

**FURTHER INDEPENDENT REVIEW OF PART 1D OF THE  
CRIMES ACT 1914 – FORENSIC PROCEDURES**

**Consultant's Discussion Paper**

**25 November, 2009**

## TABLE OF CONTENTS

<b>Preface</b>	<b>4</b>
<b>Executive Summary</b>	<b>5</b>
<b>Glossary</b>	<b>8</b>
<b>1. Introduction</b>	<b>10</b>
<b>2. Legislative and Policy Developments since Sherman Review</b>	
<b>2.1 Summary of Developments</b>	<b>12</b>
<b>2.2 Summary of Part 1D</b>	<b>17</b>
<b>3. The Operation of Part 1D of the Crimes Act 1914</b>	
<b>3.1 General issues</b>	<b>20</b>
<b>3.2 Complexity of legislation</b>	<b>20</b>
<b>3.3 Informed consent process</b>	<b>22</b>
<b>3.4 Victims of crime</b>	<b>26</b>
<b>3.5 Children</b>	<b>27</b>
<b>3.6 Voluntary mass screenings</b>	<b>28</b>
<b>3.7 Buccal Swabs</b>	<b>30</b>
<b>3.8 Hair samples</b>	<b>31</b>
<b>3.9 Sharing DNA samples</b>	<b>32</b>
<b>3.10 Innocence testing</b>	<b>33</b>
<b>3.11 Admissibility of evidence</b>	<b>35</b>
<b>3.12 Destruction of forensic material</b>	<b>36</b>
<b>3.13 Accreditation of laboratories</b>	<b>38</b>
<b>3.14 Matching requirements</b>	<b>39</b>
<b>3.15 DNA Testing protocols</b>	<b>40</b>
<b>4. Extent to which the forensic procedures permitted by Part 1D have contributed to the conviction of suspects</b>	<b>42</b>
<b>5. The effectiveness of independent oversight and accountability mechanisms for the DNA database system</b>	
<b>5.1 Towards a National Accountability Framework</b>	<b>44</b>
<b>5.2 Reporting</b>	<b>46</b>
<b>5.3 Audits and other accountability arrangements</b>	<b>48</b>
<b>6. Disparities between the legislative and regulatory regimes of the Commonwealth and participating jurisdictions for the collection</b>	

<b>and use of DNA evidence</b>		
<b>6.1</b>	<b>Disparities</b>	<b>52</b>
<b>6.2</b>	<b>Other concerns with disparities in legislation</b>	<b>57</b>
<b>7.</b>	<b>Any issues relating to privacy or civil liberties arising from forensic procedures permitted by Part 1D</b>	
<b>7.1</b>	<b>The Information Privacy Principles</b>	<b>61</b>
<b>7.2</b>	<b>Use of force</b>	<b>66</b>
<b>7.3</b>	<b>Other privacy and civil liberties issues</b>	<b>67</b>
<b>8.</b>	<b>Implementation of the Sherman Recommendations</b>	<b>72</b>

## PREFACE

In the period since the Sherman Report<sup>1</sup> was presented, the inquiries that were under way at the time<sup>2</sup> have since been completed. Those inquiries were:

- Victoria – *Inquiry into Forensic Sampling and DNA Databases*, Law Reform Committee, Victorian Parliament, 2004 ('the Victorian Review');
- NSW – *Independent Review of the Crimes (Forensic Procedures) Act 2000* (Professor Mark Findlay, April, 2003 ('the NSW Review');
- NSW – An inquiry by the NSW Ombudsman pursuant to s.121 of the above Act, - there are two reports dated August, 2004 and October, 2006 (the latter is referred to in this paper as 'the NSW Ombudsman's Report');
- Commonwealth: *Protection of Human Genetic Information*, ALRC/AHEC May, 2003 ('the ALRC/AHEC Report').

To the extent they are relevant, references to the reports of these inquiries are included in this discussion paper.

My intention with this paper is to build upon the substantial work already done towards answering the questions posed in the terms of reference. Its status is simply that of a consultant's paper and any errors are mine alone and not those of the review committee. The objective is to facilitate consultation with stakeholders by bringing together, in summary form, the conclusions and recommendations of the Sherman Report and, to the extent possible in the time available, of other relevant material. While every effort has been made to ensure accuracy, the primary sources should be consulted if the meaning is unclear. To assist research, references are made to the relevant paragraphs of the Sherman Report.

The questions raised in this paper all derive from recommendations made or issues raised in the Sherman Report or from related observations in the reports listed above. Comments on the questions should be sent by **31 January, 2010** to:

Forensic Procedures Review Committee Secretariat  
c/ Criminal Justice Division  
Attorney-General's Department  
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<sup>1</sup> Available at [http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications\\_ReportofindependentreviewofPart1DoftheCrimesAct1914-Forensicprocedures-March2003](http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_ReportofindependentreviewofPart1DoftheCrimesAct1914-Forensicprocedures-March2003)

<sup>2</sup> The Sherman Report, para. 1.25

## EXECUTIVE SUMMARY

This review is being carried out because Part 1D of the *Crimes Act 1914* ('the Crimes Act') required a 'further independent review' if the Sherman Review were to find 'inadequacies' in the operation of the national database. The Sherman Review, which was completed in March, 2003, did find and report on inadequacies and they are the focus of this discussion paper.

The purpose of this paper is to assist those who wish to comment on the issues under examination by identifying those issues in as much particularity as possible and drawing attention to the examination of them in other reviews that have reported since the Sherman Review. In brief, those issues relate to an assessment of the way in which Part 1D has operated, the effectiveness of DNA evidence in obtaining convictions and in establishing innocence, accountability arrangements, the effect of discrepancies among the legislation of participating jurisdictions and the balancing of effective law enforcement with the protection of privacy and civil liberties.

In the consideration of the operation of Part 1D, detailed attention is paid to the matching of DNA profiles, the requirements for 'informed consent', the complexity of the legislation generally, 'innocence testing', testing of children and 'incapable persons', the distinction between 'intimate' and 'non-intimate' forensic procedures and the statutory procedures for carrying out each of these, the use of force in carrying out tests on suspects and offenders, requirements for 'informed consent' to be obtained from 'volunteers', the treatment of victims of crime, voluntary mass testing, the sharing of information among participating jurisdictions, the admissibility of evidence, the place of DNA evidence in prosecutions, the other uses to which DNA material is put and the storage and destruction of DNA samples.

*Chapter 1, Introduction*, explains the origins of this review, discusses the requirements imposed by the terms of reference and introduces the issues and the position under current law.

*Chapter 2, Legislative and Policy Development*, outlines policy and legislative developments including, in broad outline, the outcome of other reviews since the Sherman Report was completed.

*Chapter 3, Operation of Part 1D of the Crimes Act 1914*, examines the issues outlined above.

*Chapter 4, Extent to which the forensic procedures permitted by Part 1D have contributed to the conviction of suspects* examines the information currently available on this issue and raises questions about what information needs to be collected in order to better evaluate the effectiveness of current practice.

*Chapter 5, The effectiveness of independent oversight and accountability mechanisms of*

*the DNA database system*, examines the effectiveness of the arrangements for accountability.

*Chapter 6, Disparities between the legislative and regulatory regimes of the Commonwealth and participating jurisdictions for the collection and use of DNA evidence*, examines the significance of the disparities by reference to the analysis of these issues in the Sherman Review and in other reviews.

*Chapter 7, Other Privacy and Civil Liberties Issues*, endeavours to identify and examine any other privacy and civil liberties issues by reference to the reports that followed the Sherman Report.

*Chapter 8, Implementation of the Sherman Recommendations*, discusses implementation issues raised in the Sherman Review.

The reviews to which reference is made are the ALRC/AHEC Review, the NSW Review, the two NSW Ombudsman's Reports<sup>3</sup>, the Victorian Review and the *WA Statutory Review of the Criminal Investigation (Identifying People) Act 2002* of April, 2009 ('the WA Review'). In most areas, the conclusions reached by those reviews are generally similar but in a few, which are discussed in this paper, they differ sharply.

Throughout the paper, there are references to the recommendations and observations of relevant reviews and the paper highlights the recommendations and observations made by the Sherman Review. The reason for this is that they identify the 'inadequacies' that are the focus of the current review. However, this paper does not itself reach any conclusions or propose any recommendations. Instead, it asks a number of specific questions seeking comments on particular recommendations of the Sherman Review or on issues raised by that review or issues that arise from the discussion in this paper.

These are not meant to limit the matters on which comments may be made but to assist in identifying the issues that appear at this stage to be central to the terms of reference.

Some persons may wish to respond to only a few of these questions or, while having regard to the committee's terms of reference, to raise other matters altogether.

Comments received will be considered by the review committee and, if practicable, responded to in the committee's report.

## **Questions**

In brief, the questions are organised around the following themes.

*1) How effective is the scheme established by the legislation?*

- what contribution does DNA forensic testing make to convictions and to establishing

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<sup>3</sup> The Forensic DNA Sampling of Serious Indictable Offenders under Part 7 of *the Crimes (Forensic Procedures) Act 2000* of August, 2004 and the DNA Sampling and other forensic procedures conducted on suspects and volunteers under the *Crimes (Forensic Procedures) Act 2000* of October, 2006

innocence?

- what should be measured in order to test the effectiveness of DNA forensic procedures?

- how well is the legislation working in terms of sharing of information among jurisdictions and internationally?

*2) How can we reduce the complexity of the legislation - at least to the point where police will use it whenever it is applicable rather than using less effective methods?*

- how can we reduce the complexity of the 'informed consent' process while, at the same time, providing all the information that needs to be provided in accordance with privacy principles?

*3) Should the Commonwealth seek to negotiate 'minimum standards' as recommended by the Sherman Review?*

- is it too late now that all jurisdictions are participating despite the 'discrepancies'?

- what discrepancies in legislation cause problems (eg do different definitions make exchanges of information problematic, or different definitions of 'serious offence' subvert the limitations imposed by some jurisdictions on the use of DNA evidence)?

*4) How can inter-jurisdictional accountability be made more effective?*

- are the Sherman recommendations on audit etc. part of the answer?

- is additional reporting desirable?

*5) Is the current law enforcement/privacy, civil liberties balance right?*

- should the recommendations of the Sherman Review and of other reviews be endorsed?

- should voluntary mass testing require a court order?

## **GLOSSARY**

<b>Term</b>	<b>Definition/explanation</b>
AHEC	Australian Health Ethics Committee, National Health and Medical Research Council
ALRC	Australian Law Reform Commission
Buccal swab	Buccal swabs are carried out by rubbing a sterile swab on the inside of the cheek. Police then press the swab onto specially treated paper.
CrimTrac	A federal agency within the Attorney-General's portfolio which supports Australian police services through the provision of national information systems and investigative tools, including the national DNA database.
DNA	Deoxyribonucleic Acid – for an explanation of the science see ALRC/AHEC Report, Chapter 2
DNA database	A database used to store DNA profiles obtained from people and from crime scenes. When a profile is added to a database it may match a profile already on the database which may assist in investigations.
DNA profile	A series of numbers and letters derived from the DNA sample.
DNA sample	The actual biological material taken from a person to obtain the person's DNA profile.
Forensic procedure	A way of obtaining evidence that relates to the investigation and prosecution of a crime.
Incapable person	An adult who is incapable of understanding the general nature and effect of a forensic procedure, or is incapable of indicating whether he or she consents to a forensic procedure being carried out.
Interview friend	A support person, usually a parent, guardian or legal representative or other person acceptable to the suspect.
Intimate forensic procedure	A procedure specified in the definition at s.23WA.

NATA	National Association of Testing Authorities, Australia
NCIDD	National Criminal Investigation DNA Database
Non-intimate forensic procedure	A procedure specified in the definition at s.23WA

## 1. INTRODUCTION

1.1 The current review is not starting with a blank slate. The issues that are to be examined in this review have been previously addressed in the *Report of Independent Review of Part 1D of the Crimes Act 1914 – Forensic Procedures* (‘the Sherman Report’) of March, 2003, which was chaired by Tom Sherman A.O. That report made a number of recommendations and identified a number of further questions for consideration in a later review when more information would be available. Those recommendations, to which no Government response has yet been provided, and the questions raised in the Sherman Report are set out in this discussion paper.

1.2 For convenience, this paper is structured along the same lines as those of the Sherman Report.<sup>4</sup> The terms of reference for the current review are as follows:

‘As required by section 23YV(5) of the *Crimes Act 1914* and the *Report of the Independent Review of Part 1D of the Crimes Act 1914 – Forensic Procedures* (the Sherman Report), this further Review will consider any relevant recommendations in the Sherman Report, and conduct a further assessment of the following matters:

- (a) the operation of Part 1D of the Crimes Act
- (b) the extent to which the forensic procedures permitted by Part 1D have contributed to the conviction of suspects
- (c) the effectiveness of independent oversight and accountability mechanisms for the DNA database system
- (d) any disparities between the legislative and regulatory regimes of the Commonwealth and participating jurisdictions for the collection and use of DNA evidence, and
- (e) any issues relating to privacy or civil liberties arising from forensic procedures permitted by Part 1D.

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<sup>4</sup> This paper does not seek to explain forensic DNA analysis but reference may be made to the ALRC/AHEC Report at pp.974, 975 and to Chapter 3 of the Victorian Review. These reports are discussed below.

In undertaking the further Review, specific consideration should be given to those matters identified in the Sherman Report as requiring additional consideration in any further review of Part ID. These matters include:

- (i) Complexity of informed consent
- (ii) A Victims of Crime Index
- (iii) Protocols for mass screenings
- (iv) Voluntary Buccal Swabs as non-intimate procedure
- (v) Common methods of taking hair samples
- (vi) Innocence testing
- (vii) Evidentiary provisions
- (viii) Matching tables
- (ix) Legislative change to support inter-jurisdictional accountability
- (x) Minimum requirements for membership of the national scheme, and
- (xi) Use of Force.

The Review will be completed by 30 June 2010.’

1.3 For ease of reference, this paper is structured around paragraphs (a) to (e). The matters listed at paragraphs (i) to (xi) are those identified in para. 8.14 of the Sherman Report and are discussed within the framework of this structure.

1.4 In accordance with s.23YV(5) of the Crimes Act, the review is being carried out by a committee comprising:

Peter Ford – Chair;  
James Carter – nominee of Commonwealth Director-General of Public Prosecutions, Deputy Director of Legal Practice Management and Policy Branch;  
Karen Curtis – Commonwealth Privacy Commissioner;  
Ben McDevitt AM APM – Attorney-General’s nominee, Chief Executive Officer, CrimTrac;  
Dianne Merryfull – nominee of Commonwealth Ombudsman, Senior Assistant Ombudsman; and  
Dr Simon Walsh – nominee of Commissioner of Australian Federal Police, Coordinator, Criminalistics & Identification Sciences, Forensic and Data Centres

## 2. LEGISLATIVE AND POLICY DEVELOPMENTS SINCE SHERMAN REVIEW

### 2.1 Summary of Developments

2.1.1 While the complexity of the legislation is frequently noted, the overall objective is relatively straightforward. The differences between jurisdictions will be examined in Chapter 6 but it is important not to lose sight of the general principles on which all such legislation is based. While allowing for some differences in detail from Part 1D, a useful starting point for a discussion of legislative and policy developments throughout Australia since 2003 is the summary of the NSW legislation in the report of the NSW Ombudsman of October, 2006 on DNA sampling and other forensic procedures ('the NSW Ombudsman's Report'), which clearly reveals the legislative objectives:<sup>5</sup>

'Forensic procedures can be conducted on suspects, volunteers and certain convicted offenders. A suspect is a person who police believe on reasonable grounds has committed an offence. Volunteers are generally people who have some connection to a crime or crime scene, but are not suspects, for example witnesses, residents of a place where a crime has been committed, and partners of people who have been sexually assaulted by somebody else. Convicted offenders are people who have been convicted of a "serious indictable offence"; that is, an offence which carries a maximum penalty of five years imprisonment or more. Victims of crime are specifically excluded from the operation of the Act.

Volunteers can only undergo forensic procedures by consent, but suspects and convicted offenders can undergo forensic procedures by consent, senior police order or court order. For a forensic procedure to be conducted on a suspect in the absence of consent, the suspect must be under arrest, there must be reasonable grounds to believe the procedure might produce evidence tending to confirm or disprove the suspect committed the offence, and carrying out the procedure must be justified in all the circumstances. Police may use reasonable force to conduct a forensic procedure, but cannot conduct the procedure in a cruel, inhuman or degrading manner.

The Act provides for a DNA database system, which contains indexes of DNA profiles obtained from crime scenes, suspects, volunteers, convicted offenders, missing persons and unknown deceased persons. When DNA profiles are put on the database, only certain types of matching are permitted. DNA profiles obtained from suspects and convicted offenders can be matched against the entire crime scene index, while profiles obtained from volunteers can only be used for a purpose

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<sup>5</sup> DNA Sampling and other forensic procedures conducted on suspects and volunteers under the *Crimes (Forensic Procedures) Act 2000*, NSW Ombudsman, Oct. 2006, Executive Summary, p.i; The report can be downloaded at: <http://www.ombo.nsw.gov.au/show.asp?id=449>

permitted by the volunteer, and are usually only used in relation to the investigation of a particular offence.

The Act contains a number of safeguards, to protect the rights and interests of people on whom police would like to conduct a forensic procedure. Police must inform the person of the nature and consequences of the proposed procedure, give the person reasonable opportunity to communicate with a legal practitioner before asking for consent, and electronically record the request for consent and, unless the person objects, the procedure itself. Forensic procedures cannot be conducted during questioning, and there are limits on the amount of time a person can be kept in custody for the purpose of conducting a forensic procedure. There are particular provisions relating to children, incapable persons and Aboriginal or Torres Strait Islander suspects. Evidence obtained through a forensic procedure where there has been a breach of the Act is generally inadmissible.’

