence available on the basis that there was no evidential foundation on which a jury could evaluate the conflicting expert testimony presented. As noted in Chapter 10, it was found that conflicting evidence as to the reliability of DNA evidence could be put to the test ‘where there was a factual or scientific basis provided by each of the experts for the competing opinions given ... upon which they [the jurors] could come to a rational conclusion for preferring one opinion over the other’.¹¹⁴⁷

In some cases, difficulties have arisen as a result of the way in which expert evidence was presented, rather than as a result of the complexity or conflict inherent in the evidence. This was the problem that the court faced in *Noll*,¹¹⁴⁸ where the court was faced with difficulties in understanding the conflicting evidence presented by expert witnesses.

The Criminal Bar Association described the difficulties faced by lawyers in understanding and presenting complex DNA evidence in trials and indicated that there was a need for clear and simple explanations of the statistical ‘odds’ and their significance.¹¹⁴⁹

Often people who are preparing these cases find it difficult to come to grips with the technical nature of the material they are provided with. If they find it difficult then juries are likely to find it difficult as well.¹¹⁵⁰

Where the evidence is admitted, jury directions, employed to assist juries to appreciate the probative value of complex evidence, are used to prevent or correct misapprehensions in the presentation of DNA evidence, such as the Prosecutor’s Fallacy.

Jury directions have been developed to warn jurors of the Prosecutor’s Fallacy and of the impact of statistical expressions of probability.¹¹⁵¹ Juries are also warned not to

1145 *R v Karger* [2001] SASC 64.

1146 [2002] VSCA 77, 29 May 2002 per Winnecke P, Arden and Chernov JJA.

1147 *Juric v The Queen* [2002] VSCA 77.

1148 *R v Noll* [1999] VSCA 164; [1999] 3VR 704, Phillips CJ, Ormiston and Callaway JJ.

1149 *Ibid* 85.

1150 *Ibid*.

attempt to evaluate the other evidence at the trial statistically in order to calculate the probability of the accused being guilty.

Liberty Victoria proposed the development of proper directions by the court to juries on 'the analysis of scientific evidence and the use they may make of it in any given case'.¹¹⁵² The ALRC also favoured the development of a model jury direction, recommending that:

In order to provide better guidance for judges and juries, the judiciary should develop a model jury direction for use where DNA evidence has been admitted in criminal proceedings.¹¹⁵³

The advantage of a model jury direction is that it enables courts to take a consistent approach to the instruction of juries. A disadvantage, however, is that a model direction does not necessarily account for the case-by-case differences which may require a more 'tailored' direction to be given.

This Committee has formed the view that, before contemplating the introduction of a model jury direction, it is preferable to focus, during the pre-trial processes, on the clear identification of evidentiary issues and the streamlined presentation of agreed facts. The Committee does not recommend requiring a jury warning to be given.

Conclusions: Evaluating Expert DNA Evidence in Criminal Proceedings

It is clear from the case law and scientific literature that the different interpretations of forensic analysis represent valid divergences between experts. It is also clear that these differences can ultimately be resolved in the courts. The Committee is therefore concerned at the moves towards limiting the opportunity to cross-examine the DNA evidence submitted in criminal proceedings. The Committee takes the view that the criminal justice system should not quarantine the examination of one form of evidence, and that the discretion should remain with the court to consider the issues relating to the examination of evidence on a case-by-case basis.

Further, the Committee is aware that the extension of judicial scrutiny – prompted initially by the need to come to terms with the complexity of the DNA evidence – has led to questioning as to the simple objectivity of evidence previously unchallenged fingerprint analysis. Bearing in mind the renewed scrutiny of the validity of this evidence in a recent British case,¹¹⁵⁴ in this Committee's view it would be unwise to pre-empt the further examination of DNA evidence in courts. DNA evidence and the capacity to deal with complex expert evidence is part of a wider challenge faced by courts in evaluating technical evidence. The proposals outlined above are equally

1151 See for example, where the jury was warned that it was inappropriate to apply Bayes Theorem and a 'Lisoff' type jury warning.

1152 Liberty Victoria, Submission 27, 3.

1153 ALRC, *Essentially Yours* (2003) Recommendation 44-2.

1154 'Finger of Suspicion', Panorama, broadcast on *ABC Television*, 23 September 2002, available at <http://news.bbc.co.uk/1/hi/audiovideo/programmes/panorama/1429484.htm>.

applicable to other forms of evidence. The Committee therefore takes the view that there should be no change to the current provisions, whereby decisions as to how the DNA evidence is to be treated are made on a case-by-case basis.

Legal Education and Training

The almost mythical power associated with DNA evidence, a lack of background on the part of juries and practitioners, and the significance of DNA evidence make it imperative for those involved with the presentation and evaluation of DNA evidence to understand it.

The difficulties encountered not only by juries but also by legal counsel and judicial officers in presenting and evaluating technical and often conflicting DNA evidence has prompted repeated calls for more legal education in this area. A New Zealand case and ensuing inquiries into forensic services provided for criminal investigations addressed the lack of information on the part of the lawyers and the court, about the profiling process and the implications of the forensic report presented at the trial. The Report concluded:

The effective operation of the system depends upon counsel involved ... having sufficient knowledge and understanding of the methods involved in DNA profiling and the principles underpinning interpretation of results as well as sufficient information about the results obtained in the particular case to make appropriate judgments on the best way to deal with the evidence.¹¹⁵⁵

The report recommended the introduction of training programs to ensure that those involved in criminal proceedings be informed on 'the principles of interpretation of DNA evidence'.¹¹⁵⁶ The ALRC also considered proposals for pre-trial information sessions and further legal education to assist judges and counsel to comprehend the implications of the DNA evidence presented in criminal trials.¹¹⁵⁷ The ALRC suggested that:

Judges and juries may need some form of education or training to consider properly the relevance and weight of the evidence in particular proceedings. Additionally, legal practitioners may need training to competently present DNA evidence and identify any issues regarding reliability or admissibility.¹¹⁵⁸

Dr Freckelton adverted to the importance of ensuring that judges, magistrates and legal practitioners are well informed on the implications of the scientific and statistical results presented in DNA evidence.

1155 New Zealand Ministry of Justice, Sim and Guzman, *DNA Evidence – The Need for ESR Reporting Protocols* (1999) 7.

1156 Eichelbaum and Scott, *Report on DNA Anomalies* (1999) 10.

1157 Recommended by the Human Genetics Society of Australasia and discussed in ALRC, *Discussion Paper 66* (2002) 890.

1158 ALRC, *Essentially Yours* (2003) 408-409.

Much in relation to the presentation of DNA profiling evidence to courts comes down to the level of facility and understanding regarded as possessed by judges, magistrates and legal practitioners about scientific matters.¹²³⁸

The Committee proposes that expert witnesses involved in the presentation of DNA evidence be assisted through professional training programs to clarify the presentation of complex evidence in criminal proceedings. It envisages that this training might bring together legal professionals and experts to develop a closer understanding of each other's roles. The Committee recommends that bodies responsible for continuing legal education develop suitable information programs to assist in the presentation and comprehension of DNA evidence.

Recommendation 11.5 Legal education on presentation of DNA evidence

That the Law Institute of Victoria, the National Institute of Forensic Science and other agencies involved in the provision of continuing legal education develop programs on the presentation of forensic evidence for forensic expert witnesses and legal practitioners.

Recommendation 11.6 Legal education on DNA evidence for judicial officers

That the Judicial College of Victoria develop legal education programs to assist judicial officers in understanding and giving jury directions on DNA evidence.

1159 Freckelton, *DNA Profiling: Issues Paper* (2002).

12. DNA SAMPLING AND THE PRINCIPLES OF CRIMINAL JUSTICE

Chapter 11 reviewed the way in which DNA evidence is used and evaluated in criminal proceedings. This chapter continues the Inquiry's examination of DNA in criminal proceedings, focussing on the provisions which govern the admissibility of this evidence and penalise unauthorised or improper collection, retention and use of DNA forensic material and information. It considers whether the current provisions are adequate to ensure and encourage compliance by law enforcement agencies with their obligations in relation to the collection of evidence in criminal investigations.

This chapter also considers how the DNA sampling provisions affect or are affected by the operation of the fundamental principles of the criminal justice system: the test of reasonable suspicion and the notion of procedural fairness and the privilege against self-incrimination. This chapter begins by discussing the admissibility and breach provisions which regulate the conduct of law enforcement agencies, by providing for the exclusion of the evidence and punishment of a breach.

ADMISSIBILITY ISSUES

Current Admissibility Rules and Provisions

The question of admissibility is pivotal to the Inquiry, because it is the most direct means to encourage compliance with the legislative requirements governing the proper collection of DNA evidence, and directly weighs the legal rights and interests of the accused against the interests of the Crown in the presentation of the evidence.

The court has a general discretion to exclude evidence on the ground that it is more prejudicial than probative. It also has the discretion to exclude evidence which 'was obtained in circumstances which rendered it unfair to use it against the accused'.¹¹⁶⁰ This discretion has been used to exclude evidence, such as confessions, which were not given voluntarily.

Finally, it has the discretion to exclude evidence on the basis of public policy – that the evidence has been obtained unfairly or illegally. The principles relevant to

¹¹⁶⁰ J D Heydon, *Cross on Evidence*, (6th Australian ed, 2000) 795.

determining the admissibility of evidence improperly obtained are set out in the leading High Court case, *Bunning v Cross*¹¹⁶¹ applied in Victoria by *R v Warrell*.¹¹⁶²

In exercising the discretions available on the grounds of fairness or public policy, the courts weigh competing public interests: the public interest in bringing to justice those who commit criminal offences, as against ‘the public interest in the protection of the individual from unlawful and unfair treatment’.¹¹⁶³ The admissibility provisions relating specifically to DNA evidence should be considered in the context of the general discretions available to the courts.

Section 464ZE: Admissibility Rules relating to DNA Evidence

This section examines the provisions in Subdivision 30A governing the admissibility of DNA evidence. The admissibility rules set out in section 464ZE provide that:

Subject to sub-section (4) [regarding the admissibility of video-recordings] and section 464ZGO [relating to laws of other jurisdictions], evidence obtained as a result of a forensic procedure conducted on a person, or from a sample voluntarily given by a person ... is inadmissible as part of the prosecution case in proceedings against that person for any offence [in the following circumstances]:

- (a) the requirements of sections 464R to 464ZA, sections 464ZF to 464ZFB, sections 464ZGB to 464ZGD or section 464ZGF (as the case may be) have not been complied with; or
- (ab) a copy of a forensic report relating to the procedure required by section 464ZD ... had not been given or sent to that person [as required]; or
- (b) the procedure was not conducted in accordance with the prescribed standards, if any; or
- (c) any sample taken was not analysed -
 - (i) in accordance with the prescribed standards, if any; or
 - (ii) if the regulations so require, by an analyst authorised under section 464ZB; or
- (d) any sample taken and any information which may identify the person ... should have been but has not been destroyed...; or
- (e) the evidence was obtained as a result of a procedure conducted in accordance with an interim order which subsequently is not confirmed under section 464V(7).

In essence, sub-sections (a) to (e) describe three types of possible breaches of the forensic sampling provisions:

- ‘procedural requirements’ concerning obtaining the donor’s consent, the conduct of the procedure, and the process for seeking and granting court orders (sub-ss (1)(a) and (ab));

1161 (1978) 141 CLR 54.

1162 [1983] 1 VR 671.

1163 J D Heydon, *Cross on Evidence* (2000) 796.

- defects in laboratory processes, where these have been regulated by prescribing standards or authorised analysts (sub-ss (1)(c) and (d)); and
- the unauthorised retention of the sample and related information (sub-ss (1)(e) and (f)).

Section 464ZE provides no discretion to admit evidence obtained through defective laboratory processes or the unauthorised retention of the DNA sample and related information. These are serious breaches which, under section 464ZE, mandate the exclusion of the evidence so obtained.¹¹⁶⁴ The legislation distinguishes between serious breaches – breach of laboratory standards or unauthorised retention and use of the forensic evidence – and minor or procedural breaches.

Victorian courts have the discretion to admit evidence obtained despite a procedural breach of the requirements of Subdivision 30A. Section 464ZE(2) sets out the factors which the court may consider in exercising its discretion.

A court may admit evidence ... otherwise inadmissible by reason of sub-section (1)(a) or (1)(b) if

- (a) the prosecution satisfies the court on the balance of probabilities that the circumstances justify the reception of the evidence; or
- (b) the accused consents to the reception of the evidence.

Section 464ZE(2A) provides that, 'in determining whether the circumstances justify the reception of evidence otherwise inadmissible', the court may have regard to the following:¹¹⁶⁵

- (a) the probative value of the evidence, including whether equivalent evidence or evidence of equivalent probative value could have been obtained by other means;
- (b) the reasons given for the failure to comply with a provision...
- (c) the gravity of that failure and whether it deprived the person of a significant protection under this Subdivision;
- (d) whether that failure was intentional or reckless;
- (e) the nature of the requirement that was not complied with;
- (f) the nature of the offence alleged against the person and the subject-matter of the proceedings;
- (g) whether the reception of the evidence would seriously undermine the protection given to persons under this Subdivision;
- (h) any other matters the court considers relevant.

Specifically, section 464ZE(3) prescribes that 'the probative value of the evidence does not by itself justify the reception of the evidence'.¹¹⁶⁶ This provision is highly

1164 In practice, however, no standards have been prescribed in relation to laboratory processes.

1165 S 464ZE(2A).

relevant in the evaluation of DNA evidence when, as shown in Chapter 11, such evidence is frequently given a high probative value in criminal proceedings.

Section 464ZF(10) and its counterpart provisions in relation to adult and child suspects (sections 464T(8) and 464U(10) respectively) provide that:

A failure of a court to comply with sub-section (9) [requiring the court to give reasons, and to cause a copy of the order and reasons to be served, and requiring the subject to be informed about the use of reasonable force] does not invalidate any order made by it but constitutes non-compliance for the purposes of section 464ZE(1)(a).

Victoria Police recommended that ‘legislation should provide that a mistake in the order does not invalidate the sample taken.’¹¹⁶⁷ However, the Committee believes that this effect is already achieved through the provisions cited above, and no further legislative action is required.

The Commonwealth Provisions

The Commonwealth legislation, like the Model Bill, makes a distinction between serious and minor breaches, and takes the breach of destruction requirements to be a serious breach. Section 23XY provides that, where forensic material is retained after it was required to be destroyed, any results of the analysis are inadmissible if adduced by the prosecution in any proceedings against the person.

Section 23XX provides that where other breaches of the legislation have occurred, the court has the discretion to admit or exclude the evidence, taking into account factors similar to those set out in the Victorian provisions.

Exercising the Judicial Discretion

This Inquiry considered how the courts exercise their discretion and whether section 464ZE has caused DNA evidence to be excluded from criminal trials.

Trends in Admissibility Rulings

A recent case where a Victorian court was required to consider whether a procedural breach justified the exclusion of the evidence obtained was *DPP v Devaldez*.¹¹⁶⁸ The court weighed the seriousness of the police member’s failure to seek the suspect’s consent to the buccal swab against the seriousness of the offence, the effect of the breach on the reliability of the evidence obtained, and the impact of the breach on the

1166 S 464ZE(3).

1167 Victoria Police, Submission 18, Recommendation 14.

1168 *Director of Public Prosecutions v Devaldez*, [2003] VSCA 29.

defendant's rights. In that case the evidence was ultimately admitted, on the basis that the breach did not affect the validity of the evidence obtained.

There is insufficient Victorian case law on the admissibility of DNA evidence obtained in breach of Subdivision 30A to draw any conclusions about the approach of the Victorian courts to the exercise of this discretion. New South Wales and English case law reflect a tendency for courts to exercise their discretion to admit DNA evidence obtained or retained in breach of the relevant provisions.

Two recent New South Wales cases involved the collection of DNA samples using powers available to the police outside the ambit of the forensic procedures provisions. In *R v Daley* a suspect was subjected to a breathalyser test and a DNA profile obtained from the breath sample.¹¹⁶⁹ The suspect was subsequently charged and convicted of sexual offences involving eight complainants, and DNA evidence was pivotal in linking the defendant to two of the complainants. NSW police had identified the defendant as a suspect, and wished to obtain his DNA sample before interviewing or charging him. The suspect was stopped ostensibly for a random breath test.

Whatever else this test was, it was anything but 'random'. [The constable] inspected the accused's vehicle, observed that the registration label did not carry the appropriate receipt evidencing registration, and arrested the accused and drove him to the Parramatta police station.¹¹⁷⁰

The suspect was issued with a traffic infringement notice and, without his knowledge, the breath sample was submitted for DNA analysis. When the DNA profile from the suspect's breath sample was found to match that taken from two of the complainants, the suspect was interviewed, searched, charged and asked to consent to a forensic procedure. The defendant acquiesced to DNA sampling. Simpson J admitted the evidence obtained from the analysis of the breath sample, while emphasising that:

It would be only in a most exceptional case that I would consider that the use of the power of arrest and detention for an ulterior purpose could be condoned.¹¹⁷¹

In this case His Honour took into account the severity of the offences, the likelihood of the suspect re-offending, and the fact that the suspect was driving an unregistered and uninsured vehicle and thereby 'exposed himself to proper arrest and detention'. The degree of intrusiveness of the methods used by the police and the reliability of the evidence that had been obtained were also considered relevant. Simpson J found that the intrusion involved in the taking of the sample was 'minimal' and that the means by which the evidence was obtained posed 'no real danger ... that its reliability would be affected'.¹¹⁷²

1169 *R v Nicola* [2002] NSWCCA, Spigelman CH, Barr and Bergin JJ, 11 March 2002.

1170 *R v Daley* [2001] NSWSC 279, Simpson J, 14 September 2001.

1171 *Ibid.*

1172 *Ibid.*

In another New South Wales case, *R v Nicola*,¹¹⁷³ a suspect in the investigation of a sexual assault had made it clear to the police that he refused to consent to a forensic procedure. While he was at the police station, he drank from and discarded a Styrofoam cup which the police informant collected and submitted for forensic analysis. The defendant claimed that the police had ‘acted improperly in obtaining the Styrofoam cup and having it examined’.¹¹⁷⁴ The DNA evidence was admitted at the discretion of the court. It was held that the retrieval and submission was not improper but that, if it were improper, the evidence would nevertheless have been admitted at the magistrate’s discretion.

A New South Wales case that considered a similar issue was *R v Tye*.¹¹⁷⁵ Here a highly probative DNA blood sample had been obtained illegally and the NSW Supreme Court heard a civil application for the return of the sample. The application was refused after the Court balanced the probative value of the sample against the public policy issues involved.¹¹⁷⁶ Similarly, an irregularity in the making of an order for the sampling of a relevant suspect – where the applicant was not authorised under the legislation to make the application – was found not to invalidate the order made.¹¹⁷⁷

Judicial Discretion or Legislative Provision

The Inquiry considered whether the exclusion of evidence obtained in breach of Subdivision 30A should remain a matter for determination at the discretion of the court or whether it should be prescribed by legislation.

Although the current Victorian provisions require evidence obtained in breach to be excluded, unless, at the discretion of the court, certain specified factors justify the admission of the evidence, it is rare for DNA evidence to be excluded on the basis of a breach. As noted above, a similar trend in the exercise of the judicial discretion appears in other jurisdictions.

In a Background Paper commissioned by this Inquiry, Dr Freckelton outlined the public policy considerations relevant here.

A tendency has existed in many contexts for illegally and improperly obtained evidence generally to be admitted in spite of the impropriety attaching to how it was procured. It may be that, given the uniqueness of DNA profiling evidence, and the important privacy and other considerations relevant to samples being taken, analysed and stored, special measures need to be put in place to provide for its inadmissibility unless all relevant legislative protocols have been adhered to - to the letter.¹¹⁷⁸

1173 *R v Nicola* [2002] NSWCCA, Spigelman CJ, Barr and Bergin J, 11 March 2002.

1174 *Ibid* para 42.

1175 (1996) 84 A Crim R 147.

1176 *Ibid*.

1177 *Kerr v Commissioner of Police and Ors* [2001] NSWSC 637, Studdert J, 27 July 2001.

1178 Freckelton, *DNA Profiling: Issues Paper* (2002) 41-42.

The Criminal Bar Association recommended that the current legislation be amended to prevent DNA evidence obtained (as well as the current provision for evidence retained) in breach of Subdivision 30A from being admitted other than in exceptional circumstances.

Samples that have been obtained in breach of legislative requirements should be inadmissible in criminal proceedings unless exceptional circumstances justify its reception.¹¹⁷⁹

The Association put the view that it is necessary to support compliance with the provisions governing collection of the samples, to enforce the safeguards that have been enacted for that purpose.

If one has a system dealing with the circumstances in which - trying to cover the field - DNA samples can be obtained, then breaches of that system should result in the evidence - at least there should be a strong presumption against the admissibility of that material.¹¹⁸⁰

This position is consistent with the approach taken by Gillard J first in *Lednar's* case, and later in *Kirsch v Dolman*.¹¹⁸¹ In *Kirsch v Dolman* an action was brought against a member of the Victorian Police Force seeking a review of an order for a compulsory procedure, on the basis that the legislative requirements had been breached. This action concerned an order made in the absence of the plaintiff, a 'relevant suspect', for a compulsory procedure to be carried out. The order was ultimately quashed and costs awarded against the police informant.¹¹⁸² Gillard J affirmed the importance of compliance with all statutory requirements in relation to forensic procedures orders. His Honour observed:

The legislation has been carefully drawn to ensure that the interference with the rights of the individual are kept to a minimum [and concluded that] it is absolutely vital that members of the force and Magistrates ensure that, before any orders are made under any of the sections in subdivision 30A, all statutory requirements have been satisfied.¹¹⁸³

Gillard J went on to emphasise:

The provisions in sub-division 30A substantially encroach upon the rights of the individual. The legislation has been carefully drawn to ensure that the interference with the rights of the individual are kept to a minimum. It is absolutely vital that members of the force and Magistrates ensure that, before any orders are made under any of the sections in sub-division 30A, all statutory requirements have been satisfied. This present matter is another example where insufficient attention was paid, by both the defendant and the Magistrates' Court, in respect of the application concerning the plaintiff.¹¹⁸⁴

1179 Criminal Bar Association, Submission 13, 4.

1180 R Punshon SC, *Minutes of Evidence*, 22 July 2002, 84.

1181 [2001] VSC 234.

