



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**

Presented by the Hon Bruce Donaldson (Chairman)

Report 48

STANDING COMMITTEE ON LEGISLATION

Terms of Reference:

- 1 There is hereby appointed a standing committee to be known as the *Legislation Committee*.
- 2 The Committee consists of 5 members.
- 3 A Bill originating in either House, other than a Bill which the Council may not amend, may be referred to the Committee after its second reading or during any subsequent stage by motion without notice.
- 4 A referral under clause 3 includes a recommittal.
- 5 The functions of the Committee are to consider and report on
 - (a) Bills referred under this order;
 - (b) what written laws of the State and spent or obsolete Acts of Parliament might be repealed from time to time;
 - (c) what amendments of a technical or drafting nature might be made to the statute book;
 - (d) the form and availability of written laws and their publication.

Members at the time of this inquiry:

Hon Bruce Donaldson MLC (Chairman)

Hon Bill Stretch MLC (Deputy Chairman)

Hon John Cowdell MLC (resigned 23 December 1988)

Hon Tom Stephens MLC (appointed 18 March 1999). The Hon Tom Stephens MLC did not participate in this Report. Refer to Appendix 9.

Hon Derrick Tomlinson MLC

Hon Giz Watson MLC

Staff at the time of this inquiry:

Ms Mia Betjeman, Advisory/Research Officer

Ms Connie Fierro, Committee Clerk

Address:

Parliament House, Perth Western Australia 6000, ph (08) 9222 7300, fax (08) 9222 7805

Website: <http://www.parliament.wa.gov.au>

ISBN 0 7309 8948 8

CONTENTS

Chapter 1	EXECUTIVE SUMMARY, OBSERVATIONS AND RECOMMENDATIONS	1
	Executive Summary	1
	Observations and Recommendations	5
Chapter 2	THE COMMITTEE’S INVESTIGATIONS	39
Chapter 3	INTRODUCTION TO FORENSIC PROCEDURES AND DNA PROFILING	43
	What is DNA?	43
	What is DNA profiling?	44
	Investigations interstate and internationally	46
Chapter 4	PURPOSE OF DNA TESTING AND ESTABLISHMENT OF A DNA DATABASE	47
	Introduction	47
	Clearance rate of crime	48
	Reduction of recidivism and a deterrent effect	50
	Elimination of persons as suspects	51
	Investigative tool - narrowing the field	52
	Other Observations	53
	Conclusion	54
	Observations and Recommendations	55
Chapter 5	FORENSIC PROCEDURES AND DNA PROFILING: AUSTRALIAN EXPERIENCE . . .	57
	Western Australia	57
	Commonwealth	58
	New South Wales	62
	South Australia	64
	Victoria	67
	Summary	72
Chapter 6	FORENSIC PROCEDURES AND DNA PROFILING: INTERNATIONAL EXPERIENCE	73
	United Kingdom	73
	United States of America	77
	Germany	82
	Summary	85
Chapter 7	DNA DATABASES: AUSTRALIAN AND INTERNATIONAL COMPARISONS	87
	The threshold question: should there be one?	87
	Observations and Recommendations	88

What should be included in the database?	89
<i>United Kingdom</i>	89
<i>Germany</i>	92
<i>United States of America</i>	93
<i>Australian Jurisdictions</i>	95
Observations and Recommendations	98
State database and/or national database?	98
Observations and Recommendations	102
Other Observations	103
<i>Subdatabases for racial/cultural populations</i>	103
Observations and Recommendations	104
<i>Quality control, accreditation, training and education</i>	105
Observations and Recommendations	105

Chapter 8

FORENSIC PROCEDURES: SAMPLING AND EVIDENCE COLLECTION	107
Introduction	107
Forensic procedures	108
<i>Intimate or non-intimate - the buccal swab debate</i>	110
Observations and Recommendations	113
<i>Offence</i>	116
<i>Type of offence</i>	116
Observations and Recommendations	120
<i>Limitation of use</i>	122
Observations and Recommendations	127
Before forensic procedures are carried out	127
<i>Informed consent</i>	129
Observations and Recommendations	131
<i>Withdrawal of consent</i>	132
Observations and Recommendations	133
<i>Suspects in custody or not in custody</i>	135
<i>Western Australia</i>	136
<i>International comparisons</i>	138
<i>Australian comparisons</i>	139
Observations and Recommendations	143
<i>Other persons on whom forensic procedures may be conducted</i>	145
<i>Volunteers</i>	145
Observations and Recommendations	148
<i>Mass screening</i>	149
<i>Post Conviction Testing</i>	149
<i>Suggested alternatives</i>	157
Observations and Recommendations	160
<i>Exoneration through Post Conviction Testing</i>	161

	Observations and Recommendations	162
	<i>Children and incapable persons</i>	163
	Observations and Recommendations	166
	<i>Compulsory forensic procedures</i>	167
	<i>Non-intimate samples by order of police officer</i>	168
	<i>Forensic procedures by order of a magistrate</i>	169
	Observations and Recommendations	174
	<i>Interim orders</i>	174
	<i>Representation at hearings</i>	176
	Observations and Recommendations	177
Undertaking the forensic procedure		178
	<i>Appropriately qualified person</i>	178
	Observations and Recommendations	182
	<i>The use of reasonable force</i>	184
	Observations and Recommendations	186
	<i>Ethical concerns of medical practitioners</i>	186
	Observations and Recommendations	187
	<i>Remote area populations</i>	187
Evidence Collection		188
	<i>Integrity</i>	188
	Observations and Recommendations	191
Other Observations		191
	Observations and Recommendations	193
Chapter 9	SAMPLE AND EVIDENCE PRESERVATION, PACKING AND STORAGE	195
	Should samples be stored?	195
	Where and how should suspect and crime scene samples be stored?	197
	Observations and Recommendations	198
Chapter 10	SAMPLE ANALYSES	199
	Scientific Process	199
	<i>What is a standard set of loci?</i>	201
	Observations and Recommendations	203
	<i>Non-coding DNA</i>	204
	Observations and Recommendations	205
	Scientific Providers: Laboratories and Scientists	205
	Observations and Recommendations	209
	<i>Collocation, integration or separation?</i>	210
	<i>Operational integration</i>	210
	<i>Arguments against integration</i>	211
	<i>Arguments for integration</i>	213

	<i>Other observations</i>	213
	<i>Western Australia</i>	214
	Observations and Recommendations	216
Chapter 11	DNA DATABASE: CUSTODIAN	217
	Observations and Recommendations	220
Chapter 12	ACCESS TO FORENSIC MATERIAL AND DATABASE INFORMATION	221
	Sample Access	222
	<i>Access and disclosure to the suspect</i>	222
	<i>Access and disclosure to persons other than the suspect</i>	224
	Database access	225
	Sanctions against unauthorised access and use	229
	Other Observations	230
	<i>Use of material from interstate</i>	230
	<i>Post Conviction Testing</i>	231
	Observations and Recommendations	232
Chapter 13	DESTRUCTION OF FORENSIC MATERIAL AND DATABASE	
	INFORMATION	235
	Introduction	235
	Western Australia	237
	United Kingdom	238
	United States of America	239
	Germany	239
	Commonwealth	240
	Victoria	241
	South Australia	244
	Other Observations	245
	Observations and Recommendations	246
Chapter 14	FUNDING ISSUES	249
	How should DNA casework and the database be funded?	249
	International observations	250
	Other Observations	253
	<i>Centralised scientific analysis</i>	253
	<i>Balanced implementation of the legislation</i>	254
	<i>The federal government's offer</i>	255
	<i>The current situation in Western Australia</i>	256
	<i>An estimation of the cost of sampling</i>	257
	Observations and Recommendations	259

Chapter 15	REGULATORY ISSUES	261
	Introduction	261
	Form of legislation	261
	<i>Arguments for a separate legislative instrument</i>	262
	<i>Arguments against a separate legislative instrument</i>	262
	Content of legislation	262
	Observations and Recommendations	264
Chapter 16	DNA AS EVIDENCE	265
	Introduction	265
	The use of the DNA database information in criminal proceedings	266
	The use of DNA evidence in criminal proceedings	267
	<i>Admissibility of forensic evidence</i>	269
	<i>Adverse inferences from evidence of refusal</i>	269
	<i>Failure to comply with legal requirements</i>	272
	<i>Reliability of the database</i>	274
	<i>Admissibility of secondary evidence</i>	276
	<i>Defence access to the forensic material and database information</i> ...	276
	<i>Procedural safeguards</i>	276
	<i>Pre-trial discovery</i>	278
	<i>The availability of legal aid and expert evidence</i>	279
	<i>Education is paramount - “From the cradle to the grave”</i> .	280
	<i>The prosecutor’s fallacy</i>	280
	Observations and Recommendations	282
Appendix 1	Persons and Organisations with Whom the Committee Met in Western Australia, Victoria and South Australia	285
Appendix 2	Persons and Organisations with Whom the Committee Met in the United Kingdom, Germany and the United States of America	287
Appendix 3	Material Collected by the Committee	291
Appendix 4	List of Abbreviations and Phrases Used in this Report	301
Appendix 5	Extract from the MCCOC Report: Pages 11, 13 & 15	305
Appendix 6	Chief Constable Gunn: National DNA Database - Presentation to Australian Legislation Committee	311
Appendix 7	1999 Model Bill: Table of Authorised Persons: clause 38	321

Appendix 8	MCCOC Report: Pages 87 - 89	327
Appendix 9	Letter from Hon Tom Stephens MLC dated 12 August 1999	333
Appendix 10	Letter from Dr Clive Cooke, PathCentre to Advisory/Research Officer, Legislation Committee dated 5 August 1999, attaching Letter from Dr Gavin Turbett to Dr Clive Cooke dated 5 August 1999	337
Appendix 11	MCCOC Report: Pages 90 - 97	345
Appendix 12	Letters from Mr Patrick Hogan, Convenor Criminal Law Committee, Law Society of Western Australia; Mr Paul Heaney, SM, Magistrates Chambers, Central Law Courts, Western Australia; and Western Australia Police Service regarding “charged” under the <i>Criminal Code</i> (Western Australia)	355
Appendix 13	Description of the Functional Operation of the United Kingdom Database	363
Appendix 14	Minority Report of Hon Giz Watson MLC	367

**Report of the Legislative Council
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**

Chapter 1

EXECUTIVE SUMMARY, OBSERVATIONS AND RECOMMENDATIONS

Executive Summary

- 1.1 The use of forensic procedures, in particular DNA (deoxyribonucleic acid) testing, profiling and evidence has now entered the mainstream of the criminal justice system. In addition it has been used extensively over a long period of time in respect of paternity testing. Today it is hard to pick up a daily paper and not find an article reporting the use of DNA testing in a civil or criminal case. Indeed it has been stated that the use of DNA in the fight against crime is the most significant advance in forensic science since the advent of fingerprinting some 90 years ago.¹
- 1.2 The United Kingdom, Germany and the United States of America have been investigating the use of, or using, forensic procedures and DNA profiling techniques for many years albeit with differing degrees of funding and political will.
- 1.3 By comparison, the use of such procedures in Australia is relatively new. Recent Commonwealth initiatives include the development of a Model Bill for forensic procedures and a proposed national DNA database.² The Commonwealth Government,

¹ Gunn, DG, Chief Constable, Cambridgeshire Constabulary, United Kingdom, *National DNA Database: Presentation to Australian Police Officers*, Melbourne, 5 August 1997, p. 5.

² Model Criminal Code Officers Committee of the Standing Committee of Attorneys General, *Model Forensic Procedures Bill*, July 1995; *Model Forensic Procedures Bill*, June 1999.

in cooperation with the States and Territories, also is establishing a national DNA law enforcement database as part of the Commonwealth CrimTrac initiative.

- 1.4 In Western Australia forensic samples were taken by police in reliance on section 236 of the *Criminal Code* as it was then drafted.³ In taking samples, the police service had considered that an “examination” of a person in custody included the taking of forensic samples, such as blood, from the person. In 1996, subsequent restrictive judicial interpretation of section 236 cast doubt on the use of the provision to collect certain types of body samples.⁴
- 1.5 In its 42nd Report⁵ the Committee considered amendments proposed by the *Criminal Law Amendment Bill (No. 1) 1998* (Western Australia) (“CLA Bill”) to the *Criminal Code* (Western Australia). The CLA Bill sought to clarify the legality of the taking of forensic samples from persons lawfully held in custody. However, the CLA Bill did not deal with the more complex issues such as the establishment of a DNA database, storage of DNA samples and DNA profiles and the uses which can be made of DNA information and whether samples should be taken from a suspect who has not been charged.

³ “.... When a person is in lawful custody upon a charge of committing any offence of such a nature and alleged to have been committed under such circumstances that there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of the offence, it is lawful for a legally qualified medical practitioner, acting at the request of a police officer, and for any person acting in good faith in his aid and under his direction, to make such an examination of the person so in custody as is reasonably necessary in order to ascertain the facts which may afford such evidence, and to use such force as is reasonably necessary for that purpose.” : section 236, *Criminal Code* (Western Australia) prior to amendment.

⁴ Refer to the decision of the Court of Criminal Appeal of the Western Australian Supreme Court in *King v R* (1996) 16 WAR 540. In *King v R* the court expressed concerns about the taking of forensic samples under section 236 of the *Criminal Code* (Western Australia). Wallwork J considered that the provision did not authorise the taking of a blood sample from a person without the person’s consent. Rowland and Ipp JJ also indicated that they were unlikely to give a broad definition to the term “examination” as provided in an earlier South Australian decision. Rowland J was of the view that it would be desirable for the Parliament to expressly provide the taking of samples from persons in custody on a charge of committing an offence as he had “grave doubts” that section 236 permitted such an examination: *King v R* (1996) 16 WAR 540 at 540 per Rowland J.

⁵ 42nd Report of the Standing Committee on Legislation: *Criminal Law Amendment Bill (No 1) 1998*, tabled 19 May 1998.

- 1.6 The amendments sought by the CLA Bill were regarded by the Attorney General, Hon Peter Foss MLC, and the then Commissioner of Police, Mr Robert Falconer, as an interim measure only.⁶ Indeed Mr Falconer further stated that the amendments “[go] nowhere near far enough. That is the point. The member is right when he refers to exciting possibilities. However, we can draw the parallel from the British experience and the way in which they have approached it, which was courageous in political terms. However, because it has produced the results it has, the early criticism has completely dissipated. The British police have the authority to obtain the material when they have reasonable grounds for suspicion. This legislation [the CLA Bill] applies after arrest; the police must have focused on the person and obtained sufficient evidence to effect an arrest. That evidence should be considerable; it should not be a stab in the dark. The person is arrested and the sample is then taken. If that sample is applicable only to that specific offence, that is different from what we need to do and what we do with fingerprints. Once we take a person's fingerprints, albeit after charging, if they are convicted of an offence, that information goes into a convicted persons' fingerprint database. We want a convicted persons' DNA national database.

Hon DERRICK TOMLINSON: *Therefore, this Bill is totally inadequate.*

Mr FALCONER: *It is useless, without being too unchristian.”*⁷

- 1.7 These issues and the Commonwealth developments have focused attention on procedures for DNA collection, profiling and use and heightened the imminent need for Western Australia to address the matter.
- 1.8 The Committee was informed by not only the Minister for Police and the Attorney General, but also the former Commissioner of Police in giving evidence to the Committee, that in or about the middle of 1999 they hoped a Bill would be introduced into the Western Australian Parliament in which the DNA forensic procedures and a DNA database would be made available as yet another tool to assist the police in investigating crime.⁸

⁶ 42nd Report, paragraph 3.15.

⁷ *Evidence*, Mr Robert Falconer, former Commissioner of Police, Western Australian Police Service, 1 April 1998, p. 8.

⁸ *Hansard*, Legislative Council, 17 December 1998, p. 5308/2.

- 1.9 Accordingly, in its 42nd Report the Committee recommended that, in the interests of the efficient and more effective resolution of crime, a broader examination of forensic procedures and DNA profiling was warranted, including its effect on civil liberties and responsibilities.⁹
- 1.10 In August 1998, the Attorney General moved and the House agreed that the Committee conduct a further inquiry into matters raised by the Committee's inquiry into the CLA Bill.¹⁰ Following prorogation of Parliament on 6 August 1999, the House re-referred the matter to the Committee for inquiry on 12 August 1999.¹¹ The Committee's inquiries intrastate, interstate and overseas has enabled the Committee to define areas of concern, consider many viewpoints, make observations and formulate recommendations.
- 1.11 This Report is very much a preliminary rather than a definitive study. Almost every topic addressed could benefit from further investigation. However, during the course of the Committee's inquiries it became clear that some issues must be addressed at the outset.¹² For convenience, the issues and the Committee's observations and recommendations are extracted at the end of this Chapter.
- 1.12 Apart from contributing to the drafting of a Bill on forensic procedures and DNA profiling, the Committee hopes that the Report will stimulate further research and discussion.
- 1.13 The Committee takes this opportunity to acknowledge and thank the Hon John Cowdell MLC for his participation in the Committee's inquiry into the issues raised by the CLA Bill from the time of the CLA Bill's referral in March 1998 to his resignation as a member of the Committee on 23 December 1998.
- 1.14 The Committee also takes this opportunity to express its appreciation for the time and invaluable assistance which those persons and organisations mentioned in Appendix 2 and 3 afforded to the Committee during its investigations. The Committee also acknowledges the services of Hansard in the transcription of evidence and information

⁹ 42nd Report, paragraph 3.18.

¹⁰ *Hansard*, Legislative Council 20 August 1998, p. 583.

¹¹ *Hansard*, Legislative Council 12 August 1999, p. 120.

¹² The Hon Tom Stephens MLC did not participate in this Report. Refer to Appendix 9.

gathered by the Committee. Without their assistance the extent of the Committee's inquiries would not have been possible.

- 1.15 Lastly the Committee wishes to express its appreciation to the Advisory/Research Officer, Ms Mia Betjeman for her outstanding commitment and dedication in the preparation of this Report, ably assisted by the Committee Clerk, Ms Connie Fierro.

Observations and Recommendations

- 1.16 The Committee has discussed each of the following issues at the relevant section of the report. They are extracted here for convenience. For ease of reference the Committee has noted the most pertinent paragraph or chapter of the Report which relates to each observation or recommendation.

- 1.17 The minority report of Hon Giz Watson MLC is attached as Appendix 14.

How effective is a DNA database?

1. The Committee considers that the Western Australian public is entitled to expect that criminals are identified, apprehended and brought before the courts as expeditiously as possible. It is in this context that the Committee recognises the increasingly important role of forensic science in criminal investigation and public safety. Equally it recognises that suitable safeguards must be in place to protect individual rights and civil liberties. (Paragraph 4.1)
2. The Committee finds that a DNA database is an effective tool for resolving criminal investigations and eliminating persons from inquiry. The Committee notes that a DNA database may prevent recidivism by acting as a deterrent to criminals. (Chapter 4, Chapter 7 paragraph 7.1.)

Should there be a DNA database?

3. Many jurisdictions have enacted, or are in the process of enacting, detailed legislation containing provisions relating to DNA databases and the collection, analysis, storage, use and destruction of both forensic samples and DNA profiles. (Chapters 5 and 6 and Chapter 7 paragraph 7.3)
4. The Committee considers that the evidence is of such a positive nature that, with the appropriate safeguards to balance personal liberty with the public interest in the

resolution of crime, DNA profiling and the establishment of a DNA database is desirable.

(Refer paragraph 4.30)

5. In implementing a DNA database, Western Australia must seek to promote two potentially conflicting policy goals:
 - a. to maximise the usefulness of a DNA database as a tool available to state agencies in carrying out their duties, principally the investigation of criminal activity; and
 - b. to protect the civil liberties and right to privacy of members of the public, with respect to the establishment, maintenance and use of the DNA database.(Paragraph 7.4)
6. **The Committee recommends that there be established, in Western Australia, a DNA database that can be utilised for criminal investigation purposes and for missing persons.**
(Chapter 7)

How wide, or “broad based” should the database be?

7. The Committee has commented on the type of offence and the type of offenders on whom forensic procedures can be conducted at paragraphs 25 to 31 and 47 to 54 of the Observations and Recommendations.
(Chapter 7)

If the database is broad based - is there a need to agree on sampling criteria to balance database capacity and analytical resources?

8. The Committee notes that the United Kingdom has broad sampling powers in relation to “*recordable offences*”. As a result the Committee notes that to ensure that the analytical infrastructure can support the possible sampling range, police and forensic scientists in the United Kingdom have developed administrative “*sampling criteria*” which prioritise categories of offences to balance database capacity and analytical resources.
(Paragraphs 7.10 - 7.13)

What measures need to be implemented to ensure the security of the database?

9. **The Committee recommends that the security of any DNA database should be protected by clear legislative provisions relating to access to, use and destruction**

of information on a DNA database. Further the Committee recommends that there be heavy penalties for the misuse of any information on a DNA database. These matters are addressed in more detail in paragraphs 111 to 122 of the Observations and Recommendations.

How should the database be structured - should there be one central national database; or a national network of State databases?

10. The Committee is of the view that the choice will depend upon many factors, including:
- a. compatibility of the State's database with any proposed by the federal government; and regardless of whether or not there is compatibility;
 - b. the resources which may be required for the ongoing use of a separate State database capable of exchanging information between States.

(Paragraphs 7.31 - 7.45)

11. **The Committee recommends that a State DNA database be established and that it be integrated with a national database.**

(Paragraphs 7.31 - 7.45)

12. The Committee observes that Mr Ben Gunn, Chief Constable, Cambridgeshire Constabulary, United Kingdom, emphasises benefits of a national approach. Mr Gunn noted the fact that any DNA database requires a major investment on behalf of both users (police) and providers (forensic laboratories). Mr Gunn considered that a national database:

- a. provides critical mass, to ensure economies of scale can provide acceptable analytical unit costs, and training and educational costs;
- b. affords wider technical and scientific support which enhances the integrity of the database;
- c. warrants the appointment of a custodian to ensure the operational and scientific integrity of the database; and
- d. ensures consistency of approach.

If Western Australia were to establish a State database all of these issues would need to be addressed.

(Paragraph 7.33, 7.40 and 7.41)

13. Another issue which may support the establishment and/or maintenance of a separate State database is the fact that each Australian State has its own criminal legislation - what may not be an offence in one State for which forensic procedures can be conducted may be so in another State. For example, the *1999 Model Bill* proposes, in part, that the national database only contain profiles from convicted serious offenders, that is, those convicted of an offence which is punishable by a maximum penalty of 5 or more years. Western Australia may wish to include offenders punishable by any term of imprisonment, that is, an “*indictable offence*”, as is recommended by the majority of the Committee in paragraphs 27, 52 and 61 of the Observations and Recommendations.
(Paragraph 7.45)

For the purposes of the calculation of match probability, should subdatabases be maintained for each of the major races in Western Australia?

14. The Committee observes that in other jurisdictions, separate databases are maintained to provide appropriate statistical databases. The Committee considers that the issue of subdatabases is a scientific question and involves the calculation of population frequencies. Accordingly the Committee does not make a recommendation on this issue.
(Paragraphs 7.46 - 7.48)
15. However local information suggested to the Committee that such databases may not be necessary for the purpose of identification of an individual in Australia, given the size of the country's population. The Committee understands that increases in technology may render the compilation of subdatabases unnecessary.
(Paragraph 10.14)

What effect does quality control, accreditation, training and education have on a database?

16. The necessity for the training of police officers and scene of crime officers, the development of standard and internationally compatible scientific techniques, and the accreditation of forensic laboratories and forensic scientists have all been canvassed in paragraphs 90 to 94 of the Observations and Recommendations.
17. The Committee emphasises the importance of quality control, accreditation, training and education to maintain database integrity.

What procedures should be regarded as intimate forensic procedures?

18. The Committee recommends that an “*intimate forensic procedure*” means:
- a. an external examination of the genital or anal area, the buttocks, or in the case of a female, the breasts;
 - b. the taking of a sample of blood;
 - c. the taking of a sample of pubic hair;
 - d. the taking of a sample by swab or washing from the external genital or anal area, the buttocks, or in the case of a female, the breasts;
 - e. the taking of a sample by vacuum suction, by scraping or by lifting by tape from the external genital or anal area, the buttocks, or in the case of a female, the breasts;
 - f. the taking of a dental impression; or
 - g. the taking of a photograph of, or an impression or cast of a wound from the genital or anal area, the buttocks, or in the case of a female, the breasts.

(For a discussion of the position in other jurisdictions studied by the Committee refer to Chapters 5 and 6.)

What procedures should be regarded as non-intimate forensic procedures?

19. The Committee recommends that a “*non intimate forensic procedure*” means:
- a. an examination of a part of the body other than the genital or anal area, buttocks, or in the case of a female, the breasts, that requires touching of the body or removal of clothing;
 - b. the taking of a sample of hair other than pubic hair;
 - c. the taking of a sample from a nail or under a nail;
 - d. the taking of a sample by swab or washing from any external part of the body other than the genital or anal area, the buttocks, or in the case of a female, the breasts;
 - e. the taking of a sample by vacuum suction, by scraping or by lifting by tape part of the body other than the genital or anal area, the buttocks, or in the case of a female, the breasts;
 - f. the taking of a handprint, fingerprint, footprint or toe print; or
 - g. the taking of a photograph of, or an impression or cast of a wound from a part of the body other than the genital or anal area, the buttocks, or in the case of a female, the breasts.

(For a discussion of the position in other jurisdictions studied by the Committee refer to Chapters 5 and 6.)

Is the taking of a sample by buccal swab an intimate or non-intimate forensic procedure?

20. The Committee is evenly divided on the issue as to whether the taking of a sample by buccal swab, is an “*intimate forensic procedure*” or a “*non-intimate forensic procedure*” and is unable to make a recommendation to the House.

Whilst some members consider that the taking of a sample by buccal swab, may be “*invasive*” or “*intrusive*”, they do not consider that it is intimate. Other members consider that it is an intimate procedure that requires more stringent checks and balances.

The Committee is of the view that the matter is essentially one of policy and is an issue that is best determined by the House.

(Paragraphs 8.8 - 8.28)

What safeguards should attach to certain forensic procedures?

21. The Committee is of the view that certain forensic procedures should be carried out by a person or persons of the same sex as the person being subjected to the forensic procedure.

(For a discussion of the position in other jurisdictions studied by the Committee refer to Chapter 5 and 6.)

22. **The Committee recommends that, if practicable, an intimate forensic procedure (other than the taking of a sample of blood or a dental impression and the taking of a sample by buccal swab, regardless of whether it is categorised as an intimate or a non-intimate forensic procedure) is to be carried out by a person of the same sex as the person being subjected to the forensic procedure.**

(For a discussion of the position in other jurisdictions studied by the Committee refer to Chapters 5 and 6.)

23. **The Committee recommends that, if practicable, a non-intimate forensic procedure for which the person undergoing the forensic procedure is required to remove clothing other than his or her overcoat, coat, jacket, gloves, socks, shoes**

and hat is to be carried out by a person of the same sex as the person being subjected to the forensic procedure.

(For a discussion of the position in other jurisdictions studied by the Committee refer to Chapters 5 and 6.)

24. **The Committee recommends that, if practicable, a person who assists in carrying out a forensic procedure covered by paragraphs 22 or 23 of the Observations and Recommendations is to be a person of the same sex as the suspect.**

(For a discussion of the position in other jurisdictions studied by the Committee refer to Chapters 5 and 6.)

What type of offences should result in body samples being taken for DNA analysis? What threshold should apply for the conduct of other forensic procedures?

25. The Committee is of the view that forensic procedures are likely to be used in relation to offences against the person. The vast majority of offences of that nature carry maximum penalties of 12 months or more imprisonment.

(Paragraphs 8.29 - 8.37 and 8.43 - 8.47)

26. The Committee notes the findings of a Commonwealth Senate Standing Committee for the Scrutiny of Bills: Ninth Report of 1997: *Crimes Amendment (Forensic Procedures) Bill 1997*, 18 June 1997. The Senate committee noted that none of the reports which has investigated the feasibility of, and justification for, forensic procedures has recommended restricting the availability of procedures to offences punishable by five years or more. The reports have all settled on indictable offences as being an appropriate threshold test. The higher threshold would exclude forensic procedures from being used for many offences for which it is most applicable. The Committee notes that many offences against the person are punishable by less than 5 years imprisonment.

(Paragraph 8.47)

27. **Subject to paragraphs 28 and 29 of the Observations and Recommendations, the majority of the Committee is of the view that forensic procedures should be available in respect of offences which are punishable by any term of imprisonment. The majority of the Committee recommends that forensic procedures be available in respect of any indictable offence.**

(Paragraphs 8.29 - 8.47)

28. The Committee believes that proposed legislation should be consistent with existing legislation. In this respect the Committee notes that fingerprints currently may be taken where a “*person is in lawful custody for any offence punishable on indictment or summary conviction*”: section 50AA *Criminal Code* (Western Australia). (Paragraph 8.33)
29. **The Committee recommends that fingerprints may be taken where a person is in lawful custody for any offence punishable on indictment or summary conviction.** (Paragraph 8.33)
30. The Committee notes that legislation in the United Kingdom grants broad sampling powers in relation to “*recordable offences*”. As a result the Committee notes that to ensure that the analytical infrastructure can support the possible sampling range, police and forensic scientists in the United Kingdom have developed administrative “*sampling criteria*” which prioritise categories of offences to balance database capacity and analytical resources. (Refer to paragraph 8 of the Observations and Recommendations)
31. The Committee further notes that under the *Criminal Code* (Western Australia) indictable offences, subject to certain conditions, may be tried summarily. However in contrast to most other Australian jurisdictions, in Western Australia a person convicted of an indictable offence after a summary hearing is deemed to be convicted of a simple (non-indictable) offence. Accordingly if Western Australian legislation regarding forensic procedures refers to an “*indictable offence*” as the threshold upon which forensic procedures may be conducted, the distinction between “*summary*” and “*indictable*” offences may unintentionally limit the circumstances in which a person can be required to undergo a forensic procedure.

The Committee notes that the above concern may be irrelevant where a forensic procedure may be conducted on a person “*suspected*” of an indictable offence. However an indictable offence which will be tried summarily may affect the nature of the charge placed against a person, or may affect the ability to conduct forensic procedures on convicted persons. The Committee has not considered this issue in detail but it notes that any proposed legislation defining the categories of offences for which a forensic procedure can be conducted, if distinguishing between summary and indictable offences, should, if necessary, contain provisions specifying that forensic procedures can be conducted with respect to indictable offences tried summarily. The Committee notes that this may require amendments to existing legislation including the *Criminal Code* (Western Australia). (Paragraphs 8.38 - 8.42)

What, if any, restrictions should apply to use of a sample obtained from a suspect?

- *Should use of that sample be limited to investigation of the offence for which the sample was taken (“limited search”); or*
- *may use be made of the sample to screen against a database in respect of investigation of the offence for which the sample was taken and other offences which the suspect may have committed (“speculative search”).*

32. **The Committee recommends that information obtained from a forensic procedure conducted on a person who has been arrested and charged, or who has been convicted of an indictable offence, should be able to be used to conduct a speculative search.**

(Paragraphs 8.48 - 8.63)

33. The Committee is divided on the use of information obtained from a forensic procedure conducted on a person who is under suspicion of having committed an indictable offence but who has not yet been arrested or charged with an indictable offence. Accordingly the Committee is unable to make a recommendation.

Some members consider that the information obtained from a forensic procedure should only be used to conduct a limited search. One of the views advanced in support of this position was that if the suspect was arrested subsequently and charged with an indictable offence then the information obtained from a forensic procedure could, at that time, be used to conduct a speculative search. Other members considered that the information obtained from a forensic procedure should be able to be used immediately to conduct a speculative search.

(Paragraphs 8.48 - 8.63)

Should there be informed consent to the conduct of a forensic procedure and if so, what elements should it contain?

34. **Subject to the provisions regarding children and incapable persons addressed in paragraphs 67 to 72 of the Observations and Recommendations, the Committee recommends that the legislation provide that a person may consent to a forensic procedure after the following has occurred:**

- a. **the forensic procedure and the purpose for which it is being carried out is explained to the person;**
- b. **the person is told that the procedure could produce evidence to be used in court;**

- c. **the person is told that information obtained from a forensic procedure and information as to the identity of the person may be placed on a database; and**
 - d. **in the case of a person under suspicion of having committed an indictable offence, and a person who has been charged with an indictable offence, the person is informed of:**
 - (i) **the offence for which he or she is being investigated; and**
 - (ii) **what powers could be invoked to compel him or her to comply.**
- (Paragraphs 8.67 - 8.74)
35. **The majority of the Committee recommends that legislation not require that a person be given the opportunity to communicate or attempt to communicate, with a legal practitioner.**
(Paragraphs 8.67 - 8.74)
36. **The Committee recommends that consent be recorded by obtaining:**
 - a. **a written consent; or**
 - b. **an electronically recorded consent.**

(Paragraphs 8.67 - 8.74)
37. There is no provision for informed consent in the *Criminal Code* (Western Australia). The Committee notes that, as the *Criminal Code* (Western Australia) is not restricted to DNA sampling techniques, and a separate piece of legislation may be enacted for all forensic procedures, informed consent should apply to all forensic procedures even if informed consent is not currently required.
(Paragraph 8.72)

When can consent to the conduct of a forensic procedure be withdrawn?

38. The Committee is of the view that a distinction needs to be drawn between two categories of persons who could be considered to be “volunteers”. For the purposes of these Observations and Recommendations the Committee distinguishes between:
- a. those persons who would fall within the categories identified in paragraph 47 of the Observations and Recommendations (“*cooperative suspects*”); and
 - b. those persons who do not fall within the categories identified in paragraph 47 of the Observations and Recommendations (“*non-suspect volunteers*”).
39. **The Committee recommends that a non-suspect volunteer, who has consented to the conduct of a forensic procedure, can withdraw his or her consent at any time.**
(Paragraphs 8.75 - 8.78)

40. **The Committee recommends that a cooperative suspect, who has consented to the conduct of a forensic procedure, can withdraw his or her consent before the commencement of the forensic procedure.**
(Paragraphs 8.75 - 8.78)
41. In respect of paragraph 40 of the Observations and Recommendations, the Committee notes that:
- a. there may be difficulties in fixing the point at which a forensic procedure can be said to have “*commenced*”. For example, in the case of the taking of a blood sample by venepuncture - is it the application of the tourniquet, the swabbing of the skin, the piercing of the skin or the drawing of the blood? and
 - b. the point at which a forensic procedure can be said to have “*commenced*” will differ between forensic procedures.
- (Paragraphs 8.75 - 8.78)
42. **In view of the matters referred to in paragraph 41 of the Observations and Recommendations, the Committee is of the view that it is necessary to objectively fix the point at which forensic procedures can be said to have “*commenced*”, after which time cooperative suspects may not withdraw their consent. The Committee recommends that persons authorised to conduct the forensic procedures again ask cooperative suspects being subjected to the forensic procedure whether they consent. Once that question has been asked and consent has been given again, the forensic procedure is deemed to have commenced and consent may not thereafter be withdrawn.**
(Paragraphs 8.75 - 8.78)

What should happen when consent to the conduct of a forensic procedure is withdrawn?

43. In the event that a person, who is under suspicion for having committed an indictable offence but who is yet to be charged, withdraws his or her consent before the commencement of the forensic procedure, the Committee notes that the police should be able to apply to a magistrate for an order for a compulsory forensic procedure (refer to paragraph 50 of the Observations and Recommendations).
44. In the event that a person who has been charged with an indictable offence withdraws his or her consent before the commencement of the forensic procedure, the Committee notes that the police can use reasonable force to conduct a forensic procedure (refer to paragraphs 51 and 86 of the Observations and Recommendations).

45. In the event that a person who has been convicted of an indictable offence withdraws his or her consent before the commencement of the forensic procedure, the Committee notes that the police can use reasonable force to conduct a forensic procedure (refer to paragraphs 52, 62 and 86 of the Observations and Recommendations).
46. **The Committee recommends that in the event that a non-suspect volunteer (as defined in paragraph 38 of the Observations and Recommendations), withdraws his or her consent then:**
- a. **if consent is withdrawn after a forensic procedure has commenced but before it is completed, then the person conducting the forensic procedure must immediately cease conducting the forensic procedure; and**
 - b. **subject to paragraphs 117, 118, 120 and 121 of the Observations and Recommendations, all material and information obtained through the conduct of the forensic procedure on a non-suspect volunteer (including any information placed on a DNA database) should be destroyed as soon as practicable.**

In what circumstances should police be empowered to conduct a forensic procedure without consent (“compulsory forensic procedure”)?

47. **The majority of the Committee recommends that compulsory forensic procedures be able to be conducted on:**
- a. **a person under suspicion of having committed an indictable offence;**
 - b. **a person who has been charged with an indictable offence; and**
 - c. **a person who has been convicted of an indictable offence.**
- (Paragraphs 8.79 - 8.101)
48. **The Committee recommends that a person is “under suspicion” if the police officer by or on whose instruction a forensic procedure is to be carried out on the person, suspects that person, on reasonable grounds, of having committed an indictable offence.**
49. The Committee is of the view that a legislative difference needs to be drawn in respect of the circumstances in which a forensic procedure may be conducted in each of the categories referred to above.
(Paragraphs 8.79 - 8.101)
50. **In respect of a person under suspicion of having committed an indictable offence but who is yet to be charged, the majority of the Committee recommends that a**

compulsory forensic procedure, regardless of whether the forensic procedure is an intimate or non-intimate forensic procedure, may be conducted under authority of a magistrate or a justice of the peace, where such forensic procedure is likely to afford evidence for the offence for which the person is under suspicion.
(Paragraphs 8.79 - 8.101)

51. **In respect of a person who has been charged with an indictable offence, the Committee recommends that a police officer may require the person to undergo a compulsory forensic procedure, regardless as to whether the forensic procedure is an intimate or non-intimate forensic procedure, where such forensic procedure is likely to afford evidence for the offence for which the person has been charged.**
(Paragraphs 8.79 - 8.101)
52. **In respect of a person who has been convicted of an indictable offence, the majority of the Committee recommends that he or she may be required by the police to undergo a compulsory forensic procedure.**
(Paragraphs 8.79 - 8.101)
53. Since its 42nd Report on the *Criminal Law Amendment Bill (No 1) 1998*, the Committee has become aware that there may be an issue surrounding at what time a person can be said to be “*in custody upon a charge of committing an offence*”, as that phrase is used in section 236 of the *Criminal Code* (Western Australia). The Committee notes that the interpretation of “*charge*” is to be read in light of the legislative instrument in which it is contained. However the Committee considers that the fact that a person is “*in custody upon a charge*” necessarily requires that a person “*has been charged*”, and fixing that time is not without debate.
(Paragraphs 8.83 - 8.86)
54. **Regardless of whether or not section 236 of the *Criminal Code*(Western Australia) is amended, if the event or “*trigger*” upon which a person may be subject to a forensic procedure using reasonable force requires that a person is “*in custody upon a charge of committing an offence*”, then the issues referred to in paragraphs 8.83 - 8.86 of the Report should be considered and clearly defined. In the event that a forensic procedure is conducted prior to the time at which it is clear that the subject is “*in custody upon a charge of committing an offence*” the use of any material obtained from the forensic procedure may run the risk of later being held to be inadmissible as having been illegally or improperly obtained. Accordingly the Committee recommends that the time at which a person is charged needs to be clarified in legislation.**
(Paragraphs 8.83 - 8.86)

Should provision be made for volunteers to be placed on the database?

55. The Committee notes that a person may be asked by the police to undergo a forensic procedure or may, for their own reason, wish to undergo a forensic procedure. For example a person in the latter category may wish to volunteer to undergo a forensic procedure to exonerate themselves from a particular offence or to exonerate themselves from types of offences for which they may have previously been convicted and released.

(Paragraphs 8.102 - 8.109)

56. **The Committee recommends that forensic procedures be able to be conducted on a volunteer with his or her consent. The Committee has addressed the issue of consent at paragraphs 34 to 46 of the Observations and Recommendations.**

What safeguards should apply to volunteers?

57. The Committee has addressed the issue of withdrawal of consent at paragraphs 38 - 46 of the Observations and Recommendations.

Should there be an ability to apply for the retention of a body sample if consent is withdrawn?

58. **In the event that a “non-suspect volunteer” (as defined in paragraph 38 of the Observations and Recommendations) withdraws his or her consent to a forensic procedure after a sample has been obtained, the police may apply to the court for an order that the forensic material and any forensic information obtained as a result of the forensic procedure be retained if, subsequent to conduct of the forensic procedure, the non-suspect has become a person to whom paragraph 47 of the Observations and Recommendations apply.**

59. In view of the Committee’s comments at paragraphs 40 - 42 of the Observations and Recommendations in relation to “cooperative suspects” (as defined in paragraph 38 of the Observations and Recommendations) there is no need for an ability for a police officer to apply for a court order to retain any forensic material or any forensic information obtained as a result of the forensic procedure.

Should there be a power to take samples from convicted offenders (Post Conviction Testing)?

60. **The majority of the Committee recommends that the power for police to conduct a forensic procedure on a person who has been convicted of an indictable offence is to apply to persons who:**

- a. are currently in prison or other place of detention;
 - b. are on parole or serving a suspended sentence; and
 - c. are in prison or in mental hospitals who have been found unfit to plead, and who have been found guilty of an indictable offence whether before or after the commencement of legislation enabling the conduct of a forensic procedure upon that person.
- (Paragraphs 8.114 - 8.148)

If so, what offences should enable Post Conviction Testing?

61. As noted at paragraphs 27, 47, 52 and 60 of the Observations and Recommendations, the majority of the Committee recommends that there should be a power for police to conduct a forensic procedure on a person who has been convicted of an indictable offence.
- (Paragraphs 8.114 - 8.148)

In respect of Post Conviction Testing, should there be a right of objection to a forensic procedure and/or a requirement for a court application on a case by case basis?

62. The Committee recommends that the power to conduct a forensic procedure on a convicted offender should not be subject to a right of objection by the person who is required to undergo a forensic procedure, nor should the legislation require that any application be made to the court for an order that the person undergo a forensic procedure. Accordingly the Committee recommends that it be a legislative requirement that convicted offenders undergo a forensic procedure to provide a DNA profile.
- (Paragraphs 8.118 and 8.121)

Should there be a power to re-sample and, if so, in what circumstances can it occur?

63. Subject to paragraph 64 of the Observations and Recommendations, the Committee recommends that there should be power for the police to re-sample if the sample obtained from the conduct of a forensic procedure was not suitable for analysis or, though suitable, proved insufficient.
- (Paragraphs 8.146 and 8.147)
64. The majority of the Committee recommends that if a person does not consent to a re-sampling then:
- a. in the case of a person who is under suspicion for having committed an indictable offence but who is yet to be charged, the police will need to

- reapply to a magistrate or a justice of the peace for an order for a compulsory forensic procedure; and
- b. in the case of a person who has been charged with or convicted of an indictable offence, the police can use reasonable force to conduct another forensic procedure.

(Paragraphs 8.146 and 8.147)

What State agency should be responsible for Post Conviction Testing?

65. The Committee recommends that the Ministry of Justice should be responsible for conducting forensic procedures on persons who have been convicted of an indictable offence.

(Paragraph 8.141)

How should the development of exoneration through Post Conviction Testing, as illustrated by the Innocence Project in New York State, be addressed?

66. The Committee makes no finding on the issue of exoneration through Post Conviction Testing as each case must be considered on its own facts. The Committee merely notes this as an issue which the Western Australia criminal justice system may, in the future, have to consider. However it also may have implications on access rights to samples and database information. This is addressed in Chapter 12 of the Report.

(Paragraphs 8.149 - 8.152)

Should the legislation recognise the special position of children and incapable persons and, if so, how?

Should there be a minimum age at which a DNA sample can be taken without consent, or other restrictions relating to samples from juveniles?

67. The Committee recommends that the legislation should recognise the special position of two categories of people who are incapable of giving informed consent: children (being a person under 18) and “incapable persons”.

(Paragraphs 8.153 - 8.163)

68. The Committee recommends that an “incapable person” include an adult who:
- a. is not capable of understanding the general nature and effect of, and purposes of carrying out, a forensic procedure; or
- b. is not capable of indicating whether or not he or she consents or does not consent to a forensic procedure being carried out.

(Paragraphs 8.153 - 8.163)

69. **Accordingly in the above categories, the Committee recommends that consent cannot be given by that person and:**
- a. **in the case of a person who is under suspicion of having committed an indictable offence or who has been charged with an indictable offence, an order from a magistrate or a justice of the peace is required; or**
 - b. **in the case of a volunteer, the informed consent of the parent or guardian is required or, if there is no parent or guardian then an order from a magistrate or a justice of the peace is required,**
- to conduct a forensic procedure.**
(Paragraphs 8.153 - 8.163)
70. **The majority of the Committee recommends that the principles espoused by the *Young Offenders Act 1994* (Western Australia), in particular the requirement to notify a “responsible adult” of certain dealings with a young person be extended to the conduct of forensic procedures involving a young person.**
(Paragraphs 8.159 - 8.163)
71. **The majority of the Committee recommends that police officers must notify the relevant “responsible person” prior to proceeding with any forensic procedure on a young person. The Committee recommends that similar provisions should apply in respect of incapable persons.**
(Paragraphs 8.159 - 8.163)
72. The Committee notes that:
- a. a young person as defined in the *Young Offenders Act 1994* (Western Australia) is a person under the age of 18 years and this reflects the definition of “children” referred to in paragraph 67 of the Observations and Recommendations;
 - b. the definition of “body sample” in the *Young Offenders Act 1994* (Western Australia) may need to be amended to be consistent with legislation regarding forensic procedures involving body samples; and
 - c. the provisions in the *Young Offenders Regulations 1995* relating to the labelling of blood or urine samples and the requirement that a body sample of blood be taken by a medical practitioner may need to be amended to be consistent with legislation regarding forensic procedures.
- (Paragraph 8.163)

In what circumstances should there be judicial oversight of the compulsory taking of samples?

73. The Committee has addressed this issue in paragraphs 49 and 50 of the Observations and Recommendations.
(Paragraph 8.164 - 8.165 and 8.171 - 8.186)

In what circumstances should a police officer be empowered to authorise the compulsory taking of samples?

74. The Committee has addressed this issue in paragraphs 49, 51 and 52 of the Observations and Recommendations.
(Paragraphs 8.164 - 8.165 and 8.166 - 8.170)

Should there be provision for interim orders?

- ***Who should be empowered to grant interim orders - police officers, justices of the peace, or magistrates?***
 - ***Should the suspect be represented at hearings of an application for an order to undergo a compulsory forensic procedure?***
 - ***What rights should a suspect have at any hearing?***
75. It appears to the Committee that, in the event that the legislation requires an application to be made to a magistrate or a justice of the peace for an order to conduct a forensic procedure, then the ability to seek an order by electronic means may be one method of alleviating some of the difficulties experienced by remote areas of Western Australia. The Committee notes that “*interim orders*”, as they are discussed in the report, can be made by electronic means but they still require final determination.
(Paragraphs 8.187 - 8.192)
76. **The Committee recommends that where it is not practicable for a police officer to physically appear before a magistrate or a justice of the peace to obtain an order to conduct a forensic procedure, an application and an order for a compulsory forensic procedure can be made by electronic means.**
(Paragraphs 8.187 - 8.192)
77. **The Committee recommends that once an order has been obtained in the circumstances set out in paragraph 76 of the Observations and Recommendations, it does not require sanction by an application and a**

corresponding order at a final hearing. The Committee emphasises that it is the only order required.

(Paragraphs 8.187 - 8.192)

78. **The majority of the Committee recommends that legislation not require that a person under suspicion of having committed an indictable offence be present or have legal representation at a hearing, to cross examine witnesses or to make a submission to the magistrate or justice of the peace.**

(Paragraphs 8.187 - 8.192)

Who should collect samples?

In what circumstances should police officers be empowered to collect samples?

Should there be different restrictions applying to different types of samples, such as a blood sample and a buccal swab?

79. The Committee considers that there is a need to clearly legislate in relation to the categories of persons authorised to conduct different types of forensic procedures.

(Paragraphs 8.197 - 8.209)

80. **The Committee recommends that intimate and non-intimate forensic procedures may be conducted by a medical practitioner, a nurse or an “authorised person”.**

(Paragraphs 8.197 - 8.209)

81. The Committee repeats its recommendation at paragraphs 21 - 24 of the Observations and Recommendations regarding the sex of the person conducting a relevant forensic procedure.

82. **In making the recommendations at paragraphs 80 and 81 of the Observations and Recommendations, the Committee refers to paragraph 20 of the Observations and Recommendations where it is stated that the Committee is divided as to whether the taking of a sample by buccal swab is to be considered an intimate or non-intimate forensic procedure. Regardless of the ultimate classification, the majority of the Committee are of the view that an “authorised person” for the conduct of a forensic procedure involving the taking of a sample by buccal swab, should include a police officer who has been trained in the relevant procedure.**

(Paragraphs 8.197 - 8.209)

83. **The Committee is of the view that an “authorised person” for the conduct of a forensic procedure involving the taking of blood should include a phlebotomist or a medical technician who has been trained in the relevant procedure.**
(Paragraphs 8.197 - 8.209)
84. **The Committee recommends that:**
- a. **a “medical practitioner” should include, in relation to a forensic procedure involving the mouth or the teeth or an impression left by the mouth or teeth, a registered dentist; and**
 - b. **an “authorised person” is one authorised by the Commissioner of Police.**
- (Paragraphs 8.197 - 8.209)

At the time a sample is physically taken, what safeguards are necessary to protect the well-being of: the person whose sample is taken; the medical officer taking the sample; and police officers assisting the medical officer?

85. **The Committee recommends that no civil or criminal liability is incurred by any person who carries out, or helps to carry out, a forensic procedure in respect of anything done by that person in carrying out or helping to carry out the forensic procedure if the person believed on reasonable grounds that:**
- a. **informed consent had been given to the carrying out of the forensic procedure;**
 - b. **in the case of a person under suspicion of having committed an indictable offence, the carrying out of the forensic procedure without informed consent had been duly authorised by a magistrate or a justice of the peace; or**
 - c. **in the case of a person who has been charged with or convicted of an indictable offence, the carrying out of the forensic procedure without informed consent employed reasonable force, if necessary,**
- and the thing was done in good faith and the doing of it was reasonable in all the circumstances.**
- (Paragraphs 8.197 - 8.209)

*Should reasonable force be used to obtain samples?
If so, in what circumstances may it be used?*

86. **The Committee recommends that a person authorised to conduct a forensic procedure or a person assisting such person may use reasonable force. In the case of a person who is under suspicion as having committed an indictable offence but who has not been charged with an indictable offence, reasonable force may only**

be used after an order to conduct a forensic procedure has been obtained from a magistrate or a justice of the peace.

(Paragraphs 8.210 - 8.217)

How should the legislation address the ethical concerns of medical practitioners and concerns expressed by other groups about the use of force in conducting forensic procedures?

87. The Committee notes that ethical concerns have been expressed by medical practitioners and concerns have been expressed by other groups such as prison staff, about the use of force in the conduct of medical procedures.

(Paragraphs 8.218 - 8. 220)

88. **The Committee recommends that the legislation expressly provide that no person be required to carry out or assist in the carrying out of a forensic procedure.**

(Paragraphs 8.218 - 8. 219)

89. **In so far as conducting forensic procedures on convicted offenders is concerned, the Committee recommends that administrative arrangements should be managed so that the forensic procedure is conducted by an outside, independent medical practitioner, nurse or authorised person. If necessary they should also be assisted by someone independent of the prison.**

(Paragraph 8.220)

What procedures should apply at the time a sample is taken to ensure integrity in the sampling and evidence collection processes? For example: what safeguards are needed to ensure the integrity of analysis of samples and prevent tampering or contamination?

90. To ensure integrity of a sample obtained through a forensic procedure, it was repeatedly emphasised to the Committee that the development of standard operation practices, training and education is essential.

(Paragraphs 8.224 - 8.331)

91. **The Committee recommends that guidelines for sampling at the scene of the crime, conducting a forensic procedure on a person and the preservation and expedition of biological evidence by trained personnel be developed to ensure the chain of evidence and to guarantee the integrity of any sample.**

(Paragraphs 8.224 - 8.331)

92. **The Committee recommends that all recruits and currently serving police officers be requested to undergo a forensic procedure to provide a DNA profile for exclusionary purposes.**
(Paragraph 8.230)
93. The Committee notes that there may need to be provision for police officers to apply for identifying data to be destroyed after they leave the police service.
(Paragraph 8.231)
94. The Committee notes that the above issues are procedural and should be addressed in an administrative manner through the development of Codes of Practice and standard operating procedures.

What measures should be taken to ensure that, should any changes be made to the legislation regarding the collection of DNA forensic material, they are not in complete variance with other forensic procedures such as procedures for taking fingerprints?

95. Although the Committee has focussed its inquiries on samples obtained for DNA profiling, its comments are equally applicable for samples taken for other forensic procedures.
(Paragraphs 8.232 - 8.235)
96. **The Committee has not addressed all of the issues that may be raised by paragraph 95 of the Observations and Recommendations. However, the Committee recognises the importance of forensic odontology in criminal law enforcement. When in South Australia the Committee was provided with submissions which highlight some of the difficulties in drafting comprehensive legislation covering all types of forensic procedures. The Committee recommends that the government have regard to such submissions when drafting legislation for this State.**
(Paragraph 8.233)

Are there any other observations?

97. The practical implementation of the reporting requirements of the Victorian legislation has created major difficulties. Sections 464ZD and 464ZF(11) of the *Crimes Act 1958* (Victoria) require that police provide a copy of a “forensic report” to everyone on whom a forensic procedure has been conducted. While the police have been acknowledging blood has been provided, it is open to interpretation whether this satisfies the requirement of the relevant Act, as it only states that blood was taken from

a particular prisoner on a particular date. The Victorian legislation did not define “forensic report” and some have queried whether this should also have included results of screening against the database.

(Paragraph 8.133)

Is there a need to retain the actual crime scene or suspect sample after the DNA profile has been extracted and the information recorded?

How should samples be stored?

98. **Subject to paragraphs 117 to 122 of the Observations and Recommendations, the Committee recommends that all body samples and crime scene samples and any information obtained from those samples should be:**

- a. **securely stored by the laboratory which conducted the relevant analysis, and not the police; and**
- b. **stored separately from any information that may identify the person to whom the body sample relates.**

(Paragraphs 9.1 - 9.12)

99. The Committee offers no judgment on the adequacy or otherwise of different methods of packaging and storage save to note that:

- a. the method of sampling has major scientific and financial implications;
- b. the method of storage has major scientific and financial implications; and
- c. the constant change in technology demonstrates the need for the users (generally police) and the providers (scientists) to consult extensively with each other to determine how best to practically implement any legislation.

(Paragraphs 9.1 - 9.12)

What is a standard set of loci?

100. In view of the diverse scientific opinions, the Committee does not make any recommendations on what may be an appropriate set of loci, apart from the need for a common set of loci for interstate and international integration and a sufficient number for accurate identification. It appears that for the purposes of DNA profiling of the Australian population the 9 loci plus the sex determinator may be sufficient.

(Paragraphs 10.12 - 10.14)

Should our legislation specifically restrict any DNA analysis to the non coding parts of DNA?

101. **The majority of the Committee recommends that any DNA analysis not be restricted to the non-coding parts of DNA.**

(Paragraphs 10.15 - 10.18)

Should Parliament legislate accreditation or licensing requirements for laboratories involved in forensic DNA typing? If so, how?

102. The Committee believes that clear and mandatory quality assurance and quality control standards should be established as being essential to the integrity of sample analysis and DNA profiling, and that such standards should be met by each laboratory in which DNA forensic testing is to be conducted.

(Paragraphs 10.19 - 10.27)

103. The development of scientific accreditation standards is not a task for which this Committee is equipped. The Committee notes that the National Institute for Forensic Science is already addressing the issue of national scientific accreditation.

(Paragraphs 10.19 - 10.27)

104. The Committee further notes that many laboratories will already operate under standard scientific protocols and that the Committee is not in a position to question the adequacy or otherwise of such protocols. Accordingly the Committee makes no comment on the content of the various standards.

(Paragraphs 10.19 - 10.27)

105. However the Committee notes that if accreditation standards affect evidentiary samples and go wider than the scientific process, it may be useful for wider consultation to occur. The Committee notes that, in line with the position in the State of New York, this may involve the development of a multidisciplinary committee. Such a committee would be an expert consultative committee including representatives of the judiciary, legal professions and appropriate professional bodies such as the State forensic laboratory. The committee could be established to determine minimum standards and a program of accreditation, recommendations regarding DNA lab accreditation and DNA forensic science accreditation and legislative regulation.

(Paragraphs 10.19 - 10.27)

Should the functions relating to storage and analysis of samples be separated from the functions of the police service or other agency seeking to use samples? If so, how?

106. In the Committee's view it is preferable to separate the functions of police investigation and forensic DNA analysis. Both functions should be financially and operationally independent.

(Paragraphs 10.28 - 10.51)

107. The Committee recognises that collocation of the three disciplines (police forensic services, the forensic chemistry laboratory and the PathCentre WA DNA Testing Unit) may result in economies of scale and improve appropriate police exchange of information and knowledge as well as maintain necessary independence. (Paragraphs 10.28 - 10.51)
108. **In the event that DNA analytical facilities are to be collocated with other police facilities, the Committee recommends that, to ensure functional autonomy and operational independence, forensic services should be funded independently of the police service.**
(Paragraphs 10.28 - 10.51)

Who should be responsible for regulatory oversight of the DNA database? Should the roles of database custodian and manager:

- *be fulfilled by the law enforcement authorities; or*
 - *be separate from law enforcement authorities and fulfilled by either:*
 - *the State's forensic laboratory; or*
 - *an independent agency?*
109. **The Committee recommends that regulatory oversight of and the roles of database manager and custodian of any Western Australian DNA database be separate to law enforcement authorities and be fulfilled by a functionally autonomous public agency.**
(Chapter 11)
110. **The Committee is attracted to the organisational model of the United Kingdom database whereby the role of the manager and custodian of the database (including all identifying information) is kept separate from the police service and is fulfilled by the Forensic Science Service. The United Kingdom police retain ownership of the data and can enter into arrangements regarding its use. The Committee recommends that consideration be given to structuring the ownership and operation of any Western Australian database in a similar manner.**
(Chapter 11)

What access should be granted to suspects, convicted offenders and third parties in relation to body samples and crime scene samples?

In what circumstances should there be access to and disclosure of information on a DNA database?

What sanctions should there be for misuse of any information?

111. **The Committee recommends that there should be legislative specification of the purposes for which forensic samples and information obtained through forensic procedures can be used and disclosed to others. The Committee recommends that permissible disclosure take place only in the event of one or more of the following situations:**

- a. **where the information is publicly known, and it is necessary for the investigation of a criminal offence;**
- b. **where it is necessary for the purposes of determining whether to commence criminal proceedings or civil proceedings (in the light of the way the procedure was carried out);**
- c. **where it is necessary for forensic comparison in the course of a criminal investigation by a police officer;**
- d. **where an arrangement with the Commonwealth or another State or Territory requires such disclosure;**
- e. **where the person to whom the information relates has consented to such disclosure; and**
- f. **where a complaint has been made to the Privacy Commissioner.**

(Chapter 12)

112. The Committee notes that a suspect (or convicted offender) will be able to provide body samples to an independent expert. However to enable independent analysis of crime scene samples, the suspect's scientist (or convicted offender's scientist) will need access to crime scene evidence. The Committee is of the view that the safeguard of independent analysis is a valuable one which provides the suspect (or convicted offender) with a reasonable opportunity to verify or contest the prosecution's evidence.

(Chapter 12)

113. **In any case where there is a sufficient “*crime scene sample*”, the Committee recommends that, if it is technically feasible, a portion of the material sufficient for independent analysis is to be protected and preserved in accordance with proper storage procedures, so that it can be made available to a defendant in criminal proceedings so as to permit independent analysis on behalf of the defendant, by an accredited forensic laboratory of the defendant's choice.**

(Chapter 12)

114. The Committee notes that in Western Australia, there is no legislation similar to the *Data Protection Act 1984* (United Kingdom). The Committee suggests that consideration be given to drafting appropriate legislation to give protection to privileged information which can be collected as a result of forensic procedures. (Paragraph 12.30)
115. **The Committee recommends that there be heavy penalties for misuse of both forensic material and information obtained from a forensic procedure, including database information.** (Chapter 12)

What measures should be adopted to allow the use of interstate forensic material and access to interstate databases?

116. The Committee is of the view that in the interests of effective crime detection in Western Australia the use of any information should be as wide as possible. The Committee has already commented on permissible uses of the information at paragraph 111 of the Observations and Recommendations.

Should body samples and/or information derived from a forensic procedure (including database profiles) obtained from body samples be destroyed and if so when?

Should destruction of a body sample and/or information derived from a forensic procedure (including database profiles) obtained from a body sample be:

- ▶ *automatic if a suspect is acquitted; or*
- ▶ *at the request of the suspect?*

117. **The Committee recommends that body samples from a person and information derived from a forensic procedure (including profiles) should be destroyed as soon as practicable:**
- a. **where that person is cleared of the offence, or the charge which has been laid does not proceed to trial or hearing within 2 years of the sample being taken;**
 - b. **where that person is not prosecuted for the offence within 2 years of the sample being taken;**
 - c. **where that person is no longer suspected of having committed the offence; or**
 - d. **where the courts rule that the evidence derived from a forensic procedure is inadmissible,**
- and that person has applied in writing for the destruction of that material.** (Chapter 13)

118. **The Committee recommends that the legislation should:**
- a. provide for the issue of a certificate of destruction upon request;**
 - b. provide for the police or the Director of Public Prosecutions to make application to the court to extend any period referred to above (117);**
 - c. provide for the creation of a summary offence punishable on conviction by imprisonment (1 year maximum) or a fine, where a person knowingly fails to destroy, or uses or causes or permits to be used, a sample or related material or information, or information derived from such samples or related materials which were required to be destroyed; and**
 - d. provide for destruction in respect of volunteers who have withdrawn their consent.**

(Chapter 13)

Should crime scene samples and/or information derived from a crime scene sample (including profiles) be destroyed and if so, when?

119. **The Committee recommends that all crime scene samples and information derived from a crime scene sample (including profiles) should be retained indefinitely.**

(Chapter 13)

What should the extent of any destruction be, that is, identifying data only or the whole sample and the profile?

120. **The Committee recommends that DNA data derived from body samples be able to be used in a statistical database to make comparisons between the pool of local DNA data and specific individual DNA and crime scene profiles for the purposes of calculating probabilities.**

(Chapter 13)

121. **The Committee recommends that “*destruction*” occurs:**

- a. in the case of a body sample obtained from a forensic procedure, when that sample is totally destroyed; and**
- b. in the case of any information obtained from a forensic procedure (including DNA profiles), when any means of identifying the information derived from a forensic procedure (including DNA profiles)**

with the person from whom it is taken is destroyed. This will enable the use of any data in an anonymous form in a statistical database.

(Chapter 13)

Any other observations regarding destruction requirements?

122. The Committee notes that some samples of body fluid, tissue or hair obtained from a person may not be the body fluid, tissue or hair of that person but of a third party. If a sample is taken, and the person is excluded from investigation, normally the sample should be destroyed. However, that sample may indicate that the third party was involved and in turn, link the third party to the crime scene. Accordingly it may provide important evidence which should not be destroyed. Victorian commentators suggested that the legislation be drafted so that, if following analysis, it is shown that the material is not the body fluid, tissue or hair of the person from whom it was sampled, then it does not need to be destroyed. Otherwise the legislation would require the destruction of evidence.

(Paragraph 5.26)

What level of funding is required to establish and maintain a DNA database in its initial stages, and from where should funding be sourced?

How should DNA casework and the database be funded?

Should there be centralised scientific analysis?

Should samples be analysed at a State or federal facility?

How should the legislation be implemented?

123. **The Committee recommends that all samples will need to be processed to the stage of having DNA profiles ready for input into the database, at State and Territory level.**

(Chapter 14)

124. It is outside the Committee's mandate to make recommendations which may amount to an appropriation, however the Committee is of the view that:
- a. any funding assessment requires an honest appraisal of costs analysis;
 - b. whilst there may be immediate advantages, the Committee notes that it may take up to four years from the inception of the database to obtain the full benefits of a DNA database. The Committee emphasises that the Western Australian community's expectation of results must be long term;
 - c. all samples will need to be processed to the stage of having DNA profiles ready for input into the database, at State and Territory level;

- d. State forensic laboratories need to be adequately funded to accommodate the increase in number of samples requiring analysis; and
- e. funding will be required to educate and train law enforcement authorities and scientific providers.

(Chapter 14)

125. In the interests of national integration and comparability the Committee is supportive of the stance which the United States of America federal government has taken in:

- a. supplying scientific training and database software, together with database installation, database training and user support, free of charge to any American state and local law enforcement laboratories performing DNA analysis; and
- b. establishing a federal grant program to assist state and local crime laboratories in developing or improving forensic DNA testing capabilities.

(Chapter 14)

126. The Committee considers that it is undesirable if the “*purchase of services*” is equated by the public as the “*purchase of prosecution*”. The Committee notes that in the United Kingdom a deliberate decision was made to provide funding directly from the United Kingdom Treasury rather than the police department. Whilst the police service in the United Kingdom ultimately support the analytical services through the “*fee for service*” arrangement with forensic service providers, the police “*pay*” for a service and do not “*fund*” a service. The Committee considers that this distinction is very important and that the same separation is appropriate for Western Australia. (Paragraph 14.29)

127. The Committee considers that the funding model adopted by the United Kingdom is an attractive model that should be considered by Western Australia. Although prompted by privatisation initiatives, the United Kingdom funding arrangement recognises the reality that the main user of forensic services are the police whilst acknowledging the risks and negative perceptions if funding is provided directly by the police. The Committee refers to its recommendations at paragraphs 109 and 110 of the Observations and Recommendations.

(Paragraph 14.30)

Should the regulatory regime for forensic procedures be set out in the Criminal Code (Western Australia), Police Act 1892 (Western Australia) or separate legislation?

If the regulatory regime is to be set out in a dedicated piece of legislation what effect will this have on existing legislation?

128. **The Committee recommends that:**

- a. provisions relating to all forensic procedures and DNA profiling be enacted in separate dedicated legislation; and
- b. the provisions of the *1999 Model Bill* be closely scrutinised by Western Australia when drafting new legislation.

(Paragraphs 15.2 - 15.7)

What level of consultation is necessary for the development and implementation of legislation?

129. **The Committee recommends that the Western Australian government consult widely when drafting any forensic procedures legislation for the State. Consultation should include, as a minimum, users (for example, the police), providers (for example, scientific analytical services) and members of the legal profession and judiciary.**

(Paragraphs 15.8 - 15.10)

Should there be a provision for review?

130. **The Committee recommends that any legislation dealing with forensic procedures and DNA profiling contain a provision for review after five years of operation.**

Should adverse inferences be drawn from evidence of refusal to undergo a forensic procedure and if so, in what circumstances?

131. **The Committee recommends that:**

- a. subject to paragraphs 131b and 131c, evidence of a person's refusal or failure to consent or withdrawal of consent to a forensic procedure should not be admissible in proceedings against the person. This would encompass volunteers sampled under mass screenings;
- b. where a justice of the peace or magistrate has authorised the carrying out of a forensic procedure on a suspect, then evidence that the suspect has refused to comply or has obstructed, resisted or hindered the carrying out of the forensic procedure should be admissible in any proceedings against the suspect; and

- c. where a person has been charged with an offence and has been requested by the police to undergo a forensic procedure then, evidence that the suspect has refused to comply or has obstructed, resisted or hindered the carrying out of the forensic procedure should be admissible in any proceedings against the suspect.

(Paragraphs 16.18 - 16.27)

Should evidence be admissible where there has been failure to comply with legal requirements, and if so under what circumstances?

132. The Committee recommends that:

- a. subject to paragraph 132b, where there has been a breach of, or failure to comply with any of the legislative provisions regarding a forensic procedure or the recording or use of information on a DNA database, then the forensic material, any results of the forensic analysis and any evidence obtained as a result of or in connection with the carrying out of the forensic procedure should not be admissible in any proceedings against the person on whom the procedure was conducted unless:

- the person on whom the forensic procedure was conducted consents; or
- the court is satisfied on the balance of probabilities of certain matters that justify the admission of the evidence into proceedings despite the failure to comply with the legislative provisions. Such matters would include the probative value of the evidence, the reasons for failure to comply, the gravity of the failure to comply and whether the failure was intentional or deliberate; and

- b. if the forensic material was required to be destroyed then the forensic material, any results of the forensic analysis and any evidence obtained as a result of or in connection with the carrying out of the forensic procedure is not admissible in any proceedings against the person on whom the procedure was conducted.

(Paragraphs 16.28 - 16.34)

What measures should be put into place regarding the reliability of the database?

133. This issue is outside the scope of the Committee's current inquiry. The Committee makes some observations in Chapter 16.
(Paragraphs 16.35 - 16.38)

If the primary evidence (the crime scene sample) is not available, whether through loss, destruction or deterioration, should the secondary evidence (the DNA profile) be admissible in evidence, and if so what weight should it carry?

134. This issue is outside the scope of the Committee's current inquiry. The Committee makes some observations in Chapter 16.
(Paragraphs 16.39 - 16.41)

What mechanisms should be in place regarding access by the defence to the forensic material and database information for independent verification?

135. The Committee has addressed this issue in Chapter 12 and in paragraphs 111 - 115 of the Observations and Recommendations.
(Paragraphs 16.42 - 16.42)

What other procedural safeguards may be required when presenting DNA evidence in criminal proceedings? For example: pre-trial discovery, the availability of legal aid and the availability of experts; the role of education in the use of DNA as evidence.

136. These issues are outside the scope of the Committee's current inquiry. The Committee makes some observations in Chapter 16.
(Paragraphs 16.44 - 16.62)

Chapter 2

THE COMMITTEE'S INVESTIGATIONS

- 2.1 Forensic procedures and DNA profiling are not new concepts. The United Kingdom, Germany and the United States of America have been investigating the use of, or using, forensic procedures and DNA profiling techniques for many years albeit with differing degrees of funding and political will. However, in comparison with other countries the use of such procedures in Australia is relatively new.
- 2.2 On 20 August 1998, following this Committee's completion of its Report into the CLA Bill,¹³ the Attorney General moved and the House agreed that the Committee conduct a further inquiry into matters raised by the Committee's inquiry into the CLA Bill.

