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**DNA Testing and Criminal
Justice**

by

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CONTENTS

EXECUTIVE SUMMARY

1.0	INTRODUCTION.....	1
1.1	Technical note.....	2
2.0	THE CURRENT DEBATE IN NSW.....	4
2.1	The debate in a national context.....	4
2.2	The NSW Attorney General.....	5
2.2	The NSW Police Minister.....	6
2.3	The NSW Police Commissioner.....	7
2.4	NSW Council for Civil Liberties.....	7
2.5	NSW Law Society.....	8
2.6	Justice Action.....	8
2.7	Editorial comment.....	8
2.7	The NSW Premier, the NSW Police Minister and the Australian Council for Civil Liberties.....	9
3.0	THE CURRENT LEGAL POSITION IN NSW.....	10
3.1	Section 353A of the Crimes Act.....	10
3.2	DNA as evidence in NSW.....	12
4.0	OVERVIEW OF THE LEGAL POSITION IN SELECTED AUSTRALIAN JURISDICTIONS.....	14
4.1	Victoria.....	15
4.2	South Australia.....	16
4.3	Queensland.....	18
4.4	The Northern Territory.....	19
4.5	Summary.....	20
5.0	THE MODEL FORENSIC PROCEDURES BILL AND THE PROPOSED NATIONAL DNA DATABASE – THE 2000 MODEL BILL.....	21
5.1	The case for a comprehensive legislative scheme.....	21
5.2	Summary of the 2000 Model Bill.....	23
5.3	The proposed DNA database system.....	26
6.0	DNA TESTING AND CRIMINAL INVESTIGATION IN THE UNITED KINGDOM.....	27
6.1	The impact of DNA matching on crime rates.....	27
6.2	The legal position in the UK.....	28
6.3	The DNA database and the role of the Forensic Science Service.....	30
7.0	CONCLUSIONS.....	30
APPENDIX 1: FORENSIC PROCEDURES – INTERNATIONAL COMPARISONS Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General May 1999		
APPENDIX 2: COMMENTS ON THE DISCUSSION PAPER DRAFT Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General February 2000		
APPENDIX 3: PERMISSIBLE MATCHING OF DNA PROFILES Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General February 2000		

EXECUTIVE SUMMARY

The purpose of this paper is to present an overview of the current debate in NSW about extending police powers to take forensic samples for DNA testing, a debate which has intensified over the past few months. The NSW Police Minister has foreshadowed the imminent introduction of relevant legislation. The paper's main findings are as follows:

- none of the participants in the local or wider debate on this issue have a blanket opposition to the use of DNA testing in criminal investigation. Instead, the discussion turns on questions of detail, concerning the scope of the proposed police powers and the nature of privacy/civil liberty safeguards which are to be established (page 1);
- DNA profiling involves a probabilistic interpretation and, to assess the evidential value of a match, it is usual practice to estimate the probability that an unknown person, unrelated to the suspect, would share the same profile (page 3);
- in relation to DNA profiles, population geneticists report that there are statistically significant ethnic differences. This raises the question of the need for subdatabases which distinguish between relevant racial/ethnic/cultural populations. The United Kingdom, for example, has three main databases for estimating match probabilities, composed of DNA profiles from people described as 'Caucasian', 'Afro-Caribbean' and 'Indo-Pakistani' (page 3);
- in the United Kingdom the sampling process involves taking two mouth swab samples or, alternatively, a minimum of 10 hairs with roots (page 3);
- the debate about extending police powers to use DNA samples for the purposes of criminal investigation has been on the agenda in Australia for around a decade, as part of a wider discussion concerning the reform of legislation dealing with forensic procedures. In February 2000, the Model Criminal Code Officers Committee released its final report titled, *Model Forensic Procedures Bill and the Proposed National DNA Database* (page 4);
- a national DNA database is planned as part of the Commonwealth Government's CrimTrac initiative (page 4);
- the legal position in NSW is governed by section 353A of the Crimes Act 1900. Following the *Fernando* case, this amended in 1995 to permit samples of blood, saliva and hair to be taken from a person in lawful custody and upon a charge of committing an offence. These amendments were described at the time by the Attorney General as an 'interim measure' (pages 10-12);
- following the release of the 1995 Model Forensics Bill a number of Australian jurisdictions introduced legislative amendments. The Commonwealth, Victoria and South Australia have introduced comprehensive legislative packages in this field, whereas the changes in Queensland have been more limited in nature. On the other hand, the reforms in the Northern Territory were not designed to reflect the terms of

the 1995 Model Bill (page 14);

- the Commonwealth, Victoria and South Australia permit the post-conviction testing of certain offenders. In Victoria, the law has a retrospective operation for any serving prisoner if found guilty of a ‘forensic sample offence’. Under the 2000 Model Bill retrospective testing will also be permitted in relation to ‘convicted serious offenders’, but under that proposal an offender can be in or out of prison (page 20 and page 25);
- in the Northern Territory, mouth swabs (the standard technique used in DNA testing) are a ‘non-intimate’ forensic procedure and, unless the suspect is under 14, samples can be taken without the suspect’s consent and in the absence of a court order. Forensic procedures can be conducted upon those suspected of more serious offences in Victoria and South Australia, but there mouth swabs are intimate samples and, in the absence of the suspect’s informed consent, a magistrate’s order is required. Under the 2000 Model Bill, samples of hair with roots (the main alternative technique used in DNA testing) are non-intimate samples and can be taken compulsorily from adult persons in custody on the order of a police officer, as well as from convicted serious offenders (unless the offender is a child or an incapable person) (page 20 and page 23);
- reference is often made in the current NSW debate to the impact DNA testing and matching has had on crime rates in the UK, in particular the impact it has had on crime clear-up rates. According to the NSW Police Commissioner, since the introduction of the national DNA database in the UK, in 1995, burglary was down by 40 per cent and the clear-up rate for unsolved crimes is up by 60 per cent (page 27);
- in the UK both mouth swabs and hair samples (with roots) are defined to be non-intimate samples and they can be taken without consent from: a person in custody suspected of a recordable offence (broadly, offences which carry a sentence of imprisonment); any person charged with a recordable offence; any person convicted of a recordable offence (page 29); and
- for the administration of justice generally, the issues at stake point in several directions – to the potential of DNA testing to free an innocent person who has been wrongly convicted, as well as to the question of the integrity of the DNA database and the need to safeguard against the tampering with, or faking of, evidence. The DNA testing debate also brings into sharp focus the role played by expert scientific evidence in the courts. It is almost certainly not a complete panacea for crime detection, nor yet an infallible evidentiary tool. It is, nonetheless, a remarkable and effective new instrument in the armoury of crime detection (page 32).

1.0 INTRODUCTION

The purpose of this paper is to present an overview of the current debate in NSW about extending police powers to take forensic samples for DNA testing. This debate has intensified over the past few months, due in part to the announcements made by the Police Minister, Hon Paul Whelan MP and the reported comments of the NSW Police Commissioner, Mr Peter Ryan, foreshadowing legislative change of one sort or another in this area. Attention has also been drawn to the issue as a result of the recent bashing and rape of a 90-year old woman in Wee Waa, subsequent to which the male residents of the town have offered to undergo DNA testing.¹

It should be noted at the outset that none of the participants in the local or wider debate on this issue have a blanket opposition to the use of DNA testing in criminal investigation.² Instead, the discussion turns on questions of detail, concerning the scope of the proposed police powers and the nature of privacy/civil liberty safeguards which are to be established. At the popular level, the question is often put in the form of whether NSW is to adopt the British model, under which police powers are defined in relatively broad terms, or is a more limited approach to be adopted. The NSW Police Commissioner, Mr Ryan, would prefer the former;³ whereas others, including the NSW Council for Civil Liberties, have supported the opposing case.⁴ Having originally advocated a more limited approach, in keeping with that adopted earlier by the Attorney General, Hon Jeff Shaw MLC,⁵ more recently the Police Minister, Mr Whelan, is reportedly considering 'broadening DNA laws to allow tests on petty criminals'.⁶ Intervening in the debate on 27 March 2000, the Premier defined the key policy question in terms of whether DNA testing is to be permitted when a person is arrested or, by contrast, when a person is convicted.⁷

The paper discusses this ongoing debate in NSW in more detail and outlines the current

¹ 'Men offer DNA in hunt for rapist', *The Sydney Morning Herald*, 23 February 2000; 'Men agree to DNA test', *The Daily Telegraph*, 23 February 2000.

² D Nason and G Safe, 'Civil rights fears over DNA tests on inmates', *The Australian*, 24 January 2000. The article cites the views of Sarah Hopkins, Secretary of the NSW Council of Civil Liberties.

³ TCN 9, 60 Minutes, 20 February 2000, interview with Police Commissioner Ryan; 'Ryan calls for wider DNA tests', *The Sunday Telegraph*, 20 February 2000; Richard Glover's Show on 2BL, 21 February 2000, interviews with Superintendent Robin Napper and Kevin O'Rourke.

⁴ M Devine, 'Why the hands of police are tied', *The Daily Telegraph*, 28 February 2000. The article cites the objections of civil libertarians and prisoners' rights groups.

⁵ Hon JW Shaw, Attorney General, Minister for Industrial Relations and Minister for Fair Trading, 'Police to have power to take forensic samples', *Media Release*, 4 March 1999.

⁶ M Florez, 'DNA law may be extended', *The Daily Telegraph*, 27 February 2000.

⁷ D Murphy, 'DNA tests likely if Carr has his way', *The Sydney Morning Herald*, 27 March 2000; C Niesche, 'DNA debate splits on timing', *The Australian*, 27 March 2000.

legal position. It then contrasts the position in other selected Australian jurisdictions where the relevant laws have been amended in recent years. Next, it looks at the comprehensive legal package proposed in February 2000 by the Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General (the Model Criminal Code Officers Committee - **MCCOC**). This is contrasted with the position in the United Kingdom which has been an important reference point in the NSW debate. Also discussed in this section of the paper is the question of what impact the greater use of DNA testing can make on the crime clear-up rate. Appendix 1 sets out the relevant laws in other overseas jurisdictions, including Canada, New Zealand and the USA.

1.1 Technical note

This paper does not attempt to canvass all the issues raised by the use and potential use of DNA testing in criminal investigation. In particular, it does not attempt to explain in detail the science of DNA (**deoxyribonucleic acid**) testing, an area which has seen rapid development over the past decade or so.⁸ It is enough to make the following points:

- Although some of the same technologies are used in both, forensic-DNA profiling is separate and different from the ‘genome project’, the international program to determine the sequence of all the base-pairs in the 23 pairs of human chromosomes.
- The DNA profile of an individual, as used in forensic-DNA profiling, does not represent the genetic make-up of that person. As Thomas Curran explains, ‘It represents only a number of fragments of the person’s DNA; these have been extracted, processed and utilized to form an individualized molecular-DNA “snapshot” that can be used for identification purposes. The forensic-DNA profile does not give any information on the individual’s genetic make-up’.⁹
- However, not all observers state the case in such categorical terms. For example, Mike Redmayne, a member of the Law Department at Brunel University, accepts that DNA profiling techniques used in forensic work tend to use ‘non-coding’ loci (areas or sites) as the basis for identification and adds that: ‘If the loci used as the basis for the DNA database are truly non-coding ones, then the database raises no more privacy concerns than does the storage of fingerprints or photographs’.¹⁰ The United Kingdom database, he says, uses STR (short tandem repeat) loci which, in 1998, were believed to be non-coding. Redmayne adds, however, that at this stage ‘one should be cautious about

⁸ For a detailed discussion see – P W Eastal and S Eastal, *The Forensic Use of DNA Profiling*, Trends and Issues in Criminal Justice No 26, Australian Institute of Criminology, November 1990; S Eastal, N McLeod and K Reed, *DNA Profiling: Principles, Pitfalls and Potential*, Harwood Academic Publishers 1991; T Curran, *Forensic DNA Analysis: Technology and Application*, Canadian Parliamentary Library 1997.

⁹ T Curran, n 8, p 8.

¹⁰ M Redmayne, ‘The DNA Database: civil liberty and evidentiary issues’ (1998) *Criminal Law Review* 437 at 439.

claiming that they will never reveal significant information about an individual'.¹¹

- The STR technique involves the amplification of areas (or loci) of the DNA molecule that show length variation in discrete short blocks. The steps in the process are: extract DNA from the crime stain or other sample; clean and measure the DNA; select and codify specific areas/loci many times; and sort the DNA fragments according to size. The result is a series of bands. Usually there will be a pair of bands, one band from each parent for each loci examined. A computer is used to convert the picture generated into numbers which represent the DNA profile. At present, in the United Kingdom, six STR loci are examined in addition to the amelogenin sex marker.¹²
- If it is found that a suspect's DNA profile is the same as that of the crime sample, then the crime stain was left either by the suspect or another unknown person who, by chance, has the same profile as the suspect. To assess the evidential value of a match, it is usual practice to estimate the probability that an unknown person, unrelated to the suspect, would share the same profile.¹³ A form of probabilistic interpretation is involved, therefore. Curran writes in this regard that 'the claim for uniqueness of a forensic-DNA profile rests on statistical probabilities developed by population geneticists'.¹⁴
- In relation to DNA profiles, population geneticists report that there are statistically significant ethnic differences.¹⁵ This raises the question of the need for subdatabases which distinguish between relevant racial/ethnic/cultural populations. The United Kingdom, for example, has three main databases for estimating match probabilities, composed of DNA profiles from people described as 'Caucasian', 'Afro-Caribbean' and 'Indo-Pakistani'.
- In the United Kingdom the sampling process involves taking two mouth swab samples or, alternatively, a minimum of 10 hairs with roots.¹⁶

The general point to make is that amazing advances have been made in recent years in

¹¹ Ibid; Western Australia Legislative Council, *Report of the Legislation Committee in relation to forensic procedures and DNA profiling: the Committee's investigations in Western Australia, Victoria, South Australia, the United Kingdom, Germany and the USA*, Report 48, 1999., p 205 and Appendix 10 – a majority of the Committee recommended that any DNA analysis not be restricted to the non-coding parts of DNA. The Committee commented that in Germany the law requires that only non-coding parts of DNA can be used in testing for the purposes of criminal investigation (page 83).