1182 *Kirsch v Dolman* [2001] VSC 234, 5.

1183 *Ibid* para 10.

1184 *Ibid* 2-3.

On the other hand, it can also be argued that circumstances may arise where the breach is less significant, and less detrimental to the accused, than the evidence is probative and valuable to the Prosecution. On this basis, it may be desirable to retain the judicial discretion, allowing for the admissibility of DNA evidence to be determined on a case-by-case basis.

Conclusions

The Committee believes that compliance with the requirements for the collection and destruction of forensic material is fundamental to the effective operation of the forensic sampling regime and therefore supports, in principle, laws which affirm the importance of compliance with these requirements. This serves a public policy objective – to protect the public interest in ensuring that law enforcement agencies comply with the obligations placed upon them.

The Committee takes the view that it is more appropriate for a magistrate to exercise the discretion on a case-by-case basis than for the legislature to establish overarching laws for the admission or exclusion of such evidence. For this reason, it favours the retention of the current provision, enabling the admissibility of DNA evidence to be determined at the discretion of the court in relation to minor breaches of Subdivision 30A.

The Collection of DNA Reference Samples: Admissibility Issues

At present, the admissibility provisions define a breach in relation to the provisions governing the process of obtaining and analysing DNA samples which include: obtaining the donor's consent, the application and grant of court orders, the conduct of the procedure and the retention and use of the DNA sample and related information. The admissibility provisions do not address the collection of DNA samples using powers or methods that are outside the ambit of Subdivision 30A. This section considers the admissibility issues raised by these methods of obtaining DNA. The implications for regulating the collection of this material were addressed in Chapter 4.

DNA Evidence collected within Victoria outside Subdivision 30A

R v Nicola and *R v Daley* showed the potential for DNA samples to be obtained from suspects without their knowledge or the authority of the court. The Criminal Bar Association recommended that penalties currently applying to the improper use of DNA samples be applied also to their improper collection. This proposal would have the effect of penalising the unauthorised collection of DNA reference samples from suspects.

There is already a general judicial discretion to exclude evidence on the basis of public policy or fairness considerations. As noted in Chapter 4, there is scant case law

to assist the Inquiry in establishing whether the DNA evidence obtained from samples collected from suspects other than pursuant to sections 464R, 464T and 464U would be admissible in criminal trials. The Committee has formed the view that the current provisions can already be construed not to authorise the collection of DNA samples from suspects other than in accordance with Subdivision 30A. The Committee believes that if this construction is applied, Subdivision 30A can be regarded as ‘covering the field’. From the evidence available to this Inquiry, the Committee concludes that the existing rules of evidence are adequate to determine, on a case-by-case basis, whether DNA evidence obtained in Victoria outside the ambit of Subdivision 30A should be admitted or excluded.

DNA Evidence from other Jurisdictions

While the matching provisions inserted in the legislation of participating jurisdictions regulate the sharing of data through the database, they do not appear to prevent or regulate the sharing of information ‘off database’. Concern has been expressed at the possibility of data-sharing arrangements allowing the use of evidence obtained from unauthorised forensic procedures or the informal collection of DNA evidence to be obtained by law enforcement agencies.

DNA evidence could in future be obtained from non-participating jurisdictions. A Victorian case, *R v Phuc and Van*,¹¹⁸⁵ concerned the collection of DNA reference samples in the USA and the other in Vietnam, both without the knowledge of the donors. In that case, where the donors were not defendants, it was held that the provisions of section 464 did not apply if the samples were obtained in another jurisdiction.

The Committee believes that where the evidence was not obtained under Victorian law, a safeguard should be provided for the examination of the quality of the evidence relied on.

Recommendation 12.1 Admissibility of DNA evidence from other jurisdictions

That in determining whether DNA evidence originating in a jurisdiction which is not a participating jurisdiction for data-sharing purposes under section 464 of the Crimes Act 1958 (Vic) should be admissible in any Victorian criminal proceedings, the court be required to take into account whether the collection and analysis of the DNA evidence would have complied with the requirements of Victorian law.

1185 [2000] VSC 242.

OFFENCES AND PENALTIES

Current Offences under the Victorian Provisions

Section 464ZGG of the Victorian legislation imposes a penalty of a maximum of one year or a level 8 fine (120 penalty units) for a person who engages in conduct which ‘causes the supply of forensic material’ or who intends or is reckless as to the supply of such material for ‘prohibited analysis’. Prohibited analysis is defined in subsections 464ZGG(2) and (3) as analysis ‘for the purpose of deriving a DNA profile for inclusion on the database’ when the forensic material is required to be destroyed.

Sections 464ZGI, 464ZGJ and 464ZGK, which relate to the matching, recording, retention and disclosure of information revealed by a forensic procedure, impose the same penalty.

There are a number of circumstances where a profile could be retained without due authorisation, and where current procedures do not indicate how this error or omission could be detected and prosecuted. Some such instances are:

- where an interim order is disallowed;
- where criminal proceedings do not result in the conviction of a suspect/accused; and
- where a conviction is overturned on appeal.

Section 464ZGJ designates a ‘responsible person’ who must ensure compliance with the requirements for the inclusion, destruction and matching of DNA profiles on the database and who will be liable to be penalised for a breach of these provisions. A similar provision in the Western Australian legislation, which enables a ‘database manager’ to be nominated.¹¹⁸⁶

The ALRC considered, in relation to equivalent provisions in the Commonwealth legislation, what mechanisms were available to ensure compliance with this provision, and to identify the person responsible for a breach. The ALRC found that it would be difficult under current Commonwealth arrangements to identify the relevant person or body responsible for compliance with the destruction provisions. It therefore recommended that:

The Commonwealth should amend the *Crimes Act* to assign ultimate responsibility for managing the destruction of forensic material and any information obtained from it.¹¹⁸⁷

This Inquiry recommended in Chapter 9 that the processes for notification of critical dates be audited to ensure that systems are in place to prevent the premature

1186 *Criminal Investigation (Identifying People) Act 2002 (WA)* s 79.

1187 ALRC, *Essentially Yours* (2003) Recommendation 41-11, 1048.

destruction or unauthorised retention of DNA samples and related information. The Committee believes that the regular audit of police and laboratory processes is the most effective means of regulating compliance with destruction obligations.

Prescribed Penalties

The Inquiry received a representation recommending more severe sanctions and penalties for the misuse of DNA information obtained under the forensic procedures provisions. Mr Meagher indicated his preference for more severe sanctions for the unauthorised use of samples and related information under the current Victorian provisions.¹¹⁸⁸

Clause 96 of the Model Bill, adopted in section 23YO of the Commonwealth legislation, provides a penalty of two years' imprisonment for conduct causing the unauthorised disclosure of information, or which is reckless as to the disclosure of this information. Other provisions prescribe the same penalty for conduct which leads to the unauthorised inclusion or use of a DNA profile on the database.¹¹⁸⁹ The NSW provisions create corresponding offences relating to the supply and use of forensic material and impose penalties of two years' imprisonment or a fine of \$11,000 or both.¹¹⁹⁰

The Committee notes that the improper retention or use of a DNA sample or profile has implications for the proper administration of justice as well as for the integrity of the DNA sampling process and the DNA database system. The Committee accepts that the penalties imposed for the unauthorised retention or use of forensic material or the data obtained from it should reflect this. In setting penalties, the Committee believes the Victoria provisions should be consistent with those imposed in other Australian jurisdictions. The Committee recommends accordingly.

Recommendation 12.2 Increased penalties for unauthorised use of DNA material

That the penalties prescribed in sections 464ZG(2) and (3) of the Crimes Act 1958 (Vic) for the unauthorised retention or use of forensic material be increased to a maximum of two years, in alignment with penalties imposed in other Australian jurisdictions.

THE PRINCIPLES OF CRIMINAL JUSTICE

The Inquiry's attention was drawn to the way in which the principles of criminal justice have been affected by forensic sampling. It was urged to consider the impact that the forensic sampling regime has on the legal rights of defendants in criminal

1188 D Meagher, *Minutes of Evidence*, 23 July 2002, 161.

1189 See *Crimes Act 1914 (Cth)* ss 23YDAD and 23YDAE.

1190 *Crimes (Forensic Procedures) Act 2000 (NSW)* ss 91-94. See also Haesler, 'An Overview of DNA Testing and the New *Crimes (Forensic Procedures) Act 2000*', (2003).

proceedings. While to some extent the scope of the privilege against self-incrimination had already been eroded, before the advent of DNA sampling,¹¹⁹¹ participants in this Inquiry noted the ongoing effect of forensic sampling on other principles of criminal justice, such as the test of reasonable suspicion and the notion of procedural fairness.

The Test of Reasonable Suspicion

Father Norden, Director of Jesuit Social Services, made the point:

[By] compelling all people in custody, or those convicted of indictable offences to submit their DNA sample we are taking away the presumption of innocence.

The Committee notes that the presumption of innocence places the onus on the prosecution to prove the guilt of the accused beyond reasonable doubt. The Committee notes, however, that the test of reasonable suspicion which defines when a person is under suspicion, operates at a lower level in determining when a request or an order for a forensic procedure can be made.

Offenders

The 1995 draft of the Model Bill considered the effect on the general principles of criminal justice of provisions permitting DNA sampling solely for inclusion on the DNA database. The Model Bill initially provided that, in considering an application for an order for a forensic procedure to be conducted on an offender, the court was to be satisfied that:

there are reasonable grounds to believe that the person may have committed some other serious offence or may commit some other serious offence in the future.¹¹⁹²

The Model Criminal Code Officers' Committee justified this provision on the basis that:

People are innocent until there are demonstrable grounds to suggest otherwise and that offenders who have served their sentence have paid their price to society and should not be subject to further impositions.¹¹⁹³

However, this provision was diluted in the next generation of the Model Bill and the drafting committee had accepted a new rationale:

1191 The Sherman Review noted that the presumption of innocence and, to some extent, the right to silence had already been eroded by provisions permitting the compulsory taking of physical evidence, such as fingerprints. Sherman, *Independent Review of Part 1D* (2003) 3.40-41, 29-30.

1192 *Model Bill 1999* clauses 69-70, quoted in Saul, 'Genetic Policing: Forensic DNA Testing in New South Wales' (2001) 89.

1193 *Ibid* 89, quoting MCCOC, *Model Forensic Procedures Report* (1999) 33.

That a person belongs to a class of people likely to offend rather than the specific circumstances of the person's offence.¹¹⁹⁴

The force of the test of reasonable suspicion was in this way weakened.

Suspects

As noted in Chapter 6, the test of reasonable suspicion that is required before an order for a forensic procedure involving a relevant suspect is granted sets a relatively low level, as compared with the standard of proof required in a criminal trial. As Dr Freckelton has indicated:

In Victoria the threshold for compulsory DNA testing of suspects is low. ... A magistrate may make an order if satisfied on the balance of probabilities that the person is a relevant suspect, and there are reasonable grounds to believe that the person has committed the offence in respect of which the application is made.¹¹⁹⁵

Once a profile has been obtained – whether consensually or by court order – and loaded onto the DNA database, the profiles represent, in a sense, a ‘pool of suspects’ in the investigation of any or all unsolved crimes on the database. The matching of the profiles on the database has been identified as a way of using the information provided by persons in one investigation to inculcate them in others through cold hits on the database, without any specific test of suspicion being applied.

The Committee has concluded that judicial authority for the sampling of suspects is an important safeguard of their interests, and serves to affirm the operation of the privilege against self-incrimination as far as it is consistent with the DNA sampling regime.

Volunteers

As discussed in Chapter 7, the use of mass DNA sampling programs relying on the voluntary participation of a select community effectively permits the collection of forensic evidence from people who are not under suspicion. Pressure may be brought to bear on members of the general community to provide a DNA sample ‘to prove their innocence’.

The Committee takes the view that enlisting the co-operation of volunteers in criminal investigations should not be used as a veil to obscure the identification of known suspects, or to obtain by consent evidence which impinges on the legal rights and interests of persons who are not identified as suspects in the investigation.

1194 Ibid.

1195 Freckelton, *DNA Profiling: Issues Paper* (2002) 34.

Procedural Fairness

Relevant Suspect Orders

In *Lednar and Ors v Magistrates' Court and Anor*¹¹⁹⁶ Gillard J considered what provisions for procedural fairness applied in s464ZF. His Honour identified two common law rules which together constitute the principles of natural justice. The hearing rule requires proper notice be given to the person whose interests will be affected by an adverse decision and a fair opportunity to be heard. The second rule is the bias rule which requires that a decision-maker must not be affected by bias in his decision-making role.

Victoria Legal Aid was one of several legal bodies that affirmed the centrality of procedural fairness in the laws and administration of forensic sampling. Victoria Legal Aid emphasised that:

Police investigations must be subject to procedural fairness.¹¹⁹⁷

A number of legal organisations, including Victoria Legal Aid, Liberty Victoria, the Criminal Bar Association, the Law Institute and PILCH, identified the requirement for court orders as the main safeguard provided by the legislation.¹¹⁹⁸ As Gillard J observed:

The legislature enacted that the important decision affecting the plaintiffs should be made by a member of the Magistrates' Court. It is clear from the legislative history and the provisions of sub-division 30A, that the important decisions involving investigation and infringement of rights have been entrusted to the supervisory role of a judicial officer.¹¹⁹⁹

Participants in the Inquiry identified two ways in which the forensic procedures regime departs from the principles of natural justice: the restrictions which apply to the defendant's right to be heard in applications for orders for forensic procedures, and the granting of *ex parte* orders.

A right to be heard

Section 464T(5) provides, in relation to adults, that in a hearing of an application for an order for a compulsory procedure involving a 'relevant suspect':

- (5) A 'relevant suspect' in respect of whom an application is made –
- (a) is not a party to the application; and

1196 [2000] VSC 549.

1197 Victoria Legal Aid, Submission 15, 2.

1198 See Submissions 15, 27, 13, 21 and 5 respectively.

1199 *Lednar and Ors v The Magistrates' Court of Victoria and Anor* [2000] VSC 549; A Crim R 396, 34.

- (b) may not call or cross-examine any witnesses; and
- (c) may not address the Court, other than in respect of any matter referred to in sub-section (3)(a) to (h).

The defendant may be represented by a legal practitioner. The provisions (3)(a) to (h) referred to in 5(c) above concern the grounds on which an application may be made.

A parallel provision applies to children, with the addition that a child's parent or guardian may act as the representative of the child in exercising the right to address at an application hearing.¹²⁰⁰ In the case of children, notice of application can be served on a parent or guardian of the child but need not be served on the child, as the child is not a party to the application.¹²⁰¹ However, the court may dispense with the requirement to give notice to the parent or guardian 'if satisfied that it is impracticable for the applicant to comply'.¹²⁰² The child must nevertheless be present at the hearing of the application.

Applications need not be supported by affidavits, and courts generally seem to require that the applicant address the matters prescribed for consideration by the legislation. Further, it would seem on anecdotal evidence that it is a matter for the discretion of the court as to whether the relevant suspect may address the court in respect of the matters covered in the application for the order.

These provisions have attracted criticism since their enactment. An article published soon after the commencement of this part of the regime observed that on an application for an order to sample a relevant suspect:

rights to natural justice are severely curtailed. For example, a relevant suspect can be represented but is not a party to the application. There is no right to cross-examine the police or other witnesses called and only limited rights of address. The legislative intention is to enable police to avail themselves of an efficient investigative mechanism which does not get litigiously obstructed.¹²⁰³

The Committee received a number of submissions advocating that the person required to undergo the forensic procedure be a party to the application for a court order. It was put to the Inquiry that the current provisions should be amended to give the defendant the right to be heard. Mr Meagher observed:

It seems contrary to the principles of natural justice that a person has no statutory right to present arguments to oppose an application which may result in them being compelled to undergo an extremely intrusive forensic procedure when they have not been formally charged with any criminal offence.¹²⁰⁴

1200 S 464U(13).

1201 S 464U(4).

1202 S 464U(5).

1203 Ray Gibson, 'Police Powers to take Body Samples', (May 1998) 72 (5) *Law Institute Journal* 55-57.

1204 Meagher, 'The Quiet Revolution – A Brief History and Analysis of the Growth of Forensic Police Powers in Victoria' (2000) 83.

Liberty Victoria¹²⁰⁵ and the Criminal Bar Association supported the proposal that a suspect be a party to the application for an order for a compulsory procedure. The Association observed:

The person from whom the sample is sought has very limited rights when appearing in court, particularly in relation to requests for samples from suspects.¹²⁰⁶ ... The present regime does not permit the alleged suspect to call evidence or cross-examine witnesses. We believe that there is no justification for denying an alleged suspect the right to at least test the evidence being presented in support of the application.¹²⁰⁷

The Director of Public Prosecutions observed that the current provisions were not clearly drafted, and that the determination of an application which was not available to the defendant was problematic:

Generally, my view about that is that that section is not a happy piece of legislation in the sense that although you are a non-party you still have the right to make submissions in relation to it. It seems to make sense only if you have the evidence in the first place.¹²⁰⁸ I did not see how you could make sense out of the operation of the legislation without handing over the affidavits.¹²⁰⁹

There is some uncertainty as to whether the current provisions completely exclude, or merely do not guarantee, the person who is the subject of the application the opportunity to make submissions and cross-examine.

A recent decision of the Supreme Court, *Pavic v Chief Commissioner of Police*¹²¹⁰ held that section 464ZF(3) does not exclude a subject's right to be heard. Nettle J construed s464ZF on the basis that:

Where a statute confers power on a public official to destroy, defect or prejudice a person's rights, interests and legitimate expectations, the rules of natural justice regulate the exercise of that power unless they are excluded by plain words of necessary intendment.¹²¹¹

His Honour indicated that:

The right to be heard is so fundamental to our legal system that it is presumed parliament intended that a failure to observe should render null and void any decision reached in breach of this requirement.¹²¹²

Nettle J held that the plaintiff 'should be given so much chance to be heard as in the circumstances of the application is properly to be regarded as reasonable'.¹²¹³ This decision is at odds with the interpretation taken by Gillard J in *Lednar's* case, who

1205 Liberty Victoria, Submission 27, 2.

1206 R Punshon SC, *Minutes of Evidence*, 23 July 2002, 84.

1207 Criminal Bar Association, Submission 13, 3.

1208 P Coghlan QC, *Minutes of Evidence*, 23 July 2002, 135.

1209 *Ibid* 136.

1210 [2003] VSC 99, Nettle J.

1211 *Ibid* para 5.

1212 *Ibid* para 51.

1213 *Ibid*.

found that the legislation had struck the balance in favour of law enforcement powers at the expense of the donor's right to be heard.¹²¹⁴

There is an avenue for appeal against the making of the order, pursuant to Order 56 of the Supreme Court Rules. This course of action was taken in the case of *Mangione* which was reported during the period of this Inquiry. In *Mangione's* case:

[T]he case proceeded on the first occasion [an application for a compulsory procedure order] purely with the use of affidavits. The police gave instructions that they did not want to release the affidavits because there was some material in it for which they wanted to claim public interest immunity. It was in that context that opposition was raised about the handing over of the affidavits.¹²¹⁵

In all, there were three hearings on issues relating to the application for the compulsory procedure. The defendant successfully sought a restraining order in the Supreme Court, claiming that he had been denied natural justice because he did not know the basis of the police application. The police were constrained from using the material on the second application because that was a sample that had, in a sense, been unlawfully obtained.¹²¹⁶

Under South Australian legislation, the suspect had the right to make submissions and to cross-examine in relation to applications for orders for forensic procedures. Section 25 of the *Criminal Law (Forensic Procedures) Act 1998 (SA)* gave the respondent the right to give or call evidence, to make submissions and to:

Cross-examine the applicant and other witnesses called by the applicant and, by leave of the appropriate authority, witnesses whose evidence has been submitted in writing.¹²¹⁷

The South Australian case, *Iskra v Police*,¹²¹⁸ involved an application for an order to sample a suspect during a burglary investigation. The suspect sought to cross-examine the informant on the contents of the affidavit. The court considered the basis of the statutory right to cross-examine and make submissions in relation to these applications. It noted that a forensic procedure 'involves a not insignificant invasion of the body of the respondent and a departure from the rule against self-incrimination, a rule which is central to the administration of criminal justice'. In these circumstances, the court took the view that:

the construction ... which affords to the respondent procedural fairness must be preferred, where such a construction, as is the case here, is fairly open.¹²¹⁹

However, in this case the court held that the suspect did not have an 'unfettered right' to cross-examine, and that the court had the discretion to refuse to permit this. Recent

1214 *Lednar and Ors v Magistrates' Court & Anor* [2000] VSC 549, Gillard J.

1215 P Coghlan QC, *Minutes of Evidence*, 23 July 2002, 135.

1216 *Ibid* 136.

1217 Ss 25(1)(a), 25(1)(c) and 25(1)(b) respectively.

1218 [2003] SASC 50 Perry J.

1219 *Ibid* para 76.

amendments to the South Australian legislation have replaced the specific rights in relation to the calling and cross-examination of witnesses, with the more general requirement that:

The respondent must be given a reasonable opportunity to make representations to the appropriate authority hearing the application.¹²²⁰

The Commonwealth legislation gives the suspect the right to call or cross-examine the applicant, to address the magistrate and a qualified right to call or cross-examine other witnesses. Under section 23WX:

- (6) The suspect or his or her representative:
 - (a) may call or cross-examine the applicant for the order; and
 - (b) may, with the leave of the magistrate, call or cross-examine any other witnesses; and
 - (c) may address the magistrate.
- (6A) A magistrate must not give leave under paragraph (6)(b) unless the magistrate is of the opinion that there are substantial reasons why, in the interests of justice, the witness should be called or cross-examined.

The Committee accepts that procedural fairness considerations support the right of the person to be heard at a hearing determining an application for an order for forensic procedures. The Committee sees the application process as a means of weighing, in general terms, the public interest in obtaining relevant evidence for the investigation against the personal and legal interests of the suspect. These interests, as outlined above, reflect the operation of the privilege against self-incrimination to place the onus on the applicant to show a reasonable belief that the defendant is a suspect in the investigation.

It is consistent with the principles of natural justice for the defendant to be informed of the nature of the application and the material supporting it. However, the Committee is concerned to ensure that the right to make submissions should not be used as a means to hold a mini-trial on the issues, and should be carefully drafted to avoid the problem contemplated in *Iskra*'s case.

