

Standing Committee on Law and Justice

Review of the Crimes (Forensic Procedures) Act 2000

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Terms of Reference

- 1) The Committee of the Legislative Council established under the name of the “Standing Committee on Law and Justice” is to inquire into and report on the operation of this Act and the regulations.
- 2) The report is to be tabled in the Legislative Council as soon as possible after the end of the period of 18 months from the date of assent to this Act.
- 3) Without limiting the matters that the Committee may take into account for the purposes of its enquiry and report, it may take into account the following:
 - a) any relevant provisions of the Model Forensic Procedures Bill 1999 set out in Appendix 3 of the Discussion paper dated May 1999 prepared by the Model Criminal Code Officers Committee or of any State, Commonwealth or other law,
 - b) the wider social and legal implications of use of information obtained from matching of DNA profiles derived from forensic material,
 - c) the effectiveness of matching of DNA profiles as an investigative tool,
 - d) the reliability of the matching of DNA profiles for the purposes of forensic identification.
- 4) The Committee may make recommendations in its report about amendments that might appropriately be made to the Act to enhance its operation and provide further safeguards for the privacy and civil liberty of persons on whom forensic procedures are carried out, or proposed to be carried out, under the Act.
- 5) The Committee is to furnish a copy of the report to the Ombudsman for consideration.

These terms of reference were referred to the Committee by section 123 of the *Crimes (Forensic Procedures) Act 2000*.

Committee Membership

The Hon Ron Dyer Australian Labor Party Chair

The Hon John Ryan Liberal Party Deputy Chair

The Hon Peter Breen MLC Reform the Legal System Member

The Hon John Hatzistergos Australian Labor Party Member

The Hon Janelle Saffin Australian Labor Party Member

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Chair's Foreword

DNA technology is a useful weapon in the crime fighting armoury of law enforcement agencies. Overseas experience has shown that it can be used successfully both in prosecuting offenders, and in establishing the innocence of people wrongly suspected or convicted.

The use of DNA technology necessarily involves some interference with the civil liberties of individuals. Accordingly a balance needs to be struck between protecting the rights of the individual and society's law enforcement needs.

The Committee has endeavoured to carry out the most thorough review of the legislation possible, and has sought to make some balanced suggestions for improvements to enable the effective application of the legislation. The Committee's recommendations aim to ensure appropriate protections of civil liberties are maintained, while facilitating an efficient and unambiguous statutory framework for the use of DNA profiling for law enforcement and investigation.

I would like to thank all the individuals, organisations, departments and agencies that contributed submissions or gave evidence to the Committee. I note that the Police Service was particularly generous with their time, appearing at several hearings and providing detailed information. I would also like to thank the Committee Members for their participation and bipartisan approach to a lengthy and complex inquiry. Finally, I am grateful to the Committee Secretariat for the support provided during the Review. In particular, Ms Christine Lloyd was responsible organising the hearings and providing administrative support, Mr Bayne McKissock provided editing services, Mr Paul McKnight undertook initial research, and Ms Tanya Bosch provided research, advice and drafting assistance.

The Hon Ron Dyer MLC
Committee Chair

Executive Summary

Inquiry reference (Chapter 1)

Section 123 of the *Crimes (Forensic Procedures) Act 2000* requires the Committee to undertake a review of the operation of the Act, and report to Parliament as soon as possible after 18 months after the Act's assent. The terms of reference suggested by the Act and adopted by the Committee focus on the social and legal implications of the use of DNA profiling, and its reliability and effectiveness as an investigative tool. The Committee's review is one of three reviews required by the statute, the others being performed by the Ombudsman and the Attorney General. The Committee consulted widely, with 26 individuals and organisations responding to the Committee's call for submissions. Nine public hearings were held, with a total of 30 witnesses being examined.

Legislative and Policy Development (Chapter 2)

DNA analysis involves the creation of a profile of a small number of specific sites on the DNA molecule. In New South Wales, nine sites (plus the sex indicator) of the 3.3 billion subunits of DNA are analysed. Profiles are entered onto a database as a set of numbers and in this way can be compared with other profiles of crime scenes or individuals.

Following developments in the forensic use of DNA in Britain and elsewhere in the 1980s, Australia began examining its policies relating to forensic sampling. In 1990, the Standing Committee of Attorneys-General established the Model Criminal Code Officers Committee (MCCOC) to advise on a model national criminal code, and which was also requested to formulate a Model Forensic Procedures Bill. A lengthy consultation process followed, and a final draft MCCOC Bill was presented in February 2000. The New South Wales *Crimes (Forensic Procedures) Act 2000* closely follows the MCCOC Model Bill, although there are some differences.

Forensic Use of DNA (Chapter 3)

According to the evidence received by the Committee, DNA matching and the profiling system used in New South Wales produces very reliable results. It is accepted by the scientific community and the courts as an accurate tool for forensic identification. There is a general agreement, also, that a DNA match cannot on its own prove the guilt of a suspect. The possibility of laboratory contamination, errors in analysis, or intentional tampering means that a DNA match cannot be considered conclusive and requires corroborating evidence.

Moreover, as DNA profiles only examine nine sites on the DNA molecule, a profile cannot be assumed to be unique. Chance or coincidental matches of profiles, while very unlikely, cannot be claimed to be impossible. For this reason, the significance of a DNA match between a suspect and a crime scene needs to be determined through the calculation of the likelihood of a chance match (known as 'match probability'). There does not appear to be a consensus on the most effective means of calculating the probability of a coincidental match. As this is a crucial matter for the fair and effective use of DNA, the Committee recommends that the proposed State Institute of Forensic Sciences be required to examine the best method of calculating the significance of a match.

The Committee has also sought to address the possible danger of unsafe convictions that could result from inappropriate use of DNA evidence, and has asked that the Attorney General consider appropriate legislative amendment so that judges are required to warn juries about the risks of convicting on the basis of DNA evidence alone.

DNA matching is undoubtedly an extremely useful tool in criminal investigations. Its uses include the identification of suspects, the exclusion of suspects, and the linkage of otherwise unrelated crimes. The use of mass testing and database searches, however, was not universally supported by participants in this inquiry.

While the Committee has been able to obtain statistics relating to the use of DNA matching, and the numbers of links between suspects and crime scenes, there is insufficient material for the Committee to reach a conclusion about the impact and effectiveness of DNA matching. The Committee therefore recommends that the collation and analysis of such statistics be undertaken by the Bureau of Crime Statistics and Research.

Social and Legal Implications of DNA Testing (Chapter 4)

The authority to request or require a DNA sample from a suspect, offender or volunteer clearly represents a significant power of the State in relation to the individual. A number of civil liberties issues arise as a result.

Evidence and submissions to the Inquiry identified a number of areas potentially at risk as a result of DNA sampling powers. These include: the right to silence; the privilege against self incrimination; the right to privacy; and the right to a fair trial. The Committee makes several suggestions for the protection of the right to a fair trial, including Judicial Commission training of judicial officers about the forensic use of DNA and DNA analysis, and the inclusion of Continuing Legal Education courses on the interpretation of DNA evidence. The insertion in judicial Benchbooks of guidelines for directions to juries about the interpretation of DNA evidence is also recommended.

Safeguards: Restrictions on Obtaining Samples (Chapter 5)

The civil liberties concerns arising from the forensic use of DNA make the existence of strong safeguards crucial. One means by which the Act seeks to protect against misuse of DNA technology is by restricting the circumstances under which DNA samples can be requested or ordered. This is done through the creation of thresholds for ordering or requesting samples from suspects and offenders.

A large number of participants in the Inquiry were critical of the thresholds established by the New South Wales Act, which are lower than those recommended in the MCCOC Model Bill. In relation to sampling of suspects, critics argue that the NSW thresholds provide insufficient safeguards, and fail to provide guidelines for determining whether a request or order for a DNA sample is justified. After carefully considering the arguments put forward by the Police Service and by those witnesses dissatisfied with the current thresholds, the Committee determined that the higher threshold for suspects contained in the MCCOC Model Bill is preferable, and asked that the Attorney General consider amending the NSW Act accordingly. The Committee also considers that the Act would be improved through the incorporation of guidelines for officers and magistrates seeking to determine whether a DNA sample request is justified in all of the circumstances, as already is the case in the MCCOC Model Bill.

In considering the thresholds for requesting and ordering samples from offenders, the Committee examined evidence from the Police Service in support of lower thresholds for sampling serious indictable offenders, as well as from civil liberties groups, prisoner support groups and other stakeholders who suggest that the threshold for taking samples from offenders is excessively low. The Committee's conclusion is that the incorporation of a requirement for police officers to consider whether the DNA sampling order is 'justified in all of the circumstances' would improve the safeguards. Magistrates already are required to do so. The Committee also recommends the inclusion of guidelines for balancing the competing interests when considering making an order.

The provisions relating to obtaining samples from volunteers is a source of concern to many witnesses. The failure to proclaim Part 8 of the Act, dealing with requests for DNA samples from volunteers, is particularly troubling, and should be addressed as a matter of priority. Witnesses suggest that the non-proclamation of Part 8 could create uncertainty about the legal status of samples taken from volunteers. The absence of provisions for victims of crime was also identified by witnesses as a matter of concern. Improvements to the provisions for volunteers suggested include the creation of guidelines for requesting DNA samples from volunteers and victims of crime, and the creation of a threshold for voluntary mass screenings. The informed consent provisions are also addressed in Chapter 5.

The Act incorporates special protections for certain categories of vulnerable people, including children, indigenous people and people considered incapable of consenting to a procedure. The importance of the presence of a support person, or 'interview friend', for indigenous people and children or incapable people is emphasised in the evidence received. Access to legal advice is also crucial. In the case of child volunteers, the Act currently allows parents and guardians to consent on behalf of children aged between 10 and 18 years. Witnesses suggest that this is an unsatisfactory approach, and that allowing children to participate in the decision to consent to a procedure is more in step with current approaches to the rights of the child. In addition, it is proposed that older children aged 15 and above, have sufficient maturity to consent on their own behalf. The Committee agrees with these proposals.

Safeguards: Restrictions on the Use of DNA Profiles (Chapter 6)

Protections are also provided through restrictions on the use of DNA profiles. The DNA database is established, with offences created for placing on the database DNA profiles from unauthorised sources, and for the unauthorised supply of forensic material for analysis after the destruction date. The access to information on the database is regulated, and attempted matches are restricted.

The appropriateness of certain attempted matches was questioned during the Review, with the matching of suspects to the entire crime scene index a particularly contentious matter. The Committee considers that preventing the attempted matching of suspects and other crime scenes would excessively restrict the capabilities of DNA technology. However, the problem of whether relatives of missing persons should be matched against crime scenes should be further examined.

While the Act does provide offences for certain types of misuse of DNA profiles, a more comprehensive approach was suggested during the hearings. Witnesses indicated that a number of activities and uses of DNA profiles are not prohibited by the Act, including the collection of DNA samples other than pursuant to the Act, the analysis of samples taken or retained in breach of the Act, profiling for non-database purposes, and the establishment of any database not fitting the definition contained in the Act. The Committee agrees that this is a matter of concern, and recommends new provisions and offences to create a more complete regulatory approach.

Chapter 6 also examines the provisions relating to the destruction of profiles and samples, which according to some legal commentators are lax in that they permit the retention of profiles after the forensic sample is required to be destroyed because it has been ruled inadmissible. Noting that the Police Service agreed that the retention of profiles was unnecessary in such circumstances, the Committee recommends amendment of these provisions. The retention of samples and profiles following the exoneration of a suspect is also a source of criticism.

The final matter considered regarding the use of samples relates to admissibility in criminal proceedings. Under the current legislation, the exclusionary rules of evidence are the chief means of deterring illegal collection of DNA evidence. It was suggested to the Committee that, as a result, there should be stricter rules of admissibility, as the current provisions provide excessive scope to admit illegally obtained evidence. The Committee agrees with the approach recommended by Dr Gans in evidence, which would allow consideration of admission of evidence obtained as a result of minor breaches of the Act, but would exclude evidence gathered in contravention of the Act.

Drafting Matters (Chapter 7)

There is a general agreement among contributors to the Review that the drafting of the *Crimes (Forensic Procedures) Act 2000* is excessively complex, undermining clarity and preventing easy understanding of the provisions. Two specific areas of the Act in need of clarification are examined by the Committee. The numerous drafting errors identified by witnesses, will be forwarded to the Attorney General for consideration.

Summary of Recommendations

Recommendation 1 *Page 33*

The Committee recommends that the Government give priority attention to the creation of a State Institute of Forensic Sciences to, inter alia, manage the use of technology in criminal investigations and prosecutions.

The Committee further recommends that, should a State Institute of Forensic Sciences be established, it be requested to further examine methods of calculating the significance of DNA matches.

Recommendation 2 *Page 41*

The Committee recommends that the Attorney General give consideration to an appropriate legislative amendment to require judges to warn juries that DNA evidence is only one aspect of the evidence required to convict a person.

Recommendation 3 *Page 58*

The Committee recommends that an independent agency such as the Bureau of Crime Statistics and Research be requested and funded to collect data and report on the role of DNA in law enforcement success, including, but not limited to:

- the percentage of DNA database matches leading to arrests
- the percentage of DNA database matches leading to prosecutions
- the percentage of DNA database matches leading to convictions

Recommendation 4 *Page 59*

The Committee recommends that an independent agency such as the Bureau of Crime Statistics and Research be requested and funded to collect data and report on the impact of DNA evidence on criminal trials, including, but not limited to, their length and complexity.

Recommendation 5 *Page 60*

The Committee recommends that an independent agency such as the Bureau of Crime Statistics and Research be requested and funded to collect data and report on the impact of the use of DNA technology on crime rates.

Recommendation 6 *Page 66*

The Committee recommends that the Judicial Commission provide training of judicial officers in relation to the forensic use of DNA, its accuracy, and the interpretation of DNA evidence.

Recommendation 7 *Page 66*

The Committee recommends the inclusion of courses in interpreting DNA evidence as part of the Practical and Continuing Legal Education for solicitors, and as part of the Reading Period and Continuing Legal Education for barristers.

Recommendation 8 *Page 67*

The Committee recommends that the Attorney General seek to have guidelines for directions to juries about the interpretation of DNA evidence incorporated into the relevant judicial Benchbooks, including such matters as:

- the potential for fabrication and

- the possibility of match errors

Recommendation 9 Page 68

The Committee recommends that, as part of his Review under s.122 of the Act, the Attorney General consider examining the access of defendants to crime scene samples and the availability of funding to enable independent analysis to be undertaken by the defence.

Recommendation 10 Page 77

The Committee recommends that the Attorney General consider amending the *Crimes (Forensic Procedures) Act 2000* in conformity with the MCCOC Model Bill so that a suspect may be requested to consent to a forensic procedure if there are reasonable grounds to believe that the forensic procedure **is likely to** produce evidence tending to confirm or disprove that the suspect committed a prescribed offence. This provision would replace the current thresholds that state that a forensic procedure may be requested if it **might** produce evidence tending to confirm or disprove that the suspect committed a prescribed offence.

Recommendation 11 Page 77

The Committee recommends that the Attorney General consider amending the *Crimes (Forensic Procedures) Act 2000* in conformity with the MCCOC Model Bill so that a magistrate or senior police officer may *order* a forensic procedure if there are reasonable grounds to believe that the forensic procedure **is likely to** produce evidence tending to confirm or disprove that the suspect committed a prescribed offence. This provision would replace the current threshold that states that a forensic procedure may be ordered if it **might** produce evidence tending to confirm or disprove that the suspect committed a prescribed offence.

Recommendation 12 Page 78

The Committee recommends that the Attorney General consider amending the *Crimes (Forensic Procedures) Act 2000* to prohibit forensic procedures on suspects unless evidence producing a DNA profile has been found at the crime scene or on the victim.

Recommendation 13 Page 79

The Committee recommends that no additional offences be prescribed for the purpose of *prescribed offences* in section 3 of the *Crimes (Forensic Procedures) Act 2000*.

Recommendation 14 Page 79

The Committee recommends that the Attorney General remove the delegated legislation provisions in section 3 of the *Crimes (Forensic Procedures) Act 2000*.

Recommendation 15 Page 82

The Committee recommends that the Attorney General consider inserting balancing guidelines similar to those in section 8(2) and 8(3) of the MCCOC Model Bill into sections 12, 20 and 25 of the *Crimes (Forensic Procedures) Act 2000* to assist police officers and magistrates in determining whether a request or order for a DNA sample is justified in all of the circumstances.

Recommendation 16 Page 88

The Committee recommends that the Attorney General consider the amendment of the *Crimes (Forensic Procedures) Act 2000* to omit sections 71 and 74(6).

Recommendation 17 Page 89

The Committee recommends that the Attorney General consider the amendment of the *Crimes (Forensic Procedures) Act 2000* to insert a requirement that a police officer, in considering whether to order a compulsory forensic procedure on an offender, take into account whether the procedure is justified in all of the circumstances, as a magistrate is required to do pursuant to section 74(5).

Recommendation 18 Page 89

The Committee recommends that the Attorney General consider amending the *Crimes (Forensic Procedures) Act 2000* to insert guidelines for police officers and magistrates in determining whether a procedure on a serious indictable offender is justified in all of the circumstances.

Recommendation 19 Page 92

The Committee recommends that the *Crimes (Forensic Procedures) Act 2000* be amended, after consultation with stakeholders, to incorporate specific provisions for forensic procedures on victims of crime.

Recommendation 20 Page 92

The Committee recommends that the volunteer provisions of the *Crimes (Forensic Procedures) Act 2000* (as amended according to recommendation 19) be proclaimed as a matter of priority

Recommendation 21 Page 93

The Committee recommends that the Attorney General consider amending the *Crimes (Forensic Procedures) Act 2000* to provide that volunteers may be requested to consent to a forensic procedure only if the procedure is likely to be useful for the investigation of a prescribed offence.

Recommendation 22 Page 95

The Committee recommends that the consent information given to volunteers include information about what database indexes are available, and that volunteers be permitted to choose on which index (if any) their profile will appear.

Recommendation 23 Page 98

The Committee recommends that the Attorney General consider amending the *Crimes (Forensic Procedures) Act 2000* to require a court order before police can undertake voluntary mass screenings.

The Committee further recommends that, in determining an order for a voluntary mass screening, a judicial officer be required to be satisfied that the order is justified in all of the circumstances, taking into account whether a smaller number of potential suspects could instead be tested, and whether any other less intrusive means are available to further the investigation.

Recommendation 24 Page 102

The Committee recommends a plain English version of the consent information be drafted, and either provided to police officers by the Commissioner of Police, included in a Schedule to the *Crimes (Forensic Procedures) Act 2000*, or prescribed by regulation.

Recommendation 25 Page 107

The Committee recommends that the Attorney General consider abolishing the consent provisions for serious indictable offenders.

Recommendation 26 Page 108

The Committee recommends amendment of the volunteer consent provisions to ensure that volunteers are provided with the same level of consent information as suspects and offenders.

Recommendation 27 Page 111

The Committee recommends the establishment and funding of a 24-hour telephone legal advice hotline, run by the Legal Aid Commission, for access by persons requested to consent to a forensic procedure.

Recommendation 28 Page 112

The Committee recommends that the Attorney General consider amending the *Crimes (Forensic Procedures) Act 2000* to expressly abrogate the common law of consent.

Recommendation 29 Page 112

The Committee recommends that the Attorney General consider amending the *Crimes (Forensic Procedures) Act 2000* to clarify that consent cannot be assumed from a suspect's silence or compliance.

Recommendation 30 Page 113

The Committee recommends the amendment of the consent information to advise a suspect that a refusal to consent is not admissible as evidence, and that the making of a court order is discretionary.

Recommendation 31 Page 114

The Committee recommends that the *Crimes (Forensic Procedures) Act 2000* be amended to distinguish between self-administered buccal swabs and buccal swabs administered by another person.

The Committee further recommends that self-administered buccal swabs be classified as a non-intimate sample, and that buccal swabs administered by another person be classified as an intimate procedure.

Recommendation 32 Page 115

The Committee recommends that the *Crimes (Forensic Procedures) Act 2000* be amended to specify that hair samples must be taken one strand at a time.

Recommendation 33 Page 117

The Committee recommends that the Attorney General amend section 10 of the *Crimes (Forensic Procedures) Act 2000* to have the informed consent provisions for Aboriginal persons and Torres Strait Islanders apply where a police officer intends to ask a suspect to consent to a forensic procedure **and the person identifies themselves as an Aboriginal person or Torres Strait Islander**.

Recommendation 34 Page 122

The Committee recommends that the Attorney General consider amending the *Crimes (Forensic Procedures) Act 2000* to provide criteria upon which a suspect or offender's interview friend may be rejected by police.

The Committee recommends that in any case where an interview friend has been rejected, an alternative interview friend should attend before procedures continue.

Recommendation 35 Page 123

The Committee recommends that the Attorney General consider amending section 55(3) of the *Crimes (Forensic Procedures) Act 2000* to clarify that the waiving of rights to an interview friend does not prevent the attendance of a legal representative, and that the waiving of rights to a legal representative does not prevent the attendance of an interview friend.

Recommendation 36 Page 124

The Committee recommends that the Attorney General review the current funding levels of the Aboriginal Legal Service to ensure that it is adequately resourced to fulfil its role in relation to indigenous suspects requested or ordered to undergo a forensic procedure.

The Committee further recommends that the Police Service ensure that police officers are aware of the requirements relating to advising Aboriginal Legal Services of indigenous suspects who are requested to provide a forensic sample.

Recommendation 37 Page 125

The Committee recommends that the Attorney General amend section 10 of the *Crimes (Forensic Procedures) Act 2000* so that, in the case of Aboriginal and Torres Strait Islander suspects, notification of an Aboriginal Legal Aid organisation is not required by police **only if**:

- the suspect has arranged for a legal practitioner to be present while the suspect is asked to consent to the forensic procedure, or
- the suspect has waived the right for a legal practitioner to be present while the suspect is asked to consent to the forensic procedure.

Recommendation 38 Page 130

The Committee recommends that the Attorney General consider amending the child volunteer provisions so that all children are provided with the consent information before a decision is made about whether the child will volunteer to undergo a forensic procedure.

Recommendation 39 Page 130

The Committee recommends that the Attorney General consider amending the child volunteer provisions for children aged between 10 years and 14 years to require the consent of both the child and the parent before a forensic procedure can be performed on the child.

The Committee further recommends that the Attorney General consider amending the child volunteer provisions for children aged between 15 and 17, allowing them to consent on their own behalf.

Recommendation 40 Page 132

The Committee recommends that the Attorney General consider amending section 74(2) to clarify that only children who are serving a sentence of imprisonment for a serious indictable offence are eligible to be required to provide a DNA sample.

Recommendation 41 Page 132

The Committee recommends that the Attorney General consider amending the *Crimes (Forensic Procedures) Act 2000* to enable forensic procedures to be performed on children under the age of 10 years to obtain evidence if they are victims of crime.

Recommendation 42 Page 134

The Committee recommends that the Attorney General consider the appropriateness of amending section 356F of the *Crimes Act 1900* to allow forensic procedures to be classified as a “time-out” of an investigation period.

Recommendation 43 Page 136

The Committee recommends the Attorney General amend the following sections of the *Crimes (Forensic Procedures) Act 2000*:

- section 51 – to clarify that a buccal swab is not required to be carried out by a person of the same sex as the subject
- section 57 – to clarify that a suspect may object to both an audio and video recording of a procedure
- sections 69 and 70 – to clarify that a only senior police officer may order a forensic procedure on a serious indictable offender
- section 98(1) – to allow a telephone interpreter service to be used where an interpreter is required.

Recommendation 44 Page 143

The Committee recommends that the Attorney General seek to address the problem of matching crime scenes and DNA profiles of relatives of missing persons.

Recommendation 45 Page 143

The Committee recommends that the Attorney General develop provisions regulating the databasing of victims’ DNA profiles that ensures that matches are not attempted between victims’ profiles and any other crimes.

Recommendation 46 Page 148

The Committee recommends that the Attorney General amend the *Crimes (Forensic Procedures) Act 2000* to prohibit: the collection of DNA samples other than pursuant to the Act; analysis of samples taken or retained in breach of the Act; profiling for non-database purposes; establishment of any database not fitting the definition of section 90; unauthorised access to the database; unauthorised matching and non-database matching; and non-database storage of profiles

Recommendation 47 Page 149

The Committee recommends that the Attorney General consider removing the delegated legislation provisions of section 92(2)(j).

Recommendation 48 Page 151

The Committee recommends that the Attorney General amend the *Crimes (Forensic Procedures) Act 2000* to require that both the profile **and** the forensic sample be destroyed if evidence is ruled inadmissible, subject to the Court ordering otherwise.

Recommendation 49 Page 152

The Committee recommends that the Attorney General amend the *Crimes (Forensic Procedures) Act 2000* to require the destruction of the forensic sample and DNA profile of offenders whose convictions are quashed.

Recommendation 50 Page 154

The Committee recommends that the Attorney General amend the *Crimes (Forensic Procedures) Act 2000* to require that both the forensic sample and the profile be destroyed when the suspect's profile does not match the crime scene profile, charges are not laid or proceedings do not commence within 12 months, the suspect is acquitted, or the suspect is convicted but the conviction is not recorded.

Recommendation 51 Page 158

The Committee recommends that the Attorney General amend the *Crimes (Forensic Procedures) Act 2000* to provide that evidence gathered in contravention of that Act is inadmissible, while retaining the balancing test of section 82(5) for admission of evidence obtained with minor breaches of the requirements of the Act.

Recommendation 52 Page 159

The Committee recommends that the Attorney General amend the *Crimes (Forensic Procedures) Act 2000* so that, after a profile is ruled inadmissible, no further DNA samples may be taken from the defendant for the purpose of prosecution of the same criminal act or acts.

Recommendation 53 Page 161

The Committee recommends that the Attorney General consider amendments to address the drafting problems identified by Dr Gans and Justice Action in their submissions to this Review.

Recommendation 54 Page 163

The Committee recommends that the Attorney General amend sections 12, 20 and 25 of the *Crimes (Forensic Procedures) Act 2000* to make the provisions clearer and easier to understand.

Recommendation 55 Page 165

The Committee recommends that the Attorney General amend the definition of forensic procedure in section 3 to clarify the prohibition on intrusion into a person's body cavities and of forensic procedures taken for the sole purpose of establishing a person's identity.

Recommendation 56 Page 165

The Committee recommends that the Attorney General amend the definition of 'permitted forensic material' in section 91(3) to clarify whether forensic material taken from a victim is permitted forensic material.

Chapter 1 Introduction

Reference to the Committee

1.1 The *Crimes (Forensic Procedures) Act 2000* received assent on 5 July 2000. Section 123 of the Act requires the Standing Committee on Law and Justice to enquire into and report on the operation of the Act and the regulations. The terms of reference adopted by the Committee on 11 April 2001, are those that appear in section 123(3):

- (3) Without limiting the matters that the Committee may take into account for the purposes of its enquiry and report, it may take into account the following:
 - (a) any relevant provisions of the Model Forensic Procedures Bill 1999 set out in Appendix 3 of the Discussion paper dated May 1999 prepared by the Model Criminal Code Officers Committee or of any State, Commonwealth or other law
 - (b) the wider social and legal implications of use of information obtained from matching of DNA profiles derived from forensic material
 - (c) the effectiveness of matching of DNA profiles as an investigative tool
 - (d) the reliability of the matching of DNA profiles for the purposes of forensic identification.
- (4) The Committee may make recommendations in its report about amendments that might appropriately be made to the Act to enhance its operation and provide further safeguards for the privacy and civil liberty of persons on whom forensic procedures are carried out, or proposed to be carried out, under the Act.
- (5) The Committee is to furnish a copy of the report to the Ombudsman for consideration.

1.2 The Act requires the Committee to report as soon as possible after 18 months from assent of the Act (that is, after 5 January 2002).

Conduct of this Inquiry

1.3 Advertisements seeking submissions to the Inquiry were placed in major metropolitan newspapers on 21 April 2000. The Chair also wrote to a number of groups and individuals with particular knowledge or interest in the forensic use of DNA, informing them of the review and inviting them to make submissions. The people and organisations written to included lawyers and legal organisations, civil liberties groups, government agencies, academics, welfare and community organisations, prisoner support groups and Aboriginal organisations. Relevant ministers were also invited to make a submission, and notices were placed on information boards in all correctional centres in New South Wales.

- 1.4** The closing date for submissions was originally 4 June 2001. However, as a result of a delay in notifying prisoners of the Review, the Committee extended the closing date by one month to allow sufficient time for prisoners to make a submission.
- 1.5** A total of 26 submissions were received by the Committee, as listed in Appendix One. The Committee held nine public hearings to obtain evidence for the Review, beginning with a comprehensive briefing on the scientific aspects of DNA on 26 July 2000. Further hearings followed on 31 July, 7 August, 8 August, 14 August, 15 August, 29 August, and 24 September. The Police Service appeared a second time on 29 October 2001, to address matters raised at previous hearings, and to sum up their position on the Act. Details about the hearing dates and witnesses appears at Appendix Two.
- 1.6** The Chair's draft report was prepared during November and December 2001 and January 2002. It was circulated to Committee Members in early February 2001, and the Committee met to consider the report at a deliberative meeting on 5 February 2002. Appendix Three contains the Minutes of Proceedings of that meeting.
- 1.7** The Committee notes that the regulation of forensic procedures by *Crimes (Forensic Procedures) Act 2000* includes forensic procedures that do not produce DNA, such as swabs to detect gunshot residue, or photographing a wound. However, the key points of contention arising from the *Crimes (Forensic Procedures) Act 2000* relate to the collection of DNA samples, and this has been the focus of the Committee's review.
- 1.8** The Committee also is aware that two other reviews of the Act are underway, or will shortly be undertaken. These are the Attorney General's review of the Act, required under section 122, and monitoring of the operation of the Act by the Ombudsman for two years pursuant to section 121 of the Act. This Committee sought not to include in this Report topics likely to be covered by the Ombudsman or the Minister. Several matters brought to the attention of the Committee are referred to the Minister for more detailed examination as part of his Review.

Structure of this Report

- 1.9** The terms of reference have been incorporated into the Report in the following way. The first item, referring to the Model Forensic Procedures Bill, is addressed as part of the historical overview of the development of policy and legislation about DNA technology in Chapter Two.
- 1.10** Chapter Three, which focuses on the science of DNA profiling, includes an examination of the effectiveness and reliability of the technology, as required by terms of reference (c) and (d).
- 1.11** The social and legal implications of the use of DNA profiles (item (b) of the terms of reference) are broadly addressed in Chapters Four, Five and Six. Chapter Four provides an analysis of the civil liberties issues arising from DNA technology, while Chapters Five and Six assess the safeguards in place. Recommendations are proposed that seek to address perceived shortcomings in the protections provided by the Act.

- 1.12** The report concludes with Chapter Seven, a brief examination of issues relating to the drafting of the *Crimes (Forensic Procedures) Act 2000*.

Chapter 2 Legislative and Policy Development

This Chapter briefly explains DNA and its use in investigations, traces the development of policy and legislation relating to the forensic use of DNA, and offers an overview of legislation in Australia and overseas.

What is DNA?

- 2.1** The information provided here is by no means a comprehensive explanation of the science of DNA or DNA profiling, but seeks to provide enough background information to enable understanding of the following discussions on the implications of DNA evidence.
- 2.2** The Committee was fortunate in receiving a detailed briefing from Ms Linzi Wilson-Wilde, a Forensic DNA Specialist with the NSW Police Service's Forensic Services Group. The following sections are based on information provided by Ms Wilson-Wilde at the Committee's hearing.¹
- 2.3** DNA stands for DeoxyriboNucleic Acid, and is described as the blueprint for life. DNA is found in every nucleated cell in the body (that is, every cell that has a nucleus – which excludes red blood cells). DNA carries the body's genetic information in the form of a code, which determines the physical characteristics of each individual, and directs chemical processes. There are approximately 3.3 billion pieces of code.
- 2.4** There are two types of DNA used in forensic analysis: mitochondrial DNA and nuclear DNA. Mitochondrial DNA, found in the mitochondria of a nucleated cell, is less useful for forensic identification, as it is more expensive to analyse and is not unique to each individual. Mitochondrial DNA is inherited through the maternal line as an exact copy. All children of the same mother therefore have identical mitochondrial DNA as each other and as their mother, her mother and so on.
- 2.5** Nuclear DNA, however, is inherited from both the father and the mother, in random combinations. Siblings' nuclear DNA are similar, but not the same, except for identical twins.

What is DNA Profiling?

- 2.6** Forensic analysis of DNA involves the creation of a profile of specific sites on the DNA molecule. **A DNA profile is not a profile of all of the 3.3 billion subunits of DNA.** The number of sites, or loci, examined can vary depending on the system used. The Profiler Plus system is most commonly used in Australia, and it examines 9 sites, plus the sex indicator.
- 2.7** Ms Wilson-Wilde described the analysis process:

¹ Wilson-Wilde, Evidence, 26 July 2001.

We look at specific sites ... The sites vary in length with different people. The technique we use to analyse DNA centres on analysing and measuring the differences in length. The sites that we look at are called short tandem repeats [STR] and they are short lengths or pieces of DNA that are repeated end on end...so you get a particular length of DNA, depending on how many times that short code repeats itself. Different people have different numbers of repeating units. If the code repeats four times we call that a “4” and if it repeats six times we call it a “6”, and so we end up with numbers ²

2.8 The DNA profile created by the analysis is a set of numbers, which can be entered onto a database. An example of a typical DNA profile is:

XY 15,15 17,18 21,22 13,13 29,30 13,14 11,12 11,12 10,11

2.9 As Ms Wilson-Wilde explained to the Committee, each of the numbers refer to the number of repeat units at each of the nine short tandem repeat (STR) sites. The first site, XY in the above example, refers to the sex of the person, although it gives a strong indication of sex rather than a definitive result.

2.10 The nine sites examined in DNA analysis do not impart any information about a person, apart from the indication of the sex. The sites are sometimes described as the “junk” areas of the DNA, providing insulation, but no genetic information. Therefore, a DNA profile does not supply information about race, hair colour, eye colour, height or predisposition to disease.

2.11 DNA profiles can be obtained from biological samples, including those found at crime scenes, on victims, or on items touched by the offender. Ms Wilson-Wilde explained:

DNA is found in blood, semen, hair, skin, faeces, urine, vomit, bone marrow and cells present in saliva, sweat and tears. Saliva may be found on cigarette butts, chewing gum, masks and balaclavas, stamps and envelopes. Sweat or skin may be found on clothing and items handled.³

2.12 Not all biological samples will provide a DNA profile: it varies for different material. Blood has a 90% chance of producing a DNA profile, saliva on a balaclava has a success rate of 43%, on a cigarette butt it is 67%, on a weapon handle has a success rate of 17%. Hairs have a 25% success rate in producing a DNA profile, largely because hair that falls out is dead at the roots and a DNA profile is difficult to get. Hair that is plucked has a far better success rate.⁴

2.13 Once the DNA profile is entered onto the database, it can be compared with other profiles on the system. A suspect’s profile can thus be compared with a crime scene sample, or crime scene samples can be compared with each other.

² Evidence, 26 July 2001, pp 1-2.

³ *ibid*, p 13.

⁴ *ibid*.

The History of Forensic use of DNA

- 2.14** The first use of DNA evidence in a criminal investigation was in England in 1986. The case involved two homicides, which the police believed to have been perpetrated by the same offender. A suspect had confessed to one of the homicides, but denied having committed the other. The police sought assistance from Professor Jeffrey from nearby Leicester University, who had been researching DNA. Professor Jeffrey's results showed that the crimes were likely to have been committed by the same person, but that the suspect who had confessed was not the offender. A subsequent mass screen of the nearby villages was undertaken. The perpetrator was identified after he persuaded a friend to provide the blood sample for him, and the friend later reported it.⁵
- 2.15** In 1992, Britain examined the use of DNA evidence more generally, and in 1995 it passed legislation empowering police to take a DNA sample. This legislation is briefly examined further below in paragraph 2.77.
- 2.16** Australian jurisdictions began reviewing policy in relation to taking forensic samples as early as 1975, when the Law Reform Commission reported on Criminal Investigations. Inquiries with a more specific focus on DNA evidence have included the Victorian Coldrey Report on Police Powers of Investigation in 1987, and Gibbs Report on Medical Examinations in 1991.⁶ The Australian Police Ministers Council also examined the need for a DNA database.
- 2.17** In 1990, the Standing Committee of Attorneys-General (SCAG) established the Model Criminal Code Officers Committee (MCCOC) to advise on the development of model criminal law for adoption on a national basis. The MCCOC was also requested to formulate model criminal procedural provisions, including a Model Forensic Procedures Bill.
- 2.18** The first draft of the MCCOC Model Forensic Procedures Bill was circulated for comment in 1994. Following extensive consultation, the Model Bill was redrafted in 1995 and 1999, before a final Model Bill was agreed upon in 2000.⁷
- 2.19** The Terms of Reference for this Review enable the Committee to comment on "any relevant provisions" of the May 1999 draft of the Model Bill. However, as this draft has been superseded by the 2000 draft, it will be more appropriate for the Committee to focus on the later draft. The following section provides a brief overview of the Model Bill. Further analysis of specific provisions occurs in later sections of the Report.

⁵ Robin Napper, "A National DNA Database: The United Kingdom Experience", *Australian Journal of Forensic Sciences*, Vol 32, 2000, pp 65-66.

⁶ The Australian Law Reform Commission, *Criminal Investigation*, Report No 2 (AGPS 1975); and *Review of Commonwealth Criminal Law*, Fifth Interim Report, June 1991; both cited Submission 12, 12 June 2001, p 3.

⁷ MCCOC, *Model Forensic Procedures Bill and the Proposed National DNA Database*, February 2000 and May 1999.

The MCCOC Model Bill ⁸

2.20 The Model Bill has the following key features:

- powers to request or require forensic procedures on three distinct groups of people: suspects, convicted persons, and volunteers
- procedures for undertaking forensic procedures, including safeguards for the person on whom the procedure is undertaken
- evidentiary rules for improperly obtained evidence from forensic procedures
- the establishment of a DNA database and
- a scheme for interstate jurisdiction.

2.21 An important feature of the Model Bill is its differentiation between *intimate* and *non-intimate* procedures. If a procedure is *intimate*, heightened safeguards apply to carrying it out, and it may only be undertaken by informed consent or judicial order.

2.22 In the Model Bill, *non-intimate* procedures are:

- examining, photographing, or taking a sample from a part of the body, except for certain intimate areas (see below)
- taking a hair sample, other than pubic hair
- taking a sample from or from under a finger or toe nail, and
- taking a hand, finger, foot or toe print.

2.23 *Intimate* procedures are:

- external examination of, photographing, or taking samples from, the genital or anal areas, the buttocks or the female breasts
- taking blood
- taking pubic hair
- taking a dental impression, and
- taking a sample of saliva by buccal (or mouth) swab.

⁸ The following overview of the final draft of the Model Bill is taken from MCCOC, *Model Forensic Procedures Bill and the Proposed National DNA Database – Final Draft*, February 2000.

Forensic procedures by consent

- 2.24** In the case of suspects and offenders, a forensic procedure may be performed after the suspect or offender has given informed consent, or without consent by order of a judicial officer or a police officer.
- 2.25** A police officer may request a suspect to consent to a procedure if there is reasonable suspicion that the person committed a prescribed offence, there are reasonable grounds to believe the procedure is likely to provide evidence of an offence, if the person is not a child or incapable person, and if the request is justified in all of the circumstances after balancing the public interest in obtaining the evidence against the public interest in maintaining the physical integrity of the suspect.
- 2.26** A police officer may request an offender (who is not a child or incapable person) to consent to a procedure if it is justified in all of the circumstances.

Forensic procedures on suspects without consent

- 2.27** Where a suspect will not consent to a procedure, a police officer may order a non-intimate procedure if the suspect is in lawful custody, there are reasonable grounds that the suspect committed a prescribed offence, there are reasonable grounds to believe the procedure is likely to produce evidence, and the procedure is justified in all of the circumstances after balancing the public interests.
- 2.28** For an intimate procedure to be performed on a suspect without consent, a magistrate's order is required. A magistrate's order is also required for any procedure on a child or incapable person, whether suspect or offender.

Forensic procedures on offenders without consent

- 2.29** If an offender refuses to consent to a procedure, a police officer may order a non-intimate procedure to take place without the offender's consent if it is justified in all of the circumstances, and after considering the seriousness of the circumstances surrounding the offence.
- 2.30** A magistrate's order is required to perform an intimate procedure on an offender, again if it is justified in all of the circumstances, and after considering the seriousness of the circumstances surrounding the offence.

Volunteers

- 2.31** Volunteers who are not children or incapable persons may give informed consent to an intimate or non-intimate procedure. If the person is a child or incapable person, a parent or guardian may give informed consent on their behalf. A magistrate may also give consent on behalf of a child or incapable person, in some circumstances. If the child or incapable person objects to the procedure, it may not be carried out, whether or not a parent, guardian or magistrate has given consent.

2.32 Under the provisions of the Model Bill, volunteers may undergo forensic procedure for *limited* purposes, or *unlimited* purposes. If they provide samples for limited purposes, those samples may only be used for that purpose (for example, the investigation of a specific offence). If they provide samples for unlimited purposes, it may be used more generally and will be put on a database (see database matching rules below).

DNA database

2.33 The Model Bill establishes a DNA database, with different categories of samples collected into separate indexes. These are:

- crime scene index, containing profiles obtained from crime scenes, including from the bodies of victims of crime
- missing persons index, containing profiles of missing persons or their relatives
- an unknown deceased persons index
- a serious offenders index, containing profiles of offenders
- a volunteers unlimited purpose index, containing profiles from volunteers who have agreed to have their profile used for investigating any criminal offence, and from known deceased persons
- volunteers limited purpose index, containing volunteers' profiles that may only be used for a specific purpose, and
- a suspects index.

2.34 Rules are established as to which index may be matched against another. For example, the suspects index and the offenders index can be matched against the crime scene index to uncover any links between crime scenes and suspects or offenders.

2.35 Participating jurisdictions in Australia may enter into arrangements to share information on databases of DNA profiles, providing their forensic procedures legislation substantially correspond to the Model Bill.

Other key provisions

2.36 Safeguards are in place relating to the way in which the procedures are carried out. These include:

- providing reasonable privacy
- having certain procedures carried out only by a person of the same sex
- videotaping the procedure

- the presence of an interview friend for a child or incapable person
- prohibiting cruel, inhuman and degrading treatment, and
- providing the subject with part of the sample for their own analysis.

2.37 Samples that have been improperly obtained will be inadmissible, unless the person does not object, or the court considers it desirable on the balance of probabilities that the evidence should be admitted. Evidence from samples which should have been destroyed are inadmissible in all circumstances.

The Crimes (Forensic Procedures) Act 2000 (New South Wales)

2.38 The New South Wales Act, which is largely based upon the Model Bill, is overviewed below. Particular provisions are examined in greater detail in later sections of the Report.

2.39 The Act regulates police powers to perform forensic procedures on suspects, offenders and volunteers. While the Model Bill identifies two types of forensic procedures (intimate and non-intimate), the NSW Act recognises three types, placing buccal swabs in a separate category of its own in addition to intimate and non-intimate procedures. The provisions for buccal swabs are virtually the same as those for intimate procedures.

Forensic procedures on suspects (Part 3)

2.40 A forensic procedure may be carried out on a suspect with the suspect's informed consent. It is not necessary for a suspect to be under arrest or to have been charged: a suspect includes any person whom a police officer suspects on reasonable grounds to have committed an offence. Children and incapable persons (an adult incapable of consenting to or understanding the nature of a procedure) are not able to give informed consent.

2.41 An officer may request consent to a forensic procedure if there are "reasonable grounds to believe that the forensic procedure might produce evidence tending to confirm or disprove that the suspect committed a prescribed offence" (s 12).

2.42 Where a suspect does not or cannot consent to a forensic procedure, it may be performed by order of a senior police officer or an authorised justice. A senior police officer may order a *non-intimate* procedure to be performed without consent if there are reasonable grounds to believe that the suspect committed an offence, and that there are reasonable grounds to believe that the forensic procedure might produce evidence probative of the offence, and that the procedure is justified in all of the circumstances.

2.43 A magistrate or other authorised justice may order an intimate procedure, a non-intimate procedure, or a buccal swab to be performed. All forensic procedures on children and incapable persons require an order by an authorised justice. As with a police order, an authorised justice must consider that there are reasonable grounds to believe the procedure might produce evidence of a probative value, and that the carrying out of the procedure is justified in all of the circumstances.

Forensic procedures on serious indictable offenders (Part 7)

- 2.44** A non-intimate forensic procedure may be carried out on a serious indictable offender by informed consent or by order of a police officer. An intimate forensic procedure or a buccal swab may be carried out on a serious indictable offender by informed consent or by court order. All forensic procedures on children or incapable persons who are offenders can only be performed following a court order.

Forensic procedures on volunteers (Part 8)

- 2.45** Volunteers (that is, persons who are not suspects or offenders) may have a forensic procedure carried out on them following informed consent. Children are considered to be volunteers if their parents or guardians consent on their behalf. Where a parent or guardian will not consent on behalf of the child, a court may order it.

