Victoria Police has embraced the scientific advancements that have led to DNA technology and has welcomed the legislative changes that have facilitated its use in criminal justice. While DNA profiling is not considered or used as conclusive proof, it has become a powerful method to provide corroborative evidence regarding the involvement, or importantly, the non-involvement of a suspect. In order to make best use of the technology Victoria Police has initiated a DNA Strategic Development Project, and part of their role is to identify any areas of improvement.

The following areas of potential improvements are raised for your consideration:

1. **Legislation should authorise forensic sampling for any indictable offence and the summary offences included in Schedule 7 of the Crimes Act 1958. Sampling should be extended to any persons suspected of, charged, cautioned, to be summonsed for or convicted of these offences. Authority to sample at the time of arrest / interview is imperative.**

Currently, an investigating member may request a forensic sample from a person suspected of committing an indictable offence. If the suspect refuses to provide a sample, the member may then apply for a court order to conduct the procedure, but only if the offence committed is a Schedule 8 offence.

Schedule 8 of the Crimes Act lists the offences for which a compulsory procedure may be ordered. All the offences listed are serious indictable offences, including attempts.

Schedule 7 of the Crimes Act lists the summary offences for which fingerprints can be taken. It includes summary offences where the maximum penalty (whether for a first or subsequent offence) is, or includes, a period of imprisonment.

The authority to obtain fingerprints, a forensic sample and photograph from the suspect at the time of arrest/interview is preferred.
In the United Kingdom, the Criminal Justice and Public Order Act gives police the power to take DNA from all persons suspected of, reported for, charged with or cautioned for, a “recordable offence” - which is essentially any offence which attracts a term of imprisonment. The samples can be taken from suspects without consent, using force if necessary, by way of mouth swabs or a head hair root. (Although actual use of force is extremely rare both here and in the UK.) Forensic samples are usually taken from suspects at the time of arrest. In the seven years since the introduction of that database, a total of 1,579,830 DNA suspect profiles have been retained resulting in 178,828 matches (over 1000 per week).

Such a system would reduce the amount of time and resources spent obtaining post conviction samples. A full set of fingerprints, taken at the time of arrest, would confirm the identity of the donor and safeguarding the individual’s rights to information privacy. Confirmation of identity of the sample is vital to the integrity of the database. Similar legislation exists in other jurisdictions within Australia. This authority should be given to the Chief Commissioner of Police to delegate to a class of members of the police force, similar to provisions that exist in the current legislation relating to the ability to supervise the mouth scraping procedure.

With the increase in the number of convicted person samples stored on the DNA database, the potential for the number of matches multiplies. Unless there is a strong growth in the number of samples stored, the DNA database will not develop to its full potential. In Victoria, crime scene samples obtained from a wide range of offences are collected and stored on the DNA database.

2. **Legislation should extend operation of section 464 to cover offences under Commonwealth law.**

There is an increasing involvement of State and Territory police forces in investigating and applying Commonwealth offences such as those located in the *Commonwealth Crimes Act 1914* or the *Commonwealth Customs Act 1901*.

These acts include serious drug offences such as importation of prohibited drugs but being Commonwealth offences, are not included in the sampling
scheme. As they have a similar serious impact upon the community, Section 464 should be amended to include such offences within the sampling scheme.

3. **Legislation should authorise the taking of samples from persons held at the Governor’s pleasure or detained after being found “not guilty because of mental impairment”**.

There is no authority to obtain forensic samples for inclusion on the DNA database, from persons held at the Governor’s pleasure or detained after being found “not guilty because of mental impairment”. This is cause for concern as many of these persons have been involved in the worst types of offences including wrongful deaths, with a strong suspicion of involvement in other offences. The sampling regime should therefore be applicable to persons detained under these provisions.

4. **Legislation should authorise the sampling of deceased persons and the power to then cross-check these samples against the DNA database.**

There is no clear legislative power to obtain DNA samples from deceased persons. In order to assist police in solving unsolved crime, legislation is required to provide a power to obtain samples from deceased persons and cross-checked against the DNA database. This provision could be directed at deceased persons for whom there are outstanding *Crimes Act 1958* section 464ZF(2) or 464ZF(3) orders in existence.

5. **Legislation should authorise the sampling of a prisoner as a condition of release on parole.**

A person due to be released on parole who is the subject of a court order to obtain a forensic sample should be required to undergo the forensic procedure as a prior condition of release.

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*Inquiry into Forensic Sampling and DNA Databases
Victoria Police Submission to the Discussion Paper.*
6. **Legislation should permit the retention on the database of voluntary samples and samples taken from persons found not guilty, or where charges are not proceeded with.**

The United Kingdom’s Criminal Justice and Public Order Act authorises the retention of DNA samples and fingerprints taken from suspects, even when an acquittal or decision not to prosecute results. This retrospective legislation also enables police to retain fingerprints and DNA samples, which have been obtained, by consent, from persons for voluntary & elimination purposes.

This legislation arose in response to an actual incident, whereby a sample that was taken from a suspect charged with an offence was matched to an outstanding murder. Subsequently however, the suspect was acquitted of the original offence which necessitated the destruction of the sample obtained and therefore forced an acquittal on the murder.

