Submission
No 4

INQUIRY INTO FORENSIC SAMPLING AND DNA DATABASES IN CRIMINAL INVESTIGATIONS

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Submission to the Inquiry Into Forensic Sampling and DNA Databases by the Victorian Parliament Law Reform Committee

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This submission is a response to the 'Discussion Paper' issued by the Committee as a preliminary to its public hearings on its Inquiry into Forensic Sampling and DNA Databases.

I am a legal academic at the University of Melbourne, researching (and teaching) in the field of criminal justice. My current area of research and teaching interest is the law regulating DNA identification. I have a number of publications and have participated in seminars and law reform forums on this topic.

My research has led me to become a strong supporter of the use of DNA identification (including DNA databases) by police in Australia. However, it has also led me to harsh criticisms of the legislation on this topic that has been adopted in Australia to date, especially the Model Forensic Procedures Bill. My view is that the DNA legislation in most jurisdictions – including Victoria – is a major impediment to the public and legal acceptance of DNA identification in Australian policing.

My approach differs substantially from some other participants in the debate on DNA identification. Many supporters of DNA identification – including many police groups – call for *less* regulation and *more* powers for DNA sampling. Many opponents of DNA identification – including many civil liberties groups – call for *more* regulation and *less* powers for DNA sampling. On the other hand, my call is for both *more* regulation and *more* powers.

Accordingly, in the discussion below, I outline the case for expanding police powers to obtain sample compulsorily and for tightening the existing regulation of DNA sampling in Victoria's *Crimes Act*. My key suggestion (Suggestion 12) is for a new investigative power, supervised by a court, for compulsory sampling of groups of up to 10 (or, in more restricted cases, larger 'mass' DNA sampling) for the limited purpose of investigating a specific crime. For a variety of reasons, I oppose the existing reliance on consensual DNA sampling in most contexts and the sampling of a person suspected of one crime to test their connection with other crimes for which the person is not a suspect.

My response to the Discussion Paper focuses on questions 1 to 3, which concern general investigative powers in relation to DNA sampling. The remaining questions are dealt with only briefly, if at all. As a necessary foundation for my discussion of investigative powers, I address issues of the adequacy of the existing regulating of DNA sampling in the *Crimes Act*. I am happy to supplement my submission on any of these topics with answers to any further questions from the Committee, either at the public hearings or in writing.

Preliminary Issue: loopholes and deficiencies in the Crimes Act's regulation of DNA sampling

All policing involves questions of balancing social needs for investigation against individual needs for privacy. The investigative benefits of DNA identification are well known.[1] However, DNA sampling involves three distinct intrusions into individual privacy. The physical obtaining of a sample intrudes on **bodily privacy** (i.e. the physical integrity of a person's body), the analysis of the sample intrudes on **genetic privacy** (i.e. the information contained in a person's genes) and the use of information derived from that analysis intrudes on **behavioral privacy** (i.e. information about where a person has been, what they have done and who they are related to.)

In my view, the investigative benefits of DNA identification outweigh *all* of these infringements of privacy. The debate over DNA identification *ought* to be about which investigative uses of DNA sampling are legitimate in modern day Victoria, including practical issues such as cost-benefit, accuracy and accountability. Unfortunately, the debate about DNA identification continues to be tied up with arguments about privacy. The main reason is that Victoria's legislation contains loopholes, out-of-date provisions and clumsy, unimaginative drafting that have given considerable legitimacy to concerns that DNA identification will be improperly used in ways that do not justify intrusions into individual privacy. Accordingly, it is important that, before the Committee addresses proposals for the expansion of police powers with respect to DNA sampling, it should close the gaps in the regulation of the use of those powers and remedy the parts of the present legislation that are poorly drafted.

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[1] See my and Gregor Urbas's paper, 'DNA Identification in the Criminal Justice System' (2002) *Trends & Issues in Crime and Criminal Justice* 226, available at www.aic.gov.au.

In the discussion that follows, I have set out a number of suggestions for changing and modernizing the *Crimes Act's* regulatory scheme. My discussion addresses, in order, three questions about DNA sampling that relate to the three aspects of privacy I outlined above: First, how should DNA samples be obtained? Second, what information should be obtained from those samples? Third, what use should be made of information obtained from those samples?

(a) How should DNA samples be obtained?

The first step in DNA identification is to obtain a bodily sample suitable for genetic analysis. The obtaining of DNA samples is regulated in Victoria by ss 464R – 464ZGF of the *Crimes Act*. Unfortunately, this regulation is flawed in two ways:

First, the *Crimes Act's* regulation only covers the obtaining of DNA samples by 'forensic procedures' (i.e. the removal of bodily samples *directly* from an individual's body.) However, investigators can also obtain DNA samples by gathering bodily samples that are no longer part of a person's body. For example, investigators can collect a cigarette butt smoked by a person, a glass they've drunk from, utensils they've eaten with, tissues they've blown their nose with, condoms they've used, saliva they've spat, hairs they've shed, blood they've bled, etc. This gathering can either be done entirely lawfully (e.g. where the sample is left in a public place, such as a rubbish bin or the street) or using non-forensic investigative powers, such as search warrants or random breath tests. The informal gathering of DNA samples is not a mere theoretical possibility; it has already happened in numerous cases, here and overseas. However, the drafters of Victoria's legislation – and the Model Bill – appear to have neglected this possibility altogether.

