

## **Submission to the Independent Review of Part 1D (Forensic Procedures) of the *Crimes Act 1914* (Cth)**

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This submission is a response to the ‘invitation for submissions’ issued by the Forensic Procedures Review Secretariat and a personal invitation from the secretariat dated 22 July 2002. (Please note that I am no longer on the Faculty at UNSW. I have moved to the University of Melbourne.)

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

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

In the division-by-division discussion of Part 1D that follows, I set out the basis for my view that Part 1D is an abysmal piece of legislative drafting. Indeed, to my knowledge, it is the most poorly drafted statute to emerge from the Commonwealth parliament in recent years. Only a small number of the provisions in Part 1D satisfy basic minimum standards of legal clarity, plain English or intelligible policy rationale. Indeed, many of the Part’s provisions, including its most important sections, fall well short of *all* of these standards. I am not the only one to reach such a view; see the findings of the NSW Standing Committee on Law and Justice in its *Review of the Crimes (Forensic Procedures) Act 2000*, which, like Part 1D, is also based on the (so-called) Model Forensic Procedures Bill.

The drafting of Part 1D is especially unacceptable because many of its provisions must be understood and applied by lay people, notably police officers and suspects in criminal investigations. In addition, because the subject-matter of Part 1D involves activities that are the foundation for criminal prosecutions, the statute’s flaws, if not remedied, may contribute to

the collapse of one or more trials involving serious offenders. In this sense, the drafting of Part 1D is literally a threat to public safety.

Part 1D's flaws are not limited to its drafting. In addition, the Part is also founded on dozens of poorly thought out, unimaginative and misconceived policy judgments, especially in regards to the use of DNA identification in Australian policing. The Part is unnecessarily lengthy because of its inappropriate reliance on consensual forensic procedures and the outdated and clumsy distinction between intimate and non-intimate procedures. Removing or revising the many pointless or inadvisable technical provisions that are scattered throughout the Part, as well as rationalizing the Part's many repetitive provisions would both reduce Part 1D's length and substantially improve its quality. Despite its length, the Part neglects to regulate many significant aspects of the use of DNA identification by police, including forensic material obtained without procedures, off-database storage and matching of profiles, analysis of 'coding' parts of the genome, 'familial' comparisons of profiles and, most egregiously, procedures performed on and material obtained from victims, innocent bystanders and police officers. Overall, a revised Part 1D would likely be neither substantially longer nor substantially longer than the current Part. However, it would be substantially better.

My simple suggestion is that the present Part 1D be completely scrapped and a new Part drafted, remedying the current legislation's drafting and policy deficiencies simultaneously. In the alternative, if the current Part 1D must be retained, then a vast number of amendments should urgently be enacted by the Commonwealth Parliament, as detailed below.

In the discussion that follows, I examine Part 1D division by division. In most cases, I commence with an overview of the division's major policy and drafting deficiencies. In the section-by-section notes that follow that discussion (in a smaller font), I briefly indicate flaws in the drafting and (in many instances) a suggested remedy.

### ***Division 1 – Explanation of expressions used***

Division 1, which sets out some core definitions that are applicable to all of Part 1D, exemplifies three of the basic flaws in the legislation:

First, Division 1, in common with some later provisions, misuses definitional provisions as means of making specific rules. Definition provisions ought to be used to define the field that is regulated by remainder

of the legislation; the body of the legislation should then apply particular rules to that subject-matter and parts of that subject-matter. Instead, Division 1 bundles definition and rule-making together, by purporting to create rules through exemptions and restrictions to the definitions used in the Part. The result is to make Part 1D, not only difficult to comprehend, but also a regulatory mess. Notably, three of Part 1D's basic definitions, 'child', 'forensic material' and 'forensic procedure', contain misconceived provisos that leave some significant issues unregulated and others inappropriately regulated.

Second, Part 1D covers a variety of different forensic procedures, including both DNA sampling and many procedures that raise quite distinct policy issues to DNA sampling, e.g. photography. Whatever the merits of this omnibus approach, it has the result that the regulation of DNA sampling, which is the most significant of the procedures covered by Part 1D, is rendered inaccessible and unnecessarily complex. The drafters have approached DNA sampling by shoe-horning both the procedures used in DNA identification and the processes that follow those procedures within the general regime governing intimate and non-intimate procedures, a distinction devised in the UK before modern DNA sampling techniques were developed. Thus, the Part insists on dividing the three standard DNA sampling procedures – blood sampling, hair pulling and buccal swabbing – across two distinct regimes governing intimate and non-intimate procedures. Not only does this approach unnecessarily complicate the Part's regulation of DNA identification, but it is also highly flawed from a policy perspective. None of the three basic methods of getting a DNA sample are amenable to simplistic classification as either intimate nor non-intimate. Rather, each of the three processes is either mild or highly intrusive, depending on the context in which it is performed. Notably, a buccal swab is clearly the mildest of the three procedures if administered by the subject themselves, but is obviously a brutal method if performed on a resisting suspect. Part 1D should deal with the three DNA sampling methods explicitly and enact clear, intelligible and, above all, practical rules for when they should be done. At the very least, self-administered buccal swabs and the obtaining of a drop of blood by pricking a person's thumb should be re-classified as non-intimate procedures.

Third, it is clear from the definitions in Division 1 that the drafters were not attuned to the fact that bodily samples can be – and are – obtained *without* a forensic procedure, if a bodily substance has already left a person's body. For example samples can be collected from inanimate objects either left at a

crime scene or discarded by a suspect, for example when the suspect spits, sneezes, sheds hair, bleeds, etc. Such indirect gathering of samples, especially from suspects, raises difficult policy issues that are never addressed by Part 1D, which instead deals with them sporadically and nonsensically through clumsy and pointless limitations on the definitions of words like ‘forensic material’ and ‘forensic procedure’. These definitions should be reformed and appropriate rules enacted (see comments on Division 4, below.)

- **23WA: *child*** – This definition excludes persons under 10. The unfortunate result is that protective provisions of the Part, such as s23WE, do not extend to children under 10. Presumably, the drafters’ intention was to ensure that children under 10 are not subject to coerced sampling. In that case, the proviso on this definition is unnecessary, as this result is achieved by s23YQA.

***forensic material*** – This definition is affected by the poorly conceived qualifier “taken from or of a person’s body by a forensic procedure.” There are two problems with this qualifier:

- The clumsy phrase “taken from or of a person’s body” should be clarified. The drafters appear to have tried to use a single phrase to cover four quite different types of material, an example of the problems caused by Part 1D’s omnibus approach to the regulation of forensic procedures. The provision should be redrafted with appropriate qualifiers for each of the four sorts of material. On one reading, the definition may have the unfortunate effect of restricting the definition of forensic material to samples and prints taken in some direct manner from a person’s body; it should be clarified that the definition also covers material recovered from a crime scene, etc, as appears to be assumed by the definition of ‘crime scene index’ in s23YDAC. In general, the definition of forensic material should be independent of how that material is gathered. Any differences in how particular pieces of forensic material ought to be treated, depending on how they were obtained, should be dealt with by rules in the body of the Part, not in definitional provisions.
- The restriction to samples, etc “taken... by a forensic procedure” has the effect of excluding samples obtained *other than* by a forensic procedure from the definition of forensic material. That is, blood taken from the ground or a knife, a hair recovered from a window, semen taken from a condom, prints taken from a wall, etc are not forensic material according to this definition. Amongst numerous other dubious consequences, this exclusion has the surprising effect of barring the placement of such samples on the ‘crime scene index’ of the ‘DNA database system.’ (see s23YDAC.) (The problems of this exclusion are made even worse by the unnecessary restrictions on the definition of forensic procedure, discussed below.) [It appears that the drafters of Part 1D failed to notice that this proviso, while present in the 1999 draft of the Model Bill, was (sensibly) removed from the 2000 draft, even though I

personally alerted them to this problem prior to the passage of the 2001 amendments.]

**forensic procedure** – The lengthy qualifier to this definition has a number of problems:

- The exclusion of cavity searches and procedures to ‘identify’ someone from the definition of forensic procedure has the effect of excluding them from regulation altogether. Thus, such procedures can still be done consensually under the common law or (perhaps) another statute, leaving such procedures without the benefit of Part 1D’s protective rules. Presumably, the drafters’ intention was to ensure that ‘cavity’ and ‘identity’ procedures were not authorized by Part 1D’s coercive regime; perhaps the drafters intended to ensure that such procedures were never used by investigators. Either intention would be better pursued through specific provisions within Part 1D setting out the desired rule (compare s23YQA), rather than in core definitional provision.
- The wording “the taking of any sample for the sole purpose of establishing the identity of the person from whom the sample is taken” is poorly conceived. The case law on police identification powers makes it clear that the word ‘identify’ covers attempts to work out if a known person was a criminal (see *Carr v R* (1972) 1 NSWLR 608; affirmed at (1973) 172 CLR 662), which would cover a procedure to gain a suspect DNA profile for comparison with a crime scene profile. Clearly, this isn’t what the drafters intended. The wording should be written to make the more limited intentions of the drafters clear. Preferably, the proviso should be removed from the definition and replaced with an explicit rule in Part 1D banning procedures for obtaining a DNA sample from a person whose whereabouts are known to police for comparison with a profile from a known person.

**informed consent** – This definition should be amended, as informed consent is *also* explained (somewhat differently) in ss 23WG, 23XWG and 23XWR!

**intimate forensic procedure; non-intimate forensic procedure** – Modern DNA sampling procedures should not be dealt with via the inappropriate distinction between intimate and non-forensic procedures. Rather, DNA sampling should be regulated by purpose-drafted contextual rules (see Division 4.) If the distinction is to be retained for such procedures, then self-administered buccal swabs and the pricking of a person’s thumb to obtain a drop of blood should be re-classified as non-intimate procedures.

Paras (b) to (d) of ‘intimate forensic procedure’ and (b) and (f) of ‘non-intimate forensic procedure’ are worded inappropriately and broadly. The “taking of a sample” of blood, saliva or hair, or of a print, conceivably covers, not merely procedures on a person’s body, but also indirect gathering from inanimate objects. (See *R v Phuc & Van* [2000] VSC 242, for an attempt to grapple with this problem.) This ambiguity should be clarified, as many of the rules in Part 1D that regulate forensic procedures (e.g. orders, informed consent, presence of a nurse) would be inappropriate if applied to gathering of these samples from an inanimate object (e.g. at a crime scene.)

*order* – This definition should be extended to cover orders by constables, which are referred to as such in Divisions 4 and 6A!

*relevant offence* – This definition fails any reasonable test of plain English. The third limb of para (a) is baffling and its policy justification is unclear – if a person is not reasonably suspected of an offence (or another offence arising out of the same context) then how could that offence be relevant to that suspect? When would this option be used? And how could any police officer understand it? (See the comments of the police cited in the NSW Committee’s Review at 7.13.)

