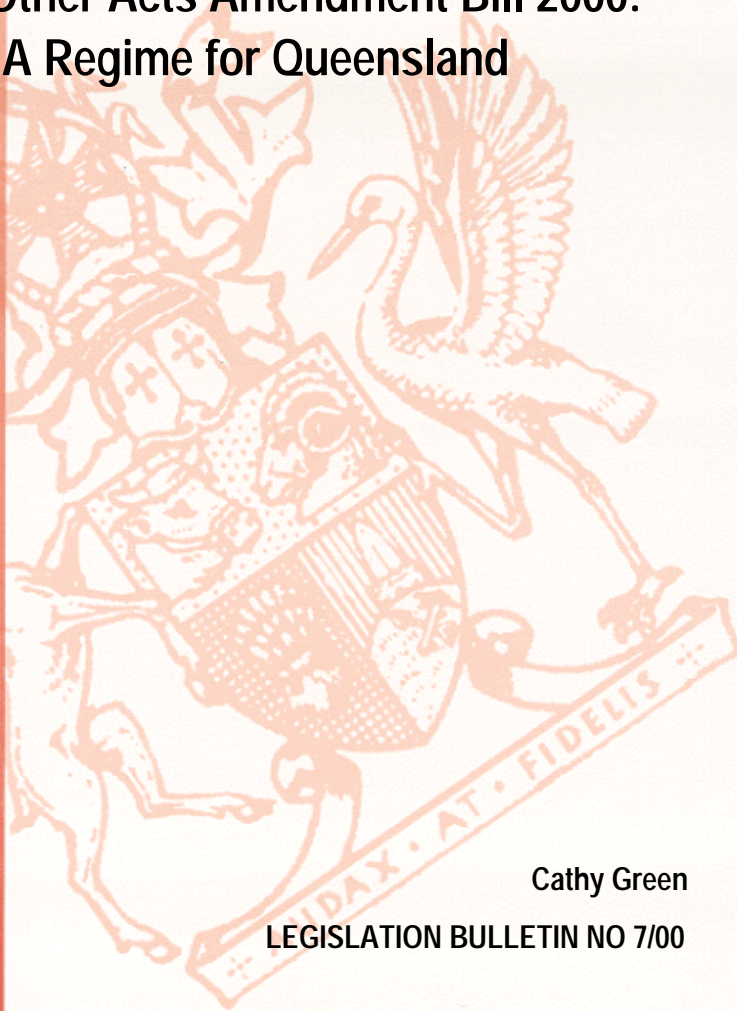




The Police Powers and Responsibilities and Other Acts Amendment Bill 2000: A DNA Regime for Queensland

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**THE POLICE POWERS AND
RESPONSIBILITIES AND OTHER ACTS
AMENDMENT BILL 2000:
A DNA REGIME FOR QUEENSLAND**

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1. INTRODUCTION

On 17 May 2000, the Honourable T Barton, Minister for Police and Corrective Services, introduced the *Police Powers and Responsibilities and Other Acts Amendment Bill 2000* (the “PPROAA Bill 2000”) into the Queensland Legislative Assembly.

One of the new policy initiatives which is proposed to be implemented under the Bill is the introduction of a legislative framework for the conduct of DNA profiling procedures.¹

The Hon T Barton, Minister for Police, in his Second Reading Speech on the PPROAA Bill 2000, explained that the legislation in Queensland which governs the collection of DNA samples for analysis has not kept pace with the dramatic advances made in DNA technology in the past ten to fifteen years. The PPROAA Bill 2000 represents the response of the Queensland Government to “*the growing public expectation that police should have available to them every reasonable*

¹ *Explanatory Notes, Police Powers and Responsibilities and Other Acts Amendment Bill 2000*, p 1.

method of identifying those responsible for committing crimes”.² These resources include the establishment of a DNA database.

The introduction of a new DNA regime in Queensland must also be placed in the context of a national movement in recent years to implement an operative national DNA database as part of Crimtrac, a new national crime investigation system.

This Legislation Bulletin presents a general summary of selected issues arising from the PPROAA Bill 2000. Firstly, the Bulletin briefly describes what DNA is and how it is profiled. The Bulletin also discusses the experience of selected countries that operate DNA databases and gives a general overview of DNA profiling in criminal investigations and DNA databases. The development of model DNA legislation and a proposed national database is also discussed. Finally, the Bulletin concludes with a comparative survey of national model DNA legislation with the PPROAA Bill 2000 and legislation in Victoria, South Australia and the Northern Territory.

2. WHAT IS DNA³

DNA is the acronym for deoxyribonucleic acid - the genetic material that encodes the entire hereditary information about each individual in almost every cell of the body. DNA is found in all cells with a nucleus and is the same throughout the body, so virtually every fluid or tissue from a human contains some DNA and can be analysed by DNA identification testing. DNA is also relatively stable and does not change over time, so samples collected years ago may be compared to samples collected recently.⁴

Most of the DNA in the cell occurs in the nucleus as a component of the chromosomes. Small amounts also occur in the organelles in the cell cytoplasm

² Hon TA Barton MLA, Police Powers and Responsibilities and Other Acts Amendment Bill 2000, Second Reading Speech, *Queensland Parliamentary Debates*, 17 May 2000, pp 1083-1088, p 1085.

³ United States of America, Federal Bureau Of Investigation, ‘DNA Testing’, <http://www.fbi.gov/kids/crimedet/dna/dna.htm> downloaded on 12 April 2000.

⁴ United States of America, National Institute of Justice, *Convicted by Juries, Exonerated by science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial*, 1996, p 21.

called mitochondria (Mitochondrial DNA or MtDNA). These types of DNA are used for different crime detection purposes.⁵

The DNA molecule has a spiral structure, generally referred to as a double helix. If the double helix was flattened and stretched out it would resemble a ladder. The sides of the ladder are made from sugars and phosphates. The rungs are made from nitrogen-containing bases. The four bases, Adenine (A), Thymine (T), Cytosine (C) and Guanine (G) are arranged linearly along the DNA strand and pair together in a unique way: A can only bind with T and C can only bind with G. These combinations of AC or TG are referred to as base pairs.⁶ DNA is composed of millions of these bases and their combinations are unique to each person, with the exception of identical twins. The sequence of these base pairs, therefore, is determinative of individual hereditary characteristics.

The great majority of DNA is actually identical from one human to another. The remaining regions of DNA contain locations that are highly variable from one individual to another. These are the regions of DNA that are analysed and used to compare the DNA obtained from an unknown evidence sample to the DNA of a known individual in DNA identification testing. Because each individual inherited half of his or her DNA from each parent, DNA testing can also be used to determine if individuals are genetically related to each other.

Any probative biological sample is a potential subject of DNA analysis. Types of samples suitable for DNA testing include saliva, blood, semen and hair roots. Some examples of tissue and crime linkage include:

- Saliva: sexual assaults, especially rape; armed robbery – in balaclavas; extortion – envelopes and stamps
- Blood: violent crimes, break and enter and burglary (about 25% of all break and enter offenders cut themselves on glass)
- Semen sexual assaults, especially rape.⁷

⁵ Nuclear DNA is inherited as a combination from both parents and is unique to every individual except identical twins. Mitochondrial DNA (MtDNA) is inherited solely from the mother and therefore serves as an identity marker for maternal relatives. Each cell contains many MtDNA copies since there are several hundred mitochondria in the body of each cell. MtDNA analysis is particularly useful where there is a very small amount of evidence to test or the nucleus of the cells may be missing or degraded, as in the case of very old bones or hair.

⁶ Dr Leo Freney and Dr Tony Ansford, 'DNA in forensic science - infallible crimebuster?', *Proctor*, January/February 1999, p 17.

⁷ Dr Leo Freney and Dr Tony Ansford, p 17.

3. HOW IS DNA PROFILED?

A comprehensive description of the scientific processes underlying DNA profiling is beyond the scope of this Bulletin, therefore such techniques are canvassed here only in a broad sense.

DNA profiling is routinely used to conduct paternity testing and as an investigative tool in criminal investigations. All DNA analysis techniques involve the identification of gene types (alleles) at a particular location (locus) on a chromosome. Identifying alleles at a number of different loci provides a DNA profile. The types and number of loci chosen are associated with many factors including their length and abundance which determines discriminatory power and sensitivity.

Techniques for analysing DNA samples have undergone rapid development since the first methodology, RFLP (restriction fragment length polymorphism) was implemented in the mid-1980's. This technique is relatively slow and requires a reasonable size sample to provide enough DNA for a successful experiment.⁸

The advent of PCR (polymerase chain reaction) technology in 1986 enabled scientists to amplify much smaller samples of DNA than before. This technique is relatively fast, comparatively cost-effective and sensitive. It enables analysis of a single copy of DNA through an extensive amplification process. This sensitivity, however, also renders the sample susceptible to contamination.⁹

The DNA profiling technique currently used in Queensland is STR (short tandem repeat (STR) analysis. This technique analyses STR loci that occur along the DNA molecule and which are highly variable between individuals. Scientists generally believe that these regions consist of non-coding or "junk" DNA do not contain genetic information directly relevant for protein synthesis. Analyses of such areas therefore does not reveal information about individual traits such as hair or eye

⁸ Dr Leo Freney and Dr Tony Ansford, p 16.

⁹ To alleviate this problem, strict and independently controlled quality control procedures are required.

colour, height, weight or predisposition to disease.¹⁰ This technique is used in Queensland, interstate and overseas.

DNA profiling in Queensland is conducted at the John Tonge Centre for Forensic Sciences in Brisbane.¹¹ The DNA profiling system currently used at the JTC for forensic testing is the nine-plex [Profiler PlusTM] system. This system types 9 different loci in addition to a sex determinant and is said to be able to exclude over 99.99999999 % of the population - the probability of a nine STR loci DNA random profile randomly matching in the population is one in billions to one in tens of billions.¹²

¹⁰ The hypothesis that it could be possible to obtain additional information from STR analysis about genetic traits of an individual can be excluded for currently used STR systems: Peter M Schneider, 'Basic issues for DNA typing', *Forensic Science International*, Vol 88, 1997, pp 17-22.

Scientists at Victoria University, Werribee, are currently investigating whether it is possible to predict the appearance and other characteristics of a suspect based on analysis of DNA samples left at a crime scene. The author of this study has advised that the information obtained from the particular study is not intended to be put on the CrimTrac national database which contains only information about non-coding or "junk" DNA. Swati Baidur-Hudson, 'Variations in genes determining hair colour phenotypes: Possible applications in forensic science', paper presented at the Crimtrac 15th International Australia and New Zealand Forensic Sciences Symposium, Gold Coast, March 2000.

¹¹ The John Tonge Centre for Forensic Sciences is part of Queensland Health Services which is part of Queensland Health Scientific Services. JTC is an impartial organisation and independent of the criminal justice system: Dr Leo Freney and Dr Tony Ansford, p 17. The JTC carries out forensic sampling procedures on behalf of the State and the defendant, in addition to other types of genetic tests, such as paternity tests.

¹² Jane E Davies, 'The impact of forensic DNA profiling technology in the Australian criminal justice system: A critical evaluation', Thesis submitted for the degree of Bachelor of Biomedical Science with Honours, School of Biomolecular and Biomedical Science, Science Faculty, Griffith University, Queensland, 11 November 1999, p 41.

The FBI has set a standard of 13 STRs that when used together can identify any person: Gunjan Sinha, 'DNA Detective', *Popular Science*, August , p 50.

Several basic steps are performed during DNA testing regardless of the type of test performed. The general procedure includes¹³:

- The isolation of DNA from an evidence sample containing DNA of unknown origin, and generally at a later time, the isolation of DNA from a sample from a known individual
- The processing of the DNA so that the test results may be obtained.
- The determination of the DNA test results (or types) from specific regions of the DNA. The result of the testing process is a series of bands. Usually there will be a series 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.
- The comparison and interpretation of the test results from the unknown and known samples to determine whether the known individual is not the source of the DNA or cannot be excluded as a possible source of the DNA.

For example, DNA profiles can be obtained from samples left at the scene of the crime and also from samples obtained from persons associated with the crime (eg the victim and the suspect). If a suspect's profile is different from that of the crime scene sample then that suspect is excluded as the source of the crime sample. If a suspect's profile is the same as that left either by the suspect or another unknown person who, be 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.¹⁴

¹³ United States Of America. National Institute of Justice, *Report on Postconviction DNA Testing: Recommendations for Handling Requests*, p 21. Also note that in 1999, the Standing Committee on Legislation of the Parliament of Western Australia released a report on Forensic Procedures and DNA Profiling. The Committee noted therein the importance of ensuring the reliability and integrity of the physical sample from the time it is taken, through the DNA testing and analysis, to the time information is passed on to the investigative agency: Western Australia. Parliament. Legislation Committee, *Forensic Procedures and DNA profiling: The Committee's investigations in Western Australia, Victoria, South Australia, the United Kingdom, Germany and the United States of America*, 48th Report, 1999, p 200.

¹⁴ United Kingdom. Home Office, 'Proposals for revising legislative measures on fingerprints, footprints and DNA samples', July 1999, <http://www.homeoffice.gov.uk/ppd/fingdna.pdf> downloaded on 15 December 1999.

4. THE PROPOSAL FOR A NATIONAL DNA DATABASE IN AUSTRALIA – SELECTED ISSUES

DNA profiling is often hailed as the most important breakthrough in crime investigation since the introduction of the fingerprint classification system in the late 1890's. In little more than a decade, DNA evidence has become the foremost forensic technique for identifying offenders and eliminating suspects when biological tissue samples such as saliva, skin, blood and semen are left at a crime scene. Since it was first introduced, the technology has undergone rapid change and refinement, increasing both its capabilities to obtain meaningful results from old samples and its discriminatory capabilities.¹⁵

There is no doubt that the advent of DNA profiling constitutes one of the most important changes in criminal justice system in Queensland in the past decade. The Queensland Director of Public Prosecutions, Royce Miller QC recently commented that:

*DNA profiling is now, without a doubt, one of the most important advances in the weaponry of forensic science since the development of fingerprinting which occurred at the end of the last century. The potential to advance identification techniques has for a long time been recognised. Whereas earlier it was used to exclude a suspect from suspicion, it has now become a recognised valid tool of inclusion in the same sense as fingerprints. Whilst a conviction can never rest solely on a matching of biological material found at a crime scene with a body sample of the person accused, its use brings certainty to a verdict where there is other incriminating circumstantial evidence.*¹⁶

Queensland and other Australian jurisdictions have used DNA technology in the criminal investigation process for a number of years. The scientific validity of DNA evidence is now well accepted in courts in Australia and overseas.¹⁷

In 1995, the Standing Committee of Attorneys-General (SCAG) proposed the establishment of a legislative scheme for a national DNA database. The Model Criminal Code Officers Committee (MCCOC) of SCAG subsequently formulated the Model Forensic Procedures Bill that provides the legislative framework for the proposed national DNA database.¹⁸ Changes to DNA legislation in preparation for

¹⁵ United States of America, National Institute of Justice, *Convicted by Juries, Exonerated by Science: Case Studies in the use of DNA Evidence to Establish Innocence after Trial*, 1996, p 1.

¹⁶ Queensland. Office of the Director of Public Prosecutions, *Annual Report 1998-1999*, p 6.

¹⁷ A recent example of a criminal case in Queensland in which DNA evidence played a pivotal role was the trial of Andrew Fitzherbert in August 1999 for the murder of Kathleen Marshall.

¹⁸ See the discussion in Section 6 of the Legislation Bulletin.

the development of a national DNA database have also occurred at a State and Territory level.¹⁹

The rationale underlying the implementation of a national DNA database is to provide police with the ability to efficiently and speedily access and share information, particularly across state borders.²⁰

The proposed establishment of a DNA database and the use of DNA testing have generated a vigorous public national debate. Proponents of a DNA database assert that it will constitute an efficient and effective tool for police in criminal investigations and therefore benefit the public in general. Privacy advocates and civil libertarians, however, have expressed concerns about the use, validity, control and supervision of a DNA database.

A selected cross-section of the perceived advantages and disadvantages associated with the proposed DNA database are discussed in summary form below.

4.1. A SUMMARY OF SOME PERCEIVED ADVANTAGES AND DISADVANTAGES

Increased Clear Up Rates for New and Old Crimes

Proponents of a DNA database in Australia often refer to the ‘positive’ experience of the United Kingdom where law enforcement agencies claim an increased clear-up rate for old and new crimes. For example, it is claimed that the success rate in finding the criminal responsible for property crimes in the UK increased from 12 to 40% virtually overnight when a DNA sampling and national database was established.²¹

MCCOC, in a Discussion Paper released in 1999, noted that:

Not surprisingly Governments are attracted to the potential for solving crimes through the use of DNA information. 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

¹⁹ See the discussion in Section 8 of the Legislation Bulletin.

²⁰ Senator the Hon Amanda Vanstone, Minister for Justice and Customs, ‘Crimtrac’, *Media Release*, 28 September 1998.

²¹ Tony Koch, ‘Police bid to swab suspects backed’, *The Courier Mail*, 23 October 1999, p 1. According to Dr Leo Freney, a forensic scientist at the John Tonge Centre, about 25% of all break and enter persons cut themselves on glass and, since most are repeat offenders, almost all leave their DNA at crime scenes: Dr Leo Freney and Dr Tony Ansford, p 16.

*many factors to a successful police investigation, there is no doubt that DNA matching can play an important role.*²²

More Focussed Investigation

A DNA database makes it possible to link unsolved crimes, and to link offenders and relevant suspects to unsolved crimes by making profile comparisons. A DNA database may enable police to establish the serial nature of crimes by aggregation of clues and leads that they may not otherwise associate. Anecdotal evidence provided to the Standing Committee on Legislation of the Legislative Assembly of Western Australia in its recent investigation into Forensic Procedures and DNA Profiling suggested that in some cases DNA evidence alone was the trigger for more thorough investigations into individuals who were ultimately convicted of the crime. Without the DNA evidence the individuals may not have been investigated for further incriminating evidence.²³

Exclusion Of Suspects And Exoneration Of Convicted Offenders

One of the features of DNA testing is that it not only helps to convict but also serves to exclude persons as suspects in a criminal investigation or exonerate persons convicted of crimes.²⁴ A 1995 survey of forensic laboratories in the United

²² Australia. Standing Committee of Attorneys-General, Model Criminal Code Officers Committee, *Discussion Paper: Model Forensic Procedures Bill and the Proposed National DNA Database*, May 1999, p 1.

