



The Crimes (Forensic Procedures) Act 2000

Justice Action's submission to the Standing Committee on Law and Justice Inquiry

The submission by Justice Action to the Inquiry into the Operation of the Crimes (Forensic Procedures) Act 2000 consists of four parts:

1) *Consent by Coercion* details how Part 7 of the Crimes (Forensic Procedures) Act has been implemented in NSW prisons. It was originally distributed on April 11, 2001 at the Sydney Institute of Criminology seminar 'The Use of DNA in the Criminal Justice System'. The main text of this paper will be submitted as a Word format document with the appendices provided separately as hard copies.

2) *Legally Scientific?* traces the history of DNA use in the criminal justice system, focussing on problems with effective laboratory standards and the difficulty courts have had in interpreting DNA evidence. An earlier draft of *Legally Scientific?* was distributed at the April 11 Sydney Institute of Criminology seminar.

3) A letter send by Justice Action to Attorney General and (then) Minister for Corrective Services Bob Debus on 03-Jan-2001 expressing our concern at Corrective Services preparations for the DNA testing of NSW prisoners.

4) This document focuses on the development and operation of the Crimes (Forensic Procedures) Act and makes suggestions as to how the laws governing the collection, testing, analysis and storage of forensic evidence in NSW might be reformed.

Justice Action has produced many articles, papers and submissions on forensic DNA use, some of which are available online at http://www.justiceaction.org.au/ja_dna/dna_ndx.html

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The following may be of interest to the inquiry.

DNA and Criminal Justice (February 2000).

http://www.justiceaction.org.au/ja_dna/papers/dna_cj.html

Originally prepared by Justice Action as a paper for a NSW Parliamentary Crossbencher Briefing. Now included in the Book of Readings for Griffith University law students.

Legislation Alert - Crimes (Forensic Procedures) Bill 2000 (05-Jun-2000).

http://www.justiceaction.org.au/ja_dna/papers/alert_050500.html

Bulletin distributed to NSW parliamentarians insisting that the Crimes (Forensic Procedures) Bill 2000 be referred to the Standing Committee on Law and Justice.

Crimes (Forensic Procedures) Bill 2000 - Amendment proposals (08-Jul-2000).

http://www.justiceaction.org.au/ja_dna/papers/crimes_bill2k.html

Amendments proposed by Justice Action during the passage of the legislation through NSW parliament.

Submission to the Senate Legal and Constitutional Committee Inquiry into the Commonwealth Crimes Amendment (Forensic Procedures) Bill 2000 (30-Oct-2000).

http://www.justiceaction.org.au/ja_dna/papers/slcc_subm.html

Justice Action was the only NGO called to give evidence before the Senate inquiry. The transcript is downloadable from

<http://www.aph.gov.au/hansard/senate/commtee/s4353.pdf>

The biotech revolution

Humanity's genes belong to everyone and should not be patented.

- Francis Collins, discoverer of the cystic fibrosis gene and head of the Human Genome Project

Neither Labor nor Coalition Senators ... could see [any] difference between patenting a new carburettor or a gene.

- Dr John Coulter, geneticist and former Senator

The past decade has seen an explosive growth in the development of genetic technology which has drawn frequent comparisons with the data processing and communication revolution which began a few decades earlier and has since changed our lives forever. As with the tech-boom of earlier years, the new discoveries have attracted big speculative money, with formerly unheard of biotechnology corporations coming to occupy major places in the globalised international economy.

The gene gold rush has attracted its fair share of opportunists and shonks, with scientists seeking self promotion vying to be the first to clone animal A or genetically engineer animal B, often with no therapeutic or scientific justification. Even human beings have now been genetically modified, although this fact was not revealed until several years after an experimental IVF treatment had 'accidentally' achieved it. It has now also emerged that the Celera contribution to the Human Genome Project data, released with much promotion and self-congratulation, is up to 50% in error.

The biotech boom was quick to spawn its own public relations industry, with millions spent to 'inform' governments, researchers, financiers and legal professionals of the 'benefits' of gene technology. This has not been without success.

- Governments worldwide have joined with companies in resisting calls for effective regulation of genetically engineered food and organisms.
- Biotech industry representatives have been appointed to prominent positions on regulatory and advisory bodies.
- Standards established for forensic labs and DNA testing methods have been progressively watered down or ignored, as have the legal standards for admitting the evidence they produce.
- Privacy protection has been bypassed or neutralised where it might interfere with the collection of saleable biotech information.
- Medical professionals have engaged in unethical practices in order to collect and retain specimens which might produce such information.
- The common law rights which once protected us from forced medical procedures have been extinguished.
- Governments in Iceland and Tonga have *sold* the genetic information of their entire populations to multinational corporations, without the consent of their people.

Worst of all, governments have granted corporations the right to patent the genes of living organisms - including human beings. Genetic sequences are not new inventions nor novel processes. Allowing biologists to patent a section of DNA is the equivalent of allowing astronomers to 'patent' the orbit of any heavenly bodies they discover and to charge a fee to anyone who wishes to use this information in their calculations.

The DNA contained in our own bodies, handed down by our ancestors since time immemorial, has now been declared 'terra nullius' and open to the claim of the first biotech company to plant its flag there.

The cowboys of the new industry have been quick to take advantage of their licence for biopiracy. Tens of thousands of gene patents have been taken out in recent years, many for sequences with functions which are not yet known. Thousands of these patents cover sections of human DNA which were obtained without the informed consent of the donors.

Decode Genomics paid a staggering US\$200 million for the genetic information of less than 250,000 Icelandic citizens, more than US\$800 per profile. It has since filed patents for dozens of genes it claims to have located in this data in its attempt to recoup the massive investment.

The first act of biopiracy upon a human being occurred (ironically) in 1984 after US cancer sufferer John Moore had his spleen removed. Unbeknownst to Moore, his surgeon was also engaged in genetic research at UCLA and kept the spleen as a specimen.

Upon discovering that Moore's cells produced far greater than normal quantities of a naturally occurring cancer fighting substance he was quick to patent the cell-line and licence the rights to two large biotech companies for a very tidy sum.

Moore sued to try to regain control of the information from his own tissue, or at least a discount on the medication produced from it. Courts rejected his suit, finding that to grant Moore the right to regain control of his own genetic information would be to "destroy the economic incentive to conduct important medical research".

But gene patenting actually hinders research. In fact several publicly funded research organisations in France and the UK claim that they only take out gene patents themselves in order to pre-empt corporations who might get in first and charge exorbitant fees for the continued research use of the patented sequences.

Members of the Ashkenazi Jewish community in Chicago who assisted research into the gene which causes Canavan's disease are now suing the research company, claiming that the patent taken out when the gene was identified has put the price of the test beyond their reach and stifled further research. Since the patent was taken out several US hospitals have ceased testing for the disease and one in four US laboratories have now stopped performing certain genetic tests because of restrictions or excessive costs associated with genetic patents.

After Myriad Genetics was granted the patents to breast cancer genes BRCA1 and BRCA2 (discovered chiefly as the result of publicly funded research) it began charging US\$2,850 for a test which costs a few hundred dollars to perform. Myriad has signalled that it will soon begin enforcing its patents in Australia.

Medical research was once characterised by its spirit of cooperation, peer review and data sharing. It is now a world of proprietary secrets, closely guarded research and 'commercial in confidence' with the increasing overlap between medical practitioners and corporate interests threatening the privacy of patients everywhere.

All over the world the individual's right to control his/her own DNA has been forced to retreat in the face of hyperbolic economic, medical and law enforcement promises backed with intense and well resourced biotech industry lobbying. Stolen information has been used to fuel an unprecedented speculative trade in medical data and specimens which is putting medication and testing beyond the reach of patients and is already showing the traits of an unsustainable 'bubble' market.

It is in this atmosphere that Australian governments have introduced laws enabling the compulsory forensic testing of their citizens and databasing of the results.

Forensic DNA and the criminal justice system

The innocent have nothing to fear.

- Tomas de Torquemada, Spanish Grand Inquisitor, 1484.

If you're not a criminal you have nothing to fear by having your DNA on a national database.

- Peter Lindsey, Federal MP for Herbert, May 31, 2001

NSW Police and forensic evidence

The collection of forensic evidence offers much potential for malpractice and abuse.

The safe collection of crime scene samples requires specialised equipment and training as well as effective measures to minimise the possibility of accidental or deliberate contamination. Collecting samples from people's bodies requires the utmost sensitivity and integrity during consent and testing. Those charged with such duties must be beyond suspicion of brutality, incompetence or corruption.

The NSW Police Service does not meet these requirements.

There is now abundant evidence that the 'state of systematic and entrenched corruption' exposed by the Wood Royal Commission has not been addressed and that the administrative and political will required to tackle it is severely lacking both in the Service and in NSW Parliament.

The Police Integrity Commission has long pointed out that it does not have the resources to investigate 'all or even most' of the serious Category 1 complaints made against the police (*Special Report to Parliament - Project Dresden*, April 2000, p6). Its latest annual report shows that the rate of Category 1 complaints against police continues to rise.

Recent evidence given in PIC hearings by senior police officers has painted a consistent picture of interference at the highest level in attempts to reform the NSW Police Service, including a group of 'Black Knights' reaching up to Deputy Commissioner level said to be committed to preserving the systematic corruption identified by Wood.

The Commissioner himself stands accused of sidelining and neutralising officers who demonstrate a dedication to cultural change in the Service. He has also demonstrated strong aversion to independent monitoring of reform with the original draft of his 'Future Directions' statement demanding that oversight be reduced and that the Qualitative

Strategic Audit of the Reform Process (QSARP) be 'terminated forthwith'. The furor which greeted the leak of this document resulted in the dropping of these demands in the final version.

Commissioner Ryan has never been shy about expressing his priorities. Within months of the release of the Wood Commission findings he told the Sydney Morning Herald, "What I have to do is say to the cops: 'Never mind this reform business ... concentrate on getting crime down'".

The Premier has shown himself likeminded, saying as early as 1998 that "it is time for police put the Wood Commission behind them and get down to the business of solving crime" and promising "if police can identify another power they need to protect public order and safety, they will get it". This is a promise he has certainly kept, even when it meant coming into conflict with his own Attorney General over police powers granted in the Crimes (Forensic Procedures) Act.

Late last year a police officer was sentenced to a term of imprisonment for assaulting a motorist in a police station in order to gain 'consent' for a forensic procedure. Premier Carr was quick to offer support, explaining that police deserved special consideration for the 'vital and dangerous' job they perform.

When the long anticipated QSARP report showed little if any progress in implementing Wood's reforms the Premier responded by making no apologies "for the fact that we are bringing down crime in NSW". Figures released shortly afterwards show that the NSW crime rate is again on the rise in almost all categories, and has been for some time.

UK Detective Superintendent Robin Napper was handpicked by Commissioner Ryan to promote forensic DNA testing in NSW, a task he undertook energetically. Although Assistant Commissioner Clive Small was very critical of Superintendent Napper's honesty in recent evidence to the PIC, describing him as a 'well trained, highly polished, used car salesman', he conceded that he'd done an excellent job of selling forensic DNA testing.

While Napper referred regularly to the 'hundreds of hits per month' on the UK DNA database, he failed to point out that the majority of these hits were actually rather 'warm', being for crimes already solved (e.g. the offender had confessed or was apprehended at the scene), or in which the DNA evidence was irrelevant (e.g. sexual assault cases hinging upon whether intercourse was consensual), or upon multiple samples taken from the same crime scene matched to the same person or matches between samples from different crime scenes left by still unidentified people. He made regular reference to a 60% increase in the clear up rate for burglaries without making it clear that he was talking about a 60% increase on an existing clear up rate of less than 6%, a more modest overall increase of around 3%.