The Committee would not regard it as appropriate for an application for an order to conduct a forensic procedure to be used to test the evidence on which the applicant's suspicion of the suspect is founded. The Committee concludes, nevertheless, that the Victorian provisions should be amended along the lines of the Commonwealth provisions set out above.

1220 *Criminal Law (Forensic Procedures) (Misc) Amendment Act 2002 (SA)* s 31D(4).

Recommendation 12.3 The defendant's standing in hearings of applications for relevant suspect orders

That the Crimes Act (1958) Vic be amended consistent with the provisions of subsections 23WX(6) and (6A) of the Crimes Act 1914 (Cth).

Ex parte Orders

There are two circumstances under the current provisions where an order can be made *ex parte*. If a volunteer has consented to a forensic procedure, the police may apply to the court, without notice, at the expiry of the consent period for an order for the retention of the volunteer's sample.¹²²¹ On or after a finding of guilt in relation to a forensic sample offence, the police may apply for an *ex parte* order to conduct a compulsory procedure on the offender.

In the first case, the Committee believes that, having consented to a forensic procedure, the volunteer should be informed of an application for the retention of the sample. To do otherwise is to negate the effect of the granting of consent. This Committee has recommended, however, that profiles and forensic material obtained from volunteers should be destroyed at the conclusion of the investigation and not retained for DNA database use. In these circumstances, applications for the retention of a volunteer's samples would not be entertained, unless the volunteer had subsequently been identified as a suspect or offender in another investigation.

The Victorian Privacy Commissioner observed that, in relation to offenders:

The legislation does not oblige police to notify a serious offender that an application is being made to the court for an order to obtain their DNA, nor does the serious offender have any right to be heard during the hearing of the application.¹²²²

This Inquiry has formed the view that in relation to an adult offender guilty of a serious indictable offence and sentenced to a term of imprisonment, there is a strong likelihood that the offender has previously committed undetected offences or will re-offend. In these circumstances, the Committee believes that the forensic benefit of the database justifies the requirement that the offender be automatically required to provide a DNA sample.

The provisions governing the sampling of offenders now in custody who have been found guilty of a 'forensic sample offence' have, in a sense, a limited currency. Currently applications are routinely made as soon as a finding of guilt has been entered, and applications for orders to sample offenders previously found guilty of forensic sample offences are likely to wane. In these circumstances, there is an expectation that the use of *ex parte* orders will therefore diminish as the sampling of offenders 'catches up' with those for whom findings of guilt have already been

1221 S 464ZG(5).

1222 Privacy Commissioner, Submission 19, 24.

entered. For these reasons, the Committee makes no recommendations in relation to the *ex parte* orders currently available under section 464ZF.

13. POST-CONVICTION REVIEWS (INNOCENCE PROJECTS)

USING DNA EVIDENCE TO ASSERT INNOCENCE

Chapter 13 is the last in Part E, dealing with the impact of DNA evidence on the criminal justice system. Chapters 11 and 12 considered the interplay between the doctrines and evidentiary rules of criminal law and the provisions made for the collection and use of DNA evidence.

This chapter considers the exculpatory power of DNA. In some ways, the exculpatory power of DNA can be more compelling than its capacity to connect a person to a crime scene. If two DNA profiles do not match, a suspect can be excluded with certainty, whereas a match between the profiles of the accused and the crime scene inculcates a person, but does not prove his/her guilt.¹²²³

The capacity of DNA evidence to exclude a person conclusively has made DNA profiling a valuable tool in post-conviction reviews. In cases where the identity of the perpetrator was at issue, and where the prosecution had relied on circumstantial evidence, DNA evidence can play a leading role in overturning a wrongful conviction.

Chapter 10 considered the *Button* case for the insight it gave into a flawed process for determining which crime scene DNA evidence was to be analysed. *Button*'s conviction for rape was overturned once exculpatory DNA evidence was tested. *Button*'s case was the first Australian case in which a conviction was quashed on the basis of fresh exculpatory DNA evidence. This case was advanced by pro bono lawyers acting on Mr *Button*'s behalf.

Australian Innocence Projects

Button's case led to the establishment of an ongoing relationship between pro bono lawyers and the Law Faculty at Griffith University, Queensland. An Innocence Project was established at Griffith University to examine other claims of wrongful conviction. Both this Project and its counterpart at the University of Technology in

¹²²³ DNA profiling in Victorian criminal investigations in the period January 2000-June 2002 exculpated approximately 25 per cent (308 out of 1158) of suspects' samples analysed at the VFSC. VFSC, Submission 23S1. See Table 6.2 above.

Sydney involve legal academics and pro bono lawyers supervising law students to screen and follow up applications from prospective applicants. Teams of students assess applications from offenders who are seeking assistance to prove their innocence on the basis of fresh DNA evidence. Matters which meet the projects' eligibility criteria are investigated further.

This Inquiry heard evidence from the Directors of both the Australian Innocence Projects at its 2002 public hearings, and during 2003 received background on a proposal for the establishment of a Melbourne Innocence Project. While the Australian projects are still at a formative stage, research outlining the results of longer-running US projects is already available.

US Innocence Projects

In the USA, innocence projects have been reviewing the convictions of offenders on death row for over 10 years. Barry Scheck and Peter Neufeld established the first Innocence Program at Cardozo Law School in 1992. The Program is staffed with pro bono lawyers, supported by academics and law students. Approximately 200 cases are reviewed annually, with priority being given to cases involving offenders on death row. Nationally, more than 100 prisoners have been released since the inception of Innocence Programs in the USA.¹²²⁴

Background on the US experience is provided by a comprehensive study of 28 US cases, where convictions were overturned on the basis of fresh or re-examined DNA evidence.¹²²⁵ All these cases related to sexual offences, and six of these involved murder. They had been concluded between 1979 and 1991, and most of the offenders had served 10 years or more of their prison sentences, having appealed their convictions at least once before their convictions were finally overturned.

At their trials the identity of the perpetrator had been at issue and the prosecution relied on largely circumstantial evidence. In many of these cases, no DNA evidence had been led at the trial. Either the trial had occurred before the advent of this technology, or the relevance or potential of the evidence had been overlooked. The initial wrongful conviction was often based on uncertain or uncorroborated identification evidence, or coerced confessions.¹²²⁶

It is possible with hindsight to identify weaknesses in the presentation or cross-examination of DNA evidence that were overlooked during the trial.¹²²⁷ Early US DNA profiling systems were later found to have been insufficiently discriminating¹²²⁸

1224 See website of US Innocence Project at <http://www.innocenceproject.org>.

1225 Connors et al, *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to establish Innocence after Trial* (1996).

1226 Ibid 15.

1227 Ibid xxx.

1228 Ibid xvi.

and defence lawyers lacked the expertise needed to cross-examine expert witnesses effectively. The standing of US forensic services was also seriously affected by revelations that a forensic scientist, whose evidence had been relied upon in eight trials, was guilty of misrepresentation and perjury. In some prosecutions the existence of DNA evidence which ruled out the involvement of the accused had not been disclosed to the defence,¹²²⁹ and in one case a prosecution witness had been hypnotised to ‘enhance their testimony’.¹²³⁰

Post-conviction Reviews in Victoria

In-principle Support for Post-conviction Reviews

There have been no Victorian cases in which fresh DNA evidence has led to the quashing of a conviction. Participants in this Inquiry were nevertheless unanimous in their in-principle support for some form of post-conviction review process. Victoria Police supported the concept of innocence panels,¹²³¹ accepting that:

In the same manner that the prosecution may seek to use DNA sampling to provide evidence for a prosecution, convicted persons may seek to use the same technology to search for new evidence in regard to a past conviction.¹²³²

Victoria Police recommended that legislation enable offenders to access DNA sampling to challenge their convictions, and indicated that it would seek to be a party to any post-conviction review process established.¹²³³ The Crime Victims Support Association also endorsed the use of DNA analysis to prove the innocence of persons wrongfully convicted. The Association took the view that:

felons should have the right to be DNA tested now if they think they can prove their innocence.¹²³⁴

Prosecution and defence lawyers shared common ground on this issue. The Director of Public Prosecutions acknowledged that:

Conviction of the wrong person is not sustainable in any sense.¹²³⁵

The Law Institute of Victoria and the Public Interest Law Clearing House supported the provision of a post-conviction review mechanism.¹²³⁶ The Criminal Bar

1229 Ibid 18-19.

1230 Ibid 5.

1231 Cmdr P Hornbuckle, *Minutes of Evidence*, 22 July 2002, 7.

1232 Victoria Police, Submission 18, 11.

1233 Ibid, Recommendation 23, 11.

1234 N McNamara, *Minutes of Evidence*, 23 July 2002, 99.

1235 P Coghlan QC, *Minutes of Evidence*, 23 July 2003, 137.

1236 Ibid.

Association indicated their support for post-conviction review 'based on DNA evidence not reasonably available at trial'.

Where a serious question is raised about the reliability of a DNA match that was used to obtain a conviction, the Association believes that convicted offenders should have the ability to apply for a review of their case for the purpose of assessing whether DNA sampling might exculpate them.¹²³⁷

Offenders currently serving prison terms in Victorian gaols also made submissions to the Inquiry on this matter, supporting the proposal for some post-conviction review process, and emphasising the need to ensure that the process was independent.¹²³⁸

There was, therefore, general concurrence on the desirability of having some form of review mechanism available for cases where DNA evidence could provide fresh evidence on which to challenge a conviction.

The Sherman Review and the ALRC Inquiry both supported the use of DNA testing for exculpatory purposes and recognised that providing offenders with access to forensic services for this purpose would involve legislative and administrative change as well as financial resources. Both reviews considered ways to provide access for offenders wishing to use DNA testing to seek a review of their conviction. The ALRC recommended:

The Commonwealth should establish a process to consider applications for post-conviction review from any person who alleges that DNA evidence may exist that calls his or her conviction in question.¹²³⁹

Similarly, the Sherman Review recommended:

That Part 1D should be amended to provide access to the relevant person samples and crime scene samples (and copies of related test analysis and results) by convicted persons who wish to establish their innocence and have applied for such access.¹²⁴⁰

This Inquiry takes the view that the opportunity to utilise DNA evidence should be available. However, in a relatively small jurisdiction such as Victoria it is important to develop a process which is neither cumbersome nor resource-intensive, and which ties into existing review processes.

Post-conviction Reviews in the Criminal Justice System

A court of criminal appeal may overturn a conviction on three grounds: the verdict was unreasonable or unsupportable having regard to the evidence, the verdict was based on an error of law, or a miscarriage of justice occurred.¹²⁴¹

1237 Criminal Bar Association, Submission 13, 5-6.

1238 See Submissions 1-3 from R Lowe, L Cunliffe and A Coulston respectively.

1239 ALRC, *Essentially Yours* (2003) Recommendation 45-2, 1130.

1240 Sherman, *Independent Review of Part 1D* (2003) Recommendation 5, 43.

‘Fresh evidence’ can be considered if, in the opinion of the appeal court, it is ‘necessary or expedient in the interests of justice’.¹²⁴² The ALRC noted a perception that there was a reluctance on the part of courts to re-open issues, and that the current requirement for prima facie evidence of a miscarriage of justice may set the standard too high.¹²⁴³ However, cases such as the Button case suggest that there are opportunities within the existing processes for appeals based on fresh DNA evidence.

The Committee examined the criteria used by existing Australian and US Innocence Projects to assess applications for post-conviction reviews. These projects have developed criteria against which to evaluate applications for assistance.¹²⁴⁴ While individual projects and jurisdictions adopt differing criteria, most consider:

- the availability of biological evidence which, if analysed, could produce a relevant, meaningful and probative result;
- whether the applicant has consistently maintained his/her innocence; and
- the nature of the evidence relied upon to convict the applicant.

Taken together, these three criteria provide a relatively stringent eligibility test. While there may be a number of offenders who consistently maintain their innocence post-conviction, convictions based on evidence which could not be rebutted by fresh DNA evidence would not be eligible for assistance. Further, before a post-conviction application could succeed it would be necessary to locate crime scene evidence containing DNA that was not available or was not tested at the time of the trial, and that is still available and that is suitable for analysis. The Innocence Projects indicated that relatively few applications are able to meet all these criteria.

Ascertaining the Level of Need

Victoria has had no experience of the use of DNA to overturn a conviction. The Office of the Director of Public Prosecutions informed the Sherman Review that:

In respect of the position of a fresh forensic sample being introduced successfully to overturn a recorded conviction, I can advise of no such case in this jurisdiction.¹²⁴⁵

One of the first issues raised in the consideration of a post-conviction review process is the prospect of ‘opening the floodgates’ to applicants serving long prison sentences who may be seeking to have their convictions quashed. Finality of decision-making is

1241 Gregor Urbas, ‘DNA Evidence in Criminal Appeals and Post-Conviction Inquiries: Are New Forms of Review Required?’ (2002) 2 *Macquarie Law Journal* 141, 144. See also ALRC, *Essentially Yours* (2003) 45.35, 1124.

1242 ALRC, *Essentially Yours* (2003) 45.36, 1125, referring to *Eastman v The Queen* (2000) 203 CLR 1 and *Mickelberg v The Queen* (1989) 167 CLR 259.

1243 Dr Jeremy Gans, quoted in ALRC, *Essentially Yours* (2003) 45.53, 1128.

1244 National Commission on the Future of DNA Evidence, *Postconviction DNA Testing: Recommendations for Handling Requests* (1999) at www.cjjcc.org/directory/program.php?program_id=1447.

1245 Sherman, *Independent Review of Part 1D* (2003) 61.

an essential element of the criminal justice system and the Inquiry is not contemplating a process that could undermine the finality of the decisions made through the existing trial and appeals processes.

The Committee detected and shared some concern about the development of a process for post-conviction review that could incite a demand for post-conviction review which would not be met. US experience suggests that these fears are unwarranted:

The empirical evidence suggests that fears of an avalanche of requests are vastly overblown. ... The availability of post-conviction tests does not loose the floodgates, although it may impose some costs.¹²⁴⁶

In the USA, a relatively small number of offenders convicted of serious offences have met the stringent criteria developed to assess applications for post-conviction DNA reviews. The District Attorney's Office in the County of San Diego, which has a population of approximately three million, reviewed all convictions obtained prior to 1993, when DNA casework began. It found that:

With about 75 per cent of the work completed, only 3 cases had been identified in which DNA testing might make a difference, but in only one is there a possibility that testing will be done.¹²⁴⁷

The Committee acknowledges a level of in-principle support shown by participants in this Inquiry. While it is not likely that there will be very many instances where a post-conviction review on the basis of DNA evidence would arise, the Committee believes that it is nevertheless a matter of fairness to make services and resources available for this purpose as required. It therefore recommends that a process for the consideration of applications for post-conviction reviews on the basis of DNA evidence should be established.

Recommendation 13.1 Post-conviction review process on basis of DNA evidence

- (i) That the Attorney-General establish a process to consider applications for post-conviction review from a serious offender serving a term of imprisonment who makes a claim that DNA evidence may exist that calls his or her conviction into question; and***
- (ii) That this process establish clear criteria for the assessment of applications for post-conviction review, including but not limited to the following:***
 - (a) the availability of biological evidence which, if analysed, could produce a relevant, meaningful and probative result;***
 - (b) whether the applicant has consistently maintained his/her innocence; and***

1246 Margaret Berger, 'Lessons from DNA: Restriking the Balance between Finality and Justice', 6-7, in David Lazer (ed), *The Technology of Justice: DNA and the Criminal Justice System* (2002) at <http://www.wksg.harvard.edu.dnabook/>.

1247 Ibid. In one case, the crime scene samples had not been retained and in the other case, the offender decided not to proceed.

(c) *the nature of the evidence relied upon to convict the applicant.*

Long- and Short-term Resource Implications

The Australian Innocence Projects noted that the examination of applications for post-conviction review is a time-consuming exercise. The preparation and research involved in advancing an application to this stage is extensive. However, with the support of university law schools, the leadership of pro bono lawyers and the participation of student volunteers, the administrative cost of the screening process can be kept to a minimum.

The most significant cost encountered by Australian Innocence Projects in the preparation of post-conviction applications is the cost of locating and re-testing relevant forensic material.

In the USA, funding incentives are offered to encourage prosecutors to use designated federal grants to fund DNA testing under post-conviction review programs, and ‘disincentives’ apply to jurisdictions which do not facilitate access to crime scene evidence for post-conviction reviews.¹²⁴⁸ In some cases, grants to law enforcement agencies and correctional institutions have been made conditional on the adoption of measures to ensure the preservation of crime scene material.¹²⁴⁹

The Inquiry also considered whether, in the long-term, there would continue to be a need for post-conviction DNA reviews. With the improvement in the reliability of DNA profiling and the increased use of DNA analysis in criminal trials, it is possible that the need or demand for this type of review will diminish. A US commentator has predicted that:

Post-conviction testing will gradually become passé as DNA testing is routinely done prior to trial, and as DNA technology reaches the point where future retesting will not provide any more definitive answers where initial results are inconclusive.¹²⁵⁰

The extent of the need or demand for post-conviction reviews reflects, to some extent, the quality of the trial processes. If DNA evidence is presented and thoroughly cross-examined at trial, it is likely that there will be few meritorious cases involving the re-testing or consideration of fresh DNA evidence. If Australian experience mirrors the US trends, cases heard before the advent of modern DNA profiling methods will be the most likely source of applications for post-conviction reviews.

The Inquiry concluded that financial assistance should be available, subject to clear eligibility criteria, to support the re-testing and review of potentially exculpatory DNA evidence in preparing for possible appeals against wrongful convictions.

1248 Section-by-Section Summary of the *Innocence Protection Act* at <http://leahy.senate.gov/issues/ipa/summary.html> page 1)

1249 *Ibid* 1.

1250 Berger, ‘Lessons from DNA’ (2002) 7.

Recommendation 13.2 Assistance for re-testing DNA evidence

That where an application for a preliminary review of the DNA evidence is made through the process developed as proposed in Recommendation 13.1, and meets the specified criteria for a review to proceed, funds be made available through a legal aid allocation for re-testing and analysis of relevant DNA evidence.

ELEMENTS OF A POST-CONVICTION REVIEW PROCESS

In an extra-curial article on the impact of DNA evidence, Justice Woods, of the NSW County Court, considered what the post-conviction reviews revealed of trial processes. Justice Woods analysed the cases of US defendants whose convictions were ultimately quashed, and observed:

What is of critical concern is that the processes of the much vaunted adversarial justice system were not adequate to deal with the forensic errors or corruption of results which emerged in these cases, and that non-adversarial inquiries following the exhaustion of the rights of the accused at trial and on appeal were needed.¹²⁵¹

The Directors of the Australian Innocence Projects outlined what they perceived to be essential elements of a post-conviction process.¹²⁵² They were: the preservation of and access to crime scene exhibits; a mechanism to enable re-testing of the DNA evidence obtained; and funding for the re-testing and verification of DNA results, where available. These issues are canvassed below.

Participants in this Inquiry also urged that the post-conviction processes be, as Justice Woods suggested, 'non-adversarial' and impartial, comprising persons who were not involved in, and who did not have an interest in, supporting the original conviction.¹²⁵³

Preservation of Crime Scene Evidence

The quashing of Frank Button's conviction was made possible because the crime scene evidence had been preserved and was available for re-testing. The Inquiry noted, however, that in some cases, innocence projects have encountered difficulties in locating and accessing the evidence. The University of Technology Innocence Project has frequently found it difficult or impossible to trace crime scene exhibits. In some cases, lawyers and students advocating on behalf of offenders are stymied in

1251 Justice J R T Wood, 'Forensic sciences from the judicial perspective' (2003) 23(2) *Australian Bar Review* 137, 152.

1252 K Edwards, *Minutes of Evidence*, 22 July 2002, 51.

1253 *Ibid* 50-51, 53.

their applications by their inability to ascertain whether the exhibits have been retained and, if retained, to locate them.¹²⁵⁴

Individuals were told that the samples had ‘disappeared’, ‘were probably destroyed’ or ‘just can't be found’.¹²⁵⁵ Even after evidence had been located, innocence project members in Queensland and New South Wales have experienced difficulties in gaining access to crime scene exhibits for re-examination.

Mr Daniel Hoenig, Senior Policy Analyst of the NSW Ministry of Police observed that the retention or disposal of crime scene evidence after the conclusion of a criminal trial had not been consistently managed. Mr Hoenig indicated:

Apparently it is not unusual for detectives to simply put things away and forget about them.¹²⁵⁶

The Inquiry was informed that there seems to be no statutory obligation of law enforcement agencies to retain crime scene exhibits after the conclusion of the appeals process, and that in other Australian jurisdictions the retention and storage arrangements are ad hoc and not transparent.¹²⁵⁷ Ms Edwards indicated that there was an urgent need to legislate to require the preservation and storage of forensic material and crime scene samples.

Legislation which enables defendants to have some portion of the crime scene sample is a very good start, but I think that centralised preservation and storage of all crime scene samples has to become law, and that is what the Innocence Protection Act in the US is about as well.¹²⁵⁸

The ALRC also found anecdotal evidence of deficiencies in current preservation and storage policies and arrangements. It also noted that there is currently no provision in the Commonwealth forensic procedures law to regulate the handling and storage of crime scene exhibits and that ‘there are no safeguards for the appropriate preservation of samples which have been retained’.¹²⁵⁹ It recommended:

That the Commonwealth should amend the *Crimes Act 1914 (Cth)* to require the long-term retention of forensic material found at the scene of serious crimes to facilitate post-conviction analysis.¹²⁶⁰

This Inquiry considered the ALRC approach, as well as that adopted in the USA, where preservation orders are available on a case-by-case basis to provide for the preservation of crime scene evidence.¹²⁶¹

1254 K Edwards, *Minutes of Evidence*, 22 July 2002, 52; Dr L Weathered, *Minutes of Evidence*, 22 July 2002, 45.

1255 Ibid 52.

1256 D Hoenig, *Minutes of Evidence*, 22 June 2002, 37.

1257 K Edwards, *ibid*.

1258 K Edwards, *Minutes of Evidence*, 22 July 2002, 51.

1259 ALRC, *Essentially Yours* (2003) 1124.

1260 Ibid. Recommendation 45-1, 1124.

1261 Seventeen US states now have provision for post-conviction review.

Preservation Orders

Whereas the ALRC has proposed a ‘blanket’ requirement for the preservation of certain types of crime scene evidence, the US approach involves considering applications for the preservation of evidence on a case-by-case basis.

