

## INQUIRY INTO THE USE OF VICTIMS' DNA

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LAW & JUSTICE

The Hon. Christine Robertson MLC  
Chair  
Standing Committee on Law and Justice  
Parliament House  
Macquarie Street,  
Sydney, NSW 2000

Dear Ms Robertson,

**Inquiry into the use of victims' DNA**

Thank you for the opportunity to comment on the options being considered by the Legislative Council Standing Committee's Inquiry into the use of victims' DNA.

The comments below address specific issues in relation to each of the proposed options.

Option 1

Dr Jeremy Gans' suggested amendment to the absolute prohibition, namely that it apply to unrelated offences instead of any proceedings, appears on its face to be an elegant solution to the issue of distinguishing between who is an offender and who is a victim in certain situations such as affrays. Should the Committee recommend this course, consideration should be given to recommending that appropriate warnings be given to victims about the possibility of use against them in that particular proceeding.

Option 2

Option 2 would give the administrators and users of the DNA database the discretion to decide whether or not a victims' profile should be used. The discretion proposed by Dr Gans is very broad in that it requires the decision maker to consider whether "the matching is justified in all the circumstances."

The proposal tempers this discretion by providing that where it miscarries, the discretionary exclusion provision in section 82 of the *Crimes (Forensic Procedures) Act 2000* would apply. As noted in the DJAG submission, a key concern about relying on discretionary exclusions at trial is that a victim might potentially be committed to trial and spend months remanded in custody before being released following a decision to exclude the evidence.

Should the Committee recommend this course, consideration should be given, taking into account the potential of having victims incarcerated and the breadth of the

discretion granted to the administrators, to accompanying that discretion with a mandatory exclusion provision (like that provided for missing persons) in the event the exercise of discretion miscarries. A mandatory exclusion provides significant incentive to decision makers to ensure that the discretion is appropriately exercised. Such a provision would also provide prosecution authorities with clear guidance on when a prosecution will fail as a result of evidence being inadmissible, which may save victims the trauma of arrest and charge in matters for which they will not be found guilty.

In light of the significant consequences which flow from the exercise of the discretion under this option, for example, the exclusion of evidence in a serious criminal matter, consideration needs to be given to who would be the appropriate person ultimately responsible for the decisions concerning the exercise of the discretion.

### Option 3

Option 3 proposes to allow a court to make a discretionary decision to admit evidence before charging in relation to major crimes. These crimes will in almost all cases be prosecuted on indictment. In the ordinary course of events, a judge or justice would make a decision on admissibility at the time of trial. In light of this, consideration should be given, in the event that the Committee recommends this option, to a judicial officer of higher rank than a magistrate in the judicial hierarchy making this decision.

Consideration need also be given to the difficulty of making a decision concerning the admissibility of evidence prior to charge, when little information will be available to the decision maker and in light of the significant changes in circumstances which might occur between the time of making the decision and trial.

Another potential difficulty with option 3 is that the victim who is under suspicion will be notified of the suspicion at the time of the hearing of the question of admissibility and use of the evidence. The victim/suspect might then decide to flee the jurisdiction.

Thank you once again for the opportunity to comment on the proposals.

Yours faithfully

Laurie Glanfield  
**Director General**