2.1.2 Of course, this summary should only be regarded as broadly descriptive of the objectives of the legislation. While the legislation of each jurisdiction is, to some extent, based on the Model Bill, there are differences in important detail, which are discussed in section 6. The Model Bill went through several versions but in its final form, in 2000, it provided for: ‘the power to request or require forensic procedures on suspects, convicted offenders and volunteers; a process for carrying out forensic procedures, including safeguards for those undergoing forensic procedures; rules in relation to evidence improperly obtained from forensic procedures; the regulation of DNA database systems; and a scheme for interstate jurisdiction.’<sup>6</sup> The key differences between the NSW Act and the Model Bill are summarised in the Independent Review of the *Crimes (Forensic Procedures) Act 2000 (NSW)* (‘the NSW Review’).<sup>7</sup>

2.1.3 In Victoria, the *Inquiry into Forensic Sampling and DNA Databases* conducted by the Law Reform Committee of the Victorian Parliament in 2004 (‘the Victorian Review’) made the following general comment on the legislation:

‘The Committee believes that the current regime provides a comprehensive and generally sound framework for DNA profiling. However, it bears the hallmarks of incremental change: it leaves new areas of activity unregulated but contains provisions which, at the time of enactment, regulated the most exposed elements of the DNA sampling process but which, with the passage of time, prescribe detailed requirements to regulate procedures that are now largely superseded.’<sup>8</sup>

2.1.4 In Western Australia, additional legislative complexity has been attributed to the existence of two separate legislative regimes to regulate forensic procedures – one for

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<sup>6</sup> ALRC/AHEC Report, pp.976, 977

<sup>7</sup> *Independent Review of the Crimes (Forensic Procedures) Act 2000*, (‘the NSW Review’) pp. 22-24. The report can be downloaded at:

[http://www.lawlink.nsw.gov.au/lawlink/clrd/ll\\_clrd.nsf/pages/CLRD\\_forensics\\_report](http://www.lawlink.nsw.gov.au/lawlink/clrd/ll_clrd.nsf/pages/CLRD_forensics_report)

<sup>8</sup> Victorian Review, Executive Summary, p. xxx

procedures carried out to identify a person and the other for more general purposes of criminal investigation.<sup>9</sup>

2.1.5 Since the Sherman Review, the major development has been the advent of participation in the national database by all Australian jurisdictions. As full participation became a reality in April, 2009, there is now some basis, although not one that provides lengthy experience, upon which to assess the effectiveness of the national DNA database system.

2.1.6 Because Part 1D is part of a national scheme, any amendments to it may have implications for other jurisdictions and any consideration of amendments must take into account the developments in participating jurisdictions. The significant developments in each jurisdiction since the Sherman Review can be summarised as follows:

### **Commonwealth**

- The ALRC/AHEC Report, *Essentially Yours: The Protection of Human Genetic Information in Australia*,<sup>10</sup> was completed in March 2003 soon after the completion of the Sherman Review. A Government response on 9 December, 2005 announced that the relevant recommendations had been referred to the Standing Committee of Attorneys-General.<sup>11</sup>
- In 2006, Part 1D was amended<sup>12</sup> to provide for integration of the Commonwealth DNA database system with State and Territory DNA database systems to form the National Criminal Investigation DNA Database (NCIDD), to enable participating jurisdictions to access the NCIDD and to enable CrimTrac to carry out data matching on behalf of participating jurisdictions.
- The relevant laws of all States and Territories have now been recognised as ‘corresponding laws’.<sup>13</sup> When the Sherman Review and the State reviews were carried out only the Commonwealth, NSW, Victoria, Tasmania and the ACT were recognised. This recognition is complemented by corresponding provisions in each State and Territory and by inter-jurisdictional Ministerial arrangements and arrangements between CrimTrac and jurisdictions.<sup>14</sup> The arrangement is now contained in a single Ministerial Arrangement signed by all responsible Ministers other than the NSW Attorney-General and by agreements between the NSW Attorney-General and each other responsible Minister.<sup>15</sup>

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<sup>9</sup> WA Review, pp. 9-15

<sup>10</sup> <http://www.austlii.edu.au/au/other/alrc/publications/reports/96/>

<sup>11</sup> <http://www.alrc.gov.au/inquiries/title/alrc96/agd.htm>

<sup>12</sup> *Crimes Act Amendment (Forensic Procedures) Act (No.1) 2006*

<sup>13</sup> *Crimes Regulations 1990* r.6E

<sup>14</sup> see s.23 YUD and corresponding State and Territory provisions.

<sup>15</sup> WA Review, p.31

## New South Wales

- The two reviews referred to in the Sherman Report – the NSW Review and the NSW Ombudsman’s Report (both of which are referred to above) were completed in 2003 and 2006 respectively.
- A DNA Review Panel was established in 2006<sup>16</sup> to consider applications for review of convictions for serious offences based on DNA evidence. The Panel may refer applications to the Court of Criminal Appeal for review of a conviction. The Panel may make its own arrangements for searches of DNA material and, if appropriate, for testing of that material.
- Also in 2006, the rules applicable to forensic procedures on offenders, and children in detention and to clarify certain procedural matters were amended.<sup>17</sup> The amendments facilitated NSW participation in the national DNA database; permitted police to take a DNA sample from a person who had previously served a custodial sentence for a serious offence if the person was charged with another serious offence; clarified the information to be made available to volunteers; and specified the criteria to be considered by magistrates in ordering a test.
- In 2007, an amendment extended the circumstances in which a suspect may be requested or required to undergo a non-intimate forensic procedure involving the taking of a hair sample or the carrying out of a self-administered buccal swab and to make it clear that a forensic procedure may be ordered in relation to a suspect only if there are reasonable grounds to believe that the suspect has committed the offence.<sup>18</sup>
- In 2008, the Act was amended to clarify the circumstances in which it is permissible to match DNA profiles, permit suspect-suspect matches and matches between profiles on the ‘unknown deceased persons’ index, enable arrangements with participating jurisdictions and CrimTrac for the transfer of information and set out the purposes for which transferred information may be used.<sup>19</sup>
- In 2009, the Act was amended to make special provision for forensic procedures to be carried out in relation to those offenders who are required to be registered and to regularly report to a police station.<sup>20</sup>

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<sup>16</sup> *NSW Crimes (Appeal and Review) Amendment Act 2006* (No. 70 of 2006)

<sup>17</sup> *NSW Crimes Forensic Procedures Amendment Act 2006* (No. 74 of 2006)

<sup>18</sup> *NSW Crimes Forensic Procedures Amendment Act 2007* (No. 71 of 2007)

<sup>19</sup> *NSW Crimes Forensic Procedures Amendment Act 2008* (No. 56 of 2008)

<sup>20</sup> *NSW Crimes Forensic Procedures Amendment (Untested Registrable Offenders) Act 2009* (No. 63 of 2009)

## Victoria

- The Review referred to in the Sherman Report - the Victorian Review (which is referred to above) was completed in 2004.
- The Act was amended in 2004 to provide for non-intimate compulsory procedures to be conducted on suspects on the authorisation of a senior police officer instead of a court, to validate certain orders and to clarify an offender's right to notice and to be heard in relation to certain applications.<sup>21</sup> A further amendment in 2007 provided legal recognition for the National Criminal Investigation DNA Database (NCIDD) separate from State databases, to change the matching table and broaden the range of permissible matches, to broaden the Minister's powers to enter into agreements with other jurisdictions and update the oversight arrangements.<sup>22</sup>

## Queensland

- The Sherman Report noted 'significant departures' from the Model Bill but that the Queensland Government had announced its intention to make changes to facilitate participation in the NCIDD system.<sup>23</sup> The departures are addressed in amendments made in 2003 soon after the Sherman Report was completed.<sup>24</sup> These amendments bring Queensland more closely into alignment with the Model Bill.

## Western Australia

- A statutory review of the *Criminal Investigation (Identifying People) Act 2002*, ('the WA Review')<sup>25</sup> was completed and a report furnished to the Minister for Police, Emergency Services and Road Safety on 20 April, 2009. The review makes 31 main recommendations and 15 findings. The recommended legislative changes would confer some additional police powers, harmonise matching tables with those of other jurisdictions, require some new privacy guidelines and establish a review board to oversee management of databases.

## South Australia

- A new Act was passed in 2007 consolidating amendments that had been made to the 1998 Act. It deals with the authorisation of forensic procedures for volunteers, victims, suspects and offenders, the carrying out of forensic

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<sup>21</sup> *Vic. Crimes Amendment Act 2004* (No.41 of 2004)

<sup>22</sup> *Vic. Crimes Amendment(DNA Database)Act 2007* (No.32 of 2007)

<sup>23</sup> Sherman Report p.21; ALRC/AHEC Report, p.982

<sup>24</sup> *Qld. Police Powers and Responsibilities (Forensic Procedures) Amendment Act2003* (No.49 of 2003)

<sup>25</sup> Available at <http://www.slp.wa.gov.au/salesinfo/CIIPAct2002StatReview.pdf>

procedures, the handling, retention and destruction of forensic material, the DNA database system, evidence and arrangements with other jurisdictions.

### **Tasmania**

- The Act was amended in 2003 to provide for the exchange of information with a participating jurisdiction and in 2008 to provide for DNA sampling from police officers.

### **Australian Capital Territory**

- The Act was amended in 2008 to accommodate its provisions to the ACT Human Rights Act, to regulate the exchange of information with other jurisdictions and to amend its application to victims of crime, the destruction of forensic samples, missing persons, unknown deceased persons, sampling of suspects in custody in other jurisdictions and sampling of serious offenders.

### **Northern Territory**

- The Police Administration Act was amended in 2007 to substitute ‘Senior Sergeant’ for ‘Superintendent’ in the authorisation procedures.

## **2.2 Summary of Part 1D**

2.2.1 *Part 1D – Forensic Procedures*, is now structured in 17 Divisions. It closely follows the Model Bill provisions.

2.2.2 *Division 1 – Explanation of expressions used*, defines relevant expressions, including ‘intimate forensic procedure’, ‘non-intimate forensic procedure’ and ‘serious offence’ and makes provision for ‘interview friends’.

2.2.3 *Division 2 – Authority and time limits for forensic procedures on suspect: summary of rules*, prescribes how forensic procedures may be authorised in different circumstances and sets time limits for carrying out forensic procedures.

2.2.4 *Division 3 – Forensic procedures on suspect by consent*, provides for forensic procedures to be carried out on suspects with their informed consent, defines ‘informed consent,’ requires the consent to be recorded and makes provision for consent to be withdrawn.

2.2.5 *Division 4 – Non-intimate forensic procedures on suspect by order of senior constable*, defines the circumstances in which non-intimate forensic procedures may be carried out by order of a senior constable on a suspect who does not consent.

2.2.6 *Division 5 – Forensic procedures on suspect by order of a magistrate*, defines the circumstances in which forensic procedures (including intimate forensic procedures) may be carried out by order of a magistrate on a suspect who does not consent. It makes provision for a number of ancillary matters including time limits for the procedure to be carried out.

2.2.7 *Division 6 – Carrying out of forensic procedures on suspects*, prescribes how forensic procedures are to be carried out and by whom. It also makes provision for the presence of certain other people, which in some circumstances is mandatory and in others discretionary or at the option of the suspect. It also requires the recording of the carrying out of procedures unless the suspect objects or the recording is impracticable. Finally, it regulates the handling of DNA samples, makes provision for them to be shared with, or made available to, the suspect, for the results of analysis to be made available to the suspect and for some ancillary matters.

2.2.8 *Division 6A – Carrying out of certain forensic procedures after conviction of serious and prescribed offenders*, specifies ‘the taking of a sample of blood’, ‘the taking of a buccal swab’, ‘the taking of samples of hair other than pubic hair’ and ‘the taking of fingerprints’ as the procedures to which it applies and prescribes how the carrying out of these procedures on offenders is to be authorised and carried out. An offender who is also a suspect or a volunteer is excluded from this Division. A procedure may be carried out with informed consent or, depending on the type of procedure, by order of a constable, magistrate or judge.

2.2.9 *Division 6B – Carrying out of forensic procedures on volunteers and certain other persons*, prescribes the procedures for authorizing and carrying out a forensic procedure on a volunteer or a child or ‘incapable person.’ It specifies the circumstances in which a parent or guardian may give consent, or a magistrate may make an order, in respect of a child or incapable person and other protections that apply.

2.2.10 *Division 7 – Admissibility of evidence*, makes provision for evidence to be excluded in cases where improper procedures have been followed or forensic material should have been destroyed. It also regulates the admissibility of evidence relating to a person’s refusal, failure or withdrawal of consent, evidence of how a forensic procedure was carried out and of evidence of any obstruction to the carrying out of the procedure.

2.2.11 *Division 8 – Destruction of forensic material*, regulates the destruction of forensic material by requiring its destruction after an interim order has been disallowed, after a period of 12 months has elapsed without proceedings being instituted, after a conviction has been quashed and where related evidence is ruled inadmissible.

2.2.12 *Division 8A – Commonwealth and State/Territory DNA database systems*, when read with State and Territory law, makes provision for the formation of the National Criminal Investigation DNA Database system (NCIDD) through the integration of the Commonwealth DNA database system with one or more State/Territory database systems. It defines whether matching is permitted through the incorporation of a

nationally agreed matching table and makes provision for inclusion of identifying information in the Commonwealth database system. It also creates offences for misuse of the Commonwealth database system or the NCIDD.

2.2.13 *Division 9 – General provisions relating to operation of this Part*, provides for the use of interpreters, powers of legal representatives and interview friends, recordings, making material available to suspects, offenders and volunteers, onus of proof in relation to particular issues, ancillary matters and the creation of an offence for the unauthorised disclosure of information stored on a database.

2.2.14 *Division 10 – Operation of this Part and effect on other laws*, makes it clear that Part 1D is intended to operate in conjunction with other laws.

2.2.15 *Division 11 – Interjurisdictional enforcement*, provides for the recognition of the laws of other jurisdictions as ‘corresponding laws’ and of the jurisdictions as ‘participating jurisdictions’. Arrangements may then be made by relevant Ministers for registration of orders so that duly authorised forensic procedures may be carried out throughout Australia and information from databases may be shared. CrimTrac may also, on behalf of the Commonwealth, enter into arrangements with participating jurisdictions for the transmission of information. The purposes for which shared information may be used are defined.

2.2.16 *Division 11A – Operation of this Part in relation to certain incidents*, was inserted to deal with the problem of identifying unknown deceased persons who were casualties of the Bali bombing of October, 2002 and also applies in relation to any incident determined by the Minister for the purpose. It confers additional powers to match and disclose information stored on databases for the purpose of identifying unknown deceased persons and informing their relatives.

2.2.17 *Division 11B – Concurrent operation of State and Territory laws*, makes it clear that, in relation to State offences that have a federal aspect, Part 1D does not limit the concurrent operation of any State or Territory law.

2.2.18 *Division 12 – Review of operation of Part*, required the carrying out of the Sherman Review and also requires this current review.

2.2.19 As noted in the Sherman Review<sup>26</sup> and in other reviews, the operational aspects of Part 1D play a relatively small part in the overall collection and analysis of DNA samples in Australia but Commonwealth law is an important element of the national scheme and there is also a growing use of DNA testing in narcotics importation, and as testing techniques improve, there will be a growing use in the Commonwealth fraud area. There may also be scope for its greater use in relation to terrorism offences.

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<sup>26</sup> Sherman Report, p.10

### 3. THE OPERATION OF PART 1D OF THE CRIMES ACT 1914

#### 3.1 General issues

3.1.1 As explained in the Sherman Report, the statutory requirement for this review was activated by the identification of inadequacies in the matters covered by its terms of reference<sup>27</sup>:

‘8.10 Section 23YV(5) of Part 1D makes the following provision in relation to this report:

(5) If a written report tabled under subsection (3) identifies inadequacies in respect of matters referred to in subsection (1) (the terms of reference of this Review):

- (a) the Minister must cause a further independent review to be undertaken within two years of the tabling of that report to ascertain whether the inadequacies have been effectively dealt with; and
- (b) subsections (2), (3) and (4) apply in relation to the report in the same manner as they apply to the report of the original review.

8.11 The effect of subsection (5)(b) is that the further review must give a written report to the Minister, the Minister must cause a copy of the report to be tabled in parliament, and the future review must be similarly constituted to the current review.

8.12 The principal deficiency identified by this Review is that because of the lack of progress in establishing the NCIDD there has been very little experience on which to make assessments on the effectiveness of the national DNA database system. This has resulted in very little information on which to assess most of the terms of reference set out in sub-section 23YV. For example, it is not possible to properly assess the operation of Part 1D if a significant element of it, the NCIDD system, is not in operation. Similar considerations apply to the other terms of reference. This has the consequence that the future review must have the same terms of reference as this Review, that is, the matters set out in sub-section 23YV(1) of Part 1D.’

***Q.1 How effectively is the national DNA database system operating now and on what do you base your assessment?***

#### 3.2 Complexity of legislation

3.2.1 Part 1D provides for forensic procedures to be carried out on suspects in relation to indictable offences, offenders in relation to prescribed and serious offences and volunteers. Each of these terms is defined. Rules and procedures govern the way in which a procedure may be authorised and carried out. Failure to follow these may result

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<sup>27</sup> The Sherman Report, p.114

in evidence being rendered inadmissible and possibly in the commission of an offence. The Part also provides for the whole or a part of the Commonwealth DNA database system and the National Criminal Investigation DNA Database (NCIDD) to be integrated with the whole or a part of one or more State/Territory DNA database systems to form part of NCIDD. The Part also provides for the exchange of information in the Commonwealth DNA database system or a State/Territory DNA database system, for the protection of information that is exchanged and for the destruction of forensic material.