A recent initiative, introduced into Federal Congress to drive the enactment of consistent post-conviction laws in US state jurisdictions, is the Innocence Protection Act of 2001.¹²⁶² The Bill enables a person convicted of a federal crime, or any other offence relied upon in sentencing for the Federal crime, to apply to a Federal court for DNA testing to support a claim of wrongful conviction.¹²⁶³ The Court would make a Preservation Order¹²⁶⁴ if:

- evidence is still in existence and ‘in such a condition that DNA testing may be conducted’; and
- the evidence was never previously subjected to DNA testing (or at least not that type of testing now requested).¹²⁶⁵

The testing procedures must be scientifically valid and the testing must yield ‘new, non-cumulative, exculpatory evidence material to the claim’ of the defendant.¹²⁶⁶ The Court has the power to impose sanctions for the intentional destruction of such evidence.¹²⁶⁷ The court is to determine whether the cost of the testing should be borne by the government or the applicant, ‘except that an applicant shall not be denied testing because of an inability to pay the cost of testing’.¹²⁶⁸ If the results inculcate the applicant, the court shall assess the applicant for the cost of the testing.¹²⁶⁹

Conclusions

Without the systematic collection and preservation of crime scene evidence there can be no real prospect of using DNA evidence to support claims of wrongful conviction. The experience of other jurisdictions which have already handled innocence project applications is a clear indication of the need to review current arrangements.

The systematic storage of crime scene exhibits has implications far beyond simply providing opportunities for fresh analysis of DNA evidence. It facilitates not only the

1262 The Bill was approved by the Senate Judiciary Committee on 11 July 2002. The US legislation is to some extent shaped by the particular characteristics and needs of the US justice system. The most important differences with the Australian system are, for this purpose: the death penalty, a statute of limitations applying to post-conviction reviews in most States, constitutional protection for civil and human rights findings of guilt made on the evidence of confession alone

1263 S 102 (a) of the *Innocence Protection Bill*.

1264 *Ibid.* s 102(c).

1265 *Ibid.* ss (2291(d)(A) and 2291(d)(B).

1266 ALRC, *Essentially Yours* (2003) 45.43, 1126.

1267 *Innocence Protection Act of 2001* s 102 at <http://www.criminaljustice.org/public/nsf/legislation>.

1268 *Ibid.* s 2291(e).

1269 *Ibid.* s 2291(g)(2)(B).

requests for post-conviction review by offenders but also the prosecution of persons linked to old, unsolved cases by the DNA database.

The Committee supports the enactment of legislation to require Victoria Police to preserve crime scene exhibits relating to criminal proceedings involving serious offences. However, the Committee wishes to ensure that this responsibility is limited to cases in which there is a real possibility that a post-conviction review could be sought and entertained.

The Committee sees merit in the US model which provides the offender with the opportunity to seek the preservation of crime scene evidence while ensuring that the application is determined by a court after considering all relevant issues. The Committee recommends that the *Crimes Act* be amended to make provision for a system of preservation orders. It also recommends that the Department of Justice consult with relevant stakeholders – Victoria Police, the Law Institute of Victoria, the Office of Public Prosecutions and the Criminal Bar Association – to develop regulations which outline the circumstances in which such applications could be made and granted.

Recommendation 13.3 Preservation orders for crime scene evidence

- (i) That the Crimes Act 1958 (Vic) be amended to provide that a serious offender, serving a term of imprisonment, may within one year of the expiry of all appeal periods, apply for a court order for the preservation of relevant crime scene DNA evidence; and***
- (ii) That the Department of Justice consult with Victoria Police, the Law Institute of Victoria, the Office of Public Prosecutions and the Criminal Bar Association to develop regulations outlining the circumstances in which such applications could be made and granted.***

Preservation and Storage Arrangements

The ALRC accepted that the indefinite or permanent retention of all crime scene exhibits might be impractical, but affirmed the importance of retaining all items from serious crimes, on a long-term basis, especially those not tested during the investigation. In the USA, even where crime scene evidence has been retained, locating and accessing it presented a significant stumbling block. Similarly in Australia, the ALRC cited one commentator's account of the large proportion of crime scene exhibits which were not locatable.

In seventy-five per cent of cases taken by the Innocence Project, where it had already determined that a DNA test would demonstrate innocence, if it were favourable to the inmate, the evidence had been lost or destroyed. In two-thirds of the cases in which

the evidence was found and DNA testing conducted, the results have exonerated the inmate.¹²⁷⁰

The ALRC recommended the development of ‘guidelines regarding the appropriate collection and retention of crime scene samples and exhibits’.¹²⁷¹ Dr Lynne Weathered, Director of the Griffith University Innocence Project, also stressed the urgency of requiring police to make satisfactory arrangements for access to crime scene exhibits.¹²⁷² Judge Nader, Chairman of the NSW Innocence Panel, observed in October 2002 that New South Wales was ‘reviewing procedures relating to destruction of police exhibits, due to the concerns raised by the Panel’ and that the NSW Commissioner for Police had issued a state-wide directive directing that no crime scene evidence is to be destroyed.¹²⁷³

Access to Crime Scene Evidence

As well as ensuring the secure and pristine storage of crime scene exhibits, it was pointed out that defence access to these exhibits was essential for a post-conviction review process. Dr Weathered recommended that this be achieved through legislation.

We need to put legislation or procedures into place so that innocence projects in this country are allowed access to that evidence, either for the purposes of further DNA testing or for other forensic purposes. Access is clearly essential to our work.¹²⁷⁴

Ms Edwards indicated the importance of having transparent and accountable procedures.

There needs to be transparency and accountability in this whole area, and there just isn’t. We have to rely on guesswork, on rumours of internal protocols of labs, health services, police departments and so on.¹²⁷⁵

The Inquiry was also made aware of the privacy implications of proposals to provide access to crime scene exhibits. Such exhibits may contain the DNA of other persons associated with the crime scene, such as the victim, witnesses and their relatives. Care must therefore be taken to ensure the carefully regulated access and use of this forensic material.¹²⁷⁶

1270 ALRC, *Essentially Yours* (2003) 1120.

1271 *Ibid* 1123.

1272 Dr L Weathered, *Minutes of Evidence*, 22 July 2002, 45.

1273 Judge Nader, *NSW Innocence Panel*, Paper presented at the Eighteenth Criminal Law Conference, October 2002.

1274 Dr L Weathered, *Minutes of Evidence*, 22 July 2002, 45.

1275 K Edwards, *Minutes of Evidence*, 22 July 2002, 51.

1276 See D Hoenig, *Minutes of Evidence*, 22 July 2002, 38.

Proposal: Establishment of an Accredited Exhibits Registry

Ms Maritta Parsell, Forensic Science Manager of NATA, was also concerned at the lack of controls applying to the handling of crime scene samples after they left the forensic laboratory:

From the point the sample is signed out of the laboratory's control it appears that the process of sampling handling becomes 'grey'. This situation is disturbing given the emphasis of innocence panels and associated conviction reviews that may take place as a result of new technologies such as DNA testing.¹²⁷⁷

Ms Parsell informed the Inquiry that the NATA Drug and Properties Registries Accreditation Program requires the establishment of 'fully formalised auditable procedures'. Ms Parsell recommended that the Inquiry consider whether NATA accreditation might be an appropriate means to regulate the handling and preservation of DNA exhibits by Victoria Police.¹²⁷⁸ NATA accreditation is accepted by courts and scientific authorities as evidence of an acceptable standard of operation.¹²⁷⁹

Crime scene exhibits would be lodged at the Registry by the investigators at the conclusion of a case or by the forensic laboratory once analysis had been completed. Storage in a formally recognised registry would be logged and traceable for predetermined storage, sub-sampling or appropriate destruction.¹²⁸⁰

In a supplementary submission to the Inquiry Ms Parsell outlined the advantages of this program:

This program was specifically developed for the tracking and storage of forensic samples held by departments remote from or other than the laboratories. ... The Drugs and Properties Registry accreditation program requires that fully formalised "auditable" procedures are established and implemented to enable the tracing or tracking of samples once in the custody of a given registry.¹²⁸¹

The Registry would have the advantages of a centralised registry reception; specifically trained staff; assured access to interested parties; and regular reviews by a NATA assessment team.¹²⁸² The NATA Requirements cover the whole range of

1277 NATA, Submission 17S3, 1.

1278 Ibid.

1279 The accreditation requirements for Drug and Property Registries were developed in 2000, in response to a request for controls on the collection and storage of drug and breathalyser samples. They were devised for use by police authorities, but have yet to be adopted in any Australian jurisdiction.

1280 Ibid 1.

1281 Ibid.

1282 Bodies seeking NATA accreditation must demonstrate continuing compliance with NATA requirements. NATA will undertake an initial assessment to determine whether a body meets accreditation standards. Accredited organisations undergo regular, generally biennial, reassessments. Failure to comply with NATA standards may prompt a review of the organisation and may lead to the accreditation being declared 'inoperative' or being suspended. In the case of drug and property registries, if the deficiencies are considered 'likely to be corrected within a few months' the registry may be 'placed on an inoperative basis'. If, on the other hand, 'the

activities involved in the operation of a registry, from human resources and administrative policies to the calibration of technical instruments.¹²⁸³ Of particular interest are those requirements relating to record keeping, complaints, preventive and corrective action, and controls for the handling of registry items. The Committee favours the introduction of NATA accreditation for Victoria Police.

Chapter 9 revealed a lack of clarity in the current arrangements for the retention and storage of crime scene evidence, as well as generalised concern by some participants at the apparent lack of transparency in the handling of crime scene evidence. Chapter 10 revealed concerns by defence counsel at the defendants' lack of input and access at critical stages of the submission and selection of crime scene evidence.

There clearly need to be secure and accountable arrangements for the retention of crime scene evidence if DNA analysis is to be, in fact, available for use by offenders seeking to overturn their convictions. Taking into account all these considerations, the Committee supports in principle the establishment of a centralised, accredited registry for crime scene exhibits.

Recommendation 13.4 Establishment of an accredited crime scene exhibits registry
That Victoria Police, in consultation with the National Association of Testing Authorities, establish a NATA-accredited Exhibits Registry for the preservation of identified crime scene exhibits.

Post-conviction Review Processes: Options

During the course of this Inquiry, the Committee examined submissions and literature on the evolution of innocence projects in the UK, the USA and in other parts of Australia. The discussion below considers how defence access to such a service can be facilitated in cases where a serious offender is able to demonstrate that the review of DNA evidence which was either not available at the time of trial or subjected to inadequate analysis, may provide grounds to call into question the original conviction. Three models for dealing with such applications are considered below. They are: an independent investigative commission, a government-run innocence panel, and a 'pro bono' innocence project.

Investigative Commission: The Criminal Cases Review Commission

In the UK, the impetus for post-conviction review came with the notorious case of the Birmingham six, and a statutory body was established to investigate this, and other possible cases of wrongful conviction. The Criminal Cases Review Commission was

deficiencies are considered to be of such a serious nature as to warrant the initiation of procedures for the involuntary withdrawal of accreditation, the registry may be suspended'.
1283 NATA, *Accreditation Requirements for Drug and Property Registries* (2000) Version 1, 6-18.

granted investigative powers and resourced to screen and follow up applications for review. It has been able to feed its findings into the established review processes in the UK criminal justice system.

The Commission is a statutory body, established under the *Criminal Appeal Act 1995 (UK)* to carry out 'reviews of convictions and sentences in alleged and suspected miscarriages of justice'.¹²⁸⁴ The Commission has the power to investigate the cases, including the power to secure documents, conduct reviews and obtain expert evidence. If an application is approved, it may be referred to an Appeal Court for review.¹²⁸⁵

The Commission has a screening process through which the applications are filtered. Essentially, an application is successively screened on the basis of:

- eligibility - whether all avenues of appeal have been exhausted and refused;
- real possibility - whether there is a 'real possibility' in the view of the Commission that the conviction, verdict or finding 'would not be upheld'.¹²⁸⁶

Only a small percentage of applications are approved for investigation by the Commission, and an even smaller percentage ultimately referred to an Appeal Court for re-consideration. On its establishment, it was referred 279 cases for review and since then has accepted between 800 and 1100 new applications for review per annum. The initial screening eliminates about 30 per cent of applications received and most of the Commission's work is devoted to the intensive examination of cases which have passed through Stages 1 and 2 of the screening process. As at 30 June 2002 the Commission had received 4,830 applications, of which 161 had been referred to the courts for review.¹²⁸⁷ At 30 June 2002, 91 of these referrals had been determined by the courts, resulting in 54 convictions being quashed, 28 convictions upheld, 10 sentences varied, and two sentences upheld.

The Commission's investigations can take many directions. It is empowered 'to require public bodies to preserve documents and other materials and to give the Commission access to them'.¹²⁸⁸ In addition, it has obtained access to records otherwise protected by public interest immunity, which 'led to discovery of information beneficial to the applicant'.¹²⁸⁹ It has also submitted evidence for DNA testing or re-testing 'in a case in which the defence had advanced a seemingly implausible argument at trial'. Using modern DNA techniques, the conviction was quashed.¹²⁹⁰

1284 Criminal Cases Review Commission, *Annual Report 2001-2002* (2002) at <http://ccrc.gov.ak>.

1285 Ibid 4.

1286 Ibid 8.

1287 Ibid 17.

1288 *Criminal Appeal Act 1995 (UK)* s 17.

1289 Ibid.

1290 Ibid.

The Directors of existing Australian Innocence Panels favoured the Commission model for post-conviction reviews because it provides a screening service, the resources for investigation and a link with established legal processes for the review of selected meritorious cases. The salient features of commissions, which Australian Innocence Project directors sought for post-conviction review, were:

They are independent. They have investigative powers and they have access to evidence and to testing. They do it all; it is a one-stop shop. No-one can complain that they are beholden to the police or to the state. They can invoke at the one time all the things which are necessary, which is why they have managed to get 68 exonerations since they have been established.¹²⁹¹

The ALRC Inquiry also considered legislative provisions made under US and UK laws for post-conviction reviews based on DNA evidence but left open the process by which reviews would be developed and screened.

The Committee's view is that, for Victoria alone, the scale of such a commission would be out of proportion to the likely use for a post-conviction process. The Inquiry favours a less formalised model, which is more easily integrated into the Victorian criminal justice system.

Government-run Innocence Panel

In 2000 the NSW Government established an Innocence Panel:

in order to use new DNA technology to facilitate the assessment of claims of wrongful conviction for a crime.¹²⁹²

The *Crimes (Forensic Procedures) Amendment Regulation 2002 (NSW)* makes it possible to access and disclose DNA profiles stored on the NSW database in relation to a claim for wrongful conviction. The regulation provides for:

the assessment of the validity of a claim of apparent or possible wrongful conviction for a serious indictable offence made by or in relation to an offender.¹²⁹³

It does this by clarifying the provisions relating to the access and use of the DNA database. Specifically, it:

- enables 'an authorised person' to access the DNA database and to disclose information stored on it;
- defines as 'a prescribed purpose'¹²⁹⁴ the assessment of the validity of a claim; and

1291 K Edwards, *Minutes of Evidence*, 22 July 2002, 53.

1292 NSW Innocence Panel, Submission 25, 1; D Hoenig, *Minutes of Evidence*, 22 July 2002, 35.

1293 New South Wales, *Government Gazette* No. 94, 7 June 2002, 3487.

1294 *Ibid* cl 11.

- stipulates that such a claim can be ‘made by or in relation to a serious indictable offender’.¹²⁹⁵

The Panel was set up as an ‘independent and impartial body’.¹²⁹⁶ The Panel is chaired by a judge and comprises members who are nominated by the Minister and represent the Office of Public Prosecutions, New South Wales Police, Privacy Commissioner, Victims Advisory Board, Legal Aid Commission, the Public Defenders’ Office, the forensic laboratory and experts in forensic medicine and criminal law.

The purpose of this Panel is limited to facilitating DNA testing or analysis sought for a review of a conviction. The scheme is initially only available to offenders convicted of serious crimes - murder, manslaughter or sexual assault - or serving prison terms of 12 years or more. Priority will be given to offenders still in custody. ‘Forensic patients’, people detained without conviction by reason of mental impairment, may apply with the approval of the Police Minister.

Under the Panel’s Terms of Reference it will be able to help fund and arrange for the Division of Analytical Laboratories to analyse relevant ‘forensic material’ and to inform the applicant of the results of the testing.

The Innocence Panel will not investigate offences or review convictions or sentences.¹²⁹⁷

The Panel does not have the power to quash convictions.¹²⁹⁸ It is responsible for ‘ensuring that searches are conducted to locate crime scene samples and that, if DNA can be extracted from these samples, they are then compared with the convicted person’s DNA’.¹²⁹⁹

The Panel will not have an investigatory role, and the only information available to the Panel is the public record from the courts. The Panel will not support applications for re-testing evidence analysed using Profiler Plus. Re-testing will be permitted only ‘if the original tests were carried out using an older technique’ and if re-testing is carried out, it must be undertaken by another biologist.¹³⁰⁰

Applications are to be kept in confidence, with names withheld even from Panel members, to take account of the possibility that members may have a conflict of interest due to prior involvement with an applicant’s case.¹³⁰¹ DNA profiling conducted on applicants - including those already released from prison –will be taken

1295 Ibid cl 10.

1296 D Hoening, *Minutes of Evidence*, 22 July 2002, 35.

1297 NSW Innocence Panel, Submission 25, *The Innocence Panel: Terms of Reference*.

1298 Judge Nader, *NSW Innocence Panel*, Address to the Eighteenth Criminal Law Conference, (2002) 1.

1299 Ibid 3.

1300 D Hoening, *Minutes of Evidence*, 22 July 2002, 36.

1301 Ibid.

on a voluntary basis for limited purposes under the forensic procedures provisions. It will not be matched with any other crime scene.¹³⁰²

Ms Kirsten Edwards, the Director of the Innocence Project at the University of Technology, Sydney, identified deficiencies in the arrangements for the conduct of the Innocence Panel. A major obstacle, according to Ms Edwards, was locating and gaining access to crime scene evidence:

Why can't we just have a centralised storage facility and let us have access to it and have some transparency procedures so we know where to look and we can go and find it? We should not have to rely upon internal memos and memorandums and police services.¹³⁰³

The ALRC reported on misgivings felt by the NSW Privacy Commissioner, who identified what he believed to be 'a potential weakness of such schemes'.

The body which reviews the availability of genetic evidence needs to be sufficiently independent from the original prosecution to have some credibility. However, unless it is adequately resourced the conclusions of an independent panel will have limited value and can scarcely replace those of the original investigators and prosecutors. There is a risk of raising expectations among convicted persons and their supporters which cannot be satisfied.¹³⁰⁴

By June 2003 the Panel had authorised six investigations. Then in August 2003 details of an application made by an offender serving a long prison term for rape became publicly available. The Panel was suspended, following media controversy over the Panel's approval of the application, when relatives of the victim expressed their disapproval at the offender's applications.¹³⁰⁵

The applicant's legal representative and Ms Edwards, the Director of the Innocence Project at the University of Technology, Sydney, expressed doubts as to the Panel's capacity to undertake its role in the circumstances. It was noted that only offenders serving terms of imprisonment of at least 12 years are eligible to apply to the Panel. Ms Edwards observed:

It is to be expected that applications will be made by offenders convicted of serious crimes.¹³⁰⁶

Legislative provision and a firm administrative framework are clearly required to support the development of applications for the use of DNA evidence to advance post-conviction reviews. However, along with the legislative provision and the administrative framework needed to fund and access forensic testing an ongoing commitment to the exculpatory use of DNA evidence is required.

1302 Ibid.

1303 K Edwards, *Minutes of Evidence*, 22 July 2002, 52.

1304 NSW Privacy Commissioner quoted in ALRC, *Discussion Paper 66* (2002) 38.13, 904.

1305 'Jamieson "sorry" legal system causing Baldings grief', *AAP Australian General News*, 13 August 2003, AAP jph/kbw/ijm/jlaw.

1306 Ibid.

Pro Bono Innocence Projects (The University Model)

The Australian Innocence Projects at Griffith University and the University of Technology are based on and affiliated with Innocence projects established in the USA. The Committee received evidence at the public hearings on the way in which the ‘university model’ innocence projects were developed and run.

The Griffith University Law School offers an elective clinical course, which provides the student volunteers for the project. The Director and pro bono lawyers supervise the students on a weekly basis, making case management decisions as required. Students generally work in teams to review the relevant documents and evidence on an allocated case.¹³⁰⁷

Students work on the cases under the guidance and instruction of academics and lawyers who work on a pro bono basis. The students will review the cases. They examine the relevant legal and factual issues involved in the case, and also undertake investigations that might uncover proof of innocence.¹³⁰⁸

The Project accepts applications from around Australia and to date the Project has received more than 100 applications.

Our projects receive applications from people who claim to be innocent of the crimes for which they have been convicted. ... We accept cases after appeal avenues have been exhausted, and we make it clear to our clients that we do not have a solicitor-client relationship.¹³⁰⁹

The Project considers applications for assistance where the following criteria are met:

- there is a claim of factual innocence;
- a person has been convicted and all appeal avenues have been exhausted or have expired
- either the DNA evidence relied on at the trial was questionable, or no DNA evidence was relied on, and its use could bring about a possible fresh evidence point.¹³¹⁰

The University of Technology, Sydney has adopted a similar model, utilising the pro bono services of lawyers and the assistance of students under supervision. The Project involves the screening, selection and investigation of requests for assistance seeking to overturn convictions on the basis of DNA evidence. The Project has developed criteria by which to assess the applications:

Applicants must come from NSW prisons and have at least two years left to serve their sentence, as well as be currently without a lawyer. They must also claim actual

1307 Dr L Weathered, *Minutes of Evidence*, 22 July 2002, 43.

1308 Ibid.

1309 Ibid.

1310 Paul Coady and Jeanette Morrish QC, *The Victorian Innocence Project* (2003).

innocence – and not apply simply to complain that their sentence is too long or that the trial was unfair.¹³¹¹

If the application meets the initial eligibility criteria, a student is allocated to develop a case plan, setting out the activities and requisitions that would be needed to advance the matter. If approved, students implement the case plan to the point where implementation is reviewed or handed over to legal practitioners to pursue the application through legal avenues.¹³¹² Within the first two years of its operation the Project has received over 50 applications.¹³¹³

A Melbourne Innocence Project

The Inquiry understands that a proposal is being developed to establish an Innocence Project in Victoria. It is envisaged that, like the Griffith and the UTS models, a Victorian University law school would run the Project as a law school subject. The Project would be managed by an executive committee of academics and legal professionals, which would be responsible for case-management decisions and for the supervision of students.¹³¹⁴

The Inquiry was informed that the Victorian Project would operate in conjunction with the pro bono schemes currently offered by the Law Institute of Victoria, the Victorian Bar and the Public Interest Law Clearing House.¹³¹⁵ Victorian lawyers have donated their services to these types of matters on many occasions. They may do this on an individual initiative or on referral from one of the pro bono referral services, such as the Victorian Bar's Legal Assistance Scheme, or the Law Institute's Pro Bono Assistance Scheme, both of which are administered by the Public Interest Law Clearing House (Vic) Inc. For example, the lawyers representing the plaintiffs in *Lednar's* case acted on a pro bono basis, having received the request for assistance from the Public Interest Law Clearing House.¹³¹⁶

Community legal centres, funded by various government agencies, provide legal assistance to clients at no charge. Advocacy on behalf of a woman convicted of the murder of her husband after years of domestic violence has been undertaken by a community legal service based at the Brimbank Community Centre, and Darebin Community Legal Centre assists women serving prison terms in Victoria.

