

Your Reference  
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Enquiries  9269 0138



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Executive Officer  
Victorian Parliament Law Reform Committee  
Level 8, 35 Spring Street  
Melbourne 3004

GPO Box 4380 Melbourne 3001  
350 Queen Street Melbourne 3000  
DX 228 Melbourne  
Tel (03) 9269 0234  
Fax (03) 9269 0440  
[www.legalaid.vic.gov.au](http://www.legalaid.vic.gov.au)

Dear Ms Mason

Victoria Legal Aid (VLA) is Victoria's largest criminal law practice. By funding the private profession and using in-house legal staff, it undertakes over twenty thousand criminal law cases a year. The cases overwhelmingly involve marginalised Victorians at the lower end of the socio-economic scale. VLA employs an in-house team of over one hundred criminal law practitioners across all parts of the state (*Victoria Legal Aid, Sixth Statutory Annual Report 2000-01*). Therefore, we are able to bring a diverse and expert perspective to the *Inquiry into Forensic Sampling and DNA Databases*.

VLA has considered the Terms of Reference and the Discussion Paper for the Inquiry. The numbering in this submission reflects the issues enumerated in the Discussion Paper. Before specifically addressing the issues, however, Victoria Legal Aid has certain general comments to make:

- A major concern of VLA is the timing of the Inquiry, given that the Australian Law Reform Commission (ALRC) and the Australian Human Ethics Committee (AHEC) are presently conducting a significant joint inquiry into genetic testing and information. While very broad in nature, the Inquiry is also specifically looking at DNA sampling and profiling in the context of law enforcement and evidence in court proceedings, and is also considering the themes of privacy and ethics. This is a major national study and the VLA thinks it sensible and practical that the VPLRC Inquiry consider the outcomes and recommendations of the joint national inquiry before considering changes to the Victorian law.
- Victoria Legal Aid is qualified to speak about the legal aspects of the Inquiry. The scientific aspects and implications of the Inquiry require a specialised scientific knowledge. While the submission makes minor comment on scientific matters, VLA does not have a scientifically qualified capacity to provide critical comment.
- The VPLRC's Discussion Paper makes no comment on what some consider an equally important scientific field of study, ethics. This is a major element of the debate over DNA sampling and ought to be considered in the context of law reform

### **Issues**

1. In the context of widespread uncertainty about the reliability DNA evidence, it would be unwise to extend the range of people required to provide DNA samples. VLA is of the opinion that the current provision should remain in place, and is strongly opposed to the

routine sampling of people suspected, charged or convicted of any offence, or the compulsory sampling of those convicted of any indictable offence. Broadening the available population of people who could be sampled is inappropriate because:

- For individuals suspected or charged with minor offences, it is a disproportionate invasion of their personal liberty,
- There are inadequate legal protections in place for a regime of routine or compulsory sampling to merit public confidence,
- Scientific and public confidence in forensic sampling is relatively low

It is the strong and unambiguous position of Victoria Legal Aid that forensic sampling should be a tool to assist criminal detection rather than criminal investigation. This is an important distinction. DNA evidence ought to be deployed, along with other procedures, to confirm criminal investigations, rather than be used to investigate anyone who comes in contact with criminal administration. Routinely or compulsorily sampling anybody whom comes into contact with criminal administration and investigation is tantamount to an assault on the person and ought to be resisted. Victoria Legal Aid considers that the current provisions with respect to forensic sampling should stay in place. That is, police should only have the power to request a DNA sample from persons suspected of, charged with or summonsed for an indictable offence and for “forensic sample offences” as detailed in Schedule 8 of the *Crimes Act 1958*.

2. In relation to the issue of who should be empowered to order a DNA sample to be taken, Victoria Legal Aid reiterates a position it communicated to the Department of Justice last year. Before any DNA samples can be taken of persons reasonably suspected of committing an indictable offence, the police must obtain a court order from a Magistrate in an open court or from the Children’s Court. Judicial supervision of the process is fundamental to engendering confidence in the forensic process and is appropriate given the extent of the intervention to individual liberty. Coercive powers that have been granted to law enforcement agencies need to be balanced with the very important principle that the right to privacy and other basic human rights are not infringed without proper process. Police investigations must be subject to procedural fairness and the most appropriate way to safeguard this is through judicial review. The need for procedural fairness and judicial supervision in criminal matters far outweigh any arguments related to speeding up the approval process for sampling. The police force should not be given the power to order DNA samples and it is in fact unreasonable to ask police as a law enforcement body to exercise judicial power.
3. Persons who volunteer to provide a sample should be confident that the sample will not be interfered with, misused, or be used for purposes other than what they have consented to. **Persons who volunteer to be DNA sampled ought to be given a tamper-proof sample (as is the case for blood samples in drink driving cases) as well.** The DNA samples and records of volunteers ought to also be destroyed once the reason behind the voluntary action is no longer extant. Similar protections should also be afforded to persons who have been ordered to provide DNA samples. Currently, samples are destroyed, together with any information identifying the person;

- within 1 month after the conclusion of the proceedings and the end of any appeal period, if the person is charged but not convicted, or
- within 12 months, if the person is not charged (unless application is made to a magistrate or Children's Court for an extension)

The possession of personal information for at least 12 months is far too extreme given that the person is not charged with any crimes. Volunteers and persons not charged should have their DNA samples destroyed after 1 month, unless application is made to the court for extension.