He also failed to mention the various difficulties faced by the UK program which were being energetically discussed over there at the time. Such as

- the two innocent people known to have been wrongly identified with DNA database searches.
- the cost of upgrading testing and the database in an attempt to address the weaknesses this exposed.
- that the majority of UK police had refused requests to provide their own DNA for elimination purposes for fear that it could be used in paternity suits. This would probably account for some of the 'unknown person' matches between crime scenes noted above.
- revelations that the UK Forensic Science Service was illegally keeping the DNA profiles of thousands of innocent UK citizens.
- the public reaction to plans by Home Secretary Jack Straw to vastly increase the scope of compulsory DNA testing in Britain and government powers to keep samples no matter how they were obtained.

The Wood Royal Commission revealed that Police Medical Officers regularly come under pressure from investigating police to corruptly alter evidence. As well as Wood, numerous appeal courts have been told of widespread falsification of evidence by NSW Police in order to gain convictions. There would seem to be no reason to believe that this practice has suddenly stopped of its own accord.

Even NSW police are not safe from the manipulation of forensic evidence by their colleagues. Detective Harry Blackburn continued to be investigated and persecuted in connection with a series of rapes while forensic evidence exonerating him was suppressed by investigating officers.

To believe that the NSW Police Service is fit to carry out the collection and transport of sensitive forensic material is an act of blind faith which defies a huge body of readily available information about its performance to date. The involvement of police in any such activities should be kept to an absolute minimum and subjected to stringent oversight.

Forensic evidence and unsafe convictions

[See *Legally Scientific?* for a more detailed discussion of the role of forensic evidence in the courtroom]

The references to unsafe convictions resulting from forensic evidence in *Legally Scientific?* are by no means exhaustive. Chamberlain, Preece, Splatt, McDermott, Perry, Carol, Rees, McLeod-Lindsay, Van Beelan, Potter, Morin, Ross - all innocent Australians convicted of very serious offences on the tainted forensic evidence of incompetent or unscrupulous

'experts', some of whom continue to provide prosecution forensic evidence in Australian courts.

Currently in Queensland prisons are two people convicted of an armed holdup they almost certainly did not commit. Identification in their trial rested on evidence from a forensic scientist that the DNA testing of a balaclava at the FES location showing alleles 10, 11, 12 and 13 was consistent with a mixed profile of the two defendants plus one 'unknown contributor'. The court was not informed of the fact that testing any two Australians at random would produce profiles matching that description more than nine times out of ten. More than three years after conviction one of the prisoners finally obtained a statutory declaration from Professor Barry Boettcher (who gave defence evidence in *Chamberlain*) that there is 13 to 17 times greater probability that the mixed profile came from two people *excluding* him than from three people including him and his appeal will be heard later this year.

The above case is atypical in that it usually requires much longer and much more public attention to expose a wrongful conviction based on forensic evidence. Following his 1991 examination of 20 unsafe convictions for serious offences in Australia and New Zealand (of which over half involved tainted forensic evidence), Paul Wilson opined that wrongfals are probably far more common for relatively minor offences as most convicted will probably not be able to mount an effective challenge during a sentence of only a few years and will want to forget about it after release. Those accused of minor offences are also less likely to be able to bring adequate legal resources to bear to properly defend themselves, a situation which has become worse with cuts to Legal Aid funding and is set to deteriorate further as more cases involve evidence requiring expensive expert testimony. Someone wrongfully convicted of a minor offence is likely to be far less energetic in challenging it if he/she is already serving time for a more serious offence anyway.

Forensic evidence already plays a part in wrongful conviction in Australia which is disproportionate to its use in court proceedings. The introduction of mass DNA testing in an attempt to solve relatively minor 'volume' crime will vastly increase the rate of wrongful conviction in NSW by increasing the frequency with which forensic evidence is used against those who are unlikely to be able properly defend themselves from it. This will be aggravated by stocking the database primarily with the profiles of those already convicted of at least one serious offence. For every innocent person sleeping in a NSW cell tonight there may be a real offender still wandering the streets somewhere.

Even if forensic evidence is presented accurately, honestly and completely it does not mean that judges and juries will understand it. In spite of the extensive testimony heard in the Chamberlain appeal the majority of the appeal judges still did not understand *why* the results of foetal haemoglobin tests performed upon samples from the Chamberlain car were not indicative of Lindy's guilt.

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 in *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". Mulligan concluded that "for practical purposes it is generally regarded that such a match could not occur", although in fact they do - something that Dr John Buckleton, another prosecution expert witness, had directly experienced in New Zealand.

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. Such a body could give non-binding advice to courts as to the suitability of 'expert witnesses' to be recognised as such and suggest counselling or retraining for those who give evidence in a confusing or misleading manner.

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.

The mass DNA testing of prisoners

In the two months since the writing of 'Consent by Coercion' Justice Action has continued to receive complaints about the brutality and injustice of the NSW prisoner DNA testing regime, although there has been a slight decrease in their frequency.

In one recent case a prisoner at the John Moroney Centre who refused to consent to a buccal swab was told that he would be asked to reconsider in a couple of weeks and if he hadn't changed his mind a sample would be taken forcibly. But instead, a large group of

boilersuited and visored prison officers charged into his cell in the middle of the night, violently restraining the prisoner and dragging him to a prison van whereupon he was unceremoniously shanghaid to Bathurst Gaol.

The SBS television 'Insight' program of May 31 showed graphic footage of the brutal DNA collection methods employed upon prisoners by Victorian police, prompting expressions of public outrage and official shock. In NSW however violence is not generally committed upon prisoners by police during testing, where it is subject to videotaping and oversight by the Ombudsman. Instead it is 'outsourced' to prison officers, who are not covered by any provisions of the Act, and carried out before consent or testing and out of range of any cameras.

Prison officers are also able to subject prisoners to extended periods of threat and intimidation in a way which is impractical for police. In most cases this has made it unnecessary to supplement 'consent' with actual violence at the time of testing.

In the televised discussion which followed the video showed by SBS, Dr Tony Raymond of the NSW Police Forensic Group showed his disinterest in what happens to prisoners in the lead up to testing by explaining that in cases where the prisoner is 'very unhappy' about testing "the Correctional Centre people talk to them and they bring them out with a restraining belt and take the samples". Presumably Dr Raymond believes that 'very unhappy' prisoners are placed in restraints by 'talking to them'.

He did however express some concern that the revelations of excessive brutality may threaten the prison testing program, worrying that "if the database is not well-populated by the people that you want to get, then it will be less effective". This is a real problem if 'the people you want to get' (i.e. NSW prisoners) don't want to be got.

In her April 11 address to a Sydney Institute of Criminology seminar NSW Police Legal Officer Natalie Dugandzic reassured the audience as to the civilised and polite manner in which samples are collected from prisoners, though it was not clear whether she was speaking from personal experience. Shortly afterwards Ms Dugandzic seemed just as shocked as everyone else when a recently released ex-prisoner told of the actual experience of being DNA tested in Silverwater prison.

NSW prison officers were not present to enlighten the seminar as to their own contribution to the mass testing of prisoners and Justice Action was not permitted to address the police-sponsored seminar about the reports it has been receiving from prisoners.

That over 65% of NSW prisoners can be subjected to such a regime and thereby lose forever the right to control their own genetic information merely so that a tiny minority of them might be convicted for as yet unsolved offences is unjust in the extreme. But even

more unjust is the increased risk of wrongful conviction they will be exposed to by having their profiles matched against thousands of crime scene samples.

The justification generally given for subjecting prisoners to such an invasion and removal of rights is that prisoners are often recidivists and are more likely therefore to have committed unsolved crimes. This is often condensed into the unsupportable statement that '10% of people commit 90% of offences'.

While it is true that more than half of convicted NSW prisoners (though not remandees) have at least one previous conviction this is largely a reflection of the longer sentences received by those with prior records. Most of those sentenced to prison in NSW do not have prior serious criminal convictions.

Claims that '10% of people commit 90% of crime' are shown to be ridiculous by findings like those of Sat Mukherjee of the Australian Institute of Criminology that for every 1000 Australian crimes committed only 64 result in arrest and only 40 in convictions; or those of Joanne Baker of the Bureau of Crime Statistics and Research which reveal that well over 50% of Australians have committed an imprisonable offence by the time they've left high school.

Mass crossmatching of DNA profiles *will* produce false matches in Australia, just as it has overseas (See *Legally Scientific?* under 'Errors at ESR' and 'Cold hits vs Hard Facts'). Notable about the cases which have come to light thus far is the sheer impossibility of the suspect having committed the offence and the long delays before the mistakes were publicly acknowledged.

UK police have expressed considerable surprise at how often they've been able to link people convicted of a certain kind of offence (such as domestic violence) with unsolved 'volume' crime of an entirely different nature (e.g. burglary). Wider public knowledge of the miscarriages of justice that can arise from mass crossmatching would serve to put this phenomena into a more realistic and unfavourable perspective.

By disproportionately exposing serving and former prisoners to the risk of bogus matches legislators are also increasing the likelihood of DNA based miscarriage of justice and decreasing the chances that such mistakes will be detected. Those with criminal records will be greeted with more skepticism than most when claiming that the DNA matched to them could not possibly be theirs and they are less likely than most to be able to access the expert scientific-legal resources needed to refute such evidence.

The fact that a disproportionate number of NSW prisoners are drawn from a few racial groups and geographical areas adds to that risk. The possibility of a match by chance is increased considerably when the DNA comes from people of the same family or ethnic subpopulation. The very persuasive 'millions to one' DNA evidence led in such cases is

likely to be supplemented by circumstantial evidence such as matching witness descriptions (e.g. of 'Aboriginal' or 'Lebanese' appearance) or residence close to the crime scene. If there is a good chance that the DNA came from a family member, the suspect is placed in the invidious position of deciding whether to try to exonerate himself/herself by implicating a relative. The mass DNA testing of prisoners will serve to increase the racial differentiation of policing, a feature of NSW criminal justice which is already of great concern to indigenous and ethnic groups as well as all others who aspire to live in a harmonious, equitable multicultural state.

As improvements in technology result in DNA profiles being produced from ever smaller and older traces of evidence the number of profiles detectable at a given crime scene increases, as does the possibility of linking an innocent person to the offence. Ex-prisoners will be expected to detail their movements to police every time their DNA is found at a crime scene, even when it is the result of them being there for entirely legitimate reasons (not every ex-con who enters a bank wears a balaclava), thus making a mockery of promises that prisoners who submit DNA samples will be at reduced risk of police questioning for offences of which they are innocent.

In an even worse position will be those who have no idea how their DNA appeared in a crime sample, such as in cases where it has been planted by the real offender or police. Or when it has got there by unexpected methods, such as through inadvertent contamination in the laboratory or, say, on goods from a warehouse at which an ex-prisoner works delivered to premises which are later robbed.

Mass searches of DNA databases are extremely problematic and should probably not be permitted except in cases of overriding public interest. The mass testing of prisoners to stock such a database significantly reduces the reliability of forensic DNA evidence while adding considerably to its expense. It should be stopped immediately.

The Crimes (Forensic Procedures) Act 2000

The development of Australia's forensic procedures laws

Although the need for new legal frameworks governing the collection and testing of forensic evidence has been recognised in Australia for more than 12 years, it was not until the mid 1990s that serious work began on updating relevant legislation to reflect the huge changes in forensic technology.

Victoria was first off the block with its 1993 amendments to the Crimes Act, amended again in 1997 to accommodate the new enthusiasm for mass DNA testing of prisoners. It is the second amendment permitting several police to hold a prisoner or suspect down while another forces a swab into his mouth which has promoted the abuses warned about

in Justice Action's February 2000 paper *DNA and Criminal Justice* and graphically documented by the SBS *Insight* program of May 31, 2001.

