Office of the Victorian Privacy Commissioner

Submission to the Victorian Parliament Law Reform Committee

on its

Inquiry into Forensic Sampling and DNA Databases

17 July 2002
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I. Introduction

1. The context requires humility.

2. Our DNA is our “fate map”, as an anonymous writer beautifully put it.

3. Our knowledge of genetics is growing fast, but it is far from complete. That ignorance should make lawmakers humble, or at least wary.

4. This inquiry deals with one aspect of DNA, in one jurisdiction, in one country. Forensic DNA laws have been the subject of recent and ongoing inquiry elsewhere in Australia, while wider issues to do with DNA are being investigated here and internationally.

5. What the state does with DNA is part of a universal and unfinished story that raises fundamental issues about the sovereignty of persons.

Public policy interests

Law enforcement

6. The collection and analysis of DNA can be a powerful tool in the detection and investigation of crime. It can assist in proving the innocence of a person suspected, or even convicted, of a crime. DNA profiling may deter re-offending, where a potential offender sees a risk of a DNA profile being readily matched with hair or other genetic material left at the crime scene.

Privacy

7. The taking and retention of DNA samples and profiles necessarily impinges upon privacy. This could occur in a number of ways:

   a. interference with physical liberty, such as where police execute a warrant to arrest a person in order to carry out a court-ordered DNA test;

   b. interference with bodily integrity, such as where blood is drawn or hair is plucked;

   c. intrusion by the state into a person’s day-to-day life without specific grounds to suspect that person, such as where the police ask volunteers in a small community to come forward to provide DNA samples as part of a mass screening; and

   d. collection, use and retention of genetic information, such as where police for law enforcement purposes seek to match a suspect’s DNA with DNA that was found at a crime scene or seek to match DNA from a crime scene against a computerised DNA database of known persons’ DNA profiles.

8. These invasions of privacy may be authorised under law. Unauthorised invasions could occur, for example, where:

   a. more DNA samples, whether from a person under suspicion or not, are collected than is necessary during a particular investigation;
b. unreasonable force is used to obtain a sample from a person;

c. samples or the data extracted from them are retained when they ought to have been destroyed; or

d. samples or the data extracted are used for unauthorised purposes, unrelated to law enforcement.

Achieving the balance

9. Privacy and respect for human dignity need not be abandoned when balancing civil liberties with community safety. In many ways, privacy principles will enhance the integrity and legitimacy of DNA profiling by limiting collection to the minimum necessary to achieve the legitimate aims of law enforcement agencies, requiring its use to be in accordance with these aims, demanding secure storage of DNA material, and requiring its destruction or de-identification when the information is no longer needed. This symbiotic relationship is implicit in the CrimTrac slogan, “Good privacy is good policing”.

10. It is noted that CrimTrac reports that use of DNA for identification purposes is from non-coding genes (or “junk DNA”) that do not contain information that can used “to build up a physical picture of an individual, or identify race or age.” This is not a complete answer to the issues raised in this Submission. We do not know enough yet to state definitively that any data extracted from a person’s DNA reveals only this or only that. We can state that we believe, on present knowledge, that the data does not say more about a person than his or her DNA appears to match the DNA obtained elsewhere. The term “junk DNA” has a ring of arrogance. In any event, much of the discussion in this Submission is not simply about the data extracted at present from DNA samples and held by CrimTrac. It is also about the fundamental issues of when the law should permit DNA samples to be extracted from people and used.

11. Where privacy is required to give way systematically to competing public interests, it should do so only:

   a. under law;

   b. to the extent necessary to achieve precise objectives that have been articulated in advance in public by the appropriate decision makers; and

   c. with safeguards that ensure accountability.

12. Transparency and accountability reassure the community that what is sacrificed for greater safety and security is done so legitimately.

Special sensitivity of DNA

13. Genetic information is a particularly sensitive class of personal information that requires additional privacy protection, beyond that which might apply to other personal information (such as fingerprints or digital fingerscans).

14. The need for safeguards was recognised early during the development of forensic procedures laws by the Model Criminal Code Officers Committee. Briefly, the reasons are as follows:
a. Unlike fingerprints, DNA material contains much more information about a person. Fingerprints simply reveal a person's identity while DNA reveals a person's entire genetic blueprint. A databank of genetic information may attract researchers who want to analyse the samples for reasons that have nothing to do with forensic identification. Health and life insurers, whose business is pricing risk on the basis of information, have an obvious potential interest. It is necessary to guard against unauthorised or illegitimate uses of information obtained for particular purposes.

b. Because DNA matching seems so convincing, safeguards against tampering and contamination are essential. DNA evidence is not foolproof.

c. Success of the DNA database often depends on the cooperation of volunteers. Public confidence must be maintained in the fundamental rule that samples will be used only in accordance with informed, voluntary and specific consent.

d. In many situations, those whose DNA is sought will be in a vulnerable position relative to those seeking the DNA sample. For example, children, mentally impaired people and prisoners in custody are more limited than others in their capacity to give informed, voluntary consent.

e. Risk of negligence or rogue behaviour can never be eliminated, so independent audit and accountability measures are necessary in the supply and administration of a DNA database.

f. Procedures to protect the integrity of the DNA database, if they work, will enhance its reputation as a reliable investigative tool and have an effect on the extent to which the courts are prepared to rely on evidence derived from the database.
II. Background to Victoria’s forensic procedures law

15. Victorian law enforcement agencies have had the power compulsorily to obtain DNA samples from suspects and offenders since 15 March 1989, when the Crimes (Custody and Investigation) Act 1988 (Vic) came into effect. These provisions were substantially amended in 1993 and 1997.

16. The forensic procedures provisions are now contained in Part 3, Division 1, Subdivision 30A of the Crimes Act 1958 (Vic) (“the Crimes Act”). They enable collection of DNA samples from volunteers, suspects and serious offenders.

17. The Crimes Act was amended this year by the Crimes (DNA Database) Act 2002 (Vic), which came into effect on 22 May 2002. This amending Act facilitates Victoria’s participation in the national DNA database scheme administered as part of CrimTrac.

CrimTrac

18. In 1998, the Federal government committed $50 million over three years to establish the CrimTrac Agency. The aim of CrimTrac was to use new technologies to enable Australian law enforcement agencies to have rapid access to detailed, current and accurate police information across jurisdictional boundaries.

19. On 1 July 2000, the CrimTrac Agency was established under the Commonwealth Public Service Act. It reports to Parliament through the Minister for Justice and Customs. As a Commonwealth agency, it is bound to act in accordance with the federal Privacy Act 1988.

20. The CrimTrac Agency is underpinned by an Intergovernmental Agreement signed by the Australasian Police Ministers’ Council (APMC). The APMC is responsible for defining CrimTrac’s directions and key policies, setting new initiatives and appointing members to the CrimTrac Board of Management.

21. According to the CrimTrac Agency, its primary role is
to provide Australia’s police services with enhanced access to high quality operational information, much of which is personal information, collated from respective individual police services, and made available to all police services as and when required. The CrimTrac Agency does not collect personal information from individuals. Rather, in terms of the Privacy Act, it undertakes what are referred to as ‘third party collections’ from police services, which may in turn have collected the information directly from the individuals concerned. When information is provided through the CrimTrac Agency to the police it is for the purpose of criminal investigation and law enforcement.

22. CrimTrac is responsible for the following projects:
   a. a National Automated Fingerprint Identification System (NAFIS);
   b. a National Criminal Investigation DNA Database (NCIDD); and
   c. a CrimTrac Police Reference System (CPRS), which is to include a paedophile database.

23. In future, the CrimTrac is likely to integrate the following databases with the CrimTrac Police Reference System:
a. apprehended and domestic violence orders;
b. court notices/orders;
c. missing persons;
d. criminal histories;
e. charged persons;
f. persons of interest;
g. facial features/images (mugshots);
h. firearms register;
i. vehicles of interest and driver information; and
j. person warnings.

24. The Board of CrimTrac is generally responsible for the overall management of the Agency, including monitoring the implementation and ongoing operation of the appropriate data access controls, security and privacy regimes. The Chief Executive Officer is accountable to the Board and obliged to ensure that all CrimTrac Agency operations are compliant with relevant Commonwealth, State and Territory Acts, including the Commonwealth Privacy Act 1988 and the FOI Act 1982.

Model Forensic Procedures Bill and the National DNA Database

25. The Model Forensics Procedures Bill began development prior to the proposal for CrimTrac. The Model Bill was developed by the Model Criminal Code Officers Committee (MCCOC) under the Standing Committee of Attorneys-General (SCAG).

26. The initial draft of the Bill was circulated by MCCOC in 1994 for public comment. The 1995 Model Forensic Procedures Bill was endorsed by a majority at SCAG in July 1995 and sent to the APMC for consideration in the context of a proposed national DNA database that the federal, state and territory governments hoped to establish.

27. At about the same time, APMC had established a committee to advise on the DNA database issue: the Easteal Committee (chaired by Mr Justice Phillips, Chief Justice of the Victorian Supreme Court). The Easteal Committee recommended the adoption of the 1995 Model Bill and their recommendations were later endorsed by the APMC.

28. As noted earlier, Victoria introduced forensic procedures provisions into the Crimes Act in 1988, which were substantially amended in 1993 and 1997. The 1995 Model Forensic Procedures Bill was based on the 1988 Victorian provisions.

29. In October 1998, SCAG agreed to the preparation of a discussion paper for consulting the public on the proposed model forensic procedures legislation. In November 1998, the APMC supported the preparation of this paper. The purpose of the MCCOC discussion paper was to canvass various issues and achieve a consistent approach to the legislation across jurisdictions, which was recognised as a significant issue in the context of the CrimTrac initiative. MCCOC noted that consistent legislation would simplify the establishment of the database and ensure that DNA evidence is used appropriately in any jurisdiction.
30. Following consultation on the discussion paper and decisions made by SCAG at its July 1999 and November 1999 meetings, the Model Bill was revised into its final form. During the preparation of the Bill, MCCOC had detailed discussion with officers from the CrimTrac project team, law enforcement agencies, and the Federal and NSW Privacy Commissioners.

31. Model legislation, the Model Forensic Procedures Bill 2000 ("Model Bill"), was developed by the Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General to facilitate this endeavour. The Federal and NSW Privacy Commissioners were consulted during the development and finalisation of the Model Bill.


33. The Crimes Act provisions already contain a number of safeguards aimed at ensuring that forensic material is collected fairly and lawfully. For instance, the Act has detailed provisions for obtaining consent from volunteers and suspects when seeking a forensic sample. The provisions relating to child suspects have been modified to allow their parents or guardians to be involved where DNA samples are sought. The offences for which samples can be compulsorily obtained are clearly articulated and generally limited to serious indictable offences against the person. The Crimes Act is more stringent than the Model Bill in requiring that every forensic sample be obtained either by consent or by court order, rather than by order of a police officer.

34. The Act also sets out the circumstances in which forensic samples must be destroyed and allows for samples to become "spent" in the case of juveniles who do not re-offend by the time they turn 26 years of age. The legislation contains sanctions prohibiting unauthorised and improper use and disclosure of forensic samples and related material.

**Crimes (DNA Database) Act 2002 (Vic)**

35. The Crimes (DNA Database) Act 2002 (Vic) ("the DNA Database Act") amended existing forensic procedures provisions of the Crimes Act 1958 to enable Victoria to participate in the national DNA database system and amended procedures to obtain, use and retain forensic samples.

36. The DNA Database Act extends volunteers' ability to control the purposes for which their samples can be used. Previously, once a volunteer had given the sample, it could be used for any purpose.

37. This Act also foresees the need for the Privacy Commissioner, Health Services Commissioner or Ombudsman to have access to information on the national DNA database in the course of handling complaints.
Victoria compared

38. Victoria’s participation in a national pooling scheme requires an examination of the adequacy of the privacy protections in the legislative schemes adopted by participating jurisdictions. Victorian data, when pooled and shared, is as secure as the weakest link of these schemes.