*sample* – The extension of the definition of ‘sample’ in this section is confusing and poorly thought out. Does it mean that a victim’s blood or a police officer’s hair found on a suspect’s body should be classified as the suspect’s forensic material, for the purposes of indexing on the database? What is the purpose of this? If the purpose is to ensure that the suspect forensic procedure provisions cover the removal of such samples, then this should be dealt with in those provisions, not in a clumsy definition!

*destroys* – Given that this definition does not require the destruction of any forensic material, the term ‘destroys’ is obviously a misnomer. The term ‘de-identifies’ should be used instead throughout Part 1D.

Also, the wording of this definition is different to the wording used in the definition of ‘identifying information’ in s23YDAG (or vice versa.) There is no reason for two provisions in the same legislation that deal with the same issue to have different wording.

## ***Division 2 – Authority and time limits for forensic procedures on suspects; summary of rules***

It is commendable that the drafters have set out useful tables to make the suspect provisions of Part 1D more accessible. However, tables like this would not be much less necessary if Part 1D did not unnecessarily rely on consensual procedures or on the distinction between intimate and non-intimate procedures, for the DNA sampling of suspects. See the discussion of Divisions 1, 3 and 4.

## ***Division 3 – Forensic procedures on suspect by consent***

A fundamental flaw in Part 1D is its excessive and dangerous reliance on consensual procedures, in preference to orders by officers or courts. Division 3 copies the 1995 version of the Model Forensic Procedures Bill, which in turn copied the Victorian *Crimes Act*, in providing extensively for forensic procedures by consent. The Victorian approach, which emerged from that jurisdiction’s unique history of not having any police powers for medical examinations prior to 1993, is now highly outdated.

Although a primary reliance on consent to obtain DNA samples has superficial appeal, its continued use in Australia is both unnecessary and dangerous. I have discussed the problems of reliance on consent in my published research.<sup>1</sup> Briefly, the problems are:

- Some investigators may rely on a refusal to consent to a DNA sampling request as a sign that the person who refuses has something to hide. This is an illegitimate breach of the privilege against self-incrimination.
- The nature of the relationship between police and the public makes it difficult to distinguish between genuine consent and pressured submission. This is especially true for police interactions with people who are the subject of a criminal investigation.
- Distinguishing between sham and real consents is virtually impossible when the police have access to a compulsory power if consent is refused, see *U.S. v Faruolo*, 506 F. 2d 490, (1974), per Newman J.
- Police reliance on ‘sham’ consents will damage the police’s relationship with the community and the dignity of everyone involved in the procedure. Perhaps more importantly, all evidence derived from sampling based on such consents will be susceptible to later legal challenge, see *Kerr v Commissioner of Police & Ors* [2001] NSWSC 637
- The notion of ‘informed consent’ is especially meaningless in the context of interactions between police and subjects of an investigation. The term is taken from medical contexts, where it is meant to facilitate patients/experimental subjects and doctors/experimenters to pursue their mutual interests and freely communicate. Police and suspects do not have mutual interests and will never freely communicate. The police cannot reveal sensitive investigative information to suspects; and yet, informed consent is meaningless unless this information is available. Continued use of the notion of informed consent is, accordingly, an additional sham and a further ground to support later legal challenges.

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<sup>1</sup> See ‘Something to Hide: DNA Databases, Surveillance and Self-incrimination’ (2001) *Current Issues in Criminal Justice*; “A Critique of the Police’s Right to Ask for DNA” in *Use of DNA in the Criminal Justice System* (Sydney Institute of Criminology, 2001)

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

An abolition of consensual procedures where compulsory orders are available would greatly simplify and shorten Part 1D and avoid the many troublesome issues raised by informed consent, especially for vulnerable people. In particular, many of the drafting and policy difficulties outlined below could be avoided:

- **23WD: Forensic procedure may be carried out with informed consent of suspect** – The Act should expressly abrogate the common law of consent. The Act’s informed consent regime is more restrictive than the common law (see *R v Braedon* [2000] NTSC 68, holding that informed consent is not required at common law.) If the common law is not expressly abrogated, then prosecutors could argue that a consensual forensic procedure that failed to follow the informed consent provisions in Division 3 was nonetheless lawful because of the common law. (See *R v T* [1999] 2 NZLR 602, where a prosecution argument along these lines failed only because of *express* language in the *Criminal Investigations (Blood Samples) Act 1995* (NZ).)

In sub-s(4), the words “this Part or” should be deleted. Sections 23WE, 23WH, 23WK and 23WLA clearly operate to limit the police’s ability to perform a forensic procedure with informed consent, even during the investigation period.

- **23WE: People who cannot consent to forensic procedures** – This rule, which is not restricted to suspects, should either be moved from Division 3 to Division 9, or repeated in Divisions 6A and 6B.
- **23WF: Informed consent to forensic procedures – general** – The term ‘informed consent’ should not be used. Informed consent is a term used in medical law and practice to describe attempts by doctors and patients to better communicate in order to facilitate their mutual interest in the patients’ well-being. It is not applicable in interactions between an investigator and a suspect, who do not have distinct, not mutual, interests. Certainly, it is inappropriate to describe a mere requirement to divulge a limited set of information and provide access to a lawyer as ‘informed consent.’

Sub-s(2) should be redrafted to clarify that mere compliance with paras(a-d) is *not* conclusive of the question of whether or not the individual has actually consented. Although sub-s(2) requires that the individual ‘consents’, the present drafting obscures the separate substantive nature of this requirement for informed consent and

may even imply that any agreement following compliance with paras(a-d) is deemed to be a valid consent. (see the prosecution argument put in *Kerr v Commissioner of Police & Ors* [2001] NSWSC 637, at para 24.) This would give insufficient protection to individuals who, despite being presented with the requisite information and an opportunity to seek legal advice, nonetheless only consent because of pressure or a misapprehension (e.g. a police officer's suggestion that failure to consent is indicative of guilt, see *R v F. (D.M.)* (1999) 139 CCC (3d) 144 at 180-181.) Preferably, actual consent (following the procedures in paras (a-d)) should be listed as a separate, substantive requirement (e.g. in para(e)).

Consent should be expressly and narrowly defined (e.g. using the definition set out in cl 5.2.3 of Chapter 5 of the *Model Criminal Code*, and specifying the silence does not amount to consent, compare s7 of the *Criminal Law (Forensic Procedures) Act 1998* (S.A.))

- **23WG: Informed consent to forensic procedures – Aboriginal persons and Torres Strait Islanders** – Consent should be expressly and narrowly defined (e.g. using the definition set out in cl 5.2.3 of Chapter 5 of the *Model Criminal Code*, and specifying the silence does not amount to consent, compare s7 of the *Criminal Law (Forensic Procedures) Act 1998* (S.A.))
- **23WH: Constable may request suspect to consent to forensic procedure** – The word ‘only’ should be inserted before ‘may’. As presently written, this section has no legal effect. Police do not need statutory authority to ask a suspect for consent to a forensic procedure. The suggested change will make it clear that this section bars police requests for consent *unless* ss23WF, 23WG and 23WJ are complied with.
- **23WI: Matters to be considered by constable before requesting consent to forensic procedure** – Para (1)(b) will always be satisfied whenever the forensic procedure is a DNA sampling procedure and a crime scene sample has been obtained for the relevant offence. Accordingly, the charade of individualised consideration for each instance of DNA sampling should be abandoned. Para (1)(b) should be amended to provide that, in the case of a procedure to obtain the suspect's DNA profile, there are reasonable grounds to believe that a crime scene sample (see the definition of crime scene index in s23YDAC) has been (or will be) obtained.
- **23WJ: Matters that suspect must be informed of before giving consent** – Sub-s(1) should require that police tell suspects about their right under s23WK to withdraw consent before or during the procedure.

The word ‘purpose’ in para (1)(b) is dangerously imprecise. Will it suffice if a suspect is told that the purpose of the procedure is to gather evidence for a criminal investigation? Do police have to specify what they hope to learn from the procedure (e.g. presence of tattoos described by the victim, blood type match with crime scene sample)? What if the police have multiple purposes? It would be unfortunate if these matters were not resolved until a narrow court decision a few years down the track.

In para (1)(c), ‘any’ should be inserted before ‘offence’, to prevent the police from informing a suspect about a minor offence while intending to investigate a more serious one.

Sub-ss(3), (4) and (5) should require that police expressly tell suspects about the matters listed in ss23WO and 23WT (as appropriate), so that suspects are able to judge whether or not a compulsory order would be granted under those divisions. They should also require that police expressly tell suspects that the making of a court order is *discretionary* (see *U.S. v Faruolo*, 506 F. 2d 490 (1974), per Newman J.)

- **23WK: Withdrawal of consent** – This section should clarify what must be done with forensic material that was obtained prior to or during the withdrawal of consent. That is, must it be destroyed or can it be retained and analysed?

#### ***Division 4 – Non-intimate forensic procedures on suspect by order of senior constable***

Division 4 should be used for all regular DNA sampling of suspects in custody. Division 3 should not be used on such suspects because of the dubious nature of consent in investigative, especially custodial, contexts. Division 5 should not be used on suspects in custody except in very rare instances when the suspect refuses to self-administer a buccal swab and neither hair nor blood pricking are viable in the circumstances.

Also, it is important that Part 1D require that investigators rely on forensic procedures available under Division 4, rather than obtaining a suspect's DNA using informal techniques or trick, as has occurred regularly in other jurisdictions.<sup>2</sup> Given the straightforward availability of compulsory DNA sampling orders in Division 4, the investigative use of these informal techniques for gathering DNA samples will almost always be unnecessary. The use of informal methods for gathering DNA is invasive of people's legitimate expectations of privacy (such as the freedom to drink, spit or blow their nose without incriminating themselves). Moreover, the continuing non-regulation of these methods is an invitation to investigators to avoid the inconveniences of following the formal procedures set out Divisions 4 and 6. Further, the regular use of these methods will lend plausibility to fears that the police may plant a person's DNA sample at a crime scene. If investigators have a genuine reason to seek DNA covertly (see *R v Daley* [2001] NSWSC 1211), then they should have to obtain a warrant, akin to

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<sup>2</sup> e.g. *Legere* (1994) 95 CCC (3d) 139 (police officer strikes suspect in face. Suspect blows nose and discards tissue in waste-paper basket. Police recover tissue and analyse blood); *Love* (1995) 102 CCC (3d) 393 (undercover police befriend suspect, pull hairs from his scalp and seize discarded tissue); *Stillman* [1997] 1 SCR 607 (suspect cries throughout custodial interview, blows nose and leaves tissue in waste-basket in washroom, from which police recover DNA); *Phuc* [2000] VSC 242 (US and Thai police seize butts smoked by custodial suspects, and give the profiles to Victorian police); *Cooper* [2001] NZCA 24 (police obtain warrant to search suspect's cell and seize the underwear he is wearing, bearing semen from which a DNA profile is derived); *Fash* (2001) 139 CCC (3d) 144 (police offer custodial suspect cigarettes and then seize butts); *Nicola* [2002] NSWCCA 63 (police trick accused into leaving saliva in styrofoam cup, following a refusal to give DNA by sample.)

other covert surveillance operations. Such a warrant could be provided for in Division 5.