The Model Criminal Code Officers Committee of the Standing Committee of Attorneys General released its first draft of the Model Forensic Procedures Bill in 1995. In spite of frequent claims that the Model Bill was subject to broad public consultation it was only ever circulated to a controlled list of SCAG designated 'stakeholders' and received no coverage in the mainstream or legal media. Those 'stakeholders' included police, public prosecutors, health officials, forensic scientists and Ministers but excluded NGOs, community groups, legal centres, professional legal bodies and the NSW Privacy Commissioner. Naturally it occurred to no one to consult Australia's prisoners although they were to be the group most profoundly affected by the new laws.

From the start the Model Bill demonstrated a fixation on the testing method employed, as if this was the only civil liberty issue to be addressed, and the structure and function of a DNA database system. In doing so it neglected many of the uses to which DNA evidence is put and the intrinsic privacy implications of mass DNA testing. It also largely neglected to regulate the use of forensic evidence which is *not* stored on a database including the most sensitive material of all, the forensic sample itself, which can be vital in overturning wrongful conviction if properly protected and exploited for personal and saleable information if not.

Following the *Fernando* case, also in 1995, NSW legislators decided that they couldn't wait for the development of the Model Bill and went ahead with hasty amendments to Section 353A of the Crimes Act enabling police to forcibly take blood samples from those charged with a serious offence in lawful police custody. Further amendments quickly extended the scope of 353A to include saliva and hair samples and those in lawful custody other than a police station. This failed to satisfy those who wished to build up a huge UK style DNA database as soon as possible however.

Although MCCOC did not produce their final version of the Model Bill until February 2000, by the election campaign of 1998/99 members of the NSW Cabinet were already signalling their intention to introduce legislation based on earlier versions of the Bill. However friction between the Attorney General on one hand and the Premier and Minister for Police on the other over the extent of police powers in the Bill and the range of offences it encompassed delayed the drafting of the Crimes (Forensic Procedures) Bill for about a year, as well as introducing inconsistencies between the NSW Bill and what was meant to be the Australia wide standard.

But by early 2000 the Bill was nearing completion and the NSW police and government began a huge PR push in lieu of broad public consultation (which they claimed had already happened).

The Premier and Police Minister led off with promises of a Forensic Science Institute which would ensure the competent and independent collection and analysis of samples. Almost 18 months later, as predicted by Nick Cowdery, there is still no Forensic Science Institute.

Also promised was a 'DNA Innocence Project' (later 'Innocence Panel') which would realise the potential of DNA evidence to free the innocent. There is still no Innocence Panel, though the Premier has recently renewed his promise (in the same week this Inquiry called for submissions) and one is expected to be formed over the next few months. However the Premier's commitment to DNA exonerations might best be judged by the fact that the Act does not guarantee access by prisoners to samples which may exonerate them nor provide any resources to enable them to have such evidence analysed and evaluated. The proposed Innocence Panel will include representatives from the police, DPP and victims of crime but not prisoners or their families, defence counsels, community organisations or Legal Aid.

The NSW Privacy Commissioner is also mooted to be represented on the panel which prisoners hope will reveal their innocence. While the Premier's sudden concern for genetic privacy is to be applauded, one wonders where it was when the Act was being drafted.

That the Innocence Panel will be made up of government appointees from bodies with little interest in overturning existing convictions is probably neither here nor there. The University of Wisconsin 'Innocence Project' which inspired it is not a government body at all. In fact its main task has consisted of trying to overcome inadequate US laws which, as in NSW, fail to guarantee the right of prisoners to access samples which may exonerate them.

If the NSW government had a sincere commitment to the potential of DNA testing to identify miscarriages of justice it would be providing adequate funding to independent legal bodies, such as Legal Aid or Community Law Centres, so that they might set up their own projects for evaluating and, where appropriate, pursuing the cases of prisoner who believe that their convictions might be overturned with forensic evidence. There would also be funding set aside to compensate those shown to have been unjustly imprisoned.

As the new Bill was approaching a parliamentary vote, the Old Bill led by Superintendent Robin Napper were planning a little media event to help it through. Several particularly repugnant unsolved crimes were being examined for their suitability for mass DNA testing of potential suspects in the same manner which had caught Colin Pitchfork and provided a huge PR boost to the introduction of DNA laws in the UK.

Aggravated rapes and sex murders in Gulgong, Darlinghurst, Dubbo and Wee Waa quickly emerged as prime candidates for such an event, with Wee Waa taking the prize due to the

extreme age and helplessness of the victim and the fact that the local supply of potential suspects was within the DNA testing resources available. Graphic photographs taken of the victim's injuries shortly after the assault were made available to the media and photo ops such as having the entire local football team line up in uniform, ready to be tested, were arranged.

Although, as with Pitchfork, the offender was finally caught following information from the public (the offender himself in this case) the Wee Waa exercise provided exactly the media sensation anticipated. All reservations were swept aside in the burst of enthusiasm over the solution of a truly heinous crime. Those raising any concerns about privacy, coercion or the abusive and intrusive police questionnaire which accompanied the testing were howled down as supporters of the rape and bashing of elderly women.

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 policework.

With bipartisan support assured the Crimes (Forensic Procedures) Bill 2000 sailed through the Legislative Assembly with no objection beyond the traditional cry from the Coalition that 'it doesn't go far enough'.

Although the bill also survived the Legislative Council almost unscathed, in spite of a chorus of protests and amendment proposals from the Aboriginal Legal Service, the Bar Association, the NSW Privacy Commission, the Ethnic Communities Council, several NSW parliamentary crossbenchers, the Law Society, CRC Justice Support, the Council for Civil Liberties, the Positive Justice Centre and Justice Action among others, its passage did not go entirely according to the script.

As debate commenced the Bill's sponsor in the Legislative Council, Attorney General Jeff Shaw, was standing on the steps of Parliament House announcing his shock resignation to the media. His departure was soon emulated by the AG officer who had represented NSW on MCCOC during the development of the Model Bill. Aptly, the task of introducing NSW to the Brave New World of compulsory genetic testing was to fall upon then Corrective Services Minister, Bob Debus.

But one minor amendment was added to the Crimes (Forensic Procedures) Bill before it passed the Legislative Council, section 123 which was the genesis of this inquiry. Although a further amendment which would have given force to s123 by requiring parliament to review the Act following the inquiry's report was defeated, this inquiry represents the last good chance for the foreseeable future that NSW will have to address the totally inadequate forensic legislation forced upon it. It also represents the first chance

for real public consultation and discussion of laws governing forensic DNA technology in NSW.

Even these modest amendment proposals drew a hysterical reaction from the Minister for Police, who rushed into press claiming that they would turn NSW into a haven for criminals from interstate. The debate in the Legislative Council was characterised by the bipartisan spinelessness which has become a familiar feature of NSW parliament. Almost all major party representatives parroted each other in a formulaic endorsement of the Act, drawing on the same anecdotes and rhetoric in a way which would have permitted them to swap speeches without anyone noticing. The only exceptions were the mild warnings sounded by Liberal MLCs John Ryan and Pat Forsythe, the former pointing out that forensic DNA testing is not the infallible science portrayed in the media and the latter drawing attention to her personal situation in order to illustrate the limitations of the technique in respect of twins who may or may not be identical.

Justice Action sincerely hopes that the Standing Committee on Law and Justice is capable of rising above the grotesque bipartisan law and order auction which passes for criminal justice policy development in this state, producing recommendations which will reflect the sensitivity and complexity of forensic DNA technology and provide for its effective and just introduction into the NSW criminal justice system. It is further hoped that committee members will take what they learn in this inquiry back to their respective party rooms and promote the kind of debate which will enable parliamentarians to give their own informed consent (or otherwise) to laws which will serve to irrevocably change criminal investigation, privacy and bodily integrity in this state.

Specific problems with the Crimes (Forensic Procedures) Act 2000

The Crimes (Forensic Procedures) Act is what you get when you subject a flawed concept to narrow, politicised consultation and rushed, shoddy legislative drafting. Justice Action does not believe that amendments to the current act are likely to be efficient or effective in addressing its many faults but that it should be rethought and rewritten from the ground up. The final section of the submission offers some suggestions for doing this.

Justice Action has little doubt that the Committee will received overwhelming evidence of the total inadequacy of the current legislation but is less certain that the government will acknowledge this by repealing the Act and engaging in consultative development of legislation which will meet the demands and challenges of forensic DNA testing.

The following is a section by section critique of the Crimes (Forensic Procedures) Act which serves to highlight its flaws and offer some suggestions for rectifying them. However it does not purport to be a recipe for consistently redrafting the Act. To get to workable forensic DNA legislation one should not start from the Model Criminal Officers Code or the Crimes (Forensic Procedures) Act.

2(2): Although the Ombudsman's Office began preparation for its duties under s121 late last year they are still not in a position to effectively monitor police use of the powers they received on January 1. Over 3000 prisoners have already been tested without external oversight and Justice Action has received numerous reports of abuses of forensic testing powers by police and prison officers. While amending this section now would be to slam the gate after the horses have bolted Justice Action strongly recommends that future legislation which is meant to be implemented with some degree of oversight not commence before that oversight is in place.

3(1): Definitions.

appropriately qualified

- There should be no provision for those without qualifications or experience to carry out forensic procedures.
- Subsection (b) should be removed.

forensic material

- Why are photographs 'forensic material' but apparently not videotapes, X-rays, digitally stored images etc?
- The provision that they are 'taken from or of a persons body' would seem to include rape test kits but exclude most other crime scene stains. Does this mean that collecting such things as bloodstains from carpets is now illegal or simply unregulated?
- Does a 'persons body' include a corpse? If so it seems that the provisions of the *Human Tissues Amendment Act 2001* may shortly provide the families of dead people with more control over their forensic samples than they have over samples taken from their own live bodies.

forensic procedure

- Now rape test kits also seem to be excluded, as they would normally be taken from a body cavity other than the mouth.
- The exclusion of 'taking any sample for the sole purpose of establishing the identity of the person from whom the sample is taken' would seem to confirm that the Act does not cover crime scene samples, which raises the question of what the 'crime scene index' is for.
- In NSW and Queensland prisoners are given the option of self administering a buccal swab. This should be the preferred method of collecting DNA samples from individuals and be explicitly recognised as such in legislation.

intimate forensic procedure

- Again the definition of 'buccal swab' in the NSW Act is sloppy and inadequate. A forcible buccal swab is most certainly an intimate procedure if not an actual assault. However a self administered voluntary buccal swab is not.

- Similar inadequacies in this definition abound such as the lack of regulation for non-photographic visual images and the specifics of (f) which fail to regulate samples taken by surface swabs etc.

non-intimate forensic procedure Similar problems to *intimate forensic procedures* in that trying to cover specifics of forensic procedures without stating overall intent or guiding principles it fails to regulate any current or future procedures not mentioned in the definition (see above).

offender This definition includes 'prescribed offenders' which permits the testing of those convicted of summary offences etc. It would seem to be designed to allow the range of those subject to compulsory testing to be massively increased without recourse to parliament or consultation.

- Subsection (b) should be removed.

order If *order* in this Act is only to apply to magistrate and court orders it would seem to make a nonsense of the forensic procedures by 'order' of a senior police officer referred to in Parts 4 and 7.

prescribed offence & prescribed offender There should be no provision for the scope of testing under the Act to be extended without explicit public and parliamentary scrutiny. These definitions seem to be designed to expedite 'function creep' and should be removed.

serious indictable offence & serious indictable offender These definitions are way too broad.