39. Since 1995, all Australian jurisdictions have passed some form of forensic procedures legislation. In many ways, Victoria’s forensic procedures law is superior to similar laws in other jurisdictions. A cursory look at those interstate models reveal the following:

   a. Some jurisdictions allow for DNA samples to be taken from persons suspected of any, or relatively minor, offences. In some cases, they do not even require there to be a reasonable belief on the part of police that a crime has been committed.

   b. DNA samples are being authorised to be collected from a broad group of people, many of whom are neither suspects nor convicted offenders, for inclusion on a forensic database or for forensic purposes.

   c. While many jurisdictions authorise the use of reasonable force during the carrying out of a forensic procedure, at least one jurisdiction allows for reasonable force to be used in anticipation of resistance by any person.

   d. In some cases, there appear to be no restrictions on the retention or use of DNA samples by the collecting authority, and the use of DNA exchanged with other jurisdictions is left open-ended.

   e. Some jurisdictions have already passed regulations that permit DNA to be exchanged with other jurisdictions, irrespective of whether the privacy protections and other safeguards are equivalent in the other jurisdictions.

40. At a minimum, the development of statutory models around the country reveals that uniformity is lacking.

International DNA disclosure

**Mutual Assistance Laws**

41. CrimTrac was partly developed to allow for the international exchange of DNA profiles. The Crimes Act expressly permits access and disclosure of information contained on the national DNA database in accordance with mutual assistance laws.

**Interpol DNA ASF Database pilot project**

42. Australia is actively involved in Interpol’s development of an international DNA database. Australia is represented on the Interpol DNA Monitoring Expert Group, which was formed to discuss the use of DNA profiling as an investigative technique and make recommendations concerning the use of DNA in criminal investigations with a view to facilitate the worldwide use of this technique. Australia (along with France, South Africa, the UK and the USA) is also a participant in the Interpol DNA Automated Search Facility (ASF) Database pilot project.

43. As with lack of uniformity around Australia’s jurisdictions, so the privacy and other safeguards can be expected to vary from country to country. Genetic data has a potential
value in international markets. Provision of DNA data of Victorians to international databases should be monitored by the Victorian Parliament, with periodic review by a parliamentary committee of the security and uses of the data.
III. Specific questions raised by the Committee in its Discussion Paper

44. Broadly speaking, the issues raised by the Committee fall into the following categories:

   a. collection;
   b. use;
   c. disclosure;
   d. destruction;
   e. access; and
   f. accountability.

   These categories mirror the categories common to information privacy and data protection laws.

Question 1: Who should be required to provide a DNA sample?

Current situation

45. Victoria’s Crimes Act currently allows for the collection of DNA samples from three categories of people: volunteers, suspects, and serious offenders.

Adult volunteers

46. Any adult (17 years or older) may consent to give a DNA sample to police: s. 464ZGB. The Act does not appear to provide for the collection of DNA from child volunteers.

47. Where a volunteer withdraws his or her consent after a sample has already been collected, police can apply to the Magistrates’ Court to retain that sample: s. 464ZGF. Otherwise, the sample must be destroyed: s. 464ZGE.

48. The retention of volunteers’ samples against their wishes, along with other issues concerning DNA collection from adult and child volunteers, are discussed later in this submission.

Suspects

49. DNA samples may be collected from three classes of suspects:

   a. adults suspected of any indictable offence who consent to the collection ("cooperative suspects"): s. 464R;

   b. adults suspected of a limited range of indictable offences where consent is refused or the person is mentally incapable of consenting, by order of the Magistrates' Court ("relevant suspects"): s. 464T(3); and
c. children (aged 10 -16 years) suspected of a limited range of indictable offences by order of the Children’s Court ("child suspects"): s. 464U(7).

50. Interim orders for collection from relevant and child suspects can also be obtained where there is a risk that the sample (other than blood samples) is likely to be lost if the procedure is delayed until an application is brought to court: s. 464V(5). The sample must not be analysed, however, prior to the final hearing of the application: s. 464V(8).

Serious offenders

51. DNA samples can be collected by order of the court from any person (including adults and children over the age of 10 years) who has been found guilty of committing (or conspiring or attempting to commit) a "forensic sample offence": s. 464ZF. Forensic sample offences are a smaller subset of those offences for which samples can be compulsorily obtained from adult and child suspects.

52. Section 464ZF came into effect on 1 July 1998, authorising the taking of samples of offenders convicted after that date. This section also has retrospective application. That is, it permits police to seek an order to take a sample from someone who committed the forensic sample offence before the legislation came into effect (on 1 July 1998) if they are subsequently serving a period of detention (whether in a prison, police gaol, youth training centre, or as a security patient in an approved mental health service) for any offence.

Should collection be broadened?

53. The Committee has asked for comment on whether compulsory collection of DNA should be extended to include a broader range of people, perhaps going so far as to recommend routine sampling of anyone suspected of any offence.

54. Where a community places a high value on liberty, of which privacy is a slice, extreme caution must be exercised before extending the power of the law enforcement agencies in the way proposed. Leave to one side for the moment issues of the reliability of the system of DNA profiling. Recalling the powerful fact that DNA is a person’s “fate map”, the first question is whether the state should be empowered under law to extract DNA, forcibly or not, and compile a database of the genetic make-up of those people who come under police suspicion in relation to any offence.

55. The collection and retention of a vast storehouse of DNA samples accumulated by the state over time creates a risk of unforeseen uses by law enforcement agencies and by others. Since DNA reveals information not just about the individual from whom it was collected, but also about their blood relations, there is a risk of families or small population groupings becoming the objects of analysis, suspicion and disadvantage based on inferences derived from their DNA. This has the potential to create a potent variant of “guilt by association”. It may challenge fundamental notions of responsibility and autonomy. That is, a person may undergo certain consequences, not because of any act of will for which they are rightly responsible, but because of assumptions – well-based or otherwise – made on the basis of their genetic blueprint. As the human genome is being unravelled, the potential for testing and re-testing DNA material to ascertain proclivities for disease or behavioural tendencies may become a reality or, just as significant, may seem to be a reality.

56. Already the Crimes Act allows DNA to be used for purposes unrelated to law enforcement. For example, the Crimes (DNA Database) Act 2002 states that DNA profiles can be used for criminal investigation or "any other purpose" provided for under the Act or under a corresponding law of participating jurisdictions. A range of uses and disclosures of the
DNA database are articulated in this Act, including disclosure to medically treat any person where it might lessen a serious threat to their life or health. These provisions also allow for administrative arrangements to be entered by the government (without Parliamentary oversight) that would allow law enforcement officers or any other person authorised by the Police Commissioner to have access to the database, without restricting the permissible uses of the information.

57. Victoria needs to be conscious at all times of the unique power of DNA data. The significance of DNA profiling to detect and deter serious or repeat offending should be acknowledged and debated in its own context. It should not become a kind of broad, imprecise slogan that can be said to justify the steady extension of the collection and use of DNA data from the population.

58. Other important factors need to be held in the front of our minds:

a. Persons charged stand in a different position from persons under police suspicion.

b. Convicted persons stand in a different position from persons accused but not yet tried or convicted.

c. Convicted, serious offenders have fewer privacy rights than those convicted of many types of offences that are less serious.

d. Police, like the rest of us, are not infallible.

e. Genetic science is still developing.

f. The power of the state in relation to the individual remains an issue for constant vigilance.

59. The potential for prejudice to do harm remains as great now as at other times in history, from which lessons should be derived.

**Limiting collection to what is reasonably necessary**

60. Collection should be limited to what is reasonably necessary for law enforcement’s functions, in proper balance with values including liberty, privacy, the presumption of innocence and the dignity of the human person. In practical terms, in this context, this might include the following options:

**Better control on requests for voluntary samples from suspects of minor crimes**

61. The Crimes Act permits police to ask suspects to volunteer a sample where they are suspected of any indictable offence (s. 464R). Indictable offences include most Crimes Act offences and other offences that are punishable by up to five or more years imprisonment and/or by a fine of up to $60,000 or more.

62. Examples of indictable offences include relatively minor offences (such as shoplifting or theft of items of minimal value, minor property damage and threats to damage property, and unlawful assembly) and offences for which DNA profiling has no obvious relevance (such as perjury, falsification of documents, bribery of a public official and misconduct in public office, election bribery, killing whales, demolishing or damaging a heritage listed place or object, pollution offences, unsafe food handling, sale or description, and non-compliance with a compliance notice under the privacy laws).
63. The Model Bill allowed samples to be obtained from cooperative suspects in relation to offences that are punishable by up to two or more years imprisonment, which would pick up a host of summary offences in Victoria (including motor vehicle offences, surveillance offences, prostitution offences, breaches of health legislation, wildlife offences and professional practice offences). But it also required police to consider a number of factors before deciding that asking a suspect to consent to provide a sample was justified. In the Model Bill police are required to consider:

a. the seriousness of the circumstances surrounding the offence and the gravity of the offence;

b. the degree of the suspect's participation in the commission of the offence;

c. the suspect's age, physical and mental health, and cultural background; and

d. whether there are less intrusive ways of obtaining evidence to confirm or disprove the suspect's involvement in the commission of the offence.

64. Victoria Police should be required to follow and document these steps to decision. Statistics showing the number of times police seek consensual samples, for which offences, and the number of consents given, should be tabled annually in Parliament.

65. Undoubtedly there will be cases where a person is suspected of committing an indictable offence, but the circumstances surrounding the offence may be trifling (such as theft of chalk from a school or shoplifting of lollies from a milk bar) or there will be less intrusive ways of confirming or disproving the suspect's involvement.

66. In the context of interactions between police and suspects, the voluntariness of any consent needs to be given special attention, both in principle in advance by Parliament, and in practice in retrospect in particular cases.

67. The Committee is urged to consider whether section 464R should be amended to narrow the range of indictable offences for which consensual collection can be sought, for example by having regard to whether the offence is triable summarily, by placing the focus on the seriousness of crimes against persons, or by adding a Schedule listing the crimes in relation to which a consensual sample may be sought. Parliament, by an action taken with proper notice and debate, should be the sole authority for extending the list. The safeguards set out in clause 8 of the Model Bill should be adopted to help to ensure collection is justified and not unduly intrusive.

68. Limiting collection to what is necessary is particularly important in this context, since, unlike the Model Bill, there is no provision for suspects to withdraw consent. Nor is there any express requirement to give the suspect an opportunity to first speak to a lawyer. Suspects might not appreciate that if they are found guilty police can seek a retention order (under s. 464ZFB) to include the sample on the national DNA database, allowing widespread matching. In effect, the 'retention rights' of individuals who commit a less serious but indictable offence are the same as those of serious offenders under the new definition of "serious offenders index" in s. 464.

69. Given the potential significance for an individual of a DNA sample being taken and retained under law, the offences that trigger that result ought to be of some gravity and defined in the Act with greater precision.
Limiting the offences for compulsory DNA collection from child and adult suspects

70. Along a similar line, the Committee is urged to consider whether the net is cast too widely in permitting collection of samples from other (adult, incapable and child) suspects in relation to those indictable offences listed in the Act (including attempted assault and resisting arrest).

71. As with cooperative suspects, the Model Bill permits an order to be sought to allow a forensic procedure to be carried out on child suspects and incapable and non-consenting adult suspects in relation to offences punishable by two or more years imprisonment. Again, in determining whether such an order is justified, the court must have regard to a similar set of factors, including the gravity of the offence and the availability of less intrusive means of confirming or disproving the suspect's involvement.

72. It is suggested that sections 464T and 464U be amended to exclude some of the offences (such as indictable offences triable summarily), or to require the court to consider whether an order under sections 464T or 464U is justified, having regard to the safeguards set out in clause 19 of the Model Bill.

73. Limiting collection to what is necessary is important in light of the potential for widespread matching (on a par with serious offenders) should a retention order be made following a finding of guilt. Unlike the Model Bill, there is no provision for adult suspects incapable of giving consent to be assisted by an 'interview friend' during the proceedings, and the right to be heard during the hearing is severely circumscribed.

Limiting retrospective collection of DNA from serious offenders

74. Section 464ZF(3) facilitates the compulsory collection of DNA from serious offenders who committed a “forensic sample offence” prior to the introduction of the DNA provisions into the Crimes Act, provided that they are imprisoned or detained in custody for any offence after 1 July 1998. The legislation does not require police to notify the offender that they are applying to the court for an order to obtain their DNA, nor does the legislation give the offender a right to be heard at the hearing of the police application.