The referral to the Committee was in the following terms:

*“That the Legislation Committee have power to inquire into and report on those recommendations, contained in the Committee's report on the Criminal Law Amendment Bill (No. 1) 1998, relating to the taking of forensic samples and stalking, that remain for consideration consequent upon the enactment of that Bill.”*¹⁴

Following prorogation of Parliament on 6 August 1999, the House re-referred the matter to the Committee on 12 August 1999.¹⁵

- 2.3 In order for the Committee to give the best consideration to the issues which forensic procedures and DNA profiling raise, it was imperative to gain more knowledge of the systems and procedures utilised in other jurisdictions.
- 2.4 Accordingly, the Committee resolved to meet with various stakeholders in other jurisdictions which had adopted, or were in the process of adopting, legislation relating to forensic procedures and DNA profiling.

¹³ 42nd Report of the Standing Committee on Legislation: *Criminal Law Amendment Bill (No 1) 1998*, tabled on 19 May 1998.

¹⁴ *Hansard*, Legislative Council, 20 August 1998, p. 583.

¹⁵ *Hansard*, Legislative Council, 12 August 1999, p. 120.

- 2.5 Between 4 October 1998 and 9 October 1998 four members of the Committee travelled to Victoria and South Australia.¹⁶ A list of the persons and organisations with whom the Committee met is attached as Appendix 1.

In December 1998 the Committee put forward a proposal to the Legislative Council for travel to the United Kingdom, Germany and the United States of America.¹⁷ The proposal was approved on 17 December 1998.¹⁸

- 2.6 Between 22 January 1999 and 9 February 1999 a subcommittee of three members of the Committee visited the United Kingdom, Germany and the United States of America.¹⁹ A list of the persons and organisations with whom the members met is attached as Appendix 2. For ease of reference in this Report, the subcommittee shall be referred to as the Committee.
- 2.7 The Committee collected and has considered information on a variety of issues from a wide range of persons and organisations. A list of the material collected in the Eastern States of Australia, the United Kingdom, Germany and the United States of America for the purposes of this Report is attached as Appendix 3.
- 2.8 Since the Committee's inquiries overseas and interstate, in May 1999, the Commonwealth Model Criminal Code Officer's Committee Secretariat ("MCCOC") released a discussion paper appending a draft model forensic database and proposed national DNA database Bill for discussion ("MCCOC Report").²⁰ The MCCOC Report

¹⁶ The Hons Bruce Donaldson, John Cowdell, Bill Stretch and Giz Watson MLCs, along with the Committee's former Advisory/ Research Officer, Mr Michael Smyth and former Committee Clerk, Ms Jan Paniperis, traveled to Victoria and South Australia.

¹⁷ 46th Report of the Standing Committee on Legislation: *Inquiry into Forensic Procedures and DNA Profiling*, tabled on 10 December 1998 ("46th Report").

¹⁸ *Hansard*, Legislative Council, 17 December 1998, pp. 5308 - 5313.

¹⁹ The Committee resolved that a subcommittee be formed for the purpose of travelling and taking evidence. The Hons Bruce Donaldson, Derrick Tomlinson and Bill Stretch, along with the Committee's Advisory/Research Officer, Ms Mia Betjeman, and Committee Clerk, Ms Connie Fierro, travelled to the United Kingdom, Germany and the United States of America.

²⁰ Model Criminal Code Officers Committee of the Standing Committee of Attorneys General, *Report: Model Forensic Procedures Bill and the Proposed National DNA Database*, May 1999 ("MCCOC Report").

proposes that new provisions be added to a model Bill on forensic procedures issued in 1995. For the purposes of this Report the proposed amended Bill shall be referred to as the *1999 Model Bill*.²¹

2.9 Where possible the Committee has taken the opportunity to comment on some of the provisions of the *1999 Model Bill*. The Committee has not examined the *1999 Model Bill* in detail as it understands that the *1999 Model Bill* is being further amended and the Committee wished to table this Report as soon as possible, so that it may assist with the drafting of the State's DNA legislation.

2.10 For ease of reference, Appendix 4 contains an explanation of abbreviations and terminology used throughout this Report. Of particular note is the use of the phrases:

- “*suspect*” which, except where the context otherwise requires, is used in this Report to refer to a person who is suspected of committing an offence whether or not he or she is in custody and whether or not he or she is arrested and charged; and
- “*forensic procedures*” which is used in this Report to refer to “*intimate forensic procedures*” and “*non-intimate forensic procedures*” (as both phrases are defined in paragraphs 18 and 19 of the Observations and Recommendations of this Report) and the taking of a sample by buccal swab. It is to be noted that the definition of “*non-intimate forensic procedures*” includes fingerprints.

²¹ The Committee notes that the consultation period for the *1999 Model Bill* has ended and understands that the *1999 Model Bill* is being redrafted. As any observations made in this Report are in relation to the *1999 Model Bill* as published with the MCCOC Report in May 1999, to some degree the observations may be superseded by further amendment.

Chapter 3

INTRODUCTION TO FORENSIC PROCEDURES AND DNA PROFILING

- 3.1 Forensic procedures involving fingerprinting, forensic odontology and pathology have long been conducted by authorities in the criminal justice system. The results of such procedures are often used as evidence in criminal proceedings.
- 3.2 DNA (deoxyribonucleic acid) testing, profiling and evidence have now entered the mainstream of the criminal justice system. In addition DNA analysis has been used extensively over a long period of time in respect of paternity testing. Today it is hard to pick up a daily paper and not find an article reporting the use of DNA testing in a civil or criminal case. The application of DNA profiling to criminal law enforcement in the 1990s, what the discovery of fingerprinting was at the beginning of the century.
- 3.3 The use of DNA in the criminal justice system has attracted much support and created much controversy. As noted by one scholar: *"Although biological innovations etc are often initially seen as perversions, over time, they become accepted as 'ritual supported by unquestioned beliefs and prejudices'. As technologies improve, people recognise them as advantageous. Society, through its legislatures and courts, figures out how to resolve the problems they posed at the outset"*.²²

What is DNA?²³

- 3.4 DNA is found in all living cells. It carries the coded information that makes every person an individual. This code is inherited from a person's parents so it can be used to prove biological family ties.
- 3.5 DNA is made up of four chemicals, called bases, which are abbreviated as A, T, C and G. The bases are like the teeth in a zipper and arranged in a spiral called a double helix. The bases are arranged in pairs. A and T always bind together and C and G

²² Kevles, Daniel J, "Study Cloning, Don't Ban It: Society finds ways to resolve problems posed by science", *The New York Times*, OPED, 26 February 1997.

²³ This information is based on: Federal Bureau of Investigation Educational Internet Publication *DNA Testing* <http://www.fbi.gov>, (searched 1 July 1999).

always bind together. DNA is composed of millions of these bases and their combinations are unique to each person, with the exception of identical twins.

- 3.6 There are two places in the cell where DNA is found. Nuclear DNA²⁴ is found in the nucleus and mitochondrial DNA²⁵ is found in the mitochondria which are in the body of the cell. These two types of DNA are used for different crime detection purposes.

What is DNA profiling?²⁶

- 3.7 DNA profiling (sometimes referred to as “DNA fingerprinting” or “DNA typing”) is a technique which has developed rapidly over the last ten years. It was first developed as an identification technique in 1984 by Professor Alec Jeffreys of the University of Leicester. Originally used to detect the presence of genetic diseases, DNA profiling soon came to be used in criminal investigations, forensic science and paternity testing. Great advances have been made in the automation and computerisation of DNA analysis techniques, and there have been improvements in the sensitivity and application of profiling methods.
- 3.8 A DNA profile is constructed by first extracting a DNA sample from body tissue, body fluids or hair. If the sample is obtained from a crime scene it may be any sufficiently robust sample of human tissue, hair or fluid such as saliva left on a glass or in a cool drink can, or blood or semen left at the crime scene or on the victim.
- 3.9 All DNA analysis techniques involve the identification of gene types (alleles) at a particular location (locus) on a chromosome. Identifying alleles at a number of different loci provides a DNA profile. The types and number of loci chosen depends on many factors including their discriminatory power and sensitivity. For example, the forensic DNA unit at the Western Australian Centre for Pathology and Medical Research (“PathCentre”) routinely identifies up to 10 loci to provide a profile which will easily exclude a falsely accused person or a suspect. Elsewhere in the world, between 5 and 13 loci are routinely used.

²⁴ Nuclear DNA is inherited as a combination from both parents.

²⁵ Mitochondrial DNA is inherited solely from the mother. As each cell has many mitochondria it is very useful when the crime laboratory only has a very small amount of evidence to test, or the nucleus of the cells may be missing or degraded, as in the case of very old bones or hair.

²⁶ This information is taken, in part, from The Forensic Science Service, “*Lawyers Guide to DNA*” Version 1; and Feeney, A, and Webb, L, “Abi Prism 310 Genetic Analyzer Acquisition”, *PathCentre News*, Vol 3, No 2, October 1997, at p. 13.

- 3.10 DNA is extracted from the sample and quantified, amplified, typed and loaded onto a database. Laboratories generally use one or both of two techniques: PCR (polymerase chain reaction) and/or RFLP (restriction fragment length polymorphisms). However, it should be noted that techniques continue to be refined and new techniques of DNA profiling continue to be developed. Further discussion of these techniques is at Chapter 10 of this Report. DNA profiles generated by either technique are then recorded and stored on a database.
- 3.11 A DNA profile is a computerised alpha-numeric value obtained from the visualised output of the DNA analytical process. In contrast to fingerprints, a DNA profile is ideally suited to electronic storage and transfer because of its numerical representation.
- 3.12 The profile is stored in a computer file to provide intelligence for crime investigation. A typical database contains three indices:
1. profiles obtained from forensic case work from material left at crime scenes (*“crime scene profiles”*);
 2. profiles of convicted offenders; and
 3. profiles of missing persons or relatives of missing persons.
- 3.13 Whenever a new profile is loaded onto the system it may be searched against the other indices to determine if it *“matches”* any other profile. Matches are sometimes referred to as *“hits”*. The structure of the database enables searches to be conducted scene to scene, person to person and person to scene.
- 3.14 The database may have a facility to compare unsolved crime scene profiles with DNA profiles from suspects to establish their innocence or confirm their probable involvement.
- 3.15 When the DNA profile of an individual matches a crime scene profile the significance can be assessed only if the probability of that profile occurring in the relevant population is known. The frequency of a profile is calculated by multiplying the frequencies of the alleles at each locus using population databases of randomly selected and unrelated individuals. Statistical databases are maintained for this purpose.
- 3.16 DNA material contains a large amount of information about a person. It is often referred to as *“a person's blueprint”*. The potential, whether real or perceived, for the use and misuse of any genetic information obtained from the DNA for purposes other than the investigation of crime has raised concerns. Although the Committee was uniformly advised that DNA scientific techniques only examine non-coding genetic

information, the rapid technological advancement of the science means that it is important that there be legislation to protect the privacy of individuals and to ensure that the DNA sample can be used only for prescribed purposes.

Investigations interstate and internationally

3.17 The Committee conducted inquiries in the following jurisdictions:

- Victoria, which was the first State to enact comprehensive legislation dealing with forensic procedures;
- South Australia, which enacted the *Criminal Law (Forensic Procedures) Act 1998* (South Australia), containing extensive safeguards surrounding the taking of forensic samples;
- the United Kingdom, which pioneered the development of DNA-related technology, has had a national database in operation since 1985 and remains at the forefront of DNA forensic technology;
- Germany, which is different from but similarly advanced as the United Kingdom, has led the development of a trans-European and eventually international standard for DNA forensic technology; and
- the United States of America, which has a DNA system and a regulatory regime different from that of the United Kingdom. The United States of America faces issues similar to Australia in having to combine the systems of a number of autonomous State jurisdictions into a workable whole, managed by the Federal Bureau of Investigations.

3.18 In addition the Advisory/Research Officer, on behalf of the Committee, made inquiries of the New York Police Department which recently foreshadowed New York State legislation that will be broader than the American federal model and more akin to the United Kingdom system with regard to the range of suspects who may be sampled.²⁷

²⁷ Police Commissioner Howard Safir's remarks to the Students of the Bronx High School of Science, 14 December 1998. This matter is further discussed at 8.88 of this Report.

Chapter 4

PURPOSE OF DNA TESTING AND ESTABLISHMENT OF A DNA DATABASE

Introduction

- 4.1 The Committee considers that the Western Australian public is entitled to expect that criminals are identified, apprehended and brought before the courts as expeditiously as possible. It is in this context that the Committee recognises the increasingly important role of forensic science in criminal investigation and public safety.²⁸ Equally it recognises that suitable safeguards must be in place to protect individual rights and civil liberties.
- 4.2 While police in each Australian jurisdiction possess broad powers to take fingerprints from persons in custody, legislation permitting police to obtain samples of genetic material from suspects who have not been arrested or charged with an offence and who do not consent, is either non-existent or too restrictive to allow for a database similar to the national Automated Fingerprint Identification System (“AFIS”). Whereas fingerprint legislation generally empowers police to take fingerprints for the purpose of future identification, legislation permitting blood sampling is much more restrictive. For example, it is generally necessary to demonstrate “*reasonable cause*” or that material evidence would be provided of the individual’s guilt or innocence of a particular crime, to justify the taking of blood from a person in custody. To establish a fully effective database police would need power to collect samples of genetic material for DNA profiling with a view to “*future*” identification not merely for suspect identification for a “*particular crime*” under investigation.²⁹

²⁸ One example of the role of DNA profiling in public safety is its use in Post Conviction Testing. Post Conviction Testing is used in this Report to refer to the sampling of persons currently undergoing a term of imprisonment or detention and who have previously been found guilty of an offence for which a forensic sample could have been obtained, had the relevant legislation been in place at the time of conviction. Post Conviction Testing can link convicted offenders with offences, other than that for which they are serving a term of imprisonment, stimulate investigative work and facilitate prosecution. If the offender is further convicted then early release can be prevented.

²⁹ See further McLeod, N “Legal Impediments to a National DNA Databank”, *Australian Journal of Forensic Sciences*, 23/2 -3 -4 (1991) pp. 22 - 23. The author also notes the ramifications of the Commonwealth *Privacy Act 1988* on the construction of DNA databases.

4.3 The collection of samples of genetic material from persons, are generally categorised as “intimate” or “non-intimate”. “Intimate procedures” usually include an examination of, taking of a sample from or the taking of a photograph of: the breasts of a female, the genital or anal areas or the buttocks, the taking of a sample of blood, and taking of a sample of pubic hair. “Non-intimate procedures” generally include an examination of, the taking of a sample from, or photograph of parts of the body other than those which are intimate (eg: the breasts of a female or the genital or anal areas), the taking of a sample of hair other than pubic hair, and taking of a sample from a nail or under a nail. Other procedures, such as the taking of a sample by buccal swab, have been treated as intimate by some jurisdictions and non-intimate by others.³⁰

4.4 The use of DNA evidence and the establishment of a DNA database in other jurisdictions has had many effects on crime and criminal law enforcement, some reported and some anecdotal. The Association of Chief Police Officers, United Kingdom, has indicated that forensic science can:³¹

- eliminate suspects;
- link incidents;
- inform inquiries;
- corroborate suspicions; and
- more rarely, directly identify an “unknown”.

A few of these aspects are canvassed below.

Clearance rate of crime

4.5 Rapid growth in the clearance rate of crime in the United Kingdom has been achieved through the use of new technology, DNA sampling and other measures. In the words of the former Western Australian Police Commissioner, Mr Robert Falconer: “*The British have found that these bits and pieces and smudges which have never before taken us anywhere can now lead us back to people.*”³²

³⁰ A buccal swab involves the scraping of a cotton bud or a buccal comb against the inside cheek of a person’s mouth in order to obtain some of the mouth (buccal) cells for analysis.

³¹ Association of Chief Police Officers, *Tackling Crime Effectively - Management Handbook Vol 2*, United Kingdom, May 1996.

³² *Evidence*, Mr Robert Falconer, former Commissioner of Police, Western Australian Police Service, 1 April 1998, p. 5.

- 4.6 The Committee was informed by Mr Ben Gunn, Chief Constable, Cambridgeshire Constabulary, that use by police of a recent report on police practices, has resulted in greater resolution of crime.³³ He also notes that English counties experiencing greater crime resolution generally correlate with those counties which utilise DNA matching in their criminal investigations. However, there are other things that reinforce the value of DNA as a investigative tool, for example, the training of police officers in crime scene preservation and sampling procedures. While it is not possible to attribute higher crime resolution solely to DNA use, the Committee was persuaded that it is more than mere coincidence.
- 4.7 Mr Alastair Ross, Director of the National Institute of Forensic Science in Australia, told the Committee that there had been an initial focus on DNA evidence being used to solve crimes of violence such as murder and rape. However, figures in Britain since setting up the DNA database three years ago showed police had markedly higher clearance rates for “*volume crimes*” such as burglary.³⁴ In the words of Mr Ross “[L]et’s face it these are the sorts of crimes that affect most Australians”.³⁵
- 4.8 In the United Kingdom the results have been impressive. Since the United Kingdom database became operational in April 1995, of 494,291 suspect profiles loaded onto the database, there have been 35,881 matches of suspect to crime scene and 6,698 matches of crime scene to crime scene.³⁶
- 4.9 The Committee notes the comments of the former Police Commissioner, Mr Robert Falconer, during the 1999/2000 Estimates Hearings of the Legislative Council that: “*[I]n this country [Western Australia] the clearance rate for house burglary is between 12 and 15 per cent, and in the last figures it reached 18 per cent and the people are critical of that. That is the best we can do in the current environment and with the*

³³ Association of Chief Police Officers, *Tackling Crime Effectively - Management Handbook Vol 2*, United Kingdom, May 1996.

³⁴ *Evidence*, Mr Alastair Ross, Director of the National Institute of Forensic Science in Australia 15 April 1998, p. 1.

³⁵ As reported by the *West Australian* newspaper, “DNA key to solving crime”, 8 September 1998.

³⁶ Figures obtained from the Forensic Science Service, United Kingdom, *National DNA Database Weekly Update, Week No. 197*. As at 23 January 1999 there were some 46,500 crime scene samples retained on the database. The total number of crime scene samples loaded onto the database was not available as crime scene profiles may be removed when the crime is solved.

*existing legislation. The Brits are getting into low 40 per cent figures for what they call volume crime, such as burglary. In essence it is because of the use of DNA legislation and technology.”*³⁷

Reduction of recidivism and a deterrent effect

- 4.10 Criminologists and people in the criminal justice system have long mooted that three groups of offenders feature high on the list of recidivism: armed robbers, burglars and sex offenders.³⁸ It has been suggested that the use of DNA as an investigative tool will have a major deterrent effect on these and other groups of offenders.
- 4.11 It is difficult to assess the benefit of DNA as a deterrent to criminal activity. It is probable that the real deterrent effect is in the higher clearance rates. The most powerful deterrent is the probability of being caught. Hence, as public awareness of the success of DNA profiling in criminal detection grows, so criminals become cautious of committing offences like burglary or criminal assaults, where they know that small body fluid stains, body tissues or even hairs left at crime scenes or on their victims, may provide traceable DNA profiles and thus increase the probability of their being caught.³⁹
- 4.12 Countries using DNA matching are experiencing declines in crime rates. It is not possible to apportion the contribution of DNA matching to the declines as other affecting factors include demographic changes, improved economic conditions and greater emphases on crime prevention and community policing.⁴⁰
- 4.13 There is anecdotal evidence in the United Kingdom that 7-8 per cent of the population is responsible for about 70-80 per cent of crime.⁴¹ When the DNA database was

³⁷ *Hansard*, Standing Committee on Estimates and Financial Operations, 1999/2000 Estimates Hearings, Legislative Council, Tuesday 1 June 1999, Mr Robert Falconer, former Commissioner of Police.

³⁸ *Evidence*, Mr Robert Falconer, former Commissioner of Police, Western Australian Police Service, 1 April 1998, p. 4.

³⁹ Also noted in the MCCOC Report at p. 2.

⁴⁰ As noted in the MCCOC Report at p. 2.

⁴¹ Gunn, DG, Chief Constable, Cambridgeshire Constabulary, United Kingdom, *National DNA Database: Presentation to Australian Police Officers*, Melbourne, 5 August 1997, p. 30.

established, the ability to compare suspect samples against unsolved crimes proved very successful. It enabled police to focus their inquiries and identify repeat offenders.

- 4.14 Reported statistics illustrate why such a focus on repeat offenders can prove effective. A study of sex offenders between 1975 and 1989 by the University of Western Australia's Crime Research Centre, found that of the 238 rape offenders able to be followed up, 96 had returned to prison at least once following their rape offence, and of these 10 had committed rape again. A further 10 had committed other sex offences by the survey date. Sixty cases had records of imprisonment for violent offences either before or after their imprisonment for rape. In all, 75 repeated an offence of violence or sex (or both), indicating high risks of dangerous re-offending, bearing in mind that only known transgressions punished by prison terms are recorded.⁴²
- 4.15 The above report lends some support to an article published by the *West Australian* newspaper which stated that a British survey had found that 90 per cent of sex offenders had convictions for lesser offences such as burglary; and 50 per cent of the males charged with murdering young women who were abducted off the streets had convictions for relatively minor crimes of assault.⁴³
- 4.16 That same newspaper article stated that in New Zealand, a case study of 32 intruder rapists had found that 28 of them had previous convictions for burglary. Thirteen were serial offenders and 12 had previous convictions for rape.⁴⁴
- 4.17 Along with clearance of unsolved crimes, the deterrent effect is one of the major justifications for Post Conviction Testing.⁴⁵ This will be examined in Chapter 8.

Elimination of persons as suspects

- 4.18 It is important to remember that DNA profiling is not just inclusionary: it is exclusionary as well. That DNA profiling can exclude a suspect is of considerable

⁴² Broadhurst, R, and Maller, R, *Sex Offending and Recidivism*, Crime Research Centre, University of Western Australia, 1991 (reprinted 1994), p. 52.

⁴³ As reported in the *West Australian* newspaper, "Gene lists carve into United Kingdom crime", 10 August 1998.

⁴⁴ As reported in the *West Australian* newspaper, "Gene lists carve into United Kingdom crime", 10 August 1998.

⁴⁵ Post Conviction Testing is explained and defined at footnote 28 above.

value not only to the suspect, but also to the police who may then pursue different lines of enquiry.

- 4.19 If the DNA profile of crime scene evidence does not match the profile of the suspect, the suspect is exonerated. DNA techniques have proven extremely useful in excluding suspects. The FBI finds exclusions in about 30 per cent of the comparisons it conducts, making DNA-typing a major source of protection for the innocent. However, it does not necessarily follow that the match of a crime scene profile with a suspect profile proves guilt.
- 4.20 Although a DNA mismatch means innocence, a DNA match does not mean guilt. If the DNA profiles from the evidence and a suspect are judged to match, the strength of this evidence is measured by a “*match probability*”, the *likelihood that an individual chosen randomly from an appropriate population will match the crime profile*. A good deal of controversy has centered on the methods for calculating this match probability. The Committee discusses this issue in Chapter 16.⁴⁶
- 4.21 In the United States of America, DNA has been used extensively to establish innocence after trial. Individuals convicted after jury trials and sentenced to long prison terms, most serving on average 7 years before their release, have been exonerated by DNA evidence produced in special appeals.⁴⁷ This issue is discussed at paragraphs 8.149 - 8.152 of the Report.

Investigative tool - narrowing the field

- 4.22 In the United Kingdom, United States of America and Germany, the DNA database is used as a tool for investigation. If a match or “*hit*” is found on the database, police approach the laboratory for a report to be used at court to obtain a fresh sample for analysis for evidentiary purposes. The fact that there has been a “*hit*” on the database is not a matter which is presented at trial. The requirement for a fresh evidentiary or “*casework*” sample negates the requirement to prove that the former database sample, which may have been taken many years before, was in fact a sample from the suspect. Such evidentiary difficulties have been experienced by the police in respect of fingerprints.

⁴⁶ See also paragraphs 7.46 - 7.48.

⁴⁷ US Department of Justice, Office of Justice Programs, *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial*, National Institute of Justice, June 1996.

- 4.23 A database can enable police to establish the serial nature of crimes by aggregation of clues and leads which they may not otherwise associate. A database can also quickly identify travelling criminals and dual identities. Anecdotal evidence provided to the Committee suggested that DNA evidence alone was the trigger for more thorough investigations into individuals who were ultimately convicted of the crime. Without the DNA evidence the individuals may not have been investigated for further incriminating evidence.
- 4.24 The Committee was informed that DNA profiling techniques in the United Kingdom has also lead to pleas of guilty - when suspects are told that a link exists between them and an unsolved crime, they tend to admit to the crime rather than take it through to trial.⁴⁸

Other Observations

- 4.25 The Committee was repeatedly informed that the integrity of any evidence is paramount and it recognises that there have been allegations, whether or not proven, that DNA evidence may be tampered with or planted by dishonest individuals. Allegations of tampering with DNA evidence may still occur in much the same way as allegations have been made with other evidentiary items and processes in the past.
- 4.26 The Committee was also informed that mistakes in the use of forensic evidence have lead to prominent miscarriages of justice, illustrated by the case of the "Birmingham Six" in the United Kingdom.⁴⁹ That case did not involve DNA evidence but it

⁴⁸ *Evidence*, Mr Alastair Ross, Director of the National Institute of Forensic Science in Australia, 15 April 1998, pp. 28-29.

⁴⁹ *McIlkenny & Ors* (1991) 93 Cr. App. R 287. In 1975 McIlkenny and others were convicted of 21 counts of murder, arising out of the IRA bombing of two public houses in Birmingham in which 21 people were killed and 162 injured. Their appeal against conviction was dismissed. In 1987 the Home Secretary referred the case to the Court of Appeal on the ground that there was fresh scientific evidence and fresh evidence that the appellants had been beaten following their arrests. This appeal was likewise dismissed. The case was again referred by the Home Secretary as a result of further fresh evidence. The appeal was allowed and the convictions quashed as being both unsafe and unsatisfactory.

The appeal court noted that whilst there was no doubt that based on the evidence at trial, the case against the appellants was convincing; equally there was no doubt that the case, as left to the jury depended heavily on scientific evidence of an expert and police evidence of interviews

emphasised the requirement for the utmost integrity in the collection and analysis of forensic evidence.

- 4.27 Further, in 1996 and 1997 the Federal Bureau of Investigations' Forensic Science Research and Training Centre was the subject of an inquiry by the USA Department of Justice Inspector General. The inquiry was prompted by the claims of a whistleblower, concerning a number of alleged security breaches including tampering with samples in the course of DNA analysis.⁵⁰
- 4.28 In mentioning these issues the Committee does not intend them to detract from the valuable use of DNA evidence in the investigation of crime. Rather the Committee recognises the need for suitable safeguards to protect individual rights and civil liberties in the use of DNA evidence and the establishment of a DNA database. Various safeguards are discussed further in this Report.

Conclusion

- 4.29 In recognising the benefits of DNA profiling and the establishment of a DNA database for crime investigation, detection, reduction and deterrence, the Committee emphasises that it is not being promoted as a panacea for crime. The Committee recognises that prevention of crime (for example through educational and social support programs) and the investigation of crime through the more traditional methods are still essential to overall crime management. The collection of DNA evidence should be seen as an addition to good basic detective work, rather than as a replacement for it.
- 4.30 However, the Committee considered that the evidence is of such a positive nature that, with the appropriate safeguards to balance personal liberty with the public interest in the resolution of crime, DNA profiling and the establishment of a DNA database is desirable.

with the appellants. So far as the fresh scientific evidence was concerned, it at least threw grave doubt on the prosecution expert's evidence at trial, if not to destroy it altogether. The scientific evidence related to the type of tests administered to the appellants which might show that the appellants, or some of them, had been in recent contact with high explosive. Different tests yielded differing results, resulting in differing interpretations.

⁵⁰

46th Report, paragraph 2.8.

Observations and Recommendations***How effective is a DNA database?***

1. The Committee considers that the Western Australian public is entitled to expect that criminals are identified, apprehended and brought before the courts as expeditiously as possible. It is in this context that the Committee recognises the increasingly important role of forensic science in criminal investigation and public safety. Equally it recognises that suitable safeguards must be in place to protect individual rights and civil liberties.
(Paragraph 4.1)
2. The Committee finds that a DNA database is an effective tool for resolving criminal investigations and eliminating persons from inquiry. The Committee notes that a DNA database may prevent recidivism by acting as a deterrent to criminals.
(Chapter 4, Chapter 7 paragraph 7.1.)

Chapter 5

FORENSIC PROCEDURES AND DNA PROFILING: AUSTRALIAN EXPERIENCE

- 5.1 This Chapter highlights some aspects of the relevant legislation in each Australian jurisdiction examined in the course of the Committee's inquiries. It is not exhaustive and recourse may be had to the legislative provisions if more detail is required. The range of legislative response reflects the different balances of political, moral and social factors in each jurisdiction. These balances change as society and its need and aspirations change.
- 5.2 In all States, except Victoria, legislation originally only contained general powers for police to examine persons who had been charged with an offence. In Victoria the legislation also empowered an examination of someone "*reasonably suspected*" of committing an offence. Subsequent amendments expressly empowered police to take a body sample subject to certain conditions, but such samples could be used only in respect of the particular offence under investigation. The States and Territories have now enacted, or are in the process of enacting, legislation which enables profiles obtained from an examination of suspects in custody, including convicted offenders, to be compiled and used for future investigations, Post Conviction Testing and, in some cases, examination of suspects not in custody but "*reasonably suspected*" of having committed offences.
- 5.3 The Committee visited and made detailed inquiry with regard to South Australia and Victoria. On occasion the Committee makes reference to other States and Territories where there is an issue or position of interest.

Western Australia

- 5.4 For relevant purposes section 236 of the *Criminal Code* (Western Australia) currently provides that:⁵¹

⁵¹ *Criminal Code* (Western Australia), section 236, as amended by the *Criminal Law Amendment Bill (No 1) 1998* (Western Australia).

*“When a person is in lawful custody **upon a charge** of committing any offence of such a nature and alleged to have been committed under such circumstances that there are **reasonable grounds for believing that** a sample of the person's blood, hair (from any part of the body), nails or saliva, or of any matter on the person's body or obtainable by a buccal swab, will afford **evidence as to the commission of the offence**, it is lawful for -*

- a. a legally qualified medical practitioner; or*
- b. a nurse as defined in the Nurses Act 1992,*

acting at the request of a police officer, and for any person acting in good faith in aid of, and under the direction of, the person acting at the request of the police officer, to take the sample from the person so in custody and to use such force as is reasonably necessary for that purpose.”

- 5.5 Further, where a person is found not guilty of an offence in respect of a sample which has been taken under that section, and the person requests that the sample and any genetic information arising from the taking of the sample be destroyed, the sample and any genetic information is to be destroyed in his presence after the time for an appeal from the finding has expired or an appeal from the finding has been resolved in his favor.
- 5.6 When considering the legislation of other States and Territories it should be noted that Western Australian legislation:
- a. does not restrict a medical examination to any category of offence;
 - b. does not differentiate between samples which are intimate or non-intimate;
 - c. does not require informed consent or a court order to compulsorily take samples;
 - d. does allow the taking of samples using reasonable force if necessary; and
 - e. does not restrict the determination of “*reasonable grounds for believing that a sample ... will afford evidence as to the commission of the offence*”, to a senior police officer. Therefore the investigating officer may determine whether there are reasonable grounds before requesting the forensic sample.
- 5.7 It is understood that, as at the date of this Report, the drafting of legislation regarding forensic procedures and databases is in progress.

Commonwealth

- 5.8 In July 1995 the Standing Committee of Attorneys General endorsed the *Forensic Procedures Model Provisions Bill* (“1995 Model Bill”) prepared by the Model

Criminal Code Officer's Committee Secretariat of the Standing Committee of Attorneys General ("MCCOC").

- 5.9 In 1998 the Commonwealth enacted the *Crimes Amendment (Forensic Procedures) Bill 1997* substantially adopting the 1995 Model Bill. Generally forensic procedures are of important but limited application to Commonwealth criminal law. The investigation of offences against the person usually is not carried out by federal law enforcement authorities. State and Territory police usually conduct such investigations. Accordingly the provisions of the *1999 Model Bill* will have greater import where adopted and enacted by the States and Territories.
- 5.10 So far as the States and Territories are concerned, the 1995 Model Bill has been substantially adopted by Victoria, South Australia and Queensland in the *Crimes (Amendment) Act 1997* (Victoria) (amending Part 4 of the *Crimes Act 1958*), *Criminal Law (Forensic Procedures) Act 1998* (South Australia) and *Police Powers and Responsibilities Act 1997 - Part 9* (Queensland) respectively.
- 5.11 Since the Committee's inquiries overseas and interstate, in May 1999, MCCOC released a discussion paper appending a revised draft model forensic procedures and proposed national DNA database bill for discussion ("MCCOC Report").⁵² The 1995 Model Bill focused on the collection and use of forensic samples from suspects, but did not provide for the comprehensive procedures required to establish a national DNA database. The MCCOC Report proposed that new provisions be added to the 1995 Model Bill and legislation based on that Bill. For the purposes of this Report the proposed amended Bill (as released with the MCCOC Report in May 1999) shall be referred to as the *1999 Model Bill*.

The Committee noted that the consultation period for the *1999 Model Bill* has ended and understands that the Bill is undergoing further redrafting.⁵³ As any observations made in this Report are in relation to the *1999 Model Bill* as published with the MCCOC Report in May 1999, to some degree they may be superseded by further amendment.

⁵² Model Criminal Code Officers Committee of the Standing Committee of Attorneys General, *Report: Model Forensic Procedures Bill and the Proposed National DNA Database*, May 1999.

⁵³ Discussions of Ms Mia Betjeman, Advisory/Research Officer to the Committee with Mr Geoff McDonald, Attorney General's Department (Commonwealth) on 3 August 1999.

- 5.12 The *1999 Model Bill* provides for the compelled provision of forensic samples, their storage, use and destruction, subject to safeguards such as judicial scrutiny, informed consent and the protection of those who can be regarded as the more vulnerable groups in the community - children and incapable persons.
- 5.13 In summary the *1999 Model Bill*:
- a. contains a procedure for taking samples from any suspect - someone suspected on reasonable grounds as having committed an indictable offence;⁵⁴
 - b. allows samples to be taken by informed consent and provides a procedure for this;⁵⁵
 - c. allows “*non-intimate samples*” (loose samples, hair, fingerprints) to be taken compulsorily by order of a police officer of the rank of sergeant or above where the “*person is in custody*” and there are reasonable grounds to believe the suspect committed the offence, and the procedure is likely to produce relevant evidence and the procedure is justified in all the circumstances;⁵⁶
 - d. allows “*non-intimate samples*” to be taken compulsorily where the person is a suspect but “*not in custody*” if the police obtain an order from a magistrate;⁵⁷
 - e. allows “*intimate samples*” to be taken compulsorily where the person is a suspect, and “*whether or not he or she is in custody*”, if the police obtain an order from a magistrate. Intimate samples include the examination of the genital or anal area, the buttocks or female breasts, taking blood samples, taking of a mouth swab, pubic hair or a dental impression;⁵⁸

⁵⁴ *1999 Model Bill*, clauses 1 & 4.

⁵⁵ *1999 Model Bill*, Division 3.

⁵⁶ *1999 Model Bill*, Division 4.

⁵⁷ *1999 Model Bill*, Division 5.

⁵⁸ *1999 Model Bill*, Division 5.

- f. provides for interim orders by a magistrate where the forensic procedure must be carried out without delay;⁵⁹
- g. prescribes rules for the carrying out of forensic procedures (Division 6) and makes provision to deal with the cautioning, informed consent and withdrawal of consent regarding suspects (clauses 6, 9 and 10) and volunteers (clause 60, 61 and 62) and the use of force (clause 35 and also refer to clause 36);
- h. stipulates that, where the sample is taken other than in accordance with the procedures, the sample and any record of the results (including DNA data) become inadmissible unless the accused agrees or a court is satisfied that it is justifiable;⁶⁰
- i. creates an offence for a person to obstruct a forensic procedure, but specifically provides that an expert (e.g. medical practitioner) is not required to carry out the procedure;⁶¹
- j. confers upon the police the right to ask for and obtain with consent forensic samples from “*people who are not suspects*”;⁶²
- k. permits the conduct of Post Conviction Testing on a person convicted of a “*serious offence*” (being an indictable offence punishable by a maximum penalty of 5 years or more imprisonment), and, in the case of fingerprints, an indictable offence, if that person is in prison or another place of detention. Any objection by the prisoner must be determined by a court;⁶³ and
- l. includes requirements for the automatic destruction of forensic material by the removal of identifying data (Division 10), and the removal of identifying data on the DNA identification database (clause 85).

⁵⁹ 1999 Model Bill, Division 5, Subdivision 3.

⁶⁰ 1999 Model Bill, Division 9.

⁶¹ 1999 Model Bill, Division 1.

⁶² 1999 Model Bill, Division 1.

⁶³ 1999 Model Bill, Division 7.

New South Wales

5.14 The New South Wales *Crimes Act 1900* was amended by the *Criminal Legislation (Amendment) Bill 1995* (New South Wales) to reverse the decision of *Fernando v Commissioner of Police* (1995) 78 A Crim R 64 in which the court held that the legislation empowered external but not internal examinations and did not enable the drawing of blood.

5.15 Section 353A(2) of the *Crimes Act 1900* (New South Wales) states that:

“ when a person is in **lawful custody** upon a charge of committing any crime or offence which is of such a nature and is alleged to have been committed under such circumstances that there are reasonable grounds for believing that an examination of his or her person will afford evidence as to the commission of the crime or offence, any legally qualified medical practitioner acting at the request of any officer of police of or above the rank of sergeant, and any person acting in good faith in his or her aid and under his or her direction, may make such an examination of the person so in custody as is reasonable in order to ascertain the facts which may afford such evidence.” (Committee emphasis).

5.16 The *Crimes Act 1900* (New South Wales) was amended by the *Criminal Legislation (Amendment) Bill 1995* (New South Wales) which provided that:

- a. a person authorised to make a medical examination of a person in lawful custody could take samples of the person's blood, saliva and hair;⁶⁴
- b. evidence concerning the samples could be given only in proceedings concerning the crime or offence in relation to which the samples were taken and the samples must be destroyed as soon as practicable after the conclusion of the proceedings and the exhaustion of any right of appeal concerning the crime or offence; and⁶⁵
- c. samples could be taken without the consent of the person in lawful custody.⁶⁶

⁶⁴ *Crimes Act 1900* (New South Wales), section 353A(3A).

⁶⁵ *Crimes Act 1900* (New South Wales), section 353A(3B).

⁶⁶ *Crimes Act 1900* (New South Wales), section 353A(3D).

- 5.17 No additional safeguards such as informed consent and the requirement for a court order to compulsorily take a sample were added to the existing law.
- 5.18 Similarly to Western Australia, at the time of the introduction of the amendment on 1 June 1995, the Attorney General of New South Wales stated that it was an interim measure only pending the introduction of a more comprehensive legislative regime dealing with forensic procedures.
- 5.19 On 4 March 1999⁶⁷ the Attorney General, Hon JW Shaw QC MLC foreshadowed legislation that would:
- a. give police the power to enforce the taking of forensic samples from a person on a serious charge, once the person had been arrested or otherwise had proceedings commenced against them;
 - b. require that, where consent had not been given, and the forensic procedures were defined as intimate, the forensic procedure must be ordered and supervised by the Court. Intimate procedures include the taking of blood;
 - c. provide that, if consent had not been given, and the forensic procedures were defined as non-intimate, they could be authorised by a police officer of or above the rank of sergeant; and
 - d. enable police to apply to a court for direction that a person already convicted of a serious offence must supply a blood sample.⁶⁸

As at the date of this Report the proposed legislation has not been finalised however the Committee understands that it is likely to follow the *1999 Model Bill*.

- 5.20 By way of preliminary comment the Committee noted that:
- a. the existing New South Wales legislation is in terms similar to the existing Western Australian legislation - it is very general, applies only to suspects in

⁶⁷ The Attorney General, Hon JW Shaw QC MLC, press release, “*Police have power to take forensic samples*”, 4 March 1999.

⁶⁸ *Crimes Act 1900* (New South Wales), section 353A (3C) and Schedule 11, clause 15.

custody, does not allow Post Conviction Testing and has no inbuilt safeguards;

- b. the foreshadowed legislation indicates that New South Wales will elect to classify types of forensic procedures as either intimate and non-intimate and introduce a requirement for a court order in cases of non-consent to compulsorily conduct an intimate procedure; and
- c. no indication has been given as to whether a buccal swab will be classified as an intimate or non-intimate forensic procedure. The Committee understands that discussions are still occurring in relation to this issue.

South Australia

5.21 South Australia has a forensic samples section in its criminal code in terms similar to Western Australia's *Criminal Code*. The size of South Australia, and the scattering of its population in remote areas means that many issues which face South Australia in implementing its forensic procedures may be applicable to Western Australia.

5.22 The South Australian Parliament enacted the *Criminal Law (Forensic Procedures) Act 1998* (South Australia), containing extensive safeguards surrounding the taking of forensic samples. This Act, which was proclaimed on 25 July 1999, is closely based on 1995 Model Bill. The 1995 Model Bill and other Commonwealth initiatives are discussed at paragraphs 5.8 - 5.13 of the Report.

5.23 The *Criminal Law (Forensic Procedures) Act 1998* (South Australia):

- a. provides that samples may be taken from a person “*under suspicion*”⁶⁹ which is wider than the previous legislative provisions requiring that the person be in lawful custody on a charge of committing an offence;⁷⁰

⁶⁹ *Summary Offences Act 1953* (South Australia), section 4: A person is “*under suspicion*” if the police officer by or on whose instructions a forensic procedure is to be carried out on the person suspects the person, on reasonable grounds, of having committed a criminal offence.

⁷⁰ *Summary Offences Act 1953* (South Australia), section 81(2).

- b. provides a number of rights to the suspect⁷¹ including:
- to give informed consent orally or in writing;⁷²
 - to be present, be legally represented and to make submissions at an application for an order that the sample be provided.⁷³ (This contrasts with the Victorian legislation⁷⁴);
 - to be treated humanely and with a minimum of physical harm, embarrassment or humiliation;⁷⁵
 - to have their chosen medical practitioner present at most procedures; and
 - to limit the number and sex of people present when intimate samples are being obtained;⁷⁶
- c. distinguishes between intimate, intrusive and non-intrusive procedures. More rigorous protections apply to “*intrusive procedures*”, which by definition includes “*intimate procedures*”. “*Intrusive procedures*” include the taking of a sample of blood; a forensic procedure involving intrusion into

⁷¹ The *Summary Offences Act 1953* (South Australia) already provided that the police officer intending to request a medical practitioner to examine a person in custody had specified obligations including: informing the person in custody of their intention; inquiring whether they desired to be examined also by another medical practitioner and if so to promptly take all reasonable steps to inform the practitioner by telephone allowing a reasonable time for the practitioner to attend at the police station.

⁷² Informed consent includes having their own medical practitioner and the ability to communicate with a legal practitioner: *Criminal Law (Forensic Procedures) Act 1998* (South Australia), sections 8, 15 and 16.

⁷³ *Criminal Law (Forensic Procedures) Act 1998* (South Australia), sections 24(1) & 25(3).

⁷⁴ Refer to paragraph 5.26.

⁷⁵ *Criminal Law (Forensic Procedures) Act 1998* (South Australia), Part 2, Division 3, section 10(1).

⁷⁶ *Criminal Law (Forensic Procedures) Act 1998* (South Australia), Part 2, Division 3, sections 10 (2) & (3).

- a person's mouth (which would include buccal swabs), and “*intimate forensic procedures*” which include the examination of and taking samples from genital or anal areas, the buttocks or, in the case of a female, the breasts;⁷⁷
- d. unless a suspect gives informed consent, an intrusive sample (which includes intimate samples), can be taken only on the order of a magistrate;⁷⁸
 - e. if a suspect is in lawful custody and does not consent, a senior police officer may order a non-intrusive forensic procedure.⁷⁹ A non-intrusive forensic procedure does not include a buccal swab;
 - f. contains procedures for Post Conviction Testing;⁸⁰
 - g. contains special procedures to protect children and adults incapable of giving informed consent;⁸¹
 - h. allows for the making of interim orders by electronic means where the taking of the sample must be made without delay;⁸²
 - i. legislates for the destruction of and access to the sample and results;⁸³
 - j. renders evidence inadmissible before a court where forensic procedures have taken place in violation of the provisions, unless the court is satisfied that it

⁷⁷ *Criminal Law (Forensic Procedures) Act 1998* (South Australia), Part 1.

⁷⁸ *Criminal Law (Forensic Procedures) Act 1998* (South Australia), Part 3, Division 3, sections 18(1) - (3).

⁷⁹ *Criminal Law (Forensic Procedures) Act 1998* (South Australia), section 18.

⁸⁰ *Criminal Law (Forensic Procedures) Act 1998* (South Australia), section 30. For a detailed discussion refer to Chapter 8 paragraph 8.114 onwards.

⁸¹ *Criminal Law (Forensic Procedures) Act 1998* (South Australia), Part 3, Division 2, section 15(6).

⁸² *Criminal Law (Forensic Procedures) Act 1998* (South Australia), Part 3, Division 4, section 20(3).

⁸³ *Criminal Law (Forensic Procedures) Act 1998* (South Australia), Divisions 5 and 6.

should be admitted. The South Australian legislation lists a number of factors that can be taken into account. The probative value of the evidence does not, by itself, justify admissibility; and⁸⁴

- k. provides for the maintenance of a database of information obtained only in relation to persons who have been found guilty of an offence.⁸⁵

Victoria

5.24 Victoria was the first State in Australia to enact comprehensive legislation dealing with forensic procedures in the *Crimes Act 1958* (Victoria). *The Crimes (Amendment) Act 1993* (Victoria), revised that Act following the publication of the *Report on Body Samples and Examinations* by the Victorian Consultative Committee on Police Powers on Investigation in 1989 (“the Coldrey Report”). These provisions were further strengthened by the *Crimes (Amendment) Act 1997* (Victoria).

5.25 The Victorian legislation provides that:

- a. a member of the police force may request a “suspect” to undergo a forensic procedure - “only if there are reasonable grounds to believe that the procedure would tend to confirm or disprove the involvement of the suspect in the commission of an indictable offence and the suspect is suspected on reasonable grounds of having committed the indictable offence, has been charged with the indictable offence, or has been summonsed to answer a charge for the indictable offence”;⁸⁶

⁸⁴ *Criminal Law (Forensic Procedures) Act 1998* (South Australia), Part 5, section 45(2).

⁸⁵ *Criminal Law (Forensic Procedures) Act 1998* (South Australia), section 49.

⁸⁶ *Crimes Act 1958* (Victoria), section 464R(1). A “forensic procedure” is defined to mean:

“The taking of a sample from any part of the body, whether an intimate or non-intimate sample or any other type of sample, or the conduct of any procedure on or physical examination of the body but does not include the taking of a fingerprint.”

The “intimate part of the body” is defined to mean the genital or anal region of the male or female, or the breast of a female. The “non-intimate part of the body” is defined to mean any part of the body other than an intimate part. An “intimate sample” is defined to mean a blood sample; a sample of pubic hair, including the root if required; a swab, washing or sample taken from the external genital or anal region of a male or female, or from the breast of a female; a

- b. a forensic procedure may be conducted on a suspect if the suspect gives his or her informed consent.⁸⁷ If no consent is given or the person is incapable of giving consent, the police officer may apply to a magistrates' court for an order directing the person to undergo the compulsory procedure;⁸⁸
- c. interim orders may be made to a Court, in respect of forensic procedures, other than blood samples, if the Court is satisfied by telephone application that the sample or evidence sought to be obtained is likely to be lost if the making of the application is delayed;⁸⁹
- d. after a Court order has been obtained reasonable force may be used to conduct the forensic procedure;⁹⁰

sample of saliva; a scraping taken from the mouth; and a dental impression. A “*non-intimate sample*” is defined to mean a sample of hair, other than pubic hair, including the root if required; a sample of matter taken from under a fingernail or toenail; and a swab, washing or sample taken from any external part of the body other than the genital or anal region of a male or female, or the breast of a female: *Crimes Act 1958* (Victoria), section 464(1).

⁸⁷ “*Informed consent*” requires that a police officer inform them of certain matters in language likely to be understood by them; of the purpose for which the procedure is required; of the nature of the procedure sought to be conducted; that it may be conducted by or in the presence of a doctor or dentist, as appropriate, of their choice; of the offence which they are suspected of having committed, or with which they have been charged or summonsed; that the procedure could produce evidence to be used in a court; and that they may refuse to undergo the procedure but that if they do refuse, an application may be made to a magistrates' court: *Crimes Act 1958* (Victoria), sections 464S(1)(a)-(g).

⁸⁸ *Crimes Act 1958* (Victoria), section 464T. The Court may make an order directing the person to undergo the procedure if satisfied on the balance of probabilities of a variety of matters. It must be persuaded that the person is a relevant suspect and that there are reasonable grounds to believe that the person has committed the offence of which the application is made. In respect of the application for any form of forensic procedure, the Court must further be satisfied that there are reasonable grounds to believe that the conduct of the procedure on the person may tend to confirm or disprove his or her involvement in the commission of the offence and that they have refused their consent or been incapable of providing consent by reason of mental impairment. Finally, the Court must be satisfied that “*in all the circumstances, the making of the order is justified*”.

⁸⁹ *Crimes Act 1958* (Victoria), section 464v(5).

⁹⁰ *Crimes Act 1958* (Victoria), section 464ZA.

- e. an intimate sample other than a dental impression, may be taken or conducted only by a medical practitioner or a nurse, if practicable, of the same sex as the suspect. A dental impression may be taken only by a dentist. A non-intimate sample may be taken only by a medical practitioner, a nurse or an “*authorised person*”. An authorised person is one authorised by the Chief Commissioner of Police and could therefore include a police officer. A person from whom an intimate sample is to be taken may request that a medical practitioner or a nurse or, if a dental impression is to be taken, a dentist of her or his choice, take the sample or conduct the examination or be present during the forensic procedure;⁹¹
- f. there are significant limitations on the circumstances in which forensic procedures may be carried out on children. A police officer is precluded from requesting either by consent or by application to the court that a child undergo a forensic procedure if the child is under 10. In addition, a police officer must not request a child between the ages of 10 and 17 to undergo a forensic procedure unless the Children's Court has made an order;⁹²
- g. Post Conviction Testing⁹³ to provide for the taking of forensic samples from criminals convicted after July 1 1998 and any serving prisoner if found guilty of a “*forensic sample offence*” is allowed. A “*forensic sample offence*” is one contained in Schedule 8 of the *Crimes Act 1958* which includes all sexual offences, injury offences and other offences such as robbery, burglary and drug offences (“Schedule 8 offence”);
- h. persons can volunteer to give samples to provide information for inclusion in a computerised database.⁹⁴ A facility is established for a computerised database although it is not clear who might have access;

⁹¹ *Crimes Act 1958* (Victoria), section 464Z.

⁹² *Crimes Act 1958* (Victoria), section 464U.

⁹³ *Crimes Act 1958* (Victoria), section 464ZF, inserted by *Crimes (Amendment) Act 1997* (Victoria). For a detailed discussion of Post Conviction Testing refer to paragraph 8.114 onwards.

⁹⁴ *Crimes Act 1958* (Victoria), section 464ZFGB.

- i. there are extensive sections relating to automatic destruction and retention of samples and other forensic material. Notice of destruction need be given only if the person requests it.⁹⁵ Although the sample is destroyed only identifying data is removed from the DNA profile. The non- identifying information can still be used for the statistical database;⁹⁶
- j. it is an offence to use, make or cause to be used or made any notes relating to a forensic procedure where the sample and record were required to be destroyed;⁹⁷ and
- k. evidence may still be admissible notwithstanding procedural irregularity in the obtaining or analysis of the sample. The court may have regard to the probative value of the evidence, and whether there is evidence of equivalent value available by other means.⁹⁸

5.26 The Victorian legislation has been criticised on several grounds:

- a. It is argued by some that, on any application to the court for an order that a suspect undergo a forensic procedure, rights to natural justice are severely curtailed.⁹⁹ Save in circumstances of emergency, an application to the court for a compulsory forensic procedure may be made only if the suspect who is the potential subject of the procedure is present. However, the suspect is not a party to the application, and may not call or cross-examine witnesses.¹⁰⁰
- b. In respect of Post Conviction Testing:¹⁰¹
 - there is no limitation in terms of the age of the Schedule 8 prior conviction. Although the person may be in prison on a minor

⁹⁵ *Crimes Act 1958* (Victoria), section 464ZG(7).

⁹⁶ *Crimes Act 1958* (Victoria), subsections 464ZFC, ZFD(2) and ZFG.

⁹⁷ *Crimes Act 1958* (Victoria), section 464ZFC(4).

⁹⁸ *Crimes Act 1958* (Victoria), section 464ZE.

⁹⁹ *Crimes Act 1958* (Victoria), section 464T.

¹⁰⁰ *Crimes Act 1958* (Victoria), section 464T.

¹⁰¹ Gibson, Ray, "Police Powers to take Body Samples", *Law Institute Journal*, May 1998, p. 56.

offence, the fact that they had in the past been found guilty of, and served time for, a Schedule 8 offence, they would potentially be caught by the provisions;

- notice of an application for an order for Post Conviction Testing is not required to be provided to the person from whom the sample is sought unless that person is a child. There appears to be no statutory right to be heard on such an application. This contrasts with the rights, albeit argued as limited, to be heard on an application for a court order to obtain a sample from a suspect. In these situations at least the suspect can be represented and make submissions; and
 - where a term of imprisonment has expired at the time of an order, a warrant may be issued directing that a person undergo a compulsory forensic procedure.
- c. Some samples of body fluid, tissue or hair obtained from a person may not be the body fluid, tissue or hair of that person but of a third party. If a sample is taken, and the person is excluded from investigation, normally the sample should be destroyed. However, that sample may indicate that the third party was involved and in turn, link the third party to the crime scene. Accordingly it may provide important evidence which should not be destroyed. Victorian commentators suggested that the legislation be drafted so that, if following analysis it is shown that the material is not the body fluid, tissue or hair of the person from whom it was sampled, then it does not need to be destroyed. Otherwise the legislation would require the destruction of evidence.

5.27 Difficulties were experienced with the practical implementation and administration of the Victorian legislation:

- a. the reporting requirements of the Victorian legislation created major difficulties;¹⁰²

¹⁰² *Crimes Act 1958* (Victoria), section 464ZF(11). For more detailed discussion refer to Chapter 8 paragraph 8.133.

- b. in respect of Post Conviction Testing, medical staff objected to being required to perform the forensic procedure as they felt it jeopardised the relationship between prisoner and medical officer, the medical officer not being a corrections officer; and
- c. in specifying within Schedule 8 the types of offences as a “*forensic sample offence*” which would attract Post Conviction Testing, care had to be taken to ensure that the offences were sufficiently comprehensive to include earlier equivalents of a current offence.¹⁰³ Anecdotal evidence suggested that in earlier versions of the Schedule, prosecutors would intend seeking an order for a forensic procedure to be conducted only to find that the earlier legislative version of the particular offence was not specified.

5.28 Most legislation recognises the special position of children and incapable persons. This topic is discussed in more detail in Chapter 8.

Summary

5.29 In all Australian states studied:

- a. laws are in place which enable police to take forensic samples from persons in custody for, or charged with, particular crimes;
- b. there is disagreement in those laws about the use of reasonable force in taking samples, some allowing police discretion and others requiring judicial direction;
- c. legislation or associated regulations require the destruction of forensic samples and information obtained to be destroyed when there is no conviction and after all processes of appeal have been exhausted; and
- d. legislation has been enacted or is being prepared for enactment that will allow the collection and recording of forensic information for the use of future criminal identification.

¹⁰³ In other words to encompass convictions under differently drafted legislation. For example an offence against a particular section of the *Crimes Act 1958* (Victoria) may have been a different offence 10 years ago.

Chapter 6

FORENSIC PROCEDURES AND DNA PROFILING: INTERNATIONAL EXPERIENCE

- 6.1 This Chapter highlights some aspects of the relevant legislation in each international jurisdiction examined in the course of the Committee's enquiries. It is not exhaustive and recourse may be had to relevant legislative provisions if more detail is required.
- 6.2 As noted in the preamble to Chapter 5, the range of legislative response reflects the different balances of political, moral and social factors in each jurisdiction. These balances change as society and its needs and aspirations change.

United Kingdom

- 6.3 The United Kingdom pioneered the development of DNA-related technology and introduced the world's first comprehensive national DNA Database on 10 April 1995.¹⁰⁴ Since the inception of DNA testing, the United Kingdom has been at the forefront of the development of forensic DNA procedures, both technologically and in regulatory and legislative response to the technology.
- 6.4 In 1993, following the findings of the Royal Commission on Criminal Justice which considered some prominent miscarriages of justice like the Guildford Four/Birmingham Six¹⁰⁵, the United Kingdom parliament enacted comprehensive legislation providing for the taking and use of forensic samples. The main piece of legislation, the *Police and Criminal Evidence Act 1984* (United Kingdom) (the "PACE Act"), was amended by the *Criminal Justice and Public Order Act 1994* (United Kingdom) and the *Criminal Evidence Amendment Act 1997* (United Kingdom).
- 6.5 The United Kingdom has broad based DNA powers. The PACE Act distinguishes between "intimate" and "non-intimate" samples. Under the PACE Act (and associated Codes of Practice):

¹⁰⁴ Gunn, DG, Chief Constable, Cambridgeshire Constabulary, United Kingdom, *National DNA Database: Presentation to Australian Police Officers*, Melbourne, 5 August 1997, p. 5.

¹⁰⁵ *Richard McIlkenny & Others* (1991) 93 Cr. App. R. Refer to paragraph 4.26.

- a. an "*intimate sample*"¹⁰⁶ may be taken from a person in police detention if consent is given, and if a police officer of at least the rank of Superintendent authorises it (subsection 62(1)). An officer may give an authorisation only if he or she has reasonable grounds for suspecting the involvement of the person from whom the sample is being taken, in a "*recordable offence*" and believes that the sample would tend to confirm or dispute that involvement (subsection 62(2)). The PACE Act requires a judge's or magistrate's order before an intimate sample may be taken without the person's consent;
- b. a "*non-intimate sample*"¹⁰⁷ may be taken from a person with or without consent if the person is in police detention or being held by the police on the authority of a court and if an officer of at least the rank of superintendent authorises it (subsection 63(1)-(4)). A non-intimate sample includes a buccal swab;
- c. intimate samples authorised by a court order and non-intimate samples can be taken using reasonable force if necessary;
- d. consent must be provided in writing;
- e. police can request a person to attend a police station in order for a DNA sample to be obtained. This applies to persons either cautioned¹⁰⁸, charged or convicted of recordable offences where either a previous body sample has not been obtained or was obtained but deemed unsuitable for profiling. If the person does not attend they may be arrested without warrant. The requirement to provide a sample also extends to prisoners although testing is conducted at the place of custody;¹⁰⁹

¹⁰⁶ Intimate samples include: blood, semen or any other tissue fluid, urine or pubic hair; a dental impression; and a swab taken from a person's body orifice, other than the mouth.

¹⁰⁷ Non-intimate samples include: sample of a hair other than pubic hair; sample from a nail or from under a nail; a swab taken from any part of a person's body, including the mouth, but not any other body orifice; saliva; and a footprint or a similar impression of any part of a person's body, other than part of his/her hand.

¹⁰⁸ A person may be "*cautioned*" for an offence where they have admitted to an offence but due to the minor nature of the offence or the background of the offender it is not in the public interest to proceed to prosecution.

¹⁰⁹ *Police and Criminal Evidence Act 1984* (United Kingdom) section 63A.

- f. there is express legislative power for police to re-sample persons convicted of, or charged with, an offence if there has been a “*failure*” but not a “*rejection*” of the submitted sample.¹¹⁰ The distinction is important and is discussed at paragraph 8.146. This power takes account of technical or scientific difficulties in the profiling process. If the person does not attend at a police station within 7 days there is power of arrest on non-compliance;
 - g. there are similar provisions to the *1999 Model Bill* in relation to destruction of samples. They must be destroyed if a suspect is not prosecuted or cautioned, is acquitted, or he or she is no longer suspected and no further proceedings are afoot; and
 - h. evidentiary matters are treated in a similar fashion as the *1999 Model Bill*.¹¹¹
- 6.6 The United Kingdom legislation did not initially provide for Post Conviction Testing. This situation was rectified by the *Criminal Evidence (Amendment) Act 1997* (United Kingdom), which gave the police power to obtain body samples, by force if necessary, from persons convicted before 10 April 1995, who are still serving their sentences in prison, or from those in mental hospitals who were found unfit to plead. A range of serious offences is covered including offences against the person, sexual or indecency offences, and burglary.
- 6.7 A national database was set up in Birmingham in 1995, about 6 years after police first started developing their DNA investigation techniques. Since then about 300,000 suspect and convicted offender samples have been retained. Police linked more than 300 people a week to crimes using information on the database. It was noted in a *West Australian* newspaper article regarding the United Kingdom that on the serious crime front: 26 people have been linked to murder or manslaughter; five to attempted murder; 92 to rape; 38 to sexual assault; 108 to serious robbery; 46 to assault occasioning grievous bodily harm; and 61 to aggravated burglary.¹¹²

¹¹⁰ Section 63(3A) and 63A(4) state that re-sampling may occur if the sample “*was not suitable for the same manner of analysis or, though so suitable, the sample proved insufficient*”.

¹¹¹ Refer to Chapter 16.

¹¹² As reported in the *West Australian* newspaper, “Gene lists to carve into United Kingdom crime”, 10 August 1998.

- 6.8 The Committee was told that the introduction of this national DNA database has led to a marked improvement in the proportion of crimes being solved.¹¹³
- 6.9 The majority of DNA profiling work in Britain is carried out for the prosecution by the Forensic Science Service (“FSS”). Formerly part of the Home Office, the FSS was established as an Executive Agency in April 1991. In April 1996, the FSS was merged with the Metropolitan Police Forensic Science Laboratory. The purpose of the FSS is to serve the administration of justice principally by providing scientific support in the investigation of crime and expert evidence to the courts for both the prosecution and the defence. It is by far the largest supplier of forensic science services in the United Kingdom. In 1998 it dealt with 60,000 cases. Scientists gave evidence at court around 2,500 times and attended around 1,200 scenes of crime.¹¹⁴
- 6.10 The FSS is a non-profit organisation. So that the capacity of the FSS could be aligned with the demand for its services it began charging for its services in 1991.¹¹⁵ This has enabled the FSS to develop commercially and offer services to private, public and overseas customers as well as the 43 police forces in England and Wales, other police forces such as the Ministry of Defence Police and British Transport Police, the Crown Prosecution Service and Customs and Excise.
- 6.11 The Laboratory of the Government Chemist (“LGC”) also provides forensic profiling services for the prosecution and the defence. Formerly a government agency, LGC was privatised in April 1996. The LGC’s official role as Government Chemist continues, providing independent advice on reference, statutory and regulatory issues. Since privatisation it also has provided comprehensive DNA profiling services of suspect samples.
- 6.12 Forensic profiling services, particularly with crime scene samples, also are provided by Forensic Alliance, a private company of three complimentary partners: Forensic Access, AEA Technology plc and Cellmark Diagnostics.

¹¹³ Gunn, DG, Chief Constable, Cambridgeshire Constabulary, United Kingdom, *National DNA Database: Presentation to Australian Police Officers*, Melbourne, 5 August 1997, p. 30.

¹¹⁴ <http://www.fss.org.uk/frame.htm>, (searched 20 July 1999).

¹¹⁵ As a result of the 1988 Parliamentary Committee on Home Affairs.

United States of America

- 6.13 The United States of America has a differently organised DNA system and a different regulatory regime for DNA profiling and data storage from that of the United Kingdom. It faces similar issues to Australia in having to combine the systems of a number of jurisdictions into a workable whole under the umbrella of the Federal Bureau of Investigations (“FBI”).
- 6.14 The Bill of Rights of the Constitution of the United States of America has a major impact on the powers of law enforcement authorities. The Fourth Amendment requires government agents to obtain search warrants before conducting any search of bodies and personal effects, homes or other areas or items that are maintained as private. Warrants are issued on the determination by a neutral and disinterested independent magistrate that there exists “*probable cause*” and that the proposed search is otherwise reasonable.
- 6.15 The committee understands that in the United States of America “*probable cause*” is the same standard as would be required for arrest in Western Australia. As a result of the constitutional protections, any forensic procedure to obtain a body sample for DNA analysis, unless the suspect has consented, must be obtained by warrant after satisfying a magistrate that there is probable cause.
- 6.16 The FBI Laboratory is one of the largest and most comprehensive forensic laboratories in the world. It is the only full-service Federal forensic laboratory in the United States of America. The Laboratory examines evidence free-of-charge for Federal, State and local law enforcement agencies. Examiners also provide expert witness testimony in court regarding the results of the forensic examinations.
- 6.17 The FBI Laboratory opened its Forensic Science Research and Training Centre in Quantico, Virginia, in 1981. A large and increasing proportion of the work of the Centre is now devoted to the establishment and operation of its DNA database. As an indication of the scale of DNA database operations at the Centre, during 1997-98 the laboratory conducted 543,556 evidentiary examinations of 149,556 specimens.¹¹⁶

¹¹⁶ Federal Bureau of Investigation Educational Internet Publication, *DNA Testing*, <http://www.fbi.gov>, (searched 1 July 1999).

- 6.18 The Department of Justice in Washington DC is responsible for programs and laws relating to use of DNA information as evidence. The Department supports a number of agencies responsible for disseminating information about DNA databases, reviewing legal and procedural issues relating to DNA and advising Government on DNA matters.
- 6.19 Without any federal guidance, States in the United States of America enacted legislation enabling the collection of blood samples from convicted sex offenders and the storage and analysis of such samples in State DNA databases. In 1988, Colorado became the first State to enact such legislation.¹¹⁷ Over the next year, five other States (Arizona, Iowa, Minnesota, Nevada and Virginia) joined Colorado in passing DNA database legislation. However, each State developed very different systems.¹¹⁸
- 6.20 The content of these State statutes varied, from a few paragraphs requiring the collection, analysis, storage and establishment of State DNA databases in law enforcement agencies to more detailed provisions describing by whom and how the samples were to be collected, regulating the destruction of DNA profiles, specifying access and disclosure, and establishing penalties for unauthorized disclosure. Generally, those statutes enacted earliest contained the least detail, while those enacted more recently have benefited from the experience of the States that implemented such statutes earlier. For example, early statutes did not specify the agency responsible for collection. In some cases this resulted in a vacuum of responsibility regarding which agency in a State was responsible for the collection of samples from the convicted offenders.¹¹⁹

¹¹⁷ California was actually the first State to begin collecting blood samples from convicted sex offenders because it had passed legislation in 1983 that required the collection of blood samples for analysis of genetic markers. The information in this section is based on: Federal Bureau of Investigation, FBI Laboratory: *Report to Congress - Implementation Plan for Collection of DNA Samples from Federal Convicted Offenders*, December 1998. For more details on other American States, the offences which are covered, whether or not Post Conviction Testing is included and whether or not juveniles are exempt, see "A state-by-state breakdown of legislation regarding DNA databanks." http://www.pbs.org/newshour/forum/july98/dna_databanks.html, (searched 3 July 1999).

¹¹⁸ Federal Bureau of Investigation, FBI Laboratory: *Report to Congress - Implementation Plan for Collection of DNA Samples from Federal Convicted Offenders*, December 1998.

¹¹⁹ Federal Bureau of Investigation, FBI Laboratory: *Report to Congress - Implementation Plan for Collection of DNA Samples from Federal Convicted Offenders*, December 1998, p. 12.

6.21 In respect of the American States' legislation:¹²⁰

- a. most include a listing of professionals authorised to collect specimens, such as physicians, phlebotomists, registered nurses, licensed practical nurses, or medical technicians;
- b. most include an indemnity for these professionals from civil and criminal liability when the blood is drawn in accordance with generally accepted medical procedures;
- c. a number provide that a central agency will supply the tubes, container, and packing labels for the collection of specimens;
- d. several, notably the more recent enactments, authorise designated law enforcement and corrections officials to employ reasonable force in cases where offenders refuse to submit to DNA sample collection;
- e. the majority prescribe the unlawful disclosure of DNA records or information as a misdemeanor. A few States prohibit the tampering or attempted tampering with a DNA sample and punish it as a felony offence;
- f. most of the DNA laws provide for expungement of a DNA profile in the event that an offender's qualifying conviction has been reversed.¹²¹ Generally, the offender bears the burden of providing notice and evidence of such reversal to the authorised agency;
- g. some list the purposes for which the DNA database may be accessed. Generally, these purposes mirror those found in the *DNA Identification Act of 1994* (United States of America);

¹²⁰ Federal Bureau of Investigation, FBI Laboratory: *Report to Congress - Implementation Plan for Collection of DNA Samples from Federal Convicted Offenders*, December 1998, p. 13.

¹²¹ A "qualifying conviction" refers to the conviction which "triggered" the DNA sampling power.

- h. some States provide authorisation to contract out the collection and/or analysis of DNA samples, and funding for the proper implementation of a DNA law and program;¹²² and
 - i. finally, there are a number of other areas that States are focusing on to assist in implementing their laws and DNA programs and thereby maximise the effectiveness of the DNA database. For example, a number of States have recently amended the definition of a qualifying offence to include additional felony offences.¹²³
- 6.22 In an effort to encourage nationwide compatibility, the FBI Laboratory issued Legislative Guidelines in 1991 with recommended provisions to be included in State laws such as: definitions, access and disclosure, compatibility, destruction, and penalties for unauthorized disclosure. Guidance in performing DNA analysis is sponsored by the FBI's Laboratory Division.¹²⁴
- 6.23 Today all American States have legislation related to DNA databases, most of it focusing on collecting and testing DNA from individuals convicted of sexual assaults, and often, homicides. In some cases the legislation requires collection from all convicted felons.
- 6.24 Although DNA data banking was proposed almost 10 years ago its development in the United States of America is still rudimentary. Problems have occurred with the definition of offender categories in the legislation. For example, persons charged with rape who plead guilty to lesser offences not covered by a particular State's database law are not subject to the legislation and are not required to provide a sample. In some jurisdictions DNA is not collected until an offender is released, making it impossible

¹²² For example, a number of State laws include fee provisions in which the offender is charged a fee for the costs associated with the sample collection. Additionally, Alabama imposes a \$2 filing fee for all criminal and civil court filings, which is deposited to the credit of the State laboratory system for the DNA database program. A number of States impose a surcharge of \$240 on the offender for the costs of collecting and analysing the DNA sample, with such monies to be deposited specifically into an account for the DNA program.