Given the availability of compulsory DNA sampling orders in Victoria, the investigative use of these informal techniques for gathering DNA samples ought to be unnecessary. The use of informal methods for gathering DNA is invasive of people's legitimate expectations of privacy (such as the freedom to drink, spit or blow their nose without incriminating themselves). Also, the continuing non-regulation of these methods is an invitation to investigators to avoid the inconveniences of following the formal procedures set out in the *Crimes Act*. Moreover, the regular use of these methods will lend plausibility to fears that the police may plant a person's DNA sample at a crime scene.

In some cases, the use of informal methods in preference to formal procedures may be legitimate, notably where the police need to obtain a

sample without alerting a suspect of the police's interest. However, such covert activity, which is analogous to other techniques for covert surveillance, should be governed by warrant, akin to those in the *Surveillance Devices Act 1999*, to ensure proper levels of external supervision and accountability.

Suggestion 1: The informal gathering of a known person's DNA sample other than using a formal forensic procedure regulated by the Crimes Act should be explicitly banned. If the police need to gather a person's DNA sample covertly, then they should obtain a special warrant for that purpose.

Second, the *Crimes Act's* regulation of physical process of DNA sampling relies on a clumsy, difficult and out-dated distinction between 'intimate' and 'non-intimate' procedures. Under the Act, buccal swabbing and blood sampling are classified as 'intimate', while hair pulling is classified as 'non-intimate'. In reality, none of these procedures ought properly be regarded as intimate. Especially in comparison to other accepted parts of criminal process, such as arrest, detention, search (including strip search), surveillance and some non-DNA bodily procedures, they are mild and trivial. In particular, *properly performed*, they involve minimal pain, intrusion or loss of dignity (such as removal of clothing.)

What is important is to ensure that the right procedures are used in the right context. The crucial distinction ought to be between situations where an individual does not *physically* resist to DNA sampling and the rare situation where an individual does *physically* resist. In the former situation, it is clear that a buccal swab, self-administered by the individual, is the easiest and least intrusive method for obtaining a DNA sample. However, in the latter situation, a performance of a buccal swab would be both dangerous and degrading, while hair pulling or blood sampling should be appropriate. There is a simple method for distinguishing between these two situations: the subject should be invited to self-administer a buccal swab. If the subject, performs the self-administration properly, then the sampling is over. If the subject refuses (or merely pretends to comply), then hair pulling or blood sampling should be used.

The *Crimes Act* should abandon specious questions of intimacy or non-intimacy and instead set out in clear terms which procedure should be used in which circumstance. It should also provide for instances where an individual has a legitimate preference for a particular sampling method or

where there is a particular investigative need to obtain a particular type of sample.

It is also important to ensure that otherwise benign procedures are not performed in an unnecessarily brutal manner. While the *Crimes Act* already contains some appropriate provisions governing issues such as the removal of clothing and the amount of blood to be sample, there is room for improvement. In particular, attention should be given to the Codes of Practice under the UK PACE. Consideration should be given to incorporating equivalent codes of best practice into Victorian law.

Suggestion 2: The distinction between 'intimate' and 'non-intimate' procedures should be abandoned for DNA sampling. Rather, the *Crimes Act* should set out clear rules about which one of the three main sampling methods should be used in particular circumstances. Buccal swabbing should be the preferred procedure in all cases except where the subject physically resists. Likely physical resistance should be ascertained by inviting the subject to self-administer a buccal swab. If the subject physically resists, then buccal swabs should never be used, and hair pulling or blood sampling should be used instead. The rules should incorporate exceptions for legitimate individual preference or investigative need. Detailed codes of best practice should be incorporated to ensure that each of the three DNA sampling procedures is performed in a minimally intrusive manner.

(b) What information should be obtained from DNA samples?

Once DNA samples are obtained, they must be analyzed. Section 464ZGG regulates the analysis – actually the 'supply for analysis' – of samples *to obtain a DNA profile*. Unfortunately, this leaves *other* analyses of the sample unregulated.

The DNA molecule contains considerable personal information, in the form of the details of a person's genetic make-up. Genetic privacy is an issue of considerable sensitivity to the public. Contemporary DNA identification does not – and ought not – involve any analysis of this information. To be useful to investigators, DNA profiles must be derived from the 'non-coding' portions of the DNA molecule. There is no reason why investigators should be permitted to analyze the coding portions of the molecule. If investigators were explicitly barred from doing so, then much public concern about DNA sampling would be alleviated.

