REPORT OF PROCEEDINGS BEFORE

STANDING COMMITTEE ON LAW AND JUSTICE

INQUIRY INTO THE USE OF VICTIMS' DNA

At Sydney on Friday 30 October 2009

The Committee met at 11.30 a.m.

PRESENT

The Hon. C. Robertson (Chair)

The Hon. D. Clarke
The Hon. G. Donnelly
The Hon. A. Fazio
The Hon. S. Hale

CHAIR: Welcome to the second public hearing of the Standing Committee on Law and Justice's inquiry into the use of victims' DNA. Today's public hearing will be a short day, where we will be hearing from an academic who has done some research in the field of DNA, Dr Jeremy Gans. Before we commence. I will just make some short comments about aspects of the hearing.

There are regulations in relation to broadcasting. You perhaps understand those very well and there are guidelines at the door.

If you have any messages you want to give to the Committee, if you would give those to the clerk or attendants and they will pass them to us, that would be good.

Committee hearings are not intended to provide a forum for people to make adverse reflections about others. The protection afforded to committee witnesses under parliamentary privilege should not be abused during this hearing. I therefore request that witnesses avoid mention of other individuals unless it is absolutely essential to address the terms of reference. That is not necessarily for you, but sometimes we get some interesting views.

If you have a mobile phone, could you put it on silent. It actually interferes with the Hansard recording processes.

I do welcome you, Dr Jeremy Gans.

JEREMY GANS, Associate Professor of Law, Melbourne Law School, University of Melbourne, affirmed and examined:

CHAIR: Would you identify your job title and employer and if you are appearing in a representative capacity?

Dr GANS: I am not appearing in a representative capacity but I am an Associate Professor of Law at the Melbourne Law School and a consultant to Victoria's Scrutiny of Acts and Regulations Committee.

CHAIR: Do you want to start with an opening statement?

Dr GANS: Only just to speak to the notes that I sent earlier. They were intended for my own purpose, but my intention is to work them up early next week, in response to some of your questions, to a late further submission, if that is okay.

CHAIR: Yes, that is fine. That would be very welcome, thank you. We had most of our hearings a couple of weeks ago, but when we read the work that you sent to us we realised that it was important for us to get the concept that you were concentrating on. My first question is: Can you just outline a bit your views towards DNA testing in the criminal code and how and why you have come to those views?

Dr GANS: Like a lot of people I am an unabashed supporter of DNA identification. Its benefits to the criminal justice system have been enormous. At the same time, I get a bit distressed at the split in advocacy about DNA between people who want to constrain DNA and people who want to take all the constraints off. To my mind, it is about making it work in the best possible way. So I have always tried to come up with ideas which are independent of the for and against lobby for DNA.

CHAIR: During our hearings a few weeks ago it was interesting that some sectors perceived that the current control processes are full and adequate and others perceived that they were not. Can you talk a bit about that issue?

Dr GANS: Yes. It is interesting. I read the testimony from the last couple of hearings and all the submissions, and it is interesting to me that there was this view that the current procedures are adequate, while at the same time it is obvious that the various bodies in different ways have all proposed limitations on their own discretion, which to my mind suggests that there are inadequacies in the current sections in the law. At the same time, most of them have shied away from legislative changes. I think the reason for that is that the legislation in New South Wales has been a bit of a disaster. It is not very well written legislation. There are similar experiences in most of Australia. The legislation is a product of compromise and a degree of rushing and this enormous pressure which has ultimately failed to create uniform legislation across Australia. What the legislation ended up being is not particularly helpful to the police, not particularly protective of rights, but just a series of obstacles that everyone has to cope with, and often very arbitrary obstacles. It does not surprise me at all, therefore, that everyone in the system would rather see no more legislation, but I still believe that the best answer is not no more legislation but to get the legislation right. That is a big job, but I think it can be done.

The Hon. David CLARKE: Dr Gans, are you aware of any people whose DNA was taken as a victim and subsequently placed on a database and matched to another crime in which they were an offender?

Dr GANS: I am not aware of any that were matched to a crime in which they were an offender, but I am aware of a couple of cases where they were suspected of being an offender, most people believe wrongly suspected of being an offender.

There are two high profile cases, one in New Zealand. A man was assaulted outside a pub in Christchurch. DNA was taken from him. It was placed onto the crime scene profile New Zealand database and was matched to two murders in Wellington. He was then investigated for three months and had to go to a lot of effort to prove he had never left Christchurch. He had no connection to the

murders. There were suggestions made that maybe an unknown half brother of his committed the crime. He had no brothers he knew of, but you never know what your parents are up to. In the end, most people believed that that was a case of contamination in the Auckland DNA lab.

A very similar thing happened in Victoria more recently, in 2003. The very notorious case, down there anyway, of the death of a toddler, Jayden Leskie. A man was prosecuted but acquitted by a jury of that crime, and then in the subsequent investigation there was a match made between the toddler's clothing and a rape victim from the other side of the State, or the other side of Melbourne anyway. She was investigated, questioned in detail, and asked at length about her siblings. She happened to have 19 half siblings, and so there were questions raised about that. Ultimately, the police realised, as they did in Auckland, that this was almost certainly a case of contamination, although the lab denied that and said it was a bizarre coincidence. Nevertheless, at the coronial inquest there was talk of her being subpoenaed to testify at the coronial inquest by the man who was acquitted.

Neither of those were the worst case scenario in my view.

The Hon. David CLARKE: Would the summary of that situation in your mind be that there needs to be some tightening up of processes but there was not anything inappropriate or untoward about how the system worked in those cases?

Dr GANS: I think it was totally inappropriate for either of the victims in those cases to have their DNA placed onto the Crime Scene Index. In both cases, both police forces had the victim in front of them, could have excluded that victim, should have realised that there was nothing to be gained in solving the assault in Christchurch or the rape in western Melbourne by doing a massive all crime scene comparison. To the contrary, they should have—

The Hon. David CLARKE: Was it because of contamination?

Dr GANS: Contamination was the side effect in that case.

The Hon. David CLARKE: Was that the main cause of this inappropriate situation developing?