- Most parliamentarians and the public continue to believe that compulsory DNA testing applies only to those sentenced to 5 or more years in prison. In fact many prisoners already tested have committed offences which are generally considered minor (such as growing one or two marijuana plants) and have been sentenced to only a few months in prison.
- The way in which sentences in 'participating jurisdictions' have been incorporated is extremely problematic. For instance those sentenced under Western Australia's 'three strike' mandatory sentencing laws who transfer to a NSW prison could be subjected to compulsory testing even if they would not normally be imprisonable for such an offence in NSW.
- These definitions should only apply to those who have received sentences of five or more years in a NSW court.

suspect A police officer's 'reasonable grounds' for suspecting someone has committed an offence does not provide anything like sufficient grounds for ordering a forensic procedure.

- Surveys by the Australian Institute of Criminology indicate that over 50% of Australian citizens have committed offences for which they were never arrested, so picking any Australian at random will provide 'reasonable grounds' for suspecting them of an offence.
- Many police and politicians have also expressed the opinion that 'the innocent have nothing to fear' from DNA testing, so presumably showing fear or reluctance at the prospect of a DNA test is also 'reasonable grounds' for suspicion. In fact

this seems to be the attitude taken by NSW Corrective Services who have increased the security classification of several prisoners simply because they refused consent to a DNA test.

- Refusal or withdrawal of consent or rejection of a request to volunteer a sample should never be accepted as 'reasonable grounds' for suspicion or it would effectively negate the whole concept of consent to forensic procedure. Neither should it be used as grounds for other police activities such as surveillance or obtaining search or arrest warrants.
- As there is no indication of the status of the offence in question, this definition would seem to allow police to consider anyone who has ever committed any sort of offence as a 'suspect' even if it was a minor one committed many years ago which has already been legally resolved.
- It also seems unlikely that someone served a court attendance notice will be suspected of an offence of sufficient seriousness to warrant a compulsory DNA test.
- Subsections (a) and (d) should be deleted.
- If subsection (a) is to be retained it should have a more rigorous threshold. 'Suspects on reasonable grounds has committed an offence' should be replaced with 'believes on balance of probabilities has committed a specific serious indictable offence'.

3(2): 'Under arrest' should only apply to those lawfully in the custody of an authorised law enforcement officer. Part 10A of the Crimes Act also applies to those subjected to citizens arrest and those unlawfully detained by police. The latter group is quite large in NSW as police regularly rely on implicit threat and bluff to detain people they have no intention of arresting. The former group is also likely to grow with the increased use of private security guards and new powers allowing prison officers to arrest people for 'summary offences'.

3(3): The definition of 'taking samples' encapsulates one of the major conceptual faults in the Model Bill and its offspring; that samples are defined according to how they are obtained and not who (if anyone) they are sourced to. Thus a sample sourced to a crime victim taken from a suspect's fingernails becomes a 'suspect sample' rather than a 'crime scene sample' and would presumably be subject to destruction provisions if the suspect is exonerated. However a sample sourced to an innocent person found at a crime scene (e.g. the hair of a flatmate) is not covered by the Act and presumably allows the innocent person no rights regarding retention, databasing or crossmatching.

3(5): 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 onselling 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, including backup copies, log entries and lab notes. Nothing less is acceptable.

4: 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.

7: At a Sydney Institute of Criminology seminar in April, UNSW Law lecturer Jeremy Gans proposed that all requirements for consent in the Crimes (Forensic Procedures) Act should be abolished as they are hypocritical in that they will not serve to protect the rights of those subject to forensic procedures and are likely to lead to police abuses and court challenges. Information Justice Action has received about the implementation of forensic testing in NSW prisons certainly supports this conclusion (see Justice Action paper '*Consent by Coercion*').

- Justice Action does not believe that the consent provisions should be removed in order to streamline compulsory testing by police, but rather that police ordered testing should be removed in order to safeguard consent.
- Consent should be withdrawable at any time and all samples and data destroyed if it is.
- Only courts should be empowered to order compulsory DNA testing.

9(3): The current clause allowing police to deny suspect access to legal consultation is unaccountable and subject to abuse.

- The police officer must be required to record his/her reasons for believing that a suspect may seek to contaminate or destroy forensic evidence before denying

access to a legal practitioner. If those reasons are later found to be 'unreasonable' any forensic procedure carried out as a result should be considered unlawful.

10: See commentary on s4 and s9(3).

12: This section is a mess.

- 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* to produce evidence ...'. The watered down standard is so weak it might just as well be left out entirely.
- Subsections (c) through (f) are particularly ill-drafted gobbledegook with (iii) apparently authorising police to request consent on the basis of any unsolved crime they care to imagine regardless of whether the 'suspect' could possibly have been involved. Apparently impressed with the awfulness of this section, legislators have duplicated it in s20, s25 and s49.
- In the absence of a court order police officers should only be able to request consent to a forensic procedure of someone who is legally responsible and is strongly suspected of committing a serious offence for which the evidence obtained from a forensic procedure is likely to be probative.
- The police officer should also be required to inform the person of the offence of which they are suspected.
- Subsubsections (iii) seem to be designed to allow Wee Waa style mass testing of people not actually suspected of any offence. As the potential for police harassment in such cases is enormous and the cost and public disruption potentially significant such mass testing should only ever be conducted following a court procedure which is required to balance public interest with other considerations.
- All references to prescribed, indictable and summary offences should be replaced with serious indictable offence and differential thresholds for requesting different kinds of tests should be abolished. Whether the test is desirable is a function of the evidence it will produce not the testing method employed, which should always be the least intrusive one practicable - preferably a self administered buccal swab.

13: This section is notable for what police are *not* required to tell a person before gaining 'informed' consent. Among these are

- that DNA testing can provide information about family relationships of which the person is unaware
- that DNA profiles can be used to provide evidence about family members (i.e. partial & derived profiles)

- that DNA testing is not infallible and has resulted in the implication of people in offences of which they are entirely innocent
- whether or not the person can be subjected to compulsory forensic testing
- that consent can be withdrawn
- that failure to give consent is not admissible in proceedings against them.
- that the data resulting from forensic testing can be passed to jurisdictions without NSW's privacy, crossmatching or data destruction provisions.

14: There is no reason that the ability to withdraw consent should be limited to 'before and during' a forensic procedure. The subject should be able to withdraw consent at any time.

- If real 'informed consent' was obtained a subject will be most unlikely to withdraw it at a later date. This will discourage police from using pressure to obtain 'consent' and allow subjects who receive (or understand) important information at a later time to act upon it.
- If consent is withdrawn all material and information obtained from the test should be destroyed unless a lawful order for a compulsory forensic procedure was made in the interim.

15: Many NSW prisoners have been subjected to threats and intimidation before the formal commencement of 'consent' procedures. Some have even being 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. This should be the case regardless of whether electronic recording is used.

17/18: Senior police should not be able to order forensic procedures, intimate or non-intimate.

- The preferred method for gaining a forensic sample should be consensual self administered buccal swab.
- In the rare cases in which someone who has been informed that grounds exist for seeking a court ordered forensic procedure exist and consent is still refused a court order should be sought.
- If senior police are to be permitted to order compulsory forensic procedures it should only be if the suspect is under arrest for a serious offence for which the sample is likely to provide probative evidence.

19: If police are to be allowed to order forensic procedures it should only be for a self administered buccal swab.

- Refusal to comply with such an order if lawful could be made an offence if necessary. In such cases a court order should be required before forcible testing can be carried out.
- Note that UK DNA testing legislation allows the subject to specify what kind of test is done and, in the case of hair sampling, from where it is taken. Western Australia's *Criminal Investigation (Identifying People) Bill 2000* includes a list of forensic procedures from least to most intrusive and requires that the least intrusive method practicable be used.

20: See commentary on s12, most of which applies equally to s20.

- Police should only be able to order a forensic procedure if it is likely to produce evidence tending to confirm that the suspect committed an offence for which he is currently under arrest. If the evidence is likely to exonerate an arrestee s/he is unlikely to refuse consent but should retain the right to do so.

21: If it is determined that the reasons recorded by the police officer do not satisfy the provisions of s20 the forensic procedure is to be considered unlawful and all material and data arising from it must be destroyed.

23: A magistrate should only be permitted to order a forcible forensic procedure if the suspect has already refused to comply with an order for a self administered buccal swab.

25: See commentary on s12 which also applies to s25.

- Magistrates should consider the wishes of the suspect when determining what kind of forensic procedure should be carried out.
- Magistrates should also be required to weigh the public interest in gaining the evidence which might be obtained from a forensic procedure against the intrusiveness of the procedure and the distress it may cause. That an emotionally disturbed child suspected of a minor summary offence might be subjected to forcible hair extraction is unconscionable, but permissible under the current Act.

30(4): The magistrate must be satisfied that the suspect has voluntarily waived his/her rights to interview friends or legal representation. Assurances from police or prison records do not suffice.

32(2): As with s12, the seriousness of the alleged offence should play no part in determining what kind of test is ordered. If the evidence likely to be produced justifies the interim order, the least intrusive method practicable should be employed with the preferences of the suspect taken into account.

37: There is no requirement anywhere in the Act that a police officer must warn a suspect/prisoner that force may be used to prevent the destruction or contamination of evidence, so a suspect could find himself/herself subjected to an unexpected police attack for simply washing his/her hands.

- A police officer must be required to warn the subject that force may be used to protect forensic evidence at the first opportunity after a decision is made to request a forensic procedure.
- If force is used, police must be required to record as soon as practicable the reason for using force and why the level of force employed was justified under the circumstances.
- The words 'reasonable force' should be replaced with 'minimum practicable force'
- Section 37 should include the caveat that nothing in this section authorises the use of force in preventing a suspect from carrying out activities consistent with the maintenance of personal hygiene

38(1): This subsection should be superfluous as the delay in obtaining a final order should be several orders of magnitude less than the time a properly prepared and stored forensic sample takes to perish. The fact it is not entirely unnecessary is a reflection of the lack of legislative standards for the safe and secure transportation and storage of forensic material in the Act.

47: See commentary on s37(1) which also applies to s47.

- NSW Corrective Services and Police have engaged in systematic intimidation of prisoners by telling them that force would be used automatically upon anyone who refuses consent to a buccal swab. Many prisoners had no intention of offering physical resistance, but refused consent in the hope that a police or court ordered test would enable them to retain more rights than would consenting to a test (see commentary on s87).
- Police should only be able to use minimum force *necessary* to carry out a forensic procedure or protect forensic material.
- Those subjected to a forensic procedure should be told that force will only be used if they physically resist a lawfully ordered forensic test or attempt to interfere with forensic evidence. To have the implicit threat of violence hanging over consent procedures is to make a mockery of consent.

48: This section should also apply to actions intended to prevent the contamination or destruction of forensic material.

49(a): see commentary on s12.

- 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.

- NSW Police have abused this 'oversight' in the NSW Act by implementing a hair sampling regime which involves twisting a dozen or more hairs out at a time, usually from the upper arm. Prisoners report that the method used is needlessly violent and painful, often resulting in a sensitive rash for a day or two later.
- Hair should be taken one strand at a time from a part of the body nominated by the subject. Wherever possible subjects should be permitted to remove their own hair under supervision.

50(4): Suspects should also be able to self administer hair sampling under supervision (i.e. items 4 & 10). Self administered sampling should be the preferred method for items 3, 4 and 10 and should be offered as an option before such procedures are administered by others.

51(2): This subsection is pretty quaint in multicultural 21st century Australia.