It may be that future developments in genetic science will someday yield techniques that render the analysis of coding portions of the genome useful to investigators. However, that is no reason not to ban such analysis now. Indeed, given the likely controversy surrounding such techniques of investigation, any decision to adopt them in Victoria should be Parliament's, not the police's.

Suggestion 3: The investigative analysis of DNA samples should be restricted to the 'non-coding' portions of the DNA molecule. Other investigative analysis of the molecule, especially the analysis of an individual's genes, should be expressly barred.

(c) What use should be made of information obtained from a DNA sample?

Once a DNA profile has been derived, it must be compared with other profiles to be of any investigative worth. Such comparisons can yield considerable information about where an individual has been, what they have done and who they are related to, i.e. how they have behaved. The invasion of people's behavioral privacy is the key issue in DNA sampling; it is much more significant than the invasions of either bodily or genetic privacy.

The 'matching' of DNA profiles is regulated directly by s464ZGI (and also indirectly by the remainder of ss464ZGG – 464ZGK.) These provisions are taken directly from Division 11 of the 2000 draft of the Model Forensic Procedures Bill. Like most of that Bill, they are models of terrible drafting and clumsy regulation. In particular, the provisions have three major deficiencies:

First, the provisions are only a partial regulation of investigative dealings with DNA profiles. Sections 464ZGG – 464ZGK only apply to profiles that are for, on or from *a DNA database system*. However, databases, while facilitating mass comparisons, are not necessary for the individual comparison of profiles. Individual comparison can occur *without* the use of a DNA database. For example, investigators could ask technicians to derive a profile from a sample, which is then kept in a police file and compared to other profiles when needed. The *Crimes Act* leaves such dealings with DNA profiles that are *not* included on the database *entirely* unregulated. This loophole must be closed.

Indeed, there seems little justification for permitting investigators to keep any record of DNA profiles outside of the official DNA database.

Consideration should be given to making official DNA databases the exclusive medium for storing and comparing DNA profiles used by investigators.

Suggestion 4: The *Crimes Act* provisions regulating dealings with DNA profiles should be extended to include profiles that are not stored on a DNA database. Consideration should be given to banning all non-database storage and analysis of profiles altogether.

Second, the provisions on matching do not distinguish between the two distinct types of DNA profile comparisons that can be made. Most typically, a DNA profile from a known person is compared with a DNA profile from an unknown sample to establish whether the known person is the source of that sample. However, an alternative approach is to compare DNA profiles from two known people to see if those people are related by blood. For example, a variety of techniques can be used to determine who a person's parents or children are. In some cases, relationship comparisons can be useful to a criminal investigation, for example to determine if a rape suspect is the father of a child born of the rape (or an aborted fetus from the rape.) However, such cases will obviously be quite rare. Issues of parentage and relatedness are highly sensitive pieces of individual information. It is vital that people who provide DNA samples can be assured that their DNA will not be analyzed to reveal significant personal information about how they are related to when such information is irrelevant to any criminal investigation. Accordingly, the use of DNA profiles to derive information about blood relationships should be specifically regulated in the *Crimes Act* and strict specific sanctions should be enacted to bar unnecessary tests of parentage or relatedness.

Suggestion 5: The testing of blood relationships using DNA profiles should be the subject of specific provisions in the *Crimes Act*. Strict sanctions should be imposed on any investigator who uses DNA profiles to test parentage or relatedness except in the rare circumstances when such facts are relevant to a particular criminal investigation.

Third, the table in s464ZGI of the *Crimes Act* is a clumsy and inappropriate device for regulating the crucial question of which unknown person profiles can be compared to a profile derived from DNA sampling of a known person. Apart from myriad difficulties of drafting and interpretation, the basic problem is that table attached to this section is egregiously simplistic. The categories of profiles used in the table are overly broad. Questions of appropriate comparisons between most of these categories are never a 'yes'

or 'no' affair, but rather depend upon distinguishing different categories of profiles that are suitable for matching in different contexts.

An example is the category of 'crime scene' profiles. Not all profiles taken from DNA samples found at a crime scene will be from the perpetrator of a crime. Rather, some of these profiles will be from the victim, from other witnesses or from people who had passed through the scene at other times. It is wholly inappropriate, therefore, that s464ZGI simply gives a blanket endorsement to the matching of profiles from any crime scene with profiles from any other crime scene. For example, this endorsement may discourage victims of crime who have committed other crimes themselves from reporting crimes to the police. Clearly, separate matching rules should be adopted for each category of crime scene profile. The fact that, in some cases, it will be difficult to discern the particular origin of sample is no reason to refrain from enacting rules where that origin is known

A further example is the category of 'missing person' profiles. Section 464ZGI gives a blanket endorsement to the mass comparison of any missing person's profile with any crime scene profiles. There is an obvious investigative purpose for comparisons between a missing person profile and some crime scenes, i.e. to discern if the missing person was a victim of another crime. But why should that profile be compared to *all* crimes scenes, e.g. including crimes committed before that person went missing? Again, the unfortunate effect of the approach of s464ZGI is to force parliament to choose between two inappropriate options. Saying 'no' to matches with crimes scenes would have denied investigators an opportunity to track that person; however, saying 'yes' to all matches with crime scenes might lead relatives of that person to be reluctant to submit to DNA profiling, because of a fear that police will uncover skeletons in the missing person's (or the relatives') closet.

