



Office of the  
Victorian Privacy  
Commissioner

Office of the Victorian Privacy Commissioner

Supplemental Submission to the  
Victorian Parliament  
Law Reform Committee

on its

*Inquiry into Forensic Sampling and DNA Databases*

20 September 2002

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# INQUIRY INTO FORENSIC SAMPLING & DNA DATABASES

## I. Introduction

- 1 This Submission supplements my earlier Submission of 17 July 2002 and:
  - provides additional information on how the privacy legislation applies to forensic sampling in Victoria;
  - responds to proposals put forward by Victoria Police in their Submission to this Inquiry; and
  - provides information about recent developments.

## II. Privacy law and forensic sampling

- 2 The Victorian *Information Privacy Act 2000* regulates the handling of personal information by the Victorian public sector, including police.

### Personal information

- 3 “Personal information” is defined to mean information or an opinion that is recorded in any form about an individual whose identity is apparent or can be reasonably ascertained.
- 4 The *Information Privacy Act* covers DNA profiles and, where identifiable, other information derived from body samples. The Act also covers body samples from which profiles and other information are derived:
  - a. DNA profiles (a sequence of numbers) are clearly personal information, their very purpose being to identify a person.
  - b. Other information derived from body samples (such as pregnancy status, blood alcohol content, genetic predispositions) is personal information where the person to whom it relates is identified or identifiable.
  - c. Body samples (such as blood, hair and saliva) will also fall within the meaning of personal information where it is recorded in a form that identifies a person or where a person’s identity can be reasonably ascertained.
- 5 The *Information Privacy Act* will apply to DNA samples that are collected, for example, by an organisation (such as police) who have the means available to them to analyse the sample in order to ascertain a person’s identity. At a simpler level, a body sample stored or able to be linked with a unique identifier of the person from whom it was extracted is considered to be personal information within the meaning of the *Information Privacy Act*.
- 6 The *Information Privacy Act* will also apply to DNA profiles that are said to be de-identified if they are readily capable of being re-identified (for instance, by matching the de-identified profile to an identifiable profile held on a database). It is questionable

whether a biometric such as DNA can ever be permanently de-identified, given it is essentially comprised of identifiable material.

## Law enforcement exemption

- 7 Section 13 of the *Information Privacy Act* provides a limited exemption for law enforcement activities where non-compliance with certain Information Privacy Principles (“IPPs”) is reasonably believed to be necessary.
- 8 No exemption applies to the obligations under the IPPs that require agencies to:
  - a. collect no more personal information than is necessary for their functions or activities (IPP 1.1);
  - b. collect personal information in a manner that is lawful, fair and not unduly intrusive (IPP 1.2);
  - c. ensure personal information is accurate, complete and up to date (IPP 3.1);
  - d. protect personal information from unauthorised access, modification or disclosure (IPP 4.1);
  - e. destroy or permanently de-identify personal information that is no longer needed (IPP 4.2);
  - f. document and make publicly available their information handling policies (IPP 5); and
  - g. allow anonymous transactions, where lawful and practicable (IPP 8).
- 9 This qualified exemption is consistent with Parliament’s decision to adopt international standards for information privacy protection. The expectation that law enforcement agencies are to comply with the privacy principles unless necessity requires otherwise is of great significance. In this context, a failure to abide by responsible data collection and handling principles carries significant risks for both the individual and the wider community. Misuse of a person’s DNA can lead to discrimination or denial of insurance, employment or other benefits or services. Inaccuracy in the analysis of DNA, or lack of security in its storage, may lead to the very serious consequence of wrongful conviction and incarceration. Mishandling of DNA also risks undermining the integrity of, and public confidence in, the DNA database.

## Interaction with the Crimes Act

- 10 The *Information Privacy Act* will give way to other legislation in the following circumstances:
  - a. where another Act, like the *Crimes Act*, specifies permissible uses and disclosures for personal information, those uses and disclosures are likely to be “authorised or required under law” under IPP 2.1(f); and
  - b. where another Act includes provisions that are inconsistent with any provision of the *Information Privacy Act*, the *Information Privacy Act* is required under section 6 to give way to the extent of the inconsistency.

- 11 This poses a challenge to lawmakers when crafting new legislation or renovating existing laws that deal with personal information or affect privacy. Firstly, the breadth of IPP 2.1(f) creates an imperative to articulate with precision those uses and disclosures of personal information that are to be permitted under law, particularly where these purposes are not related to the reason information is originally collected or might be reasonably anticipated by the individuals whose DNA is being extracted.
- 12 Where permissible uses or purposes are not precisely specified, or where the law allows uses and disclosures to be determined outside of Parliament pursuant to Ministerial or other arrangements, privacy may be too readily sacrificed and transparency and legitimacy are unduly compromised.
- 13 Secondly, the Explanatory Memorandum to the *Information Privacy Act* states that section 6 is to allow relevant aspects of the IPPs to overlay the operation of other Acts where requirements can be observed concurrently. Where amendments to the forensic sampling legislation are being considered, it would seem that they should be made compatible with the *Information Privacy Act* wherever possible. Otherwise, the safeguards embodied by the privacy principles may be disregarded to the detriment of the integrity of the DNA database and the legitimacy of the forensic sampling scheme.