¹²³ A "qualifying offence" refers to the offence which "triggered" the DNA sampling power.

¹²⁴ Federal Bureau of Investigation, FBI Laboratory: *Report to Congress - Implementation Plan for Collection of DNA Samples from Federal Convicted Offenders*, December 1998, p. 13.

to match the offender's DNA to that of an investigation opened during their incarceration.¹²⁵

6.25 At the Federal level, contained within the *Violent Crime Control and Law Enforcement Act 1994* (United States of America), is the *DNA Identification Act 1994* (United States of America). Importantly, this Act:

- a. includes funding for the FBI Laboratory (\$25,000,000 over a five-year period) and for State and local governments (\$40,000,000 over a five year period) to develop or improve their DNA testing capabilities;
- b. authorises the creation of a DNA Advisory Board whose task is to recommend quality assurance standards for forensic DNA analysis;
- c. requires the National Institute of Justice to provide a grant to an appropriate entity to determine the feasibility of performing blind external proficiency testing; and
- d. authorises the FBI Director to establish a national DNA index of convicted offenders, crime scene evidence, and unidentified human remains. "*Suspect*" DNA profiles cannot be uploaded to the national DNA index system.

6.26 Under the *DNA Identification Act 1994* (United States of America), the FBI has established the Combined DNA Index System ("CODIS") for law enforcement identification purposes. The FBI has developed CODIS to function as a national computer database of DNA profiles which are stored in three indices:

1. convicted offenders;
2. unknown suspects (also referred to as the "*forensic index*" containing profiles obtained from crime scene body fluids); and
3. population samples (for statistical purposes only).¹²⁶

6.27 CODIS enables Federal, State and local law enforcement crime laboratories to exchange and compare DNA profiles electronically, thereby linking serial crimes and identifying suspects by matching DNA from crime scene profiles to known criminal offenders. CODIS began as a pilot project in 1990, serving 14 State and local DNA

¹²⁵ Victor Walter Weedn, and John W Hicks, *The Unrealized Potential of DNA Testing*, National Institute of Justice, June 1998, p. 5.

¹²⁶ 46th Report, paragraph 2.8.

laboratories. Currently, CODIS is installed in 80 laboratories in 36 States.¹²⁷ The FBI provides CODIS software, together with installation, training and user support, free of charge to any State and local law enforcement laboratories performing DNA analysis. Each State is responsible for purchasing commercial hardware and software necessary to operate CODIS. CODIS is discussed in more detail at Chapter 7.

Germany

- 6.28 Germany has a different but similarly advanced DNA system to that of the United Kingdom and has led the development of a trans-European and eventually international standard for DNA forensic technology.
- 6.29 Prior to any legislative regime specifically dealing with the collection and analysis of DNA samples, the collection and analysis of body samples was a police practice based on the *German Code of Criminal Procedure* (“German Code”). The German Code allowed the collection of blood samples from a suspected person, whether or not they had been arrested, for any questions related to the investigation.¹²⁸
- 6.30 This police practice was reinforced by a 1995 German federal court decision which examined the German Code, and stated that DNA analysis was permissible, but restricted any analysis to non-coding genetic information.¹²⁹
- 6.31 The use of DNA identification as evidence became a prosecutorial and court practice. This culminated in two German federal court decisions which stated that a DNA identification of a person could be accepted as one sample of hard evidence that a person had committed an offence. However, the court required that it not be the only evidence.¹³⁰

¹²⁷ Office of Information Resources Management, http://www.usdoj.gov/jmd/irm/irm_major.html, (searched 30 November 1998).

¹²⁸ *Code of Criminal Procedure* (Strafprozessordnung), Section 81a.

¹²⁹ 18 September 1995.

¹³⁰ 21 August 1990, 5 StR 145/90, BGHSt 37, 157; and 12 August 1991, 5 StR 239/92 BGHSt 28, 320.

6.32 In 1997 the German Parliament enacted specific legislation for DNA analysis.¹³¹ The 1997 amendment introduced no fundamental changes to the law, merely a clarification.

6.33 In summary, the common law, and now the specific statutory provision:¹³²

- a. states that a court order is necessary if body samples have to be obtained by an invasive procedure;
- b. provides that the only circumstances in which certain police officers and officials of the public prosecutors office may order any invasive DNA examination is where the results of the criminal investigation would be endangered by delay;
- c. does not require a court order if the DNA testing can be carried out without encroaching upon a person's physical integrity, for example to use hair. Cutting off hair is not regarded as a physical measure permissible only on the order of a judge. The Committee was informed that a buccal swab is not an invasive procedure and can be collected by the police;
- d. requires that in every case there must be justified suspicion that the person from whom the sample was to be taken has committed an offence of some gravity. It is not necessary that the person has been "*indicted*"; and
- e. explicitly states that, for the purposes of DNA testing carried out for use in criminal proceedings, only non-coding parts of DNA may be used. The Committee was informed that this is implied by the wording of the *German Code of Criminal Procedure* which now permits DNA testing "*only for the purpose of establishing a person's descent or for determining whether trace material that is found comes from the suspect or defendant or from the victim*".¹³³ The Committee was informed that this phrase refers to the distinction between coding and non-coding DNA; the coding part of DNA

¹³¹ Section 81e, *German Code of Criminal Procedure* (Strafprozessordnung) inserted by *Act Amending Criminal Procedure - DNA Testing* (Strafverfahrensänderungsgesetz - DNA Analysis).

¹³² Information and translations provided by Mr Eberhard Kempf, Rechtsanwälte und Notare, letter to the Committee dated 16 July 1999.

¹³³ Mr Eberhard Kempf, Rechtsanwälte und Notare, letter to the Committee dated 16 July 1999.

is not necessary “to establish descent or whether trace material that has been found is from the suspect or the victim.”¹³⁴

- 6.34 In the absence of any specific legislation, the German States established DNA databases as administrative measures relying on the sampling powers in the German Code. Members of the German legal profession expressed concerns to the Committee that, from a civil rights perspective, specific legislation should be enacted to deal with other matters such as anonymity of samples, the separation between the database custodian and the police authorities and the use of DNA in evidence.
- 6.35 In May 1998, the *DNA Identification Act* (Germany) was passed allowing for Post Conviction Testing of persons convicted of “serious crimes” and offences which will “cause unrest against the population”.¹³⁵ As previously noted, there were extensive powers for police to gather evidence and genetic testing had been used for many years to “clarify crimes”. However, after cases were finally dealt with by the courts, DNA data were usually destroyed for privacy reasons.¹³⁶ The *DNA Identification Act* (Germany) enabled the retention of genetic data on all people convicted of serious crime.
- 6.36 The Act’s impetus came from a match in a child rape/murder case with the DNA of a person who had been convicted of rape in 1990. The match came about after a large scale DNA testing exercise in the particular city. The mass screening would have been unnecessary if a DNA database of convict records was available.¹³⁷
- 6.37 As noted above, German law requires a court order to take an invasive sample for DNA analysis. Any other type of forensic analysis does not require a court order. However, the nature of scientific analytical techniques is such that DNA testing renders the sample useless for other types of testing. Therefore the practical effect of the legislation is that nothing is analysed unless a court order has been obtained for DNA

¹³⁴ However there may be some debate as to the accuracy of the terms used in the German Code: refer to Appendix 10 being, letter from Dr Clive Cooke, PathCentre to Advisory/Research Officer, Legislation Committee, dated 5 August 1999, attaching letter from Dr Gavin Turbett to Dr Clive Cooke dated, 5 August 1999.

¹³⁵ In Germany “serious crime” includes crimes against the person, not volume crimes or burglary: as advised to the Committee by persons with whom they met in Germany.

¹³⁶ Information taken from MCCOC Report, p. 123.

¹³⁷ Information taken from MCCOC Report, p. 123.

sampling and, by implication, analysis. Many people with whom the Committee met noted that a court order was not required to take fingerprints or photographs however it was considered to be a political decision of the time to treat DNA differently.

6.38 The Committee's investigations in Germany also focused on the steps being taken by the European Community for the establishment of a European network of databases. The European Community is of necessity undertaking a great deal of work to standardise DNA databases internationally. Much of this effort springs from a 1996 conference held in Mainz, Germany, including the establishment of EDNAP, the European DNA Profiling Group. Mainz remains the central point for EDNAP activities through its Institute of Forensic Medicine.

6.39 As discussed above, the range of international legislative responses reflect the different balances of political, moral and social factors in each jurisdiction. Generally the Committee noted when comparing each country examined that:

- a. in the United Kingdom, the police have very wide powers to collect DNA samples and produce a DNA profile;
- b. in the United States of America, the collection of DNA samples and the process of DNA profiling is more limited than the United Kingdom and the Federal and State governments are very conscious of civil liberty issues which are enshrined in the Bill of Rights of the Constitution; and
- c. in Germany, the government is very conscious of the use of DNA profiling and authorises a much more limited use of the scientific technique than either the United Kingdom or United States of America.

6.40 In the United Kingdom, Germany and the United States of America there is commitment to the value of DNA profiling in criminal investigation, and in each country considerable progress has been made to establishing protocols.

Summary

6.41 The Committee notes the following points:

- a. differences identified reflect the prevailing political, legal and constitutional circumstances of the three countries;

- b. in Germany and the United States of America, the emphasis of forensic DNA processes has been in the investigation of sexual and violent crimes, whereas in the United Kingdom the database has been widened to embrace “volume crimes” such as burglary and car theft;
- c. in each country the enabling legislation contains protections for civil liberties;
- d. there is disagreement in those laws about the use of reasonable force in taking samples; some allowing police discretion and others requiring judicial direction;
- e. legislation or associated regulations require the destruction of forensic samples and information obtained to be destroyed when there is no conviction and after all processes of appeal have been exhausted; and
- f. legislation has been enacted or is being prepared for enactment that will allow the collection and recording of forensic information for the use of future criminal identification.

Chapter 7

DNA DATABASES: AUSTRALIAN AND INTERNATIONAL COMPARISONS

The threshold question: should there be one?

- 7.1 The advantages of DNA profiling and the use of a DNA database were canvassed in Chapter 4. The Committee's 46th Report at paragraph 2.7 provides examples of FBI cases which have been solved using DNA profile matching. The power of a DNA database in the criminal justice system is evident by results obtained from the United Kingdom. As at 16 January 1999, the United Kingdom database had over 46,000 crime scene samples; and over 484,000 samples from suspects and convicted persons.¹³⁸ Between 10 April 1995 and 16 January 1999, over 35,000 person to scene matches and over 6,600 scene to scene matches had been made.¹³⁹
- 7.2 DNA analysis technology, because it reveals aspects of a person's genetic code, creates privacy concerns not relevant in other forms of forensic identification such as fingerprinting. Although the Committee was uniformly advised that only non-coding DNA is used for DNA profiling, many concerns were expressed about the potential use of DNA profiling. As one person with whom the Committee met stated: "[I]t is fear of the potential which has created apprehension about its use."
- 7.3 It is therefore not surprising that many jurisdictions enact detailed legislation containing provisions relating to DNA databases and the collection, analysis, storage, use and destruction of both forensic samples and DNA profiles.¹⁴⁰
- 7.4 In implementing a DNA database, Western Australia must therefore seek to promote two potentially conflicting policy goals:¹⁴¹

¹³⁸ This does not include those samples removed due to an acquittal or pardon.

¹³⁹ Forensic Science Services, *National DNA Database Providers Update: 10/4/95 to 16/1/99*.

¹⁴⁰ Refer to Chapters 5 and 6.

¹⁴¹ 46th Report, paragraph 2.1.

- a. to maximise the usefulness of a DNA database as a tool available to state agencies in carrying out their duties, principally the investigation of criminal activity; and
- b. to protect the civil liberties and right to privacy of members of the public, with respect to the establishment, maintenance and use of the DNA database.

Observations and Recommendations

Should there be a DNA database?

3. Many jurisdictions have enacted, or are in the process of enacting, detailed legislation containing provisions relating to DNA databases and the collection, analysis, storage, use and destruction of both forensic samples and DNA profiles. (Chapters 5 and 6 and Chapter 7 paragraph 7.3)
4. The Committee considers that the evidence is of such a positive nature that, with the appropriate safeguards to balance personal liberty with the public interest in the resolution of crime, DNA profiling and the establishment of a DNA database is desirable. (Refer paragraph 4.30)
5. In implementing a DNA database, Western Australia must seek to promote two potentially conflicting policy goals:
 - a. to maximise the usefulness of a DNA database as a tool available to state agencies in carrying out their duties, principally the investigation of criminal activity; and
 - b. to protect the civil liberties and right to privacy of members of the public, with respect to the establishment, maintenance and use of the DNA database.(Paragraph 7.4)
6. **The Committee recommends that there be established, in Western Australia, a DNA database that can be utilised for criminal investigation purposes and for missing persons.** (Chapter 7)

What should be included in the database?

7.5 As discussed, DNA information can potentially be used in many cases where the investigating agency has a physical body sample relating to a crime and can take samples from other persons who may be involved in the crime, whether as victims or perpetrators. It stands to reason that the more extensive the DNA database, the greater will be its utility in investigating crime. Against this factor must be balanced the legitimate civil liberties and privacy concerns that the DNA database should not be unnecessarily broad. The Committee addresses the types of offences for which a DNA sample can be obtained in Chapter 8. The type of offences for which samples can be obtained will necessarily affect the required width of any database.

7.6 Once a decision has been made to create a database, from a practical viewpoint the Committee was alerted to the need to determine the size of the database. Two potentially conflicting issues arise:¹⁴²

- a. the costs in terms of personnel and equipment in the analytical area; and
- b. the requirement for a comprehensive collection to fulfil investigation requirements.

This involves consideration of criminological studies on recidivism rates for particular offences, the ultimate limits of public concern in relation to serious crimes and the success brought about by the creation of a database to justify the expenditure.

7.7 In addition, issues of cross border integration and international compatibility arise for consideration. The Committee considers these issues in reviewing each of the jurisdictions it studied.

United Kingdom

7.8 The United Kingdom has a national database encompassing England, Wales, Northern Ireland and Scotland. All 52 forces in the 4 Home Counties send either their suspect and crime scene samples to be analysed, in the main, by the Forensic Science Service and to be entered onto national DNA database in Birmingham, or they analyse and

¹⁴² International Police Organisation, *Final report of the Interpol European Working Party on DNA Profiling*, Cairo, October 1998, p. 20.

profile the samples locally and then transfer the profiles electronically to the national database.

7.9 The United Kingdom database has been a success. In 1997/1998 the Forensic Science Service matched 23,235 suspects to scenes of crime through the use of the national DNA database.¹⁴³

7.10 Weedn and Hicks¹⁴⁴ note that the United Kingdom has moved far more aggressively than the United States of America towards establishing a broad-based database. The key reason for the difference is that in the United Kingdom samples are taken upon arrest rather than, as in virtually all the States in the United States of America, on conviction. The United Kingdom database has been developed to contain samples from all persons cautioned,¹⁴⁵ charged with or convicted of a “recordable offence”. This captures most volume crime, such as breaking and entering.

7.11 In the course of his hearing before the Committee, Mr Alastair Ross, Director, Australian National Institute of Forensic Science, discussed how police services in the United Kingdom use the forensic database:

“From the outset, the United Kingdom determined to use the database to look at both serious and volume crime: Serious crime being homicide and assaults, and volume crime being house-breaks, car theft and so on. House-breaks affect most people in the community anyway. The database looks at both suspects and offenders. Some studies conducted in the United Kingdom before the database was established indicated that 8 per cent of the population was responsible for about two-thirds of crime. Therefore, being able to compare suspect and offender samples against unsolved crimes proved to be very successful. If a match was not made with a suspect's sample and the database, or the person was found not to be involved in the crime for which he or she was a suspect, the profile would be taken off the database.”

¹⁴³ Forensic Science Service, *Annual Report & Accounts 1997/98*, p. 19.

¹⁴⁴ Victor Walter Weedn, and John W Hicks, *The Unrealized Potential of DNA Testing*, National Institute of Justice, June 1998, p. 6.

¹⁴⁵ A person is “cautioned” for an offence when they have admitted to the offence, but due to the minor nature of the offence or the background of the offender, it is not in the public interest to proceed to prosecution.

The system relates to intra- and inter-jurisdictional crime. . . To use a Western Australian example, crimes committed in Perth and Albany may create no suspicion of connection with local police; however, the database can provide that link. It can provide a link between unsolved crime indicating a common offender, and it can provide a link between suspects, offenders and unsolved crimes, and links between suspects and offenders and other suspects and offenders. . .

It is important to realise that DNA profiling is not just "inclusionary", but also exclusionary. The database can exclude a suspect early in an investigation, which has implications for the time of police. . .

The model in the United Kingdom is appropriate for this country, with some minor changes . . ."¹⁴⁶

- 7.12 Concerning the issue of how to establish a DNA database in Western Australia and other jurisdictions, Mr Ross, also noted that Australian jurisdictions should be able to learn from the difficulties encountered in the United Kingdom in establishing a national DNA database:

*"[T]he decision was made in October 1994 to establish the database in the United Kingdom and it was to be up and running by April 1995. That caused enormous problems in training people. Birmingham was the original site for the database in the United Kingdom. There are 200 people employed just for database purposes. Scientists were recruited virtually directly from university without any experience in forensic science although they had experience in DNA profiling. Because of the lack of funds and the undue haste with which they were required to have the database up and running, they did face problems. The Association of Chief Police Officers estimated that in the first year, given the number of samples that they wanted tested, they needed about £5.6 m. They found that in existing budgets. One of the problems now starting to be overcome in the United Kingdom is the huge backlog of samples caused by the lack of funds and the haste with which the database was established."*¹⁴⁷

- 7.13 To ensure that the analytical infrastructure can support the possible sampling range, the police and FSS have developed administrative "*sampling criteria*" which prioritises

¹⁴⁶ *Evidence*, Mr Alastair Ross, Director of the National Institute of Forensic Science in Australia, 15 April 1998, p. 28.

¹⁴⁷ *Evidence*, Mr Alastair Ross, Director of the National Institute of Forensic Science in Australia, 15 April 1998, p. 29.

categories of offences to balance database capacity and analytical resources. The agreed sampling criteria are:¹⁴⁸

1. all offences against the person, including all assaults, any case involving violence or threat;
2. all sexual offences, including those with a sexual connotation;
3. all burglaries; and
4. other offences of local importance or of intelligence value.¹⁴⁹

7.14 In the *United Kingdom*, as in New South Wales and South Australia, all samples are subject to a speculative search. The Committee was informed that, in addition to a profile being compared with any other profile on the database (suspect or crime scene profiles), a sample taken in the course of one investigation can be compared with a sample taken in another investigation relating to a completely different offence.¹⁵⁰

7.15 The Committee noted that in the United Kingdom this power to conduct speculative searches is specifically referred to in the relevant legislation and is restricted to the situation where the person has actually been arrested and is not to be applied where a person is merely “*reasonably suspected*”.

Germany

7.16 The German database is narrower than that of the United Kingdom. Witnesses in Germany considered that the type of crimes most relevant to DNA analysis are those where body substances tend to be left at the crime scene and where identification of the

¹⁴⁸ New Scotland Yard, Metropolitan Police - New Scotland Yard, *Directorate of Identification DNA Presentation*, 27 January 1999.

¹⁴⁹ An example of this is an active burglar who the police know from intelligence is active but for whom they do not have a DNA sample. The police could arrest him or her for a minor offence, obtain a DNA sample and in this way have his profile on the database system to match with more serious offences including any burglaries.

¹⁵⁰ *Police and Criminal Evidence Act 1984* (United Kingdom) which requires the person is also to be informed that the sample may be subject to a speculative search section 63(8B). This does not apply in cases of mass screening, where the profiles can only be searched against the stain from that particular case.

perpetrator is in question. In addition to the low hit rates, German authorities considered that the cost and time involved in DNA analysis did not justify the extension of the technology to volume crimes such as breaking and entering.

- 7.17 As a result the German national database only covers crime scene samples and convicted persons and is further restricted to those offences where personal injury is involved and it is likely that body substances will be left at the crime scene on or the victim. For example, crimes of sexual assault and other physical assault.
- 7.18 The view was expressed by people with whom the Committee met in Germany, that the database should be expanded to enable the collection of data on missing persons, victims of violent crimes, and unidentified bodies. The Committee notes that the database proposed by the *1999 Model Bill* contains these categories.

*United States of America*¹⁵¹

- 7.19 The FBI has developed a national DNA database called Combined DNA Index System (“CODIS”). The Federal Convicted Offenders DNA Database will be an integral component of the CODIS system, being linked to the CODIS system in the same manner as DNA profiles from a State system. The federal United States of America database is narrower than the United Kingdom database and German database as it includes only convicted offenders.
- 7.20 The two main objectives for CODIS operations are to assist investigators in the identification of suspects of violent crimes and to increase the efficacy of forensic laboratories by providing software to conduct DNA case work and perform statistical calculations. The current version of CODIS software supports the storage and searching of both RFLP and PCR - based DNA profiles.¹⁵²
- 7.21 To be completely functional for comparing DNA profiles, the FBI Laboratory’s CODIS must be a fully integrated network among local, State, and Federal crime laboratories. CODIS enables these crime laboratories to exchange and compare DNA profiles, to link serial violent crimes, and to identify potential suspects by matching DNA profiles from crime scene evidence to convicted offenders’ profiles.

¹⁵¹ This majority of this section is based on: Federal Bureau of Investigation, FBI Laboratory: *Report to Congress - Implementation Plan for Collection of DNA Samples from Federal Convicted Offenders*, December 1998.

¹⁵² For a discussion of these processes refer to Chapter 10.

- 7.22 CODIS is implemented as a distributed database with three levels, that is, local, State and national. The Local DNA Index System (LDIS) is installed at crime laboratories operated by police departments, sheriff's offices, or State agencies. Currently all forensic DNA records originate at the local level and are transmitted to the State and national levels. Each State participating in the CODIS program has a single State DNA Index System ("SDIS") that facilitates the exchange and comparison of DNA profiles within a State. SDIS also links the local and national levels and is typically operated by the agency responsible for maintaining a State's convicted offender DNA database program. The National DNA Index System ("NDIS") is a single central repository of DNA records submitted by participating states. NDIS is administered by the FBI. Currently, participating laboratories communicate via telephone lines using secure telephone units modems for data encryption.
- 7.23 The majority of data stored in CODIS is created and maintained by State and local laboratories. Records of federal convicted offenders are maintained by the FBI, and DNA profiles from federally convicted offenders are entered into the national database.
- 7.24 The United States database has to deal with the difficulties raised by the fact that criminal and police operations are run by a series of loosely connected Federal, State and local jurisdictions. Australia faces similar issues, as Mr Alastair Ross, Director of the National Institute of Forensic Science in Australia, explains:

"In some instances the CODIS system established by the FBI is more akin [than the United Kingdom system] to the Australian system in that there is a number of different States, although the USA has many more States than Australia. However, having different States means different legislation governing the type of samples and how they can be taken for the database. The USA has a three tier database operating at county, State and national level. Samples can be added at county level and then fed into the State system and then to the national system.

The USA has a different software package with some advantages and some disadvantages over the software package used in the United Kingdom. The CODIS software is excellent for development of statistics but it does not have a sample tracking system, which is obviously important if samples have to be taken off the database in respect of suspects. One of the early issues with the USA database was that the data was not standardised on a DNA profiling system. Therefore, different States were using different methods to generate a DNA profile and they were not directly comparable. That has been overcome now and the authorities have opted to run with a DNA profiling system that looks at 13 different places on the DNA. The

*standard system Australia is considering looks at nine different places or loci and at present the United Kingdom system looks at six.”*¹⁵³

Australian Jurisdictions

7.25 Australian jurisdictions are reasonably advanced in the “*development*” of a national standard database. However, much work remains to be done in each jurisdiction to meet the needs and respond to the prevailing circumstances of each jurisdiction while ensuring national viability.

7.26 The Commonwealth Government is establishing, in cooperation with the States and Territories a national DNA law enforcement database as part of its CrimTrac initiative. The Committee notes the comments of the MCCOC that: “[A] *national DNA law enforcement database is necessary because criminal activity often spans Australia’s internal borders and makes it necessary to get forensic evidence from different States and the Territories. It also has advantages in terms of economies of scale. Australia has a relatively small population by world standards. Consistent legislation will simplify the establishment of the database and will ensure that DNA evidence can be appropriately used in any jurisdiction.*”¹⁵⁴

7.27 Under the **1999 Model Bill**, the national DNA database system will be able to hold discrete compartments of information. This will enable the controlled matching of information, in the way proposed in the model, to be used in criminal investigations and court proceedings.¹⁵⁵

7.28 The organisation of information comprises:

- a. a *DNA identification database*: containing the link between particular individuals or crime scenes and the results of any matching of profiles;

¹⁵³ *Evidence*, Mr Alastair Ross, Director of the National Institute of Forensic Science in Australia, 15 April 1998, p. 30.

¹⁵⁴ MCCOC Discussion Paper, p. iii.

¹⁵⁵ MCCOC Report, pp. 91 - 93.

- b. a *DNA matching database*: the database uses codes for the purpose of matching. For ease of reference and to ensure appropriate use of the profiles, the codes are sorted into indexes:¹⁵⁶
- ▶ *crime scene index*;
 - ▶ *missing and unknown persons index*;
 - ▶ *unrestricted purposes index* - profiles on this index can be matched against any other index on the database. It can be made up of volunteers who have agreed to the unrestricted purpose, for example a released offender who wishes to be eliminated from any future inquiries without police approach;
 - ▶ *serious offenders index* - profiles on this index can be matched with profiles on any other index. It includes profiles obtained from serious offenders who have been profiled in accordance with Division 7 (Post Conviction Testing); or suspects who have been convicted of the relevant offence concerned, being a serious offence;¹⁵⁷
 - ▶ *limited purposes index* - this contains codes that relate to suspects and volunteers and who have been informed that the profile will only be used for a limited purpose, for example for a particular investigation;
 - ▶ *statistical index*; and
 - ▶ any other index which may be prescribed by regulation.

7.29 The Committee has made some more specific observations on the operation of the *1999 Model Bill* in the context of the limitation of use of a suspect's profile at paragraphs 8.53 and 8.57. The relevant section of the MCCOC Report addressing this issue is attached as Appendix 11. In particular the Committee notes:

“Some may take the view that the Model Bill should restrict the matching of suspects profiles to crime scene profiles which are strictly within the grounds for ordering the procedure as provided for in clauses 14 and 19. The Committee has always taken a broader view. The general purposes for ordering the taking of the forensic sample is that the person is a suspect in relation to one or more crimes. That while the order may only be granted if there is reasonable suspicion about these crimes, if there are

¹⁵⁶ *1999 Model Bill*, Division 12, clause 83.

¹⁵⁷ A serious offence means an offence punishable by a maximum penalty of 5 or more years of imprisonment. A serious offender is a person found guilty of a serious offence: *1999 Model Bill*, clause 1.

some upon which to ground the order, it is sufficient to justify more general matching with the crime scene database.”¹⁵⁸

7.30 In addition the Committee noted the MCCOC Report states:

“Like the Canadian and USA models, the Model Bill includes an extra layer of security by prohibiting through this [clause 84 (3)] offence the inclusion of anything else than a code as an identifier for each profile. This promotes more arms length matching - a straight forward matching of codes without any idea of where it comes from. It is necessary to underpin this with an offence because it is a feature of the scheme designed to increase confidence in the fairness of the matching process. Once there is a match, the matched codes can then be used to reveal the identity of the person or the crime scene from which it was taken.”¹⁵⁹

¹⁵⁸ MCCOC Report, p. 95.

¹⁵⁹ MCCOC Report, p. 101.

Observations and Recommendations***How wide, or “broad based” should the database be?***

7. The Committee has commented on the type of offence and the type of offenders on whom forensic procedures can be conducted at paragraphs 25 to 31 and 47 to 54 of the Observations and Recommendations.
(Chapter 7)

If the database is broad based - is there a need to agree on sampling criteria to balance database capacity and analytical resources?

8. The Committee notes that the United Kingdom has broad sampling powers in relation to “*recordable offences*”. As a result the Committee notes that to ensure that the analytical infrastructure can support the possible sampling range, police and forensic scientists in the United Kingdom have developed administrative “*sampling criteria*” which prioritise categories of offences to balance database capacity and analytical resources.
(Paragraphs 7.10 - 7.13)

What measures need to be implemented to ensure the security of the database?

9. **The Committee recommends that the security of any DNA database should be protected by clear legislative provisions relating to access to, use and destruction of information on a DNA database. Further the Committee recommends that there be heavy penalties for the misuse of any information on a DNA database. These matters are addressed in more detail in paragraphs 111 to 122 of the Observations and Recommendations.**

State database and/or national database?

7.31 Two options are theoretically possible:

1. one central national database, similar to the databases operated in the United Kingdom and Germany; or
2. a national network of State databases, similar to the CODIS system operating in the United States of America.

- 7.32 Crime has ceased to respect borders. Cross border criminality is expected to increase and international and interstate crime investigation requires that the qualitative aspects of the DNA investigation be the same in the various jurisdictions so that comparable results can be exchanged. Databases have to be based on corresponding standardised DNA loci and internationally acknowledged quality control and quality assurance systems.
- 7.33 Therefore regardless of the model chosen there must be standardisation of techniques and information gathering. In the view of Mr Ben Gunn, Chief Constable, Cambridgeshire Constabulary, United Kingdom, a strong national approach provides the basis for influencing various regional and international fora on consistency of approach thereby enhancing the contribution of DNA to the investigation of national and international crime.¹⁶⁰ A copy of Mr Gunn's paper is attached as Appendix 6.
- 7.34 Australia is fortunate in this regard in that forensic profiling and information gathering are in their infancy compared with the rest of the world. At the outset techniques can be standardised and information systems developed with a view to effective integration at some level.
- 7.35 Before the *DNA Identification Act 1994* (Germany) each of the 16 German States took DNA samples, analysed them and downloaded the data onto its own database. This created problems similar to those experienced by the United States of America¹⁶¹ whereby each State database was incompatible with other States and it was not possible to match samples of offences committed in different States. Each German State now provides information directly to a central database from terminals supplied by the national government. The sub-committee was informed that whilst consideration was given to establishing separate State databases, evidence suggested that decentralised databases would demand more resources. Further a centralised database ensured that all data which is collected can be, and is, searched.
- 7.36 In establishing a national database, Mr Alastair Ross, Director of the National Institute of Forensic Science in Australia, pointed out the importance of, at the same time ensuring compatibility with international systems:

¹⁶⁰ Gunn, DG, Chief Constable, *National DNA Database, Presentation to the Australian Legislative Committee*, 27 January 1999.

¹⁶¹ Refer to paragraph 7.24 above.

“[W]hen we were looking at a national system we were conscious of the importance of its comparability with other systems - the CODIS system, the New Zealand system and the United Kingdom system. The New Zealanders are using the same system which is used in the United Kingdom and which looks at six different places on the DNA, whereas ours will look at nine. Of that nine, five are common with the United Kingdom and New Zealand systems. There is reasonably good comparability internationally now. The European Network of Forensic Science Institutes is looking at a way to standardise a DNA profiling system. It appears that will have a lot of commonality with the system we have chosen. The systems being established at the moment certainly lend themselves to international comparability for areas such as the drug trade.”¹⁶²

- 7.37 These comments apply equally if Western Australia establishes a separate database.
- 7.38 Dr Schmitter of the Bundeskriminalamt (German Federal Police) remarked that there was no impetus to build up a separate European database - rather initiatives were afoot to connect all European databases, via a network to enable each country to be searched separately. This presently occurs by way of informal arrangement between any two countries.
- 7.39 Concerns were expressed about the cost effectiveness of an integrated European database in terms of how costly it is to establish such databases and networks in view of the expected number of hits. It was emphasised to the Committee that the importance of compatibility lay, not in the development of an international database, but rather in the ability to enable cross border comparison on a case by case basis.
- 7.40 Mr Gunn also emphasised the cost benefit of a national approach. Mr Gunn noted the fact that any DNA database requires a major investment on behalf of both users (police) and providers (forensic laboratories). Mr Gunn considered that a national database:
- a. provides critical mass, to ensure economies of scale can provide acceptable analytical unit costs and training and educational costs;
 - b. affords wider technical and scientific support which enhances the integrity of the database;

¹⁶² *Evidence*, Mr Alastair Ross, Director of the National Institute of Forensic Science in Australia, 15 April 1998, p. 31; noted in the 46th Report, paragraph 2.4.

- c. warrants the appointment of a custodian to ensure the operational and scientific integrity of the database; and
 - d. ensures consistency of approach.
- 7.41 If Western Australia is to establish a State database all of the above issues would need to be addressed.
- 7.42 The 1995 Model Bill and the legislative responses in Victoria, South Australia and the Commonwealth represent the first steps in establishing a cooperative scheme across Australia with the aim of establishing nationally consistent legislation. Anecdotal evidence from the United States of America and the United Kingdom suggest that the validity of results obtained by DNA technology require the creation of a large database, which means that in Australia the database must be national.¹⁶³
- 7.43 The MCCOC Report also noted that “[A] national DNA law enforcement database is necessary because criminal activity often spans Australia’s internal borders and makes it necessary to get forensic evidence from different States and Territories. It also has advantages in terms of economies of scale. Australia has a relatively small population by world standards. Consistent legislation will simplify the establishment of the database and will ensure the DNA evidence can be appropriately used in any jurisdiction.”¹⁶⁴
- 7.44 A national database also enables the compilation of a sufficiently sized statistical database to obtain a representative cross section of the Australian population from which to calculate the statistical probability of a match.
- 7.45 Another issue which may support the establishment and/or maintenance of a separate State database is that each Australian State has its own criminal legislation - what may not be an offence in one State for which forensic procedures can be conducted may be so in another State. For example, the *1999 Model Bill* proposes, in part, that the national database only contain profiles from convicted serious offenders, that is, those convicted of an offence which is punishable by a maximum penalty of 5 or more years. If, as recommended by the majority of the Committee in paragraphs 27, 52 and 61 of the Observations and Recommendations, Western Australia includes offenders

¹⁶³ 42nd Report, paragraph 2.6.

¹⁶⁴ MCCOC Report, p. iii.

punishable by any term of imprisonment, that is, an “*indictable offence*”, then issues of appropriate sharing of information with other states will arise for consideration.

Observations and Recommendations

How should the database be structured - should there be one central national database; or a national network of State databases?

10. The Committee is of the view that the choice will depend upon many factors, including:
 - a. compatibility of the State’s database with any proposed by the federal government; and regardless of whether or not there is compatibility,
 - b. the resources which may be required for the ongoing use of a separate State database capable of exchanging information between States.(Paragraphs 7.31 - 7.45)
11. **The Committee recommends that a State DNA database be established and that it be integrated with a national database.**
(Paragraphs 7.31 - 7.45)
12. The Committee observes that Mr Ben Gunn, Chief Constable, Cambridgeshire Constabulary, United Kingdom, emphasises benefits of a national approach. Mr Gunn noted the fact that any DNA database requires a major investment on behalf of both users (police) and providers (forensic laboratories). Mr Gunn considered that a national database:
 - a. provides critical mass, to ensure economies of scale can provide acceptable analytical unit costs, and training and educational costs;
 - b. affords wider technical and scientific support which enhances the integrity of the database;
 - c. warrants the appointment of a custodian to ensure the operational and scientific integrity of the database; and
 - d. ensures consistency of approach.

If Western Australia were to establish a State database all of these issues would need to be addressed.

(Paragraph 7.33, 7.40 and 7.41)

continued...

Observations and Recommendations (*continued*)

13. Another issue which may support the establishment and/or maintenance of a separate State database is the fact that each Australian State has its own criminal legislation - what may not be an offence in one State for which forensic procedures can be conducted may be so in another State. For example, the *1999 Model Bill* proposes, in part, that the national database only contain profiles from convicted serious offenders, that is, those convicted of an offence which is punishable by a maximum penalty of 5 or more years. Western Australia may wish to include offenders punishable by any term of imprisonment, that is, an “*indictable offence*”, as is recommended by the majority of the Committee in paragraphs 27, 52 and 61 of the Observations and Recommendations.
(Paragraph 7.45)

Other Observations***Subdatabases for racial/cultural populations***

- 7.46 It is accepted science that frequency of alleles varies between races. It is for this reason that the Forensic Science Service in the United Kingdom and forensic agencies in other jurisdictions maintain separate statistical databases for each of the major races.
- 7.47 It is vital that there is statistical data sufficient to enable a proper calculation to be made of the rarity of a given profile in the population at large *and* in a relevant ethnic subgroup. Without such databases any DNA evidence presented at trial is likely to be attacked as inadmissible. In early Victorian legal cases there was not a sufficiently large database to calculate any useful probative value and many prosecution cases were successfully challenged on that basis.¹⁶⁵
- 7.48 The Forensic Science Service in the United Kingdom has three main databases available for estimating match probabilities. These are composed of DNA profiles

¹⁶⁵ In Australia the defence in *R v Tran* (1990) 50 A. Crim. R. 233 succeeded largely because there was no evidence as to the statistical match probability in the Vietnamese, that is, there was no appropriate database. Furthermore in *R v Lucas* [1992] 2 VR 109 the Western Australian court ruled that DNA evidence would not be admissible in light of the problems associated with the probability evidence.

from people described as “Caucasian”, “Afro-Caribbean” and “Indo-Pakistani” - the three broad ethnic groups which United Kingdom case work has found to be most applicable. If there is reliable evidence on the ethnic appearance of the perpetrator then the most appropriate database is used to assign a match probability. If there is no evidence of the ethnic appearance of the perpetrator or the ethnic appearance does not correspond to one of the ethnic databases then the databases corresponding to the ethnic origins are not required. In the latter case, the FSS uses all three databases to obtain separate estimates of match probability. The largest match probability, the one that is most favourable to the suspect, will be reported.¹⁶⁶

Observations and Recommendations

For the purposes of the calculation of match probability, should subdatabases be maintained for each of the major races in Western Australia?

14. The Committee observes that in other jurisdictions, separate databases are maintained to provide appropriate statistical databases. The Committee considers that the issue of subdatabases is a scientific question and involves the calculation of population frequencies. Accordingly the Committee does not make a recommendation on this issue.
(Paragraphs 7.46 - 7.48)
15. However local information suggested to the Committee that such databases may not be necessary for the purpose of identification of an individual in Australia, given the size of the country's population. The Committee understands that increases in technology may render the compilation of subdatabases unnecessary.
(Paragraph 10.14)

¹⁶⁶

Forensic Science Service, *Lawyers Guide to DNA*, p. 32.

*Quality control, accreditation, training and education***Observations and Recommendations***What effect does quality control, accreditation, training and education have on a database?*

16. The necessity for the training of police officers and scene of crime officers, the development of standard and internationally compatible scientific techniques, and the accreditation of forensic laboratories and forensic scientists have all been canvassed in paragraphs 90 to 94 of the Observations and Recommendations.
17. The Committee emphasises the importance of quality control, accreditation, training and education to maintain database integrity.

Chapter 8

FORENSIC PROCEDURES: SAMPLING AND EVIDENCE COLLECTION

Introduction

- 8.1 The powers of police and investigative officials are fundamental to the evidence which may be adduced in a criminal trial. At common law, power does not exist for police to conduct personal searches of suspects before their arrest. Legislative provisions have sought to clarify the common law powers and progressively to extend the power of law enforcement officers to take fingerprints and forensic tissue samples in specified circumstances. Generally, those powers are attended by statutory protections of individual rights and liberties, particularly of persons not in custody.
- 8.2 Each jurisdiction studied by the Committee differs in the type of forensic procedure which it allows to be conducted, the persons authorised to conduct particular procedures, the category of suspects who can be compelled to provide samples, and the circumstances, if at all, when court orders are required to conduct forensic procedures. What is acceptable in the United Kingdom may not be acceptable in Germany and vice versa.
- 8.3 The position taken on each issue is necessarily related to a position on another issue. For example, under the provisions of the *1999 Model Bill* a police officer may be authorised to take a buccal swab from a suspect in custody, but not from a suspect who is not yet in custody except when a court order has been previously obtained.
- 8.4 The Committee has spent considerable time examining the issues raised by forensic sampling procedures and evidence collection. It is one of the major areas of contention in the legislative processes in all jurisdictions examined.
- 8.5 In this Chapter the Committee has examined forensic procedures generally, and in particular the buccal swab debate. It examined the type of offence for which a person can be sampled and whether there should be any limitation on the use of information obtained from a forensic procedure.

- 8.6 The Committee has also addressed issues which raise themselves for resolution prior to carrying out a forensic procedure including:
- a. the granting and withdrawal of consent to a forensic procedure;
 - b. whether suspects who have not been charged with or convicted for an offence can be sampled;
 - c. other persons on whom forensic procedure may be conducted, including, volunteers, convicted prisoners, children and incapable persons; and
 - d. compulsory forensic procedures.
- 8.7 Finally the Committee examined issues relevant to the conduct of a forensic procedure including:
- a. who may conduct a forensic procedure; and
 - b. the use of reasonable force.

Forensic procedures

- 8.8 There are two main methods of obtaining cellular material from which to extract DNA for analysis: the buccal swab from inside of the cheek; and blood from either a finger pin prick (and then blotting on special paper or capture in a capillary tube) or venepuncture. Another less common method is by a hair sample with the root intact.
- 8.9 It is commonly assumed that blood samples are more robust than buccal swab samples because blood, if it is taken, dried and stored correctly, guarantees a DNA result. However, recent improvements in technology means that buccal swab scrapes are 95% - 99% effective.¹⁶⁷ Although in some instances blood was preferred as it guaranteed a result, forensic scientists in all jurisdictions expressed satisfaction with working with buccal swabs. A blood sample may also be preferred as it has a wider application for forensic analysis for other types of tests, for example, alcohol and drugs.

¹⁶⁷ *Evidence*, Mr Alastair Ross, Director of the National Institute of Forensic Science in Australia, 15 April 1998, p. 41; and various figures between 95%-99% provided by forensic scientists in the United Kingdom, the United States of America and Germany.

- 8.10 Improvements in sampling methods have also lead to more success with buccal swabs. Some jurisdictions, such as Germany, the United States of America and Western Australia, use a sampling tool resembling a cotton bud, whereas the United Kingdom has developed a buccal comb. The buccal comb is a small piece of abrasive cardboard which is scraped against the inside of the mouth to obtain a sufficient amount of cellular material for analysis.
- 8.11 After considering the different procedures and the advice of the police and forensic scientists the Committee agreed that, if samples are obtained by properly trained people, there is very little difference between the two procedures (venepuncture and buccal swab) and any preference has more to do with issues of analysis automation and sample storage than sufficiency of DNA material. The Committee was informed by many with whom it met that, what it has called the “sample hierarchy”, is actually determined by considerations of transport, storage and policy. Some of these matters are discussed at Chapter 9.
- 8.12 The Committee notes the advantages of the buccal swab:
- a. it is easy to obtain and relatively non-invasive;
 - b. it is possible for individuals to take their own sample;
 - c. it is an excellent source of DNA which has a long storage life;
 - d. it is inexpensive;
 - e. in 95% - 99% of cases, it provides sufficient DNA for forensic purposes;¹⁶⁸
 - f. it is safer than venepuncture; and
 - g. there are less health risks associated with the process compared with venepuncture.
- 8.13 Given the expressed reluctance of medical practitioners to participate in forced sampling and the potential health risks associated with venepuncture, the buccal swab has become an important sampling tool.

¹⁶⁸ Various figures between 95%-99% provided by forensic scientists in the United Kingdom, the United States of America and Germany.

Intimate or non-intimate - the buccal swab debate

- 8.14 In its 46th Report the Committee noted that *“It is accepted that taking a forensic sample is an invasive process and there should be some restrictions on the circumstances in which a sample can be taken, whether it is a buccal swab from the inside of the cheek, a blood sample or another type.”*¹⁶⁹
- 8.15 In all jurisdictions studied by the Committee, venepuncture is considered an intimate procedure. The main difference lies in the classification of a buccal swab as an intimate or non-intimate procedure, which classification in turn affects the class of persons empowered to take buccal swabs. Intimate samples must be taken by medically qualified personnel whereas non-intimate samples usually may be taken by an *“authorised person”*.
- 8.16 In Germany and the United States of America it has been argued that the buccal swab, which takes a gentle scraping from the inside of a person’s cheek, could be considered invasive by some test subjects and that the test should therefore be conducted by a doctor, nurse or dentist.
- 8.17 Former Western Australian Police Commissioner, Mr Falconer, does not consider buccal swabs to be intrusive and expressed concerns that the simple buccal swab test could become expensive and unwieldy if police - especially in remote areas or at odd hours - had to find a doctor or qualified nurse to take a buccal swab. Mr Falconer expressed hope that Western Australia police will be granted similar powers to police in the United Kingdom who are trained to collect buccal swabs.¹⁷⁰ Police in Germany are also empowered to collect buccal swabs.
- 8.18 Current Western Australian legislation does not differentiate between samples which are intimate or non-intimate. A sample of the accused *“person’s blood, hair (from any part of the body), nails or saliva, or of any matter on the person’s body or obtainable by a buccal swab”* can be taken by a legally qualified medical practitioner or a nurse if it will afford evidence as to the commission of the offence: section 236 *Criminal Code* (Western Australia).

¹⁶⁹ 46th Report, paragraph 2.5.

¹⁷⁰ The *West Australian* newspaper, “Mouth swab to be the focus of debate”, 10 August 1998; and *Evidence*, Falconer, pp. 3 and 14.

- 8.19 The **1995 Model Bill** classified the taking of saliva or a sample by buccal swab as an intimate procedure which may be conducted only by a medical practitioner, dentist, dental technician or nurse. The **1999 Model Bill** now proposes that such test can also be taken by “*appropriately qualified person*” but only with informed consent or after a court order has been obtained: clause 38.
- 8.20 In the MCCOC Report the committee of inquiry explained it had been persuaded that the change made to the 1995 Model Bill was justified because it appeared that the taking of such samples could be achieved by appropriately trained police or civilian staff members of law enforcement agencies or forensic facilities. The committee of inquiry noted that the issue was about safety not intimacy. However, the committee of inquiry continued to be of the view that:¹⁷¹
- a. the taking of saliva or buccal swabs was an intimate procedure and one that should not be authorised by a senior police officer; and
 - b. the right to magisterial consideration of whether the procedure is justified should be preserved.
- 8.21 Under **Victorian** legislation buccal swabs are deemed intimate procedures to be performed by a doctor, nurse or dentist.¹⁷² The Committee understands that the classification of a buccal swab as an intimate procedure may be subject to review. The Committee was informed by the Victorian police that they were hopeful that a buccal swab would become a procedure which could be conducted by authorised persons who had been specifically trained.
- 8.22 The **South Australian** legislation, the *Criminal Law (Forensic Procedures) Act 1998* (yet to be proclaimed), generally follows the **1999 Model Bill**. However, a distinction is drawn between intimate, intrusive and non-intrusive forensic procedures. More rigorous protections apply to intimate and intrusive procedures. An intrusive procedure

¹⁷¹ MCCOC Report, p. 9.

¹⁷² *Crimes Act 1958* (Victoria), section 464.

includes intimate forensic procedures,¹⁷³ a forensic procedure involving intrusion into a person's mouth (for example: a buccal swab), and the taking of a sample of blood.¹⁷⁴

- 8.23 In general, unless a suspect (not being a convicted offender) gives informed consent to the taking of an intrusive or intimate sample, such a sample can be taken only by order of a magistrate. Again, in general terms, non-intrusive samples may be taken by informed consent, or may be required to be taken by a police officer, provided certain criteria are met.
- 8.24 The *Northern Territory* enacted legislation in 1998 which categorises the taking of saliva and mouth swabs as a non-intimate forensic procedure.¹⁷⁵ Further the Committee understands that people are being requested to take their own samples.
- 8.25 In the *United Kingdom* the *Police and Criminal Evidence (Amendment) Act 1997* (United Kingdom) makes the distinction between "intimate" and "non-intimate" samples. A buccal swab is designated as a non-intimate sample and may be taken with consent or without consent if the person is in police detention or being held by the police on the authority of a court and if an officer of at least the rank of Superintendent authorises it.¹⁷⁶
- 8.26 There are concerns that although not as intimate as a blood sample, a buccal swab was still invasive and/or intrusive and there was still a risk of injury if the sample had to be taken by force. A view was expressed to the Committee that in circumstances of "reasonable suspicion" provided by the United Kingdom legislation, where consent was not provided, it was preferable that:
- a. a court order to provide the sample be obtained rather than the order of a police officer. The Committee discusses the issue of court orders at paragraph 8.171 onwards of this Chapter; or

¹⁷³ "intimate forensic procedure" means a forensic procedure that involves exposure of, or contact with, the genital or anal area, the buttocks or, in the case of a female, the breasts: *Criminal Law (Forensic Procedures) Act 1998*, section 3.

¹⁷⁴ *Criminal Law (Forensic Procedures) Act 1998*, section 3.

¹⁷⁵ Northern Territory, *Police Administration Amendment Act (No 2) 1998*, *Juvenile Justice Amendment Act (No3) 1998*, *Prisons Correctional Services Act 1998*.

¹⁷⁶ *Police and Criminal Evidence (Amendment) Act 1997* (United Kingdom), sections 63(1)-(4).

- b. that an adverse inference may be drawn from the failure to provide a sample. The Committee discusses this issue at Chapter 16.
- 8.27 In *Germany* the taking of a sample of saliva or a sample by buccal swab is not considered an invasive procedure.¹⁷⁷
- 8.28 The arguments for and against buccal swabs being classified by legislative edict as an intimate sample were comprehensively examined in the MCCOC Report. A copy of the relevant pages is attached as Appendix 5.

Observations and Recommendations

What procedures should be regarded as intimate forensic procedures?

18. The Committee recommends that an “*intimate forensic procedure*” means:
- a. an external examination of the genital or anal area, the buttocks, or in the case of a female, the breasts;
 - b. the taking of a sample of blood;
 - c. the taking of a sample of pubic hair;
 - d. the taking of a sample by swab or washing from the external genital or anal area, the buttocks, or in the case of a female the breasts;
 - e. the taking of a sample by vacuum suction, by scraping or by lifting by tape from the external genital or anal area, the buttocks, or in the case of a female, the breasts;
 - f. the taking of a dental impression; or
 - g. the taking of a photograph of, or an impression or cast of a wound from the genital or anal area, the buttocks, or in the case of a female, the breasts.

(For a discussion of the position in other jurisdictions studied by the Committee refer to Chapters 5 and 6.)

continued...

¹⁷⁷ Letter from Mr Eberhard Kempf, Rechtsanwälte und Notare, to the Committee, dated 13 August 1999.

Observations and Recommendations (*continued*)***What procedures should be regarded as non-intimate forensic procedures?***

19. The Committee recommends that a “*non intimate forensic procedure*” means:
- a. an examination of a part of the body other than the genital or anal area, buttocks, or in the case of a female, the breasts, that requires touching of the body or removal of clothing;
 - b. the taking of a sample of hair other than pubic hair;
 - c. the taking of a sample from a nail or under a nail;
 - d. the taking of a sample by swab or washing from any external part of the body other than the genital or anal area, the buttocks, or in the case of a female, the breasts;
 - e. the taking of a sample by vacuum suction, by scraping or by lifting by tape part of the body other than the genital or anal area, the buttocks, or in the case of a female the breasts;
 - f. the taking of a handprint, fingerprint, footprint or toe print; or
 - g. the taking of a photograph of, or an impression or cast of a wound from a part of the body other than the genital or anal area, the buttocks, or in the case of a female, the breasts.

(For a discussion of the position in other jurisdictions studied by the Committee refer to Chapters 5 and 6.)

Is the taking of a sample by buccal swab an intimate or non-intimate forensic procedure?

20. The Committee is evenly divided on the issue as to whether the taking of a sample by buccal swab, is an “*intimate forensic procedure*” or a “*non-intimate forensic procedure*” and is unable to make a recommendation to the House.

Whilst some members consider that the taking of a sample by buccal swab, may be “*invasive*” or “*intrusive*”, they do not consider that it is intimate. Other members consider that it is an intimate procedure that requires more stringent checks and balances.

The Committee is of the view that the matter is essentially one of policy and is an issue that is best determined by the House. (Paragraphs 8.8 - 8.28)

continued.....

Observations and Recommendations (*continued*)***What safeguards should attach to certain forensic procedures?***

21. The Committee is of the view that certain forensic procedures should be carried out by a person or persons of the same sex as the person being subjected to the forensic procedure.

(For a discussion of the position in other jurisdictions studied by the Committee refer to Chapter 5 and 6.)

22. **The Committee recommends that, if practicable, an intimate forensic procedure (other than the taking of a sample of blood or a dental impression and the taking of a sample by buccal swab, regardless of whether it is categorised as an intimate or a non-intimate forensic procedure) is to be carried out by a person of the same sex as the person being subjected to the forensic procedure.**

(For a discussion of the position in other jurisdictions studied by the Committee refer to Chapters 5 and 6.)

23. **The Committee recommends that, if practicable, a non-intimate forensic procedure for which the person undergoing the forensic procedure is required to remove clothing other than his or her overcoat, coat, jacket, gloves, socks, shoes and hat is to be carried out by a person of the same sex as the person being subjected to the forensic procedure.**

(For a discussion of the position in other jurisdictions studied by the Committee refer to Chapters 5 and 6.)

24. **The Committee recommends that, if practicable, a person who assists in carrying out a forensic procedure covered by paragraphs 22 or 23 of the Observations and Recommendations is to be a person of the same sex as the suspect.**

(For a discussion of the position in other jurisdictions studied by the Committee refer to Chapters 5 and 6.)

Offence

Type of offence

- 8.29 This section only discusses the range of offences which trigger the sampling powers against suspects in custody and those not in custody. The range of offences which act as a trigger for Post Conviction Testing is discussed from paragraph 8.114 onwards.
- 8.30 Initially DNA forensic profiling techniques were used in the most serious of crimes - rapes and murders. However, the Committee was informed by Mr Falconer, Former Commissioner of Police, Western Australia Police Service, that “[I]n the United Kingdom, Canada and New Zealand and the United States of America to an extent, by introducing legislative authority for police to obtain relevant samples from people convicted of a broad range of offences, authorities - the British in particular - have increased their clean-up rates enormously in regard to what they refer to as volume crime; that is, house burglary and motor vehicle theft. This was a huge beneficial spin-off and it is continuing in the United Kingdom. I can assure members that the figures are extremely impressive, and they go well beyond the clearance rates anywhere else, particularly for the very troublesome crime of house burglary.”¹⁷⁸ This view was reinforced by members of the police forces in the jurisdictions into which the Committee enquired.
- 8.31 With the exception of Germany, the preference expressed by law enforcement representatives in all other jurisdictions which the Committee visited was that, from an investigational point of view, the database should be as large as possible and not be limited by type of offence.
- 8.32 In *Western Australia*, section 236 of the *Criminal Code* (Western Australia) does not restrict the conduct of a forensic procedure to any particular offence although the determination of “reasonable grounds” to obtain a sample must be read in light of affording “evidence as to the commission of the offence”. The application of the section will depend on the nature of the offence, in particular whether there are reasonable grounds to believe that material left at the crime scene could be matched with a DNA profile of the suspect, thereby affording evidence of the suspect’s involvement in the offence. For example, this may be clear in the case of a sexual

¹⁷⁸ Evidence, Mr Robert Falconer, Former Commissioner of Police, Western Australia Police Service, 1 April 1998 pp. 1-2.

assault where bodily fluids usually are left, but not so clear in the case of possession of drugs.

- 8.33 The Committee notes that section 236 of the *Criminal Code* (Western Australia) does not specify if the offence should be one punishable on indictment or summary conviction or be an offence of any level of seriousness. In contrast the Committee notes that fingerprints may be taken where a “*person is in lawful custody for any offence punishable on indictment or summary conviction*”: section 50AA.
- 8.34 In **Victoria**, before the introduction of the *Crimes Amendment Act 1997* (Victoria), application for the compulsory taking of a bodily sample from a suspect was limited to murder, armed robbery, robbery and culpable driving.
- 8.35 The *Crimes Amendment Act 1997* (Victoria) has extended the category of offences for which compulsory procedures on a suspect can be sought. The power to seek a court order for compulsory testing now includes burglary, aggravated burglary, arson, arson causing death, contamination of goods and specified drug offences.
- 8.36 In **South Australia** the *Criminal Law (Forensic Procedures) Act 1998* (South Australia) enables a forensic procedure to be conducted on a “*person under suspicion*”. For the purpose of the Act, a person is “*under suspicion*” if the police officer by or on whose instruction a forensic procedure is to be carried out, suspects that person, on reasonable grounds, of having committed a “*criminal offence*”.¹⁷⁹ A “*criminal offence*” means any offence except a summary offence that is not punishable by imprisonment; or a summary offence that is capable of being expunged.¹⁸⁰ Therefore the category of offence for which a forensic procedure can be requested and ordered is, at first glance, very wide. However, if the proposed forensic procedure is an “*intrusive procedure*” and the suspected offence is a summary offence, unless the person consents, he or she cannot be compelled to undergo the procedure even by court order.¹⁸¹ This effectively limits the conduct of intrusive procedures to indictable offences, with a court order if no consent is given.
- 8.37 The **1999 Model Bill** provides that samples can be taken from any suspect if a police officer has someone suspected on reasonable grounds of having committed an

¹⁷⁹ *Criminal Law (Forensic Procedures) Act 1998* (South Australia), section 4.

¹⁸⁰ *Criminal Law (Forensic Procedures) Act 1998* (South Australia), section 3.

¹⁸¹ *Criminal Law (Forensic Procedures) Act 1998* (South Australia), section 16(1)(f).

“*indictable offence*.” The classification of an offence as “*indictable*” primarily relates to procedural matters. Generally any offence which is punishable by a term of imprisonment for more than 12 months is classified as “*indictable*”.

- 8.38 If Western Australia’s legislation is amended to reflect the *1999 Model Bill* by referring to indictable or summary offences as the “*trigger*” for sampling there will be complications for present judicial procedures.
- 8.39 All Australian jurisdictions have created a classification of indictable offences which may be tried summarily. Generally legislative gateways determine which offences may be tried summarily. These can include: an admission of guilt; in property offences, a limit on the value of goods; with offences against the person, their seriousness; the summary court’s own view of the case’s suitability; or the consent of the prosecutor. This procedural approach reduces the need for pre-trial conferences and saves resources of the Director of Public Prosecutions and the courts.
- 8.40 In contrast to most other Australian jurisdictions, under the Western Australian *Criminal Code* a person convicted of an indictable offence after a summary hearing is deemed to be convicted of a simple (non-indictable) offence.
- 8.41 If sampling offences were limited to a person “*convicted of*” indictable offences, indictable offences may no longer be tried summarily. In order to ensure that a sample can be obtained, the prosecution may decline to try indictable offences in a summary manner. This may increase trial cost and delays.
- 8.42 The Committee notes that the *1999 Model Bill* refers to a person who is “*suspected of having committed*” an indictable offence. If proposed Western Australian legislation uses suspicion of having committed an indictable offence as the trigger for sampling powers, the effect of the *Criminal Code* (Western Australia) on conviction may be irrelevant. However, the Committee has not considered whether an indictable offence which will be tried summarily affects the nature of the charge placed against a suspect, and therefore the ability to obtain a sample under future legislation. Accordingly, the Committee considers that these matters should be addressed when drafting any legislation for Western Australia.
- 8.43 In the *United Kingdom* a sample can be taken if the police officer has reasonable grounds for suspecting the involvement of the person from whom the sample is being taken, in a “*recordable offence*” and believes that the sample would tend to confirm or

dispute that involvement”.¹⁸² A “*recordable offence*” is any offence which carries a sentence of imprisonment on conviction and includes: non-imprisonable offences such as loitering or soliciting for purposes of prostitution; improper use of public telecommunications system; and tampering with motor vehicles. It is therefore possible to take a sample on the basis of minor “*recordable offences*”, such as fraudulently using a motor vehicle licence.

8.44 Some concerns were expressed to the Committee that the sampling powers in the United Kingdom legislation are too wide and inappropriate. For example, it was suggested that:

- a. some offences do not require identification, which is the major justification for DNA profiling; and
- b. DNA is irrelevant to some offences, such as failure to pay a taxi or underground tube fare. Both of these offences are “*recordable offences*” and DNA samples can be taken, yet the point was mooted that the evidence from the DNA sample was of no consequence to the offence. Although it was noted that the law enforcement authorities have made a financial decision not to pursue these offences the legislation still carries the potential.

8.45 To address these matters it was suggested to the Committee that a two tiered approach be enacted with categories of offence being prescribed for situations where sampling may occur and in all other cases an application should be made to the judge to determine, on a case by case basis, whether a DNA sample was warranted.

8.46 Many of the arguments for sampling certain offences stem from an understanding that forensic profiling will act as a deterrent and therefore reduce recidivism. The Committee noted opinions that there are certain low volume crimes where there is a low degree of recidivism, such as murder. There are also certain high volume crimes where there is a high degree of recidivism, for example, drug related crimes (such as burglary) and sexual offences. Accordingly arguments for compulsory sampling for different offences diverge. The Committee has not examined these issues but notes the comments made.

8.47 The Committee noted the findings of a Commonwealth Senate committee scrutinising the proposed *Crimes Amendment (Forensic Procedures) Bill 1997*. The Senate

¹⁸² *Police and Criminal Evidence Act 1984* (United Kingdom), section 63.

committee noted that none of the reports which have investigated the feasibility of, and justification for, forensic procedures have recommended restricting the availability of procedures to offences punishable by five years or more.¹⁸³ The reports have all settled on indictable offences as being an appropriate threshold test.¹⁸⁴ The higher threshold would exclude forensic procedures from being used for many offences for which it is most applicable. It was noted that many offences against the person are punishable by less than 5 years imprisonment.

Observations and Recommendations

What type of offences should result in body samples being taken for DNA analysis? What threshold should apply for the conduct of other forensic procedures?

25. The Committee is of the view that forensic procedures are likely to be used in relation to offences against the person. The vast majority of offences of that nature carry maximum penalties of 12 months or more imprisonment.
(Paragraphs 8.29 - 8.37 and 8.43 - 8.47)
26. The Committee notes the findings of a Commonwealth Senate Standing Committee for the Scrutiny of Bills: Ninth Report of 1997: *Crimes Amendment (Forensic Procedures) Bill 1997*, 18 June 1997. The Senate committee noted that none of the reports which has investigated the feasibility of, and justification for, forensic procedures has recommended restricting the availability of procedures to offences punishable by five years or more. The reports have all settled on indictable offences as being an appropriate threshold test. The higher threshold would exclude forensic procedures from being used for many offences for which it is most applicable. The Committee notes that many offences against the person are punishable by less than 5 years imprisonment.
(Paragraph 8.47)

continued...

¹⁸³ Senate Standing Committee for the Scrutiny of Bills: Ninth Report of 1997: *Crimes Amendment (Forensic Procedures) Bill 1997*, 18 June 1997, paragraphs 35 - 36.

¹⁸⁴ For example refer to the ALRC Report No 2 on Criminal Investigations; the Gibbs Committee Report; and the Coldrey Report.

Observations and Recommendations (*continued*)

27. **Subject to paragraphs 28 and 29 of the Observations and Recommendations, the majority of the Committee is of the view that forensic procedures should be available in respect of offences which are punishable by any term of imprisonment. The majority of the Committee recommends that forensic procedures be available in respect of any indictable offence.** (Paragraphs 8.29 - 8.47)
28. The Committee believes that proposed legislation should be consistent with existing legislation. In this respect the Committee notes that fingerprints currently may be taken where a “*person is in lawful custody for any offence punishable on indictment or summary conviction*”: section 50AA *Criminal Code* (Western Australia). (Paragraph 8.33)
29. **The Committee recommends that fingerprints may be taken where a person is in lawful custody for any offence punishable on indictment or summary conviction.** (Paragraph 8.33)
30. The Committee notes that legislation in the United Kingdom grants broad sampling powers in relation to “*recordable offences*”. As a result the Committee notes that to ensure that the analytical infrastructure can support the possible sampling range, police and forensic scientists in the United Kingdom have developed administrative “*sampling criteria*” which prioritise categories of offences to balance database capacity and analytical resources. (Refer to paragraph 8 of the Observations and Recommendations)

continued ...

Observations and Recommendations (*continued*)

31. The Committee further notes that under the Western Australian *Criminal Code* indictable offences, subject to certain conditions, may be tried summarily. However in contrast to most other Australian jurisdictions, in Western Australia a person convicted of an indictable offence after a summary hearing is deemed to be convicted of a simple (non-indictable) offence. Accordingly if Western Australian legislation regarding forensic procedures refers to an “*indictable offence*” as the threshold upon which forensic procedures may be conducted, the distinction between “*summary*” and “*indictable*” offences may unintentionally limit the circumstances in which a person can be required to undergo a forensic procedure.

The Committee notes that the above concern may be irrelevant where a forensic procedure may be conducted on a person “*suspected*” of an indictable offence. However an indictable offence which will be tried summarily may affect the nature of the charge placed against a person, or may affect the ability to conduct forensic procedures on convicted persons. The Committee has not considered this issue in detail but it notes that any proposed legislation defining the categories of offences for which a forensic procedure can be conducted, if distinguishing between summary and indictable offences, should, if necessary, contain provisions specifying that forensic procedures can be conducted with respect to indictable offences tried summarily. The Committee notes that this may require amendments to existing legislation including the *Criminal Code* (Western Australia).
(Paragraphs 8.38 - 8.42)

Limitation of use

- 8.48 When a sample is obtained from a suspect or a convicted offender the issue arises as to whether:
- a. use of that sample should be limited to investigation of the offence for which the sample was taken; or
 - b. use may be made of the sample to screen against a database in respect of other offences which the suspect may have committed; or

- c. use may be made of the sample to screen against the database in respect of any other material held on the database, regardless of whether there may be a nexus with the suspect.

8.49 The use of a sample in the latter category has been criticised as a “*fishing expedition by police*”. Concerns were expressed that, for example, police may be tempted to obtain a sample from a person who was reasonably suspected of Offence A to run it against Offence B, and other offences, for which the police did not have reasonable suspicion.

8.50 Some people with whom the Committee met considered that if “*reasonable suspicion*” for an identified offence is required to obtain a court order and the court gives permission to take a sample without consent for those purposes, then the sample should only be used for those purposes. The use of the sample for other purposes would not be something sanctioned by the court. As stated to the Committee by Ms Felicity Hampel QC, Acting President, Council for Civil Liberties: “... *you cannot get in the door of reasonable suspicion for one offence and then use it for anything else - to me that is just dodging the issue.*”¹⁸⁵

8.51 Current ***Western Australian*** legislation requires the destruction of the sample if the person is acquitted of the offence for which that sample was taken.¹⁸⁶ Western Australian legislation does not presently allow for screening of any profile obtained from a sample against other types of offences.

8.52 There appears to be a general distinction drawn by most jurisdictions between samples obtained from a convicted offender as a result of Post Conviction Testing and samples obtained from a suspect.

8.53 The ***1999 Model Bill*** presently makes it clear that the suspect’s profile may only be used to investigate the offence about which they are a suspect or other offences. The profile can be matched against anything on the crime scene index but not any other index nor may there be unrestricted comparison against all crime scene profiles.¹⁸⁷ As

¹⁸⁵ Ms Felicity Hampel QC, Acting President, Council for Civil Liberties (Melbourne) who met with the Committee on 5 October 1998.

¹⁸⁶ *Criminal Code* (Western Australia), section 236.

¹⁸⁷ For further discussion of the indexes on the proposed Australian national database refer to paragraph 7.27 onwards.

noted in the MCCOC Report: “[T]o do so would go beyond the purpose for which the forensic material was obtained in the first place and may expose suspects to random searching by police anywhere in the country who are quite separate from the particular investigation and who are just fishing for matches on the crime scene index.”¹⁸⁸

- 8.54 Under the *1999 Model Bill*, in ordering a forensic procedure to be carried out on a suspect, there must be reasonable grounds to suspect that he or she committed a “relevant offence”: clauses 14 and 19. Clause 1 defines a “relevant offence” to include:
- i. the offence in relation to which the person is a suspect;
 - ii. any other offence arising out of the same circumstances; or
 - iii. any other offence in respect of which the evidence likely to be obtained as a result of carrying out the proposed forensic procedure on the suspect is likely to have probative value.

Thus the grounds for ordering that a forensic procedure be conducted are not strictly limited to the actual offence under investigation. The justification for the scope of this legislation and the opposing viewpoints are discussed at pages 90 to 97 of the MCCOC Report which are attached as Appendix 11 to this Report.

- 8.55 The Committee considered that the proposal discussed at pages 90 - 97 of the MCCOC Report in respect of the matching of a suspect's profile is unclear. The MCCOC Report appears to suggest that suspect samples can be matched against anything on a crime scene index, but then states that there cannot be unrestricted matching. The MCCOC Report then refers to the nexus with the definition of “relevant offence”. Whilst that definition may restrict speculative searching to some degree, the Committee considered that it is not clear from the MCCOC Report or the *1999 Model Bill* as to who would assess whether, in any particular circumstance, the relevant nexus had been established for searching. For example, would it be the subjective assessment of the investigating officer? How is it intended that the definition at (iii) operate? Further the MCCOC Report then states that use of any sample must be wider than the nexus established by reference to the definition of “relevant offence”.

¹⁸⁸

MCCOC Report, p. 93.