- **23WM: Non-intimate forensic procedures on suspect by order of senior constable** – the words ‘in custody only’ should be inserted after ‘suspect’, thereby making this provision the exclusive basis for performing such forensic procedures. Preferably, this section should also bar obtaining a suspect’s DNA sample without a forensic procedure, unless a warrant is obtained for that purpose.
- **23WN: Circumstances in which senior constable may order non-intimate forensic procedures** – Paras (a) and (b) should be deleted. There is no reason why a compulsory order should be forbidden unless and until consent has been refused. The police’s use of compulsory orders whenever available would be preferable to their reliance on consent, given the dubious nature of consents made by a suspect in custody.
- **23WO: Matters to be considered by senior constable before ordering forensic procedure** – Para (1)(b) will always be satisfied whenever the forensic procedure is a DNA sampling procedure and a crime scene sample has been obtained for the relevant offence. Accordingly, the charade of individualised consideration for each instance of DNA sampling should be abandoned. Para (1)(b) should be amended to provide that, in the case of a procedure to obtain the suspect’s DNA profile, there are reasonable grounds to believe that a crime scene sample (see the definition of crime scene index in s23YDAC) has been (or will be) obtained.

### ***Division 5 – Forensic procedures on suspect by order of a magistrate***

Just as Division 4 should be the exclusive basis for DNA sampling of suspects in custody, Division 5 should be the exclusive basis for DNA sampling of suspects not in custody. ‘Consensual’ and informal procedures on suspects should be barred, unless a special warrant has been obtained for a covert DNA sampling operation. (Division 5 should provide for such a warrant.) Abolishing consent will overcome the difficulty exposed in *Kerr v Commissioner of Police & Ors* [2001] NSWSC 637 (the only case to date interpreting the Model Forensic Procedures Bill), where an apparent consent by a suspect between the interim and final orders caused entirely unnecessary legal confusion in a significant murder inquiry.

- **23WQ: Forensic procedure may be carried out by order of magistrate** – The words ‘not in custody or an intimate forensic procedure on a suspect in custody only’ should be inserted after suspect, thereby making this provision the exclusive basis for performing such forensic procedures. Preferably, this section should also bar obtaining a suspect’s DNA sample without a forensic procedure (i.e. covertly), unless a warrant is obtained for that purpose. This division should provide for a warrant procedure to cover circumstances where police have a genuine investigative need to obtain a profile covertly (e.g. *R v Daley* [2001] NSWSC 1211.)

- **23WR: Circumstances in which magistrate may order forensic procedure** – All but the first 19 words (i.e. from ‘if’ onwards) should be deleted. There is no reason why a compulsory order should be forbidden unless and until consent has been refused. The use of compulsory orders whenever available would be preferable to reliance on consent, given the dubious nature of consents made by a suspect under investigation. If these words are retained, then something should be done to overcome the problem that arose in *Kerr v Commissioner of Police & Ors* [2001] NSWSC 637.
- **23WS: Final order for carrying out of forensic procedure** – The relationship between s23WR and s23WS needs clarification, as their reference to each other is confusingly circular.
- **23WT: Matters to be considered by magistrate before ordering forensic procedure** – Para (1)(b) will always be satisfied whenever the forensic procedure is a DNA sampling procedure and a crime scene sample has been obtained for the relevant offence. Accordingly, the charade of individualised consideration for each instance of DNA sampling should be abandoned. Para (1)(b) should be amended to provide that, in the case of a procedure to obtain the suspect’s DNA profile, there are reasonable grounds to believe that a crime scene sample (see the definition of crime scene index in s23YDAC) has been (or will be) obtained.
- **23WU: Application for order** – Para(2)(b) should also require that the application evidence that s23WR is applicable (as required by s23WS.) As presently drafted, this section risks the confusion that occurred in *Kerr v Commissioner of Police & Ors* [2001] NSWSC 637 (and see, more generally, *Ousley v R* (1998) 192 CLR 69.)
- **23XG: Results of forensic procedure carried out under interim order** – Either the penalty provided for in sub-s(2) should also be made applicable to sub-s(1) or the words ‘in the circumstances set out in paragraph (1)(a)’ should be deleted from sub-s(2).

### ***Division 6 – Carrying out forensic procedures on suspects***

This Division contains numerous good provisions. However, it suffers from two broad flaws.

First, given that DNA sampling is – or, at least, will be – a routine part of criminal procedure, it is important for specific rules to be drafted to deal with DNA sampling. Such rules should provide for the use of the most appropriate of the three DNA sampling procedures in a particular context. Notably, self-administered buccal swabbing should be the preferred procedure where the subject does not resist, whereas hair or blood sampling should be the preferred procedure where the subject does resist. Likely resistance can be measured simply by inviting the subject to self-administer a buccal swab (combined with an appropriate explanation, where appropriate, as to the consequences of a refusal to self-administer.) Exceptions to this approach should be formulated if the subject has a

legitimate preference for a different sampling technique or where there is a genuine investigative need to obtain a particular type of sample. In addition, detailed rules, analogous to those for hair sampling in s23XL, should be framed for blood and buccal swabbing.

Second, the effect of ss23XWE & 23XWQ(5) is to make Division 6 applicable *by reference* to offenders and volunteers. This a clumsy drafting technique will limit the intelligibility of Part 1D, especially by non-lawyers. Moreover, some of the provisions of Division 6 are inappropriate when used on non-suspects, especially ‘volunteers’ (e.g. s23XIA, 23XIB, 23XJ & 23WXA). The drafters should stop being so lazy and redraft Division 6 so as to be expressly provide for the performance of all procedures done under Part 1D.

- **23XIB: Suspect must be cautioned before forensic procedure starts** – The words ‘while the procedure is carried out’ should be deleted or clarified so that the subject recognises that the right to silence persists at other times as well. The application of this provision to non-suspects, especially volunteers, is inappropriate.

This section should be amended to require, where a constable or magistrate has ordered the carrying out of a forensic procedure under Part 1D, that a constable inform the person of that ‘the fact of refusing to comply with the order, or obstructing, resisting, hindering, using violence against, threatening or intimidating the person, in connection with the carrying out of the forensic procedure might be used in evidence against the person.’ (see s23YB(4)).

- **23XJ: Use of force in carrying out forensic procedures** – This section is woefully drafted. Reasonable force should only be used on persons who are subject to a compulsory order and resist the carrying out of that order (e.g. in the case of DNA sampling, by refusing to self-administer a buccal swab after appropriately informed of the consequences of refusal.) The application of this section to persons who submit to a procedure in the absence of an order (i.e. by ‘consent’) is ridiculous.
- **23XK: Forensic procedures not to be carried out in cruel, inhuman or degrading manner** – The second sentence of this provision is poorly worded and of unclear effect. The wording in clause 36(2) of the Model Forensic Procedures Bill should be used instead. Consideration should be given to placing the second sentence amongst the general rules set out in s23XI.
- **23XL: Taking of hair samples** – Similar rules should be devised for blood sampling and buccal swabbing and inserted into the Division. Division 6 should also bar the use of hair or blood sampling to obtain a DNA sample unless (1) the subject refuses to self-administer a buccal swab after being appropriately informed of the consequences of that refusal; or (2) the subject prefers a different procedure to be used; or (3) there is a genuine investigative reason to obtain a blood or hair sample in preference to a buccal swab.

- **23XU: Samples – sufficient material to share** – The application of this section to samples taken to obtain the subject’s DNA profile is utterly stupid. What purpose is there in giving a subject who is undergoing DNA profiling a sample of her or his *own* hair, blood or saliva? Will constables have to pull two hairs from a suspect’s head and then promptly give one back to the suspect? Who drafted this nonsense?
- **23XV: Photographs** – By virtue of s23XWQ(5), this provision applies to volunteers as well. Do crime victims really want to be given photographs of their own body?
- **23XW: Results of analysis** – By virtue of s23XWE and s23XWQ(5), this provision applies to offender and volunteers as well. Is it really intended that all offenders be given a copy of their DNA profile? And all volunteers in mass screenings? And crime victims? And police officers?
- **23XWA: Preventing the carrying out of forensic procedure** – This provision should be restricted so that it only applies to persons who are the subject of a compulsory order to undergo a procedure.

### ***Division 6A – Carrying out of certain forensic procedures after conviction of serious and prescribed offenders***

This division, commendably, deals exclusively with DNA sampling and fingerprinting procedures (albeit retaining the unfortunate intimate/non-intimate distinction), rather than using the everything-but-the-kitchen-sink approach that dogs the suspect and volunteer provisions. However, it has three major flaws:

First, in common with Division 3, it provides for (and, in the case of non-intimate procedures, mandates as a first resort) requests for consent as a means of getting an offender’s prints and DNA. For the reasons given earlier, this is a highly undesirable, dangerous and pointless approach. In fact, a reliance on consent is even sillier for offenders than for suspects, because of the dubious nature of ‘consents’ given by prisoners and the near certainty that an order will be obtained if consent is refused. In NSW, there have been many stories of prison authorities, unwittingly or not, using prison rules as a means of pressuring prisoners to consent, probably jeopardising any prosecution based on investigative leads that emerge from the DNA profile obtained. Police and prisoners alike have recognised that the request for consent is a sham, prompting the NSW Committee to recommend the abolition of consensual procedures on prisoners. This approach should be followed in the Commonwealth.

Second, sections 23XWJ and 23XWO provide for a complex test to be performed by officers and courts to determine whether an order should be made on an offender. The factors to be considered are either unintelligible or

pointless, and seem to have been included to give the coercive provisions a ‘feel-good’ nature. It is difficult to conceive of any reason, in practice, why an offender who falls within the class of ‘serious offender’ should not be subjected to DNA sampling, especially given the mildness of the procedures. It is still more difficult to see why a police officer (or even a magistrate) is capable of making such a judgment with respect to each offender. The charade of individualised discretion in relation to the DNA sampling and fingerprinting of offenders should be abandoned. At present, its sole likely effects are to prompt offenders into self-incriminatory resistance and to provide possible grounds for future challenges to admissibility.

Third, the division is replete with laughably bad drafting.