## Privacy protection under other laws

- 14 Protection for personally identifiable genetic information that is in a form that is or could be predictive of health will also be available under the complementary *Health Records Act 2001 (Vic)*, which regulates the handling of health information by State public and private sector organisations in Victoria.
- 15 Protection may also be provided under specific obligations of non-disclosure or confidentiality, such as section 127A of the *Police Regulation Act 1958 (Vic)*. Such confidentiality obligations are likely to be additional to the protections offered under the *Information Privacy Act*.

## Jurisdictional limits

- 16 The Victorian privacy legislation is limited to the handling of information by Victorian government agencies and, in the case of health privacy, of private sector agencies operating within Victoria.
- 17 Except in limited circumstances, the Victorian Privacy Commissioner and Health Services Commissioner do not have power to investigate complaints about the mishandling of Victorian citizens' personal information by Commonwealth, State, Territory or private sector organisations operating outside of Victoria.<sup>1</sup>
- 18 IPP 9 allows organisations (such as police) to transfer Victorians' personal information outside Victoria, but only if:
  - a. the individual has consented;

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<sup>1</sup> The jurisdictional reach of the Information Privacy Act might extend wider than Victoria in relation to outsourcing under section 17, pursuant to a relevant Code of Practice approved under Part 4, or under IPP 9 (transborder data flow).

- b. the recipient is subject to a law, scheme or contract that offers substantially similar privacy protection to the IPPs; or
  - c. the organisation has taken reasonable steps to ensure the information will not be handled by the recipient in a manner that is inconsistent with the IPPs.
- 19 Law enforcement agencies are bound by these requirements unless they reasonably believe it is necessary not to comply with them. However, as noted above, inconsistent legislation may override these obligations.
- 20 Again, this creates the imperative to treat forensic sampling legislation in ways that ensure that data protection does not give way to the detriment of individual privacy and liberty and to the impoverishment of the value and utility of the national DNA database.

### **III. Response to issues raised by Victoria Police**

- 21 The following additional comments are made in response to some of the issues raised by Victoria Police's Submission to the Inquiry.

#### Whether forensic sampling should be extended

- 22 Victoria Police recommend in their Submission that forensic sampling be extended to allow for DNA samples to be taken from:
- a. anyone suspected, charged, cautioned, summonsed or convicted for:
    - (i) any indictable offence; and
    - (ii) any Schedule 7 summary offence– at the time of arrest or interview;
  - b. persons committing Commonwealth offences, where the offence is being investigated and applied by State and Territory police forces;
  - c. persons held at the Governor's pleasure or detained after being found "not guilty because of mental impairment";
  - d. deceased persons, particularly those for whom there are outstanding forensic procedure orders in existence; and
  - e. victims and other persons whose DNA is sought for the purpose of exclusion from an inquiry and not for inclusion on the DNA database.

## **Authority to sample at the time of arrest or interview**

- 23 Victoria Police state that it is imperative that they be given the authority to take a forensic sample at the time of arrest or interview from persons who are suspected, or even cautioned, in respect of a wide range of offences.
- 24 Although not expressly stated, this proposal appears to include a suggestion that police be given the power to obtain samples without having to wait for a court order. Victoria Police refer to the situation in the United Kingdom, where police have power to take samples without consent, using reasonable force if necessary, in respect of any recordable offence.
- 25 The extension of forensic sampling to any offence was addressed in my earlier Submission (see paragraphs 53-60), as was the need for judicial oversight (see paragraphs 83-93).
- 26 The proposal to take forensic samples when someone is cautioned requires more clarity. "Caution" has two meanings in the police context. The first relates to cautioning someone in an interview, where they are informed of their rights of silence and legal representation. The second usage of caution relates to diversionary programs for young people and first time offenders.
- 27 Where a caution is given to a person reasonably suspected of committing a relevant offence, as required by the forensic sampling provisions of the *Crimes Act*, the proposal does not seem to go beyond the existing provisions.
- 28 However, if the second meaning of caution is being used, any extension of forensic sampling in this context would not be supported. Cautioning schemes are used as an alternative to court appearances in an attempt to minimise the person's formal contact with the criminal justice system, with the associated stigma and other harms that flow from that contact. It would be clearly inappropriate for DNA sampling to be routinely used in such a diversionary context.