¹² Home Office, *Proposals for Revising Legislative Measures on Fingerprints, Footprints and DNA Samples*, July 1999, p 10.

¹³ Ibid.

¹⁴ T Curran, n 8, p 13.

¹⁵ PW Eastel and S Eastel, n 8, p 6.

¹⁶ T Curran, n 8, p 11.

terms of what information can be obtained from a small sample of human tissue, blood or excretion. ‘Not surprisingly’, it is said, ‘Governments are attracted to the potential for solving crimes through the use of DNA information’.¹⁷

2.0 THE CURRENT DEBATE IN NSW

2.1 The debate in a national context

The debate about extending police powers to use DNA samples for the purposes of criminal investigation has been on the agenda in Australia for around a decade, as part of a wider discussion concerning the reform of legislation dealing with forensic procedures. At the national level, this commenced with the decision of the Standing Committee of Attorneys General (SCAG) in 1990 to place the question of the development of a national model criminal code on its agenda. One result of the decision was that, in 1995, a majority of the Committee endorsed the Model Forensic Procedures Bill and forwarded a proposal to the Australasian Police Ministers Council that a legislative platform be established for a national DNA database. In May 1999 the Model Criminal Code Officers Committee (MCCOC) of SCAG released a discussion paper titled, *Model Forensic Procedures Bill and the Proposed National DNA Database*, the purpose of which is to develop the proposed national DNA law enforcement database as part of CrimTRac, a criminal investigation system the Federal Government is establishing in cooperation with the States and Territories.¹⁸ In February 2000, MCCOC released its final report which provides for a comprehensive legislative scheme.¹⁹

Developments also occurred at the State and Territory level throughout the 1990s, including the enactment in Victoria in 1993 of the first comprehensive legislation dealing with forensic procedures.²⁰ Further reforms also occurred in Victoria, Queensland and South Australia in response to the Model Forensic Procedures Bill of 1995. As discussed in a later section of this paper, legislative change also occurred at the federal level.

In NSW the debate about the use of DNA testing in criminal investigations dates at least as far back as the Crimes Legislation (Further Amendment) Bill 1990 which was introduced to ensure that the criminal law keeps pace with ‘developments in forensic science’,

¹⁷ Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Discussion Paper – Model Forensic Procedures Bill: DNA Database Provisions*, May 1999, p 1.

¹⁸ This is discussed in a later section of the paper.

¹⁹ Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Final Draft – Model Forensic Procedures Bill and the Proposed National DNA Database*, February 2000.

²⁰ The *Crimes (Amendment) Act 1993 (Vic)*, which has since been amended by the *Crimes (Amendment) Act 1997 (Vic)*. The original legislation was based on the Coldrey Report of 1989 – Victorian Consultative Committee on Police Powers on Investigation, *Report on Body Samples and Examinations*, 1989.

including developments in DNA testing.²¹ On the one side, the Bill would have empowered the police to compel a person released on bail to undergo a medical examination; on the other, it would have maintained the ‘the restriction that medical examinations may only be carried out after the person has been charged’. The Bill also contained detailed provisions relating to ‘intimate examinations’ and ‘non-intimate examinations’ and set out the circumstances in which these could take place. The Bill lapsed in June 1990 and lapsed again after being reactivated in March 1991.²²

2.2 The NSW Attorney General

In NSW, over the past year or so, the issue of the use of DNA in criminal investigation has been raised by the Attorney General, Hon Jeff Shaw MLC, the Police Minister, Hon Paul Whelan MP, and the Police Commissioner, Mr Peter Ryan. All have foreshadowed legislative changes of one sort or another in this area. On 4 March 1999, in the lead up to the last State election, the Attorney General said:

NSW police will be given the power to have forensic samples for DNA testing taken without consent from suspected criminals on serious charges such as rape and murder... The proposed legislation will also give police the power to apply to a court to direct that a person already convicted of a serious offence supply a blood sample. These blood samples will provide a DNA databank for forensic matching in later crimes.²³

A serious offence would be any offence punishable by a maximum penalty of more than five years imprisonment. In these cases, police would have the power to enforce the taking of forensic samples ‘once the person had been arrested or otherwise had proceedings commenced against them’. Mr Shaw explained that, where consent to conduct an ‘intimate’ forensic procedure had been refused, then the police could not proceed without a court order. He continued, ‘I believe that the new regime, involving as it does judicial oversight, will strike the appropriate balance between the civil rights of the individual and the need for police to have the power to effectively investigate crime’.²⁴

What the Attorney General seemed to be proposing here was something like a comprehensive legislative scheme, combining an articulation of police powers with a regime of appropriate safeguards.

²¹ NSWPD, 12 June 1990, p 5401.

²² G Griffith, *Crimes (Detention after Arrest) Amendment Bill 1994*, NSW Parliamentary Library Bills Digest, No 25/1994, p 13.

²³ Hon JW Shaw, Attorney General, Minister for Industrial Relations and Minister for Fair Trading, ‘Police to have power to take forensic samples’, *Media Release*, 4 March 1999.

²⁴ *Ibid.*

2.2 The NSW Police Minister

On 23 January 2000 the Police Minister suggested that the following categories of persons should be DNA tested:

- Prison inmates serving sentences of five years or more for the ‘serious offences’ of murder, sex offences, armed hold-up, drug trafficking and kidnapping; and
- Former prison inmates who have already spent at least five years in prison for any of the above categories of serious crimes; and
- Persons suspected of committing a serious crime, but only after they have been charged.

Inclusion of persons in the first two categories would extend the DNA testing regime beyond that proposed by the Attorney General, whose media release of 4 March 1999 had only referred to suspects who had been charged with committing certain kinds of serious crime. The Police Minister is reported to have said that:

Criminals convicted of serious offences should be DNA-tested to enable unsolved crimes to be cleared...If you have committed a serious major crime in the past, I couldn't see any reason why you wouldn't be tested...I do think that if you've committed a serious offence...then if you're released from prison on other offences, you should also be the subject of the DNA profiling.²⁵

Mr Whelan observed that, by clearing up previously unsolved crimes, the proposal would help the family and friends of the victims of those crimes. On this issue, he continued: ‘There would be hundreds of high-profile murders that have taken place and disappearances which could be tidied up by virtue of the fact that if the evidence is still there, DNA profiling will reveal the (guilty) person’. A factor in this regard, for Mr Whelan, was the high incidence of repeat offenders in NSW which means that ‘people convicted of one murder or sex attack might also be guilty of others’.²⁶ He went on to say that people who had nothing to hide would not object to giving swabs because it was the best way to prove their innocence. No reference was made to the question of legislative safeguards.

On 27 February 2000 the Police Minister suggested that the DNA testing powers could be defined to include less serious ‘volume’ crimes, such as car theft and house burglary. He would not, in any event, ‘rule out extending the powers to also cover comparatively petty criminals such as car thieves and home burglars’. As one commentator noted:

²⁵ M Rogers, ‘Criminals to be DNA tested’, *The Sunday Telegraph*, 23 January 2000.

²⁶ In 1999 65.6 per cent of the all inmates in NSW had a record of prior adult imprisonment (including remand) - S Corben, *NSW Inmate Statistics 1999: Summary of Characteristics*, NSW Department of Corrective Services, February 2000, p 3.

The minister has been under pressure from police to extend the DNA plan beyond dealing with just ‘serious’ criminals and yesterday he gave the first sign of a policy shift.²⁷

2.3 The NSW Police Commissioner

In fact, the Police Commissioner’s plan to ‘use DNA testing to solve previously unsolved crime’ was noted by the Premier in Parliament on 24 June 1999. By February 2000 it was clear that Mr Ryan favoured a wider definition of police powers in this regard than had been contemplated, at that stage, by either the Attorney General or the Police Minister. In effect, in an interview on *60 Minutes*, he argued that DNA testing should be ‘applied to volume crime to be particularly effective’. In support of his argument, he made extensive reference to the relevant British experience where, it was claimed, since the introduction of the national DNA database in 1995 burglary was down by 40 per cent and the clear-up rate for unsolved crimes is up by 60 per cent.²⁸

2.4 NSW Council for Civil Liberties

Responding to the Police Minister’s initial proposal of 23 January 2000, the Secretary of the NSW Council for Civil Liberties, Sarah Hopkins, said the Council was not opposed in principle to DNA testing. However, citing the Lindy Chamberlain case, she counselled against placing too much reliance on scientific evidence and expressed concern that Mr Whelan had failed to spell out what safeguards would be in place under the proposed scheme, stating:

There is the possibility of DNA samples being corrupted or swapped – either deliberately or inadvertently – so we need to know what sort of safeguards are going to be in place to ensure there are no wrongful convictions.²⁹

Ms Hopkins was also concerned about imposing DNA testing on prison inmates and former prison inmates:

Extending compulsory DNA testing to people who have been released from jail is a form of continuing punishment which we vigorously oppose...The same applies to the prison population. You don’t give up your rights to privacy just because you are in prison. Prisoners have a right to privacy the same as everyone else.³⁰

²⁷ M Florez, n 6.

²⁸ 60 Minutes, n 3. Interview with the NSW Police Commissioner.

²⁹ D Nason and G Safe, n 2.

³⁰ Ibid.

2.5 NSW Law Society

Again, responding to the Police Minister's announcement of 23 January 2000, the president of the NSW Law Society, John North, called for the Government to establish a statutory compensation scheme for those persons who had been wrongfully charged or convicted, but subsequently proved innocent by DNA testing.³¹ He said:

Broadly, we support any legislation that enables serious crimes to be cleared up and, just as importantly, innocent people who have been unjustly charged or convicted might also benefit from the use of a DNA database...If DNA was used to exculpate someone, then there should be a scheme in place to stop them going through the rigmarole of suing the Government.³²

In response to the suggestion, a spokesman for the Attorney General said he believed 'the present system was adequate'.³³

2.6 Justice Action

On 24 January 2000, Brett Collins, a spokesperson for the prisoner's rights group, Justice Action, issued a media release criticising the proposal for establishing a DNA database as an 'attack on our freedoms by the Big Brother Carr NSW Government'. He continued: 'Minister Whelan has lost his public touch. We remember the widespread corruption exposed by the Wood Royal Commission, and the public outrage in 1985 at the Australia Card proposal. Australians justifiably don't trust police or politicians. No public debate has happened and yet the proposition is momentous'.³⁴

2.7 Editorial comment

To date, the main editorial comment is that of *The Sunday Telegraph* on 23 January 2000 which began, 'The Government's plan to carry out DNA testing on all those with serious criminal records is a sensible move'. It continued:

Criminals and civil libertarians will doubtless shout loudly against the proposal, claiming it would be a violation of their rights. But it can be reasonably argued that in committing serious crime in the

³¹ For the US experience see – M Riley, 'DNA testing gives freedom to 64th inmate', *The Sydney Morning Herald*, 1 April 2000; A Cohen, 'Innocent, after proven guilty', *Time*, 13 September 1999, 42-44; E Connors et al, *Convicted by Juries, Exonerated by Science: Case Studies in the use of DNA evidence to establish innocence after trial*, NIJ Research Report, June 1996.

³² E Connolly, 'Alert on flip side to DNA tests', *The Sydney Morning Herald*, 25 January 2000.

³³ Ibid.

³⁴ B Collins, 'DNA database of citizens', *Media Release*, 24 January 2000.

first place, these people forfeited many of the civil liberties law-abiding citizens take as a right. There's also the maxim that if these people – convicted serious offenders – have nothing to hide, they have nothing to fear.³⁵

It was acknowledged that the DNA testing of 'suspects' in major crimes would be an area of concern for civil libertarians, but the editorial said this 'is no different from the fingerprinting that has been part of crime solving for almost a century'. It added, 'If innocent people felt they had been wronged by being DNA-tested, that would be a small price to pay for tracking down and convicting dangerous criminals'.³⁶

2.7 The NSW Premier, the NSW Police Minister and the Australian Council for Civil Liberties

As noted, by 27 March 2000 the Premier had defined the key policy question involved in terms of whether DNA testing is to be permitted when a person is arrested or, by contrast, when a person is convicted. According to one report, the Premier commented:

The British say that [in] 98 per cent of cases someone in their custody will volunteer to provide a sample...Now that's very interesting – it suggests that the area for argument is going to be much smaller than people assume.³⁷

'Whatever is decided', he added according to a second report, 'we are giving police a new forensic tool, one that helps them solve crime and deliver a safer community'.³⁸ That same report noted, 'A spokesman said Police Minister Paul Whelan had no preferred position on when people should be tested'.³⁹ On the other hand, Terry O'Gorman, President of the Australian Council for Civil Liberties, said the issue of who to take DNA from was one of many to be resolved, although he argued 'If it's to be taken at all, it should only be after conviction'. He also raised the issue of 'adequate safeguards against samples getting mixed up and against police planting genetic evidence'. According to Terry O'Gorman, 'No one on the police side wants to engage in that debate because they realise it's their Achilles heel'.⁴⁰

³⁵ Editorial, 'Justice hidden at crime scene', *The Sunday Telegraph*, 23 January 2000.

³⁶ Ibid.

³⁷ D Murphy, n 7.

³⁸ C Niesche, n 7.

³⁹ On the other hand, in an interview with Richard Glover on 2BL Drive on 27 March 2000, the Police Minister suggested that he would support both the DNA testing of convicted persons and those suspected on reasonable grounds of committing an indictable offence.

