Office of the Victorian Privacy Commissioner

Submission to the Forensic Procedures Review Committee

on its

Review of Part 1D of the Crimes Act 1914 (Cth)

5 September 2002
# Table of Contents

## I. INTRODUCTION

## II. ISSUES RELATING TO PRIVACY OR CIVIL LIBERTIES ARISING FROM FORENSIC PROCEDURES PERMITTED BY PART 1D

### Balancing public interests
- Law enforcement
- Privacy
- Achieving the balance

### Matters of interpretation & comparison
- Body samples v. information derived
- DNA v. fingerprints

### Specific privacy interests
- Bodily integrity
- Intimate v. non-intimate procedures
- Use of reasonable force
- Personal liberty
- Restraining freedom of movement
- Seizure of DNA
- Post-conviction testing
- Information privacy
- Extent of information collected
- Fair collection & opportunity to be heard
- “Function creep”
- Freedom from surveillance by the state
- Collection prior to conviction
- Indefinite retention for data-matching
- Mass screening of volunteers
- Genetic registers - Guthrie cards
- Familial privacy
- Potential for racial profiling

## III. DISPARITIES BETWEEN THE LEGISLATIVE AND REGULATORY REGIMES OF THE COMMONWEALTH AND PARTICIPATING JURISDICTIONS (INCL. VICTORIA) FOR THE COLLECTION AND USE OF DNA EVIDENCE

### Model Forensic Procedures Bill

### Interstate schemes

### International DNA disclosure

### Victoria
- Existing safeguards
- Disparities with Part 1D
IV. THE EFFECTIVENESS OF INDEPENDENT OVERSIGHT AND ACCOUNTABILITY MECHANISMS FOR THE DNA DATABASE SYSTEM ............23

V. CONCLUSION..........................................................................................................................27

ENDNOTES..................................................................................................................................29

The Victorian Privacy Commissioner acknowledges the work of Michelle Fisher, Senior Policy Officer, Privacy Victoria, in the preparation of this Submission.
INQUIRY INTO FORENSIC SAMPLING & DNA DATABASES

I. Introduction

1 The Review Committee will have the benefit of the expertise of its members, who include suppliers and users of CrimTrac. This should result in an informed and detailed description of CrimTrac, of which the National Criminal Identification DNA Database (“the National DNA Database”) is a part.

2 Lack of proper information may be one cause of concerns about the National DNA Database, and about CrimTrac. Better information may remedy some concerns. As was wisely observed in another governmental context: When all the doors are closed, the smallest chink of light seems very revealing, yet it usually distorts more than it illuminates.

3 Better information, greater transparency and independent oversight will assist in building the legitimacy on which the participating organisations in CrimTrac ultimately depend.

4 The test for the Review Committee was set out by Senator Ellison in his statement to the Commonwealth Parliament that:

   In view of the interjurisdictional nature of the scheme it is vital that we have arrangements that ensure that the oversight function is like the system itself: interconnected and properly coordinated. These arrangements must also ensure that complaints can be investigated easily without jurisdictional barriers becoming a problem. By encouraging compliance and avoiding problems later these measures will also play a role in improving the effectiveness and efficient use of the system by law enforcement agencies…. Let me make it clear: there is not just the one-off review; there is a facility for further review if matters have not progressed satisfactorily. Similar arrangements would also appear to be useful in relation to other elements of the CrimTrac system.¹

5 This Submission is naturally made from a privacy perspective. Others, including some Review Committee members and CrimTrac board members, will readily be able to provide the Review with the law enforcement perspective.

6 Broadly, this Submission urges the Review Committee to:

   a. Let liberty and security start as equals in the discussion.

   b. Acknowledge that just as collection and use by the state of its citizens’ DNA can aid law enforcement, it can also aid discrimination, even oppression.

   c. Be humble in the face of our ignorance of the subtle grandeur of the human genome.

   d. Recall the awful lessons of history when an illusory scientific certainty fed the politics of discrimination.

   e. Proceed with care, and build into the growing system of shared databases transparency and independent oversight.

7 This is the broad brush. The detail follows.
II. Issues relating to privacy or civil liberties arising from forensic procedures permitted by Part 1D

Balancing public interests\(^2\)

**Law enforcement**

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

**Privacy**

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

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

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

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

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

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

a. more DNA samples, whether from persons under suspicion or not, are collected than is necessary during a particular investigation;

b. unreasonable force is used to obtain a sample from a person;

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

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

11 Privacy and respect for human dignity need to be balanced with community safety. In many ways, privacy principles will enhance the integrity and legitimacy of DNA profiling by limiting collection to the minimum necessary to achieve the legitimate aims of law enforcement agencies, requiring its use to be in accordance with these aims, demanding secure storage of DNA material, and requiring its destruction or de-identification when the information is no longer needed. This symbiotic relationship is implicit in the CrimTrac slogan, “Good privacy is good policing”.  

12 It is noted that CrimTrac reports that use of DNA for identification purposes is from non-coding parts of the genetic material (or “junk DNA”) that do not contain information that can used “to build up a physical picture of an individual, or identify race or age.” This is not a complete answer to the issues raised in this Submission. We do not know enough yet to state definitively that any data extracted from a person’s DNA reveals only this or only that. We can state that we believe, on present knowledge, that the data does not say more about a person than his or her DNA appears to match or not match the DNA obtained elsewhere. The term “junk DNA” has a ring of arrogance.  

13 In his 2002 book, *The Human Genome*, Jeremy Cherfas writes:

> The junk DNA is turning up some surprises too. Celera [a private concern involved in genome sequencing] scientists estimate that forty-eight percent of the sequence consists of repeat sequences, one of the kinds of junk in which a pattern of bases is repeated over and over again. Nearly ten percent of the Celera sequence consists of a single kind of repeat, a sequence called Alu, which can consist of up to 280 bases. The Human Genome Project sequence reveals that Alu is clustered in areas rich in genes – perhaps it does have some important part to play, yet to be discovered.  

14 The author raises in broad terms the ethical dilemmas presented by genetic information and concludes:

> There are fine distinctions to be made; an educated public and well-informed politicians are the best guarantee that they will not be made foolishly.  

15 John Maddox states, in *What Remains to be Discovered*:

> It may be that only 3% of the human complement of DNA is functionally significant. Some of the remaining 97% or so of the human genome is given over to the sequences of DNA required for regulating individual genes; understanding of how this is done is far from complete….  

> [The] organisational overhead in the human genome cannot amount to more than, say, a further 2% of all DNA, leaving the function of 95% or so unexplained….  

> [G]enes are not only divided into segments, but are separated from each other by such long and apparently meaningless stretches of DNA that it has been called “junk”….  

> The junk is not all without meaning. For example, some of the non-functional DNA is structurally similar to active genes, but lacks the places to which regulatory proteins normally stick, and is therefore inactive. The pieces of DNA may be evolutionary relics of one’s active genes. The striking feature of the remaining junk DNA is its repetitiveness…. Do these repetitive elements have a function and how, in any case did they get there?  

