



INQUIRY INTO FORENSIC SAMPLING AND DNA DATABASES

DISCUSSION PAPER

TERMS OF REFERENCE

On 21 November 2001 the Victorian Parliament Law Reform Committee received the following reference from the Legislative Council:

That, pursuant to the Parliamentary Committees Act 1968, the Law Reform Committee be required to inquire into, consider and report on the following:

The collection, use and effectiveness of forensic sampling and the use of DNA databases in criminal investigations, with particular emphasis on identifying areas and procedures which would more effectively utilise forensic sampling and improve investigation and detection of crime.

WHAT ARE FORENSIC SAMPLES?

Forensic samples here are defined as samples collected for analysis of their DNA profile. The samples are collected through forensic procedures, which are classified as *non-intimate* – such as a scraping from under a finger- or toenail – or *intimate* procedures. A mouth scraping, a blood sample, and a swab or physical examination of an intimate part of the body are regarded as intimate procedures.

Fingerprinting and biometrics – voice and touch recognition systems, etc – are beyond the scope of this Inquiry.

BACKGROUND

Victorian laws already prescribe how forensic sampling (taken for the purposes of this Inquiry to refer only to DNA testing) is to be carried out for criminal investigations. They are largely based on model provisions for uniform, Australia-wide legislation developed by Commonwealth, State and Territory Attorneys-General.

The most recent amendments to the Victorian legislation were enacted in May 2002. They make provision for Victoria to share data with other Australian agencies participating in a national DNA database. They also enable police to enforce orders for forensic sampling by applying for warrants for the arrest of the person from whom the sample is required.

The Terms of Reference for the current Inquiry raise a number of broad issues for public comment.

The Committee's report will recommend ways to more effectively utilise forensic sampling in criminal investigations.

The Committee is inviting members of the public to make submissions to the Inquiry and to attend public hearings during July 2002.

To assist in this process, this Discussion Paper outlines the key features of the current laws and the issues to be addressed in the Inquiry. The questions are intended merely as a guide, not as an exhaustive list of the issues to be canvassed.

ISSUES

1. Who should be required to provide a DNA sample?

At present the police may request a sample from a person who is suspected of, charged with or summonsed for an indictable offence, i.e. a serious crime.

In addition, police may seek a sample from offenders convicted of certain 'forensic sample crimes', whether or not they are currently serving a prison sentence. Forensic sample crimes include: sexual offences, murder and manslaughter, assault, armed robbery, house-breaking and burglary, hoax crimes and kidnapping.

The Committee will consider whether the range of people *required* to provide samples should be broadened.

In particular, the Committee will examine the approaches developed in other jurisdictions, notably the United States of America and the United Kingdom. These include:

- Routine sampling of all people suspected, charged or convicted of any offences;
- Compulsory sampling of those convicted of any indictable offences.

The Committee will consider these options in the light of the goal of law reform in this area: to improve the reliability and efficiency of criminal investigations.

2. Who should be empowered to order a DNA sample to be taken?

If a suspect or convicted offender does not consent to provide a sample, the police may apply for a court order to require a sample to be taken and may then obtain a warrant for the arrest of the person to enforce the order.

In the case of children aged 10 –17 years, police must apply to the Children's Court for an order to require the child to provide a sample.

Judicial supervision of the process of obtaining a sample has been provided to make the police force accountable to the court for the administration of this process.

It has been suggested that, to simplify and speed up the approval process, a police officer should be able to order a suspect or convicted offender to be sampled.

The Committee will consider whether a police officer (or a designated officer, such as the Chief Commissioner for Police) should be given this power. If so, it will examine what protection should be provided to the individual and in particular, what mechanisms would be needed to allow for a review or appeal of the police officer's decisions.

3. If a person volunteers to provide a sample to assist with an investigation, what rights should they have over the use made of their samples?

Currently in Victoria, if a person offers or volunteers to provide a sample, they can determine the use(s) to which their sample may be put. Volunteers must be asked to specify whether they consent to their profile being used for only a limited purpose or whether they consent to their profile being retained on the database for unlimited use.

Victoria has not yet experienced voluntary DNA testing on a large scale. In New South Wales, an investigation into a rape involved extensive DNA testing of volunteers from the local community. A large number of male residents of Wee Waa volunteered for DNA testing to assist with police investigations.

The Committee will examine what safeguards apply to ensure that the wishes of volunteers are carried out and what further protection, if any, is required.

4. What safeguards need to be provided to regulate and review police procedures used when requesting and undertaking forensic sampling of vulnerable groups?

A suspect or convicted offender is first asked to consent to a forensic procedure. If consent is obtained, the procedure can be carried out by a medical practitioner of their choice or self-administered, under supervision.