- Obviously the significance of removing, say, an overcoat would depend on what was being worn underneath (a relevant consideration for anyone who has observed Sydney's homeless people).
- The removal of a headscarf can also be seen as invasive, by some women from Islamic countries for instance.
- Almost any kind of clothing may be used to cover up something someone is sensitive about (e.g. bald spot).
- The exceptions for specific items of clothing should be struck out.

51(3)(b): A person who is inappropriate to assist in a forensic procedure should not assist regardless of how 'impracticable' any alternatives may be.

52(3): NSW prison officers have apparently been using this clause as justification for threatening prisoners that 'a squad of 16 to 18 prison officers are ready to use force' on those who don't consent to mouth swabs (see commentary on s47 and 'Consent by Coercion').

54: See commentary to s4.

- Interview friends should be transported at police expense (up to a reasonable limit).
- Testing should not be carried out in a location for which the interview friend will be denied access (e.g. prisons for those currently on parole).
- Reasons for rejecting an interview friend should be recorded. If they are later determined to be invalid, any resultant forensic procedure should be declared unlawful.

55: See commentaries to s4 and s54.

56: Many prisoners complain of being intimidated by the presence of four police and up to a dozen prison officers during consent and testing.

- Limitations should be put on the presence of *anyone* not necessary to ensure that the procedure is carried out effectively and in accordance with the Act.
- Surely the intent of this section is to reduce the potential for police intrusion and intimidation of a suspect during forensic procedures, in which case s56(3) should be struck out.

57: See commentary to s15.

- NSW Corrective Services has been providing prison officers as the 'independent person who is not a police officer', which is obviously a breach of the intent of s57(4). In fact the 'independent' prison officer is often the same person who has threatened the prisoner in order to gain their 'consent'.
- s57(5) is particularly inappropriate. As the Act stands there is no way of determining later whether the subject has 'waived' his/her rights as the results of threats or intimidation and not even any requirement for any declaration that the rights were waived with the free consent of the subject. The whole process is basically unaccountable.

58: This section is a meaningless sop as it only applies to forensic material taken from the suspect's body.

- In the vast majority of cases this will be the subject's own forensic material and 'sharing' the sample is irrelevant.
- In rare cases where someone else's forensic material has been removed from the suspect's body s58 will be ineffective anyway as there are no guidelines indicating how much material is 'sufficient' for analysis.
- NSW prisoners have been told that there will not be sufficient material left for them even though Robert Goetz from the Division of Analytical Laboratories claims (under oath) to be able to get accurate results from as little as as 0.3 nanograms of DNA.
- If the intent of the Act is to ensure that those being investigated or prosecuted on forensic evidence are able to independently verify the results claimed by prosecution experts they must be ensured enough material to analyse whether it comes from their body or from a crime scene. There needs to be rules governing the chain of custody and storage of such material to ensure that it can't be 'lost', 'accidentally destroyed' or used up with unnecessary tests. Economically disadvantaged defendants should be provided resources to allow independent testing. As all Australian forensic laboratories are using the same DNA testing kit (Applied Biosystems Profiler Plus with the ABI Prism 310/370 Genetic Analyser

running Genotyper software) funding should be sufficient to allow independent testing to be carried out overseas.

- If these conditions are not to be met the shallow pretence of allowing suspects equal access to forensic evidence should be dropped and s58 deleted.

60: Results of *all* forensic analyses which will be used in proceedings must be made available to the suspect, whether or not the material was taken from their body. As well as results, copies of lab notes must also be made available which include the *full* results of any analyses related to the investigation of the offence (including ambiguous results and how many tests were carried out) as well as instrument settings, controls used etc.

61(4): The effect of this subsection is to retrospectively reduce the rights and liberties of many prisoners in a manner not intended by the court which passed the original sentence, (i.e. loss of the right to protect their bodily integrity and genetic privacy from invasion by the state). Whatever public and political opinion may be about the the forfeited rights of convicted criminals, few thoughtful people would consider it just to add penalties beyond those intended at time of sentencing (which is why prisoners sentenced before 'truth in sentencing' legislation were permitted to apply for redetermination when sentencing laws were changed).

- s61(4) should be struck out and Part 7 should only apply to those sentenced after the commencement of the Act.

62, 63 & 64: Again the legislation has got itself into a twist attempting to make strong distinction between the intrusiveness of different testing techniques when this is relatively trivial compared with the collection, analysis and databasing of someone's forensic material and data against their will or the manner in which the testing is carried out.

- Court orders should be required for all forcible forensic testing, regardless of the method used.
- The least invasive and intrusive testing method practicable should always be used whether or not the subject consents.
- Wherever possible the prisoner should be able to self administer the forensic procedure under supervision and his/her preference should be taken into account when determining which testing method is used.

66: It is difficult to see what this section is meant to achieve.

- Does it mean that an offender on the verge of being tested under an s74 order can abort the process by 'volunteering' at the last minute?
- Are prisoners who are suspects entitled to the same Part 6 protections as other suspects, including sample destruction if charges are dropped?
- It would help if the Act or its explanatory notes were clear about exactly what rights it seeks to abolish for prisoners, suspects, relatives of missing persons etc.

67: '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.
- It seems most unlikely that a prisoner would be in any position to threaten forensic evidence by communicating in private with a legal practitioner. This is simply a mindless mimicking of provisions in Part 6 which are meant to prevent a suspect from destroying forensic evidence which might still be present on his/her body. However s67(2) may confuse prisoners, police and prison officers as to the rights of an 'uncooperative' prisoner to consult in private with a legal practitioner, so it should be deleted.

69: See commentary to s13 which also applies to s69

- Subsection 69(b) seems to be contradicted by s66. If a prisoner is being investigated in relation to a specific offence he/she is a *suspect* and therefore must be tested under Part 6.
- It is not clear why prisoners should not be told that the procedure will be recorded and that they have the right to hear or view the recording as in s13(a)
- Police do not seem to be required to inform prisoners of the matching rules for the database as in s13(k) either, but as this is actually deceptive it is probably not needed here or in s13. The data will be passed to 'participating jurisdictions' which may have other matching rules and there are no restrictions on 'off-database' comparisons (see s109) so detailing NSW DNA database system matching rules creates an incorrect impression of the lawful limits of permissible matching.

70: Police officers should only be permitted to order self administered forensic procedures under specific conditions which should take into account the seriousness of the offence being investigated and the likelihood that forensic evidence produced will be probative. Refusal to submit to a lawfully ordered self administered forensic procedure could be made an offence.

- By May 2001 over 3000 NSW prisoners had been tested with physical force required on only four occasions (although the *threat* of physical force was very common). The rarity of the need for forcible forensic procedures, their

invasiveness and the potential for unnecessary violence should require court intervention if they are to be permitted.

71: Apparently police officers are not required to satisfy themselves that a forensic procedure upon a prisoner is 'justified in all the circumstances' as are magistrates (s25, s27 and s74) and police requesting consent or ordering procedures upon suspects (s12 and s20).

72: See commentary to s67.

- Prison officers should not be permitted to act as 'independent witnesses'.

74: Inappropriately complex and ineffective due to adherence to the fiction that the specific technique used in a forensic procedure is of greater import than whether it is consensual or non-consensual, self administered or forcible and the use to which the forensic material will be put. See commentaries to s19, s20, s21, s23, s25 and s62-s64.

- See commentary to s38(1) which also applies to s74(7).

75: The fact that this penalty only applies to court ordered forensic procedures and not those ordered by a police officer has been used to intimidate prisoners who wish to seek a court order (see commentary to s87).

- Some prison officers have made it clear to prisoners that they do not intend to allow any prisoners to gain court ordered tests (although one or two prisoners have obtained court ordered blood tests after shaving down to avoid a hair sample). As the only witnesses to a forensic procedure in prison is likely to be police and prison officers many prisoners feel that any violence which occurs may result in an extra penalty upon them, regardless of who initiates it.
- The information brochure distributed to prisoners by the Department of Corrective Services details the penalties of s75 under the bold type heading *What happens if I refuse?*. This seems to be an attempt to give prisoners the impression that refusal to consent to a forensic procedure can result in 12 months extra imprisonment.
- Consideration should be given to making refusal to submit to a lawfully ordered self administered forensic procedure an offence but any other resistance to lawful testing should be dealt with under existing laws such as failure to comply with the lawful directions of a police officer, assault etc.

76: The way 'volunteers' are conceptualised in the Act and the MCCOC bill fails to encompass the various functions and procedures already employed in forensic investigation, much less what will be introduced in the future. This fault seems to leave many forensic samples and their uses outside the scope of the legislation.

- Is a consensual sample taken from a rape victim a 'volunteer' sample or a 'crime scene' sample?

- Why should those who volunteer in order to exclude their DNA from crime scene samples (e.g. housemates or partners of victims) have their profiles recorded on the database at all? Should DNA matching innocent volunteers found at the crime scene be entered into the crime scene index?
- What about family members who volunteer in order to provide the profile (or partial profile) of an absent relative? Should their DNA be recorded or only the profile(s) derived from it?
- Should volunteers who may be suspects be treated in the same way as 'volunteers' from Wee Waa style mass testing?
- Are prisoners or suspects who 'volunteer' before being asked to consent to a forensic procedure to be treated as volunteers?
- The way in which a volunteer and any samples or profiles obtained from them should be treated should flow from the specific circumstances of the 'volunteer'. It may be appropriate to treat a volunteering potential suspect in a manner which is not appropriate for a victim or their family members.
- When a forensic sample or profile has been matched to a specific person (and the person does not contest this) it should be treated as a sample coming from that person with regards to permissible crossmatching and destruction requirements regardless of how it was collected or derived.
- 'Volunteering' under the Act frees police officers of many of the restrictions and reporting requirements which apply to suspects who 'consent' to testing, but apparently does not restrict the uses of the sample.
- Given the way in which 'consent' has been abused in NSW prisons there seems little reason to doubt that potential suspects will be intimidated into 'volunteering' forensic samples in order to reduce the paperwork etc which would flow from asking their 'consent' as a suspect. It also seems likely that 'volunteers' who are eventually charged will contest the legality of their 'volunteering' in court. Volunteering should be subjected to the same procedures and oversight as consenting.
- Mass 'Wee Waa style' testing, voluntary or otherwise, should only be carried out following a court order.

77: See commentary to s13 and s15 which applies to 'informed consent'.

- There is no good reason that volunteers should not be given *all* of the information given to a suspect before consenting.
- 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 (e.g. victims) should

never have their profile placed on the 'unlimited purpose' index regardless of police discretion or lack thereof. Use of the 'unlimited purposes' index should probably require a court order to reduced the likelihood of intimidation or other inappropriate actions by police.

- If s80 & s81 are to be retained in their present form, parents/guardians who are volunteering on behalf of their dependent(s) should be specifically warned about it.

78: Volunteering should be subjected to all of the recording, witnessing and oversight requirements of consenting. See commentary to s15 and s67.

80:

- Subsubsection 80(1)(a) seems to allow magistrates to order a forensic procedure on a child if consent cannot be 'reasonably obtained' because the parent/guardian refuses to give it. This renders 80(1)(b)(i) and 80(1)(b)(ii) ineffective.
- Subsubsection 80(1)(c) is ridiculous. The only rational reason for its inclusion is to provide a trap whereby a parent or guardian not in full possession of the facts might volunteer in ignorance and later wish to withdraw consent upon receiving further information. If this is its rationale it exposes the sham of 'informed' consent under the Act.
- The only circumstances in which withdrawal of consent should not result in the destruction of the sample and data as soon as practicable should be if an order (or interim order) for a compulsory forensic procedure has been made.
- Courts should be required to determine the purposes to which volunteer samples/data will be used and weigh public interest and the likelihood of gaining probative evidence against the rights of the person tested (or not).