Rules for carrying out forensic procedures (Part 6)

- 2.46** The Act prescribes general rules for carrying out forensic procedures. These include that a suspect may not be questioned during the procedure and that the suspect must be cautioned before the procedure is undertaken. The Act specifies who may carry out the different forensic procedure (usually a medical practitioner, a nurse, or an appropriately qualified police officer or person), and requires that certain intimate procedures be carried out by a person of the same sex if practicable.
- 2.47** Division 4 specifies who may be present while a forensic procedure is being carried out. Aborigines, Torres Strait Islanders, children, and incapable persons should have an interview friend present if practicable. A subject may also request the presence of a particular medical practitioner or dentist for certain procedures.

Consent provisions

- 2.48** The Act details the information that must be provided when seeking consent from suspects, offenders and volunteers. This varies for the different categories, but includes such information as the purpose of the forensic procedure, the way it will be carried out, and the right to refuse consent. A suspect or offender must be given the opportunity to communicate or attempt to communicate with a legal practitioner.
- 2.49** Aborigines and Torres Strait Islanders, children and incapable persons are entitled to the presence of an interview friend when being asked to consent to a procedure.

Other provisions

- 2.50** Part 9 of the Act relates to admissibility of DNA evidence. As with the Model Bill, DNA evidence that is obtained in contravention of the Act may be inadmissible in court proceedings, unless the court considers that the desirability of admitting the evidence outweighs the undesirability of admitting it.

- 2.51** Under Part 10, forensic material must be destroyed after:
- the suspect is acquitted
 - the conviction is quashed
 - no conviction is recorded
 - where forensic material is taken from a suspect but no proceedings have been instituted after 12 months
 - the proceedings have been discontinued or
 - the evidence is ruled inadmissible.
- 2.52** Part 11 authorises the retention of DNA profiles on a database system, and regulates the database's use. Certain offences are created relating to unauthorised recording, retention or removal of identifying information on the database.
- 2.53** Under Part 12, database information can be shared with interstate jurisdictions that have similar forensic procedure and database laws.

Key Differences between the NSW Act and the Model Bill

Matters to be considered in decision-making

- 2.54** Both the Model Bill and the NSW Act prescribe the matters to be considered by the police officer or magistrate before requesting or ordering a procedure, but the considerations required are different.
- 2.55** The Model Bill requires that the police officer be satisfied that the procedure *is likely to* produce evidence tending to confirm or disprove the suspect committed the relevant prescribed offence. However, under the NSW Act, it is sufficient that the police officer is satisfied that the procedure *might* produce evidence tending to confirm or disprove the suspect committed the relevant prescribed offence. This is clearly a lesser test and easier to satisfy.
- 2.56** While both the Model Bill and the NSW Act require that the request or order be “justified in all the circumstances”, the Model Bill identifies a range of factors that must be taken into account. The NSW Act provides no such guidelines.
- 2.57** The suspect provisions of the NSW Act also contain special safeguards in relation to seeking informed consent of Aboriginal persons or Torres Strait Islanders. These include the right to have friend present during the consent interview and the procedure, and a requirement to inform an Aboriginal legal aid organisation that a request to consent to a forensic procedure may be made.

The power to take samples from serious offenders

- 2.58** Under both the NSW law and the Model Bill “serious offenders”, that is people convicted of offences carrying a penalty of 5 years imprisonment or more, may be requested or ordered to provide a sample for the database.
- 2.59** The Model Bill, however, has a broader scope for the power it contains, and appears to require a more considered application.
- 2.60** Under the NSW law, sample taking is limited to those serious offenders who are currently serving their sentence in prison for that serious offence. The Model Bill allows samples to be taken from serious offenders who are not currently in prison for a serious offence. They may have been released, be in prison for some other offence, or they may never have been sentenced to imprisonment.
- 2.61** Under the Model Bill, before seeking the informed consent of the offender, the police officer seeking the procedure must be satisfied that the request is justified in all the circumstances. No such requirement exists at NSW law, where the power to seek consent for non-intimate procedures on serious offenders is unrestricted.
- 2.62** If consent is not obtained, a police officer or a court may grant an order for a forensic procedure, after considering:
- whether the sample could be obtained under the Bill’s provisions in the absence of the order
 - the seriousness of circumstances surrounding the offence, and
 - whether the carrying out of the procedure without consent is justified in all of the circumstances.
- 2.63** In New South Wales, by contrast, a senior police officer may make an order after considering just one factor: whether the Act would authorise the forensic procedure in the absence of the order. This appears to be meaningless, as the Act does not authorise procedures except by consent or by order. In effect, in New South Wales, as long as an offender has been convicted and is in prison, a sample can be sought and obtained.

Legislation in other Australian Jurisdictions

- 2.64** In this section, the forensic procedures legislation of other Australian jurisdictions are examined. The different jurisdictions have adopted the Model Bill in varying degrees, and can be seen to fall loosely into three groups:
- those that closely follow the Model Bill: New South Wales, the Commonwealth and the ACT
 - those that follow the Model Bill in some respects: Tasmania, Victoria and South Australia, and

- those that do not follow the Model Bill at all: Queensland, Northern Territory and Western Australia.

2.65 These are outlined below, with particular emphasis on divergences from the Model Code.

The Commonwealth and the ACT

2.66 The Commonwealth is probably the closest jurisdiction to the Model Bill. Part 1D of the *Crimes Act 1914* (as most recently amended by the *Crimes Amendment (Forensic Procedures) Act 2001*) provides the relevant law. The key differences from the Model Bill are:

- a suspect may be requested or required by order to undergo a forensic procedure if, among other factors, the suspect is suspected of an indictable offence (rather than an offence with a penalty of 2 or more years in prison, as provided for by the Model Bill)
- special safeguards are created for suspects and offenders who are Aboriginal persons or Torres Strait Islanders
- there are links between the forensic testing regime for suspects and the detention for investigation provisions, especially the time limits
- there is a requirement that convicted offenders who are ordered to provide samples must be in prison or otherwise “under sentence” – on parole, or subject to some other form of order that forms part of their sentence. Not all previously convicted people are subject to the power as is the case in the Model Bill.

2.67 The ACT legislation differs in other ways:

- it classifies buccal swabs as non-intimate, and
- it applies the suspect power and the serious offenders power to “serious offenders”. This is defined as those suspected or convicted of an indictable offence under ACT law, or an offence carrying a penalty of 2 years or more in prison under the law of another participating jurisdiction.

Tasmania, Victoria, and South Australia

2.68 The *Tasmanian Forensic Procedures Act 2000* is broadly consistent with the scheme of the Model Bill, and in some respects is closely aligned to it. However, its provisions are more concise and several key differences arise.

2.69 The notable features of the Tasmanian law are:

- it classifies buccal swabs as non-intimate procedures

- the suspect power covers those suspected of indictable offences as well as some other offences. It allows for the procedures to be undertaken by informed consent of a suspect or charged person over the age of 15
- a senior police officer (Inspector's rank or higher) may order a non-intimate procedure on a charged person who is aged 15 or over and who is in custody. A suspect or charged person not in custody may also be required to undergo a non-intimate procedure if a senior police officer is satisfied that there are reasonable grounds to believe that the procedure may produce evidence
- a magistrate may order a suspect to undergo an intimate procedure if satisfied that the person is a suspect or charged person, and if satisfied that the procedure is justified in all the circumstances after balancing the public interests in obtaining evidence against the public interest in the physical integrity of the person
- prescribed offenders (that is those who have been convicted of an indictable offence, or some other offences, and are in prison, on parole or subject to a restriction order under the Criminal Justice (Mental Impairment) Act may be ordered to undergo a non-intimate procedure by a police officer for the purposes of a database
- volunteers may undergo forensic procedures under conditions similar to the Model Bill, except that victims are specifically excluded from the rules governing volunteers and are left to the general law
- the database provisions are closely modelled on the Model Bill.

2.70

The Victorian *Crimes Act 1958* Part 30A (as amended by the *Crimes Amendment Act 1997*) follows the Model Bill's proposals to a certain extent, though its drafting is tied to earlier versions of the Model Bill. Like the Model Bill, it covers suspects, convicted persons and volunteers and it classifies buccal swabs as intimate. However, in general, it is more restrictive in its provisions than the Model Bill. Its key differences are:

- It contains no powers for police officers to order samples to be taken from either suspects or convicted persons
- Consent for a forensic procedure may be sought from anybody suspected on reasonable grounds of an indictable offence. However, an order for a compulsory sample may only be given by a Magistrate (for an adult) or a Children's Court (for a child) if the person is a relevant suspect – that is, a person suspected of one of the indictable offences listed in the definition
- A court may order offenders to provide a sample if they are convicted of an offence listed in Schedule 8. There is no power to take by consent
- The database is established, but no matching rules are provided, and there are no provisions for interstate cooperation.

2.71 The South Australian *Criminal Law (Forensic Procedures) Act 1998* is drafted rather differently from the Model Bill. In general, it provides powers in respect of the same forensic procedures as the Model Bill. The South Australian Act makes distinctions between “intimate” and “non-intimate” procedures, as well as “intrusive” and “non-intrusive” procedures. In general, the term “intrusive” relates to the term “intimate” in the Model Bill. Under South Australian law, buccal swabs are intrusive. The South Australian Act has the following key features:

- Suspects may be asked to consent to a procedure if they are reasonably suspected of an indictable offence, and there are reasonable grounds to suspect that the procedure may produce evidence of value to the investigation of the offence, and the person is not a “protected person” (defined as a child or person incapable of giving informed consent).
- Suspects may be required to undergo a procedure if ordered to do so by an “appropriate authority”. The appropriate authority may be a Magistrates Court, or if the person is in lawful custody, the procedure is non-intrusive, and the person is not protected, a senior police officer not connected with the investigation.
- To make an order the appropriate authority must be satisfied, among other grounds, that there are reasonable grounds to suspect the person committed a criminal offence, that there are reasonable grounds to suspect that the procedure will produce evidence of value, and that the public interest in obtaining evidence outweighs the public interest in the physical integrity of the person (having regard to specified factors).
- An offender convicted of a “major offence” (carrying a penalty of 5 years in prison or more) may be required to undergo a forensic procedure if the court orders it after considering the seriousness of the offence and the propensity of the offender to engage in criminal conduct. There is no provision for consent or for a police officer to order samples from convicted people. This provision operates only in respect of people convicted after the commencement of the Act.
- There is no provision for volunteers.
- A database is established containing the samples of suspects subsequently convicted and persons convicted of major offences. No matching rules are provided. Destruction is required following acquittal, pardoning or quashing of a conviction.

Queensland, Northern Territory, and Western Australia

2.72 The Queensland *Police Powers and Responsibilities and Other Acts Amendment Act 2000* establishes the power to take DNA samples. This Act only covers taking buccal swabs and hair samples. No other forensic procedures are covered, and the focus is entirely on DNA analysis. Its key features are:

- Samples may be taken by informed consent from any person. The provisions for consent are general and cover volunteers, suspects and convicted persons. The Act requires certain matters to be explained before consent is sought. Children may consent if they are over 14. Children and persons with impaired capacity are allowed a support person.
- A Commissioned police officer may approve a sample to be taken from a person who has been arrested, summoned, or given a notice to appear for an indictable offence. This may be done immediately on arrest if necessary. Otherwise a sample notice may be issued if a Commissioned Officer approves it after being satisfied, having regard to the rights and liberties of the person and the public interest, taking the sample is reasonably necessary in the particular circumstances.
- A Court may order a sample to be taken from an adult appearing before it charged with an indictable offence if satisfied it is reasonably necessary, having regard to the rights and liberties of the person and the public interest.
- A Court may also order a sample to be taken from an adult convicted of an indictable offence.
- A person in prison for an indictable offence is required to give a sample. This provision expires after 3 years – enabling the mass sampling of prisoners for three years. (Thereafter the provisions allowing court orders for sampling on conviction would apply.)
- Samples may be taken from children charged with indictable offences if a Children’s Court orders it, after considering certain factors.
- The procedure for taking samples is not closely defined. However, specific provisions seek to minimise the clothing that must be removed, and, if reasonably practicable, limit the persons who may be present to those who are required to be there.
- Samples must be destroyed if the person is acquitted, the proceeding is discontinued or the person is not proceeded against within a year (with some exceptions).
- A database is established, which may be used by interstate or Commonwealth agencies, but must only be used for investigative purposes.

2.73

The Northern Territory *Police Administration Act* (Division 7 as inserted in 1998) provides for the full range of forensic procedures, with the fewest restrictions of any Australian jurisdiction. It draws a distinction between intimate and non-intimate procedures like the Model Bill’s, except that buccal swabs are classified as non-intimate.

- Intimate procedures may be carried out on a person in lawful custody on a charge, if a police officer believes on reasonable grounds it may provide evidence of an offence punishable by imprisonment and either the person consents in writing or a magistrate orders it (having been satisfied of the reasonable grounds).

- Non-intimate procedures may be ordered by a Superintendent of Police if a person is reasonably suspected of a crime, or is arrested on a charge of an offence carrying a penalty of imprisonment.
- A superintendent may also authorise taking a non-intimate sample from any person who consents (subject to police instruction). A juvenile must also have his or her parent's consent. If a sample is taken for the purposes of the investigation of an offence and is taken by consent under this provision it is only admissible against the person in respect of that offence (unless the other offence is punishable by imprisonment for 14 years or more).
- A database is established, to be used for investigations only, and it may be shared with interstate or Commonwealth authorities. There are no provisions for the removal of profiles from the database following acquittals or where charges are not subsequently laid.

2.74 Western Australia does not yet have law governing forensic procedures⁹. The *Criminal Investigation (Identifying People) Bill 2000* was introduced into Parliament in 2000. A new Bill, the *Criminal Investigation (Identifying People) Bill 2001*, was introduced following the election in 2000. The Western Australian approach is somewhat different to the Model Bill.

2.75 The Western Australian Bill establishes a system of judicial warrants to take samples from various people, including suspects and convicted offenders, for the purposes of identifying them. Notably, it is the only regime that would allow a court to order a sample to be taken from victims or witnesses (so-called, "involved persons") without their consent.

Other Countries

2.76 The following section contains a brief summary of the statutory provisions for forensic procedures in selected overseas jurisdictions.

England and Wales

2.77 One of the broadest and oldest of the statutes the *Police and Criminal Evidence Act 1984* (known as PACE). The relevant provisions are contained in Part V of the Act, sections 62 and 63. Under PACE, intimate samples are those of blood, semen or tissue fluid, urine, pubic hair, a dental impression and a swab taken from an orifice other than the mouth. Non intimate samples are samples of hair, samples from under a nail, a sample taken from the body and the mouth, saliva, a footprint or other impressions from the body (other than the hand – separate provisions cover fingerprinting).

2.78 Intimate samples may be taken from a person in police detention by consent in writing, and the person must be informed that the sample may be the subject of a speculative search (that is, it may be checked against a database to see if cold hits arise).

⁹ The Bill passed through the West Australian Parliament at the end of 2001, and was awaiting assent at the time of drafting this report.

- 2.79** If the person does not consent, a police officer of the rank of superintendent or above may authorise the taking of a sample, if the officer has reasonable grounds for suspecting the involvement of the person in a recordable offence, and for believing the sample will tend to confirm or disprove the person's involvement.
- 2.80** A non-intimate sample may be taken by consent from any person. A police officer of the rank of superintendent or above may authorise a compulsory sample from a person in police detention or in custody. The provisions that apply are very similar to those governing intimate sampling, however, if the suspect has been charged, there is no requirement that the sample be relevant to the offence. A non-intimate sample may also be taken from a person without consent if that person has been convicted of a recordable offence.¹⁰
- 2.81** Section 63A of PACE (inserted in 1994) allows the samples to be checked against any database held by a United Kingdom police force. Section 64 requires destruction of the samples in certain circumstances.

New Zealand

- 2.82** The *Criminal Investigations (Blood Samples) Act 1991* allows for the taking of blood samples for DNA profiling from suspects and certain convicted offenders, by consent or court order.
- 2.83** A sample may be taken from a person suspected of an indictable offence by informed consent, and specific provisions govern how this is to be obtained. A High Court may order taking a blood sample from a suspect if satisfied that:
- there is good cause to suspect the person committed the offence
 - a crime scene sample is available
 - there are reasonable grounds to believe the analysis of a blood sample taken from the respondent would tend to confirm or disprove the respondent's involvement in the commission of the offence
 - the person has refused to consent to the taking of a blood sample, and
 - in all the circumstances, it is reasonable to make the order.
- 2.84** Persons convicted of a relevant offence (as listed in schedules) may be ordered by a court to provide a blood sample for a database. Volunteers may also have profiles recorded on a database.

¹⁰ Gareth Griffith, *DNA Testing and Criminal Justice*, NSW Parliamentary Library Research Service Briefing Paper no 5/2000, p 29.

Canada

- 2.85** Following some important constitutional cases in the Supreme Court of Canada under their Charter of Rights and Freedoms, the Canadian Criminal Code was amended to provide specifically for forensic DNA analysis, and the *DNA Identification Act 1998* was passed.
- 2.86** The Criminal Code amendment, in ss 487.04 and following, provides for the issue of court warrants for taking DNA samples from person suspected of “designated offences” (as listed, including serious sexual and violent offences). The warrant may be granted if the Judge is satisfied that there are reasonable grounds to believe that:
- a designated offence has been committed
 - a sample has been obtained at a crime scene or on a victim
 - the person was a party to the offence, and
 - the analysis of a bodily substance from the person will produce evidence, and
 - it is in the best interests of justice to do so.
- 2.87** The Judge must consider the nature of the offence and whether there is a person able to take the sample from the person. The sample taken can only be used to investigate the designated offence in respect of which the warrant was issued.
- 2.88** An order may also be made to take samples from persons convicted of some designated offences. There are factors to consider before such an order is made. Persons serving sentences who are dangerous, or who have been convicted of multiple murder or multiple sexual crimes, may also be ordered to provide samples.
- 2.89** Samples are taken by plucking hair, taking a buccal swab, or pricking the skin with a lancet.
- 2.90** The *DNA Identification Act 1998* establishes a national DNA database with a crime scene index and an offenders index.

Chapter 3 Forensic use of DNA

This chapter of the report addresses the terms of reference relating to the reliability of DNA technology and its effectiveness in criminal investigations.

Reliability of DNA Matching for Forensic Identification Purposes

3.1 The Committee is asked by its terms of reference to assess the reliability of DNA matching. As the Committee lacks the expertise to determine the accuracy of the science, this section of the report will review expert opinions about the reliability of DNA matching as found in case law, journal articles and submissions and evidence to the Committee.

3.2 DNA technology frequently is presented in the media as being infallible. It is possible that many people mistakenly believe that, as a person's DNA is unique (with the exception of identical twins), then a DNA profile is also unique. However, as was previously explained, DNA analysis creates a profile based on 9 loci only. This cannot be assumed to be unique.

3.3 The Deputy Director of the Division of Analytical Laboratories gave evidence that he regards DNA technology as providing very reliable results:

I think the science underlying the system we are using now provides a very high probability. If we have two samples and we say we have a profile match for nine loci available on the Profiler Plus then it is extremely unlikely that those two samples did not come from the same person, unless there are twins involved of course. So the science there is the smallest source of potential error... The sort of evidence that is presented in court, I would put to you, is far more fallible than the DNA...¹¹

3.4 While noting that DNA profiling is “not an absolute identifier”¹², Dr Vining emphasised the unlikelihood of a chance match occurring:

Because of the variability that exists the Profiler Plus system has a very high degree of discrimination such that it is extremely unlikely that two unrelated individuals would ever have the same DNA profile.¹³

3.5 Dr Vining provided further information on the reliability of DNA profiling, focusing on the Profiler Plus system in particular:

The Profiler Plus DNA profiling system has been shown to have the three Rs which are essential to a valid analytical system. It is a:

Reliable method – in that the obtained results are accurate

¹¹ Vining, Evidence, 29 October 2001, p 18.

¹² Vining, Evidence, 29 October 2001, p 18.

¹³ Submission 25, 30 November 2001, p 4.

Reproducible method – in that the same or similar results are obtained when the same sample is retested

Robust method – in that accurate results are obtained notwithstanding environmental, matrix or other factors that may affect the integrity of the sample.

The reliability has been shown in numerous validation exercises carried out by the Federal Bureau of Investigation (FBI, USA), Royal Canadian Mounted Police (RCMP, Canada) and other laboratories around the world. The reliability has also been shown in world wide collaborative quality assurance exercises in which hundreds of laboratories around the world have participated...

Numerous articles have now been written where Profiler Plus, or other Short Tandem Repeat (STR) systems were used in generating results demonstrating that this technology provides a reliable and robust system for forensic DNA testing. By contrast, not one paper has been published in a scientific peer reviewed journal demonstrating that current DNA profiling in general, and specifically Profiler Plus, is an unreliable method.¹⁴

3.6 The submissions from Senior Managers Australian and New Zealand Forensic Laboratories also emphasised the reliability of DNA technology:

The current STR (short tandem repeat) technology is robust, highly reliable and most importantly provides exceptionally high levels of discrimination between individuals.¹⁵

3.7 The acceptance by the scientific community of DNA technology in general, and Profiler Plus in particular, was addressed at length by Mullighan J in *R v Karger*.¹⁶ The accused sought to have the DNA evidence excluded on the grounds, *inter alia*, that it was unreliable and inaccurate.¹⁷

3.8 His Honour concluded that the relevant scientific community, both in Australia and overseas, had accepted Profiler Plus analysis of DNA:

It seems clear that the vast preponderance of opinion is that it is accurate and reliable. If there was a “nose count”, it would substantially, if not completely, indicate reliability. The relevant scientific community has reported widely as to the reliability of Profiler Plus indicating that there is no relevant error rate.

... It is significant, in my view, that there is not one scientific article introduced into evidence or referred to by any witness which disputes or challenges the reliability and accuracy of the Profiler Plus system.

¹⁴ Submission 25, 30 November 2001, p 1.

¹⁵ Submission 26, 25 November 2001, p 1.

¹⁶ *R v Karger* [2001] SASC 64

¹⁷ *ibid*, at 39.

... I have received a vast body of evidence to show not only general acceptance of the Profiler Plus as accurate and reliable but also of validation of the system in this country and overseas has been discussed.¹⁸

3.9 Courts in Australia were initially cautious in admitting DNA evidence. This appears largely to be a result of concerns that the jury would be prejudiced or confused by conflicting and complex scientific evidence, rather than belief in the unreliability of DNA profiling.¹⁹ DNA evidence is now generally accepted in Australian courts.²⁰ In *Karger*, for example, Mullighan J stated:

Although DNA evidence is commonly admitted in Courts in this State, my attention was not drawn to any case where the evidence of DNA profiling using the Profiler Plus has been rejected.²¹

3.10 In *R v Pantoja*²², Hunt CJ commented on the acceptance of DNA evidence by Australian courts:

DNA testing has been accepted by the courts for some years as an acceptable scientific technique for the identification of the source of bodily tissues.²³

3.11 In New South Wales Courts, the Profiler Plus system has been admitted despite attempts to challenge its validity. In *R v Rees* the accused sought to challenge the admissibility of Profiler Plus DNA analysis on several grounds, including that it “was not yet sufficiently recognised as a reliable body of knowledge to admit of being the subject of expert opinion.”²⁴ Bell J rejected this argument. In doing so, she referred to the comments about the general acceptance of DNA evidence in *R v Pantoja*.²⁵

3.12 Bell J considered a similar objection to the admission of Profiler Plus DNA analysis in *R v McIntyre*.²⁶ This argument was rejected, and Bell J admitted the evidence, ruling that Profiler Plus had received acceptance within the scientific community.²⁷

¹⁸ *ibid*, at 188, 209, 217.

¹⁹ For example, *R v Tran* (1990) 50 A Crim R 233; *R v Lucas* (1992) 55 A Crim R 361.

²⁰ In addition to cases cited here, see also *R v Milat* (Unreported) NSW Supreme Court, 30 May and 5 June 1996, and *R v Lisoff* [1999] NSW CCA 364 23/11/99.

²¹ *Karger*, at 211.

²² *R v Pantoja* (1996) 88 A Crim R 554.

²³ *ibid* at 16.

²⁴ *R v Rees* (unreported) NSWSC (2000), at 19.

²⁵ *ibid*, at 20.

²⁶ *R v McIntyre* [2001] NSWSC 311.

²⁷ *ibid*, at 7

- 3.13** According to the Police Service, technology such as DNA profiling has a high level of reliability compared to traditional evidence:

Concerns over the reliability of eye-witness reports, confessions and the reluctance of some populations to 'get involved' has meant that science and technology are increasingly being used by professional Police Services across the world to give rigour and to add best value to investigations.²⁸

- 3.14** From this brief overview, it appears that the scientific community considers DNA matching, using Profiler Plus, to be accurate and reliable, and this is reflected in the admissibility of the technology as evidence in the courts.

- 3.15** In the following section, the Committee examines the limits of DNA matching as reported in scientific journals and in evidence received by the Committee.

Limitations of DNA Profiling for Forensic Identification

What does a 'match' mean?

- 3.16** It is essential to note that a match between a suspect's DNA profile and a DNA profile from a crime scene stain **does not lead to a conclusion that the suspect is the offender**. The submission from the Institute of Clinical Pathology and Medical Research, whilst emphasising the overall reliability of DNA profiling, advised that a DNA match does not of itself confirm guilt:

Thus, when a match occurs between a suspect and an evidence item, there is very strong support for the proposition that the DNA originates from that person. This, however, does not necessarily equate to guilt as there may be reasonable explanations as to how the DNA got onto the evidence item...

At all times the DNA is only one piece, albeit often a powerful piece, of the circumstantial case that the police will put together in their investigation of a case.²⁹

- 3.17** The Police Service also comments on the need for corroborative evidence:

Obviously, DNA evidence alone does not prove guilt but it is a significant investigative tool.³⁰

- 3.18** The limitations of DNA matching in identifying an offender has been referred to in the Courts. Hunt CJ in *R v Pantoja* made the comment that:

... it is important to emphasize that a match obtained by any blood tests – DNA or otherwise – between the suspect and the offender does not establish that the

²⁸ Submission 21, 30 November 2001, p 1.

²⁹ Submission 25, 30 November 2001, p 5.

³⁰ Submission 21, 30 November 2001, p 2.

two are the one and the same person. It establishes no more than the accused could be the offender... However, any blood test which positively excludes the suspect as the offender, if there is a reasonable possibility that the test is correct, must necessarily exclude the suspect completely notwithstanding that a match has been obtained by other tests.³¹

3.19 This reflects the opinion of Cripps JA in *Regina v Wayne Green*.

That [DNA] evidence being admitted, it became incumbent upon the trial judge to tell the jury that the evidence, if accepted, meant that the appellant could not be excluded and that, therefore, it was possible that he was the person responsible for the semen stains. That was the highest the Crown claimed it could use the evidence. It would follow that it would have to have been made clear to the jury that the “matching” results could not, in the absence of other evidence, prove beyond reasonable doubt that the appellant was the person responsible for semen stains.³²

3.20 The need for caution in drawing conclusions is expressed with clarity in the United States Federal Judicial Centre’s Reference Guide on DNA Evidence:

The forensic scientist reports that the sample of DNA from the crime scene and a sample from the defendant have the same genotype. To what extent does this tend to prove that the defendant is the source of the sample? Conceivably, other hypotheses could account for the matching profiles. One possibility is laboratory error – the genotypes are not actually the same even though the laboratory thinks that they are... Another possibility is that the laboratory analysis is correct – the genotypes are truly identical – but the forensic sample came from another individual. In general, the true source might be a close relative of the defendant or an unrelated person who, as luck would have it, just happens to have the same profile as the defendant.³³

3.21 Jonathan Koehler argued that, while a DNA match is probative, it is not unassailable:

After learning that a laboratory report indicates that trace evidence recovered from a crime scene matches the DNA profile of a defendant, fact finders in most cases generally should strengthen their beliefs that the defendant is the source of the trace and that the defendant is guilty of the crime.

Having said this, it is important to note that a reported DNA match does not require a belief in either proposition. First, the reported match may not be a “true” match; laboratories sometimes make mistakes. Second, even a rare DNA pattern may be shared by several others, particularly by relatives of the defendant.

³¹ *R v Pantoja* (1996) 88 A Crim R 554 at 19.

³² *Regina v Wayne Green* NSW Court of Criminal Appeal, Unreported, 26 March 1993, p 9.

³³ David H Kaye and George F Sensabaugh Jr, “Reference Guide on DNA Evidence”, *Reference Manual on Scientific Evidence*, 2nd Ed, Federal Judicial Centre, 2000, p 520.

Third, even if the defendant is the source of the trace, there may be an innocent explanation.³⁴

- 3.22** There are, then, a number of reasons that a DNA match cannot be considered conclusive, including the possibility of coincidence, errors, contamination, and tampering. These will be examined further below.

Coincidental or chance matches

- 3.23** The explanation of DNA analysis provided in the previous chapter made it clear that a DNA profile contains only a very small section of an individual's DNA and might not be unique. This is adverted to time and again in the relevant literature and in the evidence received by the Committee. As a result, it is possible that two individuals could, by coincidence, have the same profile. This is known as a chance match or a false match.

- 3.24** For example, Hocking et al commented:

With the exception of identical twins, the DNA of each human individual is unique. However, all techniques currently used in forensic science, and in all likelihood to be available in the foreseeable future, use only a minute fraction of the total DNA. There is no absolute guarantee that these fractions will be unique: to talk of "genetic fingerprinting" is highly misleading.³⁵

- 3.25** According to evidence given to the Committee by the Director of the Forensic Services Group of the NSW Police Service, chance matches are not impossible, but are extremely unlikely. The Committee was told:

... the possibility of a false match is small but not zero.³⁶

- 3.26** Dr Raymond also noted:

It is agreed that there is a chance that there are two individuals who share the same profile, no matter how remote that chance is, but, as stated previously, no two unrelated individuals have ever been found to match at greater than six loci.³⁷

- 3.27** Ms Wilson-Wilde described the possibility of a false match as "very, very, very unlikely", but advised that it is not impossible:

I am not going to tell you that that is impossible. I cannot because we have not tested everyone. There is a chance, because you do not look at the whole DNA molecule; you only look at those 10 sites. So, yes, there is a chance that it could

³⁴ Jonathan J Koehler, "DNA Matches and Statistics: Important Questions, Surprising Answers", *Judicature*, Vol 76, Number 5, Feb-Mar 1993, p 224.

³⁵ Barbara Ann Hocking et al, "DNA, Human Rights and the Criminal Justice System", *Australian Journal of Human Rights*, Vol 3, No 2, 1997, p 2.

³⁶ Raymond, *Evidence*, 29 October 2001, p 21.

³⁷ *ibid.*

match somebody else, and that two people have the same DNA profile, but that is so rare.³⁸

3.28 Given that coincidental matches are not impossible, the **significance** of a DNA match is unknown unless we know how common the profile is in the general population, and calculate the likelihood of a coincidental match. As the Reference Guide on DNA Evidence states:

... even if two samples have the same genotype, there is a chance that the forensic sample came – not from the defendant – but from another individual who has the same genotype. This complication has produced extensive arguments over the statistical procedures for assessing these chance or related quantities.³⁹

... it would not be scientifically justifiable to speak of a match as proof of identity in the absence of underlying data that permit some reasonable estimate of how rare the matching characteristics actually are.⁴⁰

Calculating the significance of a match

3.29 The Committee does not propose to examine in detail the methods used for calculating the frequency of profiles and the significance of matches. Such matters fall outside the scope of the terms of reference relating to accuracy and reliability. From the brief description below of opinions about the most frequently used calculation methods, it becomes clear that there is some disagreement about the most reliable methodology.

3.30 The significance of a match is commonly indicated by the calculation of a ‘match probability’. The ‘match probability’ (also known as the ‘random match probability’ or **the probability that a randomly selected, unknown, unrelated person would have the same DNA profile as the suspect**). This has also been expressed in the following way:

What is the probability that a person other than the suspect, randomly selected from the population, will have this profile?⁴¹

3.31 As Evett and Weir advise, these probabilities are not “inherent physical qualities”, but are assigned by people.⁴² A recent Criminal Law Review article made a similar observation:

There appears to be a fairly widespread misconception that there is a real “statistical probability” to be assigned to a profile but this is not the case. There is

³⁸ Evidence, 26 July 2001, p 28.

³⁹ David H Kaye and George F Sensabaugh Jr, “Reference Guide on DNA Evidence”, *Reference Manual on Scientific Evidence*, 2nd Ed, Federal Judicial Centre, 2000, p 518.

⁴⁰ National Academy of Sciences, *Evaluation of Forensic DNA Evidence*, Washington DC, 1996, p 192.

⁴¹ *ibid*, p 127.

⁴² Ian W Evett and Bruce S Weir, *Interpreting DNA Evidence: Statistical Genetics for Forensic Scientists*, Sinauer Associates, Sunderland Mass., 1998, p 21.

an infinite range of ways of carrying out the calculation that underlies the figure given. The method chosen in the individual case must be seen to be as much a matter of opinion as one given in other areas of forensic science. The match probability is “personal”. It is based on what the scientist considers to be the most appropriate calculation given the circumstances of the case.⁴³

- 3.32** Koehler warns that, contrary to what many people believe, frequency (or match probability) relates to the chance that a **randomly selected** person has the same DNA profile, not the chance that **any** person has the same profile:

What does a frequency such as one in one trillion mean? If we assume that the frequency was derived correctly, and if we assume that there is no possibility of error, lying or misinterpretation of the data, then it means that there is 1 chance in 1 trillion that a single randomly selected person would share the observed characteristics...

Notice that this is not identical to the probability that someone else exists who shares the observed profile. Although it may be extremely unlikely that a single randomly selected person would share a DNA profile with another person, it may be quite likely that others share this profile. Thus, there is only once chance in 1 billion that a random person shares a DNA profile that is common to one in every billion people, but there is a 99.6% chance that there are others on earth who share the profile. Even for a frequency as small as 1 in 1 trillion, the chance that there are others who share the profile is greater than one in two hundred.⁴⁴

- 3.33** The Police Service questioned whether this concept is relevant in terms of an investigation, and noted that this example:

...set up a completely artificial scene invoking the earth’s entire population as potential suspects.⁴⁵

- 3.34** Intermarriage within ethnic groups or small communities is believed by some commentators to lead to different frequencies of alleles within sub-populations.⁴⁶ There is some dispute about whether match probabilities should therefore be calculated based on frequency of alleles within particular racial subgroups. The argument is illustrated in the following example:

... if, say, Italian-Americans have allele frequencies that are markedly different than the average for all whites, and if Italian-Americans only mate among themselves, then using the average frequencies for all whites ... could understate –

⁴³ Ian W Evett, Lindsey A Foreman, Graham Jackson and James A Lambert, “DNA Profiling: A Discussion of Issues Relating to the Reporting of Very Small Match Probabilities”, *Criminal Law Review* (2000), p 346.

⁴⁴ Jonathan J Koehler, “On Conveying the Probative Value of DNA Evidence: Frequencies, Likelihood Ratios, and Error Rates”, *University of Colorado Law Review*, Vol 67, pp 861-2.

⁴⁵ Raymond, Evidence, 29 October 2001, p 21.

⁴⁶ Kaye and Sensabaugh, op cit, p 526.

or overstate – a multilocus profile frequency for the subpopulation of Italian-Americans.⁴⁷

3.35 On this subject, Justice Action submitted to the Committee:

It must also be remembered that the ‘one in a million’ probabilities talked about relate to comparisons with a large standard population, usually the US population. This has serious implications when tests are performed against an accused member of an ethnic minority.

While the chance that a randomly selected Australian citizen may have a DNA profile matching a Brewarrina Aborigine may be a million to one, a randomly selected Brewarrina Aborigine may be at a much higher chance of matching.⁴⁸

3.36 The American National Academy of Sciences considered the issue of calculating match probabilities in relation to suspects of particular racial populations. To ensure that the correct frequency or match probability is calculated, it recommended that:

If the race of the person who left the evidence-sample DNA is known, the database for the person’s race should be used; if the race is not known, calculations for all the racial groups to which possible suspects belong should be made.⁴⁹

3.37 In the United States, a number of separate DNA databases have been established containing the allele frequencies for different population sub-groups.

3.38 The need for separate databases or altered probability calculations is not, however, considered necessary or appropriate by all forensic statisticians. For example, Hocking et al argue:

However, recent research has shown that the alleles typically used in DNA profiling do not differ greatly in frequency between major ethnic groups (in the US at least). The population subdivision issue is probably not of major practical importance, although this conclusion is not universally accepted.⁵⁰

3.39 This is also the opinion presented to the Committee by the NSW Police Service:

A research project has recently been done by a statistician called Bruce Weir on population data that has been collected from all around Australia, which includes general populations. Essentially, if you are a Caucasian – that is, Greek, Italian, or a myriad of others, even Indian – there is very little difference, and certainly not enough to produce [false matches]... But you can take that into account in your calculations if you feel it is necessary.⁵¹

⁴⁷ *ibid.*

⁴⁸ Submission 10, 6 June 2001, Appendix “DNA and Criminal Justice”, p 2.

⁴⁹ Cited in Kaye and Sensabaugh, p 529.

⁵⁰ Hocking et al, *op cit*, p 5.

⁵¹ Wilson-Wilde, Evidence, 26 July 2001, p 11.

3.40 However, Ms Wilson-Wilde did note that there were different arguments relating to Aborigines and Torres Strait Islanders, because they have different variations of alleles:

If you have an Aboriginal or Torres Strait Islander for a suspect and you want to give evidence on his DNA profile that you found at the crime saying how common that would be in the population, one argument is: Should you use an Aboriginal or Torres Strait Islander database or a general database, which would theoretically be made up of a lot more Caucasians? If you use a Caucasian database, you may be reporting that that DNA profile is rarer than what it is in the Aboriginal database.⁵²

3.41 The likelihood ratio (LR) is another means of evaluating the prospect of a chance match. A likelihood ratio is described by the National Academy of Sciences's 1996 Report on DNA Evidence as being:

a measure of the strength of the evidence regarding the hypothesis that the two profiles came from the same source. Suppose we find that the profiles of the person contributing the evidence DNA (E) and of the suspect (S) are both x . We consider two hypotheses: (1) the source of the evidence and the suspect are the same person, (2) the source of the evidence is a randomly selected person unrelated to the suspect... The likelihood ratio is the probability under hypothesis (1) that the suspect profile and the evidence-sample profile will both be x , divided by the corresponding probability under hypothesis (2).⁵³

3.42 Likelihood ratios are expressed as follows:

An LR of 1000 says that the match is 1000 times as probable if the evidence and the suspect samples that share the same profile are from the same person as it is if the samples are from different persons.⁵⁴

3.43 The significance of a match can also be explained through provision of information about the frequency with which the profile is expected to appear within the population:

... a frequency statement would be of the kind: "There are fifty people in the country [the United Kingdom] with this DNA profile". Of course, this is not the actual frequency, because the people who have that profile will not, in reality, have been located and counted: it is an *estimate* of the frequency.

But leaving this issue to one side, there is a related statement that can be made: "one person in a million has this DNA profile". This is a statement of a *relative frequency*.⁵⁵

⁵² *ibid*, p 12.

⁵³ National Academy of Sciences, *Evaluation of Forensic DNA Evidence*, Washington DC, 1996, p 127.

⁵⁴ *ibid*, p 129.

⁵⁵ Evett et al, "DNA Profiling: A Discussion of Issues", p 345.

3.44 Match odds generally are calculated and expressed in terms of a randomly selected person, unknown and unrelated to the suspect. Relatives, who are far more likely to have a matching profile, are not included in the calculation.

3.45 Some experts have expressed concern about the exclusion of relatives from the calculation of chance match statistics. Balding and Donnelly stated:

The current practice of ignoring close relatives, unless there are good reasons to suspect them, will often greatly overstate the weight of DNA evidence.⁵⁶

3.46 They went on to provide a Scottish case as illustration:

In a recent Scottish case (*HMA v Alsam*) the forensic scientist reported a match probability based on three single-locus probes, of 1 in 49,000 for unrelated individuals, adding that a relative “will be more likely to have the same DNA profile”. He accepted that the probability of a match from a particular brother of the defendant was about 1 in 16. As it happened, the defendant had five brothers. If the other evidence did not distinguish between the six brothers, the probability of the defendant’s innocence would be more than 1 in 5.⁵⁷

3.47 The Reference Guide on DNA Evidence notes that there are means of factoring-in the existence of relatives when calculating match probabilities:

Close relatives have more genes in common than unrelated individuals, and various procedures have been posed for dealing with the possibility that the true source of the forensic DNA is not the defendant but a close relative. Often, the investigation, including additional DNA testing, can be extended to all known relatives. But this is not feasible in every case, and there is always the chance that some unknown relatives are included in the suspect population. Formulae are available for computing the probability that any person with a specified degree of kinship to the defendant also possesses the incriminating genotype.⁵⁸

3.48 John Buckleton, a forensic scientist with the UK database, has also emphasised the importance of factoring-in relatives when calculating match probabilities:

It is important even when using our more robust model to point out the crucial importance of relatedness. When we considered 4 or 6 loci relatedness was of some importance. But with the move towards 10 or 13 loci it is becoming apparent that most matches (of the few that may remain) will be between related people. A match probability of 1 in a billion may translate to 1 in 10,000 for a pair of brothers. This issue is now crucial in DNA interpretation.⁵⁹

⁵⁶ David J Balding and Peter Donnelly, “How Convincing is DNA Evidence?” *Nature*, Vol 368, 24 March 1994, p 286.

⁵⁷ *ibid.*

⁵⁸ Kay and Sensabaugh, *op cit*, p 523.

⁵⁹ John Buckleton, “The Interpretation of Scientific Evidence”, Paper given at *DNA Prosecuting under the Microscope*, International Conference, Adelaide, 9 – 11 September 2001, p 3.

- 3.49** The NSW Police Service recognises that chance matches are more likely to occur amongst close relatives and advised the Committee that this is taken into account when using DNA as an identification tool:

We would agree ... that the chance of a match between siblings is greater than the chance of a match to a person chosen at random from the population. There are specific formulae that may be used to calculate the chance of a match with a relative... If a match is obtained using the Profiler Plus system other additional systems can be used to ultimately distinguish between siblings if required.⁶⁰

- 3.50** The risk of kinship matches (and indeed any other chance match) decreases when a greater number of loci are used:

The probability that two brothers would have the same six locus SGM profile is roughly one in 500 but with the 10 locus SGM Plus this probability is of the order of one in 10,000.⁶¹

- 3.51** The Committee notes the on-going disputes about the best means of calculating chance match probabilities, frequencies and the significance of match statistics more generally. The Committee does not have the expertise in this complex and technical field to be able to draw any conclusions. However, the Committee considers the clarification of the forensic statistics relating to DNA matching to be important.

- 3.52** The Committee understands that a State Institute of Forensic Sciences (SIFS) is proposed to oversee the organisation and management of forensic sciences and the use of technology in criminal investigations and prosecutions. The SIFS is a joint proposal of the NSW Police Service, the Attorney General and the Department of Health. Deputy Commissioner Moroney argued that the research and knowledge exchange role of the SIFS, would be important in maintaining and improving the effectiveness of DNA profiling in policing.⁶²

- 3.53** The Committee agrees that a State Institute of Forensic Sciences would be valuable for managing the use of technology in criminal investigations and prosecutions, and recommends that the establishment of the SIFS be given priority attention. The Committee considers that a SIFS would be an appropriate body to further assess the most effective means of accurately presenting the significance of DNA profile matches.

⁶⁰ Raymond, Evidence, 29 October 2001, p 21.

⁶¹ Evett et al, "DNA Profiles: A Discussion of Issues", p 348.

⁶² Evidence, 29 October 2001, p 22.

Recommendation 1

The Committee recommends that the Government give priority attention to the creation of a State Institute of Forensic Sciences to, inter alia, manage the use of technology in criminal investigations and prosecutions.

The Committee further recommends that, should a State Institute of Forensic Sciences be established, it be requested to further examine methods of calculating the significance of DNA matches.

Error matches

3.54 A match error occurs where a laboratory reports a match between a suspect and the evidence-DNA where the suspect is not the source (a false positive), or declares no match where the suspect is the source (a false negative). There are numerous causes of match errors, including contamination, misinterpretation and tampering.

3.55 Justice Action submitted information relating to errors found on the South Australian database:

In *R v Karger* Dr John Buckleton of ESR ... gave evidence of corrections he and Dr Bruce Weir had made to the South Australian Forensic Science Centre's Profiler Plus database of Caucasian Australian profiles. In the first phase they had checked 377 records, finding mistypings, mistaken results and readings outside the guidelines – prompting a review of the whole database and retesting of several samples. In the second phase conducted on 414 records they removed two records which had been mistyped, three of which weren't Caucasians and detected 19 errors in analysis... What the error rate on the SA database might now be is anyone's guess, but before the Buckleton and Weir review it would have been between 5 and 10% at least.⁶³

3.56 Koehler explained the incidence of errors:

Most of the errors that arise in proficiency tests appear to be due to human errors (eg, mis-labeling, contamination, interpretive error, etc) rather than to technical errors in the DNA typing process itself. But it does not justify unmitigated enthusiasm about the accuracy of DNA evidence.⁶⁴

3.57 In his footnotes, Koehler provides an example of a false positive which occurred after the reference samples from the defendant and the victim were inadvertently switched.⁶⁵

3.58 Contamination of samples recently caused an error match in New Zealand. In that case, an assault victim's DNA was discovered in two homicide crime scenes samples taken from the

⁶³ Submission 10, 24 August 2001, p 14.