It is not in the public interest that evidence linking a person to a serious offence such as murder should be excluded when the sample was taken in circumstances that were legal at the time but did not result in a conviction.

7. **Legislation should permit samples to be taken in order to eliminate persons from an inquiry, without being subject to the voluntary sample provisions in section 464ZGB.**

There are situations where police wish to take DNA samples from persons in order to eliminate them from their inquiries and have no intention to include the sample on the DNA database. Such situations include instances where samples that may belong to victims are found at scenes. The ability for police to exclude victims’ DNA from their inquiries may save many hours of wasted investigation time.

It is unclear as to whether the ability to take such samples is covered by the *Crimes Act 1958*, given that there is no intention to have the DNA samples included on the DNA database. If these samples are addressed in the Act, they fall within the definition of a voluntary sample and, as such, requirements including the presence of an independent person and
video/audio taping apply. This is unduly onerous for a voluntary sample that is outside of the investigatory regime.

8. **Legislation should permit the taking of a new evidentiary sample when a reference sample is already stored on the DNA Database.**

Post-conviction samples are entered onto the DNA database, and are used to match offenders to crime scenes or to link crime scenes. Police procedure is that once a match is identified, an ‘arrest’ sample is requested in order to confirm identity and to confirm the nexus between the suspect and the sample located at the crime scene. Where the offence is not a schedule 8 offence, and the suspect refuses to give informed consent to provide a forensic sample, no further action can be taken. If the offence is a Schedule 8 offence, police may apply to the Magistrates' Court for a compulsory order.

There have been a number of recent instances where Magistrates have refused to grant such orders on the basis that the suspect had previously provided a sample that had been profiled and placed onto the DNA database. In addition to the legal requirement for the prosecution to prove identity beyond reasonable doubt, it could be argued that evidence disclosing the existence of a reference sample is evidence of bad character and therefore inadmissible.

9. **Legislation should restrict the adding of conditions to an order.**

The authority off a Magistrate or Judge to make an order for sampling should be limited to that threshold question. The legislation should prevent the insertion of additional directions or prescriptive conditions on the sampling regime or procedures to be used during sampling.

10. **Legislation should remove the discretion in Sections 464ZF(8) and 464ZFB(2) of the Crimes Act 1958 that enables a**
Inquiry into Forensic Sampling and DNA Databases
Victoria Police Submission to the Discussion Paper.

When a person has been found guilty of a Schedule 8 offence, an application may be made under section 464ZF(2) for an order directing that person provide a DNA sample to be placed on the DNA database.

When a person has been found guilty of a Schedule 8 offence prior to the 1st of July, 1998, and is currently serving a term of imprisonment for any offence, an application may be made under the provisions of section 464ZF(3) for an order directing that the person provide a DNA sample to be placed on the DNA database

Where samples are obtained from suspects prior to conviction, police may make an application, upon conviction, to retain the samples under section 464ZFB.

Sections 464ZF(8) and 464ZFB(2) of the Crimes Act 1958 outline the considerations that courts must consider when hearing applications. Courts currently have discretion to grant orders or otherwise when hearing these applications.

Anecdotal evidence suggests that on occasions Magistrates are declining to issue orders and basing this on the ground that the person has no similar previous convictions. This assessment process is contrary to the spirit of the legislation and the discretion should be removed.

11. Section 464ZFAA should include a warrant procedure for the execution of section 464ZF(3) orders where donors have been released from custody.

A member of the police force may apply for a Crimes Act 1958, section 464ZF(3) order where a person has been found guilty of a forensic sample offence prior to 1 July 1998, and, at any time after that date, the person is serving a term of imprisonment. There is, however, no power to arrest or detain a person in order to execute an order once that person has been released from custody. There have been numerous instances where section 464ZF(3) orders have been unable to be executed for this reason.
Similar difficulties previously existed in relation to unexecuted section 464ZF(2) orders. These difficulties have been overcome in the new legislation with a procedure available to execute unexecuted orders. A similar provision is required in the legislation to enable the execution of the outstanding section 464ZF(3) orders.

12. *Legislation should authorise the taking of fingerprints on every occasion that a DNA sample is obtained to confirm the identity of the donor.*

This is considered to be a critical issue in our submission. The *Crimes Act 1958* provides a power for police to obtain DNA samples in a number of instances. In particular, section 464ZF(2A) directs convicted persons to attend at police stations to provide forensic samples for inclusion on the DNA database. The legislation, however, does not provide a power for police to confirm the identity of the donor. In order to confirm identity, a full set of fingerprints should be taken.

13. *Legislation should permit exceptions to the requirement that an independent medical practitioner, nurse or dentist be present for each sampling occasion.*

Section 464Z(5) of the *Crimes Act 1958*, directs that where a person providing an intimate sample, or on whom an intimate physical examination is being conducted, elects to have their own medical practitioner, nurse or dentist conduct the forensic procedure, then a medical practitioner, nurse or dentist (as the case requires) nominated by the police must be present.