## **Any indictable and Schedule 7 summary offences**

- 29 The stated rationale behind the proposed extension of forensic sampling to include such a wide range of offences is to enhance the capacity of the DNA database to reach its "full potential" for producing crime scene matches by facilitating a strong growth in the number of samples stored.
- 30 It is acknowledged that an extensive DNA database can be a useful and powerful tool for crime detection. However, overly broad powers of intrusion have the potential to be used as instruments of oppression.
- 31 The community has a legitimate expectation that they be free from arbitrary interference. Any incursion into their privacy and liberty must be limited to the minimum necessary to achieve legitimate purposes. The measures taken must then be limited to what is proportional to any perceived risk or benefit sought to be achieved, and it must be effective at achieving that.
- 32 In assessing whether any extension of forensic sampling is necessary, proportionate and effective, the following matters ought to be considered:
  - a. for an intrusion to be "necessary", it must be more than "desirable" or "useful"; necessity corresponds to a pressing social need (such as protection from serious harm

and prevention of likely serious crime, rather than minor or trifling offences that are unlikely to be repeated);

- b. any incursion into private lives requires reasonable cause or suspicion of criminal behaviour, based on factual matters;
  - c. less intrusive methods must be unavailable, unsuccessful or considerably more difficult to use;
  - d. the degree, extent and duration of the intrusion must be limited;
  - e. intrusions should not be undertaken haphazardly, irregularly or without due consideration, and should be subject to proper scrutiny by an appropriately senior or independent authority prior to and at the time the power is exercised;
  - f. any interference with the privacy or liberty of a person must only be undertaken if it is likely to yield information that is relevant to the investigation; and
  - g. the level of intrusion should be linked to the nature of the crime being investigated – for instance, greater intrusion is likely to be more proportionate in a murder investigation or where the community is in imminent serious danger than where a property offence is being investigated.
- 33 The proposal to extend the forensic sampling scheme to any indictable offence and to Schedule 7 summary offences is not supported. As noted in my earlier Submission (at paragraph 62), indictable offences include relatively minor offences and offences for which DNA profiling is unlikely to yield information that is relevant to the investigation.
- 34 Schedule 7 includes a wide range of offences for which the collection of DNA appears to be both unnecessary and unduly intrusive. For instance, Schedule 7 includes the following offences:
- a. a failure to provide name and address details to authorised officers under the Court Security Act 1980;
  - b. forging a prescription or order for certain prescribed poisons under the Drugs, Poisons and Controlled Substances Act 1981;
  - c. impersonating a police officer under the Police Regulation Act 1958;
  - d. impersonating, or obstructing, an inspector under the Prevention of Cruelty to Animals Act 1986; and
  - e. summary offences for which the maximum penalty (whether for a first or subsequent offence) is a term of imprisonment.
- 35 I reiterate my recommendation (from paragraph 69 of my earlier Submission) that, in recognition of the potential significance for an individual of DNA being taken and retained under law, the offences that trigger that result ought to be of some gravity and defined with precision.
- 36 Police should not be authorised to collect DNA samples from offenders and accused, irrespective of the gravity of the offence and the utility of the sample for solving that crime, where the underlying purpose is simply to build up a national DNA database so that it can reach its “full potential”.

- 37 Historically, the build-up of DNA databases across many jurisdictions has occurred incrementally, beginning with serious and violent convicted offenders, then extending to less serious crime by people not yet convicted, and finally encompassing individuals who are not suspected of any crime – including volunteers, victims, deceased persons, missing persons and their relatives. Ultimately, forensic sampling might be proposed to extend to include all newborns, as has been recently proposed in Victoria by the chairman of the agency administering the newborn screening program.<sup>2</sup>
- 38 Caution must be exercised whenever it is suggested that crime prevention will be enhanced by giving law enforcement wider surveillance and information gathering powers:
- Law, including criminal law, must in a free society be judged ultimately on the basis of its success in promoting human autonomy and the capacity for individual human growth and development. The prevention of crime is an essential aspect of the environmental protection required if autonomy is to flourish. It is, however, a negative aspect and one which, pursued with single-minded zeal, may end up creating an environment in which all are safe but none is free.<sup>3</sup>
- 39 While Victoria Police appear to promote the United Kingdom approach to forensic sampling as a model for Victoria to follow, it should be noted that there are reservations now being expressed in the United Kingdom about their scheme. The UK Human Genetics Commission recently released a report on balancing public interests in relation to genetic data, including in the forensic context. This is what they found:
- a. while public consultation and surveys strongly supported DNA profiling for serious and persistent criminal offences involving personal injury to another, the majority thought it inappropriate for lesser offences;
  - b. the general tenor of the public response was one of concern about extending DNA profiling into relatively trivial offences; and
  - c. the Government should engage in a greater degree of public dialogue about the justification for the apparent increase in the range of offences for which samples could be taken.<sup>4</sup>

### Commonwealth offences

- 40 Victoria Police propose that the DNA sampling scheme be extended to include Commonwealth offences under the *Crimes Act 1914* and *Customs Act 1901*, as these crimes have a serious impact on the community.
- 41 It is not clear which offences are sought to be included. Nor is it clear why such an extension is necessary, given that the Commonwealth already provide for the taking of forensic samples in relation to certain Commonwealth offences.