- 8.56 The Committee understands that it is intended that limitations on speculative searching will be achieved by the structure and practical implementation of the database.¹⁸⁹ These matters are addressed at Division 12 of the *1999 Model Bill*. However the Committee understands that this Division and others in the *1999 Model Bill* are being redrafted.¹⁹⁰ As any further observations made by the Committee in this Report may be superseded by these further amendments the Committee does not make any further comments save that the issues at pages 90 - 97 of the MCCOC Report (refer to Appendix 11) must be addressed by the drafters of the State's legislation.
- 8.57 In contrast, there are no restrictions in the *1999 Model Bill* on the use of a serious offender's profile (that is a convicted offender) and it can be matched against any index on the database.¹⁹¹
- 8.58 **New South Wales** legislation does not provide for the establishment of a database and the issue of matching does not arise. However, the legislation does provide that:
- a. evidence concerning the samples may be given only in proceedings concerning the crime or offence in relation to which the samples were taken; and
 - b. the samples must be destroyed as soon as practicable after the conclusion of the proceedings and the exhaustion of any right of appeal concerning the crime or offence.¹⁹²
- 8.59 Unlike the *1999 Model Bill*, the **Victorian** legislation does not expressly address the issue of screening of the suspect's profile against other profiles. However, the Committee was informed that as a matter of practice, when a sample is requested from a person, they are informed that the DNA profile obtained will not only be screened for

¹⁸⁹ Discussions between Ms Mia Betjeman, Advisory/Research Officer to the Committee, and Mr Geoff McDonald, Attorney General's Department (Commonwealth) on 3 August 1999; and refer to the MCCOC Report, p. 95.

¹⁹⁰ E-mail from Mr Geoff McDonald, Attorney General's Department, Canberra, to Ms Mia Betjeman, Advisory/Research Officer, Standing Committee on Legislation, Legislative Council Committee Office, 24 August 1999.

¹⁹¹ MCCOC Report, p. 97.

¹⁹² *Crimes Act 1900* (New South Wales), section 353A(3B).

a particular crime but also screened against other crimes. The Committee was informed that people being sampled still consent to the procedure when informed of this use.

- 8.60 The *South Australian* legislation does not specifically address this issue of screening although the conduct of the forensic procedure is restricted to obtaining “*evidence of value to the investigation of the suspected offence*”. However, the Committee was informed that once a sample has been obtained it can be screened against anything held on the database as the legislation does not limit the screening of a profile in any way.
- 8.61 Similarly to the position in New South Wales and South Australia, in the *United Kingdom* all samples can be subjected to a speculative search. The Committee was informed that, in addition to a profile being compared with any other profile on the database (suspect or crime scene profiles), a sample taken in the course of one investigation can be compared with a sample taken in another investigation relating to a completely different offence.¹⁹³
- 8.62 The Committee noted that in the United Kingdom this power to conduct speculative searches is specifically referred to in the relevant legislation and is restricted to the situation where the person has actually been arrested and is not just “*reasonably suspected*”. It was noted above that police in the United Kingdom may also sample persons “*reasonably suspected of being involved in an offence*”.
- 8.63 In the *United States of America* there are no restrictions on speculative searches. The database is limited to convicted offenders and their profiles can be searched against any other profile.

¹⁹³ *Police and Criminal Evidence Act 1984* (United Kingdom), which requires that the person is also to be informed that the sample may be subject to a speculative search: section 63(8B) regarding non-intimate samples and section 62(7a)(8) regarding intimate samples as reinforced by sections 63(91) and 65(4). This does not apply in cases of mass screening, where the profiles can only be searched against the crime scene stain from that particular case.

Observations and Recommendations

What, if any, restrictions should apply to use of a sample obtained from a suspect?

- *Should use of that sample be limited to investigation of the offence for which the sample was taken (“limited search”); or*
- *may use be made of the sample to screen against a database in respect of investigation of the offence for which the sample was taken and other offences which the suspect may have committed (“speculative search”).*

32. **The Committee recommends that information obtained from a forensic procedure conducted on a person who has been arrested and charged, or who has been convicted of an indictable offence, should be able to be used to conduct a speculative search.**

(Paragraphs 8.48 - 8.63)

33. The Committee is divided on the use of information obtained from a forensic procedure conducted on a person who is under suspicion of having committed an indictable offence but who has not yet been arrested or charged with an indictable offence. Accordingly the Committee is unable to make a recommendation.

Some members consider that the information obtained from a forensic procedure should only be used to conduct a limited search. One of the views advanced in support of this position was that if the suspect was arrested subsequently and charged with an indictable offence, then the information obtained from a forensic procedure could, at that time, be used to conduct a speculative search. Other members considered that the information obtained from a forensic procedure should immediately be able to be used to conduct a speculative search.

(Paragraphs 8.48 - 8.63)

Before forensic procedures are carried out

8.64 The Committee noted the many checks and balances referred to in the Coldrey Report¹⁹⁴: *“Checks and balances can serve a number of purposes within a framework of expanded police powers. First, they can eliminate arbitrary and capricious conduct on the part of those who exercise the powers. Secondly, they can promote fairness by ensuring that as far as is possible everybody receives equal treatment when they are*

¹⁹⁴ The Coldrey Report, paragraph 5.35, p. 143.

exposed to the operation of the criminal justice system. Thirdly, they can ensure that the State does not exercise a monopoly of power in seeking to obtain a conviction and fourthly they can prevent any potential abuse of power by clearly setting out the rules that govern the interaction between the State and the individual.”

8.65 In the context of forensic testing the Coldrey Report identified the following checks and balances:

- a. consent and informed consent;
- b. threshold tests for non-consensual procedures;
- c. authority to compulsorily carry out procedures;
- d. method of obtaining authority;
- e. enforcement of authority;
- f. sanctions on the effect of failure to comply with legal requirements;
- g. statutorily enshrined standards of admissibility;
- h. systems of accreditation;
- i. statutory procedures for conducting procedures;
- j. proficiency testing of experts;
- k. the use of population studies;
- l. access to forensic material;
- m. subsequent use of forensic material;
- n. time limits for destruction of sample and records; and
- o. sanctions for misuse of information.

8.66 The Committee does not examine all of these issues in the Report but discusses some which require urgent resolution.¹⁹⁵

¹⁹⁵

Issue a is discussed at paragraph 8.67 onwards; issues c, d, and e are discussed at paragraphs 8.166 onwards; issue g is discussed in Chapter 16, issues h and j are discussed in Chapter 10; issue k is discussed in Chapters 7 and 16; issues l and m are discussed in Chapter 12; and issues n and o are discussed in Chapter 13.

Informed consent

- 8.67 The Coldrey Report noted that if informed consent is required then the following minimum standards are necessary:¹⁹⁶
- a. the police must explain the procedure and the purpose for which the forensic testing is to be carried out;
 - b. the suspect must be informed of the offence for which he or she is being investigated;
 - c. the suspect must be told that the procedure could produce evidence to be used in court; and
 - d. the suspect must be told what powers could be invoked to compel him or her to comply.
- 8.68 The Coldrey Report further notes that even if procedures are carried out with the apparent consent of the suspect, there is still a risk that a dispute will occur at the trial about that issue. Avoiding this requires consideration of a means of recording consent. This could be achieved in a number of ways including:¹⁹⁷
- a. a written consent of the suspect; or
 - b. an electronic record of consent on tape and/or video.
- 8.69 The **1999 Model Bill** contains comprehensive rules relating to informed consent and withdrawal of consent regarding suspects (clauses 6, 9 and 10) and volunteers (clauses 60, 61 and 62). The *1999 Model Bill* specifically sets out those matters that suspects and volunteers must be informed of before giving consent: clauses 9 and 61 respectively. In respect of suspects, informed consent includes a requirement that the suspect be given “*the opportunity to communicate, or attempt to communicate, with a legal practitioner of the suspect’s choice*”: clause 6. Volunteers may require the same rights but it is not mandatory.¹⁹⁸

¹⁹⁶ The Coldrey Report, p. 144.

¹⁹⁷ The Coldrey Report, p. 144.

¹⁹⁸ *1999 Model Bill*, clause 60(1)(e).

- 8.70 Two categories of people are incapable of giving informed consent: children (being a person under 18) and “*incapable persons*”¹⁹⁹. Accordingly in these categories, in the case of a suspect, an order from a magistrate is required to carry out the forensic procedure (clause 5) or, in the case of a volunteer, the informed consent of the parent or guardian or a magistrate’s order: clause 59(2)(b).
- 8.71 In **Victoria**, the *Crimes Act 1958* also provides for obtaining the informed consent of a suspect or volunteer. Unlike the provisions of the *1999 Model Bill*, the Victorian legislation does not require that the suspect be given the opportunity to communicate, or attempt to communicate, with a legal practitioner of the suspect’s choice. However, safeguards include a taped caution, legal consultation and the right to withdraw consent. The suspect may request that the procedure be conducted by or in the presence of a medical practitioner or nurse of his or her choice or, where the procedure is the taking of a dental impression, a dentist of his or her choice.
- 8.72 There is no provision for informed consent in the **Western Australian Criminal Code**. The Committee noted that, as the *Criminal Code* (Western Australia) is not restricted to DNA sampling techniques, and a separate piece of legislation may be enacted for all forensic procedures, informed consent should apply to all forensic procedures even if informed consent is not currently required.
- 8.73 Further the Committee noted that in addition to informed consent, **South Australia** and the *1999 Model Bill* require the caution, giving of consent and taking of the sample to be videotaped. A recording of a forensic procedure must be made if it is reasonably practicable to make the recording; and the person on whom the forensic procedure is to be carried out does not object.²⁰⁰
- 8.74 In respect of the South Australian legislation it was noted that:

¹⁹⁹“*Incapable persons*” means an adult who:

- (a) is incapable of understanding the general nature and effect of, and purposes of carrying out, a forensic procedure, or
- (b) is incapable of indicating whether or not he or she consents or does not consent to a forensic procedure being carried out: clause 1, *1999 Model Bill*.

²⁰⁰*Criminal Law (Forensic Procedures) Act 1998* (South Australia), section 38; *1999 Model Bill*, clauses 11 and 44.

- a. there may be an anomaly between the fact that a forensic procedure is not meant to be embarrassing;²⁰¹ and
- b. if a forensic procedure is not videotaped then defense counsel may attempt to attack the regularity of the procedure.

Observations and Recommendations

Should there be informed consent to the conduct of a forensic procedure and if so, what elements should it contain?

34. **Subject to the provisions regarding children and incapable persons addressed in paragraphs 67 to 72 of the Observations and Recommendations, the Committee recommends that the legislation provide that a person may consent to a forensic procedure after the following has occurred:**
- a. **the forensic procedure and the purpose for which it is being carried out is explained to the person;**
 - b. **the person is told that the procedure could produce evidence to be used in court;**
 - c. **the person is told that information obtained from a forensic procedure and information as to the identity of the person may be placed on a database; and**
 - d. **in the case of a person under suspicion of having committed an indictable offence, and a person who has been charged with an indictable offence, the person is informed of:**
 - (i) **the offence for which he or she is being investigated; and**
 - (ii) **what powers could be invoked to compel him or her to comply.**
- (Paragraphs 8.67 - 8.74)
35. **The majority of the Committee recommends that legislation not require that a person be given the opportunity to communicate or attempt to communicate, with a legal practitioner.**
- (Paragraphs 8.67 - 8.74)

continued ...

²⁰¹

Criminal Law (Forensic Procedures) Act 1998 (South Australia), section 10 .

Observations and Recommendations (*continued*)

36. **The Committee recommends that consent be recorded by obtaining:**
 a. a written consent; or
 b. an electronically recorded consent.
 (Paragraphs 8.67 - 8.74)
37. There is no provision for informed consent in the *Criminal Code* (Western Australia). The Committee notes that, as the *Criminal Code* (Western Australia) is not restricted to DNA sampling techniques, and a separate piece of legislation may be enacted for all forensic procedures, informed consent should apply to all forensic procedures even if informed consent is not currently required.
 (Paragraph 8.72)

Withdrawal of consent

- 8.75 The **1999 Model Bill** enables a volunteer and a suspect to withdraw consent before, during and after the forensic procedure. **Victorian** legislation enables a volunteer and a suspect to withdraw consent before (but not during) and after the forensic procedure. The Committee noted that in Victoria difficulties of interpretation may apply if consent is withdrawn *during* a forensic procedure.
- 8.76 Neither jurisdiction requires that the withdrawal be in writing. Once consent is withdrawn, unless there is a court order to the contrary, material and information that has already been collected should be destroyed. Accordingly consent could be withdrawn up until the day of any trial. In such a case the police would need to apply to the court for retention of the material.²⁰²
- 8.77 In **South Australia**, consent may be withdrawn by a volunteer or a suspect at any time before completion of the forensic procedure. If consent is withdrawn after a forensic procedure has been commenced but before it is completed, the procedure may only be continued or resumed if an order authorising the procedure has been made. However,

²⁰² 1999 Model Bill clause 10 (volunteer), 62 (suspect), Divisions 4 and 5 regarding compulsory forensic procedures, and clause 64 regarding court orders after a volunteer withdraws consent. *Crimes Act 1958* (Victoria) sections 464ZGB ((3)(d) and(g)); 464ZGC and 464ZGF.

the withdrawal of consent before a forensic procedure is completed invalidates the taking of the evidence before the initial consent.²⁰³

- 8.78 Unlike the provisions of the *1999 Model Bill* and Victorian legislation, the South Australian legislation does not provide for withdrawal of consent after the forensic procedure has been completed and therefore does not have any provision for an application to be made to a court for retention of a sample.

Observations and Recommendations

When can consent to the conduct of a forensic procedure be withdrawn?

38. The Committee is of the view that a distinction needs to be drawn between two categories of persons who could be considered to be “*volunteers*”. For the purposes of these Observations and Recommendations the Committee distinguishes between:
- a. those persons who would fall within the categories identified in paragraph 47 of the Observations and Recommendations (“*cooperative suspects*”); and
 - b. those persons who do not fall within the categories identified in paragraph 47 of the Observations and Recommendations (“*non-suspect volunteers*”).
39. **The Committee recommends that a non-suspect volunteer, who has consented to the conduct of a forensic procedure, can withdraw his or her consent at any time.** (Paragraphs 8.75 - 8.78)
40. **The Committee recommends that a cooperative suspect, who has consented to the conduct of a forensic procedure, can withdraw his or her consent before the commencement of the forensic procedure.** (Paragraphs 8.75 - 8.78)

continued ...

²⁰³

Criminal Law (Forensic Procedures) Act 1998, clause 9.

Observations and Recommendations (*continued*)

41. In respect of paragraph 40 of the Observations and Recommendations, the Committee notes that:
- a. there may be difficulties in fixing the point at which a forensic procedure can be said to have “*commenced*”. For example, in the case of the taking of a blood sample by venepuncture - is it the application of the tourniquet, the swabbing of the skin, the piercing of the skin or the drawing of the blood? and
 - b. the point at which a forensic procedure can be said to have “*commenced*” will differ between forensic procedures.
- (Paragraphs 8.75 - 8.78)
42. **In view of the matters referred to in paragraph 41 of the Observations and Recommendations, the Committee is of the view that it is necessary to objectively fix the point at which forensic procedures can be said to have “*commenced*”, after which time cooperative suspects may not withdraw their consent. The Committee recommends that persons authorised to conduct the forensic procedures again ask cooperative suspects being subjected to the forensic procedure whether they consent. Once that question has been asked and consent has been given again, the forensic procedure is deemed to have commenced and consent may not thereafter be withdrawn.** (Paragraphs 8.75 - 8.78)

What should happen when consent to the conduct of a forensic procedure is withdrawn?

43. In the event that a person, who is under suspicion for having committed an indictable offence but who is yet to be charged, withdraws his or her consent before the commencement of the forensic procedure, the Committee notes that the police should be able to apply to a magistrate for an order for a compulsory forensic procedure (refer to paragraph 50 of the Observations and Recommendations).
44. In the event that a person who has been charged with an indictable offence withdraws his or her consent before the commencement of the forensic procedure, the Committee notes that the police can use reasonable force to conduct a forensic procedure (refer to paragraph 51 of the Observations and Recommendations).

continued ...

Observations and Recommendations (*continued*)

45. In the event that a person who has been convicted of an indictable offence withdraws his or her consent before the commencement of the forensic procedure, the Committee notes that the police can use reasonable force to conduct a forensic procedure (refer to paragraphs 52 and 62 of the Observations and Recommendations).
46. **The Committee recommends that in the event that a non-suspect volunteer (as defined in paragraph 38 of the Observations and Recommendations), withdraws his or her consent then:**
- a. **if consent is withdrawn after a forensic procedure has commenced but before it is completed, then the person conducting the forensic procedure must immediately cease conducting the forensic procedure; and**
 - b. **subject to paragraphs 117, 118, 120 and 121 of the Observations and Recommendations, all material and information obtained through the conduct of the forensic procedure on a non-suspect volunteer (including any information placed on a DNA database) should be destroyed as soon as practicable.**

Suspects in custody or not in custody

8.79 Jurisdictions studied by the Committee differed in the range of suspects on whom forensic procedures may be conducted. The Committee identified three main categories:

- a. a person under suspicion of having committed an offence but who has not been arrested or charged;
- b. a person who has been charged with having committed an offence; and
- c. a person who has been convicted of an offence.

Police in most jurisdictions agreed that a legislative difference should be drawn in respect of the circumstances in which samples may be taken from persons in each category. The main distinction was drawn between suspects not in custody (or under

suspicion) as opposed to persons in custody (where they have been charged with an offence). Most generally agreed with the requirement for greater procedural and legislative safeguards in respect of the former.

Western Australia

- 8.80 The recent amendment to section 236 of the *Criminal Code* (Western Australia) effected by the *Criminal Law Amendment (No 1) Act 1998* (Western Australia) makes it lawful for specified persons to take a sample of a person's blood, hair (from any part of the body), nails or saliva, or any matter on the person's body or obtainable by a buccal swab. The person must be *lawfully held in custody upon a charge of committing an offence* and there must be reasonable grounds for believing that the taking of the forensic sample will afford evidence as to the commission of the offence. Reasonable force may be used to obtain the forensic sample.
- 8.81 Presently, in the absence of consent, Western Australian police are unable to obtain a body sample for DNA analysis before a suspect is arrested and charged. Often police may have sufficient evidence to satisfy a test of "*reasonable suspicion*" but may not have other sufficient probative evidence to lay charges.²⁰⁴
- 8.82 Both the Minister for Police, Kevin Prince, MLA and Mr Robert Falconer, Former Commissioner of Police, Western Australia Police Service, are reported as expressing their preference for the legislation to allow police to compel "*suspects*" in criminal inquiries to provide DNA samples, subject to an order from a judge or magistrate.²⁰⁵
- 8.83 Since its 42nd Report the Committee became aware that there may be an issue surrounding at what time a person can be said to be "*in custody upon a charge of committing an offence*", as that phrase is used in section 236 of the *Criminal Code* (Western Australia).²⁰⁶ The Committee noted that the interpretation of "*charge*" is to be read in light of the legislative instrument in which it is contained. However the Committee considered that the fact that a person is "*in custody upon a charge*"

²⁰⁴ *Evidence*, Mr Robert Falconer, former Commissioner of Police, Western Australian Police Service, 1 April 1998, p. 11.

²⁰⁵ *Evidence*, Mr Robert Falconer, former Commissioner of Police, Western Australia Police Service, 1 April 1998, p. 2.

²⁰⁶ The Committee noted that fingerprints may only be taken where a "*person is in lawful custody for any offence punishable on indictment or summary conviction*": Section 50AA. That section does require that the person be in custody "*upon a charge*".

necessarily requires that a person *"has been charged"*, although fixing that time is not without debate.

8.84 The Committee sought the views of Mr Patrick Hogan, Convenor of the Criminal Law Committee, Law Society of Western Australia, Mr Con Zempilas, Chief Stipendary Magistrate and the Western Australia Police Service. Their replies are attached as Appendix 12.²⁰⁷

8.85 In summary:

- a. Both Mr Heaney (who responded to the Committee's letter to the Chief Stipendary Magistrate) and Mr Hogan considered that in Western Australia there appears to be no clear definition as to when a person is charged. As noted by Mr Heaney: *"Clearly significant legislation like section 236 ... requires such a definition as prior to a person being charged section 236 does not apply but once charged section 236 does apply."*²⁰⁸
- b. Mr Hogan noted that there was case law which goes some way to providing answers but it is fairly unsatisfactory. He further noted that there is less assistance to be found by reference to police rules or procedures relating to a charged person. Mr Hogan states: *"[T]hat is because there are no rules or procedures to say what a charge is, how a charge comes into existence, or how a person is charged. Therefore there is no point in time at which it can be said that a person is charged"*.²⁰⁹
- c. The Western Australia Police Service considers that a person is *"in custody upon a charge"* when *"that person has been arrested and advised of a charge"*.²¹⁰

²⁰⁷ Letters to the Committee from Mr Patrick Hogane, dated 11 August 1999, from Mr Paul Heaney, SM, Magistrates Chambers, Central Law Courts, Western Australia, dated 18 August 1999 and from the Western Australia Police Service, dated 8 September 1999.

²⁰⁸ Letter dated 18 August 1999 from Mr Pauk Heaney, SM, Magistrates Chambers, Central Law Courts, to the Committee, refer to Appendix 12.

²⁰⁹ Letter dated 18 August 1999 from Mr Patrick Hogan, Convenor Criminal Law Committee, Law Society of Western Australia to the Committee, refer to Appendix 12.

²¹⁰ Letters to the Committee dated 8 September 1999 from the Western Australia Police Service.

- 8.86 The Committee has not considered this issue in any further detail and draws the debate to the attention of the drafters of any proposed legislation on forensic procedures. Regardless of whether or not section 236 is amended, if the event or “*trigger*” upon which a person may be subject to a forensic procedure using reasonable force requires that a person is “*in custody upon a charge of committing an offence*”, then these issues should be considered and clearly defined. In the event that a forensic procedure is conducted prior to the time at which it is clear that the subject is “*in custody upon a charge of committing an offence*” the use of any material obtained from the forensic procedure may run the risk of later being held to be inadmissible as having been illegally or improperly obtained. Accordingly the Committee recommends that the matter be clearly considered and defined. This may require that the time at which a person is charged needs to be clarified in legislation.

International comparisons

- 8.87 The Committee notes an important distinction between legislation in the United Kingdom and the United States of America in relation to taking of samples. The **United Kingdom** legislation allows the taking of samples where there is a “*reasonable suspicion*” that a person has committed an offence. Most jurisdictions in the **United States of America** require that the person be convicted or at least charged with an offence before a sample can be taken.²¹¹ The State of Louisiana, proposed collection from persons who have been arrested for an offence however, as at January 1999, the Louisiana legislation had not been enacted.
- 8.88 The approach of the United States of America should be viewed within the context of its constitutional protections. The country’s restrictive approach has imposed many limitations on investigators. To illustrate the difficulties, an examination of 100 cases of forcible rape or sodomy in which arrests were made was conducted by the New York State Police Department. In 75 of those cases the perpetrator had prior arrests. However, in only 18 of those cases did the perpetrator have prior arrests and convictions that would have placed them in the State’s convicted offender DNA database. Indeed in December 1998 the Police Commissioner of the State of New York indicated that legislation would be sought to allow the DNA testing of all those

²¹¹ Victor Walter Weedn and John W Hicks, *The Unrealized Potential of DNA Testing*, National Institute of Justice June 1998 p. 6.

arrested.²¹² The Committee noted that the proposal is still narrower than the United Kingdom.

8.89 Barry Scheck who heads the Innocence Project in New York (discussed at paragraph 8.149) suggested that it would be appropriate to conduct proactive DNA testing at the very beginning of an investigation to eliminate people who should not be suspects and to generate likely suspects.²¹³ The Committee noted that this already occurs in the United Kingdom, Western Australia, Victoria and South Australia.

8.90 In *Germany*, there must be justified suspicion that the person from whom the sample was to be taken has committed an offence of some gravity. It is not necessary that the person has been "*indicted*". The Committee understands that a person indicted in Germany is similar to a person who has been arrested under Australian law.

Australian comparisons

8.91 At present all States and Territories allow forensic procedures to be conducted on persons who "*have been arrested*". Some jurisdictions, for example Victoria and South Australia, allow forensic procedures to be carried out on a person who is in custody without prior arrest. Some jurisdictions additionally require reasonable grounds to believe that use of the procedure will provide evidence. Most jurisdictions allow the use of reasonable force in taking forensic samples.

8.92 *Victorian* legislation enables a forensic procedure to be conducted on a suspect if the suspect:

- a. is suspected on "*reasonable grounds*" of having committed the indictable offence; or
- b. has been charged with the indictable offence; or

²¹² New York Police Commissioner Howard Safir's remarks to the Students of the Bronx High School of Science: 14 December 1998.

²¹³ New York Police Commissioner Howard Safir's remarks to the Students of the Bronx High School of Science: 14 December 1998, p. 12.

c. has been summonsed to answer to a charge for the indictable offence.²¹⁴

8.93 The **1999 Model Bill** defines a “suspect” in the same terms as the Victorian legislation. It also makes the distinction between suspects “in custody” and suspects “not in custody”. Clause 1(2) defines “in custody” to mean “in the lawful custody of a constable”. This in turn can be broken down into two categories:

1. where a person is under lawful arrest; and
2. where a person is in the custody of a constable pursuant to some other lawful authority. For example, the voluntary attendance by a suspect after a magistrate’s order for a forensic procedure.

8.94 The Committee noted the comments of the Senate Standing Committee for the Scrutiny of Bills in considering the Commonwealth legislation which follows the 1995 Model Bill and is reflected in the *1999 Model Bill*²¹⁵ that: “The term “under arrest” is not used because it is narrower in scope than the term “in custody”. For example a person arrested, charged, and remanded in custody may not be subject to the provisions of the [Crimes Amendment (Forensic Procedures) Bill 1997] if being “under arrest” was substituted for “in custody””.²¹⁶

8.95 It was noted further by that committee, that in some circumstances a person may be in the lawful custody of a constable but may not have been formally arrested or charged. In those circumstances a non-intimate forensic procedure ordered by a senior constable under the Commonwealth equivalent of Division 4 of the *1999 Model Bill* would be lawful.

8.96 In summary the Senate Standing Committee noted that “... the criteria which must be met before an order for compulsory testing is made are essentially the same as those which apply to arrest ie: the senior constable must be satisfied, amongst other things, that there are reasonable grounds to believe that the suspect has committed an

²¹⁴ Section 464R *Crimes Act 1958* (Victoria). The classification of an offence as “indictable” primarily relates to procedural matters. Generally any offence carrying a punishment of imprisonment for more than 12 months is classified as “indictable”.

²¹⁵ *Crimes Amendment (Forensic Procedures) Bill 1997*, which followed the 1995 Model Bill.

²¹⁶ Senate Standing Committee for the Scrutiny of Bills, *Ninth Report of 1997: Crimes Amendment (Forensic Procedures) Bill 1997*, 18 June 1997 at p. 187.

indictable offence: it is clear, therefore that in these circumstances a suspect, although not formally arrested, may be required, ... to undergo compulsory testing only when the criteria have been established which would have permitted an arrest in accordance with common law principles.”²¹⁷

8.97 Despite the above discussion the Committee reiterates that the *1999 Model Bill* classifies a buccal swab as an intimate procedure. Under the provisions of the *1999 Model Bill*, regardless of whether or not the suspect has been arrested, a police officer could not order a buccal swab unless the suspect consented or a court order was obtained.

8.98 In *South Australia*, the *Criminal Law (Forensic Procedures) Act 1998* expands the category of offender on which a forensic procedure may be conducted from “a person who is in lawful custody on a charge of committing an offence” to a “person under suspicion”. For the purpose of the Act, a person is “under suspicion” if the police officer by or on whose instruction a forensic procedure is to be carried out on the person, suspects that person, on reasonable grounds, of having committed a criminal offence.²¹⁸ This is similar to the Victorian legislation.

8.99 In this respect the Committee noted that comments of the Hon KT Griffin, Attorney General for South Australia when the legislation was introduced into the South Australian Legislative Council, that:²¹⁹

“The provisions of this bill [Criminal Law (Forensic Procedures) Bill] don’t require arrest as a pre-condition to the taking of all forensic samples. A number argued against this on civil liberties grounds. This has not been done because:

- (a) the criteria which control the right of the police to request and enforce the obtaining of a sample are clear and set a high standard. They do not permit, for example, a fishing expedition by police. Adding arrest adds nothing useful;*
- (b) arrest should be a step of last resort, and the law should not tempt police to arrest in marginal cases in order to be able to try and obtain a forensic sample; and*

²¹⁷ Senate Standing Committee for the Scrutiny of Bills, *Ninth Report of 1997: Crimes Amendment (Forensic Procedures) Bill 1997*, 18 June 1997 at p. 188.

²¹⁸ *Criminal Law (Forensic Procedures) Act 1998* (South Australia), section 4.

²¹⁹ *Hansard*, Legislative Council of South Australia, Wednesday 10 December 1987 p. 189.

(c) *an aim of the provisions which is often overlooked is to facilitate the exclusion of suspects from the case. It would be ironic that the suspect would have to be arrested (with all that entails) in order to be proven innocent.”*

8.100 It was further commented by the Hon KT Griffin MLC, Attorney General for South Australia that: *“the change was being made because the current requirement that a person be arrested and charged is a surrogate for the real protections that are needed and that have been articulated in the Bill. If those protections are given, there is no need for the formality of arrest.”*²²⁰

8.101 In 1989, the **Victorian** Coldrey Committee concluded that the basis for the exercise of non-consensual forensic procedures should be that the police believe on reasonable grounds that the person has committed the relevant offence. A lesser level of suspicion, which would not justify arrest, should not constitute sufficient grounds for carrying out compulsory procedures.²²¹ In 1991 the Gibbs Committee recommended that samples be taken only from arrested persons.²²²

²²⁰ Such protection would include the requirements for informed consent and for a court order in the case where consent has not been. Memorandum dated 16 January 1998 from Matthew Goode, Senior Legal Officer, Attorney General’s Department, Policy and Research, to Kenneth Brown, Director, Forensic Odontology Unit, University of Adelaide.

²²¹ Consultative Committee on Police Powers of Investigation, *Body Samples and Examinations*, Victoria, September 1989, paragraphs 6.62-6.66.

²²² *Review of the Commonwealth Criminal Law* Fifth Interim Report AGPS, Canberra, 1991, Part II, chapter 5, p. 90.

Observations and Recommendations

In what circumstances should police be empowered to conduct a forensic procedure without consent (“compulsory forensic procedure”)?

47. **The majority of the Committee recommends that compulsory forensic procedures be able to be conducted on:**
- a. a person under suspicion of having committed an indictable offence;**
 - b. a person who has been charged with an indictable offence; and**
 - c. a person who has been convicted of an indictable offence.**
- (Paragraphs 8.79 - 8.101)

continued ...

Observations and Recommendations (*continued*)

48. **The Committee recommends that a person is “*under suspicion*” if the police officer by or on whose instruction a forensic procedure is to be carried out on the person, suspects that person, on reasonable grounds, of having committed an indictable offence.**
49. The Committee is of the view that a legislative difference needs to be drawn in respect of the circumstances in which a forensic procedure may be conducted in each of the categories referred to above.
(Paragraphs 8.79 - 8.101)
50. **In respect of a person under suspicion of having committed an indictable offence but who is yet to be charged, the majority of the Committee recommends that a compulsory forensic procedure, regardless of whether the forensic procedure is an intimate or non-intimate forensic procedure, may be conducted under authority of a magistrate or a justice of the peace, where such forensic procedure is likely to afford evidence for the offence for which the person is under suspicion.**
(Paragraphs 8.79 - 8.101)
51. **In respect of a person who has been charged with an indictable offence, the majority of the Committee recommends that a police officer may require the person to undergo a compulsory forensic procedure, regardless as to whether the forensic procedure is an intimate or non-intimate forensic procedure, where such forensic procedure is likely to afford evidence for the offence for which the person has been charged.**
(Paragraphs 8.79 - 8.101)

continued ...

Observations and Recommendations (*continued*)

52. **In respect of a person who has been convicted of an indictable offence, the majority of the Committee recommends that he or she may be required by the police to undergo a compulsory forensic procedure.**
(Paragraphs 8.79 - 8.102)
53. Since its 42nd Report on the *Criminal Law Amendment Bill (No 1) 1998*, the Committee has become aware that there may be an issue surrounding at what time a person can be said to be “*in custody upon a charge of committing an offence*”, as that phrase is used in section 236 of the *Criminal Code* (Western Australia). The Committee notes that the interpretation of “*charge*” is to be read in light of the legislative instrument in which it is contained. However the Committee considers that the fact that a person is “*in custody upon a charge*” necessarily requires that a person *has been charged*, and fixing that time is not without debate.
(Paragraphs 8.83 - 8.86)
54. **Regardless of whether or not section 236 of the *Criminal Code* (Western Australia) is amended, if the event or “*trigger*” upon which a person may be subject to a forensic procedure using reasonable force requires that a person is “*in custody upon a charge of committing an offence*”, then the issues referred to in paragraphs 8.83 - 8.86 of the Report should be considered and clearly defined. In the event that a forensic procedure is conducted prior to the time at which it is clear that the subject is “*in custody upon a charge of committing an offence*” the use of any material obtained from the forensic procedure may run the risk of later being held to be inadmissible as having been illegally or improperly obtained. Accordingly the Committee recommends that the time at which a person is charged needs to be clarified in legislation.**
(Paragraphs 8.83 - 8.86)

Other persons on whom forensic procedures may be conducted***Volunteers***

- 8.102 The Committee also considered the ability for volunteers to provide forensic samples for DNA analysis and for their DNA profiles to be placed on the database. Overseas experience has demonstrated a readiness for persons to volunteer a forensic sample and to have their DNA profile included on a database. Significantly this group includes

individuals with a criminal history who have a marked desire to integrate back into society. Such individuals may wish to have their profile placed on a database so that they can be excluded from any police investigation without having to be contacted by the police.

- 8.103 Although there was nothing to stop police from asking non-suspects to consent to forensic procedures, overseas experience indicates that the request is usually case specific. Mass screening is one example of this approach (discussed at paragraph 8.110). Mass screening was used as an investigative procedure by the Western Australian police force when sampling taxi drivers in relation to the 1997/1998 murders allegedly originating from the Claremont area.
- 8.104 The *United Kingdom* legislation does not enable DNA profiles obtained from mass screenings to be randomly checked against the database nor does it enable volunteers to be placed on the database.²²³ Federal law of the *United States of America* also does not enable a volunteer to be placed on the CODIS as, by its nature, CODIS is restricted to convicted offenders.
- 8.105 Both *Victorian* and *South Australian* legislation provide comprehensive procedures for the conduct of forensic procedures on volunteers.²²⁴ Both legislative regimes contain rules of informed consent and the ability to withdraw consent.
- 8.106 The *Victorian* legislation specifically states that any sample taken from a volunteer will be analysed; that information obtained from the analysis will be included in a computerised database; and could produce evidence to be used in a court.²²⁵ Although *South Australia* does not have an express provision, the Committee was informed that the issue would probably be addressed as one of the matters in obtaining informed consent.
- 8.107 The *1995 Model Bill* did not provide comprehensive provisions for volunteers. The MCCOC Report recognise that the success of a DNA database often depends on the co-operation of volunteers and that legislative procedures are necessary to give the

²²³ Evidence, Mr Alastair Ross, Director of the National Institute of Forensic Science in Australia, 15 April 1998, p. 29.

²²⁴ 1. *Crimes Act 1958* (Victoria), sections 464ZGB - 464ZGF; *Criminal Law (Forensic Procedures) Act 1998* (South Australia,) sections 7(1), 8 and 9.

²²⁵ *Crimes Act 1958* (Victoria), sections 464ZGB(3)(b).

public confidence that samples given to the police are used strictly in accordance with the terms of their consent.²²⁶ Comprehensive provisions are now included in the *1999 Model Bill*.²²⁷

- 8.108 The *1999 Model Bill* addresses the situation where a person who committed an offence being investigated, consents to a forensic procedure and then withdraws consent. Given that a sample had already been taken, it would be pointless to require the police to repeat the process. Accordingly the *1999 Model Bill* proposes that an application can be made to a magistrate for the retention of the sample.²²⁸ A similar provision is in the Victorian legislation but absent from the South Australian legislation.²²⁹ When asked about this omission the Committee was informed by South Australian legal representatives and law enforcement representatives, that in those circumstances the police would have to apply for a fresh sample or wait until the person was convicted and use the Post Conviction Testing powers.
- 8.109 In establishing legislation, Western Australia has an opportunity to legislate to enable volunteers to provide samples and be included in a database.

²²⁶ MCCOC Report, pp. 3 & 4.

²²⁷ *1999 Model Bill*, Division 8.

²²⁸ *1999 Model Bill*, clause 64.

²²⁹ Refer to paragraphs 7.75 and 7.77.

Observations and Recommendations***Should provision be made for volunteers to be placed on the database?***

55. The Committee notes that a person may be asked by the police to undergo a forensic procedure or may, for their own reason, wish to undergo a forensic procedure. For example a person in the latter category may wish to volunteer to undergo a forensic procedure to exonerate themselves from a particular offence or to exonerate themselves from types of offences for which they may have previously been convicted and released.
(Paragraphs 8.102 - 8.109)

56. **The Committee recommends that forensic procedures be able to be conducted on a volunteer with his or her consent. The Committee has addressed the issue of consent at paragraphs 34 to 46 of the Observations and Recommendations.**

What safeguards should apply to volunteers?

57. The Committee has addressed the issue of withdrawal of consent at paragraphs 38 - 46 of the Observations and Recommendations.

Should there be an ability to apply for the retention of a body sample if consent is withdrawn?

58. **In the event that a “non-suspect volunteer” (as defined in paragraph 38 of the Observations and Recommendations) withdraws his or her consent to a forensic procedure after a sample has been obtained, the police may apply to the court for an order that the forensic material and any forensic information obtained as a result of the forensic procedure be retained if, subsequent to conduct of the forensic procedure, the non-suspect has become a person to whom paragraph 47 of the Observations and Recommendations apply.**
59. In view of the Committee’s comments at paragraphs 40 - 42 of the Observations and Recommendations in relation to “cooperative suspects” (as defined in paragraph 38 of the Observations and Recommendations) there is no need for an ability for a police officer to apply for a court order to retain any forensic material or any forensic information obtained as a result of the forensic procedure.

Mass screening

- 8.110 The process of mass screening is conducted outside the database provisions of most countries. With mass screenings, DNA samples from volunteers are taken and checked against the DNA profile obtained from the crime scene evidence.
- 8.111 Although police in the *United Kingdom* do not have the ability to place volunteers onto the national database, they have often conducted mass screenings of volunteers to solve a particular crime. The United Kingdom legislation does not enable DNA profiles obtained from mass screenings to be randomly checked against the database. If no match is found with the crime scene sample, the mass screening sample is destroyed.²³⁰
- 8.112 The Committee was informed that over the past two years police in the United Kingdom have used DNA mass screenings in 38 major cases. Seventeen suspects have been successfully identified, of whom 8 subsequently were convicted of murder, rape or other serious offences.²³¹
- 8.113 Mass screening was used as an investigative procedure by the Western Australia Police Service when sampling taxi drivers in relation to the 1997/1998 murders allegedly originating from the Claremont area in Western Australia. The nature of the disappearance of young women from the Claremont area, who were subsequently found to have been murdered, led to speculation that a taxi driver may have been involved. This speculation lead to a major decrease in the patronage of taxi services. A mass screening was used by police to focus their investigations and to eliminate suspects, or in this case, a group of individuals subject to public scrutiny, whether or not the scrutiny was factually justified.

Post Conviction Testing

- 8.114 Some jurisdictions also provide for the sampling of convicted prisoners who have previously been found guilty of an offence for which a forensic sample could have been obtained, had the relevant legislation been in place at the time. For ease of reference the Committee refers to this as “*Post Conviction Testing*”.

²³⁰ *Evidence*, Mr Alastair Ross, Director of the National Institute of Forensic Science in Australia, 15 April 1998, p. 42.

²³¹ Gunn, DG, Chief Constable, Cambridgeshire Constabulary, United Kingdom, *National DNA Database: Presentation to Australian Police Officers*, Melbourne, 5 August 1997, p. 31.

- 8.115 It has been said that Post Conviction Testing not only significantly assists police in the resolution of serious unsolved crime, but also serves to deter persons from re-offending upon release.
- 8.116 Mr Alastair Ross, Director, Australian National Institute of Forensic Science, said he supported the retrospective testing of prisoners for DNA: *“One of the enormous benefits of clearing up past crimes is for the peace of mind of the victims... Victims obviously want to know that the person who has committed the crime against them is made known and can serve penalties for that. If these people are in prison having committed other crimes and the database can link these crimes to them, there has got to be a benefit.”*²³²
- 8.117 One of the key recommendations of the MCCOC Report is the compulsory collection of DNA samples from all criminals convicted of serious offences. In this context the phrase “*serious*” is used to denote a person who has been found guilty of a serious offence, being an offence that is punishable by a maximum penalty of 5 or more years of imprisonment.²³³ This recommendation is based upon research showing high rates of recidivism.²³⁴
- 8.118 The Committee also noted the argument that Post Conviction Testing may unduly trespass on individual rights and civil liberties. Concerns were expressed to the Committee in the context of the Victorian legislation which initially only allowed Post Conviction Testing of serious sexual offenders. It was mooted that there was no forensic purpose for Post Conviction Testing in the sense of a demonstrated need to solve certain offences where having a DNA database would assist. For example, the Committee was informed that there were few unsolved sex crimes in Victoria and the justification for creating a database on this platform was questioned. It was also suggested that a sex offender usually was known to the victim and therefore the need to prove identity was not a factor in prosecuting the offence.
- 8.119 These arguments raise the issue of whether or not the list of offences for which Post Conviction Testing can be conducted should be based on the seriousness of the offence or properly researched recidivism studies. It also raises the issue of whether propensity

²³² As reported in the *West Australian* newspaper, “DNA Key to solving crime”, 8 September 1998.

²³³ *1999 Model Bill* clause 1- definitions of “*serious offender*” and “*serious offence*”.

²³⁴ MCCOC Report, pp. 29 and 31.

evidence should be considered when determining whether to conduct Post Conviction Testing in any give case.²³⁵

8.120 Pursuant to the provisions of the *South Australian* legislation, in deciding whether to make an order for testing of a convicted offender the court must take into account the nature and seriousness of the charge and any established propensity to engage in serious criminal conduct to demonstrate just cause before samples may be taken.²³⁶

8.121 Other concerns expressed during the Committee's investigations included:

- a. that the concept of Post Conviction Testing cuts across one of the fundamental aspects of the criminal justice system that everybody is entitled to the benefit of the presumption of innocence. It was alleged that Post Conviction Testing assumes that all prisoners will reoffend; and
- b. part of the reason for Post Conviction Testing was to increase the size of the statistical database and it should not be done in this mandatory fashion.

8.122 Most legislation requires a court order before conducting a forensic procedure on a "suspect" who has not consented. The situation is not the same with regard to Post Conviction Testing. Some jurisdictions require a court order on a case by case basis²³⁷ whereas other legislative proposals grant "blanket authority" to conduct Post Conviction Testing subject to an individual's right of objection.²³⁸

8.123 Division 7 of the *1999 Model Bill* permits the conduct of forensic procedures on a person convicted of:

- a. a "serious offence" (defined as punishable by a maximum penalty of 5 years or more imprisonment); and
- b. in the case of fingerprinting, an indictable offence,

²³⁵ Propensity evidence is evidence which suggests or tends to suggest a person has committed the offence charged because he or she has engaged in similar conduct in the past.

²³⁶ *Criminal Law (Forensic Procedures) Act 1998* (South Australia), section 30(2).

²³⁷ For example, South Australia.

²³⁸ For example, the *1999 Model Bill*.

who is in prison or another place of detention. The Division deals with those who are actually in prison and did not have a sample taken at the time of their arrest or prosecution. Where a sample has been taken when the offender was a suspect, and the person is convicted of the offence, the *1999 Model Bill* provides that application can be made to the court to retain the original sample and any DNA profile.²³⁹

8.124 The 1995 Model Bill originally proposed that Post Conviction Testing be made by application to a court on a case by case basis. The *1999 Model Bill* draws a distinction between:

- a. those who offended "*before the commencement*" of the proposed legislation. Clause 51 grants a "*blanket authority*" to take samples subject to the convicted person's right to object to the procedure. This is similar to legislation in the United Kingdom and the United States of America; and
- b. those who offended "*after the commencement*" of the legislation. Clause 52 states that a sample may not be taken from a serious offender who is not in prison unless the procedure is first authorised by a magistrate. This is similar to legislation in South Australia and Victoria.

8.125 The Committee noted that the MCCOC, in distinguishing between the two categories, states:

*"It is the Committee's view that just as it is the case in relation to other matters that prisoners' liberties are curtailed for the safe and convenient running of the institution, it is appropriate a different procedure should apply in relation to the taking of their samples. This does not mean the prisoner should have no rights at all. The prisoner's rights are modified only to the extent that it is necessary to avoid unduly disrupting the prison or where the procedure is an appropriate consequence of serious offending."*²⁴⁰

8.126 The Committee also noted that under the provisions of the *1999 Model Bill* the "*trigger offence*" for Post Conviction Testing is higher than that for sampling suspects who have not been convicted. Whereas forensic procedures can be conducted on suspects of "*indictable offences*" (i.e an offence punishable by any term of imprisonment), forensic procedures on convicted offenders must be with regard to "*serious offence*" (i.e an indictable offence punishable by maximum penalty of 5 years or more).

²³⁹ *1999 Model Bill*, clause 71(3).

²⁴⁰ MCCOC Report, p. 35.

- 8.127 Division 8 of the *South Australian* legislation addresses Post Conviction Testing. If the offence was a “*major offence*” the legislation enables a police officer, on a case by case basis, to apply to the same criminal court which delivered the judgment, for an order directing that the person undergo a forensic procedure for the taking of material for the purpose of obtaining a DNA profile.²⁴¹ A “*major offence*” is an indictable offence for which the maximum penalty is, or includes imprisonment for five years or more, or for an indefinite term. In making such an order the court must take into account the nature and seriousness of the charge and any established propensity to engage in serious criminal conduct.
- 8.128 Anecdotal evidence given to the Committee indicated that practical difficulties had been encountered with the application of Post Conviction Testing powers in South Australian prisons. Medical staff in most prisons focus on the health and medical treatment of prisoners in the same way that they would with the general public. Medical staff objected to being required to perform the compulsory forensic procedure as they felt it jeopardised the relationship between prisoner and medical officer, the medical officer not being a corrections officer. These concerns were also raised by corrections officers. The Committee was informed that, in so far as prisons are concerned, administrative arrangements should be managed so that sampling is conducted by an outside, independent medical practitioner, nurse or authorised person. If necessary they should also be assisted by someone independent of the prison.
- 8.129 In this respect the Committee notes that the *1999 Model Bill* has an express clause which does not require a medical practitioner, nurse, dentist, dental technician or appropriately qualified person to carry out a forensic procedure.²⁴²
- 8.130 *Victoria* introduced Post Conviction Testing with the passage of the *Crimes (Amendment) Act 1997* (Victoria), which, among other things, amended the *Crimes Act 1958* (Victoria) to provide for the taking of forensic samples from criminals convicted after July 1 1998 and any serving prisoner if found guilty of a “*forensic sample offence*”.
- 8.131 A “*forensic sample offence*” is one contained in Schedule 8 of the *Crimes Act 1958* (Victoria) which includes offences against the person, ranging from murder to recklessly causing serious injury, all sexual offences (past and present), property

²⁴¹ *Criminal Law (Forensic Procedures) Act 1998* (South Australia), Division 8, sections 29-30.

²⁴² *1999 Model Bill*, clause 80.

offences including robbery, armed robbery, burglary and aggravated burglary (past and present), arson offences (past and present) and the same drug offences which permit the police to apply for a compulsory forensic procedure on a suspect.

8.132 The Victorian legislation enables a police officer, on a case by case basis, to apply to the Magistrates' Court or the Children's Court, as the case may be, for an order directing that a person undergo a forensic procedure for the taking of a sample from any part of the body and the court may make an order accordingly.²⁴³

8.133 Two matters in relation to Post Conviction Testing in Victoria were mentioned to the Committee:

- a. from a practical point of view it was suggested that applications for Post Conviction Testing should be able to be made by video link-up to the court. Bail applications from remand centres are made in this manner and it minimises the resources required to transfer a prisoner from prison to court; and
- b. the practical implementation of the reporting requirements of the legislation has created major difficulties. Sections 464 ZD and 464ZF(11) of the *Crimes Act 1958* (Victoria)²⁴⁴ require that police provide a copy of a "forensic report" to everyone on whom a forensic procedure has been conducted. While the police have been acknowledging blood has been provided, it is open to interpretation whether this satisfies the requirement of the relevant Act, as it only states that blood was taken from a particular prisoner on a particular date. The Victorian legislation did not define "forensic report" and some have queried whether this should also have included results of screening against the database.²⁴⁵

²⁴³ *Crimes Act 1958* (Victoria), section 464ZF(3) Although the legislation states that the applicant police officer must specify the type of sample (whether intimate or non-intimate) sought to be taken, the policy of the Office of the Director of Public Prosecutions (who acts on behalf of applicant police officers) is that a request must be made for an intimate sample. Intimate samples include a buccal swab.

²⁴⁴ Inserted by the *Crimes (Amendment) Act 1997* (Victoria).

²⁴⁵ The Committee was informed that this latter proposition is flawed - as the size of the database increases and there are more crime scene samples available for matching, any report on the results of a screening at any particular time would become out of date.

- 8.134 What also has been noted is that:²⁴⁶
- a. there is no limitation in terms of the age of the Schedule 8 prior conviction. Although the person may be in prison on a minor offence the fact that they had in the past been found guilty of, and served time for, a Schedule 8 offence, they would potentially be caught by the provisions; and
 - b. even though the term of imprisonment may have expired at the time of the order, a warrant can be issued directing that the person undergo a compulsory forensic procedure.
- 8.135 Initially legislation in the *United Kingdom* did not provide for the sampling of offenders already in prison for serious offences before the database was created on 19 April 1995. As the *Criminal Justice and Public Order Act 1984* (United Kingdom) was not retrospective, there was no power to take DNA samples from people convicted before the legislation became effective.
- 8.136 This situation was rectified by the *Criminal Evidence (Amendment) Act 1997* (United Kingdom), which gave the police power to obtain DNA samples, by force if necessary, from persons convicted before 10 April 1995 who were still serving their sentences in prison or from those in mental hospitals who were found unfit to plead. A range of serious offences is covered including offences against the person, sexual or indecency offences, and burglary.
- 8.137 In May 1998, legislation was passed in *Germany* allowing for Post Conviction Testing of persons convicted of “*serious crimes*” and offences which will “*cause unrest against the population*”. There is no prescribed catalogue of offences and it is incumbent upon each police officer to determine whether the offence fits within any of these categories before an application can be made to the court.
- 8.138 Many States in the *United States of America* have legislated for the retrospective testing of prisoners and have faced constitutional challenges to the provisions. There appears to be no real objection to collecting a body sample of a suspect in a particular crime where the police can show probable cause and can obtain a warrant from the court on a case by case basis. However, the blanket collection of samples from a large segment of the population brings many objections. Typically the constitutional

²⁴⁶ As noted by Gibson, Ray, “Police Powers to take Body Samples” *Law Institute Journal*, May 1998, p. 55.

challenges to the collection of body samples from prisoners are based upon allegations of violation of the Fourth Amendment rights to be free from unreasonable searches and seizures. Specifically, it is usually claimed that the general purpose of enforcing the law by improving methods of identification is not sufficient to justify testing an entire category of people merely because the recidivism rate is higher for them. In all but one case has the constitutionality of these new statutes been upheld.²⁴⁷

8.139 On the Federal level, contained within the *Violent Crime Control and Law Enforcement Act of 1994* (United States of America), is the *DNA Identification Act of 1994* (United States of America). This also enables samples to be collected from convicted offenders and placed in a database.

8.140 The focal point of any DNA database statute in the American States is the offences for which a convicted individual is required to provide a DNA sample:²⁴⁸

- a. all 50 of the State laws cover sex offences, with some States including misdemeanour sexual offences;
- b. four States - Alabama, New Mexico, Virginia and Wyoming - cover all convicted felons;
- c. two-thirds of the State laws include offences against children, such as sexual assault of a child, sexual abuse of minors and unlawful exploitation of a minor;
- d. one half of the State laws also include homicide and manslaughter offences, as well as assaults;
- e. at least 20 of the State laws include other violent felonies such as kidnapping and robbery; and
- f. moreover, based upon the anecdotal “hit” evidence, a number of State laws include burglary as a qualifying offence.

²⁴⁷ *Jones v. Murray*, 962 F.2d at 305 cited in Federal Bureau of Investigation, FBI Laboratory: *Report to Congress - Implementation Plan for Collection of DNA Samples from Federal Convicted Offenders*, December 1998, p. 7.

²⁴⁸ Federal Bureau of Investigation, FBI Laboratory: *Report to Congress - Implementation Plan for Collection of DNA Samples from Federal Convicted Offenders*, December 1998, p. 12.

- 8.141 Some American State statutes did not specify the agency responsible for collection. In some cases this led to a vacuum of responsibility regarding which agency in a State was responsible for the collection of samples from convicted offenders.
- 8.142 In the *United States of America* the sampling of those with convictions before the enactment of the legislation has also been extended to prisoners who have been released on parole. As a result thousands have been rounded up by the police and subjected to compulsory sampling. The MCCOC Report considered this type of provision to be overly disruptive.²⁴⁹

Suggested alternatives

- 8.143 A few alternatives have been suggested in the approach to Post Conviction Testing:
- a. the provision of a sample as a precondition to release on parole; and
 - b. the use of a buccal swab as opposed to a blood sample, with the sample being taken by the prisoner. This raises issues of resampling.
- 8.144 In respect of the first point, the Committee noted that not all sentences will be subject to parole and it is therefore an inappropriate trigger for Post Conviction Testing. Ms Felicity Hampel QC, Acting President, Council for Civil Liberties advanced the following argument against sampling being a precondition of parole:

“[I]f a fixed maximum term is imposed, then all it means is that a person will not get parole but they will eventually get out. If someone gets a sentence of five years with a non-parole period of three years and they will not give a sample, all it means is they will stay in for five years. I see that as quite inappropriate because the idea of parole is not to impose a greater or lesser punishment on somebody but to allow for the integration of people who have been incarcerated back into the community - to allow for their supervision whilst integrating back into the community. It is more to do with their behavior in prison that parole is determined than punishing them again either for that offence or for something that is not a defense, namely declining to give a sample.

²⁴⁹

MCCOC Report, p. 41.

I see much greater social problems arising from allowing prisoners straight out without parole than from not being able to put someone on a database.”²⁵⁰

- 8.145 In respect of the second point, the Committee noted that technological innovations have meant that in 95-99% of cases an adequate sample of DNA can be obtained from the use of buccal swabs. Blood samples provide 100 percent certainty of obtaining a result. In view of the risk of not obtaining a result from a buccal swab, whether taken by the prisoner or an authorised person, it was suggested that legislation should provide for re-sampling if no result could be obtained from a buccal swab. For example, could a court order specify that in lieu of a more intimate and intrusive sample such as a blood sample that a buccal swab be taken and if no result is obtained within 3 days then a further sample may be taken?

In this respect concerns were expressed that re-sampling may be open to great abuse in terms of victimising particular individuals.

- 8.146 The Committee notes that the *United Kingdom* legislation deals with the issue of re-sampling with an express legislative power for police to re-sample if there has been a failure but not a rejection.²⁵¹ The distinction is important. For example a rejection occurs if there has been some administrative error in the sampling process that is a fault in the sample handling process by the police. This may occur where packaging was damaged or the paperwork was incomplete or wrong. A failure occurs through no fault of a person, for example, the DNA may have degraded or the sample did not provide sufficient DNA. The Committee was informed that a power to re-sample was included for cases of failure but not for rejection, largely on civil libertarian grounds.
- 8.147 In respect of re-sampling a further issue for consideration is “*Whether a sample obtained from a suspect who is subsequently convicted can be retained and used as the sample which may be required to be obtained under Post Conviction Testing Procedures.*” The Committee notes that the *1999 Model Bill* and the Victorian legislation enables an application for retention whereas South Australian legislation does not.²⁵²

²⁵⁰ Ms Felicity Hampel QC, Acting President Council for Civil Liberties (Melbourne) who met with the Committee on 5 October 1998.

²⁵¹ Sections 63(3A) and 63A(4) state that re-sampling may occur if the sample “*was not suitable for the same manner of analysis or, though so suitable, the sample proved insufficient*”.

²⁵² *Crimes Act 1958* (Victoria), section 464ZFB.

8.148 The *United Kingdom* legislation also provides that the sample used for evidentiary purposes may be retained and used as the Post Conviction Testing sample to negate the necessity to obtain another sample.²⁵³

²⁵³ Section 63A, *Police and Criminal Evidence Act 1984* (United Kingdom).

Observations and Recommendations

Should there be a power to take samples from convicted offenders (Post Conviction Testing)?

60. The majority of the Committee recommends that the power for police to conduct a forensic procedure on a person who has been convicted of an indictable offence is to apply to persons who:
- a. are currently in prison or other place of detention;
 - b. are on parole or serving a suspended sentence; and
 - c. are in prison or in mental hospitals who have been found unfit to plead,
- and who have been found guilty of an indictable offence whether before or after the commencement of legislation enabling the conduct of a forensic procedure upon that person.
- (Paragraphs 8.114 - 8.148)

If so, what offences should enable Post Conviction Testing?

61. As noted at paragraphs 27, 47, 52 and 60 of these Observations and Recommendations, the majority of the Committee recommends that there should be a power for police to conduct a forensic procedure on a person who has been convicted of an indictable offence.
- (Paragraphs 8.114 - 8.148)

In respect of Post Conviction Testing, should there be a right of objection to a forensic procedure and/or a requirement for a court application on a case by case basis?

62. The Committee recommends that the power to conduct a forensic procedure on a convicted offender should not be subject to a right of objection by the person who is required to undergo a forensic procedure, nor should the legislation require that any application be made to the court for an order that the person undergo a forensic procedure. Accordingly the Committee recommends that it be a legislative requirement that convicted offenders undergo a forensic procedure to provide a DNA profile.
- (Paragraphs 8.118 and 8.148)

continued ...

Observations and Recommendations (*continued*)*Should there be a power to re-sample and, if so, in what circumstances can it occur?*

63. **Subject to paragraph 64 of the Observations and Recommendations, the Committee recommends that there should be power for the police to re-sample if the sample obtained from the conduct of a forensic procedure was not suitable for analysis or, though suitable, proved insufficient.**

(Paragraphs 8.146 and 8.147)

64. **The majority of the Committee recommends that if a person does not consent to a re-sampling then:**

- a. **in the case of a person who is under suspicion for having committed an indictable offence but who is yet to be charged, the police will need to reapply to a magistrate for an order for a compulsory forensic procedure; and**
- b. **in the case of a person who has been charged with or convicted of an indictable offence, the police can use reasonable force to conduct another forensic procedure.**

(Paragraphs 8.146 and 8.147)

What State agency should be responsible for Post Conviction Testing?

65. **The Committee recommends that the Ministry of Justice should be responsible for conducting forensic procedures on persons who have been convicted of an indictable offence.**

(Paragraph 8.141)

Exoneration through Post Conviction Testing

- 8.149 In the *United States of America* there is another aspect to Post Conviction Testing which does not rely upon any legislative power. Mr Barry Scheck, Benjamin Cordozo Law School Professor, heads “The Innocence Project” in New York City, a program that uses DNA evidence to free wrongfully convicted people. So far the project has exonerated 33 people.²⁵⁴

²⁵⁴ Online NewHouse: DNA Databanks - July 17 1998, (searched 11 June 1999): http://www.pbs.org/newshours/forum/july98/dna_databanks.html; see also USA Department

- 8.150 It is important to remember that DNA is only part of the evidence which can be adduced at trial. Imagine a situation where a person was convicted of a rape in a trial where a DNA profile was not adduced by either the prosecution or the defense as a DNA analysis of crime scene evidence was not conducted. Some time later the prisoner either provides a sample (whether under compulsory Post Conviction Testing legislative provisions or voluntarily) for DNA profiling.
- 8.151 If the original crime scene evidence were still available the prisoner could insist that the crime scene sample be DNA profiled and compared with his or her own DNA profile. The issue arises - *what if the profile did not match?*
- 8.152 The absence of a match with the DNA profile obtained from the crime scene sample does not necessarily mean that the prisoner was not a participant in the offence. The Committee was informed by people they spoke with in the United States of America that juries have convicted suspects of crimes even where their DNA profiles did not match.

Observations and Recommendations

How should the development of exoneration through Post Conviction Testing, as illustrated by the Innocence Project in New York State, be addressed?

66. The Committee makes no finding on the issue of exoneration through Post Conviction Testing as each case must be considered on its own facts. The Committee merely notes this as an issue which the Western Australia criminal justice system may, in the future, have to consider. However it also may have implications on access rights to samples and database information. This is addressed in Chapter 12 of the Report.
(Paragraphs 8.149 - 8.152)

of Justice, Office of Justice Programs, *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial*, National Institute of Justice, June 1996. And see also "Innocent After Proven Guilty", *Time Magazine*, 13 September 1999, pp. 42 - 44.

Children and incapable persons

- 8.153 In most jurisdictions studied by the Committee there are categories of persons to whom the criminal law has a modified application or mode of operation.
- 8.154 The Committee noted that the **1999 Model Bill** identifies two categories of people incapable of giving informed consent: children (being a person under 18) and “*incapable persons*”.
- 8.155 The **1999 Model Bill** defines an “*incapable person*” as meaning an adult who:
- “a. *is incapable of understanding the general nature and effect of, and purposes of carrying out, a forensic procedure, or*
 - b. *is incapable of indicating whether or not he or she consents or does not consent to a forensic procedure being carried out.”* clause 1, **1999 Model Bill**.
- 8.156 Accordingly in these categories, the **1999 Model Bill** provides that consent cannot be given by that person and:
- a. in the case of a person who is under suspicion as having committed an indictable offence or who has been charged with an indictable offence, an order from a magistrate is required (clause 5); or
 - b. in the case of a volunteer, the informed consent of the parent or guardian is required or, if there is no parent or guardian then an order from a magistrate or a justice of the peace is required (clause 59(2)(b)),
- to conduct a forensic procedure.
- 8.157 With regard to children and incapable persons, the **1999 Model Bill** also contains provisions regarding the presence of “*interview friends*”²⁵⁵ at hearings for an order for

255

“*Interview friend*” is defined as:

- “(a) *a parent, guardian or other person chosen by, or acceptable to, the suspect, serious offender or volunteer, or*
- (b) *a legal representative of the suspect, serious offender or volunteer; or*
- (c) *if there is no available person who is covered by either paragraph (a) or (b) - a person who is not a police officer or person who is in any way involved in the*

a compulsory forensic procedure (clause 2, 23(2), 27(5)) and while forensic procedures are being carried out (clause 42).

- 8.158 In *Western Australia* there is currently no legislation in place which ensures that people who are mentally impaired have able individuals accompany them to interviews, interpret questioning, or ensures the right to legal representation. The Committee understood that such matters are usually dealt with as a matter of protocol and agreement within and between organisations such as the Guardianship and Administration Board, Mental Health Review Board, Disabilities Commission and the police.
- 8.159 In Western Australia, persons under the age of 18, are defined by the *Young Offenders Act 1994* (Western Australia) as a “*young person*”.²⁵⁶ If a person commits or allegedly commits an offence before reaching the age of 18 years, the *Young Offenders Act 1994* (Western Australia) applies to the person as a young person for purposes connected with that offence, or any order that was made in dealing with the person for that offence.
- 8.160 The *Young Offenders Act 1994* (Western Australia) contains many provisions requiring the involvement or notification of a “*responsible adult*”²⁵⁷ with regard to dealings with a young person to whom the Act applies. For example, a responsible adult must be:
- a. involved in the disposition of a court or otherwise, of allegations of offences by the young persons under their care and in their punishment or management as a result of having offended (section 8(b));
 - b. notified as soon as practicable after a young person is taken into custody or otherwise dealt with under this Act and, if the young person is in custody,

investigation of the offence in relation to which the person is a suspect, serious offender or volunteer chosen by an authorised applicant for an order in relation to the carrying out of a forensic procedure on the suspect, serious offender or volunteer.” clause 2, 1999 Model Bill.

²⁵⁶ *Young Offenders Act 1994* (Western Australia), section 3.

²⁵⁷ “*responsible adult*”, in relation to a young person, means a parent, guardian, or other person having responsibility for the day to day care of the young person but does not include a person who the regulations may provide is not a responsible adult: *Young Offenders Act 1994* (Western Australia), section 3.

should be kept informed as to the whereabouts of the young person (section 8(c));

- c. notified of the intention to question a young person who has been apprehended for the commission of an offence, before a member of the Police Service asks the young person questions about that offence or any other offence that has been, or is suspected to have been committed (section 20(1)); and
- d. notified as soon as reasonably practicable that a young person has been charged for an offence (section 20(3)).

8.161 The *Young Offenders Act 1994* (Western Australia) also enables the Commissioner of Police to make rules, orders or regulations under section 9 of the *Police Act 1892* (Western Australia) in respect of the apprehension of young persons for offences and their detention in custody (section 19).

8.162 If a youth community based order or an intensive youth supervision order is made on the condition or undertaking that the offender submit to the taking of a body sample, the *Young Offenders Regulations 1995* (Western Australia) sets out certain procedures which are to be followed. These relate to the type of apparatus to be used if the sample is a breath test; the labelling of blood or urine samples; and the requirement that a body sample of blood be taken by a medical practitioner.²⁵⁸

8.163 The Committee notes that:

- a. the definition of a “body sample” in the *Young Offenders Act 1994* (Western Australia) means “a sample of a person's blood, breath, or urine”.²⁵⁹ The definition does not include the taking of a sample by buccal swab; and
- b. although the *Young Offenders Regulations 1995* (Western Australia) provide for the identification of body samples they do not address issues of access to or the destruction of such samples.

²⁵⁸ *Young Offenders Regulations 1995*, regulation 9.

²⁵⁹ *Young Offenders Act 1994* (Western Australia), section 3.

Observations and Recommendations

Should the legislation recognise the special position of children and incapable persons and, if so, how?

Should there be a minimum age at which a DNA sample can be taken without consent, or other restrictions relating to samples from juveniles?

67. The Committee recommends that the legislation should recognise the special position of two categories of people who are incapable of giving informed consent: children (being a person under 18) and “*incapable persons*”.
(Paragraphs 8.153 - 8.163)
68. The Committee recommends that an “*incapable person*” include an adult who:
- a. is not capable of understanding the general nature and effect of, and purposes of carrying out, a forensic procedure; or
 - b. is not capable of indicating whether or not he or she consents or does not consent to a forensic procedure being carried out.
- (Paragraphs 8.153 - 8.163)
69. Accordingly in the above categories, the Committee recommends that consent cannot be given by that person and:
- a. in the case of a person who is under suspicion of having committed an indictable offence or who has been charged with an indictable offence, an order from a magistrate or a justice of the peace is required; or
 - b. in the case of a volunteer, the informed consent of the parent or guardian is required or, if there is no parent or guardian then an order from a magistrate or a justice of the peace is required,
- to conduct a forensic procedure.
(Paragraphs 8.153 - 8.163)

continued ...

Observations and Recommendations (*continued*)

70. **The majority of the Committee recommends that the principles espoused by the *Young Offenders Act 1994* (Western Australia), in particular the requirement to notify a “responsible adult” of certain dealings with a young person be extended to the conduct of forensic procedures involving a young person.**
(Paragraphs 8.159 - 8.163)
71. **The majority of the Committee recommends that police officers must notify the relevant “responsible person” prior to proceeding with any forensic procedure on a young person. The Committee recommends that similar provisions should apply in respect of incapable persons.**
(Paragraphs 8.159 - 8.163)
72. The Committee notes that:
- a. a young person as defined in the *Young Offenders Act 1994* (Western Australia) is a person under the age of 18 years and this reflects the definition of “children” referred to in paragraph 67 of the Observations and Recommendations;
 - b. the definition of “body sample” in the *Young Offenders Act 1994* (Western Australia) may need to be amended to be consistent with legislation regarding forensic procedures involving body samples; and
 - c. the provisions in the *Young Offenders Regulations 1995* relating to the labelling of blood or urine samples and the requirement that a body sample of blood be taken by a medical practitioner may need to be amended to be consistent with legislation regarding forensic procedures.
- (Paragraph 8.163)

Compulsory forensic procedures

- 8.164 There are a range of legislative provisions addressing the taking of samples without consent. In some jurisdictions all forensic procedures, whether intimate or non-intimate and whether proposed in respect of a suspect in custody or not, require a court order (for example: Victoria). Others provide that a court order is required for intimate samples on suspects in custody, however non-intimate samples on such persons may be ordered by a senior police officer (for example: *1999 Model Bill*).

Other jurisdictions do not require a court order to conduct a forensic procedure (whether regarded as intimate or non-intimate) on a suspect in custody (Western Australia).

- 8.165 The legislative trend distinguishes between the type of forensic procedure proposed and whether or not a suspect is in custody.

Non-intimate samples by order of police officer

- 8.166 Current **Western Australian** legislation does not differentiate between samples which are intimate or non-intimate, or the categories of persons who may take any particular type of sample. A sample of the accused “*person’s blood, hair (from any part of the body), nails or saliva, or of any matter on the person’s body or obtainable by a buccal swab*” can be taken by a legally qualified medical practitioner or a nurse as defined in the *Nurses Act 1992* (Western Australia), if it will afford evidence as to the commission of the offence. Further, such persons may use “*such force as is reasonably necessary*” to obtain the sample (section 236, *Criminal Code* (Western Australia)).

- 8.167 In contrast to the *1999 Model Bill*, there is no requirement to seek a court order if the suspect does not provide the sample by consent. In fact under Western Australian legislation if there is no consent, any type of procedure can be ordered by a police officer, unlike the situation in the United Kingdom or South Australia. There is no stipulation that the order be made by a police officer of a certain rank or who is independent from the investigation.