- **23XWB: Forensic procedures to which Division applies** – Sub-s(3) should be rewritten in *grammatical* English.
- **23XWE: Application of Division 6** – This is a clumsy drafting device that should not be used. It will hamper the understanding of Division 6 by lay people and, in some cases, applies rules to offenders rules that are only appropriate for suspects. The drafters should stop being so lazy and redraft the terms of Part 6 to cover suspects and offenders (and anyone else subjected to forensic procedures.)
- **23XWF: Scope of authorisation** – This is a very silly and dangerous provision. There is no reason why an offender should have the benefit of more generous tests in other divisions simply because that offender is a suspect or, even more ridiculously, someone who volunteers to give their sample before being asked. In fact, given the relative vagueness of the definitions of suspect and volunteer, this provision unnecessarily jeopardises the legality of the sampling of offenders who may fall within the margins of those definitions. Section 23XWF is a clear instance of drafting without thinking. It should simply be deleted.
- **23XWG: Informed consent to forensic procedures** – If the consent regime for offenders is to be retained, then the provisions of Division 6A need *lots* of reforming:

The term ‘informed consent’ should not be used. Informed consent is a term used in medical law and practice to describe attempts by doctors and patients to better communicate in order to facilitate their mutual interest in the patients’ well-being. It is not applicable in interactions between an investigator and an offender, who do not have a mutual interest. Certainly, it is inappropriate to describe a mere requirement to divulge a limited set of information and provide access to a lawyer.

Sub-s(1) should be redrafted to clarify that mere compliance with paras(a-c) is *not* conclusive of the question of whether or not the individual has actually consented (see the argument put in *Kerr v Commissioner of Police & Ors* [2001] NSWSC 637, at para 24.) Although the opening words require that the individual ‘consents’, the present drafting obscures the separate substantive nature of this requirement for informed consent and may even imply that any agreement following compliance with paras(a-c) is deemed to be a valid consent. This would give insufficient protection to

individuals who, despite being presented with the requisite information and an opportunity to seek legal advice, nonetheless only consent because of pressure or a misapprehension (e.g. a prison guard's suggestion that a refusal to consent will lead to the prisoner being deemed a security risk and reclassified.) Preferably, actual consent (following the procedures in paras (a-c)) should be listed as a separate, substantive requirement (e.g. in para(d)).

Also, Part 1D should expressly abrogate the common law of consent. The informed consent regime in s23XWG is more restrictive than the common law (see *R v Braedon* [2000] NTSC 68, which held that informed consent is not required at common law.) If the common law is not expressly abrogated, then prosecutors could argue that a consensual forensic procedure that failed to follow the informed consent provisions in Part 3 was nonetheless lawful because of the common law. (See *R v T* [1999] 2 NZLR 602, where a prosecution argument along these lines failed only because of *express* language in the *Criminal Investigations (Blood Samples) Act 1995* (NZ).)

Moreover, consent should be expressly and narrowly defined (e.g. using the definition set out in cl 5.2.3 of Chapter 5 of the *Model Criminal Code*, and specifying the silence does not amount to consent, compare s7 of the *Criminal Law (Forensic Procedures) Act 1998* (S.A.))

Sub-s(1) should require the offender to be provided with a written statement setting out in s23XWJ (compare s23WF(2)(b)).

Finally, provision should be made for the withdrawal of consent before or during the forensic procedure (compare s23WK.)

- **23XWH: Constable may request offender to consent to forensic procedure and 23XWI: Matters that offender must be informed of before giving consent** – The drafters in their wisdom seem to have split a single rule into two parts governed by separate provisions, thus confusing any reader. Section 23XWH on its own is a pointless provision, as no-one needs a statute's permission to ask someone for consent. The two provisions should be combined into a single rule.

Actually, both branches of the test in s23XWI seem pointless. Given that s23XWH is limited to serious or prescribed offenders, what is the point of requiring a constable to check that the person is an 'offender'? Also, what possible reason would there be for a request for consent not to be justified? Are the drafters simply trying to give bored constables conducting DNA sampling of offenders something to think about? Or do they want to give bored defence lawyers something to talk about at a voir dire in a few years' time?

- **23XWJ: Matters that offender must be informed of before giving consent** – The word 'purpose' in s-s(1)(a) is dangerously imprecise. Will it suffice if an offender is told that the purpose of the procedure is to obtain the offender's DNA profile for the database? Do police have to specify what crimes they think the offender might be guilty of? What if the police have multiple purposes? It would be unfortunate if these matters were not resolved until a narrow court decision a few years down the track.

What does sub-s(1)(b) mean? Is it talking about the offence for which the person was convicted? (but then, why 'if'?) Or is it some other offence? Hello?

The section should be modified to require offenders to be told about s23XZ (compare s23WJ(ia)).

Sub-s(3) should require that police expressly tell offenders about the matters listed in s23XWO(7) so that offenders are able to judge whether or not a compulsory order would be granted by a magistrate. Sub-ss(2) and (3) should also require that police expressly tell offenders that the making of a court order is *discretionary* (see *U.S. v Faruolo*, 506 F. 2d 490 (1974), per Newman J.)

- **23XWK: Circumstances in which constable may order non-intimate forensic procedure** – Paras (a) and (b) should be deleted. There is no reason why a compulsory order should be forbidden unless and until consent has been refused. The police's use of compulsory orders whenever available would be preferable to their reliance on consent, given the dubious nature of consents made by an offender, especially one in prison.

Unless some practical reasons can be thought up for an officer not to order a procedure, then para (c) should be deleted too.

- **23XWL: Matters to be considered by constable** – What does para (a) mean? Why does it matter that the sampling could be done under another provision? And how is an officer meant to judge this? There is a pattern here: the drafters just add things to the list without any reason. Unfortunately, some hapless police officer actually has to apply this nonsense. It should be deleted.

Para (c) should be deleted, as it will always be satisfied for DNA sampling and fingerprinting procedures.

Serious thought needs to be given as to whether paras (b) and (d) serve any useful purpose. If there is a use for them, then guidelines should be drawn up so that officers won't get it wrong. These sorts of generalised provide no real protection for civil liberties but fruitful grounds for legal challenges. If the intention is that all offenders are subjected to DNA sampling and fingerprinting, then the sham of individualised discretion should be removed from Division 6A.

- **23XWO: Judge or magistrate order for carrying out forensic procedure on offender** – Sub-s(1)'s reference to 'consent' is bizarre. How can 'consent' be ordered? The word 'permit' (compare s23XWP(4)) should be used instead.

There is a baffling overlap between sub-s(6) and sub-s(7)(d). This should be 'clarified.'

Sub-s (7)(a) is a weird mystery (see s23XWL.)

Sub-s (7)(c) will always be satisfied (see s23XWL.)

Thought needs to be given as to the purpose that is served by the factors in sub-s(7). Guidelines should be drawn up or the provision removed, or there will be legal uncertainty down the track.

Sub-s(8) certainly needs some more thought. Surely the analyser can tell others before the appeal period expires in some circumstances, for example if the analyser is changing jobs or is terminally ill. Couldn't a more practical rule be formulated?

- **23XWP: Carrying out forensic procedure following conviction** – A 'division 6 person'? Licensed to swab, I suppose. Couldn't sub-ss(1) and (2) just be combined, rather than breaking the rule up across two sub-sections and using laughable terminology? Anyway, isn't 's23XWE person' a more appropriate description?

### ***Division 6B – Carrying out of forensic procedures on volunteers and certain other persons***

Division 6B is a clear instance of criminally lazy drafting and a total absence of imagination. Basically, the drafters have tried to deal with every person who does not fit the definition of suspect or offender but may be subjected to a forensic procedure by lumping them all together under the term 'volunteers' and providing common rules for all of them. This approach is deeply flawed for two reasons:

First, the term 'volunteers' is highly ambiguous and misleading. On one reading it covers only people who approach the police themselves to provide a DNA profile, thus excluding mass DNA sweeps like the one in Wee Waa, (where police approach subjects, not the other way around.) On another reading, it covers anyone who hands over their DNA consensually, which covers suspects and offenders who could also consent under Division 3 or the consent provisions of Division 3A. On any view, its application to children and incapable people, who are by definition incapable of consenting, is wholly inapt.

Second, the drafters do not seem to have realised that some people who undergo a forensic procedure will not be suspects in any way; rather, they will be providing DNA samples for elimination purposes or to incriminate another person (e.g. a victim providing their own profile for comparison with blood found on a suspect.) It is wrong for such people to be treated as suspects, e.g. by being offered the option of going on the 'unlimited purposes' database or being read their rights (e.g. s23XWR(1)(c-e)). Rather, specific provisions should be drafted for the various categories of person who may be involved in this way, e.g. victims, people who were innocently at a crime scene, police officers, which are sensitive to their respective needs and the demands of practicality.

In addition, Division 6B, to the extent that it applies to people who are potential suspects in an investigation, continues Part 1D's error of excessive and dangerous reliance on consent. The volunteer provisions should not be

used at all on any person who could be subject to a compulsory order. Otherwise, police will have the ability to seek consent using the less extensive informed consent provisions of Division 6B, as a way of avoiding giving a suspect all of the information required to be given under Division 3.

Indeed, I would go further and argue that any reliance on consent for obtaining DNA profiles from people who fall below the threshold of 'reasonable suspicion' for the purpose of investigating whether that person has committed a crime should be discouraged and restricted to limited circumstances. Requests aimed at volunteers to 'clear themselves', especially mass screenings, are highly coercive; the inevitable message of requests for mass (or even individual) participation is that non-co-operators will fall under suspicion; certainly, if the identity of non-co-operators is known, then they will be subject to reprisals from others. Such requests should not be left to the whim of individual police officers; indeed, it would be preferable if they were only permitted with court approval, with the court scrutinising the request to make sure that it is not unnecessarily broad. Moreover, there should be no option for non-suspects to place their profiles on the 'unlimited purpose' index.

Indeed, my ultimate view is that consensual forensic procedures should be abandoned as a way of gathering evidence that could implicate the person who is subject to those procedures. Rather, if there is a genuine investigative need for the gathering of DNA samples from people who fall below the threshold of reasonable suspicion, then the legislation should provide for a narrow, court-scrutinised power for compulsory sampling in those circumstances. In a recent submission to the Victorian Parliament's law reform committee, I proposed a 'group' screening power that would apply when investigators reasonably suspect that the perpetrator of a crime is one of a group of no more than 10 people, but are unable to narrow their suspicion further. (For very serious crimes, the threshold number could be increased.) If such a power existed, then my view is that any need for a residual consensual regime for potential suspects would be negligible. Public acceptance of such a power (akin to random breath testing) would depend on the comprehensiveness of privacy protections in the remainder of the legislation and a guarantee that profiles will only be used to investigate the offence for which the group is protected. The present Part 1D would need substantial redrafting, as outlined in this submission, to satisfy those conditions.

- **23XWQ: Carrying out of forensic procedures on volunteers** – The word 'volunteers' in para(1)(a) is ambiguous. The legislation should clarify whether the

term covers only people who approach investigators without a request, or whether it covers people who are first requested in any way.

Children and incapable persons should not be referred to as ‘volunteers’ (see para(1)(b)) as they *cannot* consent to a forensic procedure (see s23WE.)