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<sup>2</sup> Robert Williamson and Rony Duncan, “DNA testing for all” (8 August 2002) 418 *Nature* 585.

<sup>3</sup> Herbert L. Packer (1968) *The Limits of the Criminal Sanction* at 65-66, note 1 in Janet C. Hoefel’s “The Dark Side of DNA Profiling: Unreliable Scientific Evidence Meets the Criminal Defendant” (1990) 42 *Stanford Law Review* 465.

<sup>4</sup> United Kingdom, Human Genetics Commission (May 2002) *Inside information: Balancing interests in the use of personal genetic data*, report, paras 9.16-9.21, available at <http://www.hgc.gov.uk/insideinformation/index.htm> last visited 20 September 2002.

## **Mentally impaired offenders**

- 42 Victoria Police seek to extend the forensic sampling scheme to include individuals held at the Governor's pleasure or detained after being found not guilty by reason of mental impairment.
- 43 This proposal is supported in principle, subject to appropriate safeguards and limitations. Judicial oversight is essential. Public advocacy involvement in decisions to take samples is critical. Applications to seek samples must be limited to cases where there is a reasonable suspicion of a serious crime having been committed.
- 44 Consideration should also be given to examining the exculpatory capacity of DNA sampling, where a mentally impaired person may be exonerated by DNA testing.
- 45 These issues require further consideration and consultation with relevant stakeholders, such as the Office of the Public Advocate and the Mental Health Legal Centre.

## **Deceased persons**

- 46 Victoria Police seek a power to obtain DNA from deceased persons for the purpose of matching across the DNA database. They suggest that this power could be limited to cases where there is an outstanding compulsory forensic procedure order in place under sections 464ZF(2) or (3).
- 47 Where a forensic order has already been made in relation to a serious offender, there is an argument that the public interest in solving serious violent crimes would justify the taking of the sample after death, for matching against the DNA database. Care would need to be exercised in relation to what conclusions are drawn from any "cold hit". While victims of serious crime, and their relatives, may obtain some solace by a match with a sample on the crime scene index, such a fact in itself ought not be presumed to conclusively prove that the deceased is the perpetrator.
- 48 A broad ranging power to collect the DNA of any deceased person is not supported.

## **Eliminating samples from an inquiry**

- 49 Victoria Police seek a power to obtain samples from victims and other persons whose DNA is sought for the purpose of exclusion from an inquiry and not for inclusion on the DNA database.
- 50 It is not clear whether this proposal is aimed at eliminating samples from the crime scene sample in order to avoid cross-contamination, or whether it is directed at volunteer screenings that narrow down possible suspects during an investigation.
- 51 With respect to the former, I refer to paragraphs 78-82 of my previous Submission.
- 52 With respect to the latter, I refer to my previous Submission, particularly:
  - a. paragraphs 107-108 relating to the importance of using alternative, less intrusive methods to confirm or disprove a person's involvement in a crime;
  - b. paragraphs 101-106 relating to mass screenings of volunteers; and

- c. paragraphs 122-123 relating to the need to extend the regulatory framework of the Crimes Act to cover consensual collection from volunteers outside section 464ZGB.
- 53 The proposal to not include such samples on the DNA database is supported. It is also recommended that any samples obtained for the purposes of exclusion be destroyed when no longer required for that investigation.

## Collecting fingerprints, photographs & DNA

- 54 Victoria police propose that legislative amendments be introduced to enhance their ability to confirm a person's identity by:
- a. being able to obtain a person's fingerprints, photograph and DNA sample at the time of arrest/interview;
  - b. being able to confirm the identity of the donor by taking their fingerprints when a DNA sample is being obtained; and
  - c. making it an offence for providing a false name or particulars when a forensic sample is provided.
- 55 The benefits of confirming the DNA donor's identity (at the time of arrest and when sampling) are stated to be:
- a. a reduction in the amount of time and resources spent in obtaining post-conviction samples;
  - b. safeguarding individuals' rights to information privacy; and
  - c. protecting the integrity of the DNA database.