3.2.2 From currently available information, it appears that:

- the complexity of the legislation is an obstacle to its use and one reason why participation in the national database by all jurisdictions was only achieved in April, 2009; and
- indications are that the potential for cross-jurisdictional matches within Australia is not being achieved and international partners regard the Australian system as presenting too many obstacles to cooperation.

3.2.3 In this connection, the WA Review, concluded that the WA Act, in effect, prohibits police from directly sharing information gathered under the Act with overseas agencies and that the international exchange of information for law enforcement purposes must be done at national level pursuant to Commonwealth law – at present under the *Mutual Assistance in Criminal Matters Act 1987*.<sup>28</sup>

### ***Q.2 What are your comments on these observations?***

3.2.4 The statistics that are included in the various reviews are somewhat limited and dated but those that are available indicate rapid growth in the use of DNA forensic procedures. For example, the Victorian Review observed in 2003 that the backlog in processing would take an estimated four years to eliminate<sup>29</sup> and that it was seriously affecting the courts' management of cases.<sup>30</sup> Statistics on the results of matching are also difficult to obtain.

### ***Q.3 What statistics are available on the use of DNA forensic procedures and on matches across Australian jurisdictions and internationally?***

3.2.5 The NSW Ombudsman Report observed that:

‘Despite the significant impact forensic procedures have had on policing, we found that many officers are extremely reluctant to conduct the procedures, due to:

- the complexity of the legislation and there being so much to remember for officers who do not conduct the procedures very often
- lack of experience in conducting procedures despite widespread training and accreditation

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<sup>28</sup> WA Review, p.33

<sup>29</sup> Victorian Review, p.469

<sup>30</sup> *ibid.*, p.472

- fear that doing something wrong may lead to the evidence being excluded and the suspect being acquitted and
- a perception that forensic procedures are cumbersome and time consuming.<sup>31</sup>

***Q.4 What provisions of Part 1D (if any) create difficulties and why?***

3.2.6 In addressing the issue of excessive complexity, the NSW Review commented:

'From the discussions we have had with serving police officers in particular, there is little doubt that bureaucratic regulation in this area, if it is believed to be unduly complex, difficult to understand and operate, irrelevant, or interfering with legitimate crime control intentions, will be ignored or subverted. The existence of complex bureaucratic regulations which are avoided by those to whom they should apply creates a false sense of accountability and responsibility in the mind of the community, which is not aware of operational reality in the area.'<sup>32</sup>

3.2.7 For this reason, the NSW Review incorporated, and placed some reliance upon, a 'best practice' approach in its recommendations.

**3.3 Informed consent process**

3.3.1 The Act requires the following information to be provided when requesting a person's consent to a DNA procedure<sup>33</sup>:

- that the giving of information under the relevant provision, and the giving of consent (if any) by the suspect, is being or will be recorded by audio tape, videotape or other electronic means, or in writing, and that the suspect has a right to a copy of that record in a form provided by section 23YF;
- the purpose for which the forensic procedure is required;
- the offence in relation to which the constable wants the forensic procedure carried out;
- the way in which the forensic procedure is to be carried out;
- that the forensic procedure may produce evidence against the suspect that might be used in a court of law;
- that the forensic procedure will be carried out by an appropriately qualified person;
- (if relevant) that the suspect may ask that a medical practitioner or dentist (depending on the kind of forensic procedure) of his or her choice be present while the forensic procedure is carried out (unless the forensic procedure is a non-intimate forensic procedure);

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<sup>31</sup> *ibid.* p.iii

<sup>32</sup> The NSW Review p.124; see also at p.97

<sup>33</sup> s.23WJ

- if the constable believes on reasonable grounds that the suspect is an Aboriginal person or a Torres Strait Islander—that the suspect’s interview friend may be present while the forensic procedure is carried out;
- that the suspect may refuse to consent to the carrying out of the forensic procedure;
- the effect of section 23XZ;<sup>34</sup>
- the consequences of not consenting, as specified in sub-section (3), (4) or (5) (whichever is applicable);<sup>35</sup> and
- that information obtained from analysis of forensic material obtained may be placed on the Commonwealth DNA database system and the rules that will apply to its disclosure and use under this Part.

3.3.2 Stated in this way, the requirements may seem unduly complex. However, in respect of the generally similar WA Act, the WA Review concluded, at least in relation to the testing of suspects, that the legislation was not too complex:

‘We have studied the suspects procedures in the legislation of each jurisdiction and have come to the conclusion that, when properly understood, the suspects procedures in the (WA Act) are not excessively complex. Nor are they unduly lengthy when compared with the provisions for suspects’ procedures that are contained in the law of

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<sup>34</sup> 23XZ *Admissibility of evidence relating to consent to forensic procedure*

Evidence of a person’s refusal or failure to consent, or withdrawal of consent, to a forensic procedure is not admissible in proceedings against the person except to establish or rebut an allegation that a constable or another person investigating the commission of the offence concerned acted contrary to law in carrying out that investigation.

<sup>35</sup> *Failure to consent to non-intimate forensic procedure—suspect in custody*

(3) If the suspect is in custody and the forensic procedure is a non-intimate forensic procedure, the constable must inform the suspect that, if the suspect does not consent:

(a) a constable may order the carrying out of the forensic procedure under Division 4 if he or she is satisfied of the matters referred to in subsection 23WO(1) [*note: that sub-section makes detailed provision as to the matters of which a constable must be satisfied*]; or

(b) an application may be made to a magistrate for an order authorising the carrying out of the forensic procedure.

*Failure to consent to intimate forensic procedure—suspect in custody*

(4) If the suspect is in custody and the forensic procedure is an intimate forensic procedure, the constable must inform the suspect that, if the suspect does not consent, an application may be made to a magistrate for an order authorising the carrying out of the forensic procedure.

*Failure to consent to forensic procedure—suspect not in custody*

(5) If the suspect is not in custody, the constable must inform the suspect that, if the suspect does not consent, an application may be made to a magistrate for an order authorising the carrying out of the forensic procedure.

other jurisdictions. In most jurisdictions the provisions are long and intricate. If it is accepted that there is a need to safeguard the rights of people who are suspected but not yet convicted and perhaps not yet even charged, some degree of complexity is inevitable, particularly in the case of children and incapable people. The *Crimes Act 1914* (Cwth) has 57 sections on suspects procedures, covering 30 pages. The *Crimes (Forensic Procedures) Act 2000 (NSW)* has 55 sections covering 24 pages and the *Crimes (Forensic Procedures) Act 2000 (ACT)* has 30 sections also covering 24 pages. For brevity and simplicity, the suspects' procedures in the *Criminal Law (Forensic Procedures) Act 2007 (SA)* stand out, but are not typical. In that Act, suspects procedures are dealt with in 5 sections covering 3 pages. This has been achieved by discarding many of the checks and balances legislated for in other jurisdictions.<sup>36</sup>

3.3.3 The contrary view was taken in some of the submissions discussed in the Sherman Report.<sup>37</sup> The response in the Sherman Report was as follows:

'3.29 As to the complexity of the informed consent procedures, there may be a case for more simplicity but it is too early in the experience of this legislation to make major changes. As noted above, the AFP, as the principal player in DNA testing under Part 1D, did not argue that the procedures are too complex. But that view may change with more experience of using the procedures. This is a matter which can be considered by a future review.'

3.3.4 Excessive complexity can seriously affect the utility of legislation. The NSW Review supported the redrafting of unnecessarily complex provisions.<sup>38</sup> In 2006, the NSW Ombudsman reported:

'Many police officers argued that the information sheet is so complex that the essential points – how a sample will be taken, what it will be used for, and that the person can decline if they wish – are lost. Simplifying the information provided to suspects and volunteers would be enormously beneficial, both for police officers and for people undergoing forensic procedures. We also recommend that children and incapable persons should be given information about forensic procedures, in a manner appropriate to their age and understanding.'<sup>39</sup>

It also observed that, in many cases, the information was not even understood by the police officer who read it to the person about to be tested. Nevertheless, the person concerned always answered 'yes' to the question whether they understood it.<sup>40</sup>

3.3.5 The NSW Review also endorsed a recommendation by the NSW Legislative Council Standing Committee for plain English consent information.<sup>41</sup>

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<sup>36</sup> WA Review, pp. 115, 116; although this comment relates to the legislation generally, it is mainly based on the procedures requiring informed consent.

<sup>37</sup> The Sherman Review, paras. 3.21 – 3.28

<sup>38</sup> NSW Review, p. 28

<sup>39</sup> NSW Ombudsman's Report, Executive Summary, p.v

<sup>40</sup> *ibid.*, pp.71-75

### 3.3.6 Complexity has also been recognised as a problem in Victoria:

‘The Committee believes that the donor should still be given a clear explanation of the nature, purpose and implications of the procedure. The Committee was concerned at the complexity of the information to be conveyed to donors and recommends that all persons who undergo forensic procedures, whether they are suspects, offenders or volunteers, receive standard prescribed information explaining the nature, purpose and implications of the procedure clearly and simply and, as already required under Subdivision 30A, in a language that the donor is likely to understand.’<sup>42</sup>

### 3.3.7 The Victorian Review also made a number of recommendations to limit the collection, use and retention of a volunteer’s DNA on the basis that this should reduce the need for detailed information to be provided:

‘If the recommendations proposed above were adopted, the concerns of police and community members about the use of their DNA would be alleviated. The caution and consent requirements could be simplified. The current provisions require the donor’s informed and witnessed consent because the volunteer’s DNA could be used for database matching or in criminal proceedings against the donor. If a donor’s sample is destroyed once the profile is obtained, if the profile is retained on the volunteers’ (limited purposes) index, and the profile is destroyed once its forensic purpose in the investigation has been achieved, the non-suspect volunteer would not need the comprehensive consent provisions that currently apply.’<sup>43</sup>

### 3.3.8 The ALRC/AHEC Report recommended doing away altogether with the consent requirement in relation to suspects and serious offenders:<sup>44</sup>

41-1 The Commonwealth should consider amending the Crimes Act 1914 (Cth) (Crimes Act) to:

(a) remove the consent provisions in relation to suspects and serious offenders so that a forensic procedure only can be conducted on these persons pursuant to an order made by a judicial officer or an authorised police officer in accordance with the Crimes Act; and

(b) provide that, once the appropriate authority has made an order for a compulsory forensic procedure, the person who is the subject of the order should be able to choose the method by which the sample is taken.

41-2 The Commonwealth should amend the Crimes Act to provide that:

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<sup>41</sup> NSW Review, p.152

<sup>42</sup> Victorian Review, Executive Summary p.xxxiii

<sup>43</sup> *ibid*, p.270

<sup>44</sup> ALRC/AHEC *Essentially Yours: The Protection of Human Genetic Information in Australia (Report 96)* pp. 73, 74; 1004-1014

- (a) the prescribed information about the nature, purpose and consequences of a forensic procedure should be given to a suspect, serious offender or volunteer in a form that is capable of being easily understood by the person receiving the information;
- (b) a child or incapable person who is a volunteer, suspect or serious offender should be given the prescribed information in a form that is capable of being easily understood by that child or incapable person, as far as circumstances permit; and
- (c) in addition to information provided to a parent or guardian, the prescribed information also should be given to a child or incapable person who is a volunteer.

***Q.5 How well has the ‘informed consent process’ worked?***

3.3.9 To address the problems that were then perceived, the Sherman Report recommended<sup>45</sup>:

***Sherman Recommendation No 2***

***The Review recommends that the form of consent and the information required under Part 1D to be imparted to persons giving consent to the provision of a DNA sample should be the subject of prescribed forms under the Crimes Act 1914.***

- (a) ***The form of consent should:***
  - i. contain in plain English all the information which Part 1D requires to be communicated;***
  - ii. make provision for recording the fact that the person understands the contents of the form and the fact that the person consents to the procedure; and***
  - iii. contain information on avenues for complaint and review (as to which see paragraph 5.106).***
- (b) ***The Review also recommends that the interpreter facility provided for in section 23YDA should be extended to cover persons who are not able to read English and to cover offenders and volunteers.***

***Q.6 Do you have any comments on Sherman Recommendation 2?***

**3.4 Victims of crime**

3.4.1 At present, victims of crime do not constitute a separate category for the purposes of the legislation and, if they provide DNA samples, do so as volunteers. The carrying out of forensic procedures on volunteers is regulated by Division 6B. In brief, there must be informed consent, which may be withdrawn at any time, records must be kept and additional protections apply in relation to children or ‘incapable persons’.

3.4.2 The ALRC/AHEC Report made the following recommendations bearing on the treatment of victims of crime:<sup>46</sup>

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<sup>45</sup> The Sherman Report, para. 3.37

41-4 The Commonwealth should make separate provision for the collection, use, storage, index matching and destruction of forensic material, and profiles obtained from that material, for each main category of volunteer, whether by amending Part 1D of the Crimes Act or through regulations.

41-5 The Commonwealth should amend the Crimes Act to specify that a known victim of crime must be treated as a volunteer, and to require that all reasonable measures be taken to:

- (a) separate the DNA belonging to a victim of crime from a crime scene sample where the latter contains mixed samples;
- (b) ensure that a victim's DNA profile is not stored in the crime scene index of a DNA database system; and
- (c) ensure that a victim's DNA profile is not matched against the crime scene index of a DNA database system.

3.4.3 The Victorian Review recommended that 'the profile obtained from a victim, complainant or a relative of a missing person shall not be stored in or matched against the crime scene index of any DNA database' and that breach of these provisions render the evidence inadmissible.<sup>47</sup>

3.4.4 Some of the submissions discussed in the Sherman Report raised concerns about the protection of information relating to victims of crime as to which the report commented:

3.63 It is appropriate that persons who are not suspects or offenders, and who are willing to provide DNA samples voluntarily to assist investigations or other inquiries, should have the final say on the uses to which their sample can be put. This seems to be satisfactorily accommodated in the current regime. The Review is not persuaded by the case for categorisation for victims of crime, at least at this stage. Similar considerations apply to the creation of a victims of crime index. Victims of crime (as with any volunteer) can stipulate the uses to which their sample can be put. The Review is conscious that the regime is already complex and is reluctant to recommend greater proliferation of the indexes. Again this is a matter which can be revisited in a future review in the light of more experience.

***Q.7 Do you have any comments on a proposal to establish a separate 'victims of crime' index on the DNA database system?***

## **3.5 Children**

3.5.1 A 'child' is defined as 'a person who is at least 10 years of age but under 18 years of age'. Additional protection for children takes the form of procedures requiring the

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<sup>46</sup> ALRC/AHEC *Essentially Yours: The Protection of Human Genetic Information in Australia (Report 96)* p. 74; 1017-1022

<sup>47</sup> Victorian Review, Rec.7.1, p.261

consent of a parent or guardian, a role for an ‘interview friend’ and a requirement for a Magistrate’s order in certain circumstances. Different provisions regulate authority from a Magistrate where an intimate forensic procedure is involved and different time limits apply where a suspect is a child. .

3.5.2 In 2006, the NSW Ombudsman reported that forensic procedures were sometimes being carried out on young children without proper authority but that there are occasions where police have good reason for wanting to carry out such tests and that the legislation should be amended to provide for them.<sup>48</sup> The NSW Review also drew attention to this problem.<sup>49</sup>

3.5.3 The ALRC/AHEC Report recommended that:<sup>50</sup>

41-3 The Commonwealth should amend the Crimes Act to provide that a forensic procedure may be carried out on a child volunteer of 12 years or more only: (a) with the consent of the child and his or her parent or guardian; or (b) pursuant to a magistrate’s order under s 23XWU of the Crimes Act.

3.5.4 To address concerns about the safeguards applying to information of child volunteers<sup>51</sup>, the Sherman Report recommended:

***Sherman Recommendation No 3***

***The Review recommends that provision should be made in Part 1D for:***

- (a) the consent of the parent or guardian to apply to children under ten;***
- (b) the consent of both the young person concerned and a parent or guardian in the case of persons between ten and under eighteen; and***
- (c) the consent of the person concerned only in the case of persons eighteen and over.***

***Q.8 Do you have any comments on Sherman Recommendation 3?***

**3.6 Voluntary mass screenings**

3.6.1 In regulating the carrying out of forensic procedures on volunteers, Division 6B draws no distinction between situations where (for whatever reason) a particular individual may be a suitable candidate for a forensic procedure and situations where a great many people may be of potential interest so as to screen out those whose DNA does not match a sample which police have in their possession. Examples of such investigations are that relating to a rape in the NSW town of Wee Waa, where, before the commencement of DNA legislation, the whole male population between 18 and 45 were

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<sup>48</sup> NSW Ombudsman Report, Executive Summary, p. iv.

<sup>49</sup> NSW Review p.156

<sup>50</sup> ALRC/AHEC *Essentially Yours: The Protection of Human Genetic Information in Australia (Report 96)* p. 74; 1014-1017

<sup>51</sup> The Sherman Report, paras. 3.64 – 3.71

asked to volunteer for screening, and the death of an English backpacker in Bundaberg, Queensland, where, at one stage, nearly 2.500 men and boys were to be asked to submit to testing<sup>52</sup>.

3.6.2 A number of submissions to the Sherman Review expressed concerns about voluntary mass screenings, as to which the report observed that it was difficult to see at that early stage what additional protocols should cover and commented:

3.83 In all the circumstances the Review considers that the status quo should be maintained at this stage and the matter can be considered again by a future review. The Review is also conscious that mass screenings in relation to Commonwealth offences are likely to be very rare.