Suspects and ‘serious’ and ‘prescribed’ offenders should be expressly excluded from the definition of ‘volunteer’. They should be dealt with under Division 3 and 6A respectively, which provide for more extensive informed consent protections than Division 6B. Certainly, such persons should not be told, incorrectly, that they are not obliged to undergo a forensic procedure (s23XWR(b)).

Consideration should be given to barring consensual forensic procedures when the purpose of the procedure is to check whether or not the subject is guilty of an offence.) Such persons should be dealt with exclusively under Division 3, possibly in accordance with a carefully regulated extended power to test people who fall below the traditional threshold of ‘reasonable suspicion’ (e.g. a narrow power to test groups of up to 10.) In the alternative, court scrutiny should be required before investigators can rely on so-called ‘consent’ or ‘volunteering’ by non-suspect non-offenders, e.g. in the context of a mass screening. As a minimum, such requests should not be permitted unless a crime scene profile has been obtained and the request is otherwise justified (see s23XWV(2)).

Sub-s(5) is a clumsy drafting device that should not be used. It will hamper the understanding of Part 1D by lay people and may lead to the inappropriate application of provisions of Division 6 to volunteers. The drafters should stop being so lazy and redraft the terms of Part 6 to cover anyone who is subjected to a forensic procedure.

- **23XWR: Informed consent of volunteer or parent or guardian of volunteers** – More appropriate informed consent procedures should be drafted for victims, innocent bystanders and police officers.

Division 6B should expressly abrogate the common law of consent. The informed consent regime in s23XWR is more restrictive than the common law (see *R v Braedon* [2000] NTSC 68, which held that informed consent is not required at common law.) If the common law is not expressly abrogated, then prosecutors could argue that a consensual forensic procedure that failed to follow the informed consent provisions in Part 3 was nonetheless lawful because of the common law. (See *R v T* [1999] 2 NZLR 602, where a prosecution argument along these lines failed only because of *express* language in the *Criminal Investigations (Blood Samples) Act 1995* (NZ).)

The term ‘informed consent’ should not be used. Informed consent is a term used in medical law and practice to describe attempts by doctors and patients to better communicate in order to facilitate their mutual interest in the patients’ well-being. It is not applicable in interactions between an investigator and someone involved in an investigation – especially a potential suspect – who do not necessarily have a mutual interest. Certainly, it is inappropriate to describe a mere requirement to divulge a limited set of information and provide access to a lawyer.

Sub-s(1) should be redrafted to clarify that mere compliance with the requirement to give the information in (a-f) and the presence of an independent person is *not* conclusive of the question of whether or not the individual has actually consented (see the argument put in *Kerr v Commissioner of Police & Ors* [2001] NSWSC 637, at para 24.) Although the sub-section requires that the individual ‘consents’, the present drafting obscures the separate substantive nature of this requirement for informed consent and may even imply that any agreement following compliance with paras(a-d) is deemed to be a valid consent. This would give insufficient protection to individuals who, despite being presented with the requisite information and an opportunity to seek legal advice, nonetheless only consent because of pressure or a misapprehension (e.g. fear of social ostracism.) Preferably, actual consent (following the procedures in sub-s(1)) should be listed as a separate, substantive requirement.

Sub-s(1) should be amended to ensure that volunteers are told the purpose of the procedure, the offence in relation to which the investigator wants the procedure carried out, that the procedure will be carried out by an appropriate qualified person and the effect of s23XZ.

If s23XWR is to be applicable to potential suspects (i.e. where the purpose of the procedure is to check whether or not the subject is guilty of an offence) then they should be given identical informed consent information to that given to suspects under Division 3 (see s23WJ.) Likewise for offenders.

Sub-s(1)(f) should be amended to warn volunteers of the exception to their right of withdrawal under s23XWV.

Investigators should be required to inform children and incapable people that the forensic procedure will not be performed if they object or resist (compare s23XWQ.)

Sub-s(2) should be qualified by the words ‘where relevant’ (compare sub-s(1)(d).)

Sub-s(2) should be amended to warn volunteers whose profile may be placed on the ‘crime scene’ or ‘missing person’ indexes of the database of the permitted matches for those indexes under Division 8A (i.e. unlimited matching with any other crime scene profile.)

Consideration should be given to deleting or greatly circumscribing the option for a volunteer to place their profile on the ‘unlimited purposes’ database. Giving this choice to subjects will place them under unfair pressure. Leaving this choice in the hands of investigators is unacceptable. Rather, if placement on the ‘unlimited purposes’ database is permitted at all, then such placement should require court approval.

- **23XWT: Withdrawal of consent** – Sub-s(1) should make it clear that withdrawal during a forensic procedure means that any evidence obtained to that point must be destroyed (compare sub-s(2) which governs what happens if withdrawal occurs *after* the procedure.)
- **23XWU: Circumstances in which magistrate may order the carrying out of forensic procedure on a child or incapable person** – Para (2)(a) should be removed or its application in practice explained.

Sub-s(3) should be changed from ‘may’ to ‘must’, at least for para (b).

Sub-s(3) should also require the court to specify which index the volunteer’s profile can be placed on (presumably the ‘limited purpose’ index) and what purpose it can be used for.

- **23XWV: Retention of forensic material by order of a magistrate after volunteer, parent or guardian of child or incapable person withdraws consent** – This section should be deleted. A volunteer should not be in a worse position than a non-volunteer. If the police want to retain a profile, then they should obtain a fresh order under Division 3, 6A or s23XWU as appropriate. Otherwise, any sample and profile should be destroyed. Certainly, this provision should not be used unless a comparison of the volunteer’s profile and the crime scene profile in sub-s(2)(a) is within any ‘limited purpose’ originally specified or agreed by the volunteer.

If this section is retained, then:

Sub-s(2) should be expanded to cover a situation when material has been recovered from a foetus or baby in a case of rape or abuse of the child’s mother, so that a paternity comparison can be made with the alleged rapist or abuser, see *R v T* [1999] 2 NZLR 602.)

Sub-s(3) should be changed from ‘may’ to ‘must.’

Also, the retention period should be no longer than was agreed originally by the volunteer. If a longer retention is needed, then investigators should seek a fresh order under Division 3, 6A or s23XWU as appropriate.

Finally, the order must restrict any matches to be made under this provision to comparisons of the volunteer’s profile and the crime scene profile described in sub-s(2)(a).

## ***Division 7 – Admissibility of evidence***

Sections 23XX & 23XY govern the admissibility of evidence obtained in breach of some provisions of Part 1D. They are woefully drafted and should be re-written to accord with the language of s138 of the *Evidence Act*.

More importantly, the policy behind the division of subject-matter between the two provisions needs to be re-thought or, at least, coherently explained. The two provisions set out a mandatory exclusionary rule for breach of the ‘destruction’ rules, but a discretionary one for breach of other rules. Although this distinction is taken from the UK PACE, its rationale is unclear to say the least. Presumably, a breach of the destruction rules is regarded as mandating an exclusion of the evidence because, if investigators could rely on a post-conviction match, then they would get an advantage that they would never have got if the destruction rule had been complied with. However, this argument is also applicable when investigators obtain a sample they should never have obtained or perform analysis or a match they

should never have been permitted to do. The two sections should be reformulated to provide for a mandatory exclusion of any evidence obtained in breach of a rule that could not have been obtained if the rule had been complied with; a discretionary rule should govern breaches where it would have been possible for the investigators to obtain the evidence if the rules had been followed. Such a recommendation was made by the NSW Committee in its Review, see Recommendation 51.

It is not appropriate to apply the traditional Australian discretionary approach in situations where investigators, in breach of the law, gain DNA evidence that they could not have obtained had they not breached the law. Any court confronted with this issue at a *voir dire* will be placed in an impossible position in applying any discretionary approach, given the probative value of DNA evidence and the seriousness of the offences for which it is used. If courts consistently balk at excluding such evidence because of these factors, then there will be every incentive for investigators to ignore the rules. Accordingly, the Commonwealth should follow the recommendation of the NSW Committee in using an American-style exclusionary rule for DNA evidence. The Australian *'Bunning v Cross'* discretion was never designed for evidence like DNA evidence, which can be used, not merely to confirm a suspect's guilt, but to alert investigators to a previously unknown link between a suspect and a crime; DNA evidence, because of its probative value, is more akin to confessional evidence, which has always been subject to a tougher regime in Australia.

Sections 23XZ, 23YA and 23YB set out rules on the admissibility of evidence of non-cooperation by people in regards to forensic procedures. Apart from a number of basic problems of drafting, these provisions are also too narrow in scope as they only cover the exclusion of refusal evidence at a trial. These provisions should also cover evidence obtained by investigators as a result of that refusal. For example, if a mass request for consent to DNA sampling occurs in a community, investigators should be barred, to the extent possible, from relying on the fact of refusal by some people to generate evidence against them. Thus, investigators should be barred from using the refusal as the basis of a reasonable suspicion that would activate compulsory police powers, either for DNA sampling or for other activities, such as arrest or search warrants. While the enforcement of such a rule may be difficult, it should be open for a defendant to argue in a later court case that evidence presented at the trial would not have been obtained but for investigators' reliance on their lawful refusal to consent to a procedure. (Of course, this problem would be greatly reduced if potential suspects were

never asked for consent and compulsory orders were the exclusive basis for obtaining DNA samples from such persons. Then, any refusal would fall within the scope of s23YB.)

- **23XX: Inadmissibility of evidence from improper forensic procedures etc** – This section covers the same ground as s138 of the *Evidence Act*. Is it really necessary? And shouldn't it, at least, use the same wording?

Sub-s(1) is clumsily drafted – there doesn't seem to be any need for a link between the procedure in para(a) and the breach in para(b)! – and the rationale for its limits is unclear. It should be altered to provide that this section applies where “evidence was obtained in contravention of a provision of Part 1D”. (This is the same wording used in s138 of the *Evidence Act*.)

Consideration should be given to extended the section to cover conduct that, while not in breach of any provision of Part 1D, is nonetheless ‘improper’ (compare s138 of the *Evidence Act* and the title of this section!)

Sub-s(2) should be extended to cover any situation where the forensic material would not lawfully have been obtained, but for the contravention (or breach or failure) [or impropriety] described in para(1)(b).

Sub-s(3) should be extended to cover the obtaining of forensic material other than by a forensic procedure, for example from an inanimate object, such as a cigarette butt smoked by a suspect. This can be achieved by deleting the words after the comma in para(a) and by adding the words ‘or the obtaining of forensic material’ to para(c).

Para(4)(b) should be altered to accord with s138(1) of the *Evidence Act*.

Sub-s(5) should be adjusted to accord with s138(3) of the *Evidence Act*. Otherwise, the proviso to para(5)(a) should be removed. The availability of alternative means has nothing to do with the ‘probative value of the evidence’, so how could a consideration of probative value include alternative means? Moreover, if the evidence could not have been obtained by other (lawful) means, then exclusion should be mandatory. If the proviso is retained, then someone should explain its relevance to the issue of exclusion. Further, the word ‘other’ should be replaced with ‘lawful’.