⁶⁴ Koehler, op cit, p 871.

⁶⁵ *ibid*, f.n. 31.

North Island in 1999. Using traditional investigation methods, police were able to determine that the assault victim had not been on the North Island at the time of the homicides. Reviews by the Police and the Institute of Environmental Science and Research (ESR, which is responsible for analysis of forensic samples) failed to determine the cause of the contamination, and an Inquiry was commissioned by the Minister of Justice.⁶⁶

3.59 That Inquiry was also unable to establish where the contamination had occurred, but a number of potential sources of contamination were identified:

- bench contamination, which occurs when the same work bench is used for different samples
- instrument contamination, where instruments are insufficiently cleaned between jobs
- failure to observe glove changing protocols, or
- deliberate contamination.⁶⁷

3.60 In the United States, a Department of Justice investigation into the FBI's DNA Analysis Unit took place over 18 months in 1996 – 1997. The investigation revealed that when all but one of the analysts at the unit failed an open proficiency test, the supervisor disposed of the results. All analysts passed the re-administered test. One staff member had been dismissed after manipulating test results to prove the guilt of African-American suspects. Other problematic procedures included routine use of inappropriate equipment and procedures.⁶⁸

3.61 Ms Wilson-Wilde recalled a case of contamination in an Australian jurisdiction, where:

a scientist talked over a set of samples and a mixed profile was produced. Part of that profile was the scientist's profile. All scientists who work in a lab are DNA profiled... Most of the labs have introduced face masks [to prevent contamination].⁶⁹

3.62 It appears that there is some dispute as to whether and how to incorporate the possibility of error into calculation of match probabilities:

Although many experts would concede that even with rigorous protocols, the chance of a laboratory error exceeds that of a coincidental match, quantifying the former probability is a formidable task. Some commentary proposes using the proportion of false positives that the particular laboratory has experienced in blind

⁶⁶ Rt Hon Sir Thomas Eichelbaum and Professor Sir John Scott, *Report on DNA Anomalies*, 30 November 1999, pp 1 – 2.

⁶⁷ Eichelbaum and Scott, *op cit*, pp 27 – 36.

⁶⁸ National Association of Criminal Defense Lawyers, "DOJ Aware of Problems in FBI's DNA Lab", Press Release, 25 November 1997, tendered by Mr Strutt, 7 August 2001.

⁶⁹ Evidence, 26 July 2001, p 4.

proficiency tests or the rate of false positives on proficiency tests averaged across all laboratories.⁷⁰

3.63 Justice Action stressed that error rates have a significant impact on reliability of DNA profiling:

The probabilities quoted in court regarding DNA evidence completely neglect the error rates of the testing laboratories.⁷¹

[Match odds of 1 in 1 billion] are meaningless when it is realised that the chance of match being declared due to errors in the laboratory or faults in the testing equipment is much, much higher – probably of the order of one in hundreds or thousands.⁷²

3.64 Jonathan Koehler believes that error rates should be included in determining the significance of a match:

In most cases, the possibility of laboratory error is substantially larger than the possibility of a coincidental match. This is not because DNA laboratory work is particularly sloppy or unreliable. Instead it is because the chance of a coincidental match is very small.⁷³

... Like all evidence, there is a risk of error associated with DNA evidence... The evidence in question ... is not a DNA match but a report of a DNA match. Accordingly, it is important to consider the role of error rates in determining DNA-related likelihood ratios.⁷⁴

3.65 Again, the Committee does not consider itself to have sufficient knowledge to be able to come to a conclusion about the inclusion of error rates in false match statistics. The proposed State Institute of Forensic Sciences, in examining match probability calculations as recommended in Recommendation 1, could appropriately deal with this aspect as well.

Maximising reliability

3.66 As laboratory contamination has been identified as a possible source of errors, it is clearly essential that measures are in place to reduce the chances of contamination, and so maximise the reliability of the procedure.

3.67 In relation to errors, the Police Service submitted that:

⁷⁰ Kaye and Sensabaugh, op cit, p 521.

⁷¹ Submission 10, 6 June 2001, Appendix “DNA and Criminal Justice”, p 3.

⁷² Submission 10, 24 August 2001, p 2.

⁷³ Koehler, “On Conveying the Probative Value of DNA Evidence”, p 866.

⁷⁴ *ibid*, p 869.

The chance of laboratory errors cannot be accurately measured nor discounted. Consequently, Australian laboratories take every reasonable measure to reduce or eliminate the chance of errors occurring.⁷⁵

3.68 Currently, quality assurance for Australian forensic laboratories is monitored by the National Association of Testing Authorities (NATA).⁷⁶ All laboratories used by law enforcement agencies (apart from one new one that is working toward full accreditation) are currently accredited, including the Department of Analytical Laboratories. NATA applies international standards (ISO/IEC 17025) in its accreditation program, which involves establishing and inspecting protocols and procedures for areas such as:

- documentation
- security
- methodology
- laboratory equipment calibration
- evidence management
- reporting
- validation methods and
- training.

3.69 Accredited laboratories are reassessed every two years, and the Director of the laboratory is required to report on compliance, and to participate in internal and external proficiency testing, including blind testing. NATA also examines documentation relating to internal audits, peer review checks, and court testing, to ensure that NATA standards are maintained.

3.70 Forensic DNA Specialist, Ms Linzi Wilson-Wilde, detailed the standard checking procedures that guard against laboratory contamination in the analysis of samples:

Every step in the procedure is checked and witnessed. Every stage is done by one scientist and checked by another, and it is all signed off. That is at every single stage there will be some sort of ticking off. There are also positive and negative controls run at every stage, just about ... If your negative control is not contaminated then you can be sure that your other samples are not contaminated, remembering that each stage is checked and witnessed: two scientists are involved in every stage. That again is to ensure there is no contamination. That is on top of a lot of other procedures, such as isolation of your samples and using sterilised

⁷⁵ Submission 21, 30 November 2001, p 2.

⁷⁶ The information relating to accreditation is taken from submissions 24, 25, and 26.

equipment, and lots of in-house procedures that we go through to make sure that the result we end up with is the correct.⁷⁷

... We have built into the system a very large number of checks, balances and safeguards. That does not stop an error from occurring – such as contamination – but it makes that result evident; it makes the contamination evident, so that you can see that has occurred. If there is contamination we can see that, and then we have to repeat the analysis ... We also do blind controls.

... Also, the DNA analysis is generally done by a different person to the person that is doing most of the casework. If a bloodstained top comes into the laboratory it will be examined for blood. If we find blood, that sample will be cut out and placed into a tube. That is sent off to someone else who does the next stage.⁷⁸

- 3.71** The Committee notes the current quality assurance procedures for DNA laboratories. While the Committee itself lacks the expertise necessary to comment on the adequacy of those procedures, the evidence received by the Committee from forensic scientists certainly suggests a high level of support for the NATA accreditation process.

Tampering

- 3.72** Many witnesses and submissions expressed concern that fabrication of DNA evidence is relatively simple. The Public Defenders, for example, quoted Mr Terry O’Gorman, President of the Australian Council for Civil Liberties:

Royal Commissions and ongoing controversies over police fabrication of evidence have dotted the criminal justice landscape in every state and territory as well as the Australian Federal Police and the National Crime Authority for the past two decades.

Are we seriously expected to believe that the sometimes significant minority of police who fabricate evidence won’t do so with DNA samples? Only the blinkered, the foolish and those who are myopically pro police would discount the possibility of fabrication of DNA evidence.⁷⁹

- 3.73** Justice Action noted:

DNA evidence is far easier to plant at a crime scene than fingerprints, and samples such as hair, dandruff or even blood can easily be obtained during interrogation of a suspect. Police in Utah once followed a suspect for days until he was observed spitting, whereupon the spit was promptly scooped into a sample container. The butt from a cigarette offered to a suspect during questioning might easily be later ‘found’ near a crime scene. Judges should be required to warn juries of the ease

⁷⁷ Evidence, 26 July 2001, p 3.

⁷⁸ Wilson-Wilde, Evidence, 26 July 2001, p 8.

⁷⁹ Cited in Submission 9, 1 June 2001, p 5.

with which such evidence can be planted in much the same way that they are now required to warn about unsigned police statements of interview.⁸⁰

3.74 Mr Chris Puplick noted that the perceived strength of DNA evidence increases the risk of attempted tampering:

The system established by the Act does not remove the possibility of planting DNA evidence to manufacture a match. Indeed the high level of proof claimed for genetic evidence, and the relative ease with which genetic material can be obtained could be seen to create an increased risk that evidence will be improperly manufactured. Strictly followed and documented procedures would go some way to minimise these risks.⁸¹

3.75 Mr Puplick gave further evidence about the difficulty of preventing tampering:

In reality, just as you cannot legislate for ethics generally, you cannot legislate for an incorruptible or uncorrupted police force. So to that extent the question of can you legislatively effectively provide for a system in which there is no possibility of evidence being manufactured or evidence being planted, I think the answer is clearly no. It is a question of what oversight, what audit, what capacity you have to keep the system under review. With a fingerprint it is very difficult, although it is not impossible by any means, ... to lift a fingerprint from one place and establish it at another place... whereas the picking up of a cigarette butt that has saliva on it, the gathering of a hair follicle from somebody's shoulder or coat and transferring that to a crime scene is quite easy.⁸²

3.76 Fear that corrupt police will use DNA samples to frame individuals is a theme in submissions received from prisoners. One inmate submitted:

It is well-established, most recently by the Wood Royal Commission and the on-going activities of the Police Integrity Commission, that members of the NSW Police Service, abetted by our, at best, spineless and, at worst, complicit, judiciary, have deliberately and systematically abused every power vested in them by the common law and by statute. Whether this be as a result of corruption, malice laziness or zealotry, there is not the slightest reason to doubt that they will do the same in relation to evidence produced by DNA sampling.

In the past, it has been very hard, often impossible, for accused persons to resist evidence of supposed confessions ("verbals"), fabricated evidence ("loading") and rewarded (both officially and unofficially) informers. It will be very easy for dishonest police to "plant", say some hair or a cigarette butt from a selected target at a crime scene or in an evidence bag, and very hard for an accused person to refute such putative evidence.⁸³

⁸⁰ Justice Action, *DNA and Criminal Justice*, p 7.

⁸¹ Submission 15, 8 June 2001, p 3.

⁸² Evidence, 8 August 2001, p 5.

⁸³ Submission 20, 28 June 2001, p 1.

3.77 Dr Jeremy Gans also referred to the danger that DNA evidence could be used to manufacture a case:

There is nothing to stop a criminal or a police officer raiding someone's trash can, leaving the cigarette butt at a crime scene and then that person has a very difficult explanation to make. That is not an argument not to use DNA evidence but it reveals the truth that DNA evidence is not a magic bullet for solving crimes, just like confessions, which are of course extremely useful in solving crimes but there is always room for reasonable doubt. DNA evidence should never be good enough on its own and I am sure it will not be considered good enough on its own, but you have to be cautious about the other evidence that supplements the DNA – for example, the confession might have been prompted by false DNA evidence.⁸⁴

3.78 The Police Service commented that tampering was not impossible, but that measures are in place to prevent it:

The risk of tampering also cannot be accurately measured nor discounted; however, all efforts are taken to ensure this does not occur.⁸⁵

3.79 The Police Service submission outlined its procedures for preventing corruption of samples:

Tamper evident DNA bags were purchased for the storage and transportation of DNA samples to the Division of Analytical Laboratories. These bags are numbered and are an accountable item. After a DNA procedure has been performed, the bag containing the sample is sealed in the presence of the inmate or suspect.

The Forensic Procedures Implementation Team has provided the Division of Analytical Laboratories with a list of rejection criteria. If any sample received by the Laboratories fails any of the criteria, the sample will be rejected and the Forensic Procedures Implementation Team advised accordingly.⁸⁶

3.80 Crime scene samples are also subject to procedures to prevent tampering:

Samples collected at crime scenes are packaged at the scene by qualified and trained crime scene examiners who seal the exhibits with evidence sealing tape so that any tampering is evident. All samples are then recorded and the continuity of samples maintained.⁸⁷

3.81 The Division of Analytical Laboratories submitted that the following measures are in place to minimise the risk of tampering with samples:

⁸⁴ Gans, Evidence, 31 July 2001, pp 32 – 33.

⁸⁵ Submission 21, 30 November 2001, p 2.

⁸⁶ Submission 21, 10 July 2001, p 1.

⁸⁷ Submission 21, 30 November 2001, p 2.

- Evidence items and data derived from them are stored in secure laboratory areas with access limited to only authorised personnel.
- Buccal (mouth) swabs from convicted offenders are transported in tamper evident packaging which is checked when specimens are received.

3.82 The database system also has tamper-resistant systems in place, including its establishment as a stand-alone network, physical security systems to restrict access, and the ability to log and trace all use of the database.⁸⁸

3.83 The Committee notes that these procedures provide some protection against tampering. However, while the Police Service's measures may reduce the likelihood of the contamination of samples taken from suspects and offenders, such contamination can in any case easily be proven by analysis of a second sample from the individual. Crime scene samples are very much more vulnerable to intentional contamination if there is an intent to 'frame' a suspect.

3.84 Dr Gans suggested that the potential for 'framing' using DNA evidence makes it essential that DNA evidence alone should never be considered sufficient to convict a person unless there is corroborating evidence. However, Mr Puplick tendered a judgment from the Court of Appeal of the Supreme Court of Queensland that indicated that DNA evidence could in fact be very heavily weighted.⁸⁹ In the judgment of the Court, the following conclusion was drawn:

There was evidence, contradicting what the appellant told the police, that he had been in contact with the deceased within a few days before her murder and also evidence that he might have had reason to feel rather hostile to her. These circumstances did not, of course, show that he killed her. **But the DNA profiling evidence showed that his blood was found at the place where the deceased was killed and was, unexplained, enough to support the conviction** (emphasis added).⁹⁰

3.85 Despite the high level of reliability of DNA technology, the Committee considers that it would be risky for DNA evidence alone to be used to convict a defendant. DNA profiles are only one piece of evidence. When a profile match between a suspect and a crime scene is supported by other evidence (witnesses, motive, opportunity etc) it can carry substantial weight. However, given the possibility of errors, chance matches, intentional tampering, or innocent reasons for the presence of a profile, it is doubtful that a prosecution would meet the required standard of proof if it were based solely on a DNA match that is not corroborated by any other evidence. It is the Committee's opinion that a conviction based solely on DNA evidence would be unsafe.

⁸⁸ Submission 25, 30 November 2001, pp 3-4.

⁸⁹ *R v Fitzherbert* [2000] QCA 255

⁹⁰ *ibid*, p 8.

Recommendation 2

The Committee recommends that the Attorney General give consideration to an appropriate legislative amendment to require judges to warn juries that DNA evidence is only one aspect of the evidence required to convict a person.

- 3.86** Several witnesses and submissions referred to the importance of separation of the database from the Police Service as a means of minimising the risk of misuse of the information. The Privacy Commissioner, for example, was emphatic that the database should be independently controlled by an agency other than the Police Service:

I think one of the great strengths of the British system, such as it is, is that the Forensic Science Services, which actually runs the database, is that it is separated physically, politically and administratively from the Police Service. Although it is part of the same department, namely the Home Office, the independence, the physical separation of the laboratories is enormously important because it means that what happens is that the Police Service does not have access to the actual sample once it has been collected and sent to the laboratory. The laboratory then only informs the police with a yes or no answer. They get a sample and are given a yes or no answer as to whether there is a match ... What it means is that there can be no circumstances in which the police can interrogate the database other than with a specific question related to a specific event or a specific sample.

... if you do not have that separation, there is a real danger that tests, which are in fact not authorised by law, will be done. We know from evidence about police access to their own database, the COP system, in an improper fashion, that that will happen from time to time.⁹¹

- 3.87** Justice Action drew the Committee's attention to the separation of agencies in the United Kingdom, where the collection and analysis of samples is performed by the Forensic Science Service, and kept separate from the Police Force:

The Forensic Science Service (FSS) was formed as a Home Office department separate to the police force and resourced sufficiently to allow for a huge expansion in DA testing capability and databasing of profiles. By keeping the collection and analysis of samples separate to the investigation, potential for the corrupt collusion between police and technicians which has been a recurring theme of forensic science is kept to a minimum.⁹²

- 3.88** The Committee was advised that the DNA database and the profiling services are operated independently of the NSW Police Service by the Institute of Clinical Pathology and Medical Research (ICPMR) and the Division of Analytical Laboratories (DAL), which are part of the NSW Department of Health. Under an agreement between the Police Service

⁹¹ Puplick, Evidence, 8 August 2001, p 8.

⁹² Submission 10, 6 June 2001, p 20.

and the Department of Health, the cost of DNA profiling services are met by the Police Service.⁹³ The Police Service submitted:

In NSW DNA analysis is carried out by the Health Department who are independent of the Police and who are not involved at all with the collection of biological samples from suspects or convicted offenders.⁹⁴

3.89 According to the Deputy Director, Dr Vining, there is no involvement of the NSW Police Service in the operation of the ICPMR and DAL:

To ensure privacy, data security and laboratory integrity, the management and governance of ICPMR/DAL is independent of and held at arms length from the NSW Police.⁹⁵

Conclusion: Reliability

3.90 From the evidence and submissions received by the Committee, and the opinions of forensic and legal experts contained in journal articles, it is clear there is a broad consensus that DNA profiling technology is accurate and reliable. In New South Wales, this is supported through strict quality assurance mechanisms and an independently managed and administered database.

3.91 Despite the reliability of DNA profiling, the technology cannot be considered unassailable. The evidence before the Committee indicates that errors and intentional contamination can occur, and coincidental matches, whether between strangers or relatives, cannot be ruled out. The Committee understands that that the incidence of chance matches declines with the increase in the number of loci used. As the Profiler Plus system used in New South Wales tests 9 loci, a chance match would be only a remote possibility, although it is certainly not impossible.

3.92 The Committee is aware that there remain divergent opinions about the most accurate means of calculating match odds and determining the significance of a match in general, and considers that a State Institute of Forensic Science would be an appropriate means of seeking to obtain a consensus.

3.93 The next part of the Chapter examines how effective DNA profiling is when used in criminal investigations.

⁹³ Submission 25, 30 November 2001, p 1.

⁹⁴ Submission 21, 30 November 2001, p 2.

⁹⁵ Submission 25, 30 November 2001, p 1.

Effectiveness of DNA Matching as an Investigative Tool

3.94 There is little doubt that DNA technology has the potential to be of enormous benefit in investigating and prosecuting crime. DNA has been described as:

... the most significant advance in the use of forensic science by police since the advent of fingerprints 100 years ago. It has brought leading edge technology into the fight against crime. ... It not only helps to convict those who have committed crime, it can positively acquit the innocent. The use of DNA has greatly enhanced our ability to identify suspects for crime, reducing the cost of investigations, particularly in serious crime. The growing effectiveness of the National DNA Database will be a significant deterrence against those who commit crime.⁹⁶

3.95 In the NSW Police Service's five year plan, *Future Directions 2001 – 2005*, the Police Commissioner identifies a number of uses for DNA testing:

DNA as a tool in the intelligence led investigation of crime can:

- identify or exclude suspects by comparing their DNA profiles with DNA profiles found at a crime scene
- identify or exclude suspects through the appropriate use of mass screenings
- link seemingly unrelated crimes by comparing DNA profiles found at different crime scenes, and
- target some high volume crime areas with traditionally low clearance rates but higher clearance rates when DNA profiling is used.⁹⁷

3.96 Dr Vining observed that when a suspect's DNA profile matches that of a key evidence item:

the police are able to focus their further investigation, avoid waste of resources and greatly increase the probability of a successful resolution of the case.⁹⁸

3.97 Known as a "warm hit", the matching of a suspect's DNA with a crime scene sample occurred in 35 cases between January and June 2001.⁹⁹

⁹⁶ Chief Constable Ben Gunn, Cambridgeshire Constabulary. Cited in Paul Mayger, "Practical Policing and the use of DNA Technology", International Association of Prosecutors Conference, Sydney, 3 September 2001, p 2.

⁹⁷ NSW Police Service, *Future Directions 2001 – 2005*, p 39.

⁹⁸ Submission 25, 30 November 2001, p 5.

⁹⁹ *ibid.*

3.98 According to the evidence of the Police Service, part of the utility of including volume crime offenders on the DNA database is that there is often a progression from break and enter crimes to sex offences:

Victorian research looked into all its sexual offenders and found that all its serious sex offenders in the past 10 years started their criminal lives as offenders of volume crime, every single one of them. ... There are a few points here. You can potentially break that link so that the offender does not progress to a serial offender or identify the offender early so that when the offender commits the first sex offence you can match up the offender, obtain a link, and investigate the case.

[In offences where] the victim does not know the offender. The victim can give a description, but does not know the offender. You are virtually relying on our DNA match to solve that crime. A database is useful because you can often get their DNA on the database from the volume crime they have committed previously.¹⁰⁰

3.99 Obviously, for DNA profiling to be useful in an investigation, it is necessary for biological material to be found at a crime scene, and for DNA profiles to be successfully obtained. As was explained in Chapter 2, not all biological samples will provide a DNA sample. And clearly not all crime scenes will contain biological samples. Without a DNA profile from the crime scene, DNA of the suspect or offender will be of no assistance in solving the crime.¹⁰¹

3.100 A number of witnesses before the Committee have cautioned against excessive confidence in the efficacy of DNA in law enforcement.

3.101 Public Defender, Mr Andrew Haesler, expressed concern in his submission:

A popular viewpoint among the media, politicians and police seems to be that forensic evidence is infallible and that if a DNA match has been made, then the culprit has been found and a conviction will follow. This is a gross simplification.

All that a DNA test does is show that there is a link between a crime scene and a suspect. How that link came about is still a matter for evidence at trial.

Further, DNA testing does not produce “fingerprint” like results, positively linking a suspect with a crime scene; instead, it only produces a statistical probability of that link.¹⁰²

3.102 Mr Haesler told the Committee that, for DNA evidence to be effective in an investigation, it needs to be used selectively:

Targeted DNA testing, in my view, is an effective way of using the legislation and will result in more convictions, particularly for someone’s first significant crime. If we brought it in that everyone who commits any offence whatsoever is DNA

¹⁰⁰ Wilson-Wilde, Evidence, 26 July 2001, p23.

¹⁰¹ Wilson-Wilde, Evidence, 26 July 2001, p 13.

¹⁰² Submission 9, 1 June 2001, p 5.

tested in the hope that we might get a match between them, all we will get is police intelligence that someone was at a scene. We will not actually get evidence which can be used to convict people.¹⁰³

3.103 Mr Haesler noted that there are different views on how extensively DNA should be used in investigations:

On the one hand there is a view that everyone should be tested and there should be as many people on the database as possible so that it will maximise ... a cold hit.

The other philosophy is that DNA is a useful investigative tool for police but that it is not necessary to have a database and to allow for the selected matching of crime scenes to suspects of crime.¹⁰⁴

Exculpation of the innocent

3.104 The Committee understands that DNA technology can have a crucial role in exonerating wrongly accused and convicted individuals. The Director of the National Institute of Forensic Science commented on the utility of DNA technology in clearing suspects, as well as implicating them:

DNA testing in forensic laboratories has, and will continue to eliminate more people from an investigation than it implicates.

One of the key effects of this are once eliminated, individuals are no longer the subject of the investigative process. They are not bothered at home or at work by follow-up police questioning as to their possible involvement...

Where an individual is not eliminated, the result is a more focussed enquiry, and therefore a more effective use of law enforcement resources.¹⁰⁵

3.105 The Police Service submission made note of the routine use of DNA to eliminate suspects:

Although DNA is in fact used prior to trial to eliminate individuals as suspects, this aspect of the DNA process is rarely reported.¹⁰⁶

3.106 Similarly, the Committee heard evidence that:

There is one thing that DNA will definitely do: it will definitely exclude someone. If you had a mixed profile and you cannot see the profile of the suspect

¹⁰³ Haesler, Evidence, 29 August 2001, p 14.

¹⁰⁴ *ibid*, p 1.

¹⁰⁵ Submission 24, 12 November 2001, p 3.

¹⁰⁶ Submission 21, 10 July 2001, p 3.

in there anywhere, he is excluded from having contributed to the profile. So it is a definitive exclusion.¹⁰⁷

3.107 An example provided in the submission of Institute of Clinical Pathology and Medical Research was the investigation of a sexual assault in Wee Waa:

It is noteworthy that while the use of a DNA mass screen was primarily responsible for solving the Wee Waa case, DNA profiling also played a vital role in the early stages of the investigation prior to any suggestion of the need for a DNA mass screen. Shortly after the brutal rape and bashing of Ms Rita Knight, Police had a number of suspects. All of these suspects agreed to be DNA profiled and were thus rapidly and relatively painlessly eliminated from further investigation.¹⁰⁸

3.108 The United States has provided dramatic evidence of the use of DNA after convictions, and between 1993 and February 2000, 64 prisoners were released following new analysis of DNA evidence.¹⁰⁹ Many prisoners had spent years on death row.

3.109 In Australia there also have been cases of DNA evidence being used to quash convictions, including that of Mr Frank Button. Mr Button was found guilty of sexual assault and spent 10 months in prison in Queensland before DNA evidence was analysed for his appeal, and his conviction was overturned.¹¹⁰

3.110 While not required by the *Crimes (Forensic Procedures) Act 2000*, the Government has created an Innocence Panel, which would consider applicants' requests for analysis of DNA evidence from crimes for which applicants believe themselves to have been wrongly convicted. The then Police Minister, Mr Whelan, advised the Legislative Assembly in September 2001:

The ability to take DNA samples under the *Crimes (Forensic Procedures) Act 2000* is the most powerful crime fighting tool ever given to New South Wales police. It was given with the intention not just to prove the guilt of the guilty but to help acquit anyone wrongly accused of a crime. To make this happen I announced the establishment of Australia's first Innocence Panel. This high level, impartial panel will provide a crucial link between different areas of the criminal justice system and those who come in contact with it. The Innocence Panel has the power to arrange for the DNA analysis of evidence that applicants believe is critical to their claims of wrongful conviction.

The panel will receive applications from convicted people who believe that DNA evidence could prove their innocence. This is an independent process. It enables a post-conviction comparison of the applicant's DNA with DNA from the crime scene – if such evidence exists. Depending on the result, a post-conviction DNA

¹⁰⁷ Wilson-Wilde, Evidence, 26 July 2001, p 16.

¹⁰⁸ *ibid*, p 6.

¹⁰⁹ Saul, 'Genetic Policing: Forensic DNA Testing in New South Wales', *Current Issues in Criminal Justice*, Vol 13, No 1, July 2001, p 92.

¹¹⁰ Stefanie Balogh, "DNA test system labelled unfair", *The Australian*, 12 April 2001, p 6.

comparison may provide fresh evidence that could be used to feed into the existing system of review. However, DNA evidence is only one part of the review process. The panel will not act as advocate for convicted people who claimed they are innocent. All parties in the justice system need to be confident of the impartiality of the panel. New South Wales already has an established system for the granting of pardons or the review of convictions or sentence if fresh evidence comes to light.¹¹¹

3.111 The Minister advised of the following members of the Innocence Panel: Judge John Nader QC (Chair); Mr Nick Cowdery, Director of Public Prosecutions; Mr Chris Puplick, Privacy Commissioner; Mr Harold Brown, Victims Advisory Board; Ms Margaret Allison, Legal Aid Commission; Mr Les Tree, Director-General of the Police Ministry; Dr Anne Cossins, University of NSW; the Director General of the Department of Health (or nominee); and Chrissa Loukas, Public Defender.¹¹²

3.112 The Innocence Panel recently met for the first time, and is determining its Terms of Reference.

Effectiveness of database ‘cold hit’ matches

3.113 The term ‘cold hit’ refers to a match on the DNA database between a crime scene sample and the sample of an individual not previously suspected of that crime. This can then be used as a basis for investigation of the crime. The Police Service noted the utility of cold hits:

Cold intelligence links are obtained by matching DNA profiles on databases (crime to crime or crime to person) and are an efficient and cost effective aid to investigations. Cold intelligence links are often the catalyst to solving a particular crime in the initial absence of any other information...

Matches obtained on databases do not prove guilt of the suspect offender but generally serve to clarify and direct the investigation.¹¹³

3.114 The National Institute of Forensic Science advised that a ‘cold hit’ is used as an intelligence tool:

A ‘cold hit’ on the database is intelligence which police may use in their investigation of a crime. The ‘cold hit’ is not produced in evidence in court. It is an event which initiates a series of steps including:

- notification of DNA scientists in relation to the ‘link’
- confirmation of the original test results by the scientists and
- notification of police by the scientists of the ‘link’.

¹¹¹ Hansard, Legislative Assembly, 18 September 2001, p 16.

¹¹² *ibid.*

¹¹³ Submission 21, 30 November 2001, p 3.

Police can then commence an investigation into the crime for which the 'link' has occurred. The DNA intelligence is like any other piece of intelligence, with respect to the fact that it gives some focus to the investigation. Again, this can lead to more effective use of law enforcement resources.¹¹⁴

3.115 Dr Vining also considers the use of 'cold hits' to be beneficial:

Many studies have concluded that a small proportion of the population commits the majority of the crime in any given community. Recidivism rates are very high amongst some criminals. The UK experience has been that "cold links" using DNA profiling matches have resulted in numerous cases being solved. In some cases, crime scene to offender links have resulted in guilty pleas, in other cases scene to scene matches in serious cases have resulted in more effective investigation by the police of cases with the knowledge that the crimes were committed by a serial offender. In other matters a cold link on the database has solved serious investigations where traditional investigative methods have been ineffective.

3.116 The Committee heard that investigations based on 'cold hits' on the DNA database can present a particular set of problems arising from the incidence of chance matches, as referred to earlier in this Chapter.

3.117 The Justice Action submission explained it this way:

... when carrying out 'suspectless' mass searches of a DNA database in an attempt to gain cold hits, even match odds of billions to one means that false matches will occur from time to time. (e.g. a database match between 100,000 crime scene profiles and 100,000 personal profiles represents 10 billion attempted matches – so if the true match odds were one in one billion you could expect about 10 false matches, but if they were closer to one in a million you would get many thousands of false matches.¹¹⁵

3.118 Mr Michael Strutt, Spokesperson for Justice Action, gave evidence that:

The mass databasing and cross-matching of DNA profiles in an attempt to gain cold hits which might produce evidence in suspectless crimes actually exceeds the theoretical and practical limitations of forensic DNA testing and will result in wrongful convictions if it is used routinely. It is totally unacceptable and discriminatory that prisoners should overwhelmingly be the ones subjected to that risk, especially as they are likely to be in a worse position than most when it comes to defending themselves from DNA-based accusations.¹¹⁶

3.119 At least one such false match from a 'cold hit' has occurred in Britain. In 1998, a profile from a crime scene stain at a burglary in Bolton, England produced a match on the national database. The hit, which had a match probability of 1 in 37 million, linked Mr Raymond Easton to the crime. Mr Easton was charged with the crime in August 1999, despite a lack

¹¹⁴ Submission 24, 12 November 2001, p 3.

¹¹⁵ Submission 10, 24 August 2001, p 9.

¹¹⁶ Evidence, 7 August 2001, p 2.

of corroborating evidence. Indeed, the evidence was in the defendant's favour, as he lived 200 miles away, suffered from advanced Parkinson's disease, was unable to drive and had a sound alibi. The match was shown to be a chance match when the Crown Prosecution Service requested more advanced profiling, using 10 loci, and the charges were dropped.¹¹⁷

3.120 Justice Action's submission points to two other cases of mistaken matches:

In a similar case the judge ordered acquittal of a defendant when evidence was produced which showed that *two* profiles on the FSS database matched the crime scene sample. The other profile was from someone living much closer to the scene of the crime and the police had no evidence beyond the match.

In a third case a man who had already spent several years in prison for safe cracking was freed following an appeal which revealed that although there was a reasonable chance that the DNA at the crime scenes also matched one of his brothers police had taken no action to eliminate them as suspects.¹¹⁸

3.121 Privacy Commissioner, Mr Chris Puplick, identified the so-called "British mistake" as evidence of the need for caution in using cold hits in investigations:

... the case of Mr Easton is one where simply his match to the crime sample was on the basis of the evidence found to be exactly correct; that it was in fact a true and proper match but that there was no possibility that he in fact could have committed the offence in question.

All it goes to demonstrate in that sense is that it appears around the place that the chance of getting a false DNA match in the United Kingdom is slightly greater than the chance of winning the national lottery. It simply demonstrates in that sense that even at very high levels of statistical probability from time to time there can be false positives. It goes simply to demonstrate that the DNA itself always needs to be accompanied by other persuasive evidence, and should never be relied upon as the only way in which possible guilt or innocence can be established.

... In many respects it is like a lot of other things, like CCTV and other investigative tools. One of the things that concerns me is an increasing reliance on the technology in all of these things to the exclusion of adequate attention paid to all of the other traditional investigative ways of gathering evidence. If one increasingly relied on DNA as the principal way in which one would adduce evidence in court or, more to the point, one got a community view built up ... then there would be greater and greater pressure for the DNA database to be expanded.¹¹⁹

3.122 The Police Service concedes that database searches can produce false or chance matches, although it emphasises that the chance of this occurring is remote, and that subsequent investigation of the case is therefore essential:

¹¹⁷ "The 'British Mistake'", Paper given at the Third Annual Canadian Symposium on Forensic DNA Evidence, 14 October 2000, tendered by Mr Chris Puplick, 8 August 2001.

¹¹⁸ Submission 10, 24 August 2001, p 22.

¹¹⁹ Puplick, Evidence, 8 August 2001, p 7.

... it is expected when comparing persons' profiles and crime scene profiles true matches would be obtained which could then be investigated as per standard procedures for the investigation of offences... The point that was raised earlier is that a DNA match is just that, it is a link, and in the context of the case it may mean a lot or it may mean very little, and the bottom line is, I guess, that there always has to be an investigation in any given matter. It is simply a signal that this could in fact be important in the context of the case.¹²⁰

3.123 Public Defender Andrew Haesler is similarly concerned that reliance on the DNA database will detract from traditional policing methods:

What is of more concern is the 10 per cent of homicides which are not solved quickly and targeting the limited resources of DNA to solving those specific crimes and specific suspects for those offences.

As I understand the United Kingdom model, smart policing can direct the DNA sample to an individual but what they like to rely upon is a huge database and hope that eventually someone might get picked up for a break and enter in five years time, at which time they will then get their DNA, which will match the crime scene and they will get a cold hit. The problem is that the crime may be stale and the DNA match will only be an investigative tool not a proof tool.¹²¹

... Targeted investigation as part of a properly conducted prosecution is far more effective and will be a far more effective use of resources than the general hope that we will get matches that may or may not be admissible in court.¹²²

3.124 The Council for Civil Liberties expressed concern that obtaining a match between a suspect and a crime scene, in which there is a possibility of fabrication of evidence, could negatively impact on the investigation:

... The other issue is that it subjectively links people to a crime. The first thing that police do when they investigate these unsolved crimes would be to try to link a person to the crime scene. That has the potential to cloud the investigation so it focuses on the person whose DNA they have [matched] instead of objectively looking at it, it becomes a subjective decision where you might try to make the facts fit the person instead of looking at the facts independently and trying to solve it otherwise.¹²³

Effectiveness of mass testing

3.125 Mass testing is used in investigations when other conventional investigative tools have been unsuccessful in identifying a suspect. Mass testing involves requesting a DNA sample from every member of a particular group, usually based on geography, such as citizens of a

¹²⁰ Raymond, Evidence, 29 October 2001, p 17.

¹²¹ Haesler, Evidence, 29 August 2001, p 2.

¹²² *ibid*, p 6.

¹²³ Murphy, Evidence, 7 August 2001, p 28.

particular town. In New South Wales, such sampling can be performed only with informed consent.

3.126 This section of the report is limited to examining the effectiveness of mass screening in investigations: the civil liberties implications are discussed in Chapter 4.

3.127 The testing of the male population of the small NSW town of Wee Waa in April 2000 is the only mass testing conducted in New South Wales to date (although smaller screens have been undertaken). The mass screening was undertaken following the violent sexual assault of an elderly female resident. The offender, who had volunteered for testing, subsequently confessed to the crime before the results of his sample were known.

3.128 The Police Service considers Wee Waa to be a case study of a successful use of mass testing in an investigation

If we had not done the testing in Wee Waa I suspect that the case would be unsolved.¹²⁴

3.129 The Division of Analytical Laboratories also considered the Wee Waa mass screening to have been a success:

It is highly unlikely that this case would have been solved and the offender brought to justice without the use of DNA profiling and a mass screen.¹²⁵

3.130 Less extensive screenings have occurred in Kings Cross and the North Coast:

A smaller screen at a boarding house at Kings Cross in relation to the rape and murder of Rebecca Bernauer was also conducted and a DNA match was obtained to a sample from a swab from a seminal sample in the vagina of the victim. A third screen on the North Coast in relation to a series of rapes has to date, not yielded a link but has eliminated a number of people from Police enquiries.¹²⁶

3.131 Evidence to the Committee detailed the implementation of the mass testing, and the associated collection of intelligence information:

We set up stations using the major incident response vehicle, which is a big truck-like vehicle, at the police station. We allowed for people to come to the police station to have their samples taken. But most of it was done in people's homes. The police went around. The reason for that is that we gave out a survey as well. It was not just the taking of DNA samples. It was all part of that intelligence web of policing. We gave a survey as well to ensure that we got everyone, which is like, "Who are you? You live here, who lives next door? Who lives on the other side?" So that we could identify people. They needed two forms of identification...

We had questions asked such as "Where were you at the time?" They we had profiling-type questions, such as "Did you commit this offence on Rita Knight"

¹²⁴ Wilson-Wilde, Evidence, 26 July 2001, p 20.

¹²⁵ Submission 25, 30 November 2001, p 6.

¹²⁶ Submission 21, 30 November 2001, p 4.

do you think the person who committed this offence would be feeling sorry for what he has done?" It was interesting to note that the only person who actually showed empathy for the offender said, "Yes, I think he would be feeling very sorry for what he has done and, yes, he does deserve the second chance", was the offender.¹²⁷

3.132 Following collection, the samples were prioritised before being analysed.

We got 497 samples, and started analysing the first batch of 42. The rest we never analysed. You do not go into a town and mass screen everyone and analyse all the samples, that would be a waste of money ... It is all about prioritising and then analysing and seeing what you get.¹²⁸

3.133 The use of mass testing in investigations, including in Wee Waa, is not without critics. Witnesses before the Committee expressed concern that the mass testing was an unnecessary intrusion emphasising technology over traditional policing. Dr Jeremy Gans, for example, told the Committee:

Part of my problem with Wee Waa, for example, is that it is clear from newspaper articles discussing the police investigation in that case the police had a small number of suspects in mind when they made the request. They did not suspect the entire town of Wee Waa ... I do not see why the entire town ... had to be brought into this investigation in that way.¹²⁹

3.134 Mr Michael Strutt of Justice Action objected to the use of mass screening in Wee Waa because other evidence could have been used:

Also escaping comment at the time was the fact that the man arrested was known to police, had been previously imprisoned for aggravated rape and had moved into the area shortly before the offence took place. In all the congratulation over catching a criminal with new technology deployed on a massive scale, no one took the time to ask why he had not been caught much earlier using conventional police work.¹³⁰

Effectiveness: Statistical Evidence

3.135 The Committee has been unable to obtain satisfactory quantitative or qualitative data supporting claims about the effectiveness of DNA in solving crime, for New South Wales or for other jurisdictions. Overwhelmingly, available statistics relate to activity rather than outcomes. That is, figures are collated detailing numbers of profiles collected and analysed, incidences of database matches, and crimes involving DNA evidence. These statistics do

¹²⁷ Wilson-Wilde, Evidence, 26 July 2001, p 24.

¹²⁸ *ibid*, p 20.

¹²⁹ Gans, Evidence, 31 July 2001, p 23.

¹³⁰ Justice Action, Submission 10, 6 June 2001, p 14.

not, however, identify the impact of DNA evidence in the solution and prosecution of crime.

3.136 In New South Wales, DNA testing is still at a very early stage, the *Crimes (Forensic Procedures) Act 2000* having been assented to only in July 2000.

3.137 Testing of serious indictable offenders in NSW correctional centres began in January 2001. The Police Service provided the following statistics to the Committee in relation to testing of offenders:

As at 31st May 2001 a total of 4304 DNA samples had been obtained from serious indictable offenders. ... These were obtained as follows:

- (a) 3,819 buccal swabs
- (b) 213 hair samples
- (c) 2 blood samples ¹³¹

3.138 The Police Service advised the Committee that selection of inmates is based on release dates, with inmates due for release within two months scheduled for testing.¹³²

3.139 In relation to suspects, testing was implemented with an initial focus on serious crime from January 2001, and expanded to include other crime on 1 April 2001. At 31 May 2001, 436 samples had been taken from suspects, of which 421 were buccal swabs, 14 were hair samples, and 1 was a blood sample.¹³³

3.140 The Division of Analytical Laboratories provided recent statistics on database matches, indicating that some links had already occurred:

In late October and November 2001 ahead of schedule, the ICPMR/DAL laboratory informed police of the first 11 cold links obtained from the DNA database. These cold links included linking convicted offenders to 1 Sexual Assault, 1 homicide, 1 steal motor vehicle and attempt to run down a police officer, 1 aggravated robbery, 6 cases of break, enter and steal. The eleventh link was a scene to scene link where we were able to link 2 separate apparently unrelated break enter steals. In each of these cases police had no active suspects under investigation.¹³⁴

3.141 The submission also provided statistics highlighting the efficacy of DNA profiling in exonerating suspects:

In the 6 months from January to June 2001 there were at least 105 occasions where suspect's DNA did NOT match the DNA from key evidence items, this is

¹³¹ NSW Police Service, Submission 22, 10 July 2001, p 1.

¹³² *ibid*, p 2.

¹³³ *ibid*, p 3.

¹³⁴ Submission 25, 30 November 2001, pp 5-6.

called an elimination. This knowledge saved an enormous amount of Police time and saved many of those individuals from the stress of further investigation.¹³⁵

3.142 In the United Kingdom, where DNA testing has been employed in investigations since the 1980s, more comprehensive statistics are available as to the use of DNA. Between July 1995 and July 2000, DNA profiles from 817,448 suspects were placed on the UK database. Match statistics for the same period are:

Person to Crime Scene	77,522
Crime Scene to Crime Scene	11,073 ¹³⁶

3.143 It is further reported that the UK database produces a 'cold hit' rate of 18 per cent, which compares favourably to the 10 per cent 'cold hit' rate for fingerprinting.¹³⁷

3.144 If the experience in the United Kingdom is repeated here, New South Wales can expect an exponential rise in database matches. Ms Linzi Wilson-Wilde, Forensic DNA Specialist with the NSW Police Service, told the Committee about the UK match statistics:

In the first year, there were hardly any matches, and there are not many in the second year. Only in the third year do we get a significant amount of matches coming up. ... So we can see that huge increase after the third year in the number of samples. We will find a similar thing here. For the first couple of years the database will not .. produce the masses of matches everybody expects it will.¹³⁸

3.145 The following graph illustrates the growth of cold hits in the United Kingdom.

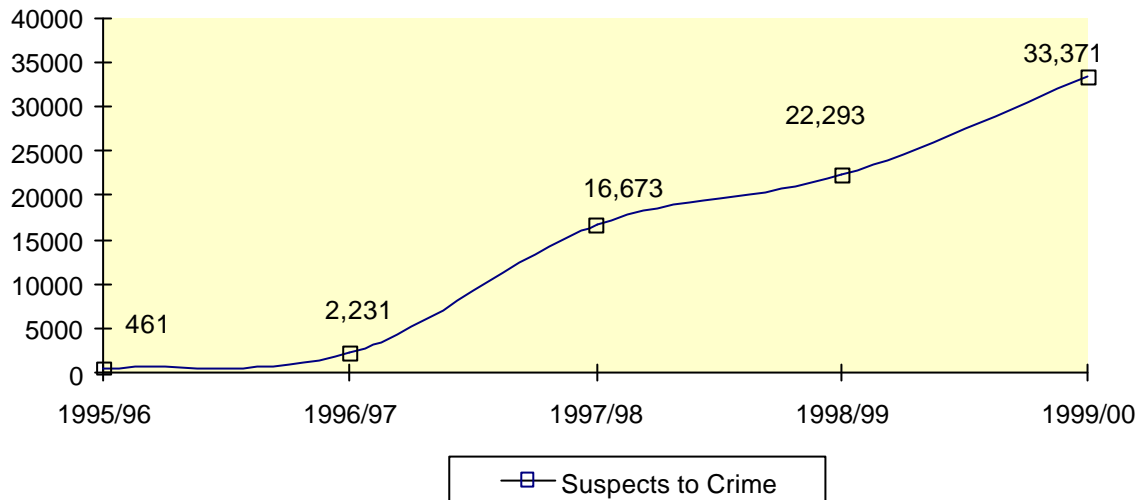
¹³⁵ Submission 25, 30 November 2001, p 4.