75. The legislation allows retrospective collection from serious offenders irrespective of:

a. the seriousness of the later offence, which apparently need not be an indictable one (eg, it can be a summary offence such as flying kites or playing games to the annoyance of anyone, blocking the footpath, putting up a poster on a building without the owner’s consent, being found drunk and disorderly in a public place, or using offensive language in a public place), and

b. irrespective of whether the person has been convicted of the later offence, as section 464ZF(3) operates where they are either imprisoned or serving a period of detention (eg, held in a police gaol while awaiting trial/sentencing).

76. Forensic sample offences are articulated in the Crimes Act and include some of the most heinous crimes, such as murder, rape and kidnapping. Such crimes require privacy to give way in various ways to the public interest in investigation, prosecution and punishment. But privacy does not give way completely and forever. Spent convictions legislation, which is lacking in Victoria despite being adopted in most other Australian jurisdictions, is an example of this principle. Consideration should be given to constraining the exercise of the power of compulsory collection, particularly given the absence of natural justice safeguards, to guard against unnecessary collection where a person is convicted of a one-off
crime committed long ago, with little chance of re-offending, and is detained by police for a trifling offence.

77. The system as it stands is vulnerable to the systematic “rounding up” of serious offenders, now released, in order to extract a DNA sample. If that is to be permitted, it should be done explicitly and with appropriate safeguards for the person who, although previously convicted and punished, is nevertheless restored in part to privacy rights upon release.

Should DNA samples be required from police?

78. Earlier this year, it was proposed that police in Tasmania and Victoria be required to provide their DNA samples so that their DNA could be excluded from the crime scene in order to avoid cross-contamination. Police expressed concerns about possible misuse of their personal data and the inadequacy of existing privacy safeguards.

79. In March 2002, it was reported that Police Federation of Australia delegates from all states unanimously rejected the proposal, with concerns that the DNA could be used for genetic screening or internal investigations. More recently, it has been reported that legislation is being developed in Tasmania to address privacy concerns, including limiting the uses that could be made of police officers’ DNA.

80. In determining whether DNA should be compulsorily acquired from police, consideration should be given to whether this is a necessary and proportionate response to the identified risk. If the risk is not significant, or if there are less intrusive methods for minimising this risk (such as through alternative quality assurance procedures), then compulsory collection of DNA from police ought not occur.

81. If the proposal is to proceed, then appropriate privacy safeguards should be included in legislation, including:

a. clearly articulated purposes of collection, use and disclosure;

b. sanctions against misuse;

c. rights of access and correction for subjects;

d. appropriate destruction of both sample and data when, for instance, the subject leaves the police force;

e. opportunities to be informed and, where appropriate, give consent, as developments in genetic knowledge suggest further uses of the sample and/or data.

82. Any extension of legislative protections for police members should also apply to samples obtained for elimination purposes from other persons present at the crime scene or involved in the handling or analysis of DNA material (e.g., witnesses, victims, media, ambulance officers, coroners, forensics analysts).

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

83. The Committee has indicated it will consider whether a police officer (or designated police officer) should be given the power to order a suspect or convicted offender to be sampled. If such a power is to be provided, the Committee asks what protections and rights of review should be introduced.
The need for judicial oversight

84. The proposal to weaken judicial oversight of the collection of DNA from suspects and offenders is not supported. Independent scrutiny of police activity in this area is vital as the procedure for collecting DNA samples can be particularly intrusive and the indignity is particularly severe. Particular safeguards are required. The reasons follow.

Minimising the use of intrusive powers

85. The Crimes Act distinguishes between intimate and non-intimate forensic procedures. Forensic procedures classified as intimate (such as extracting pubic hairs) are especially invasive of bodily integrity. Judicial oversight is essential in order to keep use of the most seriously intrusive procedures to the necessary minimum.

Maintaining public confidence

86. Unfettered police discretion is not appropriate. Collection requires sometimes intimate invasion of privacy and use of force. Videos that have previously been aired in the media have raised public awareness of the procedure. Police have a strong interest in maximising the collection of samples. Public confidence is more likely to be maintained if an independent "umpire" has a role.

Ensuring less intrusive measures are adopted

87. When police apply to the court for an order to conduct a compulsory forensic procedure on a suspect, existing provisions in the Crimes Act require the court to be satisfied, on the balance of probabilities, that the order is justified in all the circumstances (ss 464T(3)(h) & 464U(7)(g)).

88. Removal of judicial oversight may lead to a routine collection of DNA despite the availability of less intrusive means to determine whether a suspect is involved in the commission of a crime. In practice, as DNA testing is a potentially powerful elimination tool, that could happen often.

89. This is a wider issue than this DNA context. When technology permits ease of use, we tend to make a habit of use, even where the use impinges on other values and is initially restricted by safeguards in order to balance competing values. An example is telecommunications intercepts. As technology has made them more efficient, their use has increased to the point that they may perhaps be regarded by some as a standard investigative tool. Yet the privacy concerns that arose when intercepts were made technologically possible, and which led to a balancing and to certain safeguards, remain as valid now as ever they were.

90. In cases where alternative investigative means may prove or disprove someone's involvement in a crime, collection of DNA is likely to be unnecessary and unduly intrusive. And where collection does seem necessary in the particular case, that will not automatically justify retention or transfer into a database that has purposes beyond the immediate case.

Children and vulnerable adults

91. The Crimes Act currently forbids the collection of intimate and non-intimate forensic samples from children aged 10-16 unless a court order has first been obtained (s. 464U(2)). Police ought not be permitted to obtain DNA from children without the mandatory oversight of the court. Forensic procedures can be very intrusive and result in the
collection of information of great significance to the child's immediate and long-term future. In the absence of judicial oversight, this could occur without any independent, suitably qualified analysis of the child's best interests.

**Retention of more DNA samples for long-term use**

92. One effect of removing judicial oversight would be collection of more DNA samples. DNA samples have significance beyond identification or elimination from suspicion in a particular criminal investigation. Existing provisions to retain the samples, as well as the data extracted from them, add to privacy concerns and to the importance of safeguards.

93. Suspects of crime, including those who volunteer to give up their DNA, can be very young. Their DNA is their "fate map". Science in this field is developing rapidly and in ways that may have great significance in future for those whose genetic blueprints come into the hands of government, particularly law enforcement agencies. Information privacy law is in part about giving greater control to individuals over the collection and handling of their personal information. In the present context, very few child suspects or their parents/guardians will have more than vague knowledge of the implications of genetic information. In all the circumstances, judicial oversight is essential.

**Greater guidance to the courts**

94. The Act provides little or no guidance to police or courts to assist them in exercising their discretion to determine whether the taking of a sample is justified under sections 464R, 464T or 464U (from suspects); section 464ZGB (from volunteers); or section 464ZF (from serious offenders). Only section 464U directs the court's attention to factors that it should have regard to in determining whether an order is justified (viz, the seriousness of the circumstances of the offence, the degree of the suspect's participation, and the child's age).

95. The Model Bill goes much further, expressly requiring the court to balance the public interest in obtaining a sample to prove/disprove involvement against that of upholding physical integrity. The Model Bill cites a number of matters the court (and police, where they can order a sample be taken) should consider. These include:

   a. the seriousness of the circumstances surrounding the offence;
   b. the gravity of the offence;
   c. the degree of the suspect's participation in the commission of the offence;
   d. the suspect's age, health and cultural background; and
   e. whether there are less intrusive ways to prove/disprove the suspect's involvement.

96. The Crimes Act should be amended to expressly require police and courts to balance the relevant public interests in privacy and criminal investigation. The Act should clearly set out the factors that are relevant to this balancing exercising. This will promote fair and open procedures in relation to the collection of samples -- particularly important in light of suspects' limited opportunity to be heard. Requiring the court to consider these matters should reduce the risk that orders may be granted as a matter of course with very little discretion being exercised by the court.
Question 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 sample?

97. The Committee has asked what safeguards apply to carry out the wishes of volunteers and what further protection, if any, is required – particularly in relation to large scale DNA testing such as occurred in Wee Waa, New South Wales.  

98. Mass DNA testing is said to have first occurred in Western Australia, when DNA samples were obtained from taxi drivers during the investigation into the Claremont serial killer. More recently, mass screenings have been undertaken in Queensland – in Bundaberg in relation to an investigation into the murder of a British backpacker, in Toowoomba during a murder investigation, and in Gympie during an investigation into a serial rape.

**Current situation**

99. Any adult (17 years or older) may consent to give a forensic sample to police: s. 464ZGB. The recently enacted Crimes (DNA Database) Act 2002 empowered volunteers with the choice of limiting the purpose for which their sample is used.

100. The volunteer provisions would presumably – and this inquiry could give greater certainty -- encompass the following persons:

   a. those who, while not suspected of committing a crime, agree to assist in the police investigation by narrowing down the list of possible suspects (mass screening);

   b. convicted persons seeking to establish their innocence (innocence testing, discussed later in this submission);

   c. persons providing samples to assist in the identification of missing or dead relatives; and

   d. victims of crime.

**Mass screening of volunteers**

101. The problems with mass screening of volunteers (eg, across a small community) were recently highlighted in a NSW Parliamentary report, which recommended legislative change to require a court order to be obtained by police before undertaking voluntary mass screenings.

102. Neither the Victorian Act nor the national Model Forensic Procedures Bill ("the Model Bill") include any safeguards in relation to the conducting of wide scale DNA testing from volunteers.

103. Mass screening raises a number of privacy concerns, including:

   a. potential for less intrusive methods of investigation to be overlooked, with consequent risk that time will be lost and resources needlessly expended on DNA collection and screening;

   b. social (or police) pressure being exerted to coerce consent;
c. potential for collection to be excessive for what is required (both in the number of persons tested and the possibility for additional personal information to be collected, such as photographs and interview statements); and

d. potential for the understandable shock and concern felt by any community after a serious crime to be used to obtain from volunteers consents of wider scope than necessary in the circumstances – in particular, consent to retain samples and/or data and/or photographs for any future purpose.

104. The Privacy Commissioner is seeking information from relevant NSW and Queensland authorities about the mass screenings at Wee Waa and Bundaberg with a view to establishing, in consultation with Victoria Police, a clear written protocol on how any future mass screening in Victoria would appropriately balance the competing public interests of law enforcement and privacy. A detailed statutory model, debated and endorsed by Parliament, would be preferable.

105. The Crimes Act should be amended to require police to seek a court order before undertaking any mass voluntary testing, having regard to the above matters.

106. It may be that mass screenings in small communities in the aftermath of serious crime cannot properly be termed “voluntary”. This is not a reason not to conduct them, if Parliament so authorises. It is a reason to ensure that the competing interests are better balanced than at present and that judicial oversight always occurs.

**Excessive and unduly intrusive collection from adult & child suspects**

107. Unlike the Model Bill, there is no requirement in the Act to consider whether there are alternative, less intrusive ways to confirm or disprove a suspect’s involvement. This is a fundamental omission, without which it is highly likely DNA samples will be collected unnecessarily.

108. The Act should be amended to require the court to consider this factor when determining whether an order is justified (under ss 464T and 464U), and to require police to consider this and record their reasons when determining whether a sample should be obtained by consent (under s. 464R).

**Withdrawal of consent by cooperative suspects & volunteers**

109. The Act contains no provision for cooperative suspects to withdraw consent, unlike the Model Bill, and unlike the provisions in the Act relating to volunteers.

110. In the case of volunteers, the Act currently allows police to obtain a sample from a volunteer only if they have not withdrawn their consent prior to giving the sample: s. 464ZGB(2). If, after the sample is obtained, the volunteer withdraws their consent to the retention of their sample, the sample must be destroyed unless a retention order is obtained from the court: ss 464ZGE(2) and (5), and 464ZGF.

111. The Act should treat cooperative suspects and volunteers in the same manner as the giving of samples occurs by consent in both cases. The Act should also deal with the situation where consent is withdrawn by a volunteer or cooperative suspect during the forensic procedure.

112. Accordingly, the Act should be amended to ensure that, where a volunteer or a cooperative suspect withdraws their consent before or during the taking of the sample, it should be presumed that consent has been refused and the taking of the sample should not
proceed except by court order (under ss 464T or 464U). If consent is withdrawn after a sample has been taken, the sample should be destroyed unless a court authorises its retention.

113. Where an application is made to retain a volunteer’s sample, despite their having withdrawn their consent, they should receive notice of the application and be provided with an opportunity to make submissions as to whether it would be justified for the court to make the retention order. At present, the Crimes Act does not require notice to be served on a volunteer when an application has been made to retain their sample; the Act only requires reasons to be served on the person after the order has been made: section 464ZGF.