- 8.168 In **South Australia** if a suspect is in lawful custody and does not consent, a senior police officer may order the forensic procedure so long as it is non-intrusive.²⁶⁰ A non-intrusive forensic procedure does not include a buccal swab.

- 8.169 In the **United Kingdom**:

- a. An officer of at least the rank of superintendent can authorise a “*non-intimate sample*”²⁶¹ to be taken from a person with consent or without

²⁶⁰ *Criminal Law (Forensic Procedures) Act 1998* (South Australia), section 18.

²⁶¹ Non-intimate samples include: sample of a hair other than pubic hair; sample from a nail or from under a nail; a swab taken from any part of a person’s body, including the mouth, but not any other body orifice; saliva; and a footprint or a similar impression of any part of a person’s body, other than part of his hand.

consent if the person is in custody (being police detention or being held by the police on the authority of a court).²⁶² A non-intimate sample includes a buccal swab; and

- b. non-intimate samples can be taken without the consent of the subject or authorisation by a Superintendent if the person has been "*charged*" with a recordable offence or "*convicted*" of a recordable offence.²⁶³

8.170 The Committee also notes the comments made by the **Victorian** Coldrey Committee:²⁶⁴

"In favour of the option of having a senior police officer independent of the particular investigation authorizing the compulsory procedure it is argued that such a scheme would reduce the demand for the services of Judges or Magistrates who are a scarce resource in our community. Such a course might also allow for a quicker decision to be made in emergency situations or after hours."

Forensic procedures by order of a magistrate

8.171 Several people with whom the Committee met offered the opinion that the requirement for a court order to obtain samples from suspects "*not in custody*" provided an appropriate check and balance to ensure that samples could be taken only if police had a reasonable basis for suspicion. The requirement for a court order was often likened to the power to obtain a search warrant, a listening device warrant or a telephone tap warrant.

8.172 On the other hand, views were expressed that DNA samples should be treated in the same way as fingerprints and photographs. Fingerprints and photographs are standard procedures taken when a person is charged and do not require the temporal and financial expense of an application to the court. It was argued that a buccal swab, for example, should be part of that standard procedure after an accused person has been charged.

8.173 Concerns were expressed that the requirement for a court order may lead to a "*trial within a trial*" and lengthy delays. To some extent, legislation has addressed this by

²⁶² *Police and Criminal Evidence Act 1984* (United Kingdom), sections 63(1)-(4).

²⁶³ *Police and Criminal Evidence Act 1984* (United Kingdom), sections 63(3A) and (3B).

²⁶⁴ The Coldrey Report, p. 147.

altering the usual rights of representation, audience and examination. This is discussed below at paragraph 8.193 onwards.

- 8.174 In the *United States of America*, the Bill of Rights of the Constitution limits the ability of a police officer to obtain a body sample for DNA analysis. In all cases where a body sample is required, if consent is not obtained, an officer must apply to the court, show probable cause, and obtain a warrant. Although this creates an extra step for law enforcement authorities, the warrant typically covers all aspects of the procedure and establishes, at the very start, an official record that sets up inherent protection on the chain of custody of the evidence.
- 8.175 In the *United Kingdom*, court orders are required to obtain compulsorily:
- a. non-intimate samples where the person is a “*suspect but not in custody*”; and
 - b. intimate samples where the person is a suspect, and “*whether or not he or she is in custody*”.
- 8.176 The *1999 Model Bill* noted that, in the few cases where the accused does not consent to giving the sample, authorisation by a magistrate rather than a senior police officer will involve more work for law enforcement officers.²⁶⁵
- 8.177 In *Victoria*, if no consent is given or the person is incapable of giving consent, the police officer may apply to a Magistrates' Court for an order directing the person to undergo the compulsory procedure.²⁶⁶ Application must be made regardless of whether the sample required is intimate or non-intimate. Geographic considerations did not appear to concern persons who spoke with the Committee in Victoria as the

²⁶⁵ MCCOC Report p. 11.

²⁶⁶ *Crimes Act 1958* (Victoria), section 464T. The Court may make an order directing the person to undergo the procedure if satisfied on the balance of probabilities of a variety of matters. It must be persuaded that the person is a relevant suspect and that there are reasonable grounds to believe that the person has committed the offence of which the application is made. In respect of the application for any form of forensic procedure, the Court must further be satisfied that there are reasonable grounds to believe that the conduct of the procedure on the person may tend to confirm or disprove his or her involvement in the commission of the offence and that they have refused their consent or been incapable of providing consent by reason of mental impairment. Finally, the Court must be satisfied that “*in all the circumstances, the making of the order is justified*”.

State has 24 hour magistrates on call and the legislation provides for applications for interim orders to be made to magistrates by electronic means.²⁶⁷

8.178 The Victorian legislation sets out certain matters of which a court must be satisfied on the balance of probabilities before it makes an order.²⁶⁸ Anecdotal evidence suggested that there should be clearer criteria in the legislation for the magistrate making an order to avoid situations where orders are automatically made or are denied where there was in fact a strong case. The Committee recognises the difficulty in legislating for every circumstance and that it may be desirable to retain a certain amount of judicial discretion.

8.179 In *South Australia*, unless the suspect gives informed consent to the taking of an intrusive sample (which includes intimate samples), it can be taken only by order of a magistrate.²⁶⁹ Application for an interim compulsory order for the taking of an intrusive sample can be made to a “magistrate” whereas an application for a final order can be made to a “magistrates court”. This is a deliberate distinction to facilitate the urgent nature of an application for an interim order.²⁷⁰

8.180 An interesting aspect of the South Australian legislation is that, although a warrant may be issued for the purpose of obtaining a sample, it specifically provides that “*the use of force to detain a person for the purposes of:*

- a. *preventing destruction or contamination of evidence until a forensic procedure is carried out in accordance with the Act; or*
- b. *the carrying out a forensic procedure in accordance with this Act; or*
- c. *protecting evidence obtained from a forensic procedure carried out in accordance with this Act,*

²⁶⁷ *Crimes Act 1958* (Victoria), sections 464V & 464W.

²⁶⁸ *Crimes Act 1958* (Victoria), section 464T(3) provides that the Court may make an order directing a person to undergo a compulsory procedure if the Court is satisfied on the balance of probabilities of certain matters.

²⁶⁹ *Criminal Law (Forensic Procedures) Act 1998* (South Australia), Part 3, Division 2, section 16(f)(ii); *Crimes Act 1958* (Victoria), section 464ZF(3)

²⁷⁰ *Criminal Law (Forensic Procedures) Act 1998* (South Australia), sections 18 (2) and (3).

*does not, by itself, constitute an arrest of the person.*²⁷¹

8.181 In South Australia, after the formal status of arrest has been achieved, procedural and legal ramifications follow that may not be relevant to the purposes of taking samples. A compulsion order follows only after application has been made to a court for an interim or final order. The view was expressed to the Committee that this process of judicial oversight already provided adequate protection to the suspect.

8.182 The Committee asked Mr Alastair Ross, Director, Australian National Institute of Forensic Science, whether it will be necessary for police in **Western Australia** to obtain an order or warrant from a magistrate to take a DNA sample:

“Mr ROSS: The recommendation I believe will come from the [national police] working party is that the decision on whether a sample can be taken will be made by a senior police officer or a magistrate. It will not necessarily be made by the policeman on the street, as the officer would need to relay to a senior police officer or magistrate the basis of the reasonable suspicion to take the sample.

Hon J.A. COWDELL: I asked before whether it would be like a search warrant in seeking permission from a magistrate and establishing on the form some grounds for the suspicion.

*Mr ROSS: It is fair to say that the working party would rather have the decision made by either the senior police officer or a magistrate and not just a magistrate.*²⁷²

8.183 The Minister for Police, Hon Kevin Prince MLA, is reported as stating that the Government was looking at legislation but he wanted to ensure that DNA testing was approved by a Justice of the Peace or magistrate, like a search warrant.²⁷³ This is a position which the former Commissioner of Police, Mr Robert Falconer, appears to endorse.²⁷⁴

²⁷¹ *Criminal Law (Forensic Procedures) Act 1998* (South Australia), section 36.

²⁷² *Evidence*, Mr Alastair Ross, Director of the National Institute of Forensic Science in Australia, 15 April 1998, p. 41.

²⁷³ As reported in the *Sunday Times*, "Push for forced DNA", 6 September 1998 .

²⁷⁴ *Evidence*, Mr Robert Falconer, former Commissioner of Police, Western Australia Police Service, 1 April 1998, pp. 11 and 13.

- 8.184 In *Western Australia* there has been some discussion about the level of authority which should be necessary to order compulsion. As mentioned by the Minister for Police, it may be possible to use Justices of the Peace to authorise the taking of compulsory samples. In this respect the Committee notes that the Coldrey Report recommended that a judicial officer should consider the application. A magistrate was considered appropriate as it is the lowest level of judicial officer able to act in a judicial capacity and who is likely to be independent of the situation.
- 8.185 It should be debated whether or not a senior police officer properly accountable is better than a Justice of the Peace and better in the public interest. This would involve a system of prior authorisation for policing operations that authorises a police officer over and above the rank of superintendent who is not connected with the case.
- 8.186 The Committee also notes the comments made by the Coldrey Committee in respect of judicial oversight:²⁷⁵

“There are other benefits to be derived from judicial oversight. They include, for example, the impartial assessment of the reasonableness of the police belief that the person who it is sought to subject to the procedure is the perpetrator of the offence under investigation. While the investigating police officers would make every endeavour to objectively assess the relevant factors, this is a burden which should not be cast upon them. A court is best placed to objectively analyse the strength or otherwise of the police belief that there is a sufficient link between the suspect in custody and the particular offence to warrant the conduct of the compulsory procedure.

The provision of judicial review at this stage of the investigatory process also has the advantage of reducing the potential for disputes at trial as to the legality (and hence the admissibility) of evidence obtained through the carrying out of the procedure. The scheme envisaged which would lessen the potential for, and effectiveness of, any allegation of ‘planting’ of the samples or fabrication of other evidence relevant to the procedure.

Finally, the use of a judicial order authorizing the conduct of a procedure is particularly apposite if any force is to be used in obtaining the participation of the suspect. If one or other group of recommendations made in [the Coldrey Report] are

²⁷⁵ The Coldrey Report, p. 201.

adopted, force will be applicable to either all procedures or all non-intimate procedures.

Judicial supervision could be provided by either a Judge or a Magistrate. Some criminal investigation procedures available at the present time which involve significant intrusions on privacy for example, telephone taps, require the order of a Judge. By parity of reasoning it could be concluded that all or at least the intimate procedures addressed in this Report warrant similar supervision.”

Observations and Recommendations

In what circumstances should there be judicial oversight of the compulsory taking of samples?

73. The Committee has addressed this issue in paragraphs 49 and 50 of the Observations and Recommendations.
(Paragraph 8.164 - 8.165 and 8.171 - 8.186)

In what circumstances should a police officer be empowered to authorise the compulsory taking of samples?

74. The Committee has addressed this issue in paragraphs 49, 51 and 52 of the Observations and Recommendations.
(Paragraphs 8.164 - 8.165 and 8.166 - 8.170)

Interim orders

- 8.187 The **1999 Model Bill** provides that a magistrate can make an interim order for a forensic procedure if satisfied that:
- a. the probative value of the evidence to be obtained as a result is likely to be lost or destroyed if there is delay in carrying out the procedure; and
 - b. the magistrate is satisfied that there is sufficient evidence to indicate that a magistrate is reasonably likely to be satisfied of the existence of certain matters (which are specifically referred to in the legislation) when the application is finally heard: clause 26.

- 8.188 An interim order can be sought in person, by telephone, radio, telex, facsimile or other means. The suspect must be in the applicant's presence when the application is made. The suspect and the suspect's legal representative and interview friend must be given an opportunity to speak to the magistrate: clauses 27 and 28.
- 8.189 Following an interim order a final hearing must be held. If the magistrate does not confirm the order at the final hearing, all the samples and the information obtained from the samples must be destroyed.
- 8.190 *Victoria* and *South Australia* have similar legislation providing for interim orders by electronic means in cases of urgency.²⁷⁶ The Committee was informed that interim orders by electronic means would be a valuable tool in light of the procedural difficulties that may otherwise be experienced by law enforcement in remote areas in arranging a personal appearance before a judicial officer.
- 8.191 However in Victoria, interim applications regardless as to whether the forensic procedure is intimate or non-intimate, can only be made to a court. In South Australia interim applications for intimate forensic procedures must be made to a court. If the procedure is non-intrusive, the application can be made to a senior police officer above the rank of inspector.²⁷⁷
- 8.192 In respect of the South Australian legislation, the Committee notes that a police officer is also an "*appropriate authority*" for a final order if the procedure is non-intrusive. The Criminal Law Committee of the Law Society of South Australia, raised an objection, before the South Australia legislation was proclaimed, to the fact that a police officer was an appropriate authority for both interim *and* final orders.²⁷⁸ While the Criminal Law Committee understood the necessity for a broad class of authority for an interim order where speed is essential and a magistrate may not be available, that committee noted that one police officer could obtain an interim order from a senior police officer, which interim order could then be confirmed by another senior police officer, indeed on a literal reading of the legislation, by the very same senior police officer. Accordingly the Criminal Law Committee has recommended that where

²⁷⁶ *Crimes Act 1958* (Victoria), sections 464V-464W, *Criminal Law (Forensic Procedures) Act 1998* (South Australia), Divisions 3, 4 and 5.

²⁷⁷ Ibid.

²⁷⁸ Letter to the Hon JT Griffin, Attorney General, South Australia from DH Peek, Chairman, Criminal Law Committee of the Law Society of South Australia, dated 16 February 1998.

evidence has been taken by virtue of an interim order, the hearing in relation to the final order should be conducted before a magistrate. The South Australian legislation has not been amended to address this matter. As the Victorian legislation and the *1999 Model Bill* do not authorise a police officer to make an interim order, this issue is not a matter of concern for those jurisdictions.

Representation at hearings

- 8.193 At hearings for a court order to conduct a forensic procedure, a balance needs to be achieved between ensuring that the suspect is afforded adequate natural justice, and ensuring that the investigation is not compromised by the investigative authorities having to be questioned on material confidential to the investigation.
- 8.194 Concerns were expressed that the requirement for a court order may lead to a “*trial within a trial*” and cause lengthy delays. The requirement to make application to the court also has resourcing implications for the Crown Prosecutors Office or any other authority who may be involved in seeking court orders.
- 8.195 Representation of the suspect at hearings for an order is treated differently by each jurisdiction. In *Victoria*, at the initial hearing, the suspect has the right to attend and can make a written submission at the end of the hearing, but the suspect does not take part in the hearing itself and does not have a right to cross-examine.²⁷⁹ In contrast, in respect of orders for taking a sample upon conviction, the accused or the convicted person is represented, so at that stage a lawyer is involved in that hearing process.
- 8.196 *South Australian* legislation and the *1999 Model Bill* allows the suspect to be present, be legally represented and to make submissions at an application for an order that the sample be provided.²⁸⁰ This is wider than the Victorian legislation.

²⁷⁹ In this respect, however, the Committee notes that there is nothing in the legislation preventing a person from making an application to the Supreme Court for an injunction.

²⁸⁰ *Criminal Law (Forensic Procedures) Act 1998* (South Australia), sections 24(1) & 25(3); *1999 Model Bill*, clauses 21 - 23.

Observations and Recommendations***Should there be provision for interim orders?***

- ***Who should be empowered to grant interim orders - police officers, justices of the peace, or magistrates?***
- ***Should the suspect be represented at hearings of an application for an order to undergo a compulsory forensic procedure?***
- ***What rights should a suspect have at any hearing?***

75. It appears to the Committee that, in the event that the legislation requires an application to be made to a magistrate or a justice of the peace for an order to conduct a forensic procedure, then the ability to seek an order by electronic means may be one method of alleviating some of the difficulties experienced by remote areas of Western Australia. The Committee notes that “*interim orders*”, as they are discussed in the report, can be made by electronic means but they still require final determination.

(Paragraphs 8.187 - 8.192)

76. **The Committee recommends that where it is not practicable for a police officer to physically appear before a magistrate or a justice of the peace to obtain an order to conduct a forensic procedure, an application and an order for a compulsory forensic procedure can be made by electronic means.**

(Paragraphs 8.187 - 8.192)

77. **The Committee recommends that once an order has been obtained in the circumstances set out in paragraph 76 of the Observations and Recommendations, it does not require sanction by an application and a corresponding order at a final hearing. The Committee emphasises that it is the only order required.**

(Paragraphs 8.187 - 8.192)

78. **The majority of the Committee recommends that legislation not require that a person under suspicion of having committed an indictable offence be present or have legal representation at a hearing, to cross examine witnesses or to make a submission to the magistrate or justice of the peace.**

(Paragraphs 8.187 - 8.192)

Undertaking the forensic procedure

Appropriately qualified person

- 8.197 Current **Western Australian** legislation does not differentiate between samples which are intimate or non-intimate or the categories of persons who may take any particular type of sample. A sample of the accused “*person’s blood, hair (from any part of the body), nails or saliva, or of any matter on the person’s body or obtainable by a buccal swab*” can be taken by a legally qualified medical practitioner or a nurse as defined in the *Nurses Act 1992* (Western Australia), if it will afford evidence as to the commission of the offence. Further, such persons may use “*such force as is reasonably necessary*” to obtain the sample: section 236, *Criminal Code* (Western Australia).
- 8.198 It was pointed out to the Committee by Mr Robert Falconer, Former Commissioner of Police, Western Australian Police Service, that if medical practitioners were required to take all samples, issues of availability and cost arise, issues which are very relevant for a State the size of Western Australia with its attendant isolation.²⁸¹
- 8.199 It was further pointed out to the Committee by staff at the PathCentre that persons who have had phlebotomy (blood-taking) training are as capable as a medical practitioner or a nurse in taking a sample of blood and that any changes to the *Criminal Code* (Western Australia) should allow persons with phlebotomy training to take blood samples. In this respect the Committee notes that the amendments proposed by the *Criminal Law Amendment Bill (No. 1) 1998* (Western Australia) (“CLA Bill”) to the *Criminal Code* (Western Australia) proposed that “*any other person suitably qualified to do so*” could take samples. Notwithstanding the Committee’s previous concerns about those amendments,²⁸² phlebotomists would have been “*suitably qualified*” to conduct a forensic procedure involving the extraction of blood. Section 236 of the *Criminal Code* (Western Australia) as it was ultimately amended does not enable phlebotomists to extract blood unless they are aiding a medical practitioner.
- 8.200 The **1999 Model Bill** sets out a table delineating who is qualified to take certain forensic samples. This table is reproduced at Appendix 7.

²⁸¹ *Evidence*, Mr Robert Falconer, Former Commissioner of Police, Western Australia Police Service, 1 April 1998, p. 8.

²⁸² Refer to the 42nd Report of the Standing Committee on Legislation: *Criminal Law Amendment Bill (No 1) 1998*, tabled 19 May 1998.

8.201 Under *South Australian* legislation a person who carries out a forensic procedure must be a medical practitioner or a person who is qualified, as required by the regulations, to carry out forensic procedures of the relevant type.²⁸³ By definition a “*medical practitioner*” means a “*registered medical practitioner and includes, in relation to a forensic procedure involving the mouth or the teeth or an impression left by the mouth or teeth, a registered dentist.*”²⁸⁴

8.202 In July 1999, South Australian regulations were proclaimed which prescribe in detail the persons qualified to carry out forensic procedures. The regulations provide that:²⁸⁵

- “(a) *person who is a registered nurse is qualified to carry out a forensic procedure of any type except the taking of a dental impression; and*
- (b) *a police officer is qualified to carry out a non-intrusive forensic procedure consisting of -*
 - (i) *the taking of prints of the hands, fingers, feet or toes; or*
 - (ii) *an examination of an external part of a person's body; and*
- (c) *a police officer who has satisfactorily completed a course of training approved for the purpose by the Minister is qualified to carry out -*
 - (i) *a forensic procedure consisting of the taking of a sample by buccal swab; or*
 - (ii) *a non-intrusive forensic procedure consisting of:*
 - (A) *then taking of a sample of hair from a person's body; or*
 - (B) *the taking of a sample of fingernail or toenail, or material from under a fingernail or toenail; or*
 - (C) *the taking of a sample of biological or other material from an external part of the body; or*
 - (D) *the taking of an impression or cast of a wound.”*

8.203 The Committee notes that the regulations focus on the experience of the person who may conduct a particular forensic procedure. As a result the distinction between whether a procedure is “*intimate*”, “*intrusive*” or “*non-intrusive*” does not exclusively dictate who is authorised. The Committee also notes that phlebotomists are not

²⁸³ *Criminal Law (Forensic Procedures) Act 1998* (South Australia), section 33.

²⁸⁴ *Criminal Law (Forensic Procedures) Act 1998* (South Australia), section 3.

²⁸⁵ *Criminal Law (Forensic Procedures) Regulations 1999* (South Australia), section 4.

currently “*qualified*”, as determined by the regulations, to conduct forensic procedures such as taking blood and in this respect the South Australia regulations may be deficient.

8.204 In **Victoria**:

- a. an intimate sample other than a dental impression, may only be taken or conducted by a medical practitioner or a nurse of the same sex, if practicable, as the suspect. A dental impression may only be taken by a dentist; and
- b. a non-intimate sample may only be taken by a medical practitioner, a nurse or an “*authorised person*”. An authorised person is one authorised by the Chief Commissioner of Police and could therefore include a police officer.²⁸⁶

8.205 In the **United Kingdom** a “*person suitably qualified to do so*” may conduct non-intimate procedures, but an intimate procedure must be conducted by a medical practitioner or a nurse.

8.206 A “*person suitably qualified to do so*” includes a police officer who was trained in the relevant procedure. In the United Kingdom, extensive training programs are conducted to enable police officers to conduct buccal swab sampling. The Committee was advised that currently less than one per cent of samples taken by trained police officers are too difficult for DNA profiling.²⁸⁷

8.207 In the United Kingdom training of police officers had to occur in four months before implementation of the legislation. An instructional video was produced and copied to every force in the country, explaining the DNA techniques and showing how to take samples from suspects. Liaison officers were appointed to initiate training. It was emphasised to the Committee that initial training and refresher training were essential.

8.208 In addition the Committee notes that instrumental in the process was the creation of a scientifically sound sampling kit to ensure and maintain the integrity of the sample. Approved kits designed by the Forensic Science Service in conjunction with the police

²⁸⁶ *Crimes Act 1958* (Victoria), section 464Z.

²⁸⁷ *Evidence*, Mr Alastair Ross, Director of the National Institute of Forensic Science in Australia, 15 April 1998, p. 40.

are distributed and used nationally ensuring consistency and continuity of the process at all levels of investigation.²⁸⁸

- 8.209 In the *United States of America* at a federal level, liquid blood specimens are collected from convicted offenders by a medical practitioner, registered nurse or a qualified and trained professional approved by the Department of Health.

²⁸⁸ See also: Gunn, DG, Chief Constable, Cambridgeshire Constabulary, United Kingdom, *National DNA Database: Presentation to Australian Police Officers*, Melbourne, 5 August 1997, p. 25.

Observations and Recommendations

Who should collect samples?

In what circumstances should police officers be empowered to collect samples?

Should there be different restrictions applying to different types of samples, such as a blood sample and a buccal swab?

79. The Committee considers that there is a need to clearly legislate in relation to the categories of persons authorised to conduct different types of forensic procedures. (Paragraphs 8.197 - 8.209)
80. **The Committee recommends that intimate and non-intimate forensic procedures may be conducted by a medical practitioner, a nurse or an “authorised person”.** (Paragraphs 8.197 - 8.209)
81. The Committee repeats its recommendation at paragraphs 21 - 24 of the Observations and Recommendations regarding the sex of the person conducting a relevant forensic procedure.
82. **In making the recommendations at paragraphs 80 and 81 of the Observations and Recommendations, the Committee refers to paragraph 20 of the Observations and Recommendations where it is stated that the Committee is divided as to whether the taking of a sample by buccal swab is to be considered an intimate or non-intimate forensic procedure. Regardless of the ultimate classification, the majority of the Committee are of the view that an “authorised person” for the conduct of a forensic procedure involving the taking of a sample by buccal swab, should include a police officer who has been trained in the relevant procedure.** (Paragraphs 8.197 - 8.209)

continued ...

Observations and Recommendations (*continued*)

83. **The Committee are of the view that an “*authorised person*” for the conduct of a forensic procedure involving the taking of blood should include a phlebotomist or a medical technician who has been trained in the relevant procedure.**

(Paragraphs 8.197 - 8.209)

84. **The Committee recommends that:**

- a. a “*medical practitioner*” should include, in relation to a forensic procedure involving the mouth or the teeth or an impression left by the mouth or teeth, a registered dentist; and
- b. an “*authorised person*” is one authorised by the Commissioner of Police.

(Paragraphs 8.197 - 8.209)

At the time a sample is physically taken, what safeguards are necessary to protect the well-being of: the person whose sample is taken; the medical officer taking the sample; and police officers assisting the medical officer?

85. **The Committee recommends that no civil or criminal liability is incurred by any person who carries out, or helps to carry out, a forensic procedure in respect of anything done by that person in carrying out or helping to carry out the forensic procedure if the person believed on reasonable grounds that:**

- a. informed consent had been given to the carrying out of the forensic procedure;
 - b. in the case of a person under suspicion of having committed an indictable offence, the carrying out of the forensic procedure without informed consent had been duly authorised by a magistrate or a justice of the peace; or
 - c. in the case of a person who has been charged with or convicted of an indictable offence, the carrying out of the forensic procedure without informed consent employed reasonable force, if necessary,
- and the thing was done in good faith and the doing of it was reasonable in all the circumstances.**

(Paragraphs 8.197 - 8.209)

The use of reasonable force

8.210 To the extent that police have had power to conduct searches of the person, it generally has been assumed that they are authorised to exercise reasonable force. If police exceed what is reasonable in all the circumstances, they commit criminal assault, legitimise resistance and may be liable for a civil action of trespass to the person.

8.211 Most legislation provides that a person authorised to carry out a forensic procedure or a person assisting such person, may use reasonable force.²⁸⁹

8.212 The Coldrey Committee noted that:²⁹⁰

“In theory there are four options for seeking to enforce compulsory procedures. They are:

- (i) by making it a criminal offence not to comply;*
- (ii) by making it a contempt of court not to comply;*
- (iii) by the use of reasonable physical force; and*
- (iv) by the drawing of adverse inferences from the failure of the suspect to comply.”*

The Coldrey Committee did not consider the first two options as being viable alternatives.²⁹¹

8.213 The Committee noted that the Coldrey Committee was divided on the issue of the use of reasonable force in compelling a sample. Aligned with the consideration of the employment of reasonable force is the need to address whether or not at trial, adverse inferences could be drawn by the judge and/or jury from a failure to provide a sample. This later issue is discussed in Chapter 16 of this Report.

8.214 The use of reasonable force carries with it many health and safety consequences, both to the persons being sampled and the persons obtaining the sample, particularly if the sample to be taken is by venepuncture with a syringe.

²⁸⁹ 1999 Model Bill, clause 35; Criminal Code (Western Australia), section 236; Criminal Law (Forensic Procedures) Act 1998 (South Australia), section 35.

²⁹⁰ The Coldrey Report, p. 148.

²⁹¹ The Coldrey Report, p. 148.

- 8.215 The United Kingdom legislation contains differing provisions on the drawing of adverse inferences from a person's refusal to undergo a forensic procedure and reasonable force, depending on whether the procedure is an intimate procedure or a non-intimate procedure. In the case of intimate procedures:
- a. they may only be taken where a police officer of at least the rank of superintendent has authorised it *and* the person has consented;²⁹² and
 - b. where the appropriate consent to the taking of an intimate sample is refused without good cause, then in any proceedings against that person the court or jury may draw such inferences as appear proper.²⁹³
- 8.216 In the United Kingdom non-intimate samples may be taken without consent from a person in police detention, held in police custody or who has been charged or convicted or a recordable offence if they have been authorised by police officer of at least the rank of superintendent.²⁹⁴ As reasonable force appears to be able to be used in these circumstances there are no provisions dealing with the admissibility of a refusal to undergo a forensic procedure.
- 8.217 *United Kingdom* and *Victorian* experience is that on very few occasions do police have to use reasonable force to obtain samples. The Committee was told that samples are obtained usually after speaking to the person concerned for a period of time to allay any apprehension they may have about the procedure.

²⁹² *Police and Criminal Evidence Act 1984* (United Kingdom), sections 62 (1) & (1A).

²⁹³ *Police and Criminal Evidence Act 1984* (United Kingdom), section 62 (10).

²⁹⁴ *Police and Criminal Evidence Act 1984* (United Kingdom), section 63.

Observations and Recommendations

Should reasonable force be used to obtain samples?

If so, in what circumstances may it be used?

86. **The Committee recommends that a person authorised to conduct a forensic procedure or a person assisting such person may use reasonable force. In the case of a person who is under suspicion as having committed an indictable offence but who has not been charged with an indictable offence, reasonable force may only be used after an order to conduct a forensic procedure has been obtained from a magistrate or a justice of the peace.**
(Paragraphs 8.210 - 8.217)

Ethical concerns of medical practitioners

- 8.218 Concerns were expressed to the Committee by the medical profession about the use of force in conducting forensic procedures.
- 8.219 Medical associations have highlighted the ethical problems about conducting non-consensual procedures on suspects for a purpose other than a medical purpose. In this respect the *1999 Model Bill* excuses medical practitioners from participating.²⁹⁵ Legislation also has been enacted by other jurisdictions to allow for this objection.²⁹⁶
- 8.220 Anecdotal evidence given to the Committee indicated that practical difficulties had been encountered with the application of Post Conviction Testing powers in South Australian prisons. Medical staff in most prisons focus on the health and medical treatment of prisoners in the same way that they would with the general public. Medical staff objected to being required to perform the compulsory forensic procedure as they felt it jeopardised the relationship between prisoner and medical officer, the medical officer not being a corrections officer. These concerns were also raised by corrections officers. The Committee was informed that, in so far as prisons are concerned, administrative arrangements should be managed so that sampling is

²⁹⁵ *1999 Model Bill*, clause 80.

²⁹⁶ See for example *Crimes Act 1958* (Victoria), section 464Z(8) which states: “*This subsection [dealing with the conduct of forensic procedures] does not compel any medical practitioner, nurse or dentist to take a sample from a person nor to conduct a physical examination of a person nor to be present when a sample is taken or an examination is conducted.*”

conducted by an outside, independent medical practitioner, nurse or authorised person. If necessary they should also be assisted by someone independent of the prison.

Observations and Recommendations

How should the legislation address the ethical concerns of medical practitioners and concerns expressed by other groups about the use of force in conducting forensic procedures?

87. The Committee notes that ethical concerns have been expressed by medical practitioners and concerns have been expressed by other groups such as prison staff, about the use of force in the conduct of medical procedures.
(Paragraphs 8.218 - 8. 220)
88. **The Committee recommends that the legislation expressly provide that no person be required to carry out or assist in the carrying out of a forensic procedure.**
(Paragraphs 8.218 - 8. 219)
89. **In so far as conducting forensic procedures on convicted offenders is concerned, the Committee recommends that administrative arrangements should be managed so that the forensic procedure is conducted by an outside, independent medical practitioner, nurse or authorised person. If necessary they should also be assisted by someone independent of the prison.**
(Paragraph 8.220)

Remote area populations

- 8.221 The Committee noted that in remote areas of Western Australia there are particular difficulties of access to appropriately qualified persons who conduct forensic procedures. If DNA samples are required of suspects or persons held in custody in remote areas, it is probable that they will be required to be held in custody for longer periods of time if legislation requires the right to a medical practitioner and/or legal representative before forensic procedures are conducted. The Commonwealth has

noted that this has implications regarding indigenous peoples and issues such as deaths in custody.²⁹⁷

8.222 In the absence of a particular legislative regime for Western Australia the Committee has not considered the issue. In the interim however, the Committee notes the issue as one for consideration by the Government when drafting any legislation.

8.223 In view of the Committee's recommendations regarding the ability to apply by electronic means to a justice of the peace or magistrate for an order to compulsorily conduct a forensic procedure (paragraphs 50 and 75 - 78 of the Observations and Recommendations) and the ability of a police officer to obtain a buccal swab (paragraph 82 of the Observations and Recommendations) these observations may not be of major concern.

Evidence Collection

Integrity

8.224 All with whom the Committee spoke emphasised the importance of integrity in the sampling and evidence collection processes. Continuity is fundamental to ensuring the integrity of an item.²⁹⁸

8.225 The Committee was informed that generally all those involved in forensic investigation must observe a number of general guidelines:²⁹⁹

- a. the evidence must be obtained legally;

²⁹⁷ These concerns are discussed in the context of the *Crimes Amendment (Forensic Procedures) Bill 1995* in the Senate Legal and Constitutional Legislation Committee Report: *Crimes Amendment (Forensic Procedures) Bill 1995*, October 1995, pp. 17 - 27.

²⁹⁸ "Integrity" means the expectation by the forensic scientist who conducts the analyses that there has been no change, loss or addition, such that the item received is in precisely the same state as when it was collected at the scene (accepting the occurrence of natural physical changes such as desiccation, i.e. that blood dries and semen cracks and powders). See Ede, Roger and Shepherd, Eric, *Active Defence, A Lawyer's Guide to Police and Defence Investigation and Prosecution and Defence Disclosure in Criminal Cases*, 1997, p. 11.

²⁹⁹ And see Ede, Roger and Shepherd, Eric, *Active Defence, A Lawyer's Guide to Police and Defence Investigation and Prosecution and Defence Disclosure in Criminal Cases*, 1997, p. 11.

- b. the evidence must be documented fully;
 - c. the evidence must be properly marked;
 - d. the evidence must be correctly and separately package;
 - e. proper controls and standards must be maintained if the evidence is to be subject to comparison and rigorous analysis; and
 - f. the chain of custody (continuity) must be maintained and accounted for.
- 8.226 Even the slightest contamination of a crime scene sample by other human DNA during its handling can result in an incorrect interpretation. Therefore guidelines for sampling at the scene of crime, preservation and expedition of biological evidence by trained personnel are necessary to ensure the chain of evidence and to guarantee the integrity of the sample.
- 8.227 The Committee notes that these issues are procedural and have been addressed in each jurisdiction in an administrative manner through the development of Codes of Practice and standard operating procedures.
- 8.228 In the *United Kingdom* many of these concerns have been addressed by the development of a specialist kit for obtaining buccal swabs from suspects. The kit contains tamper proof bags, bar codes for all samples to ensure continuity and the suspect samples are profiled as unidentified samples thus ensuring anonymity to the suspect.
- 8.229 To ensure integrity of an item it was repeatedly emphasised to the Committee that the development of standard operation practices, training and education is essential. The Committee noted that training is being conducted in all jurisdictions. However, comments were made that:
- a. not all police are regularly exposed to a crime scene and the practical implementation of theoretical knowledge may be wanting; and
 - b. as technology improves many more crime scenes can provide forensic evidence - whereas forensic specialists usually attend a murder scene they should now also attend a burglary as do fingerprint specialists.

For these and other reasons it was suggested that it was desirable that an experienced forensic crime team attend each crime scene.

- 8.230 The Committee has noted that police recruits are required to provide their fingerprints before they are sworn as police officers. Such records can assist with the exclusion of

police officers from samples and can indicate when a sample has been contaminated. These matters are integral to the maintenance of the integrity of the evidence and the whole forensic process. The Committee considered that all recruits and currently serving police officers be requested to also undergo a forensic procedure to provide a DNA profile. The Committee noted that for internal quality assurance, laboratory staff at all levels currently provide a sample for a DNA profile.

- 8.231 The Committee noted that there may need to be provision for police officers to apply for identifying data to be destroyed after they leave the police force.

Observations and Recommendations

What procedures should apply at the time a sample is taken to ensure integrity in the sampling and evidence collection processes? For example: what safeguards are needed to ensure the integrity of analysis of samples and prevent tampering or contamination?

90. To ensure integrity of a sample obtained through a forensic procedure, it was repeatedly emphasised to the Committee that the development of standard operation practices, training and education is essential.
(Paragraphs 8.224 - 8.331)
91. **The Committee recommends that guidelines for sampling at the scene of the crime, conducting a forensic procedure on a person and the preservation and expedition of biological evidence by trained personnel be developed to ensure the chain of evidence and to guarantee the integrity of any sample.**
(Paragraphs 8.224 - 8.331)
92. **The Committee recommends that all recruits and currently serving police officers be requested to undergo a forensic procedure to provide a DNA profile for exclusionary purposes.**
(Paragraph 8.230)
93. The Committee notes that there may need to be provision for police officers to apply for identifying data to be destroyed after they leave the police service.
(Paragraph 8.231)
94. The Committee notes that the above issues are procedural and should be addressed in an administrative manner through the development of Codes of Practice and standard operating procedures.

Other Observations

- 8.232 Although the Committee has focussed its inquiries on samples obtained for DNA profiling, its comments in relation to the intimacy or otherwise of DNA sampling procedures are equally applicable for samples taken for other types of forensic procedures such as teeth impressions for the purpose of forensic odontology.

- 8.233 The Committee also recognises the importance of forensic odontology in criminal law enforcement. When in South Australia the Committee was fortunate to met with Dr Kenneth Brown and Dr Jane Taylor, Forensic Odontology Unit, University of Adelaide, South Australia. Mr Brown provided the Committee with copies of submissions which he made in relation to the *Criminal Law (Forensic Procedures) Bill* (South Australia) which highlight some of the difficulties in drafting comprehensive legislation covering all types of forensic procedures.³⁰⁰ The Committee recommends that the government have regard to such submissions when drafting legislation for this State.
- 8.234 The issue was also raised before the Committee as to whether any changes made to the collection of DNA forensic material must not be at complete variance with the current procedures for taking fingerprints. Presently fingerprints may only be taken after a person has been arrested, that is they are “*in lawful custody for any offence punishable on indictment or summary conviction*”: section 50AA *Criminal Code* (Western Australia). If the ability to take a forensic sample from which to conduct DNA is to be extended to a person not in custody, then consideration must also be given to extending the legislation in respect of other forensic procedures such as fingerprinting.
- 8.235 The **1999 Model Bill** addresses this situation by authorising forensic procedures to be conducted on persons not in custody with informed consent. If consent is not forthcoming then:
- a. intimate forensic procedures (which includes blood samples and buccal swabs) can only be taken once a court order has been obtained; and
 - b. non-intimate forensic procedures (which includes fingerprints) can only be taken only by order of a police officer.

³⁰⁰

Submissions from Dr Kenneth Brown to:

- (a) Dr Hector Kobus, Forensic Science Advisory Committee, dated 19 June 1997;
- (b) Mr MR Goode, Attorney General’s Department, dated 14 January 1998; and
- (c) Mr Alastair Ross, Director, National Institute of Forensic Science, dated 22 January 1998.

Observations and Recommendations

What measures should be taken to ensure that, should any changes be made to the legislation regarding the collection of DNA forensic material, they are not in complete variance with other forensic procedures such as procedures for taking fingerprints?

95. Although the Committee has focussed its inquiries on samples obtained for DNA profiling, its comments are equally applicable for samples taken for other forensic procedures.
(Paragraphs 8.232 - 8.235)

96. **The Committee has not addressed all of the issues that may be raised by paragraph 95 of the Observations and Recommendations. However, the Committee recognises the importance of forensic odontology in criminal law enforcement. When in South Australia the Committee was provided with submissions which highlight some of the difficulties in drafting comprehensive legislation covering all types of forensic procedures. The Committee recommends that the government have regard to such submissions when drafting legislation for this State.**
(Paragraph 8.233)

Are there any other observations?

97. The practical implementation of the reporting requirements of the Victorian legislation has created major difficulties. Sections 464ZD and 464ZF(11) of the *Crimes Act 1958* (Victoria) require that police provide a copy of a “forensic report” to everyone on whom a forensic procedure has been conducted. While the police have been acknowledging blood has been provided, it is open to interpretation whether this satisfies the requirement of the relevant Act, as it only states that blood was taken from a particular prisoner on a particular date. The Victorian legislation did not define “forensic report” and some have queried whether this should also have included results of screening against the database.
(Paragraph 8.133)

Chapter 9

SAMPLE AND EVIDENCE PRESERVATION, PACKING AND STORAGE

Should samples be stored?

- 9.1 The above question raises the fundamental issue of whether or not samples from suspects, volunteers and convicted offenders or the crime scene evidence, should be stored once any information derived from those samples has been entered into a DNA database. In this Chapter the Committee considered whether: *there is a need to retain the actual sample after the DNA profile has been extracted and the information recorded?*
- 9.2 Law enforcement authorities and some forensic scientists have suggested that all samples, whether a body sample or a crime scene sample, should be stored and no limitation should be placed on the length of storage. It was argued that the present state of the science and the rapidly developing nature of the technology may impose special needs for retaining body samples. In this respect:
- a. if an error has occurred in the analytical process, fresh tests can be conducted;
 - b. some forensic scientists expressed the view that samples should be retained because it is impossible to predict what information more sophisticated techniques might be able to deliver from them. Technological improvements, such as improved analytical instrumentation, could have an effect on existing data, possibly rendering it obsolete. If samples were retained they could be reanalysed and converted to the new technology. This is important from the point of view of intrastate, interstate and international integration - older samples may need to be reanalysed to obtain profiles that can integrate with profiles obtained under more recent scientific methods; and
 - c. if samples were not retained and could not therefore be reanalysed it may not be possible to screen profiles from old methods against profiles obtained from new methods. It would be necessary to re-sample in order to reanalyse. This may either be impossible, as the person may not be able to be located or, if possible, may be extremely expensive and inefficient.

- 9.3 The Committee also notes privacy and information security concerns suggesting that once the body samples have been used they should be destroyed. This is particularly so in light of the unrealised potential for further testing. Some views were expressed that:
- a. keeping the body sample would inevitably invite further uses of the DNA that have little to do with identification;
 - b. DNA analysis is sufficient to help police solve crimes, without the need to preserve the body samples; and
 - c. retention of the body or crime scene sample has storage capacity and cost implications.
- 9.4 The Committee notes the comments of forensic scientists with whom the Committee met, that the fragments which are currently isolated carry no genetic information. However, in the absence of suitable controls, some concerns were expressed that current “*scientific practice*” may not be sufficient to prevent further fragments being obtained from a sample. The Committee understands that analysis in Germany is only allowed to involve non-coding DNA.³⁰¹ This matter is addressed in Chapter 10.
- 9.5 In Canada it was proposed that a balance between the benefits of sample retention and the concerns about privacy and security may be addressed by the establishment of an independent agency to retain and securely store the original samples and the extracted DNA. Samples would only be identified with bar codes, and the agency would not be able to link samples with names or other identifiers. Forensic laboratories would only come into possession with the samples again should re-analysis be required. The added costs of this alternative structure were noted by the Canadian committee.³⁰²
- 9.6 The Committee notes that there is already an emphasis in forensic laboratories that body samples are afforded complete anonymity during the analytical process. In the United Kingdom, in common with the Canadian recommendations, all samples are bar

³⁰¹ Refer to paragraphs 6.30 and 6.31 above.

³⁰² Referred to in: Solicitor General Canada, *Establishing a National DNA Data Bank*, Consultation document, provided to the Committee by the State of New York Police Department.

coded upon collection and are processed by reference to the barcode. This process is referred to as “*blind testing*”.

- 9.7 The Committee was informed that in the United Kingdom, the United States of America and Germany, blind testing of crime scene samples does not occur. The rationale for this different treatment is that it is necessary for the forensic scientist to know the circumstances of the case so that the type and order of forensic tests can be tailored for maximum results. The Committee recognises that this is particularly important where a crime scene sample is old as different techniques will be required to extract and amplify any DNA.
- 9.8 Considerations relevant to access to and the destruction of samples are also relevant to the question of the storage of samples. The Committee discusses these issues at Chapters 12 and 13.

Where and how should suspect and crime scene samples be stored?

- 9.9 In all jurisdictions studied by the Committee, suspect samples are stored at the forensic laboratory where the analysis is conducted. Crime scene samples are stored either at the forensic laboratory or with police authorities.
- 9.10 The Committee notes that there is no scientific consensus on the preferred style or temperature for storing samples. Methods range from freezing wet samples at between minus 80 degrees and minus 20 degrees Celsius. However research has shown that dried blood samples or material from buccal swabs can be satisfactorily stored at room temperature.
- 9.11 In hot and humid conditions faster deterioration of a sample occurs from accelerated bacterial action. This can cause problems with the integrity of blood samples and buccal swabs from suspects. These issues have implications for areas in the North of Western Australia, however with adequate technology, training and the control of sampling conditions (for example preservation, transportation and storage of the samples in a dry as opposed to a wet condition) the Committee is of the view that this issue is not insurmountable.
- 9.12 One issue in which the Committee took particular interest was research being conducted by the Laboratory of the Government Chemist in the United Kingdom. This research involved transferring buccal swab samples onto sampling cards to be air dried and then transported and stored. The Committee was informed that the method is not

unique. The advantages of preserving and storing samples in this manner in a State the size of Western Australia, with extremes in climate, are obvious:

- a. dry samples will not degrade in the heat, which reduces the need to re-sample;
- b. packaging and posting to laboratories for analysis will be easier; and
- c. samples can be stored at room temperature, negating the costs associated with freezers and storage.

Observations and Recommendations

Is there a need to retain the actual crime scene or suspect sample after the DNA profile has been extracted and the information recorded?

How should samples be stored?

98. **Subject to paragraphs 117 to 122 of the Observations and Recommendations, the Committee recommends that all body samples and crime scene samples and any information obtained from those samples should be:**
- a. **securely stored by the laboratory which conducted the relevant analysis, and not the police; and**
 - b. **stored separately from any information that may identify the person to whom the body sample relates.**

(Paragraphs 9.1 - 9.12)

99. The Committee offers no judgment on the adequacy or otherwise of different methods of packaging and storage save to note that:
- a. the method of sampling has major scientific and financial implications;
 - b. the method of storage has major scientific and financial implications; and
 - c. the constant change in technology demonstrates the need for the users (generally police) and the providers (scientists) to consult extensively with each other to determine how best to practically implement any legislation.

(Paragraphs 9.1 - 9.12)

Chapter 10

SAMPLE ANALYSES

Scientific Process

- 10.1 Laboratories generally use one or both of two techniques: PCR (polymerase chain reaction) and/or RFLP (restriction fragment length polymorphisms).
- 10.2 RFLP was the first type of forensic DNA test to be widely used by crime laboratories. RFLP is based on the variation amongst individuals in the length of the DNA fragments. In the RFLP method, DNA is extracted and cut by an enzyme into restriction fragments, which are suspended in a gel, divided up by size, and transferred from the gel by blotting onto a membrane. In order for the examiner to see the fragments, they are identified by radioactively labelled probes, and the membrane is placed over an x-ray film. The radiation from the probe exposes the film and produces a picture of the DNA fragments called an “*autoradiogram*.”³⁰³
- 10.3 A “*match*” or “*hit*” is made when the patterns produced by DNA from an evidence stain and those from a suspect’s sample DNA are found to be the same. An estimate of the statistical probability that this evidence is from the suspect rather than someone selected at random is then calculated. RFLP is powerful but is relatively insensitive, cannot be applied to degraded specimens, and is time consuming, taking about 6 weeks to process. More recently, to avoid the precautions needed to handle radioactive samples, and to speed processing time, other labelling systems have been adopted, including chemiluminescent and fluorescent methods.³⁰⁴
- 10.4 If a forensic sample is too small for RFLP testing or if the DNA is degraded, PCR testing may be used to obtain a DNA typing result. PCR is a method of preparing samples in which the targeted DNA is copied many times (amplified). Two DNA molecules are produced from the original molecule; the procedure is repeated many times with a doubling of DNA fragments every time. Eventually this geometric

³⁰³ Extracted from Victor Walter Weedn and John W Hicks, *The Unrealized Potential of DNA Testing*, National Institute of Justice, June 1998, p. 7.

³⁰⁴ Extracted from Victor Walter Weedn and John W Hicks, *The Unrealized Potential of DNA Testing*, National Institute of Justice, June 1998, p. 7.

progression produces millions of copies of a DNA sequence. Although PCR is very sensitive, permitting analysis of as little as a single copy of DNA, this sensitivity also renders the sample susceptible to contamination.³⁰⁵

- 10.5 It is also possible to amplify regions of the DNA molecule that show variation in DNA fragment length between individuals rather than using the RFLP method of isolating and cutting out these regions. The Committee was informed that the forensic community has found that smaller sets of fragments, called short tandem repeats (“STRs”), are preferable for several technical reasons. The technique of using STRs is easier and faster than RFLP, and the analysis can be performed with a number of different automated and semi automated methods, such as capillary electrophoresis.³⁰⁶ At the time of the Committee's inquiries, the PathCentre used an automated typing system that can process up to 50 samples in a 24 hour period - a task that if done manually would take up to three weeks.³⁰⁷
- 10.6 The importance of being able to utilise different types of samples to obtain DNA information which can lead to identification of a victim or offender is illustrated by case studies from both the United States and the United Kingdom. In many cases the physical sample available to the analyst will be small, examples being saliva from a sealed envelope in a blackmail case or seminal fluid in a sexual assault case.³⁰⁸ Technology is constantly changing. The same sample that cannot provide a DNA profile today may be able to provide one tomorrow.
- 10.7 As stated in the 46th Report, the Committee is not made up of scientists and did not review the processes by which DNA samples are analysed for use by investigative agencies. However, the Committee noted the importance of ensuring the reliability and integrity of the physical sample from the time it is taken, through the DNA testing and analysis, to the time information is passed on to the investigative agency.

³⁰⁵ Extracted from Victor Walter Weedn and John W Hicks, *The Unrealized Potential of DNA Testing*, National Institute of Justice, June 1998, p. 7.

³⁰⁶ Extracted from Victor Walter Weedn and John W Hicks, *The Unrealized Potential of DNA Testing*, National Institute of Justice, June 1998, p. 7.

³⁰⁷ Feeney, A and Webb, L “Abi Prism 310 Genetic Analyzer Acquisition”, *PathCentre News*, Vol 3, No 2, October 1997, at p. 13.

³⁰⁸ 46th Report, paragraph 2.6.

- 10.8 In this respect the Committee notes the comments of Mr Robert Falconer, Former Commissioner of Police, Western Australia Police Service, that all forensic scientists in Australia are operating under the one scientific methodology which means that each State's system should be able to be interfaced without needing to spend millions of dollars on rectifying or standardising information technology formats.³⁰⁹ Much money was spent, and is still being spent, to standardise and integrate State systems in Germany and the United States of America.
- 10.9 The recommended Australian system is known as Profiler Plus. It types 9 different DNA loci plus sex with the loading of a single sample and it is estimated that the chance of two people having the same type at each loci and, therefore, the same overall DNA profile, is 1 in 72 billion. It is therefore extremely powerful in either excluding individuals from, or implicating individuals in, a criminal investigation.³¹⁰
- 10.10 There was general agreement amongst people with whom the Committee met that, funding permitting, it was highly desirable for the laboratory system to keep offender/suspect samples physically separate from that of crime scene samples. This was seen as desirable and possibly essential to guard against contamination between the two sets of samples, clerical errors or alleged fraudulent manipulation of profiles. The physical separation of analysis has implications on the resource and funding aspects of any DNA legislation and is discussed in Chapter 14.
- 10.11 The Committee notes that there is an emphasis in forensic laboratories that body samples are afforded anonymity. The Committee has addressed this issue at paragraphs 9.6 and 9.8.

What is a standard set of loci?

- 10.12 The Committee notes that there is diverse scientific opinion about the number of loci to be tested:
- a. The United Kingdom currently uses 6 loci and is moving to 9 loci.

³⁰⁹ *Evidence*, Mr Robert Falconer, Former Commissioner of Police, Western Australia Police Service, p. 3.

³¹⁰ Paper submitted by the Working Party to the Australian Police Ministers' Council in relation to the National Criminal Investigation Database on 10 June 1998, p. 2.

- b. The European standard set of loci ("ESS") consists of four STR loci. The power of discrimination of the ESS in the Caucasian population is such that the chance that 2 unrelated individuals appear to share the same profile is approximately 1 in 70,000 which is considered enough for screening purposes. For identification, more loci are needed to increase the discrimination power.³¹¹
- c. Germany uses four loci (as part of the European requirement) and uses an additional system called the SE33, which the Committee was informed has very high powers of discrimination.

Due to these powerful discrimination qualities, the SE33 has great practical application for use in the first instance. The Committee was informed that the German authorities utilise SE33 in cases of mass screening to minimise the necessity to utilise a number of different markers on all samples - further tests are conducted once the SE33 eliminates some of the samples. However, the problem with the SE 33 is that it cannot fit into a multiplex system which is the technology that most countries are using and which ensures international comparability.

- d. In contrast the FBI in the United States of America uses 13 loci and runs all 13 tests at once - omitting the intermediate screening test conducted by Germany. It was noted by members of the FBI that the decision to conduct an intermediate screen, as does Germany, is based on a cost benefit assessment. As automation increases, the cost of running all 13 loci decreases.

In the United States of America a process to standardise loci between the various States is taking place. A basic set of loci containing 13 loci in which the four loci of the ESS are included, is used. Expansion of this set with another three loci is being implemented.

- 10.13 Discussions with forensic scientists in the United Kingdom indicated that the number of loci utilised is essentially a procedural choice based on cost and policy considerations. The Committee was informed that:

³¹¹ A "discrimination power" refers to the level of differentiation amongst a population which can be achieved by a particular process. See further: *Final report of the Interpol European Working Party on DNA Profiling*, Cairo, October 1998.

- a. a two stage approach may be adopted where tests can be conducted using a smaller number of loci to screen and filter the population, with further tests on the reduced numbers to obtain a unique hit. This appears to be the approach taken by Germany in using the SE33 test; or
- b. a one stage approach may be adopted where all tests are conducted to produce a unique hit at the outset. This appears to be the policy adopted by the United States of America with its 13 marker system. This method may be more costly because more tests are being conducted at the outset.

10.14 The Committee was informed by staff at the PathCentre that in Western Australia:

- a. unlike Germany but similar to the United States of America and United Kingdom, the PathCentre use a one stage method of analysis;
- b. the PathCentre routinely identifies up to 10 loci to provide a profile;
- c. unlike the United States of America and the United Kingdom, the size of Australia's population does not require the examination of more loci; and
- d. the loci examined in Western Australia is the same Australia wide and can be integrated internationally.

Observations and Recommendations

What is a standard set of loci?

100. In view of the diverse scientific opinions, the Committee does not make any recommendations on what may be an appropriate set of loci, apart from the need for a common set of loci for interstate and international integration and a sufficient number for accurate identification. It appears that for the purposes of DNA profiling of the Australian population the 9 loci plus the sex determinator may be sufficient. (Paragraphs 10.12 - 10.14)

Non-coding DNA

- 10.15 The Committee notes the comments of forensic scientists with whom the Committee met, that the fragments which are currently isolated carry no genetic information. However, in the absence of suitable controls, some concerns were expressed to the Committee that current “*scientific practice*” may not be sufficient to prevent further fragments being obtained from a sample. The Committee understands that analysis in Germany is only allowed to involve non-coding DNA.³¹²
- 10.16 The Committee considered whether or not State legislation dealing with forensic procedures should expressly restrict analysis of DNA to analysis of non-coding DNA. The Committee made inquiries of the PathCentre WA on this issue. The PathCentre's response is attached as Appendix 10.³¹³
- 10.17 In summary the PathCentre advised that:³¹⁴
- a. in Australia the restriction to the analysis and profiling of non-coding DNA is primarily imposed for reasons of “*scientific fact*” rather than any scientific protocol, or administrative or accreditation requirement. The analytical kit in use by the PathCentre (which is also the approved kit for use in Australia) currently examines non-coding DNA because it is the most informative in its ability to discriminate between people;
 - b. it is the manufacturers of the analytical kit who make the decision as to which areas of DNA to analyse. As the manufacturer is a United States of America company it would not be bound by Australian State or Federal law;
 - c. legislative restriction of analysis to non-coding areas of DNA may cause problems in the long term. Whilst current analytical kits examine non-coding areas it is possible that the manufacturers of the analytical kit could change the components to include coding areas. Legislative restriction to the

³¹² Refer to paragraphs 6.30 and 6.31 above.

³¹³ Letter from Dr Clive Cooke, PathCentre to Advisory/Research Officer, Legislation Committee dated 5 August 1999, attaching letter from Dr Gavin Turbett to Dr Clive Cooke dated 5 August 1999.

³¹⁴ Letter from Dr Clive Cooke, PathCentre to Advisory/Research Officer, Legislation Committee dated 5 August 1999, attaching letter from Dr Gavin Turbett to Dr Clive Cooke dated 5 August 1999.

analysis of non-coding DNA would therefore preclude Australian laboratories from using the analytical kit;

- d. technological development may enable the determination of the ethnic background of the individual as well as physical characteristics. The Committee notes that this development may cause concern to many people as well as be of great investigative value;
- e. the analysis of non-coding DNA could still possibly lead to the uncovering of medically-relevant genetic information; and
- f. if Western Australia had more restrictive legislation than other States, it may not be able to fully participate in the proposed national database as information may not be compatible.

10.18 The PathCentre proposed that the most practical approach may be to develop a National Code of Conduct under which forensic laboratories would be required to operate. The Code of Conduct could regulate what types of forensic biological testing are acceptable for the purposes of human identification, the use of that information. The Committee notes the PathCentre's comments that such Code of Conduct could also apply to any laboratory that discovers genetic information of any kind.

Observations and Recommendations

Should our legislation specifically restrict any DNA analysis to the non coding parts of DNA?

101. **The majority of the Committee recommends that any DNA analysis not be restricted to the non-coding parts of DNA.**
(Paragraphs 10.15 - 10.18)

Scientific Providers: Laboratories and Scientists

10.19 The Committee was informed by members of the legal community and the scientific community from overseas that, from the scientific perspective, many consider the DNA profiling process as being relatively straightforward. Most of the current debate is outside the scientific circle and focuses on evidence collection and presentation at trial. However, as there is still debate about some issues it is essential to have accreditation

standards and established quality assurance guidelines to ensure the integrity of the scientific process.

- 10.20 Accreditation ensures proficiency testing, peer review and standardised methods of testing. Accreditation is vitally important from the point of view of analysis of crime scene samples, as very often a fault in the process can be fatal to the integrity of the evidence. Whereas a suspect may be able to be re-sampled, a crime scene sample may not, as it may have been too small to divide in half for replication purposes.
- 10.21 In the *United Kingdom* accreditation requirements are established and enforced by the FSS who, as custodian of the database, test potential providers as to whether they meet the required standards. Such a specialised field and the large capital costs required to establish facilities means that, apart from the FSS, only two - the laboratory of the Government Chemist and Cellmark Diagnostics are in the United Kingdom marketplace, alongside the Forensic Science Service.
- 10.22 In *Germany* neither the police nor the university forensic laboratories are accredited, although proficiency testing is conducted twice a year.
- 10.23 In the *United States of America* not all of the laboratories that conduct DNA analysis are accredited bodies. However, in order to progress the database and to promote accreditation requirements, State laboratories have been given access to CODIS on the condition that they *become* accredited.
- 10.24 Proficiency testing and quality assurance examples included:
- a. an internal tracking system utilised by the Local Government Chemist in the United Kingdom called "LIMS" which enables defense counsel and experts to follow the scientific process for a particular sample. This tracking system is in addition to the bar codes supplied by the FSS as part of each forensic sampling kit. The LGC noted that continuity and sample identification problems can occur if the kit bar codes go missing;
 - b. marking of evidence for identification, chain of custody, secure areas for storage, documented procedures to minimise loss, contamination and or deleterious change of evidence;

- c. if possible, retention of a portion of the evidence for retesting;³¹⁵ and
- d. extensive use of proficiency testing, protocol review and annual audits.

10.25 In addition the Committee notes that standard laboratory practice in the United States of America and United Kingdom requires that any suspect sample is analysed independently by two separate analysts. However there is a difference in approach:

- a. In the United States of America, one analyst types the DNA profile. If there is a “*match*” or “*hit*” with another profile, a second analyst verifies the profile by reanalysing one of the archived portions of the sample. A report is then sent to the agency who submitted the sample and a further blood sample is requested from the suspect for evidentiary comparison.
- b. In the United Kingdom, the Forensic Science Service recognises, while the scientific process is established, that the interpretation of data is still very much a judgment. Accordingly two analysts independently interpret the data. Their opinion is brought together electronically and a third person then assesses whether the two analysts agree. If the two analysts do not agree then the sample is reanalysed or, if the differentiation is minor, the differences may be able to be resolved.

If there is a “*match*” or “*hit*” with another profile, the same procedure is conducted on one of the archived portions of the sample. A report is then sent to the police department which submitted the sample and a further forensic sample is requested from the suspect for evidentiary comparison.

10.26 The development of standards acceptable to both users (police authorities) and providers (forensic scientists) is usually facilitated by multidisciplinary committees. In New York State, for example, legislation has been enacted to form a Committee on Forensic Science. The committee:

- a. is a multidisciplinary committee comprised of representatives from a crime laboratory, forensic laboratory, scientists, law enforcement agency, prosecution services, public defence bar, private criminal defence bar and attorney or judge with a background in privacy issues and biomedical ethics;

³¹⁵ The importance of the ability of defense to retest samples is discussed further at in Chapters 12 and 16.

- b. develops minimum standards and a program of accreditation;
- c. incorporates a DNA subcommittee which makes binding recommendations to the Committee regarding DNA laboratory accreditation and DNA forensic science accreditation; and
- d. makes recommendations which can be promulgated by the relevant State agency by regulation.³¹⁶

10.27 The Committee understands that in Western Australia there is currently no national standard of accreditation for forensic scientists. Most training is conducted as part of a biology or human biology degree, and the qualification may not be appropriate to forensic analysis.

³¹⁶ *Laws of New York* 1994 - Article 49-B regarding the Commission on Forensic Science and establishment of DNA Identification Index.

Observations and Recommendations***Should Parliament legislate accreditation or licensing requirements for laboratories involved in forensic DNA typing? If so, how?***

102. The Committee believes that clear and mandatory quality assurance and quality control standards should be established as being essential to the integrity of sample analysis and DNA profiling, and that such standards should be met by each laboratory in which DNA forensic testing is to be conducted.
(Paragraphs 10.19 - 10.27)
103. The development of scientific accreditation standards is not a task for which this Committee is equipped. The Committee notes that the National Institute for Forensic Science is already addressing the issue of national scientific accreditation.
(Paragraphs 10.19 - 10.27)
104. The Committee further notes that many laboratories will already operate under standard scientific protocols and that the Committee is not in a position to question the adequacy or otherwise of such protocols. Accordingly the Committee makes no comment on the content of the various standards.
(Paragraphs 10.19 - 10.27)
105. However the Committee notes that if accreditation standards affect evidentiary samples and go wider than the scientific process, it may be useful for wider consultation to occur. The Committee notes that, in line with the position in the State of New York, this may involve the development of a multidisciplinary committee. Such a committee would be an expert consultative committee including representatives of the judiciary, and legal professions and appropriate professional bodies such as the State forensic laboratory. The committee could be established to determine minimum standards and a program of accreditation, recommendations regarding DNA lab accreditation and DNA forensic science accreditation and legislative regulation.
(Paragraphs 10.19 - 10.27)

Collocation, integration or separation?

- 10.28 At the outset the Committee endorses the comments made by Mr Alastair Ross, Director of the National Institute of Forensic Science in Australia, that although the United Kingdom has a fairly centralised forensic laboratory, this would not be appropriate for Australia, as it is essential that each State and Territory maintain its own DNA profiling capability to service each police force.³¹⁷
- 10.29 The Committee received many comments on whether the functions relating to storage and analysis of samples should be separated from the functions of the police service or other agency seeking to use the samples. The Committee was interested in the arguments for and against operational integration of the forensic laboratory with the police service.

Operational integration

- 10.30 In **Victoria** forensic analysis services are part of the police department. However, operationally, forensic analysis services in that State are obtaining a greater degree of independence, for example most of the sworn police officers are being transferred out of the forensic area.
- 10.31 In **South Australia** there is a deliberate operational separation of the forensic laboratory and the police. The Committee was informed that the various scientific and forensic disciplines would soon be housed in one building as it had advantages for training and the use of materials and resources. However it as emphasised to the Committee that this was a matter of collocation and not integration.
- 10.32 In the **United Kingdom** the majority of DNA profiling work is conducted for the prosecution by the FSS. Profiling of suspect samples is also provided by the LGC and profiling of crime scene samples is provided by Forensic Alliance. All are independent of the police force and conduct work for the defence as well as the prosecution. The Committee was informed that the United Kingdom government made a deliberate policy decision to separate forensic service providers and the management of forensic

³¹⁷ Evidence, Mr Alastair Ross, Director of the National Institute of Forensic Science in Australia, 15 April 1998, p. 29.

services from police services.³¹⁸ Each police constabulary is free to engage whichever accredited organisation they wish.

- 10.33 In *Germany* forensic analysis is conducted by forensic institutes throughout the country. Some analysis is conducted by police laboratories. Other analysis is conducted within university institutions which are independent of police authorities. The Committee was informed that independence means that analytical services can be utilised by both the prosecution and the defence, and impartial education and training can be provided to police authorities, the legal profession and the judiciary. However the Committee was informed that independence often causes difficulties with funding. The Committee was informed that although a certain amount of government funding is received, the maintenance of forensic laboratories in universities is heavily dependent upon the teaching aspect of the universities. Further, universities find it difficult to invest in technology as there is no guarantee that a financially viable volume of samples, if any, will be referred for analysis.
- 10.34 In the *United States of America* all laboratories are part of criminal justice agencies, the majority directly associated with the police department and the remainder with the health department. Private agencies are not allowed to participate in the CODIS program. This was explained to the sub-committee on the basis that the FBI's charter is to provide technology and law enforcement services to public service agencies providing criminal justice services. The *DNA Identification Act 1994* (United States of America) only allows access to and disclosure for law enforcement identification purposes.
- 10.35 The Committee notes that the federal structure of the United States of America with its many State and local law enforcement authorities may mean that it is logistically difficult to organise services in the same way that the United Kingdom has separated its police authority from the forensic laboratory.

Arguments against integration

- 10.36 There is a school of thought that not only should police and forensic analysis procedures be separate and independent but they should also be *seen* to be separate and independent. Despite procedures to ensure that sampling is physically and operationally separate from the investigative authorities, an integrated facility may not

³¹⁸ Gunn, DG, Chief Constable *National DNA Database, Presentation to the Australian Legislative Committee*, 27 January 1999.

address public perceptions of bias. Allegations of tampering may still occur in much the same way as allegations have been made with other evidentiary items and processes in the past. This is in no way a reflection on the integrity and credibility of scientists - rather it is an observation on the impact of public perceptions.

10.37 Arguments in favour of the separation of forensic analysis from police services include:

- a. operational independence ensures a scientific check and balance on the integrity of the process;
- b. independence fosters competition rather than a marketplace monopoly;
- c. independence enables other scientific laboratories to provide an additional resource, particularly in the initial stage of establishing a database when many suspect samples would require analysis;
- d. independence ensures impartial access to forensic services by the defence as well as the prosecution;³¹⁹
- e. independence emphasises scientific impartiality and can therefore reduce the ability of the defence to raise any allegation of bias or a perceived weakness in evidence; and
- f. tensions in priorities can occur if a forensic laboratory is funded as part of the police budget.

10.38 The Committee was informed that independent providers may have access to a greater range of analytical technology than government providers. This observation was made by Forensic Alliance in the United Kingdom, an accredited private provider of forensic services. Being part of an international scientific organisation, Forensic Alliance are ensured access to many items of equipment utilised in other scientific operations which they may not have access to if they were a dedicated DNA profiling laboratory.

10.39 The Committee also noted that some laboratory accreditation standards typically state that the crime scene laboratory must be physically separate from suspect sample laboratories. Although this requirement is a reference to physical separation, as

³¹⁹ The necessity for access by the defence to impartial expert witnesses is discussed in Chapter 16.

opposed to operational separation, it is worthy to note from the point of view of the capital costs of infrastructure. This is discussed further in Chapter 14.

Arguments for integration include:

- 10.40 Representatives from the Victorian Forensic Science Centre noted that whether or not forensic scientists operate independently of the police structure, the nature of their work requires them to interface with police who are their major client. In any event it was noted that samples can be taken for independent testing and that this regularly occurs between States in order to access the most suitable expert in a particular field.
- 10.41 The reality is that the police are the major and primary client and as such are more likely to fund any forensic requirements. Integrated services such as the Victorian Forensic Science Centre also conduct work for the defence.
- 10.42 There is no mandatory requirement for crime scene samples and suspect samples to be handled in different laboratories so long as the laboratory has procedural safeguards in place to prevent contamination.³²⁰

Other observations

- 10.43 In Victoria the National Institute of Forensic Science has links with the Monash University Department of Forensic Medicine. It is a critical component not only is their service provision, but it also has a responsibility for teaching and research activities. The Committee was informed that the combination has been extraordinarily successful. The Institute provides undergraduate teaching to the medical faculties, to the law faculty and a number of other faculties. Students provide a rich source of providers of research activities. The University of Frankfurt also provides these comprehensive services. Representatives of the University of Frankfurt considered that it was essential to be independent of the police service in order to provide these services.

³²⁰ For example standard laboratory practice involves the cleansing of work areas with hydrochloride or ethanol before handling another exhibit.

Western Australia

10.44 In Western Australia there are currently two laboratories:

- a. one at the PathCentre, which services hospitals and medical pathology. It is the main forensic laboratory used by the police; and
- b. the other laboratory is at Murdoch University but it tends to be a fee-for-service institution and does not obtain funding from the State Government.

The Western Australian police also have a forensic science section but it is used mainly for forensic investigation other than DNA analysis.

10.45 The Committee noted that during the 1999/2000 Estimates Hearings of the Legislative Council, the former Police Commissioner, Mr Robert Falconer, stated that integration of facilities is essential.³²¹

10.46 The Committee noted reports of Western Australian government proposals to build a crime centre in Midland, where police forensic staff would be located in the same building as the PathCentre's DNA testing unit and the forensic chemistry laboratory run by the Department of Minerals and Energy. At the time of this Report, police forensic staff were housed in police headquarters, DNA analysis is in the PathCentre at Sir Charles Gardiner Hospital and the chemistry lab is in Hay Street, Perth.