Dr GANS: Contamination is what brought these people into suspicion of being an offender, but that suspicion would never have been acted upon unless they had a match between the contaminated sample and the known sample from the victim.

The Hon. David CLARKE: They had a match, which the police acted upon, because of contamination?

Dr GANS: Again, to be clear, contamination caused an incorrect suspicion, but the match was only made because the victim's known profile was uploaded to the database and exposed to crime scene matches.

CHAIR: From the general crime scene?

Dr GANS: Yes, it was not kept within her case. If her profile had been kept entirely within her rape case or the Christchurch man's assault case, yes, there would have been a mystery match, and that is terrible, but one of the bug bears of DNA is a false, misleading mystery match, but it would have just been a mystery match, not a match to those pure victims.

The Hon. David CLARKE: In terms of identified or known victim profiles, you talked about the system. Do you believe that the current warnings are adequate for volunteers providing their DNA profiles to New South Wales Police, and how effective is the New South Wales victims' protocol?

Dr GANS: The protocol is mostly devoted to the adequate treatment of victims when they are having forensic procedures performed on them. I have read through it. It seems like there are a lot of good rules in the protocol.

The Hon. David CLARKE: No suggestions from you as to its improvement?

Dr GANS: The main suggestion I would make is to put those protections in the legislation. Offenders, suspects, non-victims all have legislative protection. Only victims get a lesser administrative protection. That would be the major suggestion, but that being said, I think there is a problem with the warnings given to victims. I hesitate to suggest a particular form on this for reasons that I will explain, but the victims are not told the whole story in the warning. The warning they are given is, 'This profile will be used to investigate the crime that was committed in relation to you or suspected of being committed in relation to you'. That is accurate enough as it goes. I am sorry, there is an inaccuracy in that there is a misleading aspect.

I will start again. They are both misleading. The two misleading aspects are: First, by telling victims that, they are perhaps giving them the impression, given that they are given all sorts of information about the Crimes (Forensic Procedures) Act, the protections, that the limitation, that there is a promise that it will only be used to investigate the crime against them is in the Act. The truth is it is not in the Act. It is in the administrative procedures. I do not know if victims draw these lines, but to the extent—

The Hon. David CLARKE: It definitely is in the Act, is it?

Dr GANS: The protection against—

The Hon. David CLARKE: No, when they are told that it is in the Act?

Dr GANS: They are not told it is in the Act. What they are told is that their DNA will be used only to investigate a crime, and then they are given details about the Act and the protections it provides.[1] I think a victim will assume that, given the Act provides all sorts of protections, whatever protections are being told to the victim are legislatively protected rather than just guidelines that can be changed by the New South Wales administration.

The second misleading aspect is when you tell someone this is going to be used to investigate the crime against you. You give the impression it cannot be used against the victim, but it can. Even if the police keep to the protocol, and I have no reason to think that they will not, it is possible that if they conclude that in fact the real crime here was a crime by the victim, a false report of rape say, then their results of the procedure can and will be used against them. If you are being accurate, if your concern was to tell the truth to victims, you would want to point out to them that the protections are less than might appear and that the evidence could be used against them, if you want to tell victims the truth. Of course, you might not want to tell victims those particular truths, because they are marginal possibilities and they will scare or could scare away some victims. So there is a cost in the truth. That is why ultimately the best solution is to change the rules, to tighten them up, so that then you can tell the victims the truth and you will not scare them away, quite the opposite, the truth will reassure them, but at the moment they are not being told the truth and if they were it would not reassure them.

The Hon. Sylvia HALE: Dr Gans, in your submission you suggested there were four protections and you named them, but earlier when you were talking about the legislation you said it was a disaster, it was compromised, it was rushed and it imposed arbitrary obstacles. Would those four requirements that you have nominated be sufficient to get the legislation right, as it were, or are there other areas that need to be addressed?

Dr GANS: There are numerous areas that need to be addressed. There are two options open for reform of the Crimes (Forensic Procedures) Act. One is minor adjustments to try and solve the problem. That has been what has happened so far. The original Act was enacted, it was never fully proclaimed until adjustments were made to it and adjustments have occurred ever since. Adjustments have some benefits in that everyone is familiar with the existing Act and an adjustment is just a slight change in their thinking. That being said, I have maintained from the start that this legislation has some significant structural flaws in terms of the way it regulates. It mostly regulates not by clear rules

[1] In correspondence from Dr Jeremy Gans, 5 November 2009, he made a correction to this statement and advised that victims are told about the database, but not the Act. The protocol makes reference to the Act when defining terms but is not otherwise mentioned.

but by ambiguous definitions and poorly framed criminal offences. So there are some structural problems that I think ultimately can be solved by fresh legislation.

In fact, I was heartened to read in the transcript of the last public hearing that fresh legislation, a fresh start, is being contemplated in New South Wales. Fresh starts have happened in South Australia and a fresh approach was taken in WA some years ago. Although no-one's legislation is perfect, the newer legislation, which was less tied to the model criminal provisions that were developed in 2000, is much clearer and has much better potential for easy and sensible reforms in the New South Wales Act. The New South Wales Act can only be reformed by sticking bandaids on it.

The Hon. Sylvia HALE: You nominated South Australia and Western Australia. If you had a choice between the two, which do you think would provide the more appropriate legislation or is there legislation in another jurisdiction that might be worth looking at?

Dr GANS: I do not think New South Wales should feel beholden to take a particular approach taken in other jurisdictions. What it should do is choose the best from those jurisdictions or do the best on its own. There are particular provisions in federal jurisdictions that are worth a strong look here. None of them are perfect. None of them solve the big problem that the Committee is dealing with about victims. Looking to those jurisdictions you can cherry-pick some provisions with care to make sure they fit and do not cause problems with the New South Wales legislation. All the other jurisdictions—

The Hon. David CLARKE: Which jurisdictions are they?

Dr GANS: I can go through them. I have prepared some notes on some interesting jurisdictions which actually have provisions about victims. I can go through them if you would like.