Certain groups can be regarded as vulnerable and in need of special protection in these processes. These include children, people with disabilities, and people from an indigenous or non English-speaking background.

The Committee will examine whether the current provisions make adequate protection for the interests of these groups.

5. Under the existing arrangements, do convicted offenders have the opportunity to use DNA sampling to eliminate them from suspicion or challenge their convictions?

Convicted offenders might seek DNA sampling to rule out their involvement in a crime and to initiate a review of their case. In other jurisdictions, Innocence Panels have been established to assist convicted offenders to apply for a review of their cases on the basis of forensic evidence that might not have been available or used at the time of their conviction. The Committee will review the operation and effectiveness of these panels.

The Committee will investigate the potential for convicted offenders to use DNA sampling as the basis for an application for a review of their case. It will consider what measures, if any, are needed to facilitate access to independent forensic sampling and analysis.

6. What are the limitations, if any, on the conclusions that can be drawn from DNA profiling matches in criminal trials?

While DNA profiling is a powerful tool, a 'match' between two DNA profiles cannot be taken as *conclusive proof* that both profiles have the same identity. Noting the compelling and persuasive nature of DNA evidence, care needs to be taken to ensure its appropriate use in criminal trials.

The Committee will investigate the scope and limitations of DNA profiling as an investigative tool.

7. What accreditation standards and reviews are needed to ensure that the forensic laboratories maintain up-to-date, accurate and reliable sampling processes?

Problems in processing the samples and the profiles can affect the accuracy and the credibility of DNA profiling. For example, contamination of a DNA sample can produce an error in the DNA profile obtained from the sample and invalidate any 'matches' that are made. Similarly, errors or irregularities in the profiling process can produce uncertain results.

The Committee will examine the standards currently required of forensic laboratories and what should be required to ensure that the processes used are up-to-date, accurate and reliable.

8. Can the forensic sampling procedures, the samples and the DNA database be made absolutely secure from unauthorised and improper practices? Are current provisions and penalties adequate?

The security of confidential personal information is an essential requirement of a database containing DNA samples. The Committee will examine instances of the unauthorised retention, use, communication and destruction of samples and profiles in other jurisdictions.

The protection currently provided for the privacy, confidentiality and compliance with orders for the retention, restricted use and destruction of DNA profiles will be examined.

The Committee will also review the provisions preventing the unauthorised and improper use of DNA samples and profiles.

9. What special arrangements, if any, are needed to maintain the integrity, quality and privacy of Victorian data once Victoria joins the national DNA database?

The recent amendments to the *Crimes Act 1958 (Vic)* included in the *Crimes (DNA Database) Act 2002* pave the way for the integration of the Victorian data into CrimTrac, a national database for criminal investigations. These provisions enable Victoria Police to make its database available to other jurisdictions to share information provided by other Australian jurisdictions.

Different jurisdictions have already developed different laws regulating who is required to provide a DNA sample for profiling. Data might become available in Victoria that the Victorian authorities would not otherwise be authorised to obtain. The Committee will inquire into arrangements for the sharing of data and the implications for criminal proceedings in Victoria.

TO MAKE A SUBMISSION

There is no required format for submissions. You may submit a letter, a short report or commentary or a longer research document. Supplementary materials, such as videos, objects and photographs, are accepted and can be returned at the end of the Inquiry.

Please send your *signed* submission to the Committee offices by the due date, either *in hardcopy*, on disk or *by email*, with a signed authentication sent separately.

If you are signing on behalf of an organisation, please indicate your position in the organisation and/or who has authorised the submission.

Confidentiality

All submissions are treated as public documents unless confidentiality is requested. The Committee may publish and release submissions and extracts of submissions at its discretion. The Committee intends to make submissions available on its web-site.

If you wish all or part of your submission to be confidential, please specify this when you lodge your submission.

If you wish to publish your submission to the Inquiry you must first obtain the consent of the Committee.

Parliamentary Privilege

Submissions and statements made at public hearings are protected by parliamentary privilege. This means that nothing in a submission can give rise to legal action against the author or be subject to proceedings in a court of law.

THE INQUIRY TIMETABLE

The deadline for submissions is 12 July 2002. Public hearings are scheduled for 22 and 23 July 2002. To make an appointment to speak at the hearings, please contact the Committee secretariat at the address below.

COMMITTEE MEMBERS

Mr Murray Thompson, MLA (Chairman)
Hon Dianne Hadden, MLC (Deputy Chair)
Hon Ron Bowden MLC
Hon Peter Katsambanis, MLC
Mr Telmo Languiller, MLA
Ms Andrea McCall, MLA
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CONTACT DETAILS

Please contact the secretariat for further information and the arrangements for the public hearings.

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