

# Review of Pt 1D of Crimes Act

## Submission by the Australian Privacy Foundation

September 2002

### *Introduction*

The Australian Privacy Foundation<sup>1</sup> welcomes the opportunity to make a submission to this review. Unfortunately, late awareness of the review and limited resources have prevented us from preparing as comprehensive a submission as we would have liked. Fortunately, the Privacy Commissioner's background paper<sup>2</sup> covers many of our concerns. We assume that all of the suggestions included in the various other submissions referenced in that paper will be put by the Commissioner as a member of the Review Team. We endorse all of those suggestions.

One of the major concerns about the DNA testing and database regime involving all Australian jurisdictions (the DNA regime) is that the high level of intrusion – into both bodily privacy and in information privacy terms – may not be justified by the 'results' in terms of its contribution to law enforcement. It is therefore critically important that the effectiveness of the regime and its contribution be publicly demonstrated.

This concern relates to the Justification principle in the Australian Privacy Charter<sup>3</sup> which the Foundation uses as its benchmark for privacy protection.

In this respect we endorse the Privacy Commissioner's proposed framework for assessment of new initiatives in law enforcement and crime prevention to achieve an appropriate and balanced privacy response<sup>4</sup>. To the extent that elements of this framework are not already included in the accountability arrangements for the DNA regime, they should be, and we urge the Review to recommend this.

**We urge the Review to recommend incorporation in the DNA regime of all the accountability elements from the Privacy Commissioner's Framework for new initiatives in law enforcement and crime prevention.**

We are not in a position to contribute much on terms (a) and (b) as we are not aware of much publicly available information on the operation of the testing regime and CRIMTRAC's management of the DNA database<sup>5</sup>. We hope that the review has been

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<sup>1</sup> See <http://www.privacy.org.au/>

<sup>2</sup> OFPC Background information for review of Part 1D of the Forensic Procedures Provisions (Crimes act 1914)

<sup>3</sup> see <http://www.apcc.org.au/Charter.html>

<sup>4</sup> see Background Paper

<sup>5</sup> ALRC Discussion Paper 66 provides some information in Chapters 34-37.

provided with detailed information that will allow you to make an assessment of the effectiveness of the regime, to be balanced against its intrusiveness.

**We request that the Review publishes operational information about the regime including consolidated statistics about the number and type of tests and samples, and details of the contribution that they have made to law enforcement, (from all participating jurisdictions) so that the community can have confidence in the balance that has been struck between intrusion and privacy.**

### ***Oversight and accountability (terms of reference (c))***

We note that accountability arrangements featured prominently in the parliamentary debates and committee inquiries on the Bill in 1999. The then Minister gave certain assurances which do not all appear to have been implemented – particularly those involving inter-jurisdictional agreements on oversight and accountability. It is not good enough in matters that impinge on rights and liberties to simply accept the difficulty of achieving inter-governmental co-operation. In our view, until adequate oversight and accountability arrangements were in place, the DNA testing regime and database should not have been allowed to ‘go live’. Now that the system is operational, a strict deadline should be set for the accountability arrangements, and sanctions should be introduced (including ultimately exclusion from the system) for any participating jurisdictions that do not meet the deadline.

We note the discussion of this issue in the ALRC Discussion Paper and support the Proposal 36-13.

**We urge the Review to make recommendations for moving to a consistent and effective system of oversight and accountability within a specified timeframe, as a condition for the continued operation of the system.**

### ***Disparities in regulatory regimes (terms of reference (d))***

We note the Privacy Commissioner’s concern that:

“The implementation phase has not proceeded quite as smoothly. In legislating the model Bill in their own jurisdictions the States have decided on variations in approach that in some cases extend the collection of samples and lower the protections.”

(Background paper)

The ALRC-AHEC Inquiry into Protection of Human Genetic Information also comments adversely on the disparities and recommends harmonisation<sup>6</sup>.

**We urge the Review to address the variations in legislative provisions between jurisdictions and make recommendations to ensure higher minimum standards and greater consistency.**

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<sup>6</sup> ALRC Discussion Paper 66 Proposal 35-1

## **General privacy and civil liberties concerns (term of reference (e))**

### **Voluntary collection of samples**

A key issue we raised in our submission to the MCCOC Secretariat on the proposed Bill in July 1999 was the facility for law enforcement agencies to be able to solicit DNA samples from volunteers, not only in the context of particular investigations but more generally, and to keep the resulting profiles in a database for as long as the individuals consent.