One is Canada, and Canada is of interest in part because it has a similar legal system to ours, but also because the provisions on crime scene profiles in New South Wales, the model was actually mostly drawn from Canada's model. Canada passed its legislation in 1998. It defined the Crime Scene Index in similar but not identical terms to ours, but they did something extra back in 1998. When the legislation was on the floor of the Canadian parliament they introduced an amendment, which was accepted, which said access to the information in the Crime Scene Index shall be permanently removed if the information relates to a DNA profile derived from a bodily substance of a victim of an event that was the object of the relevant investigation or a person who has been eliminated as a suspect in a relevant investigation.

That is back in 1998. They had a partial solution to the problem that this Committee is facing. It is distressing to me to read that and then to realise that the Model Criminal Code Officers Committee had that legislation before them, did not notice the problem or did not act on the problem back in 2000 when this all could have been dealt with. Instead, the problem was left to individual jurisdictions to work out in their different ways. I will put this in a formal submission, but there is a parliamentary inquiry in Canada at the moment into its DNA legislation. There has been no amendment proposed to that provision, although they do want to introduce a victims' index for limited purpose uses that go beyond what is allowed here.

The Hon. Sylvia HALE: Why do they want to do that?

Dr GANS: Basically what they are thinking of there is what we would call a deceased persons index and a missing persons index. They want to be able to at times make comparisons with victim profiles. This is not allowed under Canada's legislation. I think the compelling fears which the New South Wales Police put in their submission about possible side-effects have not played out in Canada in terms of having a limitation like this. There are no stories I have read, there was no testimony before the Canadian parliament of people getting away with offences because of a pro-victim protective amendment. Canada is a different place. Nevertheless, I see they have the same protection that is a provision in now for 11 years. So that is Canada.

Western Australia, when it picked up the model legislation that New South Wales copied very faithfully, Western Australia did not copy it faithfully. They improved the drafting in all sorts of ways, and they introduced special provisions for what they call involved persons, which are victims

and witnesses. They define an involved person as a person who is not a suspect but who is reasonably suspected to have been the victim or to have witnessed the commission of an offence. That is not perfect. There are non-witnesses who could also, I think, conceivably be considered involved persons, the sexual partners and potential sexual partners of rape victims is a classic example. Then there are separate informed consent requirements, destruction requirements and the like for involved persons which are different to the provisions for regular volunteers. That, in my view, has always been a desirable model. You want to at the very least have separate provisions dealing with special cases like victims.

In South Australia they used to have an early form of the model legislation that New South Wales adopted, but after someone was acquitted on the grounds of a major problem in the South Australian DNA database - he was guilty of the offence of which he was acquitted - they passed new legislation. They ditched the model and they went for simpler legislation. One thing they did do was include a provision on volunteer and victim procedures. That was actually a change on the floor of parliament too. It is a bit of a symbolic change. Basically, they just changed the volunteer provisions to volunteer and victim provisions. So in part it is just a change in terminology to acknowledge that volunteers are not all cut from the same cloth. But they do have an interesting inadmissibility rule:

> Evidence obtained by carrying out a volunteers and victim procedure on a person is inadmissible in any criminal proceedings against that person if by the time the question of admissibility arises the forensic material that came from the procedure should have been destroyed.

There are no destruction provisions for volunteers here. Under the destruction rule for volunteer and victim procedures in South Australia, they have to request destruction. What seems to be interesting is that they can request destruction even after the match is made and under this provision it cannot be used against them. So it gives you a considerable amount of control. I do not know why South Australia went for that approach, but they did. I am not saying any of these are perfect, but these are all interesting models.

Then there is the Northern Territory. The Northern Territory often gets maligned as the lawless territory of Australia when it comes to DNA. Their DNA legislation has about four provisions or half a dozen provisions of their Police Administration Act, rather than the 200-odd provisions that New South Wales has on DNA, but they did not follow the approach of trying to compromise and make everyone happy and bundle in lots and lots and lots and lots of conflicting rules like in New South Wales. They just came up with a simple set of rules, no destruction, no use rules, no retention rules, but a tough inadmissibility provision. 147B(2) of the Police Administration Act says:

> If a non-intimate procedure is carried out in accordance with a person's consent...

That is on any volunteer, not just victims.

> ...for investigating an offence, the information obtained from the procedure must not be used for investigating another offence other than a relevant offence...

I will get to what a relevant offence is.

> ...and is inadmissible as evidence in any proceeding other than a proceeding for a relevant offence.

A relevant offence means an offence punishable by a term of imprisonment of 14 years or more, serious crime, rape, murder, that sort of thing. Basically, that is not discretionary. It is a complete mandatory rule of inadmissibility.

The Hon. Sylvia HALE: Has that resulted in any injustices?

Dr GANS: There have not been any reports of that, but it is possible. Whenever you have a rule of inadmissibility, you have potential for injustice. Like I said, I am a supporter of DNA identification, and DNA has enormous benefits. One is you catch the real offender, and if you have an inadmissibility rule you might not catch the real offender. That is not just a matter of taking the offender off the street. It also may avoid a wrongful conviction of someone else for a crime. So these are serious matters. That being said, they do exempt the most serious crimes completely from the rule. They protect people from less serious crimes. Yes, there might be an injustice in relation to a break and enter in Darwin. All right, so it is a tough rule, but what is interesting is that it is so firm, and it is

interesting that the Northern Territory, which is regarded as the most gung-ho - we want as much DNA as possible - recognise that unless you have special protection for victims, you might have trouble getting your DNA database to work effectively.

If victims start refusing to give their DNA, and that is just one of the central concerns here, then you no longer have an effective DNA database. Then you have offenders getting away with crimes. The victim does not go forward to the police or does not consent to a procedure. Then you have another problem. You have always got a danger between that happening, and therefore the police not getting the DNA, or the police being unable to use the DNA in relation to offences that the victim happens to have committed otherwise. So in the Northern Territory they have drawn the line. It is not perfect, but it is an interesting line, where they will take the risk for the serious offences but they will not take the risk for less serious ones.

Those are, I think, the major ones of interest. I could just note that in Tasmania they also took the New South Wales path of trying to exempt belatedly victims from the volunteer provisions, but they did it in a different way from here. They did not exempt them from all aspects of the Act. They just did it in a different way. Section 5 of their Act just exempts forensic procedures carried out on alleged victims, all alleged victims, not just a narrow definition that excluded volunteers from some parts of the Act. I think they exempt too many parts of the Act. They exempted victims from the destruction and inadmissibility rules. I see no cause to do that, but there is some sense in the approach that was taken there.

Finally, just a general point. One of my major concerns about the model criminal legislation in New South Wales is it is a very clumsy way of exempting certain procedures from regulation, and two which matter to victims in my view are the complete exemption of procedures on children under 10 from the legislation and the complete exemption of procedures on body cavities other than the mouth from the legislation. Presumably, the exemption was put in to make sure that no-one could be forced to have a cavity procedure done on them, at least not under this legislation, and a nine-year-old will not have a forced procedure done on them either. That is a totally good aim, but by doing it with a definition, rather than just saying no-one can be forced, you have the unfortunate side-effect of exempting procedures done with consent on those bases from the other protections of the legislation.

Tasmania, Northern Territory, Queensland, South Australia, Western Australia, everyone else in the world, except for a small number of jurisdictions in Australia that followed the Model Criminal Code, do not exempt cavity searches or under 10-year-olds in legislation. Although there are costs to that, and they would have to be managed, those procedures all fall within the protections of the legislation.

The Hon. Sylvia HALE: I do not want to sidetrack this investigation in any way, but I notice that you said you are a great supporter of DNA. I accept that, except that what the Committee has received is some material from our Bureau of Crime Statistics and Research - I think it was done in 2008 - assessing the impact of mandatory DNA testing of prison inmates on clearance, charge and conviction rates for selected crime categories, and in its summary of findings it says:

> a) For the police outcome series of Clear-up, Charge and Charge to Clear-up rates, there is consistent evidence of a positive association for 5 of the eight crime categories considered and mixed evidence for the Assault and the two motor vehicle related categories.
>
> b) For conviction rates, there is no evidence (apart from a very mild association at an implausibly short lag for Sexual Assault in higher courts) for a conclusion that the advent of DNA testing has had a positive impact.

I do not know whether I am taking some of those conclusions totally out of context and it is inappropriate, but do you have any comment on that?

Dr GANS: I am familiar with those sorts of studies. There is a degree of scepticism of the transformative nature of DNA testing in aggregate criminal justice. Things like conviction rates, although conviction rates are tricky, you could maintain a conviction rate but have more people coming forward, for example that DNA testing has encouraged more rape victims to come forward - it may not have done that - and the conviction rate is maintained and you are getting more rapes cleared, but I have never personally been particularly moved by that debate. To my mind the major role of DNA is in the marginal cases where you are clearing up injustices and solving crimes you could not

otherwise have solved. To my mind that is where all the joy of DNA comes from. You will not find the results in aggregates. You will find them in qualitative studies of particular cases where problems have been avoided, and potentially in a change of approach, hopefully a positive one, in investigators on recognition of sometimes the errors they make. Police are very reluctant to admit errors, but DNA has the power to make them admit those errors. Yes, it may well be hard to find an aggregate result, but that is not necessarily a reason not to go ahead in my view. It might be costly. You might do a cost benefit analysis and it might be hard to find a benefit that outweighs the cost, but to my mind none of that gets around the need to make sure that in marginal cases you are getting the right results, and that is the major promise of DNA in litigation.

The Hon. GREG DONNELLY: Thanks for coming along and providing some additional evidence today. I am just struggling a little bit in trying to get the tone or the balance right here in terms of the evidence given today and in your submission. In your submission on the second page, I just take you to the second last paragraph where you make some specific comments about the New South Wales legislation. You say that:

> New South Wales, like most other Australian jurisdictions, has laughably bad DNA disclosure in terms of drafting, accessibility and common sense.

We have not had that put to us by any other witness thus far. That is not to say they are right and you are wrong, or in fact vice versa. Nor do I get the impression from your answers to questions this morning, at least so far, that it is "laughably bad". There are issues no doubt that you put forward, articulated clearly and strongly, both today and in your submission, but how do I interpret what you mean by "laughably bad"?

Dr GANS: There are two senses in which I can add to that. Firstly, just to comment on the witnesses you have had, you have had members of the government, who obviously cannot say this is the worst legislation I have ever seen, and government bodies, they are more reserved, and you have had some victims groups, and there has been an unfortunate lack of attention by victims groups to the potential costs. They want more police powers and sometimes their approach is tempered by that. That being said, I am certainly not the only one who has criticised this legislation. The other body that is well known for criticising this legislation is this Committee back in 2000 when you did your statutory review and found dozens, if not many more, flaws in the legislation, some of which, but only some of which, have been patched, not fixed, in subsequent amendments.

To give some particular instances of how bad the legislation was, the problem that is now before the Committee arose because the legislation was enacted by Parliament and then the legislation was not fully commenced. Even though there had never been any intention initially of staggering the commencement, they limited the commencement of the volunteer provisions because they belatedly realised that they were laughably bad for victims. To give a couple of examples, the provisions as enacted before they were amended meant that if a procedure was done on a victim to recover DNA, and a rape victim would almost always fall within that category, the procedure done on the victim had to be video taped. If the victim objected, then she would have to be told that the reason for the video taping was to prevent disputes about the procedure between her and the police. Those are appalling things to say to a rape victim in the middle of post-rape forensics. She would be sent a copy of that videotape unless she objected. I am sure that would be lovely. She would be given parts of samples taken from her, so part of the semen of the rapist. Any legislation that requires that kind of thing is laughably bad. Actually that remains the law in the ACT.

The solution here was to suspend the volunteer provisions, for I think a year, which meant no DNA screenings occurred in New South Wales during that year, even though it had been settled the year before. So already there is a break to all enforcements, and then an exclusion of victims from not just the bad bits of the legislation but the good bits as well. I do not think anyone could be proud of that sort of legislative program, and that is just one example. I could give dozens of others. I have made submissions to various inquiries pointing out dozens and dozens of ludicrous anomalies in the legislation. It comes down to basic poor drafting by the original committee and a lack of detailed attention to the common sense of the rules. Instead, it was just a battle between the police and the civil liberties groups that reached a bad compromise.