²³ Western Australia, Parliament, Standing Committee on Legislation, *Forensic Procedures and DNA Profiling: The Committee's Investigations in Western Australia, Victoria, South Australia, the United Kingdom, Germany and the United States of America*, 48th Report, 1999, p 53.

²⁴ In the United States of America, numerous instances of erroneous imprisonment have come to light through efforts such as the Innocence Project that assists convicted persons obtain post-conviction DNA testing. To date, more than 60 convictions in the United States have been vacated. Many of these cases involved convictions that were primarily based on eyewitness identification of the alleged offender. The documentation of erroneous testing provided the impetus for the Attorney General of the United States of America, Janet Reno, to establish a National Commission on the Future of DNA Evidence. In its report on post-conviction testing, the Commission noted that as recent technological progress makes it possible to obtain more conclusive results in cases where previous testing was inconclusive, post-conviction testing will be requested not only in cases in which DNA testing was not done but also in cases in which a newer more sensitive technology may be available to furnish a conclusive answer. It was anticipated that as these changes occurred, the need for post-conviction testing would wane over time: National Institute of Justice, *Convicted by Juries, Exonerated by science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial*, (1996), p 3.

States reported that DNA testing excluded suspects in about 20% - 25% of the cases.²⁵

MCCOC has noted that:

*An important feature of the DNA database is that 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 this 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.*²⁶

Deterrence and Reduction in Crime

One perceived benefit of DNA matching is its value as a deterrent. In its 1999 Discussion Paper, MCCOC suggested that greater awareness of this technique should deter criminals from highly physical activity such as burglary and serious assaults where it is likely evidence that can be examined for DNA left at the scene of the crime. While noting that crime rates are on the decline in the UK and USA where there is extensive DNA matching, MCCOC also noted that it is difficult to apportion the degree to which this can be attributed to the use of the DNA databases. MCCOC suggested that other important factors included demographic changes, improved economic conditions and a greater emphasis on crime prevention and community policing.²⁷

Costs

The costs and time involved in DNA profiling have decreased as technology has become more advanced. According to the Explanatory Notes to the PPROAA Bill 2000, the costs associated with establishing and maintaining DNA profiling procedures will ultimately be outweighed by a significant reduction in the social and economic impact of crime on Queensland citizens.²⁸

²⁵ United States of America, National Institute of Justice, *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial*, 1996.

²⁶ MCCOC, *Discussion Paper*, p 4.

²⁷ MCCOC, *Discussion Paper*, p 2

²⁸ *Explanatory Notes*, Police Powers and Responsibilities and Other Amendments Bill 2000 (Qld), p 2.

The Possibility of Disruption In The Integrity Of The DNA Sample

One area of concern with DNA test results is the potential effect of contamination of evidentiary samples, for example a mistake in the labelling of samples at the crime scene or laboratory or the inadvertent switching of samples could lead to a sample from a suspect being compared to itself. There is also concern that the accidental or deliberate placement of genetic material at a crime scene (for example, hair or saliva on a cigarette butt previously left at the scene by an innocent party) or the planting of evidence could implicate an innocent party.²⁹

These types of concern underscore the importance of safeguards such as the standardised procedures for the collection by trained personnel and analyses of DNA samples in accredited laboratories.³⁰

The Aura Of Infallibility

The complex techniques of DNA typing, which combine principles of molecular biology, population genetics and statistics often provide a compelling connection between an accused individual and a particular victim or crime scene.³¹

One of the concerns expressed about attaching a statistical significance to a DNA match in a criminal trial was that jurors would equate these “fantastic odds” of a probability of a random match with the likelihood that the accused was guilty of the offence.³²

DNA Is Not An Investigative “Holy Grail”

DNA profiling is an important evidentiary tool, however, the probative value of such evidence is dependent on the circumstances of the particular crime which is being investigated. For example, in a rape case, identity, with which DNA is concerned, may not be in issue.

²⁹ Trevor R McDonald, Genetic Justice: DNA Evidence and the Criminal Law in Canada, *Manitoba Law Journal*, Vol 26 No 1, p 18. See also Jacobsen G, *Sydney Morning Herald*, 24 January 2000.

³⁰ Accreditation is a process in which a laboratory undergoes a review and onsite inspection by individuals from other DNA testing laboratories. This process generally requires a review of the procedures followed in the laboratory for DNA testing, security, evidence handling, protocol validation, documentation of results proficiency testing and quality assurance to determine if they meet accepted guidelines the laboratory is accredited if it meets the specified criteria for accreditation. Other review processes include certification and internal and external audits of the laboratory.

³¹ McDonald, p 3.

³² P Clack, ‘DNA Law to widen police powers’, *Canberra Times*, 13 February 2000, p 1

In its recent investigation into Forensic Procedures and DNA Profiling, the Western Australian Committee noted that “*the collection of DNA evidence should be seen as an addition to good basic detective work, rather than as a replacement for it*”. The Committee concluded that although DNA profiling and the establishment of a DNA database benefited crime investigation, detection, reduction and deterrence, it is not a panacea for crime. The Committee recognised that the prevention of crime (eg through educational and social support programs) and the investigation of crime through the more traditional methods are still essential to overall crime management. However, the Committee considered that the evidence was of such a positive nature that, with the appropriate safeguards to balance personal liberty with the public interest in the resolution of crime, DNA profiling and the establishment of a DNA database is desirable.³³

According to a recent editorial published by the Canberra Times, one of the greatest advantages of DNA fingerprinting – the ability to match the DNA of a suspect with DNA at a crime scene – is possibly one of its “drawbacks”³⁴:

The mere presence at a crime scene of a suspect’s DNA will be enough to dazzle a jury (or, indeed the investigating police), in the absence of those other kinds of evidence – motive, witnesses, alibi – which are traditionally used to build a credible case against a suspect.

The editorial continued:

Assuming the evidentiary trail is secure, most DNA evidence will only ever be able to tell us that an individual was, at one time or another, at the scene of a crime. Certainly some kinds of DNA evidence will be more incriminating than others: skin under a victim’s fingernails might be more compelling than a single hair shed on a car seat. But generally speaking, DNA evidence will always need to be supplemented by other forms of proof.

Privacy Issues

The collection and use of data about the genetic profile of individual also raises a number of general privacy policy issues. One issue raised relates to whether or not to take a DNA sample from any person arrested. Privacy advocates argue that taking a DNA sample from those suspects not even convicted of a crime is an invasion of their privacy.³⁵

³³ Western Australia. Parliament. Legislation Committee, *Forensic Procedures and DNA profiling*, 1999, p 54.

³⁴ Editorial, *Canberra Times*, 13 February 2000, p 8.

³⁵ This matter was recently considered in the United States by the National Commission on the Future of DNA Evidence. The commission did not finally decide this issue, concluding that collecting profiles from suspects was impractical at present owing to insufficient resources and a massive backlog of current samples to be tested. Sealey, Geraldine, ‘Debating DNA’,

Another concern of privacy advocates is the storage of forensic DNA samples and the possible uses to which such samples could be put. DNA analysis reveals aspects of a person's genetic code and thus creates privacy concerns not relevant to other forms of forensic identification such as fingerprinting. For example, there is a concern that DNA data could be used for more than crime detection or that the technology could be used for other purposes other than identification unless specific safeguards are incorporated into legislation.³⁶ In the United States, DNA analysis has been used in the workplace and by insurance industry to assess risk.³⁷

Although a DNA profile in the present context is comprised of non-coding or "junk" DNA, which does not contain information about diseases or other genetic traits of an individual, the original sample from which the profile is created contains an individual's entire genetic blueprint. Besides establishing someone's identity, it is also possible to analyse DNA to determine whether a person is at risk for certain diseases.

In the United States, the American Civil Liberties Union has expressed concern that where genetic material is not required to be destroyed after the DNA profile is recorded, the government would be able to reanalyse that DNA for more personal information about an individual at any point in the future, potentially threatening an innocent person's right to privacy.³⁸

Proponents of DNA databanking, however, suggest that legislative safeguards can overcome these concerns. For example, in the United States of America, samples have no identification attached to them and the misuse of samples carries penalties in almost every state.³⁹ New Zealand and a number of European countries have legislated that forensic DNA samples must be destroyed.⁴⁰

An Increase in Police Powers

One concern of civil libertarians is that the use of DNA testing enhances the power of the State at the expense of the rights of the individual. For example, two basic tenets of the criminal justice system are that the prosecution bears the onus of proof

ABCNEWS.com, <http://204.202.137.115/sections/us/DailyNews/dnadebate990804.html> downloaded on 29/10/99.

³⁶ Carey Goldberg, 'DNA databanks giving police a powerful new weapon, and critics', New York Times, 19 February 1998. http://hope-dna.com/articles/ha_nytimes_980219.htm

³⁷ MCCOC, *Discussion Paper*, p 63.

³⁸ Gunjan Sinha, p 51.

³⁹ Geraldine Sealey.

⁴⁰ David Keays, 'DNA should be recorded, not kept', *Sydney Morning Herald*, 21 April 2000, p 21.

in proving an offence and secondly, an accused is not required to give evidence that may incriminate himself or herself. It is argued that acquiring a DNA sample from a person, particularly in the case of a volunteer, is to some extent, reversing the onus of proof.⁴¹

5. DNA PROFILING AND DATABASING IN THE UNITED KINGDOM, THE UNITED STATES AND CANADA

A number of other countries have implemented forensic sampling legislation which provides for DNA profiling and DNA databasing. The use of forensic sampling procedures and the operation of established DNA databases in the United Kingdom, the United States, and Canada is discussed briefly below. (**Appendix A** of this Legislation Bulletin reproduces an additional summary of the position in these and other jurisdictions, compiled in 1999 by the Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, which may also be informative to readers).

5.1. UNITED KINGDOM

The United Kingdom implemented its national DNA database in 1995. The database, which is managed and operated by the Forensic Science Service⁴², currently contains samples from 750,000 suspects in England and Wales. Since it commenced operating, the database is credited with assisting in the resolution of thousands of crimes including murder, rape and burglary. It is claimed that about 600 matches per week are currently being made between profiles of suspects and scenes of crimes and further, that around 68,000 suspects have been linked to crimes. Forensic scientists estimate that there is a 40% chance of a stain found at a crime scene matching with a profile held on the database.⁴³ Statistics collated in 1999 indicated 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) in comparison to a cold hit rate for fingerprints of 10%.⁴⁴

⁴¹ Ray Moynihan, 'DNA testing threatens freedoms', *Australian Financial Review*, 14 April 2000, p 30.

⁴² The Forensic Science Service is the largest supplier of forensic services in the United Kingdom. It is a non-profit organisation which services public and private customers.

⁴³ Jo Butler, 'Experts hail DNA database breakthrough', AAP News, London, 9 April 2000.

⁴⁴ Statistics provided by Chief Constable Ben Gunn, UK Police, Huntingdon (26 February 1999) to the Model Criminal Code Officers Committee: cited in Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General (MCCOC): *Discussion Paper: Model Forensic Procedures Bill and the Proposed National DNA Database*, May 1999, p 1.

The United Kingdom has broadly based DNA powers. The *Police and Criminal Evidence Act 1984* (UK) classifies forensic samples as “intimate” or “non-intimate”. The Act provides that police can take forensic samples from anyone suspected of “recordable offence” and match them with DNA profiles from scenes of crimes held on the database. The sampling process generally involves taking two mouth swab samples, or alternatively, a minimum of 10 hairs with roots. If a suspect is eliminated from an inquiry, his or her profile is removed from the database. DNA profiles from convicted offenders or persons cautioned for an offence can remain on the database.

In 1997, police were given the power to obtain body samples from persons convicted of specified offences before 10 April 1995 and still serving a sentence in prison.⁴⁵ The range of offences covered includes offences against the person, sexual or indecency offences and burglary.

5.2. UNITED STATES OF AMERICA

The United States of America, like Australia, has a federal system of government. As a consequence, each State has separately legislated for the collection of forensic samples and the establishment of State DNA databases. All fifty states require convicted offenders to provide samples for inclusion in DNA databases. Most of the legislation focuses on collecting and testing individuals convicted of sexual assaults and murders, and in some cases, convicted felons.

In 1994, the FBI established the Combined DNA Index System (CODIS), which is a national database of DNA profiles from convicted offenders, unsolved crime scenes and missing persons. CODIS allows state and local law enforcement crime laboratories to exchange and compare DNA profiles electronically, thereby linking serial violent crimes (especially rapes) to each other and identifying suspects by matching DNA from crime scenes to convicted sex offenders.⁴⁶

CODIS is implemented at three levels: local, state and national. Each tier contains forensic and convicted offender indexes and the population database file. All forensic records originate at the local level and are subsequently transmitted to the state and national levels. Each state maintains its own State DNA Index System (SDIS) which enables comparison of DNA profiles within a state. Each SDIS also links to the local and national levels and typically is operated by the agency responsible for maintaining the state’s convicted offender DNA database program.

⁴⁵ *Criminal Evidence (Amendment) Act 1997* (UK).

⁴⁶ United States Of America, Department of Justice, Federal Bureau of Investigation, *Ensuring Public Safety and National Security under the Rule of Law: A Report to the American People on the Work of the FBI 1993-1998* by Louis J. Freeh, Director, p 36.

The FBI administers the National DNA Index System (NDIS) which is the single central repository of DNA records submitted by the states.⁴⁷

It is claimed that with new forensic techniques such as MtDNA analysis, approximately 25 percent of the DNA results indicate that an individual is excluded as a suspect. DNA analysis has also been used to establish innocence after trial.⁴⁸

5.3. CANADA

Canada enacted legislation in December 1998 to enable the formation of a national DNA databank.⁴⁹ Individuals convicted of certain designated primary offences such as murder or sexual offences are compelled to provide a DNA sample. Persons convicted of secondary offences, including assault and robbery, The legislation has retrospective effect in the certain cases including where an individual is:

- convicted or judicially discharged of a “designated offence”
- a repeat sexual offender serving a sentence of 2 years or more
- convicted of more than one murder committed on separate occasions, or
- declared a “dangerous offender” under the Canadian Criminal Code.⁵⁰

6. THE DEVELOPMENT OF A MODEL FORENSIC PROCEDURES BILL AND ARRANGEMENTS FOR A NATIONAL DNA DATABASE IN AUSTRALIA

6.1. THE MODEL FORENSIC PROCEDURES BILL

Ten years ago, the Standing Committee of Attorneys-General (SCAG) decided to place the question of the development of a national criminal code for Australian jurisdictions on its agenda. The Model Criminal Code Officers Committee (MCCOC), which included representatives from each Australian jurisdiction with

⁴⁷ Patricia Loftus, ‘DNA typing in corrections’, *Corrections Today*, July 1999, 64 (4), p 68.

⁴⁸ FBI, *Ensuring Public Safety and National Security under the Rule of Law: A Report to the American People on the Work of the FBI 1993-1998*, p 36.

⁴⁹ Bill C-3, An Act respecting DNA Identification and to make consequential amendments to the Criminal Code and other Acts, 1st Sess., 36th Parl., 1998 (assented to December 1998, SC 1998, c 37)

⁵⁰ Trevor R McDonald, Genetic Justice: ‘DNA Evidence and the Criminal Law in Canada’, *Manitoba Law Journal*, 26 (1), p 23.

expertise in criminal law and criminal justice matters, was subsequently established to formulate the Model Criminal Code.⁵¹

As part of its brief, MCCOC also developed a Model Forensic Procedures Bill (1995 Model Bill). The 1995 Model Bill focussed on the collection and use of forensic samples from suspects but included only tentative provisions about the establishment of a DNA database and the exchange of that information between the jurisdictions. A majority of SCAG endorsed the 1995 Model Bill and forwarded a proposal that a legislative platform be established for a national DNA database.⁵²

In May 1999, MCCOC released a Discussion Paper entitled *Model Forensic Procedures Bill and the Proposed National DNA Database* (the “1999 Discussion Paper”) which was designed to canvass the various issues involved and to achieve a consistent approach to legislation in each State and Territory and the Commonwealth.

The 1999 Discussion Paper proposed the insertion of new model provisions into the original Bill and circulated the updated Model Bill (1999 Model Bill). The new model provisions stipulated procedures to regulate the collection and use of DNA samples, in addition to accountability measures designed to prevent the inappropriate use of the information contained in the DNA databases.

In February 2000, MCCOC released its Final Report which contained the new version of the Model Forensic Procedures Bill (2000 Model Bill).⁵³

The 2000 Model Bill is a relatively comprehensive piece of legislation which addresses, in detail, the conduct of forensic procedures on suspects, convicted serious offenders and volunteers and also provides a legislative framework for the operation of the national DNA database.

In its 1999 Discussion Paper, MCCOC discussed the question of whether such detailed legislation was desirable. MCCOC suggested that:

... many will conclude we should just get on with it - give the police the basic powers and let them do their job. Those who have nothing to hide should have nothing to fear, so there should be no need for any elaborate legislative procedure.

MCCOC itself disagreed with that view and concluded that a comprehensive approach was desirable for the following reasons:

⁵¹ MCCOC, *Discussion Paper*, p i.

⁵² MCCOC, *Discussion Paper*, p i.

⁵³ Australia. Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General (MCCOC), *Final Draft: Model Forensic Procedures Bill and the Proposed National DNA Database*, February 2000.

- *DNA material contains a large amount of information about a 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 always be 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. These procedures are designed to protect the integrity of the database and hence its reputation for reliability.⁵⁴*

Various aspects of the 2000 Model Bill are discussed later in this paper.