### Proposed offence for false information

- 56 Section 456AA of the *Crimes Act* already authorises police to request a person's name and address, where they are suspected of committing an offence or where they may be able to assist in a criminal investigation. It is an offence for a person, in response to such a request, to give a false name or address, punishable by a fine of up to \$500.
- 57 Consideration might instead be given to introducing an offence to prohibit a person from passing off his or her own DNA sample as someone else's, or vice versa, where the DNA is provided to assist police in an investigation (either on a voluntary or compulsory basis).

### Collecting photographs etc

- 58 There does not appear to be any power under the *Crimes Act* authorising police to take photographs or empowering them to compel someone to have their photograph taken.
- 59 Moreover, the fingerprint provisions do not appear to authorise taking fingerprints from a convicted person for the purpose of confirming their identity when a compulsory forensic procedure order is being executed when they are no longer serving a term of imprisonment.

- 60 Ensuring a person is who they say they are, particularly when giving up their DNA, is critical for data quality and is supported in principle. This might be achieved by empowering the court, when making a forensic procedure order, to include in the order that fingerprints and/or photographs be taken where the court is satisfied that it is necessary to do so in order to assist police in identifying or confirming the identity of the subject of the order.
- 61 Where DNA samples are sought from a volunteer, particularly where mass screenings are undertaken, consideration should be given to whether there are less intrusive methods for confirming identity (such as sighting a driver's licence). Any additional information that is collected from volunteers should be destroyed when they are no longer required for the particular investigation (for example, when volunteers' samples do not match crime scene samples or where a suspect has been identified or charged).

## Indefinite retention

- 62 Victoria Police propose that existing requirements for destruction be removed to allow for the permanent retention on the DNA database of:
- a. voluntary samples;
  - b. samples obtained from suspects who are found not guilty or where charges are not proceeded with, particularly where a cold hit has been obtained by matching the sample against the DNA database; and
  - c. samples from suspects who have become unavailable due to death or moving overseas.
- 63 Where individuals have voluntarily provided their samples on the basis that it would be destroyed after a particular use, they have a legitimate expectation that the destruction proceed as foreshadowed. Retention should only be permitted where a court is satisfied that it is necessary to do so. To do otherwise would constitute a gross breach of trust and risks undermining the legitimacy of the forensic sampling scheme and the willingness of volunteers to come forward in future to assist in criminal investigations.
- 64 The Victoria Police Submission suggests that there is a risk of a suspect's sample being destroyed after being found not guilty, despite the sample being relevant to the prosecution of the suspect in respect of another unrelated crime.
- 65 However, section 464ZG of the *Crimes Act* appears to already allow for a suspect's sample to be retained, not only in respect of the offence for which the sample was obtained, but also for any offence arising out of the same circumstances, and "any other offence in respect of which the evidence obtained as a result of the forensic procedure has probative value."
- 66 A larger issue is at stake here. Not guilty means not guilty. Acquittal does not mean "not guilty enough" so that DNA samples may be kept for future use against the person. It is important to recall that developing science will permit samples (as distinct from data derived from samples) to be revisited for other types of testing. Where police retain suspicions that a person found not guilty of an offence has committed another offence, police should be required to satisfy a court that those remaining suspicions justify the taking of a fresh sample or the retention of a sample.

67 The proposal to retain a suspect's sample indefinitely because they have died or moved overseas is not supported. The death of a suspect ends the potential for the criminal justice system to prosecute and perhaps punish him or her. The DNA sample, if retained, may nevertheless lead to a kind of "guilt by association" being visited on his or her blood relatives. The fact that a suspect has moved overseas is not a sufficient reason to retain the sample having regard to the risks associated with collections of genetic material.

## Re-testing persons to obtain additional DNA samples

68 Victoria Police propose they be authorised to re-test a person where:

- a. there has been a match between a post-conviction sample and the DNA database, to confirm identity; and
- b. where an original sample is corrupted or is inadequate.

69 As police pointed out elsewhere in their Submission, confirming identity (by taking fingerprints and a photograph) at the initial time of testing would alleviate the need to obtain a second sample at a later time. Again, any extended gathering of personal information should be permitted only under court order where the court is satisfied of the necessity.

70 Where the DNA database generates a match, the accused should have a right of access to the matching sample from the database so that they can undertake an independent analysis of the material. It is not clear whether the *Crimes Act* (or any supporting regulations to be made under it) provide for this.

71 More detail is required in relation to the proposal to re-test where a sample has become corrupted or inadequate. As knowledge of the genome increases, and as genetic testing and DNA profiling becomes more refined and informative, there may be a temptation to discover more about a person's make-up than their identity. Re-testing should not be permitted by or on behalf of the state where the purpose is to probe more deeply into a person's genetic make-up, rather than to determine the person's involvement in a particular crime that is under investigation.

72 Re-testing should only be carried out pursuant to a court order, and only where the court is satisfied that the making of such an order is justified having regard to matters relating to necessity, proportionality and effectiveness (discussed above).