3.6.3 The NSW Review endorsed a recommendation of the NSW Legislative Council Standing Committee for a requirement for a court order for voluntary mass screenings.<sup>53</sup> The WA Review considered, but rejected, a proposal for compulsory mass sampling.<sup>54</sup>

3.6.4 The Victorian Review recommended that the Victorian Act ‘be amended to provide that an adult volunteer may provide a DNA sample only when it is sought in relation to an investigation into the commission of a specified indictable offence, and where crime scene evidence exists against which the DNA profile of a donor can be compared.’<sup>55</sup> It also recommended that the Act ‘be amended to provide that:

- (i) individuals who do not consent to participate in a mass screening program must not be identified or identifiable to other members of the community; and
- (ii) the disclosure of information enabling the identification of such persons should be an offence.’<sup>56</sup>

3.6.5 For the prosecution, there is a risk that a failure to fully inform a volunteer of the possibility that their DNA sample could be used in evidence against them could render such evidence inadmissible in the same way that a failure to administer a caution may render any statement that the suspect makes inadmissible.

3.6.6 The Victorian Review also considered the place of volunteers from this perspective and observed that volunteers may also be potential suspects. It noted the ALRC observation that ‘the delineation between a suspect and a potential suspect is often fuzzy.’<sup>57</sup> It considered the underlying problem to be that volunteers of this kind may undergo a transition to the ‘suspect’ category without the procedural protections afforded to suspects. It therefore drew a distinction between ‘non-suspect volunteers’ and volunteers who are ‘potential suspects’. In relation to the latter it concluded that ‘the full caution and information provided to ‘suspects’ should also be provided to ‘potential

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<sup>52</sup> NSW Review, p.69

<sup>53</sup> *ibid.* pp. 70,151

<sup>54</sup> WA Review, Ch.24

<sup>55</sup> Victorian Review Rec. 7.2, p.266

<sup>56</sup> *ibid.* Rec. 8.2, p. 286

<sup>57</sup> Victorian Review, p. 272

suspects' whose samples are sought under the voluntary sampling provisions'.<sup>58</sup> The Review also concluded that the retention order process, which is the process by which a volunteer transits to the 'suspect' category, should be reformed to provide for closer judicial scrutiny by requiring any application for the retention of a DNA sample or information after consent has been withdrawn to be heard and determined in the presence of the donor of the sample.<sup>59</sup>

3.6.7 The ALRC/AHEC Report made the following specific recommendation on mass screening programs:<sup>60</sup>

41-6 The Commonwealth should develop and publish guidelines for the conduct of mass screening programs in relation to both the process for approving the initiation of programs and the manner in which they are conducted.

***Q.9 Do you have any comments on a proposal to establish protocols for voluntary mass screenings or on other possible reforms?***

### **3.7 Buccal Swabs**

3.7.1 The 'taking of a sample of saliva, or a sample by buccal swab' is included in the definition of 'intimate forensic procedure' in s. 23WA and is therefore subject to the tighter regime that regulates sampling involving the more privacy intrusive procedures. For example, in the table of forensic procedures at s.23XM it is regulated in much the same way as the 'external examination of the genital or anal area, the buttocks or, in the case of a female, the breasts' or 'the taking of a sample of blood'. The Victorian Review notes that 'the buccal swab, generally defined as an intimate procedure which involves scraping the lining of the mouth with a cotton bud, is now increasingly widely used because it is a convenient, relatively cheap and reliable procedure that the donor can carry out unaided.'<sup>61</sup>

3.7.2 The NSW Review supported a proposal to permit a Senior Police Officer to order a buccal swab where a suspect has refused consent.<sup>62</sup>

3.7.3 The NSW Review considered a recommendation by the NSW Legislative Council Standing committee that buccal swabs be classified as 'non-intimate' or 'intimate' depending on whether they were self-administered or conducted by another person. However, on the understanding that the forcible taking of buccal swabs was not a practice in NSW, it did not support the recommendation.<sup>63</sup>

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<sup>58</sup> *ibid.*, pp.277-279

<sup>59</sup> *ibid.* pp.281-282

<sup>60</sup> ALRC/AHEC Report p. 74; 1022-1026

<sup>61</sup> Victorian Review p.59

<sup>62</sup> NSW Review, p. 29

<sup>63</sup> *ibid.*, p.154

3.7.4 The Victorian Review noted that ‘the buccal swab is currently defined as an intimate procedure, with those undertaking a self-administered buccal swab exempted from the requirement for the procedure to be video recorded. The Committee recommended that the self-administered buccal swab be redefined as a non-intimate procedure.’ After observing that the relevant police officer determines what kind of procedure to follow, the Committee recommended that ‘a donor should have the right to choose the method by which a DNA sample is taken’.<sup>64</sup>

3.7.5 The Sherman Report noted that, under Part 1D, the taking of a sample of saliva, or a sample by buccal swab is an “intimate forensic procedure”. Many submissions questioned the need to classify buccal swabs as intimate forensic procedures.<sup>65</sup> The Report noted also that the major consequence of changing the categorisation of a buccal swab from intimate to a non-intimate procedure is that it can be the subject of order of a senior constable in the circumstances described in Division 4 of Part 1D when consent is not forthcoming. At present, being an intimate procedure, a Magistrate’s order is required where consent is not forthcoming. Where consent is given to providing a buccal swab there is little practical consequence in the distinction between intimate and non-intimate.<sup>66</sup> The Report concluded:

‘3.97 In the light of the above submissions and experience, the Review sees force in the proposition that a voluntary buccal swab should not be regarded as an intimate procedure. But, as little practical consequence flows from this, the Review does not make a specific recommendation at this stage. It may be better to await further experience with the legislation and consider the matter again in a further review. The Review is also conscious of the observations of the NSW Parliamentary Committee referred to above concerning compulsory buccal swabs.’

***Q.10 Do you have any comments on the proposal to classify voluntary Buccal Swabs as non-intimate procedures?***

**3.8 Hair samples**

3.8.1 The ‘taking of a sample of hair other than pubic hair’ is classified as a ‘non-intimate forensic procedure’ and, in the table of forensic procedures at s.23XM its performance is regulated in much the same way as other non-intimate forensic procedures.

3.8.2 The NSW Review considered statutory safeguards for the taking of hair samples, noting that the Standing Committee on Law and Justice had recommended that hair samples be taken one strand at a time and that that was a requirement of the Model Bill but not of the NSW Act. However, the NSW Review commented:

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<sup>64</sup> Victorian Review, Executive Summary p.xxxiv, Rec. 4.8, pp.146-148

<sup>65</sup> The Sherman Report. para. 3.90

<sup>66</sup> *ibid.*, para. 3.96

‘The police argue that the present *‘lever arch’* method employed by them is considered to be *‘the least painful method available’*. As the current procedure removes 15 to 20 hairs with their roots, we are surprised at this evaluation and not convinced by the argument that so many hairs are necessary to ensure *‘sufficient DNA for analysis.’*

3.8.3 In the end, the NSW Review decided against making any recommendation in light of the NSW Ombudsman’s inquiry.<sup>67</sup> The Ombudsman recommended that ‘when police officers seek an order for a person DNA sample, the request include that the order permit the option for the sample to be taken as either a buccal swab, a hair sample or a blood sample and that these choices be provide to the person being tested’.<sup>68</sup>

3.8.4 Some submissions to the Sherman Review raised the issue of hair samples and in particular the desirability of taking single strands of hair in a sample. The Review commented:

3.99 The removal of single hairs is neither the least painful nor is it an effective way of sampling hair for DNA testing. In the human scalp approximately 90 – 95% of all hairs are active growing hairs and the remainder are in resting phase. It is these resting hairs which are lost or removed during normal grooming activity. Growing hairs are firmly anchored in the scalp and it takes some degree of physical force to remove these. Resting hairs are easily removed. Thus, despite growing hairs outnumbering resting hairs by up to 20 to 1, there is a good chance that when a single hair is removed it will be a resting hair. Resting hairs are not suitable for nuclear DNA testing. If hair is to be seen as an alternative source for DNA testing then several hairs need to be removed to ensure suitable hairs are recovered.

3.100 The Review considers this is a matter which can be considered by a future review in the light of more experience.

***Q.11 Do you have any comments on a proposal to formulate rules on the taking of hair samples?***

**3.9 Sharing DNA samples**

3.9.1 Where a sample is taken from a suspect, the sample must be shared with the suspect or, if there is not enough material to be shared and it does not need to be tested immediately, the suspect must be given the opportunity to have someone present at the time it is tested.<sup>69</sup> Material must also be made available to offenders and volunteers in accordance with prescribed procedures and time limits.<sup>70</sup>

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<sup>67</sup> NSW Review, p.155

<sup>68</sup> NSW Ombudsman’s Report, Executive Summary, Rec.38

<sup>69</sup> ss. 23XU and 23 XUA

<sup>70</sup> s.23YG

3.9.2 The NSW Ombudsman Report observes that ‘(s)ome elements of the DNA sampling regime are ill conceived such as the requirement that police share a person’s own DNA sample with the person, when a person’s DNA does not change and a sample can be taken for independent analysis at any time.’<sup>71</sup>

3.9.3 Some submissions to the Sherman Review also argued that the requirement to share material with the person tested had created difficulties. The difficulties were acknowledged and the Review recommended as follows<sup>72</sup>:

***Sherman Recommendation No 4***

***The Review recommends that:***

- (a) ***the current provisions relating to the sharing of DNA samples should be replaced by a simpler regime which confers a right on the person who provided the sample to part of that sample where there is sufficient material available subject to similar time limitations on that provision as presently apply; and***
- (b) ***as an alternative that a person giving a sample be entitled to receive a further sample for their own use at the same time as the giving of the primary sample, the second sample to be packaged and identified in the same manner as the primary sample.***

***Q.12 Do you have any comments on Sherman Recommendation 4?***

**3.10 Innocence testing**

3.10.1 The potential for DNA testing to establish that a person was wrongly convicted has long been recognised. In the US, ‘innocence projects’ were established in the 1990’s to review the convictions of offenders under sentence of death.<sup>73</sup> These were followed by the establishment of some innocence testing in Australia on a *pro-bono* basis.

3.10.2 The Act does not currently provide for a right to access DNA material for the purpose of proving one’s innocence. In addition to a right of access to their own samples, some submissions to the Sherman Review argued for a right of suspects and offenders to access crime scene samples that might exonerate them.<sup>74</sup>

3.10.3 The NSW Review discussed the issue of innocence testing at some length and concluded that DNA aspects should be integrated with the broader issues in proving someone’s innocence.<sup>75</sup>

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<sup>71</sup> NSW Ombudsman’s Report, Executive Summary, p.iii

<sup>72</sup> The Sherman Report. paras 3.101 – 3.113

<sup>73</sup> For an example of a news service relating to a US innocence project see <http://www.innocenceproject.org/Content/1111.php>

<sup>74</sup> *ibid.*, para. 3.114

<sup>75</sup> NSW Review, p.91

3.10.4 In 2000, the NSW Government administratively established an Innocence Panel to use DNA technology to facilitate the assessment of claims of wrongful conviction. The Panel was set up as an independent and impartial body and access to DNA profiles stored on the NSW database was made available by regulations in 2002.<sup>76</sup> In 2006, this was followed by legislation establishing the DNA Review Panel outlined in Chapter 2.

3.10.5 The Victorian Review had regard to the developments in NSW, the Sherman Review and to the ALRC/AHEC Report and recommended initiatives to give ‘statutory support to the development of a post-conviction screening and review process in Victoria, to ensure the preservation of relevant crime scene evidence, to provide regulated and accountable procedures for storage and defence access to relevant crime scene evidence, and to assist offenders with the re-testing of DNA evidence as required.’<sup>77</sup> Its recommendation for a post-conviction review process was based on the view, advanced by the Directors of the Australian Innocence Projects, that its essential elements are: the preservation of, and access to, crime scene exhibits; a mechanism to enable re-testing of the DNA evidence obtained; and funding for the re-testing and verification of DNA results. Accepting that indefinite preservation was impractical, it advocated limiting ‘this responsibility to cases in which there is a real possibility that a post-conviction review could be sought and entertained.’<sup>78</sup> The ALRC/AHEC Report also canvassed other possible limitations.<sup>79</sup>

3.10.6 The WA Review’s recommendation on this issue was broadly similar:

‘that an independent post-conviction DNA Evidence Review Panel should be established to review possible miscarriages of justice and to decide if they should be referred to an appeal court in respect of any person convicted of a crime on the basis of DNA evidence and sentenced to a term of imprisonment, whether or not that term has already been served.’<sup>80</sup>

3.10.7 The Sherman Report acknowledged that ‘much has been made in the debate in support of DNA testing legislation that DNA can establish innocence as well as guilt’ and that it is important that Part 1D reflects this balance.<sup>81</sup> It observed that:

3.126 This matter again may be further reviewed in the light of experience. The model proposed will provide an important facility for innocence testing (without cumbersome structures) and overcome many of the practical difficulties identified by the AFP.

3.10.8 It recommended that:

***Sherman Recommendation No 5***

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<sup>76</sup> Victorian Review, pp.440,441

<sup>77</sup> *ibid.*, p.445

<sup>78</sup> *ibid.*, p.435

<sup>79</sup> ALRC/AHEC Report, p.1123

<sup>80</sup> WA Review, Rec. 30, p.157

<sup>81</sup> The Sherman Report para 3.119

***The Review recommends that Part 1D should be amended to provide access to relevant person samples and crime scene samples (and copies of related test analysis and results) by convicted persons who wish to establish their innocence and have applied for such access. The access to be administered by AFP Forensic Services and subject to the condition that decisions refusing access should be subject to administrative review.***

3.10.9 DNA testing can also be part of the problem if it is not carried out properly or if records are not strictly managed. In 2006, the NSW Ombudsman reported that DNA mistakes have led to people being wrongfully charged and convicted and that DNA records are not always accurate.<sup>82</sup> While no contamination incidents were discovered, the report also identified a number of areas where contamination risks could be better managed.<sup>83</sup>

3.10.10 At the same time, the NSW Ombudsman reported that the Division of Analytical Laboratories had advised that, while it was not possible to report on the number of people eliminated from police investigations through DNA analysis, it estimated that ‘about 480 suspects had been eliminated since the Act commenced.’<sup>84</sup>

***Q.13 Do you have any comments on Sherman Recommendation 5 or on a proposal to formulate rules for ‘innocence testing’?***

### **3.11 Admissibility of evidence**

3.11.1 The admissibility of evidence where there has been some breach of the Act is dealt with in Division 7 of Part 1D. In summary, the court has a limited discretion whether or not to admit evidence obtained through improper forensic procedures,<sup>85</sup> evidence obtained from material that should have been destroyed is inadmissible if adduced by the prosecution<sup>86</sup> evidence of a person’s refusal or failure to consent, or a withdrawal of consent, to a forensic procedure is inadmissible against the person,<sup>87</sup> evidence of how a procedure was carried out is admissible for specified purposes<sup>88</sup> and evidence that a suspect obstructed the carrying out of a duly authorised test is admissible in certain circumstances.<sup>89</sup>

3.11.2 The matters specified in s.23XX(5) as being among those the court may take into account are generally similar to those specified in s.138 of the *Evidence Act 1995*, which has a general application to Commonwealth criminal proceedings. There is no direct counterpart, however, for four of the matters listed in s.138:

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<sup>82</sup> NSW Ombudsman Report, Executive Summary, p.vi

<sup>83</sup> *ibid.*, Executive Summary, p.vii

<sup>84</sup> *ibid.*, p.67

<sup>85</sup> s. 23XX

<sup>86</sup> s.23 XY

<sup>87</sup> s.23XZ

<sup>88</sup> s.23YA

<sup>89</sup> s.23YB

(b) the importance of the evidence in the proceeding; and

.....

- (f) whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the International Covenant on Civil and Political Rights; and
- (g) whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention; and
- (h) the difficulty (if any) of obtaining the evidence without impropriety or contravention of an Australian law.

Note: The International Covenant on Civil and Political Rights is set out in Schedule 2 to the *Australian Human Rights Commission Act 1986*.

3.11.3 Different views were expressed in submissions to the Sherman Review on the admissibility of evidence obtained from the improper carrying out of forensic procedures. The Review observed that the issues extended to storage and use.<sup>90</sup> The Review noted that criticism of the prevailing discretionary approach had been accepted by the NSW Parliamentary Committee<sup>91</sup> but considered that the distinctions that were proposed to determine whether breaches were ‘minor’ would be difficult to apply and commented:

3.135 The Review considers that the evidentiary provisions can be revisited by a future review in the light of more experience. The Review notes that the courts are very experienced in these matters and are in the best position to scrutinise the manner in which evidence has been obtained and to determine fairness issues. The courts have shown that they are most unlikely to balk at excluding evidence when the law, fairness and the circumstances require that it be excluded.

***Q.14 Do you have any comments on a proposal to formulate evidentiary provisions and have you had any experience with the exclusion of DNA evidence that was improperly obtained?***

### **3.12 Destruction of forensic material<sup>92</sup>**

3.12.1 Destruction of forensic material is dealt with in Division 8 of Part 1D. In summary, forensic material must be destroyed where an interim order for the carrying out of a forensic procedure is disallowed,<sup>93</sup> or the material has been retained for the period required,<sup>94</sup> or a period of 12 months has elapsed since a defined event,<sup>95</sup> or a conviction is quashed<sup>96</sup> or where related evidence has been found to be inadmissible.<sup>97</sup>

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<sup>90</sup> The Sherman Report para 3.128

<sup>91</sup> It was subsequently also accepted by the NSW Review (p.161)

<sup>92</sup> This issue is further discussed in Chapter 7.

<sup>93</sup> s.23YC(1)

<sup>94</sup> s.23YC(2)

<sup>95</sup> s.23YD

<sup>96</sup> s.23YDAA

<sup>97</sup> s.23YDAB

3.12.2 In 2006, the NSW Ombudsman reported that NSW Police and the Division of Analytical Laboratories were not meeting their legislative obligations to destroy forensic material taken from suspects and volunteers.<sup>98</sup>

3.12.3 The ALRC/AHEC Report recommended that:<sup>99</sup>

41-8 The Commonwealth should amend the Crimes Act to provide that forensic material obtained pursuant to Part 1D must be destroyed as soon as practicable after a DNA profile has been obtained from the material.