Para (5)(f) should be amended to resolve whether the seriousness of the offence is a matter for or against exclusion. This issue is currently the subject of disagreement amongst judges in NSW: see *R v Dalley* [2002] NSWCCA 284. It is obviously of great significance for DNA evidence, which is often introduced in trials of serious crimes.

Sub-s(6) should be expanded to ensure that “the nature of the offence concerned and the subject matter of the proceedings” does not by itself or in combination with the “probative value of the evidence” justify the admission of the evidence. Otherwise, police officers would have a strong incentive to cut corners on the rules in Part 1D when they are investigating serious crimes, e.g. murder.

- **23XY: Inadmissibility of evidence where forensic material required to be destroyed** – It would be preferable if this section followed the same wording as s23XX to the extent possible.

Sub-s(1) should be re-written to cover any situation where evidence described in s23XX(3) could not have been obtained if Part 1D had been complied with.

If the present wording is retained, then the relationship between sub-s(1) and sub-s(2) should be clarified, i.e., why does sub-s(1) provide that sub-s(2) applies to evidence of the forensic material and evidence consisting of the forensic material, and yet sub-s(2) does not require the exclusion of those two sorts of evidence, but rather only the evidence referred to in paras(1)(c) and (1)(d)?

- **23XZ: Admissibility of evidence relating to consent to forensic procedure** – The title of this section is misleading, as it contains a significant rule about *inadmissibility*. This may cause confusion to police officers and suspects, who must be told of this section as part of the informed consent procedures in s23WJ.

This section should be extended to a person's failure to 'volunteer' to undergo a forensic procedure (s23WXQ), a child or incapable person's resistance or objection to a forensic procedure (s23XWQ(4)) or any other behaviour during a 'consensual' procedure (e.g. the Wee Waa rapist's shaking hands.)

The section should be extended to bar the use of all such evidence as a foundation (in part or in whole) of a 'reasonable suspicion' (or similar threshold) that is a condition for a police power (including a power under Part 1D.) (The ambiguous phrase "not admissible in proceedings against the person" is not sufficient for this purpose. Its application should, at least, be clarified.)

- **23YA: Admissibility of evidence relating to carrying out of forensic procedure** – This section seems to be pointless. Section 23XX(4) does not bar evidence of *how* a procedure is carried out. Moreover, it is obvious that evidence proffered for the purposes described in this section would be admitted in accordance with the discretion in s23XX(4). Why give courts another difficult rule to apply?
- **23YB: Obstructing the carrying out of forensic procedure** – The relationship between this section and s23XZ should be stated explicitly, i.e. this section applies compulsory procedures, whereas s23XZ applies to 'consensual' procedures.

This section should be extended to cover offenders, as well as suspects (shouldn't it?)

The word 'satisfactorily' in sub-s(3) is unsatisfactory. Does it apply if the forensic material is obtained, but someone is injured in the process? It should be altered to say what it means (whatever that is!) Consideration should be given to deleting this section, as it makes sense that a person's resistance be considered by the jury, even if the procedure is successful.

Para(4)(b) should be deleted. A person should not be punished simply because (supposedly) they happen to know their rights; if the state fails to comply with a procedure designed to ensure a person knows their obligations, then the state should not be permitted to rely on an inference about that person's behaviour that is contrary

to those obligations. Moreover, as discussed earlier, the constable's obligation to warn the person should be expressly required in Division 6. (See s23XIB.)

The last 13 words of sub-s(5) should be deleted, as they are obvious.

### ***Division 8 – Destruction of forensic material***

Apart from the usual poor drafting in non-plain English, Division 8 enacts a significant policy flaw: the permission in s23YD for investigators to retain a suspect's forensic material for 12 months unless the suspect is *acquitted* during that time. A suspect may provide a DNA profile in relation to an offence and the investigators may quickly learn, as a result, that the suspect is not the offender. They may even identify the real offender shortly afterwards. As a result, the original suspect will never be charged, let alone prosecuted, and hence will not be acquitted. What possible justification is there to retain that person's profile for another 12 months? The 12 month rule should only be retained when the investigation is ongoing and the suspect *remains* a suspect. If a suspect has been cleared of suspicion for all charges, then the material should be de-identified as soon-as-practicable, not after a 12 month wait!

- Consideration should be given to providing for a general exception to all of the destruction rules if, at the time the rule would otherwise apply, an authority exists under one of the provisions of Part 1D for a fresh forensic procedure to obtain a DNA sample from the person involved. This will avoid both unnecessary repeated procedures and some otherwise convoluted drafting.
- **23YC: Destruction of forensic material where interim order disallowed** – The title of this provision is highly misleading. Sub-s(2) has absolutely nothing to do with interim orders, but is rather a quite distinct rule concerning volunteers.

The purpose of para(1)(b) is unclear. Section 23XW already requires this.

- **23YD: Destruction of forensic material after 12 months** – Sub-s(1) should be amended to also require destruction as soon-as-practicable once the suspect has ceased to be a suspect for any relevant offences (as defined in s23WA.)

Sub-s(3) does not seem to allow for further appeals to the High Court or for the delay between an acquittal and the lodging of an appeal. Perhaps simpler language could be used: e.g. avenues for appeal against the acquittal have been exhausted?

The relationship between sub-s(4) and sub-s(2) should be clarified, i.e. when must the material be destroyed when a warrant has been issued, the suspect is apprehended, but proceedings are discontinued a month later?

Some examples should be given of 'special reasons' in sub-s(5). The provision's purpose is unclear.

- **23YDAA: Destruction of forensic material taken from offender after conviction quashed** – The term ‘obtained an authority’ is not apt for s23XWG (informed consent) or s23XWK (order by a constable). Why not just say: “The constable who performed a forensic procedure under Division 6A...”?

The section should allow for further appeals to the High Court.

- **23YDAB: Destruction of forensic material where related evidence is inadmissible** – This is a highly confused provision that blurs two separate issues: destruction and inadmissibility. If a forensic procedure was not authorised by Part 1D, then material derived from that procedure should be destroyed, *whether or not* it is held to be admissible, unless authority exists under Part 1D for performing that forensic procedure again.

In any case, the provision should be extended to evidence that, while held admissible, was nonetheless found by a court to have been obtained in contravention of Part 1D. A court’s decision that admissibility in a particular trial is desirable ought not be taken for a ruling that retention after the conclusion of that trial is desirable. It is wrong for investigators to continue to benefit from evidence after a finding that it was tainted by illegality. Indeed, any further evidence derived from such evidence will be caught by s23XX(3)(c) and thus subject to further challenges under s23XX. Accordingly, all evidence that has been found to be obtained in contravention of Part 1D should be destroyed at the conclusion of a trial where the finding is made. At the very least, the retention of the evidence after the trial should require a specific court order to that effect. Such rulings should be rare.

### ***Division 8A – DNA database system***

Division 8A is the worst division in Part 1D. It is probably no coincidence that it is also the most important division in Part 1D.

This division is supposed to set out the rules governing the DNA database, i.e. what profiles can go on it, what can be divulged from it and what matches can be made? Unfortunately, instead of setting out these rules in a clear intelligible manner, the division consists almost entirely of definitions and criminal offences. The result is that Division 8 is incomprehensible to non-lawyers (and, in some cases, anyone) and contains significant regulatory loopholes. The drafters seem to have thought that they were drafting a part of the *Criminal Code*, rather than legislation regulating criminal investigation. Criminal offences have a quite modest role to play in regulating policing; all informed commentators agree that what is most important is that the rules are clearly and intelligibly put. This will not only enhance compliance but will also inform a court that must determine, at the end of the day, whether evidence is admissible. A good example of the right approach is Part 9 of the *Criminal Investigations (Identifying People) Act 2002* (W.A.)

Division 8A also contains significant regulatory loopholes that will undermine public confidence in the DNA identification system:

- Section 23YDAC is an example of ‘regulation by definition’. It defines a DNA database system as one that contains a set of indexes consisting of a set of profiles. Presumably, the intention of the drafters is that it would not be lawful to place profiles in the wrong index, or to place profiles not mentioned in the definition on the database. But this isn’t what the definition achieves. Instead, it simply excludes any database that lacks one of the indexes, or has a misfiled profile, or a profile that doesn’t belong at all, from regulation by Division 8A.
- Section 23YDAD only regulates supply for analysis with the intention of putting a profile on the database. It does not regulate supply for analysis for another purpose, for example to keep a profile in a police filing cabinet or to have a comparison done outside of the context of the database. Nor does it make it clear that access done without the fault element of these offences is still a contravention of Division 8A for the purposes of s23XX. Finally, it also leaves unregulated analysis of forensic material for a purpose other than producing a DNA profile. This means that there is no regulation of analysis of the ‘coding’ portions of the genome. The use of analysis of ‘coding’ portions of the genome by criminal investigators is a highly controversial issue that should not be left to the discretion of investigators.
- Section 23YDAE only regulates access to information ‘stored on the database system.’ This only seems to cover profiles, not a finding of a ‘match’ between two or more profiles on the database. The latter is highly sensitive information, access to which should be closely regulated.
- Section 23YDAF only regulates matches *on* the database. It leaves matches done outside of the context of the database totally unregulated. It also seems not to regulate comparisons that do not involve ‘matching’, i.e. comparisons designed to test whether or not there is a blood relationship between two people whose profiles are on the database. The latter is highly sensitive information that should be tightly regulated.

It is vital that these serious deficiencies be rectified. A key step would be to bar any non-database storage of DNA profiles (apart from temporary storage before the profile can be placed on the database).

Section 23YDAF, regulating the matching of profiles, has the hard-fought distinction of being the worst section in Part 1D. Not only do deficiencies in

its drafting make it literally impossible to comply with for some pairs of profiles (e.g. a profile from the 'suspects' index and a profile from the 'missing persons' index') but the table attached to the section contains two extremely significant policy lapses:

First, the basic problem is that the table is egregiously simplistic. The categories of profiles used in the table are overly broad. Questions of appropriate comparisons between most of these categories are never a 'yes' or 'no' affair, but rather depend upon distinguishing different categories of profiles that are suitable for matching in different contexts.