6.2. CRIMTRAC

The Commonwealth is currently establishing a national DNA law enforcement database, in cooperation with the Territories and States, as part of its \$50 million Crimtrac initiative, announced in the 1999 Federal Budget. Crimtrac is an information system that will give police better access to selected databases, including a new national DNA database. Other databases include a new fingerprint identification system, child sex offender register and operational information such as domestic violence orders, criminal records and missing persons information.⁵⁵

In its 1999 Discussion Paper, MCCOC advocated that a national DNA law enforcement database was a necessity:

⁵⁴ MCCOC, *Discussion Paper*, pp 3, 4.

⁵⁵ Senator the Hon. Amanda Vanstone, Minister for Justice, *Using the latest technology to fight crime*, Information Paper, September 1998.

*... because criminal activity often spans Australia's internal borders and makes its necessary to get forensic evidence from the different States and the Territories.*⁵⁶

MCCOC also noted that:

*It [a national DNA database] also has advantages in terms of economies of scale. Australia has a relatively small population by world standards. Consistent legislation will simplify the establishment of the database and will ensure the DNA evidence can be appropriately used in any jurisdiction.*⁵⁷

7. THE COMMON LAW POSITION

At common law there is no power to compel a suspect to provide a sample of his or her blood, saliva, hair or other bodily matter. Any use of physical force to obtain such a sample, whether exercised by police or a doctor acting at the request of the police, would constitute an assault.⁵⁸

8. FORENSIC PROCEDURES LEGISLATION IN AUSTRALIA

A number of Australian jurisdictions have based their current legislation on the concepts contained in the 2000 Model Bill and its predecessors. Other jurisdictions are at different stages of drafting or introducing legislation. The promoters of uniform model legislation have argued that the system will not operate properly if there is too much differentiation in key aspects of the legislation implemented by the States.

It is expected that there may be some variation in areas such as the severity of the crime for which samples can be collected, the requirement of consent and the circumstances in which samples must be destroyed.⁵⁹ One consequence of such variation may be that the national DNA database will have to mask certain types of information between the different jurisdictions according to their legislative restrictions.⁶⁰

⁵⁶ MCCOC, *Discussion Paper*, p iii.

⁵⁷ MCCOC, *Discussion Paper*, p iii.

⁵⁸ Queensland. Criminal Justice Commission, *Report on a Review of Police Powers in Queensland, Vol V: Electronic surveillance and other investigative procedures*, October 1994, p 819.

⁵⁹ Martin Chulov, 'Police in doubt on using DNA to convict', *The Weekend Australian*, 15 April 2000.

⁶⁰ Mandy Bryan, 'DNA registry contract bids under review', *Australian Financial Review*, 1 May 2000, p 26.

The **Commonwealth, Victoria and South Australia** have passed legislation that is based on the 1995 Model Bill.⁶¹ As noted previously, subsequent drafts of the Model Bill have incorporated comprehensive provisions relating to the proposed DNA database. The corresponding DNA database provisions in Victoria and South Australia, while still detailed, are generally less complex than the provisions contained in the 2000 Model Bill.

The **Northern Territory** legislation, which was passed in 1998, is less elaborate and more broadly based than the 2000 Model Bill. It categorises the taking of saliva mouth swabs as a non-intimate forensic procedure. This classification alleviates the requirement for magisterial approval where the suspect is 14 years or older. Where a person is detained as a result of an offence being proved, a mouth swab may be taken by force regardless of the age of the offender.⁶² The legislation also extends to prisoners.

In September 1998, **Western Australia** amended its Criminal Code to enable the police to request the collection of a forensic sample from a suspect in custody on a charge of committing an indictable offence, and use reasonable force if necessary.⁶³ If the suspect is not convicted of the offence and requests the destruction of the sample and any genetic information, those materials can be destroyed after a specified period. The Western Australian Police Minister, in October 1999, indicated that DNA testing would be extended to persons suspected of committing a crime.⁶⁴ Samples from suspects who are convicted may be retained in the database for future use. In late 1999, the Standing Committee on Legislation of the Legislative Council in Western Australia released a report on Forensic Procedures and DNA profiling in which it made a series of recommendations about investigations it conducted into these matters.⁶⁵ Western Australia is currently in the preliminary stages of drafting legislation relating to forensic sampling procedures and the establishment of a DNA database.⁶⁶

⁶¹ *Crimes Act 1914* (Cth), Part 1D; *Crimes Act 1958* (Vic); *Criminal Law (Forensic Procedures) Act 1998* (SA). The 1995 Model Bill is based on amendments made to the Victorian legislation in 1989.

⁶² *Police Administration Act (No 2) 1998* (NT); *Juvenile Justice Amendment Act (No 3) 1998* (NT); *Prisons Correctional Services Act 1998* (NT).

⁶³ *Criminal Code Act* (WA), s 236 amended by *Criminal Law Amendment Act (No 1) 1998* (WA), s 3.

⁶⁴ ABC Radio, 'WA to force crime suspects to have DNA tests', Interview between Lisa Stingel and Kevin Prince, 21 October 1999.

⁶⁵ Western Australia. Parliament, Standing Committee on Legislation, *Forensic Procedures and DNA Profiling, 1999*.

⁶⁶ Information supplied by the staff in the Policy and Legislation Division, Ministry of Justice of Western Australia on 24 May 2000.

The **New South Wales** Government recently amended the *Crimes Act 1900* (NSW) to enable police to compulsorily acquire blood samples.⁶⁷ New South Wales is planning to introduce legislation into Parliament this year. One of the main policy issues which has emerged in relation to the prospective New South Wales legislation is whether DNA testing is to be permitted when a person is arrested, or by contrast, when a person is convicted.⁶⁸ The Bill is expected to apply to people suspected of serious crimes and prisoners serving more than five years in jail.⁶⁹ The New South Wales Government recently indicated that the Bill would also establish an independent body to hold DNA samples and provide a monitoring and review role for the Ombudsman.⁷⁰

In **Tasmania**, police are currently allowed to obtain a forensic sample from a person only after he or she has been arrested and charged. On 15 May 2000, the Tasmanian Premier and Police Commissioner jointly announced plans to introduce new forensic procedures legislation which would be operational at the beginning of 2001.⁷¹ Under the proposed legislation, police would be authorised to take mouth swabs from persons suspected of committing indictable crimes and a range of other offences. A suspect who is not subsequently convicted can apply for the removal of his or her sample from the database.

The **Australian Capital Territory** is planning to introduce legislation in September 2000 which will allow police to obtain swabs from the mouths of all persons suspected of committing indictable offences, as well as all sentenced offenders in custody.⁷² Samples taken from suspects who are eliminated from inquiries or who are acquitted by the courts will be destroyed under the proposed legislation.

9. QUEENSLAND: THE CURRENT LAW

The *Police Powers and Responsibilities Act 1997* (Qld) currently governs the general power of police to obtain a sample such as blood, saliva or hair, under a

⁶⁷ These amendments were made to overcome the decision in *Fernando* (1995) 78 A Crim R 64, where it was held that the NSW Police had no power to compulsorily acquire blood samples.

⁶⁸ New South Wales. Parliamentary Library Research Service, *DNA testing and Criminal Justice*, by G Griffith, Briefing Paper No 5/00, p 1.

⁶⁹ Stephen Brook, 'International criminals at Canberra's fingertips', *The Australian*, 29 January 2000.

⁷⁰ Linda Doherty, 'Independent Body to guard DNA samples', *Sydney Morning Herald*, 17 May 2000, p 12.

⁷¹ 'Tas to give police wide DNA powers', AAP News, 15 May 2000.

⁷² Peter Clark, 'DNA law to widen police powers', *Canberra Times*, 13 February 2000, p 1.

medical or dental procedure, from a person suspected of committing an indictable offence.⁷³

The *Police Powers and Responsibilities Act 2000* (Qld), which was passed on 23 March 2000, ‘consolidates’ the 1997 Act. The provisions about medical and dental procedures, which are substantially reproduced in the 2000 Act, commence on 1 July 2000 unless proclaimed beforehand.⁷⁴

DNA profiling procedures and the establishment of a DNA database are addressed in the *Police Powers and Responsibilities Bill 2000 and Other Acts Amendment Bill 2000* (Qld) (PPROAA Bill 2000). Clause 18 of the PPROAA Bill 2000, inserts after s 295 of the *Police Powers and Responsibilities Act 2000 (Qld)*, a new Part 4 dealing with DNA procedures.

Division 3 of Part 9 of the *Police Powers and Responsibilities Act 1997* (Qld) relates to the performance of medical or dental procedures⁷⁵ on **persons suspected of committing an indictable offence**.⁷⁶

A medical procedure, which involves the taking of samples such as blood, saliva or hair, must be conducted by a doctor.⁷⁷ A dental procedure, which involves the taking of a dental impression or samples like saliva, must be conducted by a dentist.

⁷³ Note also that a sample of a substance or thing can be taken from the body of a convicted offender in limited circumstances: Section 48 of the *Corrective Services Act 1988* (Qld) enables the general manager of a prison to authorise the collection of such a sample from a prisoner whom it is reasonably believed has committed an offence during his or her term of imprisonment.

⁷⁴ The *Police Powers and Responsibilities Act 2000* (Qld) supersedes the *Police Powers and Responsibilities Act 1997* (Qld). Section 2 of the *Police Powers and Responsibilities Act 2000* (Qld), provides for the commencement of ss 373 – 377 and Schedules 2 and 3 on 23 March 2000. The remaining provisions, including those that address the conduct of medical and dental procedures, will commence on 1 July 2000 unless proclaimed beforehand.

⁷⁵ There is also provision in the 1997 Act and the 2000 Act for a police officer to take **identifying particulars**, including fingerprints, from a person suspected of committing an offence with a maximum penalty of at least one year’s imprisonment or other specified offences: *Police Powers and Responsibilities Act 1997* (Qld), Division 2, Part 9 and *Police Powers and Responsibilities Act 2000* (Qld), Division 1, Part 2, Chapter 7. Under the 2000 Act, **“identifying particulars”** means palm, foot or fingerprints, voiceprints, handwriting and photographs of a person’s identifying features: *Police Powers and Responsibilities Act 2000* (Qld), Schedule 4: definition of “identifying particulars”.

⁷⁶ *Police Powers and Responsibilities Act 2000* (Qld), Division 3 includes such a person whether or not that person has been charged with the offence.

⁷⁷ *Police Powers and Responsibilities Act 1997* (Qld), s 62(3). See also *Police Powers and Responsibilities Act 2000* (Qld), s 249.

Both types of procedure would encompass the taking of a buccal (or mouth) swab to obtain a sample of saliva.⁷⁸

A medical or dental procedure can only be conducted with the consent of the suspect or the authorisation of a magistrate. In the latter case, a suspect must be in lawful custody.

A number of provisions in the 1997 Act and the 2000 Act describe the manner in which a person can give proper, or informed, consent to a procedure. It is mandatory, for example, that the suspect be told that: his or her consent, or magisterial approval, is required for the procedure; and, that he or she has the right to have 2 other people present while it is being done.⁷⁹

A magistrate can authorise the performance of a medical or dental procedure on a suspect in custody only if satisfied there are reasonable grounds for believing performing the procedure may provide evidence of the commission of the offence.⁸⁰

A sample obtained from a medical or dental procedure authorised under the Act can be analysed and the results kept for use in a proceeding for an offence.⁸¹ A part of the sample, or an equivalent sample, must be given to the person from whom the sample was taken unless it is not practicable.⁸²

Section 259 of the *Criminal Code* (Qld) currently makes provision for the collection of forensic samples from a **suspect who has been charged with an offence**. It does not, however, apply where a suspect has not been charged, nor does it allow a suspect to be removed from a watch-house or other place of custody to a more appropriate place for the performance of the forensic examination. The capacity to effect such a transfer, however, is made in the *Police Powers and Responsibilities Act 2000*.⁸³

At present, police can only conduct forensic procedures on people who are non-suspects or mere ‘volunteers’ with the consent of the person.

⁷⁸ *Police Powers and Responsibilities Act 1997* (Qld), s 250. See also *Police Powers and Responsibilities Act 2000* (Qld), s 250.

⁷⁹ *Police Powers and Responsibilities Act 1997* (Qld), s 60. See also *Police Powers and Responsibilities Act 2000* (Qld), s 242.

⁸⁰ *Police Powers and Responsibilities Act 1997* (Qld), s 63(4). See also *Police Powers and Responsibilities Act 2000* (Qld), s 253(1).

⁸¹ *Police Powers and Responsibilities Act 1997* (Qld), s 65. See also *Police Powers and Responsibilities Act 2000* (Qld), s 257.

⁸² *Police Powers and Responsibilities Act 2000* (Qld), s 66. See also *Police Powers and Responsibilities Act 2000* (Qld), s 258.

⁸³ See: *Police Powers and Responsibilities Act 2000* (Qld), s 253 (1)(b).

10. COMPARISON OF THE QUEENSLAND BILL WITH THE 2000 MODEL BILL AND FORENSIC SAMPLING LEGISLATION IN VICTORIA, SOUTH AUSTRALIA AND THE NORTHERN TERRITORY

In this section, a comparative survey is made of the DNA profiling provisions proposed under the PPROA Bill 2000, the 2000 Model Bill and relevant legislation enacted in recent years in Victoria, South Australia and the Northern Territory. It should be noted that this survey is intended as a general overview of the legislation only and is not exhaustive in its examination of the legislation or the issues arising in these jurisdictions.

10.1. CLASSIFICATION OF FORENSIC SAMPLES

There are variations between the jurisdictions about the classification of forensic samples.

The 2000 Model Bill, Victoria, South Australia and the Northern Territory each classify forensic procedures as either “intimate” or “non-intimate”. Generally, the court must approve an intimate forensic procedure where consent is not given. There is however, a degree of difference in the types of samples that may be obtained under these procedures. The most notable difference is perhaps in the classification of buccal or mouth swabs⁸⁴. In the Northern Territory, the taking of saliva and mouth swabs is classified as a non-intimate forensic procedure. This alleviates the necessity to obtain a court order if consent is not obtained. A similar approach is taken in the United Kingdom.

In contrast, the PPROAA Bill 2000 makes provision for the taking of a “DNA sample” (constituted by a sample of hair or a mouth swab) in respect of a DNA procedure. Prior to the introduction of the PPROAA Bill 2000, the Police Minister, Hon T Barton, explained that:

*The mouth swab procedure was selected because it is less intrusive than collecting blood or hair samples and can be carried out by police with only a relatively small amount of training.*⁸⁵

⁸⁴ A mouth (or buccal) swab is taken by scraping a cotton bud or buccal comb against the inside cheek of a person’s mouth thereby removing mouth or buccal cells for analysis.

⁸⁵ Hon P Beattie MLA and Hon T Barton MLA, Government expands DNA sampling to be tougher on crime, *Ministerial Media Statement*, 8 February 2000.

10.1.1. 2000 Model Bill

The samples that may be collected from an individual for forensic analysis under the 2000 Model Bill are classified as either “intimate” or “non-intimate”.⁸⁶

The distinction is important because the Bill gives police the power to acquire compulsorily non-intimate samples such as hair (other than pubic hair) or finger nails from anybody suspected of an offence. In contrast, to gain intimate samples such as blood, saliva (including by buccal swab) or pubic hair, police are required to seek the consent of a magistrate if the suspect objects.⁸⁷

In recommending that a mouth swab be classified as an intimate forensic procedure, MCCOC explained that:

*...where the person from whom the sample is being taken agrees to the procedure it can be very simple and non-invasive. However, where a person does not consent and resists the procedure, the procedure could not be fairly described as non-intimate. Placing something inside someone’s mouth against a person’s consent is invasive.*⁸⁸

10.1.2. Queensland

The Queensland Bill empowers an authorised police officer, doctor or nurse (a “DNA sampler”) to take a DNA sample from another person for use for a DNA analysis. A **“DNA sample”** is a sample of hair (including the roots) or a mouth swab (**proposed ss 296, 297, 299**). It is prohibited under the Bill to collect hair from the genital or anal area or buttocks of a person or the breasts of a female (**proposed s 299(2)**). Therefore, the collection of hair samples appears to be restricted to the remaining body areas, including the head.

10.1.3. Victoria

In Victoria, a **“forensic procedure”** refers to the taking of a sample from any part of the body, whether an intimate or non-intimate sample or any other type of sample, or the conduct of any procedure on or physical examination of the body but does not include the taking of a fingerprint.⁸⁹

⁸⁶ “Intimate forensic procedure” and “non-intimate forensic procedure” are defined in cl 1 of the 2000 Model Bill.

⁸⁷ 2000 Model Bill, cl 17.

⁸⁸ MCCOC, *Discussion Paper*, p 11.

⁸⁹ *Crimes Act 1958* (Vic), s 464.

An **“intimate sample”** includes a sample of blood, pubic hair (including the root if required), saliva, a swab taken from the external genital or anal region of a male or female or from the breast of a female, a scraping taken from the mouth or a dental impression.⁹⁰

A **“non-intimate sample”** includes a sample of hair other than pubic hair (including the root if required), a sample of matter taken from under a fingernail or toenail 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.⁹¹

10.1.4. South Australia

In South Australia, a **“forensic procedure”** includes the taking of a sample by buccal swab or a sample of blood, saliva, hair, fingernail or toenail, biological or other material from an external part of the body, the taking of a dental impression or a fingerprint.⁹²

An **“intimate forensic procedure”** means a forensic procedure that involves exposure of, or contact with, the genital or anal area, the buttocks or, in the case of a female, the breasts.⁹³

An **“intrusive forensic procedure”** is an intimate forensic procedure, a forensic procedure involving intrusion into a person's mouth or the taking of a blood sample. This type of procedure would include a buccal swab. Conversely, a **“non-intrusive forensic procedure”** is a forensic procedure other than an intrusive forensic procedure.⁹⁴

10.1.5. Northern Territory

In the Northern Territory an **“intimate procedure”** includes the taking of a sample of blood, pubic hair, a substance on or in the body or a dental impression and an internal or external examination of the body. A **“non-intimate procedure”**

⁹⁰ *Crimes Act 1958* (Vic), s 464.

⁹¹ *Crimes Act 1958* (Vic), s 464.

⁹² *Criminal Law (Forensic Procedures) Act 1998* (SA), s 3.

⁹³ *Criminal Law (Forensic Procedures) Act 1998* (SA), s 3.

⁹⁴ *Criminal Law (Forensic Procedures) Act 1998* (SA), s 3.

includes the taking of a sample by buccal swab or a sample of saliva or hair other than pubic hair.⁹⁵

10.2. PROCEDURES FOR SUSPECTS AND OTHER CATEGORIES OF PERSONS UNDER CRIMINAL INVESTIGATION

The procedures relating to suspects under the 2000 Model Bill apply where a person is reasonably suspected of committing an offence in addition to where a person is charged with, or summonsed for, an offence.⁹⁶ The PPROAA Bill 2000, however, only makes provision for obtaining a DNA sample without consent where proceedings for an indictable offence have commenced against a person by arrest or another alternative. Therefore, a DNA sample can only be obtained from a person against whom such proceedings have not commenced with his or her consent.

The 2000 Model Bill and the Victorian and South Australian legislation each incorporate procedures for obtaining temporary court orders, called interim orders, for the conduct of forensic procedures. The function of an interim order is to preserve the evidence which is sought to be obtained from a forensic procedure and which may be otherwise lost if the procedure is delayed until the final determination of an application for such a procedure. In most instances, the Victorian and South Australian legislation requires either informed consent of the suspect or court approval for a procedure to be carried out. In limited circumstances a police officer can also authorise a forensic procedure.

The PPROAA Bill 2000, in contrast, does not provide for interim orders.

10.2.1. 2000 Model Bill

The provisions that authorise the conduct of a forensic procedure on a suspect are located in **Divisions 3, 4 and 5** of the 2000 Model Bill. The term “**suspect**” in the 2000 Model Bill encompasses a person who is reasonably suspected of committing an offence, charged with an offence or summonsed in relation to an offence. The offence must be a “prescribed offence” - punishable by 2 or years imprisonment - where the forensic procedure is a procedure other than the taking of a handprint, fingerprint, footprint or toeprint⁹⁷

⁹⁵ *Police Administration Act 1998* (NT), s4; *Juvenile Justice Act 1998* (NT); *Prisons Correctional Services Act 1998* (NT).

⁹⁶ The offence must be a “prescribed offence” - punishable by 2 or years imprisonment - where the forensic procedure is a procedure other than the taking of a handprint, fingerprint, footprint or toeprint: 2000 Model Bill, cls 1, 8(1)(b), 14 (1)(b).

⁹⁷ 2000 Model Bill, cl 1: definitions of “suspect” and “prescribed offence”.

An **intimate forensic procedure** can be carried out on an **adult suspect whether or not he or she is in custody** if the suspect gives informed consent⁹⁸ or if so ordered by a magistrate.⁹⁹ The requirements of informed consent or magisterial approval also apply to the conduct of a **non-intimate procedure** on an **adult suspect who is not in custody**.¹⁰⁰

A notable feature of the 2000 Model Bill is that it allows a **police officer** to authorise the conduct of an **intimate forensic procedure** on an **adult suspect in custody** who has not consented to the carrying out of the procedure when asked. Before making such an order, the police officer must be satisfied of numerous matters, including that:

- The suspect is in lawful custody
- There are reasonable grounds to believe the suspect committed the offence, another prescribed offence arising out of the same circumstances or another prescribed offence in respect of which the forensic procedure is likely to produce evidence of probative value
- The conduct of the forensic procedure without consent is justified in all the circumstances.¹⁰¹

Magisterial approval is required for any forensic procedure on a **child or an incapable person**.¹⁰²

A **final order**¹⁰³ or an **interim order**¹⁰⁴ for the authorisation of a forensic procedure can be made under the 2000 Model Bill. In deciding an application for an order, the magistrate must take into account a number of specified matters. At the hearing of the final order, the magistrate must also balance the public interest in obtaining evidence that tends to prove or disprove that the suspect committed the offence against the public interest in upholding the physical integrity of the suspect.¹⁰⁵

There are extensive procedures set out in the 2000 Model Bill which detail the matters that must be satisfied before a forensic procedure can be carried out on a suspect. These provisions also set out procedures that must be followed on an application for an order. These procedures traverse such issues as securing the

⁹⁸ 2000 Model Bill, cl 4.

⁹⁹ 2000 Model Bill, cls 17,18.

¹⁰⁰ 2000 Model Bill, cls 17,18.

¹⁰¹ 2000 Model Bill, cl 14.

¹⁰² 2000 Model Bill, cls 4(2), 17(d).

¹⁰³ 2000 Model Bill, Subdivision 2, Division 5.

¹⁰⁴ 2000 Model Bill, Subdivision 3, Division 5.

¹⁰⁵ 2000 Model Bill, cl 19(2).

presence of a suspect at the hearing of an application and his or her right of appearance and legal representation.¹⁰⁶

10.2.2. Queensland

The requirement of consent to having a DNA sample taken is removed with the commencement or continuation of proceedings for an indictable offence against an adult by arrest, notice to appear or complaint and summons.

A police officer may take DNA samples from an adult without consent with the approval of a commissioned officer. If the police officer is a commissioned officer, the approval must be given by a commissioned officer of a higher rank (**proposed s 307**). If it is not necessary to have the DNA sample taken immediately, a written notice, called a “DNA sample notice”, can be given to an adult which requires their attendance at a police establishment within 7 days to give the sample (**proposed s 308**).

A DNA sample can only be obtained from a child with the authorisation of the Childrens Court.

A police officer, who considers it reasonably necessary to take a DNA sample from a child against whom proceedings for an indictable offence have commenced, can apply to the Childrens Court for an order authorising the taking of the sample. Notice of such an application must be given to the child, a parent (where practicable) and the chief executive (family services). If the child is not in custody, the court can order the child to attend a police establishment within 7 days for the taking of the sample (**proposed s 312**).

A court can order the taking of a DNA sample in a proceeding against an adult charged with an indictable offence (**proposed s 309**).

Where a court or a commissioned police officer authorises the collection of a DNA sample, the rights and liberties of the person and the public interest must be taken into account before approval for the procedure is given (**proposed ss 309(1), 307(5)**).

10.2.3. Victoria

In Victoria, a **police officer** can request an adult suspect to undergo a **forensic procedure** only if:

¹⁰⁶ 2000 Model Bill, cl 23.

- there are reasonable grounds to believe that the procedure would tend to confirm or disprove the involvement of the suspect in the commission of an indictable offence, and
- the suspect is suspected on reasonable grounds of committing the offence or has been charged or summonsed for the offence.¹⁰⁷

A forensic procedure can be conducted on an adult suspect with his or her informed consent or by order of the Magistrates Court.

The Victorian legislation allows the Magistrates Court, in defined circumstances, to make an **order** or an **interim order** for the conduct of a forensic procedure on a suspect in defined circumstances.¹⁰⁸ An interim order cannot be obtained in respect of a blood sample.¹⁰⁹

Police officers in Victoria are prohibited from requesting a **child under the age of 10 years** who is suspected of doing or omitting to do an act which would have constituted an offence had the child reached the age of criminal responsibility, to undergo a forensic procedure or physical examination.¹¹⁰

A similar prohibition applies in the case of a **child aged more than 10 years but under 17 years** who is a suspect or has been charged or summonsed for an offence, unless the Children's Court has ordered otherwise. In deciding whether such an order is justified, the court must take into account the age of the child, the seriousness of the crime and alleged degree of participation of the child in the commission of the offence.¹¹¹ An interim order for a forensic procedure may also be made in certain cases.¹¹²

10.2.4. South Australia

In South Australia, a **forensic procedure** can be carried out on a person who is under suspicion with his or her consent or by court order.¹¹³ A person is a suspect if

¹⁰⁷ *Crimes Act 1958* (Vic), s 464R.

¹⁰⁸ *Crimes Act 1958* (Vic), ss 464R(2), 464T(3), 464U(7), 464V(5).

¹⁰⁹ *Crimes Act 1958* (Vic), s 464V(1).

¹¹⁰ *Crimes Act 1958* (Vic), ss 464U(2), (7), 464V(5).

¹¹¹ *Crimes Act 1958* (Vic), s 464U(8).

¹¹² *Crimes Act 1958* (Vic), s 464V(5).

¹¹³ *Criminal Law (Forensic Procedures) Act 1998* (SA), s 7(2)(a), (b). An order can also be authorised under another law: s 7(2)(c).

he or she is suspected on reasonable grounds of having committed a criminal offence.¹¹⁴

A suspect can only be requested to undergo a forensic procedure if:

- There are reasonable grounds to suspect that the procedure will produce valuable evidence, and
- The suspect is not a protected person (a child or a person physically or mentally incapable of giving informed consent).¹¹⁵

A magistrate can make an **interim order** or a **final order** for a forensic procedure in respect of a suspect.¹¹⁶

A **police officer who is not involved in the investigation of the case** can also make an **interim order** or a **final order** for a **non-intrusive forensic procedure** to be carried out on a suspect who is not a protected person and is in lawful custody.¹¹⁷

In general, the making of an interim order is limited to cases where the suspect has not given, or withdrawn, informed consent, and the suspected offence is an indictable offence.¹¹⁸ Furthermore, evidence obtained from the procedure is only admissible if a final order is subsequently obtained.¹¹⁹ If a final order is not obtained, the court must order the destruction of the forensic material.¹²⁰

There are general formal and procedural requirements about matters such as the application and hearing of an application for an order and legal representation and the right of appearance and informed consent.¹²¹

10.2.5. Northern Territory

In the Northern Territory, forensic samples can be taken from persons reasonably suspected of having committed a crime punishable by a term of imprisonment.

An **intimate forensic procedure** can be carried out on a suspect in lawful custody with his or her written consent or the approval of a magistrate.¹²² A police officer can

¹¹⁴ *Criminal Law (Forensic Procedures) Act 1998 (SA)*, s 4.

¹¹⁵ *Criminal Law (Forensic Procedures) Act 1998 (SA)*, ss 15, 3 (definition of “protected person”).

¹¹⁶ *Criminal Law (Forensic Procedures) Act 1998 (SA)*, ss 17, 18(1), (2), (3).

¹¹⁷ *Criminal Law (Forensic Procedures) Act 1998 (SA)*, s 18(4).

¹¹⁸ *Criminal Law (Forensic Procedures) Act 1998 (SA)*, s 23(2).

¹¹⁹ *Criminal Law (Forensic Procedures) Act 1998 (SA)*, s 23(3).

¹²⁰ *Criminal Law (Forensic Procedures) Act 1998 (SA)*, s 27(2).

¹²¹ *Criminal Law (Forensic Procedures) Act 1998 (SA)*, ss 16, 20, 21.

arrange for a medical practitioner or a registered dentist¹²³ to conduct such a procedure to be on a charge of an offence if the police officer believes on reasonable grounds that the procedure may provide evidence relevant to the offence or another offence punishable by imprisonment.¹²⁴ A police officer can use reasonable force to assist the medical practitioner or registered dentist to carry out the procedure.¹²⁵

A **police superintendent or an officer of higher rank** can carry out, or cause to be carried out, a **non-intimate procedure** on a person reasonably suspected of committing a crime or who is in lawful custody charged with an offence punishable by imprisonment.¹²⁶ The suspect may be directed to take his or her own sample by means of a buccal swab.¹²⁷ A police officer can use reasonable force in exercising a power associated with the conduct of the procedure.¹²⁸

In addition, a **police superintendent or an officer of higher rank** can carry out or cause to be carried out a non-intimate procedure on a person who gives written consent.¹²⁹ If the person is a child¹³⁰, a parent or guardian of the child must also give his or her written consent to the procedure.¹³¹ Information obtained from a **voluntary non-intimate procedure**, that is conducted for the purposes of an investigation of an offence, is not admissible as evidence in any other proceedings unless the offence is punishable by 14 or more years imprisonment.¹³²

¹²² *Police Administration Act* (NT), s 145(2).

¹²³ The medical practitioner or registered dentist who conducts such a procedure is protected from civil or criminal liability arising from “anything reasonably done” in the conduct of the procedure: *Police Administration Act* (NT), s 145A (12), (13). A “registered dentist” is a dentist or specialist dentist under the *Dental Act* (NT): *Police Administration Act* (NT), s 145A (14).

¹²⁴ *Police Administration Act* (NT), s 145(1).

¹²⁵ *Police Administration Act* (NT), s 145(8)(b).

¹²⁶ *Police Administration Act* (NT), s 145A(1).

¹²⁷ *Police Administration Act* (NT), s 145A(2).

¹²⁸ *Police Administration Act* (NT), s 145A(4).

¹²⁹ *Police Administration Act* (NT), s 145B(1), (2).

¹³⁰ A “child” is a person who is or, in the absence of proof of age, appears to be under the age of 17 years: *Juvenile Justice Act* (NT), s 3.

¹³¹ *Police Administration Act* (NT), s 145B(3).

¹³² *Police Administration Act* (NT), s 145B(4), (5).

10.3. PROCEDURES FOR CONVICTED OFFENDERS

The term “post-conviction testing” is used in this context to describe the DNA testing of convicted persons. The two main bases of post-conviction testing are the clearance of unsolved crimes and the effect of deterrence.

Both the 2000 Model Bill and the South Australian legislation, as a base requirement for the post-conviction forensic sampling of convicted offenders, require that the offender must have been convicted of an offence punishable by 5 or more years imprisonment. The authority to conduct post-conviction testing under the Victorian legislation is based on a set of offences defined in one of its legislative schedules. The Northern Territory legislation is more broadly based - post-conviction testing can be carried out on an adult or juvenile offender over 14 years who has been sentenced to a period of detention or imprisonment.

The PPROAA Bill 2000 proposes that a DNA sample can be taken from an offender convicted of any indictable offence. This category is wider than that provided for under post-conviction testing provisions in the 2000 Model Bill.

10.3.1. 2000 Model Bill

Division 7 of the 2000 Model Bill allows, in part, for forensic procedures to be carried out on “**serious offenders**”.¹³³ A “serious offender” is a person who has been convicted of an offence punishable by 5 years or more imprisonment or the offences of common assault or contravention of a domestic violence order.¹³⁴ The provision is expressed to have retrospective operation¹³⁵ and apply whether or not a convicted serious offender is in prison (or another place of detention)¹³⁶.

In its 1999 Discussion Paper, MCCOC contended that there is an overwhelming public interest in making it possible for a forensic sample from a serious offender to be made available to assist with the detection of a repeat offence.¹³⁷ This view appears partly based on the premise that many serious offenders re-offend. MCCOC, at that stage, recommended that the law operate retrospectively to allow samples to be taken from prisoners gaoled before the legislation came into effect.¹³⁸

¹³³ The Model Bill also allows fingerprints to be taken from prescribed offenders (other than a child or incapable person): 2000 Model Bill, cl 50(2).

¹³⁴ 2000 Model Bill, cl 1: definitions of “serious offence” and “serious offender”.

¹³⁵ 2000 Model Bill, cl 50(4).

¹³⁶ 2000 Model Bill, cl. 63.

¹³⁷ MCCOC, *Discussion Paper*, p 51.

¹³⁸ MCCOC, *Discussion Paper*, p 41.

The 2000 Model Bill as it is drafted, however, appears to have a broader operation, as it applies whether or not a serious offender is in custody.

There is some variance in the procedures and safeguards that are applicable under the 2000 Model Bill in respect of sampling serious violent offenders. These variations relate firstly, to whether the forensic procedure carried out is classified as a non-intimate or an intimate procedure, and secondly, to whether the person subject to the procedure is an adult, a child or an incapable person.

An authorised person can carry out a **non-intimate forensic procedure** to obtain a sample of hair (other than pubic hair) or fingerprints from a serious offender (other than a child or an incapable person) if the offender gives informed consent or otherwise by order of a police officer.

A police officer may only order a non-intimate procedure to be carried out if two criteria are satisfied. The first is that the offender, when asked, has not given consent to the procedure. Secondly, the police officer, in deciding whether to make an order, must take into account whether the procedure would be authorised if the order was not made, the seriousness of the circumstances surrounding the crime and whether the procedure is justified in all the circumstances.¹³⁹

An authorised person can carry out an **intimate forensic procedure** to obtain a buccal swab or a sample of blood from a serious offender (other than a child or an incapable person) if the offender gives informed consent or otherwise with court authorisation.¹⁴⁰

In its commentary on the 2000 Model Bill, MCCOC noted that the Commonwealth Director of Public Prosecutions was opposed to the applicability of a court approval process to serious offenders. MCCOC, however, noted that this was a minority view amongst the relevant submissions received in response to the 1999 Discussion Paper. In support of the court approval process, MCCOC stated:

*Serious offenders, particularly those in prison, are very vulnerable to harassment and should be afforded the same safeguards as suspects. Indeed in some cases, the person may be someone who is being investigated. If the person does not consent to an intimate procedure, then they should have the right to have the issue considered by a court (it may for be, for example, that it is the fifth time in a month that a sample is sought, or there might be an argument that the person is not in fact a serious offender for the purposes of the legislation, or that the offence is so remote from the sort of offence which is likely to be relevant to forensic matching that the person is in fact a suspect and argues he or she should be dealt with under the provisions that relate to suspects).*¹⁴¹

¹³⁹ 2000 Model Bill, cls 58, 59.

¹⁴⁰ 2000 Model Bill 2000, cl 51.

¹⁴¹ MCCOC, *Final Report*, pp 2, 3.

Court authorisation is also required for the conduct of a **non-intimate forensic procedure** on a **child or an incapable person** who is a serious offender.¹⁴²

A number of provisions in the 2000 Model Bill deal with the matter of informed consent to a forensic procedure.¹⁴³ These procedures are designed to ensure that the offender is fully informed of what is involved with the forensic procedure and his or her options.¹⁴⁴

If a serious offender is a suspect or a volunteer, that person must be dealt with only if authorised by, and in accordance with, the procedures outlined in the 2000 Model Bill for suspects or volunteers, as the case may be.¹⁴⁵

10.3.2. Queensland

Where a court has found an adult guilty of an indictable offence, the court can order the offender either to be held in police custody for up to one hour, or to report to a police station within 7 days, to enable a DNA sampler to take a DNA sample from that person (**proposed s 310**).

There is also provision for the collection of a DNA sample from serving prisoners. **Proposed s 311** authorises a DNA sampler to collect, within the precincts of the prison, a DNA sample from a prisoner who is serving a term of imprisonment for an indictable offence. A correctional officer can also be present when the sample is taken. It should be noted that this proposed section is expressed to expire 3 years after its commencement.

There is also no general requirement to destroy a DNA sample taken from a prisoner (**proposed section 316(4)**).

10.3.3. Victoria

In 1998, the Victorian Government passed amendments¹⁴⁶ to the *Crimes Act 1958* (Vic) to allow forensic procedures to be carried out on a person convicted of a

¹⁴² 2000 Model Bill, cl 62.

¹⁴³ 2000 Model Bill, cls 54 -57.

¹⁴⁴ MCCOC, *Discussion Paper*, p 47.

¹⁴⁵ 2000 Model Bill, cl 53.

¹⁴⁶ s 464ZF of the *Crimes Act 1958* (Vic) was amended by s 25 of the *Crimes (Amendment) Act 1997* (Vic). The amended section commenced on 1 July 1998.

“forensic sample offence”¹⁴⁷. A police officer must make an application for such an order within six months of the finalisation of criminal proceedings in the case of an offender convicted of a forensic sample offence or similar listed offence on or after 1 July 1998.¹⁴⁸ In the case of offenders convicted prior to 1 July 1998, the making of a court order is limited to a person serving a period of imprisonment or detention.¹⁴⁹

10.3.4. South Australia

In South Australia, a relevant criminal court can authorise the taking of material from a person convicted of an indictable offence punishable by 5 years or more imprisonment or an indefinite sentence for the purpose of obtaining a DNA profile.¹⁵⁰ In deciding whether to make the order, the court must take into account:

- The nature and seriousness of the charges, and
- Any established propensity of the person to engage in serious criminal conduct (or conduct that would be seriously criminal if it were not for a defect of capacity to be responsible for such conduct).¹⁵¹

It is interesting to note that, in contrast to the proposals made in the 2000 Model Bill for post-conviction testing, the South Australian legislation appears to encompass any type of forensic procedure in its requirement for court authorisation. The type of sample taken under the order is in the discretion of the court, which can direct the manner in which the order is to be carried out.¹⁵²

The South Australian legislation is not expressed to be retrospective in operation.

10.3.5. Northern Territory

In 1998, the Northern Territory Government passed amendments to the *Juvenile Justice Act* (NT)¹⁵³ and the *Prisons Correctional Services Act* (NT)¹⁵⁴ which allow a

¹⁴⁷ A “forensic sample offence” is specified in Schedule 8 of the *Crimes Act 1958* (Vic). The listed offences include a range of sexual offences, non-sexual offences against the person (including murder and manslaughter) and property offences and selected drug offences.

¹⁴⁸ *Crimes Act 1958* (Vic), s 464ZF(2).

¹⁴⁹ *Crimes Act 1958* (Vic), s 464ZF(3).

¹⁵⁰ *Criminal Law (Forensic Procedures) Act 1998* (SA), ss 29,30(1).

¹⁵¹ *Criminal Law (Forensic Procedures) Act 1998* (SA), s 30(2)

¹⁵² *Criminal Law (Forensic Procedures) Act 1998* (SA), s 30(3)(a).

¹⁵³ *Juvenile Justice Act* (NT), s 70B.

sample of DNA, by means of a buccal swab, to be taken from juveniles over the age of 14 years and adults who have been sentenced to a period of detention or imprisonment. If a detainee or prisoner refuses to self-sample, then reasonable force may be used to obtain the sample by an authorised officer approved by the Director of Correctional Services.

10.4. PROCEDURES FOR VOLUNTARY SAMPLING

There are a number of reasons why a volunteer may be asked to submit a forensic sample to the police. For example, voluntary sampling may assist police to focus a criminal investigation by excluding persons as possible suspects or to obtain a large pool of samples for comparison purposes.

Earlier this year, as part of the criminal investigation into the rape of an elderly woman at Wee Waa in New South Wales, police collected saliva samples from hundreds of male volunteers from the town. This incident stimulated a vigorous public debate on the merits of DNA profiling which highlighted key issues such as how forensic samples and resulting DNA profiles from volunteers are to be used and the possible retention and the destruction of such samples.¹⁵⁵

10.4.1. 2000 Model Bill

Division 8 of the 2000 Model Bill relates to volunteers. The 2000 Model Bill largely incorporates the “more comprehensive procedures”¹⁵⁶ contained in provisions relating to the taking of forensic samples from volunteers in the Victorian and South Australian legislation.

In its 1999 Discussion Paper, MCCOC argued that the taking of forensic samples from a non-suspect or volunteer should be comprehensively regulated:

It would appear that if Governments see fit to regulate the consensual taking of samples from suspects (recording consent, ensuring the person understands the procedure etc), it is also important to regulate the taking of samples from non-suspects. In some cases, volunteers may be potential suspects (where suspicion is based on a hunch but not on reasonable grounds as required in the Model Bill...). Without proper safeguards, there is potential for the legislation to be sidestepped. In other cases, the volunteers may simply be in a large pool for comparison purposes, but those cooperating are surely entitled to some statutory safeguards concerning

¹⁵⁴ *Prisons Correctional Services Act* (NT), s 95B.

¹⁵⁵ John Kidman, ‘DNA samples may be handed back to volunteers, say police’, AAP News, 12 May 2000.

¹⁵⁶ MCCOC, *Discussion Paper*, p 61.

*informed consent, the ability to withdraw consent, proper procedures and controls over the storage, security, use and disclosure of information. The consequences of mixing up the data with someone else's or using it for purposes other than the immediate investigation or something other than traditional law enforcement will be of concern to participants.*¹⁵⁷

Under the 2000 Model Bill, a forensic procedure is only authorised if there is informed consent from the volunteer, or parent or guardian where the volunteer is a child or incapable person, or by court authorisation.¹⁵⁸ In the case of a child or incapable person, a forensic procedure cannot be carried out if he or she is opposed to participating even if consent has been given or an order made.¹⁵⁹

The matters, of which the volunteer must be informed, take into account that the volunteer may be someone who later becomes a suspect.¹⁶⁰ Accordingly, the volunteer must be advised that the procedure may produce evidence that may be used in court and that he or she may consult a lawyer before deciding whether or not to consent to the procedure.¹⁶¹

In response to suggestions from the Federal and NSW Privacy Commissioner's office and others, MCCOC incorporated increased safeguards in relation to the collection of samples from volunteers into the 2000 Model Bill. An example of one such safeguard is the requirement for police to raise the issue of how long the samples will be kept¹⁶²:

*It is important that members of the community are kept fully informed so that if asked to cooperate with police, consent is real and confidence in using DNA to solve crime is not undermined.*¹⁶³

A volunteer is entitled to withdraw his or her consent to the forensic procedure or to the retention of the forensic material or information obtained from the analysis of the material. Once consent is withdrawn, the forensic material and any information that is obtained must be destroyed as soon as practicable, unless there is a court

¹⁵⁷ MCCOC, *Discussion Paper*, p 61.

¹⁵⁸ 2000 Model Bill, cls. 64, 65, 68.

¹⁵⁹ 2000 Model Bill, cl 64(2)(ii), (3).

¹⁶⁰ MCCOC, *Discussion Paper*, p 67.

¹⁶¹ 2000 Model Bill, cl 65(1)(c), (e).

¹⁶² MCCOC, *Discussion Paper*, p 3. This requirement is provided for in cl. 65(2)(d) of the 2000 Model Bill.

¹⁶³ MCCOC, *Discussion Paper*, p 3.

order to the contrary.¹⁶⁴ Such a court order may specify the period for which the forensic material may be retained.¹⁶⁵

10.4.2. Queensland

Proposed s 300 of the PPROA Bill 2000 permits a DNA sample to be taken from a volunteer only with his or her consent. The person must be given a reasonable opportunity to give informed consent to the procedure. (The requirements for informed consent are discussed in section 10.7.2 below).

10.4.3. Victoria

In Victoria, a member of the police force may conduct a forensic procedure on a volunteer if he or she has consented and that consent is not withdrawn prior to the giving of the sample. The Victorian legislation also provides rules that safeguard informed consent and the ability to withdraw consent.¹⁶⁶

In the course of an investigation into an indictable offence, the Victorian Police, in limited circumstances, can obtain authorisation from a Magistrates Court to retain a sample collected from a volunteer who has withdrawn his or her consent. The court must be satisfied that there are reasonable grounds to believe that the volunteer has committed the offence and that making the order is justified in all the circumstances. In its final report, MCCOC commented that:

*This streamlines the procedure by relieving everyone involved from having to start the procedure again under the general provisions in relation to suspects.*¹⁶⁷

10.4.4. South Australia

The sampling procedures provided under the South Australian legislation in respect of volunteers are quite similar to those in Victoria. In South Australia, a forensic procedure can be carried out on a volunteer if that person has consented to the procedure. The volunteer is at liberty to withdraw his or her consent at any time before the procedure is completed unless the continuance of the procedure is

¹⁶⁴ 2000 Model Bill, cl 67(2), 68, 69.

¹⁶⁵ 2000 Model Bill, cls. 68 (3), 69(3).

¹⁶⁶ *Crimes Act 1958* (Vic), ss464ZGB-464ZGF; *Criminal Law (Forensic Procedures) Act 1998* (SA), ss7(1), 8, 9.

¹⁶⁷ MCCOC, *Discussion Paper*, p 63.

authorised by a court order or otherwise under another law.¹⁶⁸ Court authorisation, in these circumstances, appears to be limited to situations where the person concerned is a suspect or convicted offender.¹⁶⁹ Comprehensive rules for obtaining informed consent appear to apply only in the case of a suspect under the South Australian legislation.¹⁷⁰

10.4.5. Northern Territory

There is provision under the Northern Territory legislation for volunteers to consent in writing to non-intimate forensic procedures. Information obtained under these circumstances is only admissible as evidence in respect of the offence for which the information was obtained, unless the offence is punishable by a term of 14 or more years imprisonment.¹⁷¹

10.5. DESTRUCTION OF FORENSIC MATERIAL

One question often raised in the public debate about the development and application of DNA databases is whether DNA samples and/ or the information obtained from their analysis, should be retained on the database or destroyed in particular circumstances.¹⁷² Another related question is whether destruction can be achieved simply by removing identifying data or whether the physical destruction of the sample or information is required.

The approach taken under the 2000 Model Bill is to require the destruction of the *means of identification* of the forensic material or information with the person from whom it was taken, rather than the sample itself. Neither South Australia nor the Northern Territory define in their respective legislation when forensic material is destroyed.

¹⁶⁸ *Criminal Law (Forensic Procedures) Act 1998* (SA), s 9(1),(3).

¹⁶⁹ *Criminal Law (Forensic Procedures) Act 1998* (SA), ss 9(3)(a), 14.

¹⁷⁰ *Criminal Law (Forensic Procedures) Act 1998* (SA), Part 3.

¹⁷¹ *Police Administration Act* (NT), s 145B

¹⁷² But note also that in the United States of America, the National Institute of Justice (NIJ) has recommended that samples be split wherever possible before and after the testing process. The NIJ has recommended that a laboratory should only test the amount of sample needed to obtain reliable and interpretable test results; any untested sample should be retained for possible future testing: United States of America, National Institute of Justice, *Report on Postconviction DNA Testing: Recommendations For Handling Requests*, p 64.

10.5.1. 2000 Model Bill

The Model Bill authorises the destruction of forensic material in certain instances.

Forensic material must be destroyed where:

- An interim order for a forensic procedure is later disallowed¹⁷³
- The conviction of a convicted serious offender who has given a forensic sample is quashed¹⁷⁴
- Proceedings against a suspect in respect of the offence for which the forensic material is obtained have not been commenced or are discontinued within 1 year. (The Court may extend this period by an additional year upon application by the prosecution)¹⁷⁵
- The forensic material is held to be inadmissible in relevant court proceedings¹⁷⁶

Generally, where a person is a suspect, forensic material obtained must be destroyed within one year. MCCOC, in its 1999 Discussion Paper, commented that where an offence was not proved or the charges were dropped against a suspect, he or she should be entitled the same treatment as anyone else in the community:

*To do otherwise would undermine the justice system by enabling police to take action which would result in the giving and retention of forensic material regardless of whether it is shown later to be justified.*¹⁷⁷

There is no obligation to destroy material obtained from a serious offender unless his or her conviction is quashed. One view put forward by police to MCCOC which was noted in the 1999 Discussion Paper was that some serious offenders prefer the retention of their DNA profile so that police do not approach them whenever a similar offence is committed.

The destruction of material from a volunteer will depend upon what the person agrees.

It is an offence to analyse samples that have been approved for destruction.¹⁷⁸

The Model Bill does not require the literal destruction of the forensic material - the forensic material, results of analysis or other information gained from it is deemed

¹⁷³ 2000 Model Bill, cl 75.

¹⁷⁴ 2000 Model Bill, cl 76.

¹⁷⁵ 2000 Model Bill, cl 77.

¹⁷⁶ 2000 Model Bill, cl 78.

¹⁷⁷ MCCOC, p 83.

¹⁷⁸ 2000 Model Bill, cl 80.

to be “destroyed” if the means of identification of the forensic material or information with the person from whom it was taken is destroyed.¹⁷⁹ MCCOC adopted this approach to circumvent the perceived difficulties of tracing and destroying all remnants of a sample (which has undergone various processes of analysis) and the different records of a DNA profile. MCCOC noted the view of forensic scientists that the destruction of the numerical code, with which the material is often labelled, would make it impossible to identify a sample.¹⁸⁰

The Privacy Commissioner in New South Wales, however, expressed some concern with this approach:

*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 some extent and makes it an offence to analyse samples that have been approved for destruction. Sections 65 and 66 [now ss70 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 of destruction.*¹⁸¹

10.5.2. Queensland

The PPROAA Bill provides that the destruction of a DNA sample is achieved when the information that identifies the person from whom it was taken is deleted from the DNA database (**proposed s 316(3)**).

Proposed s 316 places an obligation on the Police Commissioner to ensure the destruction of the **results of a DNA analysis** of a sample **within a reasonable time** in certain situations:

- The arrest of a person for an indictable offence to which the sample relates is discontinued
- A charge of an indictable offence to which the sample relates is discontinued before a court
- A person is found not guilty of the indictable offence, including on appeal, or
- A person is not charged of an indictable offence within 1 year after the sample is taken

¹⁷⁹ 2000 Model Bill, cl 1(5) (definition of “destroys forensic material or information”)

¹⁸⁰ MCCOC, *Discussion Paper*, p 83.

¹⁸¹ MCCOC, *Final Report*, p 7.

The destruction requirements do not apply, however, in certain situations. These situations include where: a person has been found guilty of another indictable offence; there is another charge of an indictable offence still pending against the person; or, the DNA sample and analysis results are required for the investigation of another indictable offence that person is reasonably suspected of having committed (**proposed s 316(2)**).

As noted previously, there is no requirement to destroy a DNA sample that has been taken from a prisoner according to **proposed section 311**.

10.5.3. Victoria

In Victoria, the Chief Commissioner of Police must ensure the destruction of forensic material where there is neither a charge nor any proceedings brought against the person sampled within 12 months of the conduct of the forensic procedure, or otherwise if the person is acquitted. On application to the court, there is provision for an extension of the period allowed for the retention of the sample.¹⁸²

The court can also authorise the retention of a forensic sample and any related information or material obtained prior to the conviction of an offender. If the application is not made within the period specified, or the court has refused to give authorisation to retain the sample, the sample or related material must be destroyed.¹⁸³

10.5.4. South Australia

In South Australia, there are a number of circumstances in which the investigating police officer must ensure the destruction of forensic material:

- If forensic material is obtained under an interim order for a forensic procedure and that order is subsequently not confirmed
- If proceedings in respect of the offence for which the forensic material is obtained are not commenced or are discontinued within 2 years (or longer if extended by the court upon application by the prosecution)
- The forensic material is held to be inadmissible in relevant court proceedings

¹⁸² *Crimes Act 1958* (Vic), s 464ZG

¹⁸³ *Crimes Act 1958* (Vic), s 464ZFC.

- The person from whom the forensic material is obtained is acquitted of the offence.¹⁸⁴

10.5.5. Northern Territory

Northern Territory legislation does not require the destruction of forensic samples collected from a forensic procedure. Forensic samples can be retained for any period at the discretion of the Commissioner of Police in the Northern Territory.¹⁸⁵

10.6. DNA DATABASE SYSTEM

The development of a DNA database system can substantially augment the efficacy of DNA profiling in the criminal justice system.

The 2000 Model Bill details the permissible uses of information recorded in the DNA database system. It also imposes a number of positive duties on the system manager about the retention and recording of information on the system. There are generally corresponding penalties for contraventions of these obligations.

The PPROAA Bill 2000 establishes a DNA database and authorises the recording of the results of DNA sample analyses on the database. The PPROAA Bill 2000 is procedurally less complex than the 2000 Model Bill. Notably, the use of a DNA sample or analysis is restricted to the “performance of a function of the police service”. In contrast to the Model Bill 2000, the Queensland Bill does not make their unauthorised use an offence.