41-10 The Commonwealth should amend the Crimes Act to define the destruction of forensic material and information obtained from it in terms of physical destruction of samples and permanent and irreversible de-identification of profiles.

41-11 The Commonwealth should amend the Crimes Act to assign ultimate responsibility for managing the destruction of forensic material and any information obtained from it.

41-12 The Commonwealth should develop formal policies and procedures to:  
(a) enable a volunteer (or parent or guardian) to specify, from a range of options, the retention period for his or her forensic material and any information obtained from it; and  
(b) establish a process for persons to obtain confirmation that their forensic material, and any information obtained from it, has been destroyed.

3.12.4 The Victorian Review recommended that the Victorian Act be amended to provide that a sample obtained pursuant to the Act must be destroyed as soon as practicable after a forensic profile has been derived from the sample and that protocols be developed for the destruction of profiles and related information.<sup>100</sup> It also recommended that a volunteer's profile be destroyed as soon as practicable after 'the donor has been eliminated from the investigation' or 'it has been determined that analysis of the donor's profile is not required', whichever occurs first.<sup>101</sup>

3.12.5 The WA Review, on the other hand, recommended that, the WA Act 'should be amended to expressly provide that, subject to sensible weeding rules, crime scene samples, and associated reference samples, be kept in safe custody indefinitely.'<sup>102</sup>

3.12.6 Also addressed in a number of submissions to the Sherman Review was the issue of destruction of material as against 'de-identification'. In this connection, a distinction was drawn between crime scene samples, which some argued should be retained for

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<sup>98</sup> NSW Ombudsman Report, Executive Summary, p.v

<sup>99</sup> ALRC/AHEC Report, 'Essentially Yours: The Protection of Human Genetic Information in Australia' pp.74, 75; 1026-1048

<sup>100</sup> Victorian Review Recs. 4.4 and 4.5, p. 132-138

<sup>101</sup> *ibid.* Rec. 7.4 p.276

<sup>102</sup> WA Review, Rec. 27, p.141

conviction testing purposes, and other samples.<sup>103</sup> On the basis of advice provided by the AFP that both person samples and relevant profile were destroyed<sup>104</sup>, the Review recommended that:

***Sherman Recommendation No 6***

***The Review recommends that:***

- (a) ***in relation to person samples and DNA profiles:***
- i. both destruction as well as de-identification of person samples as defined in Part 1D (either physically or by appropriate computer delinking) should occur immediately the statutory time limits expire; and***
  - ii. the relevant DNA profile should also be destroyed.***
- (b) ***NCIDD should contain a compulsory field in which the date for destruction (or review of destruction) of each DNA profile is provided.***

***Q.15 Do you have any comments on Sherman Recommendation 6?***

**3.13 Accreditation of laboratories**

3.13.1 The Sherman Review noted that the ALRC/AHEC Discussion Paper proposed that forensic procedures legislation should provide that forensic analysis of genetic samples must be conducted only by laboratories accredited by the National Association of Testing Authorities ('NATA') in the field of forensic science.<sup>105</sup> Since then, the ALRC/AHEC Report has included this proposal in its recommendations.<sup>106</sup>

3.13.2 The NSW Ombudsman made a number of very specific recommendations relating to DNA analysis.<sup>107</sup> The Victorian Review recommended an amendment to the legislation to provide that 'in relation to the analysis of forensic samples, only forensic reports produced by laboratories accredited by NATA in the field of forensic science will be admissible in criminal proceedings in Victoria.'<sup>108</sup> The WA Review recommended that 'an independent body should be established to oversee the management and operation of forensic databases in Western Australia. The functions of the body should include quality assurance, policy,

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<sup>103</sup> The Sherman Report para 3.141

<sup>104</sup> *ibid.* para 3.159

<sup>105</sup> ALRC/AHEC Discussion Paper, Reform proposal 36-9.

<sup>106</sup> ALRC/AHEC Report, 'Essentially Yours: The Protection of Human Genetic Information in Australia', Recommendation 41-7; pp.1026-1038

<sup>107</sup> NSW Ombudsman Report, Ch.10

<sup>108</sup> Victorian Review, p.359.

consideration of ethical, social, scientific and forensic issues, coordination between relevant agencies, and best practice considerations.<sup>109</sup>

3.13.3 The Sherman Report recommended that:

***Sherman Recommendation No 7***

***The Review agrees with the ALRC/AHEC Discussion Paper proposal and recommends that Part 1D should provide that forensic analysis of DNA samples must be conducted only by laboratories accredited by NATA in the appropriate field of forensic science.***

***Q.16 Do you have any comments on Sherman Recommendation 7?***

**3.14 Matching requirements**

3.14.1 The databases that are of most relevance for present purposes are the National Criminal Investigation DNA Database (NCIDD) operated by CrimTrac and the database established by the Australian Federal Police. The NCIDD was established in June, 2001 to facilitate intra-jurisdictional matching of DNA profiles, and inter-jurisdictional matching of profiles between participating jurisdictions, for law enforcement purposes. Part 1D of the *Crimes Act* defines a ‘DNA database system’ as a database (whether in computerised or other form and however described) containing the following indexes of DNA profiles: a crime scene index, a missing persons index, an unknown deceased persons index, a serious offenders index, a volunteers (unlimited purposes) index, a volunteers (limited purposes) index, a suspects index, and information that may be used to identify the person from whose forensic material each DNA profile was derived; and a statistical index; and any other index prescribed by the regulations.<sup>110</sup>

3.14.2 The types of matches that are permissible on the national DNA database are set out in tabular form in s.23YDAF. The provision incorporates a matrix which enables the reader to ascertain whether a particular kind of matching, such as ‘crime scene/suspect’, is permitted. One submission argued that this is an oversimplification which leads to undesirable policy outcomes. It argued for ‘narrower categories of profiles’. In response, the Review commented:

3.195 This issue is best left to further consideration in the light of experience. One problem with Dr Gans’s proposal is whether the “narrower categories of profiles” would improve the position by making matching requirements clearer. If the accountability arrangements proposed elsewhere in this report are implemented and expose problems with this table there may be a better foundation to take remedial action along the lines suggested by Dr Gans. Moreover, although the general point being made by Dr Gans is appreciated, it is difficult to assess his arguments without specific examples which demonstrate actual problems with the

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<sup>109</sup> WA Review, p.160

<sup>110</sup> ALRC/AHEC Report, p.1077

current regime. It is also difficult to see how narrower categories of profiles will prevent or even narrow the opportunities for rogue conduct.

***Q.17 Do you have any comments on a proposal to establish ‘narrower categories of profiles’ and what has been your experience with the application of statutory matching tables?***

3.14.3 The Sherman Review noted that the rule in the matching table that prevents a suspect profile from being matched with a profile on the suspects index drew criticism from the NSW Police and from senior managers of Australian and New Zealand Forensic Science Laboratories. Both expressed the view that it should be permissible to link suspects with suspects “as this would allow the system to ensure that suspects are not placed on the database multiple times and under different names”. ‘Another issue is that it is not uncommon for persons who engage in criminal conduct to use different identities. Matching suspects to suspects will assist in determining whether persons with different identities are in fact the same person.’ Similar considerations applied to matching between unknown deceased person indexes.<sup>111</sup>

3.14.4 More recently, the WA Review recommended that ‘whether or not the nationally agreed matching table is adopted, suspect to suspect searching should be allowed in the State DNA database’.<sup>112</sup>

3.14.5 The Sherman Review accepted the arguments put to it with the qualification that there are limits on the time persons should be on the suspects index<sup>113</sup> and recommended that:

***Sherman Recommendation No 8***

***The Review recommends that Part 1D should be amended to permit the matching of suspects to suspects; and unknown deceased persons to unknown deceased persons.***

***Q.18 Do you have any comments on Sherman Recommendation 8?***

**3.15 DNA Testing protocols**

3.15.1 The detailed nature of the rules for the conduct of forensic procedures is evident from the structure of Part 1D - Division 2 – Authority and time limits for forensic procedures on suspects: summary of rules, Division 3 – Forensic procedures on suspect by consent, Division 5 – Forensic procedures on suspect by order of a magistrate, Division 6 – Carrying out forensic procedures on suspects, Division 6A – Carrying out of certain forensic procedures after conviction of serious and prescribed offenders and Division 6B – Carrying out of forensic procedures on volunteers and certain other persons.

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<sup>111</sup> The Sherman Report paras. 3.196 to 3.198

<sup>112</sup> WA Review, p.134

<sup>113</sup> The Sherman Report para 3.199

3.15.2 Police and Corrective Services submissions raised the issue of consistent procedures by all States on the conduct of DNA testing for serious offences and suggested there would be advantages in having the tests conducted by Corrective Services under agreed protocols. The Review noted that this would involve legislative amendment and that there would be benefits for smaller jurisdictions.<sup>114</sup> It considered that the issues warranted further exploration and recommended that:

***Sherman Recommendation No 9***

***The Review recommends that the police and correctional authorities should examine the feasibility of correctional services carrying out serious offender testing on behalf of the police service in the relevant jurisdiction as well as for other jurisdictions where appropriate. This examination might appropriately take place through cooperation between the respective national police and correctional service forums. Any resultant recommendations could be put to ministerial forums for decision. It will also be important to ensure that these arrangements include appropriate training and accountability and oversight regimes.***

***Q.19 Do you have any comments on Sherman Recommendation 9?***

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<sup>114</sup> *ibid.* paras. 3.211 – 3.215

#### **4. EXTENT TO WHICH THE FORENSIC PROCEDURES PERMITTED BY PART 1D HAVE CONTRIBUTED TO THE CONVICTION OF SUSPECTS**

4.1 The Sherman Report said that it had ‘obtained little information on the extent to which forensic procedures permitted by Part 1D (or permitted by State and Territory legislation) have contributed to the conviction of suspects. Also there is little information on the extent to which those procedures have contributed to the exculpation of suspects.’<sup>115</sup>

4.2 The Report in October, 2006 of an inquiry by the NSW Ombudsman pursuant to s.121 of the *Crimes (Forensic Procedures) Act 2000* (‘the NSW Ombudsman Report’) said ‘(w)e were unable to assess how often DNA analysis results in a suspect being convicted of an offence, as neither DAL<sup>116</sup> nor NSW Police kept complete records relating to criminal proceedings stemming from DNA links.’<sup>117</sup> However, in reporting on the number of ‘cold links’ (links arising from data-matching without any prior suspicion), it observed that ‘these figures show that the number of identifications and convictions stemming from cold links are much higher for less serious types of crime than for more serious types of crime. This may be expected given that police would put considerably more resources into the investigation of serious crime at the time, rather than waiting for a suspect to be identified through a cold link, which may occur some time later. Also, by definition, volume crime offences are significantly more common.’<sup>118</sup>

4.3 In this connection, it is important to keep in mind the warning of the NSW Review:

‘We would suggest that, recognizing the many variables (evidentiary or otherwise), which impact first on conviction rates, and then the difficulty with relating conviction rates to crime rates, this may be a fruitless exercise. Interestingly, it demonstrates the popular expectation that DNA matching will impact on crime rates. The impression may be more powerful than the reality.’<sup>119</sup>

4.4 The Victorian Review, without suggesting any particular conviction rates, draws an interesting distinction between DNA profiling and DNA database matching:

‘The use of DNA profiling has challenged the legal system to handle a new form of complex expert evidence, which has a high probative value and a limited but sometimes crucial role in circumstantial cases.....’

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<sup>115</sup> *ibid.*, para 4.1

<sup>116</sup> Division of Analytical Laboratories, NSW Health

<sup>117</sup> NSW Ombudsman Report, Executive Summary, p.ii

<sup>118</sup> *ibid.*, p.66

<sup>119</sup> The NSW Review, p.142, footnote 219.

The use of DNA databases, however, presents quite a different challenge to the legislature. Within a single investigation DNA analysis may serve to inculcate or exculpate identified suspects from a specific investigation, but DNA databasing enables mass detection of unsolved crimes on the basis of forensic evidence alone.’<sup>120</sup>

4.5 The Victorian Review regarded the ‘best indication available as to the “success rate” of crime scene analysis’ to be data collected between January 2000 and June 2002 of the results of analysis of suspects’ DNA samples in Victoria.<sup>121</sup> Out of a total of 1258 samples, 527 inculpated the suspect, 308 exculpated the suspect and 423 were inconclusive due to contamination, degradation or the poor quality of the sample.

4.6 The Victorian Review also recommended the collection of statistics ‘to enable informed decisions to be made in relation to the effectiveness of current collection and investigative policies and the priorities to be given to forensic services required for these proceedings.’<sup>122</sup>

‘Recommendation 11.1 The impact of DNA evidence on criminal proceedings

That the Department of Justice, Victoria Police Prosecutions, the Office of Public Prosecutions and the Victorian Courts develop an agreed and consistent process for collecting and reporting to Parliament on the impact of DNA evidence on criminal prosecutions/proceedings, specifically including:

- (i) the number of investigations in which DNA evidence is used, indicating the type of offence involved, and specifically identifying serious crimes against the person, sexual offences, assaults, armed robbery, burglary, theft and, in relation to prosecutions involving DNA evidence:
- (ii) the number of guilty pleas and findings of guilt recorded;
- (iii) the number of prosecutions resulting primarily from a DNA database detection;
- (iv) the role of the DNA evidence; and
- (v) whether the DNA evidence was contested and, if so, on what basis.’

4.7 Both the NSW Review and the Victorian Review emphasised the need for the development of ‘best practice’ procedures in the use of forensic procedures at all stages of investigation and prosecution of offences.<sup>123</sup>

***Q. 20 To what extent have DNA forensic procedures contributed to the conviction of suspects?***

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<sup>120</sup> Victorian Review, pp.112 - 113

<sup>121</sup> *ibid.*, pp.237, 321

<sup>122</sup> *ibid.*, pp. 381-382

<sup>123</sup> NSW Review, Ch. 6, Victorian Review Ch. 9

## 5. THE EFFECTIVENESS OF INDEPENDENT OVERSIGHT AND ACCOUNTABILITY MECHANISMS FOR THE DNA DATABASE SYSTEM

### 5.1 Towards a National Accountability Framework

5.1.1 Agencies that exercise powers under Part 1D are subject to the same accountability regimes that apply generally in Commonwealth administration. The statutory requirements and limitations that are imposed provide a benchmark against which their activities may be assessed.

5.1.2 The ALRC/AHEC Review considered oversight of DNA database systems established for law enforcement to lack certain co-ordination and made the following recommendations:

‘43-1 The Commonwealth should amend the *Crimes Act 1914* (Cth) (*Crimes Act*) to provide that forensic material taken from a suspect, and any information obtained from its analysis, must be destroyed as soon as practicable after the person has been eliminated from suspicion, or police investigators have decided not to proceed with a prosecution against that person in relation to that investigation. However, in any event, the forensic material and information must be destroyed no later than: (a) 12 months after the material was taken or the information obtained; or (b) the period stipulated in an order made under s 23YD of the *Crimes Act*.

43-2 The Commonwealth should amend the definition of a ‘DNA database system’ in the *Crimes Act* to mean a database (whether in computerised or other form and however described) containing identifiable DNA profiles maintained for law enforcement purposes.

43-3 The Commonwealth should expand CrimTrac’s board of management to include independent members, such as nominees of the Office of the Federal Privacy Commissioner and the Commonwealth Ombudsman, legal academics and ethicists.

43-4 The Commonwealth should amend the *Crimes Act* to provide for a periodic audit, by an independent body, of the operation of all DNA database systems operating pursuant to the Act. The audit should include the forensic laboratories participating in the DNA database system and the audit report should be made publicly available.

43-5 In its annual report to Parliament, the Australian Federal Police should provide information on the number and category of samples obtained pursuant to Part 1D of the *Crimes Act* in that year; the authority under which these samples were obtained; and compliance with the required destruction dates for those samples and profiles.<sup>124</sup>

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<sup>124</sup> ALRC/AHEC Report, Ch. 43; see also p.1000

5.1.3 The purpose behind the ALRC/AHEC's Recommendation 43-2 was to preclude the keeping of databases outside those regulated by Part 1D and corresponding State and Territory laws.<sup>125</sup>

5.1.4 The ALRC also pointed to the problem of exercising oversight of activities carried out in concert by agencies from different jurisdictions:

'In practice, where genetic samples or profiles have been mishandled, the person to whom the information relates could make a complaint to that jurisdiction's Privacy Commissioner (where one exists), or the Ombudsman. However, that official may only investigate complaints regarding activities within that particular state or territory jurisdiction, rather than complaints crossing jurisdictional boundaries.'<sup>126</sup>

It sought to address these concerns through the other measures listed above.

5.1.5 The Sherman Report put forward a model for national accountability and discussed how it might best be achieved. In brief, its model was:

'5.84 The Review suggests that the elements of an ideal national accountability framework should include:

- uniform standards, protocols and procedures;
- transparent and independent complaint handling procedures, within and across jurisdictions;
- consistent types of record-keeping and statistical collections that allow cross jurisdictional comparison and aggregation;
- pro-active reporting against consistent quality assurance benchmarks;
- regular independent audit both within and across jurisdictions;
- periodic independent review; and
- the allocation by government of sufficient resources to ensure the model is implemented.'

5.1.6 It commented that 'external monitoring agencies have a clear and unambiguous role in this area and should be tasked to carry out regular audits of the relevant policies and procedures. These audits should within each jurisdiction address the shared responsibilities of the police, the laboratories, prosecuting authorities and where appropriate corrective services. This aspect needs to be carefully planned because traditionally external monitoring agencies have tended to audit individual agencies

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<sup>125</sup> ALRC/AHEC Report, pp.1080-1081; see also discussion in Chapters 3 (3.11 – Admissibility of evidence) and 7 (7.1 – The Information Privacy Principles)

<sup>126</sup> *ibid.*, p.1083

whereas what is required here is the monitoring of a system across a number of agencies.’<sup>127</sup>

5.1.7 Its conclusion was:

‘5.89 This Review proposes that the best use be made at this early stage of the existing mechanisms and not go down the path of legislative change. However if these processes are not established and working over the next two years a future review may in the light of that experience have to recommend legislative mechanisms to try to achieve a better result.’

