

DNA FORENSIC PROCEDURES

*Further Independent Review of Part 1D of the
Crimes Act 1914*

30 June, 2010

Table of Contents

Letter of Transmittal	5
Chair’s foreword.....	6
EXECUTIVE SUMMARY and RECOMMENDATIONS	7
1. INTRODUCTION.....	23
1.1 Terms of Reference	23
1.2 Conduct of Review	25
1.3 Structure of Report	27
1.4 Review Perspective	28
2. LEGISLATIVE AND POLICY DEVELOPMENTS SINCE SHERMAN REVIEW	30
2.1 Summary of Developments	30
2.2 Summary of Part 1D.....	33
2.3 State and Territory Forensic Procedures Legislation	36
3. THE OPERATION OF PART 1D OF THE CRIMES ACT 1914	37
3.1 General issues.....	37
3.2 Complexity of legislation	41
3.3 Informed consent process.....	47
3.4 Victims of crime.....	53
3.5 Children.....	56
3.6 Voluntary mass screenings.....	57
3.7 Buccal Swabs	59
3.8 Hair samples.....	62
3.9 Sharing DNA samples.....	63
3.10 Innocence testing.....	66
3.11 Admissibility of evidence.....	69
3.12 Destruction of forensic material.....	71

3.13	Accreditation of laboratories	75
3.14	Matching requirements.....	77
3.15	DNA Testing protocols	79
3.16	Other Matters.....	80
4.	EXTENT TO WHICH THE FORENSIC PROCEDURES PERMITTED BY PART 1D HAVE CONTRIBUTED TO THE CONVICTION OF SUSPECTS.....	82
5.	THE EFFECTIVENESS OF INDEPENDENT OVERSIGHT AND ACCOUNTABILITY MECHANISMS FOR THE DNA DATABASE SYSTEM.....	89
5.1	Towards a National Accountability Framework	89
5.2	Reporting.....	96
5.3	Audits and other accountability arrangements	97
6.	DISPARITIES BETWEEN THE LEGISLATIVE AND REGULATORY REGIMES OF THE COMMONWEALTH AND PARTICIPATING JURISDICTIONS FOR THE COLLECTION AND USE OF DNA EVIDENCE.....	103
6.1	Disparities.....	103
6.2	Other concerns with disparities in legislation	108
7.	ANY ISSUES RELATING TO PRIVACY OR CIVIL LIBERTIES ARISING FROM FORENSIC PROCEDURES PERMITTED BY PART 1D.....	111
7.1	The Information Privacy Principles	111
7.2	Use of force	117
7.3	Other privacy and civil liberties issues	119
8.	IMPLEMENTATION OF THE RECOMMENDATIONS	124
	GLOSSARY.....	128
	Attachment A - Sherman Review Recommendations.....	132
	Attachment B - Invitation for submissions.....	138
	Attachment C - Submissions.....	139
	Attachment D - Comparison of forensic procedures legislation across Australia	140

Attachment E - Indicative form of notification of information to be provided when consent is sought to the conduct of a forensic procedure150

Attachment F - Summary of meetings with stakeholders in Sydney, Melbourne and Brisbane151

Sydney..... 151

Melbourne 157

Brisbane 162

30 June 2010

The Hon Brendan O'Connor MP
Minister for Home Affairs
Parliament House
CANBERRA ACT 2600

Dear Minister

Review of Part 1D of the Crimes Act 1914 – Forensic Procedures

In October 2009 you established, under section 23YV of the *Crimes Act 1914*, a further independent review of Part 1D of the Act with the terms of reference as set out in that section. This further independent review follows the review of Part 1D delivered by the Committee chaired by Tom Sherman in 2003.

The review committee members were Peter Ford (Chair); Mr James Carter, Deputy Director of Legal Practice Management and Policy Branch, Office of the Commonwealth Director of Public Prosecutions; Ms Karen Curtis, Australian Privacy Commissioner; Mr Ben McDevitt AM APM, Chief Executive Officer, CrimTrac; Ms Diane Merryfull, Senior Assistant Ombudsman; and Dr Simon Walsh, Coordinator, Criminalistics & Identification Sciences, Forensic and Data Centres, Australian Federal Police.

In accordance with subsection 23YV(2) the Committee gives to you its attached written report of the review.

Yours sincerely

Peter Ford
Chair

Chair's foreword

Although it only became fully operational across all Australian jurisdictions in April 2009, the National Criminal Investigation DNA Database (NCIDD) is now well established and an integral part of Australia's resources for identifying suspects for a variety of crimes, including the most serious, and for serving other important social purposes such as identifying disaster victims and tracing missing persons.

In the period since the Sherman Report¹ was presented, the inquiries that were under way at the time² 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 section 121 of the above Act – there are two reports, the first dated August 2004 and the second, October 2006;
- Commonwealth: *Protection of Human Genetic Information*, ALRC/AHEC May 2003 ('the ALRC/AHEC Report').

Another review was completed in April 2009 in Western Australia, the *Criminal Investigation (Identifying People) Act 2002 Statutory Review* ('the WA Review') and in NSW the Standing Committee on Law and Justice of the NSW Legislative Council completed an inquiry into 'The Use of victims' DNA' in December 2009. In NSW, a further review was announced by the NSW Premier on 6 April 2010.

I would like to express my appreciation for the assistance provided to the committee by Charis Tierney (Legal Officer), Kimberlee Trent (Senior Legal Officer), and to Mercedes Ramsey (Graduate) Attorney-General's Department. Charis provided wide ranging assistance to the Review and also prepared **Attachment F** with Kimberlee, and **Attachment D** was prepared by Kimberlee and Mercedes.

I would also like to acknowledge research carried out by Claudia Newman-Martin, an intern from the Australian National University College of Law on accountability arrangements in the United States and the United Kingdom.

(Peter Ford)

¹ *Report of Independent Review of Part 1D of the Crimes Act 1914 – Forensic Procedures (March, 2003)* available at

http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_ReportofindependentreviewofPart1DoftheCrimesAct1914-Forensicprocedures-March2003

² Sherman Report, para. 1.25

EXECUTIVE SUMMARY and RECOMMENDATIONS

There are two major focal points for this review, one being the efficiency and effectiveness of DNA forensic sampling, profiling and matching and the other the safeguarding of civil liberties and privacy. The two are closely inter-related and the maintenance of public confidence in the system requires that any proposals for reform in one area take into account implications for the other. Accordingly, the recommendations in this review are directed towards improvements to the regulatory system that will enable effective law enforcement while at the same time protecting civil liberties and privacy. In this respect, a significant existing privacy protection is that the NCIDD has been carefully constructed so as *not* to contain information from which anyone can identify the individual. The identification process is separate from the initial matching process.

The NCIDD is a national database but not a Commonwealth one. The information on the NCIDD overwhelmingly consists of profiles placed on it by the States but the Commonwealth has a major interest in, and responsibility for, the overall health of the system. Because of its limited constitutional power in this area, however, it must seek to achieve many of its objectives through negotiation with the States and a ‘best practice’ approach.

Recurrent themes in this review are those of reducing complexity while preserving essential protection of privacy and civil liberties and, where possible, enhancing accountability.

When the first review of Part 1D of the Crimes Act (‘the Sherman Review’) was carried out in 2003, only NSW and the ACT were participating in the national scheme. Other jurisdictions subsequently joined but full participation was only achieved in April 2009. There is now a much firmer basis on which to make assessments than was available to the Sherman Review but even now there is a paucity of information in some areas.

The continuing gaps in the information available mean that some of the assessments in this report are less definitive than they would otherwise be and a primary focus is on what should be done to improve performance measurement and reporting. The Sherman Review also focused on this area and many of its recommendations are adopted, sometimes with modifications, by this Review.

Use of the NCIDD

There are many advantages to a national scheme but their full realisation depends on some degree of legislative harmonisation (rather than uniformity) and the removal of any legislative obstacles to desirable reforms. In this connection, there is a growing recognition that significant efficiencies could be gained through the utilisation by each jurisdiction of the NCIDD as their sole database. At present, only the Australian Federal Police and the Queensland Police use the database in this way. The New South Wales Police would like to do the same but have obtained legal advice that both Commonwealth and NSW legislation prevent it. Our first recommendation therefore addresses this issue.

Recommendation 1: That:

- a) Part 1D be amended to make it clear that the NCIDD may be utilised as the sole database for any participating jurisdiction for the purpose of national exchange and matching of DNA profiles;***
- b) once Part 1D has been amended, the Commonwealth negotiate an amendment to the Ministerial Arrangement between the Commonwealth and NSW to recognise that the NCIDD may be utilised by NSW as the sole DNA database for law enforcement purposes; and***
- c) the Commonwealth negotiate the adoption by participating jurisdictions of the NCIDD as the sole database.***

(paras 3.1.7 - 3.1.9)

Database objectives

In submissions and round table consultations, it was argued that there is a pressing need for the objectives of the NCIDD to be set out in legislation. Support for this proposal came from law enforcement agencies and privacy and civil liberties interests in equal measure. As the national database is jointly ‘owned’ by all participating jurisdictions, it will be necessary to negotiate an agreed statement of objectives with them but some elements of such a statement are put forward for consideration.

Recommendation 2: That the Commonwealth negotiate objectives of the following kind for the national DNA database with participating jurisdictions and, when settled, that the objectives be considered for inclusion in Part 1D:

- a) to store those DNA profiles that are likely to assist jurisdictions in criminal investigations, locating a missing person or identifying a disaster victim;***
- b) to enable those DNA profiles to be accessed by participating jurisdictions for law enforcement purposes; and***
- c) to facilitate matching of those profiles for law enforcement purposes.***

(paras 3.1.10 - 3.1.13)

Database name

When the database was established it was exclusively focused on criminal investigation. In subsequent years, its scope was extended to include the identification of missing persons and of victims of disasters such as the Bali bombings and the Victorian bushfires. The name is therefore no longer accurate and the words ‘criminal investigation’ carry a stigma when cooperation is sought from people who have no connection with any crime. At the same time, it is not a national database for all purposes and some qualifying words are required. Substitution of ‘Australian’ for ‘National’ may also assist in conveying the involvement of the States and Territories. A number of alternatives are possible but the Review favours ‘Australian Forensic Investigation DNA System’.

Recommendation 3: That the National Criminal Investigation DNA Database be renamed the ‘Australian Forensic Investigation DNA System’.

(paras 3.1.14 - 3.1.16)

Implications of a statutory charter for CrimTrac

As with the suggestions for a statement of objectives for the NCIDD, proposals for a statutory charter for CrimTrac have been put to this Review in the context of a perceived need to clarify CrimTrac's responsibilities. Some arguments are directed towards improving effectiveness; others towards better protecting civil liberties and privacy. The arguments address issues that go beyond the terms of reference for this review and our recommendation on this matter therefore merely notes that a statutory charter could also contribute to the realisation of desirable objectives in this area.

Recommendation 4: That, if a statutory charter for CrimTrac is decided upon by the Government, a statement of functions, with particular reference to its management of the NCIDD, be agreed with participating jurisdictions and set out in Commonwealth legislation.

(paras 3.1.17 - 3.1.21)

International matching

Because of the exclusively national focus of the legislation, doubts have been expressed as to whether Australian law enforcement agencies are currently able to adequately cooperate with foreign law enforcement agencies in DNA matching for criminal investigation. Among comparable countries, Australia is probably unique in this respect. In an environment where international crime and the international movement of criminals are increasingly common, this is not acceptable and it is proposed to amend Part 1D so as to expressly permit international matching.

It is important to remedy this deficiency as there are indications that, without reciprocal arrangements, foreign agencies may be less willing to assist Australian agencies.

All international matching would be conducted through the AFP and, once a match was established, the provision of further assistance would be governed by the *Mutual Assistance in Criminal Investigation Act 1987*. The AFP would also be required to prepare, in consultation with the Privacy Commissioner, procedural rules on the provision of information following a match and to report on the use of international matching rules. Foreign profiles would be entered on the 'crime scene' index for the purpose of matching and would be deleted if no longer required.

Recommendation 5: That express statutory authority be provided:

- a) *for the AFP to provide a response to an inquiry from a foreign law enforcement agency as to whether there is a match with a profile held by the foreign agency;*
- b) *for a law enforcement agency of a participating jurisdiction to initiate international matches through the AFP; and*
- c) *subject to the requirements of the Mutual Assistance in Criminal Matters Act 1987, the AFP develop, in consultation with the Privacy Commissioner, procedural rules governing the sharing of information with a foreign law enforcement agency. The AFP should report to the Minister on whether agreement has been reached with the Privacy Commissioner and the legislation should require that the rules be tabled in the Parliament.*

(paras 3.2.1 - 3.2.14)

Technical amendments

A number of submissions addressed issues of administration on which they sought either clarifying amendments or the Review's advice. Where there appeared to be a real practical problem, the Review has proposed a clarifying amendment and has grouped all such proposals within a recommendation for technical amendments.

Recommendation 6: That the following technical amendments to Part 1D be made:

- a) *replace references to 'Senior Constable' with references to 'sergeant' with consequential amendments to ensure the same powers can be carried out by officers of higher ranks;*
- b) *repeal the requirement in subsection 23XWO(7) for a judge or magistrate to take into account 'whether the carrying out of the forensic procedure could assist law enforcement, whether Federal or otherwise';*
- c) *make it clear that consent is not necessary prior to an order being sought under section 23XWO;*
- d) *include provisions for securing the attendance of an offender as are provided for in relation to suspects in sections 23WV and 23WW;*
- e) *allow a senior constable (or sergeant if Recommendation 6(a) is accepted) or equivalent of another jurisdiction to authorise the carrying out of a non-intimate forensic procedure on a suspect for a Commonwealth offence where the suspect is arrested in that jurisdiction;*
- f) *the Commonwealth negotiate agreement with participating jurisdictions for uniform legislation on:*
 - *registration of forensic orders;*
 - *power to detain a suspect for the purposes of carrying out an order;*
 - *exchange of physical DNA material;*
 - *taking of DNA samples from volunteers; and*
- g) *clarify that the reasonable use of force is available in taking a DNA sample from an offender, as provided for in section 23XJ in relation to suspects.*

(paras 3.2.19, 3.2.28, 6.2.8 - 6.2.11 and 7.2.3)

Legislative Presumption

The vast majority of ‘volunteer’ profiles are placed on the ‘unlimited purpose’ index rather than the ‘limited’ purpose index as some might expect. While volunteers must be informed that they have a choice, this may indicate that many do not understand the implications of their decision. It is proposed that the choice should be retained but that a legislative presumption in favour of storage on the ‘limited purpose’ index be created.

Recommendation 7: That Division 6B of Part 1D be amended to create a presumption that DNA profiles are to be placed on the ‘limited purpose’ index.

(paras 3.3.7 - 3.3.9)

Informed consent

There has been much criticism of the ‘informed consent’ provisions as excessively complex. The purpose of the provisions is to ensure that those who volunteer, or are asked, to provide a DNA sample are appropriately informed of all the things that a reasonably prudent person might want to take into account before giving their consent. Such things include the obvious ones, such as the purpose for which the sample will be used, and the identity of persons to whom it may be disclosed, and also a range of other matters which may be contingent on other factors.

Simplification of these provisions, and of the forms in which police now convey the information is clearly desirable but the risk is that in simplifying them we may diminish the privacy and civil liberties safeguards that they are intended to protect.

Complicating the issue is the consideration that, in respect of suspects and offenders, a refusal of consent may be over-ridden by a subsequent authorisation process.

The problem has been studied by previous reviews in some States and by the Australian Law Reform Commission and a number of options for reform have been identified. After considering a range of options, including doing away with the consent procedure altogether in respect of suspects and offenders, this Review proposes measures aimed at simplifying the procedure for the provision of information on which consent is based.

Recommendation 8: That:

- a) the information to be provided to individuals for the purpose of seeking their consent to a forensic procedure be provided by a combination of oral and written notifications drafted to include the elements set out in Attachment E and that the forms be prescribed under the Crimes Act;***
- b) the form of consent make provision for documenting the fact that the person understands the contents of the form and the fact that the person consents to the procedure;***
- c) the information provided include advice on avenues for complaint and review; and***
- d) 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.***

(paras 3.3.24 - 3.3.30)

(Sherman Recommendation 2 modified)

Consent on behalf of children

A range of options in relation to protecting children were examined including a more individual assessment of capacity for understanding but it was not considered that this would be likely to work well in a law enforcement environment. The Review concluded that the recommendation on this issue that was put forward by the Sherman Review is still appropriate.

Recommendation 9: That provision 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 eighteen; and***
- c) the consent of the person concerned only in the case of persons eighteen and over.***

(paras 3.5.1 - 3.5.5)

(Sherman Recommendation 3)

Voluntary Mass Screenings

Some submissions argued for judicial authorisation of any voluntary mass screening process arguing that reliance on the ‘volunteer’ provisions results in unwarranted pressure on individuals to participate. There are, however, some serious difficulties with the proposal and it is not clear that the concerns raised cannot be accommodated within existing processes. The Review instead proposes the development of protocols addressing particular aspects of voluntary mass screenings.

Recommendation 10: That, in conjunction with participating jurisdictions, the Commonwealth develop guidelines to regulate the conduct of voluntary mass screenings.

(paras 3.6.6 - 3.6.9)

Buccal swabs

Of the various methods for taking DNA samples, the buccal swab, which involves brushing the inside of the mouth, has become the most popular. Part 1D, in common with the legislation of Victoria, currently classifies it as an ‘intimate procedure’ but most other jurisdictions regard it as ‘non-intimate.’ Two States, NSW and South Australia, make further qualifications (see **Attachment D**). The significance of the classification is that authorisation may be given at a lower level for ‘non-intimate procedures’. The issue is not free from contention but the Review recommends that, when self-administered, the buccal swab should be regarded as a non-intimate procedure. The same should apply where, for any reason, a person is unable or unwilling to carry out the test themselves but wishes another person to carry it out on their behalf.

Recommendation 11: That, when self-administered or administered by another person at the request of the donor, a buccal swab should be included in the definition of ‘non-intimate forensic procedure’.

(paras 3.7.1 - 3.7.15)

Hair samples

The taking of hair samples is classified as a non-intimate procedure but some level of pain or discomfort may be involved and the procedure that is prescribed in Part 1D may not be the least painful. The amount and type of hair that must be removed may also be subject to change as improvements are made to DNA techniques of collection and analysis. The Review has adopted a proposal from the AFP for the legislation to be amended to require simply that the least painful method be employed.

Recommendation 12: That subsection 23CL(b) be amended to replace the present requirement for samples to be taken one hair at a time with a requirement that the sample be taken using the least painful technique known and available to the person.

(paras 3.8.1 - 3.8.6)

Sharing samples

When a DNA sample is taken, the donor has an obvious interest in the accuracy of the process. The Sherman Review recommended a simplified process for sharing DNA samples with the donor. Some aspects of the process created difficulties for the AFP, which has suggested improvements directed towards ensuring the integrity of that part of the sample provided to the donor and to address problems that have arisen with experience of the current time limits. The Review has adopted these suggested amendments while preserving those aspects of the proposal that enable a donor to challenge the accuracy of a test. The recommendations have also been revised to limit their application to crime scene samples. Since we all carry our DNA with us, any dispute about the accuracy of the analysis of a sample taken from a person can be resolved through the provision of another sample.

Recommendation 13: That:

- a) the current provisions relating to the sharing of DNA samples be replaced by a simpler regime which confers a right on the person who provided the sample to have part of any matching crime scene sample provided to an accredited laboratory within four weeks after the material comes into existence for analysis on behalf of the person provided there is sufficient material available; and***
- b) subsection 23XUA(2) be amended to require that a person who is present in a laboratory pursuant to a request by a suspect must comply with all instructions relating to the analysis of a sample with a sanction of removal for non-compliance.***

(paras 3.9.1 - 3.9.9)

(Sherman Recommendation 4 modified)

Access to samples

A related issue is that of access to samples. Access to both person and crime scene samples is important to a fair trial and access to any sample provided by the person, or information derived from the sample, is also important from a privacy perspective.

Access should be granted upon application. The application process would be a matter for regulations under the Crimes Act but decisions should be subject to Commonwealth administrative law in the same way as any other public sector decisions. As AFP Forensic Operations have custody of relevant samples, they should be responsible for their transfer but there is no reason why decisions could not be made elsewhere within the AFP if that is considered appropriate.

The provision of access could of course only be granted where the forensic material has been retained. Destruction of forensic material is discussed in section 3.12.

As a matter of principle, guaranteed access should be provided in all jurisdictions but this proposal is necessarily limited to Commonwealth legislation.

Recommendation 14: That Part 1D 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 on the basis that:

- a) samples be provided to a nominated accredited laboratory for analysis on behalf of the convicted person; and***
- b) access is to be administered by AFP Forensic Operations and subject to the condition that decisions refusing access should be subject to administrative review.***

(paras 3.10.1 - 3.10.14)

(Sherman Recommendation 5 modified)

Admissibility of evidence

The question whether there should be more specific rules relating to the admissibility of DNA evidence was examined by the Sherman Review, which concluded that the existing judicial discretion provides adequate protection. This review agrees.

Destruction and de-identification

Several reviews, in addition to the Sherman Review, have addressed the issue of destruction of DNA samples and de-identification of DNA profiles when no longer required in connection with an investigation. This Review has adopted, with modifications, the recommendation of the Sherman Review on this issue. The modification would require the destruction of the sample and de-identification of the profile to occur once the purpose for which they were obtained has been served.

Recommendation 15: That:

- a) in respect of volunteers and suspects, both destruction as well as de-identification of person samples as defined in Part 1D (either physically or by appropriate computer delinking) should occur as soon as practicable after the sample is no longer required for the investigation for which it was collected; and***
- b) the relevant DNA profile on the database should also be destroyed.***

(paras 3.12.17 - 3.12.19)

(Sherman Recommendation 6 modified)

Accreditation of laboratories

Accreditation of laboratories conducting DNA analysis is regarded by all stakeholders as essential. The National Association of Testing Authorities (NATA) currently carries out accreditation. This Review has adopted a recommendation of the Sherman Review to legislatively require such accreditation with a modification to ensure that analysis conducted on behalf of donors is similarly regulated.

Recommendation 16: That Part 1D provide that forensic analysis of DNA samples, whether on behalf of a law enforcement agency or an individual, must be conducted only by laboratories accredited by NATA or an equivalent in the appropriate field of forensic science.

(paras 3.13.1 - 3.13.9)

(Sherman Recommendation 7 modified)

Correctional Services

Submissions to the Sherman Review led to a recommendation favouring an arrangement whereby the correctional authorities might carry out serious offender testing on behalf of police. Some concerns have been raised with this proposal because of the difficulty in ensuring a chain of evidence relating to the taking of DNA samples if the task is undertaken by correctional authorities. The AFP advises that there is also reluctance on the part of NSW Correctional Authorities to provide access to the AFP. These problems should not be insuperable but the lack of progress to date indicates that a new approach may be appropriate. This proposal is directed towards encouraging the provision of access to State prisons by the AFP. The proposed legislative amendment is intended to remove any doubt as to the AFP's ability to enter into such an arrangement.

Recommendation 17: That:

- a) Part 1D be amended to make it clear that the AFP may enter into an administrative arrangement with correctional authorities to facilitate the taking of DNA samples from offenders; and***
- b) the AFP continue to seek agreement with correctional authorities for the taking of DNA samples from offenders.***

(paras 3.15.1 - 3.15.3)

(This replaces Sherman Recommendation 9)

Fingerprick samples

More general issues that arose out of the Committee's consideration of the operation of Part 1D relate to the effect of the legislation on the options available to persons who are asked or required to provide a DNA sample and on the options available to the police. To some extent, the difficulties arise out of the 'intimate' and 'non-intimate' classifications of forensic procedures. These difficulties would be alleviated by the amendment of the definition of 'non-intimate forensic procedure' to include taking a fingerprick sample of blood.

Recommendation 18: That fingerprick samples be included in the definition of 'non-intimate forensic procedure'.

(paras 3.16.1 - 3.16.3)

Measuring effectiveness

The information that is currently collected relates to the size of the database and the number of matches by category. Although of interest, it does not address the effectiveness of DNA collection and analysis for criminal investigation. A number of submissions made the point that the effectiveness of DNA evidence should be judged not only by the contribution it makes to convictions, but also to the elimination of particular persons from inquiries and that, in any particular case, it is very difficult to say what contribution it makes to the outcome.

Accepting all these difficulties, the Review considers it essential to develop a useful measure of effectiveness that can operate throughout Australia and proposes a number of particular elements for negotiation with participating jurisdictions. By bringing together all aspects of performance reporting, this proposal would also address the issues covered by Sherman Recommendation 13 relating to reporting by Directors of Public Prosecution.

Recommendation 19: That the Commonwealth negotiate a uniform approach to measuring effectiveness encompassing:

- a) the number of DNA matches facilitated between jurisdictions;**
- b) the number of matches for different types of crime – murder, rape, robbery etc.;**
- c) the number and type of offences that occur in each jurisdiction;**
- d) numbers for different types of matches – offender to crime scene, crime scene to crime scene etc.;**
- e) the outcome of matches – i.e. the number of matches that are followed by charges, the number of exculpations and the number that are a factor in conviction; and**
- f) any particular issues or problems that emerged in the courts.**

(paras 4.1.28 – 4.1.33)

Provision of information

To improve the information provided to donors, the Sherman Review recommended that all documents provided to them should contain prominent information on matters such as complaint avenues and appeal rights. This Review has adopted the recommendation with minor modifications to allow instead the inclusion of an explanation as to where such information may be found.

Recommendation 20: 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 either contain prominent information on appeal rights and complaint avenues, including any time limits on those rights or refer the reader to such information. All agencies involved in the scheme (CrimTrac, government laboratories, and the police) should also have prominently displayed on their websites the rights and avenues for complaints, with “complaints” appearing on the home page.

(paras 5.1.18 - 5.1.20)

(Sherman Recommendation 10 modified)

Reports on complaints

The Sherman Review also recommended that agencies report on the number of complaints received and the outcome of those complaints. This recommendation has been adopted with a minor modification to exclude its application to Directors of Public Prosecutions. In each jurisdiction, the DPP operates in a contested court-room environment to which a reporting obligation of this type appears less relevant.

Recommendation 21: That in relation to the use of DNA, the AFP, participating State and Territory Police Forces and relevant accountability bodies should be required to record and publicly report on the number of complaints, the type of complaints and, in a broad sense, the outcome of the complaints.

(paras 5.1.21 - 5.1.24)

(Sherman Recommendation 11 modified)

Standard reporting format

The ‘principal deficiency’ found by the Sherman Review was that because of the lack of progress at that time in establishing the NCIDD, there was very little experience on which to make assessments of the effectiveness of the program. Associated with this was a lack of any reports on its operation. To address this deficiency, the Sherman Review recommended that jurisdictions agree on a ‘consistent, standard format for reporting the use of DNA forensic information that allows aggregation and comparison across jurisdictions’.

This deficiency still exists and the recommendation is adopted by this Review.

Recommendation 22: That the Commonwealth negotiate 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 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:***
 - profiles on each database and index;***
 - complaints received, indicating the number resolved;***
 - profiles removed; and***
 - profiles de-identified.***

(paras 5.2.4 - 5.2.7)
(Sherman Recommendation 12)

Publication of auditing of laboratories

The importance of transparency in the auditing of laboratories was recognised by the Sherman Review and this Review shares that assessment. The language of the Sherman recommendation has been modified in recognition that the accreditation process already requires the resolution of most qualifications to accreditation.

Recommendation 23: That particulars of any finding in a NATA external audit that:

- a) involves a restriction or limitation being applied to accreditation; or***
 - b) requires the laboratory to re-analyse samples or withdraw reports;***
- should be recorded and made publicly available.***

(paras 5.3.9 - 5.3.13)
(Sherman Recommendation 14 modified)

Internal audits

Internal auditing was also recognised by the Sherman Review as an essential feature of good administration and this Review also shares that assessment.

Recommendation 24: 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.

(para 5.3.14)
(*Sherman Recommendation 15*)

External audits

When the Sherman Review was conducted, there was much concern about gaps in the processes for handling complaints that might cross jurisdictional boundaries. There have, in fact, been few complaints of this character and the problems that were foreseen appear not to have eventuated. There is, however, a clear need to ensure that there is seamless accountability across Australia for the administration of a database that is the joint responsibility of the Commonwealth and the States and Territories.

For these reasons, the Review has substituted for Sherman Recommendations 16-20 a new recommendation directed towards ensuring auditing of the most significant aspects of the national scheme.

The Commonwealth Ombudsman is already empowered to carry out ‘own motion’ compliance audits of Commonwealth agencies. The Ombudsman also carries out legislatively required compliance audits of the use of covert powers by law enforcement agencies. The neatest solution would be to task the Commonwealth Ombudsman with the auditing task. Audits should focus on the discharge by CrimTrac of its functions and recognise that State oversight agencies will continue to be responsible for overseeing the activities of State agencies.

This Review is conscious of the need to avoid unnecessary obligations on the Ombudsman and also on CrimTrac. It needs to be acknowledged that much of the activity relating to the NCIDD is carried out within participating jurisdictions and that CrimTrac’s role essentially involves the provision of a matching engine. It is also relevant that the Australian National Audit Office has carried out some more general audits under its legislation. The Ombudsman’s role differs from that of the ANAO, however, and audits carried out by the latter should not be seen as a substitute for accountability of this kind.

Recommendation 25: That the Commonwealth Ombudsman be tasked in legislation to carry out regular audits of CrimTrac’s compliance with legislation, practices and procedures and record keeping in relation to the management of the NCIDD. The Review also believes it would be appropriate for police in the participating jurisdictions to be subject to a similar requirement.

(paras 5.3.15 - 5.3.22)
(This replaces Sherman Recommendations 16-20)

Offender profiles

There are many areas of divergence among participating jurisdictions but, in essential respects, the movement has been one of convergence and there are now fewer obstacles to the matching of profiles than there were in 2003. In some areas, differences of approach do not adversely affect the ability to match profiles but, in other areas, they do. In this respect, it is important to negotiate a common approach. One such area is that of offender profiles.

Recommendation 26: That the Commonwealth 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.

(paras 6.1.12 - 6.1.17)
(Sherman Recommendation 21)

Uniform provisions

Other areas in which a common approach appears important are also identified and proposed for negotiation.

Recommendation 27: That the Commonwealth negotiate a uniform approach to:
a) particular forensic procedures and definitions of ‘offender’, ‘suspect’, ‘volunteer’;
b) principal privacy protections relating to how information is collected, stored, maintained, shared and retained or destroyed; and
c) standards in handling and interpreting genetic material.

(paras 6.1.18 - 6.1.22)

Children and incapable persons

It is also important to achieve a common approach to the sampling of children and ‘incapable’ persons.

Recommendation 28: That the Commonwealth negotiate agreement with participating jurisdictions that the Model Bill provisions relating to children and incapable persons should apply in all participating jurisdictions.

(paras 6.1.24 - 6.1.25)
(Sherman Recommendation 22 modified)

Developments in DNA technology

Developments in DNA technology and forecasts of what may become possible within the foreseeable future have given rise to some concern about the prospect of ‘function creep’. Some submissions proposed that there should be specific regulation of familial matching and other possible applications. Familial matching, which may be useful in the investigation of some crimes, involves the identification of a possible offender by finding close family relatives through the matching process and then following up that lead by other means.