1311 *The Australian Innocence Project*,
http://journalism.uts.edu.au/subjects/oj1/oj1_a2001/innocence/asuproject.html.

1312 *The Innocence Project Screening Process*,
http://journalism.uts.edu.au/subjects/oj1/oj1_a2001/innocence/asuproject.html.

1313 *The Australian Innocence Project*
http://journalism.uts.edu.au/subjects/oj1/oj1_a2001/innocence/asuproject.html.

1314 Paul Coady and Jeannette Morrish QC, *The Victorian Innocence Project* (2003).

1315 Ibid.

1316 E Hunt, *Minutes of Evidence*, 23 July 2002, 156.

The point was made, too, that a post-conviction review system should not rely entirely on the pro bono commitment of lawyers and student. Ms Emma Hunt, Co-executive Director of the Public Interest Law Clearing House, observed:

Whilst I am a great advocate of pro bono, I would not necessarily think that it is appropriate to set up innocence panels that somehow rely entirely on the goodwill of people to participate in the collection of evidence to acquit somebody who has been wrongly convicted.¹³¹⁷

One demonstrated strength of the university model is, however, the availability of energetic and motivated lawyers and students prepared to undertake the time-consuming preparatory work required to initiate a post-conviction review. Further, the innocence panels enjoy the support of a growing network of like-minded organisations, and benefit from the exchange of experiences and skills.

CONCLUSIONS

The Committee believes that the forensic sampling regime must be able to accommodate the use of DNA evidence for reviews of convictions for serious offences, as well as for crime detection. In this chapter the Committee has recommended three initiatives which combine to give statutory support to the development of a post-conviction screening and review process in Victoria, to ensure the preservation of relevant crime scene evidence, to provide regulated and accountable procedures for storage and defence access to relevant crime scene evidence, and to assist offenders with the re-testing of DNA evidence as required. The Committee notes with interest the moves to establish an Innocence Project in Victoria based on the pro-bono model.

1317 Ibid 157-8.

**PART F:
DATA-SHARING AND FUTURE
DIRECTIONS IN FORENSIC
SAMPLING**

14. THE DNA DATABASE AND THE DATA-SHARING PROVISIONS

This chapter reviews the Victorian DNA database. It examines, firstly, the provisions governing data-sharing on the national DNA database. Under the national data-sharing arrangements, primary responsibility for the data uploaded rests with the originating jurisdiction, while the co-ordinating body, CrimTrac, is responsible for ensuring that data is shared in accordance with the laws of each of the participating jurisdictions. The reliability of the national database therefore directly depends on the integrity of the data uploaded by participating jurisdictions, such as Victoria. The Inquiry considered what arrangements are in place to ensure the reliability of the data on the Victorian database and to manage the detections which it achieves. This chapter concludes by drawing together the implications for law reform of the future development of Victoria's forensic DNA profiling regime.

THE DATA-SHARING PROVISIONS

The Model Bill contemplated inter-jurisdictional sharing of the data obtained from forensic procedures. It envisaged that, with uniform provisions applying Australia-wide, participating jurisdictions could exchange information contained on the DNA database. To achieve this, CrimTrac was given responsibility for the centralised co-ordination of data-sharing, and participating jurisdictions were to be responsible for the collection and provision of relevant DNA data. The Model Bill data-sharing provisions, incorporated into Victorian law through the *Crimes (DNA Database) Amendment Act 2002 (Vic)*, involve:

- providing for a 'DNA database system' to establish the types of DNA data to be collected and shared through the database;
- recognising the laws of other jurisdictions as 'corresponding', and authorising the execution of Ministerial agreements between those jurisdictions;
- protecting the security and integrity of the database by defining the permissible use of data included on the database and penalising unauthorised retention or use of this data; and
- setting up a framework to enable participating jurisdictions to enforce each other's orders for forensic procedures.

The 2002 amendments inserted the standard data-sharing provisions of the Model Bill in Subdivision 30A. Section 464ZFD(1) enables information ‘obtained from the analysis of samples taken or procedures conducted [in accordance with this Subdivision] to be retained and included on a computerised database’. Section 464 defines the indices comprising the DNA database, and sections 464ZGH-464ZGK replicate the Model Bill’s ‘matching provisions’, which govern the use of the DNA profiles included on each of the indices of the DNA database.

CrimTrac and the National DNA Database (NCIDD)

CrimTrac was established on 1 July 2000. CrimTrac’s operations are defined by an intergovernmental agreement, to which the Victorian Minister for Police, along with all other Australasian Police Ministers, is a signatory.¹³¹⁸ Victoria’s Chief Commissioner of Police is a member of the Board, and a representative of the VFSC, Professor John Scheffer, is a member of the Senior Officers’ Group.¹³¹⁹ CrimTrac’s role in the national database is to co-ordinate a network of databases containing DNA profiles obtained from designated types of donors under broadly consistent forensic procedures legislation.

The Legislative Basis for Data-sharing

Providing for a DNA Database System

Under section 464 of the *Crimes Act* a ‘DNA database system’ is defined as ‘a database ... containing one or more’ of the indices set out in the table of permissible matchings in section 464ZGI. The database system also comprises ‘information that may be used to identify the person from whose forensic material each DNA profile was derived’, a statistical index and ‘any other prescribed index’.

While the Victorian definition covers a database including ‘one or more’ of the indices listed in the matching table, the Commonwealth legislation defines a DNA database system as containing all of the seven specified indices.¹³²⁰ Victoria’s provision gives it greater discretion to recognise the databases which do not contain all the indices specified in the permissible matching table.

Victoria, the Commonwealth, New South Wales, Tasmania, South Australia and Western Australia have already enacted data-sharing provisions. The Commonwealth has been conducting bilateral negotiations to encourage the remaining jurisdictions to enact the Model Bill provisions.¹³²¹

1318 ALRC, *Essentially Yours* (2003) 43.2, 1072.

1319 Professor J Scheffer, *Minutes of Evidence*, 2 June 2003, 19.

1320 See ALRC, *Essentially Yours* (2003) 43.24-43.25, 1077-1078.

1321 ALRC, *Essentially Yours* (2003) 42.21, 1059.

Recognising Jurisdictions with Corresponding Laws

The Victorian legislation permits the recognition of a DNA database ‘that is kept under a corresponding law of the participating jurisdiction’.¹³²² A ‘participating jurisdiction’ is ‘the Commonwealth, another State or a Territory in which there is a corresponding law in force’. A ‘corresponding law’:

means a law relating to the carrying out of forensic procedures and DNA databases that-

- (a) substantially corresponds to this Subdivision; or
- (b) is prescribed for the purposes of this definition.

The legislation does not provide guidance on what constitutes a law which ‘substantially corresponds’ to the provisions in the Victorian *Crimes Act*. The Model Bill provisions were based on the assumption that all Australian jurisdictions would enact uniform forensic procedures provisions. The forensic provisions are by no means uniform, but it is still possible for a law to be prescribed as a ‘corresponding law’ under (b) above, even if it does not substantially correspond to the relevant Victorian provisions.

In December 2002 Victoria prescribed regulations pursuant to section 464ZJ of the *Crimes Act 1958 (Vic)* which recognised four jurisdictions – NSW, Tasmania, the Commonwealth and the ACT – as having corresponding laws for data-sharing purposes. Likewise, the Commonwealth has also recognised Victoria, New South Wales, Tasmania and the ACT as having corresponding laws. While the actual criteria which Victoria and the Commonwealth used to identify corresponding laws have not been specified, all of these jurisdictions are largely compliant with the Model Bill.

Other jurisdictions – New South Wales and Western Australia – have prescribed regulations to recognise all Australian jurisdictions as having corresponding laws, regardless of their divergence from the laws of the prescribing jurisdiction or the Model Bill.

Ministerial Agreements

Sections 464ZGN(1) and (2) authorise the Minister to enter into arrangements with participating jurisdictions to share ‘information’ ‘relevant to the investigation of an offence against the law’ of Victoria or a participating jurisdiction.

- (1) The Minister may enter into arrangements with a responsible Minister of a participating jurisdiction under which-

1322 S 464ZGL.

- (a) information from the DNA database system of Victoria that may be relevant to the investigation of an offence against the law of the participating jurisdiction is to be transmitted to the appropriate authority in that jurisdiction for the purpose of the investigation of, or proceedings in respect of, that offence; and
- (b) information from a DNA database system of the participating jurisdiction that may be relevant to the investigation of an offence against the law of Victoria is to be transmitted to the Chief Commissioner of Police for the purposes of the investigation of, or proceedings in respect of, that offence.

Section 464ZGN(2) requires, however, that information that is transmitted ‘must not be recorded or maintained in any database of information’ after a destruction date required by Victoria or any other participating jurisdiction. This provision has the effect of allowing forensic evidence to be used in Victorian investigations, even if the conduct of a forensic procedure on that person would not be authorised under another jurisdiction’s laws. It also has the effect of allowing information collected from persons under the Victorian provisions to be used in other jurisdictions in ways which would constitute a breach of the Victorian laws.

Section 464ZGO(1) also specifies that, subject to these Victorian requirements:

- (1) Subject to section 464ZGM and this section, nothing in this Subdivision affects the ‘taking, retention or use of forensic material, or information obtained from forensic material’, if the taking, retention or use of the material is authorised by or under a corresponding law of the Commonwealth, another State or a Territory.

This provision was inserted in the Model Bill on the assumption that the participating jurisdictions would enact uniform legislation. However, a lack of uniformity in the current laws for the collection and use of DNA profiles is impeding the commencement of data-sharing.

CrimTrac has indicated that it will not conduct inter-jurisdictional index matching until it finalises agreements with the participating jurisdictions.¹³²³ In April 2002 the Commonwealth executed an agreement with State and Territory Ministers¹³²⁴ to negotiate bilateral ministerial agreements (MOUs) specifying the ‘index matching protocols’ between those jurisdictions.¹³²⁵ As of February 2003, the MOU was still in draft form and CrimTrac had not conducted any inter-jurisdictional information sharing on the NCIDD [national DNA database] system.

From a policy perspective, it is preferable for the provisions of participating jurisdictions to be aligned,¹³²⁶ so that the restrictions on use and safeguards enacted

1323 ALRC, *Discussion Paper 66* (2002) 35.27, 83.

1324 Commonwealth State and Territories Agreement on Terrorism and Multi-jurisdictional Crime, 2002 at <http://www.ag.gov.au>.

1325 ALRC, *Discussion Paper 66* (2002) 35.27, 83.

1326 *Ibid* 86.

for the protection of donors in one jurisdiction are not undermined by the transfer of data to a jurisdiction where those provisions do not apply. The possible impact of the current inconsistencies between the provisions of Australian jurisdictions on Victoria's participation in data-sharing is considered below.

Achieving Consistency in Forensic Procedures Law

The 'Lowest Common Denominator' Syndrome

The ALRC reports included representations from a number of stakeholders concerned at the prospect of a database being founded on the lowest common denominator of the participating jurisdictions. The NSW Privacy Commissioner and the Commonwealth Privacy Commissioner were among those who feared that loose controls on the collection, use, retention and destruction of DNA data in one jurisdiction could undermine the safeguards established in all the other participating jurisdictions.

This Inquiry received similar representations. Victoria Legal Aid representatives urged the Inquiry to ensure that the data-sharing provisions enable Victoria to maintain its own high legislative standards:

Victoria should not lessen its evidentiary standards to equate itself with other jurisdictions that may have in place laws that infringe personal rights or established common law principles. While the ability to share DNA data will advance criminal investigations across the country and in Victoria, Victorian authorities must oppose any national moves to influence negatively the rigour of the DNA regime in this State.¹³²⁷

Similarly, the Victorian Privacy Commissioner observed that 'in many ways Victoria's forensic procedures law is superior to similar laws in other jurisdictions' and expressed concern at the possibility that Victorian data might be transferred and used in ways not authorised under Victorian law.¹³²⁸

What is a corresponding law?

The provision which effectively 'sets the standards' for data-sharing is the provision enabling recognition of participating jurisdictions with 'corresponding laws'. This Inquiry considered generally the basis on which a law might be regarded as being a 'corresponding law', and how Victoria should determine which laws correspond for the purposes of data-sharing.

1327 Victoria Legal Aid, Submission 15, 4. See also V Stojcevksi, *Minutes of Evidence*, 23 July 2002, 45.

1328 Privacy Commissioner, Submission 19, 7, 29-32.

In the development of the Model Bill provisions, the requirement that one jurisdiction recognise another as having corresponding laws was envisaged as a way of achieving a uniformity or conformity with the Model Bill provisions. The explanatory notes to the Model Bill (1999) indicate that a corresponding law is a law ‘that is in substantially similar terms’.¹³²⁹ However, the Model Bill left the way open for a jurisdiction to ‘deem’ another as having a corresponding law by regulation. It took this approach on the assumption that uniform laws would have been enacted before data-sharing commenced.

The Commonwealth’s understanding of what constitutes a ‘corresponding law’ might be inferred from notes accompanying a Bill to amend Queensland’s forensic procedures provisions. The Explanatory Notes accompanying the *Police Powers and Responsibilities (Forensic Procedures) Amendment Bill 2003 (Qld)* indicated that four areas listed below, had been ‘identified by the Commonwealth as requiring legislative amendment before the Commonwealth would recognise Queensland as having a “corresponding law”’.

- a matching table relating to inter-jurisdictional DNA profile comparisons;
- specific offences for the misuse of DNA information and material and for unlawful matching;
- provisions to expressly permit the retention and use of DNA material or information obtained under the law of another Australian jurisdiction;
- the recognition of sampling orders by a magistrate of another jurisdiction.¹³³⁰

These four requirements define the elements of the DNA database system: the indices on the database, the inter-jurisdictional enforcement and sharing provisions, and controls over the use of the material and information obtained.

The ALRC and the Sherman Review advocated that participating jurisdictions also harmonise other provisions directly governing the scope of forensic sampling. The Sherman Review identified specific provisions which it believed should be standardised in the legislation of all participating jurisdictions. It advocated that participating jurisdictions standardise the provisions for the sampling of offenders,¹³³¹ as well as those relating to the sampling of vulnerable donors (children, incapable persons and persons of indigenous or non-English-speaking background).¹³³²

1329 ALRC, *Essentially Yours* (2003) 40.7, 990.

1330 *Police Powers and Responsibilities (Forensic Procedures) Amendment Bill 2003*, Explanatory Notes, 2.

1331 Sherman, *Independent Review of Part 1D* (2003) Recommendation 21, 112.

1332 *Ibid.*

National Minimum Standards

In its final report the ALRC observed ‘a growing pragmatism’ on the part of Australian jurisdictions¹³³³ noting that some jurisdictions which had not enacted the Model Bill provisions for data-sharing had been recognised as having corresponding laws.¹³³⁴ To prevent the dilution of the Model Bill provisions, the ALRC advocated the development of ‘national minimum standards ... with respect to the collection, use, storage, destruction and index matching of forensic material, and the DNA profiles created from such material’.¹³³⁵

It recommended that each participating jurisdiction require that information transferred be treated in accordance with these national minimum standards. To give effect to this requirement, the ALRC proposed that jurisdictions which did not comply with this requirement be excluded from the data-sharing network.¹³³⁶

[T]he Commonwealth, States and Territories should not engage in inter-jurisdictional sharing of genetic information – whether on a bilateral basis or through a national DNA database system – unless there is legislation requiring that any information transferred to that jurisdiction will be treated in accordance with the national minimum standards.¹³³⁷

The ALRC did not define ‘national minimum standards’, but proposed that they incorporate the amendments to the Commonwealth *Crimes Act* recommended by the ALRC in its final report. While the Model Bill set out a template for an entire forensic sampling regime, the concept of national minimum standards suggests that jurisdictions might only need to comply with designated standards for data-sharing to proceed. Defining these standards would require the essential features of the current data-sharing arrangements to be identified and agreed upon.

The notion of national minimum standards is similar to the US approach to data-sharing. Individual jurisdictions collect, use and retain whatever DNA material their legislatures authorise, and individual differences are ‘ironed out’ by the use of only agreed indices on the national database: the crime scene index, the missing/unidentified persons index and the offenders’ index. For example, even if a state jurisdiction permits the sampling of suspects as well as convicted offenders, that state will only enter the post-conviction profiles on the national database.¹³³⁸

Applying the US approach, data-sharing could commence on the basis that participating jurisdictions uploaded only data collected and retained in accordance

1333 ALRC, *Essentially Yours* (2003) 40.44, 999.

1334 *Ibid.*

1335 *Ibid.*, Recommendation 40-41.

1336 *Ibid.* 40.51, 1000.

1337 *Ibid.* Recommendation 40-2.

1338 By 2002 all US states, along with the Federal Government, had implemented laws to collect DNA samples from offenders convicted of ‘qualifying offences’. However, while individual US jurisdictions have all legislated for the sampling of offenders, there are still differences between jurisdictions. See Dawn Herkenham, ‘DNA Database Legislation and Legal Issues’, (February 2002) *Profiles in DNA* 6, 2 at www.promega.com.

with, for example, the Model Bill provisions. Jurisdictions would still be able to collect and use forensic material and data obtained under their individual forensic sampling provisions, but would be precluded from sharing this data with other participating jurisdictions.

In the event that participating jurisdictions do not enact uniform provisions, this Committee prefers, in the first instance, the sharing of data collected in circumstances consistent with the Model Bill provisions. By this means data-sharing could commence despite inconsistencies between the laws of participating jurisdictions, and participating jurisdictions would have confidence that the data available through the national DNA database conformed to the minimum standards set out in the Model Bill.

Recommendation 14.1 Defining national minimum standards for data-sharing

That to enable data-sharing to commence on the basis of uniform national standards, Victoria advocate that, in the first stage of data-sharing, participating jurisdictions upload onto the national DNA database only data consistent with the Model Bill definitions of offender, suspect and volunteer.

Inconsistent Laws and the Admissibility Provisions

In the event that agreed national minimum standards cannot be defined, an alternative approach would be to protect Victoria's laws by permitting the exclusion of evidence obtained or retained in other jurisdictions in circumstances which would constitute a serious breach of Victorian law. MCCOC drafted a provision to this effect, to be enacted if uniform national forensic sampling laws could not be achieved. MCCOC proposed, in that case, that:

Forensic material taken, or information obtained from it, in accordance with the law of another State or a Territory must not be retained or used in this State [Territory] for investigative or evidentiary purposes if, had the forensic material been taken or information obtained in this State, its retention or use for those purposes would constitute such a serious breach of, or failure to comply with, any provision of this Part relating to the carrying out of forensic procedures that it would be inadmissible.¹³³⁹

The Permitted Purposes of Data-sharing

Statutory Purposes of Data-sharing

As noted earlier, the data-sharing provisions authorise participating jurisdictions to take, retain and use data obtained through the database system 'if the taking, retention

1339 MCCOC, *Model Forensic Procedures Report* (1999) Alternative Clause 82, 86.

or use of the material is authorised by or under a corresponding law'. It 'may be retained or used for evidentiary or statistical purposes even if its retention or use would [otherwise] constitute a contravention of this Subdivision'.¹³⁴⁰ The DNA database can also be used for coronial investigations, the investigation of complaints and in accordance with legislation governing extradition and related matters.

Section 464ZGH specifies the purposes for which a person may access information stored on the database. These purposes include:

- (a) forensic comparison [the permissible matching provisions];
- (b) making the information available ... to the person to whom the information relates;
- (c) administering the DNA database system;
- (d) in accordance with an arrangement entered into between Victoria and the Commonwealth, another State or a Territory for the provision of access to information contained in the DNA database system by law enforcement officers or any other persons authorised in writing by the Chief Commissioner of Police.

The Privacy Commissioner observed to this Inquiry that:

Already the *Crimes Act* allows DNA to be used for purposes unrelated to law enforcement. ... DNA profiles can be used for criminal investigations or 'any other purpose' provided for under the Act or under a corresponding law of a participating jurisdiction.¹³⁴¹

The ALRC also considered this issue and recommended legislative amendments to ensure that information only be used by recipients for 'permitted purposes',¹³⁴² and that the Commonwealth 'take reasonable steps' to ensure compliance by any non-Australian jurisdiction receiving Australian DNA data with Australia's national standards.¹³⁴³

Off-database Data-sharing

The standard Model Bill wording authorises the relevant Minister to enter into data-sharing arrangements in relation to 'information held on a DNA database system' but does not explicitly preclude the sharing of DNA data not held on a DNA database system. Subdivision 30A authorises a participating jurisdiction to:

retain or use forensic material obtained from another jurisdiction for investigative, evidentiary or statistical purposes, provided the material was taken in accordance with a state or territory law.

1340 S 464AGO.

1341 Privacy Commissioner, Submission 19, 10-11.

1342 ALRC, *Essentially Yours* (2003) Recommendation 42-3, 1088.

1343 *Ibid* Recommendation 42-5, 1068.