⁴⁰ C Niesche, n 7.

3.0 THE CURRENT LEGAL POSITION IN NSW

3.1 Section 353A of the Crimes Act

Section 353A of the *Crimes Act 1900* is headed 'Power to search person, make medical examination, take photograph, finger-prints etc'. Section 353A (2) was inserted in 1924 and, for the purposes of substantive interpretation, it has not been changed since then. It provides:

When a person is in lawful custody upon a charge of committing any crime or offence which is of such a nature and is alleged to have been committed under such circumstances that there are reasonable grounds for believing that an examination of his or her person will afford evidence as to the commission of the crime or offence, any legally qualified medical practitioner acting at the request of any officer of police of or above the rank of sergeant, and any person acting in good faith in his or her aid and under his or her direction, may make such an examination of the person is in custody as is reasonable in order to ascertain the facts which may afford such evidence.

The elements which have to be made out to make this section operative include: (a) the person examined must be in lawful custody; (b) a criminal charge must have been laid; (c) the police officer who orders the medical examination must be of or above the rank of sergeant; (d) this officer must have reasonable grounds for believing such an examination will provide evidence of the offence with which the accused has been charged; and (e) the examination must be carried out by a qualified medical practitioner.⁴¹

In the 1995 case of *Fernando v Commissioner of Police*⁴² the Court of Appeal found that section 353A (2) permitted external examinations by eye and touch only. Thus, the NSW Police had no power to compulsorily acquire blood samples or any other form of body fluid or tissue by an internal examination of persons in lawful custody. Priestley JA said 'The words of subsection (2) do not suggest to me an intention to make lawful the taking of some part of the body itself from within the body of the person in lawful custody'.⁴³ Counsel for the Commissioner of Police had submitted that section 353 (2) empowered the police to obtain blood samples from the appellants, Vester and Brendon Fernando, to carry out DNA testing.⁴⁴ In part, this was an argument 'of practicality and convenience' which maintained that DNA testing was a particularly useful technique for proving innocence or guilt, one which 'will not hurt the person charged and can be done safely and quickly'.⁴⁵ Dismissing the argument, Priestley JA commented, 'In effect it was said that the invasion of civil rights or liberties by what is no more than a pin prick can not have any real effect upon the

⁴¹ M Swain, *Forensic Samples*, NSW Parliamentary Library Briefing Paper No 22/1995, p 3.

⁴² (1995) 36 NSWLR 567.

⁴³ *Ibid* at 572.

⁴⁴ *Ibid* at 584 (Clarke JA dissenting).

⁴⁵ *Ibid* at 574 (Priestley JA).

substantial common law position'. Against this, Priestley JA emphasised that the courts will not interpret a statute in a way that abrogates a fundamental right (the right to bodily integrity in this instance) unless Parliament's intention is expressed with irresistible clearness.⁴⁶

In the aftermath of the *Fernando* decision, the *Crimes Act 1900* was amended. New subsections were added to section 353A which provide:

- A person authorised to make a medical examination of a person in lawful custody can take samples of the person's blood, saliva and hair;⁴⁷
- Evidence concerning the samples can be given only in proceedings concerning the crime or offence in relation to which the samples were taken and the samples must be destroyed as soon as practicable after the conclusion of the proceedings and the exhaustion of any right of appeal concerning the crime or offence;⁴⁸
- The place of 'lawful custody' is not limited to a police station;⁴⁹ and
- Samples can be taken without the consent of the person in lawful custody.⁵⁰

From the perspective of the 'limitations' of the current law, it can be said that mere suspects who are not in 'lawful custody' and have not been charged cannot be DNA tested without their consent; nor, for that matter, can convicted prison inmates or former prison inmates. It is also the case that no provision is made for the taking of DNA samples from volunteers. Also, as the forensic sample must be destroyed when the proceedings are concluded, no provision is made for the retention of samples for use on a DNA database. The point to emphasise is that, at present, samples obtained from DNA tests can only be used for evidentiary purposes in relation to the crime or offence for which the accused person has been charged. Presumably, before a sample must be destroyed the police could attempt to match a person's DNA profile with evidence obtained from other crime scenes, relating to offences for which the person had not been charged; but it would seem that any 'match' achieved in these circumstances could not then be used for evidential purposes in legal proceedings.

⁴⁶ Ibid at 572-574.

⁴⁷ Section 353A (3A).

⁴⁸ Section 353A (3B).

⁴⁹ Section 353A (3C). The power of the police to take blood and other samples can be exercised notwithstanding that the person is not actually in the custody of police provided that the person is in custody in respect of the charge and the section is not limited to the period between arrest and appearance at court: *Hawes v Governor of Goulburn Correctional Centre* (CA(NSW), 18 December 1997, unreported, BC9707659); (1998) 5 Crim LN 13 – RN Howie and PA Johnson, *Annotated Criminal Legislation New South Wales*, 1999/2000 Edition, Butterworths 2000, p 373.

⁵⁰ Section 353A (3D).

On the other hand, from a civil libertarian standpoint it can be noted that no additional safeguards, such as informed consent and the requirement for a court order to compulsorily take a sample, were added to the law in 1995, nor does any distinction appear to have been made between different kinds of offences. Likewise, no distinction was made between intimate and non-intimate samples. As well, no accountability measures were inserted into the Crimes Act to ensure that the police do not abuse these extended powers. Furthermore, unlike section 353AA which deals with the photographing and fingerprinting of children under 14 years of age, no special provision is made in section 353A for the taking of bodily samples from juveniles.⁵¹

Significantly, in the Second Reading Speech for the 1995 amendments the Attorney General made it clear that this was ‘an interim measure’ and that the Government was ‘committed to the introduction of a much more comprehensive regime which will more fully regulate this contentious area’.⁵²

3.2 DNA as evidence in NSW

Aside from *Fernando*, which was discussed in the last section of this paper, to date there have been a number of other significant cases dealing with DNA in NSW, including *Green*⁵³ and *Pantoja*.⁵⁴ At issue in *Pantoja* was the use of DNA evidence and its probabilistic interpretation⁵⁵ in the light of the case-specific factors involved, including the appellant’s racial grouping, namely the South American Quechua Indians. At issue was the question whether the prosecution case had been made out ‘beyond reasonable doubt’ when, amongst other things, reliance was placed on DNA analysis producing statistical probabilities linking the accused with semen stains on a nightdress belonging to his wife’s sister.⁵⁶ The Crown called expert evidence that only one person in 792,000 would have the same kind of DNA profile as Pantoja and as that found in the semen stains on the nightdress. As Hunt CJ at CL remarked in the Court of Appeal:

A probability of match by chance or coincidence of that nature gave extraordinarily powerful support to the Crown case.⁵⁷

⁵¹ M Swain, n 41, p 10.

⁵² NSWPD, 1 June 1995, p 541. The Attorney General noted that the amendment was an interim measure ‘pending the final release of the model criminal code committee’s bill which has yet to be endorsed by the Standing Committee of Attorneys-General’.

⁵³ (unreported, NSW CCA, 26 March 1993).

⁵⁴ (1996) 88 A Crim R 554.

⁵⁵ See the discussion in section 1.1 under the heading ‘Technical note’.

⁵⁶ The appellant was charged with the aggravated sexual assault of his wife’s sister and, a week later, of murdering his wife. Both charges were tried together.

⁵⁷ (1996) 88 A Crim R 554 at 561.

In the event, the appeal against conviction was upheld and an order made for a new trial. Hunt CJ was particularly concerned that, for the statistical probability at issue, the DNA database relied upon was 'very small', in fact as small as 256 in this instance.⁵⁸ He concluded from this that, when the prosecution evidence of probabilities of a match is objected to by the accused, the prosecution must lead evidence to prove that the database used was of sufficient size to give statistical validity to the probability results, thereby making the results admissible. This state of affairs must apply 'until a general acceptance is accorded to the size of the DNA databases used by the various Government laboratories and commercial testing organisations...'.⁵⁹

It was also decided that any conflict of expert evidence is a question for the jury, but that, once the jury is satisfied beyond reasonable doubt that there was a 'match' then it is to be directed that 'the results showing a match demonstrate only that the accused *could* be the offender, they do *not* establish that he is in fact the offender'. On the other hand, where there is a reasonable possibility that the DNA test is correct, if the accused is positively excluded as the offender, then the jury must be directed that the accused must be excluded notwithstanding that there is a match obtained by other blood tests which operate quite independently, and however strong the other evidence in the case may be.⁶⁰

These directions follow those in *Green*. In that case it was held that the validity of the statistical evidence generally could be affected by racial variations and that, for the case in question, the accused's race was significant. This was because in *Green* the victim identified her attacker as Aboriginal and the court concluded that a reliable database could only be one which took that fact into account.⁶¹ In *Pantoja*, on the other hand, the suspect could have been anyone and therefore the accused's race was not really important. Hunt CJ concluded, 'it must be the offender's race, not the suspect's race, which dictates the validity of the database'.⁶² On the same issue, in the earlier case of *Van Hung Tran*⁶³ DNA evidence was found to be inadmissible in part because the database relied upon did not include persons (as the accused) of Vietnamese or South-East Asian racial background.⁶⁴ The case is also authority for the proposition that DNA evidence may be excluded if the conflicting

⁵⁸ Two further tests were also conducted. Both used Sydney Red Cross databases, one with 2300 DNA samples, the other with 500.

⁵⁹ (1996) 88 A Crim R 554 at 561.

⁶⁰ Ibid at 559 and 564 (Hunt CJ at CL); at 577-588 (Abadee J); J Anderson, 'Case and comment: Pantoja' (1998) 22 *Criminal Law Journal* 39 at 41. Presumably, the problems associated with the use of such a small DNA database as in this case would be overcome by the development of a national database.

⁶¹ J Anderson, n 41 at 42.

⁶² (1996) 88 A Crim R 554 at 562.

⁶³ (1990) 50 A Crim R 233.

⁶⁴ The significance of this issue is discussed in - Western Australia Legislative Council, n 11, pp 103-105.

opinions from expert witnesses leave the judge to conclude that the jury would not be capable of determining the extent of the DNA match or, alternatively, that the prejudicial value of the evidence outweighs the probative value.

The case of *R v Elliott*⁶⁵ shows that the admission of DNA evidence does not guarantee a conviction. There contested DNA evidence was admitted and the arguments of the experts were led before the jury, which subsequently returned an acquittal verdict.⁶⁶

4.0 OVERVIEW OF THE LEGAL POSITION IN SELECTED AUSTRALIAN JURISDICTIONS

The present legal position in NSW can be contrasted with that in other selected Australian jurisdictions, notably those where recent amendments have been made to the relevant laws. Victoria and South Australia are significant in this respect; Queensland and the Northern Territory are also of note. With the exception of the Northern Territory, these changes were informed by the 1995 Model Forensic Procedures Bill, as endorsed by a majority of the Standing Committee of Attorneys-General in July of that year.

At the Commonwealth level, the *Crimes Amendment (Forensic Procedures) Act*⁶⁷ was passed in 1998. That Act, which amends the federal *Crimes Act 1914*, embodies the terms of the 1995 Model Bill in full. Under it, forensic procedures may be carried out on suspects in three different circumstances: (a) with the informed consent of the suspect;⁶⁸ (b) by order of a senior constable;⁶⁹ and (c) by order of a magistrate.⁷⁰ Provision is also made under the Commonwealth law for post-conviction testing, at least with respect to the taking of blood samples from a person found guilty of a 'serious offence'.⁷¹ To some extent or other, and with certain local variations, the reforms in Victoria, South Australia and Queensland can be said to reflect that scheme.

⁶⁵ (unreported, NSW Sup Ct, Hunt J, 6 October 1990).

⁶⁶ B Schurr, *Criminal Procedure* (NSW), LBC Information Services, [11.210].

⁶⁷ This Act inserted Part 1D into the Commonwealth *Crimes Act 1914*.

⁶⁸ But not where the suspect is a child or a person defined as incapable of giving consent.

⁶⁹ In relation to non-intimate procedures. The taking of a sample of blood, a sample of saliva, or a sample by buccal swab is defined to be an 'intimate forensic procedure' – Section 23WA, *Crimes Act 1914* (Cth).

⁷⁰ This applies in three circumstances: where the suspect is not in custody and has not consented to the forensic procedure; the suspect is in custody and has not consented to the forensic procedure; and the suspect is a child or a person otherwise incapable of giving consent to a forensic procedure – section 23WR, *Crimes Act 1914* (Cth). A person must be suspected of committing an indictable offence (section 23WT(1) and the definition of 'relevant offence' under section 23WA).

⁷¹ Section 23YQ. A 'serious offence' is defined as 'an offence punishable by a maximum penalty of 5 or more years of imprisonment'. Application must be made for a court order before a blood sample can be taken.

4.1 Victoria⁷²

Victoria introduced a broad legislative scheme covering forensic procedures in 1993.⁷³ That scheme was subsequently amended in 1997.⁷⁴ Its basic components are as follows (emphasis added):

- The police may request a *suspect who is suspected on reasonable grounds* of having committed an indictable offence, *or who has been charged* with the indictable offence, *or summonsed to answer a charge for such an offence*, to undergo a forensic procedure, but only if there are ‘reasonable grounds’ to believe the procedure will confirm or disprove the person’s involvement in the offence.⁷⁵
- A forensic procedure may be conducted on a suspect if informed consent is given, or where approval is given by a magistrate;⁷⁶ Thus, in the absence of the suspect granting *informed consent* for the forensic procedure to take place, application must be made by the police for a magistrate’s court order directing the person to undergo the compulsory procedure. Once an order is obtained *reasonable force* may be used to conduct the forensic procedure.⁷⁷
- There are significant limitations on the circumstances in which forensic procedures may be carried out on children. A Children’s Court order is required for any forensic procedure to be undertaken on a child between 10 and 17; forensic procedures cannot be conducted at all on children under 10.⁷⁸
- A distinction is made between an ‘intimate’ or ‘non-intimate sample’, with the latter including a sample of hair, other than pubic hair, including the root, and a swab, washing or sample taken from any external part of the body other than the genital or anal region of a male or female, or the breast of a female. Presumably, then, a mouth swab would count as a sample from an internal part of the body and would therefore be categorised as an ‘intimate’ sample.⁷⁹
- An intimate sample (other than a dental impression) may be taken or conducted only

⁷² This account is based on – Western Australia Legislative Council, n 11, pp 67-72.