Child volunteers

114. As noted above, the Act includes provisions relating to the collection, use, retention and destruction of samples collected from volunteers. However, these provisions relate only to adults (17 years old or over).98

115. In contrast, the Model Bill provides for the collection of forensic samples from volunteers who are under the age of 17 years where consent is given on their behalf by a parent or guardian and the child does not resist or object to the procedure being carried out.99

116. There will be cases where children may wish to assist police in their investigations, including situations where they are victims of crime whose samples may provide evidence against the perpetrator. The Crimes Act should be amended to enable collection to take place while ensuring safeguards for the collection, handling and destruction of the samples.

117. Any consent provisions allowing for collection of DNA from children must recognise the right of children to participate in decisions that impact on their lives.100 A decision to take a DNA sample that will become part of a national database has considerable potential impact on a life. Forensic procedures ought not be performed on child “volunteers” without their consent if they have sufficient maturity and understanding to give consent. Where a child does not have sufficient capacity to consent, the decision will be for the parent or guardian. But, depending on age, the child should nevertheless be consulted about having the procedure so that their views can be taken into account and they are given the opportunity to object.

118. The NSW Parliamentary report has made similar recommendations.101 It will be necessary to ensure that parents and guardians also sufficiently understand the implications for the child of the sample being taken and, if permitted under law, retained.

Volunteers who are incapable persons

119. The Victorian Act does not provide for the collection of DNA from volunteers who are incapable persons, who are unable to consent on their own behalf due to mental impairment.

120. The Model Bill provides for the collection of forensic samples from such volunteers where consent is given on their behalf by a parent or guardian and the incapable person does not resist or object to the procedure being carried out.102

121. Consideration should be given (in consultation with organisations such as the Office of Public Advocate and other interested persons) to including provisions that enable collection from incapable persons to take place while ensuring safeguards for the collection and
handling of the samples and while respecting the right of individuals to participate in the
decision making process to the extent of their capability.

Collection from volunteers, apart from the Act

122. Presumably, police have had a long-standing ability to collect personal information
from victims of crime and other volunteers where this is done by consent, apart from the
volunteer provisions in s. 464ZGB of the Act.

123. The regulatory framework of the Crimes Act should be extended to ensure that privacy
safeguards apply relevantly to all forensic material obtained from volunteers (including
from infant and child victims of crime) whenever and however it was obtained.

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

124. The Committee is examining whether the Crimes Act contains adequate protections for
vulnerable persons, including children, incapable persons, people from indigenous or non-
English speaking backgrounds.

Children

17 year old suspects

125. The Act seems to allow samples to be sought by consent from 17 year old suspects in
relation to any indictable offence (s. 464R, read in the light of s. 464U(1) & (2)). This is
inconsistent with the Model Bill, which prohibits consensual collection from suspects
unless they are at least 18 years old.

126. Consideration should be given to following the Model Bill's definition of child ("under
18"). This would limit collection to what is necessary and give regard to the different
treatment usually afforded to children. Collection would be fairer, as 17 year olds would be
covered by the safeguards contained in s. 464U.

127. If “child” were to be defined as under 18 (rather than under 17), 17 year olds would
have the opportunity for their sample to become spent under s. 464ZGA.

Date when age is calculated

128. Unlike the Children and Young Persons Act, the Act does not clarify the time at
which a child's age is calculated. The Act appears to allow a sample to be obtained from a
suspect or a serious offender who is 17 years or older even if they were much younger
when the offence was committed.

129. Consideration should be given to amending the Act to ensure that any safeguards in
sections 464U and 464ZF and access to the spent sample provision (s. 464ZGA) apply to
suspects who were children at the time of the offence being committed.

'Interview friend'

130. The Act requires that the child attend court when an order is made requiring a forensic
procedure to be conducted (s. 464U(4)), and requires that notice of the hearing be served on
the child (if not in custody) and their parent or guardian (s. 464(5)). The child has a limited
opportunity to be heard on the question of whether an order for a compulsory forensic procedure is justified (s. 464(12)(c)). Submissions may be made on the child's behalf by a lawyer or, with leave, by their parent or guardian.

131. The Model Bill goes a step further by requiring (rather than simply permitting) the child to be represented at the hearing by an 'interview friend', such as a parent or guardian, a lawyer or someone independent from the police investigation.

132. Consideration should be given to amending s. 464U to ensure that children are similarly represented to ensure that they understand what is happening in the proceedings, what their rights are and what the effect of the order is.

**Impaired persons**

**Physically impaired suspects**

133. Where an adult suspect is unable to give informed consent due to mental impairment, a sample can only be obtained by seeking an order from the court under s. 464T. The Model Bill goes further to recognise that some adults may be incapable of giving consent, not only because they are unable to understand the nature and effect of the forensic procedure, but because they are incapable of indicating whether or not they consent. Samples can only be obtained from incapable adult suspects by seeking a court order.

134. In contrast, the Victorian Crimes Act does not provide for situations where a person may be unable to indicate whether they consent due, for example, to physical impairment.

135. Consideration should be given to ensuring that samples can only be obtained from these suspects by court order.

**Suspects and serious offenders**

136. While there are a number of safeguards in place to provide for fair collection of samples from child suspects and serious offenders, the Act does not contain any safeguards for incapable adults.

137. In contrast, the Model Bill has a number of safeguards for the compulsory collection of DNA from incapable persons who are suspects or who are serious offenders.

138. Consideration should be given to including similar safeguards for adult suspects incapable of giving consent.

**Culturally & linguistically diverse persons / Indigenous persons**

139. The Crimes Act currently contains no additional safeguards for indigenous persons or persons from culturally and linguistically diverse backgrounds. Privacy concerns include the importance of obtaining genuine consent that is informed and voluntary (particularly where language, illiteracy or other impairment affects capacity to understand the nature and effect of what is being asked).

140. Both the Commonwealth and NSW forensic procedures legislation contain safeguards for suspects and offenders who are Aboriginal and Torres Strait Islanders. The NSW legislation, for instance, includes precautions when consent is sought to provide a sample: an interview friend may attend the consent interview; and there is a requirement to inform an Aboriginal legal aid organisation that a consent request has been made. The NSW Parliamentary Committee recommended strengthening existing safeguards, for instance,
allowing the consent safeguards to be triggered whenever an Aborigine self-identifies (rather than leaving the determination of aboriginality to the opinion of police).  

141. Consideration should be given to introducing additional safeguards in the Act to ensure proper understanding of the nature and effect of any consent or forensic order occurs.

142. Consideration should also be given to adopting the Model Bill requirement for a person's cultural background to be taken into account when determining whether a forensic procedures order is justified.

Potential for racial profiling

143. DNA profiling may lead to racial profiling. Examples exist. The United States Justice Department’s National Commission on the Future of DNA Evidence suggests at least two ways in which people can be classified according to their membership in a particular ethnic or racial subpopulation:

a. DNA profiles differ in different racial or ethnic populations, thereby making it possible to identify an individual’s profile as being more likely to come from a particular racial or ethnic grouping; and

b. certain genes are more common in some population groupings and rare in others, thereby enabling a person to be classified according to their membership in a particular racial or ethnic group.

144. Victoria’s is a multi-racial, multi-ethnic population. In privacy law and policy, race and ethnicity comprise sensitive personal information. The Committee is urged to satisfy itself that, when a DNA sample or data derived from it is sent by Victoria to the national database, it is not accompanied by any information about the person’s racial or ethnic origin, nor that such information is ascertainable through data matching with other databases to which participating agencies in the national DNA database have access. If DNA and racial or ethnic origin data are being compiled, or able to be matched, different issues arise and particular safeguards should be a matter for parliamentary attention.

Fair collection and the opportunity to be heard

145. An intrinsic element of privacy is dignity. DNA sampling invades bodily integrity. One way to respect the basic dignity of a person is to grant a person the right to be heard by the decision-maker in relation to a decision affecting the person’s body.

146. The Act severely circumscribes suspects' opportunity to be heard when police apply to the court for a compulsory forensic procedure (under ss 464T and 464U). Suspects are not parties to the application and are not allowed to call or cross-examine any witnesses (ss 464T(5) and 464U(12)). Moreover, they are not permitted to address the court except in respect of whether the pre-conditions to making the application are met (in ss 464T(3) and 464U(7)) and, in the case of child suspects, whether the order is justified in light of defined circumstances (listed in s. 464U(8)).

Notice of the application

147. Section 464U(5) of the Act requires that notice be given to parents and guardians of child suspects (and to the child, if he or she is not in custody) of the hearing of an application for the compulsory taking of a forensic sample. However, there is no similar notice requirement for adult suspects (whether or not in custody) or child suspects in
custody. Nor is there any provision requiring the suspect to attend the hearing of the application. The Act only requires the suspect's attendance at the time a compulsory forensic procedure order is made (ss 464T(4) and 464U(11)). The Model Bill, in contrast, requires that the suspect be present at the hearing of the application unless the court decides otherwise and to attend when the order is made.

148. The absence of any notice requirement or requirement for a suspect to attend the hearing of the application undermines the suspect's opportunity to be heard, thereby calling into question the fairness of collection.

149. In order to ensure suspects have an opportunity to prepare any submissions about whether the order is justified and exercise their limited right to be heard on these matters (ss 464T(5)(c) and 464U(12)(c)), the Act should be amended to require notice to be served whenever a compulsory forensic procedure is sought (whether or not the suspect is an adult or child, and whether or not in custody) and to require their attendance at the hearing of the application, unless the court determines otherwise, with published reasons.

**Opportunity to be heard**

150. Consideration should also be given to providing child and adult suspects with a greater right to be heard, along the lines of the model legislation (viz, to cross-examine the applicant, call or cross-examine witnesses with leave of the court, and address the magistrate).

**Information about consequences and entitlements**

151. Where an order is sought to compulsorily take a sample from an adult or child suspect, they should be informed much earlier about the possibility of using reasonable force. Also, the court should inform them, upon making the order (and at an earlier stage), of the possibility of a retention order being sought if they are found guilty (under s 464ZFB) and the consequent inclusion on the national DNA database. These matters might affect their exercise of their limited right to be heard at the hearing of the application.

152. Suspects ordered to provide samples should be informed of the circumstances under which the sample must be destroyed (eg, interim orders not confirmed, finding of not guilty) and their right to seek written confirmation of the destruction.

153. Where the Children's Court makes an order under s. 464U authorising the taking of a sample from a child suspect, they should be required to inform them of the possibility of the sample becoming "spent" (under s. 464ZGA) if they do not re-offend by the time they turn 26 years of age. This promotes openness about how their personal information is handled under the Act and also may deter recidivism.

**Interim orders**

154. Where an interim order is made under s. 464V, the court should continue to be required to have regard to the matters set out in s. 464U(8) (eg, age of the child etc, as well as any expanded matters along the lines of those set out in the model legislation, discussed above at paragraph 94-96) to assist it in determining whether the interim order is justified.

155. When a suspect is informed about the terms of an interim order and the date/venue of the final hearing of the application, they should also be informed that they have an opportunity to be heard at the hearing and that, if the court does not confirm the order, then the sample must be destroyed.
Serious offenders

156. Consideration should also be given to ensuring that collection of DNA samples from convicted serious offenders is undertaken in a fair manner. This may require according greater natural justice to serious offenders when police seek a court order to compulsorily acquire their DNA. At present, the Crimes Act does not oblige police to notify a serious offender that an application is being made, nor does the serious offender have any right to be heard during the hearing of an application in relation to whether the making of the order is justified in all of the circumstances.

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

157. The Committee is investigating the potential for convicted offenders to use DNA samples as a basis for review of their case.

158. The Crimes Act was amended this year to enable disclosure of information on the DNA database to be made to the person to whom the information relates, in accordance with the regulations.

159. One of the benefits of DNA testing is that it can be used to establish the innocence of someone convicted of a crime they did not commit. In some cases, the wrongly convicted offenders’ DNA profiles may have already been collected and included on the DNA database. In other cases, there may be no authority to compulsorily acquire their DNA under the Act (eg, where they were convicted of a forensic sample offence before 1 July 1998 and are not in custody).