While the matching provisions inserted in the legislation of participating jurisdictions regulate the sharing of data through the database, it appears that they do not prevent or regulate the sharing of information ‘off database’. The ALRC noted that:

This provision does not appear to cover the sharing of forensic material which is not held on a DNA database system.¹³⁴⁴

Witnesses to this Inquiry have raised the possibility that police investigators will be able to obtain DNA profiles through informal bilateral arrangements, without the restrictions which apply through the use of CrimTrac’s database. Two concerns have been mooted:

- that forensic laboratories or police authorities compare profiles manually from data collected within their jurisdictions, regardless of the matching rules applicable through CrimTrac;
- that police investigators might be able to obtain information from DNA databases ‘that fall outside the legislative definition of a DNA database system’.¹³⁴⁵

In its final report, the ALRC recommended that:

The Commonwealth should amend the definition of a ‘DNA database system’ ... to mean a database (whether in computerised or other form and however described) containing identifiable DNA profiles maintained for law enforcement purposes.¹³⁴⁶

The effect of this amendment would be to include all forensic DNA databases within the ambit of the forensic procedures provisions to ensure that, despite their differing composition, they all come within the regulatory framework.

The Sherman Review also considered whether the current provisions could prevent off-database matching. It took the view that it would not be feasible to prevent off-database matching, and that it was preferable to focus on ways of making use of the national database more attractive.

If the participating jurisdictions see value in the national database they will use it and there will be no incentive to rely on off database matching. If on the other hand the national database does not live up to the promise then the participating jurisdictions will inevitably go elsewhere.¹³⁴⁷

Subdivision 30A, following the Model Bill, does not actually indicate how a breach of the ‘database provisions’ will affect the admissibility or use made of the information improperly used or disclosed. The Committee has concluded that no further legislative action is required at this stage in relation to sharing of forensic material under the data-sharing provisions. The issues relating to the unauthorised retention or use of forensic material obtained within Victoria are canvassed in Chapters 4, 9 and 12 above.

1344 ALRC, *Essentially Yours* (2003) 40.5, 990.

1345 ALRC, *Discussion Paper 66* (2002) 869.

1346 ALRC, *Essentially Yours* (2003) Recommendation 43-2, 1081.

1347 Sherman, *Independent Review of Part 1D* (2003) 3.184.

Inter-jurisdictional Enforcement of Orders for Forensic Procedures

Sections 464ZGL and 464ZGM combine to enable orders made in one participating jurisdiction to be executed in another. As far as Victoria is concerned, the execution of orders in Victoria originally issued in participating jurisdictions must comply with sections 464Y, 464Z and 464ZA of the Victorian *Crimes Act*, which govern the procedures involved in taking a DNA sample.¹³⁴⁸

Section 464ZGL authorises the relevant Victorian Minister to enter into agreements with Ministers from other participating jurisdictions to enable orders for forensic procedures to be enforced by persons in the other participating jurisdictions. Once a Ministerial agreement has been entered into, such orders can be registered (pursuant to section 464ZGL(2)), by including a certified copy of the order in the register kept by each participating jurisdiction. These orders can be cancelled under section 464ZGL(3). These provisions enable, but do not oblige or compel authorised persons from participating jurisdictions to execute orders made for forensic procedures in other (participating) jurisdictions.¹³⁴⁹

The ALRC recommended clarifying the arrangements under which police forces may act on behalf of each other.¹³⁵⁰ It is not known whether any orders have been registered since the Victorian regulations were issued in December 2002.

The National Database: Audits and Accountability

As part of its review of the operation of Part 1D of the Commonwealth legislation, the Sherman Review conducted an audit of CrimTrac. The audit was limited by the fact that the national database is not yet operational. Nevertheless, that audit prompted proposals for administrative measures to ensure the smooth and up-to-date operation of the database, as well as recommendations for the establishment of a comprehensive audit and review process. The implications of the audit findings for Victoria are considered below.

Verification and Destruction Protocols

CrimTrac relies on participating laboratories to notify them of destruction or retention requirements.¹³⁵¹ The Audit found that currently NCIDD data entry does not require an entry in the data field for destruction dates, and that there were as yet no

1348 The caution to be issued (s 464Y); the procedure for taking samples (s 464Z); the execution of the order, including the use of reasonable force (s 464ZA(1)); the presence of a parent, guardian or independent person in certain circumstances (s 464ZA(3)); requirements relating to the video-recording and witnessing of intimate procedures (ss 464ZA(4) and 464ZA(5)) and to the person who may assist in the taking of the sample (s 464ZA(2)).

1349 S 464ZGM(2).

1350 ALRC, *Essentially Yours* (2003) Recommendation 42-2, 1066.

1351 Professor J Scheffer, *Minutes of Evidence*, 2 June 2003, 19.

procedures in place to assess the accuracy of NCIDD records. It also found that CrimTrac lacked ‘a system for identifying and dealing with incidents of unintentional corruption of data’. The Sherman Review therefore recommended that CrimTrac:

provide a regular report advising each jurisdiction of the profiles that will be destroyed in the near future unless the destruction date for the profile is updated as permitted by law.¹³⁵²

This arrangement corresponds to the processes currently used in Victoria, whereby the VFSC notifies operational police of impending destruction dates of DNA profiles on the database.

Access and Security Safeguards

The Sherman Review found that it was possible to identify the identity of the profile’s donor using the data fields and functions available on the database and recommended that this be rectified.¹³⁵³ It was also concerned to find that security arrangements did not include the inspection of logs recording user access and searches conducted, and that active user identification codes were not being reconciled against the known active users. The review found that:

the database has sufficient functionality to be able to detect and investigate improper access and use of the database, but these tools are currently not being used on a proactive basis.¹³⁵⁴

The Committee expects that issues such as these will be overcome as the database becomes fully operational.

Complaints Mechanisms

The review noted that the lack of a complaints handling mechanism could expose the organisation to issues of legal liability and proposed that CrimTrac take steps to clarify the responsibilities of parties ‘responsible for any unlawful activity or defective administration in relation to profiles supplied by the jurisdictions’.¹³⁵⁵ In the first instance the Sherman Review proposed an immediate review of any legislative impediments to the resolution of complaints and the conduct of audits and investigations in relation to the flow of DNA data between participating jurisdictions;¹³⁵⁶ to be followed by the establishment of a co-ordinated complaints mechanism.¹³⁵⁷

1352 Sherman, *Independent Review of Part 1D* (2003) Audit Recommendation 4, 6.

1353 Ibid 7.

1354 Ibid Appendix J, 9.

1355 Ibid Recommendation 7, 9.

1356 Ibid Recommendation 16, 5.80-5.81; and 5.123 to 5.128.

1357 Ibid Recommendation 18, 5.123-5.128.

The Sherman Review recommended that all bodies involved in the maintenance of the database be required to provide information on complaint avenues and appeal rights in relation to the operation of the database.¹³⁵⁸ It also sought the publication of annual reports giving the number, type and outcome of complaints received.¹³⁵⁹

Audit and Reporting Requirements

The Victorian Privacy Commissioner drew the Inquiry's attention to the remarks of The Minister for Justice, Senator Ellison, at the establishment of CrimTrac. Senator Ellison affirmed the need for 'adequate and independent monitoring of a national DNA database system' and believed:

The best way to do this is to ensure that there is adequate independent monitoring in each jurisdiction and across jurisdictions.¹³⁶⁰

The Office of the Victorian Privacy Commissioner described the particular difficulties associated with monitoring the activities of a centralised database, relying on input from so many jurisdictions and participating agencies.¹³⁶¹ While there are provisions within the Commonwealth forensic procedures for audits and reviews of CrimTrac, it would not be within the ambit of Commonwealth laws to monitor the compliance of participating jurisdictions. As the ALRC observed:

It would be difficult to determine whether the information has been unlawfully retained if the second jurisdiction has inadequate oversight mechanisms. ... Once the Commonwealth has transferred information to a state or territory jurisdiction, federal oversight mechanisms generally will not extend to the handling of that information within the second jurisdiction.¹³⁶²

The ALRC Inquiry, the Sherman Review and the Queensland Crime and Misconduct Commission were all concerned at the loss of control over DNA information that follows from its inclusion on the national database and considered the difficulties of providing for the monitoring and review of compliance over all participating jurisdictions.

The Sherman Review also affirmed the importance of establishing a national framework for auditing the national database and related forensic and law enforcement bodies. This framework included cross-jurisdiction agreement 'on the conduct [at least once every two years] of external audits of the relevant systems and procedures' in the national DNA database system and in each of its component parts.¹³⁶³ The ALRC took the view that the operation of a transparent and accountable DNA database system was a matter of public interest and also recommended 'an

1358 Ibid Recommendation 10, 5.106-5.109

1359 Ibid Recommendation 11, 5.106-5.109.

1360 P Chadwick, *Minutes of Evidence*, 22 July 2002, 62.

1361 ALRC, *Essentially Yours* (2003) 43.63, 1086.

1362 Ibid 43.55, 1084.

1363 Sherman, *Independent Review of Part 1D* (2003) Recommendation 17, 5.123-5.124.

independent, publicly available audit of all DNA database systems operating pursuant to the *Crimes Act* (including participating forensic laboratories)'.¹³⁶⁴ These audits would report to 'an independent third party'.¹³⁶⁵

The Sherman Review considered the information currently available on the operation of DNA databases and the needs which will arise when the CrimTrac database is fully operational. It anticipated that, with the commencement of national data-sharing, there would be a clear need for data to be presented, analysed, interpreted and classified in a consistent way. It recommended, therefore, that the Australasian Police Ministers' Council:

agree on a consistent, standard format for reporting the use of DNA forensic information that allows aggregation and comparison across jurisdictions.¹³⁶⁶

It went on to specify the data which should as a starting point, be standardised, indicating that details of the number of entries in each index, the number of profiles held and de-identified, the matches achieved and the samples destroyed should be provided.¹³⁶⁷

This Inquiry noted that this type of information is currently provided by the VFSC and has recommended earlier in the Report that the VFSC publish its data annually to provide a benchmark for the collection of consistent data on a national scale.

Conclusions

The Inquiry took the view that participating jurisdictions need to accept that their control over the uses to which forensic data is put will be limited once the data has been loaded onto the national database. For this reason the Inquiry focussed on firstly, the means available to ensure that the Victorian database is accurate, up-to-date and secure, and secondly, on a phased participation in the national DNA database.

To this end the Committee endorses the recommendations made by other recent reviews and proposes that, as part of a co-ordinated audit of DNA databases in participating jurisdictions, an audit of the data contained on Victoria's DNA database be undertaken on a regular (at most biennial) basis.

1364 ALRC, *Essentially Yours* (2003) Recommendation 43-4, 1089. It also recommended that the Australian Federal Police be required to report to Parliament on the samples obtained, used and destroyed pursuant to the Commonwealth legislation. This is considered in the Victorian context in Chapter 14.

1365 Crime and Misconduct Commission quoted in Sherman, *Independent Review of Part 1D* (2003) 5.73-5.74.

1366 *Ibid* Recommendation 12, 5.110-5.118.

1367 *Ibid*.

Recommendation 14.2 Audit of DNA database

That Victoria, through its representation on CrimTrac, work towards the introduction of a regular, independent audit of the operation of the national DNA database.

VICTORIA'S PARTICIPATION IN THE NATIONAL DATABASE

Phased Participation in National Data-sharing Arrangements

Victoria has been in the vanguard of the development of Australian forensic procedures laws. Its regime is largely compliant with the Model Bill and includes safeguards for the donors of DNA samples that are lacking in the regimes of some other Australian jurisdictions. Victoria's forensic laboratory is at the cutting edge of forensic science in this country, and its representatives are to be found on accreditation panels and on the boards and committees of peak national and international forensic science organisations. Victoria and the Commonwealth have recognised the laws of Victoria's immediate neighbours – Tasmania, South Australia and New South Wales – as having corresponding laws.

Victoria is therefore in a position to benefit from data-sharing arrangements which recognise and maintain the high standards that Victoria's regime has already achieved. If evidence obtained in less regulated jurisdictions can be used in Victorian prosecutions, Victoria's own provisions are, to some extent, exposed. This exposure arises by permitting the use of data that could not have been collected and analysed under Victorian law or of data which does not meet the standards of analysis achieved by Victoria's NATA-accredited laboratory. It could also arise if the profiles of Victorians are used in other jurisdictions in ways not authorised at the time of collection under Victorian law.

This Committee is concerned at the possibility that once data is loaded onto the CrimTrac database, compliance with requirements for the limited use or the destruction of DNA profiles will be increasingly difficult to observe and to monitor. Therefore the Committee recommends that the loading of Victorian data onto the national database proceed in stages and that, in the first stage, only profiles which, at the time of collection, were provided for indefinite and unlimited use be made available to law enforcement agencies in other jurisdictions under data-sharing arrangements.

Recommendation 14.3 A phased process for entering national DNA database

- (i) That Victoria's participation in the national DNA database be phased in, to ensure that consistent or agreed minimum standards apply to the data entered and retained on the database; and***
- (ii) that in the first stage, only profiles which, at the time of collection, were provided for indefinite and unlimited use be made available to law enforcement agencies in other jurisdictions under data-sharing arrangements.***

Data Management

Maintaining the DNA Database

The effectiveness of the database depends on the quality of the data it contains. As NATA indicated, 'the quality of the work that is undertaken to achieve the results is very very important'.¹³⁶⁸ In the same way, the accuracy of the data loaded and maintained on the database is crucial.

The UK evaluations have made it clear that adequate and efficient administration is required at each stage of the DNA sampling process to maintain an accurate, up-to-date DNA database. Administrative shortcomings that result in wasted effort can quickly escalate the cost of DNA sampling.

As the UK has found, the retention of solved crime scene stains in the crime scene index, for example, or the duplicate sampling of suspects and offenders can give rise to wasted analysis and fruitless detections. The *Evaluation Report*, conducted by the Home Office during 2001-2002, noted administrative difficulties which prevent police from receiving up-to-date information on whether a person who is to be arrested/charged etc for a recordable offence has already provided a DNA sample, with the result that 'all forces are taking repeated samples from recidivists unnecessarily'.¹³⁶⁹ It was also found to be crucial to ensure that the DNA database of unsolved crimes was well maintained, so that crime stain profiles were removed once a suspect had been identified.

As the database expands, the possibility of duplication increases and the need for up-to-date record systems also increases. Representatives of the Queensland Police Service also noted that the effort required to maintain an expanding database is a significant responsibility. Senior Sergeant Pettiford observed:

A large database requires a lot more work in the area of maintenance. That is, to ensure its integrity, it is important that it is accurate and lawful. This requires

¹³⁶⁸ M Parsell, *Minutes of Evidence*, 23 July 2002, 124.

¹³⁶⁹ Home Office, Smith, *DNA Expansion Program: Evaluation Report* (2001) 20.

vigilance in making sure that only lawful samples are retained on the database and that DNA samples are destroyed when required by law.¹³⁷⁰

The *Evaluation Report* made a number of recommendations for more stringent monitoring of compliance and observed, in general:

The issues raised ...are not a bureaucratic chore but are essential to compliance with the law and to fostering public confidence in police guardianship of this important database.¹³⁷¹

The Size of the Database

Proposals for the expansion of the forensic sampling regime are driven largely by the desire to increase the size of the forensic database. The DNA database makes the greatest gains in efficiency by processing a large number of reference samples. This notion that a 'critical mass' of data was needed to justify the investment in forensic sampling prompted the decision to undertake forensic sampling on a large scale in the UK.

The business case for the investment strategy and planning, in my opinion, is best made on a national scale. This will support:

- the 'critical mass', to ensure that unit costs are acceptable;
- the 'critical mass' also helps to ensure that the Database is robust; and
- the 'critical mass' ensures that the operational benefits will be delivered.¹³⁷²

The larger the database, the greater is the saving that can be achieved by searching it electronically to identify suspects, rather than by alternative methods of crime detection. The VFSC put the proposition:

If the DNA database is to be fully utilised then the larger the number of samples for comparison, the more effective it becomes.¹³⁷³

The inference drawn from this is that a database needs to reach a minimum size in order to yield the results achieved by the UK Forensic Science Service. While the large-scale collection of reference samples brings efficiencies of scale to the laboratory, and justifies the investment in the capital equipment and staff, it imposes administrative demands on operational police. To meet these administrative demands requires, in turn, a significant investment in operational support and reduces the financial savings achieved by the laboratory at the end of the sampling process. These issues are addressed in the next chapter.

1370 Briefing provided at Committee meeting with Queensland Police, 19 September 2002, 1.

1371 Home Office, Smith, *DNA Expansion Program: Evaluation Report* (2001) 20-21.

1372 WA Legislation Committee, *Forensic Procedures and DNA Profiling: Report 48* (1999) 310-311.

1373 VFSC, Submission 23, 2; J Wallace, *Minutes of Evidence*, 2 June 2003, 11.

15. LEGISLATING FOR THE FUTURE: MANAGING THE REGIME

The Terms of Reference for this Inquiry asked the Committee to examine ‘the collection, use and effectiveness’ of DNA sampling and databases. It gave particular emphasis to ‘identifying areas and procedures which would more effectively utilise forensic sampling and improve investigation and detection of crime’. In response to this reference, the Inquiry has examined the implementation of the current provisions. The Inquiry weighed up the forensic benefits of sampling offenders, suspects and volunteers with the administrative and management responsibilities that the sampling of each of these groups entailed.

Quite apart from the direct forensic utility of DNA profiling in active criminal investigations, the databasing of DNA profiles has resulted in the prosecution of almost 1000 offenders in respect of more than 2000 charges. These results have been achieved primarily through the forensic sampling of persons found guilty of serious offences under section 464ZF.

The Committee found that the contribution made by the sampling of suspects was not as well-defined. Since far fewer suspects have been sampled than offenders, a smaller number of detections have been recorded from the inclusion of suspects’ profiles on the database.

The sampling of volunteers has been a vexed issue for this Inquiry, because of the multiplicity of purposes provided for under the current voluntary sampling provisions. Forensically, the value of sampling volunteers lies mainly in its capacity to create DNA profiles of missing persons, or to identify and eliminate extraneous DNA material from crime scene evidence. This is a necessary element of DNA sampling, and also serves as a control on the collection and handling of DNA material.

The sampling of suspects and volunteers requires management and administrative systems to ensure compliance with the more stringent statutory requirements for collection and use of this forensic material. While in some jurisdictions the legislature has removed these statutory requirements to simplify the DNA sampling of these groups, this Committee believes that ethical concerns as to the use to which the samples of ‘innocent’ people can be put justify the retention of these requirements.

In developing its proposals for law reform and the future uses of forensic DNA profiling in Victorian criminal investigations, the Inquiry noted some of the pitfalls

that can arise if the legislative regime is not provided with the support needed for its effective implementation.

CONSTRAINTS ON THE EFFECTIVENESS OF DNA SAMPLING

The Inquiry was well aware of the difficulties that can beset a forensic sampling regime that lacks the resources required for implementation. Overseas experience has shown that the risks which attend the unsupported implementation of forensic sampling laws are high. Laboratories need the capacity for timely and perfect DNA analysis, while law enforcement agencies need to have the management and administrative systems to ensure that the regime is maintained and the statutory requirements complied with.

Backlogs: The Impact of Delays on Crime Detection

As far as forensic laboratories are concerned, the capacity to provide prompt services, using flawless and well-audited processes is fundamental. One consequence of the introduction of forensic procedures regimes in other jurisdictions has been intensive, but sometimes unsupported, efforts to collect as many samples as possible under the new laws. The resources required to collect samples from crime scenes and offenders are relatively insignificant compared to the laboratory resources needed to analyse the samples and the investigative resources needed to follow up the results.

As shown in Chapter 10, delays in the analysis of DNA samples can result in perpetrators of serious offences remaining at large. In Canada, for example, the delayed analysis of DNA samples enabled the perpetrator to remain at large and commit further offences before being detected. In the USA, priority was given initially to the analysis of casework samples (DNA samples from crime scenes) where a suspect was identified. The analysis of 'no suspect' casework samples lagged behind. As at February 2001 'tens of thousands of evidence samples across the country were untested'.¹³⁷⁴ Representatives of the Federal Bureau of Investigations alerted Congress to the impact of the delays on crime detection:

Delays in processing offender samples not only reduce the number of cases solved, but can lead to situations where offenders are released from custody before the evidence linking them to other crimes has been analysed, and they are free to re-offend.¹³⁷⁵

The lack of resources for analysis can therefore undermine the effect of the forensic sampling legislation. In the USA, mounting and largely unassailable backlogs of unanalysed reference samples have negated the value of legislating for the

1374 US Office of the Inspector General, *The Combined DNA Index System: Report No. 01-26* (17 September 2001) 2, at <http://www.usdoj.gov/oig/audit/0126/exec.htm>.

1375 *Ibid* 2.

compulsory sampling of serious offenders. The backlog amounts to many thousands of samples, and the delays in processing have reached the point where the utility of the process is being questioned.¹³⁷⁶ By 2000, while over 700,000 offender samples had been collected; only half of those samples had been analysed and most of those profiles were obtained using the now outdated FRLP system and would have to be re-analysed using the STR system.¹³⁷⁷

Victoria also has a backlog of reference and casework samples awaiting analysis. The VFSC estimates that its backlog would require approximately four years to eliminate, with a lead time of approximately 12 months from the appointment of additional staff.¹³⁷⁸ In 2003/2004, the Victorian Government allocated additional funding 'to boost the State's forensic crime solving capabilities with new analytical equipment and facilities'.¹³⁷⁹

Laboratory Processes and the Reliability of Criminal Convictions

Pressures on forensic laboratories can also result in the use of flawed processes for DNA analysis. This was exemplified in the New Zealand case, where a false match was made, probably as a result of a mix-up of DNA samples at the laboratory.¹³⁸⁰ If procedural flaws are not detected, the reliability of any or all convictions obtained in proceedings relying on forensic analysis can be called into question. This has happened in the USA, and resulted in the quashing of convictions brought about largely on the basis of what has since been found to be unreliable DNA evidence.¹³⁸¹

Since the introduction of the Profiler Plus system at the VFSC during 1998, and the laboratory's accreditation by NATA in 1999, there have been no more than a handful of cases where the DNA evidence was contested at the trial or on appeal,¹³⁸² and even fewer where the evidence was found to be flawed in some way.¹³⁸³

Breaches of DNA Sampling Laws: The Impact on Public Confidence

Finally, this Inquiry has noted that where law enforcement agencies use their statutory powers to obtain DNA samples for criminal investigations, without the support of management and administrative systems, systemic breaches of statutory requirements can undermine the effectiveness of the DNA profiling process. In the UK, challenges

1376 Ibid.

1377 Federal Bureau of Investigation, *Congressional Statement* (2000) 1.

1378 VFSC, Submission 23S4.

1379 Victoria, *Victorian Budget Overview 2003-04*, 21.

1380 See Chapter 10 for details.

1381 See Chapter 13.

1382 See for example *R v Juric* [2002] VSCA 77; *DPP v Devaldez* [2003] VSCA 29; *R v Noll* [1999] 3 VR 704; *R v Ryan* [2002] VSCA 176; and the coronial investigation into the death of Jaidyn Leskie, which commenced at the time of writing of this report.