¹³⁶ Submission 22, 10 July 2001, p 3.

¹³⁷ Saul, op cit, p 93.

¹³⁸ Evidence, 26 July 2001, p 18.

UK Matches Year by Year



3.146 The NSW Police Service estimates that over the next one to two years, there will be a dramatic increase in database matches:

It is believed that once 1% of the population (made up of convicted offenders) is on the database, links will be expected in 30-50% of matters where an evidential sample yields a DNA database.¹³⁹

3.147 Similarly, the Deputy Director of the Department of Analytical Laboratories gave evidence that higher numbers of matches in New South Wales are likely in the future:

We always said that effectively we were going from a standing start then and that we would expect to see no cold hits in the first year, we would expect to see a trickle of cold hits in twelve to eighteen months and by the time we got through to eighteen months there should be a sufficient volume of convicted offenders and crime scenes on the database that you would start to get a significant number of cold hits. I think we are on target exactly as to what was predicted when the project started.

We have been severely hampered by the failure of the Commonwealth to deliver two key areas that they had promised us. One is the actual CrimTrac database that was going to do the matching of crime scenes and convicted offenders and the second one is their failure to deliver a laboratory information system that would actually provide an administrative structure within the laboratory for performing the work.¹⁴⁰

3.148 Statistics on the United Kingdom's use of mass screening of communities were provided to the Committee:

¹³⁹ Submission 21, 30 November 2001, p 4.

¹⁴⁰ Vining, Evidence, 29 October 2001, p 15.

The UK has conducted about 144 mass screens in respect of homicides or rapes. They have actually made more than 53 matches - I think it is more like 75 matches they have made so far. Out of those 53 matches they have got 20 matches for murders and 33 for sex offences.

... Mass screens are done where there is absolutely no other evidence. When an investigation has gone nowhere and the police do not know who committed a crime they conduct a mass screening ... The police were able to obtain a match, and that gave them some intelligence from which they could continue their investigation; it points them in the right direction and excludes people who may have been suspects but were not guilty of an offence.¹⁴¹

3.149 New Zealand's DNA database has been operational since the passage of the *Criminal Investigations (Blood Samples) Act 1995*. Figures for New Zealand reveal that there are approximately 10,000 samples on the database, and there is a 30% hit rate for volume crime. That is:

When they put a crime scene sample for a break, enter and steal on the database there is a 30 per cent chance that that will match something else, whether another crime scene or a person sample.¹⁴²

3.150 In Victoria, after three years' operation, the database has just over 6000 profiles on it. Statistics provided to the Committee indicate that there have been 1,567 matches, 357 of which were person to crime scene, and 210 of which were crime scene to crime scene. Fifteen of the matches were for homicides, and 10 were for sex offences.¹⁴³ Early statistics for South Australia indicate that around 30 percent of crime scene profiles match another crime scene, and almost one-quarter of convicted offender profiles matched an unsolved crime.¹⁴⁴

3.151 The Committee notes that some caution is required when considering DNA match statistics. As was discussed in the section on the reliability of DNA matching, a match between a suspect and a crime scene shows only that the suspect may have been (but not necessarily *was*) at the crime scene. Further, figures concerning clear-up rates of crimes with DNA evidence do not of themselves indicate the role of DNA in the investigation and prosecution, or whether the crime could have been solved in the absence of DNA evidence.

3.152 This point was made to the Committee by Public Defender, Mr Andrew Haesler, who was the New South Wales representative on MCCOC:

Another concern, particularly when one looks at the "propaganda" that has come out at various times from the United Kingdom about the success of DNA testing, what they trumpet is the number of matches not the number of convictions and

¹⁴¹ Wilson-Wilde, Evidence, 26 July 2001, p 19.

¹⁴² *ibid*, p 20.

¹⁴³ *ibid*, p 21.

¹⁴⁴ Submission 26, 25 November 2001, p 2.

neither I nor the people who work with me have been able to find out how successful DNA testing has been in other jurisdictions with a view to actual criminal convictions as opposed to matching individuals to crime scenes. There is a danger that that data might be misinterpreted.

I will give an example. Of the 100 or so homicides in New South Wales each year, 80 percent or 90 per cent are solved within about 48 hours because the offender was known to the police or were family-related or the offender was identified. If DNA testing is carried out in relation to that offender and that crime scene, you will get 90 percent of homicides resulting in matches. The DNA would have nothing whatsoever to do with the eventual conviction of the offender but you will get a wonderful statistic.¹⁴⁵

3.153 The Police Service was unable to provide the Committee with figures indicating success rates for DNA profiling in the UK:

We were unable to get that information as it is not freely available. It is a difficult one to say whether something was actually solved. Quite often a DNA match might be relatively innocent, it could be a cigarette at a party where there was a sexual offence but the person was legitimately at the party, and the only way they could get those sorts of figures was to go through every matter all the way to the court, if need be, so they could not tell us how many were actually followed up or solved, there were that many links.¹⁴⁶

3.154 The paucity of relevant statistics clearly limits the Committee's ability to form conclusions about the effectiveness of DNA profiling in investigations, and a useful assessment of the effectiveness of DNA profiling is not possible at this early stage.

3.155 As discussed further in the following chapters, empowering police to forcibly obtain DNA samples involves significant civil liberties issues. In order to successfully argue that the powers are justified by the resultant improvements in law enforcement, evidence must be provided that such improvements are in fact occurring.

3.156 The Committee considers that collation of statistics on the use of DNA in the criminal justice system, and an evaluation of the role of DNA in law enforcement success, would therefore be valuable for public policy purposes. For the study to be meaningful, it should take place after the Act has been operational for at least five years.

3.157 Accordingly, the Committee recommends that such a project be undertaken by the Bureau of Crime Statistics and Research, and that funding be provided for that purpose.

¹⁴⁵ Haesler, Evidence, 29 August 2001, p 2.

¹⁴⁶ Raymond, Evidence, 29 October 2001, p 14.

Recommendation 3

The Committee recommends that an independent agency such as the Bureau of Crime Statistics and Research be requested and funded to collect data and report on the role of DNA in law enforcement success, including, but not limited to:

- the percentage of DNA database matches leading to arrests
 - the percentage of DNA database matches leading to prosecutions
 - the percentage of DNA database matches leading to convictions
-

Impact of DNA profiling on criminal trials

3.158 The Committee heard evidence that DNA technology is likely to reduce the length, and therefore the cost, of trials, as the strength of DNA evidence could encourage more defendants to plead guilty:

The Hon John Hatzistergos: What I think is critical but which you have not stated anything about is whether the DNA evidence would assist, particularly in reducing the length of any trial which might take place or reducing the number of cases where persons may plead not guilty. I was interested in the fact that you indicated in a rape case you were recently involved in that that case collapsed without it going to the jury on the basis that DNA evidence was obtained during the trial. I want you to comment on what impact the DNA evidence is having on trial length and trial complexity ...

Mr Haesler: The impact of DNA in the short term, there will be more lengthy trials, because people will need to test the procedures with regard to DNA. There have been a number of trials recently where the Profiler Plus system was rigorously examined, and that led to much more lengthy trials than would ordinarily be the case. That will change, because there are a series of precedents from Supreme Court judges saying that Profiler Plus works ... So yes, they might be lengthier at the beginning but it will mean more people will plead guilty.

... The advice to clients will be, "Here is some very strong evidence against you. Given that the procedures have been followed and given that the testing from the Department of Analytical laboratories has been rigorously examined in a couple of court cases, your chances of beating the case are Buckley's and none. There is now a provision which says that you will get a discount if you plead guilty. Why waste everyone's time and why give yourself an extra couple of years in gaol by needlessly fighting this case?" Some clients will say, "I am innocent, I have been framed, I will fight the case." That is fine, that is their right. Those cases will take some time. But in the vast majority of cases I have found that my clients accept the advice I give them and they plead guilty. Hopefully there will be more pleas of guilty and more convictions as a result of DNA evidence.

My concern I expressed at the beginning is that the legislation needs to be monitored. I would like to know whether trials are getting longer. I would like to

know whether we are using DNA legislation and testing effectively to ensure that there are more appropriate convictions and shorter trials or no trials at all.¹⁴⁷

- 3.159** The Committee agrees that the impact of DNA evidence on criminal trials needs to be monitored. This research would appropriately be included in the project recommended to be undertaken by the Bureau of Crime Statistics and Research in Recommendation 3.

Recommendation 4

The Committee recommends that an independent agency such as the Bureau of Crime Statistics and Research be requested and funded to collect data and report on the impact of DNA evidence on criminal trials, including, but not limited to, their length and complexity.

Impact on crime rates

- 3.160** The deterrent effect of DNA technology is not easy to determine. The May 1999 MCCOC Report, for example described the deterrence value of DNA as “hidden and impossible to

Greater awareness of [DNA] should deter criminals from highly physical criminal activity such as burglary and serious assaults where it is likely evidence that can be examined for DNA will be left at the scene of the crime. It is therefore hoped that the database will in that way work to reduce some of the more frightening and invasive crimes.¹⁴⁸

- 3.161** However, MCCOC conceded that it is difficult conclusively to link DNA testing with declining crime rates:

Crime rates are on the decline in the UK and USA where there is extensive DNA matching, but it is difficult to apportion the degree to which this can be attributed to the use of the DNA databases. Other important factors include demographic changes, improved economic conditions and a greater emphasis on crime prevention and community policing.¹⁴⁹

- 3.162** The Committee notes that it would be useful to monitor the impact of DNA profiling on crime rates on an on-going basis, and that this issue could be incorporated into the project recommended in Recommendation 3.

¹⁴⁷ Haesler, Evidence, 29 August, p 12 – 13.

¹⁴⁸ Model Criminal Code Officers Committee, *Model Forensic Procedures Bill and the Proposed National DNA Database*, May 1999, p 3.

¹⁴⁹ *ibid.*

Recommendation 5

The Committee recommends that an independent agency such as the Bureau of Crime Statistics and Research be requested and funded to collect data and report on the impact of the use of DNA technology on crime rates.

Conclusion: Effectiveness

- 3.163** Both the information reviewed and the opinions provided to the Committee suggest a broad consensus that DNA matching is effective for investigative purposes. The Committee notes, however, that DNA technology is not entirely failsafe. The use of DNA profiling in an investigation should occur with an awareness that the science cannot provide a definitive identification of an offender. With that qualification, DNA matching can be an enormously effective investigative tool, assisting with identifying possible suspects, reducing investigative time and costs, identifying links between crimes, and exculpating the innocent. This has positive flow-on effects for the criminal justice system as a whole.
- 3.164** The Committee notes that DNA profiling is only one of a range of methods available to the police, and is most effectively used in conjunction with traditional policing methods. A match between a suspect's profile and a crime scene profile is not sufficient to conclude that the suspect committed the offence. Barring fabrication of evidence or a coincidental match, the presence of the suspect's DNA at the crime scene would confirm only that the suspect had been at the crime scene. Further evidence would be required to make the case against the suspect, particularly where identification of the suspect occurred by means of a database search.
- 3.165** The Committee's recommendations for further research into the effectiveness of DNA profiling for law enforcement aim to overcome the dearth of qualitative statistics focusing on the impact of the use of DNA technology. Such information is crucial if the effectiveness of DNA profiling is to be meaningfully assessed.

Chapter 4 Social and Legal Implications of DNA Testing

The authority to request or require a DNA sample from a suspect, offender or volunteer clearly represents a significant power of the State in relation to the individual. As the Hon Justice Michael Kirby AC CMG noted, it is crucial that this enhancement of State power occurs in a way that “is compatible with the basic principles of our legal system”.¹⁵⁰ This chapter examines the impact of the *Crimes (Forensic Procedures) Act 2000* on the rights that are central to our society and our legal system: the right to bodily integrity, the right to a fair trial, the right to privacy, and the presumption that laws will not be retrospective in effect. The next two chapters detail the way in which the Act has attempted to protect these rights while meeting society’s law enforcement requirements.

Civil Liberties Issues

4.1 The Committee received evidence and submissions from a number of individuals and organisations concerned about the potential for DNA technology and the *Crimes (Forensic Procedures) Act 2000* to threaten civil liberties.

4.2 The NSW Privacy Commissioner, for example, emphasised the need to balance civil liberties and law enforcement requirements:

The issue which is being addressed at the moment is part of a continuing debate within New South Wales – seeking to balance the need for community protection, for the detection and solution of criminal activities, and for New South Wales law enforcement authorities to have access to technologies and information which are up to date, relevant, and which will assist them in the discharge of their responsibilities, against the need for there to be some limitation on the powers of police and law enforcement authorities.

At the end of the day one can have a crime-free society at high cost to the nature of society and to the liberties and rights of individuals and citizens. Achieving the balance is extremely difficult and, I think, a great challenge for parliaments ... it is my opinion that the legislation which is currently being examined has gone too far against the supposition or the presupposition of the rights of individuals in our community to be treated as citizens with private rights and responsibilities.¹⁵¹

4.3 The New South Wales branch of the Council for Civil Liberties also noted the competing interests:

It is all about an invasion of a person’s right to their own body tissues and it is all done because of the greater need in the community to clear up crime. In those circumstances where you have a particular minority of people who are going to be

¹⁵⁰ Michael Kirby, “DNA Evidence: Proceed with Care”, *Australian Journal of Forensic Sciences*, Vol 33, 2001, p 9.

¹⁵¹ Puplick, Evidence, 8 August 2001, p 1.

subject to tests which are not available in relation to other persons in the community, then we say the safeguards have to be rigorously imposed.¹⁵²

4.4 In relation to the sampling of serious offenders, the Council for Civil Liberties expressed reservations:

In a free society you do not go around mandatorily taking information and then keeping it on record in case someone does something, you only do it when there is evidence.¹⁵³

4.5 The Sydney Regional Aboriginal Corporation Legal Service noted its general civil liberties concerns:

We stand by the belief that the introduction of this Act is in violation of a number of fundamental rights including the right to silence and privacy.¹⁵⁴

I think the Act affects directly the right ... against persons self-incriminating themselves and the presumption of innocence.¹⁵⁵

4.6 Similarly, Justice Action gave evidence that:

... the issues are compromise of genetic privacy, interference with bodily integrity and potential for future DNA surveillance. They are very serious invasions of people's rights and they should not be taken lightly.¹⁵⁶

4.7 The Public Defenders drew the Committee's attention to concerns that the testing of prisoners:

constitutes a serious interference with the respondent's personal liberty and privacy by compelling that person to undergo a forensic procedure when the State has no reasonable suspicion or proof of that person's involvements in any crime.¹⁵⁷

4.8 Mr Haesler cautioned:

Where there is a risk of interference with or threat that individual privacy or civil liberty will be interfered with, the argument in favour of the greater public good must be subject to critical scrutiny. Too often this argument and the call the innocent have nothing to fear has been used by totalitarian regimes to justify the

¹⁵² Brezniak, Evidence, 7 August 2001, p 25.

¹⁵³ Murphy, Evidence, 7 August 2001, p 28.

¹⁵⁴ Submission 13, 8 June 2001, p 1.

¹⁵⁵ Nash, Evidence, 15 August 2001, p 2.

¹⁵⁶ Strutt, Evidence, 7 August 2001, p 7.

¹⁵⁷ Dan Meagher, "The Quiet Revolution – A Brief History and Analysis of the Growth of Forensic Police Powers in Victoria", in (2000) 24 *Criminal Law Journal* 76, p 84 cited in Submission 9, 5 June 2001, p 4.

oppression of their citizens. Too often laws enacted for a particular purpose have later been subject to abuse by the unscrupulous.¹⁵⁸

- 4.9** The remainder of the chapter provides greater detail about particular civil liberties concerns raised with the Committee.

Right to privacy

- 4.10** In an article that was tendered in evidence to the Committee, Ben Saul quotes the Canadian Privacy Commissioner's description of the right to privacy as:

... the value at the heart of our individual autonomy; the right to be free from interference, from surveillance, from coercion by others who would use information about us to influence our decisions [and is] fundamental to maintaining a civil society – respecting one another by maintaining the distance which is essential to our individuality while living closely together... we are all entitled to expect enough control over what is known about us to live with dignity and to be free to experience our individuality.¹⁵⁹

- 4.11** Saul highlights the privacy implications of DNA sampling:

At a fundamental level, DNA testing is a violation of personal privacy... [it] is a form of intrusive modern technology which makes it 'feasible for others to learn many intimate details about us, whether we want them to or not.'¹⁶⁰

- 4.12** He again cites the Privacy Commissioner of Canada:

... we cannot ignore the psychological consequences of being poked and prodded by the state... What does that do to a person's sense of autonomy and sense of freedom?¹⁶¹

- 4.13** The New South Wales Aboriginal Land Council submitted that the *Crimes (Forensic Procedures) Act 2000* breaches several articles of the International Covenant on Civil and Political Rights, including Article 17.1:

No one shall be subjected to arbitrary or unlawful interference with his privacy, family home or correspondence, nor to unlawful attacks on his honour and reputation.

- 4.14** The ALC commented in relation to Article 17.1:

The attack on individual privacy constituted by the invasive procedures are well reported upon.¹⁶²

¹⁵⁸ Submission 9, 5 June 2001, p 5.

¹⁵⁹ Saul, op cit, p 79, tendered by Mr Strutt, 7 August 2001

¹⁶⁰ *ibid.*

¹⁶¹ *ibid.*

4.15 Several witnesses noted that privacy issues are far more significant in relation to DNA samples than for fingerprints because of the information that can be obtained from DNA. For example, the Council for Civil Liberties stated:

... DNA can be misused by insurance companies testing for disease, by people wanting to find out family information from people and there are other adverse consequences from DNA that you do not have with fingerprints. DNA is the most private thing of an individual.¹⁶³

4.16 The NSW Privacy Commissioner gave evidence that:

... DNA is qualitatively different from most of the other forms of identification, whether it happens to be photographic identification, voice recognition or fingerprints. DNA potentially tells you a great deal not simply about the person from whom the DNA is taken but also about all of his or her relatives.¹⁶⁴

4.17 In relation to the misuse of profiles, the Committee notes the Police Service advice (as detailed in Chapter Two) that the DNA profiles used for matching do not contain any genetic information:

The only things we look at are the bits within the genes. We look at areas where we get variation and there are nine areas. They are, if you like, the cotton wool that supports the gene. They tell us nothing about the person with the exception of the sex gene.¹⁶⁵

4.18 The DNA profiles, therefore, do not contain information that are susceptible to abuse. However, Dr Raymond agreed that a person with access to the tissue sample could undertake additional analysis which could identify certain characteristics.¹⁶⁶ The Committee firmly believes that the potential for misuse of genetic information necessitates strong safeguards, particularly in relation to the destruction of samples. This is considered further in the section of the report dealing with protections.

Right to a fair trial

4.19 Justice Action submitted that the complexity of DNA evidence (particularly chance match probabilities), and the resultant difficulties for judges and juries in understanding its significance, damages the prospect of a fair trial:

Even if forensic evidence is presented accurately, honestly and completely it does not mean that judges and juries will understand it.

¹⁶² Submission 15, 14 June 2001, p 6.

¹⁶³ Murphy, Evidence, 7 August 2001.

¹⁶⁴ Puplick, Evidence, 8 August 2001, p 2.

¹⁶⁵ Raymond, Evidence, 15 August 2001, p 34.

¹⁶⁶ *ibid*, p 34.

... Late last year Andre Moenssens, Douglas Stripp Professor of Law at the University of Missouri, conducted a survey of over 100 US trial court judges as to what they understood from testimony giving DNA match odds of '37 million to one'. All of those who responded stated incorrectly that it meant that this defendant's particular DNA pattern would occur only once in 37 million individuals.

This was also the understanding expressed by Justice Mulligan when accepting the 90 billion to one match odds given *R v Karger* last March, in spite of the best efforts of defence experts to point out his error. Perhaps this is understandable, as the chief prosecution expert in the case had told him that a 90 billion to one likelihood ratio means that 'the probability or likelihood of seeing a second unrelated person with the same DNA profile is more rare than 1 in 90 billion.'¹⁶⁷

4.20 Justice Action submitted proposals for reducing the likelihood of misinterpretation of forensic evidence:

In order to avoid the inadvertent or deliberate misleading of judges and juries with complex forensic evidence it is vital that standardised methods be developed for presenting such evidence in courts and that members of the judiciary receive training in its interpretation. It is also vital that Legal Aid resources be increased considerably so that people are not convicted on such evidence simply because they cannot afford the expert testimony necessary to challenge it.

What is really needed and way overdue is an independent body to monitor the competence and integrity of Australia's forensic expert witnesses, probably via regular audits of the evidence they give.

... The current practice of having forensic scientists who are regularly called upon to give prosecution evidence monitor each other is entirely inadequate. It does not appear to have had any impact on the quality of expert testimony given in Australian courts.¹⁶⁸

4.21 Mr Strutt elaborated on this in a public hearing:

I have read so many [court] transcripts where I am in no doubt whatsoever that that evidence has been either deliberately or incompetently misrepresented to the court...

I think [misrepresentation of forensic evidence] is largely due to the adversarial nature of the court room and what tends to happen to difficult scientific concepts when they are basically translated through that. You have got a partisan group of experts on one side and a partisan group of experts on another side, with a very complex topic and with a large number of areas that people are likely to misunderstand no matter how carefully it is explained to them unless they have been expertly trained. I think one of the biggest problems is misrepresentation of real evidence as opposed to the planting of false evidence.¹⁶⁹

¹⁶⁷ Submission 10, 6 June 2001, p 8.

¹⁶⁸ *ibid*, p 9.

¹⁶⁹ Strutt, Evidence, 7 August 2001, p 6.

4.22 The Privacy Commissioner also commented on the difficulty for juries to understand DNA evidence:

... I think for many average citizens serving on a jury even with the best will in the world to have some distinguished lawyer who is not a statistician or a scientist walk the jury through the questions of the meaning of statistical probabilities and to explain to the jury the difference between the various statistical terms such as probability and all the rest of it is, sometimes, very hard to follow particularly when you have denied juries access to the transcripts so that they can sit down themselves in the jury room and read through the transcript slowly and try to absorb it slowly. They do not have access to those in New South Wales.¹⁷⁰

4.23 In an article for the Australian Journal of Forensic Sciences, The Hon Justice Michael Kirby observed the necessity of ensuring an appropriate level of knowledge of DNA evidence in the court system. He considers it essential:

that judicial officers who receive such DNA evidence, and lawyers who tender it, examine and cross-examine upon it, are afforded basic information and training to ensure that each can perform his or her professional duty and safeguard the individual concerned from risks of mistake, oppression and injustice.¹⁷¹

4.24 The Committee shares the concerns expressed as to the complexity of DNA evidence, and the level of knowledge needed by judicial officers and lawyers to deal adequately with the evidence. It is conceivable that the misinterpretation of DNA evidence by a judge, prosecutor or defence lawyer could lead to a miscarriage of justice. The Committee therefore considers it appropriate that the Judicial Commission provide training about DNA evidence for the judiciary and that Continuing Legal Education courses be available for solicitors and barristers working in the criminal law.

Recommendation 6

The Committee recommends that the Judicial Commission provide training of judicial officers in relation to the forensic use of DNA, its accuracy, and the interpretation of DNA evidence.

Recommendation 7

The Committee recommends the inclusion of courses in interpreting DNA evidence as part of the Practical and Continuing Legal Education for solicitors, and as part of the Reading Period and Continuing Legal Education for barristers.

4.25 Juries, too, are required to contend with this highly complicated and specialised evidence. As discussed in the previous chapter, an aura of infallibility surrounds DNA technology,

¹⁷⁰ Puplick, Evidence, 8 August 2001, p 7.

¹⁷¹ Kirby, op cit, p 11.

that could cause juries to place unwarranted reliance on DNA matches. In an adversarial judicial system, juries will usually receive conflicting evidence, with the defence and prosecution each advocating different interpretations of the DNA evidence. The Committee considers it crucial to a defendant's right to a fair trial that juries understand the limitations of DNA evidence.

- 4.26** Clearly it would not be feasible for every jury to be trained in the basics of DNA evidence if relevant to the case being tried. The Committee notes, however, that judges may provide directions to juries that indicate the weight and interpretation to be given to evidence, including DNA evidence. Judicial Benchbooks provide guidance to judges when giving such directions.
- 4.27** The Committee considers that it would be valuable to have guidelines for directions about DNA evidence included in the Judicial Benchbooks to promote uniformity in the information received by juries. The directions should include such matters as the potential for fabrication of DNA evidence, the possibility of match errors, and the resultant need for corroboration (as discussed in Chapter 3).

Recommendation 8

The Committee recommends that the Attorney General seek to have guidelines for directions to juries about the interpretation of DNA evidence incorporated into the relevant judicial Benchbooks, including such matters as:

- the potential for fabrication and
- the possibility of match errors

-
- 4.28** The Hon Justice Michael Kirby also identifies the need for suspects to be able to have crime scene stains re-analysed by an independent analyst. He stated:

... effective facilities [should be] provided to suspects to permit them a secure independent scientific scrutiny of DNA samples alleged to relate to them. It is important that the relevant experts should not be entirely within the employ of the state. Just because a result is produced by an expert or a machine is no reason to accept it without further questioning, or the right to question, the applicability, accuracy and reliability of such result. An abiding difficulty of the present age is the unwillingness of many to accept that experts and machines sometimes err.¹⁷²

- 4.29** On this subject, a British study by Beverley Steventon revealed that independent analysis can often present results that contradict those presented by the prosecution:

38 per cent of defence lawyers who had obtained independent analysis of the evidence stated that their conclusions differed from those of the prosecutions'

¹⁷² Kirby, *op cit*, p 11.

expert. The response from the defence experts themselves indicated that this occurred in 43% of the cases that they had dealt with.¹⁷³

- 4.30** This raises two separate but related issues: the need for defendants to have access to crime scene stains to undertake re-analysis, and the availability of funding to enable this to occur.
- 4.31** Section 58 of the *Crimes (Forensic Procedures) Act 2000* provides for suspects to be supplied with a part of the material of any sample taken from them under the Act, as long as there is sufficient material to share. Presumably, however, a sample taken from suspects will usually be of their own DNA, and they can simply provide an additional sample for independent analysis. The Committee considers it to be equally important that defendants be given access to crime scene samples to enable that evidence to be independently assessed by the defence.
- 4.32** The Committee did not receive sufficient evidence or submissions to be able to draw conclusions about the availability of and access to the independent analysis of samples. The Committee suggests that, if he considers it appropriate, the Attorney General examine this issue when undertaking his review of the *Crimes (Forensic Procedures) Act 2000* pursuant to section 122.

Recommendation 9

The Committee recommends that, as part of his Review under s.122 of the Act, the Attorney General consider examining the access of defendants to crime scene samples and the availability of funding to enable independent analysis to be undertaken by the defence.

Self-incrimination

- 4.33** Several witnesses before the Committee argued that DNA testing detracts from the basic principle that a suspect should not be required to incriminate themselves. For example, the Council for Civil Liberties noted:

It infringes our commonly accepted understanding of the rule against self-incrimination. But the community has decided that it is a legitimate forensic tool and we are here today, not to argue that DNA testing should be abolished, but that it should be regulated in a manner which makes it consistent with our idea of a humane application of the law. We certainly agree that it does infringe against what we understand to be our idea of self-incrimination.¹⁷⁴

- 4.34** Dr Gans considers that the potential for self-incrimination occurs when a suspect is requested to consent to a procedure, rather than in any evidence obtained from the sample.

¹⁷³ Beverley Steventon, *The Ability to Challenge DNA Evidence*, Royal Commission on Criminal Justice, London, 1993, p 42.

¹⁷⁴ Brezniak, Evidence, 7 August 2001, p 32.

He argues that the privilege of self-incrimination relates to evidence obtained from people's minds, instead of their bodies.¹⁷⁵ An individual may incriminate themselves when asked to consent to a DNA test, if they appear anxious about what the test may reveal. Dr Gans considers it preferable to empower police to order DNA samples rather than to seek consent, as this will prevent suspects incriminating themselves through their reaction to a request for DNA.

4.35 Dr Gans explained this to the Committee at the public hearing:

The difference between a police order and the request is that the police order will only get someone's DNA. The request, on the other hand, will also get any consciousness of guilt from that person's mind, and that is what the privilege of self-incrimination is all about. It is not a protection for people from police gathering evidence... [You] cannot claim to be self-incriminated if police raid your house and find a dead body. That is not self-incrimination. Self incrimination is all about protecting our minds from forced discovery. I have no problem with an order because it is not an order to reveal your mind; it is an order to comply with a procedure and the police are just getting evidence. It is like finding a dead body. It just happens to be in your body but at least they are not getting the person revealing, without even any other evidence, that they might be guilty of an offence that is on the database.¹⁷⁶

4.36 Dr Gans describes this as 'DNA request surveillance', and notes that this can be used despite "an absence of an accusation or even pre-existing suspicion".¹⁷⁷

Retrospectivity

4.37 Under Part 7 of the *Crimes (Forensic Procedures) Act 2000*, serious offenders serving a term of imprisonment can be tested, even if they had been sentenced before the commencement of the Act. Several witnesses criticised the breaching of the principle that laws should not be retrospective.

4.38 The Criminal Law Committee of the Law Society of NSW expressed reservations about the retrospectivity of the provisions:

The Criminal Law Committee is very much opposed to the retrospective nature of Part 7 and is concerned that the process of testing offenders is well under way.¹⁷⁸

4.39 This was explained further in the public hearing:

It is the general concern that you should not be subject to ... a penalty that was not available at the time that you were convicted.¹⁷⁹

¹⁷⁵ Jeremy Gans, "A Critique of the Police's Right to Ask for DNA", *Use of DNA in the Criminal Justice System*, Institute of Criminology Seminar Papers, 11 April 2001, p 38.

¹⁷⁶ Evidence, 31 July 2001, p 35.

¹⁷⁷ Gans, op cit, p 38.

¹⁷⁸ Submission 12, 12 June 2001, p 11.

4.40 The retrospective nature of the testing of serious offenders was also the subject of comment in evidence from Justice Action:

... it was not intended by the original magistrate, when those people were sent to gaol, that they would lose their right to bodily integrity and genetic privacy, and would be subject to DNA surveillance for the rest of their lives. It seems to me to be a penalty that is being added on after the sentencing.¹⁸⁰

4.41 Mr Puplick also expressed concerns:

My own view is that, while I appreciate that there is a powerful argument that says that there may be statistically a greater chance that people who are already in custody or who have a record of numerous convictions may in fact have committed crimes which are still unsolved and there is a public interest in dealing with those, I think that the principle itself – namely that the Parliament has retrospectively changed the rights of a group of people by definition simply because they are in custody and has subjected them to a procedure which they would not have been subjected to, had they not been in custody – is in fact a very retrograde step as a matter of principle.¹⁸¹

4.42 Sir Harry Gibbs made a submission to the MCCOC Final Report that raised retrospectivity as an issue of concern:

There is however one provision that seems to me to be doubtful in point of principle. That is s.51 which provides that a forensic procedure may be carried out on a person found guilty of a serious offence before the section came into operation, if that person is serving a term of imprisonment. This seems to me to offend the principle that no person should suffer any adverse consequence from committing an offence unless that consequence was provided for by the law at the time the offence was committed.¹⁸²

4.43 Ben Saul was also critical of the retrospective provisions for offenders, arguing that the public interest is not furthered by the breaching of the principle:

Retrospectivity creates a precedent in the criminal law, lowering the threshold for retrospective application of future laws. Importantly, it is an approach which stigmatises individuals as members of a vaguely defined class of recidivists, without reference to the ideal of justice according to individual circumstances, and which hinders prospects of rehabilitation and post-prison reintegration.¹⁸³

4.44 The retrospectivity of the provisions for testing offenders has been a concern to the Committee. However, the Committee notes that the rationale for retrospectively applying

¹⁷⁹ Currie, Evidence, 31 July 2001, p 8.

¹⁸⁰ Strutt, Evidence, 7 August 2001, p 8.

¹⁸¹ Puplick, Evidence, 8 August 2001, p 3.

¹⁸² Sir Harry Gibbs, submission, MCCOC, Final Report, February 2000, p 7.

¹⁸³ Saul, op cit, p 91, tendered by Mr Strutt, 7 August 2001.

the serious offender provisions is that it is justified by the likely law enforcement gains to be achieved. This explanation is based on the assumption that prisoners are likely to re-offend, or to have offended in the past, and that investigations of these crimes could be assisted by database matches between prisoners and crime scenes (whether from future or past crimes).

Conclusion

- 4.45** The Committee has given careful consideration to the civil liberties issues raised in submissions and evidence. Individual rights and liberties are fundamental attributes of a free society, and provide protection to the community as a whole. In passing the *Crimes (Forensic Procedures) Act 2000*, the Parliament sought to balance the State's law enforcement needs on the one hand and civil liberties principles on the other. The Committee recognises, however, that there is ongoing concern amongst some individuals and organisations in relation to the impact of DNA testing on civil rights.
- 4.46** The Committee in this chapter has made several recommendations for practical measures to improve protections for the individual in respect of the right to a fair trial. The following two chapters examine the safeguards currently in place in the legislation.

Chapter 5 **Safeguards: Restrictions on obtaining samples**

As outlined in the previous chapter, the forensic use of DNA potentially raises civil liberties concerns. The Committee therefore considers it crucial that strong safeguards be built into the legislation. A number of protections are included in the Act, such as restrictions on the use of DNA testing, protections for more vulnerable members of society, regulation of the use of the database and the destruction of samples and profiles. The Committee examines the restrictions on obtaining samples below. Additional safeguards are considered in the following Chapter.

DNA testing may only be employed under the *Crimes (Forensic Procedures) Act 2000* if certain criteria are met (known as 'thresholds'). Different thresholds are established for suspects, offenders and victims and these are detailed and analysed below. The criteria applying to children, incapable people, and indigenous people are discussed separately.

Suspect Threshold Provisions

5.1 A 'suspect' is defined under the Act as

- (a) a person whom a police officer suspects on reasonable grounds has committed an offence
- (b) a person charged with an offence
- (c) a person who has been summoned to appear before a court in relation to an offence alleged to have been committed by the person
- (d) a person who has been served with an attendance notice issued under section 100AB of the *Justices Act 1902* in relation to an offence.

5.2 Under sections 11 and 12, a person may be requested by a police officer to consent to a forensic procedure if "there are reasonable grounds to believe that the forensic procedure might produce evidence tending to confirm or disprove that the suspect committed a prescribed offence". (Currently, a prescribed offence is an indictable offence.) Where the forensic procedure is a non-intimate procedure other than a hair sample (that is, a procedure that will not produce a DNA sample), it may be requested for people suspected of a summary offence or an indictable offence.

5.3 If a suspect will not consent to having a forensic procedure, in certain circumstances it may be ordered by a senior police officer or a judicial officer.

5.4 Non-intimate forensic procedures may be ordered by a senior police officer if the criteria set out in section 20 are met:

s20 Matters to be considered by senior police officer before ordering non-intimate forensic procedure

A senior police officer who makes an order under section 18 or 19 must be satisfied that:

- (a) the suspect is under arrest, and
- (b) the suspect is not a child or an incapable person, and
- (c) there are reasonable grounds to believe that the suspect committed:
 - (i) an offence, or
 - (ii) another offence arising out of the same circumstances as that offence, or
 - (iii) another offence in respect of which evidence likely to be obtained as a result of carrying out the procedure on the suspect is likely to have probative value, and
- (d) there are reasonable grounds to believe that the forensic procedure might produce evidence tending to confirm or disprove that the suspect committed such an offence, and
- (e) the carrying out of the forensic procedure without consent is justified in all the circumstances.

5.5 Where the non-consenting suspect is **not** under arrest, or is a child or incapable person, or where a buccal swab or intimate forensic procedure is sought, a **court order** may be sought. As with police orders, a court order may only be issued upon satisfaction of certain criteria. These are set out in section 25, and consist of the requirements that:

- there are reasonable grounds to believe the suspect committed a prescribed offence (or in the case of a non-hair, non-intimate procedure – an indictable or summary offence)
- there are reasonable grounds to believe that the forensic procedure might produce evidence tending to confirm or disprove that the suspect committed the relevant offence and
- that the carrying out of the forensic procedure is justified in all the circumstances.

Commentary: Suspect Threshold

Suitability of NSW threshold for suspects

5.6 Many witnesses noted that the New South Wales threshold for suspects differs from that of the MCCOC Model Bill, as briefly discussed in Chapter Two. The MCCOC Bill allows a test to be requested or required where there are reasonable grounds to believe that the forensic procedure **is likely to** produce evidence tending to confirm or disprove that the suspect committed an offence, and the request or order is justified in all of the

circumstances.¹⁸⁴ This contrasts with New South Wales where the threshold is **might produce** evidence.

5.7 Justice Action is critical of the New South Wales threshold:

Although the MCCOC Model Bill requires a police officer to have 'reasonable grounds to believe that the forensic procedure *is likely* to produce evidence ...' the NSW Act only requires police officers to have 'reasonable grounds to believe that the forensic procedure *might* produce evidence...' The watered down standard is so weak it might just as well be left out entirely.¹⁸⁵

5.8 NSW Privacy Commissioner, Mr Chris Puplick, favours the approach of the MCCOC Model Bill:

The Model Bill sets the higher standard of *likely to prove*. It requires a person who requests or orders a suspect to submit to a test to consider whether the test is justified in all the circumstances. The NSW legislation omits this requirement...

These departures from the Model Bill represent a significant dilution of the kind of safeguards which one would expect in a comprehensive code of this nature. I remain firmly opposed to this dilution of what I see as crucial safeguards.¹⁸⁶

My view is very strongly that the Federal standard is the correct standard and that the New South Wales standard is in fact far too open-ended... I think that the Federal standard was drawn specifically to put some onus on the investigating authorities to really demonstrate that there was a serious possibility that the evidence would be useful other than as a mere fishing expedition. The New South Wales legislation is an invitation to a fishing expedition.¹⁸⁷

5.9 The Sydney Regional Aboriginal Corporation Legal Service favours a higher threshold than that which currently exists in NSW. It proposes:

That the test of "might produce evidence" contained within section 20 be replaced with a higher burden of proof on the Police... We submit that the Police need to prove that unidentifiable DNA samples have already been gathered from the crime scene. Furthermore, the wording of s.20 should be changed so that the Police must be satisfied that the procedure "will" produce evidence.¹⁸⁸

5.10 Dr Gans suggested additional safeguards in relation to the threshold:

¹⁸⁴ See sections 8, 14, and 19 of the Model Bill in MCCOC, February 2000.

¹⁸⁵ Submission 10, 6 June 2001, p 20.

¹⁸⁶ Submission 14, 13 June 2001, p 3.

¹⁸⁷ Puplick, Evidence, 8 August 2001, p 4.

¹⁸⁸ Submission 13, 8 June 2001, p 6.

Para (a) should explicitly provide that a person's failure to consent to a forensic procedure (or withdrawal of that consent) is *not* (either alone, or in combination with other evidence) a 'reasonable ground' to regard that person as a suspect.¹⁸⁹

Another thing that was mentioned is one criteria that the Act does not use in its formulation, which I know is used in Canada and which might be appropriate for the kind of idea I have. The police should at least be restricted from asking for DNA in relation to an offence unless they have already recovered from the crime scene DNA material in relation to that offence. One problem I have is that the request for consent can be made whether or not the police have any DNA to match. In that case they are not interested in doing any DNA matching as they have nothing to compare. They are interested in a request.¹⁹⁰

5.11 Mr Strutt also commented on the need for the request or order for DNA to be linked to its role as potential evidence in a crime:

For instance, if it is establishing somebody's presence at a particular time or something like that, and the person is not denying the presence at a particular time, then there does not seem to be a lot of point in taking their DNA and data basing it in an attempt to prove that. Of course in a lot of rape cases it is not a matter of contesting whether intercourse took place, but it is consent, and again it does not seem particularly necessary that DNA evidence will be taken. I would say basically the DNA evidence has got to be shown to be useful...¹⁹¹

5.12 Dr Gans noted that the NSW threshold for procedures on suspects is low, but argues that this is necessary and of less concern than the broad use of the DNA afterwards:

The problem ... is the phrase "reasonable grounds to believe that the forensic procedure might provide evidence tending to confirm or disprove that the suspect committed an offence". That applies to anyone. If the police had DNA from a crime scene then a procedure done on me would, in fact, confirm or disprove my involvement in the crime. Certainly it would have reasonable grounds to do that. It is an empty test. The poor police have to go through it but they will never get anything but "yes" as the answer to that test.

It has to be a low standard. You can not require a proof of someone's guilt before you get the evidence that proves their guilt. ... The crucial thing with section 12 is to basically delete those sections, make it possible for police to get DNA from someone who is a suspect of a crime, but then restrict them to using that DNA profile only for the investigation of that crime, or another crime arising out of those circumstances, but not given carte blanche. That will constrain the police because they will not bother getting a DNA profile from someone unless they actually have genuine grounds for suspicion.¹⁹²

¹⁸⁹ Submission 4, 9 May 2001, p 4.

¹⁹⁰ Evidence, 31 July 2001, p 35.

¹⁹¹ Evidence, 7 August 2001, p 7.

¹⁹² Evidence, 31 July 2001, p 28.

5.13 The Police Service argued in evidence that the current lower threshold of “might produce evidence” is preferable to the higher threshold of “is likely to produce evidence” because the higher threshold would be too hard to meet. Ms Dugandzic gave the following example to illustrate:

If some hair is found at the crime scene and a suspect is arrested in fairly close proximity to the commission of the offence and the police would like to take a DNA sample for the purpose of matching it to the DNA in the hair strands. I believe that you heard evidence from Linzi Wilson-Wilde from the Police Service that when things like hair are found at the crime scene it is not a 100 per cent probability that you will get a DNA sample from that hair. I think the figure she quoted was something along the lines of 24 per cent. So in those circumstances if the test is “likely to produce evidence” the police would not be able to take a DNA sample from that person prior to the analysis of the actual hair.¹⁹³

5.14 In a later hearing, however, the Police Service advised that it had obtained legal advice that it would be only for material with a low chance of finding DNA that would not meet the “is likely to” threshold:

I am aware that Ms Dugandzic actually asked the Crown Solicitor for advice in relation to this, and certainly the advice suggested that less than fifty percent is likely to be still acceptable... but where we are dealing with material where there is a very low chance of actually finding DNA, for instance, material on a knife that has been handled or steering wheel or whatever, if that goes down typically below the 10 per cent, then we might be in trouble if it was “likely to” as opposed to

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5.15 Nevertheless, the Police argued that it considers that the higher, “likely to produce evidence” threshold may be unworkable. Inspector Duncan noted that in Queensland, South Australia and the Northern Territory, the threshold was similar to that of the current NSW legislation.¹⁹⁵

5.16 As the Committee understands it, the key purpose of the *Crimes (Forensic Procedures) Act 2000* is to enhance the investigation of crime by authorising DNA profiling in cases where the community, through the Parliament, has determined that the benefits to society in compulsorily obtaining a suspect’s DNA outweigh the public interest in protecting a person’s privacy and bodily integrity.

5.17 The provisions for obtaining a sample should reflect this purpose. The Committee agrees with those witnesses who argued that this threshold is unreasonably low. The Committee prefers the threshold contained in the MCCOC Model Bill, that is, that “there are reasonable grounds to believe that the forensic procedure **is likely to** produce evidence”. The Committee therefore suggests that the Attorney General consider amending the provisions for requesting and obtaining DNA samples from suspects to reflect the threshold in the MCCOC Model Bill.

¹⁹³ Evidence, 15 August 2001, p 20.

¹⁹⁴ Raymond, Evidence, 29 October 2001, p 24.

¹⁹⁵ Evidence, 29 October 2001, p 23.

- 5.18** The Committee notes the Police Service's opposition to the higher threshold, but the Committee does not find the grounds for that opposition to be convincing. The Police Service argued that a threshold of "is likely to produce evidence" may be unworkable because material with a low chance of finding DNA (such as objects handled by a perpetrator) would not meet that threshold. However, it appears to the Committee that this argument is applying the threshold to the crime scene rather than the suspect.
- 5.19** To take an example, a steering wheel has a very low chance of producing a DNA profile – it would not be "likely to produce evidence", as DNA profiles can be obtained from only approximately 10 percent of objects handled. However, there are no threshold restrictions on obtaining samples from crime scenes. It clearly would be open to the Police Service to obtain analysis of any objects handled at the crime scene. Once DNA evidence has been confirmed to be present, then the Police Service will have no difficulty in meeting the higher threshold of "likely to produce evidence", and a sample could be requested from the suspect.
- 5.20** In the absence of DNA evidence at the crime scene, a DNA sample from a suspect would in any case serve no investigative purpose. It appears to the Committee that no forensic procedure should meet the threshold, either the current lower threshold or the proposed higher threshold, unless DNA evidence already has been found at the crime scene. The Committee cannot see a valid reason for obtaining a suspect sample when there is no crime scene sample with which to compare it. The Committee considers that the legislation should proscribe the requesting or ordering of a sample unless a crime scene sample is available.