5.1.8 In relation to complaint handling, the Sherman Report argued that ‘there must be clear information provided to those who provide samples (irrespective of the circumstances) or who are otherwise affected by the system as to what their rights are.’<sup>128</sup>

***Q.21 Do you have any comments on the best means of achieving a national accountability framework that has the features described above?***

## **5.2 Reporting**

5.2.1 While the legislation makes detailed provision for matters that must be recorded,<sup>129</sup> it does not impose any reporting obligations. This contrasts with the *Telecommunications (Interception and Access) Act 1979*, which, in regulating the acquisition and use of another type of evidence that presents particular privacy problems, treats reporting as a major accountability mechanism.

5.2.2 In relation to reporting, the Sherman Report commented:

‘5.111 This Review was able to obtain very little hard information on how that national DNA database system is working. Granted the system is still embryonic, but even a future review would have the same problem because there are inadequate information reporting systems.’

5.2.3 To address these issues, the Report recommended:

### ***Sherman Recommendation No 10***

***The Review recommends that all documents provided to persons in relation to the national DNA system (e.g. information brochures, informed consent forms, results of analyses and matches) should contain prominent information on appeal rights and complaint avenues, including any time limits on those rights. All agencies involved in the scheme (CrimTrac, government laboratories, and the police) should***

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<sup>127</sup> The Sherman Report para 5.88

<sup>128</sup> *ibid.* para 5.106

<sup>129</sup> ss. 23W, 23WP, 23XE, 23XT, 23XWS, 23YDAG

*also have prominently displayed on their websites the rights and avenues for complaints, with “complaints” appearing on the home page.*

***Sherman Recommendation No 11***

***The Review recommends that in relation to the use of DNA, the AFP, participating State and Territory Police, DPPs and relevant accountability bodies should be required to record and publicly report on the number of complaints, the type of complaints and the outcome of the complaints.***

***Q.22 Do you have any comments on Sherman Recommendations 10 and 11?***

5.2.4 Further reporting obligations were also considered necessary.

***Sherman Recommendation No 12***

***The Review recommends that the APMC should agree on a consistent, standard format for reporting the use of DNA forensic information that allows aggregation and comparison across jurisdictions. Both CrimTrac and the relevant laboratories should include annual statistics reporting against the standard format as part of their annual reporting requirements. The Review recommends the following as the starting point for this standard format:***

- (a) the number and identity of each DNA database and index (whether of samples or profiles) maintained; and***
- (b) in respect of each database and index the total number of***
  - individuals on each database and index,***
  - profiles held on each database and index and the proportions that are from suspects, victims, volunteers, backcapture programs etc,***
  - complaints received, indicating the number resolved,***
  - samples destroyed,***
  - profiles de-identified,***
  - links identified, and***
  - matches.***

***Sherman Recommendation No 13***

***The Review recommends that the Commonwealth and participating State/Territory DPPs should record and report publicly on the number of prosecutions in superior courts of record in which DNA was admitted into evidence and on any particular issues or problems which emerged in the courts in relation to the use of DNA evidence.***

***Q.23 Do you have any comments on Sherman Recommendations 12 and 13?***

### 5.3 Audits and other accountability arrangements

5.3.1 Again in contrast to the *Telecommunications (Interception and Access) Act 1979*, no special audit requirements are imposed by the legislation.

5.3.2 The Victorian Review noted ‘the challenges involved in establishing and administering a national database system that is accessible and accountable to each of its member jurisdictions’ and recommended that ‘Victoria, through its representatives on CrimTrac committees, work towards the introduction of a regular independent audit of the operation of the national DNA database’.<sup>130</sup>

5.3.3 Of course, the primary oversight body in each jurisdiction is located within the jurisdiction itself and may be the police service in that jurisdiction. The extent to which other oversight bodies become involved is a matter for the jurisdiction. For example, the NSW Ombudsman noted that NSW Police is the primary oversight agency for complaints about police conduct<sup>131</sup> and then reported on the resolution of a number of complaints under its supervision. It discussed them in terms of:<sup>132</sup>

- wrongful conviction after police misread DNA analysis report;
- wrongful conviction after police merged the records of two different people;
- failure to pursue results of forensic procedures;
- poor knowledge of legislative obligations or failure to follow standard operating procedures;
- failure to maintain proper records; and
- failure to keep DNA records secure.

5.3.4 The NSW Ombudsman also made a number of recommendations relating to audit, including:

- ‘improving and streamlining record keeping by NSW Police and DAL, particularly in relation to police computer records of forensic procedures and DNA analysis results, to improve accuracy and reduce duplication
- establishing an audit process between DAL and NSW Police, to ensure information on the database is correct including that DNA profiles are identified by a person’s real name and not an alias
- taking away the ability of ordinary police officers to transfer forensic procedures from one person’s record to another

.....

- clarifying who is the ‘responsible person’ for the DNA database’<sup>133</sup>

5.3.5 The Sherman Review considered that it was not appropriate to make any ‘recommendations for the auditing (internal or external) of NATA accredited laboratories

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<sup>130</sup> Victorian Review, Executive Summary, p.xlvii, Rec.14.2, p.463

<sup>131</sup> NSW Ombudsman Report, p.273

<sup>132</sup> *ibid.*, pp. 275-282

<sup>133</sup> *ibid.*, Executive Summary, p. viii

because it appears that the NATA processes provide a robust auditing and accountability mechanism.<sup>134</sup> However, it recommended that other measures should be taken<sup>135</sup>:

***Sherman Recommendation No 14***

***The Review recommends that particulars of any unresolved criticism or qualification in a NATA external audit should be recorded and made publicly available.***

***Sherman Recommendation No 15***

***The Review recommends that so far as the AFP and CrimTrac are concerned, there should be an internal audit of systems and procedures relating to DNA sampling (in the case of the AFP) and to maintenance of the NCIDD (in the case of CrimTrac) at least once every two years. The Review also believes it would be appropriate for police in the participating jurisdictions to be subject to a similar requirement.***

***Sherman Recommendation No 16***

***The Review recommends that the Ombudsman and Privacy Commissioners, or equivalents from each jurisdiction should report in twelve months to their respective responsible ministers on whether there are any legislative impediments in any participating jurisdiction including the cross referral between relevant accountability bodies (as defined in paragraph 5.22) of cases and complaints or supporting evidence and information regarding the national DNA database system. The test for this report should be that it is possible to:***

- (a) resolve complaints in such a way that no complainant is disadvantaged because the complaint involves conduct in more than one participating jurisdiction; and***
- (b) conduct audits or own motion investigations that cover cross jurisdictional issues where data leaves one participating jurisdiction and goes to another participating jurisdiction.***

***The Review notes that should any legislative change be found necessary to achieve these objectives, participating jurisdictions should move promptly to fill the gaps.***

***Sherman Recommendation No 17***

***The Review recommends that relevant accountability bodies of all participating jurisdictions should reach agreement on the conduct of external audits of the relevant systems and procedures in the national DNA database system both as a whole and for each of its component parts; and report on the outcome of the audits in their annual reports. The Review considers that there should be such an audit in each participating jurisdiction at least once every two years. The audits should pay***

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<sup>134</sup> The Sherman Report, p.83

<sup>135</sup> *ibid.* pp. 85, 86

*particular attention to issues arising from data flows between participating jurisdictions.*

***Sherman Recommendation No 18***

***The Review recommends that relevant accountability bodies should reach agreement on the conduct of investigating complaints and own motion investigations, making the use of existing powers as might be amended in the light of Recommendation 16 to exchange information and evidence or refer complaints in order to ensure that:***

- (a) no complainant is disadvantaged because the complaint involves conduct in more than one participating jurisdiction; and***
- (b) for any one issue or complaint being investigated, law enforcement authorities have one point of contact and are subject to only one investigation.***

***Sherman Recommendation No 19***

***The Review recommends that participating jurisdictions should allocate sufficient resources to law enforcement agencies, forensic laboratories and accountability bodies to implement these recommendations.***

***Q. 24 Do you have any comments on Sherman Recommendations 14 to 19?***

5.3.6 The Sherman Review arranged for an independent preliminary audit of the National Criminal Investigation DNA Database ('NCIDD') maintained and controlled by CrimTrac and summarised the findings as follows:

'5.131 The audit report makes a number of recommendations which are generally specific to CrimTrac. The recommendations include:

- An audit be conducted annually (by Ombudsman in the various jurisdictions and where appropriate involving Privacy Commissioners) to determine the accuracy of records within the NCIDD. The audit report at pages 4 and 5 suggests a number of detailed steps which should be incorporated into such an audit. The audit report also notes that the MOUs proposed to be entered into between CrimTrac and the various jurisdictions make provision for this audit.
- CrimTrac staff provides a regular report advising each jurisdiction of profiles which will be destroyed in the near future unless the destruction date is updated as permitted by law, with a reference to the relevant legislation.
- A series of recommendations to ensure that profile identification does not occur inadvertently in the NCIDD.

- CrimTrac set up a complaint handling process.’

5.3.7 The Sherman Report recommended:

***Sherman Recommendation No 20***

***The Review recommends the adoption of the recommendations contained in the report of the preliminary audit report of CrimTrac.***

***Q.25 Do you have any comments on Sherman Recommendation 20?***

## **6. DISPARITIES BETWEEN THE LEGISLATIVE AND REGULATORY REGIMES OF THE COMMONWEALTH AND PARTICIPATING JURISDICTIONS FOR THE COLLECTION AND USE OF DNA EVIDENCE**

### **6.1 Disparities**

6.1.1 Reporting in 2004, the Victorian Review, summarised the differences in Australian legislation as follows:

‘There has since been a spate of legislative action around Australia, with almost all Australian jurisdictions enacting some forensic procedures legislation based, to varying degrees, on one of the editions of the Model Bill. The different editions of the Bill have given rise to several ‘generations’ of legislation. The first draft of a Model Forensic Procedures Bill was released in 1994; revised versions followed in 1995, 1999 and 2000. Most Australian jurisdictions have adopted at least some of its provisions into their forensic procedures legislation.

The Victorian legislation belongs to the ‘first generation’ of forensic procedures legislation, largely based on the 1995 Model Bill. New South Wales, Tasmania, Western Australia and South Australia also have legislation that derives in part from the Model Bill, though each jurisdiction has included provisions that depart from the Model Bill in some respects. The Commonwealth and the ACT provisions are closely based on the most recent edition of the Model Bill. The Northern Territory legislation stands apart from other Australian regimes, and more closely resembles the *Police and Criminal Evidence Act 1984 (UK)* than the Model Bill.’<sup>136</sup>

6.1.2 It also noted that ‘some jurisdictions, such as the Commonwealth, New South Wales and Tasmania, allow police to authorize a non-intimate procedure on a consenting volunteer, suspect or offender in custody, but require a court order to sample a non-custodial suspect.’<sup>137</sup>

6.1.3 The ALRC/AHEC assessment is broadly similar. It identifies Queensland and the Northern Territory as not having followed the Model Bill at all although it acknowledges that Queensland had indicated an intention to amend its legislation to facilitate its participation in the NCIDD system.<sup>138</sup> Those amendments have since been made.

6.1.4 It can be seen from the discussion by the NSW Review of representations made to it for further amendments<sup>139</sup> that there are strong influences working for further variations over time. As noted in that review,<sup>140</sup> recognition of a legislature’s capacity to diverge from the Model Bill and to create other approaches to the balance between law

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<sup>136</sup> Victorian Review, p. 61

<sup>137</sup> *ibid.* p.60

<sup>138</sup> ALRC/AHEC Report, p.982

<sup>139</sup> The NSW Review pp. 27-32

<sup>140</sup> *ibid.* p. 22, footnote 44

enforcement priorities and individual rights has been examined in the case law: *Lednar & Ors. v The Magistrates' Court & Anor.* [2000] VSC 549.

6.1.5 The NSW Review observed that '(b)roadly speaking, NSW is considered to be, together with the Commonwealth and the ACT, a jurisdiction that closely follows the Model Bill. Tasmania, Victoria and South Australia follow the Model Bill in some respects, and Victoria has recently amended its legislation to bring it closer to the Model Bill, as has Western Australia. Queensland and the Northern Territory do not presently follow the Model Bill at all, however it has been suggested that both jurisdictions are considering bringing their legislation more into line with the Model Bill.'<sup>141</sup>

6.1.6 The Victorian Review expressed concern at the lack of consistency between the laws of the participating jurisdictions and 'contemplated the real possibility that participating jurisdictions might not enact uniform forensic sampling provisions, and focused on strategies to ensure that the standards and safeguards contained in Victoria's legislation are not eroded under national data-sharing arrangements.'<sup>142</sup> It expressed particular concern that, while all Australian jurisdictions enable the sampling of 'offenders', 'suspects' and 'volunteers', 'the definitions of these groups and the circumstances in which DNA samples can be obtained vary between jurisdictions'.<sup>143</sup>

6.1.7 The Sherman Report noted that only two jurisdictions – Queensland and the Northern Territory – had departed substantially from the approach taken in the 2000 Model Bill.<sup>144</sup> It recognised that disparities between jurisdictions are inevitable but argued that in some areas a uniform approach is important<sup>145</sup>:

'6.83 However it would be unrealistic to press for a perfectly consistent uniform scheme when the political and practical realities suggest that is unattainable. Indeed the Commonwealth in recognising States and Territories as participating jurisdictions in the national scheme has conceded that some differences (including lower standards) are acceptable. This Review considers that while some differences are inevitable, it is important nevertheless to highlight those areas of divergence which have the potential to undermine the integrity of the national scheme.

6.84 The first area of concern is the differing treatment of serious offenders. The differences in definition makes the various serious offender databases quite different in character in a context where the law should be authorising the matching of like with like. This also produces the result that what might be an offence in relation to a database in one jurisdiction will not be an offence in another. Indeed the Northern Territory legislation makes no provision for separate databases at all.

6.85 It seems unlikely that all jurisdictions will adopt uniform legislative standards in this regard and this Review is reluctant to urge that effort be expended

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<sup>141</sup> The NSW Review, p. 22, footnote 45

<sup>142</sup> Victorian Review, Executive Summary, p.xlvi

<sup>143</sup> *ibid.*, p.59

<sup>144</sup> The Sherman Report, p.20; see also table at pp.20, 21

<sup>145</sup> *ibid.*, p.98

on the unattainable. What may be a more feasible approach is to deal with the issue administratively. It would be open to the Commonwealth to negotiate a position that profiles placed on the national database must be consistent with the national (Model Bill) criteria for the respective index. This would have the effect that some jurisdictions will only be able to put part of their respective databases on the national system.’

6.1.8 These observations were consistent with the recommendations made in the Victorian Review concerning the approach to data-sharing that should be taken by Victoria.<sup>146</sup> In this connection, it is also relevant that the WA Review recommended the adoption of the ‘nationally agreed matching table for comparison of lawfully obtained DNA profiles’.<sup>147</sup>

6.1.9 It also seems likely that, without some mechanism to encourage the maintenance of the degree of uniformity that has been achieved to date, further divergence will occur over time. On the other hand, there may also be countervailing forces for convergence.<sup>148</sup>

***Q.26 To what extent do you think national uniformity in legislation is desirable and achievable?***

6.1.10 The Sherman Report also commented:

3.30 It is important to note however that there is great value in keeping these procedures as uniform as possible across jurisdictions. The complexity will worsen if jurisdictions continue going their own way. This highlights the importance of securing broad jurisdictional agreement to any simplification of the current procedures. This is a matter which can be further examined in the next review when there is more experience in the use of the current procedures.

***Q.27 What difficulties have been caused by the lack of uniformity across jurisdictions in ‘informed consent processes’?***

6.1.11 The Sherman Report recognised that there is little point in pursuing uniformity for its own sake but argued that some minimum standards for inclusion on the NCIDD and for consistent treatment of vulnerable persons, including Aboriginals and Torres Strait Islanders, should be negotiated.<sup>149</sup> In relation to minimum standards, it recognised that some jurisdictions would then only be able to put part of their respective databases on the national system.

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<sup>146</sup> Victorian Review, Recs. 14.1 and 14.3, pp. 456-464

<sup>147</sup> WA Review p.132

<sup>148</sup> For example, in some areas, the NSW Review (eg at pp.143 - 147) argues for a return to conformity with the Model Bill.

<sup>149</sup> The Sherman Report paras 6.85 to 6.87

6.1.12 In this connection, the Victorian Review similarly proposed that ‘individual participating jurisdictions upload for data-sharing only data consistent with the Model Bill definitions of offender, suspect and volunteer.’<sup>150</sup>

6.1.13 The ALRC/AHEC Report went further than the Sherman Report in the emphasis it placed on harmonisation and made a number of recommendations directed towards achieving ‘an effective national approach for law enforcement purposes’.<sup>151</sup>

40-1 In order to facilitate an effective national approach to sharing genetic information for law enforcement purposes, the Commonwealth, States and Territories should collaborate to develop adequate national minimum standards in Australian forensic procedures legislation with respect to the collection, use, storage, destruction and index matching of forensic material, and the DNA profiles created from such material.

40-2 The Commonwealth, States and Territories should not engage in inter-jurisdictional sharing of genetic information—whether on a bilateral basis or through a national DNA database system—unless there is legislation requiring that any information transferred to that jurisdiction will be treated in accordance with the national minimum standards developed under Recommendation 40-1.