⁷³ *Crimes (Amendment) Act 1993* which amended the principal statute, the Victorian *Crimes Act 1958*.

⁷⁴ *Crimes (Amendment) Act 1997*.

⁷⁵ *Crimes Act 1958* (Vic), section 464R.

⁷⁶ Section 464R (2).

⁷⁷ Section 464ZA.

⁷⁸ Section 464U.

⁷⁹ Section 464 (2).

by a medical practitioner or a nurse, if practicable, of the same sex as the suspect.⁸⁰

- *Post-conviction testing*, to provide for the taking of forensic samples from criminals convicted after 1 July 1998 and any serving prisoner if found guilty of a '*forensic sample offence*', is allowed. Such offences include all sexual offences, injury offences and other offences such as robbery, burglary and drug offences. Note, however, that a court order is required for a sample to be taken.⁸¹
- Provision is made for *volunteers* to give samples for inclusion on a computerised database;⁸²
- Extensive provision is made for the *destruction and retention of samples*. Although the sample is destroyed only identifying data is removed from the DNA profile. The non-identifying information can still be used for the statistical database.⁸³
- *Evidence* may be admissible notwithstanding procedural irregularity in the obtaining of analysis of the sample. The court may have regard to the probative value of the evidence, and whether there is evidence of equivalent value available by other means.⁸⁴

4.2 South Australia⁸⁵

Enacted in 1998 was the *Criminal Law (Forensic Procedures) Act* which provides (emphasis added):

- That forensic samples may be taken from a person who is '*under suspicion*' of having committed a criminal offence.⁸⁶ In other words, as in Victoria but unlike the situation in NSW, a person need not be in lawful custody on a charge of committing an offence. However, as in Victoria, a suspect must consent to the forensic procedure, or else a

⁸⁰ Section 464Z.

⁸¹ Section 464ZF.

⁸² Section 464ZFGB.

⁸³ Section 464ZFD.

⁸⁴ Section 464ZE.

⁸⁵ This account is based on – Western Australia Legislative Council, n 11, pp 64-67.

⁸⁶ Under section 4 of the South Australian *Criminal Law (Forensic Procedures) Act 1998* a person is 'under suspicion' if the 'police officer by or on whose instruction a forensic procedure is to be carried out on the person suspects the person, on reasonable grounds, of having committed a criminal offence'. A criminal offence means any offence except: (a) a summary offence that is not punishable by imprisonment; or (b) a summary offence that is capable of being expiated. The latter would include certain offences relating to the possession of small amounts of cannabis for personal use.

magistrate's order is required for it to be carried out.⁸⁷

- Special procedures are provided for the protection of *children and adults incapable of giving informed consent*.⁸⁸
- A distinction is made between *intimate, intrusive and non-intrusive forensic procedures*, with more protections applying to 'intrusive procedures' which, by definition, include 'intimate procedures'. These include the taking of a blood sample and intrusions into a person's mouth (which would include mouth swabs).
- Unless *informed consent* is given, a magistrate's order is required for the taking of intimate/intrusive samples. But if the suspected offence is a summary offence,⁸⁹ the person cannot be compelled to undergo an intrusive forensic procedure.⁹⁰
- A number of *rights are granted to the suspect*, including to give informed consent orally or in writing and to be treated humanely and with care.⁹¹
- Division 8 of the Act provides for *post-conviction testing*. If the offence was a '*major offence*' the legislation enables a police officer or the DPP, on a case by case basis, to apply to the same criminal court which delivered the judgment for an order directing that the person undergo a forensic procedure for the purposes of obtaining a DNA profile. A major offence is an indictable offence for which the maximum penalty is, or includes imprisonment for five years or more, or for an indefinite term. In making such an order the court must take into account the nature and seriousness of the charge and any established propensity to engage in serious criminal conduct.⁹²
- Provision is made for the destruction of, and access to, the sample and results.⁹³ Further, the confidentiality of the information obtained is protected.⁹⁴
- Evidence obtained by forensic procedures conducted in violation of the Act is inadmissible, unless a court is satisfied it should be admitted.⁹⁵

⁸⁷ *Criminal Law (Forensic Procedures) Act 1998 (SA)*, Part 3, Division 2.

⁸⁸ Section 3 read with section 15 (b).

⁸⁹ The Act only applies to summary offences punishable by imprisonment – section 3.

⁹⁰ Section 16 (1) (f).

⁹¹ Part 2, Division 3.

⁹² For a commentary on these provisions see – Western Australia Legislative Council, n 11, p 153.

⁹³ Part 4, Divisions 5 and 6.

⁹⁴ Sections 47 and 48.

⁹⁵ Part 5. Section 45 (2) sets out the matters the court may have regard to when deciding if evidence is to be admitted.

- Provision is made for the maintenance of a *database of information* obtained from carrying out the forensic procedure under the Act. A DNA profile so obtained may be stored on a database only if the person in question was: found guilty of the offence in relation to which the forensic procedure was carried out; or was declared to be liable to supervision.⁹⁶

4.3 Queensland

Part 9 of the *Police Powers and Responsibilities Act 1997* deals with the conduct of ‘medical and dental procedures’ while a person is in police custody. The following elements of the law can be noted:

- A person ‘*suspected of committing an indictable offence*’ can *consent* to the performance of a medical or dental procedure (including the taking of a mouth swab). The person has the right to have two people of his or her choice present while the procedure is undertaken.⁹⁷
- If a person is in *lawful custody for an indictable offence* and there are reasonable grounds for believing performing the procedure may provide evidence of the commission of the offence, a *magistrate* can approve the performance of a medical or dental procedure, including taking samples of blood, saliva or hair).⁹⁸
- A forensic procedure must be undertaken by an appropriately qualified person.
- The results of a forensic procedure can only be kept ‘for use in a proceeding for an offence’, which means that provision is not made for establishing a DNA database.⁹⁹
- If practicable, the person tested must be given ‘a part of the sample or thing or an equivalent sample or thing’ for that person’s purposes.¹⁰⁰

It was reported on 9 February 2000 that these powers may be expanded under legislation to be introduced in the current year. In particular, the police would be permitted ‘to take a sample from anyone suspected of an indictable offence, all prisoners in Queensland jails’¹⁰¹

⁹⁶ Section 49.

⁹⁷ Section 62.

⁹⁸ Section 63.

⁹⁹ Section 65.

¹⁰⁰ Section 66. The person must also be given the results of any tests as ‘soon as reasonably practicable’.

¹⁰¹ In fact, in a media release of the previous day it was said that DNA samples could be taken from ‘All prisoners serving a sentence for an indictable offence’- Hon P Beattie MLA, ‘Government expands DNA sampling to be tougher on crime’, *Media Release*, 8 February 2000.

and those who volunteer to accept the procedure'.¹⁰² Where consent is not given, reasonable force could be used to obtain a sample, it was reported. Further, it was said that children under 14 would be excluded from the provisions.

Indeed, in a joint media release with Premier Peter Beattie, the Queensland Police Minister, Tom Barton, explained that these reforms would include the storage of DNA profiles on the proposed national DNA database and that the expansion in police powers would be accompanied by necessary safeguards, including: (a) identification of offenders by a numerical code on the national database and only Queensland police will have personal details of Queensland offenders; (b) maintaining a secure DNA database and recording methods which means that only identifying characteristics are stored and do not contain genetic information which can be used for purposes other than forensic identification; and (c) allowing only law enforcement authorities to access the database for use in criminal or coronial matters.¹⁰³ It was explained that 'The decision to sample prisoners is based on the fact that 90 per cent of all crime is committed by 10 per cent of the population and targeting known offenders will greatly help police clear up crimes'.¹⁰⁴

4.4 The Northern Territory

In 1998 the Northern Territory passed legislation, the *Police Administration Amendment Act (No 2)*, which categorised the taking of mouth swabs (and hair) as a non-intimate forensic procedure which can be carried out by a police officer of or above the rank of Superintendent, either where the officer 'reasonably suspects' that the person has committed a 'crime',¹⁰⁵ or where the suspect has been charged with an offence punishable by imprisonment. In the exercise of this power, the officer may use 'reasonable force'.¹⁰⁶ Provision was made under the amendments for volunteers to consent in writing to non-intimate forensic procedures.¹⁰⁷ The Act also provides that the information obtained from either intimate or non-intimate procedures can be stored on databases maintained by the NT Police.¹⁰⁸

¹⁰² G Newman, 'Police to get DNA powers', *The Australian*, 9 February 2000.

¹⁰³ Hon P Beattie MLA, 'Government expands DNA sampling to be tougher on crime', *Media Release*, 8 February 2000.

¹⁰⁴ *Ibid.*

¹⁰⁵ Under section 3 of the Northern Territory *Criminal Code Act* offences are divided into three: crimes; simple offences and regulatory offences. A 'crime' is the equivalent of an indictable offence in other jurisdictions.

¹⁰⁶ *Police Administration Amendment Act (No 2)* (NT), section 145A. According to telephone advice from the Northern Territory Attorney General's Department, to date it has not been necessary use reasonable force in this context.

¹⁰⁷ Section 145B. Unless the crime is punishable by a term of imprisonment of 14 years or more, the information obtained in this way is only admissible as evidence in respect of the offence for which the information was obtained.

¹⁰⁸ Section 147. Section 147B deals with access to information stored in a database.

At the same time the *Juvenile Justice Amendment Act (No 3) 1998* was passed to permit non-intimate procedures to be conducted on juvenile suspects in lawful custody and charged with an offence punishable by imprisonment,¹⁰⁹ but only with the approval of a magistrate in the case of juveniles under 14. Juveniles held in a detention centre must provide mouth swabs when directed by the superintendent of the centre. 'Reasonable force' may be used by an authorised officer. So, too, under the *Prisons (Correctional Services) Amendment Act (No 2) 1998*, must all adult prisoners provide mouth swabs if directed to do so. Again, provision is made for the use of 'reasonable force'. Provision is made, therefore, for the post-conviction testing of both juvenile detainees and adult prison inmates.¹¹⁰

4.5 Summary

The legal position in the *Northern Territory* is different to that in the other Australian jurisdiction discussed in this section, if only because in the Northern Territory the standard DNA testing procedures (mouth swabs) are defined to be 'non-intimate' in nature and, unless the suspect is under 14, samples can be taken without the suspect's consent and in the absence of a court order. In *Victoria* and *South Australia*, again, it is enough to be under suspicion for a forensic procedure to be conducted, but there mouth swabs are defined to be intimate/intrusive procedures and, in the absence of the suspect's informed consent, a magistrate's order is required for them to be carried out. In *Victoria*, as under the law of the *Commonwealth*, a person must be suspected of an 'indictable offence'.¹¹¹ Likewise, in *Queensland*, a person must be in 'lawful custody for an indictable offence' for such a forensic procedure as a mouth swab to be undertaken without the person's consent; again, a magistrate's order is required in these circumstances.

To contrast the situation with that in *NSW*, here no samples of any kind can be taken from mere suspects. But once in custody and charged this can be done without consent, with no distinction being made between intimate and non-intimate samples, or summary or indictable offences, and no court order being required where consent is denied.

Both *Victoria* and *South Australia* make provision for post-conviction testing, but the power is subject to several limitations, including the need for a court order. Likewise, under the law of the *Commonwealth* a court order is required for the post-conviction taking of a blood sample from persons found guilty of a serious offence. In the *Northern Territory*,

¹⁰⁹ Section 31B (1). Non-intimate procedures may also be conducted where a juvenile has been 'summoned to appear in respect of proceedings...for an offence punishable by imprisonment'.

¹¹⁰ According to telephone advice from the Northern Territory Attorney General's Department, all adult prisoners and all juveniles over 15 currently in prison or in detention have been required to give mouth swabs. The reasonable force provision has not been used. It seems that in future, the prison authorities will only conduct tests on inter-State transferees, leaving the testing of other prisoners and detainees to the police.

¹¹¹ In South Australia a person may be suspected of a summary offence punishable by imprisonment.

however, the power is in broad terms and refers to all adult prisoners; juveniles held in detention centres are also the subject of post-conviction testing, only there the power is more qualified and a magistrate's order is required in the case of juveniles under 14. Nonetheless, where a person is detained in the Northern Territory as a result of an offence being proved, regardless of the age of the person, a mouth swab may be taken by force.¹¹²

Provision is made in *Victoria*, *South Australia* and the *Northern Territory* for the establishment of a DNA database.

Only in *Victoria* and *South Australia*, plus at the Federal level, is the legal regime more or less comprehensive in nature, with the inclusion of provisions designed to safeguard the integrity of the person and the forensic information concerned.

5.0 THE MODEL FORENSIC PROCEDURES BILL AND THE PROPOSED NATIONAL DNA DATABASE – THE 2000 MODEL BILL

5.1 The case for a comprehensive legislative scheme

It has been noted that a number of jurisdictions have implemented to some extent the 1995 Model Forensic Procedures Bill, as endorsed by a majority of the Standing Committee of Attorneys-General in July of that year. The terms of that Model Bill were substantially adopted by the Commonwealth in 1998 and relevant legislation has also been passed in Victoria, South Australia and Queensland. In May 1999, MCCOC released a discussion paper which featured a revised draft model forensic procedures and proposed national DNA database Bill.¹¹³ In February 2000, MCCOC released its final report which provides for a comprehensive legislative scheme. 'The Bill is not short', the report noted, 'MCCOC has found that the desire by police for specificity about their powers, and concerns about ensuring there are adequate safeguards against abuse of the legislation have added to its length'.¹¹⁴ For this reason, much of the 2000 Model Bill is technical and procedural in nature.