81: See commentary on s80(c). This section should be struck out in its entirety.

- If the 'volunteer' could be lawfully subjected to a compulsory forensic test an order might be made to retain samples already gathered, otherwise all samples and data from volunteers should be destroyed as soon as practicable after withdrawal of consent. To do otherwise would not only be superfluous, it would soon provide a powerful disincentive against volunteering forensic samples.

82: Given the huge potential for abuse in the collection of forensic material, the gaining of 'consent' and the uses to which forensic material and data may be put, 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 (as in the OJ Simpson case). It is particularly worthless in regards to evidence not covered at all by the Act (e.g. forensic samples not taken from a person or taken from a body cavity other than the mouth.)

- Subsection 82(4)(c) seems to be a further post facto validation of material obtained unlawfully from children as per s81 and s82. If a mistake was made

about the age of the child it should be immediately rectified by destroying all forensic 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'. This is even more important in relatively minor offences as dispensing with some of these consideration in the interest of expediting minor cases would encourage police to ignore their lawful requirements in such cases.
- 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 difficult'.
- Really the whole section should be brought into line with s83. Why should unlawfully obtained material and data be admissible when unlawfully retained material and data is not.

84 & 85: Details of volunteering, consent or failure to consent should always be able to be introduced by the defendant. It might also be used to contest that the sample should have been destroyed following withdrawal of consent or expiration of the retention period or that it should not have been used in the manner it was.

- Only the prosecution should be barred from introducing such evidence and this bar should cover consent, volunteering, method of testing, resistance and reaction to testing or reaction to requests for consent.
- Evidence of failure to volunteer or consent to forensic procedure should also be admissible in cases not related to the forensic procedure itself as it might be used to argue that police have engaged in harassment of someone who refused to consent to a test. In such cases it may be appropriate for the prosecution to introduce it but its admissibility should probably be determined in a pre-trial hearing.

Part 10: See commentary on s3(5). The Orwellian redefinition of 'destruction' used in the Act is totally unacceptable when the future genetic privacy of NSW citizens is at stake.

87: The shoddy drafting of this section and the negligence of the NSW parliament in passing it after its errors were pointed out has already resulted in much unnecessary tension and confrontation between police & prison officers and prisoners as well as continuing punitive sanctions against prisoners who have tried to protect their rights by insisting on court ordered forensic tests.

- 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.

- Many NSW prisoners are convinced that they will eventually be exonerated, especially since the Innocence Panel was announced, and some have gone to great lengths to try to retain the right to have samples and data destroyed if this happens. This has included shaving all hair from their bodies so that a court order for a blood test must be obtained.
- It has also resulted in refusal of consent for other than court ordered tests and confrontation with prison staff who want all prisoners to consent to a mouth swab.
- Justice Action are aware of at least two prisoners who were asked to consent to a forensic procedure and later had their convictions overturned. In one case the prisoner was intimidated into consenting and was tested. The other sought advice from Justice Action and was able to obtain a stay of testing until his appeal had been heard (and granted).
- **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. It should be applied retrospectively to all prisoners tested and a commitment to the amendment should be communicated to NSW prisoners as soon as possible. Prisoners who have suffered sanctions for refusing to consent to DNA testing should have those sanctions reversed immediately.** Until this happens the prison DNA testing program should be suspended.

88: The criteria for retaining and destroying forensic samples has been badly thought out and should be rewritten.

- Forensic material not obtained directly from a person but determined to have come from them should be treated in the same way as samples taken from their body.
- Samples which are of contested origin should be retained, especially if a conviction has been obtained. Further testing in the future may provide evidence which overturns the conviction.
- Mixed samples (e.g. from rape test kits and crime scenes) are even more problematic as it is probably not possible to physically separate individual components. While it would not be desirable to retain the victims sample and data indefinitely it may be appropriate to do so with the mixed sample, especially if the offence is unsolved. Courts should probably decide on retention of these on a case by case basis.
- Samples and data from persons should not be destroyed if circumstances enabling a compulsory forensic procedure to be carried out (still) exist as this would simply result in the regular retesting of the person concerned.
- Volunteers and families of missing people should also have their samples and data destroyed after a set period (or when the missing person case is resolved), especially 'limited purpose' volunteers.
- Even convicted offenders who do not have their sentences overturned should retain the prospect of having their samples and data destroyed at some time,

especially children, relatively minor offenders and those judged unlikely to reoffend.

89: Subsection 89(2) is an intolerable loophole equivalent to the shonky definition of 'destroy' in s3(5). It seems clear from this provision that all concessions to privacy and proper police procedure in the Act are nothing but a cynical ploy by NSW lawmakers who see fit to hang onto a person's DNA profile regardless of any illegality involved in its collection or superficial provisions for its 'destruction'.

- In the words of our Commissioner of Police, s89(2) 'should be terminated forthwith'.
- Even if the evidence is admissible, it should usually be destroyed following completion of court proceedings, especially if the suspect is found innocent or convicted of a minor offence.
- s89 should apply to volunteers, prisoners etc as well as suspects.

Part 11: is very silly and a reflection of the muddleheadedness of the MCCOC Model Bill.

- Not only does it suddenly include a whole range of 'forensic material' and test subjects not mentioned in the rest of the Act (and presumably outside the scope of its regulation regarding collection, retention, admissibility etc) it is also rendered ineffective by the provisions of Part 12 (see commentary to s97). As well as that it fails to regulate in any way DNA information not on the database (such as from instrument readouts, lab notes or word of mouth).
- At a seminar on forensic DNA held by the Sydney Institute of Criminology in April, Andrew Haesler observed that the penalties in Part 11 for those who illegally disseminate forensic information are not of sufficient weight to make the offender eligible for DNA testing under Part 7 of the Act.

90: The implicit redefinition of 'forensic material' in this section is incompatible with that given in s3(1).

crime scene index The definition of 'forensic material' in s3(1) explicitly excludes the material referred to in subsections (a) and (c) so presumably they are redundant.

- However the intent of the Act is obviously not to exclude material not taken from the body of a person as per s3(1), so by including it at this point its collection, storage, retention and admissibility are left essentially unregulated.
- This is of particular concern for material taken from body cavities other than the mouth but also leaves forensic material sourced to a particular person but not taken from their body and unsourced evidence which may be used in post conviction DNA exoneration undefined in the bulk of the Act.
- Subsection (d) seems to allow samples which are in any way connected to an offence to be put on the crime scene index. This would include samples linked to

victims, suspects or volunteers (including subjects of mass testing), which is inappropriate and probably not intended by the drafters.

DNA database system This definition 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.
- Why the heck the indexing system is relevant to the definition is beyond me as the same information can always be retrieved (more slowly) using sequential access, bypassing any index.

missing persons index This is an example of a category of test subjects who have not previously been mentioned in the Act and whose samples and data are in limbo with regard to collection, admissability, retention etc.

- It should not be necessary to test relatives of a missing person if a sample from the person himself/herself is available. This should be made explicit in the Act.
- It is not desirable to try to match the DNA of relatives of missing persons against crime scenes as is now permissible under the Act, nor should forensic evidence provided by relatives usually be admissible in proceedings against them.

offenders index Subsection (b) provides for those who have been tested as suspects or those convicted in participating jurisdictions to be placed on the offenders index even if their offence was not serious enough to warrant DNA testing under Part 7. This seems to be a built in 'function creep' which will see progressively more minor offenders included on the index without the need for further consideration by parliament or the public. It should be deleted.

statistical index has also not been well thought out.

- Statistical indexes must include details of the subpopulation of the sample providers to enable valid calculation of match odds (see *R v Green* [NSWCCA, 1993], *R v Maxima Pantoja* [NSWCCA, 1995] and *R v Van Hung Tran* [NSWCCA, 1996]). This will become more important as further information comes to light about the genetic substructure of sections of the the Australian population, especially different Aboriginal subpopulations. In some cases this information alone will provide indication of the likely identity of the sample donor, especially if additional details such as age, time/location of testing etc are retained. Gender can be determined from the profile.
- The legislation should specify the exact limits of what information may be kept on this index.
- There is actually no need to keep profiles on a statistical index at all. The necessary statistical information can be kept as running totals of allele frequencies and their relationships which can provide all the information needed for match odds generation in a form which would prevent the 'unpacking' of component profiles. This method is preferable for privacy reasons.

volunteers (limited purposes) index Generally it should not be necessary to put limited purpose volunteers on a database at all, rather their profile should be used to ensure that matching profiles taken from scenes of crimes of which the volunteer is not a suspect are not entered into the database either. It seems unlikely that a database of sufficient flexibility to automatically incorporate all of the 'limits' which may be applied to the profiles of such volunteers can be designed, making 'accidental' invalid crossmatching a near certainty. If these profiles need to be databased at all the index should probably be restricted to carefully supervised manual crossmatching to ensure that the 'limited purposes' are respected.

91: 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.
- Interestingly, 'permitted forensic material' is permitted whether or not it is intended that it be placed on a DNA database.

92(2)(d): 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.

- 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'.

93: This section fails to regulate DNA matching which is not performed on the database, such as comparing readouts from testing instruments.

- 'Matching' is not defined in the legislation. Last April, CrimTrac CEO Jonathan Mobbs told a DNA seminar that 'routine' matching would involve locating profiles which match at 16 out of 18 points but that police could request different match criteria.

- A match of less than 100% between two DNA profiles suggests either that at least one of the profiles is in error or that they actually came from different people. If they match on most points but not all, there is a high likelihood that they represent the profiles of near relatives. So the match policy of CrimTrac would seem to be that 'near relatives are close enough'. The implications for privacy and policing of such a policy is obvious.
- In the Milat trial, forensic scientist Robert Goetz declared a 'match' between bloodstains found on a rope and the parents of one of the 'Backpacker murder' victims. In fact there could not have been a match between the blood and either of the parents, rather there was a match between the blood and one of the thousands of 'theoretical profiles' which could be derived by combining the profiles of the parents. This would also be the way the 'missing persons index' would normally be used.
- To be even slightly effective matching rules need to define what a match is and how derived, mixed and partial profiles are to be handled on the database. Without these provisions not only are the chances of false matches followed by deceptive court evidence greatly increased, but the DNA database will be used to track families of suspected offenders as well as suspects themselves.
- 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.
- The layout of the 'permissible match' table is ambiguous as it does not indicate whether the rows represent the profile to be matched and the columns the index it will be matched against or visa versa. For instance, are suspect profiles permitted to be matched with the missing person index or is it missing person profiles which are permitted to be matched with the suspect index? Geoff McDonald of the Federal Attorney General's Department assured the Senate Legal and Constitutional Committee that it doesn't matter because 'those administering the database understand the rules'. Surely this misses the point. Those providing samples also need to be able to understand the rules as do those collecting them.
- It also seems a bit odd that offenders profiles can be matched against other offender profiles (though this does not apply to suspects). Did the drafters imagine that 'all crims are the same' and would even share profiles or is this to explicitly allow partial matching between offenders in order to reveal family relationships? If the latter is the case it represents yet another erosion of the genetic privacy of convicted offenders and should be made explicit if it is the intent of parliament to be so draconian and intrusive.
- The author of this submission has had many years of experience in administering database systems and can see no valid reason that otherwise unlawful matches should be permitted for 'the purpose of administering the DNA database system'. Subsection (4) should be deleted.

94: Again penalties apply only to those who breach destruction requirements with respect to a 'DNA database system'. Presumably retaining 'destroyed' data on a system which does not include the indexes referred to in the s90 definition is not an offence.