## Restricting the court's discretion in relation to sampling

73 Victoria Police suggest that the court's discretion be restricted to:

- a. prevent the court inserting additional directions or prescriptive conditions on the sampling regime or procedures used during sampling;
- b. remove the discretion in sections 464ZF(8) and 464ZFB(2) of the *Crimes Act* to decline to make a forensic procedure order in respect of serious offenders;
- c. restrict the matters which a court can consider in determining whether an application for a second sample is necessary.

- 74 There should be no dilution of the court's discretion.
- 75 On the contrary, courts should be given greater guidance on exercising their independent discretion to promote fair and open procedures in relation to the extraction of DNA samples from individuals – particularly where (as in the case of adult serious offenders) there is no right to be heard at a hearing, or even notified of an application, where police seek the court's authority to extract individuals' DNA.
- 76 I refer to my earlier Submission, particularly to:
- a. paragraphs 83-93 relating to the need for judicial oversight; and
  - b. paragraphs 94-96 relating to greater guidance to the courts.

## Warrant to execute section 464ZF(3) orders

- 77 Victoria Police suggest that a warrant procedure should be included in section 464ZFAA to enable forensic procedure orders to be executed on persons who have been released from custody.
- 78 The legislation already appears to provide for this in sections 464ZFAA(6)-(8).

## Presence of independent person

- 79 Victoria Police suggest that, as there are difficulties in remote country areas in obtaining the services of medical practitioners and/or nurses, exceptions should be allowed to the requirement in the *Crimes Act* that an independent medical practitioner, nurse or dentist be present when a forensic sample is taken.
- 80 The difficulties that may be encountered in country areas of ensuring the presence of an independent medical practitioner, nurse or dentist are not sufficient to outweigh the importance of having this safeguard. In country Victoria, distances are not impossibly great nor, in this context, is time so critical that the procedure cannot await the presence of an appropriately qualified independent witness.
- 81 In extraordinary circumstances, an independent witness without the relevant qualifications may suffice, such as a pharmacist or school principal. The presence of an independent witness is important to accountability and confidence.

## Scientific evidence by certificate

- 82 Victoria Police suggest that scientific evidence by staff of the Victorian Forensic Science Centre and medical practitioners be given by way of certificate rather than by evidence.
- 83 This proposal is supported in principle, so long as there is provision for the defence and, if necessary, the prosecution to apply for the provider of written scientific evidence to appear in person where that is necessary.

## Summary

- 84 The underlying assumption of the Victoria Police Submission is that the larger the DNA database, the better. This appears to be the thinking behind the phrase “full potential”. But increasing the size of the DNA database is not wholly positive.
- 85 First, as the national DNA database grows to include more and more Australians, so will the pressures for new uses, including uses beyond criminal investigation. Second, a bigger, richer database will put a greater premium on quality and security, and any lapse in either may have increasingly serious consequences. Third, according to experts, the larger the DNA database, the greater the likelihood of a coincidental match leading to potential injustice. (This risk can be reduced by testing greater numbers of loci.)<sup>5</sup>

## IV. Recent developments

### ALRC/AHEC inquiry

- 86 Since my initial Submission and appearance before your Committee, the Australian Law Reform Commission and Australian Health Ethics Committee’s joint Discussion Paper, *Protection of Human Genetic Information*, has been released. It underscores the need for caution in authorising the collection and use of DNA samples. See in particular Part J on “Law Enforcement and Evidence”.
- 87 The creation of DNA collections also has implications for immigration, insurance, employment, health, social security, family support, indigenous affairs, and commercial and non-commercial scientific research and development, as the ALRC/AHEC paper makes clear.

### “Function creep”

- 88 The potential for “function creep” among DNA samples and data collected initially for limited law enforcement purposes is very significant. Racial and ethnic profiling are extended uses of DNA that are likely to be proposed.
- 89 As genetic knowledge grows, or appears to grow, so as to indicate a predisposition to anti-social character traits,<sup>6</sup> new pressures are likely to develop to tap any existing DNA collections under government or private control.
- 90 These are sound reasons to restrict the range of persons on whom police may collect and analyse samples, directly or indirectly.

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<sup>5</sup> Rt Hon. Sir Thomas Eichelbaum and Professor Sir John Scott (Nov 1999) *Report on DNA Anomalies for the Hon Tony Ryall, Minister for Justice* at para 6.3.

<sup>6</sup> See, for instance, recent reports about the discovery of an “aggression gene” or “gene for violence”: “Nurturing nature: Origins of Violence”, *The Economist*, 3 August 2002, page 65. Also see the press release put out by the researchers on the day their study was published in *Science*: “Gene That Prevents Male Violence Discovered by Otago Researchers”, University of Otago media release, 2 August 2002, available at [http://www.otago.ac.nz/news/news/2002/02-08-02\\_press\\_release.html](http://www.otago.ac.nz/news/news/2002/02-08-02_press_release.html), last visited 4 September 2002.