160. There should be provisions in the Act to ensure that innocence testing can occur in such a way that does not disadvantage or deter someone from seeking a review of their conviction for fear of being included on a DNA database that they ought not be on in the first place. Moreover, where the DNA of a wrongly convicted person has already been collected, there should be clear provisions requiring the destruction of the DNA profile and any related material, and its removal from the DNA database, after any pardon or quashing of conviction.

161. Extreme care needs to be exercised where a claim of wrongful conviction involves a request for a DNA sample from a victim or third party associated with the victim. Unreasonable and intrusive collection should be avoided to prevent re-traumatisation and ensure the privacy of victims and their families. In cases where the possibility of exonerating a wrongfully convicted person outweighs the privacy interest of the victim, DNA collection should only proceed with judicial authority and by the use of the least intrusive method.

162. If Victoria establishes an “Innocence Panel” such as that in NSW, the Privacy Commissioner should be a member, as in NSW.
Questions 6 & 7: What are the limitations, if any, on the conclusions that can be drawn from DNA profiling matches in criminal trials? What accreditation standards and reviews are needed to ensure that the forensic laboratories maintain up-to-date, accurate and reliable sampling processes?

163. These are questions more appropriately left to those with better expertise in the field.

164. On Question 7, the Privacy Commissioner emphasises that any participating forensic laboratory should, as a condition of accreditation, be bound contractually to comply with the Victorian Information Privacy Act 2000.

Question 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?

165. The Committee is examining instances of unauthorised retention, use, disclosure and destruction of DNA samples and related legislative provisions.

Identifying the primary purpose for collecting DNA information

166. The Crimes Act requires disclosure of the purpose of collection to cooperative suspects when a voluntary sample is sought under s. 464R: s. 464S(1)(a). However, the legislation does not clearly articulate what constitutes a legitimate purpose of collection. With all other suspects (particularly those unable to consent due to age or impairment), and with serious offenders, there appears to be no requirement that the suspect be told the purpose for which their sample is being collected. The court is simply required to inform them of the reasons for its decision to make the order (ss 464T(7), 464U(9) and 464ZF(9)).

167. The Crimes Act was recently amended to require volunteers to be informed of the purpose for which their sample may be used and to allow them the option of limiting permissible uses (ss 464ZGB(3)(b) and (bb)).

168. Presumably, the primary purpose of collecting forensic samples (at least in respect of suspects) is to prove or disprove the person’s involvement in the particular crime which is being investigated (ss 464R(1), 464T(1) & (3), and 464U(3) & (7)). With serious offenders, the purpose is presumably broader, such as linking a serious offender with unsolved crimes. If samples are being collected as a way to deter recidivism, that purpose should be a matter for separate consideration as policy by Parliament and, in particular cases, by the court.

169. Leaving to one side convicted serious offenders, the defined purposes of DNA collection are crucial. In privacy, purpose governs use. If a person consents to giving a sample voluntarily for a specific purpose, it would be a serious erosion of privacy – in the sense of control of one’s person and one’s personal information – if the state were to use the sample or data derived from it for other purposes.

170. Parliament needs to turn its mind to this matter urgently, before collection and the subsequent databases grow large and the DNA blueprints of many thousands of people are in the hands of the state. In future, governments may be tempted to use the information for
purposes not now imagined. The temptation will grow in proportion to the proportion of
the population whose samples and data are in the database. Some purposes may seem
beneficial, others benign. But others may not be, depending on the government of the day
and the development of genetic knowledge. These prospects need to be held in mind now
as we decide how widely to collect DNA and how long to retain it.

Identifying secondary purposes for using or disclosing DNA information

171. Other sections in the Crimes Act suggest that DNA profiles may be used for a range of
secondary purposes, including:

   a. for use for other unrelated offences where it has probative value (for suspects, see ss
      464ZFB; for volunteers, see ss 464ZGE and 464ZGF; also see 464ZG);

   b. to establish paternity where suspected of a sexual offence (see s. 464T(2));

   c. to identify missing or unknown deceased persons (s. 464ZGI);

   d. for statistical purposes (see s. 464ZFD, where the information can be retained even if
      the sample is required to be destroyed, provided it is de-identified).

172. Sections 464ZGH and 464ZGK set out a range of permissible uses and disclosures of
personal information stored on the DNA database. These include:

   a. administration of the DNA database system;

   b. the exercise of access by the data subject (eg, the volunteer who provided the sample),
in accordance with regulations;

   c. matching of DNA profiles on the various indexes (eg, matching the serious offenders
      index against the crime scene index);

   d. coronial investigations or inquests;

   e. complaint handling by the Victorian Ombudsman, Privacy Commissioner or Health
      Services Commissioner.

173. The Act also facilitates the use and disclosure of DNA profiles within Australia and
overseas:

   a. nationally, in accordance with agreements entered into between Victoria and any other
      Australian jurisdiction; and

   b. internationally, by allowing this information to be used in accordance with mutual
      assistance legislation.\textsuperscript{124}

174. The Crimes Act provides that information obtained from carrying out a forensic
procedure may be disclosed in the following circumstances:

   a. in accordance with any other provision in the forensic procedures Subdivision of the
      Act;\textsuperscript{125}

   b. where the information is already publicly available;\textsuperscript{126}
c. where the disclosure is by the data subject or where the data subject gives written consent to the disclosure;\textsuperscript{127}

d. for the purposes of civil proceedings (including disciplinary proceedings) that relate to the way the procedure was carried out;\textsuperscript{128}

e. for the purpose of the data subject’s medical treatment;\textsuperscript{129}

f. for the purpose of the medical treatment of another person, if necessary to prevent or lessen a serious threat to their life or health;\textsuperscript{130}

g. where necessary to prevent or lessen a serious threat to public health.\textsuperscript{131}

175. The DNA Database Act extended the purposes of collection and use of DNA profiles in a very open-ended way. The purposes are not necessarily limited to law enforcement activities. For instance, the new amendments require that cooperative suspects and volunteers be informed that their DNA profiles "may be used for the purpose of a criminal investigation or any other purpose for which the DNA database may be used under this Subdivision or a corresponding law of a participating jurisdiction": ss 464S(1) and 464ZGB(3).

176. “Corresponding law” is defined to mean any law that substantially corresponds to the Crimes Act or any law that is prescribed.\textsuperscript{132} Great caution needs to be exercised if regulations are to prescribe a law that does not substantially correspond with the Crimes Act, particularly if that law allows use and disclosure of DNA information for inarticulated or vague purposes. Such laws will of course be subject to amendment by jurisdictions other than Victoria.

"Function creep" and need for Parliamentary oversight

177. Sections 464ZGH(2)(e) and 464ZGK(2)(e) allow Victoria to enter into an arrangement with any other Australian jurisdiction to provide access to the database. The provision does not limit the purpose for which access can be granted, nor does it restrict who can be granted access. Access can be granted to police or to "any other persons authorised in writing by the Chief Commissioner of Police": ss 464ZGH(2)(d) and 464ZGK(2)(d).

178. A DNA database is a very powerful tool which has the potential to be a rich source of sensitive information that might be attractive to third parties whose interests are far removed from law enforcement. If genetic information is to be made available to third parties or for purposes unrelated to the criminal investigation purpose for which the DNA database was said to be originally established, any expansion (or "function creep") should be specifically and in every case subject to the legislative power of the Victorian Parliament and not be left to be determined by a decision of the Executive, by Memorandum of Understanding or other instrument of Ministerial Councils, by regulations, by private agreement or by the parliaments, the executive governments or the police of other jurisdictions.

Purpose specification & informed consent

179. It is critical that the legislation clearly articulate the purposes for which DNA profiles and related material are being collected. Where the purpose is not specified or is defined vaguely, it becomes exceedingly difficult to constrain unauthorised uses. Lack of specificity of purpose also undermines informed consent.
180. General statements are unlikely to enable consent to be truly informed. Disclosure should be required to be made about the sort of matching or other use that might occur and the accountability mechanisms governing it.

181. The purposes for which DNA information is collected and can be used should be precisely articulated in the Crimes Act, with a requirement to inform all persons (not just consenting suspects and volunteers) of these purposes. This would go some way towards ensuring that consent is informed and handling of DNA information is transparent.

182. It would also promote fair collection by giving suspects a fuller appreciation of what may be done with their information, in the immediate and long term, should they wish to make any submissions as to whether a compulsory forensic procedure should be ordered (under ss 464T or 464U).

Question 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?

183. The national DNA database is part of a larger shared information resource known as CrimTrac and described above at paragraphs 18-24.

184. Since CrimTrac holds data collected by others and used by others, CrimTrac alone is not able to be held accountable for privacy protection. The overall effect of the arrangements is that while control of CrimTrac is centralised, accountability for it is dispersed. It is mostly spread among various ombudsmen and privacy commissioners, where they have appropriate jurisdiction.

185. The accountability in relation to privacy protection of the various participating jurisdictions is uneven. Since the data is shared, each participant in CrimTrac may be vulnerable to the inadequacies of the privacy protection of the other participants. The data in CrimTrac is being progressively enriched by what appear to be uncoordinated decisions, whether legislative or administrative, in participating jurisdictions throughout Australia.

186. Any national database of personal information about Australians, in particular a database that incorporates genetic information, should have appropriate safeguards.

187. This is particularly the case after the events in the United States of 11 September 2001. As Australia re-examines the balance between liberty, of which privacy is a slice, and security, of which the major users of CrimTrac are practical tools, it ought to do so openly and consciously. This inquiry is an opportunity for Victoria’s Parliament, through your Committee, to do this in relation to one state’s contribution to one part of the overall CrimTrac database, namely, Victoria’s DNA data. A different inquiry is currently underway into the national DNA database (see endnote 1 and discussion below at paragraphs 191-192).

188. The Crimes (DNA Database) Act 2002 passed by the Victorian Parliament on 26 March 2002 formalises Victoria's participation in the national scheme to use DNA for law enforcement work and for other secondary uses that are unrelated to criminal investigation. In effect, Victoria is to add some of its people's DNA data to a common pool that will be accessible by other jurisdictions in Australia and overseas. The quality and security of that database Victoria alone cannot control. The future uses and consequences of that database no one can predict. This puts a premium on the safeguards applied in Victoria to the collection of DNA data.
189. The Crimes Act also allows the DNA database to be used in accordance with the *Mutual Assistance in Criminal Matters Act 1987* (Cth) or the *Extradition Act 1988* (Cth): ss 464ZGH(2)(e) and 464ZGK(2)(e). If the effect of these sections is to allow for Victorians’ genetic information to be transferred to other countries, it is essential that comparable privacy safeguards are in place to guard against misuse.

190. The Act will allow DNA profiles obtained in other jurisdictions (including those jurisdictions with limited privacy safeguards) to be used in Victoria and in evidence: s. 464ZGO.

191. When the Commonwealth amended its Crimes Act to establish the DNA database, the responsible Minister told Parliament that independent oversight would be necessary:

> “In relation to the committee’s fourth recommendation, I have engaged in discussions with the federal Privacy Commissioner and the Commonwealth Ombudsman in developing a response. Some serious issues have been raised in relation to the oversight of the national DNA database system. In addition to extending the legislation to include the Privacy Commission and the statutory review of Commonwealth forensic procedures, I have written to state and territory ministers with a view to getting agreement on cooperation between Commonwealth, state and territory bodies to ensure there is effective oversight of not only the operation of a DNA system within each jurisdiction but also the overall operation of the national system. This is best achieved by including formal independent monitoring mechanisms in the CrimTrac agreement with the states and territories so that the total scheme is properly audited and monitored. I am making these statements because I did undertake with the federal Privacy Commissioner that I would make these statements in reply in this debate. Of course, matters will no doubt be taken further during the committee stage.

> “I might also mention that I expect to discuss oversight arrangements at the next meeting of the Australian Police Ministers Council in June. While recognising that CrimTrac is conscious of accountability issues and is constructive in the development of appropriate procedures, adequate and independent monitoring of a national DNA database system is critical if we are to have an effective system that ensures that any problems are quickly identified and remedied. The best way to do this is to ensure that there is adequate independent monitoring in each jurisdiction, and across the jurisdictions, which can, in turn, properly investigate complaints and pool information and better practices to safeguard information and ensure that DNA material is collected and matched in accordance with procedures. This is extremely important and must be addressed.