Recommendation 10

The Committee recommends that the Attorney General consider amending the *Crimes (Forensic Procedures) Act 2000* in conformity with the MCCOC Model Bill so that a suspect may be *requested* to consent to a forensic procedure if there are reasonable grounds to believe that the forensic procedure **is likely to** produce evidence tending to confirm or disprove that the suspect committed a prescribed offence. This provision would replace the current thresholds that state that a forensic procedure may be requested if it **might** produce evidence tending to confirm or disprove that the suspect committed a prescribed offence.

Recommendation 11

The Committee recommends that the Attorney General consider amending the *Crimes (Forensic Procedures) Act 2000* in conformity with the MCCOC Model Bill so that a magistrate or senior police officer may *order* a forensic procedure if there are reasonable grounds to believe that the forensic procedure **is likely to** produce evidence tending to confirm or disprove that the suspect committed a prescribed offence. This provision would replace the current threshold that states that a forensic procedure may be ordered if it **might** produce evidence tending to confirm or disprove that the suspect committed a prescribed offence.

Recommendation 12

The Committee recommends that the Attorney General consider amending the *Crimes (Forensic Procedures) Act 2000* to prohibit forensic procedures on suspects unless evidence producing a DNA profile has been found at the crime scene or on the victim.

Prescribed offences

- 5.21** A DNA sample currently may be obtained from individuals who are suspected of a prescribed offence, or who have been convicted of a serious indictable offence. A prescribed offence is defined under section 3 of the Act as an indictable offence or any other offence under a law of the State prescribed by the regulations.
- 5.22** In his second reading speech, the then Police Minister, Mr Whelan, indicated that “no other offences would be prescribed for the first 18 months of the operation of the Act.”¹⁹⁶ In practice, the only offences that could be prescribed would be summary offences as indictable offences already fall within the jurisdiction of the Act. The Committee received a small amount of evidence about whether it would be appropriate for DNA samples to be taken from suspects of summary offences.
- 5.23** The Legal Aid Commission opposed the application of DNA testing to summary offences:
- The Legal Aid Commission does not believe it is appropriate for DNA testing to reach down to this level as it effectively means that any person arrested in respect of any matter can be the subject of DNA testing and the entry of their “DNA code” onto the database. The taking of any samples and their analysis for DNA should be prohibited where the suspect is under arrest for a summary matter.¹⁹⁷
- 5.24** The Public Defenders also objected to DNA sampling for summary offences:
- The whole purpose ... was that DNA samples should be restricted to serious offences or indictable offences... It should be absolutely specific that DNA sampling should not occur for summary offences.¹⁹⁸
- 5.25** The Committee considers that summary offences, which are generally of a less serious nature (for example, offensive language, or damaging fountains), should not result in DNA tests, either for suspects or offenders. The Committee therefore does not support the prescribing of any additional offences.
- 5.26** Moreover, the Committee has broader concerns about the use of delegated legislation to expand the types of offences that may cause a suspect to be subject to a forensic procedure. Public policy decisions about the offences to be brought under the *Crimes*

¹⁹⁶ Hansard, Legislative Assembly, 31 May 2000, p 6293.

¹⁹⁷ Submission 16, 19 June 2001, p 5.

¹⁹⁸ Haesler, Evidence, 29 August 2001, p 15.

(Forensic Procedures) Act 2000 should appropriately be made after full Parliamentary debate and not be left to subordinate legislation.

Recommendation 13

The Committee recommends that no additional offences be prescribed for the purpose of *prescribed offences* in section 3 of the *Crimes (Forensic Procedures) Act 2000*.

Recommendation 14

The Committee recommends that the Attorney General remove the delegated legislation provisions in section 3 of the *Crimes (Forensic Procedures) Act 2000*.

Balancing of competing interests

5.27 Several submissions and witnesses referred to the omission in the New South Wales Act of guidelines for balancing the contending public interests. Mr Haesler, for example, submitted:

... the Model Bill's reference to the balancing of competing public interests in determining whether a procedure is justified in all the circumstances was deleted from the NSW legislation. These provisions which set out essential guidelines for police and Magistrates are contained set out in the Commonwealth Act. They allow Magistrates and police a set of standards against which to measure the competing public interest. As the NSW Act now stands, if the police want the sample they will get it. They do not really have to justify in any testable way, why they want the sample. [By contrast]Section 23WT of the Commonwealth Act notes:

23WT. Matters to be considered by magistrate before ordering forensic procedure

- (1) The magistrate must be satisfied on the balance of probabilities that:
 - (a) the person on whom the procedure is proposed to be carried out is a suspect; and
 - (b) on the evidence before him or her, there are reasonable grounds to believe that the suspect committed a relevant offence; and
 - (c) there are reasonable grounds to believe that the forensic procedure is likely to produce evidence tending to confirm or disprove that the suspect committed the relevant offence; and
 - (d) the carrying out of the forensic procedure is justified in all the circumstances.
- (2) In determining whether the carrying out of the forensic procedure is justified in all the circumstances, the magistrate must balance the public interest in obtaining evidence tending to confirm or disprove that the

suspect committed the offence concerned against the public interest in upholding the physical integrity of the suspect

- (3) In balancing those interests, the magistrate must have regard to the following matters
- (a) the seriousness of the circumstances surrounding the commission of the relevant offence and the gravity of the relevant offence
 - (b) the degree of the suspect's alleged participation in the commission of the relevant offence
 - (c) the age, physical and mental health, cultural background and (where appropriate) religious beliefs of the suspect, to the extent that they are known to the magistrate or can reasonably be discovered by the magistrate (by asking the suspect or otherwise)
 - (d) if the magistrate believes on reasonable grounds that the suspect is an Aboriginal person or a Torres Strait Islander – the suspect's customary beliefs (if any), to the extent that they are known to the magistrate or can reasonably be discovered by the magistrate (by asking the suspect or otherwise)
 - (e) if the suspect is a child or incapable person – the welfare of the suspect
 - (f) whether there is a less intrusive but reasonably practicable way of obtaining evidence tending to confirm or disprove that the suspect committed the relevant offence
 - (g) if the suspect gives any reasons for refusing consent – the reason
 - (h) if the suspect is in custody:
 - (i) the period for which the suspect has already been detained and
 - (ii) the reasons for any delay in proposing the carrying out of the forensic procedure
 - (i) any other matter considered relevant to balancing those interests.¹⁹⁹

5.28 The Law Society was critical of the absence of balancing guidelines as well as the lower threshold in New South Wales:

The Crimes (Forensic Procedures) Act 2000 (NSW) fails to reproduce a number of important considerations recommended by the Model Criminal Code Officers Committee and the Senate Legal and Constitutional Legislation Committee inquiries.

Incorporation of these considerations would provide important and necessary guidance for police and the Court, and would ensure:

¹⁹⁹ Submission 9, 5 June 2001, pp 2 – 3.

- that police and the Court must be appropriately satisfied that the carrying out of a forensic procedure is justified;
- that unnecessary procedures are not carried out (including procedures that may only marginally be related to the offence in question or procedures designed as a “fishing expedition”);
- closer uniformity in investigating Commonwealth and State offences.

Without these amendments, the making of a request or order will be possible in a very broad range of circumstances, many of which may be tenuous or unjustified.²⁰⁰

5.29 The Law Society consequently recommended that the New South Wales Act should be amended to conform with the higher Commonwealth threshold and the provision of guidelines for balancing the competing interests.²⁰¹

5.30 The NSW Legal Aid Commission made a similar recommendation:

The Legal Aid Commission believes that the Model Bill represents a more balanced view on the competing interests between that of the suspect and that of the community and submits that the NSW legislation should be altered to [reflect the Model Bill’s guidelines and higher threshold].²⁰²

5.31 The Committee believes that the *Crimes (Forensic Procedures) Act 2000* would be improved by provisions that give guidance for determining whether a request or order for a DNA sample is justified. An appropriate model appears in sections 8(2) and (3) of the final draft of the MCCOC Bill, which provides guidelines for police officers to determine whether a DNA request is justified in all of the circumstance. These are repeated in sections 14(2) and (3), providing guidelines for police officers ordering a DNA test, and in 19(2) and (3), which guide magistrates making DNA test orders. The guidelines are as follows:

Section 8

- (2) In determining whether a request is justified in all the circumstances, the police officer must balance the public interest in obtaining evidence tending to confirm or disprove that the suspect committed the offence concerned against the public interest in upholding the physical integrity of the suspect.
- (3) In balancing those interests, the police officer must have regard to the following matters:
 - (a) the seriousness of the circumstances surrounding the commission of the relevant offence and the gravity of the relevant offence,

²⁰⁰ Submission 12, 12 June 2001, p 7.

²⁰¹ *ibid*, p 8.

²⁰² Submission 16, 19 June 2001, p 1.

- (b) the degree of the suspect's alleged participation in the commission of the relevant offence
- (c) the age, physical and mental health and cultural background of the suspect, to the extent that they are known to the police officer
- (d) whether there is a less intrusive but reasonably practical way of obtaining evidence tending to confirm or disprove that the suspect committed the relevant offence
- (e) if the suspect gives any reasons for refusing to consent – the reasons
- (f) any other matter considered relevant to balancing those interests.

Recommendation 15

The Committee recommends that the Attorney General consider inserting balancing guidelines similar to those in section 8(2) and 8(3) of the MCCOC Model Bill into sections 12, 20 and 25 of the *Crimes (Forensic Procedures) Act 2000* to assist police officers and magistrates in determining whether a request or order for a DNA sample is justified in all of the circumstances.

Court orders vs Police orders

- 5.32** The Sydney Regional Aboriginal Corporation Legal Service recommends further restrictions on non-intimate forensic procedures on suspects, allowing procedures to be performed without consent only after a magistrate's order:

SRACLS therefore submits that the following amendments be made to the Act:

1. The right for a non-intimate forensic procedure to be ordered without the consent of the accused be repealed...

Our experience shows that the majority of our clients who are to be dealt with under this Act are bail refused at the Police Station and are therefore required to go before a Magistrate... [and] a request can be made to the Magistrate at the time of the bail application.²⁰³

- 5.33** Representing the NSW Aboriginal Legal Services, Mr Ian Nash gave a more detailed explanation for preferring court orders rather than police orders for non-intimate procedures, including hair samples:

First of all, the taking of a hair sample, whilst defined as non-intimate, is a painful procedure... The second thing is that it seems to me that the hair sample is taken for the same purpose as a buccal swab or a blood sample, which are defined... that is, to get a DNA profile from a particular individual – we say that that specific sample should require a court order.

²⁰³ Submission 13, 8 June 2001, p 6.

We say that the hair sample is distinguishable from other non-intimate samples because the nature of other non-intimate samples is transitory. Often the reason for the taking of another non-intimate sample is that there is blood on a person or some sort of other DNA sample that the police might say has arrived on that person because of their presence, for instance, at a crime scene. Because the hair sample is not going anywhere and the purpose for taking it is not going to change – that is, to obtain a sample from the person – and because of the nature of the sample we say that that sample should be moved into either the buccal swab category or into the intimate sample category.

I do not see any good reason for that not occurring. I can see some justification for police being allowed to order a non-intimate sample to obtain evidence that might disappear. But, from where I stand, a hair sample does not fit into that category.²⁰⁴

- 5.34** Similarly, Mr Puplick advised the Committee that he favours a system whereby court orders are obtained for testing suspects, rather than police orders, as this presents a higher level of protection:

... I think that the intervention of an independent judicial authority – whether it happens to be a magistrate or judge – is far and away more preferable to the difficulties that arise with the circumstance in which this question is left entirely to the police. I find it almost inconceivable to think that, if a police officer asked a senior colleague to issue an order for a test to be taken, the senior colleague would not agree on the spot, without further concern or investigation. Indeed, were those senior officers to get a reputation of not co-operating with their colleagues in the investigation of offences, it is unlikely they would have a very good time of it in the Police Service.²⁰⁵

- 5.35** The Committee notes the concerns of witnesses who consider that requiring a court order for compulsory testing would improve the protections for suspects and ensure that compulsory DNA samples are taken only where justified. However, the Committee considers that recommendations 10, 11, and 12, if adopted, would provide the additional safeguards required.

Remandees

- 5.36** The Police Service submitted to the Committee that the definition of a suspect **under arrest** requires amendment, so that a person on bail or bail refused is considered to be under arrest for the purpose of requesting or ordering a forensic procedure:

At the time of a person's arrest it may not be known whether a forensic procedure may prove or disprove that the suspect committed the relevant offence (section 12). This may only come to light after the suspect has been granted or refused bail. However, once a person is bailed, or is bail refused, they no longer fall within the definition of a person under arrest. If a forensic procedure is required while a person is on remand for the offence, police must treat the person as being a

²⁰⁴ Nash, Evidence, 15 August 2001, p 10.

²⁰⁵ Puplick, Evidence, 8 August 2001, p 13.

suspect **not under arrest**. As such, if the person refuses to undergo a buccal swab, police must apply for a court Order in order to obtain a hair or blood sample i.e. the Act does not allow a Senior Police Officer to issue a hair order in such circumstances.

It is suggested that the Act be amended to allow for a suspect on remand to be treated as a suspect under arrest so that a forensic procedure may be carried out (without a Court Order) at any time.²⁰⁶

5.37 In support of this proposal, the Police Service offered the following evidence:

The distinction between suspects not under arrest and those under arrest appears to be based on the assumption that police must have more evidence of guilt in relation to a suspect who has been arrested, therefore a greater level of suspicion is attached to that person. On this analogy, a person who has been charged and remanded by a court would seem to have an even greater level of suspicion attached to him or her than a person merely under arrest. On this basis there does not appear to be a sound reason for treating a suspect who has been remanded any differently to a suspect under arrest.²⁰⁷

5.38 Dr Gans is generally supportive of this proposal, agreeing that it is an appropriate change (with certain conditions):

The police's proposal underlines my point that the NSW Act (and the *Model Forensic Procedures Bill*) fails to draw useful distinctions, such as distinguishing between charged and uncharged suspects. The police's proposal is appropriate, but should be accompanied by a provision barring the matching of uncharged suspects' profiles against the entirety of the crime scene database...²⁰⁸

5.39 Mr Haesler, from the Public Defender's Office, did not consider the Police Service's recommendation to be necessary:

Quite distinct rules are given in regard to interviewing a suspect, or someone under arrest, and when they have been sent to gaol bringing them back again. That is generally frowned upon because the investigation has to be done before they go to court. Procedures exist under which someone can be brought back and reinterviewed...In that case if the police need to get the suspect all that needs to happen is that the police ask for a court order. That is not particularly onerous or difficult task; it is a protection for an accused ... If the police or prosecution need more evidence, what is the problem with going to court. Generally there would be a bail hearing and at the next remand date they could apply for an order. It would require very little extra effort.²⁰⁹

5.40 Justice Action also opposes the Police Service's proposed amendment in relation to remandees, submitting:

²⁰⁶ Submission 21, 10 July 2001, p 5.

²⁰⁷ Duncan, Evidence, 29 October 2001, pp 5 – 6.

²⁰⁸ Submission 4, 14 August 2001, p 1.

²⁰⁹ Haesler, Evidence, 29 August 2001, p 8.

It is not necessary for police to have the power to order a test on someone on remand. Such a person is already under court orders and application can easily be made for a magistrate ordered test. If the person was considered to be at risk of absconding in order to avoid serious charges the court would not have granted bail.

Given the incredibly low threshold the Crimes (Forensic Procedures) Act 2000 now allows for senior police to order a hair sample it is difficult to imagine a situation where a suspect could not be tested when under arrest but would qualify for testing when on bail. However it would certainly allow police to harass remandees by ordering unjustified tests.²¹⁰

5.41 The Privacy Commissioner expressed reservations about the police proposal:

I do not support this proposal as I am not convinced that it points up any real inconsistency. The policy reasons for allowing testing on the order of a senior officer where a person is under arrest do not carry over to a person who has been charged following arrest and is on remand. They should not be subject to enforced testing without a court order where the offence with which they have been charged would not warrant such testing following conviction. To do so would simply encourage routine testing where the probative value of such tests are minimal. Where testing after arrest is called for the person on remand or bail for an offence should be readily accessible to allow for a court order to be sought and obtained.²¹¹

5.42 The Committee has carefully considered the Police Service recommendation that people on remand be included within the definition of a suspect. The Committee does not consider that there is sufficient justification to remove the requirement to obtain a court order for DNA samples from remandees. As the defendant would usually be brought before a court in any case, and as there is no risk that the evidence will be lost, there does not appear to be any real difficulty caused by the retention of the current provision. The Committee therefore does not support the Police proposal.

Offenders Threshold Provisions

5.43 A serious indictable offender is defined under the legislation as a person convicted of an indictable offence that is punishable by a maximum penalty of 5 or more years imprisonment.

5.44 Pursuant to s. 62, a **non-intimate** forensic procedure may be carried out on an offender serving a sentence of imprisonment for a serious indictable offence, either by informed consent of the offender or by order of a police officer.

5.45 Under sections 63 and 64, an **intimate** forensic procedure may be carried out on an offender currently serving a sentence of imprisonment for a serious indictable offence, either with informed consent of the offender or by court order.

²¹⁰ Submission 10, 12 August 2001, p 34.

²¹¹ Submission 14, 14 August 2001, p 2.

- 5.46** Apart from stipulating that the offender must be a serious indictable offender who is not a child or incapable person, the Act does not provide limitations or guidelines relating to the circumstances under which an offender may be requested to give a DNA sample. It is clear from the submissions and evidence of the Police Service that the intention is to sample all serious indictable offenders.

Commentary: Offenders Threshold

Suitability of NSW threshold for offenders

- 5.47** The MCCOC Model Bill has a higher threshold for the testing of offenders than that in the NSW legislation. This is referred to in the submission of the Privacy Commissioner of NSW:

The Model Bill allows testing of any convicted offender including a released offender, but requires consideration of the seriousness of the offence and whether the procedure is in all circumstances justified. The NSW Act mandates testing of offenders currently serving sentences of serious indictable offences and permanent retention of the results. Under this provision samples are being taken from all current inmates serving such sentences. The comprehensive and non-discretionary collection of samples from correctional inmates, irrespective of whether the sample has immediate probative value, can only be intended to create as large as possible a database of potential suspects for other offences.²¹²

- 5.48** Police orders for offenders to provide samples are effectively unrestricted. Where a police (or court) order is sought, the police officer (or magistrate) is required under sections 71 and 74(6) (respectively) to “take into account whether this Act would authorise the forensic procedure to be carried out in the absence of the order”. The exact meaning of this requirement is unclear:

Chair: ...You recall section 71 provides, in part, “to take into account whether this Act would authorise the forensic procedure to be carried out in the absence of the order”. What does that mean in practice, do you think?

Inspector Duncan: It is rather difficult, sir, because, as I have said in the answer, an order from a senior police officer or a court cannot be obtained unless a person is first asked to consent and has refused.²¹³

- 5.49** A magistrate is also required to determine whether the order is justified in all of the circumstances. No guidance is given for applying this discretion. However, the Committee notes Deputy Commissioner Moroney’s advice that Magistrates to date have not refused any requests for blood sample orders.²¹⁴

²¹² Submission 14, 13 June 2001, p 3.

²¹³ Evidence, 29 October 2001, p 3.

²¹⁴ Moroney, *ibid*, p 6.

5.50 Dr Gans considers the existing guideline for police officers and magistrates in determining whether to make an order to be unsatisfactory. He submits that sections 71 and 74(6):

... should be replaced by a requirement that the police officer [or magistrate] be satisfied that the carrying out of the forensic procedure is justified in all the circumstances (compare s74(5)). Alternatively, if Parliament believes that the DNA sampling of serious indictable offenders by a non-intimate forensic procedure should be compulsory in all cases, then it should simply say that (and abolish the informed consent procedure for offenders as well.) The present drafting is an invitation to police and offender confusion and legal challenges, without any real protection of the rights of offenders. It is unclear what alternative authorisation the present section is referring to or why or how such an alternative is relevant to whether an order should be made.²¹⁵

5.51 Justice Action considers that the provisions for ordering a test on an offender are too broad. It proposes that:

Prisoners should not be tested simply for being prisoners. They should be subject to the same criteria as everyone else (ie that the test is likely to provide evidence that the prisoner has committed an unsolved very serious offence which cannot be practicably obtained with other means).

There is probably a case to be made for testing prisoners judged to be at high risk of serious recidivism if the order is made as part of the sentencing procedure. It should probably be in the form of reduced non-parole period for those who agree to subject themselves to DNA surveillance for a specific period following release.²¹⁶

5.52 The Law Society of NSW also favours restrictions on the testing of prisoners:

The Law Society's view is that:

- any order for testing convicted offenders (whether or not it is a non-intimate procedure) should be a court order, and
- testing should only take place if the nature of the offence committed by the offender and the likelihood of re-offending mean that the sample is likely to have evidentiary value.²¹⁷

5.53 The Council for Civil Liberties opposes the wholesale testing of all serious indictable offenders:

The only reason in our view that [DNA testing] should be available is if someone is a material suspect and there is an evidentiary purpose in their conviction for the use of DNA. At the moment we are testing all prisoners because they are

²¹⁵ Submission 4, 9 May 2001, p 8.

²¹⁶ Submission 10, 12 August 2001, p 27.

²¹⁷ Submission 12, 12 June 2001, p 11.

prisoners and for no other reason than that they might reoffend or have committed other crimes.²¹⁸

5.54 Public Defender, Andrew Haesler, believes it is inappropriate to take samples from all prisoners, and considers that testing should target those likely to reoffend. In response to Mr Ryan's question about identifying likely recidivists, Mr Haesler advised:

Most murderers do not reoffend. They have killed the person they wanted to kill, they serve their sentence and we never see them again. That is a good category but, of course, they would be top of the list of people whose samples are taken in prisons.

I was a bit concerned, and I am concerned, that what we are doing at the moment is just a blanket testing of prisoners... Should that resource rather have been spent differently?

...Why do we not intelligently use police intelligence and say that there are a couple of hundred unsolved crimes, let us not take a random approach and hope that we get a match. Let us take the samples from those people whom we believe might well have been involved in the commission of these crimes.²¹⁹

5.55 As with the provisions for suspects, the Committee is concerned to ensure that offenders' DNA samples are taken only if they are likely to be useful for the investigation of a crime. To this end, the Committee favours an amendment of sections 71 and 74, which detail the matters that should be considered when police officers and magistrates determine whether to make an order for a compulsory forensic procedure.

5.56 The current section 71 requires a police officer determining whether to make an order to take into account "whether the Act would authorise the forensic procedure in the absence of the order". Section 74(6) requires a magistrate to do the same. As these sections do not appear to have any meaning, and as the Police Service, which is required to implement the provision, considers the provisions to be unclear, it is the Committee's opinion that sections 71 and 74(6) should be removed.

5.57 Instead, the Committee suggests that a police officer, in considering whether to make an order for a compulsory forensic procedure, should be required to be satisfied that the carrying out of the forensic procedure is justified in all the circumstances. The Committee notes that, pursuant to section 74(5), a magistrate is already required to be satisfied that the procedure is justified in all of the circumstances.

Recommendation 16

The Committee recommends that the Attorney General consider the amendment of the *Crimes (Forensic Procedures) Act 2000* to omit sections 71 and 74(6).

²¹⁸ Murphy, Evidence, 7 August 2001, p 27.

²¹⁹ Haesler, Evidence, 29 August 2001, p 16.

Recommendation 17

The Committee recommends that the Attorney General consider the amendment of the *Crimes (Forensic Procedures) Act 2000* to insert a requirement that a police officer, in considering whether to order a compulsory forensic procedure on an offender, take into account whether the procedure is justified in all of the circumstances, as a magistrate is required to do pursuant to section 74(5).

- 5.58** The Committee further considers that the legislation would be improved by providing guidance in determining whether a procedure is justified in all of the circumstances. This could include the seriousness of the crime, and the likelihood that the offender has committed previous offences or will commit further crimes in the future.
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Recommendation 18

The Committee recommends that the Attorney General consider amending the *Crimes (Forensic Procedures) Act 2000* to insert guidelines for police officers and magistrates in determining whether a procedure on a serious indictable offender is justified in all of the circumstances.

Police Service proposal for uniformity in thresholds

- 5.59** In contrast to most submissions, the Police Service recommended *lowering* the threshold for testing offenders to make it consistent with the threshold for suspects.²²⁰ This met with a great deal of opposition from other witnesses.

- 5.60** Dr Gans, for example, submitted:

The supposed ‘inconsistency’ between the suspect and offender provisions, in relation to the seriousness of the offence that can justify a forensic procedure, is specious. The suspect provisions are designed to facilitate an *ongoing* investigation; the offender provisions are designed to generate *future* investigations. It is entirely appropriate that the criteria for the latter – an intrusive power lacking a precondition of reasonable suspicion – be narrower than the criteria for the former.²²¹

- 5.61** The Privacy Commissioner makes a similar objection:

The proposed amendment assumes the basis for testing each category are the same. Suspects are only tested where the results might provide evidence of an offence. Convicted offenders are required to submit to testing, whether or not the test results are likely to prove a particular offence and the test results are

²²⁰ Submission 21, 10 July 2001, p 5.

²²¹ Submission 4, 14 August 2001, p 1.

maintained indefinitely... It is difficult to see the proposed amendment as any more than a net widening exercise for routine mandatory testing.²²²

5.62 The Legal Aid Commission does not consider the Police recommendation to lower the threshold for testing prisoners to be appropriate:

It would potentially pick up offences like shoplifting, and my submission would be that that would take it beyond the original intent of the legislation, that people charged with offences like that could be subject to these procedures.²²³

5.63 The Public Defenders also signified opposition to the recommendation:

The philosophical rationale for testing inmates is quite different from the philosophical rationale for testing suspects, and they should be kept separate.²²⁴

5.64 The Committee has noted the Police Service recommendation that the threshold for offenders be brought into line with the lower threshold for suspects. The Committee is not convinced that this proposed expansion of an already wide power is justified in the circumstances. The Committee agrees with comments from witnesses that the thresholds for offenders and suspects are intentionally different and arise from the different rationale for testing inmates and offenders. The Committee therefore does not support the Police Service recommendation.

Volunteer Provisions

5.65 The volunteer provisions, contained in Part 8 of the Act, relate to samples taken from individuals who are not suspects or offenders. Different volunteer provisions exist for children and incapable people, which are examined separately below from section 5.157.

5.66 A DNA sample may be taken from a volunteer who has given informed consent in writing in the presence of an independent person. Before obtaining consent, a police officer must advise the volunteer of certain information relating to the procedure, as detailed in section 77 of the Act.

5.67 The Committee was informed that the volunteer provisions of Part 8 of the *Crimes (Forensic Procedures) Act 2000* have not yet been proclaimed. As a result, there is currently no statutory regulation of DNA testing of volunteers.

²²² Submission 14, 13 August 2001, p 1.

²²³ Allison, Evidence, 14 August 2001, p 14.

²²⁴ Haesler, Evidence, 29 August 2001, p 7.

Commentary: Volunteer Provisions

Non-proclamation of Part 8

5.68 The non-proclamation of Part 8 was one source of concern. Legal academic, Dr Jeremy Gans, noted that the failure to proclaim Part 8 raises legal questions about any procedures done on volunteers:

The fact that that part has not been proclaimed is in itself a problem. As near as I can tell, the question of the legality of procedures done on non-suspects and non-offenders is in doubt at the moment because of the passage of the Act. The failure to proclaim Part 8 raises a question about whether those procedures are currently legal.²²⁵

5.69 One objection to the provisions relating to volunteers is that it also, inappropriately, covers victims of crime. Dr Gans believes that this is the reason that Part 8 has not been proclaimed

I have numerous concerns with that Part but, as I understand it, the chief concern of the Attorney General's Department is that its terms appear to cover the victims of crime. So if that Part was proclaimed the police would suddenly be burdened with complex and inappropriate procedures whenever they attempt to carry out any sort of reasonable procedure on a victim...

If they need to perform a procedure on a victim – which they currently do, I am sure – they would be worried about having to read victims their rights, as if the victim was a suspect, which is what Part 8 of the Act requires, so that the evidence could be used in court and the like. They are also concerned about provisions such as the definition of “forensic procedure”, which specifically excludes cavity-style searches, which is a problem for victims of, say, sexual assault who are given that sort of procedure with consent, and quite properly. But if Part 8 were proclaimed there would be doubts about whether those procedures would be legal – not for any good reason, but simply because the drafters of the Act did not realise that the definition of volunteers includes victims.²²⁶

5.70 The Committee considers that the non-proclamation of Part 8 should be rectified as a matter of priority. The continued legal uncertainty about procedures performed on volunteers is undesirable.

5.71 The Committee recognises that the application of the volunteer provisions to victims of crime would be inappropriate, and may be a reason that Part 8 has not been proclaimed. Separate provisions for performing tests on victims are clearly required. The Committee urges that appropriate amendments to the Act be drafted, in consultation with stakeholders, and presented to Parliament at the earliest opportunity.

²²⁵ Evidence, 31 July 2001, p 17.

²²⁶ *ibid.*

Recommendation 19

The Committee recommends that the *Crimes (Forensic Procedures) Act 2000* be amended, after consultation with stakeholders, to incorporate specific provisions for forensic procedures on victims of crime.

Recommendation 20

The Committee recommends that the volunteer provisions of the *Crimes (Forensic Procedures) Act 2000* (as amended according to recommendation 19) be proclaimed as a matter of priority

Restrictions on requests to volunteers

5.72 Dr Gans is critical that there is no limit on making requests for DNA from volunteers:

Consideration should be given to strictly limiting the occasions when non-suspects can be asked to consent to a forensic procedure (compare the limit on requests to suspects in s12.) At present, requests to volunteers are not even mentioned in the Act and, hence, are wholly unregulated and left to the discretion of individual police officers. This is unsatisfactory, as such requests can be highly intrusive, in that volunteers may come under enormous pressure to consent and may be tainted by suspicion if they don't consent. The 'informed consent' requirement is, at best, a partial solution to these problems. Preferably, requests for consent aimed at non-suspects (other than victims) should require scrutiny by a court, or at the very least, involvement of senior police management.²²⁷

5.73 The Police Service advised the Committee that there are no guidelines relating to when a sample may be sought from a volunteer:

Due to the suspension of Part 8 of the Act there is no current policy pertaining to the provision of DNA samples by victims and volunteers.²²⁸

5.74 The Committee notes that Part 8 currently does not provide limits on, or guidelines for, requests for DNA samples from non-suspects. The main purpose of the *Crimes (Forensic Procedures) Act 2000* is to facilitate the use of DNA profiles in investigations. The request for samples from volunteers therefore should be limited to occasions where the volunteer's DNA profile is likely to produce evidence useful in investigating a prescribed offence. Volunteer sampling takes place in several contexts including: mass screenings, missing persons investigations, to rule out a suspect, and to obtain physical evidence from a suspect. Clearly each of these contexts would need to be addressed in any new provisions.

²²⁷ Submission 4, 6 May 2001, p 8.

²²⁸ Raymond, Evidence, 29 October 2001, p 7.

Recommendation 21

The Committee recommends that the Attorney General consider amending the *Crimes (Forensic Procedures) Act 2000* to provide that volunteers may be requested to consent to a forensic procedure only if the procedure is likely to be useful for the investigation of a prescribed offence.

Which index?

5.75 The Act allows volunteer samples to be placed on the database, either on the limited or unlimited index. Justice Action identifies a number of concerns about the volunteer database provisions, including:

- Police should be explicitly prevented from changing the intended use of the sample taken from a volunteer without a court order or consent of the volunteer.
- If the profile is to be used for 'limited purposes' those purposes should be explicitly stated in the consent form. In most cases it should not be necessary to put them on a database at all.
- If the police officer intends to place the sample on the 'unlimited purposes' index he should record his reasons for doing so. Many volunteers (eg victims) should never have their profile placed on the 'unlimited purpose' index ...²²⁹

5.76 Dr Gans also criticised the volunteer database provision:

[Sections 77(2)(b) and (c)] allow a police officer a free choice on whether to seek to place a profile on the 'limited purposes' or 'unlimited purposes' index. Given the pressures on members of the public who are asked to undergo DNA sampling, this decision should not be left to the judgment of individual police officers. Rather, the 'limited purposes' index should be used unless a court gives its approval to the use of the 'unlimited purposes' index. Indeed, the 'unlimited purposes' index should be used very rarely, if ever. Consideration should be given to deleting this option altogether.²³⁰

5.77 The Police Service justified the placing of volunteers on an 'unlimited purpose' database in the following way:

This part of the Act has its genesis in what happened both interstate and in New Zealand where, particularly where gangs were involved or where families were involved who if you like were suspects in relation to particular matters, a sample would be taken from an individual and then be destroyed according to their Act... A year or two later, they come around and take a sample again, and I know that there have been matters where the individuals concerned have said, "For heaven's sake, keep my sample", and there have been arguments saying, "Well, we can't

²²⁹ Submission 10, 6 June 2001, p 29

²³⁰ Submission 4, 6 May 2001, p 9.

keep your sample because we have no legal authority to do that”... that is where the history of that was made and that is why it was, I guess, included in the Commonwealth Model Bill and we picked up on that.²³¹

5.78 The Police Service did not agree with the suggestion that court orders be required for samples to be placed on the ‘unlimited’ purpose index:

If a person consents to being on the unlimited database, I do not see the need for a court order. This would appear to merely complicate the process without adding any real protection for the volunteer.²³²

5.79 The Law Society of NSW compared the Commonwealth Act, which allows the volunteer to decide on which database the profile will appear:

Section 23WXR of the Commonwealth Crimes Act permits volunteers to choose whether to have information on either the limited or unlimited uses database. Under section 77 of the NSW Act, the choice of the database is a matter for police.²³³

5.80 The Police Service gave evidence that, although the legislation allows the police officer to decide which index the volunteer sample will be placed on, in reality it is up to the volunteer:

... while technically a police officer will inform a volunteer on which database he or she wishes to place a profile on, it is ultimately for the volunteer to consent or not consent to the carrying out of a procedure. Accordingly, if a volunteer does not consent to the placing of his or her profile on the unlimited database, then it will not be placed on that database. In most circumstances, the police officer has a choice of then requesting consent to the carrying out of the procedure and placing the profile on the limited database.²³⁴

5.81 The Committee recognises the Police Service argument that volunteers can refuse to consent to the placement of their profile on the unlimited purpose index. However, the Committee is concerned that volunteers may be unaware that there is more than one volunteer index on the database, and therefore would be ignorant that they have the option to refuse consent for their profile to be placed on a particular index. It would be appropriate, therefore, for volunteers to be advised during the consent process of the different indexes available, and to give them the choice of on which index (if any) their profile will appear.

²³¹ Raymond, Evidence, 29 October 2001 p 8.

²³² Duncan, Evidence, 29 October 2001, p 8.

²³³ Submission 12, 12 June 2001, p 15.

²³⁴ Raymond, Evidence, 29 October 2001, p 8.

Recommendation 22

The Committee recommends that the consent information given to volunteers include information about what database indexes are available, and that volunteers be permitted to choose on which index (if any) their profile will appear.

Mass testing

- 5.82** Several witnesses and submissions objected to the use of mass testing on civil liberties grounds. (Comments on the effectiveness of mass testing as an investigative tool were discussed previously in Chapter Three.)
- 5.83** The New South Wales Aboriginal Land Council submitted that mass testing of entire communities “promotes vigilantism” and “creates the environment for social alienation”. The Land Council explained:
- If a community of which the Aboriginal community is a minority calls for voluntary testing in order to identify a suspect and the Aboriginal community as a whole refuses to provide such samples ... that community will likely suffer ostracisation, ridicule and unfounded suspicion. The effect may be to incite racial vilification.²³⁵
- 5.84** The NSW ALC submits that testing of entire communities should be prohibited by the Act. If not, then it recommends additional safeguards, such as a magistrate’s order being required for mass testing, notification of the relevant Aboriginal Legal Service and the involvement of the Aboriginal Legal Service in the hearing of the application, and consideration of the cultural, spiritual or political concerns of any affected Aboriginal community.²³⁶
- 5.85** The concerns of the New South Wales Aboriginal Land Council are also held by the Aboriginal and Torres Strait Islander Commission, which noted that harassment could result if a subsection of a community decided not to volunteer.²³⁷
- 5.86** Justice Action opposes the unchecked use of mass screening, and believes that police should be required to obtain a warrant to request communities to undergo a test:
- I would expect to see similar procedures for, say, mass screening of a relatively small number of people, maybe five times as many people as could have been involved in the offence. But by the time you are getting into major disruptions of, say, a whole town, like Wee Waa, or a very big apartment building, it seems to me that not having a suspect is one thing, but declaring that perhaps the 300 occupants of an apartment building or the 300 male occupants of a country town are all suspects and proceeding from there is inappropriate. Even with crimes that

²³⁵ Submission 15, 14 June 2001, p 3.

²³⁶ *ibid*, p 4.

²³⁷ Submission 17, 18 June 2001, p 5.

are extremely difficult to detect, I would hope that police would have better grounds for narrowing the list of suspects than would be implied by, say, getting an order to test 100 or so people. For instance, I believe that in Wee Waa they had much better grounds for narrowing the suspects than were generally raised when they were requesting the mass testing.²³⁸

5.87 A particular concern with mass screening is that it may create suspicion about those individuals who refuse to volunteer for a DNA test, effectively placing pressure on people to prove their innocence by providing a sample. The Privacy Commissioner told the Committee:

There has clearly been a very lively debate about the extent to which the Wee Waa exercise was really an exercise in community coercion as distinct from genuine volunteering ... The Wee Waa exercise persuaded me that community pressure and the consequences for people in that community who objected or refused to be part of the screening process, were unacceptable.

Here I rely only upon press reports, but considering that the person eventually convicted was a suspect at a very early stage of the investigation, and that it was not reliance upon the DNA evidence itself that led to the confession and the conviction, there is considerable strength in the argument, first, that we should restrict testing to circumstances where there is a specific order given for that testing to be undertaken and, second, that the use of mass screenings to build up databases, and the social consequences that flow for the people in communities who, for good and proper reasons, will not be part of that mass testing, goes to a very important issue about relationship between citizen and State, which I think we are getting badly wrong at the moment.²³⁹

5.88 Mr Puplick objected also to the questioning of volunteers that accompanied the mass screening of Wee Waa:

I think that suckering people into a police operation on the basis that “All we are asking you to do is to come forward and give a swab,” and then when you arrive there to be told that you are going to be photographed and administered a questionnaire as well, was grossly dishonest and entirely improper.

I do not believe with any of these mass screenings there should be an opportunity to put citizens under pressure either to be photographed or to answer questions for the police to enable the police to build up profiles about people and their attitudes which, under other circumstances, they would not have access to.²⁴⁰

5.89 In Mr Puplick’s opinion, mass screening should only occur following a judicial order.²⁴¹

²³⁸ Strutt, Evidence, 7 August 2001, p 15.

²³⁹ Puplick, Evidence, 8 August 2001, p 11.

²⁴⁰ *ibid*, p 13.

²⁴¹ *ibid*.

5.90 In the case of Wee Waa the Police Service argued that its procedures offered satisfactory protection for individuals. The process for gaining approval to perform the test involved several layers of authorisation, as described by Dr Raymond:

...the officer in charge of the investigation would normally draft a submission to myself and the matter would be then discussed with the Deputy Commissioner of Specialist Operations before a final decision is made, and that in fact is exactly what happened with the Wee Waa matter.²⁴²

5.91 Dr Raymond advised that at present there are no guidelines for the decision making for mass screening.²⁴³

5.92 The Police Service gave evidence that measures were taken to prevent pressure on those in Wee Waa who did not consent:

The testing was done in the privacy of their own homes. If they said no, that was not advertised. No-one was told.... Indeed at least half a dozen people at Wee Waa did not volunteer and there were no repercussions.²⁴⁴

5.93 However, Ms Wilson-Wilde conceded that in relation to one individual, a legal practitioner, who publicised his refusal to give a sample, there was a community reaction against him:

He was extremely vocal about it. Yes, sure, in a smaller community it did affect the community... When a lawyer did not want to, there was a lot of negative feeling towards him. That is the bad side, I guess.²⁴⁵

5.94 Mr Strutt considered that the anonymous collection of volunteers' samples in their homes was an insufficient safeguard, because he believes that information about who refused to volunteer would still get around:

... that would only slightly reduce my concerns, because I think in a town like Wee Waa – and I do have some familiarity with Wee Waa – it is reasonably likely that that information would tend to get out, even if it is only in the form of a rumour, if someone had refused a test.²⁴⁶

5.95 The Committee acknowledges the reservations of witnesses about the use of mass screenings. The potential for non-consenting community members to suffer abuse or reprisals for refusing to take part in a mass screen is a matter of concern, and the Committee believes that mass screenings should be used only as a last resort. If potential suspects have been identified, it is preferable that only those suspects should be approached for consent in the first instance, and any screening should be as narrowly

²⁴² Raymond, Evidence, 29 October 2001, p 8.

²⁴³ *ibid.*

²⁴⁴ Wilson-Wilde, Evidence, 26 July 2001, p 24.

²⁴⁵ *ibid.*

²⁴⁶ Strutt, Evidence, 7 August 2001, p 16.

focused as possible. As an additional protection, the Committee prefers that a judicial officer be required to authorise any proposed mass screening.

- 5.96** The Committee suggests that new provisions relating to mass screenings be inserted into the *Crimes (Forensic Procedures) Act 2000*. The new provisions should provide for court orders to be required to request a mass screening, and detail criteria that should be met before a mass screening order is made. In particular, the magistrate should be satisfied that the order is justified in all of the circumstances, after taking into account whether a smaller number of potential suspects could instead be tested, and whether any other less intrusive means are available to further the investigation.

Recommendation 23

The Committee recommends that the Attorney General consider amending the *Crimes (Forensic Procedures) Act 2000* to require a court order before police can undertake voluntary mass screenings.

The Committee further recommends that, in determining an order for a voluntary mass screening, a judicial officer be required to be satisfied that the order is justified in all of the circumstances, taking into account whether a smaller number of potential suspects could instead be tested, and whether any other less intrusive means are available to further the investigation.

Informed Consent Provisions

- 5.97** Before a *suspect* gives consent, he or she must be informed of the matters set out in section 13:

- 13(1) The police officer must (personally or in writing) inform the suspect of the following matters:
- (a) that the giving of information under this section, and the giving of consent (if any) by the suspect, is being or will be recorded by electronic means, or in writing, and that the suspect has a right to be given an opportunity to hear or view the recording as provided by section 100
 - (b) the purpose for which the forensic procedure is required
 - (c) the offence in relation to which the police officer wants the forensic procedure carried out
 - (d) the way in which the forensic procedure is to be carried out
 - (e) that the forensic procedure may produce evidence against the suspect that might be used in a court of law

- (f) that the forensic procedure will be carried out by an appropriately qualified police officer or person
- (g) if relevant, the matters specified in subsection (2) [relating to having a medical practitioner or dentist present]
- (h) if the police officer believes on reasonable grounds that the suspect is an Aboriginal person or a Torres Strait Islander – that the suspect’s interview friend may be present while the forensic procedure is carried out
- (i) that the suspect may refuse to consent to the carrying out of the forensic procedure
- (j) the consequences of not consenting, [ie, a compulsory order may be sought]
- (k) if the police officer intends forensic material obtained from the carrying out of the forensic procedure to be used for the purpose of deriving a DNA profile on the suspect – that information obtained from analysis of the forensic material obtained from carrying out the forensic procedure may be placed on the DNA database system and the rules that will apply under this Act to its disclosure and use.

5.98 Under sections 67-69, similar information must be provided to *serious indictable offenders* before consent can be obtained.

5.99 Section 77 sets out the information that must be provided when seeking consent from a *volunteer*. This includes the way in which the procedure will be carried out, the fact that the volunteer is not obliged to consent, that the volunteer may consult a legal practitioner, and may withdraw consent at any time.

5.100 The volunteer must also be informed of what use will be made of the DNA sample, including that it may be placed on the DNA database. The police officer should, where relevant, indicate which DNA database the profile will be put on – that is, whether it will be the volunteers (limited purpose) database or the volunteers (unlimited purpose) database.

Commentary: Informed Consent

Complexity of consent information

5.101 In relation to informed consent, a number of individuals and organisations identified as a problem the length and complexity of the information that must be given to suspects. The Police Association, for example, submitted:

Singularly the biggest shared concern involves the reading of information to suspects. Prior to conducting a forensic procedure on suspects, an information sheet is read to them and then they are provided with a copy of the information sheet. This information sheet is three pages in length and contains information

about the procedure ... At the end of the reading of the information sheet, the suspect is asked the question "do you understand that?".

Taking into consideration the wide scope of issues raised in this lengthy information sheet and the stress a suspect would undoubtedly be under in such a situation – just how capable is a suspect of understanding and comprehending the implications of what has been read to them?