2000 Model Bill

One of the functions of the 2000 Model Bill is to provide an appropriate legislative framework for the DNA database system. The 2000 Model Bill does not create the databases but is descriptive of the various elements of the database and how they may be used for criminal investigation purposes.¹⁸⁶

The provisions contained in **Division 11** of the 2000 Model Bill govern the structure and operation of the proposed DNA database. The procedures contained in the DNA database provisions are relatively complex and address in detail matters

¹⁸⁴ *Criminal Law (Forensic Procedures) Act 1998 (SA)*, s 43.

¹⁸⁵ *Police Administration Act (NT)*, s 147C.

¹⁸⁶ MCCOC, *Discussion Paper*, p 91.

like the supply and use of forensic material on the database and the recording, retention and removal of identifying information.

A number of indexes of DNA profiles are proposed for inclusion in the DNA database, namely:

- A crime scene index
- A missing person index
- An unknown deceased persons index
- A serious offenders index
- A volunteers (unlimited purposes) index
- A volunteers (limited purposes) index
- A suspects index

Forensic comparison of DNA profiles from different indexes is restricted to specific combinations. Matching of a DNA profile from one index is permitted only with a DNA profile on another index in accordance with the following table¹⁸⁷:

Table from Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Final Report: Model Forensic Procedures Bill and the Proposed National DNA Database*, February 2000, p 55.

Profile to be matched	Is matching permitted?						
<i>Column 1</i>	<i>Column 2</i>	<i>Column 3</i>	<i>Column 4</i>	<i>Column 5</i>	<i>Column 6</i>	<i>Column 7</i>	<i>Column 8</i>
	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)	yes 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

There is no open access to the volunteers (limited purposes) index. It must only be used for the purposes for which the sample was given.

The legitimate uses to which information on the database can be accessed include permitted forensic comparison, the exchange of information with another Australian jurisdiction and the provision of the information to the person to whom the information relates. Unauthorised access to information is an offence punishable by up to 2 years imprisonment.¹⁸⁸

¹⁸⁷ 2000 Model Bill, cl 82.

¹⁸⁸ 2000 Model Bill, cl 81(1).

There are additional criminal sanctions imposed in relation to the misuse of the database. For example, it is an offence to intentionally, or recklessly, supply forensic material to another for unlawful analysis and inclusion in an index of the DNA database.¹⁸⁹

In addition, the 2000 Model Bill also places a positive obligation on the persons responsible for the DNA database system to properly administer and control the system. The system manager must ensure that any identifying information that relates to a DNA profile of a volunteer or a serious offender (who has been pardoned or acquitted of the offence concerned or whose conviction has been quashed) is removed from the relevant index after a specified amount of time. The unauthorised recording or retention of any identifying information in a DNA database is an offence that is punishable by up to 2 years imprisonment.¹⁹⁰

10.6.1. Queensland

Proposed s 315 of the PPROAA Bill 2000 gives a police officer or a person acting under an arrangement between the Police Commissioner and the chief executive (health) the authority to analyse and retain a DNA sample. It also provides the authority to include the results of the analysis in a DNA database.

Proposed section 317 establishes a DNA database.

The Police Commissioner must ensure that information obtained from a DNA analysis of a DNA sample is recorded in a database, which may include a national database established by agreement between the Commonwealth and the States (**proposed s 317 (1), (2)**). Information from the DNA analysis of a sample taken **before or after the commencement of the section**, including blood or a thing a police officer reasonably suspects is evidence of the commission of an offence, can also be recorded (**proposed 317(3)**).

The results of any DNA analysis kept in the database can be used for any investigation conducted by a police officer for the police service or a declared law enforcement agency (**proposed 317(4)**).

Proposed section 318 restricts the use of a DNA sample or the DNA analysis results to the performance of a function of the police service. This restriction applies only to a police officer. There is also no corresponding penalty for any misuse of the DNA sample or DNA analysis results, in contrast to the 2000 Model Bill.

¹⁸⁹ 2000 Model Bill, cl 80.

¹⁹⁰ 2000 Model Bill, cl 83.

10.6.2. Victoria

The *Crimes Act 1958* (Vic) authorises the inclusion, in a computerised database, of information (including information which may identify the person on whom a forensic procedure was conducted) obtained from the analysis of forensic samples taken from a suspect, offender convicted of a forensic sample offence or a volunteer and which is able to be lawfully retained.¹⁹¹

There is also provision in the Victorian legislation for the retention and inclusion of information other than identifying information in a computerised database for statistical purposes.

The Chief Commissioner of Police in Victoria must give the Attorney-General a quarterly report that includes a list that identifies by a unique identifying number every sample taken and details about the destruction of any sample.¹⁹²

10.6.3. South Australia

In South Australia, the *Criminal Law (Forensic Procedures) Act 1998* (SA) authorises the Commissioner of Police to maintain a database of information obtained from carrying out forensic procedures under the Act. The storage of DNA profiles is limited to persons convicted of an offence in relation to which the forensic procedure was carried out or persons declared to be liable to supervision. If a convicted person is subsequently acquitted of an offence, the DNA profile must be removed from the database. The Act also makes provision for information recorded in the database and any similar database under a corresponding Commonwealth, State or Territory law to be exchanged under an arrangement.¹⁹³

10.6.4. Northern Territory

In the Northern Territory, information obtained from either intimate or non-intimate forensic procedures can be stored on databases maintained by the police.¹⁹⁴

¹⁹¹ *Crimes Act 1958* (Vic), s 464ZFD.

¹⁹² *Crimes Act 1958* (Vic), s 464ZFE.

¹⁹³ *Criminal Law (Forensic Procedures) Act 1998* (SA), ss 3, 49.

¹⁹⁴ *Police Administration Act* (NT), s 147.

10.7. SAFEGUARDS

10.7.1. The Model Bill

In its Final Report, MCCOC stated that it attempted, in its drafting of the 2000 Model Bill, *to achieve a balance between procedures that are practical and providing adequate safeguards*.¹⁹⁵ The 2000 Model Bill incorporates numerous detailed provisions designed to provide certainty about the rules governing the conduct of forensic procedures and the operation of the DNA database. The regime proposed under the Bill includes safeguards relating to: the conduct of procedures; rules about the informed consent and the withdrawal of consent; the admissibility of evidence obtained under various circumstances; the destruction of forensic samples; the permissible matching of DNA profiles held on the database and rules and sanctions relating to the recording and use of information of the database and the disclosure of that information.

10.7.2. Queensland

The PPROA Bill stipulates that a police officer can ask a person to consent to having a DNA sample taken for analysis. The person must be given a reasonable opportunity to give informed consent to the procedure. The police officer must also be reasonably satisfied that the person is not under the influence of liquor or a drug (**proposed s 300**). Informed consent in this case involves explaining the nature of the reasons and procedures for taking of the sample to the person and of his or her right to refuse consent or withdraw consent.¹⁹⁶ These matters are detailed in **proposed s 303**.

There are special requirements for obtaining informed consent where a person (other than a child) is reasonably suspected of having an impaired capacity, or is a child who appears to be at least 14 years of age (**proposed s 301, 302**). In both cases, a support person must be present when the explanation required to be given before asking for consent under **proposed s 303** is made.

A child under 14 cannot be asked to consent to DNA sampling - court approval must be obtained (**proposed s 312**).

The PPROA Bill provides a number of restrictions on the collection of DNA samples. **Proposed s 313** stipulates procedures to promote the 'protection of a

¹⁹⁵ MCCOC, *Final Report*, p 1.

¹⁹⁶ *Explanatory Notes*, Police Powers and Responsibilities and Other Acts Amendment Bill 2000, p 20.

person's dignity'. For example, the section provides that a person must not be required to remove more clothing than is necessary for the sample to be taken. In addition, if reasonably practicable, the sample must not be taken in the presence of someone whose presence is not required or where someone not involved in taking the sample can see the procedure.

A doctor or nurse who is asked to take a DNA sample can request assistance with the sampling. The person assisting can use reasonably necessary force for taking the sample (**proposed section 314 (2),(3)**).

If a person has consented to the DNA sample being taken, but withdraws his or her consent during the procedure, the doctor, nurse or their assistant, if any, must immediately stop taking the sample. The withdrawal of consent, however, does not affect the admissibility in evidence of any DNA analysis done on any DNA sample taken prior to the withdrawal of consent. (**proposed section 314 (4), (5)**).

10.7.3. Victoria

The Victorian legislation provides a number of safeguards in areas relating to: informed consent; the withdrawal of consent to a forensic procedure; general principles about how procedures are to be conducted; analysis of a forensic sample and information from the sample analysis; and the destruction of the sample in defined circumstances with associated sanctions for non-compliance.¹⁹⁷

10.7.4. South Australia

In South Australia, the *Criminal Law (Forensic Procedures) Act 1998* (SA) provides a number of safeguards in its scheme in areas relating to: the withdrawal of consent to a forensic procedure; informed consent; general principles about how procedures are to be conducted; access to part of the forensic sample and information from the sample analysis; destruction of the sample if criminal proceedings are not commenced within a specified period, the person is acquitted, the forensic material is not admitted in court or a final order to authorise a forensic procedure is not authorised.¹⁹⁸

¹⁹⁷ *Criminal Law (Forensic Procedures) Act 1998* (SA), Parts 2, 3 and 4.

¹⁹⁸ *Criminal Law (Forensic Procedures) Act 1998* (SA), Parts 2, 3 and 4.

10.7.5. The Northern Territory

The Northern Territory legislation provides that consent to an intimate procedure or voluntary non-intimate procedure must be in writing.¹⁹⁹ A person undergoing an intimate forensic procedure may request a doctor or dentist of his or her choice to conduct the procedure, unless it is not practicable.²⁰⁰ The legislation also limits the purposes for which information stored on a database may be accessed.²⁰¹ Information obtained from the conduct of a non-intimate procedure on a volunteer is not admissible except in defined circumstances.²⁰²

11. CONCLUSION

DNA technology has been utilised in the criminal justice system for more than a decade. The probative value of DNA testing has steadily increased as technological advances and growing databases amplify the ability to identify offenders and eliminate suspects.²⁰³ The establishment of a DNA database is expected to provide police with the ability to efficiently and speedily access and share information, particularly across state borders

In the face of increasing reliance on, and the reliability of, such evidence, human rights issues need to be considered in any DNA legislative regime.

¹⁹⁹ *Police Administration Act* (NT), s 145, 145B.

²⁰⁰ *Police Administration Act* (NT), s 145.

²⁰¹ *Police Administration Act* (NT), s 145, 147B.

²⁰² *Police Administration Act* (NT), 145B(4), (5).

²⁰³ National Institute of Justice, pp 9, 10.

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APPENDIX A – FORENSIC PROCEDURES - INTERNATIONAL COMPARISONS

Source: Australia. Model Criminal Code Officers Committee, *Model Forensic Procedures Bill and the Proposed National DNA Database*, Discussion Paper, May 1999, Appendix 1.

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 State has enacted DNA databank legislation.¹

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.²

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

¹ United States of America. Federal Bureau of Intelligence, FBI Laboratory Division, . 'On line Newshour DNA Databank Legislation: A State-by-State Analysis'
http://www.pbs.org/newshour/forum/july98/dna_legislation.htm

² Figures from Forensic Science Service Fact Sheet 002/98 quoted in Mike Redmayne, 'The DNA Database: Civil Liberty and Evidentiary Issues' *The Criminal Law Review*, July 1998, p 437.

seen to control much of the process involved in preparing and presenting DNA identification evidence.³

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.⁴

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.

³ Mike Redmayne, pp 438-446; Beverly Steventon, 'Creating a DNA database' *Journal of Criminal Law*, November 1995, p 411; Andrea D Gorgey, 'The Advent of DNA Databanks: Implications for Information Privacy', *American Journal of Law and Medicine* Vol 16 No 3, p 81.

⁴ 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 not 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*.

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.⁵

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.

⁵ (July 1993) cm 2263, HMSO.

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.*⁶

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.⁷

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.⁸

The Government therefore legislated on 8 November 1993 to force nonconsenting 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

⁶ Translated press statement provided by the Australian Embassy in Bonn on 20 August 1998.

⁷ *German Parliament Approves Creation of Gene Bank*, OTC 25.06.98 01.33
http://www.netlink.de/gen/Zeitung/1_998/980625b.htm

⁸ Ate Kloosterman and Harrie Janssen of the Dutch Forensic Science Laboratory, 'Forensic DNA testing and its legislation in the Netherlands' *Forensic Science International*, 1997 Elsevier Science Ireland Ltd, p 55.

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.⁹

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 Eastaale Committee report and we understand is the concept which is the basis of the APMC proposals for a national database.

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.¹⁰

Evidence from Steve Niezgoda and Dawn Herkenham of the FBI before the US "National Commission on the Future of DNA Evidence"¹¹ 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.

⁹ Ate Kloosterman and Harrie Janssen, p 58.

¹⁰ Carey Goldberg, 'DNA Databanks Giving Police Powerful Weapon - The Instant Hit', *The New York Times on the Web*, February 19 1998, <http://www.ishipress.com/dnacrimet.htm>

¹¹ United States of America, Department of Justice, National Commission of the Future of DNA Evidence, <http://www.ojp.usdoj.gov/nij/dnamtgrans/>

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.
- 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 scaling 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 B – MINISTERIAL MEDIA RELEASE

Premier The HON. PETER BEATTIE MLA

8 February 2000

GOVERNMENT EXPANDS DNA SAMPLING TO BE TOUGHER ON CRIME

The Beattie Government will toughen up its fight against crime by extending the use of DNA sampling, Premier Peter Beattie and Police Minister Tom Barton announced today.

“The success rate in finding the criminals responsible for property crimes in the UK increased from 12 to 40 per cent virtually overnight when a DNA sampling and national database was established,” said Mr Beattie.

“This major expansion of an important crime-fighting tool means that under legislation to be introduced this year police will be able to take DNA samples from:

- All prisoners serving a sentence for an indictable offence;
- People suspected of committing an indictable offence;
- Anyone who volunteers.

“Our system will mean that if just one hair or a speck of dandruff is left at the scene of the crime, the DNA pattern it contains is damning evidence when matched against the suspect’s DNA.

“It will be particularly important for sex offences because samples of semen, blood, hair or skin are often left behind by offenders.

“The decision to sample prisoners is based on the fact that 90 percent of all crime is committed by 10 percent of the population and targeting known offenders will greatly help police clear up crimes.

“DNA profiles will be stored as part of the proposed national database.

“But innocent people have nothing to fear because if a suspect is found not guilty or the case does not proceed, the DNA samples and profiles will be destroyed.

“The decision to vastly expand DNA sampling is part of the Government’s determination to give police the necessary tools to fight crime.

“Under current legislation, DNA samples can only be taken by medical professionals with a person’s permission or with the approval of a magistrate.

“The new legislation will enable DNA samples to be taken using a sample taken from the mouth by authorised people including police, nurses or doctors.

“Having a DNA profile and database will dramatically improve police clear-up rates and help solve previously unsolved crimes.”

Mr Barton said DNA profiling and a national database will:

- Lead to the early identification of offenders;
- Lead to reduced investigation time and more focused investigations; Lead to higher clearance rates for certain criminal offences;
- Assist in revealing links between crimes committed within Queensland and across Australia; Help solve previously unsolved crimes;
- Assist in the identification of missing persons and unknown deceased persons; and
- Reduce the number of disputed issues in criminal proceedings by providing corroborative evidence to positively identify an offender and rule out other suspects.

“Samples from volunteers and suspects will be taken for all indictable offences to allow police to target serious offences as well as common offences such as burglary and motor vehicle theft.

“The mouth swab procedure was selected because it is less intrusive than collecting blood or hair samples and can be carried out by police with only a relatively small amount of training.”

Mr Barton said this expansion in police powers would be accompanied by necessary safeguards, including:

- Having to obtain the approval of a commissioned officer if samples are to be obtained without consent;
- The destruction of DNA samples and profiles, if a person is acquitted or not proceeded against;
- The need to gain court approval if a person is currently before the courts;
- Excluding children from the process unless aged 14 or more when an independent person would have to be present when a sample is taken - and then only if the child agrees to the procedure.
- If consent is not given by a child in these circumstances, a Magistrate’s approval has to be obtained; -Identification of offenders by a numerical code on the national database and only Queensland police will have personal details of Queensland offenders;
- Maintaining a very secure DNA database and recording methods which mean that only identifying characteristics are stored and do not contain genetic information which can be used for purposes other than forensic identification;
- Allowing only law enforcement authorities to access the database for use in criminal or coronial matters.

Contact: Steve Bishop on 0419 779 518 or Michelle Crawley on 0414 250 258.

APPENDIX C – NEWS ARTICLES

Title **DNA bungle**
claimed in cat woman appeal
case.

Author **Mark Oberhardt**

Source **Courier Mail**

Date Issue **23 May 2000**

Page **11**

Article: A MAN convicted of murdering a Brisbane veterinary surgeon claims a third person's DNA was found at the murder scene but the evidence was suppressed at his trial.

At a resumed Court of Appeal hearing, Andrew Richard Fitzherbert continued to attack DNA evidence which was the basis for his conviction last year for the murder of Kathleen Marshall.

Fitzherbert tendered an 86-page affidavit in which he listed alleged grounds for his claims of deliberate fraud in the DNA evidence.

The Crown tendered affidavits in which they said Fitzherbert's claims of a conspiracy were "absurd".

Fitzherbert said evidence of a third person's DNA being found in blood samples taken at the murder scene was never revealed at his trial.

He pointed to areas in a journal and spread sheets used by DNA analysts which he claimed showed three lots of DNA had been extracted from blood.

Fitzherbert claimed records of the third sample were crossed out as though they were a mistake.

He said there were 26 samples taken from the scene but only 11 less than half had returned DNA.

Justice Geoff Davies asked Fitzherbert if he claimed his (Fitzherbert's) blood, Marshall's blood, and that of someone else was found at the scene?.

Fitzherbert denied it was his blood found at the scene but repeated his claim there were three different types of DNA found.

He alleged blank spaces left in a journal had been filled in with his DNA statistics after police had obtained a blood sample from him.

"The journal was doctored but the spread sheets are a complete fabrication," he said.

Barrister Paul Rutledge, for the Crown, said answers to Fitzherbert's allegations were provided in written documents tendered to the court.

Last year in the Brisbane Supreme Court, Fitzherbert, 51, was convicted of murdering Kathleen Marshall, president of the Cat Protection Society of Queensland, at her home in the inner suburb of Windsor.

Fitzherbert yesterday appeared for himself after refusing an offer for free legal representation at his appeal.

He maintained there were serious differences in DNA evidence in a statutory declaration made by a DNA expert at the committal hearing and a journal and result sheet used in collating DNA facts.

"The entire case against me hinges on DNA evidence and I say it was deliberately falsified," he said.

A Supreme Court jury convicted him after it heard the chances of blood found at the scene belonging to anyone but Fitzherbert were 14,000,000,000,000,000 to one.

Fitzherbert denied murdering Marshall at her home in the inner northern suburb of Windsor, in March 1998.

Marshall was stabbed more than 50 times by her attacker and the case received international attention.

Fitzherbert, a palmist who worked out of a spiritualist church, was one of the last suspects interviewed about the murder.

The Court of Appeal reserved its judgment.

**Title: DNA testing not an
antidote for criminal mentality**

Author: Paul Wilson

Source: The Courier-Mail,

Date Issue: 25-APR-2000

Page: 13

DNA crime-fighting technology is on a roll. Success seems to feed on success and as a result, all governments -- including Queensland's -- will soon have legislation in place allowing compulsory testing for those charged with indictable offences or serving prison sentences.

NSW police mass tested men aged between 18 and 45 in Wee Waa this month and subsequently charged a

man with the rape of a 93-year-old woman.

Queensland police say they have achieved stunning results in investigating past sex crimes.

A senior British police officer is touring Australia claiming that a national DNA database here will double the clear-up rate for property crimes and help solve many previously unsolved violent crimes.

So will DNA be the tool that achieves ultimate victory for the forces of law and order over crime and criminals?

It is not likely, if only because the history of crime shows clearly that offenders adapt their methods to take account of new forensic technologies.

What will happen is that clever criminals become cleverer and take active steps to avoid DNA detection while dumb criminals continue to be dumb and continue to be caught by the police.

There is evidence, for example, that just as a burglar wears gloves to avoid leaving fingerprints a rapist may wear a condom to avoid depositing semen. If the offender takes the condom from the scene of the crime and there is no spillage from it, then a DNA analysis may not be possible.

It could be argued that increased condom use by rapists reduces the chances of pregnancy and disease for victims.

But a rape is still a rape. And, condom or no condom there is also the real possibility that some types of rapists -- especially those who love violence and inflicting pain -- will kill their victims and dispose of their

bodies in order to minimise the possibility of future identification through DNA analysis.

Then there is the cautious, professional burglar who is well aware that, no matter what precautions he takes, body fluids, hair or tissue might be left at the scene of the crime. Setting fire to the house or building might seem to be a way out of this dilemma.

And, though it will be rare, there will be those offenders who deliberately plant DNA evidence in order to incriminate someone else. A drink with a mate at a pub offers the chance for saliva samples on a glass to be transported to a crime scene.

Of course, cynics will say that the police are more likely than criminals to “plant” DNA samples at crime scenes. If corrupt police can “verbal” suspects successfully -- a practice that the Fitzgerald inquiry found common among Queensland police -- why would they not plant physical evidence such as DNA?

Well, one reason why this will be a rare event is that it is just a lot easier to verbal suspects (or it was before tape and video recordings of interviews were put in place) than it is to obtain a person’s DNA and place it into a crime scene. But as the O.J. Simpson trial dramatically showed, this will not stop lawyers arguing that the police might have planted evidence.

INDEED, the issues that defence lawyers will focus on in the future will be evidence collection and packaging rather than on the validity of the DNA itself. And they will also focus on the fact that positive DNA swabs do not in themselves mean that a person is guilty of a crime.

In some American police forces detectives have been accused of relying almost solely on DNA to prove crimes and neglecting eyewitness testimony and other more traditional methods of criminal evidence. This has led to overuse of DNA and huge backlogs in court cases because laboratories cannot keep up with all the requests for tests.

Last year, Queensland’s Chief Stipendiary Magistrate warned that in this state the justice system was being hampered by delays of up to 18 months because of huge demands for forensic testing.

DNA technology has had some spectacular successes and is an important crime-fighting tool.

But, as in Britain and America, don’t expect any great reductions in crime in Australia as a result of mass testing or national databases.

Criminals always adapt to new forensic techniques. Besides, crime itself has deep-seated social and economic causes that technology by itself cannot fundamentally rectify or reduce.

Title: DNA should be recorded, not kept

Author: David Keays, (David Keays is a legal researcher and molecular biologist at the University of Melbourne.)

Source: Sydney Morning Herald

Date: 21 April 2000

Page: 11

We need to balance privacy concerns with public safety.

LATE on January 3, 1983, a 26-year-old mother from Leeds in northern England was returning to her car after work. She was abducted and sexually assaulted.

She was tied up, a bag placed on her head and then thrown into a canal. This woman would be dead had it not been for a large rock that allowed her to stand on the canal bed.

This crime, like many others of its type, remained unsolved.

Then, in 1995, England introduced its DNA database. Samples found at crime scenes were analysed and entered into a DNA database.

It was found that four other offences had been committed by the same perpetrator, all of them sexual assaults. Investigators just didn't know who the offender was. At the same time DNA samples were taken from criminals and the DNA profiles were entered into the database.

The database produced a "hit". The samples found at the crime scenes matched a man who was charged and last year was sentenced to eight terms of life imprisonment.

Had it not been for the DNA database, justice would never have been done. This is the power of a DNA database. A tool of justice that can be used to identify the guilty, no matter when the offence occurred.

Australia is contemplating introducing a DNA database. There are, however, important questions to be asked: who is going to be on this DNA database and will one's privacy be protected?

The Federal Government's CrimTrac proposal provides that individuals convicted of offences where the term

of imprisonment is five years or greater must provide a saliva sample. This sample is analysed.

The DNA analysis examines non-coding or "junk" DNA that is littered within an individual's genome. This DNA, which is thought to be a kind of evolutionary baggage, does not code for any personal characteristics and is ideal for identification because it is highly variable between individuals. The DNA profile or fingerprint which is formed is stored on a computer.

The most important question is what is done with your DNA sample. What happens to it after the profile is formed? While New Zealand and several European countries have sensibly legislated that DNA samples must be destroyed, in Australia the Government plans to keep them.

It's not a DNA database it's a bank of DNA samples. A DNA sample contains the entire genetic blueprint for an individual. It may reveal predispositions to diseases such as cancer, Alzheimer's, hemochromatosis and Huntington's. It may also reveal predispositions to behavioural disorders like depression, alcoholism or suicide.

This information could potentially be used by employers, insurers and government departments to discriminate against you. A huge bank of DNA samples could also be used to research criminal links to behaviour or be used by drug companies as a source of genetic material.

And of course, if the police hold your DNA sample, the potential for abuse by corrupt officers is much greater. A state where the government has

unlimited access to your DNA sample is a dangerous one.

Already in the Northern Territory police can take a DNA sample if they suspect you've committed any crime. This sample can then be kept indefinitely and subject to any analysis the police see fit. Why do police need to keep the samples? They don't it's unnecessary. Only the profile is required for identification. Forensic scientists argue that samples need to be kept to check results. This argument is a furphy. Should one need to check a DNA profile, one need simply obtain another sample from the suspect.

A much better approach would be to have a national DNA database which contains the profiles of all citizens, but does not allow government to keep the DNA sample or blueprint. In this way DNA could not be used for improper purposes and one's genetic privacy would be respected. It would also be an incredible tool in fighting crime.

The potential of a national DNA database recently was illustrated in the town of Wee Waa. Had a national DNA database been in place, the individual who raped that elderly woman would have been caught right away. A national DNA database would also be an excellent way of eliminating suspects and would certainly save police from wasting resources pursuing false leads.

Such a database could be formed when applying for a driver's licence. A saliva sample could be taken, the junk DNA analysed, the DNA profile formed and the sample destroyed. Given that a photograph is routinely taken when one applies for a licence, and a photograph contains much

more information than a DNA profile, it is not inconsistent with present practice.

We need to balance privacy concerns with public safety. Storing DNA samples is unnecessary and highly invasive. A much better approach would be to have a national DNA database, which contains only profiles. The government can have my profile, but my blueprint is sacred ground.

Title: NSW: Man charged with Wee Waa rape

Source: MOREE, NSW, April 18, 2000, AAP News

A labourer charged with the brutal rape of a 91-year-old woman was remanded without plea when he appeared in court today.

Stephen James Boney, 44, of Charles Street, Wee Waa, in the state's far north-west, turned himself into police late yesterday.

Six hours later he was charged with the rape of Rita Knight, who was bashed and left for dead in her Wee Waa home in the early hours of New Year's Day 1999.

The crime appalled the local community in the small cotton town and led to an unprecedented campaign to obtain voluntary DNA samples from the adult male population during the past 10 days.

It is not clear whether Boney was one of the 500 locals who volunteered for the procedure but police prosecutor Sergeant Brian Willett told the court Boney submitted to a DNA test last night.

Handcuffed and with a towel over his head, Boney was escorted into Moree

Local Court from the police station next door by four Corrective Services guards.

He was charged with aggravated sexual assault inflicting bodily harm; aggravated break and enter using violence; breaking and entering a building and committing a felony involving violence.

Boney's lawyer Terence Stubbs told the court no plea would be entered today and he did not apply for bail.

Magistrate Mal Macpherson adjourned the matter until May 15.

Boney's appearance raised little interest among local court watchers, with the benches filled mainly with outside media.

The case and Wee Waa attracted national and international attention last week when samples of DNA were collected from volunteers in an effort to speed investigations.

Civil libertarians criticised the move, but NSW Premier Bob Carr said he planned to pass laws giving police the power to take DNA samples from suspects and criminals for a database.

Police Minister Paul Whelan said he expected up to 80 per cent of outstanding crimes would be solved with the help of the testing.

Convictions arising from the use of a new national DNA register could be hard to win because of differences in laws drafted by each state and territory, a top police officer has warned.

West Australian assistant commissioner Tim Atherton fears that variances in who samples can be taken from and the circumstances in which tests would be legal may threaten the effectiveness of the proposed national DNA database.

All six states and both territories have either begun, or completed, drafting legislation to allow their police services to take DNA from prisoners, people charged with crimes or, in some cases, suspects.

The DNA will be added to a database and cross-referenced to samples taken from unsolved crimes, in what police hail as the most significant development in investigative policing since fingerprinting.

But a study of legislation conducted by The Australian has found striking differences in when DNA can be taken.

In the Northern Territory, the first jurisdiction to enact the laws, in mid-1999, police are authorised to take mouth swabs from all prisoners, all adults or juveniles facing imprisonment and anyone reasonably suspected of carrying out an offence.

Laws passed by the Victorian parliament allow police to take mouth samples from all prisoners and, with a court's approval, anyone reasonably suspected of a crime. However, samples can only be kept from people with prior convictions or those who end up being convicted.

Title: Police in doubt on using DNA to convict

Author: Martin Chulov

Source: The Weekend Australian

Date Issue: 15 April 2000

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The NSW Government is proposing a package that authorises tests for anyone arrested or suspected of committing a crime, prisoners serving sentences of five years or longer and any volunteers.

Queensland police are soon to have the power to test all people charged with an indictable offence and prisoners.

South Australian police can apply to take DNA from a person convicted of a crime attracting a sentence of five years or more.

Under proposals in the ACT, Federal Police will be able to test anyone reasonably suspected of an offence.

The West Australian parliament is yet to finalise its package, but “WA is looking at somewhere between the two extremes of legislation (in Victoria and the Northern Territory)”, Mr Atherton said.

He said the legal differences “could cause some issues” when a person charged in one jurisdiction crossed a border and was identified in committing another crime.

“There could be an issue of whether we are able to use that information prior to his charging ... if the power didn’t exist in the new jurisdiction.”

Title: DNA testing threatens freedoms: Kirby

Author: Ray Moynihan

Source: Australian Financial Review

Date Issue: 14 April 2000

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One of Australia’s most senior judges has entered the debate over mass

DNA testing and warned that unless this technology is controlled it could undermine some of society’s most fundamental principles.

Justice Michael Kirby of the High Court warned that society should not intervene in the life of a person “without reasonable cause to do so”.

The judge was speaking two weeks ago at a small scientific seminar in Sydney, just before NSW police investigating a rape case announced they would ask the male population of the town of Wee Waa to offer saliva samples for DNA analysis.

Speaking at a forum at the University of Technology, he said the first problem was one of community understanding, which was lagging far behind the new technology.

“How are we going to ensure the democratic checks and maintain the controls of the sort of society we have when the technology and the science rushes ahead and beyond the capacity even of informed, conscientious and intelligent people to keep pace?” he asked.

The prospect of mass testing men in Wee Waa was first raised publicly in February, at the same time as State politicians were considering new laws enabling DNA samples to be collected from individuals and kept in a national database.

While the judge’s comments were not specifically addressed towards the Wee Waa case, they have taken on added significance as the debate on this issue intensifies.

“In the context of DNA testing, for example, I think it’s important to remember that ours is a somewhat unusual criminal justice system which until now has kept the power

of the State in check, and permitted its intervention in the lives of ordinary people only when, generally speaking, there is a reasonable cause for that to occur," he said.

"This has put a distance between the organised power of the State and the individual ... and that's pretty fundamental to our system of justice. It's often not explained, and often not understood by citizens, but it's at the very core of the nature of our form of constitutional society.

"To the extent that you enhance the capacity of the State, without reasonable cause, to take body samples, you at least raise a number of questions.

First, the issue of self-incrimination. Second, the enhanced power of the State to intervene in the life of the individual.

Third, the problem of the risk of tampering with samples, which must be carefully secured if the system is to have integrity. And finally, the risk of error."

Those attending the seminar included the Director of the National Institute of Forensic Science, Mr Alistair Ross an enthusiastic supporter of both mass testing and the new national DNA database being established. He argues that DNA testing has been highly successful in Britain and he can see no problem with mass testing men in Wee Waa, or anywhere else.

"I think it is an appropriate use of DNA testing as an intelligence tool provided safeguards are in place," he said. "It is voluntary; [it is] only used for investigating the specific crime; and where no match is found, the

sample and any information it generates are destroyed."

The president of the Civil Liberties Council of Victoria, Ms Felicity Hampel, says her organisation is totally opposed to the national DNA database, and to the mass testing of men at Wee Waa.

"The whole legal system is based on the prosecution having to prove an allegation, and a defendant not having to prove their innocence, or provide evidence which may incriminate him or her self," she said. "Calling upon every male in a town to prove their innocence is reversing the onus of proof."

Reversing the idea that people are innocent until proven guilty does not seem to bother Mr Ross.

"Where there is a serious crime the public good that may come from DNA testing outweighs the invasion of privacy and the presumption of innocence," he said.

Critics also point to the potential for error with DNA technology another theme Justice Kirby addressed, saying there should be real means of checking accuracy.

"The obligation that our system lays down is that before the great power of the organised State can come into your life, [there has to be] reasonable cause to suspect you of an offence. It's a very important definitional element ... it's the reason we have never had a society where people can stop you in the street , and say 'papers'?

"It's just not the kind of society we have. Therefore, I think it's a very fundamental question, as to whether we should change it. Or whether we

should introduce new laws which have the effect of changing it.”

Title: Genetic printing maps future of crime fighting / Moments of terror

Author: MIKE SAFE

Source: The Australian,

Date Issue: 7 April 2000

Page: 2

If the 600 menfolk of Wee Waa line up to be DNA-tested this weekend, they will be at the front of a much bigger law-and-order initiative about to sweep Australia.

DNA testing or, more exactly, the databasing of genetic samples from criminals and crime scenes, is to be at the heart of CrimTrac, a new nationwide investigative system, being set up by the federal Government with the support of all states and territories.

Police believe the databasing of DNA -- each person's unique genetic blueprint -- will give them a huge boost in the fight against crime.

Although the Wee Waa case is not the first time mass DNA-testing has been used in Australia -- it was tried in Perth during the 1997 hunt for the murderer of three young women -- it comes as DNA and CrimTrac go under the microscope.

There are many operational and privacy issues. Already, civil libertarians are warning against treating DNA, particularly its mass-testing application, as an investigative holy grail: the answer to every copper's dead end.

However, one man who will feel vindicated by the Wee Waa decision is Robin Napper, on secondment to

the NSW police service. He was founding chief of Britain's National Crime Facility, which ensured adequate resources for major crimes.

Mass DNA testing has its origins in one of the most protracted manhunts in British criminal history. Police investigating the brutal murders of two women in Leicestershire were able to use DNA obtained by semen samples to eliminate one suspect and track down the murderer. The killer - the 4583rd male tested -- had previously persuaded a workmate to take a test for him.

During his 18 months here, Mr Napper has been spreading the DNA message and is believed to have played a role in getting the Wee Waa test approved.

The British DNA database, established in 1995, contains more than 600,000 samples of individuals charged or convicted, and 50,000 samples from crime scenes. In the year ending last April, the database drew matches on samples from 65 murders, 273 rapes and 76 sexual assaults.

Moments of terror

THE crime that devastated Wee Waa took place in the early hours of January 1, 1999.

The victim, then aged 91 and well-known in the community for her charity work through the Catholic Church, was asleep when the attacker broke into her home between midnight and 2.20am.

The woman was repeatedly beaten about the head and the body with such savagery that police believe the intention was to kill her. When she passed out, the attacker -- who may

have thought she was already dead -- raped her before leaving.

The victim's cries for help were heard by a passerby later that night and she was taken to hospital in a critical condition.

Despite massive blood loss and injuries that included several broken bones and severe bruising, doctors saved her life.