- Under s94(1) it seems that someone who uploads data from 'participating jurisdictions' which contains profiles collected in NSW but since 'destroyed' on the NSW database will be committing an offence (see example in commentary to s92(2)(d)). Unless of course this is deemed to be 'unintentional' and 'not reckless'. There is no provision in the legislation for a separate index of such profiles, which might be used as a 'filter' in these cases, to be established and maintained, nor how information on such an index might be protected.
- There is no provision for the removal of 'identifying data' from off database copies of the information (e.g. backup tapes, which are sequential media and cannot be said to contain 'indexes', although such indexes can be recreated from them). Nor are there provisions for secure storage or penalties for dissemination of such copies.
- However it would seem that a database administrator who restores information from a backup tape containing data since 'de-identified' on the database will be committing an offence, even if his/her intent is to 'de-identify' the data again at a later stage of the restoration process. Unlike s93(4) this is a situation in which exemptions for database administration purposes are appropriate.
- The definition of 'identifying information' is obviously inadequate given that the intention is to retain DNA profiles which are themselves 'identifying information'. Someone who passes on a DNA profile from the suspect, crime scene or offenders index will apparently be committing no offence as long as other 'identifying information' is removed, even if it is passed to someone who can link that profile back to an individual (e.g. a private investigator who has collected hair from the brush of an investigation target and had the DNA on it analysed). Indeed, it seems doubtful that any profiles on the crime scene or statistical index will contain identifying information, so presumably they can be disseminated freely without penalty.
- The exact nature of the data permitted to be stored with 'de-identified' profiles needs to be explicitly defined in legislation.
- The real solution would be to drop the fiction of equating 'de-identification' with 'destruction' and insisting that all forensic material and information, including the profile, be really destroyed when required by legislation. (See commentary to s90 for how this can be done while still maintaining necessary statistical information).
- The definition for identifying period should include that defined for forensic material taken from suspects referred to in s88 and penalties for failure to remove it should be included in s94.

Part 12 serves to subvert all of the restrictions on use, dissemination and retention of forensic data in the rest of the Act. It further allows the data to be shared with states which have lower standards of legislated privacy than exists in NSW. The inadequacy of interstate enforcement provisions have already led to confusion and confrontation around the status of ACT and Federal prisoners incarcerated in NSW (see 'Consent by Coercion' appendices A1 & A2). That this is so is testament to the failure of the MCCOC Model Bill to meet its aim of achieving standardised, nationally enforceable forensic DNA laws.

95: Definitions.

corresponding law by making the test of a 'corresponding law' its correspondence to Part 11 (which only refers to the DNA database) s95 fails to regulate any data which may have been obtained or retained interstate in a manner which would be considered illegal in NSW (or in the other state for that matter). It is unclear whether there must be correspondence between other sections referred to in Part 11 and those of participating jurisdictions as well (e.g. destruction provisions). If so, there are *no* Australian jurisdictions with a 'corresponding law'.

DNA database seems to acknowledge that other states may have DNA databases which do not meet the definition of *DNA database system* in s90. If this is so (which it is), it not only raises the question as to whether their laws really 'correspond' with Part 11 of the NSW Act, it also makes Part 12 redundant as there is currently no restriction on supplying information to databases which do not meet the s90 definition (see commentary to s90, s91 and s94).

96: It is not clear who 'the Minister' is, Police or AG? Presumably these arrangements would be reciprocal, which would mean for example that as well as 'authorised persons' carrying out NSW forensic procedures in Victoria under Part 6 of the NSW Act it would also allow Victorian forensic procedures to be carried out in NSW under the 'corresponding' part of their Act. It is not clear whether NSW citizens would want the brutal practices of Victorian police in collecting forensic samples to be emulated here. Arrangements such as those specified in s96 should be considered by Parliament, not a single minister.

97: This section allows a single Minister to enter into an arrangement with other jurisdictions to exchange data with the NSW DNA databases system even though those jurisdictions will not provide the same level of regulation over this data and oversight by NSW agencies will become practically impossible. It also allows data which may have been obtained or retained in a manner inconsistent with NSW laws to be transferred to the NSW system. It effectively sidesteps every check and balance provided in the rest of the Act. In combination with s96 it will allow 'farming out' of DNA collection to the jurisdiction which has the least restrictive DNA legislation, rendering protection of genetic rights and privacy in NSW equivalent to the lowest standards prevailing in a 'participating jurisdiction'.

- s97 should be struck out.

- Subsection 97(2) is ambiguous as it is not clear whether information must be destroyed according to the Act, a corresponding law or both. No two Australian jurisdictions have identical destruction laws and in some cases they differ in all respects.
- Any interjurisdictional transfer of data should be done on a case by case basis and decided in a court
- If blanket arrangements for transfer of data are to exist they should be entered into by parliament as a whole, or at least a select committee with the resources and accountability to do so.

99: The provisions of s99 are rendered generally ineffective in NSW prisons by a campaign of intimidation and interference which has caused most prisoners to 'waive their rights' to legal representation and interview friends (see commentary to s4 and s54 as well as 'Consent by Coercion').

- Nowhere is it stated *who* the request or objection can be made to (those doing the testing? the Police Commissioner? the Ombudsman? Parliament? the United Nations? ...).
- s99 seems to imply that those who are not officially recognised interview friends or legal representatives have no right to make requests or objections with regard to a forensic procedure carried out on another person.
- While s99 serves no practical purpose for those wishing to complain it might be used to restrict such complaints or requests for information and should be struck out.

100: As prisoners having interview friends or legal representatives are actively discouraged by NSW Corrective Services (see commentary to s4 and s54 as well as 'Consent by Coercion') test subjects should have the opportunity to nominate a different interview friend for the purposes of s100 than that which was (or was not) nominated during consent and testing. In this way, interview friends who were unable to attend the testing venue for whatever reason will still have the opportunity to view the video.

101: Organic samples such as those referred to in s58 should not be sent to someone's 'last known address'. In fact it is probably illegal to send them through the mail at all. Sensitive information such as the results of DNA testing should not be sent out this way either.

- This section should include strict provisions defining chain of custody for this kind of information.
- If such information is to be kept at police stations there should be provisions for it *secure* storage and penalties for unlawful dissemination.
- There should be provisions for organic samples to be stored in a manner which will prevent their deterioration while awaiting collection

102: There should not be a charge for legal representatives or interview friends to view a video or collect material on the subject's behalf either.

103: So now the standard in sections 12, 20, 25 and 49 is that a police officer must be shown *on the balance of probabilities* to have *reasonable grounds* for believing a forensic procedure *might* produce useful evidence. This standard is not just weak, it is virtually non-existent. The Act can be simplified greatly by giving police the right to request samples from anyone whenever they feel like it without altering its practical effect.

106: This provision is heading in the right direction but fails to make the distance.

- The same burden of proof should be placed on prosecution with respect to consent to a forensic procedure and volunteering, which should apply to all those tested, not just ATSI's.
- It should also apply to parents/guardians of children and those not considered legally responsible
- As the provision only applies to legal proceedings it offers no protection for people who have forensic samples taken unlawfully but are not charged as a result of this
- s106 should be explicitly applied to s30 and s75 applications for court ordered forensic procedures

107: This section seems to be an exception to the dictum that 'ignorance of the law is no excuse'.

- It should include the provision that those authorised to carry out the procedure have the burden of taking reasonable measures to ensure that either subsection (a) or (b) applies.
- In the case of those assisting forensic procedures (s52) this provision should be applied to the authorised person who has requested the assistance, not those who respond to the request.
- s107 should not exempt from liability anyone who employs excessive force or negligently endangers health while carrying out a forensic procedure or protecting forensic material from destruction or contamination
- s107 should not exempt from liability anyone who carries out actions which would not be lawful even if subsection (a) or (b) applied

109: By permitting wide disclosure of information obtained from forensic procedures s109 removes any hope that uses of this information will be restricted to the DNA database system, where it is regulated under Part 11. It also explicitly strips all protection from the 'de-identified' samples and data which will be kept after the sham of 'destruction' specified in Part 10 is carried out.

- The restriction of this section to samples taken from 'suspects, offenders and volunteers' leaves information gained from crime scenes and deceased persons completely unregulated
- If the definition of 'forensic procedure' in s3 applies to this section it also fails to regulate the results of analyses of rape test kits and samples taken from persons for the sole purpose of establishing their identity
- Information on the DNA database system is also 'information revealed by the carrying out of a forensic procedure'. If these definitions are meant to apply to the original source of the data, subsections (2) and (3) overlap completely, making at least one of them redundant.
- If the definitions are only meant to apply to the most immediate source of the data, information given to a third party under s109 then falls outside provisions of both (2) and (3) as it is now 'information revealed by a person who has access to information stored on a DNA database system or revealed by a forensic procedure'. The third person would not be in a good position to know whether the information met other criteria of s109 such as whether it is in the public domain or the subject has consented in writing to its release. It is far from clear how this information would be prevented from propagating further once released in this way.
- Subsubsection 109(2)(a) explicitly provides for off database comparison of DNA profiles. These comparisons and information gained from them are outside the regulation of the Act. This effectively negates any protections which may have been provided by Part 11. It also does not require that the subject be a suspect in the 'criminal investigation' nor give any indication as to how serious an offence being investigated should be to warrant the release of such information.
- If 'matching' in Part 11 is ambiguous in that it is not clear whether it allows partial comparisons for determining family relationships, 'comparison' in s109 clearly allows police to do this. Such a practice would almost always be totally inappropriate and should be severely restricted.
- The references in (2)(b) and 3(a) to 'the person to whom the information relates' is not clear. For example, rape test kits are likely to produce a profile of the victim as well as those of recent consensual or non-consensual sexual partners. Does this information relate to the victim, suspect and all other sexual partners who may have contributed to the sample?
- Subsubsection 109(3)(e) is far too broad. It would allow the release of data to private investigators or anyone else who is 'investigating' even the most trivial or unlikely offence. Even the totally inadequate provisions of 109(2)(a) are better than this.
- Subsections 109(2)(e),(f),(g),(h), (i) and (k) do not indicate who an authorised person to receive such information might be, how serious an offence or civil proceeding should be to warrant such a release or how relevant the information need be to the proceedings in question

- Subsubsection 109(2)(i) appears to allow the release of information to people pursuing paternity suits and similar civil actions. This will serve to strongly discourage consent and volunteers for forensic procedures.
- Subsubsection 109(2)(k) is ridiculous and seems to be a function of the moral panic which the present political process in NSW generates and is hostage to. If information on the DNA database could be useful in the medical treatment of *anyone*, whether victim or not, there should be a strong presumption upon releasing it, whether or not there is an offence or a suspect. It is hard to imagine what form of medical treatment could make use of such information however and restrictions still need to be applied as to who can access it and for what purposes.
- Subsection (4) leaves all 'de-identified' forensic material and profiles outside the scope of the Act (again). The persistence in refusing to regulate such profiles as well as the convoluted definition of 'destroy' in s3 creates the inescapable impression that the Act has been specifically designed to expedite biopiracy. Once the government has got its hands on your forensic sample and data, no matter how illegally it was obtained, it will never give it up. The most you can hope for is that it will be 'de-identified' and thereby left completely unregulated. The government and its employees are then free to onsell such material and data to insurance companies, private investigators or biotech multinationals. This constitutes a gene grab by Australian governments on par with the Icelandic government's betrayal of its citizens to Decode.

110: The subject of a forensic procedure should have the right to retain copies of any recordings made in connection with that procedure.

111: The function of this section is to place all material and information gained from forensic procedures upon children outside the scope of the Act. There is no doubt that children under 10 will continue to be tested, as victims of crime, in connection to missing persons, to determine paternity (which can be relevant in criminal investigation - see 'Legally Scientific?' under 'Policing and partial profiles') etc. The tests as well as the material and information gained from them need to be regulated.