10.47 The Committee notes the comments of the former Western Australian Police Commissioner, Mr Falconer, during the 1999/2000 Estimates Hearings of the Legislative Council that “... *in this State we are having discussions with people from the Chemistry Centre (WA) and also the pathology laboratory about an amalgamation with our forensic entity into some sort of statewide forensic laboratory whereby the current three disparate entities would somehow be joined together into a state forensic laboratory, which is something that other jurisdictions in this country and elsewhere have done long ago*”.³²²

³²¹ *Hansard*, Standing Committee on Estimates and Financial Operations, 1999/2000 Estimates Hearings, Legislative Council, Tuesday 1 June 1999, Mr Robert Falconer, former Commissioner of Police.

³²² *Hansard*, Standing Committee on Estimates and Financial Operations, 1999/2000 Estimates Hearings, Legislative Council, Tuesday 1 June 1999, Mr Robert Falconer, former Commissioner of Police.

- 10.48 The Committee also notes that in the 1999/2000 Western Australian Police Service Budget Statements the following statement appears:

*“A 'Memorandum of Understanding' has been signed with the Western Australian Police Service and PathCentre for the collocation of the Chemistry Centre (WA) and PathCentre's Forensic Biology Laboratory to the proposed operational support facility at Midland. This would collocate and improve Western Australia's forensic science services.”*³²³

- 10.49 During the 1999/2000 Estimates Hearings it was commented that the Memorandum of Understanding:³²⁴

“...articulates the working arrangements that might apply should the various authorities locate to the operational support facility site at Midland. We are at only a very formative stage, so it is difficult to talk about the shape of this relationship in the future. We have entered into discussions and have made some high-level agreements about the way in which that relationship might work. At this stage it is very early days to make some statements as to whether there will be a single authority or whether they will stay as independent organisations. We see some synergy in their being on a single site where information and, perhaps, facilities can be shared.”

- 10.50 The Committee was informed by staff at the PathCentre that whilst any move to Midland in a facility in common with police forensic services will have many significant benefits for forensic disciplines, they considered that the move was a collocation and not an operational integration. The PathCentre considered this was necessary to maintain their professional and operational autonomy from the police.

- 10.51 In the event that DNA analytical facilities are to be collocated in Midland with other police facilities, the Committee considers that it is highly desirable for the functional autonomy and operational independence of forensic services to be reinforced by financial independence from the police service. The Committee considers aspects of funding in more detail at Chapter 14 of this Report.

³²³ 1999/2000 Western Australian Police Service Budget Statements, volume 1, budget paper No 2, p. 157.

³²⁴ *Hansard*, Standing Committee on Estimates and Financial Operations, 1999/2000 Estimates Hearings, Legislative Council, Tuesday 1 June 1999, Mr S Jones, Director of Asset Management, Western Australia Police Service.

Observations and Recommendations

Should the functions relating to storage and analysis of samples be separated from the functions of the police service or other agency seeking to use samples? If so, how?

106. In the Committee's view it is preferable to separate the functions of police investigation and forensic DNA analysis. Both functions should be financially and operationally independent.
(Paragraphs 10.28 - 10.51)
107. The Committee recognises that collocation of the three disciplines (police forensic services, the forensic chemistry laboratory and the PathCentre WA DNA Testing Unit) may result in economies of scale and improve appropriate police exchange of information and knowledge as well as maintain necessary independence.
(Paragraphs 10.28 - 10.51)
108. **In the event that DNA analytical facilities are to be collocated with other police facilities, the Committee recommends that, to ensure functional autonomy and operational independence, forensic services should be funded independently of the police service.**
(Paragraphs 10.28 - 10.51)

Chapter 11

DNA DATABASE: CUSTODIAN

- 11.1 The Committee was informed that in order to maintain the integrity of the database it is necessary for:
- a. strict criteria to be laid down for entry of any data onto the database; and
 - b. strict procedures to be in place to ensure that any alternative provider of DNA profiling services must achieve the necessary accreditation and competency testing before any of their data will be entered on the database.
- 11.2 The role of a database custodian is to ensure that the scientific and operational integrity of the database is contributed to and maintained in accordance with relevant accreditation requirements and the relevant laws of each State. In a national sense different State and Territory laws may result in different requirements and obligations of contribution and access to any database.
- 11.3 The Committee considered whether or not the role of database custodian should:
- a. be fulfilled by law enforcement authorities; or
 - b. be separate from law enforcement authorities and fulfilled by either:
 - (i) the State's forensic laboratory; or
 - (ii) an independent agency.
- 11.4 Mr Alastair Ross, Director, National Institute of Forensic Science, Australia, informed the Committee of the measures which could be put in place in **Western Australia** to protect the integrity of DNA information:

“If we are to have this national database, those security issues must be resolved. In this country we have developed a national laboratory accreditation program that establishes guidelines for many issues in a forensic laboratory, ranging from management to occupational health and safety. One of the issues is security of storage. Other groups are also considering the issue. I mentioned the European Network of Forensic Science Institutes, and there is also the European Haemogenetic

Society and a technical working group on DNA management in the United States. The group we deal with here is the National Association of Testing Authorities. We have worked with NATA to develop national standards for DNA profiling that take into account issues such as storage and security.

... We have had meetings with the Federal Privacy Commissioner and we are cognisant of the fact that the federal Privacy Act provides that a sample cannot be used for purposes other than those for which it was taken. ... It is important to allay fears. People believe that we can tell all sorts of things about them from their DNA, but the tests done to generate a profile do not look at genetically active regions of DNA.”³²⁵

- 11.5 Another key feature affecting the integrity of a database relates to security in the storage of information. Some views were expressed that information should be quarantined, by some method, from those (for example: police investigators) who may be perceived to have an interest in the information. Mr Ross discussed the **United Kingdom’s** approach to this complex task:

“The CHAIRMAN: The United Kingdom has separated ownership and management, and security is one of the reasons for that.

Mr ROSS: Yes, that is right and I agree with it. Normal forensic procedures provide that the police have responsibility for and ownership of samples and data and that the forensic scientists manage the input of the data. Therefore, any input or any information - for example, removing the profile of a suspect - and the interpretation of results from the database would be the realm of the scientists and not the police.

Hon GIZ WATSON: Is there no storage of the actual original sample, only the numbers?

Mr ROSS: Only the numbers would be stored on the national database. The original material would be stored by the laboratory inputting the information.”³²⁶

³²⁵ Evidence, Mr Alastair Ross, Director of the National Institute of Forensic Science in Australia, 15 April 1998, p. 31.

³²⁶ Evidence, Mr Alastair Ross, Director of the National Institute of Forensic Science in Australia, 15 April 1998, p. 31.

- 11.6 As noted above, the *United Kingdom* decided, principally on policy grounds, that its national Forensic Science Service (FSS) (the principal provider of forensic science to police in the United Kingdom) should be both the custodian and manager of the new national database. The FSS owns both the technology and the hardware however the Police Service retains ownership of the database and the data held on it.³²⁷ The functional operation of the United Kingdom database is described in more detail in Appendix 13.
- 11.7 The Committee was informed that as a matter of public policy the United Kingdom government:
- a. did not consider that the role of custodian should be fulfilled by a private organisation; and
 - b. felt that possible public perception of collusion between the analytical and database services and the police, which perception may not necessarily reflect reality, dictated that the database custodian be separate from law enforcement authorities.
- 11.8 Other private laboratories considered that there was an inherent conflict of interest in the FSS being both a provider to the database as well as database custodian. In the latter role, the FSS determines the accreditation of other forensic service providers. Another view was expressed to the sub-committee that the custodian should be under judicial control and completely independent of the provider laboratories and the police.
- 11.9 In *Germany* the database is controlled by the Bundeskriminalamt, being the federal police, as both custodian and manager.
- 11.10 In the *United States of America* the FBI is custodian and manager of the database.

³²⁷ Gunn, DG, Chief Constable, Cambridgeshire Constabulary, United Kingdom, *National DNA Database: Presentation to Australian Police Officers*, Melbourne, 5 August 1997, p. 11.

Observations and Recommendations

Who should be responsible for regulatory oversight of the DNA database? Should the roles of database custodian and manager:

- *be fulfilled by the law enforcement authorities; or*
- *be separate from law enforcement authorities and fulfilled by either:*
 - *the State's forensic laboratory; or*
 - *an independent agency?*

109. **The Committee recommends that regulatory oversight of and the roles of database manager and custodian of any Western Australian DNA database be separate to law enforcement authorities and be fulfilled by a functionally autonomous public agency.**

(Chapter 11)

110. **The Committee is attracted to the organisational model of the United Kingdom database whereby the role of the manager and custodian of the database (including all identifying information) is kept separate from the police service and is fulfilled by the Forensic Science Service. The United Kingdom police retain ownership of the data and can enter into arrangements regarding its use. The Committee recommends that consideration be given to structuring the ownership and operation of any Western Australian database in a similar manner.**

(Chapter 11)

Chapter 12

ACCESS TO FORENSIC MATERIAL AND DATABASE INFORMATION

- 12.1 DNA typing technology raises privacy concerns not relevant in other forms of forensic identification. Unlike fingerprinting it can identify genetic traits and trace inheritable diseases. Unrestricted access to personal genetic information therefore raises several questions about potential abuse and misuse.
- 12.2 Although the Committee was informed in all jurisdictions into which it enquired, that only non-coding information is presently used for profiling, some concerns were expressed that information would be kept on file and further information extracted. The concerns included the detection of abnormal genes or traits which could be used against people in the civil context by insurers, employers and educators.
- 12.3 As noted in the MCCOC Report “*there will be many people supplying, administering and using the DNA database - it would be naive to assume every person involved will be always committed to performing these functions appropriately. Accountability mechanisms are necessary to deter rogue conduct.*”³²⁸
- 12.4 Concerns regarding access to and use of personal information, are generally covered by data protection laws in the United Kingdom,³²⁹ Germany and the United States of America. As organisations collect, process and store personal information in computerised form and use both private and public telecommunications systems to transmit information between different entities, adequate mechanisms must be in place to protect the information. In this Report the Committee has not considered ways of protecting information in an era of increasing computerisation.³³⁰

³²⁸ MCCOC Report, pp. 3 & 4.

³²⁹ *Data Protection Act 1984* (United Kingdom).

³³⁰ For a detailed discussion on this issue in the United States of America, refer to: National Research Council, *For the Record: Protecting Electronic Health Information*, National Academy Press, Washington, USA, 1997. For an example of comprehensive legislation enacted in the United Kingdom, refer to the *Data Protection Act 1984* (United Kingdom).

- 12.5 As a result of its inquiries the Committee noted that control of the use and dissemination of information about forensic samples and database information was generally achieved by:
- a. legislative specification of the purposes for which the information could be used; and/or
 - b. penalties for misuse.
- 12.6 In some jurisdictions the above approach has been reinforced by organisational practices which can help to protect electronic information, such as the separation of the custodian and user of any database. The Committee discusses this issue in Chapter 11. The Committee also understands that the electronic transfer of information is in encoded form.
- 12.7 In this Chapter the Committee focused on:
- a. What access should be granted to the suspect and third parties in relation to suspect samples and crime scene samples?
 - b. In what circumstances should there be access to and disclosure of information on a DNA database?
 - c. What sanctions should there be for misuse of any information?

Sample Access

Access and disclosure to the suspect

- 12.8 Access by a suspect to crime scene samples and their own body sample are treated differently in each country. The Coldrey Report specifically addressed provision of the *crime scene sample* to the defendant:

“...the defendant will be able to provide his/her own body sample to his/her own expert for analysis and comparison to the crime scene sample. However with DNA profiling relevant evidence can only be generated by the defense if in fact the accused’s scientist has access to crime scene samples. As the law presently stands there is no right of the accused to have access to such samples. The safeguard of independent analysis is a valuable one which provides the accused person with a reasonable opportunity to verify or contest the prosecution evidence. Consequently wherever there is sufficient

*of the sample material it is essential that sufficient quantity be made available to the accused (if sought) so that such analysis may occur.”*³³¹

12.9 The Coldrey Committee recommended that “[I]n any case where a sufficient crime scene sample is available to permit independent analysis on behalf of the accused person, the accused person has a right to access to a sufficient portion of such sample as to allow analysis to occur.”³³²

12.10 The **1999 Model Bill** addresses a person’s access to the sample which has been taken from him or her by requiring that³³³ if there is sufficient material for an analysis to be carried out by not only the police officer investigating the offence, but also by or on behalf of the person being sampled then the investigating officer must ensure that:

- a. a part of the material sufficient for analysis is made available to the person being sampled as soon as practicable;
- b. reasonable care is taken to ensure that the person's part of the material is protected and preserved until the person receives it;
- c. that reasonable assistance is given to the person to ensure that the material is protected and preserved until it is analysed; and
- d. a copy of the results of the analysis is made available to the person who has been sampled.

12.11 In **South Australia**, the *Criminal Law (Forensic Procedures) Act 1998* (South Australia) contains similar provisions.³³⁴ Additionally the person who has been sampled is entitled, upon payment of a prescribed fee, access to the results of such analysis or, if it cannot be reproduced by photocopying, to view such results.³³⁵

³³¹ Coldrey Report, p. 244.

³³² Coldrey Report, p. 244.

³³³ *1999 Model Bill* clauses 45 and 47 (suspects), clause 50 (serious offender), clause 59 (volunteer) and clause 47 (copy of analysis).

³³⁴ *Criminal Law (Forensic Procedures) Act 1998* (South Australia), section 39.

³³⁵ *Criminal Law (Forensic Procedures) Act 1998* (South Australia), section 40; and *Criminal Law (Forensic Procedures) Regulations 1999* (South Australia) section 5.

- 12.12 The Committee notes that neither the *1999 Model Bill* or the South Australian legislation address the provision of all or any part of a *crime scene sample* to the suspect.
- 12.13 In contrast, the *United States of America* federal legislation, the *DNA Identification Act 1994*, specifically prescribes that, for criminal defense purposes, a defendant shall have access to samples and analyses performed in connection with the case in which such a defendant is charged.
- 12.14 The *Victorian* legislation is silent on the provision of both suspect samples and crime scene samples to the suspect. However the legislation does require that a copy of every forensic report be given to the person on whom the forensic procedure was conducted or their legal practitioner within 7 days of receipt. Possible problems with the practical implementation of this reporting requirement in the context of Post Conviction Testing have been noted by the Committee at paragraph 8.133 above.

Access and disclosure to persons other than the suspect

- 12.15 The *1999 Model Bill* and the *South Australian* legislation contain similar provisions regulating access to information obtained through the conduct of forensic procedures.³³⁶ Permissible disclosure includes:
- a. where the information is publicly known and disclosure is necessary for the investigation of a criminal offence;
 - b. where it is necessary for the purposes of determining whether to commence criminal proceedings or civil proceedings in the light of the way the procedure was carried out;
 - c. where an arrangement with the Commonwealth or another State or Territory requires such disclosure; or
 - d. with the consent of the person to whom the information relates.

³³⁶ *1999 Model Bill*, clause 81 and *Criminal Law (Forensic Procedures) Act 1998* (South Australia), section 47.

Intentional or reckless disclosure, otherwise than in accordance with the legislation, is an offence and carries a penalty of \$10,000 or two years imprisonment.³³⁷

- 12.16 The **Victorian** legislation is silent on the provision of information to third parties except where the information is required to have been destroyed. An offence is created where a “*person who at any time uses, or causes or permits to be used, or otherwise disseminates information derived from any sample or related material and information*” which has been required to be destroyed by the legislation, is liable to 1 year imprisonment or a fine. The offence does not apply where the information is used or disseminated in good faith for the purpose of inclusion in a computerised database for statistical purposes.³³⁸
- 12.17 The Committee reiterates that the offences under the Victorian legislation only apply where the information is required to be “*destroyed*”. Where information is not required to be destroyed, there is no sanction for use or dissemination of information created by the Victorian legislation. The destruction requirements of the Victorian legislation are discussed in Chapter 13.

Database access

- 12.18 The **1999 Model Bill** and the **South Australian** legislation contain comprehensive provisions governing access to and disclosure of information from DNA identification databases. Disclosure may only be made for one or more permissible purposes which include:³³⁹
- a. forensic comparison in the course of a criminal investigation by a police officer or other person prescribed by the regulations;
 - b. making the information available, in accordance with the regulations, to the person to whom the information relates;
 - c. administering the database;

³³⁷ *Criminal Law (Forensic Procedures) Act 1998* (South Australia), section 47.

³³⁸ *Crimes Act 1958* (Victoria), sections 464ZFC(4) and 464ZG(9).

³³⁹ *1999 Model Bill* clause 86; *Criminal Law (Forensic Procedures) Act 1998* (South Australia), section 50.

- d. according with any arrangement entered into between other States and Territories or the Commonwealth for the provision of access by law enforcement officers and persons prescribed by the regulations; and
 - e. in the case of the *1999 Model Bill* only, investigation of a complaint by the Privacy Commissioner.
- 12.19 In South Australia, the restriction on disclosure is specifically limited to information which identifies a person.³⁴⁰ The Committee notes therefore, that any information which does not identify a person can be disclosed without penalty. Although the head note to a similar clause in the *1999 Model Bill* indicates that the restriction only applies to the DNA identification database (which by its definition contains the identifying information), the clause itself applies to all DNA databases.
- 12.20 The Committee noted that the *1999 Model Bill* and the South Australian provisions discussed in paragraph 12.15 in referring to access to “information obtained through the conduct of forensic procedures” are wide enough to encompass database information. Accordingly those provisions are also relevant to this issue.
- 12.21 The South Australian legislation also creates an offence if any person intentionally or recklessly publishes a report of any proceedings under the Act containing the name of a person under suspicion, or other information tending to identify a person, unless the person consents; the person has been charged with the offence or a related criminal offence or the appropriate authority authorises the publication. Contravention carries a fine of \$5,000 or imprisonment for one year.³⁴¹
- 12.22 The Committee noted that the *1999 Model Bill* does not contain a similar provision.
- 12.23 The *1999 Model Bill* also contains comprehensive provisions which regulate the use of material collected for the DNA databases. The Bill:³⁴²

³⁴⁰ *Criminal Law (Forensic Procedures) Act 1998* (South Australia), section 50(3).

³⁴¹ *Criminal Law (Forensic Procedures) Act 1998* (South Australia), section 48. An “appropriate authority” means a magistrate, the Magistrates Court or a senior police officer, as appropriate: section 18.

³⁴² *1999 Model Bill*, clause 84.

- a. prohibits analysis if the forensic material is required to be destroyed. This offence applies at any stage of the forensic process prior to analysis;
- b. allows only excluded forensic material to be placed on the DNA matching database. “*Excluded forensic material*” includes forensic material: found at a crime scene; taken from a suspect, serious offender or volunteer; taken from the body of a deceased person; or that is from the body of a missing person. This offence prohibits the placing of material derived from other sources. For example, forensic material picked up by police from an item touched by someone in a place which has nothing to do with a crime scene is prohibited by this provision;
- c. prescribes that nothing that would identify an individual may be placed on the DNA matching database; and
- d. limits matching to the purposes provided for in the legislation.

A maximum penalty of 2 years imprisonment applies.

- 12.24 The **Victorian** legislation is silent on access to or disclosure of information to third parties except where the information is required to have been destroyed. The Committee has already discussed these provisions in paragraph 12.16.
- 12.25 In the **United Kingdom** the functional operation of the database assists in the quarantining of identifying information. A more detailed description is contained in Appendix 13.
- 12.26 In the United Kingdom the *Data Protection Act 1984* (United Kingdom) regulates the use of automatically processed information relating to individuals and the provision of services in respect of such information. The scope of the Act may encompass information maintained on a DNA database. The Act:
- a. grants a subject rights of access to “*personal data*”, upon a request accompanied by a fee: section 21. “*Personal data*” is defined as data consisting of information which relates to a living individual who can be identified from that information (or from that and other information in the possession of the data user), including any expression of opinion about the individual but not any indication of the intentions of the data user in respect of that individual;

- b. provides for the payment of compensation in respect of inaccuracies or unauthorised disclosures: sections 22 and 23; and
- c. prohibits a person who holds data from disclosing any data held by him to any person who is not described in the entry (section 5 (2)(d)) or without the prior authority of the person for whom the data is being stored (section 15).

12.27 Thus it appears that an individual may have unrestricted access to personal data held on a DNA database. However the Act also establishes exemptions which affect a subject's rights of access to, and the disclosure of, DNA database information. The subject access provisions outlined at a. above do not apply in any case where the application of those provisions would be likely to prejudice the prevention or detection of crime or the apprehension or prosecution of offenders: section 28 (1).

The non-disclosure provisions outlined at 12.26 c. above do not apply in any case where the disclosure is for, or non-disclosure would be likely to prejudice, the prevention or detection of crime or the apprehension or prosecution of offenders: section 28(3).

12.28 In the *United States of America*, information maintained in the federal CODIS Databank may only be disclosed in accordance with the *DNA Identification Act of 1994* (United States of America) being:³⁴³

- a. to criminal justice agencies for identification purposes related to law enforcement;
- b. in judicial proceedings, if otherwise admissible pursuant to applicable statutes or rules;
- c. for criminal defense purposes, to a defendant who shall have access to samples and analyses performed in connection with the case in which such a defendant is charged; and
- d. if personally identifiable information is removed, for a population statistics database, identification research and protocol development purposes, or for quality control purposes.

³⁴³ Federal Bureau of Investigation, FBI Laboratory: *Report to Congress - Implementation Plan for Collection of DNA Samples from Federal Convicted Offenders*, December 1998, p. 4.

- 12.29 In **Germany**, State police are quarantined from the DNA database and must request the Bundeskriminalamt for the data. Other identification databases, to which the State police have direct access, are “*flagged*” with a marker to alert investigating police to the existence of a DNA profile.
- 12.30 The Committee noted that in Western Australia, there is no legislation similar to the *Data Protection Act 1984* (United Kingdom). The Committee suggests that consideration be given to drafting appropriate legislation to give protection to privileged information which can be collected as a result of forensic procedures.³⁴⁴

Sanctions against unauthorised access and use

- 12.31 The Coldrey Committee noted that it is essential that the right to privacy of an individual be protected and recommended: “[T]hat it be an offence for any person, including a police officer, to use any information or to use or make or cause to be made any copy of records of information related to the conduct of a procedure or to otherwise disseminate such information, except for the bona fide purposes of relevant criminal investigations and proceedings, at any time prior to or subsequent to that material becoming liable to destruction”.³⁴⁵
- 12.32 As discussed above at paragraph 12.15, the **1999 Model Bill** and the **South Australian** legislation contain provisions creating offences for breaching the access and disclosure provisions of the legislation.³⁴⁶
- 12.33 In **Victoria** offences are created where a “person who at any time uses, or causes or permits to be used, or otherwise disseminates information derived from any sample or related material and information” required to be destroyed by the legislation is liable to 1 year imprisonment or a fine. The offence does not apply where the information

³⁴⁴ For a detailed discussion on this issue in the United States of America, refer to: National Research Council, *For the Record: Protecting Electronic Health Information*, National Academy Press, Washington, USA, 1997. For an example of comprehensive legislation enacted in the United Kingdom, refer to the *Data Protection Act 1984* (United Kingdom).

³⁴⁵ Coldrey Report, p. 258.

³⁴⁶ *1999 Model Bill*, clause 81 and *Criminal Law (Forensic Procedures) Act 1998* (South Australia), section 47. South Australian legislation also creates an offence in respect of the publication of material (refer to paragraph 12.21 above) and the *1999 Model Bill* creates offences relating to the use of material (refer to paragraph 12.23 above).

is used or disseminated in good faith for the purpose of inclusion in a computerised database for statistical purposes.³⁴⁷

12.34 In the *United States of America*, the *DNA Identification Act of 1994* provides for a fine not to exceed US\$100,000, for the knowing disclosure of individually identifiable information to any person and for obtaining individually identifiable information without authorisation.³⁴⁸

12.35 These penalties are consistent with American State DNA database statutes insofar as these provisions prohibit and punish the unauthorised use and obtaining of DNA information and samples. Most States, however, punish such violations as either misdemeanor or felony offences having a possible term of imprisonment ranging from six months to one year.³⁴⁹

Other Observations

Use of material from interstate

12.36 The MCCOC Report expressed the hope that all Australian jurisdictions would enact consistent legislation, although it was noted that Australia's record at achieving national consistency is not good. The MCCOC Report further noted that:³⁵⁰

“[A] consequence of this [inconsistent legislation] could be that a jurisdiction which has loose controls and allows the collection of samples in a wider range of circumstances could undermine appropriate restrictions on the use of the DNA database in another jurisdiction.

For example, State A may only allow taking samples from serious offenders while State B might allow them to be taken from any offenders. A law enforcement officer in State A could then check to see if the suspect had committed an offence in State B through a criminal records check. The officer discovers the person committed a traffic offence after which the person had been required to give a sample for DNA analysis. The law

³⁴⁷ *Crimes Act 1958* (Victoria), sections 464ZFC(4) and 464ZG(9).

³⁴⁸ 42 U.S.C. §14133.

³⁴⁹ Federal Bureau of Investigation, FBI Laboratory: *Report to Congress - Implementation Plan for Collection of DNA Samples from Federal Convicted Offenders*, December 1998, p. 18.

³⁵⁰ MCCOC Report p. 87.

enforcement officer then conducts matching on the DNA database against someone who would not be on the database in the same circumstances under local legislation.”

- 12.37 The MCCOC Report discusses the impact of evidentiary rules on evidence obtained improperly and for ease of reference the discussion is attached as Appendix 8.³⁵¹

Post Conviction Testing

- 12.38 Post Conviction Testing also raises an interesting issue about access by convicted offenders to DNA profiles of crime scene samples or their own profiles. In the United States of America “The Innocence Project” in New York City, a program that uses DNA evidence to free wrongfully convicted people, has so far exonerated 33 people.³⁵² This raises issues including:

- a. *What rights should a convicted offender have to utilise the database to his own advantage to exonerate himself after conviction?* For example an offender may have been convicted on evidence including DNA evidence that was profiled using basic early technology - as technology improves is he able to request that the evidence be reanalysed?
- b. Alternatively DNA testing may not have been available but the crime scene evidence has been preserved - *what right does a convicted person have to the evidence to conduct DNA testing?*
- c. *If the crime scene evidence is not preserved but a DNA profile has been extracted what right should a convicted person have to the database profile?*

- 12.39 Some of these issues may be addressed in the federal arena of the United States of America by the *DNA Identification Act of 1994*, which specifically prescribes that, for criminal defence purposes, a defendant shall have access to samples and analyses performed in connection with the case in which such a defendant is charged.

³⁵¹ MCCOC Report pp. 87-89.

³⁵² Online NewHouse: DNA Data banks - July 17 1998, http://www.pbs.org/newshours/forum/july98/dna_databanks.html, (searched 11 June 1999); and see also USA Department of Justice, Office of Justice Programs, *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial*, National Institute of Justice, June 1996.

Observations and Recommendations

What access should be granted to suspects, convicted offenders and third parties in relation to body samples and crime scene samples?

In what circumstances should there be access to and disclosure of information on a DNA database?

What sanctions should there be for misuse of any information?

111. The Committee recommends that there should be legislative specification of the purposes for which forensic samples and information obtained through forensic procedures can be used and disclosed to others. The Committee recommends that permissible disclosure take place only in the event of one or more of the following situations:
- a. where the information is publicly known, and it is necessary for the investigation of a criminal offence;
 - b. where it is necessary for the purposes of determining whether to commence criminal proceedings or civil proceedings (in the light of the way the procedure was carried out);
 - c. where it is necessary for forensic comparison in the course of a criminal investigation by a police officer;
 - d. where an arrangement with the Commonwealth or another State or Territory requires such disclosure;
 - e. where the person to whom the information relates has consented to such disclosure; and
 - f. where a complaint has been made to the Privacy Commissioner.
- (Chapter 12)
112. The Committee notes that a suspect (or convicted offender) will be able to provide body samples to an independent expert. However to enable independent analysis of crime scene samples, the suspect's scientist (or convicted offender's scientist) will need access to crime scene evidence. The Committee is of the view that the safeguard of independent analysis is a valuable one which provides the suspect (or convicted offender) with a reasonable opportunity to verify or contest the prosecution's evidence.
- (Chapter 12)

continued ...

Observations and Recommendations (*continued*)

113. **In any case where there is a sufficient “*crime scene sample*”, the Committee recommends that, if it is technically feasible, a portion of the material sufficient for independent analysis is to be protected and preserved in accordance with proper storage procedures, so that it can be made available to a defendant in criminal proceedings so as to permit independent analysis on behalf of the defendant, by an accredited forensic laboratory of the defendant’s choice.**

(Chapter 12)

114. The Committee notes that in Western Australia, there is no legislation similar to the *Data Protection Act 1984* (United Kingdom). The Committee suggests that consideration be given to drafting appropriate legislation to give protection to privileged information which can be collected as a result of forensic procedures.

(Paragraph 12.30)

115. **The Committee recommends that there be heavy penalties for misuse of both forensic material and information obtained from a forensic procedure, including database information.**

(Chapter 12)

What measures should be adopted to allow the use of interstate forensic material and access to interstate databases?

116. The Committee is of the view that in the interests of effective crime detection in Western Australia the use of any information should be as wide as possible. The Committee has already commented on permissible uses of the information at paragraph 111 of the Observations and Recommendations.

Chapter 13

DESTRUCTION OF FORENSIC MATERIAL AND DATABASE INFORMATION

Introduction

13.1 Both the sample and a DNA profile obtained from a sample can be stored indefinitely. As discussed in Chapter 7, the usefulness of a DNA database relies on ongoing availability of an extensive set of DNA profiles. However, there is an alternative view that a person whose DNA sample is taken and whose profile is included on a DNA database should, under certain circumstances, be entitled to have the information removed after a certain period of time.

13.2 The Coldrey Report conveniently summarises these viewpoints: “[C]onsiderations of privacy require that information derived from physical examinations or body samples be destroyed where no prosecution of the suspect occurs or where there is an ultimate acquittal. Similarly, destruction should occur if the courts rule that the evidence derived from a forensic procedure has been illegally or unfairly obtained.

*One qualification needs to be made to this proposition. Since it is in the community interest that an adequate statistical database be established so as to enable experts to undertake an accurate assessment of probability levels, relevant information derived from forensic procedures ought to be added to that database provided that, wherever a suspect has been eliminated from an investigation or acquitted, the anonymity of that person can be guaranteed.”*³⁵³

The Coldrey Committee recommended that: “[W]here the samples, ancillary records, reports and photographs can usefully form part of a database of population statistics they may be retained for statistical purposes in all cases providing that, where the supplier of the sample has been eliminated from the investigation or the prosecution is terminated by acquittal or otherwise, the name of that person is expunged from the records.”³⁵⁴

³⁵³ Coldrey Report, p. xviii.

³⁵⁴ Coldrey Report, pp. 253 - 256.

- 13.3 In this Chapter, the Committee considered:
- a. when body samples and/or database information obtained from body samples should be destroyed;
 - b. when crime scene samples and/or database information obtained from crime scene samples should be destroyed;
 - c. whether the destruction of body samples and/or database information obtained from a body sample should be:
 - automatic if a suspect is acquitted; or
 - at the request of the suspect; and
 - d. the extent of any destruction. For example, should only identifying data be destroyed or should the entire sample and the entire profile be destroyed?
- 13.4 In Chapter 9 the Committee examined whether there was a need to retain the body sample after the DNA profile had been extracted and the information recorded. The arguments for and against storage of body samples are relevant to the issue of the destruction of samples. The Committee does not repeat those arguments here.³⁵⁵
- 13.5 At the outset the Committee noted the comments of a working party of the National Institute of Forensic Science, Australia in relation to the destruction requirements of a proposed national DNA database.³⁵⁶ The working party:
- a. noted that keeping track of individual cases and obtaining relevant information relating to removal of samples and information would be logistically and administratively very difficult, citing difficulties with the Victorian legislation; and
 - b. recommended that forensic samples and information relating to suspects not subsequently convicted be removed from the database following a written request from the suspect. The Committee noted that this latter viewpoint

³⁵⁵ Refer to paragraphs 9.2 - 9.8 of this Report.

³⁵⁶ Paper submitted by the Working Party to the Australian Police Ministers' Council in relation to the National Criminal Investigation Database on 10 June 1998.

reflects the current provisions of the Western Australian legislation in relation to fingerprints and DNA samples.³⁵⁷

- 13.6 Alternative views were expressed, that as DNA is an individual's “*blueprint*”, body samples from which DNA can be extracted should be treated differently to fingerprints. A view was expressed to the Committee that a person who has provided the sample should be entitled to assume that the sample is only to be used for the purposes for which it was taken and nothing else. Accordingly, automatic destruction was advocated by some people who met with the Committee, thereby shifting the onus for destruction from the person who had been sampled to authorities with custody of the sample.
- 13.7 With these viewpoints in mind the Committee examined the position in each jurisdiction.

Western Australia

- 13.8 In the 42nd Report the Committee noted its concern that there was no provision in the *Criminal Code* (Western Australia) for the destruction of forensic material, including the results of analysis of such material, collected from a person lawfully in custody even where the person has been acquitted.³⁵⁸
- 13.9 Subsequent amendments to section 236 of the *Criminal Code* (Western Australia) effected by the *Criminal Law Amendment Act (No 1) 1998* (Western Australia) provide that:

*“[I]f a person is found not guilty of an offence in respect of which a sample has been taken and the person requests that the sample be destroyed and any genetic information arising from the taking of the sample be destroyed, then the sample and any genetic information arising from the taking of the sample is to be destroyed in his presence after the time for an appeal from the finding has expired or an appeal from the finding has been resolved in his favour.”*³⁵⁹

³⁵⁷ *Police Act 1892* (Western Australia), section 50AA (fingerprints); and *Criminal Code* (Western Australia), section 236 (samples).

³⁵⁸ 42nd Report, paragraph 3.26.

³⁵⁹ *Criminal Code* (Western Australia), section 236.

- 13.10 This is consistent with the treatment of fingerprints in Western Australia. Fingerprints are only destroyed if the person makes a request and the time for an appeal from the judgment has expired or an appeal from the finding has been resolved in favour of the accused person.³⁶⁰
- 13.11 In contrast the Committee noted that the former Commissioner for Police, Mr Robert Falconer, in his evidence to the Committee, expressed the view that forensic material, including the results and analysis of the forensic material, should be *automatically destroyed* upon the acquittal of the accused person once the time of appeal has expired.³⁶¹
- 13.12 The Committee also noted that section 236 of the *Criminal Code* (Western Australia) only requires destruction if a person has been found “*not guilty*” of an offence in respect of which the sample had been taken. The *Criminal Code* (Western Australia) does not cover the situation where a person may have been charged and sampled but the charge which has been laid does not proceed to trial.
- 13.13 The Committee also noted that where the samples, ancillary records, reports and photographs can usefully form part of a database of population statistics there is no ability for the information to be retained upon removal of identifying data.

United Kingdom

- 13.14 The United Kingdom legislation contains similar provisions as the *1999 Model Bill* in relation to the destruction of samples. Samples must be destroyed as soon as practicable if:
- a. the person is cleared of the offence;
 - b. the person is not prosecuted for the offence; or
 - c. the person is no longer suspected of having committed the offence.³⁶²

³⁶⁰ *Police Act 1892* (Western Australia), section 50AA.

³⁶¹ *Evidence*, Mr Robert Falconer, former Commissioner of Police, Western Australian Police Service, 1 April 1998, p. 16.

³⁶² *Police and Criminal Evidence Act (1984)* (United Kingdom), sections 64 (1), (2) & (3).

- 13.15 The legislation also provides that while samples may be destroyed, the DNA data could be kept but not used in evidence against the person or for the investigation of an offence.³⁶³ This enables the use of the data in a statistical database, established to make comparisons between the pool of local DNA data and specific individual DNA, and crime scene profiles, for the purposes of calculating probabilities.
- 13.16 Although not required by legislation, a certificate of destruction is supplied to the person from whom a sample has been taken, if requested. This is a procedural practice adopted by the United Kingdom police service to ensure consistency in the treatment of all forensic material and sampling processes. It reflects the certificate requirements which apply to the destruction of fingerprints.³⁶⁴
- 13.17 The United Kingdom legislation is silent on the fate of “*crime scene samples*” and “*crime scene profiles*” held on the database. The Committee was informed by members of New Scotland Yard that once a conviction had been secured, the crime scene profile was removed from the database. The Committee reiterates its observations at paragraph 9.2 (regarding the arguments for the indefinite retention of samples) and paragraphs 12.38 to 12.39 (regarding exoneration through Post Conviction Testing). In view of those observations the Committee expresses its concern if such a practice was to be adopted in Western Australia. The Committee would prefer to see crime scene samples retained as recommended in Chapter 9.

United States of America

- 13.18 The majority of American States only allow for testing of convicted persons. Most legislation provides for the destruction of a DNA profile in the event that an offender's qualifying conviction has been reversed. Generally the offender bears the onus of providing notice and evidence of such reversal to the authorised agency.

Germany

- 13.19 In Germany, the Committee was informed that a distinction is drawn between the destruction of a DNA profile and the destruction of a body sample.
- 13.20 In respect of the DNA profile: if a person is acquitted, the DNA profile is immediately removed from the database. However, if there is a suspicion that the suspect may

³⁶³ *Police and Criminal Evidence Act (1984)* (United Kingdom), section 64 (3A).

³⁶⁴ *Police and Criminal Evidence Act (1984)* (United Kingdom), sections 64 (4) - (6A).

commit another offence in the near future, then the authorities may apply to the court for the retention of the profile.

13.21 In respect of samples:

- a. those used in criminal proceedings are required to be destroyed after the analytical process has been concluded; and
- b. any other samples, regardless of whether or not the person has been convicted, can be kept for 5 years (in the case of juveniles) or 10 years (in the case of adults).

Commonwealth

13.22 In the case of suspects:

- a. who have been acquitted of an offence to which the forensic material relates;
- b. who have not had proceedings in respect of an offence to which the forensic material relates commenced against them or such proceedings have been discontinued within 12 months since supplying a sample; or
- c. where the interim order has been disallowed,

the *1999 Model Bill* includes requirements for:

- the automatic destruction of forensic material by the removal of identifying data either as soon as possible (if no proceedings commenced, or proceedings discontinued), or as soon as practicable (if the suspect has been acquitted);³⁶⁵ and
- the removal of identifying data on the DNA identification database.³⁶⁶

13.23 The destruction of forensic material obtained from volunteers will depend upon what the volunteer agrees to when providing the sample.

³⁶⁵ *1999 Model Bill*, clauses 70 - 72 when read with clause 1 (5) definition of destruction.

³⁶⁶ *1999 Model Bill*, clause 85.

- 13.24 The Committee noted that the *1999 Model Bill* is silent on the destruction of forensic material, or information obtained from such material, where a person has been convicted of an offence. By omission therefore, the *1999 Model Bill* would not preclude indefinite retention of such information.
- 13.25 The Committee noted that this legislative regime allows for information obtained from the analysis of forensic material to continue to be used in compiling a database for statistical purposes. Only the identifying material is removed as opposed to the whole DNA profile.
- 13.26 The MCCOC Report noted that once the identifying link is destroyed, other information concerning the person will be useless.³⁶⁷ In this respect the *1999 Model Bill* specifically states: “[F]or the purposes of this Part [DNA provisions], a person destroys forensic material taken from another person by a forensic procedure if the person destroys any means of identifying the forensic material with the person from whom it is taken.”
- 13.27 The MCCOC Report noted the same concerns addressed by the National Institute of Forensic Science Australia (refer to paragraph 13.5 above):

*“[F]orensic scientists advise that once samples have been subjected to the various processes of analysis in a forensic laboratory it would be extremely difficult to trace all remnants of the samples and destroy them. The same also goes for all the different records of the DNA profile. However, they point out that the material is often labelled with a numerical code which if destroyed makes it impossible to identify the sample. It would therefore appear to be reasonable to include the proposed interpretation clause in the Model Bill. Under the proposal there must be no means of identifying the forensic material - leaving identifying initials or clues such as file that is kept on and the name of a case officer will mean that the material has not been destroyed and there has been a breach of the legislation.”*³⁶⁸

Victoria

- 13.28 The Victorian legislation requires automatic destruction of the sample and any “related material and information” obtained from that sample:

³⁶⁷ MCCOC Report, p. 105.

³⁶⁸ MCCOC Report, p. 21. See also paragraph 13.5 above.

- a. if the person has not been charged with a “*relevant offence*” within 12 months of the sample being taken;³⁶⁹
- b. if the person has been charged but the charge is not proceeded with;³⁷⁰
- c. if the person is found not guilty of the offence or any other “*relevant offence*”;³⁷¹ or
- d. if an interim order has not been confirmed.³⁷²

“*Related material and information*” means notes and video-recordings made of the forensic procedure and any information which may identify the person contained in any record of, or report relating to, the forensic procedure and in any copy of a record or report.³⁷³

“*Relevant offence*” is defined quite widely to include: the offence for which the sample was taken; any other offence arising out of the same circumstances; or any other offence in respect of which the evidence obtained has probative value.³⁷⁴

13.29 The Victorian legislation also:

- a. establishes time limits for destruction being either “*immediately*” or “*within 1 month*” depending on the circumstances. Application to the court can be made to extend this period;³⁷⁵
- b. provides for the issue of a certificate of destruction upon request;³⁷⁶

³⁶⁹ *Crimes Act 1958* (Victoria), section 464ZG.

³⁷⁰ *Crimes Act 1958* (Victoria), section 464ZG.

³⁷¹ *Crimes Act 1958* (Victoria), section 464ZG.

³⁷² *Crimes Act 1958* (Victoria), section 464V (7)(b).

³⁷³ *Crimes Act 1958* (Victoria), section 464.

³⁷⁴ *Crimes Act 1958* (Victoria), section 464ZG(1).

³⁷⁵ *Crimes Act 1958* (Victoria), section 464ZG(3).

³⁷⁶ *Crimes Act 1958* (Victoria), section 464ZG(3).

- c. provides for the creation of a summary offence punishable on conviction by imprisonment (1 year maximum) or a fine, where a person knowingly fails to destroy, or uses or causes or permits to be used, a sample or related material or information, or information derived from such samples or related materials which were required to be destroyed³⁷⁷; and
 - d. contains provisions for destruction in respect of volunteers who have withdrawn their consent.³⁷⁸
- 13.30 The same requirements apply in the case where a person has volunteered a sample but has been found guilty,³⁷⁹ unless a police officer has made an application to court to retain the sample and any forensic material and information.³⁸⁰ The application must be made within 6 months of the expiry of the appeal period. This is different to the *1999 Model Bill* (refer to paragraph 13.22 to 13.27 above).
- 13.31 Victorian legislation provides that, although the sample is destroyed, only identifying data is removed from the DNA profile. The non-identifying information can still be used for the statistical database.³⁸¹ This differs from the *1999 Model Bill*, which only requires destruction of identifying information attached to either the sample or the DNA profile.
- 13.32 Some concerns were expressed to the Committee that the automatic destruction requirements of the Victorian legislation create a difficulty for the forensic laboratory which is storing the sample, in view of the fact that the onus for automatic destruction is placed on them. The Committee was informed that often the laboratory is not made aware that a suspect has been acquitted or an interim order has been disallowed. The Committee was informed by forensic scientists in Victoria, that they would prefer that samples be destroyed on receipt of a written request from the person providing the sample. This is particularly so in light of the penalties applying to the use of information that is required to be destroyed.

³⁷⁷ *Crimes Act 1958* (Victoria), section 464ZG(3).

³⁷⁸ *Crimes Act 1958* (Victoria), section 464ZGE.

³⁷⁹ *Crimes Act 1958* (Victoria), section 464Z.

³⁸⁰ *Crimes Act 1958* (Victoria), section 464ZB.

³⁸¹ *Crimes Act 1958* (Victoria), section 464ZFD(2).

South Australia

- 13.33 The *Criminal Law (Forensic Procedures) Act 1998* (South Australia) contains provisions relating to destruction of forensic material.³⁸² “*Forensic material*” means “*the material obtained by carrying out a forensic procedure and includes the results of the analysis of such material*”.³⁸³ The legislation requires automatic destruction of forensic material (as soon as practicable) where:
- a. suspects have been acquitted;
 - b. suspects have not had proceedings commenced against them for 2 years since supplying a sample, or proceedings have been discontinued;
 - c. an interim order has been disallowed; or
 - d. the material has been declared to be inadmissible in court proceedings.
- 13.34 Material need not be destroyed until all rights of appeal are exhausted, and a police officer or the Director of Public Prosecutions (South Australia) may make application to the court to extend the 2 year period referred to above.³⁸⁴
- 13.35 Unlike the *1999 Model Bill* and the Victorian legislation, destruction is not qualified by requiring only the removal of identifying data.³⁸⁵ Section 49 of the South Australian legislation empowers the Commissioner of Police to maintain a database of information obtained from carrying out forensic procedures under this Act. The database may only store DNA profiles if the person on whom the forensic procedure was conducted was found guilty of an offence in relation to which the forensic procedure was carried out. If the person is subsequently acquitted, the information must be removed from the database as soon as practicable.³⁸⁶ The Committee notes that non-identifying information of volunteers or acquitted suspects cannot be retained for

³⁸² *Criminal Law (Forensic Procedures) Act 1998* (South Australia), section 43(1).

³⁸³ *Criminal Law (Forensic Procedures) Act 1998* (South Australia), section 3.

³⁸⁴ *Criminal Law (Forensic Procedures) Act 1998* (South Australia), section 43(2).

³⁸⁵ *1999 Model Bill*, Division 10.

³⁸⁶ *Criminal Law (Forensic Procedures) Act 1998* (South Australia), section 49.

statistical purposes - only information relating to convicted persons may be stored on the database.

Other Observations

13.36 The Committee also noted that:

- a. with increases in technology, it is important for samples to be retained in the event that they need to have further analysis conducted upon them; and
- b. even if samples and the identifying link between the database profile and the person is destroyed, there needs to be safeguards in place to ensure that the link cannot be re-established. The Committee notes that, through the use of reconstructive forensic computing procedures, deleted material can be retrieved and reinstated. The Committee was informed by the FBI that these procedures are regularly used by law enforcement authorities involving cases of computer assisted child pornography.

Observations and Recommendations

Should body samples and/or information derived from a forensic procedure (including database profiles) obtained from body samples be destroyed and if so when?

Should destruction of a body sample and/or information derived from a forensic procedure (including database profiles) obtained from a body sample be:

- ▶ *automatic if a suspect is acquitted; or*
- ▶ *at the request of the suspect?*

117. The Committee recommends that body samples from a person and information derived from a forensic procedure (including profiles) should be destroyed as soon as practicable:

- a. where that person is cleared of the offence, or the charge which has been laid does not proceed to trial or hearing within 2 years of the sample being taken;
- b. where that person is not prosecuted for the offence within 2 years of the sample being taken;
- c. where that person is no longer suspected of having committed the offence; or
- d. where the courts rule that the evidence derived from a forensic procedure is inadmissible,

and that person has applied in writing for the destruction of that material.

(Chapter 13)

118. The Committee recommends that the legislation should:

- a. provide for the issue of a certificate of destruction upon request;
- b. provide for the police or the Director of Public Prosecutions to make application to the court to extend any period referred to above (117);
- c. provide for the creation of a summary offence punishable on conviction by imprisonment (1 year maximum) or a fine, where a person knowingly fails to destroy, or uses or causes or permits to be used, a sample or related material or information, or information derived from such samples or related materials which were required to be destroyed; and
- d. provide for destruction in respect of volunteers who have withdrawn their consent.

(Chapter 13)

continued ...

Observations and Recommendations (*continued*)

Should crime scene samples and/or information derived from a crime scene sample (including profiles) be destroyed and if so, when?

119. **The Committee recommends that all crime scene samples and information derived from a crime scene sample (including profiles) should be indefinitely retained.**
(Chapter 13)

What should the extent of any destruction be - that is, identifying data only or the whole sample and the profile?

120. **The Committee recommends that DNA data derived from body samples be able to be used in a statistical database to make comparisons between the pool of local DNA data and specific individual DNA and crime scene profiles for the purposes of calculating probabilities.**
(Chapter 13)

121. **The Committee recommends that “*destruction*” occurs:**
- a. **in the case of a body sample obtained from a forensic procedure, when that sample is totally destroyed; and**
 - b. **in the case of any information obtained from a forensic procedure (including DNA profiles), when any means of identifying the information derived from a forensic procedure (including DNA profiles) with the person from whom it is taken is destroyed. This will enable the use of any data in an anonymous form in a statistical database.**
- (Chapter 13)

continued ...

Observations and Recommendations (*continued*)***Any other observations regarding destruction requirements?***

122. The Committee notes that some samples of body fluid, tissue or hair obtained from a person may not be the body fluid, tissue or hair of that person but of a third party. If a sample is taken, and the person is excluded from investigation, normally the sample should be destroyed. However, that sample may indicate that the third party was involved and in turn, link the third party to the crime scene. Accordingly it may provide important evidence which should not be destroyed. Victorian commentators suggested that the legislation be drafted so that, if following analysis, it is shown that the material is not the body fluid, tissue or hair of the person from whom it was sampled, then it does not need to be destroyed. Otherwise the legislation would require the destruction of evidence.
(Paragraph 5.26)

Chapter 14

FUNDING ISSUES

How should DNA casework and the database be funded?

- 14.1 The experience in the United Kingdom indicates that DNA analysis and the database will result in long term net savings to the criminal justice system through a reduction in length of police investigations and trials and an anticipated reduction in recidivism. Although difficult to quantify, these effects are nonetheless very significant in any discussion of resources, both human and financial, associated with forensic DNA evidence.³⁸⁷
- 14.2 Realisation of the benefits of DNA evidence will require expenditure of a significant level of funds in the analysis of samples and the establishment and operation of a national DNA database. Costs include ongoing costs, laboratory supplies, and capital costs for new equipment and facilities. Accordingly, in the immediate short term there will be major costs associated with implementing any system.
- 14.3 It may be difficult to align the resources needed for, and the outcomes of, a DNA database. As a critical mass is required for an effective database, there will usually be a long period of time between inputs and outputs. This is confirmed by overseas experience. For example, from the inception of the database to obtaining results, New Zealand took 18 months and the United Kingdom two years. The Committee emphasises that expectations of results must therefore be long term.
- 14.4 In this respect the Committee noted that:
- a. in some jurisdictions, although the legislation has been enacted, the implementation of any database has been hampered by a lack of funding;
 - b. the United Kingdom experienced practical difficulties in establishing its database. A decision was made in October 1994 to establish a database in the United Kingdom, which was to be operational by April 1995. The tight time frame caused enormous problems in training people. As advised by Mr

³⁸⁷ See also: Solicitor General Canada, *Establishing a National DNA Data Bank - Summary of Consultations* 1996.

Alistair Ross, Director of the National Institute of Forensic Science in Australia: *“Birmingham was the original site for the database in the United Kingdom. There are 200 people employed just for database purposes. Scientists were recruited virtually directly from university without any experience in forensic science although they had experience in DNA profiling. Because of the lack of funds and the undue haste with which they were required to have the database up and running, they did face problems. The Association of Chief Police Officers estimated that in the first year, given the number of samples that they wanted tested, they needed about £5.6 m. They found that in existing budgets. One of the problems now starting to be overcome in the United Kingdom is the huge backlog of samples caused by the lack of funds and the haste with which the database was established.”*³⁸⁸

- 14.5 DNA casework and databases are resourced in various ways in the jurisdictions which the Committee examined. While it is outside the Committee’s mandate to make recommendations which may amount to an appropriation, the Committee makes some observations on the funding arrangements in other jurisdictions.

International observations

- 14.6 Funding arrangements are usually a “*fee for service*” system³⁸⁹ with individual police forces paying for DNA casework and the national police funding a national DNA databank.
- 14.7 In the **United Kingdom** no new funding was provided for the establishment of DNA casework or the DNA database. Whilst an up front capital grant of over £4.5 million was provided to the Forensic Science Service by the Home Office, Treasury rules require that the Forensic Science Service repay the capital.
- 14.8 Under the “*fee for service*” scheme in place for forensic services in the United Kingdom, individual police constabularies are responsible for paying for the DNA

³⁸⁸ Evidence, Mr Alistair Ross, Director of the National Institute of Forensic Science in Australia, 15 April 1998, p. 291 and also refer to: Gunn, DG, Chief Constable, Cambridgeshire Constabulary, United Kingdom, *National DNA Database: Presentation to Australian Police Officers*, Melbourne, 5 August 1997, p. 5.

³⁸⁹ A “*fee for service*” system is one in which cost recovery, by the provider of services, takes place through a fee paid by the user of the service.

casework and use of the database. This income is used by the FSS to repay the capital grant to the Treasury.

- 14.9 The police estimated that 675,000 people per annum may be involved in a “*recordable offence*”, which would place a major burden on the country’s scientific facilities. Accordingly the police and FSS agreed to concentrate on collecting samples from and profiling those involved in major categories of crime - an estimated 135,000 people per annum. Despite the restriction this created an additional financial burden to the 3 police forces in England and Wales of some £5.5 million.³⁹⁰
- 14.10 The police force had to fund these additional costs and other associated costs such as training and education, out of existing budgets. However the Committee was informed that the police force (as user) negotiated with the FSS (as major provider) and set charges for suspect profiling at £40 per sample, being hair samples or buccal swabs. Casework is more expensive depending on the forensic treatment which is required, however it usually costs in the region of £200.
- 14.11 The Committee noted the comments made by Mr Ben Gunn, Chief Constable, Cambridgeshire Constabulary, United Kingdom, that the key issue is whether the unit costs of producing a result from casework or suspect material is appropriate in the context of the overall costs of the investigation - essentially *is it good value for money?* Mr Gunn considered that a national solution adopted by the United Kingdom provides greater justification for the significant investment necessary for the strategic planning process and the preparation of any business case. In Mr Gunn’s view the national solution benefits from economies of scale because:
- a. for the users, police, it reduces costs in training and operational issues; and
 - b. for the major providers, the FSS, the size of the facility helps to add weight in discussions with suppliers and royalty owners in economic bargaining power.³⁹¹

³⁹⁰ Gunn, DG, Chief Constable, Cambridgeshire Constabulary, United Kingdom, *National DNA Database: Presentation to Australian Police Officers*, Melbourne, 5 August 1997, p. 17; and Gunn, DG, Chief Constable *National DNA Database, Presentation to the Australian Legislative Committee*, 27 January 1997, p. 4.

³⁹¹ Gunn, DG, Chief Constable, Cambridgeshire Constabulary, United Kingdom, *National DNA Database: Presentation to Australian Police Officers*, Melbourne, 5 August 1997, pp. 17 & 18.

14.12 At a state level in the *United States of America* it appears that funding has created many difficulties with the practical implementation of DNA profiling and databases. In 1996 the Canadian Solicitor General noted that whilst most American States had DNA database laws in place, in many cases the systems had not been established as:

- a. the State legislature had not yet appropriated funds sufficient to implement the legislation; and
- b. the State did not have the scientific and human resources required to collect and analyse samples.

The State of Louisiana repealed its statute in 1993 because of the legislature's failure to appropriate necessary funds.³⁹²

14.13 In 1996, the FBI provided US\$8 million to the National Institute of Justice to supplement first year congressional funding of US\$750,000. The National Institute of Justice, in conjunction with the FBI Forensic Science and Research Training Centre, ensures that federal grants are used effectively by State and local DNA laboratories.³⁹³

14.14 At a federal level, costs of training and education are absorbed by the FBI Forensic Science and Research Training Centre. In addition to overseeing accreditation requirements, the Centre researches and develops valid and reliable DNA typing methods, trains state, local, and foreign crime laboratory personnel, provides expert testimony in DNA admissibility hearings, and is involved in the development of a system for the comparison of DNA profiles among American crime laboratories. The Centre hosts symposia for the exchange of scientific data on DNA and conducts an Honors Intern Program to provide working experience for college students working toward a science degree with the aim to attract qualified students into forensic science professions.³⁹⁴

³⁹² Solicitor General Canada, (1996) *Establishing a National DNA Data Bank*, Consultation document, p. 10.

³⁹³ Federal Bureau of Investigation Educational Internet Publication *DNA Testing* <http://www.fbi.gov>, (searched 1 July 1999).

³⁹⁴ Federal Bureau of Investigation Educational Internet Publication, *FBI Academy*, <http://www.fbi.gov/programs/academy/fors.htm>, (searched 1 July 1999).

- 14.15 The FBI also provides CODIS software, together with installation, training and user support, free of charge to any State and local law enforcement laboratories performing DNA analysis. Each State is responsible for purchasing commercial off the shelf hardware/software necessary to operate CODIS.³⁹⁵
- 14.16 In *Germany* funding is provided by the Ministry of Interior in each State and the Federal Ministry of the Interior. Each State is responsible for funding the case work and suspect sample analysis which includes maintaining the forensic scientists, technicians and all the necessary equipment. The federal Bundeskriminalamt operates the DNA database from funding allocated by the federal government to the Bundeskriminalamt for criminal investigations. The sub-committee was advised that the Bundeskriminalamt does not charge the States to analyse samples.

Other Observations

Centralised scientific analysis

- 14.17 There appear to be two possibilities in relation to the analysis of samples:
1. All DNA suspect profiles collected from around Australia are processed at a central laboratory; or
 2. all DNA suspect profiles are processed to the stage of having DNA profiles ready for input into the database, at State and Territory level.

In both cases the State and Territory continue to conduct profiling of crime scene evidence.

- 14.18 There was unanimous agreement amongst persons who met with the Committee that it was desirable for the laboratory system to keep offender/suspect samples physically separate from that of crime scene samples. Physical separation was considered as being essential to guard against contamination between the crime scene samples and suspect samples, clerical errors or alleged fraudulent manipulation of profiles. However, in some jurisdictions the cost of this physical separation may be prohibitive.

³⁹⁵ Office of Information Resources Management (IRM), http://www.usdoj.gov/jmd/irm/irm_major.html, (searched 30 November 1998).

- 14.19 Preliminary costings conducted in 1998 for the National Institute of Forensic Science, Victoria, estimated that a central laboratory was less expensive than processing at State and Territory laboratories, by approximately \$1.2 million per year. One of the main savings of a centralised laboratory analysis was the ability to keep crime scene and suspect samples physically separate. In order to fulfill this criteria huge infrastructure costs would need to be incurred by State and Territory laboratories.³⁹⁶
- 14.20 Leaving issues of cost aside, the Committee questioned the practical realities of a central laboratory given the size of Western Australia and the isolation of certain areas. Difficulties with collection and transport may affect the integrity of samples. In the United States of America, which would face the same challenges, all crime scenes and suspect samples are processed at a State level. The Committee noted that the PathCentre, which conducts the majority of forensic and DNA profiling in Western Australia, operates a number of satellite laboratories around the State. Whilst the PathCentre has no facilities to separate analysis of crime scene from suspect samples, the Committee was informed that along with usual scientific standards, the temporal spacing of the analysis of suspect samples and crime scene samples reduces any risk of cross contamination.

Balanced implementation of the legislation

- 14.21 The Committee believed that there is a need to ensure that:
- a. resources are not concentrated on the crime scene profiles at the expense of suspect profiles and vice versa;
 - b. there is adequate funding to process samples; and
 - c. in order for intrastate, interstate and international integration, older samples may need to be reanalysed to obtain profiles that can integrate with profiles obtained under more recent scientific methods.
- 14.22 With regard to the first issue, this is a matter which can be addressed by the development of administrative guidelines.

³⁹⁶ Paper submitted by the Working Party to the Australian Police Ministers' Council in relation to the National Criminal Investigation Database on 10 June 1998, p. 5.

14.23 With regard to the second issue, State forensic laboratories need to be adequately funded to accommodate the increase in the number of crime scene and suspect samples requiring analysis, for example:

- a. in the United Kingdom, the *Police and Criminal Evidence Act 1984* (United Kingdom), extended the category of crime for which a suspect sample could be taken from “a serious arrestable offence” to “a recordable offence”. The Committee was informed that this increase resulted in a large backlog of samples for analysis on the United Kingdom. As of January 1999 this backlog was approximately 45,000 samples which was to take until May 1999 to clear.³⁹⁷

In view of the backlog, sampling criteria were agreed between the police and the FSS, initially focusing on the more important offences then, once analytical mechanisms were fully operational, moving to sampling the “smaller” recordable offences. The sampling criteria are discussed at paragraph 7.13; and

- b. the Committee was informed there was a backlog of 250,000 samples at the FBI. There is anecdotal evidence that one State in the United States of America collected 180,000 samples but their processing abilities meant that the backlog would not be cleared for three years.

14.24 With regard to the third issue, this may not be of immediate concern as Australia is fortunate to be at the beginning of the development of a DNA profiling system and database, and integration and compatibility can be established at the outset.

The federal government’s offer

14.25 The Committee noted that in December 1998 the federal government pledged approximately \$50 million to fund a national crime register which would hold DNA evidence lifted from crime scenes around Australia.³⁹⁸

³⁹⁷ New Scotland Yard, Metropolitan Police - New Scotland Yard, *Directorate of Identification DNA Presentation*, 27 January 1999.

³⁹⁸ Reported in the *West Australian* newspaper, “Don’t feel sorry for criminals: Howard”, 17 September 1998.

- 14.26 It is not clear to the Committee what portion, if any, was to be allocated to the States to assist with the development of DNA facilities. In this respect the Committee notes the comments of Mr Robert Falconer, former Commissioner of Police, Western Australia Police Service, during the 1999/2000 Estimates Hearings of the Legislative Council to the effect that:³⁹⁹
- a. the \$50 million dollars referred to by the federal government also covers the rebuilding of the national fingerprint database; and
 - b. most of the federal funding will be used for a central entity to which the States supply information and extract information.

The current situation in Western Australia

- 14.27 Most of the State's forensic DNA analysis is conducted by the PathCentre at the Queen Elizabeth II Medical Centre, Nedlands.
- 14.28 Funding for the PathCentre was formerly provided by the Health Department. However, funding for the financial year 1999/2000 is provided by the Western Australian Police Service. The Committee has significant reservations about this arrangement and believes that public perception of independence would be severely tested if independent funding were not in place.
- 14.29 The Committee noted that there may be a problem with the "*purchase of services*" being equated by the public as the "*purchase of prosecution*". The Committee noted that in the United Kingdom a deliberate decision was made to provide funding directly from the United Kingdom Treasury rather than the police department. Whilst the police service in the United Kingdom ultimately support the analytical services through the "*fee for service*" arrangement with forensic service providers, the police "*pay*" for a service and do not "*fund*" a service. The Committee considered that this distinction is very important and that the same separation is appropriate for Western Australia.
- 14.30 The Committee considered that the funding model adopted by the United Kingdom is an attractive model that should be considered by Western Australia. Although prompted by privatisation initiatives, the United Kingdom funding arrangement recognises the reality that the main user of forensic services are the police, whilst

³⁹⁹ *Evidence*, Mr Robert Falconer, Former Commissioner of Police, Western Australia Police Service at the Standing Committee on Estimates and Financial Operations, 1999/2000 Estimates Hearings, Legislative Council, Tuesday 1 June 1999.

acknowledging the risks and negative perceptions if funding was provided directly by the police.

- 14.31 In the event that DNA analytical facilities are to be collocated in Midland with other police facilities, the Committee considers that it is highly desirable for the functional autonomy and operational independence of forensic services to be reinforced by financial independence from the Western Australian Police Service.

An estimation of the cost of sampling

- 14.32 The Committee has already noted the funding required by the United Kingdom when implementing its DNA database at paragraphs 14.7 to 14.11 above. The amount of funding essentially dictated the practical implementation of the DNA powers in the United Kingdom.

- 14.33 The Committee considered that it would be useful to estimate the funding required by Western Australia in implementing its own DNA legislation. Implementing the legislation will have many cost ramifications including those for persons and entities involved in collecting samples, analysing samples, storing samples and establishing and maintaining a DNA database. Unfortunately, it is not clear from the Commonwealth Government's CrimTrac proposal who will be responsible for different aspects of the database and any estimates involving costs associated with the establishment of a database would be premature. It was also not possible to obtain accurate figures of costs associated with the collection and storage of samples. However, the Committee was able to estimate the approximate cost of analysing samples which may provide some illustration of the absolute minimum funding commitment that may be required.

- 14.34 The Committee understands that the basic cost of analysing a sample in Victoria and South Australia ranges from \$220 to \$320.⁴⁰⁰ It is difficult to accurately compare the States as each adopts different accounting practices. However these figures:

- a. include consumables (for example, chemicals and test tubes), staffing and overheads (for example, electricity);
- b. include a profit element for the analytical service provider; and

400

One commentator has noted that the rough cost of testing in Australia is \$300 to \$500 per sample, with some private laboratories having higher costs: Freckleton, I and Selby, H, *The Law of Expert Evidence*, 1999, Law Book Company, Australia p. 448.

- c. only apply where a sample is provided. They do not apply where an examination of an article is required to obtain a sample.

14.35 Costs depend upon the number of persons likely to be sampled. This in turn depends upon whether DNA and forensic profiling techniques are to be extended to persons who are suspected of committing an offence but who are not in custody, those charged with an offence and Post Conviction Testing. The Committee emphasises that realisation of the benefits of DNA evidence will require a considerable funding commitment from the government to meet the cost of the collection, analysis and storage of crime scene and suspect samples and the establishment and operation of a DNA database.

Observations and Recommendations

What level of funding is required to establish and maintain a DNA database in its initial stages, and from where should funding be sourced?

How should DNA casework and the database be funded?

Should there be centralised scientific analysis?

Should samples be analysed at a State or federal facility?

How should the legislation be implemented?

123. **The Committee recommends that all samples will need to be processed to the stage of having DNA profiles ready for input into the database, at State and Territory level.**

(Chapter 14)

124. It is outside the Committee's mandate to make recommendations which may amount to an appropriation, however the Committee is of the view that:

- a. any funding assessment requires an honest appraisal of costs analysis;
- b. whilst there may be immediate advantages, the Committee notes that it may take up to four years from the inception of the database to obtain the full benefits of a DNA database. The Committee emphasises that the Western Australian community's expectation of results must be long term;
- c. all samples will need to be processed to the stage of having DNA profiles ready for input into the database, at State and Territory level;
- d. State forensic laboratories need to be adequately funded to accommodate the increase in number of samples requiring analysis; and
- e. funding will be required to educate and train law enforcement authorities and scientific providers.

(Chapter 14)

continued ...

Observations and Recommendations (*continued*)

125. In the interests of national integration and comparability the Committee is supportive of the stance which the United States of America federal government has taken in:
- a. supplying scientific training and database software, together with database installation, database training and user support, free of charge to any American state and local law enforcement laboratories performing DNA analysis; and
 - b. establishing a federal grant program to assist state and local crime laboratories in developing or improving forensic DNA testing capabilities.
- (Chapter 14)
126. The Committee considers that it is undesirable if the “*purchase of services*” is equated by the public as the “*purchase of prosecution*”. The Committee notes that in the United Kingdom a deliberate decision was made to provide funding directly from the United Kingdom Treasury rather than the police department. Whilst the police service in the United Kingdom ultimately support the analytical services through the “*fee for service*” arrangement with forensic service providers, the police “*pay*” for a service and do not “*fund*” a service. The Committee considers that this distinction is very important and that the same separation is appropriate for Western Australia.
- (Paragraph 14.29)
127. The Committee considers that the funding model adopted by the United Kingdom is an attractive model that should be considered by Western Australia. Although prompted by privatisation initiatives, the United Kingdom funding arrangement recognises the reality that the main user of forensic services are the police whilst acknowledging the risks and negative perceptions if funding is provided directly by the police. The Committee refers to its recommendations at paragraphs 109 and 110 of the Observations and Recommendations.
- (Paragraph 14.30)

Chapter 15

REGULATORY ISSUES

Introduction

15.1 The Committee considered:

- a. the form of any legislation - whether the regulatory regime for forensic procedures should be set out in the *Criminal Code* (Western Australia), the *Police Act 1892* (Western Australia) or separate legislation; and
- b. the content of any legislation.

Form of legislation

15.2 Only the Commonwealth, South Australia and the federal German parliaments have enacted separate Acts relating to forensic procedures. Victoria, New South Wales and the United Kingdom Parliaments amended existing legislation.⁴⁰¹

15.3 The United States of America has one piece of legislation at a federal level, with variations among the States. In most States the regulatory regime for the database is contained in a separate dedicated Act whilst provisions relating to the admissibility of evidence and the conduct of forensic procedures is placed in the relevant existing Act dealing with police powers.

15.4 The Committee notes the comments of the MCCOC, that a consistent approach to legislation “*is important because the Commonwealth government is establishing in cooperation with the States and Territories a national law enforcement database as part of its CrimTrac initiative.*”⁴⁰²

⁴⁰¹ Refer to Chapters 5 and 6. New South Wales is currently reviewing its legislation. The Committee understands new provisions for New South Wales will be contained in a separate legislative instrument.

⁴⁰² MCCOC Report, p. ii.

Arguments for a separate legislative instrument

15.5 It was emphasised by many persons with whom the Committee met that it was highly desirable that all laws relating to forensic procedures be contained in the one piece of legislation. There appear to be several advantages to enacting a separate piece of legislation dedicated to forensic procedures and DNA profiling. The Committee was informed that one legislative instrument:

- a. is easier for compliance and implementation by the public, members of the police force, legal profession and the judiciary;
- b. is likely to reduce the risk of internal inconsistencies that may arise when amending existing Acts; and
- c. may afford greater consistency with the provisions of *1999 Model Bill*.

Arguments against a separate legislative instrument

15.6 The Committee was advised that difficulties were experienced by the South Australian government when drafting the *Criminal Law (Forensic Procedures) Act 1998* (South Australia). As noted in the second reading speech by the Attorney General for South Australia when introducing the South Australian legislation:

*“police may deal with the bodily integrity of a suspect for at least four purposes. They are (a) search; (b) forensic sampling; (c) identification; and (d) medical examination of the health of a person in custody. The problem is that, while there is no neat dividing line between any of these four purposes, the Bill tries to deal with one of them only. That being so, the Bill must draw some very difficult lines.”*⁴⁰³

15.7 The Committee noted the importance that proposed legislation is consistent with existing legislation that may address the same subject matter.