An example is the category of 'crime scene' profiles. Not all profiles taken from DNA samples found at a crime scene will be from the perpetrator of a crime. Rather, some of these profiles will be from the victim, from other witnesses or from people who had passed through the scene at other times, such as police officers. It is wholly inappropriate, therefore, that s23YDAF simply gives a blanket endorsement to the matching of profiles from any crime scene with profiles from any other crime scene. For example, this endorsement may discourage victims of crime who have committed other crimes themselves from reporting crimes to the police or it may make police reluctant to provide elimination samples (thus greatly reducing the utility of DNA identification.) Clearly, separate matching rules should be adopted for each sub-category of crime scene profile. The fact that, in some cases, it will be difficult to discern the particular origin of sample is no reason to refrain from enacting rules where that origin is known

A further example is the category of 'missing person' profiles. Section 23YDAF gives a blanket endorsement to the mass comparison of any missing person's profile with any crime scene profiles. There is an obvious investigative purpose for comparisons between a missing person profile and some crime scenes, i.e. to discern if the missing person was a victim of another crime. But why should that profile be compared to *all* crimes scenes, e.g. including crimes committed before that person went missing? Again, the unfortunate effect of the structure of s23YDAF is to force parliament to choose between two inappropriate options. Saying 'no' to matches with crimes scenes would have denied investigators an opportunity to track that person; however, saying 'yes' to all matches with crime scenes (as s23YDAF does) might cause relatives of that person to be reluctant to submit to DNA profiling, because of a fear that police will uncover skeletons in the missing person's (or the relatives') closet.

I could go on, but the point should be clearly enough. Clause 82 of the Model Forensic Procedures Bill (from which s23YDAF was taken) is a colossal failure of drafting and policy imagination that, I believe, will ultimately greatly hamper the introduction of DNA identification in Australia. This mistake should be rectified. Clearly, a more nuanced approach is required. The best approach would be to define narrower categories of profiles than the broad ‘indexes’ defined in s23YDAC. The resulting rules may be too complex to put in a table, but an appropriate policy on matches is more desirable than a simplistic one. If necessary, rather than using legislation, this topic could be regulated by flexible codes of practice, such as those used in the UK PACE. My point is that these sensitive issues should not be left to the good intentions of investigators or the database administrators. A single instance of rogue conduct, or even the appearance of such conduct, would be catastrophic to public confidence in the DNA identification system. It may also have broader negative effects on policing, especially cooperation from victims, police officers and the relatives of missing persons.

Second, the table in s23YDAF, simply through the placement of the word ‘yes’ in the box in column 3 / row 2, permits unlimited matching between suspect and crime scene profiles. This rule is a complete reversal of the approach endorsed by MCCOC in its 1999 Discussion Paper. MCCOC’s backflip on this issue in its 2000 Final Draft has never been explained; indeed, the change was not even mentioned in the notes attached to that draft! It is obvious that the change in policy was the result of a political directive from MCCOC’s superiors, rather than a considered decision by MCCOC or a response to submissions it received. Unsurprisingly, this policy decision is deeply flawed.

The apparent purpose of the rule permitting unlimited suspect-crime matches is entirely pragmatic: the prediction that many people who are merely suspected of a crime have other skeletons in their closet. The problem with this prediction is that it is probably also true for many other classes of person: priests, police officers, politicians, etc. Moreover, this pragmatism neglects some profound policy reasons *not* to make people liable to speculative matches merely because they fell, for a time, within the legal category of ‘suspect’:

- The legal definition of ‘suspect’ is unclear and hard to define. Accordingly, hits resulting from speculative matches will be

susceptible to later legal challenge if they are used to bring a prosecution.

- Allowing the mere criterion of ‘reasonable suspicion’ to be a basis for exposing a person to speculative matching will give police officers an incentive to expose individuals to coercive powers, such as arrest and search, on the basis of dubious levels of suspicion.
- The attachment of such serious consequences to the concept of ‘reasonable suspicion’ may lead the courts to develop a restrictive definition of this concept. This will hamper the legitimate use of other police powers that also depend on the ‘reasonable suspicion’ criterion.
- It is also difficult to define when a ‘reasonable suspicion’ ceases. (Compare the case with offenders, whose status can only change if they are acquitted on appeal or are pardoned by the executive.)
- A difficult question will arise as to what should happen if a suspect is subsequently cleared of the crime for which they were suspected, but match based on a speculative comparison has been discovered in the meantime.

If, contrary to my view, speculative matching of suspect profiles and unsolved crimes is retained in Part 1D, then the category of people exposed to such matching should be defined by a narrower criterion than suspicion. The criterion of arrest is not useful for this purpose, as it turns on the requirement of reasonable suspicion and, therefore, is open to the same objections listed above. Rather, a better (although still not ideal) criterion for speculative matching is the *charging* of that suspect with an offence that, if there was a conviction, would justify the taking of a ‘cold hit’ sample. Using the criterion of ‘charging’ at least brings some measure of accountability into the selection of suspects for speculating matching and reduces (but does not eliminate) the possibility that innocent people will be exposed to investigation for unsuspected crimes.

On top of these serious flaws, Division 8A is also burdened by the clumsy drafting that is characteristic of Part 1D:

- **23YDAC: Definitions** – This section is another example of ‘regulation by definition’, which is not only clumsy and obscure, but also legally inadequate. The apparent intent of the drafters is to ensure that DNA profiles can only be placed on a database if that fit within the definitions of one of the indexes and that they must be placed in that index only. Part 1D should state this explicitly, rather than leaving this important point to the vagaries of implication.

**crime scene index** – Para (a) should not be limited to ‘prescribed’ offences. There is no reason why the database should not be used to investigate any Commonwealth offence, if it is useful for that purpose. (That is not to say that suspects for such offences can be required to give up their DNA. However, it may be that a ‘cold hit’ can be found between a crime scene profile from a non-prescribed offence and a person whose profile was obtained on a different basis.)

Para (d) is broadly drafted and might unnecessarily expose uninvolved persons to DNA matching with other crime scene profiles. This paragraph should be limited to forensic material from such persons, things or places where a police officer has reasonable grounds to believe that the material came from the body of the perpetrator of the crime or the victim of the crime. It should also explicitly exclude persons who are suspected of having committed the crime. (Compare s76 of the *Criminal Investigation (Identifying People) Act 2002* (W.A.))

The definition does not clearly cover material taken from a foetus believed to be the offspring of a sex offender. It should expressly cover such material, for the purposes of a familial comparison with the suspect. (See *R v T* [1999] 2 NZLR 602.)

**DNA database system** – This definition is clumsily drafted and unnecessarily complex. As presently written, a database of DNA profiles that lacked just one of the listed indexes would fall outside of the definition (and, hence, regulation by Part 11.) The definition should, at the very least, be modified to ensure that a database is covered if it contains any of the indexes in para (a). Better still, the definition should be framed independently of the individual indexes it contains, e.g. as a database (however described and formed) containing identifiable DNA profiles maintained for the purposes of criminal investigation and prosecution. (Compare s61 of the *Criminal Investigation (Identifying People) Act 2002* (W.A.))

**serious offenders index** – Para (b) should be narrowed so that convicted suspects’ profiles are only transferred to the serious offenders index if the criteria in s23XWL or s23XWO(6,7) are satisfied.

**volunteers (limited purposes) index** – This definition should refer to s23XWR(2)(ba), not (b). That section should also be qualified by the words ‘or a corresponding provision under a corresponding law of a participating jurisdiction.’

**volunteers (unlimited purposes) index** – Para (b) should be limited to deceased person who, before they died, fell within para (a). Inclusion of other dead people’s profiles in this index is obviously inappropriate.

- **23YDAD: Supply of forensic material for purposes of DNA databases** – The question of what forensic material can and cannot be analysed should be set out in simple rules, rather than being addressed exclusively in criminal provisions. The criminal provisions in this section will hamper lay people’s understanding of the ground rules for the database. They are also insufficient for regulatory purposes, as Part 1D is silent on analysis that lacks the *mens rea* required by these criminal offences.

Para(1)(b) is ungrammatical, which is especially extraordinary as it is concerned with a criminal offence. It should be redrafted along the lines of para(2)(b) (apart from the recklessness part...)

The recklessness proviso in para(2)(b) is confusing - a reader may think that it is the receiver who has to be reckless! The proviso should be removed and para(2)(c) should be redrafted along the lines of para(1)(c).

The words 'for inclusion on an index of the DNA database system' should be deleted from paras(1)(d) and (2)(d). There is no reason to permit analysis of excluded material or material thought out to be destroyed for reasons other than the inclusion of the profile on the database.

The section should be extended to cover 'analysis', rather than merely 'supply for analysis'. It is unclear why lab technicians who have the relevant mental state should be exempt from criminal liability, while their suppliers should be liable to be punished.

The section should also regulate the analysis of forensic material for a purpose other than deriving a DNA profile, especially analysis of the 'coding' portions on the genome. Consideration should be given to barring such analysis altogether, given its sensitivity, until Parliament carefully considers this issue.

The term 'excluded forensic material' in sub-s(2) and (3) is very misleading, as it actually refers to material for which analysis is permitted. It should be renamed 'permitted forensic material'.

Para (3)(a) is too narrow. It should be extended to clearly cover all the material mentioned in the definition of 'crime scene index' in s23YDAC, e.g. on or within a victim's body, on anything worn or carried by the victim, and on or within the body of a person or thing associated with the commission of the offence.

- **23YDAE: Use of information on DNA database system** – Sub-s(2) should be expanded to include access for the purpose of disclosing the information in accordance with s23YO(2). As presently written, no-one is permitted to access the database for the purposes of passing information to investigators or prosecutors!
- **23YDAF: Permissible matching of DNA profiles** – This section should bar or otherwise regulate the forensic comparison of DNA profiles off the database.

The section should provide for the separate regulation of familial comparisons of profiles (i.e. to test blood relatedness) or at least clarify whether these fall within the word 'match.'

Sub-s(1) and (2) are drafted in a manner that makes the provision partially unworkable. Both refer to matching 'a DNA profile... with a DNA profile'. However, it is obvious from the non-symmetric nature of the matching table that this section intends to regulate matches between individual profiles on 'column 1' indexes and the entirety of the indexes listed in the remaining columns. This intent should be made explicit. As presently drafted, s23YDAF is, for some pairs of indexes, impossible to apply. (For example, a profile from the missing persons index both can and cannot be

matched against a profile from the suspects index, depending on which order the profiles are listed.)

The words ‘the same or’ should be inserted before ‘another’ in s-s(1). (Compare s-s(2)).

The contents of the boxes in the table should be wholly reconsidered. In particular, various categories of profiles on the crime scene index should be dealt with separately, so that inappropriate matches do not occur between (say) the suspects index and profiles taken from victims, witnesses or police officers.

Matches between suspect and crime scene profiles should be restricted. A suspect’s profile should only be matched against crime scene from ‘relevant offences’ as defined in s23WA.

- **23YDAG: Recording, retention and removal of identifying information on DNA database system** – It is unclear why s-s(2) and (3) are needed, given the broad terms of s-s(1). If specific offences for each category of profile are deemed necessary, then additional offences should also be drafted to cover destruction under ss 23YC, 23YD and 23YDAB.

If it is retained, sub-s(3) should be modified to allow for appeals to the High Court, etc.

*identifying information* – What is the purpose of para (b)? What does it even mean?