When advocating the case on behalf of such a comprehensive legislative scheme in May 1999, MCCOC posed the question, if DNA testing can be assumed to be such a powerful crime fighting tool, why not 'give the police the basic powers and let them do their job?' MCCOC noted the argument that 'Those who have nothing to hide should have nothing to fear, so there should be no need for any elaborate legislative procedure'. MCCOC did not find the argument persuasive. Instead, it set out the 'general reasons' for a comprehensive statutory scheme as follows:¹¹⁵

¹¹² Model Criminal Code Officers Committee, n 17, p ii.

¹¹³ The 1995 Model Bill focused on the collection and use of forensic samples from suspects, it did not provide for the comprehensive procedures required to establish a national DNA database.

¹¹⁴ Model Criminal Code Officers Committee, n 19, 'Introduction'.

¹¹⁵ Ibid pp 3-4.

- DNA material contains a large amount of information about the person (more than fingerprints) so it is important that there should be legislation to protect the privacy of citizens from those who might use the information for illegitimate purposes;
- evidence concerning DNA matching relies on scientific expertise – it can be very convincing, so it is important to have safeguards which work against tampering;
- the success of the DNA database often depends on the cooperation of volunteers – the legislative procedures are necessary to give the public confidence that samples given to the police are used strictly in accordance with the terms of their consent;
- those convicted of serious offences, particularly those in prison, are vulnerable to harassment – high recidivism rates are well known, so there is little sympathy for these people. However, harassment is unacceptable, it does not solve crime and can even work against it (from time to time serious offenders cooperate with investigations);
- there will be many people supplying, administering and using the DNA database – it would be naive to assume every person involved will be always committed to performing these functions appropriately. Accountability mechanisms are necessary to deter rogue conduct;
- the effectiveness of the DNA matching will depend very much on how well it is received in court. The reputation of the DNA database as a reliable investigative tool will have an effect on the extent to which the courts are prepared to rely on evidence derived from the databases. The procedures are designed to protect the integrity of the database and hence its reputation for reliability.

MCCOC went on to say that an important feature of the DNA database is that it can also be a tool for eliminating people from suspicion:

It can be used to reduce the impact of investigations on innocent people and at the same time will work to make investigations more efficient by reducing the number of suspects. It is in that way that the DNA database can be a step forward for civil liberties in Australia. Justice is about getting to the truth, anything that helps in that process should enhance the quality of our justice system.

The Committee has therefore tried to develop procedures that are practical and at the same time contain accountability measures which should work to prevent inappropriate use of the DNA databases.¹¹⁶

¹¹⁶

ibid, p 4.

5.2 Summary of the 2000 Model Bill

In most respects the main components of the 2000 Model Bill follow the template set down in MCCOC's discussion paper of May 1999. However, there are important differences between the two and these are noted in the summary that follows.¹¹⁷ Thus, the 2000 Model Bill:

- contains a procedure for taking samples from any *suspect*¹¹⁸ – someone suspected on reasonable grounds as having committed an offence. Note that the 1999 Model Bill referred to an 'indictable offence' in this context, but that the 2000 Model Bill refers, for DNA testing purposes, to a 'prescribed offence' which means an *offence punishable by a maximum penalty of 2 or more years of imprisonment*.¹¹⁹ This does not appear to reflect a policy change as much as the fact that what constitutes an indictable offence can vary from one jurisdiction to another.
- allows samples to be taken by informed consent and provides a procedure for this.¹²⁰ Provision is also made for the withdrawal of the suspect's consent;¹²¹
- allows *non-intimate samples* (for example, a sample of hair, a sample from a nail or under a nail, or fingerprints) to be taken compulsorily by *order of a police officer* where the adult *person is in custody* and there are reasonable grounds to believe the suspect committed a relevant offence, and the procedure is likely to produce relevant evidence and the procedure is justified in all the circumstances.¹²²
- allows *non-intimate samples* to be taken compulsorily where the person, including a child or an incapable person, is a suspect but *not in custody* if the police obtain an *order from a magistrate*.¹²³ Note that, under clause 37 of both the 1995 and 1999 Model Bills the taking of a *hair root* was defined to be an intimate forensic procedure. Under the 2000 Model Bill, however, clause 37 has been redrafted to permit the taking of a hair root as part of a *non-intimate forensic procedure*, but only if 'each strand of hair is

¹¹⁷ Ibid, p 7; Western Australia Legislative Council, n 11, pp 60-61.

¹¹⁸ Model Bill 2000, clause 1 (1) defines suspect to mean: (a) a person whom a police officer suspects on reasonable grounds has committed an offence; or (b) a person charged with an offence; or (c) a person who has been summonsed to appear before a court in relation to an offence.

¹¹⁹ Clause 8 (1) (b) and Clause 14 (1) (b). The 'prescribed offence' regime does not apply to the taking of a handprint, fingerprint, footprint or toeprint.

¹²⁰ Clause 6.

¹²¹ Clause 10.

¹²² Clause 14.

¹²³ Clause 17. In balancing the public interest involved, the magistrate must have regard to a broad range of issues which are set out in clause 19 (3).

taken individually using the least painful technique known and available to the person'. In relation to DNA testing, this is significant as 'hair samples are not adequate for DNA analysis unless they include the roots'.¹²⁴ MCCOC noted that 'while the procedure of taking samples of hair with roots may be marginally more inconvenient and uncomfortable, it is not more intimate'.¹²⁵

- allows *intimate samples* to be taken compulsorily where the person, including a child or an incapable person, is a suspect, and *whether or not he or she is in custody*, if the police obtain an *order from a magistrate*.¹²⁶ Intimate samples include the examination of the genital or anal area, the buttocks or female breasts, taking blood samples, *taking of a sample of saliva or by buccal swab*, pubic hair or a dental impression;
- provides for *interim orders* by a magistrate where the forensic procedure must be carried out without delay.¹²⁷ Detailed procedural requirements are set out in the 2000 Model Bill, including the requirement that, in the case of a child or an incapable person, the suspect's interview friend or legal representative must be present;¹²⁸
- provides for the use of *reasonable force* in the carrying out of forensic procedures;¹²⁹
- provides for the carrying out of forensic procedures on *volunteers*. Thus, it confers upon the police the right to ask for and obtain, with consent, forensic samples from *people who are not suspects*. The 2000 Model Bill also deals with the withdrawal of consent by a volunteer.¹³⁰ MCCOC notes that it has 'improved the safeguards in relation to the collection of samples from volunteers. For example, under the latest draft police will be required to raise the issue of how long the samples will be kept'.¹³¹
- specifies in detail which qualified persons are authorised to carry out the various forensic procedures, and requires that, if practicable, an intimate forensic procedure is to be carried out by a person of the same sex as the suspect.¹³² Note, however, that qualified persons cannot be compelled to carry out a forensic procedure;¹³³

¹²⁴ Model Criminal Code Officers Committee, n 19, p 2.

¹²⁵ Ibid.

¹²⁶ Clause 17.

¹²⁷ Division 5, Subdivision 3.

¹²⁸ Clause 27 (5).

¹²⁹ Clause 35.

¹³⁰ Division 8.

¹³¹ Model Criminal Code Officers Committee, n 19, p 3.

¹³² Division 6, Subdivision 2.

¹³³ Clause 95.

- provides that a medical practitioner or dentist of the suspect's choice may be present for most forensic procedures;¹³⁴
- provides for *post-conviction testing* of *convicted serious offenders* (a 'serious offence' being an offence with a maximum penalty of 5 years or more imprisonment, or anyone convicted of common assault or breach of a domestic violence order). This can apply to serious offenders currently in gaol or another place of detention. It will also apply, retrospectively, to those convicted of a relevant offence 'before or after the commencement of this section', whether or not they are in prison at the time the new legal regime commences.¹³⁵ This last application is said to reflect the decision taken by SCAG in July 1999;¹³⁶
- again, for the purposes of *post-conviction testing*, a distinction is made between intimate forensic procedures (the taking of a sample of blood or of a buccal swab) and non-intimate forensic procedures (the taking of samples of hair other than pubic hair and the taking of fingerprints).¹³⁷ In the case of *non-intimate forensic procedures*, unless the offender is a child or an incapable person, these can be taken with the *informed consent of the offender*, or by *order of a police officer*. In the case of *intimate forensic procedures*, these can be carried out either with the informed consent of the serious offender, or *by order of a court*. Under the 1999 Model Bill, a court order was required for carrying out any forensic procedure on a convicted serious offender. However, this was altered after the NSW Police submitted it was inconsistent with the fact that a non-intimate sample could have been taken under the 1999 model from a non-consenting suspect by order of a senior police officer, but court approval would have been needed for the same sample to be taken from a convicted serious offender. MCCOC commented, 'The police pointed out that if this inconsistency was remedied, then it would give them a non-intimate option which did not require court approval if the serious offender refused to consent to providing a mouth swab or blood sample. In many cases taking a hair sample will be sufficient as a second choice to obtain the necessary DNA and will be easier to take when someone is resisting than a mouth swab or blood sample'.¹³⁸

¹³⁴ Clause 41. Note that the medical practitioner is required to attend the forensic procedure unless he or she is unable, *or does not wish*, to attend, or cannot be contacted.

¹³⁵ Clauses 50 and 51. Clause 63 provides that if a court orders an offender 'who is not in prison or another place of detention to permit a forensic procedure to be carried out' the offender can be ordered to attend a police station (or some other specified place) for the procedure to be carried out. The discussion of this point in the Model Criminal Code Officers Committee's introduction to the 2000 Model Bill suggests that the provisions will only apply retrospectively to serious offenders 'if they are still in prison' (Page 3). However, that position is not reflected in the Bill itself, which applies whether or not a convicted serious offender is still in prison.

¹³⁶ Model Criminal Code Officers Committee, n 19, p 3.

¹³⁷ Clause 49.

¹³⁸ Model Criminal Code Officers Committee, n 19, p 2.

- also omitted from the 2000 Model Bill is the special objection procedure for convicted serious offenders in gaol (as opposed to those out of gaol). Under the 1999 Model Bill, an objection by the prisoner had to be determined by a court, a provision which was included ‘in an attempt to make the legislation more workable in the prison environment’. In the event, MCCOC was persuaded by the negative experience of police in Victoria with a similar court approval process, as well as by the argument that its proposal would discriminate between different categories of serious offenders (those in and out of gaol);
- stipulates that, where the sample is taken other than in accordance with the procedures, the sample and any record of the results (including DNA data) become inadmissible unless the accused agrees, or a court is satisfied that the evidence should be admitted;¹³⁹
- stipulates that the 2000 Model Bill is ‘not intended to limit or exclude the operation’ of another relevant State law, including those relating to the carrying out of forensic procedures;¹⁴⁰ and
- provides for inter-State enforcement of forensic procedure orders and the inter-State transmission of DNA database information for those jurisdictions participating in the scheme.¹⁴¹

5.3 The proposed DNA database system

Also proposed under the 2000 Model Bill is a regulatory framework for a national DNA database. In fact, the Model Bill describes in detail the way in which different information may be held and matched under the plan to establish a DNA criminal investigation database as part of the Commonwealth Government’s CrimTrac initiative.

What is proposed is a DNA database system containing: first, indexes of DNA profiles – for example, a crime scene index, a serious offenders index, a suspects index and a volunteers (unlimited purposes) index¹⁴² - together with information that may be used to identify the person from whose forensic material each DNA profile was derived; and, secondly, a statistical index.¹⁴³ The way these various indexes can be used to ‘match’ DNA profiles is then set out in the form of a Table (see Appendix 2).¹⁴⁴ For example, the Table

¹³⁹ Clause 70 (4). Clause 70 (5) sets out the matters which a court may take into consideration in determining whether evidence should be admitted.

¹⁴⁰ Clause 84.

¹⁴¹ Division 13.

¹⁴² There is also a ‘volunteers (limited purposes) index’, under which the information obtained can only be used for a purpose specified to the volunteer.

¹⁴³ Division 11, clause 79. The system can also include ‘any other index prescribed by the regulations’.

¹⁴⁴ Clause 82.

makes it clear that there is to be no open access to the volunteers limited purpose index. It must only be used for the purposes for which the sample was given.¹⁴⁵ On the other hand, the DNA profiles contained in the ‘missing persons index’ can be matched with the DNA profiles on all the other indexes. The same is true of the ‘unknown deceased persons index’. The reason for setting out the ‘permissible matching’ rules in this way was that, where this issue was concerned, the May 1999 discussion paper was ‘difficult to understand and in need of refinement’.¹⁴⁶

Also included in Division 11 of the 2000 Model Bill are various offence provisions relating to the misuse of information on the DNA database system. This includes offences concerning the removal of what is called ‘identifying information’ from the system.¹⁴⁷ In the May 1999 discussion paper it was said that these proposals are based on the relevant Canadian legislation (see Appendix 1).

6.0 DNA TESTING AND CRIMINAL INVESTIGATION IN THE UNITED KINGDOM

6.1 The impact of DNA matching on crime rates

Reference is often made in the current NSW debate to the impact DNA testing and matching has had on crime rates in the UK, in particular the impact it has had on crime clear-up rates. For example, the claim is made that the DNA testing of ‘prisoners in England has led to about 60 per cent of major unsolved crimes being cleared up...’.¹⁴⁸ According to the NSW Police Commissioner, since the introduction of the national DNA database in 1995 burglary was down by 40 per cent and the clear-up rate for unsolved crimes is up by 60 per cent.¹⁴⁹

In its May 1999 discussion paper MCCOC also referred to the UK experience with DNA testing and matching. It opened its account with the following comment: ‘While it is not possible to be exact about the benefits of DNA matching in terms of the crime clear-up rate, because there are many factors to a successful police investigation, there is no doubt DNA matching can play an important role’.¹⁵⁰ MCCOC went on to report that since 1995 the UK national database:

- has been used to make over 10,000 matches between crime scenes and suspects;

¹⁴⁵ Model Criminal Code Officers Committee, n 19, p 3.