16 Summarising the publication of the joint announcement of the sequencing of the human genome in 2000 by British and American teams, Kevin Davies states:

> The report also shed light on the bizarre world of junk DNA, families of viral and bacteria-derived sequences variously characterised as freeloaders and parasites. Surprisingly, some of these DNA
elements are not distributed randomly across the genome but tend to congregate near genes, suggesting they may have some unknown function.\(^9\)

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

a. under law;

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

c. with safeguards that ensure accountability.

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

19 The National DNA Database operated by CrimTrac will contain the fruits of all that Commonwealth, State and Territory authorities collect. To the extent that their collections are tainted, CrimTrac will be tainted. To the extent that any one of the authorities’ schemes is not secure or is insensitive to the privacy balance, CrimTrac will be perceived as not secure or as insensitive to the privacy balance.

20 CrimTrac will be vulnerable to the least secure, least privacy sensitive among its participating jurisdictions. Its transparency and accountability structures should reflect that fact. It is inappropriate that coordination of vast amounts of the personal information of Australians should be centralised, while the accountability for collection, use and quality of that information should be dispersed among participating jurisdictions.

Matters of interpretation & comparison

21 In this Submission, and in forensic procedures laws generally, a distinction is usually made between body samples that contain DNA (such as blood, hair and saliva) and information derived from the samples (such as the sequence of numbers that create a DNA profile). The former has the potential to be particularly privacy-invasive because:

a. the very act of collecting body samples usually requires some interference with the body;

b. body samples have the potential to surpass the utility of fingerprints in identifying a person – for instance, an analysis of a body sample can reveal a person’s health status, ethnicity, racial background, and ancestry; and

c. body samples that are retained may be re-tested, at any time in the future, to ascertain things about a person beyond what was originally intended to be discovered at the time the sample was initially collected.

**Body samples v. information derived**

22 The Victorian *Information Privacy Act 2000* regulates the handling of personal information by the Victorian public sector, including police.

23 “Personal information” is defined to mean information or an opinion that is recorded in any form about an individual whose identity is apparent or can be reasonably ascertained.
24 DNA profiles (a sequence of numbers) and other identifying information derived from body samples are clearly personal information, their whole purpose being to identify a person.

25 Body samples (such as blood, hair and saliva) will also fall within the meaning of personal information where it is recorded in a form that identifies a person or where a person’s identity can be reasonably ascertained.

26 The *Information Privacy Act* will apply to DNA samples that are collected, for example, by an organisation (such as police) who have the means available to them to analyse the sample in order to ascertain a person’s identity. At a simpler level, a body sample stored or able to be linked with a unique identifier of the person from whom it was extracted is also personal information.

**DNA v. fingerprints**

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

28 The need for safeguards was recognised early during the development of forensic procedures laws by the Model Criminal Code Officers Committee. Briefly, the reasons are as follows:

a. Unlike fingerprints, DNA material contains much more information about a person. Fingerprints simply reveal a person's identity while DNA reveals a person's entire genetic blueprint. A databank of genetic information may attract researchers who want to analyse the samples for reasons that have nothing to do with forensic identification. Health and life insurers, whose business is pricing risk on the basis of information, have an obvious potential interest. It is necessary to guard against unauthorised or illegitimate uses of information obtained for particular purposes.

b. Because DNA matching seems so convincing, safeguards against tampering and contamination are essential. DNA evidence is not foolproof.\(^\text{10}\)

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

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

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

f. Procedures to protect the integrity of the DNA database, if they work, will enhance its reputation as a reliable investigative tool and have an effect on the extent to which the courts are prepared to rely on evidence derived from the database.\(^\text{11}\)
Specific privacy interests

29 Information privacy law generally requires that collection of personal information (including genetic information) be limited to what is necessary, and that the means of collection be fair, lawful, not unreasonably intrusive and, wherever reasonable and practicable, involve direct collection from the individual.

30 Information privacy overlaps to some extent with other aspects of privacy affected by DNA profiling: bodily integrity, personal (i.e. physical) liberty and freedom from surveillance.

31 For ease of discussion, the various privacy issues raised by the collection of DNA are categorised under each of these aspects. While bodily privacy encompasses any interference with the person, it is useful to distinguish bodily integrity (involving the actual method used for extracting body samples) from personal liberty (involving the detention of a person and the “search and seizure” of their DNA).

32 The issues dealt with under the category, freedom from surveillance, involve matters that go beyond collection of DNA from a single individual and instead raise wider issues about the relationship between the citizen and the state when it seeks to collect DNA on a large scale, particularly from those who have not been suspected, charged, tried or convicted of a crime.

33 While CrimTrac does not itself collect from persons samples of their DNA, the significance of collection by others – and the perceived legitimacy of that collection – will affect perceptions of CrimTrac, which is likely to become the most visible, centralised DNA Database. Because of the other information shared via CrimTrac, the privacy concerns associated with CrimTrac’s DNA Database may intensify.

Bodily integrity

34 While bodily integrity is clearly not the only privacy interest that arises when DNA samples are collected and handled, it is the aspect most often highlighted in forensic procedures laws when decision makers are asked to take privacy interests into account.

Intimate v. non-intimate procedures

35 Forensic procedures laws generally distinguish between “intimate” procedures and “non-intimate” procedures. For example, the taking of pubic hair and examination of genital areas are generally accepted as intimate procedures, while the taking of scrapings from under fingernails is regarded as non-intimate.

36 Greater oversight and safeguards usually apply to the taking of body samples through intimate procedures, which are regarded as more invasive and threatening to personal dignity.

37 Jurisdictions have not uniformly agreed that the taking of buccal mouth swabs should be regarded as intimate, as the procedure is not seen as particularly invasive where it simply involves scraping a cotton bud along the inside of the mouth. Similarly, obtaining blood by a finger prick is regarded by some as not as invasive as use of a syringe.
38 When examining whether a procedure ought to be categorised as invasive and a potential interference with bodily integrity, it is not sufficient to limit the analysis to whether the procedure can be simply undertaken where the person involved consents. Regard must also be given to issues such as whether and to what extent:

a. the body is penetrated;

b. the procedure is painful or causes physical discomfort;

c. the body part or area is regarded as private, taking into account the cultural background and religious beliefs of the affected person;

d. the procedure is self-administered; and

e. the procedure involves the use of force.

**Use of reasonable force**

39 Where a court orders that a forensic procedure be carried out, police are generally entitled to use "reasonable force".

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

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

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

42 The Consultative Committee acknowledged that the use of force was not without difficulties and pointed to the potential for institutionalised violence.

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

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

The method preferred by police to take forensic DNA samples from inmates is by a self-administered buccal (or mouth) swab, which involves the inmate soaking up the saliva and cheek cells from the inside of her or his cheek using a foam-tipped plastic swab. If the inmate does not consent, a senior police officer can make an order for a sample of hair with roots to be taken, with force if necessary. Alternatively, the police can apply for a court order to take the sample.
The Police Service has informed us that samples of blood are taken only as a last resort, such as when an inmate does not consent to the mouth swab, and has ‘shaved down’ [removed all body hair] in an attempt to avoid a sample of hair being taken….

The NSW Police Service procedure for taking a forensic hair sample is ‘the lever arch method’, where 15-20 hairs are levered out, placing even pressure on the hair that is being pulled out.