The Hon. GREG DONNELLY: You mentioned the Canadian legislation. Once again, I am trying to get a sense of your particular view about other jurisdictions in Australia. Before I come back

to Australia, are there any other overseas jurisdictions that you think have legislation worth us having a look at?

Dr GANS: None that I know of. Just to point out though that just about every other jurisdiction has much simpler legislation than the sort of legislation adopted in Australia. It is more along the Northern Territory lines, a narrow set of tough rules, rather than a vast set of soft and difficult to apply rules. The Canadian, Western Australian, South Australian and to an extent Tasmanian legislation are the only ones I put forward to you as worth a look on this particular issue.

The Hon. David CLARKE: Do not more rules bring greater clarity?

Dr GANS: They can, but only if they are well thought out rules. These are conflicting unbalanced rules. To make the point specifically about victims, the reason that the original legislation was flawed and needed to be bandaged was because the Model Criminal Code Officers Committee came up with two indices of relevance, a Crime Scene Index and a volunteer limited purpose index, but never ever, nowhere in the legislation is there a rule that says which index you have to put the DNA on. The DNA from a victim could go on either of those indexes. It falls within the definition of both. There is no provision whatsoever in the legislation simply telling a database administrator how to proceed. So database administrators would have had to come up with their own rules and they have had to come up with quite nuanced rules to work out which profile goes onto which index.

The Hon. David CLARKE: A good situation is where more rules would have brought greater clarity and direction?

Dr GANS: More rules being the right rules in that case, yes. I am not speaking against lots of rules, but I am speaking against the idea that somehow how more rules in this case is more protective.

The Hon. David CLARKE: I just have a concern when you mention about Northern Territory, I think you mentioned four provisions. That seems very intriguing to me, that legislation. I am just wondering if there are a lot of pitfalls there, a lot of situations arising where there is no clarity in the law.

Dr GANS: There is clarity, although some would argue that there is insufficient protection in the Northern Territory. My research has not really found any instances of that. Going beyond victims, I think that there are some incredible areas of lack of clarity and lack of protection in the law. They are mostly not visible in the legislation. There is a heavy reliance on consent. This applies to victims as well. The legislation is full of rules about warrants and orders and forced takings and protections and all that sort of thing, but most DNA sampling of suspects, offenders, victims, volunteers, the lot, is done by consent, and the legislation treats the issue of consent as an exchange of information: I will give you a set of 20 points that I have tell you, as a police officer, and then you say yes or no and you have to specify the purpose you want the DNA to be used for. There is a complete lack of clarity about what counts as consent in high pressure situations like that.

To my mind that is the major practical issue and practical ambiguity of the legislation. I have argued over and over again that consent should actually be a last resort, not a first resort, in DNA, because of the uncertainty and the inherent difficulty of working out whether someone is truly consenting. I have made that point many a time since the start of this legislation.

The Hon. Amanda FAZIO: In the indicative questions that were sent to you, the sort of issue being teased out in relation to question 9, which is: The Department of Justice and the Attorney General advises that links can potentially be made between a victim's DNA and another sample on the Crime Scene Index before the person has been identified as a victim, and asks: Do you know if forensic information is currently used in courts to convict offenders and do you think that this has negatively impacted on reporting of crime?

Dr GANS: I do not know of any definite facts about either of those. It is complete speculation. I have not heard of any situation where a victim has been prosecuted or the evidence has been used against them in that way where they are known to be a victim. It could be is what worries me, and it could be then leads to the second concern, could this be discouraging victims, and that is complete speculation as well. We just do not know whether victims are getting discouraged. The

reason this is less of a problem so far, and maybe it is not in practice a big problem, is because basically no-one out in the community whatsoever has much of an understanding at all of how DNA is used. They have considerable concerns about it, because people nowadays, even though DNA has only been known to exist in the last 50 years or so, they regard it as part of their personhood, they regarded it as capable of being planted, which it is on occasion, they have all sorts of vague concerns, but high concerns, about DNA, but they do not know anything about the nuances.

Whenever I talk to people who have been the subject of procedures, they do not understand anything that happened to them. I talked to a few people on Norfolk Island when they were fingerprinted in a mass fingerprint screening. Just about all of them told me DNA was taken from them, even though I have checked with the police and they insisted they never took DNA as part of that mass fingerprinting. People just do not understand what is going on. The good thing news of that is they do not understand that there are flaws in the legislation that could expose them.

No, I do not think victims are generally likely to be refusing to go to the police or refusing to consent to a procedure, but it is possible. I have some scenarios in mind where I think this could occur. One of them is not so much about victims' DNA but third parties' DNA. What if, and it is possible under current protocols that it will happen in New South Wales, a test on a rape victim produces some male DNA and the male DNA goes onto the Crime Scene Profile Index, because clearly the male DNA is not the rape victim's DNA, putting aside inter-sex cases, and that male DNA is put on the Crime Scene Profile Index and linked to a whole set of other offences. The police then go back to the victim and say where could this male DNA have come and they realise it perhaps is not from the rapist, it is from a sexual partner of the victim. That sexual partner, hurray, we have caught him, he's a mass killer, or whatever he is, let's put him in gaol, but once word gets out that one way for the police to get hold of someone's DNA is if they are a sexual partner of a rape victim, then word will get around prisons and elsewhere that you have to make sure that your girlfriend, if she is raped, does not go to the police and does not submit to testing. That is the kind of worry I have. It may not involve media publicity, although that could heighten the problem. It involves word of mouth in the system. It is not so much the victims not coming forward, although that could happen as well. It is that kind of scenario, pressure is placed on victims not to come forward.

There are other scenarios. You might be aware that a new approach to the use of DNA which gets occasional publicity, and presumably we will have a case in Australia which gets a lot of publicity soon enough, is trawling the database not for the offender but for family members of the offender. You find a partial match and you think, hey, that person looks interesting, let's go and find out about their relatives and see if they are the serial killer we are looking for. That will implicate and will weigh on the minds of victims who happen to have family members who have things to hide, who might be robbers or whatever they are. It is those people that I worry about. I do not know whether this is around at all, but it is a certain plausibility to my mind.