## Fallibility of DNA profiling

- 91 While the strength of DNA profiling as a law enforcement tool is acknowledged, it would assist balanced discussion if the advocates of the process would acknowledge the weaknesses with equal force. The processes are neither tamper-proof nor foolproof.<sup>7</sup>
- 92 The science is not exact, as the joint inquiry by the Right Hon. Sir Thomas Eichelbaum and Professor Sir John Scott in New Zealand showed. Their thorough and measured analysis of a serious problem in the New Zealand system simultaneously reiterated the strength of the tool and the importance of safeguards:

DNA technology, which continues to develop, is already so sensitive that seemingly bizarre situations may well arise from time to time. DNA testing is a scientific exercise, subject to a range of potential human and systematic errors which however we believe can be kept to a minimum. Apart from the potential human error in failing to follow protocols, in the present state of scientific development there is still room for subjective interventions to influence readings. Techniques and protocols will continue to evolve, as will the accuracy and specificity of the results.<sup>8</sup>

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<sup>7</sup> Examples of the fallibility of DNA in the forensic context include:

- (i) in Australia, questions were raised about DNA profiling used to convict two men relating respectively to a series of bank robberies in Queensland and the infliction of grievous bodily harm in New South Wales. The report suggested that the first case highlighted how DNA evidence may be misinterpreted by forensic experts and the second case showed how easy it is to falsely plant incriminating DNA evidence: “DNA – A Shadow of a Doubt”, *Catalyst*, 27 June 2002, available at <http://www.abc.net.au/catalyst/stories/s591803.htm> last visited 4 September 2002.
- (ii) in New Zealand, a man was acquitted after being wrongly convicted and jailed for abducting and raping an 11 year old girl. He was acquitted after it was found that the DNA evidence left on her clothing could not have come from him but belonged to another man, resulting in Cabinet agreeing to a compensation payout of over \$860,000: The Hon Phil Goff, Minister for Justice, “Compensation payment for David Dougherty”, New Zealand Government press release, 11 July 2001, available at <http://www.executive.govt.nz/speech.cfm?speechralph=35330&SR=0>, last visited 3 September 2002;
- (iii) another New Zealand case involved the wrongful acquittal of a man in 1996 after DNA testing found he could not have been the rapist when retesting in 1999 indicated he was the most likely source of the DNA evidence: Tony Ryall, Minister of Justice, “Release of Report into DNA Evidence”, New Zealand Government press release, 26 June 1999, available at <http://www.executive.govt.nz/speech.cfm?speechralph=28935&SR=0>, last visited 3 September 2002;
- (iv) the DNA sample of a man in Christchurch, New Zealand, contaminated the crime scene samples at two unrelated murders in Wellington, resulting in a Ministerial inquiry into the situation: The Hon Phil Goff, “DNA Reports Released”, New Zealand press release, 9 March 2000, available at <http://www.executive.govt.nz/speech.cfm?speechralph=30507&SR=0>, last visited 3 September 2002. Also see Rt Hon. Sir Thomas Eichelbaum and Professor Sir John Scott (Nov 1999) *Report on DNA Anomalies for the Hon Tony Ryall, Minister for Justice*;
- (v) a man wrongfully convicted of an aggravated sexual assault crime in Texas, USA had his conviction overturned after he served 4 years of his sentence, when it was discovered that his DNA results had been falsified by a Texas forensic expert. The County was later ordered to pay him \$250,000 in a civil suit: Edward Connors et al (June 1996) *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial*, study commissioned by the National Institute of Justice, United States Department of Justice, pages 34-35, available at <http://www.ojp.usdoj.gov/nij/for96.htm> last visited 3 September 2002; and
- (vi) an innocent man’s DNA was falsely matched against the national DNA database to crime scene samples relating to a burglary in the United Kingdom, leading the FBI to refer to the mismatch (said to be one in 37 million) as “mind-blowing” since it uses the British DNA testing model: John Howard, “UK DNA Mismatch”, *Scoop Headlines*, 10 February 2000, available at <http://www.scoop.co.nz/stories/HL0002/S00053.htm>, last visited 3 September 2002; and “After an innocent man is wrongly matched to a crime, could thousands in jail now appeal?”, *Manchester Stories*, available at <http://www.north-west.co.uk/nojava/features/stories/stories/story7.html>, last visited 3 September 2002.

<sup>8</sup> Rt Hon. Sir Thomas Eichelbaum and Professor Sir John Scott (Nov 1999) *Report on DNA Anomalies for the Hon Tony Ryall, Minister for Justice* at para 8.12.