> “The procedures in this legislation and the legislation of the states and territories are to be put in place to prevent an undue impact on the lives of individuals who provide DNA for the system and to ensure that information obtained from it is used only for the purposes for which it is collected. It is therefore very important that we take steps to ensure that there is adequate independent oversight of compliance with agreed procedures. In view of the interjurisdictional nature of the scheme it is vital that we have arrangements that ensure that the oversight function is like the system itself: interconnected and properly coordinated. These arrangements must also ensure that complaints can be investigated easily without jurisdictional barriers becoming a problem. By encouraging compliance and avoiding problems later these measures will also play a role in improving the effectiveness and efficient use of the system by law enforcement agencies.

> “I consider these issues can be addressed within the 12-month period before the proposed review, but in order to ensure that there is adequate follow-up on this issue it is proposed that the legislation be amended to provide for a further review within two years of that date if the review report indicates there are still deficiencies. This will cover the situation if there has been less progress than expected. So we have the review in 12 months and, if that reveals that there has not been the progress that was desired, then a further review is possible within two years of that date. Let me make it clear: there is not just the one-off review; there is a facility for further review if matters have not progressed satisfactorily. Similar arrangements would also appear to be useful in relation to other elements of the CrimTrac system. I will also be taking up the broader application of the proposed monetary and accountability mechanisms with state and territory ministers.

> “I now come to recommendation No. 4. The legislative changes proposed in relation to this recommendation are: firstly, to include the Privacy Commissioner on the independent review team; secondly, to ensure the independent review considers the effectiveness of the independent oversight and
accountability mechanisms for the DNA database system; thirdly, to defer the review until 12 months after the commencement of these new provisions—this will enable the review to assess the procedures in light of an operational DNA database; and to assess progress in developing the accountability mechanisms. With this deferral we will able to see how these provisions are operating in the meanwhile. There is a provision for a review due now but the government is of the view that this, perhaps, would not be worth while and wishes to defer it for 12 months and then have the review in the fashion mentioned.

“The final response is to cause the minister to ensure a further review is undertaken if the initial written report tabled identifies any inadequacies with the matters considered in the initial review—that is the review within two years after that first review that I mentioned. Proposed government amendment No. 27 deals with these matters. Proposed government amendment No. 24 merely adds the Commonwealth Ombudsman and joins the Privacy Commissioner as a person to whom database information can be disclosed without that disclosure constituting an offence. This amendment recognises the own motion investigation powers of the Ombudsman and will improve independent oversight of the legislation.”

192. The first review is underway. The NSW Parliament has reviewed the NSW aspects of DNA data collection and use. The NSW Ombudsman has also published a review. Now, through this Committee, a Victorian review is underway.

193. Whatever may be the various conclusions, recommendations and outcomes of these reviews, the central problem will remain. The national DNA database will still be operated in a centralised way, while its accountability will be dispersed and uncoordinated.

194. The Australasian Police Ministers’ Council, which set up CrimTrac, is neither established nor equipped to exercise oversight in the specialised, detailed, ongoing way that a database of this significance requires.

195. Neither the Commonwealth nor any one participating State or Territory can adopt and enforce a role as independent auditor of the collection, quality, use, disclosure and, when appropriate, destruction of the data about Australians that is gradually being built up in CrimTrac.

196. So far, the legislatures of the various participating jurisdictions do not appear to have addressed this inherent flaw of concentrated control with dispersed accountability. Nor could they, as separate legislatures.

197. If the executive governments of the participating jurisdictions have recognised the issue—it perhaps through the various Ministerial Councils—they do not appear to have addressed the problem in a coordinated way.

198. Having regard to the significance of the data being collected, the apparent quickening of the rate (and breadth) of collection and the likelihood of improvements in database technologies and genetic analysis, this Committee is urged to address this issue in its report to the Victorian Parliament.

199. The first review of the Commonwealth’s DNA database provisions may produce relevant proposals. So may the current joint inquiry by the Australian Law Reform Commission (“ALRC”) and Australian Health Ethics Committee (“AHEC”).

200. At a minimum, the accountability measures should address the following matters:

  a. clear, uniform, purpose-built statutory basis for the broader CrimTrac system, to be adopted by each participating jurisdiction;

  b. independent audit, investigation and complaints-handling mechanisms with appropriate powers and a duty to report directly to Parliaments;
c. provision for redress;

d. sanctions against misuse;

e. provision for mandatory annual reporting, in a uniform fashion, by all participating jurisdictions, and by the national DNA database administered by CrimTrac, as relevant, of:

(i) the total number of individuals whose information is on the database;

(ii) the number of DNA samples kept and of DNA profiles kept, and the location of where these are housed;

(iii) the number of times, and extent to which, reasonable force was used to obtain a sample;

(iv) the number of new individuals added in the reporting year;

(v) the number of samples (and associated data) destroyed in the reporting year;

(vi) the names of the organisations (Australian and overseas) with access to the information, or parts of it, and the precise authorisation under law for that access;

(vii) the names of the various databases that comprise the system and the precise authorisation under law for those databases and for their inclusion in the shared system;

(viii) measures taken in the reporting year to address matters reported by the independent oversight body;

(ix) the number of matches and non-matches of profiles against profiles in the database; and

(x) the number of prosecutions in which DNA was admitted into evidence, and the number of prosecutions in which DNA evidence was ruled as inadmissible.
IV. Additional matters

Use of reasonable force

201. In carrying out a compulsory forensic procedure on a suspect or serious offender, police are entitled to use "reasonable force": s. 464ZA(1).

202. Where unreasonable force has been used (in breach of s. 464ZA), the evidence obtained as a result of carrying out the forensic procedure is inadmissible: s. 464ZE.

203. While the Model Bill similarly allows reasonable force to be used, it includes a provision that forensic procedures must not be carried out in a way that is cruel, inhuman [sic] or degrading: cl. 36. The Model Bill also requires that, with the removal of hair, only so much hair as is necessary for an analysis should be taken and the least painful method is to be used: cl. 37.

204. In considering the issue of reasonable force, MCCOC considered alternatives used in other jurisdictions, such as the drawing of adverse inferences.\textsuperscript{138}

205. The use of force was also compared with adverse inferences in the 1989 report by the Victorian Consultative Committee on Police Powers of Investigation, which led to the early forensic procedures provisions in the Crimes Act. In that report, the Committee was unanimous in the use of reasonable force for non-intimate procedures (such as fingernail scrapings) but was evenly divided as to which method was preferred for intimate procedures (such as mouth swabs and taking samples of pubic hair from a person's genital area).\textsuperscript{139} The Committee stated that, where reasonable force was supported, it was to operate in a passive way:

"It is envisaged that the force will be used merely to restrain the suspect while the procedure is being performed, and no more force will be used than is required to achieve that end. It is not in any way contemplated that force will be used to require any active participation by the suspect in any procedure."\textsuperscript{140}

206. The Consultative Committee acknowledged that the use of force was not without difficulties and pointed to the potential for institutionalised violence.\textsuperscript{141}

207. Concerns were raised last year alleging that excessive force was used to collect DNA samples from prisoners in Victoria.\textsuperscript{142} The use of capsicum spray, police dogs and riot gear were said to be justified to effectively restrain a prisoner who was uncooperative.\textsuperscript{143}

208. The independent analysis by the NSW Ombudsman in this respect is instructive:

"The method preferred by police to take forensic DNA samples from inmates is by a self-administered buccal (or mouth) swab, which involves the inmate soaking up the saliva and cheek cells from the inside of her or his cheek using a foam-tipped plastic swab. If the inmate does not consent, a senior police officer can make an order for a sample of hair with roots to be taken, with force if necessary. Alternatively, the police can apply for a court order to take the sample.

"The Police Service has informed us that samples of blood are taken only as a last resort, such as when an inmate does not consent to the mouth swab, and has ‘shaved down’ [removed all body hair] in an attempt to avoid a sample of hair being taken….

"The NSW Police Service procedure for taking a forensic hair sample is ‘the lever arch method’, where 15-20 hairs are levered out, placing even pressure on the hair that is being pulled out."
“Earlier this year a community-based organisation raised concerns with our office that this method of taking hair was more painful than that employed by police in other jurisdictions such as the UK and Canada. It cited UK policies which specify that the hair must be taken one strand at a time and that the prisoner or suspect be allowed to specify from which part of the body the hair is to be collected.

“In his evidence to the Standing Committee on Law and Justice on 7 August 2001, the President of the NSW Council for Civil Liberties stated that: ‘The way the Act is operating at the moment, if you do consent you get a lesser treatment in terms of the DNA extraction, if you do not consent you have a harsher procedure.’

209. It is emphasised that the above quotation relates to NSW and not to Victoria.

210. Consideration should be given to formulating, in light of experience since Victoria’s 1989 Consultative Committee’s note of caution was sounded, more detailed rules to govern use of reasonable force, with provision for sanction, redress and the mandatory presence of an independent observer whose report of the procedure shall be made public in every instance. With online publication now routine, such a publication requirement would not be onerous or expensive. By compelling publication of every report, not just those that may have led to a complaint, public confidence will be maintained in the process, where the reports show that a majority of occasions of use of reasonable force comply with the rules.

Relatives

211. The Act already allows relatives to volunteer DNA samples to assist in the identification of missing or deceased persons. The DNA Database Act will extend this practice so that relatives’ DNA may be matched on the national DNA database with the missing persons’ index and the unknown deceased persons’ index.

212. Clarification is necessary as to whether samples can be sought from volunteers for the purpose of assisting in the identification of suspects and serious offenders, and whether consenting relatives’ DNA can be matched against other indexes on the national DNA database (including the suspects index, the serious offenders index, and the crime scene index).

213. While the Act contains express provisions in relation to obtaining forensic samples from suspects and serious offenders, these provisions (and any safeguards accompanying them) may be circumvented if DNA can be otherwise obtained from a "third party", namely from suspects or serious offenders' relatives.

214. Consideration should be given to prohibiting the seeking or obtaining, without a court order, of DNA material from volunteers for the purpose of identifying suspects or serious offenders.

Genetic registers

215. Concern has been expressed about police access to genetic registers, such as "Guthrie cards". Guthrie cards are cards that contain blood samples collected from the heels of newborns at hospital for the purpose of testing them for cystic fibrosis and phenylketonuria. In Victoria, all children born since the late 1960s have had such blood tests. Testing and storage is conducted by laboratories at the Murdoch Institute and the Royal Children's Hospital.

216. Further consideration is required to determine whether it is appropriate for police to be able to access existing genetic registers (or tissue banks, where individuals provide samples solely for the purpose of possible use in research), having regard to the public policy
interests that led to the establishment of such registers in the first place. When parents of newborns consent to the blood test, the furthest thing from their mind is any measured judgement of the potential use by the state, through the police or otherwise, of their child’s DNA. Individuals may be less inclined to seek a genetic test or to provide a tissue sample if the genetic register or tissue bank becomes a pool of data into which police may routinely dip.

217. In Western Australia, when police sought Guthrie card DNA for investigative purposes, the hospital custodians destroyed the samples. Without more detail, no judgment is made or implied about the wisdom of this action. It is, however, a cautionary tale for Victoria. The issue needs to be addressed transparently and by the appropriate authority, Parliament. The ALRC/AHEC has drawn attention to this important issue. It should not be decided by default through occasional or routine administrative arrangements by authorities dealing with each other.

218. It should be a matter for thorough public debate and considered parliamentary decision before Victoria’s collections of infant DNA or research volunteers’ tissue are tapped for law enforcement purposes. If approved, any such use should:

a. be subject to clear purpose limitations;

b. be a technique of last resort in only the most serious cases;

c. not result in addition of the DNA or derived data to any other database;

d. require informed consent in all but the most unusual cases; and

e. in all cases require a court order made after public proceedings about which reasonable notice should be given to relevant parties to put appropriate submissions to the court.

219. The scheme should ensure that relevant parties such as medical researchers, leading research ethics committees and the Privacy Commissioner receive due notice and have standing to be heard.