Content of legislation

15.8 It was repeatedly impressed upon the Committee that it is vital for cooperation and consultation between all entities with different user/provider roles who may be

⁴⁰³ Hon KT Griffin, Attorney General for South Australia, *Hansard*, Legislative Council of South Australia, Wednesday 10 December 1987, p. 190.

involved in or affected by proposed DNA and forensic procedures legislation. In particular, members of the Court of Appeals Section, Office of Public Prosecutions in Victoria, suggested to the Committee that before enacting legislation, procedural and administrative issues must be thoroughly tested:

“That involves spending a month doing a set of hypotheticals or something. Before it is enacted, present them [the police] with 20 hypotheticals - different types of offences, different people, one or two of whom are mad, one or two who have escaped, one or two for whom you are not sure if the offence is really in the schedule [of offences which warrant sampling]. Go through it and ask who does the test, how long have they got to do it, are they going to be able to do it within seven days, does it have to be served; if so, who serves it and how do you prove the service?”⁴⁰⁴

- 15.9 The necessity to consult with persons affected by proposed legislation was emphasised in relation to the treatment of forensic odontology by the South Australian legislation. Legislation initially failed to take account of the use of forensic odontology. Many proposed provisions were inappropriate.
- 15.10 The Committee noted that current legislation contains provision for review. Should it be demonstrated that technological change, or the access and destruction requirements present opportunities or insurmountable problems or concerns for criminal investigators or civil libertarians these can be addressed at that time. However most changes could be picked up by regulations if matters were left to promulgation by regulation.

⁴⁰⁴ Discussions with Mr Bruce Gardener, Program Manager and Ms Anna Loughnan, Policy Advisor Court of Appeals Section, Office of Public Prosecutions, Victoria.

Observations and Recommendations

Should the regulatory regime for forensic procedures be set out in the Criminal Code (Western Australia), Police Act 1892 (Western Australia) or separate legislation?

If the regulatory regime is to be set out in a dedicated piece of legislation what effect will this have on existing legislation?

128. The Committee recommends that:

- a. provisions relating to all forensic procedures and DNA profiling be enacted in separate dedicated legislation; and
- b. the provisions of the *1999 Model Bill* be closely scrutinised by Western Australia when drafting new legislation.

(Paragraphs 15.2 - 15.7)

What level of consultation is necessary for the development and implementation of legislation?

129. The Committee recommends that the Western Australian government consult widely when drafting any forensic procedures legislation for the State. Consultation should include, as a minimum, users (for example, the police), providers (for example, scientific analytical services) and members of the legal profession and judiciary.

(Paragraphs 15.8 - 15.10)

Should there be a provision for review?

130. The Committee recommends that any legislation dealing with forensic procedures and DNA profiling contain a provision for review after five years of operation.

Chapter 16

DNA AS EVIDENCE

Introduction

- 16.1 The reception of DNA evidence has been approached differently by Australian and international courts. Despite DNA testing being widely regarded as reliable and discriminating, it has not been wholeheartedly embraced by the courts as an unimpeachable form of evidence. Concerns have been expressed, particularly in Australian courts, that there is “*the danger that consistency could assume the colour of identity, or at least of probability.*”⁴⁰⁵
- 16.2 The Committee has not considered the case law on DNA evidence in detail in this Report. It has been succinctly summarised elsewhere and in any event, the reception of DNA evidence in each case must always be seen in light of the particular facts.⁴⁰⁶
- 16.3 In this Chapter the Committee briefly examined the use of the DNA database information in criminal proceedings. The Committee then examined the use of DNA evidence in criminal proceedings, including issues of;
- a. whether or not adverse inferences should be drawn from evidence of a refusal to undergo a forensic procedure;
 - b. the admissibility of evidence where there has been failure to comply with legal requirements;
 - c. database reliability;
 - d. secondary evidence; and
 - e. procedural safeguards, including;
 - legal aid and expert evidence,

⁴⁰⁵ *R v Lucas* [1992] 2 VR 109 at 118 per Hampel J.

⁴⁰⁶ A convenient summary can be found in Freckleton, I and Selby, H, *The Law of Expert Evidence*, 1999, Law Book Company, Australia, pp. 59 - 62.

- ▶ access to samples and database information;
- ▶ education; and
- ▶ the “*prosecutor’s fallacy*”.

Although some of these matters may not appropriately be dealt with by a forensic procedures bill, they are of interest to the Committee from the point of view of the impact that DNA evidence may have in the judicial arena.

The use of the DNA database information in criminal proceedings

16.4 In all jurisdictions into which the Committee inquired, the database is used as an intelligence tool, not an evidential one. When a “*hit*” or “*match*” is achieved, an entirely separate DNA sample is taken for casework and evidential purposes.⁴⁰⁷ The necessity for fresh samples negates the requirement to prove that the former database sample, which may have been taken many years before, was in fact a sample from the suspect. It may not be possible to recreate the chain of custody or, if it can be recreated, then many hours in attending court to provide evidence may have to be spent by everyone involved in dealing with the sample or the analytical process.

16.5 Mr Alastair Ross, Director, National Institute of Forensic Science, Australia, informed the Committee that:

“What we are looking at with the database is whether there is an indication that two samples may have come from the same source. In other words, is it possible that a stain from an unsolved crime could have come from a suspect whose sample has been put onto the database. If they match in all nine systems there is compelling evidence that it was a common source. That is where the database finishes. It is only to be used as an investigative and intelligence tool. The information from the database indicating that the profile from the suspect matches the profile from the unsolved crime will be given to the police who will then conduct an investigation to see whether there is other evidence to corroborate that.

If that case went to court further testing would have to be done to corroborate those facts from the database. . . Recommendations from the working party include that database information not be used, that the sample will need further investigation for

⁴⁰⁷

For example: Gunn, DG, Chief Constable, Cambridgeshire Constabulary, United Kingdom, *National DNA Database: Presentation to Australian Police Officers*, Melbourne, 5 August 1997, p. 13.

*corroborative evidence and further testing to substantiate the match on the database. . . . I think the database should be used as only an [investigative] and intelligence tool.”*⁴⁰⁸

- 16.6 The Committee has already recommended in Chapter 7 that the database be used as an investigative tool not an evidential one.

The use of DNA evidence in criminal proceedings

- 16.7 In the United States of America in an article published in the National Institute of Justice journal, Weedn and Hicks make the comment that:

*“Advances in technology have helped DNA testing to become an established part of criminal justice procedure. Despite early controversies and challenges by defense attorneys, the admissibility of DNA test results in the courtroom has become routine. More than 200 published court opinions support this use, and DNA testing standards have been developed and promulgated. Last year there were more than 17,000 cases involving forensic DNA in this country alone. Questions about the validity and reliability of forensic DNA test methods have essentially been addressed.”*⁴⁰⁹

- 16.8 The Committee was informed by many people with whom it met that there is now little debate on the accuracy and validity of scientific protocols and processes. However as a result of its inquiries the Committee has identified three issues relating to the use of DNA evidence in criminal proceedings where there still remains scope for debate:

1. the integrity of the evidence;
2. the compelling effect of scientific evidence; and
3. the application of statistics and population genetics to the results achieved.

- 16.9 The first issue has already been discussed in Chapters 9 & 10.

⁴⁰⁸ *Evidence*, Mr Alistair Ross, Director of the National Institute of Forensic Science in Australia, 15 April 1998, p. 35 (as noted in the 46th Report at paragraph 4.6).

⁴⁰⁹ Victor Walter Weedn and John W Hicks, *The Unrealized Potential of DNA Testing*, National Institute of Justice, June 1998 p. 1 (noted in the 46th Report at 2.9).

- 16.10 With regard to the second issue: It was alleged that there is the potential for DNA profiling to “*introduce an element close to certainty to the identification of two human tissues as having the same source, it is [therefore] of enormous utility to both crime investigation and to legal counsel*”.⁴¹⁰ However DNA evidence is seen by some people with whom the Committee met, particularly defence lawyers, to be such a powerful and compelling form of scientific evidence that it has the potential to overwhelm the jury and disproportionately influence its decision.
- 16.11 As discussed later in this Chapter, this concern has been addressed in some jurisdictions by requiring that the examination, admissibility and presentation of the evidence (by expert witnesses) be ruled by strict legal and procedural safeguards.
- 16.12 The third issue involves statistical calculations and the consideration of frequency databases (both requiring evidence from expert witnesses), and an assessment by the jury of the weight to be attached to any calculated probability.
- 16.13 With regard to the third issue, it is important to remember that DNA evidence is just one form of evidence of a suspect’s involvement in an offence. The frequency of a profile is not always an infallible pointer to a particular individual. Given a match between the profile obtained from the crime scene sample and the profile obtained from the suspect, the key question is - *What is the significance of that match?* Accordingly an estimate of the probability of a match between two genetic samples occurring by pure chance needs to be made. The question will then be - *How accurate is the calculation of the probabilities?* The Committee was informed that even if the scientific technique is not open to challenge, in every scientific procedure there is inevitably a question of the interpretation of the information. It is that interpretation that can give rise to differing opinions.
- 16.14 The admissibility and weight to be attached to any evidence is always a matter for the court and jury. The Committee was informed by members of the legal profession in both the United Kingdom and United States of America that there are problems with the jury thinking that the “*probability of a match is equivalent to the probability of guilt*”. In addition there may be a difficulty with the jury not weighing up other evidence that may or may not corroborate the DNA evidence. In this respect it was emphasised to the Committee that DNA evidence should be treated in the same fashion

⁴¹⁰ Freckleton, I and Selby, H, *The Law of Expert Evidence*, 1999, Law Book Company, Australia. p. 444.

as a confession - it should never be presented in a way that does not take account of other evidence.

- 16.15 One of the main challenges to be faced by both the prosecution and the defence is making DNA and statistical evidence meaningful to a jury so that it can be understood and the appropriate weight attached to it. When a fingerprint expert testifies, the jury can actually verify that the expert did make the necessary comparisons and they can see the comparisons on an image of the fingerprint. With DNA, the scientific procedure and the presentation of evidence in a visual form is more difficult.

Admissibility of forensic evidence

- 16.16 English, American and Australian legislation regarding forensic procedures do not require a court to admit forensic evidence neither does it require a jury to give any weight to the forensic evidence. There are generally no specific requirements regarding the admissibility of scientific evidence other than the fact that such evidence should be relevant and must not infringe any exclusionary rule. The scientific evidence is put before the court and it is for the jury, assisted by expert evidence, to assess the appropriate weight to give to the evidence.
- 16.17 However, in addition to the usual evidentiary rules developed by the courts at common law and as may be enshrined in the Evidence Acts of each jurisdiction, some jurisdictions do supplement their general evidentiary rules in respect of the admissibility of forensic scientific evidence, in particular DNA evidence. This is usually in the context of:
- a. whether adverse inferences should be drawn from evidence of a refusal to comply; and
 - b. whether evidence should be admissible where there has been failure to comply with legal requirements, and if so under what circumstances?

Adverse inferences from evidence of refusal

- 16.18 The Committee was informed by many people with whom it met that, in most cases, suspects will either have consented to the forensic procedure or have subsequently agreed to co-operate once a judicial order has authorised the forensic procedure. However there may be cases where the suspect refuses to undergo a forensic procedure. The Committee has already discussed possible courses of action where there is a refusal to comply at paragraphs 8.212 to 8.216 of this Report.

- 16.19 In some jurisdictions legislation authorises the use of reasonable force.⁴¹¹ In other jurisdictions the legislation allows the refusal to comply to be led in evidence and to permit the court or the jury to draw adverse inferences from such refusal. Some jurisdictions adopt both alternatives depending on the circumstances. For example, the United Kingdom legislation utilises both approaches: reasonable force can be used to obtain a non-intimate sample whilst a refusal to supply an intimate sample may attract an adverse inference.
- 16.20 As was noted by the Coldrey Report there are advantages and disadvantages with the ability to draw inferences.⁴¹² The ability to draw an adverse inference is attractive for a number of reasons:
- a. it avoids any questions of compromising the ethics of health professionals;
 - b. it obviates the need to use physical force and hence eliminates issues of abuse; and
 - c. whether or not the inference can be drawn lies squarely within the power of the suspect.
- 16.21 There are also problems with the ability to draw an adverse inference for a number of reasons:⁴¹³
- a. there may be explanations not consistent with a consciousness of guilt that can explain the refusal to comply, for example, religious or philosophical beliefs;
 - b. the inference can only apply if a person is tried for an offence and that may not necessarily occur;
 - c. juries may be confused in having to distinguish between drawing adverse inferences in relation to physical evidence and not drawing such an inference in a case where the suspect has exercised the right to silence;

⁴¹¹ For example South Australia and Western Australia.

⁴¹² Coldrey Report, p. 150.

⁴¹³ Coldrey Report, p. 150.

- d. because no objective standards can be laid down for the exercise of the discretion by juries there may be unjustified disparity between various decisions based upon similar facts; and
 - e. in the case of evidence that is perishable, the suspect, even if he or she has a change of heart and decides to comply with the procedure, may be able to rebut the inference.
- 16.22 In Western Australia the *Criminal Code* allows reasonable force to be used and is silent on the issue of failure to provide consent.⁴¹⁴
- 16.23 The *1999 Model Bill* addresses admissibility differently, depending on the circumstances:
- a. Prior to a person becoming a suspect and in the absence of an order that a forensic procedure be conducted, the *1999 Model Bill* proposes that evidence of a person's refusal or failure to consent, or withdrawal of consent, to a forensic procedure is not admissible in proceedings against the person.⁴¹⁵
 - b. However where a police officer or magistrate has authorised the carrying out of a forensic procedure on a suspect then evidence that the suspect has refused to comply or has obstructed, resisted or hindered the carrying out of the forensic procedure is admissible in any proceedings against the suspect. The court or jury may also draw such inferences as appear to be proper in the circumstances.⁴¹⁶ The Committee notes that this provision only applies to suspects and where the forensic procedure has been authorised in accordance with the *1999 Model Bill*.
- 16.24 The South Australian legislation reflects the *1999 Model Bill*.⁴¹⁷ The Victorian legislation is silent on the issue and the Committee understands the Victorian

⁴¹⁴ *Criminal Code* (Western Australia), section 236.

⁴¹⁵ Except to establish or rebut an allegation that a police officer acted contrary to law in carrying out the investigation: *1999 Model Bill*, clause 67.

⁴¹⁶ *1999 Model Bill*, clause 69.

⁴¹⁷ *Criminal Law (Forensic Procedures) Act 1998* (South Australia), section 46.

government chose to sanction the use of reasonable force in conducting a forensic procedure rather than enable adverse inferences to be drawn from a suspect's refusal.

16.25 The United Kingdom legislation contains differing provisions on admissibility and reasonable force depending on whether the procedure is an intimate procedure or a non-intimate procedure.

16.26 In the case of intimate procedures:

- a. they may only be taken where a police officer of at least the rank of superintendent has authorised it *and* the person has consented;⁴¹⁸ and
- b. where the appropriate consent to the taking of an intimate sample is refused without good cause then in any proceedings against that person the court or jury may draw such inferences as appear proper.⁴¹⁹

16.27 Non-intimate samples may be taken without consent from a person in police detention, held in police custody or who has been charged or convicted of a recordable offence if they have been authorised by police officer of at least the rank of superintendent.⁴²⁰ As reasonable force can be used in these circumstances there are no provisions dealing with the admissibility of a refusal.

Failure to comply with legal requirements

16.28 The question of what should happen if procedural requirements set down by statutes are breached has been discussed in the Coldrey Report.⁴²¹ Options include:

- a. that all evidence obtained as a result of a breach should be excluded;
- b. that all evidence obtained as a result of a breach should be excluded unless the prosecution can establish exceptional circumstances for the breach;

⁴¹⁸ *Police and Criminal Evidence Act 1984* (United Kingdom), sections 62 (1) & (1A).

⁴¹⁹ *Police and Criminal Evidence Act 1984* (United Kingdom), section 62 (10).

⁴²⁰ *Police and Criminal Evidence Act 1984* (United Kingdom), section 63.

⁴²¹ Coldrey Report, pp. 152 - 153.

- c. that exclusion from evidence should be determined in accordance with the general discretion available to the courts to exclude illegally or unfairly obtained evidence; and
 - d. that it should be a criminal offence on the part of the police concerned to illegally obtain the evidence.
- 16.29 The Committee recognise that whilst people should be able to expect that set standards are to be adhered to, possible minor or inadvertent defects should not result in exclusion of the evidence.⁴²²
- 16.30 The Coldrey Committee recommended that:⁴²³
- “a. *Non-compliance with the mechanisms prescribed for the exercise of power to carry out a procedure will result in evidence so obtained being inadmissible (as against a defendant or accused person) in any criminal proceedings unless the prosecution could establish that exceptional circumstances for the failure to observe the legislative requirements;*
 - b. *the fact that the evidence obtained from such procedure tends to confirm the involvement of the suspect in the crime under investigation is not to be regarded as an exceptional circumstance;*
 - c. *where evidence has been ruled inadmissible it should be destroyed, subject to information gained from that sample being used as part of a database; and*
 - d. *this rule of admissibility is to be in addition to and not in substitution for existing judicial discretions for determining the admissibility of evidence.”*
- 16.31 The 1999 Model Bill proposes that where has been a breach of, or failure to comply with, any of the legislative provisions regarding a forensic procedure or the recording or use of information on a DNA database then:
- a. the forensic material;

⁴²² For further discussion refer to the Coldrey Report p. 153.

⁴²³ Coldrey Report, p. 237.

- b. any results of the forensic material; and
- c. any evidence obtained as a result of or in connection with the carrying out of the forensic procedure

is not admissible unless the person consents or the court is satisfied, on the balance of probabilities, of matters that justify the admission of the evidence into proceedings despite the failure to comply with the legislative provisions.⁴²⁴

16.32 In determining whether or not to justify admission the court must have regard to a number of factors, including:⁴²⁵

- a. the probative value of the evidence;
- b. the reasons for the failure to comply;
- c. the gravity of the failure to comply; and,
- d. whether the failure to comply was intentional or reckless.

16.33 If the material was required to be destroyed then no discretion for admission is left to the court - such evidence is totally inadmissible.⁴²⁶

16.34 The South Australian and Victorian legislation broadly reflects the *1999 Model Bill*.⁴²⁷

Reliability of the database

16.35 As discussed the Committee was informed that it was usually recognised that there was little legal debate on the accuracy and validity of scientific protocols and processes. Rather defence lawyers tended to focus on how the evidence came into existence, questioning the integrity of the evidence, and the application of statistics and

⁴²⁴ *1999 Model Bill*, clause 65.

⁴²⁵ *1999 Model Bill*, clause 65.

⁴²⁶ *1999 Model Bill*, clause 66.

⁴²⁷ *Crimes Act 1958* (Victoria), section 464ZE, *Criminal Law (Forensic Procedures) Act 1998* (South Australia), section 45.

population genetics to the results achieved. The latter issue involves consideration of the validity of the database which has been used to assess the probability of a match.

- 16.36 When the Committee made its inquiries in early 1999, it was informed that the admissibility of DNA evidence had not been successfully challenged in the United Kingdom on the basis of the alleged unreliability of the database. However, in the United Kingdom, the recent appeal case of *R. v Doheny and Adams* (1997) 1 Cr.App.R.367 recognise the significance of the database used by the Crown by including, in a model direction on procedure where DNA is involved, a direction that the FSS must, if requested, make available to the defense expert the database upon which the calculations have been based.
- 16.37 In Australia the defense in *R v Tran* (1990) 50 A.Crim.R. 233 succeeded largely because there was no evidence as to the statistical match probability in the Vietnamese, i.e. there was no appropriate database. Furthermore in *R v Lucas* [1992] 2 VR 109 the court ruled that DNA evidence would not be admissible in light of the problems associated with the probability evidence.⁴²⁸
- 16.38 A probability of a match gives extraordinary powerful support to the Crown case. Therefore, it was suggested to the Committee that it was particularly important that forensic scientists highlight in their evidence any uncertainties remaining and assumptions made in calculation of these probabilities. Without greater knowledge of the validity of the database used to calculate the probability (such as its size and representativeness) DNA evidence of match probability could overawe the jury by its seemingly watertight scientific foundation and may give it greater weight that it is capable of bearing.⁴²⁹ The Committee has noted in paragraphs 16.36 and 16.44 of this Chapter that appropriate judicial and legislative directions may provide an appropriate balance to some of these concerns. In addition the Committee reiterates its comments at paragraphs 7.46 - 7.48 and 10.14 of this Report and paragraphs 14 and 15 of the Observations and Recommendations.

⁴²⁸ In *R v Lucas* 1991 55 A Crim R 361 the DNA evidence was ruled inadmissible in light of problems associated with the probability evidence. In particular it was argued by the defense, and accepted by the Court, that the racial composition of the statistical database was unknown, the racial background of the accused was unknown and, although a match may be rare compared to the database, it may be quite common compared to the population of the outlying town of Norseman, Western Australia where the crime was committed.

⁴²⁹ Hunter, Katherine "A new Direction on DNA?", *Criminal Law Review*, 1998, p. 478.

Admissibility of secondary evidence

- 16.39 One issue which was raised by some people who met with the Committee was: *If the primary evidence (the crime scene sample) is not available, whether through loss, destruction or deterioration, should the secondary evidence (the DNA profile) be admissible in evidence, and if so what weight should it carry?*
- 16.40 The Committee was informed that the defence may suffer immense prejudice if the secondary evidence of the DNA profile extracted by one expert was admissible and yet the primary evidence was not available for testing by the defence's own expert.
- 16.41 This issue requires consideration of the admissibility of secondary evidence generally and requires a detailed consideration of complex areas of law. Accordingly it is outside the scope of the Committee's current inquiry and the Committee does not express a view. However with the advent of a database holding the profile of crime scene evidence that may have become denatured, destroyed or lost, the issue may soon require attention.

Defence access to the forensic material and database information

- 16.42 As noted by the Coldrey Report: *"The safeguard of independent analysis is a valuable one which provides the accused person with a reasonable opportunity to verify or contest the prosecution evidence."*⁴³⁰
- 16.43 The Committee has addressed a suspect's access to crime scene evidence for independent verification of the results in Chapter 12 of this Report.

Procedural safeguards

- 16.44 A number of other procedural safeguards were suggested by members of the legal profession and judiciary who met with the Committee as being necessary to ensure justice. Although the safeguards are not matters which may all appropriately be dealt with by a forensic procedures bill, they are of interest to the Committee from the point of view of the impact that DNA evidence may have in the judicial arena.

⁴³⁰ Coldrey Report, p. 244.

16.45 Difficulties faced by the defence when the prosecution discloses the existence of DNA evidence were summarised in research conducted for the United Kingdom Royal Commission on Criminal Justice in 1992 (“1992 Study”) and include:⁴³¹

- a. lack of pre-trial notice of the existence of DNA evidence;
- b. considerable time may be required for the defence to locate a suitable expert. It was further noted that DNA profiling is a highly specialised technique and there are relatively few experts outside the FSS who are experienced in this field;
- c. work is delayed whilst the defence apply for legal aid authority prior to instructing the expert;
- d. the number of experts is small and their workloads high; it may be several weeks before the defence expert is able to visit the prosecution laboratory to examine the results; and
- e. there may be insufficient crime stain remaining for the defence expert to conduct an independent laboratory analysis.

16.46 The value of independent forensic work by the defence is illustrated by the 1992 Study, which noted that 38% of defence lawyers who obtained an independent analysis of the evidence stated that their conclusions differed from those of the prosecution’s expert. However the Committee noted that, at the time of its inquiries in 1998/1999, there was very little debate on the accuracy and validity of scientific protocols and processes.

16.47 To a certain degree perceived inadequacies in the judicial system are being addressed in the United Kingdom through the use of guideline judgments. In the United Kingdom the proper procedure for introducing DNA evidence in trials was established by the Court of Appeal in *R. v Doheny and Adams* (1997) 1 Cr.App.R.367. In a preamble to the judgments in that case the Court provided guidance on the presentation of DNA evidence to juries and the weight to be attached to it. The guidance includes recommendations on the nature of material to be disclosed to the defence (in particular, details of how calculations have been arrived at and the databases upon which

⁴³¹ Steventon, Beverley, *The Royal Commission on Criminal Justice The Ability to Challenge DNA Evidence*, London H.M.S.O. 1993 and see Ede, Roger and Shepherd, Eric, *Active Defence, A Lawyer’s Guide to Police and Defence Investigation and Prosecution and Defence Disclosure in Criminal Cases*, 1997, p. 335.

calculations were based); and recommending that any issues of expert evidence should be resolved at a pre-trial review.

Pre-trial discovery

16.48 As noted in the Coldrey Report: “[A] matter of great moment in the conduct of a fair criminal trial is the ability of the accused to properly assess the evidence that will be led against him. For this to occur he or she must be fully informed of the prosecution case, and have the opportunity to seek independent advice about it. Nowhere is this more important than in the area of scientific evidence.” The issues for and against are examined in detail in the Coldrey Report.⁴³²

16.49 Ultimately the Coldrey Committee recommended that:⁴³³

- “a. copies of all forensic reports relating to the procedures considered in this report be made available to the accused person or his or her nominees as soon as practicable after they are received by the prosecution but in any event within seven days of their receipt; and
- b. copies of all forensic reports similarly be made available to a suspect eliminated from an investigation by reason of forensic analysis.”

16.50 The Committee noted that in the United Kingdom the procedural guidelines established by *R. v Doherty and Adams* (1997) 1 Cr.App.R.367 and recent statutory enactments address some of these issues.⁴³⁴

⁴³² The Coldrey Report, pp. 247 & 248.

⁴³³ The Coldrey Report, pp. 248, 249 & 283.

⁴³⁴ *Crown Court (Advance Notice of Expert Evidence) Rules 1987* (SI 1987 No, 716) requires, amongst other matters, that where any party proposes to adduce expert evidence in the proceedings he shall as soon as possible, unless he has already done so:

- furnish the other party with a statement in writing of any finding or opinion which he proposes to adduce by way of such evidence; and
- where a request is made of him in writing provide that other party with a copy of the record of any observation, test, calculation or other procedure on which such finding or opinion is based and any document or other thing or substance in respect of which any such procedure has been carried out.

A party who seeks to adduce expert evidence and who fails to comply shall not adduce the evidence without the leave of the court.

- 16.51 The Committee also noted that the Victorian legislation requires that police provide a copy of a “*forensic report*” to everyone on whom a forensic procedure has been conducted.⁴³⁵ While this provision appears to endorse the recommendation of the Coldrey Report, major problems have been experienced with the provision of such reports.⁴³⁶

The availability of legal aid and expert evidence

- 16.52 The use of DNA evidence in criminal proceedings has ramifications for legal aid. Members of the legal profession in the United Kingdom considered that it was essential that an expert be available to interpret the DNA evidence from the defense’s point of view.
- 16.53 The 1992 Study referred to above at paragraph 16.45 indicates that where the defence does challenge the evidence, differing opinions do arise. Whilst there is no little debate on the accuracy and validity of scientific protocols and processes, expert evidence may still be required to question the integrity of the evidence and in the application of statistics and population genetics to the results achieved.
- 16.54 As the prosecution has vastly greater resources than do individual criminal defendants - the vast majority of whom may be indigent - views were expressed to the Committee that DNA evidence therefore favored the prosecution. The Committee was informed that individual defendants who claim they can prove, through DNA, that they have been wrongfully convicted, or who wish to challenge DNA evidence proffered by the prosecution might be able to pay for the costs of testing the DNA which is relatively inexpensive, but may not be able to pay for the cost of presenting it in court, which is very expensive.
- 16.55 The Committee was also informed that even where legal aid is available it does not pay well compared to privately funded briefs. As a result, many of the preferred experts do not undertake legal aid funded briefs. Of those experts that do, there is usually a long waiting list for their services. As court proceedings are not usually timetabled to accommodate the availability of experts many defendants have to proceed to trial without their preferred expert.

⁴³⁵ *Crimes Act 1958* (Victoria): sections 464 ZD and 464ZF(11).

⁴³⁶ Refer to paragraph 8.133.

Education is paramount - "From the cradle to the grave"

- 16.56 It was continually impressed upon the Committee that the integrity of DNA evidence was facilitated and protected by education "*from the cradle to the grave*" - that is from scene of crime officers, police officers, laboratory staff and forensic scientists to defence and prosecution lawyers, juries and the judiciary.
- 16.57 The Committee has already commented on the need for education and training of scene of crime officers, the police, laboratory staff and forensic scientists.⁴³⁷
- 16.58 The Committee was informed by representatives of the legal profession in the United Kingdom and the United States of America that training is needed on the significance and the interpretation of DNA evidence and the need to challenge it. Indeed the 1992 Study indicated that 1 in 4 criminal cases were not challenged on the DNA evidence.⁴³⁸ In the United Kingdom the Law Society facilitates legal education by conducting workshops and conferences and is able to emphasise topical areas of the law by awarding more continuing legal education points to a certain topic.

The prosecutor's fallacy

- 16.59 The prosecution, experts, trial judge and the jury may fall into the trap of what has become known as the "*prosecutor's fallacy*". This involves an error of logic in legal reasoning involving probability in respect of many types of evidence. In criminal trials involving DNA there are two questions to be asked:
1. what is the probability that the defendant's DNA profile matches the crime sample, given that the defendant is innocent? (the match probability); and
 2. what is the probability that the defendant is innocent given that the DNA profile matches the profile from the crime sample? (the guilt probability).
- 16.60 The fallacy occurs when the answer to the first question is given as the answer to the second question. The Committee was informed that the match probability is the

⁴³⁷ Refer to paragraph 8.224 to 8.231 of this Report.

⁴³⁸ Zander, M, and Henderson, P, *The Crown Court Study, RCCJ Research Study No 19*, London: HMSO, 1992; and see also Ede, Roger, and Shepherd, Eric, *Active Defense: A Lawyer's Guide to Police and Defense Investigation and Prosecution and Defense Disclosure in Criminal Cases*, London: Law Society, 1998.

domain of the experts, whilst the guilt probability is the question which is of direct relevance to the jury and which requires an assessment of all the evidence, not just the DNA evidence.

- 16.61 It is possible for the two questions posed at paragraph 16.59 above, to have different answers and in particular a very small probability in answer to the first question does not necessarily imply a very small probability in answer to the second question. For example there may be other non-DNA evidence that may strongly implicate the defendant.
- 16.62 As this is an issue relating to the presentation of evidence in court proceedings the Committee has not examined it in any more detail.⁴³⁹ In any event the Committee

⁴³⁹ See further: Justice, *Litigation and Casework*, undated document provided to the Committee by Liberty, United Kingdom, p.23. The issue was examined in *Adams and The Queen* [1996] 2 Cr. App R 467: Gary Adams was convicted of non-consensual buggery of a woman in March 1991. He denied the allegation and gave alibi evidence at trial which was supported by witnesses. He was sentenced to six years' imprisonment.

A central plank of the Crown's case was DNA analysis of a semen stain found some months later on a cushion in the complainant's home. The DNA profile obtained from the crime sample was declared to match the profile from Mr Adams' blood sample. The frequency of obtaining such a profile was said to be one in twenty seven million.

Justice argued that both the Crown's expert and the trial judge fell into the trap of what has become known as the 'prosecutor's fallacy'. In July 1996, the Court of Appeal found that the prosecutor's fallacy had been committed, but upheld the conviction, on the grounds that the strength of the DNA evidence remained unchanged and other evidence supported the claim that the appellant had left the stain. In a joined appeal, *R. V Doheny and Adams* (1997) 1 Cr.App.R.367 the Court quashed the conviction, because the DNA evidence had been inappropriately put to the jury and its strength overstated.

The case also illustrated the difficulty in finding experienced defense experts. Justice needed to find an expert statistician to replace their original expert who had gone abroad to work. The Criminal Appeal Office would not initially extend legal aid to fund his return. Justice was unable to find a replacement after an extensive search. Of the few who appeared qualified,

was consistently advised that prosecutions do not proceed to trial on DNA evidence alone.

Observations and Recommendations

Should adverse inferences be drawn from evidence of refusal to undergo a forensic procedure and if so, in what circumstances?

131. **The Committee recommends that:**
- a. subject to paragraphs 131b and 131c, evidence of a person's refusal or failure to consent or withdrawal of consent to a forensic procedure should not be admissible in proceedings against the person. This would encompass volunteers sampled under mass screenings;
 - b. where a justice of the peace or magistrate has authorised the carrying out of a forensic procedure on a suspect, then evidence that the suspect has refused to comply or has obstructed, resisted or hindered the carrying out of the forensic procedure should be admissible in any proceedings against the suspect; and
 - c. where a person has been charged with an offence and has been requested by the police to undergo a forensic procedure then, evidence that the suspect has refused to comply or has obstructed, resisted or hindered the carrying out of the forensic procedure should be admissible in any proceedings against the suspect.

(Paragraphs 16.18 - 16.27)

continued ...

most accepted instructions from the Crown only, and one had such a bad experience with court proceedings (eg delays and postponements) that he did not want to get involved with criminal trials.

This confirms the need for an independent panel of experts to which the defense has access. Justice has pressed for this for many years, and it was one of the recommendations of the Royal Commission on Criminal Justice in 1993.

Observations and Recommendations (*continued*)

Should evidence be admissible where there has been failure to comply with legal requirements, and if so under what circumstances?

132. The Committee recommends that:

- a.** subject to paragraph 132b, where there has been a breach of, or failure to comply with any of the legislative provisions regarding a forensic procedure or the recording or use of information on a DNA database, then the forensic material, any results of the forensic analysis and any evidence obtained as a result of or in connection with the carrying out of the forensic procedure should not be admissible in any proceedings against the person on whom the procedure was conducted unless:

- the person on whom the forensic procedure was conducted consents; or
- the court is satisfied on the balance of probabilities of certain matters that justify the admission of the evidence into proceedings despite the failure to comply with the legislative provisions. Such matters would include the probative value of the evidence, the reasons for failure to comply, the gravity of the failure to comply and whether the failure was intentional or deliberate; and

- b.** if the forensic material was required to be destroyed then the forensic material, any results of the forensic analysis and any evidence obtained as a result of or in connection with the carrying out of the forensic procedure is not admissible in any proceedings against the person on whom the procedure was conducted.

(Paragraphs 16.28 - 16.34)

continued ...

Observations and Recommendations (*continued*)***What measures should be put into place regarding the reliability of the database?***

133. This issue is outside the scope of the Committee's current inquiry. The Committee makes some observations in Chapter 16.
(Paragraphs 16.35 - 16.38)

If the primary evidence (the crime scene sample) is not available, whether through loss, destruction or deterioration, should the secondary evidence (the DNA profile) be admissible in evidence, and if so what weight should it carry?

134. This issue is outside the scope of the Committee's current inquiry. The Committee makes some observations in Chapter 16.
(Paragraphs 16.39 - 16.41)

What mechanisms should be in place regarding access by the defence to the forensic material and database information for independent verification?

135. The Committee has addressed this issue in Chapter 12 and in paragraphs 111 - 115 of the Observations and Recommendations.
(Paragraphs 16.42 - 16.42)

What other procedural safeguards may be required when presenting DNA evidence in criminal proceedings? For example: pre-trial discovery, the availability of legal aid and the availability of experts; the role of education in the use of DNA as evidence.

136. These issues are outside the scope of the Committee's current inquiry. The Committee makes some observations in Chapter 16.
(Paragraphs 16.44 - 16.62)

Hon Bruce Donaldson MLC
Chairman

Date:

APPENDIX 1
PERSONS AND ORGANISATIONS WITH WHOM THE COMMITTEE MET IN
WESTERN AUSTRALIA, VICTORIA AND SOUTH AUSTRALIA

VICTORIA AND SOUTH AUSTRALIA

Monday 5 October 1998

Chief Inspector Tim Cartwright, Manager, Legislative Review and Proposals, Victorian Police, Victoria.

Mr David Gidley, Director and Mr John Scheffer, Associate Director, Victorian Forensic Science Centre, Victoria.

Tuesday 6 October 1998

Mr Greg Burn, Manager, Policy Unit, Attorney General's Department, Department of Justice, Victoria.

Inspector Doug Cowlshaw and Detective Sergeant Peter Johnson, Police Department Forensic Sample Implementation Committee, Victorian Police, Victoria.

Ms Felicity P Hampel QC, Barrister, Victoria and Acting Chair for the Victorian Council on Civil Liberties.

Wednesday 7 October 1998

Mr Bruce Gardener, Program Manager and Ms Anna Loughnan, Policy Advisor Court of Appeals Section, Office of Public Prosecutions, Victoria.

Dr David Wells, Head of Forensic Medicine, State Coroner's Office, Department of Justice, Victoria.

Mr Alastair Ross, Director, National Institute of Forensic Science, Victoria.

Thursday 8 October 1998

Mr Paul Kirkbride, Forensic Science South Australia, Department of Administrative and Information Services, South Australia.

Dr Kenneth Brown and Dr Jane Taylor, Forensic Odontology Unit, University of Adelaide, South Australia.

Mr Matthew Goode, Attorney General's Department, South Australia.

Friday 9 October 1998

Ms Wendy Abraham, Associate Director of Public Prosecutions, South Australia.

Commissioner Mal Hyde, Commissioner; Superintendent A Telfer, Technical Services Branch; Snr Sergeant Alan McDonald Field Training Officer for Prosecution Services; Mr Greg Hutchins and Ms Irene Katsikakis, Legal Officers, South Australian Police, South Australia.

WESTERN AUSTRALIA

Staff of the PathCentre, Queen Elizabeth II Medical Centre, Nedlands, Western Australia, including Dr Clive Cooke, Dr Darrel Whitaker, Dr Gavin Turbett and Dr Karen Margolius.

Hearing, Wednesday, 1 April 1998

Mr Robert Falconer, former Commissioner of Police, Western Australia Police Service.

Hearing, Wednesday, 15 April 1998

Mr Alastair Ross, Director, National Institute of Forensic Science, Victoria.

APPENDIX 2**PERSONS AND ORGANISATIONS WITH WHOM THE COMMITTEE MET IN THE UNITED
KINGDOM, GERMANY AND THE UNITED STATES OF AMERICA**

Monday, 25 January 1999

The Hon Clive Griffiths, Agent General for Western Australia, London, United Kingdom.

Mr Patrick Lincoln, Honorary Fellow and Emeritus Reader in Haemogenetics, Department of Hematology, St Bartholomews Royal London School of Medicine and Dentistry, London, United Kingdom.

Tuesday 26 January 1999

Mr Nigel Bengier, Head of Unit, Police, Science and Technology Unit, Police Policy Directorate, Home Office, London, United Kingdom.

Forensic Science Service, London, United Kingdom:

Dr Janet Thompson, Director General;

Dr David J Werrett, Director of Research and DNA Services; and

Mr Chris Hadkiss.

Wednesday 27 January 1999

Cambridgeshire Constabulary, United Kingdom:

Mr Ben Gunn, Chief Constable; and

Mr PR Moore, Scientific Support Manager.

New Scotland Yard, London, United Kingdom:

Ms Jenny Wiles, Deputy Director of Identification and Forensic Science Advisor,
Directorate of Identification; and

Inspector Martin Bagshaw, Metropolitan Police Service.

Thursday 28 January 1999

Forensic Alliance Limited, Abingdon, Oxfordshire, United Kingdom:

Mr Russell Stockdale, Managing Director;

Dr Angela Gallop, Operations Director; and

Mr Graham Wren, Director.

Cellmark Diagnostics, Abingdon, Oxfordshire, United Kingdom:

Matt Greenhalgh, Forensic Services Manager; and

Dr Gill Rysiecki, Business Manager.

Dr Paul Debenham, Head of Life Sciences, Laboratory of the Government Chemist, and Managing Director of University Diagnostics, subsidiary of Laboratory of the Government Chemist, Teddington, Middlesex, United Kingdom.

Friday 29 January 1999

Mr Roger Ede, Secretary, Criminal Law Committee of the Law Society of England and Wales, London, United Kingdom.

Mr Graham Cooke, Barrister, Criminal Bar Association and DNA Expert.

Mr Peter Donnelly, Statistician, Oxford University.

Saturday 30 January 1999

Mr John Wadim, Liberty, London, United Kingdom.

Monday 1 February 1999

Department of Forensic Science, Johann Wolfgang Goethe University, Frankfurt/Main, Germany:

Professor Dr Med. Hansjürgen Bratzke, Director of the Department of Forensic Medicine; and

Professor Dr Dietrich Mebs.

Tuesday 2 February 1999

Bundeskriminalamt (BKA), Federal Police Headquarters, Wiesbaden, Germany:

Dr Schmitter, Chief Scientific Officer of the DNA Analysis; and

Mr Eberhard Kempf, German Bar Association, Frankfurt, Germany.

Thursday 4 February 1999

Federal Bureau of Investigations, Washington DC, United States of America:

Ms Dawn Herkenham, Chief, Forensic Science Systems Unit;

Mr Steve Niezgoda, CODIS Program Manager;

Mr Timothy Kosiba, Computer Analysis and Response Team;

Mr Barry Brown, Forensic Science Systems Unit;

Dr Jennifer Smith, Chief of the DNA Analysis Unit; and

Dr Dwight E Adams, Chief, Scientific Analysis Section.

Friday 5 February 1999

Ms Rachel King, Counsel, American Civil Liberties Union (ACLU), Washington DC, United States of America.

His Honour Judge Ronald Goodbread, District of Columbia Superior Court, Washington DC, United States of America.

Ms Patricia A Stoup, House Policy Fellow, Senate Health Education, Labor and Pensions Committee, Washington DC, United States of America.

Saturday 6 February 1999

Professor James Starrs, George Washington University, Washington DC, United States of America.

Tuesday 9 February 1999

New York Police Department, New York, United States of America:

Lieutenant Frank Dwyer, Police Commissioners Office; and
Maureen Casey, Counsel to the First Deputy Commissioner.

APPENDIX 3
MATERIAL COLLECTED BY THE COMMITTEE

United Kingdom:

Data Protection Act 1984 (United Kingdom).

Doheny and Adams (1997) 1 Cr.App.R.367.

Ede, Roger and Shepherd, Eric, *Active Defence, A Lawyer's Guide to Police and Defence Investigation and Prosecution and Defence Disclosure in Criminal Cases*, 1997.

Extract from *Criminal Justice Act 1988*, (United Kingdom) s. 30.

Extracts of the *Criminal Evidence (Amendment) Act 1997* (United Kingdom).

Extracts of the *Police and Criminal Evidence Act 1984* (United Kingdom), sections 53 - 60.

Extracts of Hansard debate on the *Criminal Evidence (Amendment) Act* in the House of Commons and the House of Lords (various dates June 1996 - February 1997).

Forensic Alliance Ltd, *Brief to the Standing Committee on Legislation*.

Forensic Alliance Ltd, *Forensic Science for investigators, lawyers and the courts*.

Forensic Alliance Ltd, Newsletter, *Exhibit A*, Issue One.

Forensic Science Services, *Annual Report and Accounts 1997/98*.

Forensic Science Services, *Approval of Suppliers of Profiles to the National DNA Database* with accompanying overheads, Presentation to the Standing Committee on Legislation.

Forensic Science Services, *National DNA Database Providers Update: 10/4/95 to 16/1/99*.

Forensic Science Services, DNA Database Mouth Swab Sampling Kit.

Forensic Science Service, *Lawyers' Guide to DNA*, Version 1.

Forensic Science Service website: <http://www.fss.org.uk/frame.html>

Gunn, D G, Chief Constable, *National DNA Database*, 27 January 1997, with attachments:

- Appendix 2A - Association of Chief Police Officers *Memorandum of Understanding* 24 March 1995.
- Appendix 2B - Draft protocol for Agreement between Police and the “Provider” of DNA profiling services.
- Appendix 2C - Draft technical annex to the draft protocol for Agreement between Police and the “Provider” of DNA profiling services.
- Appendix 2D - Extract from *Criminal Justice and Public Order Act* pp. 37-39.
- Appendix 2E - National DNA Database - Process flow chart.
- Appendix 2F - National DNA Database - Providers update: Statistics 4/95-1/99.
- Appendix 3G - Association of Chief Police Officers - *Tackling Crime Effectively - Management Handbook Vol 2*, United Kingdom, May 1996 .

Laboratory Government Chemist, *Introducing LGC*.

Laboratory Government Chemist, *Forensic Science Services*.

Laboratory Government Chemist, *Forensic DNA Services*.

Laboratory Government Chemist, *Forensic Toxicology Services*.

Laboratory Government Chemist, *Hair Testing*.

Laboratory Government Chemist, *Questioned Document Services*.

Laboratory Government Chemist, *Forensic Drugs Services*.

Laboratory Government Chemist, *Employment Drug Screening*.

Law Society of England and Wales. *Criminal Practitioners Newsletter*, Number 37, January 1999.

Letter from Graham Cooke, Criminal Bar Association, United Kingdom, to the Editor of the *Criminal Law Review*, dated 25 September 1998.

Liberty, The Civil Liberties Trust, *Liberty Annual Review 1997*.

Metropolitan Police Annual Report 1997- 1998.

New Scotland Yard, Metropolitan Police - New Scotland Yard, *Directorate of Identification DNA Presentation*, 27 January 1999.

Richard McIlkenny & Ors (1991) 93 Cr. App. R.

Steventon, Beverley, *The Royal Commission on Criminal Justice The Ability to Challenge DNA Evidence*, 1993.

Zander, Prof M and Henderson, Paul *The Royal Commission on Criminal Justice Crown Court Study*, 1993.

Germany:

Bundeskriminalamt (Federal Police Headquarters), Folder of material containing academic and scientific articles and examples of the German legislation (all in German and untranslated except for the final report of the Interpol European Working Party on DNA Profiling, Cairo, October 1998).

Extracts from the German Code of Criminal Procedure (Strafprozessordnung)

JW Goethe Universitat, DNA Database diagram and information sheet.

United States of America:

American Civil Liberties Union, Policy #260a *DNA Identification in Criminal Cases*.

American Civil Liberties Union, Civil Liberties Internet Links.

American Civil Liberties Union, Briefing Paper No 1, *Guardian of Liberty*.

American Civil Liberties Union, Publications Catalog, Winter 1999.

American Civil Liberties Union, Policy #202 *Warrantless Searches*.

American Civil Liberties Union, Policy #265a *Genetic Screening*.

Bassan D, "Bill C-104: Revolutionizing Criminal Investigations or Infringing on Charter Rights?", *University of Toronto Law Review*, Vol, 54, No 2.

National Research Council, *For the Record: Protecting Electronic Health Information*, National Academy Press, Washington, DC, USA, 1997.

Computer Science and Telecommunications Board, National Research Council, *For the Record: Protecting Electronic Health Information*, Washington, DC, USA, 1997.

Department of Justice, *Forensic Laboratories: Handbook for Facility Planning, Design, Construction and Moving*, 1997.

Extract of *DNA Identification Act 1997 (Bill C-3)* (Canada).

Extract Laws of New York Article 49-B, *Commission on Forensic Science and Establishment of DNA Identification Index*.

Extract Federal Law *DNA Identification Act (New York)* pp. 279-285.

Federal Bureau of Investigation, *Table - State DNA Databank Statutes - Qualifying Offenses*.

Federal Bureau of Investigation Educational Internet Publication, *DNA Testing*, <http://www.fbi.gov>, (searched 1 July 1999).

Federal Bureau of Investigation, FBI Laboratory Overview.

Federal Bureau of Investigation, *Crime Laboratory Digest*, July 1991, Vol 18, No 3.

Federal Bureau of Investigation, *Quality assurance standards for forensic DNA testing laboratories*.

Federal Bureau of Investigation press release: *Introduction of NDIS*.

Federal Bureau of Investigation, CODIS Program Overview.

Federal Bureau of Investigation, FBI Laboratory: *Report to Congress - Implementation Plan for Collection of DNA Samples from Federal Convicted Offenders*, December 1998.

Federal Bureau of Investigation, Internet publication, *An explanation of DNA properties and testing used by courts to prove guilt or innocence*.

George Washington University, *Scientific Sleuthing Review - Forensic Science in the Courts*, Vol 22, No 2, Summer 1998.

George Washington University, *Scientific Sleuthing Review - Forensic Science in the Courts*, Vol 22, No 3, Fall 1998.

Goodbread, RA, Hearing Commissioner, District of Columbia Superior Court, Discussion Paper, *Forensic Procedures and DNA Profiling - from the viewpoint of the Legal Profession*, 5 February 1999.

Health Care Personal Information Nondisclosure Act of 1988, United States of America.

Kevles, Daniel J, "Study Cloning, don't ban it: Society finds ways to resolve problems posed by science", *NY Times*, OPED, 26 Feb 1997.

Laundry et al -v- Harsharger Massachusetts Superior Court, Borenstein J, 12 August 1998.

Laws of New York, Article 49B.

Letter D Kerr, Assistant Director of the Laboratory Division, Federal Bureau of Investigation to Crime Laboratory Director, Federal Bureau of Investigation dated 12 June 1998, re: STR Project.

List of statutes and legislation regarding mandatory submission of blood samples for DNA identification purposes, November 1998.

National Institute of Justice newsletter, *The Unrealised Potential of DNA Testing*.

New York Police Department, New York Police Commissioner Howard Safir's Speech to the Students of the Bronx High School of Science, 14 December 1998.

Office of Information Resource Management (IRM): <http://www.usdoj/jmd/irm-major.html>

Online Newshouse: "A State by State breakdown of legislation regarding DNA databanks": <http://www.pbs.org/newshourforum/july98/-dna.databanks.html>

Rothenberg, K and Fuller, B, *Genetic Information and Health Insurance Enacted Information*, March 1998.

Solicitor General Canada, (1996), *Establishing a National DNA Data Bank - Summary of Consultations*, Consultation document.

Solicitor General Canada, (1996), *Establishing a National DNA Data Bank*, Consultation document.

Summary of *DNA Identification Act of 1994*, United States of America.

Summary of *Health Care Personal Information Nondisclosure Act of 1988*, United States of America.

The People of the State of New York -v- Wesley, Court of Appeals of New York (83 N.Y. 2d 417, 633 N.E. 2d, 611 N.Y.S.2d 97), March 29, 1994.

US Department of Justice, Research Report *Convicted by Juries, Exonerated by Science: Case Studies in the use of DNA Evidence to Establish Innocence after Trial*, June 1996.

Wayner, Peter “G-men launch distributed database; criminals baffled”, *Byte Magazine*, December 1995.

Commonwealth of Australia:

Australasian Police Ministers Council: *National Criminal Investigation DNA Database (NCIDD)*, 9 June 1998.

Commonwealth of Australia House of Representatives, *Crimes Amendment (Forensic Procedures) Bill 1997*.

Commonwealth of Australia, Legal and Constitutional Legislation Committee, Official Committee Hansard: *Crimes Amendment (Forensic Procedures) Bill 1997*, 18 November 1997.

Draft Model Forensic Procedures Bill 1999 (Commonwealth).

Forensic Procedures Model Provisions (Commonwealth).

Gunn, DG, Chief Constable, Cambridgeshire Constabulary, United Kingdom, *National DNA Database: Presentation to Australian Chief Police Officers*, Melbourne, 5 August 1997.

Model Criminal Code Officers Committee of the Standing Committee of Attorneys General, *Report: Model Forensic Procedures Bill and the Proposed National DNA Database*, May 1999 (“MCCOC Report”).

Review of the Commonwealth Criminal Law Fifth Interim Report AGPS, Canberra, 1991, Part II, chapter 5.

Schurr, Bellally, "Contemporary Comment: Sensitive Tissues- The Model Bill for Forensic Procedures 1994", *Criminal Law Journal* Vol.19, February 19 1995.

Senate Legal and Constitutional Legislation Committee, Confederation of Legislation referred to the Committee, *Crimes Amendment (Forensic Procedures) Bill 1997*, November 1997.

Senate Standing Committee for the Scrutiny of Bills, Ninth Report of 1997, *Crimes Amendment (Forensic Procedures) Bill 1997*, 18 June 1997.

Senate Legal and Constitutional Legislation Committee Report, *Crimes Amendment (Forensic Procedures) Bill 1995*, October 1995.

R v Tran (1990) 50 A. Crim. R. 233

Western Australia:

Broadhurst, R, and Maller, R, *Sex Offending and Recidivism*, Crime Research Centre, University of Western Australia, 1994.

Criminal Law Amendment Bill (No.2) 1998 (Western Australia).

Criminal Law Amendment Act (No.1) 1998 (Western Australia).

Extracts from the *Criminal Code* (Western Australia).

Extracts from the Police Act 1892 (Western Australia).

Extracts from the *Evidence Act 1906* (Western Australia).

Feeney, A, and Webb, L, "Abi Prism 310 Genetic Analyzer Acquisition", *PathCentre News*, Vol 3, No 2, October 1997, 13.

Legislative Council, *Second Reading Speech: Criminal Law Amendment Bill 1997* (Western Australia).

Legislative Council, *Clause Notes: Criminal Law Amendment Bill 1997* (Western Australia).

Legislative Council of Western Australia, *Hansard*, 20 August 1998, p.5308/2.

Legislative Council of Western Australia, *Hansard*, 17 December 1997, p.583.

Legislative Council of Western Australia: Standing Committee on Estimates and Financial Operations, Estimates Hearings 1999/2000, Mr Robert Falconer, former Commissioner of Police, 1 June 1999.

R v Lucas [1992] 2 VR 109.

PathCentre, *Booklet of material received from the PathCentre, Nedlands, Western Australia*.

Standing Committee on Legislation, *42nd Report: Criminal Law Amendment Bill (No 1) 1998*, tabled 19 May 1998 in the Legislative Council of the Parliament of Western Australia.

Standing Committee on Legislation, *46th Report: Inquiry into Forensic Procedures and DNA Profiling*, tabled 10 December 1998 in the Legislative Council of the Parliament of Western Australia.

Utting, R "DNA Profiling in Western Australia", *Brief*, 20 (3) April 1993: 9.

Western Australia Police Service Budget Statements, Vol 1, 1999/2000 Budget Paper No 2.

The *Sunday Times* newspaper, "Push for Forced DNA", 68 September 1998.

The *West Australian* newspaper, "Mouthswab to be focus of debate", 10 August 1998.

The *West Australian* newspaper, "DNA Key to Solving Crime", 8 September 1998.

The *West Australian* newspaper, "Don't feel sorry for the Criminals", 17 September 1998.

Victoria:

Consultative Committee on Police Powers of Investigation: *Body Samples and Examinations*, September 1989 ("The Coldrey Report")

Crimes (Amendment) Act 1997 (Victoria).

Extracts from the *Crimes Act 1958* (Victoria).

Hampel QC, F and Lindner, B *Seminar Paper - Crimes (Amendment) Act 1997* (Victoria).

Letter from Mr Alistair Ross, Director, National Institute of Forensic Science, 22 January 1998.

Letter from Stary & George, Barristers and Solicitors, to M Smyth, Legislation Committee, dated 14 October 1998 attaching:

- Hunter, K, “Current Topic: a new direction on DNA?”, *Criminal Law Review*, 1998, p. 479
- Gibson, R, “Police powers to take body samples”, *Law Institute Journal*, May 1998, p. 55
- Extracts from Victorian *Hansard* regarding *Crimes (Amendment) Bill*
- Article entitled “DNA Database - The Amended Legislation” by Sharon Cure
- “Checklist for Procedure for Making Applications Pursuant to Section 464ZF(2)”
- media articles.

Transcripts of Proceedings and Sentencing, *The Queen v Mark Thomas England*, Supreme Court of Victoria, Criminal Jurisdiction, 23 October 1998.

Victoria Police Gazette, Executive Instruction No 286, Victoria Forensic Science Centre: 14 November 1994.

South Australia:

Criminal Law (Forensic Procedures) Act 1998 (South Australia).

Criminal Law (Forensic Procedures) Regulations 1999 (South Australia)

Extract from House of Assembly *Hansard* regarding the *Criminal Law (Forensic Procedures) Bill* (South Australia), various dates February 1998 - March 1998.

Extract from Legislative Council *Hansard* regarding the *Criminal Law (Forensic Procedures) Bill* (South Australia), 10 December 1997 - February 1998.

Extract from *Summary Offences Act 1953* (South Australia).

Legislative Council of South Australia, *Hansard*, 10 December 1997, p.189.

Letter from Mr DH Peek, Chairman, Criminal Law Committee of the Law Society of South Australia to the Hon JTGriffins, Attorney General, dated 16 February 1998, regarding the *Criminal Law (Forensic Procedures) Bill 1997* (South Australia).

Letter from Kenneth Brown, Forensic Odontology Unit to the Attorney General's Department, dated 14 January 1998, attaching submissions on the *Criminal Law (Forensic Procedures) Bill 1997* (South Australia).

Letter from Mr M Goode, Senior Legal Officer, Policy and Research, Attorney-General's Department to Mr Kenneth Brown, Director, Forensic Odontology Unit, University of Adelaide.

Letter from Dr H Kobus, Forensic Science Centre, Adelaide, to Chairperson, Forensic Science Advisory Committee, Forensic Procedures Bill attaching comments regarding the *Criminal Law (Procedures) Bill 1997* (South Australia).

New South Wales:

Attorney General, Hon JW Shaw QC MLC, Press Release, "*Police have power to take forensic samples*", 4 March 1999.

Extract from the *Crimes Act 1900* (New South Wales).

Extract from the *Criminal Legislation Amendment Bill 1995* (Explanatory Note) (New South Wales).

Miscellaneous:

ABA educational leaflet - DNA Detective: Gene Probes and Fingerprints.

Gibson, Ray, "Police Powers to take Body Samples", *Law Institute Journal*, May 1998, p.55.

Freckleton, I and Selby, H, *The Law of Expert Evidence*, 1999, Law Book Company, Australia.

Kaye, DH, "DNA Identification: Some Malinger and Evidentiary Issues" (Proceedings from the 7th International Symposium on Human Identification 12-26, 1997).

McLeod, N, "Legal Impediments to a National DNA Databank", *Australian Journal of Forensic Sciences* 23/2 -3 -4 (1991) p. 21.

Redmayne, M, "A DNA Database: Civil Liberty and Evidentiary Issues", *Criminal Law Review*, 1998, p. 437.

APPENDIX 4

LIST OF ABBREVIATIONS AND PHRASES USED IN THIS REPORT

1995 Model Bill	Model Provisions Forensic Procedures Bill (Commonwealth) 1995.
<i>1999 Model Bill</i>	Model Provisions Forensic Procedures Bill amended as proposed by the MCCOC Report.
AFIS	Automated Fingerprint Identification System.
allele	One of the alternate forms of the gene at a particular locus.
body sample	A sample, for example hair, body tissue or body fluid, obtained from a suspect, volunteer or convicted offender.
CODIS	Combined DNA Index System established by the federal government of United States of America.
Coldrey Report	Report on <i>Body Samples and Examinations</i> by the Victorian Consultative Committee on Police Powers of Investigation in 1989.
convicted offender	A person who has been convicted of an offence and who has not finished serving their sentence.
CLA Bill	<i>Criminal Law Amendment Bill (No. 1) 1998</i> (Western Australia).
crime scene profile	A profile obtained from a crime scene sample.
crime scene sample	Encompasses forensic material obtained from: a crime scene; from the body of a victim; or on an object or other person associated with the crime but does not include a suspect sample.

CrimTrac	A Commonwealth initiative regarding the tracking of crime and criminals.
DNA	Deoxyribonucleic acid.
DNA casework	The collection, analysis and profiling of body and crime scene samples.
DNA profile	A set of DNA identification characteristics, that is, the particular chemical form at the various DNA locations (loci), which permit the DNA of one person to be distinguishable from that of another person.
EDNA	European DNA working party.
ESS	European standard set of loci.
FBI	Federal Bureau of Investigation, United States of America.
FSS	Forensic Science Service, United Kingdom.
forensic procedures	means “ <i>intimate forensic procedures</i> ” and “ <i>non-intimate forensic procedures</i> ” (as both phrases are defined in paragraphs 18 and 19 of the Observations and Recommendations of this Report) and the taking of a sample by buccal swab.
LGC	Laboratory of the Government Chemist, United Kingdom.
LDIS	Local DNA Index System in the American States which contains the DNA records selected from LDIS for searching for DNA matches and for inserting into higher level (such as SDIS and NDIS and CODIS indexes).
locus (plural = loci)	A specific location on a chromosome.
MCCOC	Model Criminal Code Officer’s Committee of the Standing Committee of Attorneys General (Commonwealth).

MCCOC Report	Model Criminal Code Officers Committee of the Standing Committee of Attorneys General (Commonwealth), <i>Report: Model Forensic Procedures Bill and the Proposed National DNA Database</i> , May 1999.
NDIS	American National DNA Index System which is the FBI-administered, centralised system of DNA identification records contributed by all State and local participating laboratories. NDIS receives records from LDIS and SDIS.
Observations and Recommendations	The observations and recommendations made by the Standing Committee on Legislation throughout this Report and which have been summarised in Chapter 1 of this Report.
PACE Act	<i>Police and Criminal Evidence Act 1984</i> (United Kingdom).
PathCentre	The Western Australian Centre for Pathology and Medical Research.
PCR	polymerase chain reaction, a forensic process.
Post Conviction Testing	The sampling of persons currently undergoing a term of imprisonment or detention and who have previously been found guilty of an offence for which a forensic sample could have been obtained, had the relevant legislation been in place at the time of conviction.
RFLP	restriction fragment length polymorphism, a forensic process.
sample	The biological sample, typically blood, semen, hair or buccal cells, that is the object of DNA analysis for purposes related to forensic identification. It includes crime scene samples and body samples.
suspect	Except where the context requires otherwise, the term “ <i>suspect</i> ” is broadly used to refer to a person who is suspected of committing an offence, whether or not he or she is in custody and whether or not he or she is charged or arrested.
suspect sample	A forensic sample which has been taken from a suspect.

SDIS	American State DNA Index System which contains the State-level DNA records for searching by local DNA laboratories within the State. SDIS is the State's repository of DNA identification records and is under the control of State authorities. SDIS typically serves as the central point of contact for access to NDIS.
STR	short tandem repeats, a forensic process.

APPENDIX 5

EXTRACT FROM THE MCCOC REPORT: PAGES 11, 13 & 15

Commentary

These definitions remain unchanged from the 1995 Model Bill. The exception is that the definition of informed consent now needs to also refer to the provisions concerning volunteers. The 1995 Model Bill did not provide for comprehensive provisions in relation to volunteers. The proposal to retain the definition of 'intimate forensic procedure' is not supported by everyone. Some believe the taking of saliva and mouth swabs should be classified as a non-intimate procedure.⁸ The following is an explanation of why the Committee continues to favour retaining the procedure as an intimate procedure.

'intimate forensic procedure'

Classifying the taking of saliva and mouth swabs as an intimate procedure will mean that the person from whom it is taken will have a right to have the procedure considered by a magistrate. In the few cases where the accused does not consent to giving the sample, authorisation by a magistrate rather than a senior police officer will involve more work for law enforcement officers. Those who disagree with the proposal take the view that it adds unnecessarily to the work of police and that the procedure for taking the saliva is not really intimate. They point out that taking the sample involves little more than scraping the inside of the mouth with something similar to a cotton bud. No doubt many will find it much more preferable to being punctured by a syringe for blood.

The Committee agrees that where the person from whom the sample is being taken agrees to the procedure it can be very simple and is not invasive. However, where a person does not consent and resists the procedure, the procedure could not fairly be described as being non-intimate. Placing something inside someone's mouth against the person's consent is invasive.

The Committee is aware that mouth swabs are categorised as a 'non-intimate' procedure in the UK.⁹ However, the UK motivation for categorising mouth swabs in this way was different. In the UK intimate samples can only be taken if the request is authorised by a superintendent and the person consents. If the person refuses to consent or cooperate, the sanction is that the jury may draw adverse inferences about the refusal. Law enforcement cannot use force to take an intimate sample. Making the taking of mouth swabs a non-intimate procedure had more to do with ensuring that they could be taken compulsorily rather than determining whether it was invasive. The 1993 Royal Commission into Criminal Justice, which recommended the change, said:

⁸ Note the Northern Territory *Police Administration Amendment Act (No.2) 1998*, *Juvenile Justice Amendment Act (No.3) Act 1998*, *Prisons Correctional Services Act 1998* where the taking of saliva and mouth swabs is classified as a non-intimate procedure.

⁹ *Criminal Justice and Public Order Act 1994 (PACE)* - s.58

Commentary

The police service argue that swabs taken from a person's mouth should be classed as non-intimate, thus enabling them to be taken without consent if the requirements described in paragraph 26 are met. *They told us that mouth swabs may be taken without consent in Northern Ireland and that the provision has worked satisfactorily there.* Saliva can readily be used to obtain a DNA profile. We therefore think there is merit in the police service's proposal and recommend that saliva be reclassified as a non-intimate sample for the purpose of section 65 of PACE, thus enabling mouth swabs to be taken without consent under section 63 of PACE.¹⁰

Under the Model Bill classification of a procedure as being an intimate procedure does not rule out the compulsory taking of the sample. It just requires that there be court authorisation.

The Committee notes that in Canada, New Zealand and in some parts of the US, the compulsory taking of mouth swabs is categorised as a procedure requiring judicial authorisation. The 'Gibbs Committee' Review of Commonwealth Criminal Law, Fifth Interim report (June 1991) had the same view and a requirement of court approval is consistent with earlier Australian reviews (some of which opposed the taking of saliva).

The procedure is intimate and a number of commentators in the UK have come to a similar conclusion.¹¹

The Committee notes that the overwhelming response in consultation and the reception of the legislation based on the 1995 Model Bill in the 4 Parliaments that have enacted it or similar legislation would suggest many people are of the same view. For example, the Commonwealth Parliament spent some time investigating whether the legislation should include the taking dental impressions at all let alone categorising the procedure as something other than an intimate procedure. The Senate Standing Committee on Constitutional and Legal Affairs report mentioned but ignored submissions from the SA and NT Police to re-categorise the taking of mouth swabs as non-intimate procedures. The Standing Committee's 1995 report rejected the inclusion of dental impressions as a forensic sample which could be taken under the proposed legislation.¹² While Parliament eventually accepted the inclusion of dental impressions, it would be surprising if many would entertain categorising the taking of mouth swabs as a non-intimate procedure.

¹⁰ (July 1993) cm 2263, HMSO, paragraph 29 at pp.14-15.

¹¹ 'Journal of Criminal Law' November 1995, *Creating a DNA database*, by Beverley Stevenon at 412.

¹² The Parliament of the Commonwealth of Australia, *Crimes Amendment (Forensic Procedures) Bill 1995*, at p 15. Report by the Senate Legal and Constitutional Committee, October 1995.

Commentary

It also occurs to the Committee that it was quite inconsistent for the UK Parliament to conclude that the taking of dental impressions should remain an intimate procedure but that the taking of mouth swabs or even searching the inside of a person's mouth was non-intimate.

It is also noted that the 1995 Eastaál Committee, (which included senior police and prosecution representation from the Western Australia, Queensland, Tasmania and the Commonwealth) came out in support of the Model Bill as a "properly accountable set of powers."¹³

The 1995 consultations on the Model Bill produced only 3 submissions out of 64 (see Attachment 3 for the list of organisations and individuals who made comments) which disagreed with the categorisation of mouth swabs as an intimate sample. They were the Senior Managers of Australian and New Zealand Forensic Laboratories, Victoria Police and the Australian Defence Force Academy. The 1995 consultations produced wary but generally supportive response from groups who would normally be concerned about privacy issues. An example is the comment of Greg James QC from New South Wales:

Generally, although there is a widely held but vaguely expressed opposition to some of the concepts of the draft Bill on civil liberties grounds, and similarly widely held and expressed support for much tougher proposals, since it is clear that unless there is such a model as this, a confusion of legislation unlikely to embody the positive features of the draft Bill, will result.

And the then Federal Privacy Commissioner, Kevin O'Connor:

I support the idea of developing a consistent national regime to govern the carrying out of forensic procedures and to provide appropriately detailed safeguards for the rights of suspects.

In the main it seems to me that the Bill is a reasonable attempt to strike a balance between the rights of suspects and the public interest in effective law enforcement of the law. I am however concerned about extensive intrusions upon personal privacy.¹⁴

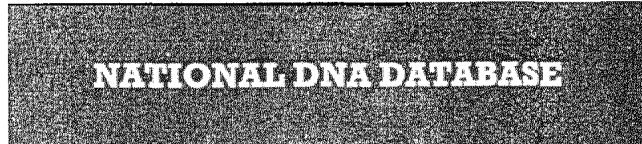
Watering down a category of sample from being intimate to non-intimate cannot be justified.

¹³ *Report Eastaál Working Party, DNA Sampling*, March 1995, p. 10.

¹⁴ His submission went on to detail some specific concerns.

APPENDIX 6

CHIEF CONSTABLE GUNN NATIONAL DNA DATABASE - PRESENTATION TO AUSTRALIAN LEGISLATION COMMITTEE



*Presentation to Australian Legislative Committee
27th January 1997
by
D.G. Gunn, QPM, MA(Cantab)
Chief Constable, Cambridgeshire Constabulary*

NATIONAL DNA DATABASE

The National DNA Database became operational on 10th April 1995. How did we go about bringing this major national initiative to fruition?

There were significant:

- (i) political and constitutional;
- (ii) legal;
- (iii) scientific and technical;
- (iv) operational and, not least;
- (v) financial;

hurdles to jump in planning the National DNA Database.

The Association of Chief Police Officers (ACPO) (England, Wales, Northern Ireland) - (I'll mention Scotland later) commissioned a Police User Requirement which our Crime Committee drew up and following consultation with all Forces, got it endorsed by ACPO. The Government decided, principally on public policy grounds, that our national Forensic Science Service (principal provider of Forensic Science to police in England and Wales - 90-95% of our laboratory based services), should be the custodian and manager of the new National Database, which was to be sited at the FSS Headquarters in Birmingham, at least for the first 5 years.

The Police Service, however, retained ownership of the Database and the data held thereon.

With a "User Requirement" drawn up and the Custodian and Manager of the new Database agreed, in late October 1994, a joint Police /FSS Team set about creating the Database, which the Home Secretary wanted operational by the date that the Codes of Practice to the Criminal Justice and Public Order Act came into force - originally 1st April, 1995 (an apt date you might think - for that gave us barely 20 weeks to complete a major national project and overcome some significant scientific/technical and operational problems - not to mention some financial ones!!). In effect, the Codes came into force on 10.4.95 - so we had another 10 days!