¹⁴⁶ Ibid.

¹⁴⁷ Clause 83.

¹⁴⁸ M Rogers, n 25.

¹⁴⁹ 60 Minutes, n 3. Interview with the NSW Police Commissioner.

¹⁵⁰ Model Criminal Code Officers Committee, n 17, p 1.

- has been used in clearing up on average 333 crimes per month;
- there is a 'cold hit' rate of 18% (matches arising from comparing whole indexes, eg the whole crime scene index against the whole of the serious offenders index). This is better than fingerprints where the hit rate is 10%;
- has seen over 600,000 samples being submitted for analysis. Of these, just over 500,000 have been 'profiled' and included on the database;
- during the period April 1998 to the end of January 1999 there have been the following person to crime matches:

- murder/manslaughter	35
- rape	112
- sexual assault	41
- grievous bodily harm	40
- serious robbery	88
- aggravated burglary	51
- arson ¹⁵¹	46

MCCOC noted, too, the value DNA matching can have as a deterrent, particularly in relation to 'highly physical criminal activity such as burglary and serious assaults'. Following this, MCCOC commented that crime rates are on the decline in the UK (and USA) where there is extensive DNA matching, but added 'it is difficult to apportion the degree to which this can be attributed to the use of the DNA database'.¹⁵² However, it may be that the picture is more complex still, as crime statistics released by the UK Home Office in January 2000 showed a rise of 115,000 recorded crimes, including a 19 per cent rise in robberies and a 2 per cent increase in sexual offences. Falls were recorded in the number of cases of burglary, drug offences and theft of or from vehicles. The Government was told by Home Office analysts that 'the booming economy, the rising number of consumer goods in people's homes and a growth in the number of young men in the key 17-25 age group is putting significant upward pressure on property crime'.¹⁵³ This only serves to emphasise MCCOC's cautionary note that crime rates are the product of diverse factors, including demographic changes and improved economic conditions. It does not alter the argument that DNA matching can play an important role in the clear-up of crimes.

6.2 The legal position in the UK

The power to take forensic samples is governed under the *Police and Criminal Evidence Act 1984 (PACE)* which was amended by the *Criminal Justice and Public Order Act 1994*

¹⁵¹ Statistics provided to MCCOC by Chief Constable Ben Gunn, UK Police, Huntingdon (26 February 1999).

¹⁵² Model Criminal Code Officers Committee, n 17, p 2.

¹⁵³ R Ford, 'Blair at bay after leap in violent crime', *The Times*, 19 January 2000.

and the *Criminal Evidence Amendment Act 1997*. Under PACE and its associated Code of Practice both mouth swabs and hair samples are defined to be ‘non-intimate samples’. They were re-classified in this way in 1994 and, as MCCOC has said, this ‘allowed a massive increase in the size of the [UK] database’.¹⁵⁴ In effect, since 1994 non-intimate samples may now be taken in broadly the same circumstances as fingerprints. These can be taken without consent from:¹⁵⁵

- A person in police detention or a person held in custody providing an officer of at least the rank of Superintendent authorises it to be taken. An officer may only give such authority if there are reasonable grounds for suspecting the involvement of that person in a *recordable offence*,¹⁵⁶ and the sample will help prove or disprove the person’s involvement;
- Any person charged with, or who has been informed that he will be reported for a *recordable offence*, regardless of whether the sample is relevant to the investigation of a particular offence, and either the person has not had a non-intimate sample taken in the course of the investigation of the offence or the non-intimate sample taken was either unsuitable or insufficient; and
- Any person convicted of a recordable offence.

Of these powers, MCCOC commented in its May 1999 discussion paper that permitting DNA samples to be taken without consent in relation to ‘recordable offences’ makes it possible to take a sample on the basis of such a minor offence ‘as fraudulently using a motor vehicle license’. In other words, recordable offences cover a wide range of offences, including those of a summary and indictable nature. The PACE scheme also refers to persons *convicted* of a recordable offence and in this way provision is made for the post-conviction testing of offenders. In 1997 the law was altered again to allow a *retrospective operation in certain cases*, namely, in respect to persons convicted before 10 April 1995 and who are still serving their sentences in prison, or in respect to persons in mental hospitals who were found unfit to plead. However, only a limited category of offenders are included under this amendment, those committed for offences against the person, sexual or indecency offences, and burglary. On the other hand, unlike the 2000 Model Bill, the legislation does not appear to contemplate the DNA testing of past offenders who were not in prison or a mental hospital at the time these amendments were passed.

A feature of the British experience is that extensive use has been made of the DNA testing of volunteers. Indeed, as at July 1999 110 mass DNA screens had been undertaken in the investigation of serious crime. The police have called for this aspect of the legislation to be altered to permit, under section 64 of PACE, the retention of samples from volunteers, and

¹⁵⁴ Model Criminal Code Officers Committee, n 17, p 122.

¹⁵⁵ This account is based on – Home Office, n 12, p 11.

¹⁵⁶ ‘Recordable offences’ are broadly those which carry a sentence of imprisonment. Before 1994 a person had to be suspected of committing a ‘serious arrestable offence’.

the DNA profiles derived from samples, for use in future investigations.¹⁵⁷ At present, Section 64 provides that where a sample is taken from a person in connection with the investigation of an offence and that person is not suspected of having committed the offence, or is not prosecuted, or is acquitted of the offence, the sample must be destroyed. Further, the information derived from the sample cannot be used in evidence against that person, or for the purposes of any investigation of an offence. DNA profiles are retained in searchable form on the database only if the suspect is convicted, cautioned for a recordable offence or if action against the individual is ongoing.

6.3 The DNA database and the role of the Forensic Science Service

It is worth noting that in the UK the police forces do not have to take DNA samples. The national DNA database is described, rather, as ‘an investigative tool for the police service to use where they decide it would be appropriate’. As of July 1999, the Association of Chief Police Officers had advised police forces to take samples where the offence being investigated is sexual or one of burglary or violence against the person, or where the suspect is convicted, charged or reported for one of these offences. Moreover, the police do not carry out DNA tests and matching on their own behalf. Since 1995 the national DNA database has been operated on behalf of the Police Service by the Forensic Science Service, an organisation which is formally part of the Home Office. The purpose of the Forensic Science Service is to serve the administration of justice principally by providing scientific support in the investigation of crime and expert evidence to the courts for both the prosecution and the defence.¹⁵⁸ It seems this model is to be followed in NSW where a Forensic Science Institute is to be established.¹⁵⁹ The Police Minister has indicated that such arrangements, by separating the police from the DNA database, should enhance the system’s integrity.¹⁶⁰

7.0 CONCLUSIONS

It is clear that the use of DNA testing and matching has an important role to play in criminal investigation. What is also clear is that its application in this context raises contentious issues, both concerning the scope of police powers and the safeguards for the integrity and liberty of the individual. The Model Criminal Code Officers Committee has taken the view that these powers need to be articulated in specific terms, as do the safeguards and the penalties incurred if the information held on a DNA database is misused. It is for this reason that its own comprehensive legislative proposal is long, technical and highly procedural in nature. Whether legislation regulating DNA testing and the matching of profiles needs to follow this comprehensive model is a key issue in the debate.

¹⁵⁷ Home Office, n 12, p 11.

¹⁵⁸ Western Australia Legislative Council, n 11, p 76.

¹⁵⁹ E Connolly, ‘State to tackle “worst” forensic crime service’, *The Sydney Morning Herald*, 11 February 2000.

¹⁶⁰ R Glover’s Show on 2BL, 27 March 2000, interview with the NSW Police Minister.

Most of the jurisdictions surveyed in this paper categorise the taking of mouth swab samples, the most common technique used in DNA testing, as intimate forensic procedures. The Northern Territory and the UK are exceptions to this rule. The alternative technique for DNA testing, the taking of hair (including the roots) is more often categorised as a non-intimate procedure, although the Model Criminal Code Officers Committee has only been persuaded to adopt this approach in its final report of February 2000. Also, most of the jurisdictions surveyed here permit a sample to be taken from a person suspected of committing an offence, usually an indictable offence or its equivalent. The UK is an exception in that it refers to 'recordable offences' (broadly any offence carrying a sentence of imprisonment), but there a person must be 'in police detention' or 'held in custody'. In these circumstances in the UK, relevant samples can be taken without consent and without a court order. The same applies in the Northern Territory (unless the juvenile is under 14). Omitting NSW from the equation for the moment, in the other jurisdictions looked at in this paper, a court order is required if a suspect is to be compelled to undergo an intimate forensic procedure. No provision is made for a court order in NSW, but here suspects cannot be tested; a person must be in lawful custody and charged for a relevant forensic procedure to be undertaken. One question, therefore, is whether the law in NSW should be altered to permit the sampling of suspects in certain circumstances and, if so, should a court order be required where consent is refused. Moreover, in relation to which category of offences should such sampling be permitted – more serious indictable offences or, following the UK model, a wider range of offences?

Another feature of legislation in most of the surveyed jurisdictions is the provision that is made for the post-conviction testing of certain prison inmates, with some laws including a retrospective element for certain offences. In most cases, including the UK and Victoria, post-conviction testing only applies where the relevant category of offenders are still in prison. However, this is not the preferred approach of the Model Criminal Code Officers Committee in its final report, under which there is no requirement for a 'serious offender' who was convicted before the new law commenced to still be in prison. Under the same proposal, a non-intimate sample could be taken retrospectively from a serious offender without a court order; whereas a court order would be required for the taking of an intimate forensic sample. The general question, therefore, is should the law apply retrospectively in some cases and, more contentiously still, should it apply to a category of offenders who are not in prison at the time the legislation is passed? How broadly is a retrospective power of this kind to be drawn? Moreover, what assumptions can and should be made about recidivism patterns in this context?

Post-conviction testing also raises other issues. For example, in the Northern Territory such testing applies to all prisoners and juvenile detainees, with a court order only being required for juveniles under 14; whereas other jurisdictions limit the category of offenders who can be tested and most require a court order in all cases. As noted, under the 2000 Model Bill of the Model Criminal Code Officers Committee the taking of intimate samples would require a court order, but the taking of non-intimate samples would not. This would mean that DNA samples in the form of hair could be taken from a certain category of prisoners without consent and without an order from a court. For NSW, the question again is how broadly to define the offenders who may be tested and in what circumstances?

Behind these issues is the further question of the future participation of NSW and the other States in a national DNA database under the Commonwealth Government's CrimTrac initiative.

For the administration of justice generally, the issues at stake point in several directions – to the potential of DNA testing to free an innocent person who has been wrongly convicted, as well as to the question of the integrity of the DNA database and the need to safeguard against the tampering with, or faking of, evidence. The DNA testing debate also brings into sharp focus the role played by expert scientific evidence in the courts. DNA matching is a probabilistic science dependent in the end for the role it plays in criminal investigation on human interpretation, analysis and judgment. It is almost certainly not a complete panacea for crime detection, nor yet an infallible evidentiary tool.¹⁶¹ It is, nonetheless, a remarkable new instrument in the armoury of crime detection, with much potential for future application.

¹⁶¹

For recent experience in New Zealand in this respect see – E Bingham, 'DNA evidence – under the microscope', *The New Zealand Herald Online*, 14 March 2000; E Bingham, 'Appeals loom after DNA test blunders', *The New Zealand Herald Online*, 10 March 2000.

APPENDIX 1

FORENSIC PROCEDURES – INTERNATIONAL COMPARISONS

**Model Criminal Code Officers Committee of the Standing Committee
of Attorneys-General**

May 1999

FORENSIC PROCEDURES - INTERNATIONAL COMPARISONS

The trend elsewhere is also towards more comprehensive accountable procedures and the creation of legislation which regulates the storage, flow and use of information collected on databases. This appendix contains a review of legislation in New Zealand, Canada, the UK, Germany, the Netherlands and several States in the USA which should provide readers with some useful comparisons.

Law enforcement agencies in most developed countries are calling for the use of large national DNA databases following the establishment of one in the UK in 1995 and the pooling of data from 8 US States in 1997 using FBI software. Starting with Colorado in 1988, during the 1990's every US States has enacted DNA databank legislation.⁴⁶

The UK and US law enforcement agencies are enthusiastic about DNA data matching. In both those countries the procedure has involved the sampling and use of samples from large numbers of people - thereby having a hitherto unprecedented impact on the community. Straight after establishment of the UK data base, the police arrested 900 suspects for theft and firearms offences in the South of England and Wales and subjected them to mass DNA testing. In the UK it is estimated 135,000 DNA samples are to be processed annually (650 per day). By March 1998 the UK database contained DNA profiles on more than 255,000 suspects and convicted persons, and 30,000 profiles developed from material found at crime scenes. The database is generating 300 matches per week.⁴⁷

However, there are people in those countries who are concerned about the sheer size of these databases and the grounds for collecting the data. It is therefore not surprising that people fear the potential for the information to be used for other purposes (using the data to identify say whether the person has a particular mental illness and then placing the person on a short list of suspects who law enforcement think have a propensity to commit crime). It is therefore necessary to consider the potential for errors and misuse of the information and to develop procedures which work to minimise these problems. There are concerns overseas that there is potential for misuse because DNA evidence can be used in a convincing way through use of scientific jargon and because law enforcement is seen to control much of the process involved in preparing and presenting DNA identification evidence.⁴⁸

46 http://www.pbs.org/newshour/forum/july98/dna_legislation.html. 'On line Newshour DNA Databank Legislation: A State-By-State Analysis' Source: FBI Laboratory Division.