1383 *R v Juric*, *ibid*.

to the admissibility of DNA evidence in two high-profile cases revealed that many thousands of DNA samples had been retained and used in breach of the statutory requirements for their destruction.¹³⁸⁴ Police and forensic services lacked the administrative systems needed to track and ensure compliance with these requirements.

PRIORITIES FOR THE FUTURE USE OF FORENSIC SAMPLING

As outlined above, the effectiveness of forensic sampling in criminal investigations is affected by the extent and efficiency of the administrative and investigative support it receives. The forensic benefits of timely and accurate DNA analysis have nevertheless prompted a surge of demand. As shown in Chapter 2, this demand is nurtured by technological innovation, which is constantly increasing the potential capacity and efficiency of forensic DNA profiling and databasing. As Victoria Police noted in *Tracing the Future*:

Technology now permits greater efficiency and sophistication of analysis and identification...[D]igital technology, combined with the national database, provide the platforms to rapidly compare crime scene and offender samples. These breakthroughs have been communicated widely, raising the expectations of police, the community and Government of the uses and outcomes of forensic services.¹³⁸⁵

The Increasing Demand for Forensic DNA Analysis

The VFSC is experiencing the same escalating demand for forensic services that forensic laboratories in the UK, the US and other Australian jurisdictions have witnessed in recent years. In New South Wales, for example, DNA evidence was used in at least 600 cases over 12 months. In the first quarter of 2000, 303 cases were investigated using DNA analysis, involving the analysis of 727 samples. Twelve months later the number of cases in which DNA analysis was used had trebled.¹³⁸⁶ A similar growth in demand has been experienced in Queensland. According to Queensland police officers, the rate of submission of DNA exhibits for analysis has increased by 400 per cent, largely due to the training that has heightened the awareness and capacity of crime scene officers to collect such forensic material.¹³⁸⁷

1384 *Attorney-General's Reference (No. 3 of 1999)* [2002] 2 Cr App R. 416; [2001] Cr App R 475 (HL).

1385 Victoria Police, *Tracing the Future* (2002) 5.

1386 1016 cases were investigated using DNA analysis, and 4,246 samples analysed. This averages approximately twenty-six new cases per day, and sometimes the NSW laboratory receives up to 60 cases in one day. See Linzi Wilson-Wilde, 'DNA Profiling and its Impact upon Policing', *Use of DNA in the Criminal Justice System*, seminar papers, Institute of Criminology, 11 April 2001, 5.

1387 Briefing provided to the Law Reform Committee at a meeting with Queensland Police, 19 September 2002, 1. Forensic sampling began in Queensland in November 2000, and expanded in June 2001. By September 2002 a total of 26,123 DNA crime scene samples had been received at the DNA Unit, of which 3,000 have been entered onto the Queensland DNA

Likewise, during 2001/2002 the South Australian forensic laboratory recorded a 70 per cent increase in the number of criminal cases involving DNA analysis and a 68 per cent increase in the number of samples to be profiled for inclusion on the database.¹³⁸⁸

Criminal Proceedings

The Inquiry's attention was drawn to the size and impact of the backlog of samples awaiting DNA analysis by media reports of a recent criminal matter listed for special mention in the Melbourne Magistrates' Court.¹³⁸⁹ Magistrate Hannan observed that delays in DNA analysis had produced a bottleneck in the courts, where the smooth conduct of criminal trials was impeded. Magistrate Hannan observed:

The overwhelming issue for the Magistrates' Court and the criminal justice system as a whole is the delay in forensic testing. Delays, in reality are entrenched and they are increasing. ... It is obviously of concern to use as lawyers and the court that we have people whose cases we cannot progress because we are simply stalled by delays in forensic testing.¹³⁹⁰

The more serious the offence, the more likely there is to be a delay.¹³⁹¹ Victims and complainants endure extreme stress for the duration of the criminal proceedings, and their suffering is compounded by the delays that are occurring.

The delays also affect the defendants. The courts are also becoming increasingly concerned at the implications for defendants not granted bail. Magistrate Hannan indicated that:

Defendants remain in custody for extended periods of time without access to material which will form part of the evidence alleged against them'.¹³⁹²

To obtain bail under the *Bail Act 1977 (Vic)* it is necessary for the accused to show 'exceptional circumstances'. Generally it is difficult to establish 'exceptional circumstances' and bail is almost never available to those charged with serious (including drug-related) offences. However, in a case heard by Magistrate Hannan early in 2003, Her Worship determined that the delay at the forensic laboratory constituted exceptional circumstances and bail was granted. Magistrate Hannan

database. A further 13,000 historical profiles are being prioritised for submission to the laboratory.

1388 South Australia, Department of Administrative and Information Services, *Annual Report 2001-2002* (2002) 46. It recorded an overall increase in output of 74 per cent, including a 35 per cent increase in overall casework output.

1389 *Police v Romeo & Ors*, (Magistrates' Court of Victoria, Transcript, Magistrate Hannan, 9 May 2003).

1390 Magistrate Hannan, *Minutes of Evidence*, 2 June 2003, 37-38.

1391 *Ibid* 41.

1392 *Police v Romeo & Ors*, (Magistrates' Court of Victoria, Transcript, Magistrate Hannan, 9 May 2003) 2.

indicated that the circumstances leading to the grant of bail in this case were not uncommon.

I think it is a fairly common view that ... people are being granted bail solely, in the end, on the basis of this delay.¹³⁹³

It was put to this Inquiry that the problem had reached a stage where the scheduling of cases was not able to proceed as required by the *Magistrates' Court Act 1989 (Vic)*. Magistrate Hannan concluded:

It has got to the stage when the VFSC has its own interpretation of what is to happen in the first few weeks. As they understand it, what they should do in the first six weeks is acknowledge that they have been sent the material and advise us as to how long the delay will be. We regard that as entirely unsatisfactory. We have people languishing in custody. It is obviously of concern to us as lawyers and the court that we have people whose cases we cannot progress because we are simply stalled by delays in forensic testing. If they have an ongoing investigation they will prioritise that work over people who have already been charged and are in custody.¹³⁹⁴

The Committee formed the view that the preparation of DNA evidence for criminal trials should be a very high priority, in view of the implications for the victims and the defendants. The Committee has recommended further research to consider the role and impact that DNA evidence has in criminal proceedings, noting that the routine inclusion of DNA evidence in prosecution briefs exacerbates the pressures on the forensic laboratory.

The Sampling of Offenders and DNA Databasing

As noted above and in Chapter 5, the Victorian DNA database has already demonstrated the utility of databasing the profiles of serious offenders. The contribution made by repeat offenders to the crime rate is evident, even without strong data on recidivism in Victoria,¹³⁹⁵ from the number of database detections already made. The Committee has endorsed the priority given to databasing serious offenders' profiles, and has recommended that this use of forensic sampling be expanded. The Committee believes that considerable forensic benefit will be achieved by the routine sampling of capable adult offenders sentenced to prison terms for Schedule 8 offences. The Committee notes, too, that the administration of offender sampling is in some ways less burdensome than the sampling of suspects and volunteers, because the requirements for consent and for the destruction of DNA material do not apply. The profiles of adult offenders can be retained indefinitely. If the Committee's recommendation for a spent convictions provision is implemented, DNA profiles could nevertheless be retained on the database for at least 10 years.

1393 Magistrate Hannan, *Minutes of Evidence*, 2 June 2003, 37-38.

1394 *Ibid.*

1395 See Chapter 5 generally, and the publications of the Office of the Correctional Services Commissioner, *Reducing Re-offending Framework: Setting the Scene* (January 2002).

The Sampling of Suspects

The ‘investigative’ use of DNA profiling, reviewed in Chapter 6 in relation to suspects, and in Chapter 11 in relation to the ensuing criminal proceedings, is the backbone of the forensic sampling regime. The sampling of suspects, whether it ultimately includes or eliminates the suspect from the investigation, is equally useful and provides evidence of a person’s connection to a crime scene that, in some circumstances, could not be adduced in any other way.

The Committee believes that the sampling of suspects should continue to be based on the direct forensic relevance of their DNA profile to the investigation in which it is sought. It notes, too, that the analysis of crime scene evidence in complex investigations is probably the most resource-intensive aspect of DNA sampling. It is this use of DNA sampling which has produced a backlog of samples and which has the most direct bearing on the timely prosecution of defendants.

The Detection of Volume Property Crimes

Magistrate Hannan believed that higher priority should be given to DNA profiling for use in serious criminal cases, where defendants are in custody. Her Worship expressed concern at the impact of the appointment of the Crime Scene Examiners and the proposed collection of DNA evidence from the scenes of volume crimes, such as motor vehicle thefts and house-burglaries. Her Worship queried whether this initiative would bring benefits overall to the criminal justice system. In relation to proceedings in train, Her Worship noted that the submission of evidence from volume crime scenes will merely add to the pressures on the laboratory.¹³⁹⁶

The Inquiry examined the data available from the UK, where the *PACE Act* provides for DNA sampling on the same basis as fingerprinting. As noted in Chapter 9,¹³⁹⁷ although police forces in the United Kingdom have been expanding the collection of DNA from volume crime scenes, the data available suggests that the yield from these crime scenes has remained steady despite the higher priority attached to the collection of this form of evidence and the higher rate of submission.

An evaluation of Phase One of the UK program found that ‘the number of DNA samples obtained from scenes (“yield”) and then presented for analyses (“submitted”) has remained quite constant throughout 2000/2001. Incentives provided to police forces seem to be having an effect on the submission rate, but not necessarily on the yield. The Evaluation Team found that there were ‘major increases over the year in the number of DNA scene samples submitted’ for analysis, and that ‘the submission rate for ‘scenes of crimes stains’ has clearly altered as a result of the additional

1396 Magistrate Hannan, *Minutes of Evidence*, 2 June 2003, 39.

1397 See ‘The Collection of Crime Scene Evidence’ in Chapter 9 above.

funding available'.¹³⁹⁸ Nevertheless, the DNA samples yielded from crime scenes remained fairly constant at approximately three percent of the evidence collected.

There may be a number of explanations for this outcome. It is possible that the yield is to some extent determined by the nature of the crime scenes at which the evidence is collected. It is also possible that the yield recorded in the UK during this study was affected by priorities and operational factors that applied at the time. The UK study found that some operational considerations which affected crime scene yield were more difficult to address. The team found that in some forces the additional funds for the collection of DNA from volume crime scenes 'conflicts with a desire to focus resources on those scenes most likely to yield potential DNA material'. A downturn in the number of recorded volume property crimes also reduced the priority accorded to this activity in some forces.¹³⁹⁹

UK data also indicates that collection of the crime scene evidence and the DNA data generated by its collection has not been consistently and completely documented or investigated.¹⁴⁰⁰ There is therefore some doubt as to whether the investment in the collection of DNA from volume crime scenes is being repaid in terms of the resulting prosecutions or convictions.

DNA Profiling and Fingerprinting: Some Comparisons

Some regional UK police forces have developed their own methods of monitoring the role of DNA profiling, comparing it to the contribution of fingerprinting. The UK *Evaluation Report* observed, from the limited data available, 'fingerprint identifications appear to have yielded a far higher number of additional detections'.¹⁴⁰¹ In one region, it was found that:

- 66 per cent of fingerprint identifications led to a primary detection, compared to 55 per cent of DNA; and
- 84 per cent of fingerprint identifications led to additional detections, compared to only 5 per cent for DNA.¹⁴⁰²

Freckelton and Selby have also noted the advantages that fingerprinting may have over DNA profiling in the speedy and inexpensive detection of crime.

DNA profiling has the potential to have an impact upon arrest and conviction rates, but it will not be statistically dramatic. Traditional techniques cover a considerable percentage of the field now being augmented by DNA typing. In fact, given the speed

1398 Home Office, Smith, *DNA Expansion Program: Evaluation Report* (2001) 5, 65 respectively.

1399 Ibid 5.

1400 Ibid.

1401 Ibid 78.

1402 Data recorded by the Kent region quoted in Home Office, Smith, *DNA Expansion Program: Evaluation Report* (2001) 78.

with which some of these traditional techniques can be undertaken, a major role still remains for such forms of analysis. What DNA contributes to this is refinement, improvement and greater certainty.¹⁴⁰³

Victoria Police sees DNA profiling and fingerprinting as complementary forensic tools.¹⁴⁰⁴ While DNA analysis is potentially available in urgent investigations within 48 hours, this could not be achieved with current resources except for the most urgent cases.¹⁴⁰⁵ Fingerprinting is cheaper and generally faster than DNA profiling:

Fingerprints have traditionally been used as a rapid method of identifying individuals at crime scenes for some 100 years. The response time is generally within 24-48 hours.¹⁴⁰⁶

Very little published data is available on the cost-effectiveness of fingerprinting and DNA profiling in Victoria. *Tracing the Future* indicated that the future Planning Unit¹⁴⁰⁷ would be responsible for, among other things, evaluating the 'value added product derived from the collection and processing of relevant information' and providing transparency about real costs of forensic services.¹⁴⁰⁸

Victoria Police indicated a need to review the cost-effectiveness of forensic services, and to ensure that the services are meeting targeted goals and providing the outcomes required of its clients. In *Tracing the Future* it was acknowledged that the public sector requires 'rigorous evaluation' of expenditure, and noted in relation to forensic analysis that:

Forensic analysis needs to target specific court outcomes or contribute to intelligence. This requires ongoing and accurate data on the contribution that various forensic services make to the investigation, detection and reduction of offences. ... Patterns of usage in forensic services in themselves do not indicate investigative cost-benefit.¹⁴⁰⁹

The Committee believes that to establish the net potential benefit of collecting and analysing DNA evidence from volume crime scenes, the cost-effectiveness of DNA sampling needs to be compared with the cost-effectiveness of fingerprinting and with other strategies in the prevention and detection of these crimes.

DEFINING AN ACHIEVABLE ROLE FOR DNA PROFILING

The Committee has concluded that, on the evidence available from other jurisdictions and on the experience within Victoria, the two most effective elements of the current regime are the investigative use of DNA profiling in the investigation of serious offences including unsolved 'cold' cases, and the databasing of offenders' profiles.

1403 Freckelton and Selby, *Expert Evidence: Law, Practice, Procedure and Advocacy* (2002) 488.

1404 Victoria Police, Submission 23S2, 7.

1405 Ibid.

1406 Ibid.

1407 Victoria Police, *Tracing the Future* (2002) 52-53.

1408 Ibid 54.

1409 Ibid 41.

Despite the resource implications, therefore, the Committee believes that this aspect of DNA profiling needs to be addressed as a priority. Reducing the backlog is not only an imperative from the viewpoint of those involved in current criminal proceedings, but also as a means of avoiding the preventable commission of further serious crimes by repeat-offenders.

Reconciling Police and Laboratory Priorities

Defining an appropriate role for forensic sampling involves making decisions about policing and laboratory priorities. Decisions on priorities made by operational police and the forensic laboratory affect each organisation in different ways and can 'pull' each body in different directions.

The forensic laboratory can achieve economies of scale and make a quantifiable contribution to crime detection by DNA databasing. The profiling system is well suited to the large-scale analysis of standard reference samples, and the economic and forensic benefits of the DNA database are most evident in its handling of large amounts of data. However, for operational police, the larger the database the greater is the difficulty in maintaining and supporting it. The gains to the laboratory that are achieved by economies of scale are offset by the cost to operational police of managing the data: investigating the detections made, maintaining communication and administrative systems to ensure that the database is up-to-date, and integrating the DNA database intelligence with other policing strategies.

Similarly, while streamlining the collection of crime scene evidence by operational police may increase the efficiency and effectiveness of this activity, it will also increase the workload of the laboratory significantly. Victoria Police acknowledged that the appointment of specialised Regional Crime Scene Officers would have this effect, but envisaged that the creation of an expanded Biological Analysis Unit would be able to meet the growing demand for crime scene analysis.

The creation of the Biological Analysis Unit, adequately staffed and working at full capacity, combined with the consolidation of the biology shopfront and the pilot of the RCSO concept, will increase the number of samples that require DNA analysis.¹⁴¹⁰

At present, the VFSC is part of Victoria Police, and the priorities of the VFSC are reconciled with other competing priorities of Victoria Police. As noted in Chapters 9 and 10, the Committee formed the view that the VFSC should be placed on an independent footing so that it can determine its own priorities and maximise the effective use of its resources.

1410 Ibid 73.

Co-ordinating Legislative and Operational Commitment

While the advantages of a large DNA sampling regime are compelling in theory, in practice, there are real administrative and investigative difficulties in maintaining the database and making the best use of the information it can produce. It would seem desirable therefore, to define a role for DNA profiling which, while perhaps not exploiting the technology to the full, is actually achievable with the administrative and investigative resources available.

It is clear that the provision of a legislative framework is only one element of the forensic sampling regime, and that the effectiveness of the regime depends on a workable and efficient framework being established for its implementation.

In both the USA and the UK, the implementation of the forensic procedures regimes has suffered, to some extent, from a lack of co-ordination between the scope of the legislative regime and the financial, technical and administrative resources available for implementation. A multitude of operational, technological and administrative factors affect the flawless conduct of DNA profiling; and nothing short of flawless conduct is required to ensure that the final results are reliable and admissible. And even where all the pre-conditions for DNA collection and analysis are met, the role and the probative value of the DNA evidence will still vary case-by-case.

The resource implications of DNA sampling should not be under-estimated. The resources required extend well beyond the initial investment in the forensic services. There is also a significant investment of staff in the administration of the procedures, in the establishment and maintenance of information systems to monitor the impact of the regime and in the investigation time required to incorporate and follow up the results of DNA profiling. Finally, the maintenance of the database, and of the information systems on which it relies, may become increasingly costly as the database grows.

The investment required to establish a comprehensive DNA sampling regime creates an obligation on law enforcement agencies to maximise and account for their use of this potentially complex, costly yet effective investigative tool. Resources are wasted if sampling is not conducted carefully, if the results are not followed up, or if the sampling is conducted in investigations where the results will have limited probative value.

It is therefore essential for the expansion of the DNA sampling regime and the DNA database to proceed in a planned and co-ordinated way, to ensure that the laboratory services, administrative systems, and operational support are available to give effect to the legislative regime.

Adopted by the Committee

18 February 2004

PART G:
APPENDICES AND BIBLIOGRAPHY

APPENDIX 1: SUBMISSIONS

No.	Date	Name	Affiliation
1. 1S*	2 July 02	Mr R Lowe	
2. 2S*	2 July 02 11 July 02	Mr L Cunliffe	
3. 3S*	5 July 02	Mr A Coulston	
4. 4S*	8 July 02 28 July 02	Mr J Knight	
5.	10 July 02	Ms Emma Hunt	Co-Executive Director Public Interest Law Clearing House
6.	10 July 02	Mr Noel McNamara	President Crime Victims Support Association Inc.
7.	11 July 02	Mr Julian Gardner	Public Advocate Office of the Public Advocate
8.	11 July 02	Dr B W Perry	The Ombudsman Victoria and the Deputy Ombudsman (Police Complaints)
9.	12 July 02	Mr Glen Dower	CPSU representative Victoria Forensic Science Centre
10.	12 July 02	Dr Henry Roberts	Forensic Scientist Biological Examination Branch, Victoria Forensic Science Centre
11.	12 July 02	Associate Professor Geoff Hogg FRACP, FRCPA	Director Microbiological Diagnostic Unit Public Health Laboratory University of Melbourne
12.	12 July 02	Associate Professor David Wells	Head, Division of Clinical Forensic Medicine Victorian Institute of Forensic Medicine

No.	Date	Name	Affiliation
13.	12 July 02	Mr Roy Punshon SC	Chair Criminal Bar Association
14.	12 July 02	Mr John Sestanovich	Area Sales Manager Whatman Asia Pacific
15.	12 July 02	Mr Tony Parsons	Managing Director Victoria Legal Aid
16.	12 July 02	Dr Jeremy Gans	Senior Lecturer Faculty of Law, University of Melbourne
17. 17S*	16 July 02	Ms Maritta Parsell	Manager, Forensic Science Laboratory Accreditation Program, National Association of Testing Authorities
18.	18 July 02	Cmdr Paul Hornbuckle	Corporate Policy Victoria Police
19. 19S*	19 July 02	Mr Paul Chadwick	Privacy Commissioner Privacy Victoria
20.	18 July 02	Mr John Magill	
21.	19 July 02	Mr David Faram	President Law Institute of Victoria
22.	19 July 02	Mr Alastair Ross	Director National Institute of Forensic Science
23.	19 July 02	Professor John Scheffer	Assistant Director (Biology) Victoria Forensic Science Centre
24.	25 July 02	Mr Michael Strutt	
25.	25 July 02	Mr Daniel Hoenig	Senior Policy Analyst NSW Ministry for Police
26.	25 July 02	Professor Tony Coady	Director, Centre for Applied Philosophy and Public Ethics University of Melbourne
27.	25 May 2003	Mr Greg Connellan QC	President, Liberty Victoria
28. 28S1 28S2	27 May 2003 23 July 2003 22 August 2003	Ms Patricia Farnell	

*S - Supplementary submission.