Title: Doubts over DNA tests

Author: Simon Kearney, Ian Haberfield

Source: Sunday Mail (QLD)

Date Issue: 13 February-2000

Page: 34

QUESTIONS over the infallibility of DNA testing have been raised as Queensland moves toward taking samples from all criminals.

An innocent man was recently linked to a burglary in the United Kingdom.

It was the first mistake from the supposedly fool-proof system, prompting fears thousands of people convicted through DNA testing may lodge appeals.

But scientists in Queensland are confident the same won't happen here, with predictions improved testing will mean burglars will be twice as likely to be caught from next year thanks to DNA.

The State Government is about to start gathering the DNA profiles of 4160 prisoners in Queensland jails for indictable offences.

Police Minister Tom Barton said the major spin-off from DNA testing

would be doubling the property crime clear-up rate.

In Britain, the world's largest crime-solving computer had made a one in 37 million mistake, but Queensland forensic scientist Leo Freney said the same would not happen here.

Mr Freney said the basic difference between the two countries' DNA procedures was that previously the UK tested at six points along the DNA molecule, whereas Australia tested at 10.

"It's beyond the realm of statistical probability for there to be a coincidental match with 10 genes," he said.

"Even if there were a match, and in the absence of a confession, everything would be double-checked using new reference samples."

Mr Barton revealed police had 5000 unsolved crimes waiting for the DNA database to come on line.

He said convictions for rapes and murders had already shown the success of DNA testing but property crime was where it would be felt in the wider community.

"It (DNA) has virtually doubled the clear up rate for that type of crime," Mr Barton said.

"If you have a break-and-enter at your place and if they get a good clear set of prints they can find approximately 10% of those people -- the UK experience for DNA in those circumstances is 18%.

"It won't just be the murders and the rapes which typically we've seen DNA used for."

The clear-up rate for property crime in Queensland is 24%.

Mr Barton said based on the UK experience, the new database would lead to more than 40% of unsolved crimes being solved in a short period from next January.

"I would think there'll be an initial flash of a lot of crimes being cleared as that database comes on line," he said.

Title: Cops and swabbers (DNA database)

Author: SMITH, DEBORAH

Source: Sydney Morning Herald

Date Issue: 1 December 1999

Page: 19

The robbery is carefully planned. There are no witnesses. But the thief nicks his hand on a piece of broken glass, and leaves a spot of blood at the scene.

Police investigators send the blood to a laboratory where it is quickly checked against a national DNA database.

The computer matches it with DNA collected years before from a man who is not a suspect for this latest crime.

An arrest is made. Case solved.

This scenario is no longer wishful thinking for police in Victoria, and it is likely to become reality soon across Australia following the Federal Government's Budget decision to fund a national forensic DNA database as a key part of the \$50 million national CrimTrac system.

So far, only Victoria and the Northern Territory have introduced legislation to allow police to build up

DNA profiles of prisoners and newly charged criminals in the hope of randomly matching them with DNA in blood, semen and other human deposits at past and future crime scenes.

The Victorians have already had their first major success. A 12-month-old robbery was recently solved following a routine cross-check of entries on the new DNA database.

A young heroin addict was convicted of a petrol station robbery after his DNA profile matched a blood sample collected from a stolen car used during the hold-up.

He had not been a suspect. Police around the country have long used DNA analysis to convict, or clear, individual suspects of individual offences.

But a national DNA database is expected to be an unrivalled forensic tool for solving crimes.

It will also act as a preventative, says Dr Tony Raymond, director of forensic services, NSW Police: "If their DNA is on file, it is more likely to make people think twice about committing a crime."

Privacy advocates, however, are concerned about the database. "I am very, very suspicious of the potential misuses," says the NSW Privacy Commissioner, Chris Puplick.

People who have served their time in jail are supposed to be welcomed back into society and given a second chance, adds Brett Collins, a spokesman for the prisoners' rights group, Justice Action.

With their DNA profiles remaining on the database, they will feel like outlaws, he says.

“The idea of community forgiveness will be destroyed.

They will remain suspects for the rest of their lives.”

A model Commonwealth bill was released in May to act as a guide for the remaining states and territories, including NSW, to develop or enhance their own legislation governing how the DNA samples will be taken, from whom, and for what specific purpose.

Legislation is expected to be introduced in NSW early next year.

Detective Superintendent Robin Napper, seconded from the UK to work as an adviser to NSW police, thought DNA profiling was just another “forensic gizmo” when it was introduced in Britain in 1995.

“I had no idea of the door that was opening.

It has transformed the way we do policing,” he says.

The British legislation allows police to take a mouth swab DNA sample from people charged with serious offences, without their consent, at the same time as their photo and fingerprints are recorded.

“It is so easy,” says Napper.

Ninety per cent of crime is committed by 10 per cent of people “recidivists”, as Napper puts it.

And the 650,000 people, or 1 per cent of the population, now on the British DNA database are the country’s “core criminality”, he says.

About 62,000 DNA stains at crime scenes, including blood, semen, saliva on cigarettes, nose fluids on tissues, and hair, have also been entered.

“DNA can even be picked up from steering wheels,” says Napper.

Between 400 and 700 matches on the database are recorded each week, he says.

There is a 40 per cent hit rate between DNA found at new crime scenes and other entries on the database.

About 17 per cent of new people profiled also match up with DNA from unsolved crime scenes.

Thirty-four homicide cases have been solved this way at last count.

And for more than 100 investigations of major crimes, a large number of those living near the crime scene have also been screened.

Although these public DNA profiles are only used during investigations of a specific crime, the British Government is considering expanding the legislation so the profiles of these members of the public can be added to the main database, if those involved give their permission.

A similar mass DNA screening has also been carried out in Western Australia.

Hundreds of taxi drivers volunteered saliva samples in 1997 to police searching for a serial killer believed responsible for the death of three women last seen in a fashionable Perth nightspot.

The taxi drivers’ aim, in part, was to restore confidence in their industry, which had been damaged by publicity about the case.

They also made sure they had prior police assurances that the DNA samples would be destroyed once the case was solved.

The innocent need have no concerns about this rapidly advancing technology, argues Napper.

“You can’t do anything with a DNA sample other than identify the person who left it.”

The more people on a DNA database, the better.

Those who commit high-volume crimes, such as simple burglary, should be included on the database, not just the serious offenders, as recommended by the model legislation, he says.

“All big crooks start out as little crooks.

If you can interrupt this early enough, you can reduce crime.”

Napper cautions the Australian states still developing legislation that if they make it too hard for police to collect DNA samples, or laws vary too much between states, then the national database will not be very effective.

He also argues against the model bill’s premise that a DNA mouth swab should be regarded as an intimate sample, requiring a person’s consent.

The swab is tiny, not the “toilet brush” some critics think, he says.

The procedure is a quick and simple wipe.

Having to get court approval to take a swab will deter some police from collecting DNA.

So will the requirement in the model bill that people be videoed giving permission for sampling, as well as during the actual collection of blood or mouth swab.

The Victorian legislation, introduced last year, has many of the checks and balances contained in the model bill.

Mouth swabs are classified as intimate, and Victorian police recently began the massive project of seeking court orders to sample thousands of prisoners who are in jail for serious offences such as murder, serious assault and rape.

They have also begun to go back and place stored samples of semen and blood from unsolved crimes onto the database.

The Northern Territory legislation is much closer to the British model.

Consent is not required for a swab, and DNA can be taken from people who have committed a wide range of crimes, including serious driving offences.

Puplick, is concerned that NSW not go down this path.

Police should not be given the authority to “violate” a person’s body by taking a DNA sample without consent.

Other civil libertarians claim police could plant DNA evidence.

Napper’s dismissive response is that the final arbiter of DNA from a crime scene is the jury.

Safeguards are also needed to ensure the forensic DNA profiles are used only for crime investigations and not other purposes, such as insurance assessments for disease susceptibility, he says.

Alastair Ross, the director of the National Institute of Forensic Science, in Melbourne, counters that this fear is based on a common

misunderstanding about DNA profiling.

The nine sections of DNA which will be the standard used to build a profile for the Australian database do not provide any genetic information, because they have been selected from the “junk DNA” that lies between genes.

It is true that British forensic scientists are working on ways to use whole DNA collected at a crime scene to provide clues, such as the hair colour and the race of the possible suspect, says Ross.

“But that is irrelevant in terms of the database.”

Both the forensic scientist and the privacy commissioner, however, agree that access to the DNA database is a major issue.

Puplick cites the possible example that police who know a person is on the database may want access to his DNA profile for use in a paternity case.

Ross says only a limited number of scientists should have access to the database.

If they identify a match they should tell the police involved in the criminal investigation, but this should not be used as evidence in court.

“A match would have to be confirmed by taking another sample,” he says.

Ross also believes the database will be most useful in nabbing car and house burglars.

Anyone reasonably suspected of committing these crimes should be sampled, and compared with specified crimes on the database.

If no charge is laid, their details should be removed, he argues.

Justice Action’s Brett Collins does not accept the argument that knowing their DNA profiles are on permanent database will be a strong deterrent to criminals.

People involved in crime are deterred only if they have a firm belief they will be caught, and many will be confident they can commit a crime without leaving any DNA behind.

His objections to the database are philosophical, as well as privacy-related.

“A reduction of people to some cyber form is dehumanising.”

He also cautions the rest of the population that new technologies are often tried first on prisoners.

When it becomes acceptable, it will be expanded so more people in the community with no association with crime will end up with a DNA profile on the database, as in Britain, he claims.

Title: Trial by acid test.

Author: Leisa Scott

Source: Australian

Date Issue: 09 September 1999

Page: 9

The scientists have taken mucus from the handkerchief and Andrew Fitzherbert’s luck is about to run out.

The sample has been soaked in water, dissolved in chemicals, mixed with gel, had an electric charge put through it and now the computer is ready to display the nine sets of numbers that science says make him who he is.

In this small room above Brisbane's morgue, forensic biologist Ken Cox holds in his hand the deoxyribonucleic acid profile of a murderer who left tiny spots of his own blood at the scene of the multiple stabbing of veterinarian Kathleen Marshall last year.

As a colleague calls out Fitzherbert's DNA numbers on the computer, Cox checks them with the spot.

"The first locus was a match, the next locus was a match, third locus was a match and by this time we were well into the hundreds of thousands of chances that it could match anyone else," says Cox, relating the excitement that built up in the room.

"Then another one, the fourth, fifth, all to the ninth matched. It was him".

Fitzherbert had just been snared by a science so accepted that, despite there being no witnesses, no weapon, no motive not even any history of Fitzherbert meeting Marshall last month a jury was convinced enough to put him away for life.

The first conviction using DNA was a little more than a decade ago in the UK.

Now, in Australia, the Federal Government is about to launch a revolutionary national DNA tracking system.

It's a science most Australians remain blithely ignorant of, but it will have an impact on us all.

More killers, rapists and burglars will be caught and the innocent freed.

However, personal privacy will be under greater threat and framing

innocent suspects will become simpler.

Late next year, a national DNA database will become part of CrimTrac, a policing system championed by Attorney-General Senator Amanda Vanstone, into which \$50 million is being poured.

CrimTrac senior adviser Kim Terrell says national model legislation should be released this month (which the States may adapt) and the tender is out for the computer system.

On the database will be the DNA profiles of offenders, suspects and volunteers who, through the years, have surrendered samples of blood or saliva to the police services in their State or Territory.

(Volunteers help add to the database's statistical index.) Together they will make the start of a database of Australia's DNA make-up.

Another part of the database will hold DNA profiles from unsolved crimes: nine sets of numbers extracted from the blood, semen, spittle, skin or hair left at the scene of a crime by the offender.

One by one, DNA samples collected from scenes of unsolved crimes some dating back decades will be run against the DNA samples of offenders.

Police around the country will suddenly find they have hard evidence linking, say, a suspect in Western Australia to a murder in Queensland.

The clean-up rate could be amazing.

In the UK, the world leader with its five-year-old national DNA database,

30 mystery murders have been solved.

Every week, about 300 previous offenders with recorded DNA profiles from house burglars to murderers have helped British police catch them by leaving some minuscule trace of themselves at the scene.

According to British detective superintendent Robin Napper, a DNA expert in Sydney on secondment: "It's been phenomenal, absolutely phenomenal".

Prisoners who commit crimes carrying penalties of five years or more even if they are serving less could be asked to give a DNA sample.

All it takes is a cotton bud wiped around the mouth.

In some States, as in the UK, it may become routine.

So if a prisoner is in for armed robbery but has got away with murder, the database will get him if he left DNA evidence at the scene of the crime.

Additionally, it could free someone imprisoned for a murder they never committed.

In the US, which runs its database through the FBI, a 1996 report found 51 innocent people were freed because of DNA evidence.

Says Napper: "You will have to brace yourselves as a country because, in the UK, we've had a number of high-profile acquittals".

It goes on.

Suspects are likely to be asked to give DNA samples.

In some States they will be able to make an objection before a magistrate, but there are loopholes.

Fitzherbert, under Queensland law, refused to give a blood sample and a magistrate agreed with him.

But the same magistrate gave the police a warrant to Fitzherbert's home, from which they removed a toothbrush, socks and a pair of trousers.

That's where Cox found the handkerchief.

Then there are the mass screenings, labelled "bloodings", from the days when blood samples were needed, in the UK.

If, for example, a child has been raped and murdered in, say, Portsea, all the men in the town could be asked to give a salival swab to see if their DNA matches that found at the scene.

They will be able to refuse, but if you are innocent and a child has been sexually assaulted and killed, wouldn't you want to help?

If you refuse, you may become a suspect.

Anyway, why would a law-abiding citizen refuse?

Chris Puplick, the NSW Privacy Commissioner, has one reason: police, whom he doesn't trust.

"It's the secret policeman's ultimate orgasm to have a database on everybody," says the former Liberal senator.

He knows the legislation says a sample must be destroyed once a person is discounted, but Puplick questions who's watching the police.

For effect, he conjures up our history of special branch files, which Australians were told falsely never existed.

PUPLOCK recommended to the national model legislators that a privacy commissioner or ombudsman be responsible in each State and Territory to oversee the monitoring and destruction of DNA records.

The response?

“Get stuffed, basically,” he says.

Terrell says CrimTrac may generate reports saying it is time for samples to be destroyed, but it will be up to the police in each State to follow through.

It’s not all plain sailing for CrimTrac.

State boundaries are causing a range of stumbling blocks to the national DNA database.

Terrell says CrimTrac would be “surprised” if the model legislation is uniformly implemented because of the variant attitudes between jurisdictions on the question of DNA versus privacy.

He admits that, if the approaches are too divergent, the system could “wither and die”.

One example is the concept of a suspect being able to object to a magistrate.

In the Northern Territory, mouth swabs are considered “non-intimate”

and so consent will not be required just as in the UK.

NSW, Tasmania, Western Australia and the ACT have not yet declared their hand.

The others, to date, consider it an intimate procedure and require a magistrate’s order if the suspect objects.

Napper says the latter is ridiculous and is setting up a system that will be plagued by legal manoeuvring.

In the UK, police take mouth swabs routinely and this, Napper says, is what has made the system successful.

Puplick finds that attitude incredible.

He raises one of the tenets of our legal system: the right not to incriminate oneself by preserving one’s silence, “but we are going to force them to self-incriminate by taking body samples?”

Where’s the logic?”

Another particularly vexing issue about DNA evidence is that, because it’s so easy to leave behind, it’s so easy to set someone up.

Imagine, says Puplick, if a criminal has a drink with an associate before a job.

They smoke, the criminal takes his associate’s cigarette butt and drops it at the scene.

Voila! Instant framing.

Then imagine, says Puplick, if the police did the same.

We may free people with DNA evidence, but will it frame others?

Of course, it generally takes more evidence than DNA to convict someone.

But remember Fitzherbert.

Puplick says these issues and scores of others have hardly been touched

on in public debate, with governments beavering away on this revolution with hardly a whimper about privacy.

Yet he's aware he's facing an uphill battle.

Who wants to talk about privacy when murderers and rapists are at large?

"There is a real belief that ... if all of these bleeding heart, liberal, civil libertarian, privacy people would just get out of the road, we could fix everything up and we'd have a nice secure society, but there's always a trade-off," says Puplick.

"Until such time as people start seeing misuse of the system, they are hardly likely to be persuaded to stop it".

Message in a helix.

DNA, or deoxyribonucleic acid, is a large molecule contained in the cells of living things that carries the genetic recipe for an individual.

DNA's structure resembles an hourglass, known as a double helix.

The two interweaving strands making up that structure consist of thymine (T), adenosine (A), guanine (G) and cytosine (C).

On each strand, T, A, G and C sit together. Imagine the strands pulling together like a zipper.

In this position, T is compatible with A, and G with C. So if one strand starts with AACTGA, the parallel strand will start TTGACT.

At various points on a long strand of DNA called loci repeats occur, such as CGAT CGAT.

They may repeat twice in one person and 20 times in another.

That, scientists say, is where the variation occurs: different people have different numbers of repeats.

Forensic testing involves looking for repeats on nine specific loci.

The chances of two people having the same repeat sequence is 1 in 100 million.

Australia has adopted the Profiler Plus system, which after the blood sample has been chemically prepared and linked to the computer produces Geneotyper graphs, showing the sequences.



This Publication:

LB 7/00 *The Police Powers And Responsibilities And Other Acts Amendment Bill 2000: A DNA Regime For Queensland* (QPL May 2000)

Related Publications:

LBR 7/00 *Evidence (Witness Anonymity) Amendment Bill 2000* (QPL May 2000)

LBR 6/00 *The Police Powers And Responsibilities And Other Acts Amendment Bill 2000: Controlled Operations and Controlled Activities* (QPL May 2000)

LBR 1/00 *The Police Powers and Responsibilities Bill 2000 The Power to Arrest Without Warrant a Defendant Released on Bail* (QPL Mar 2000)

LB 3/00 *The Police Powers and Responsibilities Bill 2000 – Surveillance Warrants* (QPL Mar 2000)