The User Requirement sets out the range of issues that we (the Police) expected the Forensic Science Service to incorporate into the DNA Database. It drew up the template for the essential "client"/"provider" relationship and enabled the development of a close working partnership between the ACPO and the FSS, which has been a crucial feature of the success of the Database.

The detailed requirements set out exactly what would be expected from the FSS in its initial five year custodianship and management of the Database. Issues such as the capacity of the Database, its scope and ability to achieve rapid cross searching, and the ability to migrate data from current technology to any new advances in the future were included; the "User" requirement also laid down expected quality and standards and sought processes to avoid cross-contamination - all are crucial to maintaining the integrity of the Database and ensuring that the high standards of our CJ system were not breached.

Essentially, it also confirmed that the Database was to be an intelligence tool, not an evidential one. It had to be capable of rapid automatic checking of a suspect's DNA profile and/or a crime scene profile with all outstanding crime stain and suspect profiles on the system in order to:

- > identify suspects;
- > discover linked cases and
- > verify identification (distinguishing multiple identities).

When "hits" are achieved, an entirely separate DNA sample, using blood, is taken for court and evidential purposes.

The User Requirement was fundamental to setting out where responsibilities lay between Police and the FSS in the DNA profiling sequence.

In order to ensure national ownership of the User Requirement, consultation took place with Forces and eventually all 43 Forces in England and Wales signed up to it. The 9 Forces in Scotland and Northern Ireland joined within the first year.

MEMORANDUM OF UNDERSTANDING

Whilst Police and the FSS progressed their respective work to achieve the position sought in the User Requirement, the Joint ACPO/FSS project team was drawing up a "Memorandum of Understanding", to be signed between the Police Service (President of ACPO) as "User" and the FSS (Director General) as "Provider" of the National DNA Database. Initially, the FSS had wanted a binding contract with provisions for quantum and regular throughput of samples for analysis and profiling but we resisted that on the grounds that it could bind us to conditions that would be difficult to guarantee (eg arrest figures). As things have turned out, we need not have worried too much - the take up on both suspect profiling and crime scene stains has been phenomenal - it has grown rapidly as the "hit" rate has increased.

The Memorandum of Understanding was again a product of detailed consultation. Although it is not a binding legal contract, it is a clear and unequivocal statement of intent by the Police Service and the FSS to a National DNA Database for an initial agreed period. Principal issues included were:

- > length of commitment (5 years);
- > volume estimates;
- > protocols for the delivery of service by the FSS (including a range of technical/scientific issues);

3

- transportation of samples and storage,
- charging issues;
- data protection;
- quality assurance/accreditation issues;
- statistical database.

NATIONAL DATABASE

But why a National Database rather than a Regional or even local one?

I would like to offer some thoughts, based on our experience in the UK, on why I think a national solution is the best one, in the following respects:

- critical mass;
- technical/scientific terms;
- operationally;
- and
- economically.

I believe to deliver the full benefits requires a major investment AND a positive "mind-set" on the part of both "Users" and "Providers" of DNA services. For the Police, it is a long term operational investment decision, for the providers it represents a medium term technology decision in a field which is fast moving, encapsulating a growing number of alternative solutions.

The Importance of Critical Mass

The business case for the investment strategy and planning, in my opinion, is best made on a national scale. This will support:

- the "critical mass", to ensure that unit costs are acceptable; I believe throughput and infrastructure costs benefit from economies of scale;
- the "critical mass" also helps to ensure that the Database is robust; by that I mean the quality and methodology is supported by both the scientific and Police community and they are empowered jointly to maintain it;

AND

- the "critical mass" ensures that the operational benefits will be delivered, such as processes to ensure the technology, the operational strategy, deployment and training of investigators, and the provision of data is consistent and measured by key performance indicators.

A National Technical Solution

In technical terms, I believe a technical solution should have the support of the widest possible scientific community. This will make it more sustainable and resilient in dealing with scientific issues, helping to maintain the integrity of the Database. Quality and standards should underpin the successful operation of the Database. A wider "community" approach will ensure it is fit for the purpose. It is vital that the suppliers to the Database are commonly accredited - a national approach, I believe, provides the best means to attain a widely respected accreditation.

4

The wider body of knowledge centred on the preferred approach in the scientific community will ensure that developments in the wider DNA field are taken into account in decisions affecting the performance of the Database - by that I mean we must ensure that Database technology and casework technology are developed in step to ensure that benefits are delivered. Technical migration is important as a stepped change in technology will be extremely expensive and disruptive; the widest possible support will ensure that incremental improvements deliver the benefits of the Database over the lifetime of the investment.

It is also important to ensure that the standard, agreed protocols, either of the "User" or "Provider", are followed and that any difficulties are quickly sorted out and implemented - this is easier to achieve on a national basis.

A National Relationship Operationally between Suppliers and Users

A national solution provides scope for developing effective oversight arrangements to represent the views of both suppliers and users. A strategic approach to issue resolution helps to provide the trust and confidence inherent in a resilient solution. Crucially, it helps to promote the development of an overall operational strategy, resulting in best practice and innovative approaches being incorporated into the working practices, both of the Database and the users of it.

A National Database guarantees a database of sufficient size and standing to warrant the appointment of a "custodian". The custodian role is to ensure that the scientific and operational integrity of the Database is maintained in accordance with the requirements of the "User" and allow the contribution of a number of suppliers in the context of the national legislation and regulatory controls. A strong national approach provides the basis for influencing various regional and international fora on consistency of approach, thereby enhancing the contribution of DNA to the investigation of national and international crime.

Local or even Regional databases create potential problems for:

- (i) common practices;
 - (ii) unified processes;
 - (iii) consistent and compatible equipment;
 - (iv) agreed protocols;
 - (v) inter-operability and compatibility;
- AND
- (vi) a co-ordinated and shared intelligence capability.

All these issues are, I believe, instrumental to success on a national basis and why I contend our National DNA Database is such a resounding success.

COST/RESOURCE IMPLICATIONS

I mentioned the requirement for the Police to estimate the number of persons who would be caught by the provisions of the new Criminal Justice and Public Order Act for DNA profiling (essentially all those involved in recordable offences). Overall, we estimated that involved some 675,000 people. With no new money available, it was clearly going to be impossible for Police to profile all 675,000 people in the first instance. (Some £27 million on the basis of unit costs which I'll mention shortly.)

ACPO took an early policy decision to concentrate on three principal categories of crime in the first instance:

5

- | | | | |
|-------|----------------------------------|---|------------------------|
| (i) | all offences against the person: |) | |
| (ii) | all sexual offences, and |) | NB: |
| (iii) | all burglaries. |) | Intelligence led cases |

For those offences, we estimated there would be a need to profile some 135,000 people in the first year - AND, as events turned out, we were virtually "spot on" that figure.

Together with the FSS, after much hard negotiation (and some table-thumping on both sides) we set the initial charges for suspect profiling at £40 (80 Australian Dollars), which created an additional financial burden to the 43 Forces in England and Wales of some £5½ million (11 million dollars). Not an insignificant sum, but one of the major advantages to us of having a single National Database and having a principal supplier of DNA profiling (FSS), is the benefit we gained from "economies of scale".

For the FSS, the initial capital investment was over £4.5 million and although the Home Office provided that money to "pump-prime" the Initiative, as the FSS is an Executive Agency of the Home Office, under our Treasury Rules, that capital has to be repaid.

A key issue for the "Users" (Police) is that the unit cost of producing a result from casework or suspect material is appropriate in the context of the costs of the investigation - essentially, is it good value for money? A national solution benefits from economies of scale. There are substantial costs for "Users", particularly in training and operational issues, so a national approach can help to share such costs and ensure that custom and practice is consistent.

For the Database "Provider", the size of the facility helps to add weight in discussions with "suppliers" and "royalty owners" in economic bargaining power. Importantly, for those responsible for putting in place the arrangements for the Database, I believe a national solution provides greater justification for the investment, strategic planning and the business case.

LEGAL ISSUES

As I've mentioned, we needed a change in our law to facilitate the creation of our National Database.

The Criminal Justice and Public Order Act 1994 (and the associated Codes of Practice) gave us the power to take DNA samples from all persons suspected of, reported for, charged with or cautioned for a recordable offence. Those samples could be taken, without consent and using force if necessary, by mouth swabs or rooted hair (not pubic) (non-intimate); this was a quick, easy and relatively cheap way of taking DNA samples which formerly had to be taken using blood (an intimate sample requiring consent - a far more intrusive and much more expensive way of obtaining a sample).

The creation of the new powers coincided with the development by the Forensic Science Service of new techniques of analysing DNA samples quickly and at relatively low cost (Polymerase Chain Reaction using Short Tandem Repeats [STR]). This method enables the analysis to be converted to a set of data (the profile) capable of being stored on a computer.

The scene was set, therefore, for the creation of the world's first National DNA Database. The Database is essentially in two discrete parts:

- (i) the suspect database. This, in addition to the DNA profile itself, contains the following details:
 - (a) a unique identification number;
 - (b) an arrest/summons number which provides a link to the Police National Computerised Index of Criminal Records (Phoenix);
 - (c) the subject's full name, sex, date of birth, ethnic origin;
 - (d) the Police Force and Station Code;
 - (e) the name of the officer taking the sample.
- (ii) a second and completely separate part of the Database contains DNA profiles taken from the scenes of crime up and down the country.

The Database is a consolidated national one and is not partitioned by Police Forces, Region, or on any other basis. That, I suggest, is one of its real strengths and the results we are achieving - linking suspects to scenes, and scenes to scenes throughout the length and breadth of the UK have amply illustrated the value of a single consolidated National Database.

As I've mentioned, all 43 Forces in England and Wales have signed up to the National Database. In April 1996 the 8 Scottish Forces came in, followed by the RUC in Northern Ireland. Essentially, the Scottish Forces either send their samples to the FSS to be analysed, profiled and entered on the Database, or their laboratory in Dundee, which has now achieved the necessary accreditation to carry out profiling, does the analysis and profiling and then electronically transfers the profile to the National DNA Database in Birmingham (as does the RUC).

We also envisage that other law enforcement agencies (Military Police, Customs and Excise, etc., will join the Database before long (consultation already under way) - British Transport Police and Ministry of Defence Police already submitting samples).

MIGRATION

One important consideration in our planning was to ensure that there was some provision for migrating future profiles to the Database if new methods of analyses were developed, which I'm sure will happen as the science of DNA is moving so fast.

We envisage the need for a similar process that occurred when the first DNA tests using the single Locus Probe techniques were upgraded and re-profiled using the new Short Tandem Repeats. That will be necessary, as there are very strict criteria laid down for entry of any data onto the Database (to maintain integrity) AND there are strict procedures in place to ensure that any alternative provider of DNA profiling services to Police (non-FSS) must achieve the necessary accreditation and competency testing before any of their data will be entered on the Database (either suspect or crime scene). In addition, ACPO, as owner of the Database, has also drawn up some essential protocols concerning:

- (i) processes;
- (ii) equipment;
- (iii) consumables,

that have to be met by potential alternative providers of DNA services.

(NB: Such a specialised field with large capital and revenue set up costs, that only two others, LGC and Forensic Alliance are currently providing a DNA service in the UK.)

TRAINING

Another essential requirement we had to address before launching the Database was training.

All Police Officers (especially front line Officers and those responsible for investigating offences), together with Custody Officers, Scene Examiners and Scientific Support Officers, needed to receive urgent instruction on their legal powers, how to take a sample, complete the necessary forms, ensure the integrity and continuity of the sample, and transport it to the FSS. All this had to be achieved in some 6-12 weeks.

An instructional video was produced and copied to every Force in the country, explaining the DNA techniques and showing how to take samples from suspects. Key liaison officers were appointed in each Force to spearhead the training and to ensure common and good practice was promulgated throughout the country. Importantly, the Liaison Officers also helped to "sell" the concept and the potential value of the Database at the grass roots level in the Service.

A widespread, and practically based training programme was introduced, using actual equipment and allowing officers to practice by taking DNA samples from colleagues. Some of those samples, particularly from ethnic officers, were also used, with consent, to compile the separate statistical frequency Database.

The Statistical Database is an entirely separate and distinct part of the National Database that cannot be cross-referenced to the Intelligence sections. It contains anonymised profiles from volunteers, and some from persons acquitted, to allow a frequency calculation to be made on the likelihood of one DNA profile being the same as another one.

This is an area of potential conflict, particularly in a court hearing and judgements in 1996 (Doherty and Adams) have given advice to Judges and Jurors on how to consider DNA evidence, (viz the random occurrence ratio).

Another value in such a hands-on training process was that the samples taken from Police "guinea-pigs" were submitted as "specimens" in the agreed format to the Birmingham Laboratory in a series of "dry-runs", providing an ideal opportunity to check and test all the links in the specimen handling chain between Police and the FSS.

KITS

Instrumental in such a process is the need for a validated and scientifically sound sampling kit to ensure no cross-contamination can occur and to maintain the integrity of the sample. We again took the opportunity to pilot the procedure for the collection and delivery of the DNA sample in the approved kits which again were standard nationally. This helped to iron out many problems, both with the consistency and continuity of the process at an early stage. (NB: 48 hour delivery by post requirement or preferably freezing of sample -20°C to be submitted in its frozen state).

DATA PROTECTION

The National Database has to meet the strict requirements of our Data Protection Legislation and conform to our national strategy for Police Information Systems - it does (NB: Phoenix).

PERFORMANCE MONITORING

A comprehensive system of monitoring the National Database is in place by virtue of the National DNA Database User Group, which I chair. That group, which comprises senior representatives of Police Forces in the UK and senior FSS personnel, monitors the operations of the Database, identifies problems and the concerns of both Users and Providers, seeks solutions, promulgates good practice, and co-ordinates the collection and dissemination of performance statistics on a quarterly basis. It also provides a useful forum to keep Ministers informed of the progress and achievements of the Database.

FUTURE DEVELOPMENTS

So what of the future?

Advances in DNA technology are developing rapidly - we have some exciting prospects from current research into mitochondrial as well as chromosomal DNA.

Here in Australia your scientists, and ours in the FSS, are looking at the potential for obtaining DNA from minute particles of skin left behind on objects when touched - that may produce further valuable evidence.

We are already able to establish gender and, in some cases ethnicity, through chromosomal DNA examination and it is hoped that soon we will also be able to establish:

- > hair colour;
- > eye colour;
- > facial characteristics.

Just think of the advantages that it could give Police, if in an investigation we know we are looking for a white Caucasian male, with blonde hair, blue eyes and a big nose!

The use of DNA profiling by Police has exceeded all our expectations AND, if I may say so, our best estimations too.

CONCLUSION

In summary, our experience has shown that DNA can:

- > quickly identify a suspect or link a crime scene;
- > save significantly on the time and cost of investigations, particularly for serious offences;
- > is also proving very successful in helping us attack bulk crime, eg burglary and car crime;
- > be a very effective deterrent to repeat offending;
- > bring leading edge technology right to the forefront in our fight against crime;

AND, importantly,

- > it not only helps us to convict the guilty - it can also positively acquit the innocent.

APPENDIX 7

1999 MODEL BILL

TABLE OF AUTHORISED PERSONS: CLAUSE 38

Appendix 3

- (2) All forensic procedures are to be carried out in a manner consistent with appropriate medical or other relevant professional standards.
- 36 **Forensic procedures not to be carried out in cruel, inhuman or degrading manner** (former cl 36)
- (1) Nothing in this Part authorises the carrying out of a forensic procedure in a cruel, inhuman or degrading manner.
- (2) For the purposes of this section, the carrying out of an intimate forensic procedure is not in itself regarded as degrading to the suspect.
- 37 **Taking samples of hair** (former cl 37)
- Nothing in this Part authorises the intentional taking of a sample of hair by removing the root of the hair.

Subdivision 2 - Persons involved in forensic procedures

- 38 **Persons who may carry out forensic procedures** (former cl 38)
- (1) Table 2 shows, for each forensic procedure, the persons who may carry out the procedure under this Part. A person not specified in the second column of the Table is not authorised to carry out a forensic procedure under this Part except as mentioned in section 40.
- (2) The third column of Table 2 shows, for each forensic procedure, whether a medical practitioner or dentist of the suspect's choice may be present while the forensic procedure is carried out.

Note. Section 41 makes detailed provisions for the presence of a medical practitioner or dentist of the suspect's choice while a forensic procedure is carried out.

Table 2

Forensic procedure	Persons who carry out forensic procedure	May medical practitioner or dentist of suspect's choice be present?
external examination of the genital or anal area, the buttocks, or, in the case of a female, the breasts	medical practitioner nurse appropriately qualified person	medical practitioner

Appendix 3

2	the taking of a sample of blood	medical practitioner	medical practitioner
		nurse	
		appropriately qualified person	
3	the taking of a sample of saliva, or a sample by buccal swab	medical practitioner	dentist
		dentist	medical practitioner
		dental technician	
		nurse	
4	the taking of a sample of pubic hair	appropriately qualified person	
		medical practitioner	medical practitioner
		nurse	
5	the taking of a sample by swab or washing from the external genital or anal area, the buttocks, or, in the case of a female, the breasts	medical practitioner	medical practitioner
		nurse	
6	the taking of a sample by vacuum suction, scraping or lifting by tape from the external genital or anal area, the buttocks, or, in the case of a female, the breasts	medical practitioner	medical practitioner
		nurse	
7	the taking of a dental impression	medical practitioner	dentist
		dentist	
		dental technician	
8	the taking of a photograph of, or an impression or cast of a wound from, the genital or anal area, the buttocks, or, in the case of a female, the breasts	appropriately qualified person	medical practitioner

Appendix 3

9	external examination of a part of the body other than the genital or anal area, the buttocks, or, in the case of a female, the breasts, that requires touching of the body or removal of clothing	medical practitioner	no
		nurse	
		appropriately qualified person	
10	the taking of a sample of hair other than pubic hair	medical practitioner	no
		nurse	
		police officer	
11	the taking of a sample from a nail or from under a nail	medical practitioner	no
		nurse	
12	the taking of a sample by swab or washing from any external part of the body other than the genital or anal area, the buttocks, or, in the case of a female, the breasts	medical practitioner	no
		nurse	
		appropriately qualified person	
13	the taking of a sample by vacuum suction, scraping or lifting by tape from any external part of the body other than the genital or anal area, the buttocks, or, in the case of a female, the breasts	medical practitioner	no
		nurse	
		appropriately qualified person	
14	the taking of a handprint, fingerprint, footprint or toeprint	appropriately qualified person	no

Appendix 3

- | | | | |
|----|---|--------------------------------|----|
| 15 | the taking of a photograph of, or an impression or cast of wound from, an external part of the body other than the genital or anal area, the buttocks, or, in the case of a female, the breasts | appropriately qualified person | no |
|----|---|--------------------------------|----|

Note. *Appropriately qualified person* is defined in section 1

- 39 **Certain forensic procedures generally to be carried out by person of same sex as suspect** (former cl 39)
- (1) If practicable, an intimate forensic procedure (other than the taking of a sample of blood, a sample of saliva, a buccal swab or a dental impression) is to be carried out by a person of the same sex as the suspect.
 - (2) If practicable, a non-intimate forensic procedure for which the suspect is required to remove clothing other than his or her overcoat, coat, jacket, gloves, socks, shoes and hat is to be carried out by a person of the same sex as the suspect.
 - (3) If practicable, a person asked under section 40 to help carry out a forensic procedure covered by subsection (1) or (2) is to be a person of the same sex as the suspect.
- 40 **Person may get help to carry out forensic procedure** (former cl 40)
- (1) An order by a police officer or magistrate authorising the carrying out of a forensic procedure authorises the person who is to carry out the procedure in accordance with section 38 to ask another person to help him or her to carry out the procedure, and authorises the other person to give that help.
 - (2) A person who is asked to help carry out a forensic procedure need not be a person mentioned in section 38.

APPENDIX 8

MCCOC REPORT

PAGES 87 - 89

Commentary
Clause 82. Taking, retention and use of forensic material

While it is hoped that all jurisdictions will enact consistent legislation, Australia's record at achieving national consistency is not good. A consequence of this could be that a jurisdiction which has loose controls and allows the collection of samples in a wider range of circumstances could undermine appropriate restrictions on the use of the DNA database in another jurisdiction.

For example, State A may only allow taking samples from serious offenders while State B might allow them to be taken from any offender. A law enforcement officer in State A could then check to see if the suspect had committed an offence in State B through a criminal records check. The officer discovers the person committed a traffic offence after which the person had been required to give a sample for DNA analysis. The law enforcement officer then conducts matching on the DNA database against someone who would not be on the database in the same circumstances under local legislation.

While collusion which involved arranging for the suspect to be charged with a minor offence in State B just to get the sample for investigation in State A would probably be inadmissible on the basis that it had been improperly obtained, the type of activity in the first example is less likely to result in the evidence being held to be inadmissible under the 'Uniform Evidence Act'. It would not contravene the law in State B and is unlikely to be held to be improper:

"138(1) Evidence that was obtained:

- (a) improperly or in contravention of an Australian law; or
- (b) in consequence of an impropriety or of a contravention of an Australian law;

is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained."³⁷

Under the common law prosecution evidence may be excluded on public policy grounds in circumstances where it has been obtained by unlawful conduct on the part of the police. It also covers conduct which is while not unlawful, is improper conduct.³⁸ The High Court has held:

"The effective investigation by police of some types of criminal activity may necessarily involve subterfuge, deceit and the intentional creation of opportunities for the commission by a suspect of a criminal offence. When those tactics do not involve illegal conduct, their use would ordinarily be legitimate

³⁷ *Evidence Act 1995* (Cth, NSW, ACT): s.138.

³⁸ *Bunning v Cross* (1978) 141 CLR 54.

Model

- 82 Taking, retention and use of forensic material (former cl 68)
- (1) Nothing in this Part affects the taking, retention or use of forensic material, or information obtained from forensic material, if the taking, retention or use of the material is authorised by or under another law of the State [or Territory] or a law of the Commonwealth.
- (2) Forensic material, or information obtained from it, that is taken in accordance with the law of another State or a Territory may be retained or used in this State [Territory] for investigative or evidentiary purposes even if its retention or use would, but for this subsection, constitute a breach of, or failure to comply with any provision of this Part relating to the carrying out of forensic procedures.

Alternative should it not be possible to achieve substantially consistent legislative schemes:

- (2) Forensic material taken, or information obtained from it, in accordance with the law of another State or a Territory must not be retained or used in this State [Territory] for investigative or evidentiary purposes if, had the forensic material been taken or information obtained in this State [Territory] its retention or use for those purposes would constitute such a serious breach of, or failure to comply with any provision of this Part relating to the carrying out of forensic procedures that it would be inadmissible.

Commentary

notwithstanding that they are conducive to the commission of a criminal offence by a person believed to be engaged in criminal activity. The most that can be said is that the stage of impropriety will be reached in the case of conduct which is not illegal only in cases involving a degree of harassment or manipulation which is clearly inconsistent with acceptable police conduct in all the circumstances,³⁹

The High Court went on to note that whether what was done was unfair to the accused is ordinarily of "peripheral" importance compared to "the public interest in maintaining the integrity of the courts and insuring the observance of the law and minimum standards of propriety by those entrusted with powers of law enforcement".⁴⁰

Although it is probably the case that obtaining evidence in the way outlined in the first example may not mean it will be excluded, it raises an issue that must be faced. It is not desirable that variations of the nature described even in the first example should be allowed to undermine the DNA database legislative requirements. The Committee therefore believes a consistent approach between jurisdictions is very important in combating this type of problem. Therefore the Committee only favours recommending the first provision if there is consistency and does so on the basis that in preparing the model it must assume there will be consistency. If there is, then the proposed approach will also be in line with section 138(1) of the Uniform Evidence Act.

The alternative provision would depart from the policy of the Uniform Evidence Act and would be unique in that it would involve excluding evidence obtained lawfully and which would be acceptable to a court in another part of Australia. It would be a most unfortunate outcome, but it may be necessary if the disparity between jurisdictions is too great.

The Committee notes that this problem has not arisen in other countries because most have national legislation. In the USA the national database is controlled by the FBI who through funding incentives have been successful at persuading participating States to enact similar legislation, thereby maintaining the standards of the national database. In other countries the criminal law is usually the responsibility of the national government.

³⁹ *Ridgeway v R* [1994-1995] 184 CLR 19, Mason CJ, Deane J and Dawson J at 37.

⁴⁰ Above at 38.

APPENDIX 9

LETTER FROM HON TOM STEPHENS MLC DATED 12 AUGUST 1999



PARLIAMENT OF WESTERN AUSTRALIA

HON. TOM STEPHENS BA JP MLC

Leader of the Opposition in the Legislative Council
Member for Mining and Pastoral Region

Parliament House
Perth W.A. 6000
Telephone: 08 9222 7297
Facsimile: # 08 9322 3550
Email: tstephens@mp.wa.gov.au

Hon Bruce Donaldson MLC
Chairman
Standing Committee on Legislation
Parliament House
PERTH 6000

Dear Bruce

RE: DNA AND FORENSIC PROFILING

I write to advise that I will not be signing off on the DNA and Forensic Profiling report.

As you are aware, I was appointed as a Member on the Legislation Committee on 18 March 1999 at which time the Committee's detailed investigations and inquiry into this matter were well under way. On this basis it was judged to be inappropriate for me to participate in the residual part of the inquiry.

Having not participated in the inquiry, it is inappropriate that I should sign off on the report. However I look forward to reading the final report and studying the findings in collaboration with my Labor colleagues.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Tom Stephens'.

HON TOM STEPHENS MLC
Leader of the Opposition in the Legislative Council
Labor Member for Mining and Pastoral Region

12 August 1999

H:\share\LOOPLC99\STEPHENS\CORRO\dna-report-g12.doc

APPENDIX 10

**LETTER FROM DR CLIVE COOKE, PATHCENTRE TO ADVISORY/RESEARCH
OFFICER, LEGISLATION COMMITTEE DATED 5 AUGUST 1999, ATTACHING
LETTER FROM DR GAVIN TURBETT TO DR CLIVE COOKE DATED 5 AUGUST
1999**

The Western Australian Centre for Pathology and Medical Research

*Forensic Pathology
Chief Forensic Pathologist: Dr Clive T Cooke*



Mia Betjeman,
Advisory/Research Officer,
Standing Committee on Legislation,
Parliament House,
PERTH, W.A. 6000

Fax : 9222 7609

Dear Ms. Betjeman,

Re: DNA and Forensic Profiling Inquiry

Thank you for your letter of 28 July, 1999.

I have referred the questions raised to Dr. Gavin Turbett for his review and comment.

Please find attached Dr. Turbett's reply. I draw your attention to page 3 of his report (summary), in which Dr. Turbett suggests adherence to a National Code of Conduct regarding the restriction to non-coding DNA, rather than legislative control.

If you require further elaboration, please contact us on 9346 2614

Yours sincerely,

Dr C T Cooke MBBS, BMedSci, FROPA
Chief Forensic Pathologist

5 August, 1999

CTC/eji

F:\admin\199.dna.doc

*Queen Elizabeth II Medical Centre • Western Australia
Postal Address: Locked Bag 2009, Nedlands, Western Australia 6009
Telephone: (08) 9346 2614 • Facsimile: (08) 9346 2575
E-mail: Clive.Cooke@health.wa.gov.au*

The Western Australian Centre for Pathology and Medical Research



PATHCENTRE

Dr. Gavin Turbett, PhD.
Forensic Biology Laboratory.
Tel: 08-9346-2857.
Fax: 08-9346-2575.

Thursday, 5 August 1999

Dr. Clive Cooke.
Clinical Director of Forensic Services.
PathCentre.

Dear Dr. Cooke;

Please find attached my reply to the letter you have forwarded to me from Ms. Mia Betjeman of the Legislative Council Standing Committee on Legislation, dated 25 July 1999 (ref LGCR3502).

1. Is the restriction to the analysis and profiling of non-coding DNA imposed by any scientific protocol, or administrative or accreditation requirement?

The restriction to the analysis and profiling of non-coding DNA is primarily imposed for reasons of scientific fact. The kit we currently use for DNA profiling is called Profiler Plus and is manufactured by the Perkin Elmer Corporation (USA). The Profiler Plus kit examines nine areas of microsatellite DNA as well as Amelogenin (which determines the sex of the individual). The primary aim of the Profiler Plus kit is to provide the highest possible degree of discrimination between people (given the technology currently available). To achieve this, they have focussed upon areas of DNA that are known to vary the most between individuals. The greatest amount of variation in DNA between individuals is found in the non-coding DNA. The most commonly used method currently employed for forensic identification worldwide involves analysing a special kind of DNA called *microsatellite DNA* (also known as a *Short Tandem Repeat* or *STR*). Microsatellite DNA is analysed using a technique called Polymerase Chain Reaction (PCR).

Therefore, we currently examine non-coding DNA because it is the most informative in its ability to discriminate between people, not because of administrative or accreditation requirements. As such, there is not any one reference that I could provide to you that will support this. One good Internet source of background information regarding STR DNA is:
<http://ibm4.carb.nist.gov:8800/dna/intro.htm>.

The decision as to exactly which microsatellites to include in the Profiler Plus kit has been made by the Perkin Elmer Corporation. I believe that their decision would have been made on the basis of scientific experimentation. I am unaware if there are any laws in the USA that specifically prohibit the use of coding DNA for Forensic identification.

Microsatellite DNA mostly occurs in non-coding areas. However, there are a few microsatellite DNA regions in coding DNA. I am unaware of any of these coding microsatellite DNA regions being used for Forensic identification in Australian Forensic laboratories.

*The Queen Elizabeth Medical Centre • 115, Queen Victoria Road • Western Australia
Postnet Address: Locked Bag 2009, Stirling, Western Australia 6007
Tel: 08-9346-2575 • Fax: 08-9346-2575*

2A. Would a legislative restriction of DNA analysis of a suspect and a crime scene sample to the non-coding parts of DNA cause any problems from the scientific point of view? Please identify the problems if any.

In the long term, yes it probably would. However, using the current Forensic profiling system (Profiler Plus), it would not. The nine microsatellite DNA loci used in Profiler Plus are, to the best of my knowledge, all in non-coding areas of DNA. The Amelogenin test examines an area of non-coding DNA that occurs between the coding DNA of the Amelogenin gene. The size of this area of non-coding DNA varies between the X and Y chromosomes.

As I see it, there could be several problems with introducing a legislative restriction:

Firstly, all Australian Forensic Biology laboratories all use the Profiler Plus kit, which is supplied by Perkin Elmer Corporation. The Perkin Elmer Corporation is not bound by Australian law. It is possible that they could change the components of the kit. If the change was to include analysis of an area of coding DNA, then Australian laboratories would no longer be able to use that kit.

Secondly, the technology employed for Forensic analysis could change over time. One possible alternative to the analysis of microsatellite DNA is the analysis of small variations in DNA called *Single Nucleotide Polymorphisms* (SNPs). Using microchip technology, several hundred or even several thousand regions of DNA known to contain SNPs may be analysed simultaneously. This approach could provide an even greater level of discrimination than the use of microsatellite DNA. However, this method could prove to be controversial, as SNPs occur in coding DNA as well as non-coding DNA. Particular SNPs in coding regions of DNA may have functional significance and could be associated with certain diseases or genetic predispositions to disease.

Thirdly, it is possible that in the future there will be Molecular Biological techniques available that will be able to determine the ethnic background of the individual, as well as physical characteristics such as hair and eye colour. I realise that this is a possibility of great concern to many people. However, the ability to obtain such information would also be of great investigative value. If legislation was enacted that precluded such analyses, then potentially valuable forensic information could not be collected.

Fourthly, the methods for Forensic analysis will change over time with improved technology and have already changed significantly several times in the last decade. An earlier Forensic identification system directly examined coding DNA (the HLA-DQ α typing system). The current system (PCR of microsatellite or STR DNA) does not. Future technological advances may make the analysis of coding DNA more appropriate. Would legislation restricting against the analysis of coding DNA make it impossible to present any HLA-DQ α typing data in court if it was necessary?

Finally, even the analysis of non-coding DNA could still possibly lead to the uncovering of medically-relevant genetic information. An association between schizophrenia and a rare allele of the microsatellite found near the tyrosine hydroxylase gene has been reported, although these findings have not been confirmed by other researchers. The microsatellite found near the tyrosine hydroxylase gene is not used in Profiler Plus, but is used for Forensic profiling elsewhere in the world.

Therefore, I do not believe that it is desirable to place legislative restrictions upon the use of coding or non-coding DNA for Forensic DNA profiling. The methods used for Forensic DNA profiling are

primarily driven by scientific knowledge of DNA (such as the fact that non-coding DNA tends to vary more than coding DNA and is therefore the best way to differentiate between people, given current technology) and advances in the technology required to detect these variations. If DNA profiling techniques were to alter in some way to include coding DNA, it would be because there were advantages to doing so (eg cheaper, faster, more sensitive, more discriminating, more forensically-useful information obtained). If that were to happen, then Australia could be in danger of being left behind technologically, and would also be out of step with other countries that began using the new technology. Furthermore, if Western Australia introduces legislation that is more restrictive than that enacted elsewhere in Australia, it could result in a situation whereby WA could not fully participate in the National DNA database, nor would WA be able to obtain the maximum possible benefits of such a database, as the profiling information we utilised would at best be only partly compatible with that in use elsewhere in Australia.

2B. Would the form of words used in the German legislation be appropriate to draw the distinction between coding and non-coding DNA.

I find the wording used in the German legislation to be somewhat vague. Permitting DNA testing "*only for the purposes of establishing a person's descent or of determining whether trace material that is found comes from the suspect or defendant or from the victim*" does not accurately draw a distinction between coding and non-coding DNA. As indicated above, SNPs from coding DNA could also be used for this purpose.

They are correct in stating that coding DNA is not necessary to "*establish descent or whether trace material that has been found is from the suspect or the victim*". However, coding DNA can and has been used for this purpose in Australia and elsewhere in the past and, as indicated above, may or may not be a useful tool for investigation in the future.

The statement that DNA testing is "*permissible only if it does not reveal any genetic information*" is not concise. The Profiler Plus kit *does* reveal genetic information – including the sex of the individual. While this is not normally considered to be of importance, I am sure that there would be some individuals who would not want their sexual identity known. The German legislation is attempting to protect people from having information about medical conditions or genetic predispositions to disease revealed (either accidentally or deliberately). Their definition of "genetic information" is in reality referring to "medically-relevant genetic information". It should be noted that for the purposes of Forensic identification, there is abundant "non-medical genetic information" available and there is therefore currently no need to obtain "medically-relevant genetic information".

Summary: The establishment of a National Code of Conduct.

Having been prompted by the letter and the visit of the Committee to think about these issues in detail, I feel that the most practical approach may be to develop a National Code of Conduct under which Forensic Biology laboratories would be required to operate. It would be appropriate to involve the National Institute of Forensic Science (NIFS) on this. Similarly, the Australia and New Zealand Forensic Science Society (ANZFSS) already has a Code of Ethics for its members.


A National Code of Conduct would regulate what type(s) of Forensic Biological testing are acceptable for the purposes of Human identification. The Code of Conduct would also carefully regulate what Forensic Laboratories can and cannot do with the information once it has been obtained. In this way, specific provision could be made to ensure that the Forensic laboratories can share DNA profiles for the purposes of the CrimTrac National DNA database. The Code of Conduct could also incorporate any

relevant Genetic Privacy legislation. In principle, such a Code of Conduct would also be applicable to any laboratory (whether they are Forensic or Medical, Private, Government or University, Research or Clinical) that discovers genetic information of any kind.

As far as introducing legislation to restrict the types of DNA that may be tested, it is necessary to recognise that it is almost impossible to predict what technological advances will be made in the future, even over relatively short periods of time. Restrictive legislation may make it impossible to take advantage of future technological advances in Forensic Science, even if these techniques are used elsewhere in the world.

I hope that my answers are clear and would be happy to discuss this with you further if required.

Yours sincerely;



Dr. Gavin Turbett.
Scientist in Charge.
Forensic Biology Laboratory.

APPENDIX 11

**MCCOC REPORT
PAGES 90 - 97**

Model

Division 12 - DNA databases (former cll 65–66B)

83 DNA matching database and DNA identification database

(1) In this Act:

crime scene index means an index of DNA profiles derived from forensic material found:

- (a) at any place (whether within or outside Australia) where a serious offence was committed, or
- (b) on or within the body of the victim of a serious offence, or
- (c) on anything worn or carried by the victim at the time when a serious offence was committed, or
- (d) on or within the body of any person or thing or at any place associated with the commission of a serious offence.

DNA identification database means a database (whether in computerised form or otherwise and however described) containing the following information in relation to DNA profiles on the DNA matching database:

- (a) in the case of a profile in a crime scene index or a missing and unknown deceased persons index - the case number of the investigation associated with the forensic material from which the profile was derived,
- (b) in the case of a profile in a serious offenders index, limited purposes index or unrestricted purposes index- the identity of the person or deceased person from whose forensic material the profile was derived

Commentary

DNA Databases

The Committee believes it is important that the legislation accurately describes the DNA databases and the way in which different information may be held and matched. The establishment of a national DNA criminal investigation database system is a key element of the Commonwealth Government's CrimTrac initiative and as the development of CrimTrac is at an early stage, the final composition of this system has not yet been settled. The appropriate framework and composition for the system will be developed in consultation with the States and Territories, so the Committee has been careful not to assign aspects of the database as being the responsibility of particular jurisdictions. While the Commonwealth Government has promised funding for a law enforcement tracking database called CrimTrac which will include a national DNA database, it is not settled as to who will be responsible for different aspects of the database. Fortunately it is not necessary for the Model Bill to be specific about jurisdictional responsibility issues as it does not purport to be the legislation of a particular jurisdiction. Further, the Model Bill does not create the databases. There is nothing in the model to prevent them from being created by administrative means. However, the model is descriptive of the various elements of the database and how they may be used for criminal investigation purposes. Under the Model Bill, the national DNA database system will be able to hold discrete compartments of information. This will enable the controlled matching of information in the way proposed in the model for the information to be used in criminal investigations and court proceedings.

The descriptive approach of Division 12 draws on concepts contained in the Canadian legislation which creates that country's national database.⁴¹ The difference between Canada and Australia is that in Canada the Federal Government can place all the controls in one Act. In Australia we will need to enact legislation at the State, Territory and Federal level. We therefore need a model if there is to be a simple and comparable system throughout the country.

Clause 83. DNA matching database and DNA identification database

The following definitions in subclause 83(1) describe the databases and indexes and provides a framework for where the information may be kept and how it may be used.

'Crime scene index'

This closely follows the equivalent Canadian provision and is self-explanatory. Clearly the crime scene DNA profiles need to be kept separate from the profiles of individuals with whom they will be matched.

'DNA identification database'

This is the most sensitive database of them all as it contains the link between particular individuals or crime scenes and the results of any matching of the persons DNA profile with other profiles. A DNA profile is a type of code which records the characteristics of an individual's DNA but is course useless if

⁴¹ DNA Identification Act 1998 - section 5.

Model

DNA matching database means a database (whether in computerised or other form and however described) containing:

- (a) the following indexes of DNA profiles:
 - (i) a crime scene index,
 - (ii) a missing and unknown deceased persons index,
 - (iii) an unrestricted purposes index,
 - (iv) a serious offenders index,
 - (v) a limited purposes index,and identification codes, and
- (b) a statistical index, and
- (c) any other index prescribed by the regulations.

identification code means a code linking a DNA profile to information in a DNA identification database that may be used to identify the person from whose forensic material the DNA profile was derived.

limited purposes index means an index of DNA profiles derived from forensic material taken:

- (a) in accordance with Division 3, 4 or 5 or under a corresponding law of a participating jurisdiction from suspects, or
- (b) in accordance with Division 8 or under a corresponding law of a participating jurisdiction from volunteers (or whose parents and guardians) have been informed that information obtained will be used only for a purpose specified to them under section 60(2)(b).

missing and unknown deceased persons index means an index of DNA profiles derived from forensic material of persons who are missing and deceased persons whose identity is unknown.

serious offenders index means an index of DNA profiles derived from forensic material taken from:

- (a) serious offenders in accordance with Division 7 or under a corresponding law of a participating jurisdiction, or
- (b) suspects who have been convicted of the relevant offence concerned (being a serious offence or other indictable offence).

Commentary

it cannot be connected to a particular individual. As a security measure, under the Model Bill the link between the code and the individual is to be kept on a separate database from the one where the profiles of individuals will be matched those found at crime scenes. The definition makes it clear that missing or unknown deceased persons profiles are similar to and are to be treated the same as crime scenes (identified by a case number), while profiles from suspects, serious offenders, various types of volunteers and known deceased persons are also similar (identified by a name).

'DNA matching database'

This database uses codes. It is not to be possible for an individual or particular crime scene to be identifiable in this database. This database is for the purpose of matching the codes. However it is recognised that for ease of reference and to facilitate appropriate use of the various classes of profiles within this database that the codes should be sorted into indexes. Those that are self-explanatory are the crime scene index, the missing and unknown deceased persons index and the serious offenders index. There is also a statistical index and the possibility of prescribing another one by regulations. The two indexes that require further explanation and reference to other definitions are the 'limited purposes index' and the 'unrestricted purposes index'.

'Limited purposes index'

This is to contain the codes that relate to suspects and volunteers and who have been informed that the profile will only be used for a limited purpose, for example it might be for a particular investigation.

In the case of suspects the Model Bill makes it clear that their profiles may only be used to investigate the offence about which they are a suspect or other offences (paragraphs 81(2)(d)(e)(f) and (g) provide that information revealed by a forensic procedure may only be disclosed for the purpose of investigating or making a decision about a particular offence or offences generally). It follows that a suspects profile should only be used for those limited purposes. The suspects profile can be matched against anything on the crime scene index but unlike the serious offenders index, should not be available for unrestricted comparison as part of a pool of suspects that can be matched with profiles from any index. For example, it is not intended that the whole index of suspects could be compared with all crime scene profiles. To do so would go far beyond the purpose for which the forensic material was obtained in the first place and may expose suspects to random searching by police anywhere in the country who are quite separate from the particular investigation and who are just fishing for matches on the crime scene index.

The grounds for ordering a forensic procedure to be carried out on a suspect are that there are reasonable grounds to suspect he or she committed a 'relevant offence' (clauses 14 and 19). Clause 1 defines a 'relevant offence' to include the

Model

statistical index means an index of information obtained from the analysis of forensic material taken from persons in accordance with this Part or under a corresponding law of a participating jurisdiction that has been compiled for statistical purposes, being information that cannot be used to identify the persons from whom the forensic material was taken.

missing and unknown deceased persons index means an index of DNA profiles derived from forensic material of persons who are missing and deceased persons whose identity is unknown.

unrestricted purposes index means an index of DNA profiles derived from material taken:

- (a) in accordance with Division 8 or under a corresponding law of a participating jurisdiction, from volunteers (or whose parents or guardians) have been informed under section 60(2)(c) that information obtained may be used for the purpose of criminal investigation or any other purpose for which a DNA database may be used under this Division, and
- (b) from deceased persons whose identity is known.⁴

serious offenders index means an index of DNA profiles derived from forensic material taken from:

- (a) serious offenders in accordance with Division 7 or under a corresponding law of a participating jurisdiction, or
- (b) suspects who have been convicted of the relevant offence concerned (being a serious offence).

statistical index means an index of information obtained from the analysis of forensic material taken from persons in accordance with this Part or under a corresponding law of a participating jurisdiction that has been compiled for statistical purposes, being information that cannot be used to identify the persons from whom the forensic material was taken.

⁴² The order of this definition is changed to make comparison easier.

Commentary

offence for which the person is a suspect or an offence arising out of the same circumstances or in respect of which evidence is likely to be obtained.

Some may take the view that the Model Bill should restrict the matching of suspects profiles to crime scene profiles which are strictly within the grounds for ordering the procedure as provided for in clauses 14 and 19. The Committee has always taken a broader view. The general purpose for ordering the taking of the forensic sample is that the person is a suspect in relation to one or more crimes. That while the order may only be granted if there is a reasonable suspicion about these crimes, if there are some upon which to ground the order, it is sufficient to justify more general matching with the crime scene database.

The Committee notes that its proposal effectively limits the people who are responsible for initiating the matching to the investigators who obtained the consent of the suspect or the order. This ensures the small group conducting the investigation are identified and can be held responsible for the way in which the profiles are being used. It would not be possible to monitor its use as closely if the suspects profiles were available for any police in Australia to initiate general matches. This approach is justified because as opposed to serious offenders the allegations against the suspects are unproved

'Missing and unknown deceased persons index'

Another grouping of DNA profiles are those from someone who is missing⁴³ and those from the dead bodies of people who are unknown. The DNA database has tremendous potential for determining whether someone who is missing is dead. In this case even the matching of DNA profiles within the index may produce results. The unknown body may be that of a missing person.

Matched against the crime scene index it may be found that the missing person's profile matches that of a victim. In other cases it may be shown the unknown body comes from a crime scene. Matched against the serious offenders index it may be that the identity of the dead person is discovered through the fact that the person was once an offender. Matched against the unrestricted purposes index it may be found the person was once a volunteer. Indeed it is even possible some will volunteer so that they can be more easily identified in these circumstances. This index should be open to unrestricted matching, but needs to be in a separate index because of its peculiar nature and the likelihood that the purpose of the matching will often not be to investigate a crime.

'Unrestricted purposes index'

Profiles on this index may be matched against anything on the database. The whole of this index can be matched against the whole of another index on the

⁴³ Forensic material from someone who is missing may come from the person's dwelling - a DNA profile can be obtained from a small splattering of blood or other human tissue, including hair, loose skin and from things that the missing person has touched.

(*sic*: page 96 inserted into MCCOC Report as blank)

Commentary

DNA matching database. For example all the profiles in this index against all those on the crime scene index.

This index is made up of profiles from volunteers who have agreed to the unrestricted purpose. An example might be someone who has a criminal record and wishes reduce the number of times he or she is approached by the police by giving them a way to eliminate the person from their enquiries (the UK police have advised us that this occurs in their country). Alternatively, it might be a civic minded citizen who is concerned to assist the police with efforts to build up a large database.

The other group of DNA profiles suitable to place on this index are those deceased people whose identity is known. In some cases it may be uncertain how the deceased person died and there is some value in matching the sample against the crime scene databases. It may be there is a sample elsewhere which together with other evidence at that location suggests the person did meet foul play. It could be a person who appears to have committed suicide at one location but in fact was murdered elsewhere.

This index will also be useful where the deceased person is one of several suspects. Matching of the deceased person's profile with the crime scene index could eliminate those that are alive from suspicion. Committee members are aware of a serial killing case where matching this type of profile with the crime scene index could have reassured the community that a particular serial killer was dead and no longer a threat.

'Serious offenders index'

The DNA profiles of serious offenders may also be matched with any index. However the Committee favours also including them in a separate index in recognition that they are collected in a different way and that the people involved are a distinct category. It should be noted that a person may be removed from this index if they receive a pardon or the conviction is quashed. Where the profile comes from a sample collected from a suspect who is convicted of an indictable offence, the profile is to be placed on this index. Some may view this as an inconsistency, but the Committee considers that if a sample has not been obtained in the first place, and the convicted person has the proceedings behind them, the disturbance of having to give a sample should only occur where the person is convicted of a serious offence.

'Statistical index'

This is a separate index from which no one can be identified by code or other means. Its purpose is to examine the characteristics of profiles in Australia so that an accurate assessment can be made about the probability that particular indicators are unique. The statistical index is valuable as the Committee understands that there are variations in the genetic make up of different nations.

APPENDIX 12

**LETTERS FROM MR PATRICK HOGAN, CONVENOR CRIMINAL LAW
COMMITTEE, LAW SOCIETY OF WESTERN AUSTRALIA; MR PAUL HEANEY,
SM, MAGISTRATES CHAMBERS, CENTRAL LAW COURTS, WESTERN
AUSTRALIA; AND WESTERN AUSTRALIA POLICE SERVICE REGARDING
“CHARGED” UNDER THE *CRIMINAL CODE* (WESTERN AUSTRALIA)**

PATRICK HOGAN - BARRISTER
HOWARD CHAMBERS 19 HOWARD ST PERTH WA 6000
PHONE: (08) 9486 9411 FAX: (08) 9486 9422

Ms Mia Betjeman

Advisory/Research Officer

Standing Committee on Legislation

Date: 11 August 1999

Parliament House

PERTH WA 6000

Dear Ms Betjeman

DNA and Forensic Profiling Inquiry

Thank you for your letter of 6 August 1999.

The term "charge" is not defined in any Act, nor is the term "charged". I am not aware of any internal police rules or regulations which define those terms either. The phrase "upon a charge" is an entirely new creation. Therefore, there is no point in time to be found in statute or rules at which a person is "charged"

The Justices Act contains a definition of the term "complaint". It includes the term "charge". Notably, the terms mean an information and complaint before justices (plural). The scheme of the Justices Act is to begin with the word complaint, and then gradually use the terms complaint and charge interchangeably.

There is case law which goes some way to providing answers, but it is fairly unsatisfactory. For example, it has been held that the phrase "charged with an indictable offence" may have different meanings according to its context (R v Walters & Ors (1945) St. R. Qd. 154). The clearest answer to be found is that a person is charged at the time when the Magistrate reads out the complaint form to him in court. (R v D'Eyncourt (1888) 21 Q.B.D. 109); (Arnell v Harris (1945 K.B.

60). The case law is concerned with the provisions of the Justices Act itself, and those provisions only come in to play once the person is in the court system.

There is even less assistance to be found by reference to police rules or procedures relating to charging persons. That is because there are no rules or procedures to say what a charge is, how a charge comes into existence, or how a person is charged. Therefore, there is no point in time at which it can be said a person is charged.

I would guess that this very problem was seen at the time that the Bail Act was written. That Act includes the situation where a person is in police custody but has not yet appeared in court, a similar situation to that which can occur under section 236. In the Bail Act the problem is avoided rather than solved simply by avoiding any reference to being charged as a precondition to being released on bail.

My concern with section 236 is that it appears to rest on fairly shaky foundations so far as the phrase "upon a charge" is concerned. If evidence is obtained by force under that section, it runs the risk of later being held to be inadmissible as being unlawfully obtained.

I trust that these short comments may be of some assistance to the Committee in its deliberations.

Yours faithfully



Patrick Hogan

**COPY**

18 August 1999

Magistrates Chambers
Central Law Courts,
Perth, Western Australia 6000
Telephone 425 2222

Ms Mia Betjeman
Research Officer
Standing Committee on Legislation
Parliament House
PERTH WA 6000

Dear Ms Betjeman

I refer to your letter of 6 August 1999 to the Chief Stipendiary Magistrate
Con Zempilas concerning DNA and Forensic Profiling Inquiry.

Mr Zempilas has referred this matter to me and pursuant to that
instruction, you will recall that I spoke to you on Wednesday 11 August
1999.

It appears that your concern arises from the wording of Section 236 of the
Criminal Code and in particular the words "*.....a person in lawful custody
upon a charge of committing an offence...*". Your query is, at what point of
time is a person actually charged.

Regrettably it would appear that in the jurisdiction of Western Australia
there is no clear definition as to when a person is charged. Clearly
significant legislation like section 236 above requires such a definition as
prior to a person being charged section 236 does not apply but once
charged section 236 does apply.

A person alleged to have committed an offence can be dealt with by way of
arrest and release on bail or remand in custody or alternatively by way of
summons.

In the case of a person who is arrested it is arguable that he is "charged"

- (a) at the point the police complete their investigations and advise the
person that he is to be charged with a specific offence
- (b) at the point that the police officer actually swears or makes the
complaint
- (c) at the point that the complaint is filed with the court or



STIPENDIARY MAGISTRATE'S CHAMBERS

2.

- (d) at the time the judicial officer reads the complaint to the defendant on his first appearance in court.

In the case of a person who is dealt with by way of summons it is arguable that is he "charged"

- (a) at the point when the police officer or other authorised person makes or swears the complaint to be dealt with by way of summons
- (b) at the point the summons is served upon the defendant
- (c) at the point the summons is filed with the court
- (d) at the time the judicial officer reads the complaint to the defendant on his first appearance in court
- (e) if, the defendant does not appear in response to the summons, (as he is not always required to) at the time he enters his plea of guilty, or not guilty by endorsement

Obviously from the above analysis it is clear that there is some uncertainty as to when a person is actually charged. I am not aware of any legislation that specifies when a person is charged or any authorities that have dealt with this issue in the Western Australian jurisdiction.

In some Commonwealth legislation the point that a person is charged is defined in the legislation itself, and perhaps such a definition is needed in the Western Australian Criminal Code to clarify this issue. Given the nature of the power given to police officers under section 236 of the Criminal Code it is an issue that clearly needs defining.

If you have any further queries please do not hesitate to contact me.

Yours sincerely

Paul Heaney SM



WESTERN AUSTRALIA POLICE SERVICE

**ASSISTANT COMMISSIONER
POLICY, PLANNING & EVALUATION**WESTERN AUSTRALIA POLICE HEADQUARTERS
2 ADELAIDE TERRACE, EAST PERTH
WESTERN AUSTRALIA 6004
TELEPHONE: (08) 9222 1497
HQ ADMIN: (08) 9222 1997
FACSIMILE: (08) 9222 1387Ms Mia Betjeman
Advisory Research Officer
Legislative Council Standing Committee on Legislation
Parliament House
PERTH WA 6000YOUR REF: LGCR3502
OUR REF: RB:0340399P5 /LS: 990522
ENQUIRIES: A/Inspector Dale Bell
Legal Services Unit
Telephone: 9268 7662

Dear Ms Betjeman

SECTION 236 OF THE CRIMINAL CODE

Thank you for your letter to Mr Richard Sims of the Western Australia Police Service Legal Services Unit regarding the application of section 236 of the Criminal Code.

Should further advice be required, a request direct to the Commissioner of Police will ensure protocol is maintained and a timely response is provided.

The Police Service considers a person to be in custody upon a charge when that person has been arrested and advised of a charge. At that point, if necessary section 236 of the Criminal Code would be utilised to obtain samples.

Yours sincerely

R G CRANNAGE
ACTING ASSISTANT COMMISSIONER
(POLICY, PLANNING & EVALUATION)

September 8, 1999

APPENDIX 13**DESCRIPTION OF THE FUNCTIONAL OPERATION OF THE UNITED KINGDOM DATABASE**

1. The scene of crime officer (“SOCO”) takes a sample, and calls the Police National Computer Bureau (“PNC Bureau”). The PNC Bureau is the custodian of the police national computer (“PNC”) where *“police”* records are kept of convictions, car registrations and offences.
2. The PNC Bureau creates a record for the offence and allocates an Arrest Summons number (“AS”) which is given to the SOCO.
3. The SOCO records the AS on the DNA sample form (“DNA1”) which is part of the Forensic Science Service (“FSS”) Kit. The AS becomes the unique *police* reference number for that sample. The FSS Kit contains many copies of the same bar code which is adhered to the samples and the DNA1 form. The bar code becomes the unique *“database”* reference number for the sample and DNA profile. The PNC Bureau create and note a DNA Taken flag (“DT”) on the PNC.
4. The SOCO submits the FSS Kit to the FSS as analytical service provider or another approved forensic analytical service provider (for example: the Laboratory of the Government Chemist or Forensic Alliance). Once profiled the DT marker on the PNC is updated to a DNA Profiled marker (“DP”). If the sample fails then the marker on the PNC is updated to a DNA Failure marker (“DF”). The successful profile is down loaded onto the DNA Database by the approved analytical service provider.
5. The FSS has three roles in the process:
 - as a supplier to the DNA database;
 - as custodian of the DNA Database in which role it is responsible for ensuring operational and scientific integrity. In this capacity the FSS is responsible for approving other suppliers of analytical services; and
 - as manager of the DNA database in which role the FSS carries out matching and hit notification services.
6. The DNA database contains:
 - the DNA profile (from crime scene samples and subject samples);
 - the Sample Identification Number (Bar code);
 - the PNC Reference number;
 - the full name, sex, date of birth and ethnic appearance of the subject (“identifying information”); and

- details of the police officer, offence for which the sample was taken and police force details.
7. Different components of the DNA database have different owners. The hardware and technology is owned by the FSS. The data is the legal property of the relevant police force which submitted the sample. The FSS act as a police force's agent in passing information onto other police forces.
 8. Operation of the database is subject to the *Data Protection Act 1984* (United Kingdom) which determines who may have access to information and how it must be destroyed. Data is held on a password protected system and the security is layered so that *Data Protection Act* regulations are met. Access is to authorised users only - at the time of the Committee's inquiries only database unit staff could access the DNA database to initiate searches against profiles.
 9. The FSS, as custodian of the database, challenges the database with all profiles of samples submitted and reports any "*presumptive matches*" to the analytical suppliers involved. Under no circumstances are the "*presumptive matches*" to be notified to the relevant police force. Suppliers of analytical services are required to recheck the results and confirm their validity to the FSS. The checking procedures designed by the FSS must be used for confirmation of matches. For suspect samples this involves independent reanalysis. For scene of crime samples it involves checking the allele designations.
 10. Once confirmed, the FSS releases all details of matching profiles (including identifying information) to the relevant police force.
 11. Each police force has a dedicated DNA unit which receives, records, monitors and researches hit/match notifications from the FSS before submission to police officers for action. For example the DNA Unit within the Directorate of Identification at New Scotland Yard is the nominated unit in the Metropolitan Police Service.
 12. Once notified of a hit, the relevant police force DNA unit notifies its police officers who may arrest the subject and conduct an interview. It is important to remember that the hit information is only treated as an investigative tool, not an evidential tool.
 13. Depending on the outcome of the "*hit*":
 - the subject is released. For example, because of insufficient evidence or they have been eliminated from inquiry;

- the subject is charged without further samples being obtained. For example there may be other sufficient evidence; or
 - a further sample is taken and the subject is released on bail, pending case work submission. This latter sample is treated as an “*evidential sample*” or “*case work sample*”. The results of the evidential sample are used in any court proceedings.
14. The local police force is responsible for notifying its own DNA unit and the PNC Bureau of the court/disposal result. The PNC Bureau updates the PNC record by either deleting the DNA record if acquittal is notified or charging it to a DNA Confirmed marker (“DC”) if convicted. The PNC Bureau notifies the FSS who amend the DNA database. Once a DC marker is obtained no further samples need to be taken from a suspect, although as a matter of practice some police forces still do.

APPENDIX 14

MINORITY REPORT OF HON GIZ WATSON MLC

1. Introduction

- 1.1 I believe that the introduction of powers to take and use DNA should proceed with caution. In recommending legislation in this area we must be mindful of balancing the right of the State to information against the individual's reasonable expectation of privacy. The procurement of human samples to identify DNA and the subsequent use of that information creates privacy concerns not raised by any other forensic technique. DNA analysis reveals aspects of a person's genetic code and potentially their complete genetic "blueprint", which is quite different from current techniques such as fingerprinting. The right to intrude on an individual's body and to retain the information thereby obtained is a powerful right which should only be exercised in the most compelling of circumstances. The broadscale use of this right would, in my opinion, amount to an intrusion on privacy on an unprecedented scale.

2. General comments

- 2.1 I dissent from the recommendations of the majority of the Committee in two major respects:
1. the type of offence for which a person must be under suspicion, charged with or convicted of before becoming subject to compulsory forensic procedures; and
 2. the level of judicial oversight required to initiate an order for a compulsory forensic procedure
- 2.2 With regard to the first point: in light of my introductory comments I do not support the recommendation that forensic procedures be available in respect of any indictable offence. I note that the 1999 *Model Bill* creates a category of offences designated as a 'serious offence' which is defined as "*an offence under a law of this State or of a participating jurisdiction that is punishable by a maximum penalty of 5 or more years of imprisonment*"; clause 1 of the 1999 *Model Bill*. I note that the 1999 *Model Bill* only applies the higher threshold of 'serious offence' to convicted offenders and proposes the sampling of suspects of 'indictable offences'.

I recommend that forensic procedures should be limited to serious offences, being offences under the law of Western Australia that are punishable by a maximum penalty of 5 or more years imprisonment.

Accordingly, wherever a Committee recommendation includes a reference to ‘indictable offence’, I dissent from that aspect of the recommendation and instead recommend that the wording be ‘serious offence’ as I have defined that term.

In support of my recommendation, I note that Germany has taken this approach and that the Privacy Commission of Canada in its 1992 report “Genetic Testing and Privacy” recommended limiting the collection of DNA samples to cases involving criminal violence. It is likely that in any case financial limitations and prioritising of serious offences will limit the use of DNA, at least initially, to serious indictable offences.

I note also that the Committee is recommending a review of the legislation after five years. This would then provide the opportunity to extend the powers to take DNA for all indictable offences if it was considered necessary and desirable. This cautious approach allows a trial period to test public acceptance of these significant new procedures. I also believe there is unlikely to be much opposition to using DNA procedures for serious indictable offences, whereas there is more likely to be opposition to the broader powers.

- 2.3 In respect of the second point: given the seriousness of requiring a person to undergo a compulsory procedure that is both intimate and intrusive, I believe that the higher authority of a magistrate is warranted. Other recommendations in the Committee’s Report suggest that adverse inferences can be drawn by a court if a person refuses to undergo such a procedure. I note that the Canadian Privacy Commissioner recommended that collection of DNA samples from suspects ‘must be authorised by a judge.’ The use of electronic communication to facilitate applications to magistrates and the availability of magistrates twenty four hours a day means that the argument that it is necessary to also use justices of the peace because magistrates are less available, carries little weight.

I recommend that a compulsory forensic procedure may be conducted under authority of a magistrate where such forensic procedure is likely to afford evidence of the offence for which the person is under suspicion.

Accordingly, wherever a Committee recommendation includes a reference to ‘an order from a magistrate or justice of the peace’, I dissent from that aspect of the recommendation and recommend that the reference only be to ‘an order from a magistrate’.

3. Comments to specific recommendations

- 3.1 Dissent from **Recommendation 27** - *‘that forensic procedures be available in respect of any indictable offence.’* Refer to paragraph 2.2. Subject to the substitution of ‘serious offence’ for ‘indictable offence’ I do not otherwise dissent from the recommendation.
- 3.2 Dissent from **Recommendation 32** - *‘has been convicted of an indictable offence.’* Refer to paragraph 2.2. Subject to the substitution of ‘serious offence’ for ‘indictable offence’ I do not otherwise dissent from the recommendation.
- 3.3 Dissent from **Recommendation 34d** - *‘an indictable offence’*. Refer to paragraph 2.2. Subject to the substitution of ‘serious offence’ for ‘indictable offence’ I do not otherwise dissent from the recommendation.
- 3.4 Dissent from **Recommendation 35** - that legislation *‘not require that a person be given the opportunity to communicate or attempt to communicate with a legal practitioner.’*

I believe that a person should be given the opportunity to communicate or attempt to communicate with a legal practitioner. The fact that existing legislation does not provide such an opportunity is, in my opinion, a failing in existing legislation that should be rectified rather than recreated in legislation regarding forensic procedures and DNA profiling. DNA profiling is a relatively new procedure that can potentially yield a full picture of a person’s genetic makeup. Access to legal advice is a reasonable right in such circumstances.

- 3.5 Dissent from **Recommendation 47** - *‘that compulsory forensic procedures be able to be conducted on:*
- a. a person under suspicion of having committed an indictable offence;*
 - b. a person who has been charged with an indictable offence; and*
 - c. a person who has been convicted of an indictable offence.’*

Refer to paragraph 2.2. Subject to the substitution of ‘serious offence’ for ‘indictable offence’ I do not otherwise dissent from the recommendation.

- 3.6 Dissent from **Recommendation 48** - *‘indictable offence’*. Refer to paragraph 2.2. Subject to the substitution of ‘serious offence’ for ‘indictable offence’ I do not otherwise dissent from the recommendation.

3.7 Dissent from **Recommendation 50** -

‘indictable offence’. Refer to paragraph 2.2. Subject to the substitution of ‘serious offence’ for ‘indictable offence’ I do not otherwise dissent from the recommendation.

‘compulsory forensic procedure ... may be conducted under authority of a magistrate or a justice of the peace.’ Refer to paragraph 2.3. Save and except for the substitution of ‘magistrate’ for ‘magistrate or a justice of the peace’ I do not otherwise dissent from the recommendation

3.8 Dissent from **Recommendation 51** - *‘indictable offence’*. Refer to paragraph 2.2. Subject to the substitution of ‘serious offence’ for ‘indictable offence’ I do not otherwise dissent from the recommendation

3.9 Dissent from **Recommendation 52** - *‘indictable offence’*. Refer to paragraph 2.2. Subject to the substitution of ‘serious offence’ for ‘indictable offence’ I do not otherwise dissent from the recommendation

3.10 Dissent from **Recommendations 60 and 61** - *‘power for the police to conduct a forensic procedure on a person who has been convicted of an indictable offence.’*

Refer to paragraph 2.2. In addition, in the case of a convicted offender the main justification for the taking of DNA samples is where serious crimes against the person have been committed and where there is a high rate of recidivism (such as sexual assault). There is in these cases, I believe, strong argument that the retention of DNA samples and profiles will act as a deterrent against re-offending. Given the seriousness with which the community views these offenses there is likely to be strong support for the requirement of DNA procedures, whereas the broader powers may be seen to intrude on the convicted person’s rights.

Subject to the substitution of ‘serious offence’ for ‘indictable offence’, I do not otherwise dissent from the recommendation.

3.11 Dissent from **Recommendation 64**

‘indictable offence’. Refer to paragraph 2.2. Subject to the substitution of ‘serious offence’ for ‘indictable offence’ I do not otherwise dissent from the recommendation.

‘reapply to a magistrate or a justice of the peace.’ Refer to paragraph 2.3. Subject to the substitution of ‘magistrate’ for ‘magistrate or a justice of the peace’ I do not otherwise dissent from the recommendation.

- 3.12 Dissent from **Recommendation 65** - *‘indictable offence’*. Refer to paragraph 2.2. Subject to the substitution of ‘serious offence’ for ‘indictable offence’ I do not otherwise dissent from the recommendation.

- 3.13 Dissent from **Recommendation 69** -

‘indictable offence’ Refer to paragraph 2.2. Subject to the substitution of ‘serious offence’ for ‘indictable offence’ I do not otherwise dissent from the recommendation.

‘magistrate or a justice of the peace.’ Refer to paragraph 2.3. Subject to the substitution of ‘magistrate’ for ‘magistrate or a justice of the peace’ I do not otherwise dissent from the recommendation

- 3.14 Dissent from **Recommendations 70 and 71** - that, in respect of children and incapable persons, the police officer’s responsibility being limited to a requirement that he or she must notify the relevant *“responsible person”*.

I recommend that, in addition to the requirement to notify, there be a requirement that a *“responsible person”* must be present prior to proceeding with any forensic procedures. In this respect I believe that the principles espoused by the *Young Offenders Act 1994* should be extended in practice. It is unlikely that a minor or an incapable person has the capacity to understand the forensic procedure they are being asked to submit to or the nature of the evidence they are providing. The presence of a *“responsible person”* provides an additional safeguard both for the suspect and the police officer.

- 3.15 Dissent from **Recommendation 76** - *‘a magistrate or a justice of the peace.’* Refer to paragraph 2.3. Subject to the substitution of ‘magistrate’ for ‘magistrate or a justice of the peace’ I do not otherwise dissent from the recommendation.

- 3.16 Dissent from **Recommendation 78** - that *‘the legislation not require that a person under suspicion of having committed an indictable offence be present or have legal representation at a hearing, to cross examine witnesses or to make a submission to the magistrate or justice of the peace.’*

I recommend that a person under suspicion should be entitled to be present or have legal representation at a hearing, to cross examine witnesses or make a submission

to the magistrate. I believe it is a reasonable expectation to have legal representation prior to being required to undergo any forensic procedure and that the suspect be able to challenge the ‘reasonable grounds’ on which such an application is being made.

‘a magistrate or a justice of the peace.’ Refer to paragraph 2.3. Subject to the substitution of ‘magistrate’ for ‘magistrate or a justice of the peace’ I do not otherwise dissent from the recommendation.

- 3.17 Dissent from **Recommendation 82** - *‘that an “authorised person” for the conduct of a forensic procedure involving the taking of a sample by buccal swab, should include a police officer who has been trained in the relevant procedure.’*

I recommend that an “authorised person” not include a police officer. Where a forensic sample is being taken without consent, the person is likely to experience this as a violation of his or her personal integrity. It is appropriate for such procedures to be carried out by a suitably qualified health care professional. This limitation also serves to reduce any perception or claims of police intimidation or coercion.

- 3.18 Dissent from **Recommendation 85** -

‘indictable offence’. Refer to paragraph 2.2. Subject to the substitution of ‘serious offence’ for ‘indictable offence’ I do not otherwise dissent from the recommendation.

‘a magistrate or a justice of the peace.’ Refer to paragraph 2.3. Subject to the substitution of ‘magistrate’ for ‘magistrate or a justice of the peace’ I do not otherwise dissent from the recommendation.

- 3.19 Dissent from **Recommendation 86** -

‘indictable offence’. Refer to paragraph 2.2. Subject to the substitution of ‘serious offence’ for ‘indictable offence’ I do not otherwise dissent from the recommendation.

‘a magistrate or a justice of the peace.’ Refer to paragraph 2.3. Subject to the substitution of ‘magistrate’ for ‘magistrate or a justice of the peace’ I do not otherwise dissent from the recommendation.

- 3.20 Dissent from **Recommendation 101** - *‘that any DNA analysis not be restricted to the non-coding parts of DNA.’*

I recommend that any DNA analysis be restricted to the non-coding parts of DNA.

Given that police and forensic scientists consistently claim they can obtain the necessary information for matching purposes from non-coding DNA and that they have no interest in the other parts, I believe the legislation should make it clear that coding information is not needed and will not be used. As the remaining DNA coding information is the part which is contentious in that it can be used to gain additional information about a person, then the legislation should make it clear that it prohibits the use, now or in the future, of that coded information. I note that Germany has adopted this approach.

- 3.21 Dissent from **Recommendation 131b** - '*a magistrate or a justice of the peace.*' Refer to paragraph 2.3. Subject to the substitution of 'magistrate' for 'magistrate or a justice of the peace' I do not otherwise dissent from the recommendation.

Hon Giz Watson MLC

Date: