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Privacy
Foundation**

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**SUBMISSION TO THE FURTHER REVIEW OF
PART 1D (FORENSIC PROCEDURES) OF THE
*CRIMES ACT 1914***

Forensic use of DNA

[http://www.ag.gov.au/www/agd/agd.nsf/Page/Consultations_reforms_and_reviewsReview_of_P
art_1D_of_the_Crimes_Act_1914](http://www.ag.gov.au/www/agd/agd.nsf/Page/Consultations_reforms_and_reviewsReview_of_Part_1D_of_the_Crimes_Act_1914)

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The Australian Privacy Foundation

The Australian Privacy Foundation is the main non-governmental organisation dedicated to protecting the privacy rights of Australians. The Foundation aims to focus public attention on emerging issues which pose a threat to the freedom and privacy of Australians. Since 1987, the Foundation has led the defence of the right of individuals to control their personal information and to be free of excessive intrusions. The Foundation uses the Australian Privacy Charter as a benchmark against which laws, regulations and privacy invasive initiatives can be assessed. For further information about the Foundation and the Charter, see www.privacy.org.au

Introduction

The Australian Privacy Foundation¹ welcomes the opportunity to make a submission to this review, as it did to the 2003 Sherman Review and on the original legislation establishing Part 1D. Unfortunately, once again, our limited all-volunteer resources have not allowed us to prepare as comprehensive a submission as we would have liked, and which the subject deserves.

We note that the Office of the Privacy Commissioner (OPC) is represented on the review Committee and expect that OPC (and the Ombudsman) will raise many of the issues which will be of concern to us.

We congratulate the Review on a comprehensive and well presented Discussion Paper which has made it much easier to respond to the terms of reference. Our submission follows the structure of those ToR and of the Discussion Paper, with general comments on each Part followed by our answers to the specific questions posed. We are happy for our submission to be published and hope that the Review will publish all submissions received unless there are very good reasons for confidentiality.

We note that the review is taking place because of the requirement in s23YV(5) to address inadequacies found by the Sherman Review. Given that it is nearly 7 years since that Review, and 9 years since the enactment of Part1D, it is to be sincerely hoped that all inadequacies identified in 2003 have been remedied and that no new ones have appeared. However, the fact that the finding of inadequacies triggered this further review should not in our view limit the Review Committee's focus – the terms of reference invite re-consideration, in the light of experience, of *all* of the matters considered in the original Sherman Review.

The DNA testing and database regime involving all Australian jurisdictions (the DNA regime) involves a high level of intrusion – both into bodily privacy and in information privacy terms, and we continue to ask whether this intrusion is justified by the 'results' in terms of its contribution to law enforcement. We urge the Review Committee to approach its terms of reference broadly in this respect, and to write its report in a way that publicly demonstrates and

¹ See <http://www.privacy.org.au/>

substantiates the need for the regime as well as its effectiveness and the adequacy of its governance and safeguards.

It may well be that in light of the experience of the last 9 years and the changing operational environment of law enforcement, the review can identify aspects of the regime that could be amended, and we urge the Committee to consider in particular whether the regime can be made less privacy intrusive without significantly compromising its effectiveness. This is particularly relevant to the issue of sample retention and samples from volunteers, witnesses etc, as opposed to those from suspects or convicted criminals.

We again draw attention to the Privacy Commissioner's proposed framework for assessment of new initiatives in law enforcement and crime prevention to achieve an appropriate and balanced privacy response². To the extent that elements of this framework are not already included in the accountability arrangements for the DNA regime, they should be, and we urge the Review to recommend this.

We urge the Review to recommend incorporation in the DNA regime of all the accountability elements from the Privacy Commissioner's Framework for new initiatives in law enforcement and crime prevention.

We would like to draw the Review Committee's attention to some valuable overseas resources. The American Civil Liberties Union (ACLU) has had a project on Forensic DNA Databanks which has a wealth of information and analysis up until 2007 - <http://www.aclu.org/technology-and-liberty/forensic-dna-databanks> . We are advised that the project has continued and that more detailed materials may be available soon, including 'model testimony' for use in reviews of forensic DNA legislation and practice in US jurisdictions.

We note in particular one main theme of the ACLU work which is to challenge the cost-effectiveness of forensic DNA use, and the opportunity cost of it compared to other arguably more productive uses of limited law enforcement resources. While cost-effectiveness and efficiency are not expressly part of this Review's terms of reference, we submit that you cannot complete your task without addressing this issue.

Operation and Effectiveness of Part 1D (terms of reference (a) and (b))

General comments

We are limited in our ability to make submissions on these aspects by the scarcity of publicly available information on the operation of the testing regime and CRIMTRAC's management of the DNA database. We hope that the review will be provided with detailed information that will allow you to make an assessment of the effectiveness of the regime, to be balanced against its intrusiveness.

² see OPC Background Paper for the Sherman Review

We request that the Review publishes operational information about the Part 1D regime including consolidated statistics about the number and type of tests and samples, and details of the contribution that they have made to law enforcement, (from all participating jurisdictions) so that the community can have confidence in the balance that has been struck between intrusion and privacy.

Q.1 Effectiveness of the DNA Database system

We have no basis for providing a substantive answer to this question, but we support the suggestion (which we hope will become a recommendation) that a further review with the same terms of reference will be necessary in light of operational experience since commencement of the national database in April 2009.

Q.2 Complexity

The complexity of the legislation and of the intersecting federal and state legislation is in no-one's interests. To the extent that complexity is proving a barrier to use of DNA information for forensic purposes, there may be some incidental, if unintended, reduction in privacy intrusion. However, this is not a sensible privacy safeguard – we would prefer to see greater simplicity and consistency, provided it is not achieved by 'levelling down' privacy safeguards and accountability to a common 'floor'. Any simplification must ensure that safeguards are levelled up to a common ceiling.

Q.3 Statistics

We support the need for answers to this question – comparative statistics are an essential input to the review.

Q.4 Operational evidence

It is essential that any criticism of the legislation in terms of it hindering law enforcement is based on sound evidence or argument rather than mere assertions of 'difficulties'.

Q.5 Informed consent process

On the basis of the information in the Discussion Paper, we conclude that the notice provisions need not in practice be too onerous, and there is certainly insufficient operational evidence to support the view that they need to be significantly cut back. We strongly support 'plain english' notices, and suggest that one 'solution' to perceived problems is to provide notice in writing with a requirement for sufficient time for the individual to read and consider it in an unpressured environment – it is difficult to see many circumstances in which the process of obtaining samples would need to be rushed.

We have a longstanding general view that it is not appropriate to use 'consent' spuriously when an individual in practice has no choice. To be meaningful, consent must be both informed and

freely given. Where, as in many of the circumstances covered by Part 1D and equivalent provisions in State & Territory laws, the taking of a DNA sample can be mandatory it would be better to make this clear from the start – still with the notice being given but recording the individual's *acknowledgement* of the information, rather than a spurious granting of 'consent'.

As the ALRC-AHEC report pointed out, the legislative provision for collection of DNA from convicted persons and suspects 'with consent' debases the accepted meaning of consent, since in nearly all cases, the authorities are able to insist on compulsory collection if consent is withheld. We agree with the ALRC-AHEC recommendation that the consent provisions for these categories of samples be removed from the legislation.³

Q.6 Form of notice

We support Sherman Recommendation 2 subject to our submission above that notice should be the basis of acknowledgement rather than consent except where the sampling is from genuine volunteers.

Q.7 Victims of crime

It is not clear whether the current system, where victims of crime are not differentiated from other volunteers, satisfies the concerns that led to recommendation 41-5 in the ALRC-AHEC report. We would not want to see victims given any less right to control the use of their DNA samples/profiles than other volunteers (including the right to withdraw consent and have their sample and profile destroyed). If it is necessary to set up a separate 'victims of crime' index to avoid the matching with crime scene index, then we support this (subject to clarification of how victims' samples and profiles can be useful without such matching?)

Q.8 Testing of children

We support Sherman Recommendation 3, subject to our general reservations about the meaning of consent.

Q.9 Voluntary testing

The collection of DNA samples from 'volunteers' is not surprisingly an area of significant concern, for the various reasons canvassed by the earlier reviews and set out in the Discussion Paper.

We commented in submissions in 1999 and again in 2002 that this had the potential over time to generate a DNA database of a large proportion of the community, based on generalised appeals to the 'public spirit' which involve significant community pressure which undermines the claimed 'voluntariness'. We noted the widely recognised risk of other uses of DNA information, with major implications for people's life chances and circumstances, and concluded that it was inappropriate to rely on individual consent as the only safeguard.

³ ALRC Report 96, Recommendation 41-1

Whatever the justification for the use of DNA samples for targeted law enforcement investigations, it should not in our view be permitted to build up a permanent database of DNA information about people who are in no way suspected of any wrongdoing. If it is considered desirable to allow people to volunteer samples to help eliminate suspects (and we do not necessarily accept this case), then these samples, and the resulting profiles, must be destroyed soon after completion of the particular investigation.

We are particularly concerned about the loss of procedural safeguards if individuals who give voluntary samples become ‘suspects’ at a later date. In our view, clear distinctions need to be made between the different categories of ‘volunteers’ – particularly between ‘potential suspects’ and others, with appropriate protocols and safeguards. As a general principle, DNA samples and any derived profiles taken from volunteers in ‘mass screening’ exercises to eliminate individuals must be destroyed or deleted soon after the conclusion of an investigation. They should certainly not become ‘by default’ part of a permanent national database and it is not sufficient to rely on particular volunteers withdrawing consent. The default should be deletion, with strong procedural safeguards for any exceptional retention.

The entire concept of ‘voluntary’ mass screening for elimination purposes is fraught with difficulties. As was extensively debated during the Wee Waa and Bundaberg cases, community pressure can undermine the ‘voluntariness’ of any such exercise, and we doubt if even the safeguards proposed by the Victorian Review would overcome this problem.

We hope that the review will reveal publicly the incidence and extent of any other ‘voluntary’ collections and report on the disposal of samples and profiles in such cases.

We are inclined to support a requirement for a court order for any mass screening programme.

We support the ALRC-AHEC Recommendation 41-4 in Report 96 that separate provision be made either in Part 1D or in Regulations for each category of volunteer who may be subject of forensic DNA procedures. Volunteers should be able to specify a retention period for their forensic material and any information obtained from it (Recommendation 41-12) (see below re destruction).

We submit that there should be a legislative requirement for disposal of both samples and profiles within a certain period of time, with any extensions required for specific operational purposes being approved by an independent – preferably judicial – authority.

We also support the ALRC-AHEC recommendation 41-6 for guidelines for mass screening programs by the police, but these should in our view be binding – preferably in the form of Regulations.

We also support the ALRC-AHEC Recommendation 41-13 to define exclusively the circumstances in which collection of genetic samples is permitted so that informal collection cannot undermine the controls in Part 1D.

Q.10 Buccal swabs

We do not support the re-classifying of voluntary, self administered buccal swabs as ‘non-intimate’ procedures. This would mean fewer procedural safeguards, and encourage greater use of this option. The intimacy derives more from the nature of buccal swab than whether it is self-administered or not – some people may well find it just as degrading or offensive to be effectively required to self-administer as to have the swab carried out by another person.

Q.11 Hair samples

Given the explanation in the paper that to be effective, several growing hairs need to be removed with roots, requiring some degree of physical force and pain, we submit that it cannot accurately be classified as non-intimate. We submit that hair sampling should be reclassified and subject to the same procedural safeguards (and respect for human dignity) as other intimate sampling.

Q.12 Sharing sample with the subject

In principle, this requirement would appear to be an important safeguard, and the NSW Ombudsman’s comment reported in 3.9.2 appears to miss the point. It is not clear how the Sherman Recommendation 4 would offer any advantages or be any simpler. See our comments below about access rights.

Q.13 Innocence testing

‘Innocence testing’ is in our view an important and necessary corollary to the use of DNA samples for law enforcement. The ‘principled’ arguments for this appear to be supported by operational experience of errors, inappropriate charges and wrongful convictions. We strongly support Sherman Recommendation 5 for amendments to provide a firm basis for use of DNA samples for post-conviction reviews.

Q.14 Evidence

We support the ALRC-AHEC Recommendations for judicial and legal education (44-1); a model jury direction (44-2); continuing guidance to forensic scientists and legal practitioners (44-3) and legislative amendment to give defendants pre-trial notice of crime scene samples to allow for independent analysis (44-4).

Q.15 Destruction

Retention limits and a robust destruction programme are essential safeguards, and it is of particular concern that at least in NSW the current statutory obligations have not been met. We support the ALRC-AHEC and Victorian Review recommendations and reject the WA Review preference for indefinite storage.

We support the ALRC-AHEC Recommendation 43-1 that the legislation should provide for destruction of forensic material taken from any suspect (and of information obtained from its

analysis) as soon as possible after the person ceases to be of interest. We support the proposal originally considered by the ALRC-AHEC that destruction of information about suspects should take place no later than 12 months of collection or a period stipulated in an order under s23YD. The legislation should also define destruction of forensic material and information clearly in terms of physical destruction and permanent and irreversible de-identification of profiles (41-10), and should assign clear responsibility for destruction (41-11).

We strongly support Sherman Recommendation 6.

Q.16 Accreditation of laboratories

We strongly support Sherman Recommendation 7.

Qs.17 & 18 Matching

We do not feel there is sufficient information in the Discussion Paper to allow us to answer question 17. In respect of Q.18 (Sherman Recommendation 8), ‘suspect to suspect’ matching sound sensible but we note the Sherman review discussion of ‘multiple identities’ (reported in 3.14.3). We suggest that this raises important issues of identity management which the current review should canvass in a wider context if it is to make any recommendations. Matching of unknown deceased persons profiles would appear uncontroversial, subject to resolution of any technical issues.

Q.19 DNA testing protocols

We do not feel there is sufficient information in the Discussion Paper to allow us to answer question 19 (Sherman Recommendation 9). We would need to know more about the relative advantages and risks of testing of serious offenders being undertaken by police and correctional services respectively, including evidence of their experience to date.

Q.20 Contribution to conviction of suspects

It is of serious concern that many jurisdictions appear not to have kept adequate records to allow this question to be answered. At the very least, they should be required to do so in future, as recommended by the Victorian Review (reported in 4.6). We hope that more empirical evidence is presented to this Review.

Oversight and accountability (terms of reference (c))

General comments

We note that accountability arrangements featured prominently in the parliamentary debates and committee inquiries on the Bill in 1999. The then Minister gave certain assurances which do not all appear to have been implemented – particularly those involving inter-jurisdictional agreements on oversight and accountability. It is not good enough in matters that impinge on

rights and liberties to simply accept the difficulty of achieving inter-governmental co-operation. We repeat our 2002 view that the DNA testing regime and database should not have been allowed to 'go live' until adequate oversight and accountability arrangements were in place. We sincerely hope that the inadequacies identified by the Sherman Review have long since been remedied. If they have not, then a strict deadline must be set and sanctions should be introduced (including ultimately exclusion from the system) for any participating jurisdictions that do not meet the deadline.

We note the discussion of this issue in the ALRC-AHEC Report 96 and support their recommendations 40-1 to 40-4, and 43-3 to 43-5. We assume the Review will have regard to these recommendations and assess the extent to which they remain relevant.

We urge the Review to make recommendations for moving to a consistent and effective system of oversight and accountability within a specified timeframe, as a condition for the continued operation of or participation in the Part 1D regime. As recommended by the ALRC-AHEC report, CRIMTRAC's management committee should be expanded to include independent members and there should be periodic independent audits of all participants in the Part 1D regime.

Q.21 A national accountability framework

There clearly needs to be a better framework. The model suggested by the Sherman Review (reported in 5.1.5) seems like a good foundation.

Qs.22 & 23 Reporting etc

We strongly support Sherman Recommendations 10-13 for better reporting (Recommendation 10 is primarily about public information about the DNA database system and individuals rights, which we also support). We note the comparison drawn in 5.2.1 with the telecommunications interception regime, where public reporting has proved a very valuable accountability device. Published figures and other information in annual reports have been used extensively by APF and other interested parties in successive debates on amendments to telecommunications interception law. Similar requirements should apply to all participants in the forensic DNA testing and database system. The detailed requirements specified in Sherman Recommendations 12 & 13 seem like a good foundation for the DNA-specific information to be included in an enhanced reporting regime.

Qs.24 & 25 Auditing etc

We strongly support Sherman Recommendations 14-19 for improved internal and external auditing and monitoring of all participants in the forensic DNA testing and database system. The Discussion Paper does not comment on whether any or all of the recommendations of the preliminary NCIDD and Crimtrac audit have been carried out (Sherman Recommendation 20). If not this would be evidence of a serious failure by the Commonwealth government, and Crimtrac in particular, to take accountability seriously. We urge this Review to at a minimum

make the same recommendations as the Sherman report in relation to auditing of the NCIDD and other Crimtrac actions.

We submit that this Review should also recommend statutory provision for cross-referral of complaints to ensure that any complaints about the operation of the national forensic DNA system are dealt with as efficiently as possible with the least double-handling.

Disparities in regulatory regimes (terms of reference (d))

General comments

We remain concerned that there are significant disparities in the way in which different jurisdictions have implemented the regime, which was supposed to be a common national standards and safeguards. Once again, recommendations 40-1 to 40-4 of the ALRC Report 96 are relevant.

We urge the Review to identify and address any remaining variations in legislative provisions between jurisdictions and make recommendations to ensure higher minimum standards and greater consistency.

Qs.26 -29 National uniformity

Consistency and uniformity are desirable in principle but must not be used as an excuse for lower standards or lesser safeguards. Compliance with the minimum standards in the model bill, should be a pre-condition for participation in the national system. To the extent that any jurisdiction has imposed higher standards or greater safeguards than the model bill, participation in the national system must not have the effect of undermining or weakening those standards and safeguards, either within the jurisdiction concerned or by allowing other jurisdictions to handle an individual's DNA sample or profile (including in any data sharing) in any way that would be prohibited in the 'source' jurisdiction.

We are not in a position to answer Question 27, but answers from participating jurisdictions will be of great interest.

We acknowledge that there may be political and practical difficulties in obtaining consensus on all issues, we suggest that the Commonwealth is in a strong position to effectively mandate minimum standards and safeguards as a condition of participation in the national system. The Commonwealth should be prepared to show leadership by insisting on these conditions, even if it means that some jurisdictions initially decline to participate fully in the system. We note that this is consistent with the ALRC-AHEC recommendation 40-2 (reported in paragraph 6.1.13).

In response to Q.28, we support Sherman recommendations 21 & 22.

We also strongly support the ALRC-AHEC Recommendation 40-4 (reported in paragraphs 6.1.13 and 6.2.12) for publication of all relevant Ministerial agreements and protocols, in the interests of transparency. We urge this Review to confirm this recommendation.

General privacy and civil liberties concerns (term of reference (e))

General comments

We remain concerned about the potential for ‘function creep’ which was also highlighted in the ALRC-AHEC Report 96⁴.

Qs.30 & 31 Function creep and other privacy issues

The Discussion Paper is disappointing in its analysis of the application of both the existing provisions of the Privacy Act 1988 (Cth) and of the amendments currently being considered by the government. We note that the Privacy Act was amended in 2006⁵ to implement some of the recommendations of the ALRC-AHEC Inquiry, although this is not mentioned in the Discussion Paper (paragraph 7.1.1). These amendments included changes to the definitions of ‘health information’ and ‘sensitive information’ to more clearly cover genetic information. This was a welcome development, but was an amendment directed at health information and its uses, and does not unambiguously confirm that DNA samples and profiles collected and held for the purposes of the Part 1D regime are covered by this definition. The ALRC Privacy report commented on this issue⁶ but made no specific recommendations beyond its earlier (2003) proposals and the recent government response is silent on the issues. We note however the government’s proposed amendment to implement the related ALRC Report 108 recommendation 6-4 concerning biometric information but again, a clear statement as to the position of DNA samples and profiles would be welcome.

We urge the Review to confirm that DNA samples and profiles collected and held for the purposes of the Part 1D regime are information subject to the Privacy Act, and if not, to recommend amendments to effect this.

We support the ALRC Recommendation 43-2 in Report 96 that the definition of ‘DNA database system’ in the Crimes Act be amended to clearly cover all databases, both manual and electronic, containing identifiable DNA profiles maintained for law enforcement purposes.

The government’s October 2009 response to the ALRC Privacy Report 108 expressly addresses genetic information only in relation to health and research, but many of the more general proposed changes (such as the adoption of a set of uniform privacy principles to replace the IPPs) will have a bearing on the use that Commonwealth agencies can make of forensic DNA information. To the extent that Part 1D expressly regulates collection use and disclosure of

⁴ ALRC Report 96, paragraphs 39.59-39.60

⁵ Privacy Legislation Amendment Act 2006, Schedule 2

⁶ ALRC Report 108 (2008) paragraphs 9.74-9.78

forensic DNA information it will ‘trump’ the general privacy principles, but the latter will continue to apply as a minimum standard or ‘floor’. Some analysis of the implications would be useful, and could perhaps be requested from the Office of the Privacy Commissioner.

The Discussion Paper does refer to the ALRC-AHEC recommendations for changes to the Crimes Act to support the application of privacy principles to forensic DNA material (recommendations 41-9 and 41-13, reported in paragraphs 7.1.3 & 7.1.4) but does not pose any specific question relating to these recommendations. We support them, and urge this Review to explore ways of implementing them that overcome the possible constitutional limitations identified by the Sherman Review (mentioned in paragraph 7.1.6).

We note that Western Australian (WA) and South Australia (SA) have yet to enact general information privacy legislation which would provide the same ‘floor’ for their agencies handling of forensic DNA information as the relevant privacy laws do in the other Australian jurisdictions. It would be helpful if this review would recommend the enactment of general privacy legislation in WA and SA to provide this ‘safety net’.

In a submission to the Tasmanian government review of the Tasmanian FOI Act in May 2009, we commented on the exception to the right of access for “information gathered or created for criminal intelligence, such as the ... DNA database” which we assumed would be carried over into the ‘access to personal information’ provisions to be transferred to the Personal Information Protection Act 2004. We were concerned that the inclusion of ‘DNA database’ in this exemption might inhibit individuals’ legitimate right to access DNA information held about them even where it does not relate to suspicion of a crime or a current investigation.

We ask the Review to enquire into the position under the FOI or Privacy laws of all Australian jurisdictions in relation to individuals’ rights of access to and correction of DNA information. The national DNA database held by Crimtrac and with input from all Australian jurisdictions contains DNA information about witnesses and others not suspected of any crime. Even if there is a case for denying access rights to criminals (which we do not accept) such a case could not possibly extend to other third parties. It is essential that this information should be available to the individual concerned. The Review must confirm this fundamental right which is also an important safeguard and accountability device.

We note that the issue of access is bound up with the question of the definition of personal information already addressed above.

We urge the Review to confirm the extent to which individuals have a right of access to information about them held in the national DNA database, and to the extent that they do not, to recommend the maximum possible restitution of this right, subject only to limited exemptions to protect operational law enforcement interests.

We support the recommendation of the Victorian Review concerning destruction of samples and reject the contrary recommendation of the WA Review (both reported in paragraph 7.1.10). We note the reference (in paragraph 7.1.11) to the 2008 European Court judgement in relation to the DNA database in England & Wales, and submit that this judgment confirms an important

fundamental principle which should be incorporated in the Australian legislation. The proposed UK government response to the judgment – to allow retention of profiles of most people arrested but not charged or convicted for six years – is in our view inadequate (and could also be found to be unlawful) and should not therefore be used as a model.

The suggestion from the WA Review of allowing ‘familial searches’ is, as that review found, fraught with privacy issues (reported in paragraph 7.1.12). If it is to be pursued as part of the national system, further discussion of privacy implications and safeguards will be required. In relation to use of ‘elimination samples’ we note the reluctance of police officers themselves to be included (reported in paragraph 7.1.13, and commented on in 7.3.9-7.3.11), and submit that this should give everyone pause for thought. It would be wholly unacceptable for the system, and supporting legislation, to apply a double standard with police themselves being exempt from procedures that they could apply to others.

We note and share the concerns of the Sherman Review in relation to possible ‘function creep’ (reported in paragraphs 7.1.14 and 7.1.17. We support both Sherman recommendation 23 to statutorily limit the secondary use of forensic DNA samples and profiles, and recommendation 24 to limit matching with any other database of DNA information that is outside the regulated scope of Part 1D . The legislation should specifically regulate the covert collection of DNA and resulting information by Commonwealth agencies, and should support conditions of participation in the national system to ensure similar regulation of State and Territory law enforcement authorities.

Q.32 Use of force

Clearly the issue of the use of force, discussed in paragraphs 7.2.1-7.2.3, is highly sensitive. It is both a general civil liberties issue and a privacy issue in relation to ‘bodily privacy’ intrusion as distinct from an information privacy issue (as noted in paragraph 7.3.1). We note that earlier reviews found that force had not been used in many cases, but we hope that this review will obtain more up-to-date evidence. The mere fact that force is used only infrequently should not be used to play down the importance of the issue.

There have been occasional disturbing reports about the non-consensual collection of samples from some prisoners involving major duress. In our 2002 submission, we expressed particular alarm at reports of the Victoria Police obtaining samples from *former* prisoners, involving threats of arrest and further imprisonment.

It is not in our view appropriate for the compulsory collection to be implemented in a heavy handed way. We doubt if there is any overwhelming urgency about collection of samples from convicted offenders and suggest that prolonged negotiation and time for re-consideration of consent are desirable before resorting to the forced collection ultimately allowed by law. We also believe strongly that blood samples should only be taken by qualified medical personnel – we understand that this is not currently required.

We hope that the Review will obtain evidence of the extent of compulsory collection of samples and assess whether additional controls or safeguards are required.

We are inclined to support express statutory provision in relation to the use of force by Commonwealth agencies rather than leaving it, as now, to the common law. The Victorian legislation, reported in paragraph 7.2.3, would appear to offer a possible model, requiring a court order for the use of force.

We urge the Review in any case to recommend guidelines to ensure a more sensitive approach to compulsory collection.

Q.33 Other privacy and civil liberties issues

The table included in paragraph 7.3.6 is a useful illustration of the need to balance law enforcement and privacy interests, and supports many of the other positions we have taken in this submission.

We have already commented above (in response to Qs 30 & 31) on the issue of police officers' participation in elimination matching, discussed in paragraphs 7.3.9-7.3.11.

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