V. Conclusion

220. In summary, this Submission argues that:

a. Genetic information is unique, powerful and of profound significance to maintaining respect for privacy and for the sovereignty and dignity of the human person.

b. Unlike most other personal information about an individual’s body, his or her DNA also contains personal information about the bodies of the persons related to the individual from whom the sample was taken. Your DNA contains information about your parents’ DNA and your children’s DNA, as well as the DNA of many of your blood relatives.

c. Genetic information can predict a person’s future health with growing sophistication. It may in time be regarded as predictive also of traits we associate not with health but with character.

d. The science of genetics is developing and in ways that may make today’s certainties less obvious tomorrow and tomorrow’s discoveries perhaps more challenging to
lawmakers than today’s knowledge might seem. Any DNA databases built now may in future take on far greater public policy significance.

e. When Victorian authorities, in particular law enforcement agencies, gather, collect, share and use genetic information, serious privacy risks need to be considered and balanced precisely and transparently with other public interests.

f. Victoria’s Crimes Act is in some ways superior in its protections. In some ways, it is deficient in achieving the requisite balance, falling short of the recently developed Model Bill and failing to provide adequate safeguards for some of the most vulnerable of the persons from whom DNA samples may be collected.

g. Particularly in light of the renewed attention to the balance between liberty and security following the crimes in the US of 11 September 2001, Parliament should examine urgently the adequacy of accountability and oversight of the national DNA database in CrimTrac and encourage, to the extent it can properly do so, similar but coordinated examination by all the participating federal, state and territory jurisdictions. As noted, similar work is being undertaken. So far, the work seems uncoordinated.

h. Uniformity is needed, but uniformity is escaping us.

i. Key suggested improvements are:

   (i) proper procedures for mass testing of volunteers (see paragraphs 97-98 and 101-106);

   (ii) better protection for the particularly vulnerable (see paragraphs 125-156 and 201-219);

   (iii) more precise attention to permitted purposes and uses, and the process by which they are authorised (see paragraphs 166-182); and

   (iv) as DNA and other personal information crosses borders, so must privacy protection and accountability (see paragraphs 183-200).

PAUL CHADWICK
Privacy Commissioner
17 July 2002
Endnotes

1 The Commonwealth is required by statute to review the effectiveness of its forensic procedures legislation (contained in Part 1D of the Cth Crimes Act 1914) at some time after 20 June 2002. The review was scheduled to occur 12 months after the commencement of the amendments by the Crimes Amendment (Forensic Procedures) Act 2001 (Cth) to section 23YV of the Crimes Act 1914 (Cth). The Commonwealth Senate Legal and Constitutional Committee reported on the forensic procedures amendments prior to their introduction: Inquiry into the Crimes (Forensic Procedures) Bill 2000, December 2000, available at http://www.aph.gov.au/senate/committee/legcon_ctte/Forensic/contents.htm, last visited 12 July 2002. Other Australian jurisdictions have similarly been looking at their proposed and existing forensic DNA laws, see:

   - Western Australia, Legislative Council, Standing Committee on Legislation (December 1998) Report of the Standing Committee on Legislation in relation to Forensic Procedures and DNA Profiling, report no. 46; and
   - Western Australia, Legislative Council, Standing Committee on Legislation (October 1999) Report of the Legislation Committee in relation to Forensic Procedures and DNA Profiling: The Committee's Investigations in Western Australia, Victoria, South Australia, the United Kingdom, Germany and the United States of America, report no. 48.


6 “Although the DNA used [for forensic purposes] is considered ‘junk DNA’ (STRs-single tandem repeated DNA bases), in the future this information may be found to reveal personal information such as susceptibilities to disease and certain behaviors”; “DNA Forensics: Ethical, Legal and Social Concerns about DNA Databanking” on the Human Genome Project Information website at http://www.ornl.gov/TechResources/Human_Genome/elsi/forensics.html, last visited 17 July 2002. Also see United Kingdom, Human Genetics Commission (May 2002) Inside information: Balancing interests in the use of personal genetic data, report, para 1.3, available at http://www.hgc.gov.uk/insideinformation/index.htm, last visited 17 July 2002, which acknowledges that the function of “junk DNA” is not currently understood.


8 Crimes (Custody and Investigation) Act 1988 established subdivision 30A in Div. 1 of Part 3 of the Crimes Act 1958. Subdivision 30A contains the forensic procedures sections. This amending legislation was passed.
following the April 1986 report of the Consultative Committee on Police Powers of Investigation, under the chairmanship of Mr John Coldrey QC.

9 Crimes (Amendment) Act 1993 (Vic), which came into effect on 1 June 1994. This amending legislation was based on the September 1989, Report on Body Samples and Examinations, of the Consultative Committee on Police Powers of Investigation, chaired by Mr John Coldrey QC.

10 Crimes (Amendment) Act 1997 (Vic), which came into effect on 1 July 1998.


12 The Board is chaired by a Commonwealth representative from the federal Attorney-General’s Department. It has four voting members: two police commissioners from large jurisdictions (Vic and NSW) and two police commissioners from small jurisdictions (Tas and WA). There are two non-voting member positions: a finance specialist (from Victoria Police) and an information technology specialist. The membership of the board rotates every three years to ensure the equitable representation of each jurisdiction. See http://www.crimtrac.gov.au/board.htm, last visited 8 July 2002.


19 "Forensic material" is defined in s. 464 of the Crimes Act 1958 (Vic) as meaning any material from which a DNA profile can be derived and which is obtained in accordance with the Act's forensic procedures provisions. Material that is taken solely for the purpose of identifying a person is excluded from this definition.

20 Forensic samples may be intimate or non-intimate. Intimate samples include blood samples, pubic hair samples, saliva samples and dental impressions: s. 464. Non-intimate samples include hair (other than pubic hair) including the root, and samples from under a fingernail or toenail: s. 464.

21 The Model Bill allows police to order the taking of non-intimate samples from adult suspects: cl. 13.

22 Crimes (DNA Database) Act 2002 (Vic), s. 1.

23 Crimes Act 1958 (Vic), ss 464ZGH(2)(g) and 464ZGK(2)(g).

24 See the 1998 and 2001 Commonwealth Crimes Amendment (Forensic Procedures) Acts; the Crimes (Forensic Procedures) Act 2000 (ACT); the Crimes (Forensic Procedures) Act 2000 (NSW); Chapter 8, Part 4 of the Police Powers and Responsibilities Act 2000 (Qld); the Criminal Law (Forensic Procedures) Act 1998 (SA); and the Forensic Procedures Act 2000 (Tas). The Northern Territory forensic procedures laws are contained in Division 7 of Part VII of the Police Administration Act 1978 (NT), Part V of the Juvenile Justice Act 1983 (NT); and Part XXVII of the Prisons (Correctional Services) Act 1980 (NT). Western Australia was the last remaining Australian jurisdiction to enact forensic procedures legislation: The Criminal Investigation (Identifying People) Act 2002 (WA) was assented to on 4 June 2002 but has yet to be proclaimed.

25 For instance, in the Northern Territory, intimate forensic procedures (such as taking a blood sample or a sample of pubic hair) may be undertaken, by consent or under a court order, where a person is in lawful custody charged with any offence, provided only that police reasonably believe that the procedure may reveal evidence relevant to that or any other offence: Police Administration Act 1978 (NT), s. 145. Non-intimate forensic procedures (such as taking a mouth swab or a sample of hair) may be carried out with the approval of an authorised police officer where police reasonably suspects the person has committed “a crime” or where the person is in lawful custody charged with an offence punishable by imprisonment” Police Administration Act 1978 (NT), s. 145A.

In Queensland, the Police Powers and Responsibilities (DNA Amendment Act 2002, which came into effect on 21 June 2002, was enacted to ensure that DNA could be collected from offenders convicted of any
indictable offence, whether tried summarily in the Magistrates’ Court or on indictment in the District and Supreme Courts. This amending Act also retrospectively validated any collection of DNA from offenders convicted summarily of indictable offences in the Magistrates’ Court, in anticipation of an appeal to the High Court in the matter of Brodgen and Others v Commissioner of the Police Service.

In Western Australia, DNA can be obtained from uncharged suspects, in respect of offences punishable by 12 months or more, with the suspect’s consent or approval by a senior police officer (for a non-intimate procedure) or justice of the peace (for an intimate procedure on an adult suspect) or magistrate (for an intimate procedure on a child or incapable person): Part 6, Criminal Investigation (Identifying People) Act 2002. 26 In the Northern Territory, the Juvenile Justice Act allows police to seek a court order to carry out an intimate forensic procedure on a child (17 years or under) who is in lawful custody for “an offence”: s. 31. The magistrate need only be satisfied that there are reasonable grounds for police to believe that the procedure may produce evidence relating to the offence or any other offence punishable by imprisonment. Non-intimate procedures can be carried out on a juvenile with the approval of a magistrate or with the approval of an authorised police member: s. 31B, Police Administration Act 1978 (NT). Approval can be granted where the juvenile is simply under suspicion of committing a crime; there is no requirement for that suspicion to be on “reasonable grounds”.

In Western Australia, prisoners on remand (who have been charged but not convicted of an offence punishable by a term of imprisonment of 12 months or more) may be required by police to undergo a forensic procedure on a child or incapable person): Part 6, Criminal Investigation (Identifying People) Act 2002, Schedule 1. 27 In Western Australia, the Criminal Investigation (Identifying People) Act 2002 authorises the collection of DNA from volunteers and witnesses (including children), police officers (including cadets, Aboriginal Aides, and police constables), deceased persons, and uncharged suspects 28 The Criminal Investigation (Identifying People) Act 2002 (WA) authorises the use of reasonable force, not only in exercising powers under the legislation, but also to overcome any resistance that might reasonably be expected to be offered by the person whose sample is being sought: s. 14. Forensic procedures may be carried out repeatedly in relation to the same investigation: s. 59. 29 In the Northern Territory’s forensic procedures scheme, there appear to be no provision for destruction of a suspect’s sample where no conviction has resulted or where it was improperly obtained or where a conviction becomes spent; samples (whether given by volunteers or charged persons) can be retained by the Police Commissioner for as long as they see fit and tested however they think fit: s. 147C, Police Administration Act 1978 (NT). Prisoners under sentence of imprisonment for a crime can be required to provide a buccal swab sample when directed to do so by the officer in charge of the prison: s. 95B(1), Prisons (Correctional Services) Act. Aside from having to deliver the sample to the Commissioner of Police (s.95B(5)), there do not appear to be any limitations on how the sample is used, disclosed, stored or retained. 30 For instance, in the Northern Territory, s. 147A of the Police Administration Act 1978 (NT) allows for samples to be included on a database and exchanged under an arrangement with the Police Commissioner or other appropriate authority of a corresponding jurisdiction. This section is phrased in such a way as to allow any government authority to enter into an arrangement with the NT for the exchange of DNA data for any purpose and under any law, provided only that the participating jurisdiction has a forensic procedures law in force at the time: s. 147A (esp. the definition of “corresponding jurisdiction”) and s. 147B(d). 31 For example, New South Wales enacted the Crimes (Forensic Procedures) (Corresponding Laws) Regulations 2002 on 14 June 2002. These Regulations prescribe forensic procedures legislation in every jurisdiction as a "corresponding law" to its own, thereby enabling NSW to exchange DNA throughout Australia. 32 The intention to exchange DNA profiles internationally was noted in the CrimTrac tender documents: CrimTrac: Request for Tender (21 July 1999) at page 25 and Appendix 3, available at the Commonwealth Attorney-General’s website at http://www.ag.gov.au/publications/crimtrac%5Ffinal/welcome.html, last visited 5 March 2002. 33 Crimes Act 1958 (Vic), ss 464ZGH(2)(e) and 464ZGK(2)(e). 34 Werner Schuller (Manager Interpol DNA Projects, Interpol General Secretariat), Status Quo on Interpol’s DNA Projects, esp. pages 14 and 26, presentation at the 2nd International DNA User's Conference for Investigative Officers at Lyon, France, on 7-9 November 2001, available at http://www.interpol.int/Public/Forensic/dna/conference/2001/papers.asp, last visited 5 March 2002. 35 Oksana Hloden, “For Sale: Iceland’s Genetic History” (June 2000) ActionBioscience.org, available at http://www.actionbioscience.org/genomic/hlodan.html, last visited 17 July 2002. 36 Indictable offences are those offences which are punishable by up to 5 or more years imprisonment or a fine of up to $60,000 or more: Sentencing Act 1991 (Vic), ss 112 and 109. All offences under the Crimes Act are deemed to be indictable offences, unless the contrary intention appears: Crimes Act 1958 (Vic), s. 2B. Similarly, all offences under the Wrongs Act are deemed to be indictable ones, unless the contrary appears: Wrongs Act 1958 (Vic), s. 2A. 37 The relevant offences are indictable offences: against the person at common law; under Div 1 of Part 1 (offences against the person, including murder, rape, kidnapping, stalking, assault, resist arrest, possessing child porn); under ss 75, 75A, 76, 77 (robbery, armed robbery, burglary, aggravated burglary); under s 197 (destroying or
damaging property, if by arson), 197A (arson causing death); under ss 249, 250 and 251 (contamination of goods with intent to cause public alarm); under ss 317 and 317A (explosive substances, bomb hoaxes); under s. 318 (culpable driving); under ss 71, 71AA, 72 or 72A of the Drugs Poisons and Controlled Substances Act 1981 (drug trafficking and cultivation of commercial quantities).