I could go on, but the point should be clearly enough. Clause 82 of the Model Forensic Procedures Bill (from which s464ZGI was taken) is a colossal failure of drafting and policy imagination that, I believe, will ultimately greatly hamper the introduction of DNA identification in Australia. Victoria should avoid this mistake.

Clearly, a more nuanced approach is required. The best approach would be to define narrower categories of profiles than the broad 'indexes' utilized by the Model Bill. The resulting rules may be too complex to put in a table, but an appropriate policy on matches is more desirable than a simplistic one. If necessary, rather than using legislation, this topic could be regulated by

flexile codes of practice, such as those used in the UK PACE. My point is that these sensitive issues should not be left to the good intentions of investigators or the database administrators. A single instance of rogue conduct, or even the appearance of such conduct, would be catastrophic to public confidence in the DNA identification system. It may also have broader negative effects on policing, especially cooperation from victims and the relatives of missing persons.

Suggestion 6: Section 464ZGI should be replaced with more detailed provisions regulating the matching of particular categories of DNA profiles. The present broad categories of DNA profiles should be replaced by a greater number of more specific categories, to allow vital issues of policy to be regulated by the legislature, rather than left to investigators of the administrators of the database. These more detailed regulations should be placed either in the body of the *Crimes Act* or in a regulatory code of practice. Particular categories of concern are the treatment of profiles from victims and missing persons.

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

If the *Crimes Act* is left in its present poorly framed state, then any discussion of the merits of a 'requirement to provide a DNA sample' will be founded on shifting sand. On the other hand, if the various flaws in the current regulatory scheme are resolved, it will be safe to proceed on the basis that any sampling, analysis or matching authorized by a 'requirement to provide a DNA sample' will be strictly limited to a proper investigative purpose within the bounds approved by parliament.

My view is that, once DNA identification is properly limited to uses necessary for criminal investigation, the apparent conflict between policing and privacy disappears This is because the benefits of the use of DNA identification by police clearly outweigh the mild infringements of privacy involved in *appropriately regulated* DNA sampling. For the reasons discussed above, within appropriate limits, the infringement of bodily privacy will be mild, there will be no infringements of genetic privacy for the reasons discussed above and the only behavioral privacy infringed will be criminal behavior.

(a) Sampling everyone?

It might seem that, once the privacy issues have been dealt with in this way, then everyone should be 'required to provide a DNA sample'. Indeed, the arguments for a universal database are quite compelling. Nonetheless, in the short (and, perhaps, medium) term, problems in the practicalities of the use of DNA identification by the police merit a more cautious approach. Three problems of note are:

- **Stigma:** Although DNA identification can be effectively used by investigators on suspects and non-suspects alike, it is clear that, in the view of the public, DNA sampling still carries the stigma of police suspicion. Accordingly, police overuse of DNA sampling on non-suspects would damage relations between police and the community, to the detriment of both investigative and non-investigative policing functions. A precondition for uniform sampling or sampling of entire categories of people is popular acceptance, akin to the current acceptance of 'random' breath testing.

- **Errors:** As the Discussion Paper notes – but, contrary to public belief and, unfortunately, the stated beliefs of some Victorian parliamentarians – DNA identification, while very reliable, is *not* error-free. [2] Accordingly, no-one should be *unnecessarily* exposed to such a risk of error. This is particularly the case with mass comparisons on the database, where it may be very hard for a wrongly matched 'suspect' to demonstrate that an error has occurred.

- **Cost:** DNA identification is costly and is of limited or no efficacy with respect to the investigation of many crimes, i.e. where identification is not an issue or no crime scene profile is obtained. Any decision to expand the use of DNA identification should be made only after a careful, informed cost-benefit analysis. Overuse of DNA identification may drain resources from other aspects of policing. Accordingly, the issue of the use of resources is of public concern and should not be left to the discretion of the police.

None of the above reasons is cause to abandon DNA identification. However, each must be carefully considered when deciding who should be 'required to provide a DNA sample' in contemporary Victoria. It may be that, in the future, these concerns may diminish to the point that a universal database becomes feasible. Clearly, that is not the case today.