Earlier this year a community-based organisation raised concerns with our office that this method of taking hair was more painful than that employed by police in other jurisdictions such as the UK and Canada. It cited UK policies which specify that the hair must be taken one strand at a time and that the prisoner or suspect be allowed to specify from which part of the body the hair is to be collected.

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

Victoria Police have a specially trained police unit, the “Cell Extraction Team”, to obtain DNA by force from convicted offenders who do not agree to provide a sample voluntarily. It is reported that about 4000 convicted persons not in custody will be targeted.

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

**Personal liberty**

Privacy has famously been referred to as “the right to be let alone”. This dimension of privacy involves the freedom to seclude oneself or to assemble and associate with others away from the public gaze, as well as the freedom from being detained without lawful cause, and freedom to be secure from arbitrary search and seizure, whether that be of ones’ home, correspondence or person.

**Restraining freedom of movement**

Where a person is living in the community, arrest and detention for the purpose of obtaining their DNA during a police investigation will be more intrusive than situations where a person is serving a term of imprisonment. As MCCOC noted, unlike prisoners in custody, police locating and detaining a person in the community may interrupt their family and work life.

While convicted offenders in prison can expect to have their privacy rights diminished, individuals living in the wider community have a legitimate expectation that, absent reasonable suspicion or risk to the community, their privacy will be respected.

In determining whether the liberty of people not in custody ought to be curtailed – whether the individual concerned is an ex-convict, a suspect, a victim, or a volunteer – a number of matters should be considered. The primary one is that the DNA sample will be effective in achieving a legitimate goal, which may be:
a. deterring recidivism of violent offending;

b. solving past violent crimes; or

c. identifying offenders of serious crime.

52 Other matters to be considered include the availability of less intrusive methods to achieve the stated purpose.

53 Where a person has neither been convicted nor is suspected of a crime, it is difficult to see any justification for curtailing their liberty through detention for forensic DNA sampling.

Seizure of DNA

54 Where a DNA sample is obtained for the purpose of extracting a DNA profile, more information will be seized than is necessary for the particular investigation:

The information obtained by DNA profiling, whether it comes from blood, saliva, semen, or hair, is potentially quite extensive and personal. Obtaining a DNA profile may eventually be more invasive of an individual’s privacy than rifling through personal files. Scientists have already located the sites of many genetic diseases and disorders; it is only a matter of time before the entire human genome is mapped.... Although only intending to seize evidence that would identify the suspect as the perpetrator of the crime, police would in fact be seizing the medical, physiological, racial, ethnic, and genealogical history of the suspect as well...

[The sort of privacy invasion implicated by gaining access to DNA profiling information goes beyond simply physical invasion and thus deserves heightened protection... Not only should the traditional protections of bodily integrity apply, but protections against the seizure of private information unrelated to criminal activity should also apply...]

[P]rocedures must be designed to ensure that unrelated personal information obtained from the DNA profile is not used without consent or made a part of a police record.23 [emphasis added]

55 Consideration should be given to investigating alternative methods for police collection of DNA profiles that do not require collection and retention of body samples. This might, for instance, be achieved by having the sample initially collected and held by an intermediary that is independent of police. Routine destruction of DNA samples (aside from crime scene samples), when uses of the samples (including any verification of re-testing) are complete, might be considered.

Post-conviction testing

56 One of the benefits of DNA testing is that it can be used to establish the innocence of someone convicted of a crime they did not commit, who may have been wrongly incarcerated.24 In some cases, the wrongly convicted offenders’ DNA profiles may have already been collected and included on the DNA database. In other cases, there may be no authority to compulsorily acquire their DNA under the Act (eg, where, under Victorian law, they were convicted of a forensic sample offence before 1 July 1998 and are not in custody25).  

57 There should be provisions in the forensic procedures laws to ensure that innocence testing can occur without disadvantaging or deterring persons from seeking a review of their conviction for fear of being included on a DNA database that they ought not be on in the first place. Moreover, where the DNA of a wrongly convicted person has already been collected, there should be clear provisions requiring the destruction of the DNA profile
and any related material, and its removal from the DNA database, after any pardon or quashing of conviction.

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

Information privacy

Extent of information collected

59 As discussed above, when a DNA sample is collected for the purpose of identifying a person, more information is collected than is necessary for that purpose.

60 Extraneous, irrelevant information (such as that which is capable of revealing a person’s medical, racial, ethnic or genealogical history) ought not be retained.

Fair collection & opportunity to be heard

61 Privacy serves human dignity. DNA sampling invades many aspects of privacy, including bodily integrity. One way to respect the basic dignity of a person is to grant a person the right to be heard by the decision-maker in relation to a decision affecting the person’s body.

62 Forensic procedures laws around Australia differ on the opportunity given to individuals at a hearing of an application seeking compulsory collection of their DNA. In Victoria, for instance, suspects are not parties to the application and are not allowed to call or cross-examine any witnesses. Moreover, they are not permitted to address the court except in respect of whether the certain pre-conditions to making the application are met and, in the case of child suspects, whether the order is justified in light of defined circumstances.

63 To ensure that information as sensitive and extensive as that contained in DNA samples is collected in a fair manner, the affected person should have an opportunity to be heard at various stages in the process, including:

a. notice of the application for the compulsory taking of a forensic sample and attendance at the hearing of the application. Any absence of a notice requirement or requirement for a suspect to attend the hearing of the application undermines the suspect’s opportunity to be heard, thereby calling into question the fairness of collection.

b. opportunity to be heard at the hearing, including the right to cross-examine the applicant, call or cross-examine witnesses with leave of the court, and address the court;

c. information about the consequences of an order being made and the affected person’s rights of access and destruction. Where an order is sought to compulsorily take a sample, the affected person should be informed of a number of matters that might affect their exercise of their limited right to be heard at the hearing of the application, including:
(i) the possibility of reasonable force being used;

(ii) the possibility of an order being sought (eg, upon a finding of guilt) to retain their sample and any related information for inclusion on the National DNA Database;

(iii) the circumstances under which the sample and related information must be destroyed (eg, interim orders not confirmed, finding of not guilty) and their right to seek written confirmation of the destruction.

(iv) the possibility of a sample and related information becoming "spent" if, for instance, a child does not re-offend by the time they turn 26 years of age. This promotes openness about how their personal information is handled under the Act and also may deter recidivism.

“Function creep”

64 Forensic procedures laws that have been amended to enable participation on the National DNA Database generally make provision for use and disclosure of DNA information to take place in accordance with regulations or, less transparently, by arrangements between police across Australian jurisdictions.

65 A DNA database is a very powerful tool which has the potential to be a rich source of sensitive information that might be attractive to third parties whose interests are far removed from law enforcement. If genetic information is to be made available to third parties or for purposes unrelated to the criminal investigation purpose for which the DNA database was said to be originally established, any expansion (or "function creep") should be specifically and in every case subject to the legislative power of the Parliament and not be left to be determined by a decision of the Executive, by Memorandum of Understanding or other instrument of Ministerial Councils, by regulations, by private agreement or by the parliaments, the executive governments or the police of other jurisdictions.31

Freedom from surveillance by the state

66 The community has a legitimate expectation that they be free from arbitrary interference. Any incursion into their privacy and liberty must be limited to the minimum necessary to achieve legitimate purposes. The measures taken must then be limited to what is proportional to any perceived risk or benefit sought to be achieved, and it must be effective at achieving that.