Obviously, the purpose of reading this information is so that prior to the accused making a decision on whether or not to grant consent, the accused is fully informed. The problem is, however, that the document read to these suspects is far too long and complex. How difficult would it be in the future for defence lawyers to overturn forensic evidence by arguing that their client had no way of understanding and comprehending what was read to them? This would therefore provide a very real risk that the sample may be excluded from evidence.²⁴⁷

- 5.102** The Law Society of NSW expressed doubts that the consent information as it currently exists is likely to be understood by most prisoners:

Having been a criminal lawyer for many years, and having acted for people in circumstances like this, I wonder what levels of comprehension convicted persons in prison have about matters such as those contained in the forensic provisions that are the subject of your examination. I suggest to you that the overwhelming majority of them have no idea what they mean, what is going on and why these things are happening ...²⁴⁸

- 5.103** The Department of Corrective Services told the Committee that the level of prisoner understanding of the consent information appears to be low:

The information read out by police to inmates in testing is a legal document and it is very complex, and having sat in and watched the interview and testing program, I think that there are a lot of inmates that find that difficult to understand, but that is a police issue ...²⁴⁹

- 5.104** The Police Service has requested the amendment of the consent provisions to make them simpler:

The information required to be included on the Forensic Procedures Information Sheet for both suspects and serious indictable offenders is too complex e.g. section 13(1)(k) requires police to inform a suspect of the rules concerning the disclosure and use of DNA profiles on the national database. This requires an explanation of sections 92 and 109. Section 109 alone has some 22 points that need to be addressed, including reference to disclosure of information in accordance with the provisions of the Mutual Assistance in Criminal Matters Act and the Extradition Act.

²⁴⁷ Submission 7, 4 June 2001, pp 1 – 2.

²⁴⁸ Richardson, Evidence, 31 July 2001, p 10.

²⁴⁹ Middlebrook, Evidence, 24 September 2001, p 6.

It is suggested that the Act be amended to simplify the information that needs to be provided to suspects and serious indictable offenders, or alternatively, the Act place the onus on the suspect's or serious indictable offender's own legal advisors (rather than the Police Service) to explain the intricacies of the legislation.²⁵⁰

5.105 In relation to this latter suggestion, the Legal Aid Commission was concerned that it would be dangerous for the Police to rely on the subject's legal advisers, because, as discussed further below, legal advice is rarely available:

The latter suggestion, in my submission, is such as to completely relieve the police from any obligation to provide information, because there are no legal advices present in the current circumstances. There are some extreme difficulties with that.²⁵¹

5.106 Justice Action agrees with the Police Service that the information provided for consent purposes is confusing and complex, but argues that some relevant information is omitted:

Justice Action has some sympathy for police who must try to navigate the complexities of the *Crimes (Forensic Procedures) Act 2000* and attempt to explain them to test subjects. The confused planning and shoddy drafting of the Act advantages no one...

But under the current Act there is a strong case for *increasing* the amount of information which must be given to potential DNA contributors if consent to DNA testing is to be truly informed. This would include:

- the potential for off database matching and transfer of information to other jurisdictions
- the fallibility of forensic DNA and the implications of that for mass database trawling
- family relationships which might be revealed by forensic DNA testing
- that the contributor will *never* regain control of his/her genetic information as the government will keep samples and profiles *forever*.²⁵²

5.107 Mr Haesler agrees that the consent information currently used by the Police Service is excessively complicated, but considers legislative change is unnecessary. He argues that the Police need not read out the entire relevant section of the Act, but could read a simplified version that contains the information required by the Act without using the legalistic wording:

I refer now to the section 13 simplification. The way the police do it at the moment is not simple; it is onerous. That is not the fault of the legislation. There

²⁵⁰ Submission 21, 10 July 2001, p 6.

²⁵¹ Humphreys, Evidence, 14 August 2001, p 14.

²⁵² Submission 10, 24 August 2001, p 35.

is simply no reason why the police cannot get the little form that they read looked at by someone who has an understanding of linguistics and simple English...

No lawyer or court would insist that to comply with the law the police need to read every word of section 13 and the cross-referencing provisions. All that is required is a series of short points be made to a person...²⁵³

- 5.108** The Committee agrees with the majority of contributors to this review that the informed consent provisions are problematic. The wording of the consent provisions is convoluted and confusing, and there is a great deal of doubt whether it is understood by the majority of test subjects. This in turn could result in a court questioning the validity of a consent. It would appear appropriate that a plain English version of the consent information be drafted.
- 5.109** The Committee notes Mr Haesler's evidence that simplification of the consent information would not necessarily require legislative amendment as the Act does not require that the relevant sections be read to the suspect, offender or volunteer as they appear in the legislation. A plain English version of the information could be provided to police officers by the Commissioner of Police. Alternatively, the plain English version could be included in a schedule to the Act, or prescribed by regulation.

Recommendation 24

The Committee recommends a plain English version of the consent information be drafted, and either provided to police officers by the Commissioner of Police, included in a Schedule to the *Crimes (Forensic Procedures) Act 2000*, or prescribed by regulation.

Consent by prisoners

- 5.110** The standard procedures for testing offenders were described to the Committee by the Department of Corrective Services. Although the sampling takes place within the prisons, it is conducted by the Police Service. Prison officers are responsible only for escorting the prisoner to the testing venue, and Corrective Service records are used to identify prisoners who are eligible for DNA sampling. Offenders are provided with the consent information, and asked to consent to the test. If they do not consent, the offenders are advised that a police order for a hair sample will be made. An offender who indicates an unwillingness to comply with the hair order is given a cooling off period of up to 10 days. During the cooling off period, Correctional Centre staff will counsel the prisoner. Continued non-compliance can result in the sample being taken using force.²⁵⁴
- 5.111** In relation to the numbers of police and prison officers involved in the testing, the Committee was advised:

²⁵³ Haesler, Evidence, 29 August 2001, p 9.

²⁵⁴ Haviland, Evidence, 24 September 2001, p 9.

With the 6,000-odd inmates that have been tested to date the biggest majority of them have been consenting and the staff ratio would have been three to four police that are required to undertake the testing procedures. From correctional officers there would be the correctional centre liaison officer and usually two escorting officers.

In minimum security camps it is not and has not been unusual for it to be one correctional officer, which is the centre liaison officer, and the inmates are called by the camp public address system. In the maximum security gaols there is usually the two officers to escort and there are usually up to four officers from the special regional response teams to assist in case there are problems.

We usually have notice that people are non-compliant and every effort is made to speak to the inmates within that cooling off period. In those few examples where force has been used, it is usually five officers, correctional officers, that would be involved, plus the four testing police, plus the correctional centre liaison officer.²⁵⁵

5.112 The Department of Corrective Services described the education program it had developed to inform prisoners about the testing regime:

The education campaign incorporated face-to-face information sessions. Information videos, brochures and handouts were delivered simultaneously at all correctional centres on Monday 27 November 2000 and that education is on-going.

The inmate development committees, which are made up of representatives from inmates in correctional centres and all those correctional centres were consulted in relation to the legislation and testing procedures. Standard operating procedures for staff involved in the implementation process were developed and distributed. There were 140 copies of the legislation distributed to correctional centre libraries for use by inmates.²⁵⁶

5.113 The question of whether prisoners' consent is truly free was brought to the Committee's attention by several witnesses. Dr Gans noted that the requesting of consent from prisoners is hollow, as the legislation permits the ordering of involuntary tests for all serious offenders:

The provisions are so wide that there is no point in having them at all and the procedures should be changed to have a more meaningful role. For example, in the case of offenders, it is crystal clear that despite the tests in this legislation the idea is that DNA can be taken from all offenders who fall within the definition of "offender" in this Act. I think that all the bizarre rigmarole of going through orders and asking for consent is a bit of a sham.²⁵⁷

5.114 The Police Service concedes that the consent provisions for offenders are redundant, as a compulsory order in practice is automatic where consent is not forthcoming:

²⁵⁵ Middlebrook, Evidence, 24 September 2001, p 5.

²⁵⁶ *ibid*, p 3.

²⁵⁷ Gans, Evidence, 31 July 2001, p 21.

The current scheme seems to be devised so that a sample will be obtained from every serious indictable offender by one means or another. Due to this, consent appears to be, and perhaps could be observed to be, artificial.²⁵⁸

5.115 In evidence before the Committee, Dr Gans elaborated on what he considers to be serious problems with the consent provisions:

It is not just a problem of inadequacy of the informed consent procedures, or of the non-provision of legal advice. The greater problem is that consent in those situations is given under pressure. Any law student can tell you that consent under pressure is not consent. There is always a question of how much pressure is enough to raise that consequence, but I think there is a good legal argument that the kinds of pressures put on offenders regarding classification, being told – perhaps even rightly told – that an order will be obtained anyway if they do not consent, is exactly the kind of pressure that will allow the courts to have much concern about those procedures.²⁵⁹

5.116 Noting that the Committee had previously received evidence that, except for five prisoners, all offenders' DNA had been taken by consent, Dr Gans remarked:

My understanding of that is that it means all but five prisoners now have a wonderful argument to make, if they are ever brought to trial, about the legality of those procedures.²⁶⁰

5.117 The Department of Corrective Services gave figures that indicated that at September 2001, 6,673 samples have been taken from prisoners, and of those, 6,298 or 94 per cent consented, and provided a sample by buccal swab. A total 375 did not consent, but complied with a section 70 police order for a hair sample (categorised as "compliant non-consent"). A further 10 prisoners refused to comply with the police order.²⁶¹

5.118 In relation to pressure to consent, Justice Action submitted:

Many NSW prisoners have been subjected to threats and intimidation before the formal commencement of 'consent' procedures. Some have even been called off video during the procedure so that further threats can be made out of shot.

A truly independent witness, preferably a legal representative of the subject or an 'interview friend', should be required to interview the subject in private immediately before consent is sought.

The subject, witness and senior police officer signatures should be affixed to a consent form which includes statements that no pressure or coercion was used to gain consent...²⁶²

²⁵⁸ Moroney, Evidence, 29 October 2001, p 6.

²⁵⁹ Gans, Evidence, 31 July 2001, p 19.

²⁶⁰ *ibid*, p 19.

²⁶¹ McLoughlin, Evidence, 24 September 2001, pp 8-9.

²⁶² Submission 10, 6 June 2001, p 21.

'Consent' to testing in NSW prisons has been obtained thus far with extensive use of threats and intimidation as well as sanctions against selected prisoners who refuse consent (apparently as 'examples' to others).

There should be a 'cooling off' period of at least 14 days between consent and testing during which a prisoner can withdraw consent without any penalty. prisoners should be able to seek legal advice during this period.

The consent procedure should include a statutory declaration signed by the prisoner, senior police officer and *independent* witness to the effect that consent was freely given without pressure or intimidation.

The Ombudsman should be required to fully investigate and report to parliament on any claims by prisoners that their 'consent' was obtained illegitimately...²⁶³

5.119 Mr Strutt gave evidence that he was aware of cases of prisoners who had been disadvantaged after refusing to consent to the DNA test:

Mr Strutt: I know of at least three prisoners specifically who have lost privileges, being reclassified or transferred to higher security prisons often in inconvenient locations for them, because of where their families are located ...

Mr Ryan: Are you sure that the reclassification or transfer was the result of their refusal to participate in a DNA test?

Mr Strutt: If you ask Corrective Services – and I have done in a couple of these cases – they will say, "Oh, no. This prisoner was reclassified as a result of an intelligence report that we received and decided to look at because he had refused DNA testing. It made us think a bit" ...

I would suggest that the prisoners themselves are in no doubt whatsoever as to the reasons they have been penalised.²⁶⁴

5.120 Justice Action considers the presence of a large number of police and prison officers to constitute physical intimidation:

Certainly I have heard reports that large numbers of prison officers are often standing immediately outside the room, and that prisoners have been told that if they do not consent to a test – I am quoting from one letter now – "I've got 12 to 18 Corrective Services Officers on standby, ready to make sure that you do". So yes. I am aware of physical intimidation with regard to the presence of those officers.²⁶⁵

5.121 The Council for Civil Liberties has also received complaints from prisoners about pressure to consent:

²⁶³ *ibid*, p 26.

²⁶⁴ Evidence, 7 August 2001, p 10.

²⁶⁵ Strutt, Evidence, 7 August 2001, p 11.

I will now run through some of the complaints about duress that we have received. A prisoner in the Lithgow Correction Centre says, "While waiting to be called into the forensic procedure, I was warned by the Department of Corrective Services officer that police were removing hair samples from inmates on the spot for not consenting". The prisoner goes on to say, "Under the circumstances I unwillingly consented to this mandatory DNA forensic procedure to avoid any conflict between the officers and myself as well as avoiding any future retribution by the Department of Corrective Services that would have resulted from any conflict with Corrective Services officers". He also goes on to say that a copy of the consent form was given and the only part read out was the reverse side...

We have many of these complaints. Another prisoner was at Silverwater. he was told that he was to lose his C2 security rating and placement and Silverwater and be moved to Cessnock and have the security rating increased to C1. He says that after accepting that that was the case he was let out of a holding cell where he had been held for the past eight hours to consider his position...²⁶⁶

5.122 One offender who wrote to the Committee complained in general terms that:

Section 64 refers to "informed consent" which sounds very high-minded and fair, yet is in fact cruelly meaningless, since the "bottom line" is that the procedure will be carried out regardless of consent, informed or otherwise.²⁶⁷

5.123 The Police Service advised the Committee that it has not heard of any complaints from prisoners about the consent process:

No, we are unaware of any such allegations of complaints. No such complaints have come to the notice of the Police Service. But there is a process which is designed to give a person the best opportunity to consider his or her position.²⁶⁸

5.124 The Department of Corrective Services told the Committee that it was aware of only one complaint:

Now, as the person that has been overseeing the forensic testing for the department, there has been only one complaint that has come to me in relation to an inmate who has raised an issue about the forensic testing process, out of 6,673.²⁶⁹

5.125 According to the Department of Corrective Services' submission, there is no pressure from prison officers to coerce prisoners into consenting:

The Department's officers have been specifically instructed not to coerce or attempt to persuade inmates to provide a sample of forensic material. At all times inmates are encouraged to seek legal advice should they have concerns with providing a forensic sample. Any inmate who refuses to provide a sample is

²⁶⁶ Murphy, Evidence, 7 August 2001, p 22.

²⁶⁷ Submission 20, 28 June 2001, p 3.

²⁶⁸ Jarratt, Evidence, 15 August 2001, p 33.

²⁶⁹ Middlebrook, Evidence, 24 September 2001, p 9

advised of the procedures that will be followed to obtain the sample in accordance with the legislation.²⁷⁰

5.126 Chief Superintendent Middlebrook was asked whether the refusal to consent to a test had an impact on prisoners' classifications. He responded:

No, not the refusal of the test, no. There have been examples where inmates have made statements and provided information to institutional staff about what might happen to them if they gave a DNA sample. In one case an inmate told no less than three separate staff members that if, in fact, he gave a DNA sample he could be convicted for other crimes. This person had done two lengthy sentences prior. He was in a minimum security environment and it was my decision to move him to a more secure environment until we could test that information he provided...

We deliberately put in a mechanism that would prevent governors of correctional centres from moving people from the centre for simply failing to agree to a test. the procedure if somebody failed to, or did not consent to the DNA process, the procedure to have them removed from a correctional centre had to go through both classification and they had to contact me as the overall person sitting over that to get approval to do that. That happened on one occasion.²⁷¹

5.127 It appears to the Committee that offenders feel pressured to consent, whether or not pressure in fact is placed upon them. The Committee is concerned about the potential for courts to overturn consent given by prisoners in circumstances that could be interpreted to be coercive. The Committee is of the opinion that the process of requesting consent from offenders is a mere procedural formality, since a test will be performed without consent in all cases where a request for consent is refused. In practice the consent procedures offer no real protection, and may therefore be omitted. The problems connected with obtaining consent from prisoners make the removal of the consent provisions even more desirable.

Recommendation 25

The Committee recommends that the Attorney General consider abolishing the consent provisions for serious indictable offenders.

Volunteers' consent information

5.128 Dr Gans noted that the consent information provided to volunteers is less detailed than that provided to suspects and offenders:

[Section 77(1)] should be amended to provide the same 'informed consent' requirements as suspects and offenders. (Compare s13.) there is no reason why volunteers (who may eventually become the subject of an investigation) should be told *less* information than a suspect. Police officers should be explicitly required to tell volunteers the purpose of the procedure (compare s13(1)(b)), the offence in

²⁷⁰ Submission 22, 11 July 2001, p 2.

²⁷¹ Middlebrook, Evidence, 24 September 2001, p 16.

relation to which the police officer wants the forensic procedure carried out (compare s13(1)(c)), that the forensic procedure will be carried out by a police officer or appropriately qualified person (compare s13(1)(f)) and the effect of s84.²⁷²

5.129 Justice Action also contends that the restricted information given to volunteers is a source of concern:

There is no good reason that volunteers should not be given *all* of the information given to a suspect before consenting.²⁷³

5.130 The reduced consent information for volunteers is, in the Committee's opinion, anomalous and unsatisfactory. Volunteers should receive as much information as suspects and offenders when making their decision about whether to consent.

Recommendation 26

The Committee recommends amendment of the volunteer consent provisions to ensure that volunteers are provided with the same level of consent information as suspects and offenders.

Legal advice and informed consent

5.131 The availability and accessibility of legal advice was identified as an essential requirement for informed consent.

5.132 Under section 9(2)(d) of the *Crimes (Forensic Procedures) Act 2000*, a suspect must be given reasonable opportunity to communicate or attempt to communicate with a legal practitioner of the suspect's choice. Section 67(1)(c) requires that a serious indictable offender be given opportunity to communicate or attempt to communicate with a legal practitioner of choice. The communication can be in private unless the police officer suspects on reasonable grounds that the suspect or offender might attempt to destroy evidence. Volunteers may also communicate with a legal practitioner before consenting to a forensic procedure, and must be advised of this right before they consent.

5.133 The difficulty for suspects and offenders in obtaining legal advice was referred to by a number of witnesses. In evidence before the Committee, the Law Society indicated that the lack of real access to legal advice is one of their major concerns with the Act:

The first concern is that it does not provide to suspects and those who are required to be the subject of forensic examination any ability to obtain or receive legal advice prior to the examination being conducted...

²⁷² Submission 4, 6 May 2001, p 9.

²⁷³ Submission 10, 6 June 2001, p 29

Absent a scheme which funds and provides for [legal advice], I would imagine and suggest to the Committee that these procedures will be undertaken in years to come pursuant to this legislation in circumstances where the suspect or the person who is subject to the process has received no advice as to his or her rights or entitlements.²⁷⁴

5.134 According to one interpretation of the legislation, it is possible that an unsuccessful attempt by a suspect to obtain legal advice will still satisfy the requirements of the Act. The Act entitles a person to attempt to communicate with a lawyer:

Chair: I want to ask you a question relating to section 9 subsection (2) of the legislation, which sets out the circumstances in which the suspect is deemed to give informed consent to a forensic procedure. Paragraph (d) refers to giving the suspect a reasonable opportunity to communicate or attempt to communicate with a legal practitioner of the suspect's choice. In your view are the requirements of that provision fulfilled if a suspect attempts, unsuccessfully, to communicate with a practitioner, such as being given access to a telephone, ringing and simply not succeeding in getting a response? Perhaps a telephone is not answered.

Ms Allison: In our view, yes, that is the case. We believe that the provisions would be satisfied by allowing the suspect access to a telephone. It may well be that at a police station in the country the suspect is given access to a telephone and the number of the local legal aid office. However, it is three o'clock at the morning at that time. It is clearly most unlikely and unreasonable that the office would be staffed at that time. But it could well be open to interpretation that on the ringing of that phone the police officer has discharged his or her obligation to the person.²⁷⁵

5.135 The Legal Aid Commissioner advised it is not currently able to provide detailed legal advice to adult suspects requested to provide a DNA sample, although an extended hours phone line is available for young people under the age of 18 years. Legal Aid considers that without such access to free legal advice, most people will not have access to a legal practitioner to seek information about forensic procedures:

Legal Aid believes that in reality, given the lack of any comprehensive legal aid telephone advice or representation service which covers police stations on a 24 hour basis, persons held in custody have no reasonable prospect of obtaining legal advice even if given the opportunity by police, unless they are able to afford the cost of private representation.²⁷⁶

5.136 According to the Sydney Regional Aboriginal Corporation Legal Service, indigenous suspects have varying levels of access to legal advice, depending on their location:

...the Aboriginal Legal Service has a 24-hour custody notification phone. I think that at least one other or perhaps two other Aboriginal Legal Services also have that, but the remainder do not. Therefore, out of hours, there are a number of

²⁷⁴ Richardson, Evidence, 31 July 2001, p 2.

²⁷⁵ Allison, Evidence, 14 August 2001, p 16.

²⁷⁶ Submission 16, 20 June 2001, p 2.

Aboriginal people – particularly west of the mountains – who do not have 24-hour access to legal advice... and that is something that is of concern to us.²⁷⁷

5.137 In evidence, the Legal Aid Commissioner noted that a phone hotline was one means of providing legal advice:

One of the possible options is the availability of a statewide after-hours legal advice service able to be accessed by telephone from persons detained in police stations or in some other form of police custody. The commission makes no particular submission about the form of that service except to say that there is probably a substantively comparable model in the United Kingdom that may warrant some consideration.²⁷⁸

5.138 The Law Society of NSW submission also compares the situation in the United Kingdom, where a Duty Solicitor Scheme ensures that all people have access to free legal advice when they come into contact with police, including where forensic procedures are sought. The Society recommends a similar scheme for NSW.²⁷⁹

5.139 Ms Jane Sanders, from the Youth Justice Coalition, offered support for the option of a telephone information service, though she prefers a duty solicitor scheme:

So I would definitely support, at the very least, a 24-hour telephone hotline being made available to all suspects. I also think it would be very important not just for the hotline to exist but to make it mandatory for police to tell suspects about the hotline and to give them the number to ring²⁸⁰

5.140 Serious indictable offenders are able to obtain information and advice on DNA testing from the Prisoners Legal Service, which is part of the Legal Aid Commission. The Committee was informed of the Prisoners Legal Service's advice to offenders relating to DNA testing:

We go through the legislation. First of all, we verify why they are in prison, whether they fall within the category of people who are subject to a forensic sample. We then explain what procedures are and that there is a cooling-off period. We explain that they can request that an order be obtained and that if an order is obtained and the prisoner resists that the prisoner can be the subject of a further offence... We explain what the material can be used for and what will happen with it. It is general advice covering all of those areas.²⁸¹

5.141 The Department of Corrective Services advised the Committee that all prisoners were given the opportunity to obtain legal advice:

²⁷⁷ Nash, Evidence, 15 August 2001, p 14.

²⁷⁸ Allison, Evidence, 14 August 2001, p 10.

²⁷⁹ Submission 12, 12 June 2001, p 6.

²⁸⁰ Evidence, 29 August 2001, p 20.

²⁸¹ Humphreys, Evidence, 14 August 2001, p 15.

During the cooling off period the inmates are encouraged to ring legal aid or ring various representatives. The opportunity is there and I am not aware of any particular instance where people have been denied that...²⁸²

A lot of tests have been suspended so an inmate can actually go and make a legal call and they generally come back and will go through with the test following the advice of their legal representatives.²⁸³

5.142 One prisoner who made a submission to the inquiry, however, considered legal advice difficult to obtain:

Further, the supposed right to "...communicate, or attempt to communicate, with a legal practitioner..." is illusory, since most inmates cannot afford the price of a telephone call to a lawyer, even if they know one, and even if he or she is available at that time, and very few can afford to squander money on fees for advice which is, as stated above, rendered worthless by the Act itself.²⁸⁴

5.143 The lack of access to legal advice for people considering a request to consent to a forensic procedure is a concern to the Committee. The Committee considers that legal advice is an important part of informed consent. While the Act provides for suspects, offenders and volunteers to seek advice from a legal practitioner, in reality, the cost of legal advice is often prohibitive.

5.144 The duty solicitor scheme in the United Kingdom was attractive to the Committee because it would ensure access for all suspects. However, to establish such a scheme in New South Wales would be enormously expensive. The alternative option, the establishment of a 24-hour phone hotline, would be less resource intensive, but would still enable individuals to obtain the information and legal advice that they require to make an informed decision.

5.145 The Committee considers that such a phone information service could appropriately be administered and staffed by the Legal Aid Commission, as long as adequate funding is provided.

Recommendation 27

The Committee recommends the establishment and funding of a 24-hour telephone legal advice hotline, run by the Legal Aid Commission, for access by persons requested to consent to a forensic procedure.

²⁸² Middlebrook, Evidence, 24 September 2001, p 12.

²⁸³ Haviland, Evidence, 24 September 2001, p 12.

²⁸⁴ Submission 20, 28 June 2001, p 3.

Other matters relating to consent

5.146 Dr Gans identified the failure of the legislation to abolish the common law of consent as a source of potential confusion:

The Act should expressly abrogate the common law of consent. The Act's informed consent regime is more restrictive than the common law (see *R v Braedon* [2000] NTSC 68, which held that informed consent is not required at common law.) If the common law is not expressly abrogated, then prosecutors could argue that a consensual forensic procedure that failed to follow the informed consent provisions in Part 3 was nonetheless lawful because of the common law.²⁸⁵

5.147 Clearly it is preferable that there be no uncertainty about a matter as important as informed consent, and the Committee recommends an amendment accordingly.

Recommendation 28

The Committee recommends that the Attorney General consider amending the *Crimes (Forensic Procedures) Act 2000* to expressly abrogate the common law of consent.

5.148 Additional concerns relating to informed consent noted by Dr Gans include:

- the Act does not specify that consent cannot be assumed from a suspect's silence
- compliance with the requirements by the suspect should not be assumed to indicate consent
- suspects are not advised that a refusal to consent is not admissible as evidence
- suspects are not advised that the making of a court order for a procedure is discretionary.²⁸⁶

5.149 The Committee has noted, and agreed with, these concerns about the consent provisions for suspects and considers that amendments addressing Dr Gans' criticisms would improve

Recommendation 29

The Committee recommends that the Attorney General consider amending the *Crimes (Forensic Procedures) Act 2000* to clarify that consent cannot be assumed from a suspect's silence or compliance.

²⁸⁵ Submission 7, 4 June 2001, pp 4 – 5.

²⁸⁶ Submission 4, 9 May 2001, pp 5 – 6.

Recommendation 30

The Committee recommends the amendment of the consent information to advise a suspect that a refusal to consent is not admissible as evidence, and that the making of a court order is discretionary.

Types of Procedures

Buccal swabs – intimate or non-intimate?

5.150 As described in Chapter Two, the Act distinguishes between buccal swabs, intimate and non-intimate procedures. The threshold for requesting a consent for procedure is the same for all procedures (except that non-DNA producing procedures can be performed on a suspect of a summary offence). The procedures for ordering a sample in the case of non-consent differ, with increased safeguards for ordering buccal swabs and intimate procedures. A court order is required for buccal swabs and intimate procedures if the subject will not consent, compared to a senior police order for non-intimate procedures.

5.151 The Committee has considered the Act's treatment of buccal swabs as intimate procedures. Although buccal swabs are a separate category, they are subject to the same safeguards and provisions as intimate procedures. Some witnesses pointed out that a self-administered buccal swab would more appropriately be classified as a non-intimate procedure, while a forcible buccal swab would best be kept as an intimate procedure:

The Act should distinguish between a *self-administered* buccal swab and a buccal swab *performed by another person*. The former – a very mild procedure – should be treated as a non-intimate forensic procedure and the preferred method for gathering DNA, whether by consent or by order. The latter – a highly intrusive procedure – should be treated as an intimate forensic (if it is to be permitted at all).²⁸⁷

The problem with this Act is that to get an order for a buccal swab the police would have to go to court so they would instead choose to get an order or make their own order for hair sampling. That is a worse procedure – a nastier procedure – than a self-administered buccal swab. If the police were allowed to order someone to do a self-administered buccal swab with the penalty, if one wants to call it a penalty, that there will be a hair sample taken otherwise, that would be a much more satisfactory approach to getting these procedures done.²⁸⁸

5.152 Justice Action submits that as New South Wales already allows self-administered buccal swabs in practice, it should be “explicitly recognised” in the legislation.²⁸⁹

²⁸⁷ Submission 4, 6 May 2001, p 3.

²⁸⁸ Gans, Evidence, 31 July 2001, p 20.

²⁸⁹ Submission 5, 6 June 2001, p 17.

- 5.153** The Department of Corrective Services indicated that self-administration is the preferred means of obtaining a buccal swab:

All the buccal swabs taken to date have been self-administered. We would not support somebody else taking a buccal swab. We do think that that would create problems and we would not support that at all.²⁹⁰

- 5.154** The Committee considers that it would be useful for the legislation to draw a distinction between a self-administered buccal swab and a buccal swab forcibly administered by another person. In the Committee's opinion, a self-administered buccal swab would most suitably be categorised as a non-intimate procedure, while a forcibly administered buccal swab correctly belongs in the intimate procedure. The Committee considers that a forcibly administered buccal swab is potentially hazardous, and its use should be avoided.

Recommendation 31

The Committee recommends that the *Crimes (Forensic Procedures) Act 2000* be amended to distinguish between self-administered buccal swabs and buccal swabs administered by another person.

The Committee further recommends that self-administered buccal swabs be classified as a non-intimate sample, and that buccal swabs administered by another person be classified as an intimate procedure.

Hair samples

- 5.155** In relation to hair samples, the way in which hairs are removed was a subject of concern for Justice Action. It proposed that the legislation should state that hairs should be removed one strand at a time:

Almost all other jurisdictions and the MCCOC Model Bill specify that hairs must be taken single strand at a time. Note 5D of the UK Codes of Practice (1999 Revised Edition) of the Police and Criminal Act 1984 specifies not only that hair must be taken one strand at a time, it also allows the prisoner/suspect to specify from which part of the body the hair is to be collected. The NSW Act does not contain any such provision.²⁹¹

- 5.156** The Committee agrees with this suggestion of Justice Action, which would ensure that hair samples must be taken in as humane a manner as possible.

²⁹⁰ Middlebrook, Evidence, 24 September 2001, p 11.

²⁹¹ Submission 5, 6 June 2001, p 24.

Recommendation 32

The Committee recommends that the *Crimes (Forensic Procedures) Act 2000* be amended to specify that hair samples must be taken one strand at a time.

Special Protections for Vulnerable People

Indigenous suspects and offenders

5.157 The *Crimes (Forensic Procedures) Act 2000* seeks to provide added protections for Aboriginal and Torres Strait Islanders. The main differences, as set out in section 10, are that for an Aboriginal or Torres Strait Islander suspect:

- a police officer must not ask the suspect to consent unless an interview friend is present, or the suspect has expressly and voluntarily waived his or her right to have an interview friend present, and
- the police officer must notify an Aboriginal legal aid organisation that the suspect will be asked for consent to a forensic procedure and advise the suspect that this will be done.

Section 55 allows Aborigines and Torres Strait Islanders to have an interview friend and/or legal representative present while the forensic procedure is carried out, although the interview friend may be excluded if he or she unreasonably interferes with the procedure.

An interview friend for an Aboriginal or Torres Strait Islander suspect or serious indictable offender is defined in section 4(3) as: a relative or other person chosen by the suspect or offender, a legal practitioner, or a representative from an Aboriginal Legal Aid organisation or a person from the Minister's list of interview friends under s.116(1).

5.158 The Aboriginal and Torres Strait Islander Commission emphasised the importance of the interview friend provisions:

We see the presence of a friend as being a safeguard for the suspect, to ensure that any consent that is given is informed consent. There are issues also in relation to instances of illiteracy, which is unfortunately relatively high within sectors of the Aboriginal community. There are issues concerning mental health conditions, substance misuse. It is a safeguard to ensure that suspects are aware of their rights and are aware of what they are consenting to. As the ATSIC submission points out, we would like that section strengthened to say this really should be mandatory.²⁹²

²⁹² Riley, Evidence, 15 August 2001, pp 4 – 5.

5.159 ATSIIC's Executive Police Officer Mr Riley further explained the purpose of the interview friend:

I think it is to ensure ... that there is informed consent; that people understand exactly what process is being undertaken and what it is being used for, as well as what their rights are in relation to agreeing or not agreeing.²⁹³

5.160 Both the NSW Aboriginal Land Council and the Aboriginal and Torres Strait Islander Commission identified a number of practical difficulties with the safeguards for indigenous suspects and offenders. These include:

- that 10(1)(b) requires a police officer to determine if a suspect is an Aboriginal person or Torres Strait Islander
- that alcohol or drug use may prevent true informed consent
- that an interview friend can be excluded on subjective and ill-defined grounds (s.10(9))²⁹⁴

5.161 One of the basic problems with the protections for indigenous people, according to representatives who gave evidence on behalf of Aboriginal organisations, is that it is the police officer who determines if the suspect is indigenous, rather than allowing the suspect to self-identify as an Aborigine or Torres Strait Islander.

5.162 The Aboriginal and Torres Strait Islander Commission commented on section 10(1)(b), which provides for the protections for Aborigines and Torres Strait Islanders to be invoked in cases where:

the police officer believes on reasonable grounds that the suspect is an Aboriginal person or Torres Strait Islander. This may be in practice very difficult to apply. The regulations should be very clear that if a person claims to be Aboriginal person or Torres Strait Islander then that constitutes reasonable grounds.²⁹⁵

5.163 The NSW Aboriginal Land Council concurred:

If a person self-identifies, then it should not be a question for the police to make any value judgments about whether that person is Aboriginal or not and entitled to an interview friend. If the person says, "I am an Aboriginal person and I want somebody here while this procedure is being taken out on me", then that should be mandatorily provided for.²⁹⁶

²⁹³ *ibid*, p 15.

²⁹⁴ Submission 15, 14 June 2001, pp 13 – 15; Submission 17, 18 June 2001, pp 3 – 4.

²⁹⁵ Submission 17, 18 June 2001, p 3.

²⁹⁶ McAvoy, Evidence, 8 August 2001, p 24.

5.164 The NSW ALC did not propose the amendment of the definition of Aboriginal and Torres Strait Islander in the Act, rather the amendment was sought to the provisions relating to informed consent procedures for indigenous people:

What is being advocated is that the discretion in the police to accept someone's profession to be an Aboriginal is removed and that people be allowed to self-identify. It is open to misuse and it is not a case where a police officer should be put in the position of being able to determine whether somebody is of a particular racial or ethnic background, in particular Aboriginal people.²⁹⁷

5.165 The Committee agrees with the opinions put forward by ATSIC and the NSW Aboriginal Land Council relating to individuals being able to self-identify as an Aboriginal person or a Torres Strait Islander. The definition of Aboriginal and Torres Strait Islander in the *Crimes (Forensic Procedures) Act 2000* is a person who is a member of the Aboriginal race of Australia, and identifies as an Aboriginal and is accepted by the Aboriginal community as an Aboriginal. This reflects the current policy for defining indigenous people, and is used by the Aboriginal and Torres Strait Islander Commission, and the Aboriginal Land Rights Act. However, currently, for the purpose of informed consent procedures in section 10, the question of Aboriginality is determined according to the opinion of a police officer. The Committee considers that it would be more appropriate for the protections of section 10 to be invoked where a person claims to be an Aborigine or Torres Strait Islander.

Recommendation 33

The Committee recommends that the Attorney General amend section 10 of the *Crimes (Forensic Procedures) Act 2000* to have the informed consent provisions for Aboriginal persons and Torres Strait Islanders apply where a police officer intends to ask a suspect to consent to a forensic procedure **and the person identifies themselves as an Aboriginal person or Torres Strait Islander**.

5.166 The NSW Aboriginal Land Council submitted that the interview friend and legal representative provisions do not go far enough, and recommended the following change in relation to procedures for all types of offences:

That provisions be inserted into the legislation to make mandatory the requirement for an independent person to be present at the time of giving consent to the taking of any sample by an Aboriginal person.²⁹⁸

5.167 The Aboriginal and Torres Strait Islander Commission made a similar recommendation.²⁹⁹

5.168 Justice Action submitted that in practice the interview friend provision for offenders was not working due to Department of Corrective Services procedures:

²⁹⁷ *ibid.*

²⁹⁸ Submission 15, 14 June 2001, p 2.

²⁹⁹ Submission 17, 18 June 2001, p 5.

NSW Corrective Services has been able to subvert the provisions allowing ATSI prisoners interview friends by insisting that the prisoner cover costs of bringing the interview friend to the testing venue (many ATSI prisoners are incarcerated a long way from friends and families), rescheduling consent and testing procedures without notice and reserving the right to refuse admission to anyone they consider 'unacceptable'. At Goulburn they have further discouraged Aboriginal prisoners from exercising this right by stirring up resentment between ATSI and non-ATSI prisoners about their different rights under the Act.

The government should meet the costs of transporting interview friends and police and corrective services officials should be required to give written reasons for rejecting any 'unsuitable' candidates. Otherwise the provision of 'interview friends' becomes farcical and should be abolished.³⁰⁰

5.169 A prisoner at Berrima correctional centre agreed that protections for indigenous prisoners could cause conflict:

... the provisions of the Act relating to Aboriginals and Torres Strait Islanders ... are discriminatory against non-indigenous suspects/inmates, thereby causing, or rather aggravating, the mistrust and ill-will between those groups, particularly in a prison setting.³⁰¹

5.170 The Department of Corrective Services responded to the claim that the interview friend provisions were being undermined:

Unless you have a specific example of that, I am not aware of that happening anywhere. I am not aware of any request from the inmates to have the department pay for an independent interview friend to be present, but any person nominated as interview friend must meet the department's criteria. For example, if somebody had been a banned visitor, or somebody who was banned from visiting a correctional centre, they cannot be allowed to come along as an interview friend.

There are examples where inmates have nominated other inmates to be an interview friend and providing that person has not been on segregation, or been away at another correctional centre, we would agree to that process.³⁰²

5.171 The Police Service requested several amendments to the interview friend provisions for suspects. The first was as follows:

Section 10(3) provides that if a suspect is an Aboriginal or Torres Strait Islander, a police officer **must not** ask him/her to consent to a forensic procedure unless either an interview friend is present or the suspect has voluntarily waived his/her right to have the interview friend present. Section 55(2) provides, however, that an interview friend must be present **if reasonably practicable**, while the forensic procedure is carried out.

³⁰⁰ Submission 10, 6 June 2001, p 19.

³⁰¹ Submission 20, 28 June 2001, p 4.

³⁰² Middlebrook, Evidence, 24 September 2001, p 12.

It is suggested that 'if reasonably practicable' be inserted in section 10(3) of the Act to make it consistent with the provisions of section 55(2).³⁰³

5.172 The Sydney Regional Aboriginal Corporation Legal Service expressed reservations about this recommendation:

It would seem to me that the important question there is whether or not some interference would, in the circumstances, be likely to result in the destruction of some evidence. It would seem to me that in the vast majority of these sorts of cases where samples are taken that it is unlikely because it is simply a blood sample. If it is a blood sample, a hair sample or a buccal swab, that evidence is not going anywhere.³⁰⁴

5.173 Chairman of ATSIC, Mr Hewitt Whyman also opposed the recommendation, observing:

History shows that the relationship between police and Aboriginal people can get very ugly at times... for the police to suggest that they are seeking an amendment that there not be an interview friend present in some instances, that could further strain the relationship that Aboriginal people and police have today.³⁰⁵

5.174 Dr Gans does not support the Police Service proposed amendment:

This suggested amendment should be rejected given the extreme doubts that exist about so-called 'consents' to forensic procedures given by indigenous Australians. (See *Braedon* [2000] NTSC 68 for a disturbing example.) In any case, the supposed inconsistency between s10(3) and s55(2) is (again) spurious. The former provision governs requests for consent, while the latter governs the performance of the procedure. The role played by the 'interview friend' in these circumstances is entirely different.³⁰⁶

5.175 The Privacy Commissioner also objected:

I oppose this amendment. If anything it is more important for an indigenous person to be supported at the initial stage where they may be asked or improperly pressured to waive or forego rights which they may not clearly understand. The use of the term *reasonably practical* at the point where testing occurs is understandable as a matter of practicality and real practice, however to deny indigenous people access at the critical entry point is not justified any more than waiving a person's right to consult their legal adviser would be.³⁰⁷

5.176 Public Defender Andrew Haesler suggested that there were potential dangers if an interview friend were only present "if reasonably practical":

³⁰³ Submission 21, 10 July 2001, p 6.

³⁰⁴ Nash, Evidence, 15 August 2001, p 5.

³⁰⁵ Evidence, 15 August 2001, p 5.

³⁰⁶ Submission 4, 14 August 2001, p 2.

³⁰⁷ Submission 14, 13 August 2001, p 2

It is a very broad test and would essentially mean that a couple of phone calls were made but the interview friend could not be found...What is reasonable to a police officer may not be reasonable to a court.³⁰⁸

5.177 The Police Service recommended a second amendment to enable them to remove an interview friend if they have reasonable belief that the interview friend will interrupt the procedure:

Sections 54 and 55 ... allow an interview friend to be excluded where the interview friend unreasonably interferes with or obstructs the carrying out of the forensic procedure. It is recommended that the Act be amended to allow police to exclude alleged co-offenders from acting as interview friends for suspects.

It is also suggested that police be given the power to exclude an interview friend where the police **reasonably suspect** that the interview friend will interfere with or obstruct the carrying out of the forensic procedure.³⁰⁹

5.178 The reasoning given by the police was as follows:

Some police officers express concerns that some accused people may seek to have co-accused people as interview friends, which may compromise an investigation if they were present during the carrying out of the forensic procedure, in so far as they may be able to glean from that process some information about the way the police investigation was going that they were not entitled to know. ... The other one is that there was some concern that if an interview friend was being outwardly aggressive prior to the procedure commencing, that the police would have no power to exclude that person until the procedure began; that is they would have to start the procedure, let it escalate and then exclude the person.³¹⁰

5.179 Mr Puplick did not support the proposed amendment:

I would not support this proposal which seems to go significantly further than the safeguard against actual interference which is already provided. The test of reasonable suspicion that an interview friend will interfere with or obstruct a procedure is far too imprecise. Any provision to allow the exclusion of interview friends who are co-offenders would also need to be carefully scrutinised. To characterise a person as a co-offender of a suspect would appear to involve circular reasoning and an assumption of guilt.³¹¹

5.180 Reservations about the police proposal were also expressed by the Legal Aid Commission:

I am very concerned at the suggestion in part 8 of the submission that police be given the power to exclude an interview friend where police reasonably expect that the interview friend will interfere with or obstruct the carrying out of the forensic procedure. At the moment it is excluded where the person unreasonably

³⁰⁸ Evidence, 29 August 2001, p 8.

³⁰⁹ Submission 22, 10 July 2001, p 6.

³¹⁰ Dugandzic, Evidence, 15 August 2001, p 23.

³¹¹ Submission 14, 13 August 2001, p3.

interferes with or obstructs. The potential, if one adopted that legislative basis, would be that, first of all, it is completely unappealable. It is not even reasonable likelihood. One goes then to reasonable belief. It is at the very minimum that one could frame it in terms of legal jargon. A reasonable suspicion is at the very lowest end, and I question why that is necessary.

It would seem to me that the current legislation, which allows them to exclude people where there is an obstruction or interference, is reasonably based... It would seem to me that there are very sound public policy bases why the legislation included the use of interview friends and access to legal advice. This, in fact, completely undermines that. It is a completely retrograde suggestion.³¹²

5.181 Dr Gans gave conditional support for this proposal:

While the police's suggestions are sensible, they should be subject to a requirement that the procedure not be permitted to proceed until an alternative interview friend is present.³¹³

5.182 Ms Sanders, representing the Youth Justice Coalition, expressed a similar concern about the need for an alternative interview friend to be found:

There may be cases in which the police know from the demeanour of the interview friend when they arrive and before the process starts. The police have a pretty good idea that the interview friend is going to be disruptive.

...If an interview friend is excluded there is no provision for getting another interview friend in... If you have this situation of an Aboriginal teenager with a very, very aggressive and unhelpful, disruptive parent, she gets ejected before the forensic procedure or during it or whatever, and this 16 year old boy ... is left with no-one to support him during the application or during the forensic procedure. That does concern me.³¹⁴

5.183 The Police Service did not object to the suggestion that an alternative friend be required to be found, with Mr Jarratt noting that the Police Service considers the interview friend provisions to be an important safeguard:

Certainly I do not think the Police Service would object to that. We have to say very clearly on the record that we understand and support the notion of an interview friend being present. This is not to prevent an interview friend being present. ... It is simply a matter for the operational reasons we outline that require that we would seek to delay the process pending the identification of another interview friend.³¹⁵

5.184 Mr Haesler made a further suggestion in relation to this police proposal:

³¹² Humphreys, Evidence, 14 August 2001, p 14.

³¹³ Submission 4, 14 August 2001, p 2.

³¹⁴ Sanders, Evidence, 29 August 2001, p 21.

³¹⁵ Evidence, 15 August 2001, p 23.

Once again, it depends how it is applied. The problem is “reasonably suspects”. It will never be able to be properly tested, because it is a suspicion. I would prefer, if it is going to go in, to have something along the lines of, “Persons may be excluded as an interview friend if...” they fit within a certain category of persons. In other words, a person suspected of being a co-offender, a person with a criminal history, things of that nature.³¹⁶

- 5.185** The Police Service further recommended amendment to section 55(3) to clarify that if a suspect expressly and voluntarily waives his or her right to have an interview friend present, the right to have a legal representative present remains, and vice versa.³¹⁷ This proposal was supported by all those who commented on it.
- 5.186** It is the Committee’s opinion that the interview friend provisions are important safeguards for indigenous people, children and incapable people. The Committee does not support any weakening of this protection. However, in some respects, the interview friend provisions can be made more functional.
- 5.187** The Committee does not support the Police Service recommendation to require the presence of an interview friend during consent procedures only *if reasonably practicable*. The Committee considers the attendance of a support person essential when an indigenous suspect or offender is asked to consent to a forensic procedure.
- 5.188** The Committee recognises that operational difficulties could arise if a suspect selects an alleged co-offender to be an interview friend. However, rather than allow the Police Service to reject an interview friend they subjectively suspect may become troublesome, the Committee prefers the option of amending the Act to provide rejection criteria, that allow the exclusion of suspected co-offenders. Given the importance of the interview friend’s role, the Committee agrees with the witnesses who suggested that an alternative interview friend should be found whenever the suspect’s choice is rejected.