40-3 In order to facilitate an effective national approach to sharing genetic information the States and Territories should amend their forensic procedures legislation in a manner consistent with the recommendations made in this Report in relation to the Crimes Act 1914 (Cth).

40-4 For the purpose of achieving greater transparency, the Commonwealth, States and Territories should publish all ministerial agreements for sharing genetic information, as well as protocols for inter-jurisdictional matching.

6.1.14 The Sherman Report recommended:

***Sherman Recommendation No 21***

***The Review recommends that the Commonwealth should negotiate agreement with participating jurisdictions that relevant profiles on the NCIDD for offenders should comply with the Model Bill standard that is an indictable offence punishable by at least two years imprisonment.***

***Sherman Recommendation No 22***

***The Review recommends that the Commonwealth should negotiate agreement with participating jurisdictions that the Model Bill provisions relating to children,***

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<sup>150</sup> Victorian Review, Executive Summary, p.xlvii; Rec. 14.1, p.456

<sup>151</sup> ALRC/AHEC *Essentially Yours: The Protection of Human Genetic Information in Australia (Report 96)* pp.72,73 and Ch. 40

***incapable persons and Aboriginal and Torres Strait Islanders should apply in all participating jurisdictions.***

***Q.28 Do you have any comments on Sherman Recommendations 21 and 22?***

6.1.15 The issue of ‘uniformity’ or ‘harmonisation’ of laws is mainly significant for the purposes of data-sharing. Reporting in 2004, the Victorian Review noted:<sup>152</sup>

Some jurisdictions, such as NSW, permit data-sharing with all other jurisdictions. Others, such as the Commonwealth and Victoria, have prescribed regulations enabling data-sharing arrangements to be developed with specified jurisdictions having ‘corresponding laws’.

6.1.16 In discussing the ALRC/AHEC Review and the Sherman Review, the Victorian Review noted:<sup>153</sup>

Both these reviews proposed initiatives aimed at realising the potential for nationwide use of forensic profiling by ‘harmonising’ the Commonwealth, State and Territory laws, to align Australian regimes for the collection, handling and forensic uses of DNA material.

6.1.17 The Victorian Review and the ALRC/AHEC Review both expressed concern at the prospect of a national database being founded on the lowest common denominator of the participating jurisdictions.<sup>154</sup> In this connection, the ALRC/AHEC’s Recommendation 40-1 (above) suggested areas in which minimum requirements should be specified.

6.1.18 The Sherman Review expressed concern at the lack of informed consent provisions in the Northern Territory<sup>155</sup> but noted that ‘the other disparities mentioned in this Chapter, while detracting from the uniformity of the national scheme do not appear (at least in the light of the limited experience so far) to affect the basic integrity of the scheme.’<sup>156</sup> It commented as follows:

‘6.91 If negotiations as contemplated are not successful a future review might have to consider recommending these minimum requirements as basic conditions to membership of the national scheme.’

***Q.29 Do you have any comments on the question whether minimum standards for membership of the national scheme should be established?***

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<sup>152</sup> Victorian Review p.63

<sup>153</sup> *ibid.* p.76

<sup>154</sup> Victorian Review, p.453; ALRC/AHEC Report p.994

<sup>155</sup> The Sherman Report para 6.88

<sup>156</sup> *ibid.* para 6.89

## 6.2 Other concerns with disparities in legislation

6.2.1 In light of the inter-jurisdictional sharing of information that was then proposed and has since commenced, the ALRC/AHEC Report identified as examples raising some concern ‘differences in the:

- classification of certain forensic procedures as ‘intimate’ and ‘non-intimate’;
- seriousness of the offence for which a forensic procedure might be carried out on a suspect or offender;
- treatment of volunteers, children and other vulnerable persons;
- procedure for authorising compulsory forensic procedures;
- index matching rules (or other rules regarding profile matching); and
- requirements for destruction of genetic samples or profiles.’<sup>157</sup>

6.2.2 The seriousness of the offence for which a forensic procedure might be carried out on a suspect or offender is perhaps the area where the effect of disparities is most apparent. The Model Criminal Code Officers’ Committee (MCCOC) provided the following example<sup>158</sup>:

‘State A may only allow taking samples from serious offenders while State B might allow them to be taken from any offender. A law enforcement officer in State A could then check to see if the suspect had committed an offence in State B through a criminal records check. The officer discovers the person committed a traffic offence after which a person had been required to give a sample for DNA analysis. The law enforcement officer then conducts matching on the DNA database against someone who would not be on the database in the same circumstances under local legislation.’

6.2.3 Similar concerns were expressed by the Senate Legal and Constitutional Legislation Committee in its report on the 2000 amending Bill<sup>159</sup> and by the Victorian Review.<sup>160</sup> The latter also raised broader issues:

‘Victoria is therefore in a position to benefit from data-sharing arrangements which recognise and maintain the high standards that Victoria’s regime has already achieved. If evidence obtained in less regulated jurisdictions can be used in Victorian prosecutions, Victoria’s own provisions are, to some extent, exposed. This exposure

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<sup>157</sup> ALRC/AHEC Report, p.990

<sup>158</sup> *ibid.*, p.991

<sup>159</sup> *ibid.* p.991; Senate Legal and Constitutional Legislation Committee, *Inquiry into Provisions of the Crimes Amendment(Forensic Procedures) Bill 2000* [3.63] Rec.3

<sup>160</sup> Victorian Review, Ch.14

arises by permitting the use of data that could not have been collected and analysed under Victorian law or of data which does not meet the standards of analysis achieved by Victoria's NATA-accredited laboratory. It could also arise if the profiles of Victorians are used in other jurisdictions in ways not authorised at the time of collection under Victorian law.<sup>161</sup>

6.2.4 The use of a profile in jurisdictions other than those in which the profile was obtained can be regulated by provisions such as s.23YUD(2) of Part 1D:

'Information that is transmitted under this section must not be recorded, or maintained in any database of information that may be used to discover the identity of a person or to obtain information about an identifiable person at any time after this Part or a corresponding law of a participating jurisdiction requires the forensic material to which it relates to be destroyed.'

6.2.5 A submission to the ALRC argued for an alternative approach to information sharing based on an 'expansion' of this provision.<sup>162</sup> It could also be applied to the transmission of information from one State to another if the prohibition were recognised in the law of the receiving State.<sup>163</sup>

6.2.6 However, if this approach were extended to limit the information that could be shared, the resulting complexities could make the system unworkable. This risk was recognised by the ALRC in its consideration of the option of 'mutual recognition' as an alternative to agreed national standards. Under this approach, 'each jurisdiction would be required to enact laws requiring its investigators to obey the matching, destruction, access and disclosure rules of the jurisdiction where those profiles were originally obtained. The administrators of any cross-jurisdictional database—including the NCIDD system—would apply the jurisdictional rules on retention and disclosure applicable to each profile and could only compare profiles from two different jurisdictions if permitted to do so by the laws of both jurisdictions.'<sup>164</sup>

6.2.7 For these reasons, the ALRC favoured an approach based on agreed minimum standards as reflected in its recommendation 40-1 (above) and saw it as 'especially important in light of the lack of co-ordinated, independent oversight of DNA database systems established for law enforcement.'<sup>165</sup>

6.2.8 The ALRC also noted that serious policy issues lay behind the position taken by the Northern Territory:

'The Northern Territory remains unwilling to amend its forensic procedures legislation to bring it into greater conformity with the Model Bill. In a press release

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<sup>161</sup> *ibid.* p.463

<sup>162</sup> ALRC/AHEC Report, p.998

<sup>163</sup> *ibid.*, p.1000

<sup>164</sup> *ibid.*, p.998

<sup>165</sup> *ibid.*, p.1000

prior to the Australasian Police Ministers Council (AMPC) conference in November 2002, the Northern Territory's Acting Police Minister, Syd Stirling, commented:

“If the NT was to move towards this national ‘model’, it would significantly reduce the capacity of NT Police to use DNA as a crime fighting tool. I will be taking the Territory’s position to the Police Minister’s Conference and calling on all jurisdictions to make greater use of DNA as a modern crime fighting tool.”<sup>166</sup>

6.2.9 The ALRC noted that ‘New South Wales, Western Australia and South Australia have each entered into ministerial agreements for the sharing of information with the Northern Territory, despite significant variations between them. The Inquiry understands that New South Wales and South Australia entered into these agreements in the context of a criminal investigation into the presumed murder of British tourist, Peter Falconio, in the Northern Territory in 2001.’<sup>167</sup>

6.2.10 The ALRC considered that ‘variations in forensic procedures legislation may tend to result in a ‘lowest-common-denominator’ approach. Where a sample or profile is transferred from a jurisdiction with strong privacy and civil liberties protections to a jurisdiction with lesser protections, the safeguards applying in the first jurisdiction could be undermined. For example, where a person in the first jurisdiction volunteers for a forensic procedure for ‘limited purposes’, that persons’ sample or profile should not be subjected to use for other purposes in any jurisdiction to which it is legitimately transferred.’<sup>168</sup>

6.2.11 Variations in index matching rules can also give rise to problems. In a submission to the ALRC/AHEC Review, National Legal Aid commented:

‘Because of the variations in indexes and permissible matching, there are numerous types of matching which are lawful in some jurisdictions but not in others. With the confusion arising from such a situation there is a real risk that a match will be made which is not permitted under the law of the relevant jurisdiction.’<sup>169</sup>

6.2.12 The ALRC considered that publication of Ministerial agreements, (rec 40-4 above) would assist in achieving greater transparency in the sharing of information.

6.2.13 The Victorian Review also listed other matters that had been specified in the Queensland Explanatory Memorandum to its amending legislation in 2003. It was said that these matters had been ‘identified by the Commonwealth as requiring legislative amendment before the Commonwealth would recognise Queensland as having a “corresponding law”’:

- a matching table relating to inter-jurisdictional DNA profile comparisons;

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<sup>166</sup> *ibid.*, p.993

<sup>167</sup> *ibid.*, p.994; see also at p.999

<sup>168</sup> *ibid.*, p.994

<sup>169</sup> *ibid.*, p.996

- specific offences for the misuse of DNA information and material and for unlawful matching;
- provisions to expressly permit the retention and use of DNA material or information obtained under the law of another Australian jurisdiction;
- the recognition of sampling orders by a magistrate of another jurisdiction.

6.2.14 These four requirements define the elements of the DNA database system: the indices on the database, the inter-jurisdictional enforcement and sharing provisions, and controls over the use of the material and information obtained.<sup>170</sup>

6.2.15 The Victorian Review observes that the ‘national minimum standards’ approach is similar to the approach in the US:

‘The notion of national minimum standards is similar to the US approach to datasharing. Individual jurisdictions collect, use and retain whatever DNA material their legislatures authorise, and individual differences are ‘ironed out’ by the use of only agreed indices on the national database: the crime scene index, the missing/unidentified persons index and the offenders’ index. For example, even if a state jurisdiction permits the sampling of suspects as well as convicted offenders, that state will only enter the post-conviction profiles on the national database.’<sup>171</sup>

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<sup>170</sup> Victorian Review, p.454

<sup>171</sup> *ibid.*, p.455

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

### **7.1 The Information Privacy Principles**

7.1.1 On the basis that ‘a DNA profile contains a set of numbers and a sex gene which, when combined with information held by the forensic laboratory, is capable of identifying the individual from whom the profile was obtained,’ the ALRC considered ‘that DNA profiles fall within the definition of ‘personal information’, being information about an individual whose identity can reasonably be ascertained from the information.’<sup>172</sup> As a Commonwealth agency, CrimTrac is bound by the Information Privacy Principles (IPP’s)<sup>173</sup>, which are set out in the *Privacy Act 1988* and summarised in plain English by the Privacy Commissioner as follows<sup>174</sup>:

#### **IPP 1: manner and purpose of collection**

The information must be necessary for the agency's work, and collected fairly and lawfully.

#### **IPP 2: collecting information directly from individuals**

An agency must take steps to tell individuals why they are collecting personal information, what laws give them authority to collect it, and to whom they usually disclose it. This is often done by what is called an IPP 2 notice.

#### **IPP 3: collecting information generally**

An agency must take steps to ensure the personal information it collects is relevant, up-to-date and complete and not collected in an unreasonably intrusive way.

#### **IPP 4: storage and security**

Personal information must be stored securely to prevent its loss or misuse.

#### **IPPs 5 - 7: access and amendment**

These principles require agencies to take steps to record the type of personal information that they hold and to give individuals access to personal information about them. Personal information can be amended or corrected if it is wrong.

#### **IPPs 8 - 10: information use**

These principles outline the rules about keeping accurate, complete and up-to-date personal information; using information for a relevant purpose; and only using the information for another purpose in special circumstances, such as with the individual's consent or for some health and safety or law enforcement reasons.

#### **IPP 11: disclosure**

This principle sets out when an agency may disclose personal information to someone else, for example another agency. This can only be done in special circumstances, such as with the individual's consent or for some health and safety or law enforcement reasons.

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<sup>172</sup> ALRC/AHEC Report, p.1073

<sup>173</sup> *ibid.*, p.1081,1082

<sup>174</sup> <http://www.privacy.gov.au/materials/types/law/view/6892>

7.1.2 For present purposes, the most important principle is that information should only be used for the purpose for which it was collected or for another purpose that is within the limitations imposed by the Privacy Principles. Some other purposes are specified in Part 1D itself. In summary, access is authorised for a ‘permitted purpose’ to information stored on the Commonwealth DNA database system or NCIDD for forensic comparison under the Part itself or under a State or Territory law relating to forensic procedures, for ‘permissible matching’ of DNA profiles and for certain disclosures<sup>175</sup>.

7.1.3 The ALRC/AHEC Report recommended an extension to the coverage of the provisions limiting use and disclosure:<sup>176</sup>

41-9 The Commonwealth should amend the Crimes Act so that the provisions limiting use and disclosure of information held on a DNA database system also apply to forensic material.

7.1.4 Noting that the intention of the Commonwealth Parliament and of the framers of the Model Bill appeared to have been that the legislative framework ‘should provide the sole authority for the collection of genetic samples’ for forensic analysis,<sup>177</sup> the ALRC/AHEC Report also recommended;<sup>178</sup>

41-13 The Commonwealth should amend the Crimes Act to provide that, with the exception of crime scene samples, law enforcement officers may collect genetic samples only from: (a) the individual concerned, pursuant to Part 1D; or (b) a stored sample, with the consent of the individual concerned (or someone authorised to consent on his or her behalf), or pursuant to a court order.

7.1.5 The ALRC/AHEC Report observed that, while one approach is to rely on the existing provisions regarding admissibility of evidence, ‘this would not provide sufficient safeguard against the informal collection of genetic samples. In practice, the police could obtain a suspect’s cigarette butt and have the sample analysed and compared with a crime scene sample. If the person is excluded as a suspect, or if the person is implicated but a formal sample is subsequently taken pursuant to the *Crimes Act* provisions, the admissibility of the covertly obtained sample would not arise as an issue in court proceedings.’ For that reason it considered that ‘there is a public interest in ensuring that Part 1D of the *Crimes Act* is not undermined by the use of informal means to collect genetic samples for law enforcement purposes. The Australian community has a right to expect that the private and sensitive information contained within their genetic samples is used only as specifically permitted by legislation or other court authority.’<sup>179</sup>

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<sup>175</sup> ss.23YUG, 23YUH and 23YUI

<sup>176</sup> ALRC/AHEC Report, p. 74; 1026-1038

<sup>177</sup> *ibid.* p. 1051

<sup>178</sup> *ibid.* pp. 74, 1053

<sup>179</sup> *ibid.* p.1052

7.1.6 The Sherman Review also considered this issue on the basis of an ALRC/AHEC Discussion Paper but pointed to a lack of Commonwealth constitutional power to regulate ‘off database’ matching relating to State or Territory offences or any bilateral arrangements between the States. It acknowledged that it ‘might be possible to control off database matching by a combination of Commonwealth, State and Territory legislation’ but commented that ‘reaching agreement might be a protracted process.’ It concluded that the real solution might lie in ‘market forces’ and observed that ‘if the participating jurisdictions see value in the national database they will use it and there will be no incentive to rely on off database matching.’<sup>180</sup>

7.1.7 The Victorian Review took account of the ALRC/AHEC recommendation but concluded that the current admissibility rules applying to criminal proceedings offer the scope to exclude evidence obtained covertly and that a ‘specific prohibition on the collection of covert DNA samples is not required at this stage.’<sup>181</sup> It considered Victorian legislation against the following ‘ethical principles’, each of which deals with a privacy issue:

- the uses of the sample and information should be clearly stated when the original authority (consent or court order) for collection of the sample is sought;
- use of personal samples and information should be restricted to those for which authority is given at the time of collection; and
- the retention of the sample and information should be limited to that required for the authorised use to be achieved.’<sup>182</sup>

7.1.8 The Victorian Review recommended that the Victorian Act be amended to insert a ‘purpose clause’, to prevent the use of DNA samples and profiles obtained pursuant to its provisions for purposes other than forensic purposes in criminal investigations<sup>183</sup>. It also recommended that the Act ‘be amended to provide that the profile obtained from a volunteer shall only be matched against the profile for the crime scene and shall be stored on the volunteers (limited purpose) index’<sup>184</sup>.