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[2] See my and Gregor Urbas's paper, 'DNA Identification in the Criminal Justice System' (2002) *Trends & Issues in Crime and Criminal Justice* 226, available at www.aic.gov.au.

Suggestion 7: A universal requirement to provide a DNA sample should not be adopted. Once issues of regulation, stigma, error and cost have been sufficiently addressed, a future parliament should give fresh consideration to such a requirement.

(b) Sampling by consent?

Until the late 1980s, Victorian investigators obtained DNA samples by consent. When the Coldrey Committee recommended amendments to the *Crimes Act* to permit the taking of DNA samples by orders, the Committee recommended that consensual procedures be retained. The *Crimes Act* adopted this recommendation and, indeed, mandated consensual procedures as the preferred approach, with orders as a fall-back option when consent was rejected.

Although a primary reliance on consent to obtain DNA samples has superficial appeal and may have been an appropriate approach in the past, its continued use in Victoria is both unnecessary and dangerous. I have discussed the problems of reliance on consent in my published research.[3] Briefly, the problems are:

- Some investigators may rely on a refusal to consent to a DNA sampling request as a sign that the person who refuses has something to hide. This is an illegitimate breach of the privilege against self-incrimination.
- The nature of the relationship between police and the public makes it difficult to distinguish between genuine consent and pressured submission. This is especially true for police interactions with people who are the subject of a criminal investigation and prisoners, particularly as those people will be aware that a refusal of consent will be followed up by a compulsory order.
- Police reliance on 'sham' consents will damage the police's relationship with the community and the dignity of everyone involved in the procedure. Perhaps more importantly, all evidence derived from sampling based on such consents will be susceptible to later legal challenge.

[3] See 'Something to Hide: DNA Databases, Surveillance and Self-incrimination' (2001) *Current Issues in Criminal Justice*; "A Critique of the Police`s Right to Ask for DNA" in *Use of DNA in the Criminal Justice System* (Sydney Institute of Criminology, 2001)

- The notion of 'informed consent' is especially meaningless in the context of interactions between police and subjects of an investigation. The police cannot reveal sensitive investigative information to suspects; and yet, informed consent is meaningless unless this information is available. Continued use of the notion of informed consent is, accordingly, an additional sham and a further ground to support later legal challenges.

In most cases, these unfortunate problems are almost entirely *unnecessary*, because the police can obtain an order to obtain a DNA sample regardless of consent. Relying on such orders, rather than consent, does not necessitate any greater use of force than presently occurs, as such force is only necessary when a person physically resists. The use of orders is both more honest and a safer legal footing than reliance on so-called 'consent' (whether 'informed' or otherwise.) In NSW, the NSW Parliament's Law and Justice Committee has recommended that consent should no longer be relied upon when compulsory orders are available.

Suggestion 8: The Victoria's *Crimes Act* should be amended to abolish the use of requests for consent to DNA sampling in circumstances where compulsory orders are available.

I would go further than the NSW Committee in one respect. I would abolish the use of consent even when compulsory orders are not available, if the purpose of the sampling is to test whether or not the individual sampled has committed a crime. If there is a legitimate investigative need that is not satisfied by existing regimes for compulsory orders, than the availability of compulsory orders should be expanded. Compulsory orders are more accountable than requests for consent, and, in practice, no more coercive.

The only occasion when consent should continue to be used is when the police want to take DNA samples from an individual for a purpose *other than* testing whether or not that individual has committed a crime. The main examples are victims of crime, other people present at a crime scene and relatives of missing persons.

Suggestion 9: Compulsory orders should be made the *exclusive* basis for obtaining DNA samples when the investigative purpose is to test whether or not the person sampled has committed a crime. Investigators should not rely on consent, in the absence of an order, except where the consent is from a person who is sampled for a reason other than to test

whether or not they have committed a crime, e.g. victims, witnesses and relatives of missing persons.

(c) Sampling for cold hits?

An almost unique feature of DNA sampling is its potential utility in exposing *unsuspected* links between known individuals and unsolved crimes. It is this feature that has driven the establishment of DNA databases. A 'cold hit' (i.e. an *unsuspected* link) can be generated if a known person's profile is compared to all of the profiles from unsolved crimes. My view is that DNA sampling for this purpose should be distinguished from DNA sampling for the more limited purpose of testing a *suspected* link between a known person and an unsolved crime (i.e. a 'warm hit.') Under s464ZGI, a precondition for sampling for a 'cold hit' purpose can only be done there is a 'yes' in column 2 opposite the category in which the known person's profile falls. I will refer to such sampling as 'cold hit' sampling.

Who should be subjected to 'cold hit' sampling? As I outlined earlier, this depends on the issues of stigma, exposure to DNA identification errors and cost. It is useful to divide the discussion between offenders and suspects.