67 Caution needs to be exercised where intrusive police powers are expanded in the name of crime prevention:

Law, including criminal law, must in a free society be judged ultimately on the basis of its success in promoting human autonomy and the capacity for individual human growth and development. The prevention of crime is an essential aspect of the environmental protection required if autonomy is to flourish. It is, however, a negative aspect and one which, pursued with single-minded zeal, may end up creating an environment in which all are safe but none is free.32
Collection prior to conviction

68 Where a community places a high value on liberty, of which privacy is a slice, extreme caution must be exercised before extending the power of the law enforcement agencies to expand DNA collection beyond cases of serious, violent offenders and suspects.

69 Leave to one side for the moment issues of the reliability of the system of DNA profiling. Recalling the powerful fact that DNA is a person’s “fate map”, the first question is whether the state should be empowered under law to extract DNA, forcibly or not, and compile a database of the genetic make-up of those people who are not convicted of a serious offence. What is to be the threshold at which collection of DNA data is to be permitted? If gradations are to be introduced into the system – for instance, conviction of serious offences, less serious convictions, charge, suspicion, mere police convenience – what gradations will be applied to the purposes for which the data may be used? What safeguards?

70 These are not hypothetical questions. Australia appears to be following the British trend of permitting the steadily increasing collection of DNA from a steadily broadening range of persons for a steadily widening range of reasons for use by a steadily growing group of organisations. The purposes for which DNA may be used are insufficiently defined.  

71 The justification is almost always said to be detection or prevention of crime. But the implications of what is collected, held, shared and perhaps used go far wider.

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

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

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

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

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

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

d. Police, like the rest of us, are not infallible.
e. Genetic science is still developing.

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

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

**Indefinite retention for data-matching**

76 DNA samples have significance beyond identification or elimination from suspicion in a particular criminal investigation. Existing provisions to retain the samples, as well as the data extracted from them, add to privacy concerns and to the importance of safeguards.

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

**Mass screening of volunteers**

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

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

80 Neither the Victorian Act nor the Model Bill include any safeguards in relation to the conducting of wide scale DNA testing from volunteers.

81 Mass screening raises a number of privacy concerns, including:

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

b. social (or police) pressure being exerted to coerce consent;

c. potential for collection to be excessive (both in the number of persons tested and the possibility for additional personal information to be collected, such as photographs and interview statements); and

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

82 A clear written protocol on how mass screenings should be undertaken would appropriately balance the competing public interests of law enforcement and privacy. A detailed statutory model, debated and endorsed by Parliament, would be preferable.

83 Forensic procedures laws should be amended to require police to seek a court order before undertaking any mass voluntary testing, having regard to the above matters.

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

Genetic registers - Guthrie cards

85 Concern has been expressed about police access to genetic registers, such as "Guthrie cards." Guthrie cards are cards that contain blood samples collected from the heels of newborns at hospital for the purpose of testing them for cystic fibrosis and phenylketonuria. In Victoria, hundreds of thousands of children born since the late 1960s have had such blood tests. Testing and storage in Victoria is conducted by Genetic Health Services Victoria, a subsidiary of the Murdoch Children’s Research Institute.

86 Further consideration is required to determine whether it is appropriate for police to be able to access existing genetic registers (or tissue banks, where individuals provide samples solely for the purpose of possible use in research), having regard to the public policy interests that led to the establishment of such registers in the first place. When parents of newborns consent to the blood test, the furthest thing from their mind is any measured judgement of the potential use by the state, through the police or otherwise, of their child’s DNA. Individuals may be less inclined to seek a genetic test or to provide a tissue sample if the genetic register or tissue bank becomes a pool of data into which police may routinely dip. Such reluctance to have newborns tested would not be in the public interest.

87 In Western Australia, the obtaining by police of Guthrie card DNA for investigative purposes led to public concern about the continued willingness of parents to consent to newborn screening. A document retention policy was subsequently introduced by Genetic Services of Western Australia, the Western Australian Department of Health, King Edward Memorial Hospital and Princess Margaret Hospital for Children requiring the cards to be kept for two years only and then destroyed.

88 It is a cautionary tale. The issue needs to be addressed transparently and by the appropriate authority, Parliament. The ALRC/AHEC has drawn attention to this important issue. It should not be decided by default through occasional or routine administrative arrangements between police, other authorities and custodians of the cards. Transparency and accountability are vital.

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

a. be subject to clear purpose limitations;
b. be a technique of last resort in only the most serious cases;

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

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

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

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

**Familial privacy**

91 In Victoria, the law already allows relatives to volunteer DNA samples to assist in the identification of missing or deceased persons. The Victorian DNA Database Act extends this practice so that relatives' DNA may be matched on the National DNA Database with the missing persons' index and the unknown deceased persons' index.

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

93 Forensic procedures provisions allowing forensic samples to be obtained from suspects and serious offenders (and any safeguards accompanying them) may be circumvented if DNA can be otherwise obtained from a "third party", namely from suspects or serious offenders' relatives.\(^47\)

94 Consideration should be given to prohibiting the seeking or obtaining, without a court order, of DNA material from volunteers for the purpose of identifying suspects or serious offenders.\(^48\)

**Potential for racial profiling**

95 DNA profiling may lead to racial profiling.\(^49\) Examples exist.\(^50\) The United States Justice Department’s National Commission on the Future of DNA Evidence suggests at least two ways in which people can be classified according to their membership in a particular ethnic or racial subpopulation:

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

b. certain genes are more common in some population groupings and rare in others, thereby enabling a person to be classified according to their membership in a particular racial or ethnic group.\(^51\)

96 Australia’s is a multi-racial, multi-ethnic population. In privacy law and policy, race and ethnicity comprise sensitive personal information. The ALRC/AHEC discussion paper, *Protection of Human Genetic Information*, has recently adverted to the significance of the use of genetic data in the context of Australia’s indigenous population.\(^52\) A large
proportion of the Australian population was born overseas or are the children of migrants. From time to time in Australian history since 1788, ethnicity or race have been matters that have led to serious discrimination against particular persons. The National DNA Database should not be permitted to develop into a source of information that feeds discrimination. The awful story of eugenics is a warning from history that ought in this context to be heeded.\textsuperscript{53}

When a DNA sample is obtained, it should not be analysed for racial or ethnic origins. When data derived from a sample is sent by any one jurisdiction to the National DNA Database, it should not be accompanied by any information about the person’s racial or ethnic origin. Nor should it be possible or even permissible for such information to be ascertainable through data linking with other databases to which participating agencies in the National DNA Database have access. If DNA and racial or ethnic origin data are being compiled, or able to be linked, different issues arise and particular safeguards should be a matter for parliamentary attention. The National DNA Database should be limited to data relating to the unique identity of a particular person, not to any other characteristics of that person.
III. Disparities between the legislative and regulatory regimes of the Commonwealth and participating jurisdictions (incl. Victoria) for the collection and use of DNA evidence

Model Forensic Procedures Bill

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

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

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

101 Victoria introduced forensic procedures provisions into the Crimes Act 1958 (Vic) in 1988. These provisions were substantially amended in 1993 and 1997. The 1995 Model Forensic Procedures Bill was based on the 1988 Victorian provisions.