114 & 115: Explicitly permit the many categories of forensic testing and its uses not covered by this Act. This leaves crime scene samples, samples from body cavities other than the mouth, samples from children under 10, samples from deceased persons, samples collected before the Act commenced, etc unregulated. It also fails to regulate off database profile matching and any other uses not explicitly referred to in the Act. The drafters of the Act seemed to find many categories of forensic tests too hard and left them unregulated. These sections simply ensure that failure to think them through and regulate them will not prevent them from being carried out. This is completely unacceptable.

122: If there are policy objectives governing the drafting and legislation of this Act they should be made available for public scrutiny.

Schedule 1.1: Section 353A should be entirely deleted and the Crimes (Forensic Procedures) Act expanded to consistently cover *all* forensic procedures carried out for the purposes of investigating or prosecuting an offence.

Schedule 2 Section 3:

- All regulations covering the destruction, admissibility, permissible crossmatching and dissemination in the Crimes (Forensic Procedures) Act 2000 should be applied retrospectively to samples and data resulting from forensic procedures carried out before the commencement of the Act
- Volunteers should be given the opportunity to withdraw consent after being informed of the matters set out in s77(2)
- This section should not permit the retention of forensic material or data which was obtained in a manner which was unlawful at the time of the forensic procedure which produced it

Towards effective and equitable DNA laws

In suggesting improvements which might be made to the Crimes (Forensic Procedures) Act, Justice Action is not suggesting that adequate legislation for the regulation of forensic DNA testing in NSW will result. The Act and the MCCOC Forensic Procedure Model Provisions which inspired it suffer from fundamental flaws in concept and execution which render them unsuitable as a basis for effective DNA legislation.

The Model Bill was intended to legalise and regulate forensic DNA testing in a manner which could be adapted uniformly across Australian jurisdictions.

By failing to canvass many of the methods used to collect DNA samples and many of the uses to which such samples may be put it has left a wide range of activity outside any legislative framework. Even the more modest goal of regulating how forensic samples might be collected from people's bodies has been compromised by vagueness as to categories of people giving samples and complexity (sans accountability) surrounding the spurious 'consent' provisions of the Bill.

CrimTrac has deemed Commonwealth, ACT, NSW and Tasmanian forensic legislation to be 'MCCOC compliant' even though destruction, dissemination and privacy provisions differ significantly in each of these jurisdictions; with Tasmania having no provision to destroy (or 'de-identify') forensic samples or data under any circumstances. Queensland, Victoria, WA, SA and the NT have essentially ignored the MCCOC Model in developing their own legislation.

The best way to develop uniform legislation under Australia's federal system is work towards a best practice model which will be emulated in other jurisdictions not because it

was suggested by a centralised committee but because it functions most effectively in protecting the rights of its citizens while expediting the reliable, cost-effective use of forensic DNA in criminal investigation. As the most populous state, NSW is in a particularly good position to take the lead in developing such a model.

Effective forensic DNA legislation must start with the rights of the people it will effect. Their right to genetic privacy and to control the information contained within their own cells, their right to protection from criminal victimisation and wrongful conviction, their right to freedom from invasive and abusive procedures and their right to have their criminal justice tax dollars spent in a worthwhile and cost-effective manner.

By starting from this position it is immediately obvious that the use of forensic samples and the data derived from them should not be determined by the method or location of collection, but by reference to the person or people who are most directly linked to it. While this would primarily be the person whose body produced the sample, if known, it would also include others with a stake in the information it may contain. Someone should only be compelled to surrender control over their own genetic information for compelling reasons, which may include *serious* criminal matters for which that information is likely to be relevant.

Obviously this means that samples and data may change status as more is discovered about them. While it might be reasonable for police to retain and analyse unsourced DNA found at an unsolved serious crime scene, it would cease to be reasonable if it was found to have come from someone with no involvement in the crime.

The fact that the MCCOC Model Bill and its spawn promote the retention of *all* collected samples and data regardless of their source or the legality of their collection shows how far from the minds of its drafters such rights were.

The collection of forensic samples cannot be regulated by focussing purely on the technical method used. A self administered buccal swab given in the spirit of cooperation is not the same as having several police officers use 'reasonable force' to inflict it. Being beaten to the ground so that a hair sample can be collected isn't all that different from being beaten to the ground for a blood sample. Or being beaten to the ground to gain 'consent'.

The legislation should seek to enter into a partnership with those it is hoped will provide samples. This should include giving the subject as much control as is feasible over the testing method, full explanations as to why the sample is required and to what purposes it will be put, a *full and honest* explanation of the strengths and weaknesses of forensic DNA and what it may reveal and solid guarantees that the sample and information will not be used, passed on or retained inappropriately. It should *not* involve the indefinite

retention and undefined use of *anyone's* DNA, regardless of whether it has been 'de-identified'.

Although senior police may be empowered to order a self-administered compulsory DNA test they should not be permitted to forcibly collect DNA from a person on their own say so. Abuses under the current legislation are inevitable (indeed, they are already happening) and this will only serve to turn the public against forensic DNA testing and result in needless litigation (which is also already happening). A court should always be involved before any orders for forcible forensic testing are granted. Leaving the discretion to order and perform forcible testing up to NSW police will ensure that any 'consent' involved in DNA collection will remain a shallow facade.

Forcible DNA testing should only ever be invoked as a court mandated penalty for someone who has failed to comply with a lawful order for a compulsory forensic procedure. In determining whether the order was lawful the court will be in a good position to determine whether forced testing is warranted.

The use of forensic DNA evidence will lead to crimes being solved. It will also lead to wrongful convictions. It is imperative that forensic DNA legislation acts to tip the balance as far as possible in favour of the former.

Such legislation should provide clear chain of custody and storage regulation of forensic samples and data. A body should be formed to oversee this chain of custody, audit the use of samples and data and (probably) provide for the secure storage and destruction of samples.

Another body should be created to set and monitor standards regulating procedures and practices in forensic laboratories and to perform regular audits of the evidence given by expert witnesses (both prosecution and defence) for the purpose of being able to advise courts as to their competence to be recognised as such. Such a body should probably be made up largely of academics and should definitely exclude anyone with links to the forensic testing industry.

There should also be guidelines in the legislation prioritising different sorts of samples for testing and discouraging excessive or trivial testing of evidence. This will be absolutely necessary if the US experience of massive testing backlogs, delays in investigations of recent offences and regular blowouts of laboratory budgets aren't to be repeated here.

Mass crossmatching in order to gain 'cold hits' in an attempt to solve 'suspectless' crimes are particularly problematic and particularly likely to lead to wrongful convictions. If this is to be permitted at all it should only be for in specific cases of compelling public interest in which it is likely to produce evidence which could not be gained in any other practicable way. It should certainly not be routinely invoked for every offence, no matter

how trivial and no matter whether the case has been solved already, as currently happens in the UK.

Mass collection of DNA from prisoners for the DNA database is even less acceptable.

As with forensic DNA testing in general, it too will lead to some crimes being solved and to some wrongful convictions. However in the vast majority of cases the collection of DNA from prisoners will have no impact on any criminal investigation whatsoever. It is not justifiable to abolish the rights of large numbers of prisoners to control their own genetic information simply so that a tiny minority of them might be convicted, rightfully or otherwise, of an unsolved offence.

If mass databasing and mass crossmatching is acceptable, it must be implemented for *all* Australians, not just prisoners. To exclusively expose particular groups to the risk of wrongful conviction due to chance match, lab error or the deliberate or inadvertent contamination of crime scene evidence is highly discriminatory and completely unjust.

If all Australians had their DNA profiles stored on CrimTrac all would be at equal risk of being wrongfully implicated in an offence, of having their data or samples passed on illicitly and having their genetic privacy compromised. Everyone would thereby have a stake in ensuring that collection, analysis and storage methods were up to scratch, which would improve the reliability of the process for all. That would be a pretty certain method of getting best practice DNA legislation ASAP.

If legislators do not think it justifiable to abolish everyone's right to genetic privacy so as to increase the crime clearup rate then it is not justifiable to abolish it for anyone, unless a strong specific case can be made for the public interest.

If it is not right to test you or I on the off chance that it might help to clear up a crime then it is not right to test anybody on that basis and the current mass testing of NSW prisoners should be halted immediately.

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Appendix

Illustration of the current functioning of the Crimes (Forensic Procedures) Act 2000

Late last year a truly tragic event took place in Cabramatta.

A Vietnamese Australian woman briefly visited a shop, leaving her baby in her black BMW which was parked outside with the air conditioning running. Temperatures that day in western Sydney exceeded 35C.

When she returned moments later the car was gone. According to a police media release, witnesses had reported seeing a 'young man of Asian appearance' tampering with the vehicle.

After an extensive search lasting several hours the car was found abandoned nearby. The baby was still strapped in but the air conditioning had been turned off. The dark duco and scorching sun had done their job and the child was declared dead shortly afterwards.

Police forensic officers swarmed all over the vehicle, lifting samples from door handles, the steering wheel and upholstery. Those samples would have contained the DNA of the mother, the deceased child, any other family members or acquaintances who had recently been in the car, perhaps staff from service stations, parking lots or car washes and possibly the DNA of the car thief (although this is less likely if he wore gloves). Samples would probably also have been taken from the mother and child in order to eliminate their DNA from that found in the car.

Within days an Anglo-Australian man was arrested in Canberra and charged with the offences.

In a tragic postscript, while the mother was preparing for her child's funeral it was discovered that a vital organ had been removed during autopsy. Following several days of negotiations it was returned in time for the traditional funeral, which required that the body of the deceased be intact insofar as is possible.

But the DNA samples taken will never be returned.

Although the mother should be able to have the sample and profile derived from her own body 'de-identified' sooner or later, depending on the nature of her 'volunteering', the sample and profile themselves, as well as any off database copies the police may have made of other information, will be kept.

As a 'deceased person whose identity is known' the baby's sample and data is treated as 'volunteer (unlimited purposes)' for database matching but is undefined in law with regards to 'destruction', so the samples and data will remain identified and in police possession indefinitely.

All DNA taken from the car, including the mother's and baby's, is 'crime scene' evidence and will be retained. It will also be crossmatched with all other crime scene, offenders, suspects and missing persons data on the database. As it was not taken from a person it is 'de-identified' by default and may be freely disseminated without incurring any of the penalties in the Act, even though exclusion samples from the mother and baby will have identified which crime scene profiles are theirs.

If any of the 'innocent' sources of this DNA (e.g. other family members) is located they too might give an elimination sample. As they could be 'limited purpose' volunteers they may not be exposed to having these samples matched against DNA from other crime scenes. However the DNA taken from the car and now known to be from a certain person can be freely matched and police are free to act on any information which results from this. Thus a victim's family member can become implicated in a different unsolved offence.

The illustration might be extended further by engaging in a hypothetical.

What if the accused had not been caught a few days later using conventional policing methods and the Crimes (Forensic Procedures) Act had already been operating for several years?

In all likelihood, each of the DNA profiles extracted from the car (including mixed and partial profiles which can often 'match' a large number of different people) would have been crossmatched on the DNA database system.

If anyone whose profile was already on the database was found to match (with the exception, hopefully, of the mother and child) an investigation would almost certainly have resulted. If the car had been used by say, a Vietnamese Australian service station attendant with a record of property offences, he would have been expected to answer some very serious questions about his movements.

Even worse is that the mixed and partial profiles recovered are likely to 'match' a large number of Australians, especially if they are of the same ethnic descent as those who actually left the DNA (in this case, probably Vietnamese). Should one of these profiles happen to match a local Vietnamese youth with a record of car theft (a not so unlikely occurrence) and he can't provide an alibi ...