(1) 'Cold hit' sampling of offenders

In my view, it is appropriate that serious offenders are subjected to compulsory cold hit sampling. The basic rationale is that serious offenders are an especially compelling category of likely recidivists. Moreover, the fact that serious offenders have been convicted and punished means that the resulting stigma from undergoing an additional investigation for other crimes is acceptable. I disagree with the view expressed by some that exposure to cold hit sampling is a retroactive increase in punishment.

The difficult question is how far this category should be extended. There is much to be said for the Victorian regime that limits compulsory orders on offenders to those where a court makes a specific finding of a particular need to obtain a sample. However, judicial fact-finding of this sort is obviously an expensive procedural process and its operation in practice is uncertain. On the balance, I support a switch to the classification of particular classes of offenders by the legislature as automatically subject to compulsory cold hit sampling, regardless of any judicial (or other) fact-finding about individual likelihood of recidivism. I have no strong views on how that category should be defined, although attention should obviously be paid to the likelihood of recidivism (with respect to particular crimes) and to issues of cost. However, for the purposes of equity in inter-jurisdictional database comparisons, it

would be highly desirable that a uniform approach was taken to this definition across Australia.

Suggestion 10: Convicted offenders' susceptibility to a compulsory requirement to provide a DNA sample that can be compared to all profiles from unsolved crimes should be determined categorically by Parliament, rather than being left to a factual determination of specific need in each case. The definition of this category should depend upon a cost-benefit analysis, the likelihood of recidivism and the desirability of a uniform definition of this category across Australia.

(2) 'Cold hit' sampling of suspects (and arrestees)

On the other hand, my view is that there is *no* rational policy basis for exposing anyone suspected of a crime to DNA sampling for the purpose of detecting unsuspected criminality. This is because mere suspicion provides no basis for likely recidivism. Moreover, the use of a criterion of mere suspicion as the basis for taking a cold hit sample will have important negative effects:

- The legal definition of 'suspect' is unclear and hard to define. Accordingly, if cold hits are founded on a compulsory order applicable to a 'suspect', then they will be susceptible to later legal challenge.

- Allowing the mere criterion of 'reasonable suspicion' to be a basis for taking a 'cold hit' sample will give police officers an incentive to expose individuals to coercive powers, such as arrest and search, on the basis of dubious levels of suspicion.

- The attachment of such serious consequences to the concept of 'reasonable suspicion' may lead the courts to develop a restrictive definition of this concept. This will hamper the legitimate use of other police powers that also depend on the 'reasonable suspicion' criterion.

- It is also difficult to define when a 'reasonable suspicion' ceases. (Compare the case with offenders, whose status can only change if they are acquitted on appeal or are pardoned by the executive.)

- A difficult question will arise as to what should happen if a suspect is subsequently cleared of the crime for which they were suspected, but a cold hit has been discovered in the meantime.

Unfortunately, nearly all Australian jurisdictions have already approved the taking of cold hit samples from suspects, despite the above problems. To my knowledge, this has occurred without any consideration of the above difficulties whatsoever. In the case of the Model Bill, the 1999 draft contained a provision barring the use of suspect samples to generate cold hits. This provision disappeared without any explanation in the 2000 draft. My view is that Australian jurisdictions will come to regret their willingness to use mere suspicion as a criterion to fill up DNA databases. Victoria should not follow this trend.

If, contrary to my view, the Committee believes that 'cold hit' sampling of some suspects is required, then it should define this category by a narrower criterion than suspicion. The criterion of arrest is not useful for this purpose, as it turns on the requirement of reasonable suspicion and, therefore, is open to the same objections listed above. Rather, a better (although still not ideal) criterion for the cold hit sampling of suspects is the charging of that suspect with an offence that, if there was a conviction, would justify the taking of a 'cold hit' sample. Using the criterion of 'charging' at least brings some measure of accountability into the selection of suspects for cold hit sampling and reduces (but does not eliminate) the possibility that innocent people will be exposed to investigation for unsuspected crimes.

Suggestion 11: Suspects should not be sampled for the purpose of testing *unsuspected* links between the suspect and unsolved crimes. The database should not be used to compare suspect profiles and profiles from crimes for which that person is not a suspect. If, contrary to this suggestion, such speculative sampling and matching is permitted on suspects, then it should be restricted to suspects who have been *charged* with a 'forensic sample' offence.

(d) Sampling for warm hits?

Most of the objections to 'cold hit' sampling outlined above do not apply if the purpose of sampling is to test a suspected link between a person and a crime *and* the matching of profiles is limited to that purpose. The present *Crimes Act* restricts sampling of suspects to this purpose, but s464ZGI allows for unlimited matching of a profile derived from such a sample against all crime scenes. Section 464ZGI only provides for 'limited purpose' matching in the case of volunteers. On my view, the permissible matching of suspect profiles (and certainly uncharged suspect profiles) should be similarly limited, with the limited purpose defined as the purpose of investigating the crimes that the suspect is reasonably suspected of

committing. I refer to sampling done with this limitation in place as 'warm hit' sampling.