102 In October 1998, SCAG agreed to the preparation of a discussion paper for consulting the public on the proposed model forensic procedures legislation. In November 1998, the APMC supported the preparation of this paper. The purpose of the MCCOC discussion paper was to canvass various issues and achieve a consistent approach to the legislation across jurisdictions, which was recognised as a significant issue in the context of the CrimTrac initiative. MCCOC noted that consistent legislation would simplify the establishment of the database and ensure that DNA evidence is used appropriately in any jurisdiction.  

103 Following consultation on the discussion paper and decisions made by SCAG at its July 1999 and November 1999 meetings, the Model Bill was revised into its final form. During the preparation of the Bill, MCCOC had detailed discussion with officers from the CrimTrac project team, law enforcement agencies, and the Federal and NSW Privacy Commissioners.

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

105 Consultation on the discussion paper and Model Bill pre-dated the establishment of the Office of the Victorian Privacy Commissioner in September 2001.
Interstate schemes

106 Since the 1995 Model Bill was developed, all Australian jurisdictions have passed some form of forensic procedures legislation:

a. 1998 and 2001 Commonwealth *Crimes Amendment (Forensic Procedures) Acts*;

b. the *Crimes (Forensic Procedures) Act 2000 (ACT)*;

c. the *Crimes (Forensic Procedures) Act 2000 (NSW)*;

d. Chapter 8, Part 4 of the *Police Powers and Responsibilities Act 2000 (Qld)*;

e. the *Forensic Procedures Act 2000 (Tas)*;

f. the *Criminal Law (Forensic Procedures) Act 1998 (SA)*. South Australia introduced a Bill into Parliament on 20 August 2002 to facilitate their participation in the National DNA Database scheme and, among other things, to extend collection of DNA from convicted offenders serving terms of imprisonment: the *Criminal Law (Forensic Procedures) (Miscellaneous) Amendment Bill 2002*;

g. the Northern Territory forensic procedures laws are contained in Division 7 of Part VII of the *Police Administration Act 1978 (NT)*, Part V of the *Juvenile Justice Act 1983 (NT)*, and Part XXVII of the *Prisons (Correctional Services) Act 1980 (NT)*; and

h. Western Australia was the last remaining Australian jurisdiction to enact forensic procedures legislation: The *Criminal Investigation (Identifying People) Act 2002 (WA)* was assented to on 4 June 2002 and parts of the Act came into effect on 29 June 2002 with the remainder not yet proclaimed.

107 It has been said that the Model Bill has been followed closely by some jurisdictions (such as the Commonwealth, New South Wales and the Australian Capital Territory) and not at all by others (namely Queensland and the Northern Territory).  

108 A cursory look at interstate models reveals the following:

a. Some jurisdictions allow for DNA samples to be taken from persons suspected of any, or relatively minor, offences.  

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

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

d. In some cases, there appear to be no restrictions on the retention or use of DNA samples by the collecting authority, and the use of DNA exchanged with other jurisdictions is left open-ended.
e. Some jurisdictions have already passed regulations that permit DNA to be exchanged with other jurisdictions, irrespective of whether the privacy protections and other safeguards are equivalent in the other jurisdictions.63

109 At a minimum, the development of statutory models around the country reveals that uniformity is lacking. This raises obvious concerns, particularly in relation to the national pooling of DNA data, the quality, security and uses of which will only be as good as the weakest safeguards among various participants.

International DNA disclosure

110 CrimTrac was partly developed to allow for the international exchange of DNA profiles.64 Victoria’s Crimes Act expressly permits access and disclosure of information contained on the National DNA Database in accordance with mutual assistance laws.65

111 Australia is actively involved in Interpol’s development of an international DNA database. Australia is represented on the Interpol DNA Monitoring Expert Group, which was formed to discuss the use of DNA profiling as an investigative technique and make recommendations concerning the use of DNA in criminal investigations with a view to facilitate the worldwide use of this technique. Australia (along with France, South Africa, the UK and the USA) is also a participant in the Interpol DNA Automated Search Facility (ASF) Database pilot project.66

112 As with lack of uniformity around Australia’s jurisdictions, so the privacy and other safeguards can be expected to vary from country to country. Genetic data has a potential value in international markets.67 Provision of DNA data of Australians to international databases should be monitored by the relevant Parliaments and subjected to a periodic review by relevant parliamentary committees of the security and uses of the data.

Victoria

113 Victorian law enforcement agencies have had the power compulsorily to obtain DNA samples from suspects and offenders since 15 March 1989, when the Crimes (Custody and Investigation) Act 1988 (Vic) came into effect.68 These provisions were substantially amended in 199369 and 199770.

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

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

116 The Victorian Parliamentary Law Reform Committee is currently inquiring into forensic sampling and the use of DNA databases in criminal investigations. They released a discussion paper71 in June 2002 and conducted public hearings in July. The Committee is due to report to Parliament by 31 October 2002.
**Existing safeguards**

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

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

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

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

121 This Act also foresees the need for the Privacy Commissioner, Health Services Commissioner or Ombudsman to have access to information on the National DNA Database in the course of handling complaints.

**Disparities with Part 1D**

122 The following is a brief summary of some of the disparities between the Victorian forensic procedures provisions in the Victorian Crimes Act 1958 as compared with the Commonwealth’s provisions in Part 1D:

a. Definitions differ:

   (i) “child” – the Victorian provisions applying to children appear to set the age limit at under 17, in contrast to the Commonwealth’s express definition of child as being under 18;

   (ii) “incapable person” – the Commonwealth’s definition recognises that some adults may be incapable of giving consent, not only because they are unable to understand the nature and effect of the forensic procedure, but because they are incapable of indicating whether or not they consent. In contrast, Victoria does not provide for situations where a person may be unable to indicate whether they consent due, for example, to physical impairment;

   (iii) “crime scene index” – unlike the Commonwealth, Victoria does not include material found “within” the body of the victim;
(iv) “volunteers (unlimited purposes) index” – unlike the Commonwealth, Victoria
does not include forensic material taken from deceased persons whose identity is
known;

(v) “destroy” – Victoria does not adopt the definition of destroy used by the
Commonwealth which purports to equate de-identification with destruction;

b. Absence of safeguards for vulnerable people – unlike the Commonwealth:

(i) the Victorian forensic procedures provisions do not include safeguards for
culturally and linguistically diverse individuals and indigenous people. For
instance, Victoria does not have comparable provisions to the Commonwealth’s
requirements for an interpreter, interview friend, or participation of an
Aboriginal legal aid organisation;

(ii) with the limited exception of considering the age of a child suspect, Victorian
courts are not expressly required to consider the cultural background or religious
beliefs of the person whose DNA is being compulsorily sought; and

(iii) Victorian courts are not expressly required to consider the best interests of the
child or incapable person when deciding whether to make an order that their
DNA should be compulsorily obtained;

c. Victorian courts are not expressly required to take privacy or civil liberty interests into
account, in contrast to the Commonwealth provisions requiring:

(i) a balance of the public interest in preserving the physical integrity of the suspect
with the public interest in obtaining evidence to prove/disprove the suspect’s
involvement in committing the offence;