We commented in 1999 that this had the potential over time to generate a DNA database of a large proportion of the community, based on generalised appeals to the 'public spirit' which involve significant community pressure which undermines the claimed 'voluntariness'. We noted the risk, recognised in the 1999 discussion paper, of other uses of DNA information, with major implications for people's life chances and circumstances, and concluded that it was inappropriate to rely on individual consent as the only safeguard. Whatever the justification for the use of DNA samples for targeted law enforcement investigations, it should not in our view be permitted to build up a permanent database of DNA information about people who are in no way suspected of any wrongdoing. If it is considered desirable to allow people to volunteer samples to help eliminate suspects (and we do not necessarily accept this case), then these samples, and the resulting profiles, must be destroyed soon after completion of the particular investigation.

We note in this context that there has been one widely publicized 'voluntary' collection of DNA samples – in the NSW town of Wee Waa in 2000. In this case, samples (and profiles?) were reportedly destroyed some five months later. We hope that the review will reveal publicly the incidence and extent of any other 'voluntary' collections and report on the disposal of samples and profiles in such cases.

**In our view there should be a legislative requirement for disposal of both samples and profiles within a certain period of time, with any extensions required for specific operational purposes being approved by an independent – preferably judicial – authority.**

We also favour the ALRC proposal for guidelines for mass screening programs by the police<sup>7</sup>, but these should in our view be binding – preferably in the form of Regulations.

### **Collection of samples with informed consent**

As the ALRC Discussion Paper points out, the legislative provision for collection of DNA from convicted persons and suspects with consent debases the accepted meaning of consent, since in nearly all cases, the authorities are able to insist on compulsory

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<sup>7</sup> ALRC Discussion Paper 66 Proposal 36-6

collection if consent is withheld. We agree with the ALRC proposal that the consent provisions for these categories of samples be removed from the legislation.<sup>8</sup>

### **Compulsory collection of samples from convicted persons**

There have been occasional disturbing reports about the non-consensual collection of samples from some prisoners involving major duress. This involves issues of bodily privacy (as opposed to information privacy) which is also covered by the Australian Privacy Charter (see Principle 9 at <http://www.apcc.org.au/Charter.html> ).

We are particularly alarmed by the recently reported approach of the Victoria Police to obtaining samples from *former* prisoners, involving threats of arrest and further imprisonment, and emphasis on the authority to use force to take blood samples. See <http://theage.com.au/articles/2002/09/01/1030508161504.html>

It is not in our view appropriate for the compulsory collection to be implemented in a heavy handed way. We doubt if there is any overwhelming urgency about collection of samples from convicted offenders and suggest that prolonged negotiation and time for re-consideration of consent are desirable before resorting to the forced collection ultimately allowed by law. We also believe strongly that blood samples should only be taken by qualified medical personnel – we understand that this is not currently required.

**We urge the Review to recommend guidelines to ensure a more sensitive approach to compulsory collection.**

### **Compulsory collection of samples from suspects**

This is another area where disposal of samples is a key issue. As the Privacy Commissioner states in his submission to the current ALRC/AHEC inquiry into Genetic Information:

“the relative vagueness or inconsistency in legislative obligations across jurisdictions regarding retention and destruction or de-identification of data (both data relating to a forensic sample and the sample itself) leaves much room for inconsistency in data handling, with significant potential for negative effects on privacy.”

**We believe that the Review should make positive recommendations to address this problem. As with voluntary samples, we would like to see maximum statutory retention periods with provision for court ordered extensions if required.**

### **Coverage of Privacy Act**

We are aware that there is some uncertainty about whether DNA profiles are caught by the definition of personal information in the Privacy Act 1988.<sup>9</sup> This uncertainty should be resolved in the affirmative so that all Commonwealth agencies and any private sector

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<sup>8</sup> ALRC Discussion Paper 66 Proposal 36-1

<sup>9</sup> ALRC Discussion Paper 66 Paragraph 36-109

organisations handling the profiles involved in the DNA regime are subject to the relevant privacy principles.

**Legislative amendments should confirm that DNA profiles are ‘personal information’ for the purposes of the Privacy Act 1988.**

*End*