*identifying period* – paras (a) is pointless; all profiles on the two volunteers indexes (which are the only indexes covered by s23YDAG(2), which is the only section that refers to an identifying period), will fall within either (b) or (c)

## ***Division 9 – General provisions relating to the operation of this Part***

Division 9 is an improvement on Division 8A, but that’s not saying much. The usual wrongheaded drafting:

- **23YDA: Interpreters** – This section should be extended to cover procedures on offenders and volunteers where those people must be told something by a constable.
- **23YE: Powers etc of legal representatives and interview friends** – Sub-s(1) should be extended to cover requests or objections by volunteers (and parents and guardians of volunteers.) (e.g. if the independent person wants to request a legal practitioner under s23XWR(1)(e)).
- **23YF: Obligation of investigating constables relating to tape recordings** – In sub-s(3), ‘section 23YD’ should be replaced with ‘Division 8’. Also, isn’t this rule too absolute? Perhaps the subject will want to get access to the tape in order to make a complaint to the ombudsman. Has anyone given these issues some thought?
- **23YI: Proof of belief or suspicion, 23YJ: Proof of impracticability, 23YJA: Proof that time should be disregarded, 23YK: Proof of voluntary waiver of certain rights** – The words ‘In any proceedings’ in these sections should be clarified. These

rules should not apply if any of the issues they deal with are elements of an offence that is prosecuted within those proceedings. For example, in a prosecution under s23YDAG(2), s23YJ would appear to apply to the issue of whether the profiles were removed from the database ‘as soon as practicable’, distorting the usual rule that the prosecution must prove all elements of an offence beyond reasonable doubt ! Likewise, the relationship between s23YI and the defence in s23YL needs urgent clarification.

If (as seems likely) these provisions are only supposed to apply to disputes about admissibility, then (apart from the voluntariness and understanding requirements in s23YK(2)) they are unnecessary as the standard of proof on such issues is dealt with by s142 of the *Evidence Act 1995*.

- **23YM: Experts not obliged to carry out forensic procedures** – Nor should Part 1D require non-experts to carry out a procedure!
- **23YN: Retention of electronic recordings** – The relationship between this section and s23YF(3) should be clarified.
- **23YO: Disclosure of information** – The word ‘access’ in para(1)(a) should be clarified. Does it only cover people who are lawfully allowed to access information (e.g. under s23YDAE(2)) or does it cover anyone who comes to possess such information, however obtained? If the latter, then the section should refer to possession, rather than access. In any case, there should also be a recklessness requirement in regards to the facts set out in para (a).

Para(2)(a) should be restricted to forensic comparisons permitted under s23YDAF. It should also be restricted to bar investigators from obtaining profiles for the purpose of off-database matching.

Para(2) should be extended to cover the matters referred to in paras (3)(f), (3)(g) and (3)(h).

The relationship between sub-ss(2) and (3) should be clarified. Consideration should be given to placing s23YO(2) in Part 8A, alongside other provisions regulating the DNA database.

What is the purpose of the words ‘or offences generally’ in para(3)(e)?

- **23YP: Taking, retention and use of forensic material** – This section is simply insane. What is the point of all the privacy protections in Part 1D if they can be avoided by using one of the many laws of states and territories that authorise taking of forensic materials (e.g. random breath test laws, see *R v Daley* [2001] NSWSC 1211)? Why shouldn’t profiles derived from materials taken under those laws also be subject to the protections in Part 8A? Indeed, why should such underhand approaches be used to derive profiles at all? The laws of every jurisdiction in Australia provide for formal mechanisms for obtaining DNA profiles and other forensic materials. Shouldn’t those be the laws that are used by investigators and generate the information on CrimTrac?

If this section is retained, then sub-s(1) and (2) should be narrowed to exclude laws ‘relating to the carrying out of forensic procedures and DNA databases’. Otherwise, these sections will render Division 11 redundant.

Are both sub-s(1) and sub-s(2) necessary? The latter part of sub-s(2) seems to say the same thing as sub-s(1)!

Sub-s(3) is totally bewildering. Does anyone other than me ever read these sections? While the title refers to material taken before the commencement of the sub-section, the terms of the section are not so limited. Rather, as written, sub-s(3) will authorise the retention of material taken any time, so long as the taking was in accordance with a law that existed just before sub-s(3) commenced, i.e. even if that law was later repealed or changed before the material was taken. Surely this is not what was intended. The sub-section is also unnecessarily repetitive. Couldn’t it just provide that sub-s(2) also applies to material taken before the commencement of the sub-section?

### ***Division 10 – Operation of this Part and effect on other laws***

And so it goes on...

- **23YQA: Part does not apply to persons under 10** – Part 1D should clarify whether (and, if so, when) forensic procedures can be performed on child victims under 10.
- **23YS: Relationship with Part 1C** – The proviso in sub-s(1) (i.e. ‘to the extent... by this Part.’) should be deleted. Its meaning is wholly unclear. It is not clear why Parts 1C and 1D are incompatible.

The proviso in sub-s(2) (i.e. ‘but...’) should be deleted. Its appears to be wholly unnecessary and its meaning is somewhat unclear.

- **23YU: Application of other laws** – Para(1)(e) should be restricted to bar the production, matching and retention of DNA profiles other than in accordance with Division 8A.

### ***Division 11 – Interjurisdictional enforcement***

Some of the provisions of Division 11 are premised on the notion that it is either necessary or desirable that all Australian jurisdictions adopt similar laws on forensic procedures. Perhaps similarity across Australia would be desirable, but only if the similarity was of high-quality legislation. In the case of dross like the Model Bill and Part 1D, however, a movement towards uniformity is certainly not desirable. Indeed, it is highly desirable that the states and territories should be encouraged to come up with higher quality legislation than the (so-called) Model Forensic Procedures Bill, for example the *Criminal Investigation (Identifying People) Act 2002* (W.A.)

More importantly, a national DNA database can still function in the context of quite disparate laws on forensic procedure across Australia. To be functional, a DNA database only requires scientific, not legal, similarity,

something that has already been obtained in Australia, in January 1999, through an extra-legal initiative of Australian forensic laboratories and the commercial savvy of market leader in DNA profiling kits, Perkin Elmer Corporation.

Lack of uniformity or similarity across Australia does, of course, carry the risk of a ‘lowest common denominator’ approach, whereby investigators in jurisdictions with restrictive laws transfer profiles of interest to jurisdictions with lax laws (a process that, sadly, is facilitated by s23YP in Part 1D.) However, uniformity or similarity in all jurisdictions that sign on to the database is not the only cure for this disease. Rather, it will suffice if every Australian jurisdiction that engages in the interjurisdictional transfer of profiles enacts laws requiring its investigators to obey the matching, destruction, access and disclosure rules of the jurisdiction where those profiles were originally obtained. The administrators of the national DNA database should – as they presently do – keep track of the jurisdiction-of-origin of each profile on the database and ensure that the relevant jurisdiction’s rules on destruction, access and disclosure are applied, and that, in the cases of cross-jurisdictional matches, both relevant jurisdictions’ rules on matching are obeyed.

This ‘mutual recognition’ approach will prevent the ‘lowest common denominator’ approach without otherwise requiring uniform or similar legislation on forensic procedures and databases across Australia. The Commonwealth should abandon SCAG’s and MCCOC’s *grand projet* of uniform forensic procedure laws across Australia, in favour of the more modest ‘mutual recognition’ approach. Indeed, this approach is already partially enacted in Part 1D, but only for destruction rules (s23YUD(2)). The ‘uniformity/similarity’ approach has already failed: every jurisdiction that has purported to enact the Model Bill has tinkered significantly with it, and they will have to tinker with it further to try to counteract its numerous flaws.

In one Australian jurisdiction, NSW, the government has already passed regulations declaring every other jurisdiction’s law to be a ‘corresponding law’, whether or not they follow the Model Bill. ‘Mutual recognition’ is a more politically achievable and practical way of preventing Australian laws from sliding further towards the ‘lowest common denominator’ of Queensland and the Northern Territory. Section 23YUD(2) should be expanded to cover matching, access and disclosure and the Commonwealth should pass legislation barring transfers to other jurisdictions unless those

other jurisdictions enact laws recognising the laws of the jurisdictions where those profiles were first obtained by investigators.

- **23YUA: Definitions** – In the definition of ‘corresponding law’, ‘this Part’ should be replaced with ‘s23YUD(2).’ There is no need for other jurisdictions to have substantially similar forensic procedures laws to the Commonwealth in order to transfer information with the Commonwealth. Rather, the ‘lowest common denominator’ approach can be achieved through a requirement that each jurisdiction’s investigators be bound by the rules on access, use, disclosure, matching and destruction that were in effect in the jurisdiction where the material from which a profile was derived was obtained.

Given how this provision has been misused in NSW, the last 12 words of the definition of ‘corresponding law’ should be deleted.

- **23YUC: Carrying out of registered orders** – Sub-s(1), to the extent that it purports to authorise or regulate forensic procedures that relate to subject-matter (e.g. state criminal offences) that is not within s51 of the *Constitution*, would seem to be unconstitutional.
- **23YUD: Database information** – Sub-s(2) should be extended to also require compliance with the rules on matching, retention, access and disclosure that were applicable in the jurisdiction where the forensic material, from which the profile was derived, was obtained.

### ***Division 12 – Review of operation of Part***

This division sets up a review of the ‘operation’ of Part 1D. None of the matters mentioned in s23YV expressly refer to the drafting of the Part or the policy consideration that has gone into it. However, a review of Part 1D’s content is a necessary precondition to any consideration of the matters expressly listed in s23YV.

It should be clear from this submission that any such review would find that Part 1D is woefully inadequate to any task it is supposed to achieve. Part 1D neither furthers criminal investigations nor the privacy and civil liberties of Australians; rather, it unwittingly hampers both. It is clear that something went terribly wrong in the process that preceded the drafting and enactment Part 1D, both in MCCOC and within the Commonwealth Attorney-General’s Department. Fixing the numerous flaws in the legislation should be a precondition to any positive findings on the matters set out in s23YV(1).

It is crucial that those involved in the drafting of Part 1D (or its inspiration, the Model Forensic Procedures Bill) are not themselves members of the Review established in this Division. If such persons are involved, especially in recommendations concerning the standard of drafting in the Part, then the

Review will not satisfy the requirement of *independence*, set out in s23YV(1). People who should be excluded from the Review include any former member of MCCOC and anyone in the Commonwealth Attorney-General's Department who had responsibility for the drafting of Part 1D or its various passages through the Commonwealth Parliament. In addition, membership of the Review should exclude persons intimately involved in the drafting of the Model Forensic Procedures Bill, for example those persons from the Office of the Privacy Commissioner, CrimTrac and the working group of Police Commissioners, who, according to MCCOC's 1999 and 2000 publications, assisted in the drafting of some of the Bill's provisions.