(ii) consideration of whether less intrusive but reasonably practicable alternatives
exist to prove/disprove the suspect committed the offence;

d. Victoria has no comparable provision directing that the taking of hair samples be done
using the least painful technique known and available to the person;

e. Vague time limits for conducting forensic procedures exist in the Victorian legislation,
in contrast to explicit timeframes in the Commonwealth legislation;

f. Victoria does not provide for the withdrawal of consent by a cooperative suspect;

g. Victorian suspects, offenders and volunteers have a limited (and, in some case, no) right
to attend and be heard at an application to obtain or retain their DNA samples;

h. the Commonwealth has more detailed provisions for ensuring that suspects are able to
obtain an independent analysis of their sample;

i. Victoria has no equivalent provision requiring destruction of forensic material where a
suspect is found to have committed an offence but no conviction is recorded;

j. Victoria allows personal information stored on the DNA database to be used and
disclosed to the Victorian Privacy Commissioner, Health Services Commissioner and
Ombudsman. The Commonwealth allows for disclosure to the Privacy Commissioner
or Ombudsman of the Commonwealth or any other participating jurisdiction;
k. while the Commonwealth allows for personal information stored on the DNA database to be used for medical treatment of the person whose DNA it is and for medical treatment of the victim, Victoria permits wider use for:

   (i) the medical treatment of any person to prevent or lessen a serious threat to that person’s life; and

   (ii) if necessary to prevent or lessen a serious threat to public health; and

l. unlike the Commonwealth, Victoria has no statutory mechanism to ensure the forensic procedures are periodically reviewed.

123 A thorough analysis of the variations between the Commonwealth regime and all of the participating jurisdictions would doubtless reveal considerable complexity. This has implications where each participating jurisdiction has separately assured its population of safeguards that may or may not reflect safeguards applied by each user of DNA data obtained from the National DNA Database.
IV. The effectiveness of independent oversight and accountability mechanisms for the DNA database system

124 The National DNA Database is part of a larger shared information resource known as CrimTrac and described above.77

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

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

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

128 This is particularly the case after the events in the United States of 11 September 2001.78 As Australia re-examines the balance between liberty, of which privacy is a slice, and security, of which the major users of CrimTrac are practical tools, it ought to do so openly and consciously. This inquiry is an opportunity for your Review Committee to do this.

129 The Crimes (DNA Database) Act 2002 passed by the Victorian Parliament on 26 March 2002 formalises Victoria's participation in the national scheme to use DNA for law enforcement work and for other secondary uses that are unrelated to criminal investigation. In effect, the States and Territories are adding some of their people's DNA data to a common pool that will be accessible by other jurisdictions in Australia and overseas. The quality and security of that database no participating jurisdiction alone can control. The future uses and consequences of that database no one can predict. This puts a premium on the safeguards applied in each jurisdiction to the collection of DNA data as well as the safeguards applied to CrimTrac to use, disclose, quality of data, security of data, data linking and data matching, transborder data flow, access and correction and, as appropriate, destruction.

130 The Victorian Crimes Act also allows the DNA database to be used in accordance with the Mutual Assistance in Criminal Matters Act 1987 (Cth) or the Extradition Act 1988 (Cth).79 Similar provisions exist in the Commonwealth Crimes Act.80 If the effect of these sections is to allow for Australians' genetic information to be transferred to other countries, it is essential that comparable privacy safeguards are in place to guard against misuse. Moreover, it is important that any transfer of DNA to overseas destinations is undertaken transparently, with people being informed of that possibility at the time their DNA is collected.81
When the Commonwealth amended its Crimes Act to establish the DNA database, the responsible Minister, Senator Ellison, told Parliament that independent oversight would be necessary.

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

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

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

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

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

The final response is to cause the minister to ensure a further review is undertaken if the initial written report tabled identifies any inadequacies with the matters considered in the initial review—that is the review within two years after that first review that I mentioned. Proposed government amendment No. 27
deals with these matters. Proposed government amendment No. 24 merely adds the Commonwealth Ombudsman and joins the Privacy Commissioner as a person to whom database information can be disclosed without that disclosure constituting an offence. This amendment recognises the own motion investigation powers of the Ombudsman and will improve independent oversight of the legislation. 82

132 This is the first Commonwealth review. The NSW Parliament has reviewed the NSW aspects of DNA data collection and use. The NSW Ombudsman has also published a review. 83 A Victorian Parliamentary review is underway. 84

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

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

135 Neither the Commonwealth nor any one participating State or Territory can adopt and enforce a role as independent auditor of the collection and handling of the data about Australians that is gradually being built up in CrimTrac.

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

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

138 Having regard to the significance of the data being collected, the apparent quickening of the rate (and breadth) of collection 85 and the likelihood of improvements in database technologies and genetic analysis, this Review Committee is urged to address this issue as a priority.

139 The current joint inquiry by the Australian Law Reform Commission (“ALRC”) and Australian Health Ethics Committee (“AHEC”) has chronicled in detail the several dimensions of the issue of genetic information. 86 Its work should both inform and give urgency to the work of this Review Committee.

140 At a minimum, the accountability measures for CrimTrac should address the following matters:

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

b. independent audit, investigation and complaints-handling mechanisms with appropriate powers and a duty to report directly to Parliaments; 87

c. provision for redress;

d. sanctions against misuse;
e. provision for mandatory annual reporting, in a uniform fashion, by all participating jurisdictions, and by the National DNA Database administered by CrimTrac, as relevant, of:

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

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

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

(iv) the number of new individuals whose samples or profiles were added in the reporting year;

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

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

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

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

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

(x) the number of prosecutions in which DNA was admitted into evidence, and the number of prosecutions in which DNA evidence was ruled as inadmissible; and

(xi) the type of offence involved in each case in (ix) and (x).
V. Conclusion

141 In summary, this Submission argues that:

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

b. Unlike most other personal information about an individual, DNA also contains personal information about the persons related by blood to the individual from whom the sample was taken.

c. Large DNA banks have potential applications in commerce and in public policy-making. Genetic information can predict a person’s future health with growing sophistication. Genetic information may in time be regarded as predictive also of traits we associate not with health but with character.\(^88\) History teaches that such information – whether accurate or not – can be seriously misused.\(^89\)

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

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

f. CrimTrac appears to be run by representatives of the organisations that principally supply and use CrimTrac’s databases. In relation to ensuring proper privacy protection, these organisations have real or perceived conflicts of interest.

g. Particularly in light of the renewed attention to the balance between liberty and security following the crimes in the US of 11 September 2001, the Review Committee is urged to recommend to all participating jurisdictions significant improvements in the accountability and independent oversight of the National DNA Database in particular and of CrimTrac generally.

h. Uniformity is needed, but uniformity is escaping us.\(^90\)

i. Key suggested to the forensic procedures laws among participating jurisdictions would enhance the legitimacy of CrimTrac. Such improvements should address:

   (i) greater guidance to courts and other decision-makers about balancing privacy and crime prevention, with particular reference to:

      (1) interference with bodily integrity – paragraph 38;

      (2) the use of force – paragraph 46;

      (3) restraint of personal liberty – paragraphs 51-53;