If the police suspect someone of a crime, then a requirement to provide a 'warm hit' sample is obviously desirable because of the prospect of either confirming that suspicion or dispelling it, to the benefit of suspect and police alike. Accordingly, if investigators have obtained a crime scene sample believed to be that of the perpetrator of that crime, then all suspects for that crime should be required to provide a 'warm hit' sample. Section 464T(c) of the *Crimes Act* achieves this goal with respect to sampling powers, although s464ZGI needs to be narrowed to ensure that this 'warm hit' sampling power is not misused as a 'cold hit' sampling power.

On my view, with appropriate regulatory restrictions (especially narrowing s464ZGI), there is a strong case for s464T to be substantially broadened to cover a wider category of potential suspects than the present *Crimes Act* allows. The *Crimes Act* uses the traditional criterion of 'reasonable suspicion' to define who is a suspect. The 'reasonable suspicion' requirement is usually regarded as only capable of attaching to one person at a time. That criterion was developed by the courts and parliaments to restrict intrusive powers, such as arrest, detention, search and seizure. My view is that DNA identification has unique investigative utility for determining who is guilty when there is more than one possible suspect and is less intrusive than more traditional coercive powers. Accordingly, I would recommend that the requirement to provide a 'warm hit' sample should be applicable to *groups* of people, where investigators reasonably suspect that one of the group has committed a crime for which a crime scene profile has been obtained, but investigators are unable to narrow that suspicion to a particular individual. For example, the power might be applicable where the police suspect that a crime was committed by a member of the victim's household or workplace, or by a narrow subset of individuals at the vicinity of a crime committed in a public place.

I conceive of the power to sample groups as useful where traditional approaches to crime investigation have substantially narrowed the field of investigation, but have been unable to narrow the focus to a specific individual (who might then have been subjected to traditional investigatory powers, such as arrest, interrogation and regular DNA sampling.) However, a group sampling power should not be used as a pretext for undifferentiated mass sampling of portions of the population. Accordingly, the number of people who are part of a 'group' for this purpose should be limited. As a

starting point, I would suggest a limit of testing, under the above criterion, to groups of no more than 10 people. However, in the case of especially serious crimes, such as murder or rape, it may be desirable to subject larger groups – perhaps up to 1000 people – to compulsory samplings, akin to the 'mass screenings' that have occurred elsewhere.

My proposal for compulsory 'group' sampling is made in the context of my other proposals regarding the regulation of DNA sampling. In particular, three crucial points must be noted. First, my proposal is for compulsory, not voluntary groups sampling. I reiterate my view, stated earlier, that a reliance on so-called 'consent' in these circumstances is both unnecessary and dangerous, both socially and legally. Second, as discussed below, any sampling of groups (as opposed to suspects in lawful custody) must follow from a court order, not a police order. Third, the sole use to be made of profiles derived from group sampling must be the investigation for the crime on which the group suspicion is based. DNA sampling of groups cannot be used to investigate 'cold hits.'

Suggestion 12: Section 464T, which permits the compulsory sampling of suspects for the purpose of testing a suspected link between a suspect and a particular crime where a crime scene profile has been obtained, should be retained and *expanded*. Compulsory sampling to test suspected links with particular crimes should be permitted on all members of a defined group of up to 10 people where investigators have a reasonable suspicion that one of the group has committed a crime, but are unable to narrow that suspicion to a particular individual. For especially serious crimes (i.e. homicide and rape), consideration should be given to a similar power to compulsorily DNA sample groups of up to 1000.

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

The chief constraints on DNA sampling are the legislative preconditions for the sampling and the rules that govern what happens after the sampling. Nonetheless, some of the preconditions involve exercises of judgment. If investigators are permitted to make those exercises of judgment on their own, then there will always be scope for concern that those judgment calls will be influenced by the needs of the investigation, rather than a sound factual basis. This concern will be reduced if there is a degree of court

scrutiny of these judgments, akin to the warrant system for searches of property.

There is much to be said for a regime where only a court has the power to make a compulsory DNA sampling order. Nonetheless, it is also appropriate that DNA identification become a regular part of Victorian criminal investigation; essentially, this necessitates allowing such orders to be made by the police in routine cases. The question is: which cases are appropriate for (relatively unsupervised and unaccountable) police orders and which are appropriate for court supervision? There is no 'right' answer to this question.

My view is that a simple and distinction can be made between people who are in *lawful custody* (i.e. prisoners and arrestees) and people who are not. The former category represents the bulk of any routine use of DNA sampling. Moreover, such people, by virtue of their confinement, are automatically protected by an array of legal rights that (while imperfect) can contribute to the accountability of any decisions about DNA sampling. Note: people who 'voluntarily' assist the police with their inquiries at a police station are not in lawful custody, as they are not under arrest.