7.1.9 In other respects, the Victorian Review drew a clear distinction between ‘samples’ and ‘profiles’:

‘It is important to distinguish between the DNA sample and the DNA profile because they are stored, analysed, used, transferred and destroyed in entirely different ways. The DNA sample has a greater potential to divulge personal information. The profile, while not capable of revealing personal information, can be more easily disclosed and re-used. While the current provisions of the *Crimes*

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<sup>180</sup> Sherman Report, p.52; this issue is also discussed in Chapter 3 (3.11 – Admissibility of evidence)

<sup>181</sup> Victorian Review p.320

<sup>182</sup> *ibid.*, p.117

<sup>183</sup> *ibid.* Rec. 4.2, p.127

<sup>184</sup> *ibid.* Rec. 7.3, p.269

*Act* permit different treatment of the sample, the profile and related information, this Inquiry believes that the current provisions fail to take account of the quite different potential of the sample and profile.<sup>185</sup>

7.1.10 On this basis, it recommended that a sample obtained for reference purposes must be destroyed as soon as soon as practicable after a forensic profile has been obtained from it.<sup>186</sup> However, the WA Review recommended that ‘subject to sensible weeding rules, crime scene samples, and associated reference samples, be kept in safe custody indefinitely.’<sup>187</sup> By ‘weeding rules’ it meant ‘rules to accommodate the fact that at some time no useful forensic purpose remains to expending resources on the retention of particular samples.’

7.1.11 In England, Wales and Northern Ireland, DNA samples have, until recently, been stored on the assumption that they could be held indefinitely. In 2008, the European Court of Human Rights ruled that the National DNA Database in England and Wales was illegal because it because it allowed the indefinite retention of profiles of people who had been arrested but never charged or convicted and on 11 November, 2009, it was reported that the Home Office has announced that ‘the DNA of most innocent people... will not be kept for more than 6 years.’<sup>188</sup> The exceptions comprise or include terrorism suspects.

7.1.12 The WA Review considered a submission from WA Police that the legislation should be amended to specifically authorise ‘familial searching’ of databases. The term was explained as ‘searching a DNA database for blood relatives in cases where a search has failed to find an exact match in a crime scene sample’.<sup>189</sup> The purpose is to develop a new line of inquiry by interviewing the relatives of an unknown suspect in the hope that this may lead to the offender. The review found that this was not prohibited by the Act but considered that there were serious privacy implications and that guidelines should be developed to regulate the conduct of such searches.

7.1.13 A further privacy issue, recognised in all three State reviews and in some legislation, is that of the regulation of the collection and use of ‘elimination samples’ provided by police or other persons who collect or handle DNA samples. The significance of this issue is underlined by the reported reluctance of the police themselves to provide samples for this purpose.<sup>190</sup>

7.1.14 The Sherman Review expressed some concern at the possibility for ‘function creep’ in genetic testing.<sup>191</sup> It noted in particular that ‘as it is presently structured, the CrimTrac system does not contain particulars of a person’s identity so that further uses of the system may be constrained. But this is an administrative restraint and administrative systems (including computer systems) can always be changed. The Review considers the

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<sup>185</sup> Victorian Review, p.123

<sup>186</sup> *ibid.*, pp. 130-132

<sup>187</sup> WA Review, p.141; see also reference to this recommendation in the discussion in Chapter 3 (3.10)

<sup>188</sup> [http://news.bbc.co.uk/2/hi/uk\\_news/politics/8354850.stm](http://news.bbc.co.uk/2/hi/uk_news/politics/8354850.stm)

<sup>189</sup> WA Review, p. 95

<sup>190</sup> See e.g. Victorian Review, Rec. 9.4, p. 328; WA Review, Rec. 16, p.110

<sup>191</sup> The Sherman Report paras 7.13 – 7.26

issue as so important that specific legislative constraints should be placed on the use of DNA material for other than assisting in the identification of those who commit crimes.<sup>192</sup>

7.1.15 It also noted that:

The United Kingdom's Forensic Science Service (FSS) is conducting research directed toward identifying commonplace characteristics from bodily samples – such as sex, race, skin/hair/eye colour, stature, weight, age and facial characteristics, and perhaps even behavioural traits – so that in future crime scene samples could be analysed to create a “genetic photo-fit” of an offender for use in criminal investigations.<sup>193</sup>

7.1.16 On this matter, it observed that ‘(a)t the time of parliamentary passage of Part 1D, such advances were not contemplated. Hence the legislation is silent on the issue of how a DNA sample collected under the legislation can be analysed.’<sup>194</sup>

***Sherman Recommendation No 23***

***The Review recommends that Part 1D should be amended to specifically exclude testing of DNA for the purpose of detecting phenotypically expressed information including health or medical conditions.***

***Q.30 Do you have any comments on Sherman Recommendation 23 or on any other privacy issues?***

7.1.17 The Sherman Review noted that an issue related to function creep is the possible use of Guthrie Cards<sup>195</sup> for law enforcement purposes. It considered that the issues went beyond its terms of reference but observed that ‘it seems to the Review that there is something fundamentally wrong with allowing law enforcement agencies unfettered access to databases or samples which were never intended to be used for law enforcement purposes, particularly when samples come from newborns who have no power over the use to which the sample may be put.’<sup>196</sup>

7.1.18 To address this concern, it recommended:

***Sherman Recommendation No 24***

***The Review recommends that Part 1D should contain a provision prohibiting linking the matching outside any database which is not regulated by statute for law enforcement purposes.***

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<sup>192</sup> The Sherman Report para 7.18

<sup>193</sup> ALRC/AHEC Discussion Paper, para 36.73; discussed in para. 7.19 of the Sherman Report.

<sup>194</sup> The Sherman Report, para 7.20

<sup>195</sup> The following definition is given in Appendix G to the Sherman Report:

The cards on which blood samples are preserved from Guthrie Tests (MD: a blood test in newborn babies to detect phenylketonuria, a congenital metabolic disease resulting in mental retardation).

<sup>196</sup> The Sherman Report, para 7.31

7.1.19 The ALRC/AHEC also discussed Australia's various regulatory frameworks for collecting, storing, accessing and destroying newborn screening cards (often referred to as 'Guthrie cards'), including access for law enforcement purposes and recommended that 'the Australian Health Ministers' Advisory Council, in consultation with the state and territory Attorney-General's Departments and police services, should develop nationally consistent rules governing disclosure, for law enforcement purposes, of newborn screening cards, pathology samples, banked tissue and other genetic samples.'<sup>197</sup>

7.1.20 Other instances of forensic procedures being conducted without appropriate authorisation have also been noted. In 2006, the NSW Ombudsman reported:

'Police sometimes take covert DNA samples, by retrieving discarded items like cigarette butts or tissues, or through some other investigative procedure, like a random breath test. The Act does not specifically prohibit police from taking covert DNA samples, and this kind of conduct is essentially unregulated. However, a court may find the evidence inadmissible, if it has been obtained improperly. We do not know how often police are submitting covert DNA samples for analysis, or the circumstances in which covert samples are being taken. In our view, this issue should be specifically considered by Parliament.'<sup>198</sup>

7.1.21 The NSW Ombudsman recommended legislative amendment to require NSW Police to include information about covert DNA sampling, forensic procedures conducted by force and DNA analysis in its Annual Report.

### ***Q.31 Do you have any comments on Sherman Recommendation 24?***

## **7.2 Use of force**

7.2.1 A person who is authorised to carry out a forensic procedure may use reasonable force to enable the procedure to be carried out or to prevent loss, destruction or contamination of a sample provided the procedure is carried out in a manner consistent with appropriate medical or other professional standards and is not carried out in a cruel, inhuman or degrading manner.<sup>199</sup>

7.2.2 The use of force to acquire forensic samples from individuals was discussed in the Sherman Review in terms of privacy and civil liberties and of the provisions of Part 1D. It was noted that the legislation 'does not authorise the use of force on prisoners but it does in relation to suspects.'<sup>200</sup> The review commented:

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<sup>197</sup> ALRC/AHEC Report, p.524, Rec. 19-1

<sup>198</sup> NSW Ombudsman's Report, Executive Summary, p.iv

<sup>199</sup> ss. 23XJ and 23XK

<sup>200</sup> The Sherman Report para 7.9

‘7.12 In the case of the AFP operating under Part 1D the current arrangements seem appropriate. What constitutes a reasonable and proportional use of force is a matter regulated by the common law. The Commissioner’s Orders seem an appropriate mechanism to guide the police. This is a matter which can be kept under review.’

7.2.3 In 2006, the NSW Ombudsman reported that police rarely use force to conduct forensic procedures.<sup>201</sup>

Similarly, in Victoria, it appears that force is rarely used:

‘Where DNA sampling is conducted with the donor’s consent, issues of compliance are unlikely to arise. Where a procedure is authorised by court order, the order permits the use of reasonable force to obtain the required sample. The Inquiry was informed that the use of force has rarely been required in the Victorian DNA sampling program. As noted in Chapter 5, reasonable force was required in only four instances over the past five years.’<sup>202</sup>

***Q.32 Do you have any views on the need for legislation to regulate the use of force?***

**7.3 Other privacy and civil liberties issues**

7.3.1 The ALRC/AHEC Report noted suggestions ‘that DNA sampling involves intrusion into three forms of individual privacy: bodily privacy, where the sample is taken from a person’s body; genetic privacy, where predictive health and other information about the person is obtained from the sample; and behavioural privacy, where the information is used to determine where a person has been and what they have done. DNA sampling may also impinge on familial privacy where information obtained from one person’s sample provides information regarding his or her relatives.’<sup>203</sup>

7.3.2 In outlining the background to its inquiry, the Victorian Review noted that its focus should be ‘not only on what is permitted under the current laws but also the extent to which DNA sampling is, or could be, used.’<sup>204</sup> It observed that ‘the procedures developed for determining when forensic samples can be taken reflect the operation of certain fundamental principles of criminal justice: the privilege against self-incrimination, the right to silence and procedural fairness. The provisions governing the presentation and evaluation of DNA evidence are based on the requirement that guilt be proven beyond reasonable doubt, and on the general rules that apply to evidence in criminal proceedings.’<sup>205</sup>

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<sup>201</sup> NSW Ombudsman Report, Executive Summary, p.v

<sup>202</sup> Victorian Review, p.156; the discussion in Ch.5 covers some differences of view expressed in submissions about the discretion that should be permitted (pp.205-206).

<sup>203</sup> ALRC/AHEC Report, p.976

<sup>204</sup> Victorian Review p.53.

<sup>205</sup> *ibid.*p.54

7.3.3 The NSW Review considered a number of other issues relating to the ‘balance between the rights of the individual sample provider and appropriate law enforcement bodies’,<sup>206</sup> in particular:

- a critique of the consent provisions in the NSW legislation as illusory since the Act provides for several processes by which a forensic procedure may be carried out without consent;
- whether the protections that are provided to suspects and offenders should be extended to volunteers;
- additional protection for vulnerable persons;
- effect of withdrawal of consent;
- best practice in relation to sampling populations;
- treatment of forensic evidence before the courts;
- mass testing of volunteers;
- integrity of databases;
- data protection and dissemination;
- ownership of genetic material and management of profiles;
- misuse by third parties;
- independent analysis;
- deeming provisions;
- innocence panels;
- accountability frameworks; and
- regulated police powers.

7.3.4 Some of these issues are dealt with elsewhere in the Sherman Review. For present purposes, the following recommendations of the NSW Review, each of which responds to earlier recommendations of the Review of the *Crimes (Forensic Procedures) Act 2000* by the Legislative Council Standing Committee on Law and Justice, are relevant:

- prohibit testing on suspects unless evidence producing a profile is found at the crime scene or on the victim;<sup>207</sup>
- ensure no new offences are prescribed for DNA testing at least until experience with current offences is thoroughly reviewed;<sup>208</sup> and
- remove delegated legislation provisions.<sup>209</sup>

7.3.5 The NSW Ombudsman’s Report identified the following areas as the principal ones upon which concerns had been expressed by legal practitioners, academics, members of Parliament and the media<sup>210</sup>:

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<sup>206</sup> NSW Review, ch.4

<sup>207</sup> *ibid.*, pp.144 - 146

<sup>208</sup> *ibid.*, p.146

<sup>209</sup> *ibid.*, p.146

- the invasiveness of DNA sampling;
- protection of genetic information;
- contamination risks;
- perceived lack of independence of forensic service providers;
- security issues;
- use of DNA evidence in court proceedings;
- inadequacy of legislative safeguards;
- erosion of long established rights; and
- complexity of the legislation.

7.3.6 The balancing of law enforcement interests with privacy and civil liberties can be represented in tabular form where the options that grant police the maximum power to obtain DNA samples are at the left end of the spectrum and the options that would produce the most restrictive regime for the conduct of the forensic procedures and the use of samples are at the right. (This way of presenting the issues is adapted from the Victorian Review at pp.88-91)

<b>Law Enforcement powers</b>	<b>Donors' interests</b>	
<i>Authority to conduct Forensic Procedures</i>		
Police powers	Court orders for vulnerable individuals/intimate procedures	Court orders
<i>Offences for which DNA sampling can be undertaken</i>		
All summary & indictable offences	Indictable offences	Serious indictable offences
<i>Who can be sampled: Volunteers, Suspects and Offenders</i>		
Volunteer Not under suspicion	Suspect under suspicion charged/arrested	Offender guilty of serious Offence
<i>Retention and use of DNA evidence</i>		
Unlimited database Searches	Specified database searches	Donor's right to specify/not loaded On database
Retained on Database indefinitely	Retained on database for fixed period during	Destroyed after acquittal/

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<sup>210</sup> NSW Ombudsman's Report, pp. 19,20

Investigation

elimination

*Admissibility of DNA Evidence*

Judicial discretion

Inadmissible for certain breaches

Evidence inadmissible

7.3.7 Some issues can also arise from the nature of the processes that are involved. For example, the Victorian Review noted that:

‘..... the more sensitive the extraction method is, the higher the risk of contamination. The exhibits need to be handled with great care, but the investigator may not even be aware of, or able to detect their forensic potential. A sensitive process will also reveal mixtures of DNA from multiple sources, complicating the analysis of the profile.’<sup>211</sup>

7.3.8 The Victorian Review also noted the possibility of coincidental matches:

‘It is possible, but exceedingly rare, for a coincidental match to be discovered. One such match occurred in the United Kingdom:

An incorrect match was made between a DNA sample found at a burglary scene and an innocent suspect whose DNA profile had been stored on the national database. The incorrect match was said to have a probability of one in 37 million.

As far as could be ascertained, there have been no Australian cases where a match used in evidence in criminal proceedings has ultimately been found to have been a coincidental match.’<sup>212</sup>

7.3.9 The importance of privacy issues is highlighted by the reluctance of the police themselves to provide their own DNA samples for the purposes of elimination from investigations. In this connection, the NSW Division of Analytical Laboratories has commented that:

‘...if the police do not want to have a profile on a police elimination DNA database, they should not be involved in the collection, examination, and investigation of crimes scene samples. Their reluctance to provide reference samples has resulted in the very thing they have wanted to avoid – namely, their profiles being placed onto the crime scene DNA database.’<sup>213</sup>

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<sup>211</sup> Victorian Review, p. 99

<sup>212</sup> Victorian Review, p.108

<sup>213</sup> NSW Ombudsman Report, p.238

7.3.10 The Victorian Review regarded ‘the sampling of Victoria Police members who have access through the course of their duties to DNA crime scene and reference samples as integral to the management of contamination protocols’<sup>214</sup> and recommended:

‘That police members be required to provide a DNA reference sample for elimination purposes, and that the profiles obtained be stored along with profiles of Victoria Forensic Science Centre laboratory staff, on the internal VFSC staff elimination database.’<sup>215</sup>

7.3.11 The WA Review concluded that the existing provisions on elimination databases for police and forensic workers were not utilised and were probably unworkable and should be replaced with provisions requiring the establishment of a ‘special elimination database for police officers and police staff and other people working with or for police (including private contractors), whose duties may involve a risk of contamination of crime scenes or evidence.’<sup>216</sup> The reason the provisions were considered to be probably unworkable lay in the conflict between a compulsory collection regime and provisions allowing individual police officers to limit the purposes for which their samples might be used.

***Q. 33 Do you have any comments on any of these privacy or civil liberties issues?***

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<sup>214</sup> Victorian Review, p.327

<sup>215</sup> *ibid.*, Rec. 9.4, p.328

<sup>216</sup> WA Review, pp. 99-110

## 8. IMPLEMENTATION OF THE SHERMAN RECOMMENDATIONS

8.1 The central relevance of the Sherman Recommendations to this review is underlined by s.23YV(5) in Part 1D, which requires the current review ‘to ascertain whether the inadequacies [identified in the Sherman Review] have been effectively dealt with.’ Even in the absence of this provision, the Sherman Review would be central to any inquiry carried out at this time but the provision puts the matter beyond doubt.

8.2 In discussing implementation issues, the Sherman Report says:<sup>217</sup>

‘8.3 The Review wishes to make some brief comments regarding the implementation of these recommendations. All the recommendations build upon existing mechanisms.

8.4 The Recommendations call for action by the Commonwealth, by other participating jurisdictions, as well as by agencies within those jurisdictions.

8.5 In the case of the Commonwealth there will be a facilitating and coordinating role to ensure that the national DNA database system is established and operating effectively. It would be regrettable if the future review were not able to report substantial progress in this area.

8.6 The benefits of a fully operating national scheme to Australian law enforcement should be sufficient incentive to redouble efforts to have the scheme fully functional.

8.7 In the case of the Commonwealth the recommendations also call for action by both the AFP and CrimTrac. In both cases the Minister has the legal capacity to ensure that recommendations are implemented and in the case of CrimTrac that capacity applies quite apart from the functions of the CrimTrac Board because the CEO of CrimTrac is accountable to the Minister both in a constitutional sense, as well as by virtue of CrimTrac’s designation as an executive agency pursuant to section 66 of the *Public Service Act 1999*.

8.8 However, it is also important to note that it is highly desirable that there be consensus amongst ministers to implement the recommendations because it will assist the momentum for change and ensure that implementation is consistent.

8.9 A number of the recommendations refer to joint action by relevant accountability bodies. The Review considers that the national meetings of Ombudsman are best placed to co-ordinate this work and involve other relevant accountability bodies as appropriate.’

### ***Q.34 Do you have any comments on these observations of the Sherman Review?***

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<sup>217</sup> The Sherman Report, paras 8.3 – 8.9