47 Figures from Forensic Science Service Fact Sheet 002/98 quoted in 'The Criminal Law Review', July 1998, *The DNA Database: Civil Liberty and Evidentiary Issues* at 437, by Mike Redmayne.

48 Ibid at 438 - 446; 'Journal of Criminal Law' November 1995, *Creating a DNA database*, by Beverley Steventon at 411; 'American Journal of Law and Medicine' Vol XVI No.3, *The Advent of DNA Databanks: Implications for Information Privacy*, at 381, by Andrea D Gorgey.

Appendix 1

Details of the position in the other countries is as follows:

New Zealand

New Zealand has legislation which is very similar to the Model Bill. Enacted in 1995, it provides for magisterial approval of the taking of samples and applies to suspects (not just people who are charged with an offence). It was enacted at the time the 1995 Model Bill was being circulated for public comment. Indeed the database provisions in the 1995 Model Bill were based on the New Zealand legislation. However the New Zealand legislation is only concerned with the taking of blood samples. An important difference from the 1995 Model Bill is that the grounds for taking blood samples from those convicted of serious offences are less onerous for law enforcement. There is no requirement to demonstrate propensity to the commit these offences.

Canada

The existing Canadian legislation provides for a detailed list of offences against the person and terrorist offences. Like Australia and New Zealand, it requires court authorisation for the compulsory taking of samples. It requires police to obtain a warrant for taking the sample from a suspect from a 'provincial judge.' Where there are practical problems the warrant can be obtained by telephone.

Unlike the Model Bill, there was no procedure regulating the consensual taking of samples. The warrant must be obtained for plucking hairs, taking mouth swabs or blood and may be subject to conditions. The suspect may be detained 'for a period that is reasonable'. The data may only be used for the investigation or proceedings in relation to the offence. Like the Model Bill it must be destroyed within 12 months if the proceedings are not commenced or if the proceedings are discontinued/dismissed. The Canadian privacy legislation regulates the maintenance of the database. The Canadian Privacy Commissioner has recommended against permanent databases from the general population or from people convicted of serious offences.⁴⁹

On 24 August 1995 the Canadian Association of Chiefs of Police passed resolutions calling for the creation of a nation DNA database and legislation for the "mandatory taking and retention of DNA samples from persons charged with a designated offence for the purpose of data banking, the sample and result to be destroyed upon request if the person is found not guilty, or a stay is entered" and the "taking and retention" of samples from people convicted of a designated offence as well as those currently serving sentences and on parole.

49 The Privacy Commissioner of Canada, *Genetic Testing and Privacy* 1992 pp 43-50.

The Canadian Government responded in 1997 by introducing the *DNA Identification Bill* which was enacted in 1998. The new legislation provides for:

- the creation of a national DNA data bank;
- regulates the use of information collected including transmission of the information within and outside Canada;
- that if a person is convicted of a listed offence *the information may be kept indefinitely* unless
 - the conviction of the offence which was the basis for the taking of the data is overturned;
 - he or she is conditionally discharged of a conviction (if they do no reoffend within prescribed periods; or
 - the person is a juvenile and the specified retention period has expired.

The Act would allow a judge to order the taking of samples from people convicted of a range of offences including even common assault and makes provision for court authorisation of taking samples from people convicted of a listed offence prior to the commencement of the legislation. The court must be satisfied it is in the interests of the administration of justice, taking into account:

- the criminal record of the person;
- the nature of the offence;
- the circumstances surrounding its commission;
- the impact of the order on the privacy and security of the person.

However the Act provides for a less discretionary approach to court authorisation where the person from whom police wish to take a sample:

- has been declared a 'dangerous offender' (the Canadian *Criminal Code* already has a procedure where someone who has committed a very serious violence offence (eg rape or murder) and, following an assessment as to persistent aggressiveness, is declared to be a 'dangerous offender');
- convicted of more than one murder at different times;
- convicted of more than one serious sexual offence and is still serving a sentence of 2 or more years imprisonment for one or more of the offences; and

obtaining the sample is *reasonably required*.

Appendix 1

United Kingdom

The UK *Police and Criminal Evidence Act 1984* was developed many years before the Australian, Canadian and New Zealand models. While it provided for very comprehensive police procedures hitherto unknown in most places, the legislation allowed the taking of 'intimate samples' from any person in police detention on the authorisation of a police superintendent where he or she has reasonable grounds for suspecting the involvement of the person concerned in a 'serious arrestable offence' and for believing the sample will tend to confirm or disprove involvement; and the person had given written consent. It included saliva and urine samples as intimate samples that did not need to be taken by a registered medical practitioner.

Non-intimate samples could be taken without consent where the person was in police detention and it is authorised by a police superintendent on grounds of suspicion of involvement in a serious arrestable offence and belief the sample will tend to confirm or disprove involvement in the offence. There was provision for the destruction of samples where proceedings were discontinued but the question of whether the data could be retained after the destruction of the samples was not addressed in the legislation.

In 1994 the UK Act was amended to enable non-intimate samples to be taken compulsorily where the person is suspected by the superintendent of committing a 'recordable offence' as opposed to a 'serious arrestable offence.' However, if the person has not been charged or informed he or she will be reported for the offence, the superintendent must still have reasonable grounds for believing the sample will tend to prove or disprove involvement in the offence. Under these changes it would be possible to take a sample on the basis of minor 'recordable offences' such as fraudulently using a motor vehicle license.

The second change authorised the taking of the samples without consent for the database from people who are charged with or convicted of a 'recordable offence' - there is no requirement of police detention or even authorisation by the police superintendent. This, along with the reclassification of mouth swabs as a non-intimate procedure, allowed a massive increase in the size of the database.

The procedure for the taking of intimate samples was also relaxed in that it could now be used in relation to 'recordable offences'. However, there are requirements that there be consent as well as the authorisation of the superintendent on reasonable grounds for believing involvement in the offence and that the sample would tend to confirm or disprove involvement in the offence. In the UK the taking of a blood sample, an intimate procedure, cannot be done without the consent of the suspect. The Model Bill allows the taking of intimate samples without consent providing it is authorised by a court.

The classification of mouth swabs as a non-intimate procedure has a quite different background to the situation in Australia. Interestingly, like the Model

Bill, dental impressions are specifically included as an 'intimate sample'. This follows a recommendation of the UK Royal Commission on Criminal Justice.⁵⁰

The destruction requirements were also changed. The legislation provided that while the samples must be destroyed where the suspect is exonerated or charges are withdrawn, the DNA data could be kept but not used in evidence against the person or for the investigation of an offence. This enables the use of the data in a statistical database established to make comparisons between the pool of local DNA data and specific individual DNA and crime scene profiles for the purpose of calculating probabilities. The UK Royal Commission on Criminal Justice suggested the statistical database should be maintained by an independent body to reassure people it is not used for investigative purposes or there is no doubling up of data put into the system, however that suggestion was not taken up by the Government.

The amendments clearly authorised the creation of a separate investigative database which can be used to conduct indefinite speculative searches with the remaining data (ie data obtained from suspects and those convicted of 'recordable offences'). It allows the data to be used in evidence against the suspect or others.

Germany

The German Parliament has just passed a new *DNA Identification Act*. On 28 May 1998 the Interior Minister, Mr Kanther said:

Whereas hitherto a DNA analysis could be initiated solely with a view to convicting a criminal offender, it shall in future be admissible for the purposes of future criminal proceedings. A regulation relating to past cases also allows for offenders to be registered who have already been convicted and are about to be released.⁵¹

While, as with the police in other civil law countries, there are extensive powers to gather evidence and genetic testing has been used for years to 'clarify crimes', up until the passage of the new legislation, DNA data was usually scrapped for privacy reasons after cases were finally dealt with by the courts.

The new law is said to be needed to enable the retention of genetic data on all people convicted of serious crime following a match in a child rape/murder case with the DNA of someone who had been convicted of rape in 1990. The match came about after a large scale DNA testing exercise in the particular city which it is now being claimed would have been unnecessary if a DNA database of convict records was available.⁵²

⁵⁰ (July 1993) cm 2263, HMSO.

⁵¹ Translated press statement provided by the Australian Embassy in Bonn on 20 August 1998.

⁵² <http://www.netlink.de/gen/Zeitung/1998/980625b.htm> *German Parliament Approves Creation of Gene Bank*, OTC 25.06.98 01.33

Appendix 1

A 1993 Report of the Project Group on Data Protection for the Council of Europe accepts the use of DNA sampling for identification purposes. Use of the data for asserting pre-disposition to crime was rejected.

The Netherlands

Forensic DNA testing in criminal cases was first introduced in 1989 and was accepted as exculpatory evidence by the Dutch Supreme Court in 1990. However, defendants who refused to cooperate with DNA testing could not be forced to provide blood samples for analysis.⁵³

The Government therefore legislated on 8 November 1993 to force non-consenting defendants to give samples and authorised the use of the results of DNA testing as evidence of guilt. The taking of the sample must be authorised by the 'Investigating Judge' after a request from the 'Public Prosecutor' or on the initiative of the 'Investigating Judge', however it can only be authorised where the offence is serious (maximum penalty 8 years imprisonment or certain specified violent offences which have a lower penalty - eg sexual assault). The samples must be taken by a 'surgeon'. The legislation includes strict procedures preserving the chain of evidence, quality control and right of the defendant to conduct his or her own tests from a spare sample.

The legislation authorises the creation of a national DNA database which includes DNA profiles of suspects in previous cases and DNA data collected at crime scenes. It is used for matching for the purpose of criminal prosecutions but also for identifying deceased people and people who are unable to identify themselves.

Provision is made to remove the data on people who are wrongly considered as being a suspect, however other data (eg convicted people) may be kept for up to 30 years. Crime scene data for 18 years.

The Dutch report that due to the serious nature of the offences involved, there are about 1000 crime scene profiles and 250 from suspects each year.⁵⁴

United States of America

While there are US Department of Justice Guidelines on DNA sampling which apply to the FBI and other federal law enforcement agencies, the enacting of sampling and database procedures have been left to State Governments. Creating a permanent database of convicted offenders has found favour and the FBI has developed a national database model called CODIS. This style of database was supported in the Eastal Committee report and we understand is the concept which is the basis of the APMC proposals for a national database.

53 *Forensic Science International*, 1997 Elsevier Science Ireland Ltd, *Forensic DNA testing and its legislation in the Netherlands* at p 55, Ate Kloosterman and Harrie Janssen of the Dutch Forensic Science Laboratory.

54 *Ibid*, p 58.

In the US it is reported that there have been over 200 cases where matching resulted in 'cold hits' - the completed identification of offenders for unsolved crimes. Many of the 'cold hits' concern rapes and murders and repeat offenders. Like the UK, some States are moving to take samples on a very large scale. In Virginia 160,000 samples have been gathered and they have moved to a policy of gathering samples from all convicted felons, including some juveniles. The same is also said to be happening in Alabama, New Mexico and Wyoming. In South Dakota the samples are taken routinely upon arrest (like fingerprints) and in Massachusetts thousands of convicts, probationers and parolees have been rounded up for the taking of samples.⁵⁵

Evidence from Steve Niezgod and Dawn Herkenham of the FBI before the US "National Commission on the Future of DNA Evidence" ⁵⁶ suggests that by mid 1997 450,000 samples had been collected in 35 States but they have a large backlog of samples to be analysed. All States collect samples from sex offenders, half cover homicide and assault offences, and half cover robbery and kidnapping. One third include juvenile offenders.

According to the FBI evidence the US State legislation has the following features:

- authorisation of collectors;
- indemnification for collectors from civil or criminal liability if generally accepted medical practices have been followed;
- a 'contributors' right of access to the information and to know it is included on the database;
- a right to expungement of the record on request where the particular conviction is reversed;
- criminal penalties for unauthorised disclosure of the information and tampering with samples.

These laws have been challenged and upheld on Constitutional grounds on several occasions. Generally the State legislation follows the FBI guidelines, however there are variations which is evident in the following comparison of legislation in Virginia, Massachusetts and Vermont:

Virginia

- an adult or juvenile 14 years or older convicted of a felony since 1 July 1990 must give a sample of blood, saliva or tissue for DNA analysis.
- after 1 July 1990 the blood, saliva or tissue shall be taken prior to release from custody, or where there is no custodial sentence, as a condition of the sentence.

⁵⁵ <http://www.ishipress.com/dnacime.htm> 'The New York Times on the Webb' February 19, 1998. 'DNA Databanks Giving Police Powerful Weapon - The Instant Hit' by Carey Goldberg.

⁵⁶ <http://www.ojp.usdoj.gov/nij/dnamtgrans/trans-e.html>

Appendix 1

- procedures require those taking the samples to be qualified (includes nurses) and proper labelling and sealing of samples.
- the results of DNA analysis must be maintained and may be presented as evidence of the facts to the court in the form of a prescribed certificate.
- the results must be made available to federal, state and local law enforcement authorities, but non-disclosure requirements apply, unless there is a match.
- provides for the creation of a non-identifying statistical database.

Massachusetts

- any person (including children) convicted of a range of specified offences against the person and other serious offences must submit a sample for DNA analysis within 90 days of the conviction.
- results must be placed in State DNA database.
- 'includes blood samples' - does not exclude saliva.
- procedures require those taking the samples to be qualified (includes nurses) and proper labelling and sealing of samples.
- the results must be made available to federal, state and local law enforcement authorities, but non-disclosure requirements apply, unless there is a match.
- provides for the creation of a non-identifying statistical database.
- the data can be used to identify deceased persons, for missing persons and "advancing other humanitarian purposes."
- any person can apply to a superior court to have their data removed from the database where the conviction has been overturned/ expunged/ dismissed; providing 12 months have expired and the DA is not contemplating further charges for the same conduct.
- Any person on probation or parole for such a conviction must submit a sample within 90 days of the commencement of the legislation (1997).