The Hon. Amanda FAZIO: One of the other things that I was interested in was whether there is a difference that exists between, for example, somebody who is shot in the street and is obviously the victim of a serious crime, but when the police attend and the ambulance attend the person has got a bag with them with five kilos of cocaine and $100,000. That person would then not just be a victim, they would also be involved in a crime. Should we be treating under the law people differently if the evidence is physical like that or DNA evidence?

Dr GANS: This is one of the mysteries. This is what actually got me into DNA. Why is DNA different? I am not entirely convinced it is. It is just an instance of powerful information. What is actually different about DNA is there is all this legislation regulating police using information. In no other area, or just about no other area, is there any regulation whatsoever on the police dealing with information. If they come across information in a variety of ways, including that they visited the rape victim's house and saw some interesting things there, they just whack it onto their intelligence database and there is no law that says that they do not. That is standard fodder for investigation, and it is extremely rare and difficult to regulate the use of information. DNA is a special case though because of the potential for cold hits, that is, not just intelligence, not just a piece of the jigsaw puzzle, and that is how most police intelligence works, but the first step in an all new investigation. That is such powerful information, and it is also possible to regulate, because it cannot be done without a database. You cannot control what one police officer says to another, but the database can be controlled. So it is both powerful and regulatable information. That is why DNA, rightly or wrongly,

has been treated differently and can be treated differently to the five kilos of cocaine on the streets.

I cannot say to you entirely happily that there is a complete difference between the two. There is not. But for historical reasons, for issues of regulation, the magic nature of DNA is and can be treated differently.

The Hon. Amanda FAZIO: In relation to the information you gave us on the Northern Territory, you said a match can be used if it is a very serious offence. What are your views on that? Do you think that is fair enough?

Dr GANS: My general view is there are no easy answers here. There is going to be no perfect solution to the issue of victims' DNA. There are always going to be some troubling cases. There is not a single rule you can come up with that is not going to lead to trouble in cases. It is all a matter of striking a balance. One way to strike the balance is to leave the whole issue to the end of the day for the courts or the police officers or the data administrators once they have the match in their hands, and that is what the Attorney General's Department in their submission describe as a massive ethical dilemma. I am a fan of heading off the ethical dilemma in advance by clear rules that mean that you do not have an ethical dilemma, you just follow the rules. That being said, the rules will not be perfect rules. They will be clear but imperfect. There is a clarity to the Northern Territory approach, although you will always get issues of where you draw the line, is 14 years the right level and what if parliament later on ups penalties and they are suddenly coming within the DNA regime where they were not before. There are problems with those sorts of lines. I think there was another suggestion to only protect victims of rape and domestic violence.

Depending on your agonising about how to deal with this issue, those might appeal as solutions. I worry a little about them, because my concern is to give the clearest possible rules at the pre-match stage, so that when investigators are contemplating putting an unclear sample, which they are not quite sure what it is about, onto their matching crime scene profile database, they are well aware of what they are meant to do and they are well aware of the consequences if they do not. The problem is that if you create some digouts for the police, then yes, they will be well aware of the consequences, but they might say we are willing to take the risk because at least we will not let a murderer get away. I worry that having those openings will send the wrong message to some police officers. I am not against those rules, but I think it is a matter of choosing the right balance in the rules.

I should say that I have alternative proposals to the ones put forward by the Attorney General's Department, which to my mind strike a better approach.

The Hon. Amanda FAZIO: Are they in your submission?

Dr GANS: No, but they will be. I can tell you about them. I am sure you realise this, but I put in a brief and hurried submission, and I should say I put it in on the assumption that this matter would be dealt with as so many others have been dealt with, without careful attention to the detail.

CHAIR: We are a very serious Committee, Dr Gans.

Dr GANS: Not by the Committee, but by the submissions before you. That being said, I have totally changed my mind on that, having read the submissions and listened to the public hearing. You have got great submissions before you. I do not think there is anything wrong in any of the submissions, although they do present alternative views, and you should pay a lot attention to the differences between them.

I wrote this article in 2005 basically complaining that no-one was taking the issue seriously. I no longer have that complaint. The issue is taken seriously. So I am now forced to actually do the serious thinking myself. My thinking was always limited to rape victims, and rape victims are an easy case, because they are physically there in front of the police, you basically get the DNA from them at the same time as you get the mystery samples. So it is easy to exclude them. The cases where this could be a kind of fake rape victim who is an offender in disguise, a wolf in sheep's clothing, are so narrow and trivial as to be almost ignored, and the costs to rape victims of exposing them to that danger are obvious. It is not so obvious with other victims. So my thinking has expanded a little, and

what I am mostly thinking about now is that the approach taken in New South Wales is on the right track, which is the database administrator, on their own it seems, but potentially in conjunction with some other departments, have opted to keep some of the profiles that could legally go onto the Crime Scene Index off the Crime Scene Index.

You have had different submissions on that. CrimTrac says keep off profiles you know are from the victim by a DNA match, the AFP says keep profiles you know or reasonably suspect to be from the victim off the index, and I think that is more or less the approach done in New South Wales, but New South Wales also has a protocol for obtaining the DNA profiles from those excluded people that could then confirm, could solve the mystery of the rape. I would go further. That is because I also agree with those submissions that talk about the difficulty of defining who is and who is not a victim. I think that is a major problem, not in the rape context, we all know who the victim is there, but in some of the messier investigations. I agree with the submissions that say the idea the victim might not be workable in all situations. So you have to shy away from rules that assume all crime scenes are the same and all investigations are the same. There is too much variation out there.

What I have tried to come up with is a regime which is a bit more flexible. To tell you my regime, it is a use limitation on how Crime Scene Index profiles can be used. The legislation just has this Crime Scene Index, which allows comparisons with other crime scene indexes. It is at the moment being limited by New South Wales departments who keep some of the profiles off that index. My suggestion is that you change the open slather on the Crime Scene Index to a purposive limitation which works in this way - it is a little complex - what matches can you do between Crime Scene Index profiles and other Crime Scene Index profiles, within crime match it. That is what New South Wales police calls it. You can use any profile you can put on the Crime Scene Index to look at evidence related to that same crime and use the definition of the Crime Scene Index to identify an in crime match. That is one scenario, but then there are two other scenarios.