Additional Papers provided by Victoria Police

No.	Date	Title
18S1	28 August 2002	DNAMU Statistical Returns 2000-2002
18S2	4 September 2002	Supplementary Submission Prepared in response to questions submitted to Victoria Police by the Inquiry
18S3	5 September 2002	Training Documents (confidential)
18S4	5 September 2002	Victoria Police DNA Sampling Forms
18S5	17 September 2002	Prosecutions Division Applications made and granted under s464ZF, 2000-2002
18S6	1 July 2003 30 October 2003	DNAMU Statistical Returns 2003
23S1	30 July 2002	Quarterly Reports Pro Forma Forensic Report Casework Information Sheet
23S2	10 September 2002	Supplementary Submission – General <i>Prepared in response to questions submitted to the VFSC by the Inquiry in 2002.</i>
23S3	10 September 2002	Supplementary Submission – Databases <i>Prepared in response to questions submitted to the VFSC by Dr Greg Gardiner, Senior Research Librarian, Parliamentary Library, on behalf of the Inquiry in 2002.</i>
23S4	7 July 2003	Supplementary Submission 2003 <i>Prepared in response to questions submitted to the VFSC by the Inquiry in 2003.</i>

APPENDIX 2: WITNESSES

Public Hearings, 22 July 2002

No.	Witness	Affiliation
1.	Commander Paul Hornbuckle	Corporate Policy Division Victoria Police
2.	Acting Inspector Anthony O'Connor	Legislative Review and Proposals Victoria Police
3.	Detective Inspector Douglas Cowlshaw	DNA Implementation Unit Victoria Police
4.	Dr Jeremy Gans	Senior Lecturer, Faculty of Law University of Melbourne
5.	Mr Daniel Hoenig	Senior Policy Analyst, New South Wales Ministry for Police
6.	Dr Lynne Weathered	Director, Griffith University Innocence Project Faculty of Law, Griffith University
7.	Ms Kirsten Edwards	Co-ordinator, Innocence Project University of Technology Sydney
8.	Mr Paul Chadwick	Privacy Commissioner Privacy Victoria
9.	Associate Professor David Wells	Head, Division of Clinical Medicine Victorian Institute of Forensic Medicine
10.	Ms Sarah Nicholson	Director, YouthLaw
11.	Ms Anna Radonic	Case Worker, Youth Law
12.	Mr Roy Punshon, SC	Chair, Criminal Bar Association of Victoria
13.	Mr D. Faram	President, Law Institute of Victoria
14.	Mr D. Laschko	Criminal Law Specialist, Law Institute of Victoria

Public Hearings, 23 July 2002

No.	Witness	Affiliation
15.	Professor John Scheffer	Biology Division, Victoria Forensic Science Centre
16.	Dr Peta Stringer	Biology Division, Victoria Forensic Science Centre
17.	Mr Noel McNamara	President, Crime Victims Support Association
18.	Mr Nick Halvagas	Crime Victims Support Association
19.	Mr John Magill	
20.	Ms Maritta Parsell	Manager, Forensic Science Laboratory Accreditation Program, National Association of Testing Authorities
21.	Mr Paul Coghlan QC	Director of Public Prosecutions
22.	Mr Victor Stojcevski	Senior Policy Officer, Victoria Legal Aid
23.	Mr John McLoughlin	Solicitor, Victoria Legal Aid
24.	Father Peter Norden	Director, Jesuit Social Services
28.	Ms Emma Hunt	Co-Executive Director, Public Interest Law Clearing House
29.	Mr Dan Meagher	Lecturer in Law, Deakin University
30.	Mr Greg Connellan QC	Vice-President, Liberty Victoria

Public Hearings, 2 June 2003

31.	Asst Commissioner Noel Ashby	Victoria Police
32.	Acting Asst Commissioner Paul Evans	Victoria Police
33.	Acting Cmdr Ian Thomas	Victoria Police
34.	Acting Det Inspector Douglas Cowlshaw	Victoria Police
35.	Snr Sergeant Anthony O'Connor	Victoria Police
36.	Mr John Wallace	Acting Director, Victoria Forensic Science Centre
37.	Professor John Scheffer	Asst Director, Biology, Victoria Forensic Science Centre
38.	Dr Jeremy Gans	Senior Lecturer, Faculty of Law University of Melbourne
39.	Mr Noel McNamara	President, Crime Victims Support Association
40.	Magistrate Lisa Hannan	Supervising Magistrate, Criminal Jurisdiction Melbourne Magistrates' Court
41.	Mr Victor Stojcevski	Senior Policy Officer, Victoria Legal Aid
42.	Mr John McLoughlin	Solicitor, Victoria Legal Aid

APPENDIX 3: MEETINGS

9 January 2002, Melbourne

Victoria Forensic Science Centre

Professor John Scheffer	Assistant Director (Biology)
Dr Peta Stringer	Manager (Biology)

22 January 2002, San Francisco

San Francisco Police Department

Ms Cydne Holt	Supervisor, Forensic Biology Section Forensic Services Division
---------------	--

California Department of Justice

Mr Harry Dorfman	Assistant District Attorney Attorney-General's Office
------------------	--

24 January 2002, Washington

Federal Bureau of Investigation

Mr John Behun	Combined DNA Index System (CODIS) Forensic Science Systems Unit
---------------	--

24-25 January 2002, New York

New York City Police Department

Robert Messner	Assistant Commissioner, Legal Bureau Civil Enforcement Unit
Sergeant Martin Gleeson	Managing Attorney
Mr Peter Ostapenko	Associate Staff Analyst, Office of Management Analysis and Planning
Mr Thomas Prasso	Director, License Division
Thomas Doepfner	Assistant Commissioner, Legal Bureau
George Grasso	Deputy Commissioner, Legal Matters
Detective Edward Wallace	Senior Crime Scene Analyst, Forensic Investigation Division

19 September 2002, Brisbane (cont'd)

Queensland Police

Acting Assistant Commissioner David Melville	Operations Support Command
Acting Superintendent Bob Burns	Acting Superintendent, Forensic Services Branch
Inspector John Brand	State Scenes of Crime and DNA Co-ordinator
Snr Sergeant Garry Pettiford	Acting Officer in Charge, DNA Unit
Snr Sergeant Michael Ede	Legal Services Branch
Snr Sergeant Jason Saunders	Ethical Standards Command
Ms Diana Beree	Ethical Standards Command
Sergeant Michael Briody	Fingerprint Bureau
Dr Charles Naylor	
Ms Kristin Bentley	

Department of Health

Associate Professor Leo Freenev	Senior Scientist, Scientific Services Laboratory
------------------------------------	--

20 September 2002, Sydney

NSW Police Service

Dr Peter Gunn	Manager, Scientific Support, Forensic Services Group
Mr Wayne Tosh	Manager, Procedures Implementation Team DNA
Ms Natalie Dugandzic	Solicitor, Court and Legal Services Unit

NSW Public Defenders' Office

Mr Peter Zahra	Senior Public Defender
Mr Andrew Haesler	Public Defender
Mr Christopher Craig SC	Deputy Senior Public Defender

20 September 2002, Sydney (cont'd)

NSW Legislative Council Standing Committee on Law and Justice

Hon Ron Dyer	Chairman
Hon John Ryan	Deputy Chair

NSW Ombudsman's Office

Mr Stephen Kinmond	Assistant Ombudsman (Police)
Mr Simon Cohen	Senior Investigation Officer (legal) NSW Ombudsman

25 September 2002, Adelaide

South Australian Police

Inspector Barry England	Head DNA Project Team
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Forensic Science Centre

Dr Hilton Kobus	Director
Mr Robert Locan	Assistant Director, Operations
Mr Andre Telfer	Superintendent, Forensic Services Branch

Office of Public Prosecutions

Mr Paul Rofe QC	Director of Public Prosecutions
Ms Wendy Abraham QC	Associate Director of Public Prosecutions
Ms Geraldine Davidson	Senior Solicitor

23 June 2003, Melbourne

Review of NSW Forensic Procedures Legislation

Professor Mark Findlay	Deputy Director, Institute of Criminology University of Sydney
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APPENDIX 4:
SCHEDULES 7 AND 8, CRIMES ACT 1958
(VIC)

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Sch. 7 repealed by No. 8143 s. 11, new Sch. 7 inserted by No. 129/1993 s. 8.

Sections 464K, 464L, 464M

SUMMARY OFFENCES FOR WHICH A PERSON MAY BE FINGERPRINTED

1. A summary offence where the maximum penalty (whether for a first or subsequent offence) is or includes a period of imprisonment.
2. An offence under section 3(2) or 3(4) of the Court Security Act 1980.
3. An offence under section 6(2) of the Control of Weapons Act 1990.
4. An offence under section 36A of the Drugs, Poisons and Controlled Substances Act 1981.
5. An offence under section 97 of the Police Regulation Act 1958.
6. An offence under section 20, 23 or 35(6) of the Prevention of Cruelty to Animals Act 1986.

Sch. 7A inserted by No. 7546 s. 13, substituted by No. 7782 s. 14, repealed by No. 8143 s. 11.

* * * * *

Sch. 8 repealed by No. 8143 s. 11, new Sch. 8 inserted by No. 8870 s. 6(2), amended by Nos 9848 s. 18(1), 16/1986 s. 30, repealed by No. 25/1989 s. 18(1), new Sch. 8 inserted by No. 81/1997

S. 31, amended by Nos 67/2000 s. 7(7)-(9), 61/2001 s. 16(1)(c), 16/2002 s. 18(1)(2), 35/2002 s. 28(Sch. item 3.4).

SCHEDULE 8

Section 464ZF

FORENSIC SAMPLE OFFENCES

A forensic sample offence is:

Offences against the person--Non-Sexual Offences

1. Murder.
2. An offence against, or for which the penalty or the maximum or minimum penalty is fixed by, section 4 (conspiracy to murder) (as amended) of the Crimes Act 1958 repealed on 1 June 1984 by section 8(b) of the Crimes (Conspiracy and Incitement) Act 1984.
3. Manslaughter.
4. An offence against, or for which the penalty or the maximum or minimum penalty is fixed by, any of the following sections of the Crimes Act 1958:
 - (a) section 16 (causing serious injury intentionally);
 - (b) section 17 (causing serious injury recklessly);
 - (c) section 19A (intentionally causing a very serious disease);
 - (d) section 63 (child stealing);
 - (e) section 63A (kidnapping).
5. An offence against, or for which the penalty or the maximum or minimum penalty is fixed by, any of the following provisions (as amended) of the Crimes Act 1958 repealed on 24 March 1986 by section 8(2) of the Crimes (Amendment) Act 1985:
 - (a) section 17 (intentionally causing grievous bodily harm or shooting, etc. with intention to do grievous bodily harm or to resist or prevent arrest);
 - (b) section 19 (inflicting bodily injury);
 - (c) section 19A (inflicting grievous bodily harm);
 - (d) section 20 (attempting to choke, etc. in order to commit an indictable offence).
6. The common law offence of kidnapping.
- 6A. The common law offence of false imprisonment.

Offences against the person--Sexual Offences

7. An offence against, or for which the penalty or the maximum or minimum penalty is fixed by, any of the following sections of the Crimes Act 1958:

(a) section 38 (rape);

(b) section 39 (indecent assault) if--

(i) immediately before or during or immediately after the commission of the offence and at, or in the vicinity of, the place where the offence was committed, the offender inflicted serious personal violence on the victim or did an act which was likely seriously and substantially to degrade or humiliate the victim, whether or not the serious personal violence or that act constituted or formed part of the indecent assault; or

(ii) the offender was aided or abetted by another person who was present; or

(iii) the victim was under 16 years of age at the time of the commission of the offence;

(c) section 40 (assault with intent to rape); (d) section 44(1), (2) or (4) (incest) but not section 44(4) if both people are aged 18 or older and each consented (as defined in section 36 of the Crimes Act 1958) to engage in the sexual act;

(e) section 45(1) (sexual penetration of child under the age of 16);

* * * * *

(g) section 47(1) (indecent act with child under the age of 16);

(h) section 47A(1) (sexual relationship with child under the age of 16);

(i) section 49A(1) (facilitating sexual offences against children);

(j) section 51 (sexual offences against people with impaired mental functioning);

(k) section 52 (sexual offences against residents of residential facilities);

l) section 53 (administration of drugs, etc.);

(m) section 55 (abduction or detention);

(n) section 56 (abduction of child under the age of 16);

(o) section 57 (procuring sexual penetration by threats or fraud);

(p) section 58 (procuring sexual penetration of child under the age of 16);

- (q) section 76 (burglary) in circumstances where the offender entered the building or part of the building as a trespasser with intent to commit a sexual or indecent assault;
 - (r) section 77 (aggravated burglary) in circumstances where the offender entered the building or part of the building as a trespasser with intent to commit a sexual or indecent assault.
- 7A. An offence against section 45(1) (sexual penetration of child under the age of 10) (as amended) of the Crimes Act 1958 inserted in the Crimes Act 1958 on 5 August 1991 by section 3 of the Crimes (Sexual Offences) Act 1991 and repealed by section 5 of the Crimes (Amendment) Act 2000.
- 7B. An offence against section 46(1) (sexual penetration of child aged between 10 and 16) (as amended) of the Crimes Act 1958 inserted in the Crimes Act 1958 on 5 August 1991 by section 3 of the Crimes (Sexual Offences) Act 1991 and repealed by section 5 of the Crimes (Amendment) Act 2000.
8. An offence against, or for which the penalty or the maximum or minimum penalty is fixed by, any of the following provisions (as amended) inserted in the Crimes Act 1958 on 5 August 1991 by section 3 of the Crimes (Sexual Offences) Act 1991 and repealed on 1 January 1992 by section 3 of the Crimes (Rape) Act 1991:
- (a) section 40 (rape);
 - (b) section 41 (rape with aggravating circumstances);
 - (c) section 43 (indecent assault with aggravating circumstances).
9. An offence against, or for which the penalty or the maximum or minimum penalty is fixed by, any of the following provisions (as amended) inserted in the Crimes Act 1958 on 1 March 1981 by section 5 of the Crimes (Sexual Offences) Act 1980 and repealed on 5 August 1991 by section 3 of the Crimes (Sexual Offences) Act 1991:
- (a) section 44(1) (indecent assault);
 - (b) section 44(2) (indecent assault with aggravating circumstances);
 - (c) section 45(1) (rape);
 - (d) section 45(2) (attempted rape);
 - (e) section 45(2) (assault with intent to commit rape);
 - (f) section 45(3) (rape with aggravating circumstances);
 - (g) section 45(4) (attempted rape with aggravating circumstances);
 - (h) section 45(4) (assault with intent to commit rape with aggravating circumstances);
 - (i) section 47(1) (sexual penetration of child under the age of 10);
 - (j) section 47(2) (attempted sexual penetration of child under the age of 10);

- (k) section 47(2) (assault with intent to take part in act of sexual penetration with child under the age of 10);
 - (l) section 48(1) (sexual penetration of child aged between 10 and 16);
 - (m) section 48(2) (attempted sexual penetration of child aged between 10 and 16);
 - (n) section 48(2) (assault with intent to take part in act of sexual penetration with child aged between 10 and 16);
 - (o) section 50(1) (gross indecency with child under the age of 16);
 - (p) section 51 (sexual penetration of mentally ill or intellectually defective person);
 - (q) section 51 (attempted sexual penetration of mentally ill or intellectually defective person);
 - (r) section 51 (assault with intent to take part in act of sexual penetration with mentally ill or intellectually defective person); (s) section 52 (incest) but not section 52(4) or (5) if both people are aged 18 or older and each consented to taking part in the act of sexual penetration;
 - (t) section 54 (procuring persons by threats or fraud);
 - (u) section 55 (administration of drugs, etc.);
 - (v) section 56 (abduction and detention);
 - (w) section 61 (unlawful detention for purposes of sexual penetration).
10. An offence against, or for which the penalty or the maximum or minimum penalty is fixed by, any of the following provisions (as amended) of the Crimes Act 1958 repealed on 1 March 1981 by section 5 of the Crimes (Sexual Offences) Act 1980:
- (a) section 44(1) (rape);
 - (b) section 44(2) (rape with mitigating circumstances);
 - (c) section 45 (attempted rape);
 - (d) section 45 (assault with intent to rape);
 - (e) section 46 (unlawfully and carnally knowing and abusing a girl under the age of 10);
 - (f) section 47 (attempting to unlawfully and carnally know and abuse girl under the age of 10);
 - (g) section 47 (assault with intent to unlawfully and carnally know and abuse girl under the age of 10);
 - (h) section 48(1) (unlawfully and carnally knowing and abusing girl aged between 10 and 16);
 - (i) section 48(2) (attempting to unlawfully and carnally know and abuse girl aged between 10 and 16);

- (j) section 48(2) (assault with intent to unlawfully and carnally know and abuse girl aged between 10 and 16);
 - (k) section 52 (incest) but not section 52(3) or (4) if the woman or girl is the sister of the offender and both are aged 18 or older and the carnal knowledge or attempt or assault with intent to have unlawful carnal knowledge was or was made with the consent of the sister;
 - (l) section 54 (carnal knowledge of female mentally ill or intellectually defective person); (m) section 54 (attempted carnal knowledge of female mentally ill or intellectually defective person);
 - (n) section 54 (assault with intent to carnally know female mentally ill or intellectually defective person);
 - (o) section 55(1) (indecent assault);
 - (p) section 55(3) (felonious indecent assault);
 - (q) section 57(1) or (2) (procuring defilement of woman by threats or fraud or administering drugs);
 - (r) section 59 (abduction of girl under eighteen with intent to have carnal knowledge);
 - (s) section 60 (unlawful detention with intent to have carnal knowledge);
 - (t) section 62 (forcible abduction of woman);
 - (u) section 68(1) (buggery);
 - (v) section 68(3A) or (3B) (indecent assault on male person);
 - (w) section 69(1) (act of gross indecency with girl under the age of 16).
11. An offence against, or for which the penalty or the maximum or minimum penalty is fixed by, section 61 (abduction of woman from motives of lucre) of the Crimes Act 1958 repealed on 1 March 1980 by section 5 of the Crimes (Sexual Offences) Act 1980.
12. Any of the following common law offences:
- (a) rape;
 - (b) attempted rape;
 - (c) assault with intent to rape.

Property Offences

13. An offence against, or for which the penalty or the maximum or minimum penalty is fixed by, any of the following sections of the Crimes Act 1958:
- (a) section 75 (robbery);
 - (b) section 75A (armed robbery);
 - (c) section 76 (burglary);
 - (d) section 77 (aggravated burglary).
14. An offence against, or for which the penalty or the maximum or minimum penalty is fixed by, any of the following provisions of the Crimes Act 1958 repealed on 1 October 1974 by section 2(1)(b) of the Crimes (Theft) Act 1973:
- (a) section 117 (robbery; larceny from the person);
 - (b) section 118 (assault with intent to rob);
 - (c) section 119 (robbery with wounding);
 - (d) section 120 (robbery under arms or company);
 - (e) section 128 (burglary by breaking out);
 - (f) section 130 (burglary with wounding);
 - (g) section 132 (entering house at night with intent to commit a felony);
 - (h) section 133 (breaking into etc., building within curtilage);
 - (i) section 134 (house-breaking);
 - (j) section 135 (house-breaking etc., with intent etc.);
 - (k) section 138 (larceny in the house);
 - (l) section 139 (larceny with menaces).
15. The common law offence of robbery abolished on 1 October 1974 by section 3(1) of the Crimes (Theft) Act 1973.
16. The common law offence of burglary abolished on 1 October 1974 by section 3(1) of the Crimes (Theft) Act 1973.
17. An offence against, or for which the penalty or the maximum or minimum penalty is fixed by, any of the following sections of the Crimes Act 1958:
- (a) section 197 (destroying or damaging property) in circumstances where the offence is charged as arson;
 - (b) section 197A (arson causing death).

18. An offence against, or for which the penalty or the maximum or minimum penalty is fixed by, any of the following provisions of the Crimes Act 1958 repealed on 1 July 1979 by section 2(1)(c) of the Crimes (Criminal Damage) Act 1978:
 - (a) section 196 (setting fire to church etc.);
 - (b) section 197 (setting fire to house anyone being in it);
 - (c) section 199 (setting fire to railway buildings etc.);
 - (d) section 200 (setting fire to public buildings);
 - (e) section 201 (setting fire to other buildings);
 - (f) section 202 (setting fire to goods in buildings);
 - (g) section 203 (attempting to set fire to buildings).
19. An offence against section 203A (placing inflammable substance with intent to destroy, damage, etc.) (as amended) of the Crimes Act 1958 repealed on 1 July 1979 by section 2(1)(c) of the Crimes (Criminal Damage) Act 1978.
20. The common law offence of arson.
21. An offence against section 249, 250 or 251 (contamination of goods) of the Crimes Act 1958.

Explosive Substances

- 21A. An offence against section 317 (offences connected with explosive substances) of the Crimes Act 1958.
- 21B. An offence against section 317A (bomb hoaxes) of the Crimes Act 1958.

Parties to Offence

- 21C. An offence against section 325(1) (assisting offender) of the Crimes Act 1958 if the principal offence was any other forensic sample offence.

Drug Offences

22. An offence against section 71 of the Drugs, Poisons and Controlled Substances Act 1981 (trafficking in a quantity of a drug or drugs of dependence that is not less than the large commercial quantity applicable to that drug or those drugs).
23. An offence against section 71AA of the Drugs, Poisons and Controlled Substances Act 1981 (trafficking in a quantity of a drug or drugs of dependence that is not less than the commercial quantity applicable to that drug or those drugs).
24. An offence against section 71AB of the Drugs, Poisons and Controlled Substances Act 1981 (trafficking in a drug of dependence to a child).
25. An offence against

- section 71AC of the Drugs, Poisons and Controlled Substances Act 1981 (trafficking in a drug of dependence).
26. An offence against section 72 of the Drugs, Poisons and Controlled Substances Act 1981 (cultivation of a narcotic plant in a quantity of a drug of dependence, being a narcotic plant, that is not less than the large commercial quantity applicable to that narcotic plant).
 27. An offence against section 72A of the Drugs, Poisons and Controlled Substances Act 1981 (cultivation of a narcotic plant in a quantity of a drug of dependence, being a narcotic plant, that is not less than the commercial quantity applicable to that narcotic plant).
 28. An offence against section 72B of the Drugs, Poisons and Controlled Substances Act 1981 (cultivation of a narcotic plant for a purpose related to trafficking in that narcotic plant).
 29. An offence against section 71 of the Drugs, Poisons and Controlled Substances Act 1981 as in force immediately before the commencement of the Drugs, Poisons and Controlled Substances (Amendment) Act 2001 (trafficking in a drug of dependence).
 30. An offence against section 72(1)(ab) of the Drugs, Poisons and Controlled Substances Act 1981 as in force immediately before the commencement of the Drugs, Poisons and Controlled Substances (Amendment) Act 2001 (cultivation of a narcotic plant in circumstances where the offence is committed in relation to a quantity of a drug of dependence, being a narcotic plant, that is not less than the commercial quantity applicable to that narcotic plant).
 31. An offence against section 72(1)(b) of the Drugs, Poisons and Controlled Substances Act 1981 as in force immediately before the commencement of the Drugs, Poisons and Controlled Substances (Amendment) Act 2001 (cultivation of a narcotic plant for a purpose related to trafficking in that narcotic plant).

Schs 8A-11 repealed. [165]

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