Vermont

- any person (presumably including children) convicted of a range of specified violent crimes (list of serious assaults, sexual assaults and lewd behaviour, burglary, unlawful trespass) on or after the commencement of the legislation (1998) or before the legislation where still in custody, on parole, probation or under supervision

for a violent crime, must submit DNA sample for analysis.

- shall be obtained by drawing blood, unless Department determines that a less intrusive method of collection is available, in which case it must be used.
- procedures require those taking the samples to be qualified (includes nurses) and proper labelling and sealing of samples.
- if a person refuses to provide the required sample - the responsible public officers must make an application to the district court for an order requiring the person to provide the sample.
- if the court determines the person is required under the legislation to provide the sample (no discretion, only to satisfy itself there is compliance with the legislation) - the court can make an order to authorise the use of force.
- database must be compatible with the national FBI CODIS database - cooperation with federal, state, local and foreign law enforcement (Canada also provides for this).
- use limited to criminal investigations.
- provides for the creation of a non-identifying statistical database.
- where the conviction for the violent crime is reversed, etc it is for the court to notify the holders of the DNA data; the sample and record must be destroyed.
- where a crime scene sample is matched with someone who is eliminated as a suspect; that person's details should be removed from the database.

Conclusion

There is also legislation in many other European countries which we have not examined. The Netherlands was chosen as a country similar to Australia in population size and Germany as an example of a larger European country.

APPENDIX 2

COMMENTS ON THE DISCUSSION PAPER DRAFT

**Model Criminal Code Officers Committee of the Standing Committee
of Attorneys-General**

February 2000

APPENDIX

COMMENTS ON THE DISCUSSION PAPER DRAFT

General

Former Chief Justice of the High Court - Sir Harry Gibbs

“The Bill seems to me to be carefully drawn and on the whole to make a satisfactory balance between the needs of those conducting investigations into crime on the one hand and the rights and interests of the persons affected on the other.”

John Tonge Centre For Forensic Science (Queensland)

“Generally the proposed changes to the Model Bill are supported. They overcome many of the limitations of the 1995 Bill, while providing reasonable and balanced safeguards.”

NSW Police

“The Service supports the overall thrust of the proposed legislation and movement towards a national legislative framework in this area.”

Privacy Commissioner (NSW)

“Regulation of the taking, retention and use of forensic samples should not simply mandate clear technical procedures. The regime should also be sufficiently transparent to prevent law enforcement officers taking advantage of people’s ignorance or misunderstanding of the evidentiary process to exert undue pressure on suspects.

For these reasons I support the proposition that restrictions on the way a database is to be established and used should be incorporated into forensic testing legislation by all Australian jurisdictions as recommended in the Discussion Paper and the Model Bill.”

The Criminal Bar Association (Victoria)

“We are in general agreement with the proposed procedures and safeguards proposed. For example, in our opinion, it is essential that the courts regulate the taking of samples from suspects or persons convicted of relevant offences.”

On mouth swabs as an intimate procedure

Tasmania Police

“It is argued that it will seriously hamper the expediency of police investigations if there is a requirement to obtain a medical practitioner, dentist, nurse or other qualified person when a buccal swab is required from a suspect or charged/incarcerated person. It is also argued that it should not be necessary to obtain a Magistrates approval for such a process where the person refuses to support it. It is our contention that the procedure should be dealt with in the same way as the taking of fingerprints and hair, ie non-intimate forensic procedure.”

Western Australia Police

“If WA legislation reflects the Model Forensic Procedures Bill view that buccal swabs are classed as an intimate procedure, the WA legislation should include authority for a trained police officer to take this type of sample.”

Similar views were expressed by the National Institute of Forensic Science (NIFS), the John Tonge Centre (Qld), ‘the AFP, Queensland Police, Australian Forensic Science Forum’ (Commissioners of Police, Directors of Forensic Science Services and Australian Association of Crown Prosecutors), and the CrimTrac Project Office.

While supporting the treatment of mouth swabs as a non-intimate sample, Victorian Police put forward an alternative option:

“Although there is little doubt that the taking of a mouth swab, by force or without agreement, would be intrusive, the taking of the sample with the consent of the subject, or the taking of the swab by the subject themselves would be far less intrusive than other methods of collection At the very least the Bill should allow the taking of a mouth swab as a non-intimate sample in the instance of consent.”

NSW Police and ‘Australian Forensic Science Forum’ favour defining the taking of mouth swabs as non-intimate, but propose another alternative:

“...concerns raised by the committee about suspect non-consent and possible need for ‘reasonable force’ could be averted. These concerns could be easily addressed by including alternative provisions in the Bill for the taking of a sample of head hairs (including roots) as an alternative source of DNA material.”

Privacy Commissioner (NSW):

“I support including mouth swabs in the definition of intimate samples. Having regard to the legal consequences of this definition (requiring judicial authorisation for taking a sample without consent) the crucial consideration should be the violation of personal autonomy in providing a bodily sample which is capable of revealing detailed information about a person and not a subjective assessment of the kind of procedures which are capable of arousing prurient interest.”

Retrospective taking of samples from serious offenders

Sir Harry Gibbs:

“There is however one provision that seems to me to be doubtful in point of principle. That is s.51 [now ss 50(4)] which provides that a forensic procedure may be carried out on a person found guilty of a serious offence before the section came into operation, if that person is serving a term of imprisonment. This seems to me to offend the principle that no person should suffer any adverse consequence from committing an offence unless that consequence was provided for by the law at the time the offence was committed.

The justification suggested for this retrospective provision is that a serious offender belongs to a class of persons likely to offend again. That seems to me to be too broad a generalisation. I do not accept that a person convicted of, say, company fraud is likely to commit robbery or burglary. The Committee recognises that providing a sample is an imposition on a person's liberty, but suggests that the proposed procedure is less significant than the restrictions imposed on prisoners generally. Those restrictions however, are, as the Committee has said, imposed for the safe and convenient running of the prison, and are thus deemed a necessary incident of the imprisonment, whereas the forensic procedures have quite a different purpose.”

Destruction requirement

The Privacy Commissioner (NSW) has some difficulties with the approach taken in the Model Bill:

“As long as a retained sample exists there is the possibility of reidentifying the person it comes from through comparison with another sample from the same person. The Model Bill recognises this to the extent that it makes it an offence to analyse samples that have been approved for destruction. Sections 65 and 66 [Now ss.70 and 71] which prevent the admission of destroyed samples into evidence. These safeguards would not necessarily prevent the reuse or threatened reuse of a sample to pressure a person into making an admission. The Bill should explicitly rule out the reuse of samples which have been anonymised in accordance with the requirements for destruction.”

Volunteers

The Privacy Commissioner (NSW) is very concerned that there be strict accountability:

“Procedures for taking forensic samples from volunteers together with the creation of an index containing volunteer profiles on the proposed National database raise serious privacy concerns. There would have to be extremely comprehensive and credible safeguards to prevent samples acquired from volunteers being permanently retained or used for purposes other than to eliminate members of a class from a specific inquiry. Unless these safeguards can be guaranteed, we believe that the legislation should remove the nexus between the general process of collecting and analysing samples from volunteers and the inclusion of such samples on the National database.

I also support the Discussion Paper's recommendations on informed consent and on the need for comprehensive consultation with privacy bodies on the wording of any notification to prospective volunteers. My office is aware of a number of instances where the form of notification proposed by police where personal information is collected for law enforcement purposes is either grudging or uninformative."

The Australian Privacy Charter Council was also very concerned about material obtained from volunteers:

"...While we have not been able to digest and analyse much of the paper, there is one key issue which we would like to highlight. This is the proposal for law enforcement agencies to be able to solicit DNA samples from volunteers, not only in the context of particular investigations but more generally, and to keep them in a database for as long as the individuals consent.

This has the potential over time to generate a DNA database of a large proportion of the community, based on generalised appeals to the 'public spirit'. Given the risk, recognised in the discussion paper, of other uses of DNA information, with major implications for people's life chances and circumstances, it is inappropriate to rely on individual consent as the only safeguard. Whatever the justification for the use of DNA samples for targeted law enforcement investigations, it should not be permitted to build up a permanent database of DNA information about people who are in no way suspected of any wrongdoing. If it is considered desirable to allow people to volunteer samples to help eliminate suspects (and we do not necessarily accept this case), then these samples must be destroyed soon after completion of the particular investigation.

In this and other matters, the Committee responsible for the Discussion Paper appears to place too much faith in safeguards against inappropriate use, rather than focussing on the threshold questions of whether some collections and uses should not be allowed in the first place."

Court approval

The Commonwealth DPP and Queensland Police suggest that the requirements for court approval where a serious offender does not consent to providing a sample are unnecessary. It is claimed there would be no circumstances where the application could be legitimately refused and then serious offenders may be 'bloody minded' and object all the time.

The Privacy Commissioner (NSW) supports court supervision but believes the grounds for granting an order should be tighter:

" I support this approach as it reduces the risk of samples being taken for intimidatory or other inappropriate reasons and reinforces the concept of a register which is used solely for evidentiary purposes rather than as an identification database. However I have some concerns that criteria to be considered by the court in clause 56(3) [now ss 62(6)] are both narrow and overly discretionary. They would allow for different interpretations which could lead to an uneven approach to the taking of samples. I would prefer to see criteria which more clearly indicate that samples should only be taken where the

nature of the offence and the likelihood of re-offending mean that the sample is likely to have evidentiary value.”

Right to have others present

Victoria Police suggest MCCOC gives the suspect or serious offender the option of having too many different types of witnesses. They suggest video taping should be sufficient. Queensland Police object to the right to have any independent person or medical practitioner present. However the NIFS submission suggested that video taping would be impractical in remote areas.

Children

NSW Police and NIFS submit that children should be able to consent without the agreement of a parent or guardian from the age of 16 years. Victoria Police express similar views. Also the ‘Australian Forensic Science Forum’ states that 16 year olds can consent to serious medical procedures - so why not these procedures?

Queensland Police seem to suggest that any children should be able to consent.

MCCOC’s response is that young people are vulnerable up until the internationally recognised age of 18 years. The procedures proposed could lead to a life changing result - imprisonment. It can therefore have more risks and consequences than a medical procedure.

Hair roots

The John Tonge Centre (Qld), NIFS, the AFP, NSW Police, CrimTrac Project Office advise that it is necessary to have hair roots for proper forensic analysis.

Spare sample

Queensland Police suggest it is unnecessary to require the police to give the person from whom it is collected a spare sample as they can test their DNA at any time.

MCCOC’s response is that the requirement is general to all samples. The provision of a spare sample at the same time should improve confidence in the procedure and will allow the person from whom it is taken to have tests done not only on the DNA but other indicators that may be relevant.

Use of DNA evidence in other jurisdictions

CrimTrac Project Office is strongly in favour of proposed section 82 [now s.97] which allows the information to be used in other jurisdictions if it is lawful in the collecting jurisdiction and opposes the alternative provision which is described as ‘unworkable.’ They say:

“We do not believe that there are justifiable grounds to prevent police accessing and using material and information obtained lawfully. Any prohibition on the use of this material and information for investigative purposes will represent a significant intrusion on the exchange of information procedures that Australia's

police services currently employ. Much of this information is police intelligence, which is used not only to help solve crimes, but may also, in some circumstances, help eliminate suspects from an investigation.”

The Privacy Commissioner (NSW) has the opposite view:

“I strongly support the strategy of insisting on uniform adoption before choosing the first alternative.

However, I have some concerns over how an appropriate level of uniformity is to be assessed so as to determine which of the two alternatives is adopted. In particular I am concerned that variations between jurisdictions could lead to piecemeal expansion of the scope and functions of a national database. There needs to be a more explicit benchmark provision to avoid jurisdictional variations translating into expanded functions of the DNA database.”

The MCCOC response is that it agrees it is desirable there should be consistency.

Model Criminal Code Officers Committee
February, 2000

APPENDIX 3

PERMISSIBLE MATCHING OF DNA PROFILES

**Model Criminal Code Officers Committee of the Standing Committee
of Attorneys-General**

February 2000

82 Permissible matching of DNA profiles (former cl84)

1. A matching of a DNA profile on an index of the DNA database system specified in Column 1 of the following Table with a DNA profile on another index of the system specified in Column 2,3,4,5,6,7 or 8 of the Table is not permitted by this Part if:
 - a) “no” is shown in relation to the index specified in Column 2,3,4,5,6,7 or 8 opposite the index specified in Column 1, or
 - b) “only if within purpose” is shown in relation to the index specified in Column 2,3,4,5,6,7 or 8 opposite the volunteers (limited purposes) index specified in Column 1 and the matching is carried out for a purpose other than a purpose for which the DNA profile placed on the volunteers (limited purposes) index specified in Column 1 was so placed.

TABLE

Profile to be matched	Is matching permitted?						
	column 2	column 3	column 4	column 5	column 6	column 7	column 8
column 1	crime scene	suspects	Volunteers (limited purposes)	volunteers (unlimited purposes)	serious offenders	missing persons	unknown deceased persons
crime scene	yes	yes	No	yes	yes	yes	yes
Suspects	yes	no	No	no	yes	no	yes
volunteers (limited purposes)	only if within purpose	no	No	no	only if within purpose	only if within purpose	only if within purpose
volunteers (unlimited purposes)	yes	no	No	no	yes	yes	yes
serious offenders	yes	yes	No	no	yes	yes	yes
missing persons	yes	yes	Yes	yes	yes	yes	yes
unknown deceased persons	yes	yes	Yes	yes	yes	yes	no