



## **DNA Testing and NSW Prisoners**

### **What is forensic DNA testing?**

Forensic DNA testing relies on the fact that almost every cell in your body contains complex chemical instructions which regulate many biological processes and ultimately play a large part in your individual development. This DNA is identical in every cell of your body, but will differ slightly from the DNA in the bodies of other people, unless you are one of the approximately 70,000 Australians who has an identical twin.

Forensic DNA testing does not read the entire sequence of someone's DNA, rather it checks a few points on the genome which are believed to vary widely within the population. Usually between 4 and 12 points are checked. There is always the possibility that two people may share the same gene by chance but this chance decreases the more points are tested and compared. Of course those who are closely related are at much greater chance of having genes in common and identical twins will match for all points tested.

Thus it becomes possible to compare human cells found at a crime scene (from say, a cigarette butt or even the sweat from a fingerprint) with cells taken from a suspect and generate a statistical probability as to whether they came from the same person.

However forensic DNA is not fingerprinting. People who are related, even identical twins, do not have similar fingerprints. Fingerprints are hard to plant at crime scenes and easy to collect and interpret. DNA samples are very easy to plant at crime scenes and require careful and complex procedures to collect and analyse as well as arcane and controversial statistical formulas to interpret.

### **How reliable is forensic DNA?**

Modern forensic DNA methods are reliable enough to make them an extremely powerful tool to assist in the investigation of crime, missing persons or family relationships. The problems arise when their results are presented as evidence in court or when they are allowed to replace, rather than assist, the investigation of crime.

Match statistics of the order of millions to one regularly quoted in court cases not only rely on very dubious mathematical models, they far exceed the practical limits of the laboratories which perform the tests. Authorised DNA labs in the US are subject to external testing, which shows an error rate of about one percent for most labs. About 7 in

10 of those errors are false positives, which would have wrongly implicated someone had they been real tests. Australian and New Zealand DNA labs are not subject to such external testing.

New Zealand's ESR laboratories have made some spectacular DNA testing blunders in recent years. In one case a serial rapist was released to commit at least three more rapes. In another a mild mannered Christchurch assault victim underwent a 4 month police investigation over two Wellington gang murders which he couldn't possibly have committed. The resulting inquiry into the lab found that DNA from a test performed on the assault victim had contaminated at least five other tests, but how this had happened was never discovered.

The massive number of tests and crossmatches between prisoners, suspects, volunteers and crime scene samples which will be attempted in NSW over the next few years not only makes these kinds of errors a near certainty, they will stretch even the theoretical limits of DNA testing.

NSW forensic laboratories have been described as 'the worst in the world' by the Director of Public Prosecutions, Nicholas Cowdery QC.

### **Do the innocent have anything to fear?**

There are more reasons to be concerned about the current wave of enthusiasm for DNA testing than the chance of laboratory error during testing or data error on the database.

The sheer impressiveness of the 'millions to one' match odds given by forensic experts in court cases can bamboozle juries whose job it is to determine guilt 'beyond reasonable doubt'. The sheer number of attempted matches proposed by NSW police ensures that chance matches and matches due to lab error will occur from time to time. Overseas experience gives no reason to expect that this fact will be properly explained to juries.

OJ Simpson was able to exclude DNA evidence from a glove found on his property only because his high powered defence team was able to convince the jury that there was a possibility that police had planted it there. Courts are usually very reluctant to accept the possibility of police tampering with evidence, even though it has now become far easier than ever before.

The chief thing that the innocent have to fear is the bogus reputation for infallibility that forensic DNA testing has acquired in this country and the rush to implement it, which has led to shoddy legislation, a lack of testing standards and disregard for the privacy and civil rights of all Australians.

### **Can I use DNA to prove my innocence?**

The information gained from forensic DNA testing is of more use in eliminating suspects than implicating them.

While it can never be said with absolute certainty that two matching DNA profiles came from the same person, two which do not match could not possibly have come from the same individual. This makes forensic DNA testing an extremely powerful tool for proving innocence.

OJ Simpson lawyer Barry Scheck has gained international recognition for the success of his "Innocence Project" in using DNA evidence to overturn the convictions of over 80 US prisoners, including several on death row. Due to the huge number of wrongful convictions which have been exposed in the US using DNA evidence Illinois has suspended its death penalty.

In order to cash in on the fame of Scheck's work, Bob Carr has announced his own Innocence Project which should commence in NSW in mid-2001. Funding has been promised to allow prisoners to contest their convictions where DNA evidence which might cast doubt on them exists.

However the Crimes (Forensic Procedures) Act does not give suspects or prisoners the right to independently test crime scene evidence which may prove them innocent. Only material taken from the prisoners body will be provided for independent testing, and only if there is enough left after police finish testing. There is also no provision to reactivate an exhausted appeal if there is reason to believe that there may be DNA evidence which calls the original conviction into doubt.