## Annual reporting

- 93 Victoria Police note in their Submission that 1000 orders were executed to August 2000. It would assist if accurate statistics were to be required on the current total of individual profiles in both the Victorian and National DNA database and the rate at which profiles are being added.
- 94 There should be annual reporting of statistics relating to the forensic sampling scheme, including:
- a. orders sought;
  - b. orders granted;
  - c. orders granted with conditions;
  - d. orders refused;
  - e. offences for which orders are sought;
  - f. prosecutions in which DNA evidence is admitted.

## Independent testing & storage

- 95 Consideration should be given to establishing a body independent from police to analyse and store DNA samples. This has recently been recommended in the United Kingdom, along with the proposal that, once DNA profiles are generated from a sample, the sample be destroyed.<sup>9</sup>

## Guidelines for mass screenings

- 96 I refer to paragraphs 101-106 of my earlier Submission and paragraphs 36.46-36.56 of the ALRC/AHEC report and reiterate the need for formal guidelines for, or legislative regulation of, mass DNA testing in Victoria of persons not under suspicion.

## Can any of the human genome confidently be called "junk"?

- 97 It is often stated that DNA profiling uses non-coding parts of the human genome or "junk DNA". I note first that a DNA sample if retained, as well as data derived from it, can be revisited for testing other parts of the genome. But leaving that important fact to one side for the moment, it is by no means clear that any DNA is "junk". Like most Parliamentarians and police members, I am not competent to comment on the specialised scientific literature. The following references from more general science texts will suffice to underline the point:

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<sup>9</sup> United Kingdom, Human Genetics Commission (May 2002) *Inside information: Balancing interests in the use of personal genetic data*, report, paras 9.27-9.39, available at <http://www.hgc.gov.uk/insideinformation/index.htm> last visited 20 September 2002. At para 9.39, the Commission notes that the UK Government is giving consideration to the establishment of an independent oversight body for DNA samples.

98 John Maddox states, in *What Remains to be Discovered*:

It may be that only 3% of the human complement of DNA is functionally significant. Some of the remaining 97% or so of the human genome is given over to the sequences of DNA required for regulating individual genes; understanding of how this is done is far from complete....

[The] organisational overhead in the human genome cannot amount to more than, say, a further 2% of all DNA, leaving the function of 95% or so unexplained....

[G]enes are not only divided into segments, but are separated from each other by such long and apparently meaningless stretches of DNA that it has been called "junk"....

The junk is not all without meaning. For example, some of the non-functional DNA is structurally similar to active genes, but lacks the places to which regulatory proteins normally stick, and is therefore inactive. The pieces of DNA may be evolutionary relics of one's active genes. The striking feature of the remaining junk DNA is its repetitiveness.... Do these repetitive elements have a function and how, in any case did they get there?<sup>10</sup>

99 Summarising the publication of the joint announcement of the sequencing of the human genome in 2000 by British and American teams, Kevin Davies states:

The report also shed light on the bizarre world of junk DNA, families of viral and bacteria-derived sequences variously characterised as freeloaders and parasites. Surprisingly, some of these DNA elements are not distributed randomly across the genome but tend to congregate near genes, suggesting they may have some unknown function.<sup>11</sup>

100 In his 2002 book, *The Human Genome*, Jeremy Cherfas writes:

The junk DNA is turning up some surprises too. Celera [a private concern involved in genome sequencing] scientists estimate that forty-eight percent of the sequence consists of repeat sequences, one of the kinds of junk in which a pattern of bases is repeated over and over again. Nearly ten percent of the Celera sequence consists of a single kind of repeat, a sequence called Alu, which can consist of up to 280 bases. The Human Genome Project sequence reveals that Alu is clustered in areas rich in genes – perhaps it does have some important part to play, yet to be discovered.<sup>12</sup>

101 The author raises in broad terms the ethical dilemmas presented by genetic information and concludes:

There are fine distinctions to be made; an educated public and well-informed politicians are the best guarantee that they will not be made foolishly.<sup>13</sup>

PAUL CHADWICK  
Privacy Commissioner  
20 September 2002

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<sup>10</sup> John Maddox (1998) *What remains to be discovered: mapping the secrets of the universe, the origins of life, and the future of the human race* at pages 205-207, New York: Martin Kessler Books.

<sup>11</sup> Kent Davies, (2001) *The Sequence: Inside the Race for the Human Genome* at page 258, Phoenix.

<sup>12</sup> Jeremy Cherfas (2002) *The Human Genome* at page 49, London: Dorling Kindersley.

<sup>13</sup> Jeremy Cherfas (2002) *The Human Genome* at page 65, London: Dorling Kindersley.