38 Consent is deemed to be refused if the suspect is in prison, gaol etc and fails to consent within 24 hours of the request: s. 464S(3).

39 “Relevant suspect” is the term used and defined in the Crimes Act 1958 (Vic) – see s. 464T and definition in s. 464(2).

40 “Child” is not defined in the Act, but s. 464U limits sampling to children who are of or over 10 years of age, but under 17 years of age: see especially ss 464U(2) and (7).

41 Same set of offences as applies in respect of s. 464T(3).

42 Additional requirements are set out in s. 464W for situations where the interim order is sought by telephone.

43 Forensic sample offences are set out in Schedule 8 of the Act and include murder, rape, kidnapping, burglary, arson, bomb hoaxes and drug trafficking and cultivation.

44 Crimes Act 1958 (Vic), ss 464ZGH(2)(d) and 464ZGK(2)(d) [emphasis added].

45 Crimes Act 1958 (Vic), ss 464ZGH (use) and 464ZGK (disclosure), esp s. 464ZGK(3)(k).

46 Crimes Act 1958 (Vic), ss 464ZGH(2)(d) and 464ZGK(2)(d).

47 See endnote 36.

48 Crimes Act 1958 (Vic), s. 74.

49 Crimes Act 1958 (Vic), ss 197 and 198.

50 Common law offence.

51 Crimes Act 1958 (Vic), s. 314.

52 Crimes Act 1958 (Vic), s. 83A.

53 Common law offences.


55 Wildlife Act 1975 (Vic), s. 76.

56 Heritage Act 1995 (Vic), s. 64.

57 Environment and Protection Act 1970 (Vic), s. 59E; and relevant offences under Pollution of Waters by Oil and Noxious Substances Act 1986 (Vic).

58 Food Act 1984 (Vic), ss 8, 8A, 9, 9A, 10 and 10A.

59 Information Privacy Act 2000 (Vic), s. 48; and s. 71 of the Health Records Act 2001 (Vic).

60 Eg, dangerous driving (s. 64) and, where a repeated offence, driving while disqualified: ss 64 and 30, respectively, of the Road Safety Act 1986 (Vic).

61 Eg, installing or using listening, optical surveillance and tracking devices (ss 6, 7 and 8) and communicating or publishing conversations or activities (s. 11): Surveillance Devices Act 1999 (Vic).

62 Eg, carrying on a business as a prostitution service provider without a licence: s. 22(1A), Prostitution Control Act 1994 (Vic).

63 Eg, blood or tissue donor making a false statement: s. 136, Health Act 1958 (Vic).

64 Eg, hunting, taking or acquiring endangered wildlife: s. 41, 45 and 47D of the Wildlife Act 1975 (Vic).


66 Model Bill, cl. 8 and “prescribed offence” in cl. 1.


68 The maximum term of imprisonment for a person convicted of an indictable offence that was heard summarily under s. 53(1) of the Magistrates' Court Act is 2 years: s. 113, Sentencing Act 1991 (Vic). These offences include theft and robbery, obtaining financial advantage by deception, unlawful possession of a firearm, destroying property valued under $250,000, Occupational Health and Safety Act offences, Environment Protection Act offences, and non-compliance with a compliance notice under the Information Privacy Act: s. 53(1) and Sch. 4, Magistrates’ Court Act 1989 (Vic).

69 See Model Bill, cl. 10.

70 See Model Bill, cl. 6.

71 Model Bill, cl. 19.

72 Under s. 464ZFB.

73 Model Bill cl. 23(2).

74 Compare ss 464T(5) and 464U(12) with Model Bill cl. 23(4).

75 Summary Offences Act 1966 (Vic), s. 4(d).

76 Summary Offences Act 1966 (Vic), s. 4(e).
It was reported that most of Perth’s 3500 taxi drivers provided DNA samples as a way to restore public confidence when police indicated their strongly suspected a cab driver was responsible for the murders. The media report queried whether police in fact had any crime sample against which the taxi drivers’ could be compared. The report also noted that there was concern about the mass DNA samples not being destroyed, despite police undertakings that they would destroy the DNA samples after a prime suspect was identified. Concern was express that the DNA would end up on the national DNA database, despite police assurances that the samples would be most on their guard to protect liberty when the Government’s purposes are beneficent…. The greatest dangers against unreasonable searches and seizures"]) Brandeis J continued (at page 479), “Experience should teach us to be most on our guard to protect liberty when the Government’s purposes are beneficent…. The greatest dangers against unlawful search and seizure as the “search” did not involve a physical trespass into the owner’s premises, and no tangible evidence was “seized” (as conversations were simply overheard).

Dissenting, Brandeis J balanced privacy with government intrusions as follows (at pages 478-9): “[The makers of the Constitution] sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be left alone -- the most comprehensive of rights, and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment [namely, the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures].” Brandeis J continued (at page 479), “Experience should teach us to be most on our guard to protect liberty when the Government’s purposes are beneficent…. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.” In support of this last statement, Brandeis J quoted (in note 12) from a “friend of the court” brief made on behalf of the telephone companies: “Criminals will not escape detection and conviction merely because evidence obtained by tapping wires of a public telephone system is inadmissible, if it should be so held; but, in any event, it is better that a few criminals escape than that the privacies of life of all the people be exposed to the agents of the government, who will act at their own discretion, the honest and the dishonest, unauthorized and unrestrained by the courts.”

Six years after the Olmstead decision, the government enacted the Federal Communications Act 1934 to prohibit unlawful wiretapping and place restrictions on telephone interceptions by government. Olmstead was eventually overruled by the Supreme Court in Katz v. United States, 389 US 347 (1967), which held that the government’s use of a listening device attached to a public telephone booth was an unlawful search and seizure that violated a person’s reasonable expectation of privacy.

Model Bill, cl 8(2), 14(2) and 19(2).

Model Bill, cl 8(3), 14(3) and 19(3). Also see cl 56, 59, 62(5) and (6), and 68(2).

This possibility was alluded to by the Court of Appeal in a matter involving s. 464T of the Crimes Act 1958 (Vic): Ellis v Dean (28 May 1996) Unreported judgment no. 7772 of 1995, Supreme Court of Victoria Court of Appeal, obiter of Brooking, Phillips and Charles JJA at 13.


It was reported that most of Perth’s 3500 taxi drivers provided DNA samples as a way to restore public confidence when police indicated their strongly suspected a cab driver was responsible for the murders. The media report queried whether police in fact had any crime sample against which the taxi drivers’ could be compared. The report also noted that there was concern about the mass DNA samples not being destroyed, despite police undertakings that they would destroy the DNA samples after a prime suspect was identified. Concern was express that the DNA would end up on the national DNA database, despite police assurances that the samples would only be used for the particular investigation. Gerald Tooth, “The Courage of our Convictions – The Claremont Serial Killer”, Radio National’s Weekly Investigative Documentary: Background Briefing, 25 June 2000, available at http://www.abc.net.au/rn/talks/mbing/stories/s146359.htm, last visited 17 July 2002.

Privacy Victoria, Submission to Vic Parlt LRC’s DNA inquiry, 17 July 2002
102 Model Bill, cl. 64(2) and (3).
103 Seventeen year old volunteers are also allowed to consent to giving samples: s. 464ZGB.
104 Model Bill, cl. 4(2), and cl. 1 definitions of “adult” and “child”.
105 This “spent sample” provision applies to all children who undergo a forensic procedure (including serious offenders), except for where the procedure was obtained in relation to a limited range of offences (eg, murder, sexual offences, causing serious injury, assault and arson causing death).
106 The definition of “child” in the Children and Young Persons Act indicates that the age is calculated at the time of the offence.
107 Model Bill, cl. 2 and cl. 23(2).
108 Model Bill, cl. 1 definition of “incapable person”.
109 Model Bill, cl. 3.
110 For example, notifying parents or guardians of an application for a compulsory forensic procedure: s. 464U(5); additional considerations which must be taken into account by the court in determining whether an order is justified: s. 464U(8); attendance of the parent or guardian when the forensic procedure is carried out: s. 464ZA(3); providing parents or guardians with a copy of every forensic report: s. 464ZD.
111 For example, notice to parents or guardians of an application for a compulsory forensic procedure: 464ZF(5).
112 For example, prohibiting samples to be sought by consent: cl. 4 and 5; requiring the incapable person’s best interests to be taken into account when deciding whether an order is justified: cl. 19(3)(d); requiring they be independently represented at the hearing of the application for a forensic procedure: cl. 23(2); presence of an interview friend when the forensic procedure is carried out: cl. 42. Also see cll 52 and 62.
114 For instance, evidence given before the NSW Parliamentary committee during its review of the NSW forensic procedures laws suggested that, throughout Australia, “there are cultures and customs within the indigenous community that indicate that people hold strong beliefs that the taking of human samples is a matter that gives rise to certain spiritual connotations. The way in which medicine – and, in white terms, sorcery – is practised in some communities is such that the taking of a hair, blood or saliva sample is the basis upon which harm can be inflicted upon a person”: Evidence of Mr Anthony Logan McAvoy, Report of Proceedings before Standing Committee on Law and Justice Inquiry into the Operation of the Crimes (Forensic Procedures) Act 2000, 8 August 2001, page 16, available at http://www.parliament.nsw.gov.au/prod/parlment/Committee.nsf/LookUp/InquiryKey/LawandJusticeDNA, last visited on 17 July 2002.


118 Model Bill, cl. 20(2)(d).

119 Model Bill, cl. 23(1).

120 *Crimes Act 1958 (Vic)*, ss 464ZGH(2)(b) and 464ZGK(2)(b).


124 *Crimes Act 1958 (Vic)*, ss 464ZGH(2)(c) and 464ZGK(2)(c).

125 *Crimes Act 1958 (Vic)*, s. 464ZGK(3)(c).

126 *Crimes Act 1958 (Vic)*, s. 464ZGK(3)(b).

127 *Crimes Act 1958 (Vic)*, ss 464ZGK(3)(a) and (m).

128 *Crimes Act 1958 (Vic)*, s. 464ZGK(3)(i).

129 *Crimes Act 1958 (Vic)*, s. 464ZGK(3)(j).

130 *Crimes Act 1958 (Vic)*, s. 464ZGK(3)(k).

131 *Crimes Act 1958 (Vic)*, s. 464ZGK(3)(l).

132 *Crimes Act 1958 (Vic)*, s. 464ZGK(3)(n).

133 In response to the 11 September attack, the Australian Prime Minister, State and Territory Leaders agreed on a new national framework for combating terrorism and multi-jurisdictional crime, including a commitment to enhance the capacity of each jurisdiction to collect and create DNA profiles for uploading onto a national database: *Summit Communiqué 5 April 2002*, para 19, available at [http://www.nca.gov.au/content/MedRel/FinalSummitCommunique.pdf](http://www.nca.gov.au/content/MedRel/FinalSummitCommunique.pdf), last visited 15 July 2002.


135 See endnote 1.

136 See paragraphs 38-40 above in relation to developments in other jurisdictions’ forensic procedures laws.

137 See endnote 2.


See paragraphs 4 and 191 above, together with associated endnotes.

The problems associated with a lack of uniformity across Australian jurisdictions was foreseen by the framers of the Model Law, who suggested that DNA not be retained or used for investigatory or evidentiary purposes if such retention or use would involve a substantial departure from the home jurisdiction’s legislation: Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General (May 1999) Model Forensic Procedures Bill and the Proposed National DNA Database, Discussion Paper, pages 87-89, available at http://www.ag.gov.au/publications/pubs.htm, last visited 10 July 2002.