The second scenario, and this is the instruction to the database administrators, you think about every person who could reasonably have been a source of that sample and who you do not reasonably suspect to be the offender, so consensual sexual partners of a rape victim for example, the bystanders at the scene of a bloody fight. For all of those people, you either exclude them or you could not find them, they are not around, or that person has said no, they do not want to give their DNA, and you should give full instructions to those people on what is at stake if they say no. Once you have excluded or otherwise cannot deal with those people, then you can do your crime scene match with open slather.

There is then a third scenario, just to cover the odd cases. Allow open matches if the matching is otherwise justified in all the circumstances, that is allow for the urgent cases, the messy cases, the unusual cases, allow the matching to be done, but require someone out there to think there is a danger if I get this wrong, I have to be sure it is justifiable in the circumstances - this will be a judgement by presumably a database administrator - if I get this wrong, then the match will be illegal and then will be subject to significant inadmissibility rules. That procedure does not require a definition of victim. It just says keep in mind the innocent sources of the sample, do your best to clear them, but you have to do just your best. If you did your best and it turns out there was someone who was an innocence source, that is bad luck, they end up on the matching crime scene profile database. If they are a serial killer, hurray, we have caught them, but the police know what they have to go through to get to that point. Have flexibility, allow for other circumstances that you did not think of, but put it in the legislation so that no-one has any doubt about the significance consequences if you do not do any of this.

For example, New South Wales Police's horror scenario, and it is an interesting scenario, is of the person who turns out to be a serial killer around Australia or something. They are before you, they appear to be a victim, but when you realise they have actually committed lots of other crimes, you had a second look and realised they were not the victim after all, but the problem is you have already done the matching. Is that going to be excluded? You are on safe ground if you did the right thing and asked them for the sample. If they said no, you are safe. If you could not find them, you are safe. If they were excluded, then it is not an issue, or if there was an urgency that meant that you had to hurry and put the DNA on the database, you are safe. Nice clear rules for the police to follow that tell them how to Act. I do not think this is any different to the current New South Wales database protocol, except that is not limited to victims. It covers everyone who the police reasonably suspect

has not committed the crime, and that covers consensual partners of rape victims, bystanders in the street and all of those.

That is my solution. I will happily work it up as a more formal submission, but to my mind having a fairly tough set of rules, but with a flexible exception, is the appropriate way to work this protocol into a tougher legislative form.

The Hon. Amanda FAZIO: I just wanted to ask you, we see a lot on television where police get covert DNA samples, a fellow coming down the street picks up a cigarette butt or whatever. If a victim who is also suspected of being an offender declined to provide DNA, can they do that here?

Dr GANS: Yes, covert DNA sampling. It is like consent. It is one of the complete loopholes in the law. Every court that has looked at the issue has said the covert sample is either not illegal or, if it was illegal, who cares, because it is not that bad to covertly pick up DNA. This is a holdover from the old days when the major worry that civil liberties groups had about DNA was the blood prick on the finger or the hair pull. They were sad that there was a moment of pain for the offender. That is a complete non-issue. The issue is the information, not how you get it. But a consequence of the legislation is it leaves covert DNA samples completely unregulated. I have advocated over and over again that the way to deal with covert sampling is to ban it unless the police get a warrant, but allow the warrant in circumstances where it is appropriate to do covert sampling. There are such circumstances.

CHAIR: Examples?

Dr GANS: When you are worried that if you approach someone they will abscond or they will commit a crime or something like that, you do not want to give away that they are under investigation, you go and get your warrant to do a covert sample. Covert sampling I think has a correct place in the law, but it needs regulation. Not regulating it means victims, for example, can have their profile put on without any of the protection here and so can others. You know where those profiles go, it is onto the Crime Scene Index, the same index we are talking about all along. That is how you can get them onto the database, if indeed they do go on the database. They do not always go onto the database. Another problem with the legislation is there is very little regulation of database matching, which is how these matters are dealt with.

The Hon. Amanda FAZIO: Can I just take you back to something I mentioned earlier about evidence obtained by one method, why should it be treated differently if it is DNA evidence. What happens with victims' fingerprints? Do they go onto the general fingerprint—

Dr GANS: I am not an expert on fingerprinting, but fingerprinting is often put up as the curious example compared to DNA because there is relatively little regulation. While DNA has this way of gathering up DNA from offenders and suspects, it first requires them to be suspectable, it requires them to fall into that particular offender category, fingerprinting is an arrest system. Once you are arrested they just fingerprint you. They fingerprint you when you go to the United States. They fingerprint you all over the place and there are no significant controls, except in New South Wales in theft cases, on using those fingerprints just the way police use every bit of information they ever get. There is an interesting question of whether fingerprints should be dealt with in the same way as DNA. An oddity in New South Wales' legislation is that fingerprints and hand prints and palm prints and toe prints, or whatever they are, of bystanders to the theft, that is the people who live in a house which was robbed, are dealt with differently to the DNA of those people, even though these days DNA is used to investigate break and enters. I cannot understand why you would treat them differently. It raises a question of which model should you choose.

The Hon. Sylvia HALE: Just a minor question. In terms of the flexibility option, and you are saying that someone has to be aware of the potential illegality of misusing the DNA, would you suggest that that onus is on the person who is about to upload the DNA or in these circumstances should there be a couple of people to whom the matter is referred and they make the decision?

Dr GANS: The key issue to me is it should be a person who is independent of the police, and basically a diligent database administrator, someone like Mr Gertz, who seems to have taken a fairly diligent approach already, and who I suspect, but I do not know, has dragged the rest of the New

South Wales administration along with him on this. Could I contrast him though with (1) the police. I am not a detractor of the police, but the police obviously have their own take on things and they are very committed to gathering as much information as possible. They hate saying no to information. So if you leave discretionary decision making up to them - do I think this is justified in all the circumstances - of course, they are going to find everything is justified. It is always worthwhile putting things on the database because we just learn good information. Police never say no to good information.