      (4) limitation on collecting and retaining body samples – paragraphs 55 and 60 (bearing in mind paragraph 77);
(ii) ensuring fair collection occurs by providing a fair hearing at the time police seek authority for collection or retention of a sample – paragraph 63;

(iii) facilitation of post-conviction (“innocence”) testing – paragraphs 57-58;

(iv) express and precise delineation of permissible uses and disclosures of DNA samples and information derived from the samples, with transparent and open public debate before any expanded uses are agreed to – paragraph 65;

(v) limitation of large-scale collection of DNA, and inclusion of judicial oversight, particularly where:

(1) collection is sought from individuals with little or no criminal culpability, in situations where the intrusion is not justified when balanced with the risk to the community – paragraphs 66 and 82-84 (bearing in mind the matters set out in paragraphs 73-75 and 81);

(2) police access is sought to newborns’ DNA – paragraphs 89-90 (bearing in mind the discussion in paragraph 86-88);

(vi) prohibiting collection of DNA from relatives of potential suspects or serious offenders, where this circumvents existing safeguards – paragraph 94;

(vii) prohibiting racial or ethnic profiling in the absence of express, specific parliamentary approval – paragraph 97;

(viii) establishing minimum standards for participation in the national exchange of DNA data, bearing in mind the current disparities across jurisdictions – paragraphs 108, 112 and 122; and

j. whether or not the participating jurisdictions make improvements, better information about CrimTrac and more appropriate accountability measures for the oversight and operation of CrimTrac would be beneficial results of this first Review – paragraphs 138 and 140.

PAUL CHADWICK
Victorian Privacy Commissioner
5 September 2002
Endnotes


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


10 Examples of the fallibility of DNA include:

(i) in Australia, questions were raised about DNA profiling used to convict two men relating respectively to a series of bank robberies in Queensland and the infliction of grievous bodily harm in New South Wales. The report suggested that the first case highlighted how DNA evidence may be misinterpreted by forensic experts and the second case showed how easy it is to falsely plant incriminating DNA evidence: “DNA – A Shadow of a Doubt”, *Catalyst*, 27 June 2002, available at [http://www.abc.net.au/catalyst/stories/s591803.htm](http://www.abc.net.au/catalyst/stories/s591803.htm), last visited 4 September 2002.

(ii) in New Zealand, a man was acquitted after being wrongly convicted and jailed for abducting and raping an 11 year old girl. He was acquitted after it was found that the DNA evidence left on her clothing could not have come from him but belonged to another man, resulting in Cabinet agreeing to a compensation payout of over $860,000: The Hon Phil Goff, Minister for Justice, “Compensation payment for David Dougherty”, New Zealand Government press release, 11 July 2001, available at [http://www.executive.govt.nz/speech.cfm?speechralph=35330&SR=0](http://www.executive.govt.nz/speech.cfm?speechralph=35330&SR=0), last visited 3 September 2002;

(iii) another New Zealand case involved the wrongful acquittal of a man in 1996 after DNA testing found he could not have been the rapist when retesting in 1999 indicated he was the most likely source of the DNA evidence: Tony Ryall, Minister of Justice, “Release of Report into DNA Evidence”, New Zealand Government press release, 26 June 1999, available at [http://www.executive.govt.nz/speech.cfm?speechralph=28935&SR=0](http://www.executive.govt.nz/speech.cfm?speechralph=28935&SR=0), last visited 3 September 2002;


(v) a man wrongfully convicted of an aggravated sexual assault crime in Texas, USA had his conviction overturned after he served 4 years of his sentence, when it was discovered that his DNA results had been falsified by a Texas forensic expert. The County was later ordered to pay him $250,000 in a civil suit: Edward Connors et al (June 1996) *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial*, study commissioned by the National Institute of Justice, United States Department of Justice, pages 34-35, available at [http://www.ojp.usdoj.gov/nij/for96.htm](http://www.ojp.usdoj.gov/nij/for96.htm), last visited 3 September 2002; and

(vi) an innocent man’s DNA was falsely matched against the national DNA database to crime scene samples relating to a burglary in the United Kingdom, leading the FBI to refer to the mismatch (said to be one in 37 million) as “mind-blowing” since it uses the British DNA testing model: John Howard, “UK DNA Mismatch”, *Scoop Headlines*, 10 February 2000, available at [http://www.scoop.co.nz/stories/HL0002/S00053.htm](http://www.scoop.co.nz/stories/HL0002/S00053.htm), last visited 3 September 2002; and “After an innocent...


12 CrimTrac is responsible for the following projects: a National Automated Fingerprint Identification System (NAFIS); a National Criminal Investigation DNA Database (NCIDD); and a CrimTrac Police Reference System (CPRS), which is to include a paedophile database. In future, the CrimTrac is likely to integrate the following databases with CPRS:

- apprehended and domestic violence orders;
- court notices/orders;
- missing persons;
- criminal histories;
- charged persons;
- persons of interest;
- facial features/images (mugshots);
- firearms register;
- vehicles of interest and driver information; and
- person warnings.


13 For example, the Model Forensic Procedures Bill expressly requires the court to balance the public interest in obtaining a sample to prove/disprove involvement against that of upholding physical integrity: cll 8(2), 14(2) and 19(2).


25 *Crimes Act 1958 (Vic)*, s. 464ZF(3).


27 See the discussion relating to the seizure of DNA at paragraphs 54-55.

28 *Crimes Act 1958 (Vic)*, ss 464T(5) and 464U(12).

29 In ss 464T(3) and 464U(7), *Crimes Act 1958 (Vic)*.

30 Listed in s. 464U(8), *Crimes Act 1958 (Vic)*.

31 An examination of the various forms in which governments within a federalist state can cooperate, see Cheryl Saunders, “Collaborative Federalism” (June 2002) 61(2) *Australian Journal of Public Administration* 69.

33 The purposes for which information from the National DNA Database may be used or disclosed are specified in the Victorian Crimes Act at sections 464ZGH and 464ZGK, both of which allow for undefined purposes to be specified in arrangements between Victoria and another Commonwealth, State or Territory jurisdiction – without Parliamentary scrutiny or debate. Similar provisions exist in the Commonwealth Crimes Act in sections 23YDAE and 23YO.

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


39 Media reports suggest that police have visited persons who chose not to participate in the mass screening in Bundaberg: Ashleigh Wilson, “Second round in DNA hunt”, *The Australian*, 20 June 2002, page 3. In effect, then, a decision for any reason not to participate in a mass screening would appear to make a person a suspect.


42 The genetic testing service in Victoria estimates that their newborn screening laboratory tests about 65,000 babies each year, with babies having been tested since the mid-1960s: Genetic Health Services Victoria, *Genetic Health Strategic Plan 2002*, available at http://www.genetichealthvic.net.au/pages/aboutus/whoweare.html, last visited 4 September 2002.

43 West Australian police executed a search warrant to seize Guthrie test records from the Princess Margaret Hospital during an investigation into whether a man was the father of several of his daughter’s children after she refused to allow the children to undergo fresh blood tests: Steve Pennells, “Baby test cards seized”, *The West Australian*, 24 May 1997.