Recommendation 34

The Committee recommends that the Attorney General consider amending the *Crimes (Forensic Procedures) Act 2000* to provide criteria upon which a suspect or offender’s interview friend may be rejected by police.

The Committee recommends that in any case where an interview friend has been rejected, an alternative interview friend should attend before procedures continue.

- 5.189** The Committee supports the Police Service proposal that section 55(3) be amended so that it is clear that, if a person waives the right to an interview friend, they may still have a legal representative present. Similarly, if the right to a legal representative is waived, the right to an interview friend remains.

³¹⁶ Evidence, 29 August 2001, p 12.

³¹⁷ Submission 21, 10 July 2001, p 7.

Recommendation 35

The Committee recommends that the Attorney General consider amending section 55(3) of the *Crimes (Forensic Procedures) Act 2000* to clarify that the waiving of rights to an interview friend does not prevent the attendance of a legal representative, and that the waiving of rights to a legal representative does not prevent the attendance of an interview friend.

Other matters relating to protections for indigenous people

5.190 The legislation designates a role for the Aboriginal Legal Service in providing legal advice, and section 10(4) requires police to inform an Aboriginal Legal Service before asking an indigenous suspect to consent to a procedure (unless the suspect waives the right to an interview friend, or has arranged for an alternative legal practitioner to be present). In many cases, the Aboriginal Legal Services also serve as interview friends. However, the Sydney Regional Aboriginal Corporation Legal Service (SRACLS) has found that lack of funding has limited the effect of the interview friend provisions:

The legislators also included the right for an Indigenous person to have a friend present when forensic procedures are to be carried out. However, the exercise of this right is often impractical due to insufficient funding provided to Aboriginal Legal Services.³¹⁸

5.191 The SRACLS noted that there are some problems with the requirement to notify an Aboriginal legal aid organisation about procedures on indigenous suspects, because the Police Service frequently did not advise of the intention to carry out a forensic procedure:

... the taking or not of a forensic procedure and the proposal to take a forensic procedure by the police, is not raised with us by the police themselves. As I say, I have spent some time doing this and answering these calls myself. It is not until we inquire about whether or not there is such a proposal by investigating police or arresting police that we find out it is on the cards.³¹⁹

5.192 Responding to this criticism, Inspector Duncan from Police Service told the Committee in cases where the Aboriginal Legal Service have not been advised of forensic procedures, it was likely that this was because the suspect has either arranged for a legal practitioner or waived his or her right to an interview friend. The legislation does not require notification of an Aboriginal Legal Service in those circumstances.³²⁰

³¹⁸ Submission 13, 8 June 2001, p 4.

³¹⁹ Nash, Evidence, 15 August 2001, p 3.

³²⁰ Evidence, 29 October 2001, p 12.

5.193 The SRACLS recommended that it be regularly provided with a list of indigenous people who have had forensic procedures performed on them as this:

...allows SRACLS the opportunity to ensure that the procedures are being carried out in good faith. By being able to keep a running record of our clients who have been subjected to these procedures we can bring to the attention of the Ombudsman any cases where the Police have failed to bring action against our clients and have not destroyed the forensic samples.³²¹

5.194 The Police Service did not support this proposal, arguing that it:

would appear to impinge upon the right of an Aboriginal and Torres Strait Islander person to choose their legal representative and it impinges upon their privacy.³²²

5.195 The Committee believes that the Aboriginal Legal Services play an important role in the protection of the legal rights of indigenous people who are requested to provide a forensic sample. The Committee is concerned that the effectiveness of the Aboriginal Legal Service may be reduced by a lack of funding, and by not being informed of the intention of Police to request consent of a suspect for a forensic procedure. The Committee therefore makes the following recommendations:

Recommendation 36

The Committee recommends that the Attorney General review the current funding levels of the Aboriginal Legal Service to ensure that it is adequately resourced to fulfil its role in relation to indigenous suspects requested or ordered to undergo a forensic procedure.

The Committee further recommends that the Police Service ensure that police officers are aware of the requirements relating to advising Aboriginal Legal Services of indigenous suspects who are requested to provide a forensic sample.

5.196 The SRACLS drew the Committee's attention to section 10(5)(b), which removes the requirement for a police officer to notify an Aboriginal Legal Service about an intention to request consent for a procedure on an indigenous suspect in cases where the suspect has waived the right to an interview friend. Mr Nash commented:

[Section 10(4)] on its face forces the police to inform the Aboriginal Legal Service that it is proposed that a forensic procedure might be carried out, but reading through the entire section, the actual operation of the section does not continue that burden upon the police if under subsection 3(b) an indigenous person has already waived the right to an interview friend.³²³

³²¹ Submission 13, 8 June 2001, p 7.

³²² Duncan, Evidence, 29 October 2001, p 12.

³²³ Evidence, 15 August 2001, p 3.

- 5.197** While it is logical that the Aboriginal Legal Service need not be notified if a suspect has alternative legal advice, it is unclear to the Committee why the waiving of the right to an interview friend should affect the requirement for police to notify the Aboriginal Legal Service of an intention to request a forensic procedure. It would appear reasonable, however, for notification of the ALS to be unnecessary if the suspect has waived his or her right to a legal practitioner, and this is recommended by the Committee.

Recommendation 37

The Committee recommends that the Attorney General amend section 10 of the *Crimes (Forensic Procedures) Act 2000* so that, in the case of Aboriginal and Torres Strait Islander suspects, notification of an Aboriginal Legal Aid organisation is not required by police **only if**:

- the suspect has arranged for a legal practitioner to be present while the suspect is asked to consent to the forensic procedure, or
 - the suspect has waived the right for a legal practitioner to be present while the suspect is asked to consent to the forensic procedure.
-

- 5.198** The NSW Aboriginal Land Council had general concerns about the application of the *Crimes (Forensic Procedures) Act 2000* to indigenous people. This includes questions about ownership of genetic material. The submission noted:

... that there is significant recognition of the fact that all indigenous peoples have a right to 'own' and prescribe limits upon the technical, scientific and legal use of their genetic material

At the very least the Indigenous peoples of NSW assert that they have the right to be consulted on the serious transgression of their right to 'own' their own genetic material following enactment of the Act

In recognition of the right of indigenous peoples to own and therefore control their own genetic material, the NSW Government should enter into a negotiation with the NSW Aboriginal Land Council over the operation of the *Crimes (Forensic Procedures) Act 2000*.³²⁴

- 5.199** The Committee notes that the question of ownership of forensic material is a contentious and complex issue. This applies not only to indigenous people, although there is an increased sensitivity in Aboriginal communities as a result of historical exploitation of Aboriginal remains. The Committee did not receive sufficient evidence to come to a conclusion about the issue of ownership of genetic material, but notes that the Australian Health Ethics Committee and the Australian Law Reform Commission are currently undertaking a joint inquiry into the use of DNA. The Issues Paper for that Inquiry indicates that matters such as ownership of genetic material will be examined.

³²⁴ Submission 16, 14 June 2001, p 9.

5.200 The clash between Aboriginal spiritual beliefs and the *Crimes (Forensic Procedures) Act 2000* was also identified as a potential problem by the NSW Aboriginal Land Council:

A number of Indigenous communities believe a persons hair, blood and saliva are capable of being used to influence their health, fate and prosperity...

The Act operates to empower the relevant authority with the right to extract bodily material from a person who may attach significant spiritual significance to the removal and retention of this material. It pays no attention to the traditional structure of indigenous society which only vests certain people with this right and only in very specific circumstances which are linked to serious consequences for the individual.³²⁵

5.201 The NSW ALC proposed that an Aboriginal person should be entitled to refuse to give a sample on cultural grounds.³²⁶ The Police Service did not support this proposal, arguing that the law should treat all citizens equally regardless of their race or ethnicity.³²⁷

Children and incapable persons

5.202 The Act seeks to provide additional safeguards for children and incapable persons. A child is defined as a person between the ages of 10 and 18 (the Act does not apply to children younger than 10 years). An incapable person is an adult who is incapable of understanding the general nature and effect of a forensic procedure, or who is incapable of indicating consent.

5.203 As with indigenous people, children and incapable persons are entitled to have an interview friend with them, if reasonably practical, when the procedure is performed. Again, the interview friend may be removed if he or she interferes with the procedure.

5.204 The other key protection for children and incapable *suspects and offenders* is that, pursuant to section 8, they are not able to consent to a forensic procedure. All procedures may only be performed after a court order is obtained.

5.205 According to the unproclaimed provisions of Part 8, children or incapable persons are similarly unable to volunteer to a procedure. Instead, a child or incapable person is deemed to have 'volunteered' under section 76 if a parent or guardian gives informed consent on their behalf, or a court orders the procedure. Despite any consent, a voluntary procedure will not be performed on child or incapable person who resists.

Child volunteers

5.206 The majority of submissions and witnesses that mentioned the provisions for children and incapable persons focused on the consent procedures for child volunteers.

³²⁵ *ibid*, p 9.

³²⁶ McAvoy, Evidence, 8 August 2001, p 21.

³²⁷ Moroney, Evidence, 29 October 2001, p 11.

5.207 The Commissioner for Children and Young People, Ms Gillian Calvert, identified a number of situations in which police may want to take a sample from a child who is not a suspect:

- Where the child is a victim and the police wish to obtain forensic material which might provide evidence against the perpetrator
- Where there is no evidence to link a child with a crime but a police officer has a hunch that the child may be implicated
- To obtain evidence to help disprove an allegation from a suspect that the crime was committed by the child
- As a part of a broader 'blind sampling' of a group of people or a whole community which will exculpate as many members of that group or community as possible and allow the police to concentrate their efforts elsewhere.³²⁸

5.208 The Commissioner expressed the following concerns about child volunteers:

- Children (including 16 and 17 year olds) are treated as not having the competence to give or refuse consent on their own behalf
- A parent or guardian can 'volunteer' the child to submit to a procedure without any requirement that the child be consulted or that the child's views be taken into account
- The child can only avoid the procedure by objecting or resisting
- The child has no right to information as to the nature of the proposed procedure or the consequences of undergoing the procedure (including the possible consequences of DNA information being placed on the DNA database). This information is given to the parent or guardian.
- If the consent of a parent or guardian cannot reasonably be obtained application can be made for a compulsion order. The Act does not allow for a compulsion order to be made in relation to an adult who is not a suspect.³²⁹

5.209 Giving more detail in a later submission, Ms Calvert noted:

Under the Act, children can only avoid the taking of a forensic sample by 'objecting or resisting'. The Commission believes that their non-entitlement to basic information and the requirement that they must demonstrate dissent is the antithesis of 'informed consent' which is the basis of the volunteer provisions in the Act as they affect adults. The Commission believes that the volunteer provisions in the Act could lead to conflict between children and parents.³³⁰

³²⁸ Submission 5, 23 May 2001, p 3.

³²⁹ Submission 5, 23 May 2001, p 5.

³³⁰ Submission 5, 27 August 2001, p 2.

5.210 Alternative provisions for child volunteers in other jurisdictions were identified. In Victoria, a person must be 17 or older to be able to volunteer to a forensic procedure. In New Zealand, informed consent must be obtained from both parent and child.³³¹

5.211 Ms Calvert noted that other legislation in New South Wales allows for the involvement of older children in decisions that affect them, including:

- There is a rebuttable presumption that a child aged 10 or older is capable of giving instructions to his or her legal representative: s99(3) *Children and Young Persons (Care and Protection) Act 1998*
- An adoption order or sole parental responsibility order cannot be made in respect of a child aged 12 or older without that child's consent: s55 Adoption Act 2000; amendment to s.149 *Children and Young Persons (Care and Protection) Act 1998*...
- Children can at the age of 14 give an effective consent to their medical and dental treatment: s49(2) *Minors Property and Contracts Act 1970*.³³²

5.212 The Commissioner for Children and Young People presented several options for reforming child volunteer provisions, including prohibiting children under 18 from volunteering to a forensic procedure, requiring the informed consent of both parent and child, or a graduated approach as detailed below:

- 10 – 14 year olds: the consent of both parent and child would be needed
- 15 – 17 year olds: the consent of the child only would be required.³³³

5.213 The graduated approach reflects the difference in maturity and understanding of children of various ages:

A graduated approach would take into account differences in levels of developmental maturity attained by children at different ages. It recognises that a 10 year old is likely to be considerably dependent on his or her parents while a 17 year old will normally be competent to make decisions on most issues.

A graduated approach has the further advantage of providing clear rules based on the chronological age of the child and would be simple to administer. The police would not have to make an inquiry into the maturity and competence of the individual child.³³⁴

5.214 The Commissioner further recommended that all children be entitled to receive the consent information in a way that they can understand.

³³¹ Submission 5, 23 May 2001, pp 8-9.

³³² Submission 5, 27 August 2001, p 2.

³³³ *ibid*, p 4.

³³⁴ Submission 5, 27 August 2001, p 2.

5.215 The proposal for a graduated approach to child volunteer provisions was not opposed by the Police Service. Inspector Duncan compared the *Minors (Property and Contracts) Act 1970*, which allows older children to consent to medical treatment. Inspector Duncan advised:

I think legally there does not appear to be any difficulty consulting older children. However, in certain cases, a court order should be able to be obtained where the child does not consent. This would enable police to carry out procedures where a parent has pressured a child into not consenting, possibly because the parent is implicated in the offence...³³⁵

5.216 Concern about the volunteer provisions was also expressed by Ms Jane Sanders of the Youth Justice Coalition:

The definition of “volunteer” in section 76 of the Act includes a child whose parent or guardian has volunteered on their behalf! We are very uncomfortable with this definition (which bears little relation to the ordinary meaning of the word “volunteer”) and with the provisions covering child “volunteers”.³³⁶

5.217 The YJC recommended an amendment so that the child and the parent both should give informed consent for a voluntary procedure:

We believe that a forensic procedure on a child “volunteer” should be carried out only *with the informed consent of the child and a parent or guardian* (or, in the absence of parental consent, a court) giving a child a right to object, and having the police telling them about this right, is not enough. A child whose parent has “dobbed them in” to undergo a procedure is unlikely to feel confident to voice their objection. Children should be required to have independent advice, preferable legal advice, before agreeing to be a volunteer.³³⁷

5.218 The child volunteer provisions are considered unsatisfactory by the Committee, and are out of step with current trends that recognise the right of children to participate in decisions that impact on their lives. The Committee considers that even children between the ages of 10 and 14 should be consulted about a forensic procedure proposed to be performed upon them. Older children, 15 years and above, may already have a level of responsibility for their own lives, may have left school and be working. It is anomalous that children of this age be unable to participate in the decision to volunteer for a forensic procedure. The Committee favours a graduated approach that recognises the different level of maturity of children of different ages. In any case, the Committee considers that all children should be consulted about having a forensic procedure, and should be provided with all the information about the procedure that is given to the adult.

³³⁵ Evidence, 29 October 2001, p 9.

³³⁶ Submission 11, 12 June 2001, p 5.

³³⁷ *ibid.*

Recommendation 38

The Committee recommends that the Attorney General consider amending the child volunteer provisions so that all children are provided with the consent information before a decision is made about whether the child will volunteer to undergo a forensic procedure.

Recommendation 39

The Committee recommends that the Attorney General consider amending the child volunteer provisions for children aged between 10 years and 14 years to require the consent of both the child and the parent before a forensic procedure can be performed on the child.

The Committee further recommends that the Attorney General consider amending the child volunteer provisions for children aged between 15 and 17, allowing them to consent on their own behalf.

Young Serious Indictable Offenders

5.219 According to Ms Sanders, the provisions relating to the testing of serious indictable young offenders are insufficiently clear:

Even more concerning is s74(2), which provides:

“A police officer may apply to the court for an order of the carrying out of a non-intimate forensic procedure to which this Part applies on a child or other incapable person who is a serious indictable offender”.

There is no requirement in this subsection that the child be serving a sentence of imprisonment... We suggest that this must be a drafting error. As regards the legislative intention, our understanding is that Part 7 was intended to apply only to children serving terms of *imprisonment* for serious indictable offences. This means children who have been sentenced “according to law” in a superior court, for offences regarded as too serious to be finalised in the Children’s Court...

The intention of the Act was that Part 7 was not to apply to children serving control orders, which are custodial sentences imposed under the *Children (Criminal Proceedings) Act 1987*, usually by the children’s Court...

We would suggest that, if there is any ambiguity in the Act, it be corrected to make it abundantly clear that Part 7 applies to children serving terms of *imprisonment*, and not *control orders*, for serious indictable offences...

Many children are sentenced to control orders for comparatively minor offences (many relatively minor offences, such as stealing small amounts of property, are still defined as “serious indictable offences”) Control orders are often imposed because there is no appropriate accommodation available in the community. To

expose these children to forensic testing, or even to require them to attend court for the hearing of an application, would be unreasonable.³³⁸

5.220 In response to questioning by the Committee Chair about intentions in regard to testing juvenile offenders the Police Service representative indicated that a final decision had not been made:

Chair: Will children who are serious indictable offenders and serving control orders, as distinct from terms of imprisonment, be tested?

Dr Raymond: There have been ongoing negotiations with the Department of Juvenile Justice in relation to this issue and we have resolved many of those issues. To this point there has been no resolution as to whether or not we will be testing children who are serving control orders. The decision is currently no, we will not. We have agreed to and begun testing juveniles who have committed serious indictable offences, had a conviction recorded against them and have been sentenced to a term of imprisonment – there are 40 only across the State that fit within that particular category... - but in terms of the control orders that matter is still being discussed by our own legal people and those of the Department of Juvenile Justice.³³⁹

5.221 The Youth Justice Coalition also submitted that the maintenance of a child's profile on the DNA database runs counter to the philosophy of rehabilitation that is central to juvenile justice:

It should be remembered that one of the primary principles of the juvenile justice system is rehabilitation. Keeping a child's details on a database, with a view to implicating them in crimes that have not been solved (or may not even been committed yet) is not conducive to their rehabilitation, and we suggest this outweighs the public interest in clearing up unsolved crimes.³⁴⁰

5.222 Ms Sanders provided more details in the public hearing:

The Children's Court is a closed court, and publication of names and identifying details of children are generally prohibited. All of that is due to ensure that a youthful transgression does not affect a child for the rest of his or her life.

Similarly, the sentencing options in the Children's Court and the diversionary programs under the *Young Offenders Act* recognise that rehabilitation is a primary consideration and, of course, that is in line with Australia's international treaty obligations. To subject children who are not very serious offenders to forensic testing is a barrier to their successful rehabilitation.³⁴¹

³³⁸ Submission 11, 12 June 2001, pp 4 – 5.

³³⁹ Evidence, 29 October 2001, p 9.

³⁴⁰ Submission 11, 12 June 2001, p 5.

³⁴¹ Evidence, 29 August 2001, p 22.

- 5.223** The Committee considers it important that the extent of testing of child serious indictable offenders be clarified. Given the philosophy of rehabilitation that forms the basis of juvenile justice policy, it would appear appropriate that the testing of young offenders and the maintenance of their profiles on the database be restricted to only the most serious offences. The Committee therefore considers that testing of young serious indictable offenders should occur only where the child is serving a sentence of imprisonment. Children serving control orders should not be DNA tested.

Recommendation 40

The Committee recommends that the Attorney General consider amending section 74(2) to clarify that only children who are serving a sentence of imprisonment for a serious indictable offence are eligible to be required to provide a DNA sample.

Other matters relating to children

- 5.224** Child victims are currently not covered by the *Crimes (Forensic Procedures) Act 2000*. Dr Gans pointed out that, in excluding children under 10 from the provisions of the legislation, the Act inadvertently prevents child victims of crime from having procedures performed on them:

[Section 111] should be amended to permit the performance of forensic procedures on young children who are victims of crime under Part 8 (or, preferably, under specific provisions applicable to victims.) Clearly, young children should never be dealt with as suspects and offenders. However, police should be able to perform forensic procedures on young victims (e.g. victims of child sexual assault).³⁴²

- 5.225** It appears to the Committee that this is a legislative oversight, and requires amendment. It is obvious that forensic procedures will, on occasion, be required to be performed on children under the age of 10 years to obtain evidence if they are victims of crime. The Committee does not consider it appropriate that forensic procedures be performed on young children in other categories.

Recommendation 41

The Committee recommends that the Attorney General consider amending the *Crimes (Forensic Procedures) Act 2000* to enable forensic procedures to be performed on children under the age of 10 years to obtain evidence if they are victims of crime.

³⁴² Submission 4, 6 May 2001, p 14.

Police recommendations for amendments to procedures for taking samples

5.226 The Police Service submission proposes a number of amendments to the Act relating to the way in which forensic procedures are undertaken. One recommendation is to amend section 6 of the Act, which regulates the time limit for a procedure on a suspect who is under arrest. For the purpose of performing a forensic procedure, the Act allows for an extension of two hours at the end of the normal (four hour) investigation period established by section 356D of the *Crimes Act 1900*. The Police Service submits that for practical purposes it would be useful to be able to perform the procedure on the suspect at the beginning of the investigation period, rather than the end:

In some cases, however, it may not be desirable to carry out the forensic procedure at the end of the investigative period as to do so may result in forensic evidence being destroyed or contaminated e.g. if a suspect under arrest has blood on his/her face which may have come from the victim, it would make sense to carry out the forensic procedure first. If this course of action is chosen, the time taken to perform the forensic procedure will not be treated as a time-out for the purposes of section 356D ie the maximum investigation period of 4 hours will be reduced by the time taken to perform the forensic procedure or procedures.³⁴³

5.227 The Law Society of NSW offered extensive comment on the investigation period provisions. The Law Society argued that there should be no extension to the investigation period, whether at the beginning or the end:

The Law Society sees no reason why there should be any delay whatsoever in conducting a forensic procedure. The provision of a buccal swab, for example, should take a matter of mere minutes. Accordingly, an absolute limit should be imposed on the time for which a person may be detained to enable a forensic procedure to be carried. In the Society's view, the time period of 4 hours should be sufficient to accommodate any necessary "time out" and to enable the required procedure to be carried out.

Without this limitation, the procedure period is open to being suspended or deferred for significant periods of time in a similar manner to the investigation period permitted under Part 10A fo the *Crimes Act 1900* (detention after arrest for purposes of an investigation).³⁴⁴

5.228 Dr Gans pointed out that section 17(5) of the Act specifically prevents police from extending the investigation period if the forensic procedure is performed during the investigation period. Section 17(3) permits police to keep a suspect under arrest for two hours after the investigation period, in order to perform a forensic procedure.

5.229 Public Defender Andrew Haesler warned that the Police recommendation could result in an extended investigation period:

³⁴³ Submission 21, 10 July 2001, p 5.

³⁴⁴ Submission 13, 12 June 2001, p 9.

If that is to be interpreted, and it could be interpreted, as a way of giving an extra two hours to the police to carry out their investigation it should be resisted... Generally, most of the sampling, whether buccal swabs or blood tests, takes about 10 minutes. If someone under investigation is being detained subject to the Crimes Act, it may be appropriate to amend that Act to allow that any time taken to carry out a forensic procedure during the Crimes Act investigation period should be a time-out.

... if they carry out the testing during the investigation it may be appropriate to amend the Crimes Act to allow for the taking of a forensic procedure to be classified as a time-out. It would require careful drafting because we want to avoid double dipping if they get two hours during the investigation and another two hours at the end.³⁴⁵

- 5.230** Given that the Act expressly prohibits the approach suggested by the Police Service, firm evidence is required in support of the proposal. Such evidence has not been received by the Committee from the Police Service, and the key submission on this matter (from the Law Society) is firmly opposed to the proposal. In the circumstances, the Committee cannot support the Police Service recommendation at this time. However, as suggested by Mr Haesler, there may be argument for the amendment of the investigation period provisions of the *Crimes Act 1900*. The Committee has received insufficient evidence on that matter, and refers the question to the Attorney General for consideration.

Recommendation 42

The Committee recommends that the Attorney General consider the appropriateness of amending section 356F of the *Crimes Act 1900* to allow forensic procedures to be classified as a “time-out” of an investigation period.

- 5.231** Police Service recommendation 6 relates to the use of force in obtaining a sample. It seeks an amendment to section 37 of the Act, which allows a police officer who is awaiting determination of an interim order to use reasonable force to prevent a suspect destroying or contaminating evidence. The Police Service submitted that such use of force should be permitted at other times as well, in order to prevent the destruction of evidence.

For this power to be effective, it must allow police to prevent the destruction or contamination of evidence from the time the suspect first comes to the attention of the police i.e. not only during the time that the interim order is being determined.³⁴⁶

³⁴⁵ Haesler, Evidence 29 August 2001, p 8.

³⁴⁶ Submission 21, 10 July 2001, p 6.

5.232 Dr Gans opposed this recommendation, arguing that police should instead arrest the suspect:

The problems described by the police could be solved simply by arresting the suspect. It is inappropriate for the police to use reasonable force on a person or detain a person unless the suspect is under arrest. This proposal should not be adopted unless the police explain why an arrest is not appropriate. If necessary, the police's powers to arrest in these circumstances should be clarified.³⁴⁷

5.233 Mr Puplick also expressed concern about the proposal:

While I acknowledge some problems may arise in this area, I would not support any amendment in such an open-ended form as is proposed. In its present form the proposal would further intensify the controversial effect of the Act which allows mandatory procedures on people who are not under arrest. This proposal could represent a serious interference with the way an individual performs personal functions amounting in some instances to a form of preventative detention where a person has not been arrested or charged. If the Police are seriously concerned that a suspect may destroy cogent evidence, the appropriate option is to arrest the person.³⁴⁸

5.234 The Committee has not been convinced by the evidence provided in support of this proposal, and agrees with the witnesses that arrest of a suspect would be the more appropriate action if the suspect sought to destroy evidence.

5.235 Other amendments were recommended by the Police Service as follows:

- section 51 – to clarify that a buccal swab is not required to be carried out by a person of the same sex as the subject
- section 57 – to clarify that a suspect may object to both an audio and video recording of a procedure
- sections 69 and 70 – to clarify that a police officer must be a senior police officer to order a forensic procedure on a serious indictable offender
- section 98(1) – to allow a telephone interpreter service to be used where an interpreter is required.³⁴⁹

5.236 None of the evidence received by the Committee opposed these four proposals. They appear to the Committee to be practical suggestions of a largely functional nature, and consequently the Committee supports the proposals.

³⁴⁷ Submission 4, 14 August 2001, p 2.

³⁴⁸ Submission 14, 13 August 2001, p 3.

³⁴⁹ *ibid*, p 7.(sub 21)

Recommendation 43

The Committee recommends the Attorney General amend the following sections of the *Crimes (Forensic Procedures) Act 2000*:

- section 51 – to clarify that a buccal swab is not required to be carried out by a person of the same sex as the subject
 - section 57 – to clarify that a suspect may object to both an audio and video recording of a procedure
 - sections 69 and 70 – to clarify that a only senior police officer may order a forensic procedure on a serious indictable offender
 - section 98(1) – to allow a telephone interpreter service to be used where an interpreter is required.
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Chapter 6 Restrictions on Use of DNA profiles

Permitted Uses of DNA Profiles

'Function creep'

6.1 In relation to DNA sampling, 'function creep' describes a situation where the permissible uses of a DNA profile gradually expand. Concern about function creep was expressed by several contributors to the Review.

6.2 The Privacy Commissioner suggested that people are concerned that DNA samples collected for forensic purposes may be used for other purposes:

Much of the concern which people have expressed over the use of DNA for forensic purposes can be related to the longstanding fears associated with a centralised form of identification such as a national identity card. DNA identification would represent a much greater threat in that, for practical purposes individuals would be stuck with it.³⁵⁰

6.3 Mr Puplick gave examples of what he considers to be potential risks of function creep:

... there has already been a call by one member of the Federal Parliament for the establishment of a national DNA database on the basis of testing everybody or recording everybody in Australia.

...overseas experience in a very like jurisdiction, the United Kingdom, concerns me. There is evidence that the British police have on file approximately 80,000 DNA samples which have been taken unlawfully or not in accordance with the provisions of UK legislation and with no attempt by the authorities to clean that up. In fact, the British Government has indicated that wants the police to treble the number of DNA samples that it takes over the next couple of years. They have actually set a target of 3.5 million samples over the next three years which would result in a British register of DNA samples of one in 15 of the population.

I think that the pressures for the continued expansion of this – in other words, the expansion to suspects, then to groups of volunteers, then to people in particular occupations and then to newly arrived migrants or newborn babies, whatever it happens to be – is something that law enforcement authorities and other people have an interest in, that is, the expansion of this database. I think that it is really up to the Parliament to establish ongoing limits – of course the Parliament would keep that under review – to ensure that we do not get what is referred to in the literature as 'function creep' in relation to these matters.³⁵¹

6.4 Justice Action submitted that function creep had already occurred with DNA in other jurisdictions:

³⁵⁰ Submission 14, 8 June 2001, p 4.

³⁵¹ Puplick, Evidence 8 August 2001, p 4.

Governments in Iceland and Tonga have *sold* the genetic information of their entire populations to multinational corporations without the consent of their people.³⁵²

6.5 The Council for Civil Liberties warned that selling of DNA could also occur in New South Wales:

Prisoners do not seem to retain ownership over their DNA samples. It seems that either the Government or the courts do, certainly the Government through the Police Service. In the future a government that is cash-strapped could sell DNA to fundraise. There is nothing to prevent this under the legislation, it seems.³⁵³

6.6 The CCL also pointed to the danger of insurance companies seeking access to DNA material:

Under the current legislation there is potential for discrimination against prisoners and their descendants through DNA forensic material being used by third parties... we received an e-mail from the United Kingdom, from someone who described an insurance company accessing DNA forensic material in order to investigate an insurance fraud. The prisoner was cleared of the insurance fraud but in the course of the investigation the insurance company decided to test the forensic material for other things including genetic diseases. I understand that the prisoner had a propensity for Huntington's disease and was a carrier of it. The insurance company denied life insurance to the prisoner's daughter on the basis that she could develop Huntington's disease. At the moment this is not confirmed. We have contacted the United Kingdom to seek further information about it. But certainly the potential is there if the DNA is given out to third parties.³⁵⁴

6.7 The Committee shares the concerns expressed about the potential for the uses of DNA to be expanded, but received insufficient evidence to be able to form conclusions or recommendations on this matter. As noted in the previous chapter, the Australian Law Reform Commission and the Australian Health Ethics Committee are currently examining in detail this complex area. In these circumstances, the Committee thinks it most appropriate that comment and recommendations on such matters be left to the federal inquiry.

DNA Database Restrictions

6.8 Part 11 of the *Crimes (Forensic Procedures) Act 2000* details the provisions for the DNA database system. The database is defined in section 90 as:

a database (whether in computerised or other form and however described) containing:

³⁵² Submission 10, 6 June 2001, p 3.

³⁵³ Murphy, Evidence, 7 August 2001, p 22. The Committee notes that such activity may, however, be prohibited under sections 62 and 63 of the *Privacy and Protection of Personal Information Act 1998*.

³⁵⁴ Murphy, Evidence, 7 August 2001, p 22.

- (a) the following indexes of DNA profiles
 - (i) a crime scene index
 - (ii) a missing persons index
 - (iii) an offenders index
 - (iv) a suspects index
 - (v) an unknown deceased persons index
 - (vi) a volunteers (limited purposes) index
 - (vii) a volunteers (unlimited purposes) index

and information that may be used to identify the person from whose forensic material each DNA profile was derived, and

- (b) a statistical index, and
- (c) any other index prescribed by the regulations.

6.9 The Act creates an offence in section 91 for supplying, intending to supply, or being reckless in supplying forensic material to a person for analysis if the material is required to be destroyed. Forensic material that is taken from an unauthorised source (that is, if it is taken from elsewhere than from a suspect, offender, volunteer, crime scene, deceased person, missing person, or relative of a deceased or missing person) may not be included on the DNA database. The maximum penalty for each offence is 100 penalty units or 2 years imprisonment or both.

6.10 Section 92 regulates the use of information on the database, and prohibits unauthorised access to the database. The database may only be accessed for the following reasons:

- (a) the purpose of forensic matching permitted under section 93
- (b) the purpose of making the information available, in accordance with the regulations, to the person to whom the information relates
- (c) the purpose of administering the DNA database system
- (d) the purposes of any arrangement entered into between the State and another State or Territory or the Commonwealth for the provisions of access to information contained in the DNA database system by law enforcement officers or by any other persons prescribed by the regulations
- (e) the purposes of and in accordance with the *Mutual Assistance in Criminal Matters Act 1987*, or the *Extradition Act 1988*, of the Commonwealth
- (f) the purposes of a review of, or inquiry into, a conviction or sentence under Part 13A of the *Crimes Act 1900*
- (g) the purposes of the investigation of complaints about the conduct of police officers under Part 8A of the *Police Service Act 1990*

- (h) the purposes of a coronial inquest or inquiry
- (i) the purpose of the investigation of a complaint by the Privacy Commissioner,
- (j) any other purposes prescribed by the regulations.

6.11 The attempted matching of DNA profiles on the various indexes is restricted under section 93. The Act includes a table indicating what indexes may be compared against each other. This is reproduced below.

Index of profile to be matched	Is matching permitted?							
	Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7	Column 8
	Crime scene	Suspects	Volunteers (limited purposes)	Volunteers (unlimited purposes)	Offenders	Missing persons	Unknown deceased persons	
Crime scene	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Suspects	Yes	No	No	No	Yes	Yes	Yes	Yes
Volunteers (limited purposes)	Only if within purpose	No	No	No	Only if within purpose	Only if within purpose	Only if within purpose	Only if within purpose
Volunteers (unlimited purposes)	Yes	No	No	No	Yes	Yes	Yes	yes
Offenders	Yes	Yes	No	No	Yes	Yes	Yes	Yes
Missing persons	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Unknown deceased persons	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No

6.12 Attempted matching that is contrary to these provisions is punishable by 100 penalty units or 2 years imprisonment, or both.

Commentary: Database Restrictions

Appropriate matching

6.13 One contentious issue raised by contributors to the Review was whether the matching of suspects against all unsolved crime scenes is appropriate, or whether suspects should only be matched against the crime(s) for which they are being investigated. This broader matching is also known as seeking “cold hits”, and can indicate whether a suspect for one crime may be linked to other unsolved crimes. Mr Haesler pointed out that the MCCOC Discussion Paper did not allow for matching suspects against all crime scenes:

Another change, from that recommended by MCCOC is particularly significant given the rules set out in the Act regarding the matching of DNA profiles. Section 93 provides that a DNA profile taken from a suspect may be matched against any unsolved crimes on the crime scene index of the database. It will be possible for suspects for one offence to be tested in order to link them with matters to which they would not otherwise be connected. The temptation will be there to test all suspects or consider otherwise innocent persons as “suspects” in order to maximise the chance of a match; what in the UK has come to be known as “maximising cold hits”.

The MCCOC discussion paper did not recommend this approach preferring a more conservative matching regime of – matching suspects only against crimes for which they were suspected. The Model Bill and Commonwealth Act however have adopted the more expansive matching now found in NSW.³⁵⁵

6.14 Further details about the pros and cons of suspect matching were provided by Mr Haesler in evidence:

The rationale for it, once again, the original philosophy is that the more people on the database the more crimes or matches you might have. The argument against it is that if I am being asked as a suspect to provide a sample in regard to a serious sexual assault down the road, I would be more than happy to provide it. However, if I know that my sample will then stay on the database and be matched against other crimes – maybe I committed a break and enter 15 years ago and it is going to be turned up or I have committed some other offence – then I will be very reluctant to co-operate. In my view it is essential that the public feels comfortable about providing samples and co-operating with the police in regard to specific crimes. They would not feel so comfortable and there is a danger that they will not co-operate if they know that by providing a sample in regard to crime A it will be matched against any other crime scene in the nation.³⁵⁶

6.15 Dr Gans also gave evidence critical of the suspect matching provisions:

One of the greatest weaknesses in the Act are the provisions about suspects. The police can get DNA if they suspect someone of a crime and the DNA will be useful for investigating that crime, but the Act allows that DNA then to be placed on the database and matched against any crime scene for the following 12 months, even if that person is immediately cleared of being a suspect.

...Suspects’ DNA should either not be placed on the DNA database or should be given a very limited range of matches.³⁵⁷

The benefit the police argue for ... is where they suspect someone wrongly for a crime and that person turns out to be a mass serial criminal... That argument can also be made about people who are never suspected of the crime because if that person is wrongly suspected of a crime, they are no different from you or me. There are good arguments to say that everyone should be susceptible to that kind

³⁵⁵ Submission 9, 1 June 2001, p 4.

³⁵⁶ Haesler, Evidence, 29 August 2001, p 4.

³⁵⁷ Evidence, 31 July 2001, p 22, p 28.

of analysis but those arguments need to be made rather than the irrelevancy that somebody happens to be wrongly suspected.³⁵⁸

6.16 The Police Service stressed that it considers it essential that the provisions allowing matching of suspects to crime scenes remain:

... if any other view of the Model Bill were applied in New South Wales then the national DNA database would be largely ineffective and the legislation would once again be equivalent to section 353A of the Crimes Act as it was before, because no cold hits would be produced outside of the case in question and the potential for linking crimes to recidivists would be seriously diminished.³⁵⁹

6.17 The Committee notes the legitimate concerns expressed by the opponents of the provisions for allowing matching of suspects against the crime scene index. However, these concerns clearly need to be balanced against the community's law enforcement requirements. It is the Committee's view that the provisions for suspect matching should remain in order for the capabilities of the DNA database to be realised.

6.18 Mr Strutt was critical of the matching provisions for the missing persons index. According to section 90, the missing persons index may include profiles from persons who are missing, or their blood relatives who volunteer. (If there is no sample from the missing person, blood relatives' profiles can be used due to their likely similarity to the missing person's profile.) Section 93 allows the missing persons index to be matched against all other indexes. Justice Action argued:

It also seems totally inappropriate that families of missing persons will have their DNA profiles matched against the crime scene index. This is likely to make people who may have committed an offence at some time in the past very reluctant to provide a sample or perhaps even to report a missing family member.³⁶⁰

6.19 The Committee presumes that the purpose of matching a missing person index against a crime scene is to seek evidence that a missing person may have been present at a crime scene, possibly as a victim. In the case of missing persons, the complexity in reaching an appropriate balance for matching provisions arises from the inclusion of relatives' profiles. Clearly, in the absence of a profile for the missing person, relatives' profiles can be of assistance. However, the matching of relatives' profiles against the crime scene index is problematic, as it may create reluctance on the part of relatives to submit their DNA.

6.20 The Committee has not received sufficient evidence to be able to make recommendations that seek to resolve this difficulty. However, the Committee wishes to draw this matter to the attention of the Attorney General for more detailed consideration.

³⁵⁸ *ibid*, p 34.

³⁵⁹ Raymond, Evidence, 29 October 2001, p 20.

³⁶⁰ Submission 10, 6 June 2001, p 35.

Recommendation 44

The Committee recommends that the Attorney General seek to address the problem of matching crime scenes and DNA profiles of relatives of missing persons.

- 6.21** Similarly, Dr Gans raised the question of the use of victims' profiles. The Act does not specify whether or where victims' profiles should be placed on the database, and therefore matching of victims' profiles is unregulated:

One of the unfortunate features of the Act is that it does not really deal with how victims' DNA profiles, say, should be dealt with on the database. The disturbing possibility is that they will be put on the crime scene database, which means that they can then be compared with every other crime scene in Australia or that the database reaches to. That will be a problem for some victims who may well not want to undergo that kind of outcome. Some of them might have something to hide.

The Committee might consider it serendipitous that we catch these victims out, but I am sure you can see that there is a problem with getting victim co-operation with the police, if that is a consequence.³⁶¹

- 6.22** The Committee notes the need to develop separate provisions to deal with victims' profiles. The Committee considers it to be inappropriate for victims' profiles to be placed on the crime scene index. A victim's profile should be used solely in an attempt to make a link with a suspect for that crime, and should not be more broadly matched.
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Recommendation 45

The Committee recommends that the Attorney General develop provisions regulating the data-basing of victims' DNA profiles that ensures that matches are not attempted between victims' profiles and any other crimes.

Inter-jurisdictional matching

- 6.23** Matching against databases of other 'participating' jurisdictions with corresponding laws is permitted pursuant to Part 12. Some concerns were expressed about this, because the differing safeguards in different jurisdictions could effectively undermine the protections of the New South Wales Act. Justice Action submitted:

This provision will serve to subvert impermissible matching, privacy and destruction provisions in the rest of the Act as no other state (not even the 'MCCOC compliant' ones) have identical provisions in these areas.

³⁶¹ Gans, Evidence, 31 July 2001, p 20.

Example: Tasmania has no provision for the destruction of samples and data under any circumstances. If data from NSW is shared with Tasmania which must later be destroyed (or de-identified) in NSW there is no way of enforcing the destruction provisions on the Tasmanian copies of the data. It is possible, even likely, that the Tasmanian data would later be 'shared back' to NSW and the 'destroyed' NSW data would be resurrected.

It can also be seen that the effective privacy of those on the NSW database would be equivalent to the lowest common denominator of privacy provisions in 'participating jurisdictions'.³⁶²

... by making the test of a 'corresponding law' its correspondence to Part 11 (which only refers to the DNA database) s 95 fails to regulate any data which may have been obtained or retained interstate in a manner which would be considered illegal in NSW.³⁶³

6.24 Similar reservations were placed on the record by the Privacy Commissioner:

What I have expressed concern about is what I have called the lowest common denominator, namely a national database accessible to every police service in the country. If the rules in New South Wales are set high – so that one can access the database only in particular circumstances – and the rules in the Northern Territory are set very low – so that one can access that information in any circumstances – then the temptation will be for someone in a jurisdiction that has a higher threshold to invite one of their colleagues in a State or Territory that has a lower threshold to undertake the interrogation of the national database on their behalf and let them have the information back...

If we have a national database which is accessible by each State or Territory on a different basis, then at the end of the day we will be operating on a national database at the lowest common denominator. That is what will happen inevitably, and all of the protections that we say we have built into the New South Wales legislative framework suddenly will count for nothing if they are subverted through the interstate transfer of information and the mates network of exchange of information within law enforcement authorities... Under provisions that are in place at the moment for the exchange of police crime intelligence, it will be no offence for say a Northern Territory officer to tell his mate in New South Wales what he has found out.³⁶⁴

6.25 The Police Service advised that the CrimTrac database information was not yet operational, largely as a result of the differences in safeguards in the different jurisdictions:

The major problem, as I see it, is actually one of a legal nature. The legislation requires that we can only share database information with other jurisdictions which have corresponding laws. The reality is that many of the other States and Territories do not have legislation that aligns with the Commonwealth Model Bill as we do. The exceptions are Tasmania, the Commonwealth itself and the ACT.

³⁶² Submission 10, 6 June 2001, p 34.

³⁶³ *ibid*, p 37.

³⁶⁴ Puplick, Evidence, 8 August 2001, p 12.

As a result of that, Queensland, Victoria, South Australia and Western Australia are looking to modify their legislation to more closely align so that we can actually share that information...³⁶⁵

- 6.26** The Committee understands that there are on-going difficulties with the CrimTrac database, partly as a result of the different standards amongst the jurisdictions. The Committee considers it crucial that the safeguards in place in New South Wales are not inadvertently undermined through the national database provisions. The Committee notes that the legislation permits interstate exchange of information only with jurisdictions that have corresponding laws for DNA databases and for taking forensic procedures. This should ensure that only those jurisdictions with similar protections are able to access the New South Wales database, and vice versa.

Unregulated matching

- 6.27** According to Dr Gans, the restrictions on matching contain significant loopholes resulting from poor drafting. The definition of ‘database’ was one area specifically identified, because in defining databases in section 90, any database that does not meet the definition is completely unregulated (but not prohibited):

This definition is clumsily drafted and unnecessarily complex. As presently written, a database of DNA profiles that lacked just one of the listed indexes would fall outside of the definition (and, hence, regulation by Part 11). The definition should, at the very least, be modified to ensure that a database is covered if it contains any of the indexes in para (a). Better still, the definition should be framed independently of the individual indexes it contains, e.g. as a database (however described and formed) containing identifiable DNA profiles maintained for the purposes of criminal investigation and prosecution.³⁶⁶

- 6.28** This point was also made by Justice Action:

... it fails to regulate in any way DNA information not on the database (such as from instrument readouts, lab notes or word of mouth)...

[The definition of DNA database] seems to imply that any method of recording DNA data which does not include the elements of (a) (b) and (c) is not a DNA database system and therefore falls outside the scope of Part 11 regulation.