4. Persons from disadvantaged social groups should be adequately protected by any forensic sampling regime. All persons, but particularly disadvantaged individuals, should be personally informed by the Court, where they are ordered to undergo a forensic procedure, of the meaning and implications of the forensic procedure. Victoria Legal Aid looks forward to the Committee's investigation and recommendation in relation to the protection of vulnerable groups.
5. The right of judicial appeal is a fundamental criminal justice principle and, therefore, any regime of forensic sampling must be subjected to this principle. All convicted persons have the right to appeal their conviction and if DNA sampling is able to assist a convicted person's case, there should be no barrier to them having access to the samples for the purposes of appealing a conviction. To facilitate access to forensic samples and ensure their credibility, Victoria Legal Aid is of the opinion that forensic samples (and the consequent analysis and records) should be held by an agency in which there is utmost public confidence.
6. We recognise that the goal of this Inquiry is to improve the reliability and efficiency of criminal investigations. This is a laudable aim but an extension of the regime of forensic sampling and DNA databases does not, in fact, achieve this. Recently, many cases have come to light in which forensic sampling procedures have demonstrated the unreliability and inefficiency of criminal investigation. The Lisoff and Renton cases investigated by the ABC *Catalyst* program (<http://www.abc.net.au/catalyst/stories/s591803.htm>) demonstrate how doubts, confusions and differing scientific opinions about forensic sampling impact negatively on the reliable administration of criminal justice. We note that the Committee acknowledges that "a 'match' between two DNA profiles cannot be taken as conclusive proof", however, we think that DNA evidence should not be accorded any greater priority than other evidentiary tools, such as fingerprinting, eyewitness accounts, or other proofs. The Committee should not be unduly swayed by scientific zealotry in relation to DNA and, moreover, ought to consider the limitations of DNA profiling in the context of other investigative techniques.
7. It is our understanding that, for the purposes of criminal investigation, DNA samples and DNA profiles are analysed and housed at the Victorian Forensic Science Centre, a unit of the Victoria Police. At the time of the submission we did not have access to the standards and safeguards at the VFSC. We are acutely aware, however, that there is a level of scientific debate about the accuracy and reliability of various sampling processes and the relative risks of contamination of samples (refer to para. 6). **The solution may be to take the sampling and storage of DNA out of the hands of the police authorities altogether and reassign it to an independent collecting service. In such a situation, police would have to go to court to get**

permission for the sample and then have to go to the independent service for the collection of it. The independent service would be authorised to take three (3) samples - one for the police, one for the donor or person charged and one to be kept for the for a prescribed period of time. On the face of it, this appears a better way of maintaining the integrity of the DNA collection and profiling system.

8. Forensic samples and DNA databases need to be made absolutely secure. As well as examining unauthorised access to samples and profiles in other jurisdictions, the Inquiry should also examine such occurrences in Victoria. How often has security of the samples and profiles broken down and what practices or technologies can be put in place to maximise the security of samples? The personal information about DNA samples and profiles stemming from criminal investigation must only be used (and for only a short time) for those purposes, and any trafficking of personal information into other areas of the public domain (for example, to employers, insurance, superannuation, etc) must be strictly prohibited.
9. In the context of the national DNA database, Victoria must maintain the high standards it has set for itself in relation to forensic sampling for law enforcement and criminal administration. Victoria should not lessen its evidentiary standards to equate itself with other jurisdiction that may have in place laws that infringe personal rights or established criminal law principles. While the ability to share DNA data will advance criminal investigations across the country and in Victoria, Victorian authorities must oppose any national moves to influence negatively the rigour of the DNA regime in this State.

### **Conclusion**

Victoria Legal Aid thinks that there is a need for a complete review of the legislative scheme concerning forensic procedures, and that there is a need to clearly articulate the nature of the discretion exercised by the court in granting such applications. However, these are not simple exercises and the VPLRC Inquiry ought to seek every assistance on this matter before making any recommendations to the Parliament. The joint ALRC and AHEC Inquiry has been studying the field of human genetic information for 17 months and the VPLRC Inquiry would be well advised to await the analysis and recommendations of the national Inquiry before it makes any decisions on reforming Victorian law.

Yours faithfully

**TONY PARSONS**  
**MANAGING DIRECTOR**