The other body that worries me about this is CrimTrac, the national database. I think their submission requires close attention, but what it requires close attention to is their complete concern with what they call the efficiency of the database, and what they mean is as few rules as possible and as many matches as possible. Whatever that is, that is not attuned to the many other issues in this area. If I had to pick a body that unfortunately has done more than anything else to cause the difficulties with DNA in Australia it is CrimTrac, because they have an obsession with uniformity and the simplicity of rules, and I suspect that the reason they have those obsessions is because they are like the IT department. I am sure you have one. There is one in my faculty. When you ask them to do something you want, they say it cannot be done. What they mean is: it is more work for us to do it that way, because you just fit into our little program, which is nice and easy, but they put it in terms which make it hard to say no. I would worry about putting big decisions in the hands of software writers, and that is what I think CrimTrac is. You need to have someone like the Department of Health, which is more attuned to the balance that you need to draw, the dangers let us say.

The Hon. GREG DONNELLY: Can I just ask you one thing. It is in the realm of speculation and almost fancy perhaps I guess. Aspects of DNA that we do not purely at this stage understand, yet science is pushing us towards, are there in your research and your reflections - you talk about this whole thing because you have clearly done a lot of this - are there any aspects of DNA perhaps which we might be moving towards or in the realm of possibility which we should be considering at this stage?

Dr GANS: The major ones concern this familial matching, which is of enormous potential benefit, but raises some significant issues about widening of the database. You have a database which at the moment is largely premised on direct contact with the criminal justice system, not your family members' contact with the criminal justice system. It is hard to justify family members' contact with the criminal justice system as a relevant criterion, although it is a very powerful, new method. That is the major one in my mind. Everyone in this area talks about the potential of DNA, it is full of information, but I think a lot of the claims about the coded bits of DNA, not just the junk bits, are a bit overblown.

The Hon. GREG DONNELLY: Why?

Dr GANS: For a start, I am sceptic on the power of the coded bits to really reveal any investigatively useful information.

CHAIR: Don't you believe in American television?

Dr GANS: My wife watches CSI and I am sometimes forced to watch. There are some magic things that can be done, but I think they will be limited to marginal, crazy cases and they are not of major concern. The best thing about DNA is how easy it is to regulate its use, because it is the database where everything happens. You just do not allow those things by not allowing the database to be used in those ways. Can I just point out again, the Northern Territory is the only jurisdiction I know of in the world, but certainly in Australia, which has regulations which limit the type of analysis you can do on DNA. They limit it to match it, not to deep analysis mining for secrets about the offenders' family history or breast cancer or whatever it is. They are the only ones that did it. The Northern Territory, again, they get maligned, but they put in place a limitation because presumably there was some concern that DNA might be used for non-identifying purposes. I say the status of familial matching in the Northern Territory is therefore unclear.

CHAIR: Do you think it is possible that the current complexity of the law in New South Wales influences the police person's concerned about the possibility of changed or more legislation?

Dr GANS: Absolutely. The Sydney Institute of Criminology held a seminar on the new legislation back in 2000. I spoke at it and talked about the problem of consent, and I also stood up and asked about status of victims. There was all sorts of talk about that, and then I sat in the audience, and a couple of cops sitting behind me sat there saying this is just a conspiracy by civil liberties groups to stop DNA working. I do not think that is what it is, but I think that sometimes the police view bad legislation as a loss of confidence, but somehow even worse than that. Like I said at the start, yes, I do think New South Wales Police have become legislation shy, and rightly so, but I think you should take on board that concern but see it as a reason to improve, dramatically improve, not to bandaid, not to have an easy solution and not to have a poor compromise, but to properly improve the legislation. Like I said, the ultimate solution is to rework the legislation from scratch, but bandaids are there and I will suggest some in my further submission.

CHAIR: Another issue is: what do you think the view of the other people in the agencies who have submitted to this inquiry would be to the proposals that you are putting forward?

Dr GANS: We will see, but I would have thought that having the exception where the matching is otherwise justified in all the circumstances should meet all of the particular concerns that were raised in the submissions. Yes, they will not be totally thrilled to have some legislation there, but it is legislation with this very general exception. They are not to be hemmed in by rules; there is an allowance for exceptional cases. There is an uncertainty about what might count as being justified in all the circumstances, but that uncertainty, they will know full well, will ultimately have to be resolved by a court if they ever want to use the DNA. So they know that whatever decision they make will have to be on fairly firm ground. That being said, all this worry that the New South Wales police had about weird cases where villainous pseudo victims become permanently immune from prosecution, there are ways out for the police under my proposal. I would have thought they would be happy. Perhaps the civil liberties groups will not be so happy. I do not know what they would think.

The Hon. Sylvia HALE: Without wanting to turn you into a marked man of any sort, when you respond will you critique those submissions that have been made where you think it is relevant?

Dr GANS: Like I said, I actually think there are all great submissions.

The Hon. Sylvia HALE: Yes, but you obviously take difference with some of them?

Dr GANS: I will point out what you I see are responses to some of the submissions. Make no bones about it, I said very nasty things about the legislation in my career, and even today, but I am not saying nasty things about these submissions. These are much more thoughtful submissions. I would just like to point out that all these issues should, of course, have been thought about eleven years ago, not now. It is far too late. I will make that point.

CHAIR: No, no.

The Hon. Sylvia HALE: I was thinking what the Committee would benefit from is an informed critique of those submissions.

Dr GANS: I hope I can provide that. It will just be my view.

CHAIR: Your information has been very valuable to us. We have got a whole lot of questions on notice we have not got to, which the secretariat will furnish to you. We look very much forward to more of your work. Thank you very much for attending. Any questions you have taken on notice, which includes the ones we did not get to ask you, will be sent to you by the Committee staff, along with a copy of the transcript from the proceedings today, and the Committee would appreciate it if your response to any questions on notice could be forwarded to the secretariat by Friday 14 November to ensure the information is considered in the report writing.

Dr GANS: I will actually try and do it next week, because I like to clear these things off my desk.

CHAIR: Thank you very much indeed for making the effort to come today. It has been very valuable to us.

Dr GANS: Thank you for having me here, and also in particular for flying me up here. I am sorry to put you to that expense. I am no fan of flying, but unfortunately my experience of video conferencing has just been so negative, I do not think this discussion would have been quite so robust without it.

(The Committee adjourned at 12.37 p.m.)