It is to be hoped that Premier Carr will prove as eager to clear these legal obstacles to appeal using DNA evidence as he has been to expedite convictions using DNA evidence. Until he does, his 'Innocence Project' remains nothing more than a cynical public relations exercise and wrongly imprisoned NSW citizens will have little chance of overturning their conviction using DNA evidence.

### **What will happen to prisoners?**

All NSW prisoners over 18 who have been convicted of an offence which could carry 5 or more years imprisonment will be subject to DNA testing, even if they were actually sentenced to far less than 5 years.

Prisoners will first be asked to consent to a mouth swab. Before giving consent, prisoners must be given the opportunity to seek legal advice. Justice Action and the Prisoners Legal Service are of the opinion that most prisoners should not give consent, but advise that all

seek legal advice regarding their own specific situation before giving or refusing consent. Aboriginal prisoners may ask for an interview friend to be present when consent is requested.

An independent witness must be present to countersign the consent form. Corrective Services will be providing prison officers as these 'independent' witnesses.

If consent is not given either a police order for a hair sample or a magistrates order for a blood test will be made. After a few days the prisoner will be required to submit to hair or blood sampling. Hair sampling involves taking 6 to 10 hairs, along with the root, by the least painful method known and available to the person. Unfortunately NSW police apparently only know how to twist it all out at once.

Any attempt to interfere with testing, or to resist a non-consensual test can be met with 'reasonable force' on the part of police. Any attempt to interfere with a magistrate ordered test carries up to 12 month jail and 50 penalty points.

Samples from prisoners will be sent to Health Department labs for testing and storage. DNA profiles from the tests will be loaded onto a database and eventually copied to the Federal CrimTrac database. From there it will be available for distribution to forensic DNA databases in other states. They will then be checked against DNA profiles taken from the scenes of unsolved crimes. In this way, Australian police hope to be able to use all Australian prisoners in 'fishing expeditions' in an attempt to clear up unsolved crimes.

There are many problems with this kind of 'mass fishing expedition', one being that the massive number of crossmatches attempted dwarves even the 'millions to one' match odds quoted by forensic scientists. Any prisoners who face charges resulting from these crossmatches should encourage their legal representative to contact Justice Action for research assistance.

### **What about the information leaflets?**

NSW Corrective Services has distributed information leaflets in which it is stated that failure to consent to DNA testing will result in the use of force. Prisoners have a perfect right under the Crimes (Forensic Procedures) Act to refuse to consent to a mouth swab. Force may only be used if a prisoner resists a legal test, whether or not a consent form has been signed. Refusal to give consent will not result in 12 months extra imprisonment, this only applies to those who resist a magistrate ordered test.

If you are threatened with force, revision of classification or any other penalty for refusing to sign the consent form you should make a complaint to the NSW Ombudsman and the NSW Inspector General of Prisons. If force is used on you and you have not resisted the testing procedure you should also lodge a complaint.

## **What should I do?**

Exercise your right to get legal advice before consenting to a test. You should not give consent to testing unless advised to do so by your legal representative.

Whether you consent or not, you will still be tested. Police are only authorised to use force if you resist testing but if you do resist they most certainly will use force. If a magistrate has ordered the test, resisting it can carry another 12 months prison.

If you are denied the right to contact a legal representative before giving consent, threatened with force or sanctions if you don't consent or subjected to force in the absence of resistance you should contact the Ombudsman and the Inspector General of Prisons. You should also do this if you are an Aboriginal and are denied the right to have an interview friend during the requesting of consent or during the actual testing.

The NSW Legislative Council Standing Committee on Law and Justice will be conducting an inquiry into the DNA laws from mid-2001. If you intend making a submission to the inquiry you should write down concerns as they arise so that you will remember the details when the inquiry begins taking submissions.

## **Where can I get help?**

For more information on forensic DNA, write to "DNA Information", c/o Justice Action, PO Box 386, Broadway NSW, 2007. You should also encourage your legal representation to contact Justice Action if you are charged as the result of a DNA test.

For legal advice contact the Prisoners Legal Service, the Aboriginal Legal Service or your own legal representative if you have one.

To complain about police practices under the new laws contact the NSW Ombudsman, 3rd Floor, 580 George St, Sydney 2000, phone: 9286 1000 or 1800 451 524.

To complain about prison officers or Corrective Services practices in carrying out the new laws write to the Office of the Inspector-General of Corrective Services, PO Box K1313, Haymarket.

If you have information which may be useful to the Standing Committee on Law and Justice for its inquiry into the new DNA laws you should write it down now in preparation for when the inquiry begins in mid-2001. It may be possible for Justice Action to lodge it anonymously on your behalf.