In Western Australia, prisoners on remand (who have been charged but not convicted of an offence) may be searched for the purpose of taking a mouth swab or a sample of hair) may be undertaken, by consent or under a court order, where a person is in lawful custody charged with an offence punishable by imprisonment.

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

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

In Western Australia, DNA can be obtained from uncharged suspects, in respect of offences punishable by 12 months or more, with the suspect’s consent or approval by a senior police officer (for a non-intimate procedure) or justice of the peace (for an intimate procedure on an adult suspect) or magistrate (for an intimate procedure on a child or incapable person): Part 6, Criminal Investigation (Identifying People) Act 2002.

In the Northern Territory, the Juvenile Justice Act allows police to seek a court order to carry out an intimate forensic procedure on a child (17 years or under) who is in lawful custody for “an offence”: s. 31. The magistrate need only be satisfied that there are reasonable grounds for police to believe that the procedure may produce evidence relevant to the offence or any other offence punishable by imprisonment. Non-intimate procedures can be carried out on a juvenile with the approval of a magistrate or with the approval of an authorised police officer: s. 31B, Police Administration Act 1978 (NT). Approval can be granted where the juvenile is simply under suspicion of committing a crime; there is no requirement for that suspicion to be on “reasonable grounds”.

In Western Australia, prisoners on remand (who have been charged but not convicted of an offence punishable by a term of imprisonment of 12 months or more) may be required by police to undergo a forensic...
procedure simply on the basis that the WA police reasonably believe that they do not yet hold that person’s DNA profile: *Criminal Investigation (Identifying People) Act* 2002, Schedule 1.  
In Western Australia, the *Criminal Investigation (Identifying People) Act* 2002 authorises the collection of DNA from volunteers and witnesses (including children), police officers (including cadets, Aboriginal Aides, and police constables), deceased persons, and uncharged suspects.  
The *Criminal Investigation (Identifying People) Act* 2002 (WA) authorises the use of reasonable force, not only in exercising powers under the legislation, but also to overcome any resistance that might reasonably be expected to be offered by the person whose sample is being sought: s. 14.  Forensic procedures may be carried out repeatedly in relation to the same investigation: s. 59.  
In the Northern Territory’s forensic procedures scheme, there appears to be no provision for destruction of a suspect’s sample where no conviction has resulted or where it was improperly obtained or where a conviction becomes spent; samples (whether given by volunteers or charged persons) can be retained by the Police Commissioner for as long as they see fit and tested however they think fit: s. 147C, *Police Administration Act 1978* (NT).  Prisoners under sentence of imprisonment for a crime can be required to provide a buccal swab sample when directed to do so by the officer in charge of the prison: s. 95B(1), *Prisons (Correctional Services) Act*.  Aside from having to deliver the sample to the Commissioner of Police (s. 95B(5)), there do not appear to be any limitations on how the sample is used, disclosed, stored or retained.  
For instance, in the Northern Territory, s. 147A of the *Police Administration Act 1978* (NT) allows for samples to be included on a database and exchanged under an arrangement with the Police Commissioner or other appropriate authority of a corresponding jurisdiction.  This section is phrased in such a way as to allow any government authority to enter into an arrangement with the NT for the exchange of DNA data for any purpose and under any law, provided only that the participating jurisdiction has a forensic procedures law in force at the time: s. 147A (esp. the definition of “corresponding jurisdiction”) and s. 147B(d).  
For example, New South Wales enacted the *Crimes (Forensic Procedures) (Corresponding Laws) Regulations 2002* on 14 June 2002.  These Regulations prescribe forensic procedures legislation in every jurisdiction as a “corresponding law” to its own, thereby enabling NSW to exchange DNA throughout Australia.  
*Crimes Act 1958* (Vic), ss 464ZGH(2)(e) and 464ZGK(2)(e).  
*Crimes (Custody and Investigation) Act* 1988 established subdivision 30A in Div. 1 of Part 3 of the *Crimes Act 1958* (Vic).  Subdivision 30A contains the forensic procedures sections.  This amending legislation was passed following the April 1986 report of the Consultative Committee on Police Powers of Investigation, under the chairmanship of Mr John Coldrey QC.  
*Crimes (Amendment) Act* 1993 (Vic), which came into effect on 1 June 1994.  This amending legislation was based on the September 1989, *Report on Body Samples and Examinations*, of the Consultative Committee on Police Powers of Investigation, chaired by Mr John Coldrey QC.  
*Crimes (Amendment) Act* 1997 (Vic), which came into effect on 1 July 1998.  
“Forensic material” is defined in s. 464 of the *Crimes Act 1958* (Vic) as meaning any material from which a DNA profile can be derived and which is obtained in accordance with the Act’s forensic procedures provisions.  Material that is taken solely for the purpose of identifying a person is excluded from this definition.  
Forensic samples may be intimate or non-intimate.  Intimate samples include blood samples, pubic hair samples, saliva samples and dental impressions: s. 464.  Non-intimate samples include hair (other than pubic hair) including the root, and samples from under a fingernail or toenail: s. 464.  
The Model Bill allows police to order the taking of non-intimate samples from adult suspects: cl. 13.  
*Crimes (DNA Database) Act* 2002 (Vic), s. 1.  
*Crimes Act 1958* (Vic), ss 464ZGH(2)(g) and 464ZGK(2)(g).  
See paragraphs 19-20 and note 12 above.  
In response to the 11 September attack, the Australian Prime Minister, State and Territory Leaders agreed on a new national framework for combating terrorism and multi-jurisdictional crime, including a commitment to enhance the capacity of each jurisdiction to collect and create DNA profiles for uploading onto a national database: *Summit Communiqué 5 April 2002*, para 19, available at [http://www.nca.gov.au/content/MedRel/FinalSummitCommunique.pdf](http://www.nca.gov.au/content/MedRel/FinalSummitCommunique.pdf), last visited 15 July 2002.

Aside from this Part 1D review, other Australian jurisdictions have similarly been looking at their proposed and existing forensic DNA laws, see:


Western Australia, Legislative Council, Standing Committee on Legislation (December 1998) Report of the Standing Committee on Legislation in relation to Forensic Procedures and DNA Profiling, report no. 46; and

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

See media paragraphs 106-108 above in relation to developments in other jurisdictions’ forensic procedures laws. Also see media reports of Victoria Police’s plans to obtain, by force if necessary, DNA from almost 4000 convicted persons not in prison: John Silvester, “Criminals forced to give DNA samples”, The Age, 2 September 2002, page 1. There have also been calls for DNA testing of everyone at birth as a means of deterring and detecting crime: Robert Willimas and Rony Duncan, “DNA testing for all” (8 August 2002) 418 Nature 585.


One oversight model to be examined is that adopted in Canada. The National DNA Data Bank Advisory Committee was established to advise and report on the operation of the National DNA Data Bank, assist in preventing potential misuse of DNA information, and monitor the implementation of the DNA legislation to ensure that privacy rights were not infringed upon. For further details, see http://www.rcmp-grc.gc.ca/dna_ac/index_e.htm, last visited 4 September 2002.

The problems associated with a lack of uniformity across Australian jurisdictions was foreseen by the framers of the Model Law, who suggested that DNA not be retained or used for investigatory or evidentiary purposes if such