All methods of storing, retrieving and communicating data obtained from a forensic test should be regulated to prevent inappropriate use.³⁶⁷

- 6.29** Flowing from the “flawed” definition of database, Dr Gans notes that all the restrictions on accessing and matching profiles and samples relate only to the database described by the definition. He argued that access to and matching of profiles and samples kept on a non-compliant database or kept off-database remain unregulated by the Act:

³⁶⁵ Raymond, Evidence, 29 October 2001, p 16.

³⁶⁶ Submission 4, 6 May 2001, p 12.

³⁶⁷ Submission 10, 6 June 2001, pp 32 - 33.

The Act should ban the non-database storage of profiles (apart from temporary storage prior to databasing) and DNA profiling for non-database purposes. The two offences in ss91 only apply to analysis *for the purpose of deriving a DNA profile for inclusion in an index of the DNA database*. (For s-s(1), this follows from the definition of 'prohibited analysis'.)

Accordingly, it is presently legal for criminal investigators to obtain DNA profiles if they do not intend to place the resulting profile on the database. There is no reason for such a loophole. On the contrary, it would be better for the purposes of accountability and regulation (including destruction) if all profiles were stored *exclusively* on the database. At the very least, the words 'for inclusion on an index of the DNA database' should be removed from the definition of 'prohibited analysis', as police should not be allowed to use forensic material that is past its destruction date for non-database purposes.

The Act should criminalize the analysis of forensic material that ought to have been destroyed and non-permitted forensic material, if the analyser intends or is reckless as to the analysis of material of that kind. The two offences in s91 only criminalize the 'supply' of forensic material for analysis...

The matching of DNA profiles by criminal investigators *off* the database should be expressly banned. At present, such matching is completely unregulated, because s93 is limited to matching between profiles on an index of the DNA database system.³⁶⁸

6.30 Similar comments were made in the Justice Action submission:

By restricting itself to 'forensic material for DNA database system purposes' the Act leaves non-databased forensic information entirely unregulated.

There is apparently nothing restricting a lab technician from passing instrument readouts to police officers or talking about results to the media.

Even 'prohibited analysis' is only prohibited if it is intended to include the results on a DNA database system as defined in s90. Presumably if someone was to pass samples from the Division of Analytical Laboratories to me and I had them DNA tested and posted the results on a web page I would not be prosecutable unless my web page included the indexes defined in s90.³⁶⁹

6.31 Sections 114 and 115 are identified as additional sources of concern, as they allow the taking, retention and use of forensic material as governed by other Acts. For example section 114(1) states:

This Act is not intended to limit or exclude the operation of another law of the state relating to the following:

- (a) the carrying out of forensic procedures, including procedures not referred to in this Act.

³⁶⁸ Submission 4, 6 May 2001, p 13.

³⁶⁹ Submission 10, 6 June 2001, p 34.

6.32 Dr Gans considered that this could allow otherwise prohibited collection and analysis of samples:

At present, s-ss(1)(a) & (c) permit the police to obtain a DNA profile from a person without using the Act, eg common law consent, a saliva sample from an abandoned object or bodily substances held for medical purposes, and s-s(1)(f) permits any analysis to be performed on that profile. There is no reason why this regulatory loophole should be permitted...

The section should be amended to bar the police from obtaining *DNA profiles* from a person (who is not dead or missing) otherwise than via Parts 3, 4, 5, 7 and 8 and to require that any DNA profiles obtained by the police be governed by Part 11. The Act should be the *exclusive* authority for obtaining DNA profiles from suspects, offenders and volunteers, and for the storage, analysis and use of those profiles.³⁷⁰

6.33 The Police Service does not agree that the Act leaves some important matters unregulated. Dr Raymond advised:

In my opinion section 114 allows forensic procedures to be carried out that are lawful under another law, for example those under the road transport legislation. It does not allow DNA profiles to be obtained from those samples, unless there is some other law that permits that. For example, if a sample of blood is taken pursuant to the road transport legislation for the purpose of toxicology, section 114 would not allow that sample to then be DNA profiled.³⁷¹

6.34 Inspector Duncan advised the Committee that he believes that all aspects of DNA databasing are regulated:

...it is my opinion that the Act purports to cover the field in respect of carrying out forensic procedures on suspects and serious indictable offenders in the maintenance of a DNA database. I believe that maintaining a separate database would be contrary to the Act and that evidence obtained from such a database could be inadmissible.³⁷²

6.35 The conflicting evidence received by the Committee suggests some ambiguity in the provisions relating to the database, and prohibited analysis and matching. The Committee considers that clarification of the provisions is vital to maintaining the protections.

6.36 The Committee in particular notes the evidence received that the drafting of the definition of 'the database' could inadvertently restrict the safeguards intended by Part 11. This could be clarified either by prohibiting any database that does not fit the description, or by redefining the term to include (and thus regulate) all databases, however formulated. It is the Committee's view that the former option is preferable, in that it would help prevent the proliferation of databases. In so finding, the Committee does not intend that additional databases fitting the definition be established.

³⁷⁰ Submission 4, 6 May 2001, pp 14 – 15.

³⁷¹ Evidence, 29 October 2001, p 19.

³⁷² Evidence, 29 October 2001, p 19.

6.37 The Committee considers that the Act would benefit from a more comprehensive approach to database restrictions. Based on the evidence received, the Committee suggests a regulatory regime that would prohibit:

- the collection of DNA samples other than pursuant to the Act
- analysis of samples taken or retained in breach of the Act
- profiling for non-database purposes
- establishment of any DNA database not fitting the definition of section 90
- unauthorised access to the database
- unauthorised matching and non-database matching
- non-database storage of profiles.

6.38 Offences should be created accordingly.

Recommendation 46

The Committee recommends that the Attorney General amend the *Crimes (Forensic Procedures) Act 2000* to prohibit: the collection of DNA samples other than pursuant to the Act; analysis of samples taken or retained in breach of the Act; profiling for non-database purposes; establishment of any database not fitting the definition of section 90; unauthorised access to the database; unauthorised matching and non-database matching; and non-database storage of profiles

Prescribed uses of the database

6.39 As detailed previously, section 92 sets out the permitted uses of the DNA database. Privacy Commissioner, Mr Chris Puplick, drew the Committee's attention to section 92(2)(j) of the Act, which enables regulations to be made to authorise the use of information on the DNA database for purposes other than investigations.

6.40 Mr Puplick was highly critical of the regulation provisions:

That is a very significant matter to the extent that a very powerful tool such as a DNA database, which has been established for a particular purpose, namely the detection of crime or the matching of crime samples ... could be somehow altered by regulation; in other words, a regulation could be made which expanded either the sort of matches that could be made, the circumstances in which matches could be made, the circumstances in which samples could be taken, the question about how samples could be treated, where information should go, whether information should be given to third parties, all those sorts of things, should be subject to the regulation-making power rather than the legislative power of the Parliament is a matter of considerable concern.

We are talking about a new era in terms not only of crime detection with all of the DNA debate, a new era in terms of the relationship between individuals and the State. If we are going to change any part of that balance, then it should be the Parliament in full public debate with informed discussion that takes the responsibility for that.³⁷³

- 6.41** The Committee agrees with Mr Puplick that any proposed expansion of the permitted uses of DNA should occur only after appropriate debate in the Parliament. The Committee considers the provisions allowing additional uses of the database (92(2)(j)) to be prescribed by regulation to be an inappropriate use of delegated legislation that could result in the expansion of DNA profiling without a satisfactory level of public debate or consultation.

Recommendation 47

The Committee recommends that the Attorney General consider removing the delegated legislation provisions of section 92(2)(j).

Destruction of Profiles and Samples

- 6.42** Part 10 details the requirements for the destruction of forensic material, while section 94 outlines the provisions for removing information from the database. The term “destroy” in relation to forensic material or information is defined in section 3(5) as:

For the purposes of this Act, a person *destroys* forensic material taken from another person by a forensic procedure, the results of the analysis of the material or other information gained from it (including information placed on the DNA database system) if the person destroys any means of identifying the forensic material or information with the person from whom it was taken or to whom it relates.

- 6.43** Section 88 requires that forensic material taken under the Act must be destroyed if:
- an interim order is disallowed after the procedure is carried out
 - a serious indictable offender has his or her conviction quashed and the sample was taken after a court order
 - in the case of a suspect, 12 months has elapsed since the forensic material was taken and proceedings have not been instituted against the suspect for the offence, or proceedings have been discontinued
 - in the case of a suspect for whom there is a warrant for arrest, the warrant expires or 12 months has elapsed since the suspect was apprehended
 - the suspect is convicted but no conviction is recorded

³⁷³ Evidence, 8 August 2001, p 6.

- the suspect is acquitted, and no appeal is lodged against the acquittal or, if an appeal is lodged, any acquittal is confirmed or the appeal is withdrawn.

6.44 Section 89 regulates the destruction of forensic material where related evidence is found inadmissible in a court. Section 89(1) requires that if DNA evidence is found inadmissible, the forensic sample from which the evidence came must be destroyed. Sub-section 2 allows the profile taken from the forensic material to be retained despite any inadmissibility.

6.45 Under section 94, identifying information about a person may not be recorded or retained on a DNA database if the forensic material has been required to be destroyed by the Act. Identifying information relating to DNA profiles on the volunteers (limited purposes) index or volunteers (unlimited purposes) index must be destroyed at the end of the identifying period as agreed with the volunteer. Similarly, if an offender is pardoned or acquitted, or if the conviction is quashed, the identifying information about the offender's profile must be removed.

6.46 The Police Service explained the destruction procedures to the Committee:

When somebody is not committed, not convicted or when there is an appeal, or they are not matched against anything, a message comes from the forensic procedures implementation team down to the Division of Analytical Laboratories and says, "Cut the link." So they do three things. They cut the link between the name and particulars and the profiles, so there is no longer any link to a profile. So when you match, you do not say, "Oh, we have a profile and we used to know who that was". You just do not get the match, but you can still use it for statistical purposes. They also cut the links through to CrimTrac.³⁷⁴

Commentary: Destruction of Profiles and Samples

Retention of samples where evidence is inadmissible

6.47 Dr Gans considers that a number of amendments are necessary to improve the safeguards relating to the destruction of profiles and samples. He was particularly critical of section 89(2), which allows profiles to be retained even if the evidence is found inadmissible and the sample is required to be destroyed:

Sub-s(2)'s blanket exemption for DNA profiles from the s89 destruction requirement is indefensible. If a DNA profile was obtained or retained illegally, then its continued retention (and its continued matching against other profiles) is unconscionable and unethical. It is wrong for investigators to continue to benefit from the original illegality... Accordingly, such profiles should be destroyed once the inadmissibility has become apparent.³⁷⁵

6.48 The Law Society argued:

³⁷⁴ Raymond, Evidence, 15 August 2001, p 25.

³⁷⁵ Submission 4, 6 May 2001, p 11.

If evidence is inadmissible, section 89(2) provides that DNA profiles can be retained.

... in any circumstances where forensic material must be destroyed, then DNA profiles and any other information obtained from analysis of the forensic material should similarly be removed from the DNA database system.³⁷⁶

6.49 This was also a concern of the Legal Aid Commission:

It would seem to me that whilst the forensic material itself has to be destroyed, if there has been a profile obtained of the person, notwithstanding the fact that the evidence itself has been ruled inadmissible by the court, the fruits of that, that being the profile, can remain on the database. That would appear to be at odds with the Commonwealth legislation, and I question the reason for that in all of the circumstances. Again, there are arguments both ways. It is a matter of public policy as to whether it is appropriate that the fruits of procedures that have been ruled inadmissible at court should then be able to be retained on the database, albeit that that material might not be able to be used in the actual court proceedings themselves.³⁷⁷

6.50 Director of the NSW Police Service Forensic Services Group, Dr Raymond, did not consider it necessary for profiles to be kept if the evidence was ruled admissible:

[In relation to the argument that] section 89 should require the destruction of DNA profiles that are ruled inadmissible, in my opinion the DNA profile should only be retained for the purpose of a statistical database in that instance.³⁷⁸

6.51 The Committee has considered the arguments put forward by Dr Gans, the Law Society and the Legal Aid Commission that where forensic evidence is found to be inadmissible, the profile arising from it should be destroyed. The Committee sees no reason why DNA profiles which have been ruled inadmissible should be permitted to be kept. The Committee notes that the Police Service did not oppose this approach when it was raised with them in the hearing. The Committee recommends that the Act be amended to require that a profile be destroyed along with the forensic sample if it is ruled inadmissible.

Recommendation 48

The Committee recommends that the Attorney General amend the *Crimes (Forensic Procedures) Act 2000* to require that both the profile **and** the forensic sample be destroyed if evidence is ruled inadmissible, subject to the Court ordering otherwise.

³⁷⁶ Submission 12, 12 June 2001, p 16.

³⁷⁷ Humphreys, Evidence, 14 August 2001, p 15.

³⁷⁸ Evidence, 29 October 2001, p 20.

Retention of profiles in other circumstances

- 6.52** Mr Strutt noted that the destruction rules for samples of offenders who are later acquitted only apply if the sample was taken after a court order:

Under s87 only prisoners who are tested following a s75/s76 court ordered forensic procedure remain eligible to have their samples and data destroyed if their conviction is quashed. Those who consent or are subjected to police ordered forensic procedures (over 99% of those tested so far) lose this right and remain on the serious offenders index...

It is imperative that s87 be amended as soon as possible to incorporate all prisoners who are tested, regardless of the procedure or testing method used.³⁷⁹

- 6.53** In the evidence of the Police Service, the Committee was advised that the policy is that all acquitted offenders' profiles are removed, despite this not being currently required by the legislation:

It is my understanding that that is actually a drafting error and that it will be addressed in the next lot of amendments to the Act...

I would also like to advise the Committee that the Police Service has adopted the policy that the profile of a person whose conviction is quashed, regardless of whether the sample was taken as a result of consent or by order, should be removed.³⁸⁰

- 6.54** The Committee agrees with the witnesses that it is appropriate that an offender's DNA profile be removed and the sample destroyed as soon as the conviction is quashed. Logically, the way in which the sample was obtained should not impact on the decision to destroy the sample and profile.

Recommendation 49

The Committee recommends that the Attorney General amend the *Crimes (Forensic Procedures) Act 2000* to require the destruction of the forensic sample and DNA profile of offenders whose convictions are quashed.

- 6.55** Another source of concern by witnesses was the provisions that allow a suspect's profile to be placed on the database for 12 months, even if the suspect is cleared and proceedings do not commence.

- 6.56** Dr Gans noted:

³⁷⁹ Submission 10, 6 June 2001, p 31.

³⁸⁰ Dugandzic, Evidence 15 August 2001, p 29.

If you are a suspect and are cleared by the very DNA you provide, you still go on database for 12 months...

The requirement here is you have to be acquitted in court or have the proceedings discontinued against you. The problem is you might never have had proceedings started against you.³⁸¹

6.57 The Legal Aid Commission considers it unsatisfactory that samples are retained if charges are not laid:

There is no requirement for the immediate physical destruction of samples taken if charges are not laid. This should be clarified by way of amendment with a requirement for immediate destruction if charges are not laid.³⁸²

6.58 The Police Service advised in relation to this that their policy under the Standard Operating Procedures is to remove the profile if the suspect is not charged, even though this is not required by legislation:

If the person is not charged, the policy is that it then just comes off. It is deleted... We do not wait the 12 months that we could keep it if the person is not charged. That is being written into the revised SOPs... We have a contract which requires [the Division of Analytical Laboratories] to break it within 48 hours, two working days.³⁸³

6.59 It appears anomalous to the Committee that a profile or sample should be retained when a suspect has been exonerated, acquitted or otherwise cleared. The Committee considers that both the sample and the profile should be destroyed if:

- the suspect's DNA profile does not match the crime scene sample/s
- charges are not laid or proceedings do not commence within 12 months of the sample being taken
- a person is acquitted, or
- a conviction is not recorded.

6.60 In each of these circumstances, the retention of a sample and profile is not justified, given that the individual is, in practice, no longer a suspect. The Committee notes that in some of the circumstances listed, it is already a requirement for the sample to be destroyed. However, the Committee thinks it important that **both** the sample **and** the profile be destroyed.

³⁸¹ Evidence, 31 July 2001, p 33.

³⁸² Submission 16, 19 June 2001, p 4.

³⁸³ Raymond, Evidence, 15 August 2001, p 21.

Recommendation 50

The Committee recommends that the Attorney General amend the *Crimes (Forensic Procedures) Act 2000* to require that both the forensic sample and the profile be destroyed when the suspect's profile does not match the crime scene profile, charges are not laid or proceedings do not commence within 12 months, the suspect is acquitted, or the suspect is convicted but the conviction is not recorded.

Definition of destruction

6.61 Justice Action is particularly critical of the definition of destruction, which allows de-identification rather than physical destruction:

This is probably one of the shonkiest and most suspicious definitions ever to find its way into NSW legislation.

There is no legitimate reason police or the government have for retaining the genetic information or body samples of innocent citizens against their will, whether or not 'identifying information' is removed. DNA profiles *are* identifying information and their presence on the database alone could provide valuable information to private investigators, insurance companies etc.

Declaring 'de-labelling' the legal equivalent of destruction would seem to remove all legal impediment to further use of profiles and samples, allowing their on-selling to biotech companies for research for instance.

Destruction of forensic samples and data should mean just that, the thorough destruction of *all* material and data known to come from the person who is eligible to have their forensic material destroyed...³⁸⁴

6.62 Mr Puplick suggested that there is a danger that de-identified profiles could be re-identified:

While there is talk about eventually de-identifying material that is on the database, it is my view that almost any material can, at some stage, be re-identified in terms of a new sample that is taken that is matched against something that was allegedly de-identified, but is clearly now re-identified.³⁸⁵

6.63 The Police Service explained that the de-identified profiles are retained on a statistical index to allow frequencies and chance match probabilities to be calculated (for purposes described in Chapter 3):

Statistical information is either calculated as allele frequencies or genotype frequencies, in other words the profile at a particular locus, at a particular point on the DNA. In order to create an accurate database that is representative of the population there must be a representative sample of the population with no repeat profiles, in other words nobody on the database twice. To ensure the accuracy of

³⁸⁴ Submission 10, 6 June 2001, p 19.

³⁸⁵ Evidence, 8 August 2001, p 9.

the database before use, it must be statistically tested and these measures require the profile to be in complete form so that testing can be conducted which would highlight linkages between one genotype and another... because if there are linkages it certainly impacts on the probabilities that we talked about before... In order to be able to properly define or properly indicate the level of probability we do need to have the genotype, we do need to have the profile.³⁸⁶

6.64 The Division of Analytical Laboratories, responsible for administering the database, clarified that de-identification provided a satisfactory destruction process:

All I can say is that in the way we have constructed the database we have taken all reasonable measures to ensure that once we have de-identified the sample and cut the link between the profiles it would be impossible to go back.... Once we cut the link between the final DNA profile and the processing that has occurred there is no way of us ever linking that profile that we keep only for statistical purposes...

Admissibility in Criminal Proceedings

6.65 The use of DNA evidence in court proceedings is governed by Part 9. Section 82 makes a forensic procedure inadmissible if the provisions of the Act are not complied with. However, such material may still be admitted if: the court considers that the desirability of admitting the evidence outweighs the undesirability of admitting the evidence; there was a mistaken but reasonable belief as to the age of a child; or the person the subject of the forensic evidence does not object.

6.66 Section 82(5) provides matters for the court to consider when deciding whether to admit improperly obtained evidence:

- (a) the probative value of the evidence
- (b) the reasons given for the failure to comply with the provision of this Act
- (c) the gravity of the failure to comply with the provisions of this act, and whether the failure deprived the person of a significant protection under this Act
- (d) whether the failure to comply with the provision of this Act was intentional or reckless
- (e) the nature of the provision of this Act that was not complied with
- (f) the nature of the offence concerned and the subject matter of the proceedings
- (g) whether admitting the evidence would seriously undermine the protection given to suspects by this Act

³⁸⁶ Raymond, Evidence, 29 October 2001, p 20.

- (h) whether the breach of or failure to comply with the provision of this Act was contrary to or inconsistent with a right of a person recognised by the International Covenant on Civil and Political Rights
- (i) whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the breach or failure to comply
- (j) the difficulty (if any) of obtaining the evidence without contravention of an Australian law,
- (k) any other matters the court considers to be relevant.

6.67 Section 82(6) clarifies this further:

The probative value of the evidence does not by itself justify the admission of the evidence.

6.68 Under section 82(7), if a judge permits such evidence to be admitted, he or she must inform the jury of the breach of provisions, and give any warning the judge thinks appropriate.

6.69 Evidence relating to whether a person consented to a procedure is not admissible in proceedings against the person, except to establish or rebut an allegation that a police officer or another investigator breached the law in carrying out the procedure.

6.70 Justice Action considers the rules for inadmissibility to be inadequate:

... s82 does not go far enough in excluding evidence which might be obtained illegally, especially if doubt might exist as to the actual manner in which it was collected...

Subsection 82(4)(c) seems to be a further post facto validation of material obtained unlawfully from children ... If a mistake was made about the age of the child it should be immediately rectified by destroying all material and data obtained unless the parent/guardian and child do not object to its use.

Subsection 82(5) should be given teeth by replacing 'may be considered' with 'must be considered'...

Subsubsection 82(5)(j) should be deleted. Police should not be encouraged to engage in illegal investigative techniques simply because the legal ones are 'too

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6.71 Dr Gans disagrees with the general approach of allowing the trial judge the discretion to determine whether to admit otherwise inadmissible evidence:

I think a tougher test is needed here because I think trial judges are put in an impossible position. One distinction that I think needs to be drawn, and is drawn in other jurisdictions, is the difference between a mere failure to follow a procedure which, if the police had put their attention to it they would have

followed it – that can be proved as a question of fact – or a situation where the police should not have done the forensic procedure at all but have got it and have now serendipitously got a cold hit. In those situations the evidence should be excluded, otherwise the police have every incentive to be less cautious with procedures if they feel that the procedure will go against them.³⁸⁸

6.72 Dr Gans also criticised what he considers to be inadequate rules of inadmissibility:

[Section 82(4)(b)] should provide for a stricter exclusionary rule for evidence gathered as a result of a database match that could never have been performed if lawful procedures had been complied with. The ‘balancing’ test laid down in this section is appropriate for avoidable breaches of the law (eg a failure to record a procedure) but is too mild in relation to evidence that could not have been obtained by lawful means (see s-s(5)(j)). The latter category of evidence is particularly important in relation to DNA database matches, because an entire investigation may be based on a ‘cold hit’ (ie a previously unsuspected investigative lead) provided by a database match. Section 83 already takes a strict exclusionary approach in relation to illegal retention. However, the same strict rule should also apply to illegal obtaining, storage and use. Otherwise, illegal conduct by investigators will be insufficiently deterred (given the possible investigative reward) and courts asked to exercise the balancing test will be placed in a highly invidious position.³⁸⁹

6.73 Dr Gans also suggested that the admissibility provisions should stipulate that the gravity and subject matter of the offence should not by itself justify admissibility:

Sub-s(6) should specify that ‘the nature of the offence concerned and the subject matter of the proceedings’ does not by itself (or in combination with the probative value of the evidence) justify the admission of the evidence. Otherwise, those accused of very serious crimes (e.g. murder) would receive less protection than those accused of lesser crimes and police officers would have a strong incentive to ‘cut corners’ in relation to the investigation of serious crimes.³⁹⁰

6.74 The Legal Aid Commission expressed concern that there was no safeguard to prevent a new sample being taken legally after the original sample is ruled to be inadmissible due to breaches of the provisions:

An interesting conundrum, however, arises. Firstly, the court may in its discretion allow illegally or improperly obtained material to be admitted into evidence. If, however, upon challenge the evidence is rejected, there is nothing to stop the DPP or police to make a request for another set of samples to be taken. Provided the correct procedure were followed on the second occasion, the evidence would then become prima facie admissible. Given the fact that by the time the challenge might be taken, the testing procedures may have been completed and the results known, the court may be faced with a dilemma as to whether to allow into evidence the new test results, knowing the results may support guilt.

³⁸⁸ Gans, Evidence, 31 July 2001, p 29.

³⁸⁹ Submission 4, 6 May 2001, p 10.

³⁹⁰ Submission 4, 6 May 2001, p 10.

It seems to Legal Aid that in balancing the interests of the accused as against that of the community, given the particularly invasive nature on a person's civil liberties of these procedures, it is not unreasonable to suggest that where a court finds that relevant procedures have not been followed, and in exercising its discretion, the court concludes that such evidence should be excluded, that this be an absolute bar to the obtaining of further samples of a similar nature from the defendant.³⁹¹

- 6.75** The Committee notes that, as the legislation currently stands, the exclusionary rules of evidence are the chief means of deterring illegal collection of DNA evidence. That is, it seeks to discourage police from breaching the provisions of the Act by making the evidence obtained illegally inadmissible in court. The Committee's recommendation 46, that aims to enhance restrictions on collecting, analysing and storing forensic samples and profiles, seeks to create offences that further deter illegal collection and use of DNA. In addition, however, the Committee believes stricter exclusionary rules to be appropriate.
- 6.76** The Committee is supportive of the approach suggested by Dr Gans, that would apply the balancing test of section 82(5) for admission of evidence obtained with minor contraventions of the requirements of this Act, but would exclude DNA evidence that is gathered illegally and is prohibited by this or other legislation. Thus, incorrect paper work would probably not lead to exclusion of evidence, but evidence from procedures performed in unauthorised circumstances (such as where a threshold has not been met) or unauthorised database matches (such as a cold hit on a profile that should have been removed) would not be admissible. Sub-section 82(5)(j), which allows the judge to consider "the difficulty (if any) of obtaining the evidence without contravention of an Australian law" is particularly problematic, as it appears to explicitly condone illegal evidence gathering.
- 6.77** In addition, once evidence is ruled inadmissible, the Committee considers that further samples from the defendant should not be permitted for the purpose of prosecuting the same criminal acts. Otherwise, the Police Service could respond to a ruling of inadmissibility by simply taking a second sample using the correct procedures. The illegal collection of evidence should not be condoned, and the Committee believes that strict exclusion of such evidence will discourage illegal practices.

Recommendation 51

The Committee recommends that the Attorney General amend the *Crimes (Forensic Procedures) Act 2000* to provide that evidence gathered in contravention of that Act is inadmissible, while retaining the balancing test of section 82(5) for admission of evidence obtained with minor breaches of the requirements of the Act.

³⁹¹ Submission 16, 19 June 2001, p 3.

Recommendation 52

The Committee recommends that the Attorney General amend the *Crimes (Forensic Procedures) Act 2000* so that, after a profile is ruled inadmissible, no further DNA samples may be taken from the defendant for the purpose of prosecution of the same criminal act or acts.

Chapter 7 Drafting Matters

7.1 In the course of this Review, the Committee has received numerous comments about what is said to be a large number of drafting errors contained in the *Crimes (Forensic Procedures) Act 2000*. In fact, the claimed extent of the errors prevents the Committee from listing them here. The general complexity of the drafting was also identified as a problem.

7.2 The complicated drafting is a source of difficulty for the Police Service. The Legal Officer for the Police Service gave evidence that:

Overall, if I had one criticism to make of the Act it would be that it is very complex.

It is an Act that has to be understood and implemented by police officers on the street, who obviously are not solicitors. This Act, in my opinion, is so complex that it really is only capable of being understood by lawyers, which is quite unfortunate. Also, in my experience there are quite a few provisions that even lawyers cannot agree on.³⁹²

7.3 The most severe criticisms about the drafting were from Dr Jeremy Gans, Lecturer in the Faculty of Law at the University of New South Wales, who identified approximately 125 drafting flaws. He submitted:

The Act is a drafting disaster. Nearly half the Act's provisions, including almost all of its most important sections, contain significant drafting flaws. The Act's flaws disadvantage all groups involved in the use of DNA identification technology in crime investigation and prosecution. Some provisions intrude on suspects' and others' personal rights to no investigative gain. Others hamper criminal investigators and prosecutors, for no discernible reason and without any added protection for individual liberty. The Act is riddled with confusing, lengthy, inconsistent and arbitrary legal rules, needlessly disadvantaging citizens and police alike. The Act repeatedly fails to draw useful distinctions or provide worthwhile procedures, for no apparent reason other than a lack of drafting imagination. In several vital respects, the meaning of the Act is simply impossible to discern or the rules set out are logically unworkable.³⁹³

7.4 Both Dr Jeremy Gans and Justice Action offer a section-by-section examination of the Act in their submissions. The Committee notes that many of the matters raised concern drafting rather than policy issues. They include such matters as:

- imprecise meanings and definitions, such as the meaning of 'purpose' in section 13(1)(b)
- unclear procedures in certain contingencies, for example, what should be done with forensic material obtained prior to the withdrawal of consent under section 14, and

³⁹² Dugandzic, Evidence, 15 August 2001, p 18.

³⁹³ Submission 4, 6 May 2001, p 1.

- complex structuring, such as the ‘regulation by definition’ approach to the database in section 90.

7.5 Rather than quote and comment on each of the many problems identified by Dr Gans and Mr Strutt, the Committee will forward the submissions to the Attorney General for consideration.

Recommendation 53

The Committee recommends that the Attorney General consider amendments to address the drafting problems identified by Dr Gans and Justice Action in their submissions to this Review.

7.6 The remainder of this chapter examines two specific areas of concern to the Committee.

Drafting of sections 12, 20 and 25

7.7 The Committee notes the extraordinary and, in the Committee’s opinion, unnecessary complexity of the provisions relating to thresholds for suspects. Section 12 of the Act provides:

Matters to be considered by police officer before requesting consent to forensic procedure

The police officer must be satisfied that

- (a) the person on whom the procedure is proposed to be carried out is a suspect, and
- (b) the person on whom the procedure is proposed to be carried out is not a child or an incapable person, and
- (c) if the forensic procedure concerned is an intimate forensic procedure – there are reasonable grounds to believe that the forensic procedure might produce evidence tending to confirm or disprove that the suspect committed
 - (i) a prescribed offence, or
 - (ii) another prescribed offence arising out of the same circumstances as that offence, or
 - (iii) another prescribed offence in respect of which evidence likely to be obtained as a result of carrying out the procedure on the suspect is likely to have probative value, and
- (d) If the forensic procedure concerned is a non-intimate forensic procedure other than the taking of a sample of hair other than pubic hair – there are reasonable grounds to believe that the forensic procedure might produce evidence tending to confirm or disprove that the suspect committed:

- (i) an indictable or a summary offence, or
 - (ii) another indictable or summary offence arising out of the same circumstances as that offence, or
 - (iii) another indictable or summary offence in respect of which evidence likely to be obtained as a result of carrying out the procedure on the suspect is likely to have probative value, and
- (e) If the forensic procedure concerned is the taking of a sample of hair other than pubic hair – there are reasonable grounds to believe that the forensic procedure might produce evidence tending to confirm or disprove that the suspect committed:
- (i) a prescribed offence, or
 - (ii) another prescribed offence arising out of the same circumstances as that offence, or
 - (iii) another prescribed offence in respect of which evidence likely to be obtained as a result of carrying out the procedure on the suspect is likely to have probative value, and
- (f) If the forensic procedure concerned is the taking of a sample by buccal swab – there are reasonable grounds to believe that the forensic procedure might produce evidence tending to confirm or disprove that the suspect committed:
- (i) a prescribed offence, or
 - (ii) another prescribed offence arising out of the same circumstances as that offence, or
 - (iii) another prescribed offence in respect of which evidence likely to be obtained as a result of carrying out the procedure on the suspect is likely to have probative value, and
- (g) The request for consent to the forensic procedure is justified in all the circumstances.

7.8 Sections 20 and 25 are similarly formulated.

7.9 It seems to the Committee that the drafting of these sections is needlessly complicated. Subsections (ii) (“another prescribed offence arising from”) and (iii) (“another prescribed offence in respect of which...”) of the definition are redundant as they would fall within subsection (i) in any case. These provisions could be simplified by deleting subsections (ii) and (iii) wherever they appear in such circumstances.

7.10 Moreover, each section requires the police officer or magistrate to apply two different tests within the one provision. For example, section 12(c) requires the police officer to be satisfied that there “are reasonable grounds to believe the forensic procedure *might* produce evidence ... that the suspect committed ... another prescribed offence in respect of which evidence *likely to be obtained* ... *is likely to have probative value*...”.

7.11 Witnesses were also critical of these sections. Dr Gans' comment on the drafting of section 12 was:

This section should be redrafted. As presently drafted, the section is highly confusing to police officers and suspects, to no legal purpose. In s-ss(c-f), paras (ii) and (iii) are redundant, in that they describe offences that, by definition, are already covered by para (i).

7.12 He also noted problems in sections 20 and 25:

This provision is a drafting disaster and should be completely rewritten. Paras (ii) and (iii) of (c) are redundant (see comment on s12). The reference to "such an offence" in (d) is bewildering (i.e. which offence?). Moreover, this provision differs from the formulation in s12 (which is garbled in a different way...) There is no reason to have a different evidence requirement for two sections, each of which limit the police's ability to perform forensic procedures on suspects, let alone utilise garbled drafting that will confuse both police officers and suspects. The section should be re-drafted to accord with s12 (subject to the comments on s12, above).³⁹⁴

7.13 The Police Service also identified section 12 as problematic, particularly 12(c)(iii):

The paragraph has caused the Police Service a great deal of concern. It is very difficult to interpret. At this stage I do not think it has been used, although I may be wrong.³⁹⁵

7.14 The Committee is concerned that these three crucial sections of the Act are drafted in such a complicated and convoluted way. This makes the implementation of the Act by police officers more difficult, prevents the easy understanding of the provisions by suspects, and potentially could cause legal uncertainty. As sections 12, 20 and 25 establish the thresholds for requesting and ordering forensic procedures on suspects, the Committee considers it essential that they be drafted in a clear and concise manner. The Committee therefore recommends that sections 12, 20 and 25 be re-written in plain English.

Recommendation 54

The Committee recommends that the Attorney General amend sections 12, 20 and 25 of the *Crimes (Forensic Procedures) Act 2000* to make the provisions clearer and easier to understand.

³⁹⁴ Submission 4, 6 May 2001, p 6.

³⁹⁵ Dugandzic, Evidence, 15 August 2001, p 22.

Unregulated collection and matching

7.15 According to evidence provided by witnesses, the way in which the Act is drafted has led to some collection and matching of DNA being left unregulated. “Forensic procedure” is defined in section 3 to exclude “(d) any intrusion into a person’s body cavities except the mouth, or (e) the taking of any sample for the sole purpose of establishing the identity of the person from whom the sample is taken”. By so excluding these procedures, they are not covered by the provisions and protections of the Act.

7.16 Dr Gans commented:

Paras (d) and (e) should be abolished and explicit provisions enacted to deal with cavity searches and identification procedures. The present drafting – apparently intended to bar such procedures from occurring – has the unfortunate effect of excluding these procedures from the regulatory provisions of the Act when they are performed under other laws. For example, if a cavity search is performed on a suspect under s353A(2) of the *Crimes Act 1900 (NSW)*, then Part 6’s procedural rules do not have to be followed and the Part 10 destruction rules do not apply to any forensic material gathered. Both cavity searches and identification procedures should be included in the definition of forensic procedure and express provisions should be drafted to specify that such procedures are not authorised by Parts 3 – 5 & 7. The propriety of performing such procedures under Part 8 (especially on victims) other legislation or the common law should be carefully considered. If the procedures are permitted, then Part 6 should apply to them.³⁹⁶

7.17 The definition of “permitted forensic material” in section 91(3) was also identified as problematic. It defines permitted forensic material as any forensic material that is:

- (a) found at a crime scene, or
- (b) taken from a suspect in relation to an offence in accordance with Part 3, 4, or 5 or under a corresponding law of a participating jurisdiction
- (c) taken from an offender or a volunteer in accordance with Part 7 or 8 or under a corresponding law of a participating jurisdiction, or
- (d) taken from the body of a deceased person, or
- (e) that is from the body of a missing person, or
- (f) taken from a volunteer who is a relative by blood of a deceased or missing person.

7.18 Dr Gans’ comment on the definition is :

... para (a) of the definition should be extended to explicitly cover forensic material from a victim’s body or an object connected with a crime. Courts may imply this result by assuming that para (a) covers everything mentioned in the definition of ‘crime scene index’. However, the definition of ‘permitted forensic

³⁹⁶ Submission 4, 6 May 2001, p 3.

material' is too vital (as both a criminal offence provision and a vital regulatory provision) to be left to rest on the hope that a court will make this implication.³⁹⁷

7.19 The Committee agrees with Dr Gans that these two areas of the Act require clarification. If the intention of the Act is to prohibit body cavity searches and procedures that are solely to identify a person, then that should be explicitly stated. The current formulation of the Act does not appear to achieve this prohibition, and the failure to regulate such procedures could lead to abuses.

7.20 In relation to the definition of 'permitted forensic material', it is clearly important that there be no uncertainty about whether forensic material from victims' bodies fall within the definition. If it is the intention of the Attorney that such material is 'permitted forensic material' under section 91(3), then that should be clarified.

Recommendation 55

The Committee recommends that the Attorney General amend the definition of forensic procedure in section 3 to clarify the prohibition on intrusion into a person's body cavities and of forensic procedures taken for the sole purpose of establishing a person's identity.

Recommendation 56

The Committee recommends that the Attorney General amend the definition of 'permitted forensic material' in section 91(3) to clarify whether forensic material taken from a victim is permitted forensic material.

³⁹⁷ Submission 4, 6 May 2001, p 13.

Appendix 1

Submissions Received

Submissions Received

NO	AUTHOR	ORGANISATION
1.	J D WHEADON	
2.	Mr Tony SAVAGE	
3.	Mr John ABERNETHY	State Coroner, NSW Attorney General's Department
4.	Dr Jeremy GANS	Faculty of Law, University of New South Wales
5.	Ms Gillian CALVERT	Commissioner, NSW Commission for Children and Young People
6.	Ms Astrid YASNA	
7.	Ms Sandra SOLDO	NSW Police Association
8.	Mr Brendan MILLS	
9.	Mr Andrew HAESLER	NSW Public Defenders Office
10.	Mr Michael STRUTT	Justice Action
11.	Ms Jane SANDERS	Youth Justice Coalition
12.	Mr Nicholas MEAGHER	President, Law Society of NSW
13.	Mr Andrew CAMERON	Sydney Regional Aboriginal Corporation Legal Service
14.	Mr Chris PUPLOCK	NSW Privacy Commissioner
15.	Mr Jeffrey BRADFORD	Chief Executive Officer, NSW Aboriginal Land Council
16.	Ms Margaret ALLISON	Chief Executive Officer, Legal Aid Commission of NSW
17.	Ms Sonja STEWART	Aboriginal and Torres Strait Islander Commission
18.	CONFIDENTIAL	
19.	Ms Ruth McCOLL SC	President, NSW Bar Association
20.	Graham BELLAMY	
21.	Mr Peter RYAN	Commissioner, NSW Police Service
22.	Mr John WATKINS	Minister for Corrective Services
23.	CONFIDENTIAL	
24.	Mr Alistair ROSS	Director, National Institute of Forensic Science Australia
25.	Dr Ross VINING	Deputy Director, Institute of Clinical Pathology and Medical Research

26. Dr Hilton KOBUS	Director, Forensic Science Centre South Australia and Chair Senior Managers Australia and New Zealand Forensic Laboratories
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Appendix 2

Witnesses at Hearings

Witnesses at Hearings

26 July 2001

Ms Linzi-Wilson Wilde DNA Forensic Specialist
NSW Police Service Forensic Services Unity

31 July 2001

Mr Mark Richardson Chief Executive Officer
Law Society of NSW

Ms Sherida Currie Senior Legal Officer
Law Society of NSW

Dr Jeremy Gans Lecturer, Faculty of Law
University of NSW

7 August 2001

Mr Michael Strutt Spokesperson
Justice Action

Ms Shelagh Daniels Clinical Services Team Leader
CJC Justice Support

Mr John Murray Positive Justice Centre

Mr Cameron Murphy NSW Council for Civil Liberties

Mr Daniel Brezniak Lawyer

8 August 2001

Mr Chris Puplick NSW Privacy Commissioner

Mr Jeffrey Bradford Chief Executive Officer
NSW Aboriginal Land Council

Mr Tony McAvoy Barrister

14 August 2001

Ms Gillian Calvert Commissioner
NSW Commission for Children and Young People

Ms Margaret Allison Chief Executive Officer
Legal Aid Commission of NSW

Mr Doug HumphreysDirector, Criminal Law
Legal Aid Commission of NSW

15 August 2001

Mr Hewitt WhymanChairperson
Aboriginal and Torres Strait Islander Commission**Mr Andrew Riley**Executive Policy Adviser
ATSIC**Mr Ian Nash**Solicitor
Sydney Regional Aboriginal Corporation Legal Service**Mr Jeff Jarratt**Deputy Commissioner
NSW Police Service**Dr Tony Raymond**Director, Forensic Services Group
NSW Police Service**Ms Natalie Dugandzic**Legal Officer, Court and Legal Services
NSW Police Service

29 August 2001

Mr Andrew HaeslerBarrister
NSW Public Defender**Ms Jane Sanders**Solicitor
Youth Justice Coalition

24 September 2001

Mr Ken MiddlebrookChief Superintendent, Commander of Security and Investigations
Silverwater Correctional Complex
Department of Corrective Services**Mr Tom McLoughlin**Senior Assistant Superintendent, Department Liaison Officer
Silverwater Correctional Complex
Department of Corrective Services**Mr David Haviland**Policy and Projects Officer Operations Division
Department of Corrective Services

29 October 2001

Mr Ken Moroney

Deputy Commissioner

NSW Police Service

Dr Tony Raymond

Director, Forensic Services Group

NSW Police Service

Inspector Ian Duncan

Court and Legal Services

NSW Police Service

Dr Ross Vining

Deputy Director, Institute of Clinical Pathology and Medical Research

NSW Department of Health

Appendix 3

Minutes of Proceedings

Proceedings of the Committee

Meeting No 55

10:45 am Tuesday 5 February 2002

Room 1153, Parliament House, Sydney

1. MEMBERS PRESENT

Mr Dyer (in the Chair)

Mr Breen

Mr Hatzistergos

Mr Ryan

Also in attendance: Director, Ms Tanya Bosch; Project Officer, Mr Bayne McKissock

2. APOLOGIES

Ms Saffin

...

3. CONSIDERATION OF CHAIRMAN'S DRAFT REPORT FOR REVIEW OF THE CRIMES (FORENSIC PROCEDURES) ACT 2000

The Committee expressed thanks to the Director and the Secretariat for their assistance in drafting the Report.

The Chair submitted his draft Report on the *Crimes (Forensic Procedures) Act 2000*, which having been circulated to Members of the Committee, was accepted as being read.

The Committee considered the draft report.

Chapter One read and agreed to.

Chapter Two read and agreed to.

Chapter Three read.

Resolved, on the motion of Mr Breen, that Recommendation 2 [Recommendation 2 of the Final Report] be amended to omit the words "it may be unsafe to convict on the basis of DNA evidence alone and that some form of corroboration is desirable", and to replace them with "DNA evidence is only one aspect of the evidence required to convict a person", and that the words "an appropriate" be inserted before the words "legislative amendment".

Chapter Three, as amended, agreed to.

Chapter Four read.

Resolved, on the motion of Mr Hatzistergos, that Recommendation 2 [Recommendation 7 of the Final Report], be amended to omit the word "Mandatory" and replace it with the words "Practical and", and that "and Continuing Legal Education" be inserted before the words "for barristers".

Chapter Four, as amended, agreed to.

Chapter Five read.

Resolved, on the motion of Mr Hatzistergos, that Recommendation 12 [Recommendation 21 of the Final Report] be amended to replace the word “profile” with the word “procedure”.

Chapter Five, as amended, agreed to.

Chapter Six read.

Resolved, on the motion of Mr Hatzistergos, that Paragraph 6.53 [Paragraph 6.51 of the Final Report] be amended to omit the words “obtained or retained in breach of the provisions of the Act”, and to replace them with “ruled inadmissible”.

Resolved, on the motion of Mr Hatzistergos, that Recommendation 5 [Recommendation 48 of the Final Report] be amended by inserting the words “subject to the Court ordering otherwise” after the word “inadmissible”.

Mr Hatzistergos requested that the Minutes formally indicate that he dissented from Recommendation 8 [Recommendation 51 of the Final Report].

Chapter Six, as amended, agreed to.

Chapter 7 read.

Resolved, on the motion of Mr Ryan, that Recommendation 1 [Recommendation 53 of the final Report] be amended by inserting the word “drafting” before the word “problems”.

Chapter 7, as amended, agreed to.

Executive Summary read.

Resolved, on the motion of Mr Ryan, that the Executive Summary be agreed to, subject to necessary changes to phraseology arising from amendments to recommendations.

Resolved, on the motion of Mr Hatzistergos, that the Draft Report, as amended, be the Report of the Committee and that the Chairman and Director be permitted to correct stylistic, typographical and grammatical errors.

Resolved, on the motion of Mr Ryan, that the Report, together with the transcripts of evidence, submissions, documents and correspondence in relation to the inquiry, be tabled and made public.

...

4. ADJOURNMENT

The Committee adjourned at 12.35pm, to reconvene at 3.00 pm on 13 February 2002.

Tanya Bosch
Director