

INQUIRY INTO THE USE OF VICTIMS' DNA

Organisation: University of Melbourne
Name: Dr Jeremy Gans
Position: Associate Professor, Melbourne Law School
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THE UNIVERSITY OF
MELBOURNE

Dr Jeremy Gans
Melbourne Law School

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Principal Council Officer
Legislative Council Committees

Dear Ms Main,

Submission: Inquiry into the use of victims' DNA

I hope the Committee will accept this brief late submission to its inquiry. I only became aware of the inquiry last week.

My background

I am an associate professor at Melbourne Law School and have an ongoing human rights consultancy with the Victorian Parliament's Scrutiny of Acts and Regulations Committee. I research, teach and consult on all legal and law reform issues associated with criminal justice and related fields.

Between 2000 and 2008, I engaged in research into a number of aspects of the legal regulation of DNA in Australia, including the following articles:

- 'Much Repented: Consent to DNA Sampling' (2007) *UNSWLJ* 579
- 'Catching Bradley Murdoch: Tweezers, Pitchforks & the Limits of DNA Sampling' (2007) 19 *Current Issues in Criminal Justice* 34
- 'The Peter Falconio Case: Needles, Hay & DNA' (2007) 18 *Current Issues in Criminal Justice* 415
- 'DNA Profiles, Privacy and the Irrelevance of Australian Law' (2007) 3 *Privacy Law Bulletin* 110
- 'DNA Identification and Rape Victims' (2005) 28 *UNSWLJ* 272
- 'The Quiet Devolution: How the Model Criminal Code Officers' Committee Botched New South Wales's DNA Law' (2002) 14 *Current Issues in Criminal Justice* 210
- 'DNA Identification in the Criminal Justice System' (with G Urbas), 226 *Trends & Issues in Crime & Criminal Justice* 1
- 'Something to Hide: DNA, Surveillance and Self-incrimination' (2001) 13 *Current Issues in Criminal Justice* 168

The article on Rape Victims and DNA Identification covers some aspects of your inquiry's terms of reference. I have supplied a link to that article to Rebecca Main.

General comments on the inquiry

I'll begin with some general remarks.

First, both DNA identification in general and the specific issue of victims' DNA are not problems unique to NSW. Rather, they arise everywhere where DNA identification is routinely used in

criminal justice. The Committee would do well to look beyond NSW in its inquiry, in terms of both identifying problems and determining potential solutions to those problems. At the very least, the Committee should look closely at other Australian jurisdictions that share NSW's misfortune in adopting the extremely poorly thought out so-called Model provisions on forensic procedures, published by SCAG's MCCOC in 2000.

Second, the category of 'victims' consists of a number of sub-categories that raise different sets of concerns. My article looked specifically at rape victims, because the procedures typically performed on them differ dramatically from those performed on, say, victims of home burglaries, and also because rape is a crime where it is notorious that victims are reluctant to come forward, fearing a second victimisation by the criminal justice system. So, the Committee would do well to distinguish different categories, such as victims of homicide (including relatives), living victims of non-sexual offences against the person, rape victims, child sexual assault victims, victims of theft, etc. I note with some dismay that the only victims' group testifying at your public inquiry is a homicide victims group. While I don't doubt that such a group will have much to offer, I would point out that they would be unlikely to be able to engage with the terms of reference from the point of view of other victims, notably rape victims. As I note in my article, non-victim lobby groups – such as police and civil libertarians – are also poorly placed to fully address the unique concerns of victims.

Third, I note the following remark of the Committee Chair:

"Victims' DNA is not usually placed on the DNA database, however, where DNA samples are collected at a crime scene and it is not possible to distinguish victim DNA from perpetrator DNA, a victim's DNA profile may be placed on the DNA database and matched against profiles from another crime scene where they possibly may have been an offender. The Committee will consider this issue, including what can and cannot be done with this resulting information."

The placing of victims' DNA on the database ought to be the Committee's central concern. However, I am concerned that this problem is misdescribed in the Chair's remark. It will only be in very rare cases that 'it is not possible to distinguish victim DNA from perpetrator DNA'. It is typically very easy for the police to identify a victim's DNA and keep it off the database: just perform a buccal swab or hair pull on the victim and analyse the results; any matching profile or partial profile from the crime scene can then be excluded from uploading to the database. This easy solution will only be unavailable where either the victim's identity or his/her body is unavailable to the police, or s/he doesn't consent to sampling, or some extraordinary time constraints make it impossible to do the necessary elimination in time. So, the problem of victims' DNA being uploaded onto the database isn't a problem of practicalities, but – in nearly all cases – of regulation.

Specific comments on the *Crimes (Forensic Procedures) Act 2000* (NSW).

NSW, like most other Australian jurisdictions, has laughably bad DNA legislation, in terms of its drafting, accessibility and common sense. This is in large part because it is based on the poorly conceived national Model legislation. However, as is well known, there is a lot of variation amongst Australian statutes because of differing approaches to overcoming the flaws of the model. So, each unhappy statute is unhappy in its own way. Here, I address some specific flaws in the NSW statute.

In the first part of my article, I set out the inaptness of the Model provisions on 'volunteers' to rape victims. NSW dodged these problems by, first, delaying the commencement of those provisions, and then by amending ss 76 and 76A to exclude victims from the definition of volunteers. This solution has significant problems of its own.

Defining victims

One problem is that s76A is drafted too narrowly. While it excludes victims of offences against the person, it only excludes victims of theft in relation to fingerprints and handprints. In recent years, DNA profiling has been increasingly used to investigate home burglaries, e.g. sampling smudges on windows, cups and cigarette butts, on the (apparently correct) theory that burglars will foolishly leave their DNA all over the houses they burgle. Clearly, such processes will often lead to police obtaining DNA samples from innocent residents or visitors to the house. Equally clearly, such genetic samples should be treated the same as fingerprints and handprints.

Exclusion from statutory protections

The bigger problem is that ss76 and 76A remove victims, not only from the inaptness of the Act's volunteer provisions, but also from the Act's protections:

- **Procedures:** Unlike other volunteers (see s76(4)), victims don't get the benefit of any of the Part 6 rules on carrying out forensic procedures, including a requirement of same sex procedures (s51), an entitlement to have a medical practitioner of the victim's choice present (s53) and bars on the unnecessary presence of police officers (s56). Of course, some of Part 6's procedures are inappropriate for victims (e.g. s57 on recordings.) I understand that similar protections exist in administrative orders, but I'd suggest that victims deserve the same level of statutory protection as offenders, suspects, other volunteers etc.
- **Inadmissibility:** None of Division 1 of Part 9 applies to victims, including the crucial complete ban on admitting evidence derived from DNA samples that should have been destroyed. While victims whose DNA is matched to the crime scene database may get the protection of s138 of the Evidence Act 1995, that protection requires weighing up costs and benefits of admission. In my article, I explain why such matching should never occur. But, anyway, victims should get no less protection than suspects or offenders.
- **Destruction:** Except for s87A, there are no destruction rules for victim samples (or indeed, for any other volunteers.)
- **Offences:** The major privacy protections for DNA are contained in Part 11 (although they are incredibly poorly drafted.) Victims aren't protected by ss 91 and 94 (on improper procedures and improper supply), as they are all limited to procedures performed or samples taken 'under this Act'.

Even if s76A didn't exist, rape victims would still be poorly protected, because the definition of 'forensic procedures' in s3 excludes 'any intrusion into a person's body cavities'. This exception has the commendable aim of ensuring that no forced cavity searches can be done on suspects and offenders, but it has the entirely non-commendable side-effect of excluding consensual procedures on people's cavities from the Act too. So, vaginal and anal swabs (and many of the constraints on use) fall entirely outside of the above protections too.

Inclusion in the database

Of course, the biggest problem for victims is their easy inclusion in the least restricted index of the database:

"crime scene index" means an index of DNA profiles derived from forensic material found:

- (a) at any place (whether within or outside Australia) where an offence (whether a serious indictable offence or a prescribed offence or an offence under the law of a participating jurisdiction) was, or is reasonably suspected of having been, committed, or
- (b) on or within the body of the victim of such an offence, or
- (c) on anything worn or carried by the victim at the time when such an offence was committed, or

(d) on or within the body of any person, on any thing, or at any place, associated with the commission of such an offence.

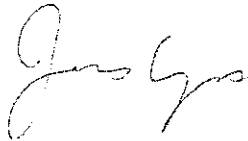
The problem with this definition is that it only looks at where forensic material is found, rather than whose forensic material it is. It should be limited to exclude samples the are known to come from the victim. Instead, the sole index where such samples should go is the limited purposes index.

This requirement should be accompanied by the following protections:

- A requirement to inform victims that performing a buccal swab (or whatever on them) is solely to allow their DNA sample to be eliminated from the database.
- A requirement that all labs endeavour to identify whether any sample from a crime scene is a match or partial match to a sample from a victim.
- An extension of s83(1) to all DNA profiles obtained from a person only because they were an actual or suspected victim of a crime.
- The application of appropriate protections of the Act, outlined above, to victim DNA profiles.

Thank you for your consideration. I am happy to provide any further information that you require. I can be contacted by phone on 8344 1099 or, most easily, by e-mail: Jeremy.Gans@uimelb.edu.au.

Yours Sincerely,

A handwritten signature in black ink, appearing to read 'Jeremy Gans', written in a cursive style.

Dr Jeremy Gans