464ZA(4) of the *Crimes Act 1958*, directs that intimate samples or examinations conducted (other than a blood sample or a scraping from a person’s mouth taken by that person), if not video recorded, must be witnessed by an independent medical practitioner, nurse or dentist.

Dr. Wells, from the Victorian Institute of Forensic Medicine, has pointed out that, particularly in remote country areas, there are difficulties in obtaining the services of medical practitioners and/or nurses. In many instances, there is only one doctor or nurse available to service a large
area and Dr. Wells believes that the presence of one doctor or nurse should suffice.

14. **Legislation should provide that a mistake in the order does not invalidate the sample taken.**

Section 464ZE should be amended to clarify that where a mistake occurs in an order as the result of the issuing court, that mistake should not make inadmissible any evidence obtained from any sample taken under that order which would have otherwise been admissible.

15. **Legislation should provide for a further sample if initial sample corrupted.**

The Act should be amended to enable police to apply for an order for a further sample if the original sample is corrupted or for some other reason is inadequate. When hearing the application for a further sample, the court should be restricted to examining the reasons why the second sample is necessary, rather than proceeding as a re-hearing of the original application.

Out of the 1000 orders executed to August 2000, only two samples obtained insufficient DNA material to include them on the database. Advice from the OPP confirms that there is no provision to allow for retesting a person or for obtaining another order.

16. **Legislation should clarify that information from samples from convicted offenders can be retained indefinitely.**

Section 464ZFD allows retention and inclusion on the computerised database of information obtained from forensic samples. It implies but does not say that this will allow the use of this information for identification and investigation purposes in future incidents. The section should be amended to make this clear.
17. **Legislation should authorise the long term retention of suspect samples in those instances when a suspect becomes unavailable.**

Section 464ZG requires samples from suspects to be destroyed if the suspect has not been charged within 12 months, if the charges are not proceeded with, or the suspect has been found not guilty. Police may apply for an order to extend the period of retention. However, there are concerns about the ability of police to retain samples until a suspect is charged, which in some serious crime investigations, may take several years.

It is anticipated that there will be a number of situations, especially during convoluted investigations, where it will be necessary to retain relevant suspect samples for extended periods of time. The Act provides for repeated applications for extension periods to be made, but is not explicit on the procedure if a suspect dies or moves overseas prior to the completion of the investigation. There is no mechanism for the permanent retention of the sample unless the suspect is charged and subsequently convicted of the relevant offence.

18. **Legislation should allow scientific evidence from VFSC staff to be given by certificate.**

The Act should permit the scientific evidence of staff of the Victorian Forensic Science Centre to be given by way of certificate rather than by evidence. Similarly, medical practitioners should be required to attend court, only if the defence can demonstrate that there may be a legal or administrative defect in the process.

These provisions would alleviate workload for routine matters and would be similar to the requirements for calling medical practitioners under section 57(7) of the *Road Safety Act* 1986.

19. **Legislation should define Forensic Report**

There currently is no definition of *Forensic Report* in section 464ZD, which causes difficulties in ensuring compliance with disclosure requirements.
20. **Legislation should create an offence for providing a false name or particulars when providing a forensic sample.**

As previously mentioned, section 464ZF(2A) of the *Crimes Act 1958*, directs convicted persons to attend at police stations to provide forensic samples, but provides no power to obtain fingerprints from these persons. Clearly, suspects will be reluctant to provide samples if they realise that these samples will probably link them to a crime. In these instances, there may be attempts to have other persons provide DNA samples on behalf of the person named in the court order. In order to provide a deterrent to this occurring, an indictable offence should be included in the legislation to guard against this possibility.

21. **Legislation should provide an offence for a third party who seeks to hinder or obstruct the taking of a sample.**

An offence should be created for a person who fails to provide information known to them, or which they are reasonably able to ascertain, on the location of a convicted person (including a child) against whom there is a court order to obtain a forensic sample, after a copy of the order has been produced to that person.

22. **Legislation should specifically authorise and oblige a prison officer/employee to assist in the sampling of prisoners.**

Currently there is no requirement for prison officers / employees to assist with the sampling of prisoners. This has the potential to produce a conflict between the authority to take the sample and the obligation of the prison for the prisoner's custody. To facilitate the process, prison officers / employees should be authorised and obliged to assist in the process. This assistance could be limited to production of the prisoner for sampling by police or could be extended to allow prison officers / employees to take the prisoner samples.
23. Legislation should permit convicted offenders to access DNA sampling to eliminate them from suspicion or challenge their convictions.

Victoria Police accept that in the same manner that the prosecution may seek to use DNA sampling to provide evidence for a prosecution, convicted persons may seek to use the same technology to search for new evidence in regard to a past conviction. Victoria Police fully supports the availability of a process whereby the person can pursue such sampling. As a party to the original proceedings, we would seek to be involved as a full party in that review process.

**Conclusion**

The new amendments provided in the *Crimes Act 1958* are welcomed by Victoria Police. The United Kingdom experience, however, clearly shows that DNA technology can achieve a much greater potential if the legislation is enhanced and clarified as outlined in the submission.

DNA has an amazing potential to solve current crimes, match offenders to past crimes, prove innocence and discourage future crimes. That potential should not be unreasonably limited by legislation.