On the other hand, if the police lack the authority to arrest a person, then they should not have the authority to obtain a DNA sample from that person. Rather, they should apply to a court for such authority in individual cases, as they do to obtain a search warrant. Obviously, a court order is an essential precondition for a compulsory power to perform group or mass screenings, as proposed above.

Suggestion 13: Where a person is in lawful custody (i.e. in prison or formally under arrest) and other preconditions for compulsory sampling are satisfied, then the police should be able to order DNA sampling without the involvement of a court. A court order (and continuing court supervision) ought to be a prerequisite for taking a DNA sample from people who are *not* in lawful custody (including people who 'voluntarily' attend at a police station), where the sample is to be used to test whether or not that person committed a crime.

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?

For the reasons outlined earlier, my view is that DNA samples should only be taken from so-called 'volunteers' when the purpose of the sampling is *not*

to determine whether the 'volunteer' is or is not guilty of an offence. That is, sampling by consent should be limited to victims of crime, relatives of missing persons and people who provide samples for *solely* exclusionary purposes, such as innocent visitors to a crime scene who must be eliminated as the source of a suspected perpetrator sample. Clearly, as I noted earlier, there must be careful regulation to assure that profiles taken from such persons are not used to test that person's involvement in a crime, or else future cooperation with the police by victims and others will be endangered. Apart from these remarks, I have no comment on what rights victims and others should have over samples they give.

Where the purpose of the sampling is to test whether or not the volunteer is guilty of a crime, suspected or otherwise, then consent should never be relied upon. Rather, where there is an investigative need for such sampling, compulsory orders should be used. Compulsory orders are more accountable and less susceptible to legal challenge than so-called consensual sampling.

I acknowledge the theoretical possibility that a person who cannot be made the subject of a compulsory order nonetheless genuinely desires to give a sample to the police, either out of civic duty or to clear any possibility of suspicion. Some such persons may be covered by the broader compulsory powers I've proposed (i.e. convicted child offenders who wish to avoid future visits by the police; mass screenings for serious crimes). However, for the remainder, my view is that it is safer to deny the offer of help, then to engage in the slippery slope of distinguishing between genuine consent and 'sham' consent.

If the Committee rejects my suggestion for the exclusive use of compulsory orders for test of guilt or innocence of the subject, then it should ensure that any so-called consensual or voluntary sampling is placed under close legislative and judicial scrutiny. The police should not be encouraged to use so-called consents as a device for avoiding the proper regulation of DNA sampling. Accordingly, prior court approval should be required before a request for consent can be made or a valid consent given, either from individuals or in the context of mass screenings.

Suggestion 14: Apart from victims, witnesses and relatives of missing persons, there should be no voluntary DNA sampling in Victoria. Rather, all sampling of persons for the purpose of testing whether or not that person is guilty of a crime should be based on a compulsory order. If the Committee rejects this view, then very close legislative and judicial scrutiny should be required as a precondition for consensual

sampling. In particular, prior court approval should be obtained before a so-called 'volunteer' can be sampled, both in individual cases and in the context of 'mass' screenings.

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

The case against so-called 'consensual' or 'voluntary' sampling is especially strong in the case of vulnerable goods. There are *no* safeguards that are adequate to ensure the validity of so-called 'consents' to DNA sampling by members of vulnerable groups. This is why reliance on consent should be barred in all cases when the purpose of the sampling is to test whether or not the 'consenter' has committed a crime. Rather, in all such cases, compulsory orders, including the extended powers I've suggested above, should be used.

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

I have no comment to make on the issue of post-conviction testing.

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

This issue is addressed in my and Dr Gregor Urbas's paper, 'DNA Identification in the Criminal Justice System' (2002) *Trends and Issues in Crime and Criminal Justice* 226, available at www.aic.gov.au. I have no other comments to make on the issue of the conclusions to be drawn from DNA matches.

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

I have no comment to make on the issue of accreditation and review of forensic laboratories.

8. Can the forensic sampling procedures, the sample and the DNA databases be made absolutely secure from unauthorized and improper practices? Are current provisions and penalties adequate?

There is at least one sort of improper practice with respect to DNA identification that *cannot* be prevented: the fraudulent planting of a person's DNA at a crime scene. It may be possible to secure a crime scene once it is brought to the police's attention; but nothing can secure a crime scene before that point.

Accordingly, the prospect of fraudulent planting of DNA will always be a *potential* issue in *every* investigation and trial involving DNA identification evidence. Because of this, any claim that DNA identification will guarantee – or even greatly improve – the accuracy of investigation and prosecution must be taken with a grain of salt. There is no such thing as perfect, fraud-proof evidence. Certainly, DNA identification evidence falls far short of that description.

Apart from the above remarks, I have no comment to make about unauthorized and improper DNA practices.

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?

I have no comment to make on the issue of the national DNA database.