Familial matching may already be legally possible under Part 1D and corresponding State and Territory legislation but the NCIDD would need substantial modification in order to accommodate it. Work is already under way to identify what changes might be required and to assess the possible impact on privacy but it is still too early to form a view on the elements of any particular regulatory scheme.

Science is moving quickly in this area and there are also other possible developments that also need to be considered in this context. The Sherman Review considered these under the heading of ‘phenotypically expressed information’ and recommended a prohibition on the use of DNA testing for such purposes (Sherman Recommendation 23). The difficulty is, however, that a prohibition expressed in these terms may be too wide. As a matter of principle, the legislation should not be framed in terms of prohibiting the adoption of developments in DNA technology but any significant new techniques should not be employed until they have been subjected to public scrutiny.

The kind of examination and assessment that might be appropriate depends on what is involved. An example is provided by the issue of ‘familial matching’ which has been regarded by the CrimTrac Board as warranting the development of a technical and policy framework before being undertaken.

Recommendation 29: That significant development in DNA technology or applications of it, such as familial matching, should only be adopted after an appropriate exposure to public examination and assessment.

(paras 7.1.19 - 7.1.25)

Matching outside regulated databases

The Sherman Review also recognised that the elaborate matching limitations in Part 1D could easily be undermined by the matching of samples with profiles from other databases that have been constructed for purposes other than law enforcement. This Review adopts its recommendation on this matter.

Recommendation 30: That, subject to limited exceptions to be negotiated with participating jurisdictions, Part 1D should contain a provision prohibiting the matching of samples with profiles from other databases that have been constructed for ‘non-law enforcement’ purposes.

(paras 7.1.26 - 7.1.33)
(Sherman Recommendation 24)

Elimination database

One area in which there has been significant development is the establishment of 'elimination' databases on which would be stored the DNA profiles of investigating police and of laboratory staff who may be involved in DNA analysis. An amendment to Part 1D to establish a procedure for the collection of forensic material from AFP employees to eliminate their samples from matches with crime scene samples was made in 2006 but the establishment of such a database in each jurisdiction would also be useful. In this connection, there are legitimate concerns on the part of those whose DNA profiles would be stored on them and these need to be addressed.

Having regard to developments in Australia and overseas, this Review considers that it is time to establish such a database. It need not be part of the NCIDD but it is desirable to avoid the proliferation of separate databases.

Recommendation 31: That the Commonwealth negotiate agreement with participating jurisdictions for the establishment of an elimination database to hold DNA profiles of investigating police and laboratory analysts.

(paras 7.3.18 - 7.3.23)

Future Review

The effectiveness of DNA forensic procedures has now been sufficiently demonstrated but regulation of DNA collection, storage and analysis needs to take account of rapid and continuing advances in DNA science and technology and it would be appropriate for another review to be held in five years time or sooner if warranted by the current rapid pace of technological advances. The form of that review may be left for consideration in the light of developments in the intervening period. Depending on the circumstances at the time, it may be appropriate to invite the States and Territories to participate in a joint review.

Recommendation 32: That the Commonwealth carry out another review of Part 1D after a further period of no longer than five years to examine whether further amendments are required in the light of developments in DNA technology and any other matters that may be considered appropriate. Alternatively, the Commonwealth might invite participating jurisdictions to participate in a joint review of the national scheme for DNA forensic procedures.

(paras 8.1.6 - 8.1.9)

1. INTRODUCTION

1.1 *Terms of Reference*

1.1.1 For convenience, this paper is structured along the same lines as those of the Sherman Report.³ 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.

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 1D. 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.’

³ 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.

1.1.2 For ease of reference, this report 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.

1.1.3 The statutory requirement for this review is to be found in subsection 23YV(5) of Part 1D, which provides:

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

(a) the Minister must cause persons to commence, no later than 1 November 2009, a further independent review to ascertain whether the inadequacies have been effectively dealt with; and (b) subsections (2), (3) and (4) apply in relation to the report of that further review in the same manner as they apply in respect of the report of the original review.’

1.1.4 Subsection (1) sets out the matters listed at paragraphs (a) to (e) of the terms of reference, which, in this respect, are identical to those for the Sherman Review. Subsections (2) and (3) require the report of the review to be provided to the Minister and then to be tabled in the Parliament. Subsection (4) defines ‘independent review’ to include certain nominees.

1.1.5 At the time when this further review was originally scheduled to commence, inter-jurisdictional matching had not occurred and the former Minister for Justice and Customs delayed its initiation until November 2009.⁴

1.1.6 As the science of DNA has been adequately explained elsewhere,⁵ it is sufficient to note here that the features of DNA – that it is unique to each individual (except in the case of identical twins), stable over time and susceptible to reliable analysis – make it a very powerful means of identifying and differentiating individuals with well established application in criminal investigations and prosecutions. The capacity to electronically store and retrieve DNA profiles, derived from DNA samples, greatly adds to its utility. At the same time, the storage of sensitive personal information on DNA databases, and the potential for its misuse, raises significant privacy and civil liberties issues.

1.1.7 In accordance with section 23YV, the review was carried out by a committee comprising:

Peter Ford – Chair;

James Carter – nominee of Commonwealth Director of Public Prosecutions, Deputy Director of Legal Practice Management and Policy Branch;

Karen Curtis – Australian Privacy Commissioner;

Ben McDevitt AM APM – Attorney-General’s nominee, Chief Executive Officer, CrimTrac;

Diane 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.

⁴ Attorney-General’s Department submission, p.3

⁵ See, e.g. ALRC/AHEC Report, Ch. 2.

1.1.8 During the course of the review, two events that are relevant to any consideration of the operation of Part 1D occurred in December 2009 in Victoria. One was the overturning of the conviction of Farah Jama for rape when prosecutors admitted human error in the DNA testing on which the case against him was based. Retired Supreme Court Judge Vincent was asked to review the case and his report was tabled in the Victorian Parliament on 6 May 2010.⁶ The other was a direction by the Chief Commissioner of Victoria Police that no DNA evidence was to be produced in prosecutions until the method used to interpret testing of samples was reviewed. He was reported as saying that new technology – brought online in September 2009 – meant that more detailed information was obtained from DNA samples but that the statistical models used to interpret DNA data had fallen behind and were now inadequate. Deputy Commissioner Sir Ken Jones was asked to lead the review.⁷ The use of DNA evidence was resumed soon after.

1.1.9 Both events received considerable media coverage and prompted criticism by commentators and professional bodies such as the Law Institute of Victoria and the Victorian Criminal Bar Association of excessive reliance on DNA evidence.⁸ A critical report by the Victorian Ombudsman of the handling of drug samples and general case management by the Police Forensic Laboratory was also considered in this context.

1.2 Conduct of Review

1.2.1 The recommendations made in the Sherman Report (**Attachment A**) and the ‘inadequacies’ identified in that Report provided a starting point for this review. In this connection, the Sherman Report said:

‘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 subsection 23YV.’⁹

1.2.2 The ‘remaining deficiencies’ were identified as those matters that were addressed by the recommendations.¹⁰ In this sense, each of the Sherman Recommendations (other than Recommendation 1, which relates to resourcing and Recommendation 8, which has been implemented) is a matter for reconsideration by this Review, whether from the perspective of endorsement, amendment or implementation. Explicit reference is therefore made to relevant Sherman recommendations in addressing each term of reference. As the Sherman Report says, ‘a major task of the future review will be to inquire and report upon the extent to which those recommendations have been implemented.’¹¹

⁶ <http://www.justice.vic.gov.au/wps/wcm/connect/5a103e804263c8da810e832b0760a79a/VincentReportFinal6May2010.pdf?MOD=AJPERES>

⁷ ‘The Australian’, 10 December, 2009, p.3.

⁸ See, e.g. The 7.30 Report, ABC TV 10 December, 2009; ‘The Australian’ 10 December, 2009 p.3 and 11 December 2009 p.11

⁹ Sherman Report, para.8.12

¹⁰ Sherman Report, para 8.13

¹¹ Sherman Report, para 8.13

1.2.3 Having regard to the language of subsection 23YUV(5) and to the particular ‘inadequacies’ identified by the Sherman Review,¹² a major focus must be on the reasons for the lack of action on many of the Sherman Recommendations. In this connection, it is relevant to note that, in the Government’s response on 9 December 2005 to the ALRC/AHEC Report, it was said ‘The Government is of the view that the procedures in place for the consideration and implementation of the [Sherman Report] recommendations are also the appropriate context to deal with the recommendations in this report.’¹³

1.2.4 The Sherman Report also identified a number of matters which it regarded as best left for a future review to consider in the light of more experience.¹⁴ These are listed at sub-paragraphs (i) to (xi) in the terms of reference and are addressed in the context of the matters outlined in the preceding paragraphs (a) to (e). Although Part 1D also covers forms of biometric information other than DNA samples,¹⁵ no issues concerning them were raised in submissions or consultation and they are not examined in this review.

1.2.5 As with the Sherman Review, a variety of measures were taken to gather information. We wrote to the same agencies and organisations that had been invited to contribute submissions to the Sherman Review and researched the developments that had taken place in the intervening period, bringing together the reports of subsequent reviews and inquiries in New South Wales, Victoria and Western Australia, as well as two reports of the Australian Law Reform Commission.

1.2.6 Further letters were sent to Directors of Public Prosecutions in each jurisdiction seeking information on their experience with the use of DNA forensic evidence in prosecutions. Their responses provided useful information which was taken into account in our consideration of the effectiveness of such evidence.

1.2.7 A website was set up to provide details of the review to anyone interested and the Chair prepared a Consultant’s Discussion Paper, which was published on the website to provide assistance to stakeholders and the public in identifying the issues that needed to be addressed.

1.2.8 On 1 December 2009, the Chair attended, as an observer, a meeting of the CrimTrac NCIDD Consultative Forum, comprising representatives of each of the participating jurisdictions. The chair also attended the 1st Interpol Australasian Regional DNA Symposium in Sydney on 15 and 16 June 2010.

1.2.9 On 11 and 12 December 2009, the Secretariat published a notice (**Attachment B**) in the press inviting public submissions and drawing attention to a Consultant’s Discussion Paper.

1.2.10 A list of those agencies and organisations that lodged submissions is at **Attachment C**. The submissions were published on the website. We were also given access to a number of submissions to other similar inquiries. Some other stakeholders said that they

¹² See para. 1.1.2 of this review and the discussion of ‘Identified inadequacies’ at paras. 8.10 to 8.16 of the Sherman Report

¹³ Response to Rec.40 (<http://www.alrc.gov.au/inquiries/title/alrc96/agd.htm>)

¹⁴ Sherman Report, para 8.14

¹⁵ See definition of ‘non-intimate forensic procedure paragraphs (f) and (g) in s.23WA

regarded the issues as very important but were unable to find the resources to enable them to prepare suitable submissions.

1.2.11 The Committee was invited to inspect the AFP Forensic Laboratory and CrimTrac headquarters and was able to do so on 18 January 2010. Both visits provided useful background information.

1.2.12 The Committee met on 8 occasions on 4 November 2009, 14 December 2009, 18 January 2010, 22 February 2010, 22 March 2010, 30 April 2010, 28 May 2010 and 21 June 2010. Meetings with particular stakeholders were arranged in Sydney, Melbourne and Brisbane on 16 to 18 February and a summary of the discussion at those meetings is at **Attachment F**.

1.3 Structure of Report

1.3.1 This report is structured around the terms of reference. This chapter, *Chapter 1*, explains the origins of the review, outlines its terms of reference, details the way in which the review was carried out and provides an overview of the ‘disparities’ previously identified.

1.3.2 *Chapter 2*, as its title suggests, provides an account of the policy and legislative developments that have occurred since the Sherman Review of 2003. Chief among these is the fact that the national database system is now fully operational, but only since April 2009. The various reviews that have been completed since 2003 and other significant developments are outlined and the legislation is summarised.

1.3.3 *Chapter 3* addresses Term of Reference (a) – the operation of Part 1D of the Crimes Act. In doing so, it covers most of the matters identified by the Sherman Review as requiring further examination – the complexity of the informed consent requirements, a ‘victims of crime’ index, protocols for mass screenings, the issue of the categorisation of voluntary buccal swabs as non-intimate procedures, common methods of taking hair samples, innocence testing, evidentiary provisions and matching tables. Broadly speaking, the headings of each section of the chapter correspond to these issues but there are some additions and minor changes have been made to facilitate references to the Sherman Review. The additional headings, which also align with the Sherman Review, cover general issues, the complexity of the legislation itself, the treatment of children, sharing DNA samples, the destruction of forensic material, the accreditation of laboratories and DNA testing protocols.

1.3.4 *Chapter 4* addresses Term of Reference (b) – the extent to which the forensic procedures permitted by Part 1D have contributed to the conviction of suspects.

1.3.5 *Chapter 5* addresses Term of Reference (c) – the effectiveness of independent oversight and accountability mechanisms for the DNA database system. The issues of legislative change to support inter-jurisdictional accountability and minimum requirements for membership of the national scheme, both of which were specified by the Sherman Review as requiring additional consideration, are discussed in this context. Particular attention is paid to reporting and auditing issues since these are considered to be central to the task of developing a national accountability framework. From the amount of space devoted to them in the Sherman Review, and the number of recommendations it made concerning reporting and auditing, it seems that it regarded them in a similar light.

1.3.6 *Chapter 6* addresses Term of Reference (d) – any disparities between the legislative and regulatory regimes of the Commonwealth and participating jurisdictions for the collection and use of DNA evidence. It attempts to distinguish between those areas where a uniform approach may be essential, or at least important, and those where it matters less. In so doing, it seeks to avoid taking policy positions on any other grounds.

1.3.7 *Chapter 7* addresses Term of Reference (e) – any issues relating to privacy or civil liberties arising from forensic procedures permitted by Part 1D. Issues relating to the use of force, which were also identified by the Sherman Review as requiring additional consideration, are addressed in this context. Privacy and civil liberties issues are also included in the discussion under other terms of reference.

1.3.8 *Chapter 8* addresses the implementation of the recommendations of this review.

1.4 Review Perspective

1.4.1 The two major focal points of the review relate to the efficiency of DNA forensic procedures and their ‘safety’ in the sense of civil liberties and privacy protection. Public confidence in both the efficiency and the safety of the system is essential if it is to continue and develop as a highly significant law enforcement tool. These two aspects of efficiency and safety are closely inter-related and it is important that any improvements to efficiency are accompanied by corresponding improvements to accountability arrangements.

1.4.2 While the Commonwealth is, in some respects, only a minor user of DNA forensic techniques, it has a major interest in, and responsibility for, the overall health of the national system. Its constitutional power in this area is limited and it must therefore seek to achieve many of its objectives through negotiation with the States and through a ‘best practice’ approach. Accountability arrangements are primarily focused internally within jurisdictions but, at least in relation to transparency and reporting, there is a need to develop a fully effective national accountability scheme and also to ensure that accountability arrangements are not displaced when international cooperation is involved. This presents some significant challenges, which this Review attempts to address.

1.4.3 In maintaining this focus, it has been necessary to put to one side, as beyond our terms of reference, all those proposals put forward in submissions that go to much broader issues. These include proposals for a Bill of Rights and that those States and Territories that do not currently have privacy laws should enact them. The recommendations of the Sherman Review are directly relevant and those of other similar reviews are also considered to the extent that they bear on the terms of reference for this review.

1.4.4 An issue that was frequently raised in some submissions, and during round table consultations, was that people feel more concerned about the use of DNA material than they do about other forms of biometric identifying information, including fingerprints. There is undoubtedly a widespread view that the potential for misuse of DNA information is greater than that for other biometrics. There is also some confusion about the distinction between a

DNA sample and a DNA profile.¹⁶ The profile, which is stored on the NCIDD, comprises information derived from a sample and is subject to different rules of access and use.

1.4.5 In this context, it is not always appreciated that the NCIDD has been carefully constructed so as *not* to contain information from which anyone can identify the individual to whom a profile relates. To obtain that information, it is necessary to go to the jurisdiction that uploaded the profile and ask them for it. If the request is made by a participating jurisdiction, the answer is likely to be provided but even then it will not be forthcoming if the request does not conform in all respects to the law and policies in the jurisdiction concerned.

1.4.6 It also needs to be appreciated that the NCIDD is a national database but not a Commonwealth one. It is only ‘national’ in the sense that all jurisdictions use it. The collection of DNA samples and the uploading of information from a particular jurisdiction, and its deletion, are matters that are controlled by the jurisdiction concerned. In this respect, the only area of Commonwealth control relates to the discharge of functions by the AFP.

1.4.7 Much of the complexity of the legislation arises out of the perceived need to regulate what is to be included on, and what excluded from, the national database. One option that, for the purposes of argument, is sometimes identified in DNA literature is to allow a database to be developed with no exclusionary rules – i.e. a database with everyone on it. The Review does not consider this to be an acceptable option in Australia. The history of DNA legislation in Australia, although short, demonstrates clearly that public confidence is dependent upon the development of a regulatory system that maintains an appropriate balance between the various interests involved. As well as the administration of criminal justice, those interests include the identification of missing persons and victims of disasters. In brief, we need a system that enables these important social objectives to be achieved and promotes effective law enforcement while at the same time protecting civil liberties and privacy.

¹⁶ For an explanation, see Glossary at the end of this report.

2. LEGISLATIVE AND POLICY DEVELOPMENTS SINCE SHERMAN REVIEW

2.1 Summary of Developments

2.1.1 Since the Sherman Review was completed, 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.

2.1.2 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*¹⁷ ('the ALRC/AHEC Report') 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 and to the former Australasian Police Ministers Council Joint Working Group (now the Ministerial Council on Police and Emergency Management – Police). From these bodies, further references were made to working groups where appropriate. The response was based largely on the view that the procedures in place for the consideration and implementation of the Sherman Report are 'also the appropriate context to deal with the recommendations in this report.'¹⁸
- In 2003, Part 1D was amended to allow the DNA profile of an unknown deceased person to be matched with the DNA profile of another deceased person and to clarify and expand the provisions enabling the Minister to enter into arrangements with participating jurisdictions for sharing DNA information.
- In 2005, Part 1D was amended to clarify that the Minister could enter into arrangements with States and Territories to allow bulk matching on the NCIDD and address the concern that Commonwealth legislation was limited to matching to a specific investigation rather than any investigation.
- In 2006, Part 1D was amended¹⁹ to provide for integration of the Commonwealth DNA database system with State and Territory DNA database systems to form the NCIDD, to enable participating jurisdictions to access the NCIDD and to enable CrimTrac to carry out data matching on behalf of participating jurisdictions. Some restrictions on matching volunteer (unlimited purpose) DNA were also removed and suspect to suspect matching, as recommended by the Sherman Review, was allowed.

¹⁷ <http://www.austlii.edu.au/au/other/alrc/publications/reports/96/>

¹⁸ <http://www.alrc.gov.au/inquiries/title/alrc96/agd.htm>

¹⁹ *Crimes Act Amendment (Forensic Procedures) Act (No.1) 2006*

The amendments also established a procedure for the collection of forensic material from AFP employees to eliminate employee forensic material from crime scene samples.

- In 2008, Part 1D was amended to delay the commencement of the present review.
- The relevant laws of all States and Territories have now been recognised as ‘corresponding laws’.²⁰ 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.²¹

New South Wales

- The reviews referred to in the Sherman Report – the NSW Review and the two NSW Ombudsman Reports – were completed.
- A DNA Review Panel was established in 2006²² 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.²³ 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.²⁴
- 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.²⁵

²⁰ *Crimes Regulations 1990* r.6E

²¹ see s.23 YUD and corresponding State and Territory provisions

²² *NSW Crimes (Appeal and Review) Amendment Act 2006* (No. 70 of 2006)

²³ *NSW Crimes Forensic Procedures Amendment Act 2006* (No. 74 of 2006)

²⁴ *NSW Crimes Forensic Procedures Amendment Act 2007* (No. 71 of 2007)

²⁵ *NSW Crimes Forensic Procedures Amendment Act 2008* (No. 56 of 2008)

- 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.²⁶
- In December 2009, the Standing Committee on Law and Justice of the NSW Legislative Council completed an inquiry into ‘The use of victims’ DNA’.
- On 6 April 2010, the Premier announced a six-month review to be carried out by the former Supreme Court Justice Barr.²⁷

Victoria

- The Review referred to in the Sherman Report - the Victorian Review – was completed. It recommended further limitations on the collection and use of a volunteer’s DNA, restrictions on the retention of DNA samples (particularly to protect volunteers who may become suspects), a post-conviction screening and review process and other initiatives.
- 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.²⁸ A further amendment in 2007 provided legal recognition for the 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.²⁹
- Further amendments to the DNA legislation in 2007 enabled the integration of Victorian records in the national database.

Queensland

- The Sherman Review 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.³⁰ The ALRC/AHEC Report similarly acknowledged that Queensland had indicated an intention to amend its legislation to facilitate its participation in the NCIDD system. The departures were addressed in amendments made in 2003 soon after the Sherman Report was completed.³¹ These amendments bring Queensland more closely into alignment with the Model Bill.

²⁶ *NSW Crimes Forensic Procedures Amendment (Untested Registrable Offenders) Act 2009* (No. 63 of 2009)

²⁷ <http://www.smh.com.au/nsw/dna-evidence-rules-to-go-under-the-microscope-2010>

²⁸ *Vic. Crimes Amendment Act 2004* (No.41 of 2004)

²⁹ *Vic. Crimes Amendment(DNA Database)Act 2007* (No.32 of 2007)

³⁰ Sherman Report, p.21; ALRC/AHEC Report, p.982

³¹ *Qld. Police Powers and Responsibilities (Forensic Procedures) Amendment Act2003* (No.49 of 2003)

Western Australia

- A statutory review of the *Criminal Investigation (Identifying People) Act 2002*, ('the WA Review')³² 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 procedures, the handling, retention and destruction of forensic material, the DNA database system, evidence and arrangements with other jurisdictions. The Act allowed South Australia to match DNA profiles and exchange information via the NCIDD with all Australian 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 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'.

³² Available at <http://www.slp.wa.gov.au/salesinfo/CIIPAct2002StatReview.pdf>

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 authorising 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 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 Review³³ 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.

³³ Sherman Report, p.10

2.3 State and Territory Forensic Procedures Legislation

2.3.1 All legislation establishing DNA databases is based on the DNA profiling technique, which was developed in the UK in the 1980's. DNA profiles are derived from DNA samples taken from an individual, place or thing. They are encrypted sets of numbers that reflect a person's DNA makeup and can be used as an identifier. Although 99.9% of DNA sequences are the same in every person, enough of the DNA is different to distinguish one person from another. While there are similarities between closely related individuals, the sequences used are otherwise so variable that unrelated individuals are extremely unlikely to have the same profiles.

2.3.2 A comparison of legislation in each participating jurisdiction regulating forensic procedures is at **Attachment D**.

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

3.1 *General issues*

3.1.1 As outlined above (1.2 – Conduct of Review), the Sherman Review found that the ‘principal deficiency ... is that because of the lack of progress in establishing the NCIDD there has been very little experience on which to make assessments of the effectiveness of the national DNA database system’. There is now more information on which an assessment can be based.

3.1.2 The other identified deficiencies were ‘those matters that the ... recommendations (**Attachment A**) address and attempt to rectify.’³⁴ Each of these is discussed in the text below and supported – sometimes with suggested variations.

3.1.3 Part 1D represents the Commonwealth’s implementation of the Model Bill and is significant as a precedent for other jurisdictions. Ideally, it should embody best practice in respect of all issues.

3.1.4 Although there is still not a great deal of experience on which to make an assessment, this review’s general assessment is that the NCIDD is now operating reasonably effectively but that the findings of the Sherman Review still stand and some improvements are required. A number of new recommendations are made addressing effectiveness and accountability and the Sherman Recommendations are modified to take account of developments that have occurred since 2003. References to the Sherman Review are made where appropriate.

3.1.5 The reports that have been completed since the Sherman Review all address issues that resonate with those now under review. All have found it difficult to measure the effectiveness of DNA forensic procedures and a variety of views have been expressed about the practicality and utility of doing so. All have put forward proposals for improvement of the procedures in some respects and most have also focused on improving accountability arrangements.

3.1.6 The NSW Police see efficiencies in utilising the NCIDD as their sole database but have obtained legal advice that they are required by both the Commonwealth Act and the NSW Act to maintain a State database. The most serious obstacles are those identified in the NSW Act and in the legislatively approved *Arrangement for the Transmission of DNA Database Information to and from New South Wales and the CrimTrac agency of the Commonwealth*.

3.1.7 Section 23YUD in Part 1D is also regarded as an obstacle as it is expressed in terms of any arrangement for the transmission of information being *from* a DNA database of a participating jurisdiction, ‘thereby requiring the information to be placed on the NSW database in the first place for that transmission of information to CrimTrac to have occurred’.

³⁴ Sherman Report, para 8.13

3.1.8 Whether or not any participating jurisdiction utilises the NCIDD as its sole DNA database is a matter for that jurisdiction but the Commonwealth legislation should not create any obstacles to a decision to do so. The interests of efficiency and privacy protection would also be served by the adoption of the NCIDD in all jurisdictions as the sole database and it would therefore be desirable for the Commonwealth to seek this objective through negotiation.

3.1.9 The issues of statutory interpretation appear not to have been regarded as a problem in Queensland, as that State does use the NCIDD as its sole DNA database for law enforcement purposes. It would, however, be desirable now to put the matter beyond doubt by a suitable amendment to section 23YUD. It will also be necessary to follow up a legislative amendment with an appropriate amendment to the Ministerial Arrangement between the Commonwealth and NSW to remove any legislative impediments it might be thought to present.

Use of the NCIDD

Recommendation 1: That:

- a) Part 1D be amended to make it clear that the NCIDD may be utilised as the sole database for any participating jurisdiction for the purpose of national exchange and matching of DNA profiles;***
- b) once Part 1D has been amended, the Commonwealth negotiate an amendment to the Ministerial Arrangement between the Commonwealth and NSW to recognise that the NCIDD may be utilised by NSW as the sole DNA database for law enforcement purposes; and***
- c) the Commonwealth negotiate the adoption by participating jurisdictions of the NCIDD as the sole database.***

3.1.10 The purposes of the NCIDD are not set out in the legislation but are implicit in its focus on the collection and use of DNA samples and rules for the matching of DNA profiles and samples. There would be some advantage in making them explicit in that a statement of objectives would provide a reference point for statutory interpretation, particularly when issues arise requiring the balancing of law enforcement interests with privacy and civil liberties. Subject to Parliament's approval, the precise formulation of statutory objectives should be settled by agreement between all participating jurisdictions but, generally speaking, they might cover the storage of those DNA profiles that are likely to assist jurisdictions in criminal investigations and the facilitation of matching for law enforcement purposes of DNA samples with DNA profiles.

3.1.11 Some submissions argued that the purposes should not include the investigation of offences other than indictable offences. As is noted in the joint submission from the NSW Council for Civil Liberties and Liberty Victoria (CCL – LV), the effect of the relevant provisions³⁵ is that 'while it may appear on the surface that the use of the NCIDD is restricted by Part 1D to the investigation of more serious offences, in reality information on the NCIDD can be used for the investigation of any 'offence'. This may include both statutory and regulatory offences.'³⁶

³⁵ ss23YDAE(2)(d), 23YUD(1), (1A), (1B).

³⁶ CCL – LV submission, p.14

3.1.12 It may be true, as is argued by CCL – LV, that the popular conception is that the national database may only be used for the most serious offences but the utility of the database in investigating less serious, but high volume, offences is a reason for retaining this capability. Another is the often observed link between ‘serious’ and ‘minor’ offences. There is no reason in principle why DNA forensic procedures should not continue to be used in this way. However, the legal position should be made clear in legislation.

3.1.13 The CCL – LV submission argues that the implicit purposes of the NCIDD, as derived from its founding charter, are far too broad and provide no defence against ‘function creep’ and ‘function leap’ and recommends a statutory statement of objectives.³⁷ There is some force in this argument although the language it proposes may be too restrictive. Any statement of objectives should allow the continuation of the use of DNA forensic procedures in investigating the offences currently covered and must also be sufficiently broad to cover all existing uses outlined in Part 1D, including the location of missing persons and the identification of disaster victims.

Database objectives

Recommendation 2: That the Commonwealth negotiate objectives of the following kind for the national DNA database with participating jurisdictions and, when settled, that the objectives be considered for inclusion in Part 1D:

- a) to store those DNA profiles that are likely to assist jurisdictions in criminal investigations, locating a missing person or identifying a disaster victim;***
- b) to enable those DNA profiles to be accessed by participating jurisdictions for law enforcement purposes; and***
- c) to facilitate matching of those profiles for law enforcement purposes.***

3.1.14 A related issue is that of the name of the database. In this connection, CrimTrac has proposed renaming the database to remove the words ‘Criminal Investigation’. However, the database is not, nor should it be, a general database in the sense that it covers matters such as health and, for this reason, some qualifying words are necessary.

3.1.15 CrimTrac observes that the primary purpose of the database is to assist law enforcement *investigations* and its name should reflect that purpose. It also suggests that ‘in order to optimise the use of the database for a number of investigation purposes, more DNA profiles need to be voluntarily given by the public for the investigation of missing persons or unknown deceased.’³⁸

3.1.16 One option would be to substitute the word ‘Forensic’ for ‘Criminal Investigation’ so that the title would be ‘National Forensic DNA Database’. The connotations of the word ‘forensic’ would extend to the location of missing persons and the identification of disaster victims. There would still be the difficulty that the database is administered by a law enforcement agency but that is not of major concern. Another is to retain the word ‘Investigation’ as denoting the primary purpose of the database. This can be used in conjunction with ‘forensic’. The word ‘Australian’ may be substituted for ‘National’ to more readily convey the involvement of the States and Territories. On balance, this is the option favoured by the Committee.

³⁷ CCL – LV submission, pp. 12, 13

³⁸ CrimTrac submission, p.6

Database name

Recommendation 3: That the National Criminal Investigation DNA Database be renamed the 'Australian Forensic Investigation DNA System'.

3.1.17 While CrimTrac is responsible for the administration of the NCIDD, the cooperation of participating jurisdictions is essential to success and changes must be brought about through negotiation. Negotiations of this kind are difficult and CrimTrac would be in a stronger position if it were to be given a statutory charter. It would also clarify its responsibilities in relation to the management of the NCIDD. Proposals for a statutory charter have been put forward independently of this review and will no doubt be considered by the Government within a broader context. For the purposes of this Review, it is sufficient to note that a statutory charter for CrimTrac would assist in the resolution of some difficulties.

3.1.18 A statutory charter for CrimTrac was proposed in the CCL – LV submission which observes:

‘In order to build public confidence in NCIDD and increase scrutiny of the DNA system, CCL – LV strongly urges the government to provide a statutory basis for it. This will ensure that parliament and the populace have a full and frank discussion about the organisation and oversight of CrimTrac. This increased oversight should result in a more accessible and trustworthy agency.’³⁹

3.1.19 Interestingly, in the UK, an intention to ‘strengthen governance arrangements by placing the national DNA Database Strategy Board on a statutory footing and by introducing to it a wider independent membership’ has recently been announced.⁴⁰

3.1.20 At least so far as DNA functions are concerned, any statutory charter should be negotiated with the States and Territories but a good place to start is the statement of functions advised by CrimTrac itself:⁴¹

- provide leadership in generating national approaches to information sharing solutions for law enforcement agencies;
- ensure the secure, accurate and timely exchange of a broad range of information between law enforcement agencies in accordance with Australian law;
- provide national criminal record checking services for law enforcement and other accredited agencies;
- identify, investigate and develop emerging information technologies, opportunities and information sharing solutions that would provide benefits to law enforcement agencies; and
- develop information sharing solutions that leverage off CrimTrac’s core capabilities.

³⁹ CCL – LV submission, p.9

⁴⁰ Secretary of State for the Home Department (UK), Statement of 11 November, 2009.

⁴¹ CrimTrac submission, p.1

3.1.21 To these could be added a specific reference to the management of the NCIDD along the following lines:

- maintain and develop the NCIDD (as renamed) for the benefit of all participating jurisdictions in accordance with best international practice and report on its effectiveness.

Implications of a statutory charter for CrimTrac

Recommendation 4: That, if a statutory charter for CrimTrac is decided upon by the Government, a statement of functions, with particular reference to its management of the NCIDD, be agreed with participating jurisdictions and set out in Commonwealth legislation.

3.2 Complexity of legislation

3.2.1 The legislation deals with a complex subject. It took until July 2005 for State and Territory jurisdictions to enact complementary legislation and for CrimTrac to develop the NCIDD to the point where it could be used for inter-jurisdictional matching.⁴² The Consultant's Discussion Paper observed⁴³ that, 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
- 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.

3.2.2 When foreign police find forensic material at a crime scene from which they extract a DNA profile, it is becoming more common for them to ask if Australia can match the profile. Under the legislation as it stands, the AFP takes no action beyond advising the foreign police that Australia cannot assist unless a formal request is made under the *Mutual Assistance in Criminal Matters Act 1987* (the Mutual Assistance Act). As this is regarded as a resource intensive process, and there is only a chance of a match, the inquiry usually ends there with the consequence that the foreign police concerned are less likely to provide assistance to Australia when our police seek it from them.

3.2.3 This is in contrast with the practice in countries such as New Zealand and the United Kingdom where law enforcement agencies perform preliminary DNA database inquiries using the informal police-to-police assistance network or Interpol. One country then informs the other whether or not there has been a match and a formal assistance mechanism is then used to obtain DNA evidence and related information.⁴⁴ The gap in the Australian scheme is no doubt explicable by the early focus on a system that would operate across Australia rather than internationally.

⁴² Commonwealth Attorney-General's Department submission, p.3

⁴³ Consultant's Discussion Paper, para 3.2.2

⁴⁴ CrimTrac submission, p.3

3.2.4 Efforts are being made to overcome our difficulties within the constraints of the current legislation⁴⁵ but there is no doubt that, as it stands, the legislation is an obstacle to legitimate cooperation between Australian police and those of other countries. This is not acceptable in 2010. The ability to exchange information internationally for law enforcement purposes is an essential element in modern policing. Rather than seeking to rely on the existing patchwork of unrelated legislative provisions, there should be a clear statutory charter for such exchanges. They should, of course, be carried out within an appropriate legislative framework to protect privacy and ensure accountability.

3.2.5 To overcome the difficulties, the legislation would need to clearly enable the AFP to provide a 'yes' or 'no' answer to an enquiry from foreign police as to whether there is a match between their profile and a profile on the NCIDD. It would be essential to cover profiles that are obtained from individuals as well as profiles from crime scenes. An affirmative answer could then be followed up by a request for the identity of the person concerned. Within appropriate limitations, personal information could be provided as if it were a request from a participating jurisdiction. Appropriate limitations on the power might include a requirement that the matching conform to the Australian matching table, which is reflected in section 23YDAF, and observe any additional limitations imposed by the legislation of participating jurisdictions. At present, NSW and the ACT would appear to have additional limitations and these could affect the practicality of implementing the proposal through amendments to Part 1D alone. It should be possible, however, for the Commonwealth to negotiate a solution to this problem through amendments to the legislation of those jurisdictions. Foreign DNA profiles would be matched against participating jurisdictions via the NCIDD in accordance with the matching tables that currently exist between the Commonwealth and those participating jurisdictions.

3.2.6 While the location of such a positive power would be a drafting issue, there would be some advantage in setting it out in a new provision. The provision should contain clear administrative guidance on the circumstances in which international matching might be carried out and could prescribe the process to be followed in relation to the relevant participating jurisdiction as well as the foreign police service. Section 23YO, which deals with offences of disclosure, would, however, need to be amended to expressly recognise the power.

3.2.7 As recognised in the WA Review,⁴⁶ it would be appropriate for the AFP to act as the channel of communication between a State or Territory law enforcement agency and a foreign law enforcement agency.

3.2.8 Once the initial match is established, the further provision of information should take place under the *Mutual Assistance in Criminal Matters Act 1987*. To some extent, this will ensure that appropriate privacy protections are in place but there is still a need for particular measures to be developed to complement these procedures. As the ACT Attorney-General observes, 'the legislation should be amended to facilitate international cooperation but ...the

⁴⁵ See, for example, submissions from the Commonwealth Attorney-General's Department and the AFP referring to advice from the Australian Government Solicitor that the provision of a preliminary indication of a match in the context of an unidentified crime scene sample would not involve the disclosure of 'personal information' within the meaning of the Privacy Act.

⁴⁶ WA Review, p.33

potential dangers of sharing information with jurisdictions that may have fewer protections should result in necessary safeguards'.⁴⁷

3.2.9 In the context of international exchanges of information, it would be appropriate for the AFP to develop procedural rules to 'flesh out' the implementation requirements of **Recommendation 5** and to seek the Privacy Commissioner's agreement to their adoption.

3.2.10 This could be expressed as a legislative requirement which would recognise the role of the Privacy Commissioner without making the Commissioner responsible for the final form of the rules. As the rules would seek to protect the privacy of Australians once their information is transmitted to a foreign jurisdiction, it could be expected that they would be of some significance and, in accordance with normal practice, should be tabled in the Parliament. There would not appear to be any need to do the same in relation to the sharing of information within Australia as this is already covered in some detail by the legislation itself.

3.2.11 The Office of the Privacy Commissioner suggests that appropriate safeguards could include:

- Restrictions on which type of profile may be matched. For example, it is unlikely that it will be appropriate to match against volunteer profiles;
- Matching should only be permitted in cases where the foreign jurisdiction is investigating a crime that would be considered a serious or indictable offence in Australia;
- Initial matching activity should provide a 'Yes/No' type match response, with further detail sought through appropriate processes;
- Information from the NCIDD should only be disclosed to foreign jurisdictions that are able to demonstrate data protection regimes of a similar standard to Australia's; and
- Restrictions should be placed on the period for which exchanged profiles may be stored both in Australia and in any participating foreign jurisdiction.

3.2.12 As indicated above, the international exchange of information of this kind gives rise to particular privacy concerns and it would be important to develop an appropriate legislative framework within which exchanges might take place. Having regard to the inability of Australian law to regulate what happens to information once it is out of the jurisdiction, a fundamental privacy principle that is capable of applying is that the transferring agency should remain accountable to Australian oversight agencies for the appropriate handling of the personal information it transfers to a foreign agency. This would be consistent with the *APEC Privacy Framework* in the negotiation of which Australia played a prominent part.⁴⁸ It is also consistent with the proposed amendment to the privacy principle relating to cross-border transfers of personal information that has been formulated by the Government on the basis of the ALRC recommendation in its report on privacy.⁴⁹ The Office of the Privacy Commissioner supports such a recommendation provided adequate safeguards are also enacted.⁵⁰

⁴⁷ ACT Attorney General's submission, p.2

⁴⁸ APEC Privacy Framework Principle 9 - Accountability

⁴⁹ Government response to ALRC Report 'For Your Information' at

<http://www.alrc.gov.au/inquiries/title/alrc108/response.html>

⁵⁰ Office of the Federal Privacy Commissioner submission, recommendation viii

3.2.13 In order to submit a foreign profile to matching it is necessary to enter it on the database for a limited period. The most appropriate index would appear to be the crime scene one. It could be identified as a foreign profile by the addition of an appropriate prefix. Once a result is achieved, the profile could be removed but, from an operational perspective, it would be desirable to retain it for a limited period, perhaps six months, for reference purposes.

3.2.14 It is also relevant to note that this is an issue faced by countries with which we could be expected to exchange information on a regular basis. In this connection, the UK Review recommended that ‘robust processes should be developed to control international data sharing and that these should be subject to appropriate monitoring.’⁵¹ Fifty four countries now have national databases. The proposal is quite consistent with the way in which data is exchanged through Interpol.

International matching

Recommendation 5: That express statutory authority be provided:

- a) for the AFP to provide a response to an inquiry from a foreign law enforcement agency as to whether there is a match with a profile held by the foreign agency;***
- b) for a law enforcement agency of a participating jurisdiction to initiate international matches through the AFP; and***
- c) subject to the requirements of the Mutual Assistance in Criminal Matters Act 1987, the AFP develop, in consultation with the Privacy Commissioner, procedural rules governing the sharing of information with a foreign law enforcement agency. The AFP should report to the Minister on whether agreement has been reached with the Privacy Commissioner and the legislation should require that the rules be tabled in the Parliament.***

3.2.15 CrimTrac says that such a provision ‘would assist with any reciprocal exchange of DNA profiles with a country like New Zealand, where there is a free flow of people across the border, and would allow for this exchange to occur on a continuing basis. By way of example, if a crime scene sample from New Zealand did not match a suspect or convicted person on the NCIDD, the retention of that profile provides the opportunity for matches to occur in the future as further Australian person profiles are loaded onto the NCIDD, rather than requiring the periodic resubmission of a profile for matching.’⁵² As suggested by the Office of the Privacy Commissioner, retention should be limited to a specific period.

3.2.16 Some concerns have also been expressed relating to consent requirements when the AFP is asked to enforce the order of another jurisdiction to take a DNA sample and the person is a suspect of ‘a State offence that has a federal aspect’. Sections 23YUB and 23YUC provide for the registration and carrying out of orders but some doubt has been expressed whether a forensic sample can be taken from a cooperative suspect using the volunteer provisions in Division 6B (Subsection 23YUC(1) says that ‘the person is authorised to carry out the procedure in accordance with Division 6 and not otherwise’).

3.2.17 However, to allow the volunteer procedures to be followed in these circumstances would be a derogation from a suspect’s rights, particularly the right to a caution.

⁵¹ UK Review, p.85

⁵² CrimTrac submission, p.4

3.2.18 A related concern of the AFP is that section 23YUC does not allow the police in another jurisdiction to take samples on the Commonwealth's behalf in accordance with their own legislation. Instead, subsection (1) provides, in effect, that a person in a participating jurisdiction may carry out a forensic procedure authorised by a registered order 'in accordance with Division 6 and not otherwise'. It would no doubt be more administratively convenient and efficient if, in such circumstances, police could follow the procedures to which they are more accustomed but it is apparent from **Attachment D**, that to permit this may derogate substantially from a person's rights. It should not be permitted until there is a greater degree of harmonization of law in this area.

3.2.19 An AFP proposal that does not give rise to any such concerns is that references to 'Senior Constable' in Part 1D are potentially confusing and misleading and should be replaced by 'sergeant'. The AFP does not utilise the term 'Senior Constable' outside ACT policing and the term does not appear in the *Australian Federal Police Act 1979*. Although defined in section 23WA to mean a constable of the rank of sergeant or higher, potential for confusion arises because in ACT policing the term has a different meaning. References to 'Senior Constable' in Part 1D should be replaced by references to 'sergeant'. Consequential amendments will be needed to ensure that the same powers can also be exercised by an officer of higher rank.

3.2.20 The Northern Territory Police argued that, even taking into account the generally detailed nature of Commonwealth legislation, Part 1D is complex and restrictive. The intrusion on a person's liberty is relatively small but the legislation contains unnecessary formalities that do not, in the broader picture of law enforcement, protect people or enhance their civil rights. It suggested that it is not in the interests of justice to have processes which tend to deter police from obtaining forensic evidence. By way of example, they argued that the requirement for a forensic procedure to be carried out only by order of a magistrate seems unnecessary as this decision could be made by a senior police officer. They added that complex and detailed legislated procedures for obtaining evidence invite legal challenge on technicalities when it is more important to ensure the integrity of the subsequent process of analysis and the chain of evidence. However, the current requirements for a magistrate's order to authorise certain forensic procedures are an important safeguard of civil liberties and should be retained.

3.2.21 The Commonwealth Director of Public Prosecutions raises an operational issue concerning the matters that a judge or magistrate is to take into account in determining whether to make an order for the carrying out of a forensic procedure on an offender. Among other things, subsection 23XWO(7) requires the judge or magistrate to take into account 'whether the carrying out of the forensic procedure could assist law enforcement, whether Federal or otherwise'. While the DPP provided an example of one application where the issue was raised by a Magistrate and satisfied by additional affidavit evidence, the Office observes that it is not clear what type of evidence is necessary since, in its view, orders under this section could always assist law enforcement due to the potential for database matches. The Office therefore suggests the deletion of this particular requirement.

3.2.22 It might be argued that there is some value in retaining this requirement as a protection against the seeking of an order for an improper purpose, unlikely as that may be. On balance, however, the requirement does appear to be unnecessary and it would be

preferable to repeal the provision. Subsection 23XWL(c) contains a corresponding requirement and should also be repealed.

3.2.23 Two other procedural proposals are also put forward in the following terms:

- 1) Section 23WR provides that where a suspect is not a child or an incapable person a Magistrate may order the carrying out of a forensic procedure on the suspect if the suspect has not consented to the forensic procedure. Section 23XWO includes no requirement that the judge or magistrate must be satisfied that the subject has not consented and therefore it appears an authorised applicant can apply to a judge or Magistrate without first seeking informed consent. This allows an order to be sought by the Court following conviction and avoids all parties having to come back before the Court on a separate occasion following informed consent being sought. It would be preferable if the legislation could be amended to make it clear that consent is not necessary prior to an order being sought under section 23XWO in order to avoid any challenge in relation to this.
- 2) In relation to suspects provisions in relation to securing attendance are found in sections 23WV and 23WW. To avoid problems securing the attendance of offenders, the Act should include provisions for securing their attendance at Court.

These would simplify and clarify current procedural requirements and both proposals are accepted.

3.2.24 The Commonwealth Director of Public Prosecutions also refers to a characterisation of Part 1D by Weinberg J. during the course of a hearing as extraordinary and as being more complex than tax laws.⁵³ As was recognised by the NSW Review, excessive complexity can be counter-productive:

‘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.’⁵⁴

3.2.25 The Australian Privacy Foundation observes that complexity is in no-one’s interests but that any simplification of legislation across jurisdictions must ensure that privacy safeguards are not ‘levelled down’ to a common floor but are ‘levelled up’ to a common ceiling.⁵⁵

3.2.26 The ACT Attorney-General suggests that one of the reasons for excessive complexity is that Part 1D encompasses forensic procedures other than DNA testing and that separating procedures that result in DNA profiles from other procedures would improve the situation.⁵⁶

⁵³ Commonwealth Director of Public Prosecutions submission, attaching letter from Grahme Delaney, First Deputy Director, dated 30 January, 2003

⁵⁴ NSW Review p.124

⁵⁵ Australian Privacy Foundation submission, p.5

⁵⁶ ACT Attorney General’s submission, p.2

3.2.27 Clearly, the legislation is more complex than is desirable but it is important that any amendments to reduce complexity be carefully drafted so as not to detract from the current level of protection of civil liberties and privacy. The issue arises most directly in the next section, dealing with 'informed consent' and will be addressed in that context.

3.2.28 On the basis of the submissions summarised above, it would be desirable to clarify or simplify a number of particular procedures. For convenience, technical amendments to clarify particular provisions, which are discussed elsewhere in this Review, are also incorporated into this recommendation as reproduced in the Executive Summary.

Technical amendments

Recommendation 6: That the following technical amendments to Part 1D be made:

- a) replace references to 'Senior Constable' with references to 'sergeant' with consequential amendments to ensure the same powers can be carried out by officers of higher ranks;***
- b) repeal the requirement in subsection 23XWO(7) for a judge or magistrate to take into account 'whether the carrying out of the forensic procedure could assist law enforcement, whether Federal or otherwise';***
- c) make it clear that consent is not necessary prior to an order being sought under section 23XWO;***
- d) include provisions for securing the attendance of an offender as are provided for in relation to suspects in sections 23WV and 23WW;***
- e) allow a senior constable (or sergeant if Recommendation 6(a) is accepted) or equivalent of another jurisdiction to authorise the carrying out of a non-intimate forensic procedure on a suspect for a Commonwealth offence where the suspect is arrested in that jurisdiction;***
- f) the Commonwealth negotiate agreement with participating jurisdictions for uniform legislation on:***
 - registration of forensic orders;***
 - power to detain a suspect for the purposes of carrying out an order;***
 - exchange of physical DNA material;***
 - taking of DNA samples from volunteers; and***
- g) clarify that the reasonable use of force is available in taking a DNA sample from an offender, as provided for in section 23XJ in relation to suspects.***

3.3 Informed consent process

Volunteers

3.3.1 In respect of volunteers, complexity in the informed consent process has been recognised as a problem by all of the reviews that have been carried out in participating jurisdictions. Different approaches have been taken to the resolution of the problem, however, and it is convenient to start with that of the Victorian Review since it identified the underlying problem as inadequate regulation of collection, use and retention of a volunteer's DNA.

3.3.2 The Victorian Review distinguished ‘non-suspect volunteers’ from volunteers who are, or may become, suspects. While acknowledging that it can be difficult to determine whether a person has been eliminated from an investigation until the case has been prosecuted, it recommended that the Victorian legislation be amended to provide that a profile obtained pursuant to the legislation should be destroyed as soon as practicable after:

- (i) the donor has been eliminated from the investigation or
- (ii) it has been determined that analysis of the donor’s profile is not required.⁵⁷

3.3.3 Addressing this problem would, it concluded, to some extent, remove the need for complex information to be provided:

‘If [*the review’s recommendations further restricting the use of a volunteer’s DNA profile*] 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.’⁵⁸

3.3.4 The WA Review recommended that, in order to simplify the Act, certain provisions relating to ‘protected persons’ should be removed and the rules regulating the doing of identifying procedures on victims and witnesses who are adults should be removed and the persons treated as volunteers.⁵⁹

3.3.5 A different approach is suggested by Civil Liberties Australia, which proposes that the emphasis should be on clarifying the understanding of the person giving the ‘informed consent’ to the taking of a DNA sample and use of their DNA profile.⁶⁰ In the same vein, the Office of the Privacy Commissioner suggests that consideration be given to improving the manner and the quality of information provided to a person who has been asked to provide a DNA sample.⁶¹

3.3.6 The Commonwealth Director of Public Prosecutions has been involved in assisting the AFP to prepare standard documentation in relation to informed consent. The CDPP has also developed *pro forma* documents to be used by AFP officers and CDPP prosecutors when applying for court ordered forensic procedures.⁶²

3.3.7 The ACT Attorney General points to the very small proportion of volunteer profiles that are kept on the limited purpose index (see table in Chapter 4) and suggests that, while the reasons for this are not apparent, it does at least raise some concern that volunteers may not fully understand the potential consequences of providing their consent. He suggests that a

⁵⁷ Victorian Review, pp. 269- 270

⁵⁸ Victorian Review, p.270

⁵⁹ WA Police submission, summary of recommendations 5 and 6.

⁶⁰ Civil Liberties Australia submission, p.2

⁶¹ Office of Privacy Commissioner submission, recommendation i

⁶² Commonwealth Director of Public Prosecutions submission, p.4

legislative amendment to create a presumption in favour of volunteer profiles being placed on the limited purpose index could effectively address the problem.⁶³

3.3.8 The discrepancy is partially explained by the broad coverage of ‘volunteer’ in the Northern Territory but this is not a complete explanation as the Northern Territory only accounts for 3.6% of DNA profiles on the NCIDD.⁶⁴ It is also apparent from the table of DNA profiles by index in Chapter 4 that the Northern Territory is unlikely to account for the discrepancy. It may be, however, that, as suggested by the AFP, the vast majority of ‘limited’ purpose volunteer samples are never uploaded to the NCIDD as they are used for manual comparison within the case.

3.3.9 The creation of a presumption that volunteer profiles are to be placed on the limited purpose index could be effected by the insertion of a new provision in Division 6B. It could be accompanied by a consequential amendment to subsection 23XWR(2) to require donors to be informed of the presumption. In relation to any particular investigation, it would be necessary to stipulate what the limited purpose is. In most cases, it would be the specific investigation but different categories would be appropriate in relation to missing persons or disaster victim identification.

Legislative presumption

Recommendation 7: That Division 6B of Part 1D be amended to create a presumption that DNA profiles are to be placed on the ‘limited purpose’ index.

Suspects

3.3.10 In respect of suspects, one approach, which is considered later in this chapter, is to do away with the consent requirement altogether on the basis that it is, in the final analysis, illusory since a refusal of consent may be followed by a compulsory process. Before turning to this question, however, it is worth looking at the kind of information that must now be provided to a suspect.

3.3.11 The requirements in section 23WJ for a suspect to be informed of particular matters before giving consent to the carrying out of a forensic procedure are undoubtedly complex.

3.3.12 The amount of information to be conveyed is certainly considerable. Among other things, the provision requires that information be given about the purpose of the procedure, the offence to which it relates, the way the procedure will be carried out, the fact that it may produce evidence against the person, how it will be carried out, the fact that it will be recorded, the possibility of refusing consent but also the possibility that the procedure may then be authorised anyway, that information may be placed on the Commonwealth database and the rules that will apply to its disclosure.

3.3.13 Depending on other matters such as the status of the suspect – whether they are a child, for example, other information may also need to be provided. This adds to the complexity of the system for all concerned.

⁶³ ACT Attorney General’s submission, p.3

⁶⁴ See table in Chapter 4.

3.3.14 After surveying a number of respondents on the operation of the generally similar NSW provisions, the NSW Ombudsman reported that the information was far too complex and that the then NSW Privacy Commissioner commented that one of the purposes of providing the information is to notify the person of certain matters and that the privacy purpose of notification is frustrated if the individual does not understand how their information will be stored and used. The NSW Ombudsman recommended that ‘the Attorney-General urgently prepare a plain English version of the information that is required to be provided to serious indictable offenders by the Act... and consider whether this information should be prescribed by the regulations or a Schedule to the Act.’⁶⁵

3.3.15 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 suspect procedures in the legislation of each jurisdiction and have come to the conclusion that, *when properly understood*, [emphasis added] 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 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, suspect 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.’⁶⁶

3.3.16 South Australia police comment that ‘complexity has been minimised via the introduction of defined procedures for the collection of DNA profiles from volunteer/victims (section 7) and suspect/offender (section 20).’

3.3.17 The Northern Territory Police argued that the provisions for informed consent are unnecessarily complex and, in any event, do not give information that is useful. The information ‘does not actually explain what a DNA profile is, nor how it will be used and retained’.

3.3.18 On the other hand, the ACT Attorney-General argues that, while the option of refusal may be somewhat illusory, the process of seeking consent may reduce conflict and escalation.⁶⁷

3.3.19 The Discussion Paper quoted the Sherman Review’s observation that it was, at that time, too early to propose any major changes to the legislation but then reported the views of

⁶⁵ NSW Ombudsman, ‘The Forensic DNA Sampling of Serious Indictable Offenders under Part 7 of the *Crimes (Forensic Procedures) Act 2000*’ (the 2004 NSW Ombudsman Report) pp. 94-104

⁶⁶ WA Review, pp. 115, 116; although this comment relates to the legislation generally, it is mainly based on the procedures requiring informed consent.

⁶⁷ ACT Attorney General’s submission, p.3

subsequent inquiries in NSW and Victoria that had considered the procedures too complex.⁶⁸ It also reported the recommendation of the ALRC/AHEC Report that consent should be replaced with a requirement for authorisation by a judicial officer or authorised police officer. The ALRC/AHEC Report also recommended that the individual should be able to select the method of sampling and that the Act require prescribed information be given in a form that is capable of being easily understood.

3.3.20 Although the Sherman Review did not advocate any major change, it did recommend (Recommendation 2) an amendment to Part 1D to require that the form of consent and a plain English version of the information that is to be provided should be prescribed under the Act.

3.3.21 The Australian Privacy Foundation supported Sherman Recommendation 2 but on the basis that the ALRC-AHEC proposal to replace the consent requirement with an authorisation process is accepted.⁶⁹ There was also significant support for this proposal at the consultation meetings held in Sydney, Melbourne and Brisbane in February 2010.

3.3.22 The ALRC-AHEC proposal was formulated somewhat tentatively in the light of the more limited information available in 2003 and was expressed in the following terms'

'41.36 In any case, the Inquiry considers this matter would benefit from further consideration and practical experience in the conduct of forensic procedures. Therefore, the Inquiry recommends that the Commonwealth Attorney-General should consider amending the *Crimes Act* to: (a) remove the consent provisions in relation to suspects and serious offenders, so that a forensic procedure only may 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.'⁷⁰

3.3.23 However, this proposal would mean that court orders would need to be sought for all procedures relating to suspects and offenders. Advice from the AFP is that the great majority of forensic procedures are performed by consent and that the removal of a consent option would significantly increase the number of court orders, unnecessarily take up court time and resources and also be much more onerous for police officers. Some also consider that the removal of consent procedures would be detrimental to individuals' sense of autonomy and dignity and could escalate conflict. For these reasons, it has not been adopted.

3.3.24 Leaving this option aside, it remains important to ensure that information is conveyed in a form that is readily comprehensible to anyone providing a DNA sample. It should, of course, be recognised that some volunteers may transition to suspects and it is important that their procedural rights be protected through an appropriate caution. Once they become suspects, further procedures in relation to them are governed by Divisions 2 to 6 of Part 1D.

3.3.25 The CCL – LV submission argues for the implementation of the Sherman recommendation and also put forward its own recommendation:

⁶⁸ Consultant's Discussion Paper, paras 3.3.4-3.3.7

⁶⁹ Australian Privacy Foundation submission, p.6

⁷⁰ ALRC-AHEC Report, p.1011

‘CCL – LV urges the government to create a simple form written in plain English to be signed by any person ‘consenting’ to a forensic procedure. An interpreter should also be provided when necessary, and this service should be extended to ‘volunteers’ as well as ‘suspects’.⁷¹

3.3.26 The Office of the Privacy Commissioner observes that, since the circumstances that generally give rise to the need to collect forensic DNA samples may be distressing to those individuals, the donor may, in some cases, have a reduced capacity to think clearly about the consequences of providing a sample. On this basis, it suggests that the information provided should include written information that can be reviewed at a later time, including information about complaint avenues.⁷²

3.3.27 In this connection, it is appropriate to look to privacy principles for guidance. In brief, those principles require that information be conveyed in a form in which it can be understood by the persons to whom it is directed.

3.3.28 There are two aspects to the problem. The first is that of what should be said to the individual and the second is what information might more appropriately be conveyed in writing.

3.3.29 On the first, there is no reason why what is said should not be expressed in a very short statement, analogous to the caution given to a suspect upon their arrest. In place of the dozen or so matters that are currently covered in the statement that is read by a police officer, it would be desirable, as an aid to comprehension to include only the four or five essential elements – the purpose of the procedure, the offence to which it relates, the fact that it may produce evidence against the person and the possibility of refusing consent but also the possibility that, if the volunteer is also a suspect, the procedure may then be authorised by a magistrate. In most cases, the individual could, as the ALRC/AHEC Report proposes, be allowed to nominate the way in which it should be carried out. Where there is good reason why this would not be possible, the individual could be advised of the reasons.

3.3.30 On the second – information to be conveyed in writing – there would be scope to set out in more detail information on ways in which forensic procedures may be conducted, who may be present, or may be required to be present, recording of the procedures, how information will be stored and handled, to whom it may be disclosed, in what circumstances a refusal to consent may be overridden and who may decide this and so on. While the precise form of any plain English documents would need to be settled in consultation with relevant agencies, some elements of what needs to be included are set out at **Attachment E**. It would be essential for the individual to be allowed adequate time to read the notice and to seek advice on it if they wish. This is a modification of Sherman Recommendation 2.

⁷¹ CCL – LV submission, p.25

⁷² Office of the Privacy Commissioner submission, p.4

Informed consent

Recommendation 8: That:

- a) the information to be provided to individuals for the purpose of seeking their consent to a forensic procedure be provided by a combination of oral and written notifications drafted to include the elements set out in Attachment E and that the forms be prescribed under the Crimes Act;*
- b) the form of consent make provision for documenting the fact that the person understands the contents of the form and the fact that the person consents to the procedure;*
- c) the information provided include advice on avenues for complaint and review; and*
- d) 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.*

3.4 Victims of crime

3.4.1 In seeking to balance the interests in this area, the ALRC-AHEC Report recommended that:

‘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.’⁷³

3.4.2 Broadly speaking, the sensitivity about the inclusion of victims’ profiles on the NCIDD is that the profiles may then be used to prosecute them for an unrelated offence.⁷⁴ It is put with greater particularity by the Office of the Privacy Commissioner:⁷⁵

‘In rape and serious assault cases the victim’s body may be considered part of the ‘crime scene’ – this potentially leads to the victim’s DNA profile being placed on the crime scene register of the NCIDD.

Further, in cases where suspect DNA evidence is removed from the victim’s body, this can result in the victim’s DNA also being sampled and, again, their profile being placed on the crime scene register of the NCIDD.

There are documented cases where this has led to a victim of crime being implicated in other, unrelated, offences. In some cases there may be an explanation for this – such as

⁷³ ALRC-AHEC Report, Recommendation 41-5

⁷⁴ The extent to which the other offence is ‘unrelated’ may vary. For example, CrimTrac puts forward a situation where a complainant presents as a victim of sexual assault where the alleged perpetrator is found to be a homicide victim and the complainant subsequently becomes a suspect in the homicide (CrimTrac submission attachment).

⁷⁵ Office of the Privacy Commissioner submission, pp.6, 7

where the perpetrator has transferred their DNA to the second site. In other cases the match seems to be adventitious⁷⁶ and there is no explanation⁷⁷.

The Office considers it imperative that a victim providing a forensic DNA sample should be able to stipulate the uses to which their sample is put. In circumstances where the victim is not able to do so, their DNA profile must only be used for the purposes of investigating the crime for which they are recognised as a victim.

Similarly, it is important that in situations where it is recognised that a victim's DNA profile is likely to be placed on the crime scene register of the NCIDD as a result of evidence-gathering, every effort be made to identify and remove it.

The Office notes that at present, the Crimes Act does not stipulate that steps should be taken to prevent victim profiles being included on the crime scene register. The Office considers that, at a minimum, the Crimes Act should be amended to provide stronger protection against victim profiles being included or maintained on the crime scene register.

On balance, the Office suggests it may be reasonable to establish a separate register specifically for victim profiles, in order to effectively manage the sensitivities arising specifically in relation to victim profiles.'

3.4.3 The Australian Privacy Foundation says that it would not want to see victims given any less right to control the use of their DNA samples or profiles than other volunteers.⁷⁸

3.4.4 Generally speaking, Division 8A of the Crimes Act requires that the NCIDD comprise⁷⁹:

- 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.

3.4.5 The AFP's policy is that 'DNA profiles of victims of crime are not loaded onto the NCIDD for matching, this includes any DNA profile derived from a crime sample that is identical to that of the victim. If at a later date it is decided that a victim profile is to be loaded for comparison, the category under which the profile is loaded (volunteer limited purpose) limits matching to within the limited purpose specified upon loading the profile onto the NCIDD.'⁸⁰

⁷⁶ The Office understands the term 'adventitious' is used by law enforcement agencies, such as the Australian Federal Police and CrimTrac, to describe a match that happens purely by chance and does not appear to have an explanation (for example, when it matches an existing profile on the system but that person was never at the crime scene).

⁷⁷ See Gans, Jeremy - "DNA Identification and Rape Victims" [2005] UNSWLAWJl 16; (2005) 28(1) University of New South Wales Law Journal 272

⁷⁸ Australian Privacy Foundation submission, p.6

⁷⁹ see definition of 'Commonwealth DNA database system' in s.23YDAC; variations in State and Territory systems make it difficult to be more precise.

⁸⁰ AFP submission, p.10

3.4.6 However, this is an administrative practice. It is legally possible for victims' DNA profiles to be stored on the NCIDD 'crime scene' index from which they can be matched against profiles from other crime scenes around Australia. Such matching could determine whether the victim has been involved in an earlier crime, effectively treating the victim profile as a suspect profile. Victims may therefore be deterred from providing a sample for testing.

3.4.7 The problem could be addressed legislatively through a simple amendment to section 23YDAC to expressly exclude known victims profiles from the definition of 'crime scene index'. The question is whether that might create other problems.

3.4.8 As argued by the Office of the Privacy Commissioner, and by the Victorian Privacy Commissioner,⁸¹ a more fundamental amendment to create a statutory requirement for a separate database could also address the problem.

3.4.9 The ACT Victims of Crime Coordinator supports a separate victims of crime index 'with strict matching rules to protect privacy and interests of victims' and 'for a strengthening of the informed consent process for victims by 'obliging police officers to offer victims the opportunity to have an independent person assist them in giving consent.'⁸² If the Review rejects the proposal to create a separate index, the Coordinator suggests that, following informed consent, victims of crime DNA be placed on the volunteers (limited purpose) index as a matter of course, unless the victim specifically requests that their DNA be placed on the volunteers (unlimited purpose) index.⁸³

3.4.10 However, the proposal is generally opposed by law enforcement agencies.

3.4.11 CrimTrac observes that victims of crime must now be treated as volunteers under the legislation and therefore have the protection of being able to consent to use of their profile for a limited purpose. It also expresses concern for the implications for matching with other indices particularly across jurisdictions. In addition, it points out that a crime scene profile is distinct from a person profile as it is obtained from an unknown source. Until a DNA sample taken from a crime scene is identified as belonging to the victim through DNA analysis, the profile from that sample must be treated as a crime scene DNA profile.⁸⁴

3.4.12 The Queensland Police say that they do not load known victim profiles on the crime scene index. Victims commonly provide a DNA sample in accordance with the 'informed consent' provisions to enable matching to occur with DNA profiles and the victim's profile is loaded either onto the volunteer (limited purpose) or volunteer (unlimited purpose) index, depending on the victim's election.⁸⁵

3.4.13 The Northern Territory Police see little value in a victims index. A victim's profile can be compared with material from the crime scene without retaining it on a database. Once identified, a profile derived from the victim can be removed from the crime scene index and, unlike suspects, a victim's identity is usually known or can be ascertained by other means.

⁸¹ Victorian Privacy Commissioner submission, p.8.

⁸² ACT Attorney General's submission, pp. 3,4.

⁸³ ACT Attorney General's submission, p.4

⁸⁴ CrimTrac submission, p.12

⁸⁵ Queensland Police Service submission, p.4

3.4.14 The Standing Committee on Law and Justice of the NSW Legislative Council has taken a different approach, recommending a legislative ban on the use of a victim's DNA profile against that victim for an unrelated offence except where the unrelated offence is a serious crime.⁸⁶

3.4.15 Current laboratory practice, as understood by CrimTrac, is that if the DNA profile is *identified* as belonging to a victim, it is not loaded onto the NCIDD, or is removed as quickly as practical. CrimTrac suggests that a nationally endorsed policy or business principle outlining the practice for dealing with the loading of DNA profiles from *identified* victims may be the most appropriate mechanism for managing this issue.⁸⁷

3.4.16 Complicating the issue is the fact that any restriction imposed on uploading a victim's DNA profile onto a database would need to be crafted to avoid the situation where this restriction would result in mixed profiles being prevented from being uploaded. Mixed profiles are those which could potentially contain parts of a victim's DNA mixed in with the DNA of an offender.⁸⁸ In some situations, such as the violent brawl that erupted at Sydney Airport in 2009 between rival criminal elements culminating in the death of one person, it is impossible to determine, until the DNA analysis is done, whether blood or other material belongs to a victim or a perpetrator.

3.4.17 Moreover, the creation of a separate index would further complicate an already complex system and the additional protection it would provide can, in most cases, already be provided under the 'volunteer (limited purpose)' procedure. If the Act is amended, as proposed in **Recommendation 7** to make that the default procedure for all volunteers, that additional protection would safeguard the rights of victims of crime. For these reasons, the Review is not persuaded that there is a need for a separate 'victims' index and takes a similar approach to that taken by the Sherman Review.⁸⁹

3.4.18 Nor does the Review consider that the recommendation of the Standing Committee on Law and Justice of the NSW Legislative Council to the NSW Parliament, referred to above, should be followed in Commonwealth legislation. The issues it addresses involve a number of complex policy balances, including the need to ensure that victims are not dissuaded from coming forward to report crime, but the existing provisions of Part 1D satisfactorily address these concerns. The round table consultation carried out by the Review in Brisbane also brought to light problems of complexity in the legislation that would be exacerbated if this approach were taken by the Commonwealth.⁹⁰

3.5 Children

3.5.1 In Part 1D 'child' is defined as 'a person who is at least 10 years of age but under 18 years of age'. This definition has not been uniformly adopted throughout Australia. The ACT Attorney General, for example, points out that the ACT *Crimes (Forensic Procedures) Act 2000* defines a child as a person under eighteen and requires the consent of a parent or

⁸⁶ Parliament of NSW, Standing Committee on Law and Justice, Legislative Council, Report 41, December, 2009, pp. xi, 55

⁸⁷ CrimTrac submission, p.12

⁸⁸ CrimTrac submission, attached letter.

⁸⁹ Sherman Report para 3.63

⁹⁰ See **Attachment F** discussion relating to complexity of legislation

guardian. He suggests that this is the most straightforward way of ensuring that all those under eighteen years of age fall within the legislation and queries whether any useful purpose is served by obtaining consent from the child, particularly in the lower range of the age group.

3.5.2 The Office of the Privacy Commissioner proposes⁹¹ that the Crimes Act make provision for:

- the individual assessment of the decision making capacity of children; and
- how a person may be determined to be ‘incapable’, who is able to make that decision and how that decision applies in relation to future requests for DNA samples.

3.5.3 In support of this view it argues that if a child can demonstrate a capacity to understand the issues, it would be good privacy practice to involve them in decision making about their participation in DNA sampling for law enforcement purposes rather than relying on an arbitrary age to determine their involvement. In relation to ‘incapable persons’, it argues that assessments should take account of the fact that incapacities may be episodic in nature and that individuals presenting with a reduced capacity may still be capable of making decisions if provided with appropriate support.⁹²

3.5.4 The Australian Privacy Foundation supports Sherman Recommendation 3 subject to its general reservations about the meaning of ‘consent’.⁹³

3.5.5 While the Review sees merit in the approach proposed by the Office of the Privacy Commissioner, it does not consider that it would work well in the law enforcement environment, where the degree of objectivity that is inherent in a prescribed age, provides a degree of certainty for police officers operating under detailed rules every aspect of which may give rise to legal challenge. It therefore supports the approach taken by the Sherman Review.⁹⁴

Consent on behalf of children

Recommendation 9: That provision 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 eighteen; and*
- c) the consent of the person concerned only in the case of persons eighteen and over.*

(Sherman Recommendation 3)

3.6 Voluntary mass screenings

3.6.1 South Australia Police advise that instructions are provided to members on how to conduct mass screenings utilising the victim/volunteer provisions of the Act.

⁹¹ Office of the Privacy Commissioner submission, recommendation ii

⁹² Office of the Privacy Commissioner submission, p.5

⁹³ Australian Privacy Foundation submission, p.6

⁹⁴ Sherman Report, Recommendation 3 – see Attachment A; see also ALRC-AHEC Recommendation 41-3

3.6.2 Northern Territory Police advise that it has not yet been found necessary to develop protocols for mass screening and that, if one were contemplated, each individual would be regarded as a ‘limited purpose’ volunteer and their consent would be sought.

3.6.3 From a civil liberties and privacy perspective, the problem with voluntary mass screenings is that individuals may be unduly pressured to take part. Refusal may lead to suspicions of guilt. To some this may cause little concern on the basis that those who have nothing to hide have nothing to fear but, as the *Farah Jama case* demonstrated, the system is not perfect and there may be risks for the innocent in volunteering.

3.6.4 To address these concerns, some have argued for a court authorisation process on the basis that it should act as a moderating influence on the social pressures that may be felt by those who, for legitimate reasons, are unwilling to participate.⁹⁵

3.6.5 The ACT Attorney General says that ‘the central difficulty in relation to mass screenings is that the subjects are a hybrid between true volunteers and suspects.’ He suggests either specific legislation or a protocol to regulate them. He expresses a preference for legislation requiring a court order and creating a presumption in favour of profiles being placed on the limited purpose index.⁹⁶

3.6.6 The objectives of legislation can be readily appreciated but it is not clear how such a provision might work in practice. Some might be keen to undergo a DNA test so as to remove themselves from the field of possible suspects. If a court should decline to make such an order, should they be prevented from undergoing a test? Others may continue to decline to participate despite court authorisation. Should the authorisation be viewed as negating the validity of their objections? If so, should there be some element of compulsion? (A compulsory process may, in some circumstance, be an unreasonable imposition on innocent persons.) If not, what does the court’s authorisation say about their objections?

3.6.7 A somewhat different approach was suggested by the Office of the Privacy Commissioner:⁹⁷

‘The Office agrees with recommendation 41-6 of the joint Australian Law Reform Commission/Australian Health Ethics Committee report *Essentially yours: the protection of the human genome* (the ALRC/AHEC report), regarding the establishment of guidelines for the conduct of mass screenings including the process for approving a mass screening to be undertaken. The Office recognises that such situations will be rare, but establishing guidelines before the event will ensure a robust, accountable process is in place should the need arise.

The Office considers that these guidelines could, at a minimum, include the following requirements that:

- such screenings are undertaken as a last resort
- 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

⁹⁵ See, for example, Victorian Privacy Commissioner submission, pp. 9,10

⁹⁶ ACT Attorney General’s submission, p.4.

⁹⁷ Office of the Privacy Commissioner submission, p.6

- the information provided to volunteers include information about what may happen if they become a suspect on the basis of the sample they have provided.’

3.6.8 The Australian Privacy Foundation expresses its concern about the potential loss of procedural safeguards through unregulated use of voluntary mass screenings and supports ALRC-AHEC recommendations:

- 41-4 that separate provision be made either in Part 1D or in the regulations for each category of volunteer who may be subject to DNA forensic procedures;
- 41-6 for guidelines for mass screening programs by the police but they should be binding;
- 41-12 enabling volunteers to specify a retention period for their forensic material and any information obtained from it subject to an upper limit with any extensions required for specific operational purposes being approved by an independent – preferably judicial – authority; and
- 41-13 to define exclusively the circumstances in which collection of genetic samples is permitted.

3.6.9 A practical consideration is that voluntary mass screenings are very rare in the States and are likely to be even rarer within the AFP’s jurisdiction. Nevertheless, it would be desirable for guidelines to be formulated by relevant Commonwealth agencies as a contribution to the development of a nationally agreed protocol in this area. The round table consultation in Melbourne identified the following objectives as among those that should be incorporated into guidelines:

- the class of persons to be covered should be limited as much as possible (e.g. by gender or geographical location); and
- the uses to which samples may be put should be declared.

Voluntary Mass Screenings

Recommendation 10: That, in conjunction with participating jurisdictions, the Commonwealth develop guidelines to regulate the conduct of voluntary mass screenings.

3.7 Buccal Swabs

3.7.1 Buccal swabs have become perhaps the most common means of taking samples. Often they are self-administered and this has prompted the suggestion that, when carried out by the donor, a buccal swab should no longer be considered to be an ‘intimate procedure’. On the other hand, some have argued in submissions and in the roundtable consultation meetings that the procedure of taking a bodily sample is, by its very nature, intrinsically intrusive on the bodily privacy of an individual.⁹⁸ As noted in the Sherman Review, the major practical consequence of changing the categorisation of a buccal swab from ‘intimate’ to ‘non-intimate’ is that it can then be ordered by a senior constable, rather than requiring a magistrate’s order. A change to the categorisation would therefore remove judicial oversight of such procedures.

⁹⁸ See, for example, Victorian Privacy Commissioner’s submission p.10 and Australian Privacy Foundation submission, p.8

3.7.2 The Victorian Review, however, took a different approach, recommending that the legislation be amended to provide that a buccal swab, when self-administered, is a non-intimate procedure and that a person from whom a DNA ‘reference’ sample is sought has the right to choose the method by which the DNA sample is taken.⁹⁹

3.7.3 Commenting on methods of collecting samples generally rather than on the question of buccal swabs, the Office of the Privacy Commissioner says:¹⁰⁰

‘The Office supports the view of the Victorian Parliamentary Law Reform Committee in its 2004 report *Forensic sampling and DNA databases in criminal investigations* that ‘a donor should have the right to choose the method by which a DNA sample is taken’¹⁰¹.

The Office considers that it is appropriate to ensure that in taking a DNA sample, the least intrusive method of collection is used. In determining which method is the least intrusive, the views of the donor will be relevant.

The Office also considers that donors should be offered the option of self-administering the sampling procedure where possible, as this will generally be less intrusive than a process administered by another.’

3.7.4 As discussed in section 3.3, the ALRC-AHEC Report also argues for a donor right to choose the method by which a DNA sample is taken.

3.7.5 In Queensland, Western Australia, Tasmania, the ACT and the NT buccal swabs are classified as ‘non-intimate procedures’ (see **Attachment D**). In South Australia, a forensic procedure involving intrusion into a person’s mouth is classified as an ‘intrusive forensic procedure’ but buccal swabs and finger prick samples are classified as ‘simple identity procedures’ and excluded from the definition of ‘intrusive forensic procedures’. In NSW a self-administered buccal swab is classified as ‘non-intimate’. Only the Commonwealth and Victoria classify them as ‘intimate’.

3.7.6 Northern Territory Police say that most mouth swabs are self-administered and that the process is equivalent to brushing teeth and should not require a dentist or medical practitioner to be present.

3.7.7 The Queensland Police say that it is less invasive and more appropriate to take a buccal swab than a sample of hair in the first instance and argue for a reclassification of buccal swabs as a non-intimate procedure.

3.7.8 CrimTrac also supports the ‘simplification of the process’ by defining it as a non-intimate procedure.

3.7.9 The Sherman Review expressed some support for the proposition that a voluntary buccal swab should not be regarded as an intimate procedure but did not make a

⁹⁹ Victorian Review, pp.146 – 148

¹⁰⁰ Office of the Privacy Commissioner submission, pp.39, 40

¹⁰¹ Victorian Parliamentary Law Reform Committee, *Forensic sampling and DNA databases in criminal investigations*, Executive Summary p.xxxiv, Rec 4.8 pp.156-148

recommendation because it considered that little turned on the distinction and that it would be better to await further experience.

3.7.10 Beyond Australia, legislation of the United Kingdom and of New Zealand is helpful. In the UK, buccal swabs have been classified as ‘non-intimate’ since 2004 and in New Zealand amendments made by the *Criminal Investigations (Bodily Samples) Amendment Act 2009* provide authority for police to take DNA samples at the time they take fingerprints. Bodily samples are to be taken by either a fingerprick or a buccal sample. The sample is to be taken by the method chosen by the person. Where the person does not indicate a preference, the constable can choose the method but, if reasonable force is required, it must be taken by fingerprick.

3.7.11 The New Zealand approach has much to commend it. Australian legislation is formulated on a different basis and much depends on the characterisation of a procedure as either ‘intimate’ or ‘non-intimate’. Over the years, the varying approaches to buccal swabs, for example, can be seen in **Attachment D**.

3.7.12 Where to draw the line on these matters is a question on which it may be expected that opinions will differ. In the definition of ‘intimate forensic procedure’ in section 23WA, some procedures appear to be more intimate than others. Clearly, any taking of a sample from a genital area should be regarded as ‘intimate’ but, in some other cases, the question is more difficult. Having regard to the submissions, and the conclusions drawn by other inquiries, this Review considers that a voluntary buccal swab, when self-administered, would appear less intimate than many other tests and should not be classified as an ‘intimate procedure’. However, as illustrated by the submissions, not all agree. Those who do regard it as intrinsically intrusive will presumably decline to carry out the procedure themselves in which case, the procedures applicable to the authorisation of intimate procedures will become applicable.

3.7.13 Some persons may be unable to carry out the test themselves or may simply prefer that it be carried out by someone else. Where this is the case, the administration of the test should still be regarded as ‘non-intimate’.

3.7.14 It is also appropriate in this context to consider further the question whether donors should have the option of choosing the method by which a sample may be taken. As discussed above, a recommendation to this effect was made in the ALRC-AHEC Report.¹⁰²

3.7.15 The Review also considered this issue but came to the conclusion that, while a right to choose the method of sampling is unobjectionable as a matter of principle, it would be undesirable to express it in legislation. One concern was that any statutory provision should not be cast in terms that could give an uncooperative person the opportunity to frustrate the sampling procedure by insisting upon a method that for some reason may not be a practicable one in the particular circumstances. Another was that a statutory requirement would only be relevant where consent was an issue and would also add to the complexity of the legislation.

¹⁰² ALRC-AHEC Report, Recommendation 41-1(b)

Buccal swabs

Recommendation 11: That, when self-administered or administered by another person at the request of the donor, a buccal swab should be included in the definition of ‘non-intimate forensic procedure’.

3.8 Hair samples

3.8.1 Some submissions to the Sherman Review raised the issue of the method for taking 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.’

3.8.2 The Australian Privacy Foundation commented that, in light of this explanation, the procedure cannot accurately be classified as ‘non-intimate’.

3.8.3 The AFP commented:¹⁰³

‘Subsection 23XL(b) requires hair samples for DNA testing to be taken one hair at a time.

In reality this procedure could be considered as inhumane, as it is not the least painful technique and alternative techniques are available.

The AFP would like to see subsection 23XL(b) amended to remove the requirement that each strand of hair be taken individually and have the subsection simply provide that the sample is to be taken using the least painful technique known and available to the person.

Adoption of this wording would bring the Commonwealth legislation closer into line with subsection 52(b) of the ACT *Crimes (Forensic Procedures) Act 2000* and section 49 of the NSW *Crimes (Forensic Procedures) Act 2000* keeping procedures more uniform across the jurisdictions.’

¹⁰³ AFP submission, pp.10, 11

3.8.4 South Australia Police comment that the removal of loose hair from clothing is excluded from the SA Act and is no longer considered a ‘forensic procedure’. The removal of hair from the person is defined as an ‘intrusive forensic procedure’ and must be conducted by a medical practitioner.

3.8.5 ACT Policing refer to the change in the *Crimes (Forensic Procedures) Act 2000* (ACT) from ‘one strand at a time’ to ‘by the least painful technique known to the person’ and say that it is impossible to guarantee one strand at a time.¹⁰⁴

3.8.6 The AFP proposal that the prescriptive language of subsection 23XL(b) be replaced by a simple requirement that the sample be taken using the least painful technique known and available to the person would be a marked improvement and would allow for modifications in technique as broader advances are made in DNA technology. With this amendment, the Review considers that the taking of hair samples should continue to come within the ‘non-intimate forensic procedures’ definition.

Hair samples

Recommendation 12: That subsection 23CL(b) be amended to replace the present requirement for samples to be taken one hair at a time with a requirement that the sample be taken using the least painful technique known and available to the person.

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.¹⁰⁵ Material must also be made available to offenders and volunteers in accordance with prescribed procedures and time limits.¹⁰⁶

3.9.2 There have been some suggestions that sample sharing provisions are unnecessary and should be deleted.¹⁰⁷ However, the Office of the Privacy Commissioner says that it is an important principle of good privacy management to allow individuals access to their personal information:¹⁰⁸

‘The Office notes that the Sherman Report refers to difficulties commonly experienced with sharing such material and the view expressed by some stakeholders that ‘individuals could always obtain their own DNA sample and have it analysed at any time they wished’¹⁰⁹. On this basis the Office suggests that it may be of more value to donors to be provided with a copy of the forensic analysis of the sample and any accompanying demographic or other information, rather than the sample itself.’

¹⁰⁴ ACT Attorney General’s submission, p.5

¹⁰⁵ ss.23XU and 23 XUA

¹⁰⁶ s.23YG

¹⁰⁷ See e.g. ACT Attorney General’s submission, p.5

¹⁰⁸ Office of the Privacy Commissioner submission, p18

¹⁰⁹ Sherman Report, chapter 3, para 3.105 p. 40

3.9.3 The AFP says that the provision of a duplicate sample (and later analysis results) has created difficulties and puts forward a number of suggestions:¹¹⁰

‘1. Material required to be made available to suspect, offender or volunteer

The AFP seeks amendment to section 23YG(2)(a) to increase the 7 day timeframe provided for materials to be made available to a suspect, offender or volunteer under Part 1D. The AFP believes that the timeframe should be increased to 4 weeks to be more consistent with the model laws. In practice the AFP has been unable to comply with s 23YG(2)(a) and instead has complied with s 23YG(2)(b). Four weeks, as stipulated in the model laws, would be far more practical and some samples may have to come back from analysis interstate or overseas.

2. Provision of samples to an accredited independent facility rather than to person directly

The AFP is also keen for appropriate safeguards to be put in place in relation to the release of forensic material. The AFP believes that samples required to be provided to a suspect, offender or volunteer under s 23YG should be made available only to a facility (nominated by the person) that is accredited under ISO/IEC 17025 (rather than to the individual directly). These samples should be made available to the accredited facility for the purpose of conducting a specific type of testing. The facility could then be held accountable as to their dealings with the sample and their obligations could be outlined clearly in the legislation. The accredited independent facility could also then be obliged to return the sample to police

3. Section 23XUA Samples insufficient material to share

Under this section a person of the suspect’s choice is allowed access to a restricted area where an analysis is being conducted. The AFP maintains that the presence of an independent person during forensic analysis in a laboratory undermines the accreditation process for that laboratory as well as having implications for the contamination and security of samples.

All members working in an AFP laboratory have to have a security clearance up to a minimum clearance level of highly protected and for some cases top secret. Even other members of the forensic team are not permitted into the biology laboratory. The AFP has great concern about allowing an unknown person to enter a laboratory to watch an analysis. Contamination is a real risk as all a person would have to do is inadvertently talk over a sample for it to be contaminated.

The AFP seeks amendment to section 23XUA(2) to provide safeguards to ensure that a person nominated to be present when a suspect’s sample is analysed will only be entitled to do so if they comply with the instructions specifically aimed at preventing the loss, obstruction or contamination of a sample. Such a nominated person should also be denied access or removed where they do not comply with such directions.’

¹¹⁰ AFP submission, pp.5,6

3.9.4 Each of these proposals seems reasonable and should be further considered within the context of the larger proposals that were put forward by the Sherman Review. The time limit in paragraph 23YG(2)(a), to which the AFP submission refers, runs from the time the material comes into existence.

3.9.5 The AFP has expressed some concern about the administrative and cost implications of the alternative proposal put forward by the Sherman Review and also queries its purpose since a person's DNA is always available to them. It needs to be recognised that the objective is to enable the person to check the accuracy of what has been done. To fulfil this objective it should be sufficient to limit any amendment to crime scene samples rather than to samples provided by the person.

3.9.6 Another objection raised by the AFP is that supplying the sample to the person themselves rather than to an accredited facility nominated by them involves unnecessary risks.

3.9.7 In light of the AFP submission, it would be appropriate to amend Sherman Recommendation 4 so as to require that the right to be conferred on the person who provided the sample is to have a part of that sample transmitted to a nominated and accredited laboratory for analysis on their behalf. Substitution of the time limits proposed by the AFP also appears appropriate. The proposed amendments to time periods should run from the same dates as at present. A requirement to supply a part of a sample to a nominated and accredited laboratory would arise on the receipt from the donor of a request. The process for making a request could be prescribed in regulations.

3.9.8 The proposal also needs to be considered in the light of concerns raised publicly by defence counsel.¹¹¹ Briefly stated, the concerns relate to alleged flaws in test results provided by some laboratories for the justice system. More recently, moves by Australian law enforcement agencies to adopt the European standard of DNA testing, which requires a matching of 16 markers instead of 10, have been initiated.¹¹² Whether or not the allegations are well founded or will be maintained notwithstanding the improvements now under consideration is a matter for the courts to decide in any particular case but the legislation should enable defence counsel to test the accuracy of laboratory reports should they choose to do so. For this purpose, it is necessary to ensure that donors are able to obtain access to any sample they provide.

3.9.9 Generally speaking, it should be possible for a court to rely on the expert evidence given by a witness who represents an accredited laboratory but the maintenance of public confidence in the system requires the existence of some means of testing such evidence when a challenge arises from other sources.¹¹³ For these reasons, this recommendation and the next one are very important.

¹¹¹ See, e.g. *The Australian* 3 - 4 April, 2010 p.8

¹¹² *The Australian* 16 April, 2010 pp. 29, 30

¹¹³ see e.g. Professor Paul Wilson and Dianne McInnes, *Five Drops of Blood*, Sydney, New Holland Publications 2008, pp. 105, 106

Sharing samples

Recommendation 13: That:

- a) *the current provisions relating to the sharing of DNA samples be replaced by a simpler regime which confers a right on the person who provided the sample to have part of any matching crime scene sample provided to an accredited laboratory within four weeks after the material comes into existence for analysis on behalf of the person provided there is sufficient material available; and*
- b) *Subsection 23XUA(2) be amended to require that a person who is present in a laboratory pursuant to a request by a suspect must comply with all instructions relating to the analysis of a sample with a sanction of removal for non-compliance.*

(Sherman Recommendation 4 modified)

3.10 Innocence testing

3.10.1 A broader issue is that of innocence testing. This relates both to the sharing of samples as discussed in the previous section and to access to samples. Two current developments underline the importance of adequate provision for innocence testing – the review of the *Farah Jama* case and controversy over an alleged excessive dependence on DNA evidence. These issues relate to the conduct of trials rather than to the content of Part 1D but they are nevertheless relevant to the issue of ‘innocence testing’.

3.10.2 Related issues are canvassed in the 2008 book, *Five Drops of Blood* by Professor Paul Wilson and Dianne McInnes¹¹⁴ on the conviction of Andrew Fitzherbert for the murder of Dr Kathleen Marshall, which is said to be the first occasion in Australia in which a murder conviction was based on DNA evidence alone. The study provides further support for the recommendations in this review relating to access to, and sharing, DNA samples,¹¹⁵ accreditation of laboratories¹¹⁶ and the auditing of all procedures and publication of audits.¹¹⁷

3.10.3 On 18 May, 2010, the High Court dismissed an application for special leave to appeal from the decision of the ACT Court of Appeal in *Forbes v. R. [2009] ACTCA 10 (19 June, 2009)*, a case which involved a sexual assault by a person who could not be identified by the victim. While the High Court’s decision has been criticised by some commentators¹¹⁸, it makes it clear that the absence of corroborating evidence is not necessarily a bar to a prosecution. However, the High Court left open the further consideration of this question in a ‘more suitable’ case.

3.10.4 A related concern is that of test results contested by defence lawyers.¹¹⁹ A specific concern is that in at least one sexual assault case, the presence of male DNA, other than the DNA of the accused, in a female’s swab has not been reported. The reason given was that it was ‘low level DNA’ which was outside the guidelines on what should be reported in a particular State.

¹¹⁴ Sydney, New Holland Publications, see especially at pp. 72 -75

¹¹⁵ Ibid pp.105, 106

¹¹⁶ Ibid pp.72-75

¹¹⁷ Ibid pp.64 -65

¹¹⁸ See, e.g. *The Australian*, 21 October, 2010, pp. 33, 34 (Legal Affairs supplement)

¹¹⁹ *The Australian* 3 – 4 April, 2010 – see also discussion in section 3.9

3.10.5 One difficulty is that there are still no national guidelines on this matter;¹²⁰ another may be that revision of the various guidelines may not be keeping pace with scientific developments. In any case, the presence of ‘foreign DNA’ is not something that a laboratory should be able to disregard as it may raise issues that should be determined by the court.

3.10.6 The Australian Privacy Foundation comments:¹²¹

‘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.’

3.10.7 In New South Wales, a DNA Review Panel has been established (see discussion in Chapter 2 above) and the WA Review recommended 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.’¹²²

3.10.8 As a matter of principle, persons convicted of Commonwealth offences in State courts should get the benefit of any post-conviction review procedures, whether relating to DNA or of a more general character. Having regard to the low volume of Commonwealth prosecutions involving DNA evidence, it would not be appropriate to make similar provision in Commonwealth law but these developments are nevertheless relevant to a reconsideration of Sherman Recommendation 5.

3.10.9 The Office of the Privacy Commissioner relates this issue to the privacy principle that individuals should have access to information about them that is held in the records of agencies and should be given the opportunity to correct information that is inaccurate, misleading, out of date or otherwise incorrect.¹²³ The AFP argued that access to person samples is not necessary because a person is able to provide a sample of their DNA for independent analysis at any time. However, even if such an argument could be justified in terms of legal guarantees to a fair trial, it is inconsistent with privacy principles.

3.10.10 In South Australia, the legislation provides for the taking of voluntary samples for comparison to specific indices of the State Criminal Reference DNA database.

3.10.11 Much of the discussion of this issue has proceeded on the basis that DNA testing may establish the innocence of a suspect or of a convicted person but the issue also needs to be considered from the perspective that a person may be wrongly convicted of an offence because of a contaminated DNA sample.

¹²⁰ Although there are moves to adopt a more rigorous national standard – see section 3.9.

¹²¹ Australian Privacy Foundation submission, p.8

¹²² WA Review recommendation 30

¹²³ Office of Privacy Commissioner submission, p.10

3.10.12 Two developments that bear on this question are the Vincent Report of 6 May 2010 on the *Farah Jama* case¹²⁴, and the announcement by the Victorian Attorney-General on the following day that national standards for the collection, use and interpretation of DNA evidence will be examined by a working group of the Standing Committee of Attorneys-General.¹²⁵ The issues were encapsulated in the following observation by Mr Vincent:

‘...In the present case, the obviously unreserved acceptance of the reliability of the DNA evidence appears to have so confined thought that it enabled all involved to leap over a veritable mountain of improbabilities and unexplained aspects that, objectively considered, could be seen to block the path to conviction.’¹²⁶

3.10.13 The Victorian Privacy Commissioner comments that one common principle, in privacy and freedom of information law, is that individuals should be provided with a right of access to information held about them on request.¹²⁷ Noting that a statutory scheme has been established in NSW and recommended in Victoria, she proposed that, at a minimum, a proposed access regime should include:

- ‘A legislated right of access contained in Part 1D, including a presumption towards the provision of access.
- The ability of a relevant authority to decline access should be on limited and clearly defined grounds. A decision to decline access should be subject to judicial review.
- Establishment of an independent body or panel charged with the task of administering the right to access. While the Sherman Review recommended that ‘access be administered by the AFP Forensic Services’, this creates somewhat of a conflict, in that the investigative and prosecuting authority will also be responsible for the provision of access. I would strongly recommend that this body be independent from the prosecuting authority, to ensure impartiality and public confidence.
- Amendments to ensure DNA crime-scene evidence is preserved in anticipation of any potential access requests.’¹²⁸

3.10.14 In the DNA context, the issue resolves into one of access to the sample upon which a prosecution was, or will be, based. The AFP is concerned as to how the use of samples provided would be governed, as it is crucial that restrictions should apply and that the same obligations are imposed on the defendant as apply to police in relation to issues such as the type of testing and destruction. It suggests that if samples are to be provided then it would be better for the legislative provisions to state that police are to provide samples to an accredited facility nominated by the defendant (not to the defendant directly). The facility could then be held accountable as to their dealings with the sample and their obligations could be outlined clearly in the legislation. The accredited independent facility could then be obliged to return the sample to police.¹²⁹ These qualifications are reasonable and are accepted.

¹²⁴ <http://www.justice.vic.gov.au/wps/wcm/connect/5a103e804263c8da810e832b0760a79a/VincentReportFinal6May2010.pdf?MOD=AJPERES>

¹²⁵ <http://www.premier.vic.gov.au/component/content/article/10323.html>

¹²⁶ Vincent Report, p.37

¹²⁷ Victorian Privacy Commissioner submission, p.11

¹²⁸ Victorian Privacy Commissioner submission, p.12

¹²⁹ AFP submission, p.11

Access to samples

Recommendation 14: *That Part 1D 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 on the basis that:*

- a) *samples be provided to a nominated accredited laboratory for analysis on behalf of the convicted person; and*
- b) *access is to be administered by AFP Forensic Operations and subject to the condition that decisions refusing access should be subject to administrative review.*

(Sherman Recommendation 5 - modified)

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;¹³⁰ evidence obtained from material that should have been destroyed is inadmissible if adduced by the prosecution;¹³¹ evidence of a person's refusal or failure to consent, or a withdrawal of consent, to a forensic procedure is inadmissible against the person;¹³² evidence of how a procedure was carried out is admissible for specified purposes;¹³³ and evidence that a suspect obstructed the carrying out of a duly authorised test is admissible in certain circumstances.¹³⁴

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

'(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 The CCL – LV submission argues that the discretionary test under section 23XX is likely to promote a culture of investigative short-cutting and recommends that it be replaced with a statutory prohibition of improperly obtained evidence. This argument was rejected by the Sherman Review and there is no sufficient basis to depart from that conclusion in the light

¹³⁰ s.23XX

¹³¹ s.23 XY

¹³² s.23XZ

¹³³ s.23YA

¹³⁴ s.23YB

of subsequent experience.

3.11.4 Much has been said and written about a supposed tendency of DNA evidence to overawe juries and lead to a higher rate of convictions in cases where the evidence is circumstantial. The tendency to give undue weight to DNA evidence has been termed by some ‘the CSI effect’ in recognition of the influence of a popular television crime drama, ‘C.S.I.: Crime Scene Investigation’. The concern underlines the importance of preserving the ability for defence counsel to challenge DNA evidence through the use of other expert evidence or cross-examination.

3.11.5 In this connection, a study published by the Australian Institute of Criminology on 29 March 2010 reported findings consistent with those of previous studies ‘that if jurors are given clear and well-sequenced complex information, they deal competently with it.’¹³⁵ The study concluded that its findings, together with a model tutorial that had previously been developed, ‘could be applied to train forensic scientists who serve as expert witnesses and to assist legal counsel and judges in conveying relevant DNA information more effectively to jurors.’¹³⁶

3.11.6 One aspect of the question that is clearly relevant is that of contamination of DNA samples. Measures that might be taken to preclude contamination are further discussed in Chapter 5 but, for present purposes, it should be noted that the strength and weakness of DNA forensic procedures may be understood as ‘two sides of the same coin’ – on the one hand, an ability to yield highly credible evidence about a person’s presence at a crime scene or a person’s identity but, on the other, a vulnerability to contamination. Contamination of samples may occur if they are not handled correctly and accounted for throughout their processing. Samples may also be contaminated through laboratory errors.¹³⁷

3.11.7 Moreover, as vividly demonstrated by the Vincent Report, contamination may occur outside the laboratory – e.g. at the sample collection stage – and the problem may intensify as the samples become smaller with technological developments:

‘ It is almost incredible that, in consequence of a minute particle, so small that it was invisible to the naked eye, being released into the environment and then by some mechanism settling on a swab, slide or trolley surface, a chain of events could be started that culminated in the conviction of an individual for a crime that had never been committed by him or anyone else, created immense personal distress for many people and exposed a number of deficiencies in our criminal justice system. But that, I believe, is what happened.’¹³⁸

3.11.8 Moreover, additional possibilities for error arise in the handling of DNA profiles. Actual and potential errors have been detailed by the NSW Ombudsman¹³⁹ and are discussed in Chapter 5.

3.11.9 A match between a DNA sample taken from a crime scene and a DNA profile on a

¹³⁵ Australian Institute of Criminology, ‘Enhancing fairness in DNA jury trials’ Trends & Issues in crime and criminal justice No. 392, March, 2010

¹³⁶ Ibid

¹³⁷ See, e.g. *Five Drops of Blood*, p.67

¹³⁸ Vincent Report, p.48

¹³⁹ NSW Ombudsman Report, pp. 223-227, 273-275.

database may lead different people to draw different conclusions if they are not properly instructed in the significance of the match. For example, if expert evidence is given that there is a match between a DNA sample taken from a crime scene and the DNA profile of a suspect and that the likelihood of another individual's DNA profile being the same as that of the suspect is one in ten million, there may be a tendency to conclude that the chance of the suspect being innocent is also one in ten million but this is not so. There may be an explanation for the match that is consistent with the suspect's innocence and such explanations should be considered in investigations and trial. The sample may have been contaminated with the suspect's DNA or the suspect may have been at the crime scene without having committed the offence. Circumstances differ from case to case and the importance of accurate explanations being given to juries cannot be overestimated.

3.11.10 The CCL – LV submission argues that the *Farah Jama case*, in which DNA evidence was considered so conclusive that it effectively nullified several eye-witness statements, highlights some of the ongoing weaknesses of forensic data in criminal investigations and that two particular risks are contamination and a lack of sufficient oversight.¹⁴⁰ The links between the two are discussed in chapter 5.

3.11.11 The Australian Privacy Foundation supports 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).¹⁴¹

3.11.12 Northern Territory Police argue that the exclusion by section 23XZ of a refusal to provide a forensic sample should be replaced by a discretion in the court to exclude it. They also argue that Part 1D should be amended to allow the laws of participating jurisdictions to apply in relation to the admissibility of evidence in prosecutions for offences that have a federal aspect. It is said that it may not be practicable at the time of collecting crime scene evidence to determine whether offences may have a federal aspect.

3.12 Destruction of forensic material¹⁴²

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,¹⁴³ or the material has been retained for the period required,¹⁴⁴ or a period of 12 months has elapsed since a defined event,¹⁴⁵ or a conviction is quashed¹⁴⁶ or where related evidence has been found to be inadmissible.¹⁴⁷ Some uncertainty has been expressed as to whether the physical sample is effectively destroyed if the means of linking the material or information to the person from whom it is taken is destroyed.

3.12.2 In 2006, the NSW Ombudsman reported that NSW Police and the Division of

¹⁴⁰ CCL – LV submission, p.9

¹⁴¹ Australian Privacy Foundation submission, p.8

¹⁴² This issue is further discussed in Chapter 7.

¹⁴³ s.23YC(1)

¹⁴⁴ s.23YC(2)

¹⁴⁵ s.23YD

¹⁴⁶ s.23YDAA

¹⁴⁷ s.23YDAB

Analytical Laboratories were not meeting their legislative obligations to destroy forensic material taken from suspects and volunteers.¹⁴⁸

3.12.3 Most of the submissions that addressed this issue agreed with the requirement that samples should be destroyed but there were some differences over the timing of the obligation, with some arguing for it to apply ‘immediately after the expiration of statutory time limits’¹⁴⁹ and others ‘as soon as practicable’ after some event such as ‘the discontinuance or conclusion of investigation of the crime for which that person’s material was collected unless the person has been charged or there are reasonable grounds for keeping all the forensic material relating to the crime’.¹⁵⁰

3.12.4 The AFP considers that the current DNA sample destruction requirements are complex and impracticable and could potentially undermine the accreditation process for forensic laboratories:¹⁵¹

‘The destruction of all samples, as currently required, not only involves destroying the physical sample itself and related database records, but also requires removing and destroying all associated reports and notes, including laboratory work sheets which record a number of different samples, from case files. The destruction of this associated material could undermine the accreditation of forensic laboratories as case file integrity underpins the current system.’

3.12.5 The AFP suggests that ‘focusing law enforcement accountability on meeting an obligation to remove, at somebody’s request, their DNA profile from law enforcement systems would be a more appropriate approach.’¹⁵²

3.12.6 The ALRC/AHEC Report recommended that:¹⁵³

‘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

¹⁴⁸ NSW Ombudsman Report, Executive Summary, p.v

¹⁴⁹ Eg. Victorian Privacy Commissioner submission, p.12

¹⁵⁰ CCL-LV submission, p.17

¹⁵¹ AFP submission, p. 6

¹⁵² AFP submission, p. 6

¹⁵³ ALRC/AHEC Report, ‘Essentially Yours: The Protection of Human Genetic Information in Australia’ pp.74, 75; 1026-1048

(b) establish a process for persons to obtain confirmation that their forensic material, and any information obtained from it, has been destroyed.’

3.12.7 The Office of the Privacy Commissioner takes a similar view:¹⁵⁴

‘The Office agrees with the ALRC/AHEC report’s recommendation that the Crimes Act should provide a definition for the destruction of forensic material that encompasses the physical destruction of the sample and the permanent de-identification of the profile.

The Office is aware that collecting samples from convicted offenders can be useful in establishing new links to unsolved crimes. However, the Office considers that the DNA profiles of convicted offenders should be retained on the NCIDD no longer than the period of time specified in the spent convictions scheme for the relevant offence.’

3.12.8 The Australian Privacy Foundation says that retention limits and a robust destruction program are essential safeguards and it is of particular concern that, at least in NSW, the current statutory obligations have not been met. It supports the ALRC-AHEC recommendations quoted above and also 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.¹⁵⁵

3.12.9 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.¹⁵⁶ 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.¹⁵⁷

3.12.10 In the United Kingdom, the Report of the Human Genetics Commission also recommended the destruction of biological samples after a profile has been derived from it.¹⁵⁸ In relation to profiles, the Report identified two kinds of justification for the retention of information:

- I. ‘a justification based on facts or claims about each particular individual (such as that their known behaviour makes them more likely to offend in future); and
- II. a justification based on an individual’s membership of a class of people about which claims are made (such as that people who share certain relevant biological or other similarities are likely to pose an increased risk to the rest of the population).’¹⁵⁹

¹⁵⁴ Office of the Privacy Commissioner submission, p.10

¹⁵⁵ Australian Privacy Foundation submission, pp.8, 9

¹⁵⁶ Victorian Review Recs. 4.4 and 4.5, p. 132-138

¹⁵⁷ *ibid.* Rec. 7.4 p.276

¹⁵⁸ UK, Report of Human Genetics Commission, *Nothing to hide, nothing to fear* (Nov. 2009)

<http://www.statewatch.org/news/2009/nov/uk-dna-human-genetics-commission.pdf>

¹⁵⁹ UK Review, p.33

3.12.11 On 11 November, 2009, the UK Government announced¹⁶⁰ proposals to:

- adopt a 6 month maximum retention period for DNA samples of all persons (including those convicted) subject to a power for the police to take a further sample should the defence of an accused person challenge the authenticity of the results of the analysis of the destroyed sample;
- continue the indefinite retention of DNA profiles of convicted adults;
- adopt a 6 year retention period for the DNA profiles of unconvicted adults irrespective of the seriousness of the alleged offence;
- adopt indefinite retention for the profiles of juveniles convicted of serious offences and a 5 year retention period for the first minor offence of a juvenile with indefinite retention for a second conviction;
- adopt a 6 year retention period for unconvicted 16 and 17 year olds where the alleged offence is a serious one;
- adopt a 3 year retention period for other unconvicted juveniles;
- empower the police to take fingerprints and non-intimate samples without consent from UK nationals or residents convicted of specified serious offences abroad at any time;¹⁶¹
- set out in statute the criteria for earlier destruction of DNA samples and profiles; and
- enable the retention beyond 6 years where there is a case for doing so on national security grounds.

Further changes can be expected following the change of government in May 2010.

3.12.12 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.’¹⁶²

3.12.13 In support of the WA Review’s recommendation, it might be argued that it is in the interests of justice to retain samples indefinitely so as to lessen the chance of an offender going undetected. The more confidence is placed in DNA database systems, the more this argument gains traction but experience to date suggests that, although DNA profiling is a very useful tool in criminal investigation, it is less than perfect and, like other very useful systems, open to human error.

3.12.14 Another reason for requiring the destruction of samples after the expiration of a particular period is that volunteers may be less likely to come forward if their samples are to be kept indefinitely.

3.12.15 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 conviction testing purposes, and other samples.¹⁶³ On the basis of advice provided by the AFP that both

¹⁶⁰ UK Secretary of State for the Home Department, Ministerial Statement

¹⁶¹ A suggestion from the WA Police that a similar power be inserted in Part 1D is discussed in chapter 7.

¹⁶² WA Review, Rec. 27, p.141

¹⁶³ Sherman Report, para 3.141

person samples and relevant profile were destroyed¹⁶⁴, the Sherman Review recommended as set out in **Attachment A** (Recommendation 6). That recommendation proposes the amendment of the Act to give legislative force to this practice.

3.12.16 This issue was also addressed in the ALRC/AHEC Report on genetic privacy in the context of accountability arrangements and the recommendations of that report are discussed in Chapter 5.

3.12.17 As pointed out by the ACT Attorney General, this proposal needs to be considered against the background of technological advances and the potential for ‘function creep’¹⁶⁵. In light of the ALRC-AHEC recommendation on this issue and the submissions received, the Sherman Recommendation should be amended in three respects – first to substitute a test of practicability so far as timing of destruction is concerned, second, to require the permanent and irreversible de-identification of profiles with the destruction of samples and third, to recognise that the NCIDD does now contain a field for the entry of destruction dates. The field is not compulsory, however, since some jurisdictions are not required to destroy samples or profiles.

3.12.18 There is no point in having a strict test of immediacy if it cannot be met in practice and nothing follows from the failure to meet it. A test built around practicability would be more realistic given the wide variety of circumstances faced by law enforcement. A requirement for the ‘permanent and irreversible de-identification of profiles,’ associated with the destruction of samples, is also appropriate although it must be recognised in the drafting of the provision that it would be administratively impossible to destroy all derivative records on the criminal investigation file.

3.12.19 In relation to volunteers and suspects, the point at which the duty to destroy the sample should be activated should be when the sample is no longer required for the investigation for which it was collected.

Destruction and de-identification

Recommendation 15: That:

- a) in respect of volunteers and suspects, both destruction as well as de-identification of person samples as defined in Part 1D (either physically or by appropriate computer delinking) should occur as soon as practicable after the sample is no longer required for the investigation for which it was collected; and***
- b) the relevant DNA profile on the database should also be destroyed.***

(Sherman Recommendation 6 modified)

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

¹⁶⁴ *ibid.* para 3.159

¹⁶⁵ ACT Attorney General’s submission p.5

Authorities ('NATA') in the field of forensic science.¹⁶⁶ Since then, the ALRC/AHEC Report has included this proposal in its recommendations.¹⁶⁷ It is supported by the Office of the Privacy Commissioner and by the Australian Privacy Foundation.

3.13.2 Since the Sherman Review, reliance on DNA profiling by a non-accredited laboratory in a particular murder conviction in a 2003 Queensland case has been subject to trenchant criticism.¹⁶⁸

3.13.3 The question of Commonwealth responsibility for the setting of standards was raised at the Melbourne round table consultation meeting on 17 February. There are many aspects to this issue but it is best considered in the context of the accreditation of laboratories. At the Brisbane round table meeting on 18 February, it was pointed out that the National Institute for Forensic Science (NIFS) is currently working on standards relating to low copy sampling.

3.13.4 The issue of national standards was discussed by the Board of the Australian and New Zealand Police Advisory Agency (ANZPAA) in April, 2010 and further work commissioned from NIFS on the adoption of the European standard. Adoption of the European standard, which involves comparisons of 16 rather than 10 loci, would assure greater accuracy and consistency across the country and would facilitate Australia's participation in international matching. For these reasons, this Review supports these developments. The announcement on 7 May, 2010 of a decision to establish a SCAG working party to examine national standards, which is discussed in section 3.10, indicates that they are being pursued.

3.13.5 NATA is a longstanding and experienced laboratory accreditation body, which was established in 1947. It represents Australia in international bodies in this area.

3.13.6 NATA's competence as an accreditation provider is regularly evaluated internationally for continued inclusion in Mutual Recognition Arrangements. Evaluation teams comprise individuals from accreditation bodies in Europe, North America and the Asia-Pacific region. This ensures NATA's operations remain consistent with international practices. NATA similarly undertakes audits of its mutual recognition partners.

3.13.7 NATA already accredits laboratories in all Australian jurisdictions. In this respect, the Australian environment differs significantly from that in either the US or the UK where more centralised mechanisms have been employed to achieve national consistency in standards.¹⁶⁹ It is relevant to note however, that the Vincent Report proposes that post-conviction reviews should assess not only the DNA testing but also match where a sample was collected and how it was transported to identify any contamination before a sample even reaches a laboratory.¹⁷⁰ This aspect will no doubt be considered further by the SCAG

¹⁶⁶ ALRC/AHEC Discussion Paper, Reform proposal 36-9.

¹⁶⁷ ALRC/AHEC Report, 'Essentially Yours: The Protection of Human Genetic Information in Australia', Recommendation 41-7; pp.1026-1038

¹⁶⁸ See *Five Drops of Blood*, at pp. 64 – 67 and at 72-75 (which includes a statement by the then Queensland DPP that a conviction can never rest solely on DNA evidence).

¹⁶⁹ Claudia Newman-Martin, 'A Comparative Study of the Australian, American and British National Databases Accountability and Oversight Mechanisms - a contribution to the Further Independent Review of Part 1D of the Crimes Act 1914', internship paper by a student of the Australian National University College of Law.

¹⁷⁰ Vincent Report, p.55.

working party.

3.13.8 In commenting on the Sherman recommendation, the AFP suggested that the requirement for accreditation should also apply to any independent analysis that may be facilitated under the amendments proposed by this review. Any DNA analysis of personal material collected under Part 1D conducted by the prosecution or defence would be required to be conducted by an accredited NATA laboratory. Where the circumstances warrant it, equivalent foreign accreditation would suffice.

3.13.9 The AFP proposal, which was also put forward by other law enforcement agencies in the round table consultation meetings, is reasonable and should be adopted.

Accreditation of laboratories

Recommendation 16: That Part 1D provide that forensic analysis of DNA samples, whether on behalf of a law enforcement agency or an individual, must be conducted only by laboratories accredited by NATA or an equivalent in the appropriate field of forensic science.

(Sherman Recommendation 7 - modified)

3.14 Matching requirements

3.14.1 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 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.¹⁷¹

3.14.2 The types of matches that are permissible on the national DNA database are set out in tabular form in section 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. The matching table is now less restrictive than it was when the Sherman Review was carried out. It is now possible, for example, to match suspects to suspects and unknown deceased persons to unknown deceased persons.

3.14.3 The CCL – LV submission expresses concern about a perceived reduction of rights protection through amendments to the matching tables.¹⁷² It instances the *Supplementary Explanatory Memorandum* that accompanied the *Crimes Act (Forensic Procedures Amendment) Act 2006* in which it was said:

¹⁷¹ ALRC/AHEC Report, p.1077

¹⁷² CCL – LV submission, p.7

‘These amendments bring the Commonwealth table of permissible matching in line with Queensland and Western Australia. Other jurisdictions are considering amending their matching tables to...avoid a situation where States and Territories allow DNA profile matching in certain circumstances but the Commonwealth does not, a situation that would impede the usefulness of NCIDD.’¹⁷³

3.14.4 It argues that any amendments to bring Commonwealth legislation into conformity with State legislation should accord with the most ‘rights-protective’ legislation.

3.14.5 The CCL – LV submission also expresses concern about the use of ‘suspect’ or ‘crime scene’ DNA that can currently take place within the matching table regime. As evidenced by the *Farah Jama case*, the risk of contamination of samples is such that a match of any of the suspect samples with DNA from a past offence (a ‘cold hit’) is not a sound basis for building an investigation. It suggests that one way of addressing this problem is to limit the ability to make ‘cold hits’.¹⁷⁴

3.14.6 It proposes that ‘law enforcement officials should have to have some other reasonable grounds for matching a suspect’s DNA with the general crime scene database, other than that the DNA was found at a crime scene. While a suspect must be “reasonably suspected” of committing a relevant offence, the mere presence of DNA should not be enough to found a reasonable suspicion.’¹⁷⁵ It also proposes that ‘as suspect’s DNA should only be able to be matched against the scene of the crime for which they are a suspect’.¹⁷⁶

3.14.7 The Vincent Report, on the other hand, suggested that legislative limitations might have contributed to the difficulties that were encountered in the *Farah Jama case*. While acknowledging that the question of legislative amendments was outside its terms of reference, it included a recommendation that:

‘Attention will need to be given to the possibility of reconfiguration of the database to enable the existence of links between the collection and testing of samples to be detected.’¹⁷⁷

3.14.8 The DNA sample that led to Jama’s conviction was taken from the supposed¹⁷⁸ victim at a Crisis Care Unit within the Austin Hospital. The doctor who took the sample had taken forensic samples at the same location only approximately 28 hours previously from another woman who had engaged in sexual activity with Mr Jama. No charges were laid in respect of the earlier incident. This was unknown by anyone involved in the investigation until much later. When it came to light, it was immediately appreciated that the sample may have been contaminated. Mr Vincent considered that:

‘there were ample warning signs along the way but they were simply not read.’¹⁷⁹

¹⁷³ Parliament of the Commonwealth of Australia, Senate (2006) Crimes Act Amendment (Forensic Procedures) Bill (no.1) 2006 – Supplementary Explanatory Memorandum, Amendment 4 – pp.2, 3.

¹⁷⁴ CCL – LV submission, p.15

¹⁷⁵ CCL – LV submission, p.16

¹⁷⁶ CCL – LV submission, p.16

¹⁷⁷ Vincent Report, Recommendation 8, p.55. The review is advised that none of this information is stored on the NCIDD.

¹⁷⁸ It appears from the Vincent Report that no offence was in fact committed.

¹⁷⁹ Vincent Report, p.11

3.14.9 It is in this context that the recommendation relating to legislation is put forward. It may be that some amendment to legislation is warranted but it is too early to put forward a specific proposal at this stage. The matter may need to be considered further in the light of the Victorian Government's response to this recommendation.

3.14.10 Another way of addressing the problem is that canvassed in media reports following the resumption of the use of DNA evidence in Victoria in January 2010 – i.e. the adoption of a policy change requiring that no prosecution be taken forward if it is based on DNA evidence alone.¹⁸⁰

3.14.11 The NSW Director of Public Prosecutions also points to the need for caution:

'Without doubt DNA evidence is powerful evidence in any prosecution. It can be compelling evidence of guilt. (In the investigation phase it can also be strongly indicative of innocence.) However it can be misleading and there is a heavy onus on the prosecution to ensure the jury comprehends the relevance of the evidence. It is essentially corroborative evidence and should be balanced against other evidence. It will never be sufficient alone to prove guilt.'¹⁸¹

3.14.12 Northern Territory Police say that they are moving towards further categorising DNA profiles uploaded onto the NCIDD but that this is for administrative convenience only and that there is no intention to legislate for these categories. They argue that the detailed legislation of database indexes under the model law which formed the basis of Part 1D was one of the main causes of the delay in making the national system operational and that the regime should be simplified.

3.14.13 The Sherman Review also considered, but rejected, a proposal for narrower categories of profiles.¹⁸² The observations it made on that proposal remain persuasive.

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.

3.15.2 In response to submissions from police and correctional authorities, the Sherman Review recommended that they 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.

¹⁸⁰ 'The Australian' 13 January 2010 ('DNA evidence back but with caution')

¹⁸¹ Letter dated 21 December 2009 from NSW Director of Public Prosecutions in response to DNA Questionnaire; see also reference to statement of a previous Queensland DPP in section 3.13; as reported in section 3.10, the legal issue is now before the High Court.

¹⁸² Sherman Report, para 3.195

3.15.3 In this respect, the AFP has encountered difficulties in negotiating with NSW Corrections over the implementation of its DNA back capture program relating to Commonwealth offenders in NSW prisons. Its internal report, issued in July 2009, revealed that since 2000 fewer than 50% of serious offender DNA had been collected. These difficulties could be addressed through implementation of the Sherman recommendation but the lack of progress to date indicates that a new approach may be required. There are, in any event, some concerns that the chain of evidence would be difficult to prove if responsibility for the collection of DNA samples were to be assigned to Correctional Services staff. To address these concerns, the proposal has been amended to focus on securing access for AFP officers to prisons for the purposes of collecting DNA samples.

Correctional Services

Recommendation 17: That:

- a) Part 1D be amended to make it clear that the AFP may enter into an administrative arrangement with correctional authorities to facilitate the taking of DNA samples from offenders; and*
- b) the AFP continue to seek agreement with correctional authorities for the taking of DNA samples from offenders.*

(Sherman Recommendation 9 – modified)

3.16 Other Matters

3.16.1 Some difficult issues arising in relation to our consideration of buccal swabs (section 3.7) gave rise to a range of views within the Committee which are best discussed in a broader context. Generally speaking, it seems appropriate that a person who is asked, or required, to provide a DNA sample, be afforded maximum opportunity to choose the method by which the sample is to be taken. This is most consistent with the dignity of the individual which is an important value in our society. At present, the practical options are buccal swab or a hair sample. As the first is classified as an ‘intimate forensic procedure’ it must either be self-administered or be carried out by a qualified person.

3.16.2 If a person is unwilling to provide a sample and the police have lawful authority to carry out a forensic procedure, they have discretion, within the limits of that authority, to choose the method by which the sample is taken. As the options for sampling are limited to those covered by the definition of ‘non-intimate forensic procedure’ (unless they have authority from a magistrate to carry out an intimate forensic procedure), this will usually mean a hair sample. That is not always the most suitable or convenient method.

3.16.3 The New Zealand legislation discussed in section 3.7 allows a person to opt for a fingerprick sample, and if force is required, the sample must be taken by this means. The use of force is discussed generally later in this paper in section 7.2 but, for present purposes, it is interesting to contrast the New Zealand approach with that in Part 1D, which treats fingerprick samples no differently from blood tests in the ways traditionally understood. Both are covered by the definition of ‘intimate forensic procedure’ in section 23WA. Yet a fingerprick is a minor matter which can be routinely and easily administered. It would be appropriate to include the taking of a fingerprick sample in the definition of ‘non-intimate forensic procedure’.

Fingerprick samples

Recommendation 18: That fingerprick samples be included in the definition of ‘non-intimate forensic procedure’.

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

4.1.1 As the Victorian Review observed:

‘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...

The use of DNA databases, however, presents quite a different challenge to the legislature. Within a single investigation DNA analysis may serve to inculpate or exculpate identified suspects from a specific investigation, but DNA databasing enables mass detection of unsolved crimes on the basis of forensic evidence alone.’¹⁸³

4.1.2 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 convictions. Also there is little information on the extent to which those procedures have contributed to the exculpation of suspects.’¹⁸⁴

4.1.3 As recommended by the Sherman Review, rigorous reporting requirements are essential to any assessment of the utility of DNA forensic procedures. It is also important to recognise the role that the NCIDD can play in intelligence gathering.

4.1.4 Available statistics relate to matters such as the number of the NCIDD profiles, the number in each category, the number of ‘cold links’ by category of offence and from a total number of samples, the number of analyses inculpating a suspect and the number exculpating a suspect.¹⁸⁵ While useful up to a point, these are in no way adequate to form a judgment on the effectiveness of DNA profiling.

4.1.5 Law enforcement agencies point to the utility of DNA procedures in matters such as eliminating particular suspects from their inquiries as well as in obtaining convictions. For example, CrimTrac says:

‘Conviction of suspects is only one measure of success of a DNA database. Other measures include for example exoneration of individuals, exclusion of suspects from investigations and associated positive effect on police resources and exoneration of individuals as examples, identification of suspects, charges being laid as well as contribution to successful court outcomes.’¹⁸⁶

4.1.6 There is, however, no measurement of these aspects. The statistics that are collected provide information such as the number of samples taken over a period by each jurisdiction, the number of profiles in each category and the number of matches but do not tell us how

¹⁸³ Victorian Review, pp. 112, 113

¹⁸⁴ Sherman Report, para 4.1

¹⁸⁵ see, e.g. CrimTrac ‘OnTrac’ vol.2, issue 3 (2009); NSW Ombudsman Report, p.66; Victorian Review, pp.112 - 113

¹⁸⁶ CrimTrac submission, p.6

effective the procedures are in contributing to the outcomes of investigations.

4.1.7 The nearest we have come to a useful measure to date is that reported by the Victorian Review when it cited the data collected between January 2000 and June 2002 of the results of analysis of suspects' DNA samples in Victoria as the 'best indication available of the "success rate" of crime scene analysis.' 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.¹⁸⁷

4.1.8 Law enforcement agencies also point to the utility of DNA profiling in community policing, particularly in investigating high volume crime. The AFP says 'it is important to understand that the techniques required to investigate the majority of offences in community policing, are more immediately suited to collection of DNA samples than those required by the majority of investigations [into Commonwealth offences]. While DNA samples are useful in investigating the offences in the Commonwealth jurisdiction, they are not as useful as they are in community policing and will have a different baseline, over time, in terms of level of usage.'¹⁸⁸

4.1.9 In respect of community policing, the AFP says:

'In relation to matches obtained on the ACT jurisdictional database in 2008, approximately one third of these have resulted in charges being laid. This outcome highlights the advantages of DNA in community based policing and volume crime.'¹⁸⁹

4.1.10 We sought information on the effectiveness of DNA forensic procedures from the Commonwealth and State Directors of Public Prosecutions.

4.1.11 In the Commonwealth sphere, the low volume of cases makes it difficult to draw conclusions but the Office of the Commonwealth Director of Public Prosecutions advised that it had intended to rely on DNA evidence in the retrial of Shane Kent for a terrorist offence. In the event, Kent pleaded guilty and DNA evidence was not led.¹⁹⁰ DNA and fingerprints obtained pursuant to Part 1D were also led during the Operation Pendennis Sydney trial which involved the prosecution of a number of people for conspiring to do acts in preparation for a terrorist act or acts. The trial resulted in the conviction of all the accused. The evidence obtained pursuant to Part 1D assisted in proving the nature and scope of the conspiracy and the accused's participation in it. This evidence was critical in proving the nature of the relationship between the accused. In addition, this evidence assisted in resolving factual matters thereby reducing the length of the trial. In this case there was no challenge to the forensic evidence or instructions given by the judge in relation to the use of the evidence.¹⁹¹

4.1.12 The NSW Director of Public Prosecutions commented:

'There are some useful and often dramatic statistics in relation to DNA evidence. The article *DNA testing of convicted offenders* by Wayne Tosh published in the Judicial Officers' Bulletin December, 2005, Vol 17 No 11 states that the DNA testing of adult

¹⁸⁷ Victorian Review, pp. 112, 113

¹⁸⁸ AFP Submission, p.2

¹⁸⁹ AFP Submission, p.4

¹⁹⁰ Letter from Jaala Hinchcliffe, Senior Assistant Director dated 28 January 2010

¹⁹¹ Letter from Jaala Hinchcliffe, Senior Assistant Director dated 3 March 2010

convicted offenders in NSW correctional centres has linked more than 3,900 convicted offender profiles to previously unresolved crimes.¹⁹²

4.1.13 The Office of the Queensland Director of Public Prosecutions advised that it could provide no empirical data but that:

- DNA testing and profiling is an important tool where the offender is unknown to the victim in sexual offences and offences of violence but in many cases its role is to confirm the identity of a known offender or to link the known offender to the crime scene and a limited number of cases are based solely upon DNA evidence establishing the identity of the offender;
- in the majority of cases it is non-controversial and confirms other evidence available to the prosecution; and
- in certain types of cases, such as sexual offences where biological samples are recovered from the victim or their clothing, DNA evidence is received as a matter of course; in others it is exceptional.

4.1.14 On 12 January 2010, there were 510,210 profiles on the NCIDD, with the number and proportion from each jurisdiction being as follows:¹⁹³

ACT	4,815	(0.9%)
Commonwealth	1,153	(0.2%)
NSW	93,887	(18.4%)
NT	18,168	(3.6%)
Queensland	150,171	(29.4%)
SA	64,721	(12.8%)
Tasmania	28,691	(5.6%)
Victoria	39,496	(7.7%)
WA	109,108	(21.4%)

4.1.15 The lack of any correlation between population size and use of DNA procedures indicates substantial variations in law and practice among jurisdictions. It appears that the large number of Queensland profiles is due to a number of factors, including the adoption of the NCIDD as the only DNA database, the lower threshold in that State for offences justifying the collection of a sample, longer retention rules and some duplication.¹⁹⁴

¹⁹² Letter dated 21 December, 2009 from NSW Director of Public Prosecutions in response to DNA questionnaire.

¹⁹³ CrimTrac submission, p.2

¹⁹⁴ Brisbane round table consultation meeting 18 February 2010

4.1.16 As at 12 January 2010, the total number and proportion of DNA profiles by index were:

(Serious) Offenders	137,981	(27.4%)
Crime Scene	136,426	(26.84%)
Missing Persons	71	(0.01%)
Non-Volunteer	18,168	(3.66%)
Suspects	199,149	(39.03%)
Unknown Deceased Persons	127	(0.02%)
Volunteers (Limited Purposes)	582	(0.11%)
Volunteers (Unlimited Purposes)	17,706	(3.47%)

4.1.17 The enormous disparity between the two ‘volunteers’ indices is unexplained. While it may be attributable in part to the broad scope of the ‘volunteer’ category in the Northern Territory, that jurisdiction only accounts for a small proportion of the national total, as can be seen from the above table.¹⁹⁵ A proposal by the ACT Attorney General to create a presumption in favour of the use of the limited purpose index is discussed in Chapter 3.

4.1.18 CrimTrac advises that, from 1 July 2009 to 12 January 2010, 129,610 inter-jurisdictional matches and 15,632 intra-jurisdictional matches were made between crime scene DNA profiles and person DNA profiles. This indicates a high level of usage in criminal investigation although it is acknowledged that not all matches are actioned. There is also duplication of DNA profiles because DNA is collected from an individual for every incident as a suspect and then again as an offender.

4.1.19 The ‘turning on’ of matching arrangements between particular jurisdictions has also yielded some dramatic results:¹⁹⁶

Match statistics between NSW and Qld when matching turned on – 27 August, 2008

Total links at highest stringency only – 4481

NSW crime scene to Qld offenders – 556

NSW crime scene to Qld suspects – 1024

NSW offenders to Qld crime scene – 584

NSW offenders to Qld offenders – 684

Match statistics between WA and SA when matching turned on – 9 October, 2007

Total links at highest stringency only – 686

SA crime scene to WA offenders – 35

¹⁹⁵ See also discussion in section 3.3; a break down of the numbers by jurisdiction would assist in explaining the discrepancy.

¹⁹⁶ Email advice from CrimTrac 29 January, 2010

SA crime scene to WA suspects – 166

SA crime scene to WA volunteers (unlimited) – 49

SA offenders to WA crime scene 72

SA offenders to WA suspects – 106

SA offenders to WA offenders – 33

SA crime scene to WA crime scene - 193

4.1.20 However, while all this information is useful, each of the respondents said that they do not have statistics on the questions raised. No doubt, the collection of such statistics is not considered relevant to the discharge of their responsibilities. Yet it would be useful to policy formulation generally and may be a suitable function to vest in police services. This issue is addressed further in Chapter 5.

4.1.21 Within the CrimTrac Consultative Forum, work on performance indicators is under way, under the leadership of Victoria Police. This recognises not only the importance of developing improved measurements relating to convictions but also the role DNA plays in exoneration or elimination of persons from police investigations and the role DNA plays in the identification of missing persons and in disaster victim identification. The elimination of a person from the field of suspects is of at least equal importance as the contribution of DNA evidence to a conviction.

4.1.22 In round table consultation meetings, there was some support for the recommendation of the Victorian Review that relevant authorities be required to report to Parliament on the impact of DNA evidence on criminal prosecutions and proceedings.

4.1.23 In response to the question implicit in this chapter heading, it may be objected that DNA matches are only one factor in the outcome of any particular investigation. While no doubt correct, this has not prevented the collection of useful statistics in comparable areas such as those required annually of all jurisdictions under the *Telecommunications (Interception and Access) Act 1979* (Cth). The various reviews of that legislation have made use of these statistics and also included references to particular cases¹⁹⁷ in which that investigative technique has contributed significantly to a conviction. In contrast, the current reporting capabilities of the NCIDD are essentially limited to the annual cost of the system and the number of matches that occur within and between jurisdictions.¹⁹⁸

4.1.24 Another objection might be that, while DNA evidence may be used in investigations or prosecutions, other investigative strategies or forms of evidence might have led to equally effective outcomes. For this reason, the UK Review concluded that measurements should focus on the extent to which a database produces improvements in the police's performance in correctly identifying and distinguishing offenders in relation to particular reported crimes. It distinguished between the value of DNA as evidence and the value of a DNA database in the context of an investigation. In relation to the second aspect, it concluded that there is currently insufficient evidence collected to estimate the forensic utility of the national

¹⁹⁷ cf. CrimTrac 'OnTrac' vol.2, issue 3 (2009)

¹⁹⁸ CrimTrac submission, p.6

database and recommended that further efforts be made to develop appropriate measures.¹⁹⁹

4.1.25 The following suggestions for possible measures were put forward by the UK Review in a discussion paper which preceded its report:

- (i) identifying suspects more quickly or economically than other investigative techniques would have made possible;
- (ii) identifying suspects where other investigative techniques would not have been able to do so;
- (iii) cost-effectiveness in detecting all crimes against persons and property, or being especially effective in relation to serious or violent crime; and
- (iv) demonstrating effectiveness in securing convictions of suspects identified using the National DNA Database.²⁰⁰

4.1.26 However, none of these suggestions were included in the final report and they may be more relevant to an analysis of statistical reporting rather than to the raw statistics.

4.1.27 From the abundance of policy reviews and other available material, it is at least clear that DNA forensic procedures are a useful addition to the crime fighting capabilities of law enforcement agencies and sometimes provide the only means available for investigation. The publicity they attract is generally associated with the investigation of the most serious crimes such as murder but they are perhaps even more useful in combating high volume crime such as burglaries. It is of at least equal importance that they have also proven invaluable in establishing the innocence of particular persons under investigation and in bringing to light a number of wrongful convictions.

4.1.28 The lack of useful statistics on some matters is a matter of concern from privacy and civil liberties perspectives as well as from the perspective of effective law enforcement.²⁰¹

4.1.29 The importance of appropriate safeguards for privacy protection and civil liberties will be discussed in Chapter 7 but, for present purposes, it is sufficient to note that safeguards are also important in maintaining public confidence in the integrity of DNA procedures. In this context, the development of a mechanism for measuring the effectiveness of DNA forensic procedures in contributing to convictions would complement the safeguards.

4.1.30 Having regard to the small size of the Commonwealth database, there would be little point in the Commonwealth acting unilaterally in this area. Moreover, in the long term, there would be significant advantages to all jurisdictions if a uniform approach could be developed to measuring performance. Accurate national measures of effectiveness would provide a sound basis for jurisdictional strategic planning in law enforcement and for the allocation of resources.

¹⁹⁹ UK Review, pp.66-70

²⁰⁰ UK Review, p.65

²⁰¹ For example, concerns are expressed by Civil Liberties Australia (p.1) and by the Australian Privacy Foundation (p.9)

4.1.31 On balance, the most practical approach would appear to be to negotiate with participating jurisdictions a series of measures that covers:

- the number of DNA matches facilitated between jurisdictions;
- matches for different types of crime – murder, rape, robbery etc.;
- the number and type of offences that occur in each jurisdiction;
- numbers for different types of matches – offender to crime scene, crime scene to crime scene etc.; and
- the outcome of matches – i.e. the number of matches that are followed by charges, the number of exculpations and the number that are a factor in convictions.

4.1.32 Such negotiations should appropriately be conducted by the Attorney General’s Department and corresponding State and Territory departments in consultation with CrimTrac and law enforcement agencies. The AFP anticipates that the proposal to record performance outcomes of DNA matches in the form of numbers of matches that result in charges, exculpations and convictions will require changes to existing recording procedures and will take longer to achieve than the other proposed performance measures.

4.1.33 This kind of measurement of performance will require the cooperation of all relevant agencies. While, for example, the Sherman Review covered DPP reporting as a separate issue (Sherman Recommendation 13), it is incorporated in this proposal on the basis that it is one element, albeit a very important one, of measuring performance. In commenting on Sherman Recommendation 13, the Commonwealth Director of Public Prosecutions recognised that assessing the contribution of DNA evidence may benefit from reports from DPP’s on the number of prosecutions in superior courts of record in which DNA evidence was admitted and on any particular issues or problems that emerged in that regard.²⁰²

*Measuring effectiveness*²⁰³

Recommendation 19: That the Commonwealth negotiate a uniform approach to measuring effectiveness encompassing:

- a) the number of DNA matches facilitated between jurisdictions;*
- b) the number of matches for different types of crime – murder, rape, robbery etc.;*
- c) the number and type of offences that occur in each jurisdiction;*
- d) numbers for different types of matches – offender to crime scene, crime scene to crime scene etc.;*
- e) the outcome of matches – i.e. the number of matches that are followed by charges, the number of exculpations and the number that are a factor in convictions; and*
- f) any particular issues or problems that emerged in the courts.*

²⁰² Commonwealth Director of Public Prosecutions submission, p.3

²⁰³ This recommendation needs to be read with recommendation 22.

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

5.1 *Towards a National Accountability Framework*

5.1.1 Where police seek to match a crime scene DNA sample with a DNA sample taken from a suspect, the accountability arrangements that should apply are the same in most respects as those that apply to any criminal investigation. The only areas of difference relate to the scientific interpretation of the samples and the application of the laws of evidence to those scientific interpretations. In this respect, apart from the need to treat DNA evidence with great care, as discussed in section 3.14, there is little difference in principle between DNA evidence and any other kind of evidence.

5.1.2 However, where police derive a DNA profile of a person from a DNA sample and enter the profile on a database, or use or disclose a DNA profile for a particular purpose, the application of the *Privacy Act 1988* (the Privacy Act) must be considered and the *Information Privacy Principles* come into play. Those principles recognise the role of law enforcement agencies but also impose obligations on the agencies in the way they discharge their functions.

5.1.3 In general terms, the purposes of privacy regulation of databases are to:

- achieve a high level of compliance with privacy principles;
- provide support and help to individuals in the exercise of their privacy rights; and
- provide appropriate redress where privacy principles are infringed.

5.1.4 There are two ways in which observance of privacy principles may be enforced. One is through the complaint handling process and it is by this means that support may be provided to individuals and redress provided for the infringement of principles. The other is through auditing. In addition to the specialised oversight provided by the Privacy Commissioner, a more general oversight is provided by the Ombudsman. Both oversight bodies may hear complaints and may also carry out audits of the exercise of powers by law enforcement agencies. The Sherman Review devoted a great deal of attention to the role of audits.

5.1.5 The NSW Ombudsman drew this review's attention to recommendations in his two reports²⁰⁴ that the NSW Act be amended to enable implementation of Sherman Recommendations 15-20, which relate to regular audits of the national database system and the development of a national system for investigating complaints and carrying out 'own motion' investigations. He advised that in May 2009, the NSW Government indicated that it supported the recommendations and that the NSW Attorney-General's Department would conduct a separate consultation with respect to them.

²⁰⁴ 'The Forensic DNA Sampling of Serious Indictable Offenders under Part 7 of the *Crimes (Forensic Procedures) Act 2000*' (August, 2004) and 'DNA sampling and other forensic procedures conducted on suspects and volunteers under the *Crimes (Forensic Procedures) Act 2000*' (October, 2006).

5.1.6 However, despite the NSW Government's support for these recommendations and other initiatives pursued through working groups of the Standing Committee of Attorneys-General (SCAG), the Ombudsman expressed concern at what he described as 'the current stagnation in the development of a co-ordinated approach to oversight and accountability mechanisms for cross-jurisdictional law enforcement activities':

'...there is a need to harmonise legislative provisions regulating how forensic material/DNA profiles are obtained, used, stored, shared, protected, retained and/or destroyed. This is important because it is not uncommon for criminal investigations to span across more than one jurisdiction and currently DNA profiles are uploaded to the National Criminal Investigation DNA Database (NCIDD) for access by law enforcement agencies across Australia.

In addition, there appears to be a need to address the challenges involved in effectively handling any complaint or conducting investigations requiring cross-agency and/or cross-jurisdictional co-operation given some of the limitations on sharing information and delegating/transferring complaints between accountability organisations.'

5.1.7 On the other hand, Queensland Police say that the *Ministerial Arrangement for the Sharing of DNA Profiles and Related Information* requires each State or Territory to facilitate compliance with its own accountability requirements under its own laws. Northern Territory Police say that police services should remain accountable to their respective State and Territory oversight bodies but acknowledge that oversight bodies may wish to review their own legislation to enable them to share information.

5.1.8 The issues raised by the NSW Ombudsman are central to this review. Apart from the issue of 'harmonisation', which is discussed in Chapter 6, these matters all relate to national accountability arrangements. It is, of course, also important to discuss accountability arrangements for the small part of the NCIDD that is contributed by the Commonwealth and this chapter will address both aspects.

5.1.9 Apart from the NSW Ombudsman's submission, there has, however, been little comment on the need to harmonise accountability arrangements. This may indicate that the problems that were anticipated in 2003 in this area have not materialised.

5.1.10 In the next chapter it is argued that uniformity is more important in some areas than others. On this basis, and as a first step, distinctions should be drawn between those matters in which it is essential or highly desirable to have uniform standards, protocols and procedures, transparent complaint handling procedures and so on and those in which it matters less. The next step should be their negotiation. In relation to matters such as consistent types of record-keeping and statistical collections to allow cross-jurisdictional comparison and aggregation, it should be possible, at least to some extent, to develop a uniform approach without amendments to legislation.

5.1.11 Because of limitations on Commonwealth constitutional power in this area, any fully effective national scheme can only be achieved with the cooperation of the States. In this connection, it would be necessary to build on current arrangements including the Memorandum of Understanding between CrimTrac and other jurisdictions setting out the responsibilities of each and the independent audit solution developed by CrimTrac which

interfaces with jurisdictional information systems.²⁰⁵

5.1.12 In relation to national accountability arrangements, one option would be to persevere with the initiatives within SCAG that appear to have stalled. The comments of the NSW Ombudsman extend beyond complaint handling to other matters and it is important to maintain this broad focus.

5.1.13 Another possible option was identified in the course of considering the Sherman Review's recommendations in this area. The existing power in section 6 of the *Ombudsman Act 1976* to transfer complaints could be augmented by expressly enabling the Commonwealth Ombudsman to refer a complaint to an oversight agency²⁰⁶ of a participating jurisdiction and to accept a transfer of a complaint from an accountability agency of a participating jurisdiction - with ancillary provisions to allow the receiving agency to continue the investigation utilising Commonwealth powers if necessary, and allowing disclosure by the Commonwealth Ombudsman to the other agency of information relating to the matter. Reciprocal powers could be sought in the legislation of participating jurisdictions. It could be underpinned by an administrative agreement between participating jurisdictions and limited in its application to those jurisdictions that would be prepared to 'opt in'. A decision to 'opt in' could be made a precondition to participating.

5.1.14 However, from the apparent absence of inter-jurisdictional complaints²⁰⁷, it appears that this has not turned out to be a real problem area in practice. In the absence of any clear need for such amending legislation, there would be little point in proposing that scarce resources be devoted to the substantial effort that would be required to achieve a national scheme for seamless complaint handling. On the basis that the real need is to ensure that there is a seamless system of *compliance auditing* rather than complaint handling, it is appropriate to instead focus on those of the Sherman recommendations that relate to this issue.

5.1.15 Setting aside the handling of complaints, it is helpful to start with the suggestions in the Sherman Report for an identification of the elements of the 'ideal national accountability framework':

'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

²⁰⁵ CrimTrac submission, p.13

²⁰⁶ This term is used instead of State Ombudsman because in some jurisdictions the general oversight agency is not an Ombudsman.

²⁰⁷ While there are no records of the number of complaints, the only ones of which the Review is aware are those relating to intra-jurisdictional issues in NSW that are reported on in the NSW Ombudsman's Report.

- the allocation by government of sufficient resources to ensure the model is implemented.’

5.1.16 There is some support in submissions and commentary for this as a foundation for agreement with States and Territories.²⁰⁸

5.1.17 The Commonwealth’s stake in the national database is not measured by its physical share of the data uploaded to it but by the public interest in an effective national system utilising DNA technology for crime prevention and criminal investigations. If public confidence in the use of DNA technology is to be maintained and strengthened, it is important that there be effective accountability arrangements within each jurisdiction as well as an effective national accountability framework. For this reason, it is important that the Commonwealth should be at the forefront of developments in accountability within its direct area of responsibility. Indeed, this should precede moves towards a national accountability framework.

5.1.18 In this connection, the Sherman Review identified areas in which improvements are required. Two recommendations point to areas in which the Commonwealth should take a lead.

5.1.19 The first concerned the provision of information to donors:

‘5.106 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. Perhaps the best way to achieve this is that all documents provided to persons in relation to the system (e.g. information brochures, informed consent forms, results of analyses and matches) should contain prominent information on appeal rights and avenues, including any time limits on those rights. As already observed this occurs in other areas of public administration and there is no cogent reason why it should not occur here. All agencies involved in the scheme (CrimTrac, government laboratories, and the police) should also have prominently displayed on their websites the rights and avenues for complaints with “complaints” appearing on the home page.’²⁰⁹

5.1.20 The AFP, while agreeing with the objective, suggest that this information be provided separately in order not to make the complaint form too cumbersome.²¹⁰ The forms should, in that event, refer the reader where to get such information.

²⁰⁸ For example, Australian Privacy Foundation submission, p.10

²⁰⁹ Sherman Report, p.81

²¹⁰ AFP submission, p.26

Provision of Information

Recommendation 20: 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 either contain prominent information on appeal rights and complaint avenues, including any time limits on those rights or refer the reader to such information. All agencies involved in the scheme (CrimTrac, government laboratories, and the police) should also have prominently displayed on their websites the rights and avenues for complaints, with “complaints” appearing on the home page.

(Sherman Recommendation 10 - modified)

5.1.21 The second area in which the Sherman Review proposed that the Commonwealth should take a lead was that of reporting on complaints:

‘5.110 The reporting of basic information on the operation of the national database system is also important to accountability. Unless such information is provided no intelligent assessment can be made on how well the system is working.’²¹¹

5.1.22 Although complaint handling has not come to the fore as an issue in this Review, there is an absence of information on the number of complaints. As the Sherman Review recognised, this should be remedied through appropriate reporting requirements.

5.1.23 In commenting on Sherman Recommendation 11, the Commonwealth DPP queried in what circumstances complaints might be made to it about its use of DNA evidence since objections would be determined by the court in which the case was brought. For this reason, it suggested that DPP’s should be excluded from this recommendation. This suggestion is accepted.

5.1.24 To avoid unnecessary processes, this reporting should be integrated with the measuring of performance that is proposed in **Recommendation 19**. Reporting should cover some qualitative indices such as outcomes but only in general terms. It may also be appropriate for agencies, if they see fit, to integrate reporting on DNA matters with the more general reporting they undertake on complaints of all kinds.

Reports on complaints

Recommendation 21: That in relation to the use of DNA, the AFP, participating State and Territory Police Forces and relevant accountability bodies should be required to record and publicly report on the number of complaints, the type of complaints and, in a broad sense, the outcome of the complaints.

(Sherman Recommendation 11 - modified)

5.1.25 So far as privacy accountability is concerned, the ALRC’s Report, ‘*For Your Information*’ (‘the ALRC Privacy Report’) takes a very specific approach. It notes that in a discussion paper, the ALRC had ‘expressed the view that national consistency will be promoted if the federal, state and territory governments enter into an intergovernmental

²¹¹ Sherman Report, p.81

agreement in relation to the handling of personal information. The ALRC proposed that the intergovernmental agreement should establish an intergovernmental cooperative scheme. The scheme would provide that the states and territories should enact legislation that regulates the handling of personal information in the state and territory public sectors.²¹² Insofar as they are relevant, its recommendations were:

‘Recommendation 3–4 The Australian Government and state and territory governments, should develop and adopt an intergovernmental agreement in relation to the handling of personal information. This agreement should establish an intergovernmental cooperative scheme that provides that the states and territories should enact legislation regulating the handling of personal information in the state and territory public sectors that:

- (a) applies the model Unified Privacy Principles (UPPs), any relevant regulations that modify the application of the UPPs and relevant definitions used in the *Privacy Act* as in force from time to time; and
- (b) contains provisions that are consistent with the *Privacy Act*, including at a minimum provisions:
 - (i) allowing Public Interest Determinations and Temporary Public Interest Determinations;
 - (ii) regulating state and territory incorporated bodies (including statutory corporations);
 - (iii) regulating state and territory government contracts;
 - (iv) regulating data breach notification;
 - (v) regulating decision making by individuals under the age of 18.²¹³

‘Recommendation 3–5 To promote and maintain uniformity, the Standing Committee of Attorneys-General (SCAG) should adopt an intergovernmental agreement which provides that any proposed changes to the:

- (a) model Unified Privacy Principles and relevant definitions used in the *Privacy Act* must be approved by SCAG; and
- (b) new *Privacy (Health Information) Regulations* and relevant definitions must be approved by SCAG, in consultation with the Australian Health Ministers’ Conference.

The agreement should provide for a procedure whereby the party proposing a change requiring approval must give notice in writing to the other parties to the agreement, and the proposed amendment must be considered and approved by SCAG before being implemented.²¹⁴

5.1.26 The Government’s first stage response to the ALRC Privacy Report does not cover these recommendations.²¹⁵ If accepted, their implementation will apply equally in the current context to any issues involving privacy. In that event, their adaptation to areas other than privacy could also be further considered.

²¹² ALRC, ‘For Your Information’ Report, 108, p.213

²¹³ ALRC, ‘For Your Information’ Report, 108, pp.219-220

²¹⁴ ALRC, ‘For Your Information’ Report, 108, pp.224-225

²¹⁵ see <http://www.pmc.gov.au/privacy/alrc.cfm>

5.1.27 On the general issue of accountability arrangements, the conclusion of the Sherman Review 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.’

5.1.28 On the basis of the submissions received and the round table consultations, we are still at this point. Some other proposals should also be discussed in this context.

5.1.29 A comprehensive set of proposals was put forward in the ALRC/AHEC Report:

‘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.’²¹⁶

5.1.30 The majority of the ALRC/AHEC recommendations were referred to SCAG, the Australian Health Ministers’ Conference and the Australasian Police Ministers’ Council (now the Ministerial Council on Police and Emergency Management – Police) Joint Working Group for consideration along with the recommendations of the Sherman Review.²¹⁷ They deal with a broader range of issues than this review and, apart from 43-4, their adoption

²¹⁶ ALRC/AHEC Report, Ch. 43; see also p.1000

²¹⁷ Commonwealth Attorney-General’s Department submission, p.3

would not affect the proposals put forward by this Review.

5.1.31 The CCL – LV submission also argues for a restriction on the kinds of offences for which the DNA database might be used in investigation.²¹⁸ However, restrictions of this kind are not well suited to the objective of holding law enforcement agencies properly accountable. The proposal may be tested by positing a situation where both DNA evidence and fingerprints are found at the scene of a crime that falls into the ‘minor’ category. The practical effect would be to prohibit an investigator from using the first category of evidence but allowing them to use the second. From an investigative perspective, there seems no rational basis for this kind of distinction.

5.1.32 The distinction does, however, make sense in the context of regulation of the kinds of information that may be stored on the database for subsequent matching. The application of privacy principles to the NCIDD is discussed in Chapter 7.

5.1.33 Some submissions also argued for a more assertive role for the Commonwealth in insisting upon national accountability arrangements. The Australian Privacy Foundation, for example, says sanctions should be set ‘including ultimately exclusion from the system’ for any jurisdiction that does not meet a deadline for meeting national standards²¹⁹ and Civil Liberties Australia suggests that an independent body such as the Australian National Audit Office should be authorised to conduct audits of the use of all DNA database systems.²²⁰ In contrast, the WA Review found that no change to inter-jurisdictional accountability arrangements was warranted. Recognising the limitations on Commonwealth constitutional power does not mean inaction in the face of difficulties in achieving inter-governmental cooperation but it does require a different approach and the recommendations in this review are tailored to that end.

5.2 Reporting

5.2.1 While the legislation makes detailed provision for matters that must be recorded,²²¹ it does not impose any reporting obligations. This contrasts with the *Telecommunications (Interception and Access) Act 1979* (Cth), 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 The Australian Privacy Foundation supports the Sherman Review’s recommendations on reporting, noting that the published figures and other information provided in relation to telecommunications interception have proved to be a very valuable accountability device.²²²

5.2.3 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

²¹⁸ CCL – LV submission, p.15

²¹⁹ Australian Privacy Foundation submission, pp.10 , 11

²²⁰ Civil Liberties Australia submission, p.1

²²¹ ss. 23W, 23WP, 23XE, 23XT, 23XWS, 23YDAG

²²² Australian Privacy Foundation submission, p.10

future review would have the same problem because there are inadequate information reporting systems.’

5.2.4 This review has, in fact, faced similar difficulties.

5.2.5 In response to the Sherman Review’s recommendation for a standard format for reporting, the AFP commented that some of the information is not collected by the jurisdictions or available through the NCIDD. On the basis that a ‘link’ is the possibility of two profiles being from the same source and a ‘match’ is where a scientist confirms that two profiles are the same (but not that they are necessarily from the same source) then it would be possible to provide records of the number of matches obtained from the database, but not links. The database produces many links depending on what stringency is put on the matching process.²²³

5.2.6 The Sherman Review’s recommendations on reporting are directed towards achieving greater transparency and accountability in complaint handling and in measuring the effectiveness of the DNA database system. The implementation of these recommendations would greatly assist in remedying the deficiency of inadequate reporting systems and are endorsed by this review. If broader proposals to establish CrimTrac on a statutory basis are implemented, reporting obligations should be included in such legislation.

5.2.7 In part, the issues addressed by the Sherman Review in the context of reporting obligations are addressed in Chapter 4 of this review (see **Recommendation 19**). The Sherman recommendation on this issue is adopted with amendments to avoid duplication with **Recommendation 19** and changes in the language to substitute ‘jurisdictions’ for the reference to the former Australian Police Ministers’ Council.

Standard reporting format

Recommendation 22: That the Commonwealth negotiate 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 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*
 - profiles on each database and index;*
 - complaints received, indicating the number resolved;*
 - profiles removed; and*
 - profiles de-identified.*

(Sherman Recommendation 12 - modified)

5.3 Audits and other accountability arrangements

5.3.1 Again in contrast to the *Telecommunications (Interception and Access) Act 1979*, no

²²³ AFP submission, p.27

special audit requirements are imposed by the legislation. This is strange as audits have long been recognised as an important means of providing assurance that unusually intrusive powers are properly exercised. It is probably attributable to the difficulties in reaching agreement across all jurisdictions. Unlike telecommunications interception, this is not an area where the Commonwealth has constitutional legislative power. Nevertheless, an appropriate framework within which audits may be carried out is in the interests of law enforcement as it may be expected to build and maintain public confidence in the exercise of the powers conferred on police in this important area.

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’.²²⁴

5.3.3 Of course, the primary oversight body in each jurisdiction is located within the jurisdiction itself. The NSW Ombudsman noted that NSW Police is the primary oversight agency for complaints about police conduct²²⁵ and then reported on the resolution of a number of complaints under its supervision. The Ombudsman discussed them in terms of:²²⁶

- 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 the Division of Analytical Laboratories (‘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’²²⁷

5.3.5 The importance of audits is underlined by their capacity to provide a safeguard against wrongful convictions. This is illustrated by the NSW Ombudsman Report of the two

²²⁴ Victorian Review, Executive Summary, p.xlvii, Rec.14.2, p.463

²²⁵ NSW Ombudsman Report, p.273

²²⁶ *ibid.*, pp. 275-282

²²⁷ *ibid.*, Executive Summary, p. viii

cases outlined above – in one of these cases the accused was himself swayed by the DNA evidence against him and, on that basis, entered a guilty plea although he said he did not remember having committed the offence: it was included with a number of other charges for which he had also entered a guilty plea.²²⁸

5.3.6 Commenting on these and related matters in the context of discussing the *Farah Jama case*, the CCL – LV submission argues that ‘the overarching weakness which compounds the danger of the contamination risks is the lack of sufficient oversight’.²²⁹ To address this issue, it proposes the establishment by statute of a body responsible for the DNA, biometric and genetic functions of CrimTrac. ‘This agency should have its organisation and oversight mechanisms clearly stipulated to lessen the risk of contamination and build public confidence in the DNA database.’²³⁰

5.3.7 There may come a time when it is appropriate to establish such a body but it would seem premature to do so at this stage of development of the national system.

5.3.8 The Victorian Privacy Commissioner advocated regular auditing and ‘rigorous reporting requirements for all jurisdictions, as recommended in the Sherman Review’ observing that they ‘allow for public scrutiny and accountability as to the size, usefulness and continued functioning of the National DNA Database’.²³¹ Noting that the Sherman Review had initiated an independent preliminary audit into the NCIDD, she recommended a statutory requirement for such audits:

‘Given the immense expansion of the database, and the fact the database now incorporates a substantial portion of the Australian population, I would encourage further and regular auditing of the NCIDD to ensure continued data quality, data security and public scrutiny and confidence. I recommend a requirement that the National DNA Database is independently audited on an annual basis be incorporated into s.23YV.’²³²

5.3.9 The Sherman Review observed that external monitoring agencies ‘should be tasked to carry out regular audits of 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 whereas what is required here is the monitoring of a system across a number of agencies.’²³³

5.3.10 The AFP suggest that the publication of any unresolved criticism or qualification in a National Association of Testing Authorities (NATA) external audit would be extremely controversial and that it would be preferable to limit publication to the question whether or not accreditation is given.²³⁴

5.3.11 The AFP also argues that the language of the Sherman recommendation requires

²²⁸ NSW Ombudsman Report, pp.227, 273-276

²²⁹ CCL – LV submission, p.10

²³⁰ CCL – LV submission, p.11

²³¹ Victorian Privacy Commissioner submission, p.17

²³² Victorian Privacy Commissioner submission, p.17

²³³ Sherman Report, para 5.88

²³⁴ AFP submission, p.28

amendment and observes that while a qualification or restriction is already published on NATA's website, an 'unresolved criticism' arguably never arises as the very system that is in place for accreditation mandates that they are 'resolved'. All matters raised at the end of an assessment must be satisfactorily resolved between the laboratory and NATA prior to reassessment.

5.3.12 It is acknowledged that this recommendation may be controversial but, while the Sherman recommendation requires some modification, experience to date indicates that it is better to bring any shortcomings to light early than to wait until they result in major problems. A greater level of transparency in this area is important to public confidence in the system. Having regard to the matters raised by the AFP, the recommendation is expressed in terms that relate to particular kinds of findings by NATA.

5.3.13 The Australian Privacy Foundation supports the Sherman Review's recommendations on auditing.²³⁵

Publication of auditing of laboratories

Recommendation 23: That particulars of any finding in a NATA external audit that:

- a) involves a restriction or limitation being applied to accreditation; or***
 - b) requires the laboratory to re-analyse samples or withdraw reports;***
- should be recorded and made publicly available.***

(Sherman Recommendation 14 modified)

5.3.14 The need for regular internal auditing was addressed by the Sherman Review, which recommended that they be carried out at least once every two years. This would clearly be desirable from the perspective of accountability and also as a matter of good management.

Internal audits

Recommendation 24: 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 15)

5.3.15 Part 1D, together with corresponding legislation of participating jurisdictions, establishes a national scheme for the collection, storage and handling of DNA information without establishing a coherent scheme for compliance auditing. Recommendations 16-20 of the Sherman Report were formulated on the basis that, although each participating jurisdiction, including the Commonwealth, makes its own arrangements for oversight of its particular contribution to the national scheme, what is needed is a requirement for audit of the system as a whole.

5.3.16 The establishment of such a system would require the agreement of each participating

²³⁵ Australian Privacy Foundation submission, p.10

jurisdiction and, as the Sherman Review observed:

'In reaching agreement on these external reviews careful consideration needs to be given to covering cross-jurisdictional issues where data leaves one jurisdiction and goes to another. It may be necessary to consider joint reviews to ensure gaps are covered. Attention also needs to be paid to security of data, particularly in cross-jurisdictional flows.'²³⁶

5.3.17 If proposals to establish CrimTrac by legislation are accepted, it would be appropriate to include audit requirements in the legislation. It must be recognised, of course, that Commonwealth legislation could only cover CrimTrac's activities and not those of an agency of a participating jurisdiction.

5.3.18 As to what should be audited and how often, the preliminary audit of the NCIDD that was arranged by the Sherman Review recommended that audits address the accuracy of records within the NCIDD and be undertaken annually.²³⁷ An arrangement of this kind may be appropriate but the precise details would be a matter for negotiation among participating jurisdictions. In this connection, it needs to be recognised that the system depends on action taken within participating jurisdictions and that CrimTrac merely provides a matching engine. Annual audits may be excessive given the other accountability arrangements that are in place. Compliance with destruction and de-identification requirements should be added to the matters to be audited. However, compliance by the agencies of each jurisdiction with the procedural requirements for collection and uploading of DNA information to the database would be a matter for audit by the relevant oversight agency of the jurisdiction.

5.3.19 The Sherman Review made a number of detailed recommendations²³⁸ relating to external audit that, in view of their relationship to the then perceived gaps in complaint handling and to the recommendations of the preliminary audit, may no longer be appropriate. In essence, the problem now appears to be one that could be addressed through agreement among the jurisdictions on what is to be audited and who should carry out that audit.

5.3.20 As CrimTrac is a Commonwealth agency, it is already subject to the possibility of an 'own motion' investigation by the Commonwealth Ombudsman under the *Ombudsman Act 1976*. The Ombudsman also undertakes compliance audits of the use of covert powers by law enforcement agencies under the *Surveillance Devices Act 2004*; Part 1AB of the *Crimes Act 1914* and the *Telecommunications (Interception and Access) Act 1979*. It would, of course, be necessary for any such investigation to remain within the limits of Commonwealth jurisdiction having regard to the fact that most of the information on the NCIDD is 'owned' by the States but it would be possible for an audit to be carried out within these constraints. Informal arrangements could also be made between the Commonwealth Ombudsman and State oversight agencies to coordinate any audits that might be carried out.

5.3.21 While, as a Commonwealth agency, CrimTrac is also subject to audit by the Australian National Audit Office, the absence of any legislative requirement for audit is unusual in an area such as this. It would be desirable for the Commonwealth Ombudsman to be expressly tasked to carry out regular audits. Having regard to experience since the Sherman Review was completed, it would be more practical for the Commonwealth to

²³⁶ Sherman Report, para 5.125

²³⁷ See recommendation 2 in Appendix J to Sherman Report

²³⁸ Sherman Report, Recommendations 16-20

legislate in respect of its area of responsibilities than to continue to seek agreement on national arrangements to cover all aspects of managing the database.

5.3.22 This approach would leave open the possibility of adopting Sherman Recommendations 16-20 at a later date but would focus instead on what can be done within the Commonwealth's direct area of responsibility. In this sense, it would be a more achievable objective.

External audits

Recommendation 25: That the Commonwealth Ombudsman be tasked in legislation to carry out regular audits of CrimTrac's compliance with legislation, practices and procedures and record keeping in relation to the management of the NCIDD. The Review also believes it would be appropriate for police in the participating jurisdictions to be subject to a similar requirement.

(This replaces Sherman Recommendations 16-20)

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 The main differences in the legislation of participating jurisdictions can be seen in **Attachment D - Comparison of Forensic Procedures Legislation**. In this connection, CrimTrac has observed that complexity in matching has been reduced and that there are now only three matching ‘rules’ as compared with thirty-six in 2001.

6.1.2 CrimTrac has advised that the majority of jurisdictions have now adopted the following table for their matching rules within the NCIDD:

Operational Matching Table:

		Other Jurisdictions' Categories						
		Crime Scene	Suspect(s)	Volunteer(s) (Limited Purpose(s))	Volunteer(s) (Unlimited Purpose(s))	(Serious) Offender(s)	Missing Person(s)	Unknown Deceased Person(s)
Defining Jurisdiction's Categories	Crime Scene	Yes	Yes	If within purpose	Yes	Yes	Yes	Yes
	Suspect(s)	Yes	Yes	If within purpose	Yes	Yes	Yes	Yes
	Volunteer(s) (Limited Purpose(s))	If within purpose	If within purpose	If within purpose	If within purpose	If within purpose	If within purpose	If within purpose
	Volunteer(s) (Unlimited Purpose(s))	Yes	Yes	If within purpose	Yes	Yes	Yes	Yes
	(Serious) Offender(s)	Yes	Yes	If within purpose	Yes	Yes	Yes	Yes
	Missing Person(s)	Yes	Yes	If within purpose	Yes	Yes	Yes	Yes
	Unknown Deceased Person(s)	Yes	Yes	If within purpose	Yes	Yes	Yes	Yes

This is the same as the table at section 23YDAF of Part 1D.

6.1.3 There are still problems but they generally arise out of differences in what is permitted by the legislation of each participating jurisdiction as it applies to the collection of samples. That can cause difficulties when police in one State are asked by police in another to collect a sample on their behalf but such difficulties can only be addressed by reaching agreement between the jurisdictions.

6.1.4 The Attorney-General's Department observes that the effect of remaining disparities

largely relates to AFP operational matters in conducting inter-jurisdictional matches.²³⁹ The AFP identifies the following significant disparities:²⁴⁰

- The definition of serious offender varies from the Commonwealth (offence with 5 years maximum penalty: s 23WA *Crimes Act*) to State and Territory legislation (ACT 12 months: s 9 *Crimes (Forensic Procedures) Act 2000* (ACT));
- Lack of consistency between some State legislation, for example, the Queensland, Northern Territory and Western Australia legislation does not correspond; and
- Commonwealth legislation does not correspond to any State legislation.

6.1.5 The NSW Ombudsman commented that there is a need to harmonise legislative provisions regulating how forensic material/DNA profiles are obtained, used, stored, shared, protected, retained and/or destroyed (see Chapter 5). Common standards and terminology are also fundamental to any assessment of the utility of the national database.

6.1.6 The development of common standards is also important for the collection and exchange of information and intelligence, including sensitive material, between police agencies and with strategic partners.

6.1.7 However, it must be acknowledged that, in pushing for uniformity, there is a risk of adopting a ‘lowest common denominator’ approach in terms of the protection of civil liberties and privacy. The issue arises most clearly in the application of the above matching table and is discussed in section 3.14 above. Where this is a likely outcome, it would be better to accept the disparities, at least for the present. Over time, it may be possible to reduce them by adopting a ‘best practice’ approach. Implementation of this would require leadership within consultative forums and a willingness on the part of each jurisdiction to consider the improvements made in others.

6.1.8 In this connection, Queensland Police say that the disparities reflect each responsible Government’s position regarding the collection and use of DNA material. ‘While Queensland’s matching table is more liberal than some other jurisdictions, the creation of and participation in the Arrangement ensures the administrative mechanisms exist to allow each jurisdiction’s legislation to work effectively. The Arrangement clearly stipulates that where the tables do differ, the most restrictive of the tables will be applied to the matching of DNA profiles.’²⁴¹

6.1.9 At each of the round table consultation meetings, law enforcement agencies said that divergence among jurisdictions is no longer a significant problem. It was also observed at the Brisbane round table consultation meeting that the scheme has moved away from the original conception of an automatic exchange of information to one where each jurisdiction decides on its response to a request from another jurisdiction once the initial match has been made. That decision must have regard to the restrictions imposed by the legislation of the jurisdiction that ‘owns’ the information.

6.1.10 On the other hand, there was also some support in the round table consultations for the Victorian Review’s recommendation for a ‘national minimum standards’ approach similar to that taken in the United States with respect to data sharing. On this basis, the national DNA

²³⁹ Attorney-General’s Department submission, p.6

²⁴⁰ AFP submission, p.7

²⁴¹ Queensland Police Service submission, p.2

database could set a ‘best practice’ approach, allowing jurisdictions to upload collected profiles having met the higher requirements of that database. The US approach was summarised in the following terms:

‘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 authorize, and individual differences are ‘ironed out’ by use of only agreed indices on the national database...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.’²⁴²

6.1.11 Northern Territory Police argue that sharing information for law enforcement purposes is generally desirable and that characterisation as a ‘law enforcement agency’ should be the criterion for membership of the national scheme. New members of the national scheme should be able to match profiles against the NCIDD but filters should remain in place to ensure that identifying information and intelligence is used for law enforcement purposes only and released to non-police members only if permitted by the law of the jurisdiction. Northern Territory Police also query the justification for making special provision for Aboriginals and Torres Strait Islanders.

6.1.12 CrimTrac advises that inconsistency in the use of indices and differences between matching tables will continue to provide challenges for inter-jurisdictional matching.²⁴³ For example, some jurisdictions put relatives of missing persons’ profiles on the volunteers (limited purpose) index. This creates difficulties because that index only allows matches within the purpose.²⁴⁴

6.1.13 There are two reasons harmonisation is important in particular areas – so that performance measurements can be made across jurisdictions and so as not to undermine privacy protections. For example, if the definitions of ‘serious offence’ or of the categories of ‘offender’, ‘suspect’ and ‘volunteer’ differ significantly between jurisdictions, it is difficult to arrive at an overall measure of a conviction rate for each category.

6.1.14 The need for harmonisation of the ways in which forensic procedures are carried out is open to question but disparities could have implications for the admissibility of evidence in particular cases involving the collection of a DNA sample in one jurisdiction for use in another or where a case depends on matching profiles between jurisdictions. An effective national approach to sharing genetic information requires some degree of uniformity.

6.1.15 The problem for matching was stated succinctly by the Sherman Review in the following terms: ‘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.’²⁴⁵

6.1.16 As suggested in the discussion paper, the seriousness of the offence for which a

²⁴² Victorian Review, p.454

²⁴³ CrimTrac submission, pp.9, 13

²⁴⁴ CrimTrac submission, p.9

²⁴⁵ Sherman Report, para 6.84

forensic procedure might be carried out on a suspect or offender is perhaps the area where the effect of disparities is most apparent. The former Model Criminal Code Officers' Committee (now the Model Criminal Law Officers' Committee) provided the following example:²⁴⁶

'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.'

6.1.17 The Model Bill definition of 'serious offence' as an indictable offence punishable by imprisonment for two years seems reasonable and should be achievable through negotiation.

Offender profiles

Recommendation 26: That the Commonwealth 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 21)

6.1.18 It is also important that jurisdictions have confidence in the laboratory processes followed by other jurisdictions. There should, for example, be strong safeguards against contamination of samples in all participating jurisdictions.

6.1.19 Of at least equal importance is the need for uniformly high standards in the scientific interpretation of genetic material. The ALRC/AHEC Report made a number of recommendations in this connection.²⁴⁷ Capabilities in this area are rapidly improving and reviews in NSW and Victoria since the ALRC/AHEC Report underline the importance of this for all jurisdictions.²⁴⁸

6.1.20 The need for a common approach to what is categorized as a 'serious offence' is addressed in **Recommendation 26**. To address the real problems that arise from excessive divergence, it would also be desirable to regard the provisions of the Model Bill as representing minimum standards in the following areas:

- particular forensic procedures and definitions of 'offender', 'suspect', 'volunteer';
- principal privacy protections relating to how information is collected, stored, maintained, shared and retained or destroyed; and
- standards in handling and interpreting genetic material.

6.1.21 In this connection, the ACT Attorney General has suggested that the definition of 'volunteer' in both the ACT Act and the Commonwealth Act as a person 'who volunteers'²⁴⁹

²⁴⁶ *ibid.*, p.991

²⁴⁷ ALRC/AHEC Recommendation 40-1 to 40-4; see also Discussion Paper at para 6.1.13

²⁴⁸ NSW Ombudsman Report and Victorian Police Review of DNA sampling, 2010.

²⁴⁹ s.23XWQ

would bear re-examination given that the reality is that the police must take the initiative. However, if the essential element of the definition is that of acting voluntarily, the initiation of the request by the police may not be significant.

6.1.22 Where a degree of harmonisation is regarded as important, the question of how it might best be pursued is a difficult one. The Sherman Review favoured negotiations but foreshadowed a possible need for legislation should negotiations fail.²⁵⁰ The national database system has only recently commenced and it would not be appropriate to put at risk the degree of cooperation that has now been achieved unless it is essential to do so. Moreover, in areas such as laboratory standards, legislation is not appropriate. In this respect, it should be noted that the National Institute for Forensic Science is currently working on standards relating to ‘low copy sampling’.²⁵¹

6.1.23 The discrepancies can be readily identified in **Attachment D**.

Uniform provisions

Recommendation 27: That the Commonwealth negotiate a uniform approach to:

- a) *particular forensic procedures and definitions of ‘offender’, ‘suspect’, ‘volunteer’;*
- b) *principal privacy protections relating to how information is collected, stored, maintained, shared and retained or destroyed; and*
- c) *standards in handling and interpreting genetic material.*

6.1.24 While a uniform approach would also be of assistance in other areas, such as gauging the effect of the legislation on the treatment of indigenous persons who are questioned in criminal investigations, the lack of uniformity in these areas has less impact on the overall integrity of the system. It must be recognised that different jurisdictions may choose to follow different policies in relation to a range of social issues and also that the circumstances in some jurisdictions may differ substantially from those in others.

6.1.25 A uniform definition for ‘children’ would, however, appear to raise fewer issues and to be achievable through negotiation. The same should be true of ‘incapable persons’ although, as the Office of the Privacy Commissioner has pointed out, incapacity may be limited to a particular point in time and may also be overcome with appropriate assistance from another person. In these respects, this review endorses the recommendation of the Sherman Review.

Children and incapable persons

Recommendation 28: That the Commonwealth negotiate agreement with participating jurisdictions that the Model Bill provisions relating to children and incapable persons should apply in all participating jurisdictions.

(Sherman recommendation 22 – modified)

²⁵⁰ Sherman Report, paras 3.30, 6.83 to 6.85 and 6.91

²⁵¹ See Attachment F, Round Table Consultation in Brisbane, 18 February, 2010 and discussion in section 3.10

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.²⁵²

6.2.2 Civil Liberties Australia suggests that there should be a uniform set of standards and rules controlling issues such as the collection, storage, deletion and use of the data as well as access to it.²⁵³

6.2.3 One reason differences may matter is that privacy and civil liberties protections afforded by one jurisdiction may be undermined if a DNA sample of its residents may be matched against records from another jurisdiction with lower standards of protection. This problem was recognised by the Senate Legal and Constitutional Legislation Committee and was also taken into account in the drafting of the Model Bill.²⁵⁴

6.2.4 When the idea of having national minimum standards as a prerequisite to participation in the national database system was put forward, only NSW and the ACT were participating in the national scheme. Now that there is full participation, it may be argued that it would be inappropriate to propose a standard that is not currently being met by all jurisdictions.

6.2.5 The discussion paper also canvassed an option that had been put forward in a submission to the ALRC but rejected because of the resulting complexities. The idea was to build on the approach taken in subsection 23YUD(2)²⁵⁵ to limit the transmission of information between jurisdictions so as to apply the laws of the receiving jurisdiction to exclude any information on the national database that was not collected in accordance with the laws of the receiving jurisdiction.

6.2.6 This would require CrimTrac to monitor and flag all information that is collected under any provision that departs in even minor respects from those of other jurisdictions. It would be impractical to require this kind of differentiation.

6.2.7 In the final analysis, most of the essential elements of a harmonised approach would

²⁵² ALRC/AHEC Report, p.990

²⁵³ Civil Liberties Australia submission, p.3

²⁵⁴ See Discussion Paper at paras 6.2.2-6.2.3.

²⁵⁵ ‘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.’

appear to be represented by the current state of the national scheme. As the Sherman Review recognised,²⁵⁶ some matters are essential to the integrity of a national scheme whereas in others, consistency is desirable but not essential. Disparities in the latter category are manageable provided any emerging practical problems are monitored and action taken to address them. The existing consultative mechanisms, such as the CrimTrac NCIDD Consultative Forum are suitable for this purpose.

6.2.8 Queensland Police drew attention to a situation where a Queensland police officer arrests a person for a Commonwealth offence that is not an indictable offence in Queensland. The police officer would be required to seek authority from an AFP senior constable to take a sample of hair whether or not the Queensland officers were of equivalent rank. Queensland Police suggest an amendment to Part 1D to allow approval to be given, in such circumstances, by a 'senior constable or equivalent' from another jurisdiction. This proposal is reasonable and is incorporated into **Recommendation 6** in the following terms:

- *amend the relevant provisions of Part 1D to allow a senior constable (or sergeant if Recommendation 6(a) is accepted) or equivalent of another jurisdiction to authorise the carrying out of a non-intimate forensic procedure on a suspect for a Commonwealth offence where the suspect is arrested in that jurisdiction.*

6.2.9 CrimTrac drew attention to the following issues raised by the NCIDD User Advisory Group concerning the need for some degree of uniformity of approach in taking a DNA sample from a suspect or other person on request from another jurisdiction once a match has been identified through the NCIDD:²⁵⁷

- registration of forensic orders;
- power to detain a suspect for the purposes of carrying out an order;
- exchange of physical DNA material; and
- taking of DNA samples from volunteers.

6.2.10 In relation to the first matter, the User Group has identified the need for a Ministerial arrangement to serve as a basis for the taking of a DNA sample from a suspect in one jurisdiction to be compared to a crime scene sample in another. In relation to the second, it says there are discrepancies regarding the power to enforce an order providing for the carrying out of a forensic procedure. In relation to the third, it says that police have agreed that best practice would be to send physical samples but the legislation of some jurisdictions does not allow this. The fourth matter is couched in terms of a question of statutory interpretation but it would be better to focus on the policy issue – i.e. the need for uniform legislation.

²⁵⁶ Sherman Report, paras 6.80-6.91

²⁵⁷ CrimTrac submission, pp.7, 8

6.2.11 All of the User Group's objectives could be achieved through legislative amendment in each jurisdiction following agreement at Ministerial level and this review therefore incorporates into **Recommendation 6** a proposal in the following terms:

- the Commonwealth negotiate agreement with participating jurisdictions for uniform legislation on:

- *registration of forensic orders;*
- *power to detain a suspect for the purposes of carrying out an order;*
- *exchange of physical DNA material; and*
- *taking of DNA samples from volunteers.*

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.’²⁵⁸ Some submissions expressed doubt²⁵⁹ but this Review proceeds on the basis of the ALRC interpretation. As a Commonwealth agency, CrimTrac is bound by the Information Privacy Principles (IPP’s),²⁶⁰ which are set out in the *Privacy Act 1988* (Cth) and summarised in plain English by the Privacy Commissioner as follows.²⁶¹

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.

²⁵⁸ ALRC/AHEC Report, p.1073

²⁵⁹ E.g. Victorian Privacy Commissioner submission p.15: ‘it is an open question as to whether the DNA profile of an individual, not yet linked to the identity of an individual, is alone ‘personal information’ and would be afforded the total protection of privacy legislation’.

²⁶⁰ ALRC/AHEC Report, p.1081,1082

²⁶¹ <http://www.privacy.gov.au/materials/types/law/view/6892>

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.

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 the 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.²⁶²

7.1.3 The Australian Privacy Foundation draws attention to amendments made to the Privacy Act in 2006 to more clearly cover genetic information and suggests that it should be made clear that DNA samples and profiles are included in the definition of 'personal information' in the Act. Uncertainty about the application of the Privacy Act appears to lie behind reported concerns in Victoria 'that the information exchange between the State police and CrimTrac may be a privacy risk'.²⁶³ It is reported that the Victorian Commissioner for Law Enforcement Data Security is reviewing the flow of data between CrimTrac and Victoria Police. Ironically, the doubts about the legal position only arise because profiles are stored on the NCIDD in a way that does not identify the individual. Only the jurisdiction from which the profile is uploaded can link the profile to a particular individual.

7.1.4 No purpose would be served by this Review offering a view on the legal issue but it is relevant to note that the profiles are treated by CrimTrac and the AFP on the basis that they do amount to 'personal information'.

7.1.5 In May 2008, the ALRC furnished Report No.108 ('the Privacy Report') in which it put forward proposed Model Unified Privacy Principles to apply to both public and private sectors. For present purposes, these are generally similar to the IPP's.

7.1.6 The ALRC/AHEC Report recommended an extension to the coverage of the provisions limiting use and disclosure.²⁶⁴

'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.'

7.1.7 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,²⁶⁵ the ALRC/AHEC

²⁶² ss.23YUG, 23YUH and 23YUI

²⁶³ 'The Australian' 12 May, 2010 *'Police Data put at risk: Watchdog'*

²⁶⁴ ALRC/AHEC *Essentially Yours: The Protection of Human Genetic Information in Australia (Report 96)* p. 74; 1026-1038

²⁶⁵ ALRC/AHEC *Essentially Yours: The Protection of Human Genetic Information in Australia (Report 96)* p. 1051

Report also recommended;²⁶⁶

‘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.’

Interoperability of the NCIDD with other CrimTrac systems

7.1.8 The NCIDD is currently isolated from other CrimTrac systems such as the National Police Reference System (NPRS) and the National Automated Fingerprint Identification System (NAFIS). There is a suggestion that the systems should be integrated ‘to provide a one stop shop for police and to service new strategic initiatives’. In the language of privacy principles, integration of this kind would involve issues of the ‘use and disclosure’ of personal information.

7.1.9 Issues relating to the use and disclosure of information involve not only the current application of the *Information Privacy Principles* referred to above but also the proposed ‘*Model Unified Privacy Principle 5 – Use and Disclosure*’ that has been put forward in the ALRC Privacy Report and, subject to some amendments, accepted by the Government. One of the amendments made by the Government was to include further exceptions to a general prohibition on the use of personal information for a purpose other than that for which it was collected.²⁶⁷ One exception applies where the individual consents to the use or disclosure and another relevant exception to situations where the disclosure is authorised or required by law.

7.1.10 Obtaining consent would not be practicable in this context but the ‘authorised or required by law’ exception raises the question whether an express authorisation should be made in Part 1D. This involves a policy balancing of the right to privacy with law enforcement interests. The related issue of ‘function creep’ also signals the need to consciously balance the advantages to law enforcement of any particular initiative with any adverse effect on privacy.

7.1.11 An important safeguard in the matching process is that the identity of the person concerned is not revealed to the inquiring agency by the system itself. It is necessary for an approach to be made to the police service of the jurisdiction from which the data on the NCIDD has originated in order to ascertain the identity of the individual whose profile matches that put forward. If there is to be a capability to link one system with another, this feature would need to be preserved.

Familial searching

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

²⁶⁶ ALRC/AHEC *Essentially Yours: The Protection of Human Genetic Information in Australia (Report 96)* pp. 74, 1053

²⁶⁷ Government response to ALRC Privacy Report (October, 2009) Rec. 25-2 at <http://www.alrc.gov.au/inquiries/title/alrc108/response.html> p.52

to find an exact match in a crime scene sample'.²⁶⁸ Where blood relatives are found, they may be interviewed in the hope that this may lead to the offender. The review found that this was not prohibited by the Act, and is therefore already possible, but considered that there were serious privacy implications and that guidelines should be developed to regulate the conduct of such searches.

7.1.13 This is also a live issue for law enforcement agencies in other jurisdictions. In addition to addressing privacy concerns, it is necessary to consider, if the technique is accepted, how legislation might support a collaborative approach across jurisdictions.

7.1.14 An example of the application of familial searching, as outlined in the CrimTrac submission,²⁶⁹ is provided by a 1973 UK case of the rape and murder of three sixteen-year-olds. In 2002 the DNA profile from the scenes had not matched any offender profiles in the National DNA Database but there was a near match with Paul Kappen, the son of one of the suspects, Joseph Kappen. Kappen had died some years earlier and an exhumation order was obtained. A sample taken from his body matched the suspect's DNA profile.

7.1.15 There are also implications for the use of DNA in locating relatives of missing persons and unknown deceased persons. A significant number of unknown deceased are the victims of homicide and the use of the NCIDD to establish their identity would assist in the investigation of serious crime. Even without a connection to criminal activity, there may also be a legitimate and important role for DNA analysis and the issue can assume great significance in times of disaster, such as the Victorian bushfires of 2009 or the Bali bombings of 2002.

7.1.16 In relation to the Victorian bushfires, CrimTrac says that a version of the NCIDD was deployed to assist with the identification of unknown deceased. While it could be used for direct matching however, it could not perform kinship matching by using a relative's DNA to identify a victim.²⁷⁰

7.1.17 The Office of the Privacy Commissioner suggests there should be a detailed assessment of the privacy impact before familial searching is used in law enforcement investigations.²⁷¹ The Victorian Privacy Commissioner goes further:

'The idea of familial matching raises entirely new issues for consideration. For example, procedures allowing forensic samples to be taken from suspects directly could be easily circumvented by obtaining DNA samples from the suspect's relatives.

Familial testing will drastically extend the scope of the database; individuals with a blood relative on the database (such as suspects, volunteers or those convicted) will be somewhat ascertainable. Such a change should only be considered after extensive public debate and consultation, and express legislative change should be required to expressly define the scope and extent of familial matching, should it be implemented.'²⁷²

7.1.18 The ACT Attorney General expresses support for a CrimTrac initiative to coordinate

²⁶⁸ WA Review, p. 95

²⁶⁹ at p.10

²⁷⁰ CrimTrac submission, p.9

²⁷¹ Office of the Privacy Commissioner submission, p.1

²⁷² Victorian Commissioner's submission, pp.19, 20

the development of the technical and policy framework for a national familial searching capability, including undertaking a privacy impact statement.²⁷³ This exercise was authorised by the CrimTrac Board comprising Police Commissioners of the participating jurisdictions.

Other possible applications and future developments

7.1.19 The Sherman Review recommended 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.²⁷⁴ The context for this recommendation was a concern about ‘function creep’ and the capacity for new uses to be found for DNA technology. The purpose of the legislation is to regulate the use of DNA for criminal investigation and, as a matter of principle, a specific exclusion of this kind would be consistent with its underlying objectives and a reasonable safeguard.

7.1.20 There are, however, serious difficulties in framing a legislative prohibition in terms that will cover all objectionable uses without having unforeseen consequences on legitimate applications of new and developing technology.

7.1.21 In this connection, the AFP acknowledge that there are a number of novel approaches to DNA analysis that target different information than previously exploited. They suggest that any statutory exclusion of the kind proposed by the Sherman Review runs the risk of ignoring the important investigative or intelligence potential of such information. Many countries have embraced this issue already through lengthy and comprehensive dialogue with numerous stakeholders and the community. They advocate a similar approach.²⁷⁵

7.1.22 The Sherman recommendation on this matter was not intended to preclude acceptance of future uses of DNA technology but merely to require that they be considered by Parliament before being accepted. In this connection, the Office of the Privacy Commissioner suggests that the use of new techniques should be dependent on further review and analysis including privacy impact assessment.²⁷⁶

7.1.23 This is a reasonable approach but one that is more suited to expression as a policy position than as a legislative prohibition. The Review is advised, for example, that a legislative prohibition framed in terms of ‘phenotypically expressed information’ could cover the identification of a suspect as a male or a female. It might also rule out an investigative technique that does not require comparison with an existing DNA profile.

7.1.24 It should also be noted that the Privacy Act, through the *Information Privacy Principles*, already provides some protection against any ill considered adoption of new technologies. The UK and New Zealand have both implemented familial testing within administrative frameworks that have been carefully formulated with regard to ethical principles. Their Privacy/Information Commissioners have been consulted on the arrangements. Key to each is a requirement that approval be obtained at a senior level and that the inquiries be carried out in accordance with restrictions that are designed to fit particular circumstances.

²⁷³ ACT Attorney General’s submission, p.5

²⁷⁴ Sherman Report, Recommendation 23

²⁷⁵ AFP submission, p.31

²⁷⁶ Office of the Privacy Commissioner submission, p.1; see also ACT Attorney General’s submission, p.5

7.1.25 Because of the risk of unforeseen consequences, the Review does not propose any legislative prohibition in this area but instead endorses the current approach of the CrimTrac Board in relation to familial matching – that is, a policy decision to refrain from adopting new techniques until an appropriate regulatory framework can be developed. The new framework might be implemented through legislation but, if that is not appropriate, it might instead be expressed in some other way that involves exposure of the technique to public examination. As a matter of principle, the legislation should not be framed in terms of prohibiting the adoption of developments in DNA technology but any significant new techniques should not be employed until they have been subjected to public scrutiny.

Developments in DNA technology

Recommendation 29: That significant developments in DNA technology or applications of it, such as familial matching, should only be adopted after an appropriate exposure to public examination and assessment.

(Sherman Recommendation 23)

7.1.26 The Sherman Review also recommended that Part 1D should contain a provision prohibiting linking the matching outside any database which is not regulated by statute for law enforcement purposes.²⁷⁷ The concern was directed to the use of ‘Guthrie cards,’ which record DNA of newly born babies. The exclusion of unregulated matching by such a provision would also be a reasonable safeguard for privacy protection against the gradual extension of DNA testing for purposes that were never envisaged when the legislation was drafted.

7.1.27 One basis for this approach is that it should be for future parliaments to consider the extent to which they wish to extend use of the database in light of future technological developments.²⁷⁸ The CCL – LV submission argued for a tight specification of the purposes of the NCIDD²⁷⁹ – a matter that is discussed in section 3.1 above.

7.1.28 The AFP suggest that that there need to be exceptions to any prohibition on matching an NCIDD profile with a profile outside a law enforcement database as recommended by the Sherman Review. The AFP believe that linking outside the NCIDD is necessary in some instances including missing persons, identification of disaster victims and unknown deceased persons as sometimes the Guthrie card is the only way to identify someone and the family may want this to occur. The AFP also queries the effect such a provision may have on current exchanges of DNA material or profiles between Australia and other countries.²⁸⁰

7.1.29 The matching of a profile for specific purposes with a database other than a law enforcement database of a State or Territory could be permitted as an exception to any general prohibition and any adverse effect on legitimate international matches could be prevented in the drafting of the legislative amendments proposed in **Recommendation 5**. The specific purposes for which a match might be permitted should be negotiated with participating jurisdictions.

²⁷⁷ Sherman Report, Recommendation 24

²⁷⁸ E.g. Victorian Commissioner’s submission, p.20

²⁷⁹ CCL – LV submission, p.11

²⁸⁰ AFP submission, p.31

7.1.30 The need for a provision of this kind becomes clear when it is considered that the elaborate matching limitations in Part 1D could easily be undermined by the matching of samples with profiles from other databases that have been constructed for other purposes.

7.1.31 This Review endorses the recommendation of the Sherman Review.

7.1.32 The Australian Privacy Foundation and Civil Liberties Australia both express concern at the scope for broader uses of DNA information.²⁸¹ The Office of the Privacy Commissioner says:

‘It is an important principle of good privacy practice that an individual’s information will not be used for purposes other than those for which it was collected. On this basis, the Office considers that it would be inappropriate to allow general access by law enforcement agencies to non-law enforcement genetic registers, given the sensitivities around the collection and use of genetic material generally.’²⁸²

7.1.33 The formulation of an amendment will require care. On the one hand, there is a concern that legitimate matching for purposes such as victim identification should not be compromised. On the other, there is a concern with ‘function creep’ if legitimate matching is broadly defined. It could be argued that any specific recommendation is unnecessary given the existing application of the Privacy Act to any matching that is not ‘authorised by law’, but it would be desirable to put the matter beyond doubt.

Matching outside regulated databases

Recommendation 30: That, subject to limited exceptions to be negotiated with participating jurisdictions, Part 1D should contain a provision prohibiting the matching of samples with profiles from other databases that have been constructed for ‘non-law enforcement’ purposes.

(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.²⁸³

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

²⁸¹ Australian Privacy Foundation submission, pp. 12, 13 and Civil Liberties Australia submission, p.5

²⁸² Office of the Privacy Commissioner submission, p.9

²⁸³ ss. 23XJ and 23XK

relation to suspects.’²⁸⁴ The review commented:

‘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 However, the AFP say that it is currently unclear whether AFP officers are in a position to use reasonable force to obtain DNA samples from convicted offenders. The doubt arises because of the terms in which sections 23XJ and 23XWE are expressed. Section 23XJ, which is located in Division 6 dealing with suspects, provides for the reasonable use of force by a person authorised to carry out a forensic procedure on ‘a person’. Section 23XWE specifies that Division 6 applies to the carrying out of a forensic procedure on ‘an offender’ as if the references to ‘the suspect’ were references to ‘the offender’. The provision should be clarified and a proposal is included in **Recommendation 6** in the following terms:

the legislation be amended to clarify that the reasonable use of force is available in taking a DNA sample from an offender, as provided for in section 23XJ in relation to suspects.

7.2.4 Queensland Police expressed support for the existing State regulation of the use of force in the *Police Powers and Responsibilities Act 2000*. Broadly speaking, this is similar to the common law position endorsed by the Sherman Review.²⁸⁵

7.2.5 The ACT Attorney General observes that ‘reasonableness’ is a concept that has been effectively applied by courts and does not need alteration.²⁸⁶ Northern Territory Police observe that the existence of a power to use force often obviates the need to use it.

7.2.6 On the other hand, some submissions argue for specific regulation of the use of force. In brief, the arguments are that, where reasonable force is required in collection of a sample, an independent observer should be required to report on the procedure and method used to collect the sample, that police procedures and instructions are not sufficiently transparent, that prison inmates are particularly vulnerable and that the presence of prison officers should be limited to is the extent necessary to carry out the procedure.²⁸⁷ In support of these arguments, reference is made to examples of the use of excessive force in carrying out procedures in NSW and Victoria.

7.2.7 The Australian Privacy Foundation expresses concern at occasional disturbing reports about non-consensual collection of DNA samples from prisoners and doubts whether there is any overwhelming urgency about the collection of samples from convicted offenders. It suggests that prolonged negotiation is preferable to resorting to the level of force allowed by law.²⁸⁸

7.2.8 Despite these concerns, it is not clear that legislation is warranted in relation to the relatively small part of the NCIDD for which the AFP is directly responsible. In this area, circumstances today have not changed from those considered by the Sherman Review and

²⁸⁴ Sherman Report, para 7.9

²⁸⁵ Queensland Police submission, p.4

²⁸⁶ ACT Attorney General’s submission, p.6

²⁸⁷ Victorian Privacy Commissioner submission, p.21; CCL-LV submission, pp.19-24

²⁸⁸ Australian Privacy Foundation submission, p.14

there is little to support an argument that the Commonwealth should negotiate a uniform approach. If excessive force is used in any particular case, the existing sanctions under the common law - a right of action for assault, and the possibility of criminal proceedings - are likely to be as effective as any that might be devised in new legislation.

7.3 Other privacy and civil liberties issues

7.3.1 While DNA technology has proved its value to law enforcement, it has serious implications for privacy and civil liberties, which, to some extent, have driven the detail and complexity of the legislation. The overlap between privacy and civil liberties would make any strict division of the topics artificial but it is convenient to start with privacy.

7.3.2 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.’²⁸⁹

7.3.3 Some law enforcement agencies have argued that it would be preferable to load an individual’s DNA profile into the national database upon arrest.²⁹⁰ It is said that this would assist police to solve crimes associated with the individual and may deter the individual from committing another crime before their case goes to court. However, this proposal raises serious privacy and civil liberties concerns. In this connection, a recent review of the UK’s national DNA database by the Human Genetics Commission (‘the UK Review’) has reported that police in England and Wales are now routinely arresting people in order to add their DNA sample to the national database.²⁹¹

7.3.4 In some respects, the UK Review faced a very different situation from that which exists in Australia. In others, there are similarities. It noted that the National DNA Database had been established without a sufficiently detailed legislative framework and that it covers over 8% of the population. Many of the issues it addressed are closely regulated in Australia. New Zealand has addressed this problem by legislating to limit the power to take a DNA sample to those cases where the police have formed an intention to charge the person arrested. As a mechanism to prevent excessive use of power, this has a number of advantages but, in the Australian context, it would add another level of complexity to already complex legislation.

7.3.5 Nevertheless, the UK Review provides a useful perspective from which to consider our legislation. Among other things, it serves as a reminder that ‘holding the DNA records of innocent people (in a criminal investigation database) fundamentally alters how suspicion,

²⁸⁹ ALRC/AHEC Report, p.976

²⁹⁰ eg. CrimTrac submission, pp.8, 9

²⁹¹ ‘Nothing to hide, nothing to fear?’, Report of UK Human Genetics Commission on the National DNA Database for England and Wales, November, 2009 at <http://www.statewatch.org/news/2009/nov/uk-dna-human-genetics-commission.pdf>; see also *The Guardian* report of 24 November, 2009 at <http://www.guardian.co.uk/politics/2009/nov/24/dna-database-inquiry> note that separate databases are held in Scotland and Northern Ireland.

guilt and innocence function in the relationship between the citizen, society and the state.²⁹² In this connection, it is interesting to note that the UK Review made a number of findings and recommendations that are pertinent in the current context:

- that in order to express solidarity and to foster greater trust and cooperation between the police and the communities they serve, all serving police officers, and those whose professional duties require or permit them to come into contact with crime scenes or crime scene samples, should have their DNA profiles recorded on the Police Elimination Database and retained; this requirement should be a condition of employment;
- clear and explicit rules for the removal of samples/profiles from the National DNA Database be drawn up and an independent body be empowered to consider appeals against rejection of an application to remove a DNA profile from the database; and
- there is currently insufficient evidence available to demonstrate the forensic utility of the database – ‘certainly to the extent that its proven usefulness might justify greater intrusions into individual privacy’.

7.3.6 Noting that that the policy orientation of the UK national database had ‘drifted from confirming suspicions to identifying suspects’,²⁹³ the UK Review recommended that a clear purpose for the database be specified in primary legislation.

7.3.7 The CCL – LV submission argues that the foundations of a similar trend in favour of arrest are replicated in the Crimes Act through provisions that favour the sampling of people in custody since a suspect in custody can be subjected to a non-intimate forensic procedure by order of a senior constable.²⁹⁴ To address this concern, it proposes an amendment to raise the level of authorisation to a more senior rank.

7.3.8 However, the UK legislation is substantially different and, in the absence of any firm indication that there is in fact a similar trend here, a better solution would be to strengthen the accountability arrangements as proposed in the Sherman Recommendations and this review.

How big should the database be?

7.3.9 The NCIDD is growing rapidly, prompting strategic planning for an upgrade. In this connection, the UK Review reported on calculations for an optimum size for their database. It noted Home Office estimates that half of all crime was committed by a stable pool of 100,000 offenders, with a 20% turnover each year and just 5,000 offenders being responsible for 9% of all crimes. From these figures, it estimated that half of all crimes are committed by approximately 2.2% of those currently on the database and concluded that ‘putting more effort and resources into the recovery of DNA samples from crime scenes could yield significantly better detection rates than the indiscriminate expansion of criminal justice samples taken from arrestees.’²⁹⁵

General comments

²⁹² ‘*Nothing to hide, nothing to fear?*’, Report of UK Human Genetics Commission on the National DNA Database for England and Wales, November, 2009 at <http://www.statewatch.org/news/2009/nov/uk-dna-human-genetics-commission.pdf> Summary and Recommendations.

²⁹³ UK Review, pp.38, 62.

²⁹⁴ CCL – LV submission, p.18

²⁹⁵ UK Review, p.75

7.3.10 The two concerns that are most often raised when DNA forensic procedures are discussed are those of contamination and planting of evidence – perhaps by the criminals responsible. There are probably no measures that can guarantee neither of these will ever occur but the risks can be minimised through the application of safeguards that are of general application in democratic societies and through a combination of measures specific to the use of DNA technology.

7.3.11 In the first category are generally accepted ideas such as the rule of law, the independence of the judiciary, independent defence counsel, the onus of proof, prosecutors' duties to the court and the professionalism of police investigators. Police professionalism in this context includes a willingness to accept responsibility for the quality and reliability of DNA assessments tendered in evidence. In relation to the onus of proof, the law recognises that the presence of a suspect's DNA can be accounted for in a number of ways and it is for the prosecution to prove that:

- the crime scene sample was the only plausible source of the DNA; and
- the DNA from the suspect was deposited coincidentally with the offence and not at some other time.²⁹⁶

7.3.12 In this respect, it is salutary to note that, in the *Farah Jama* case, investigating police did raise a query about the possibility of contamination, which the laboratory answered with a brief account of the reasons any contamination was highly unlikely to have occurred. It was never contemplated that, if there was contamination, it could have occurred anywhere other than at the laboratory.²⁹⁷

7.3.13 'Trial by jury' could possibly also be included in the first category but for concerns raised in previous reviews about juries being overawed by DNA evidence and attaching more weight to expert DNA evidence than is warranted.

7.3.14 In the second category, relating to measures specific to DNA technology, are matters such as the independence, professionalism and accountability of laboratories, oversight of DNA legislation by Parliamentary committees, oversight by the Ombudsman and the Privacy Commissioner and the development of best practices in all participating jurisdictions. Having regard to the concerns that have been raised about juries placing too much reliance on DNA evidence, best practices should include measures to educate juries about the particular characteristics of this kind of evidence.

7.3.15 Through a combination of measures of this kind, it should be possible to achieve and maintain a very high standard of reliability in DNA forensic procedures.

7.3.16 The NSW Public Defender's Office opposed any amendment that would further intrude into the privacy of citizens, whether victims, suspects, defendants or convicted persons.

7.3.17 The WA Police put forward for consideration a proposal to empower police to take non-intimate DNA samples without consent from Australian nationals or residents convicted

²⁹⁶ See, e.g. *'Five Drops of Blood'* at p.75

²⁹⁷ Vincent Report, p.25

of specified serious offences outside Australia.²⁹⁸ The proposal is based on the announced intention in the UK to give a power of this kind to police in respect of UK nationals or residents. In the Australian context, this seems too great a derogation from privacy and civil liberties and is not supported.

An elimination database?

7.3.18 Part 1D was amended in 2006 to establish a procedure for the collection of forensic material from AFP employees to eliminate employee forensic material from crime scene samples.²⁹⁹ However, this development has not yet occurred in other jurisdictions and the issue remains significant in a national sense. 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 crime 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.’³⁰⁰

7.3.19 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’³⁰¹ 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.’³⁰²

7.3.20 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.’³⁰³ 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.

7.3.21 As mentioned above, the UK Review was even stronger in this respect:

‘we recommend that all serving police officers, and those whose professional duties require or permit them to come into contact with crime scenes or crime scene samples,

²⁹⁸ WA Submission, p.1

²⁹⁹ Commonwealth Attorney-General’s Department submission, p.4

³⁰⁰ NSW Ombudsman Report, p.238

³⁰¹ Victorian Review, p.327

³⁰² *ibid.*, Rec. 9.4, p.328

³⁰³ WA Review, pp. 99-110

should have their DNA profiles recorded on the Police Elimination Database and retained; this requirement should be a condition of employment.’³⁰⁴

7.3.22 The introduction of a standard practice along these lines presents a management challenge. Against the proposal for a legislative requirement for an elimination database that would form part of the NCIDD, it might be argued that the element of compulsion may cause more problems than it would solve. The attitude of police unions to similar proposals, as reported in the media, has been hostile. An elimination database would not need to be part of the NCIDD.

7.3.23 The Brisbane round table consultation meeting on 18 February revealed that significant progress in this direction is being made in Queensland and it would be appropriate to build on that experience in establishing a ‘best practice’ approach to this issue.

Elimination database

Recommendation 31: That the Commonwealth negotiate agreement with participating jurisdictions for the establishment of an elimination database to hold DNA profiles of investigating police and laboratory analysts.

³⁰⁴ UK Review, p.5

8. IMPLEMENTATION OF THE RECOMMENDATIONS

8.1.1 The central relevance of the Sherman Recommendations to this review is underlined by subsection 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.

8.1.2 In discussing implementation issues, the Sherman Report focused on the need to make the national scheme fully accountable in a consistent way across Australia.³⁰⁵

8.1.3 On the positive side, the scheme is now fully functional but, on the negative, there are still major gaps in accountability and in the ability to assess its effectiveness.

8.1.4 The lack of a useful measure of effectiveness is a real practical problem as it may impact on the allocation of resources and development of improvements in criminal investigations and prosecutions. Measurements do not necessarily need to put a dollar value on outcomes that may not be susceptible to such treatment but they do need to be capable of providing government with the ability to analyse the benefits to the public of all aspects of DNA sampling and profiling in a law enforcement context.

8.1.5 While it is not possible, at this stage, to quantify the public benefit in employing DNA forensic procedures, we know that in many cases they have been instrumental in solving high volume property crimes such as burglaries and in investigating some more serious crimes of violence such as murder and rape. The value to society in detecting offenders and thereby preventing further such crimes is substantial. In this respect, the development of DNA forensic procedures has significantly enhanced law enforcement capabilities. It is reasonable to expect that, over time, further refinements in technique will lead to further improvements in such capabilities.

8.1.6 However, such improvements are likely to bring with them new challenges in protecting privacy and safeguarding civil liberties. For this reason, it is important to keep the law in this area under review and to maintain a dialogue between law enforcement and privacy and civil liberties interests. There is an abundance of consultative mechanisms within which law enforcement interests can be discussed among participating jurisdictions, but what is needed is some means of engaging wider interests in the discussion. The auditing and reporting recommendations of the Sherman Review would provide a basis upon which discussions might periodically occur.

8.1.7 Having regard to the rapid pace of scientific advances and technological developments in this area, it would also be desirable to carry out another formal review after, say, five years. It could be sooner if circumstances warrant it. The form of that review may be left for consideration in the light of developments in the intervening period but it may be desirable to invite the participation of States and Territories.

8.1.8 The advantage of a joint review would be that it could address broader terms of reference relating to the national operation of the system and, where jurisdictions have taken different approaches, make assessments of best practice. Where the solution to a problem

³⁰⁵ Sherman Report, paras 8.3 – 8.9

requires legislation in more than one jurisdiction, it could also propose fully effective solutions.

8.1.9 While this review's recommendations for legislative change are generally limited to Commonwealth legislation, they should be viewed as proposals to bring the Commonwealth jurisdiction to a position of best practice. It is to be hoped that they will be taken into account not only by the Commonwealth but also by other participating jurisdictions. If a future joint review is held, it would be a good opportunity to seek to achieve greater harmonisation of legislation. The potential for use of DNA procedures in many more cases than at present could be considered in a future review; so could the increasing complexity of database management.

Future Review

Recommendation 32: That the Commonwealth carry out another review of Part 1D after a further period of no longer than five years to examine whether further amendments are required in the light of developments in DNA technology and any other matters that may be considered appropriate. Alternatively, the Commonwealth might invite participating jurisdictions to participate in a joint review of the national scheme for DNA forensic procedures.

8.1.10 To date, only Recommendation 8 of the Sherman Recommendations has been implemented at the national level. However, South Australia Police advise that the amendments to the SA Act in 2007 addressed many of the issues raised in the Sherman Report.

8.1.11 The assessment of the current situation must therefore be mixed. There have been significant achievements but much remains to be done. The progress achieved to date will, we believe, be enhanced by the adoption of the recommendations in this report. Rather than persevering with those implementation measures that have not yet been followed up, a new strategy, based on a staged approach, may be more effective. In this connection, prioritisation along the following lines would seem appropriate:

First priority

- 1 Use of the NCIDD*
- 5 International matching*
- 8 Informed consent*

Implementation of these recommendations would enable Australian law enforcement agencies to benefit from international matching conducted on a clear basis within a well defined accountability framework and would ensure that the information provided in connection with a DNA forensic procedure is as clear and concise as possible.

Second priority

- 3 Database name*
- 19 Measuring effectiveness*
- 21 Reports on complaints*
- 22 Standard reporting format*
- 24 Internal audits*
- 25 External audits*

Implementation of these recommendations would address problems that have arisen in the use of DNA forensic procedures in prosecutions, enable an assessment of the effectiveness of DNA forensic procedures and facilitate the development of a national accountability framework.

Third priority – other recommendations.

Implementation of the remaining recommendations, which, although not necessarily less important, may be less urgent, would generally improve effectiveness and accountability.

Complexity

8.1.12 One of the main themes of this review is that there is a need to reduce the complexity of the legislation and of its administration. This is important not only from the perspective of donors of DNA samples but also from that of police officers who need to work in accordance with the legislation. The following recommendations are intended to assist in reducing complexity:

- 1. Use of the NCIDD*
- 2. Database objectives*
- 4. Implications of a statutory charter for CrimTrac*
- 5. International matching*
- 6. Technical amendments*
- 8. Informed consent*
- 10. Voluntary mass screenings*
- 11. Buccal swabs*
- 12. Hair samples*
- 13. Sharing samples*
- 14. Access to samples*
- 15. Destruction and de-identification*
- 17. Correctional services*
- 20. Provision of information*
- 26. Offender profiles*
- 27. Uniform provisions*
- 28. Children and incapable persons*
- 31. Elimination database*

Responsibility for implementation

8.1.13 A number of recommendations call for action by the Commonwealth without

specifying which particular agency should have the carriage of implementation, should the recommendation be accepted. This is due to some uncertainty about which may be best placed to undertake such an initiative. Much will depend on the circumstances, such as whether work on related issues is already under way within a particular forum, and the inter-relationship between recommendations that are accepted.

8.1.14 It will also be necessary to consider appropriate consultative arrangements with agencies that have a stake in the implementation of recommendations. Having regard to the linkages with State and Territory legislation, it would also be appropriate to consult the States and Territories through established processes.

GLOSSARY

Term	Definition/explanation
Adventitious match	a match that happens purely by chance and does not appear to have an explanation (for example, when it matches an existing profile on the system but that person was never at the crime scene).
AFP	Australian Federal Police
AHEC	Australian Health Ethics Committee, National Health and Medical Research Council
AIC	Australian Institute of Criminology
ALRC	Australian Law Reform Commission
ANZPAA	Australian and New Zealand Police Advisory Agency
Arrangement	the Ministerial Arrangement for the Sharing of DNA Profiles and Related Information.
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.
CCL – LV	NSW Council for Civil Liberties and Liberty Victoria (joint submission to review)
CDPP	Commonwealth Director of Public Prosecutions
Cold link	a new link derived from the Jurisdictional or National DNA Database system. The term ‘cold’ refers to the fact that prior to the database match this link was unknown.
Contamination	in the context of the Part 1D legislation this term refers to the introduction of foreign DNA into a sample or profile result. In the unlikely event that this occurred undetected it could lead to an incorrect entry on the national DNA database. Forensic procedures are designed to minimise the occurrence of contamination and maximise the possibility of detection.
Crime scene sample	a sample collected from the scene of an offence or from persons associated with an offence and/or their property or belongings.
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.

DAL (NSW)	Division of Analytical Laboratories
DNA	deoxyribonucleic acid. The heredity genetic material contained within the nucleus of the cell that codes for the synthesis of proteins and other vital biological processes. 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 numerical sequence that represents the genotype (genetic type) of a selected group of forensic loci (or DNA markers). These markers have been selected on the basis that they provide a high level of discrimination between individuals and are able to be reliably analysed in forensic samples.
DNA sample	a sample containing extracted DNA that has originated from forensic material (see below). A DNA sample can be used to develop a forensic DNA profile.
Familial searching	the practice of searching a DNA database for the existence of a closely matching profile (rather than a direct match). Closely matching profiles are more likely to have originated from a relative of the donor of the unidentified DNA profile.
Forensic material	a sample of biological material harvested from a person or object for the purpose of attempting to derive a forensic 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	the definition of this varies in different legislative models. For example, it could be appropriately defined as samples of blood

or tissue or samples taken from the genitalia of a person undergoing a forensic procedure. Samples such as saliva, buccal swabs (from the cheek), and hair are often considered non-intimate.

For the purposes of Part 1D, intimate forensic procedures are specified in the definition at section 23WA.

Links	when two profiles on a DNA database correlate (are the same or highly similar) they are described as being 'linked'. The term 'link' is preferred to 'match' as there is still a requirement for linked profiles to be further examined and the legitimacy of the match confirmed. DNA database outputs often count the number and types of links generated.
Low copy sampling or Low Template DNA sampling	the production of a forensic DNA profile from a very limited amount of starting material. 'Low copy number (or LCN)' or 'Low Template DNA (or LtDNA)' are also used to describe this type of analysis. 'Low template' or 'low copy' refer to the low number of copies of the DNA molecule present in the original sample. Techniques that target such low amounts of starting material have been controversial as they can complicate result interpretation due to the higher propensity for artifacts and contaminants.
Match	a link that has been confirmed by a qualified scientist
NAFIS	National Automated Fingerprint Identification System (another CrimTrac system)
NATA	National Association of Testing Authorities, Australia
NCIDD	National Criminal Investigation DNA Database
NIFS	National Institute of Forensic Science
Non-intimate forensic procedure	see definition of 'intimate forensic procedure' above. The definition of this varies in different legislative models. For example samples such as saliva, buccal swabs (from the cheek), and hair are often considered non-intimate. For the purposes of Part 1D 'non-intimate forensic procedures' are specified in the definition at section 23WA
NPRS	National Police Reference System (another CrimTrac system)
Phenotypically expressed Information	information on the DNA itself is referred to as a 'genotype'. Where this information results in the expression of a physical

trait or other cellular function, the outcome produced is referred to as the 'phenotype'. In some circumstances it is possible to link the DNA information (genotype) with its outcome (phenotype) – such as when describing the genetic precursor for a particular physical or medical condition. When this process is fully understood it is possible to test the DNA and then infer from the result of testing the phenotype that relates to the observed DNA test results. This has a potential future application in forensic science whereby biological evidence could be tested to infer physical information regarding the donor of the material. Such testing is not currently in routine use.

SCAG

Standing Committee of Attorneys-General

Voluntary mass screening

bulk sampling of persons who volunteer to provide samples for the purpose of elimination through DNA testing.

Volunteer

a person who provides informed consent to provide a DNA sample.

Attachment A - Sherman Review Recommendations

Sherman Recommendation No 1

Resource Issues

The Review recommends that the Attorney-General's Department and other participating agencies need to plan and budget for appropriate resources in any future review of Part 1D.

Sherman Recommendation No 2

Complexity of Information

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.
- (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.

Sherman Recommendation No 3

Child Volunteers

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.

Sherman Recommendation No 4

Sharing of material

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 should 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.

Sherman Recommendation No 5

Access to other samples

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 be administered by AFP Forensic Services and be subject to the condition that decisions refusing access should be subject to administrative review.

Sherman Recommendation No 6

Meaning of destruction

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 when 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.

Sherman Recommendation No 7

NATA accreditation

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.

Sherman Recommendation No 8

Suspects – suspects matching

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

Sherman Recommendation No 9

Who should carry out DNA testing?

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.

Sherman Recommendation No 10

Complaint Handling

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

Sherman Recommendation No 11

Complaint Handling

The Review recommends that in relation to the use of DNA, the AFP, participating State and Territory Police Forces, 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.

Sherman Recommendation No 12

Reporting

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

Reporting

The Review recommends that 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.

Sherman Recommendation No 14

Audits

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

Audits

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

Audits

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

Audits

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

Sherman Recommendation No 18

Audits

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

Audits

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

Sherman Recommendation No 20

Independent preliminary audit of the NCIDD

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

Sherman Recommendation No 21

Effect of disparities between regimes/arrangements

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

Effect of disparities between regimes/arrangements

The Review recommends that the Commonwealth should negotiate agreement with participating jurisdictions that the Model Bill provisions relating to children, incapable persons and Aboriginal and Torres Strait Islanders should apply in all participating jurisdictions.

Sherman Recommendation No 23

Genetic Testing – Function Creep

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.

Sherman Recommendation No 24

Genetic Registers – Guthrie Cards

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.

Attachment B - Invitation for submissions

NOTICE

(*Financial Review*, 11 December, 2009, *Australian and Canberra Times*, 12 December, 2009) Review of Part 1D (Forensic Procedures)

In accordance with section 23YV(5) of the *Crimes Act 1914*, a review of Part 1D is being conducted. Part 1D provides for the collection and use of DNA material for law enforcement purposes and establishes the National Criminal Investigation DNA Database. The review is being undertaken by a committee chaired by Mr Peter Ford, and includes the Federal Privacy Commissioner, the Chief Executive Officer of CrimTrac and representatives from the Australian Federal Police, the Office of the Commonwealth Director of Public Prosecutions and the Office of the Commonwealth Ombudsman.

The Committee will have particular regard to matters raised by the Sherman Report and will be considering:

- (a) the operation of Part 1D
- (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
- (e) any issues relating to privacy or civil liberties arising from forensic procedures permitted by Part 1D.

Information about the review, including the full terms of reference can be found through the following internet site:

http://www.ag.gov.au/www/agd/agd.nsf/Page/Consultations_reforms_and_reviews

The Committee invites submissions addressing the terms of reference. The closing date for receipt of submissions is **5 February 2010**. Contributors are asked to lodge their submissions by email to Part1D.Review@ag.gov.au or to the address below. Submissions and comments may be reproduced in part or in whole and may be made public, unless otherwise requested.

Our other contract details are as follows:

Forensic Procedures Review Committee Secretariat
c/o Criminal Justice Division
Attorney-General's Department
3-5 National Circuit
BARTON ACT 2600, Telephone 02 6141 2860, Facsimile: 02 6141 2871

Attachment C - Submissions

Australian Capital Territory Attorney General

Australian Federal Police

Australian Institute of Criminology

Australian Privacy Foundation

Civil Liberties Australia

Commonwealth Attorney-General's Department

Commonwealth Director of Public Prosecutions

CrimTrac

New South Wales Council of Civil Liberties and Liberty Victoria

New South Wales Director of Public Prosecutions

New South Wales Ombudsman

New South Wales Police

New South Wales Public Defenders Office

Northern Territory Police

Office of the Federal Privacy Commissioner

Public Defender's Office, NSW

Queensland Director of Public Prosecutions

Queensland Police Service

South Australian Police

Victoria Police

Victorian Privacy Commissioner

Western Australian Police Service

Attachment D - Comparison of forensic procedures legislation across Australia

- Commonwealth - *Crimes Act 1914*
- New South Wales - *Crimes (Forensic Procedures) Act 2000*
- Victoria - *Crimes Act 1958*
- South Australia - *Criminal Law (Forensic Procedures) Act 2007*
- Queensland - *Police Powers and Responsibilities Act 2000*
- Tasmania - *Forensic Procedures Act 2000*
- Western Australia - *Criminal Investigation (Identifying People) Act 2001*
- Australian Capital Territory - *Crimes (Forensic Procedures) Act 2000*
- Northern Territory - *Police Administration Act, Youth Justice Act and Prisons (Correctional Services) Act*

	Terminology
Cth	Forensic procedure
NSW	Forensic procedure
Vic	Forensic procedure
SA	Forensic procedure
Qld	Forensic procedure
Tas	Forensic procedure
WA	Identifying procedure
ACT	Forensic procedure
NT	Forensic procedure/ examination

	Classification of procedure
Cth	Buccal swab classified as an 'intimate' procedure
NSW	A self-administered buccal swab is categorised as non-intimate and the carrying out on a person of an other-administered buccal swab is categorised as intimate
Vic	Buccal swab classified as an 'intimate' procedure
SA	A forensic procedure involving intrusion into a person's mouth is classified as an 'intrusive' forensic procedure, but does not include a 'simple identity procedure' which includes the taking of forensic material from a person by buccal swab or finger prick for the purposes of obtaining a DNA sample
Qld	Buccal swab classified as a 'non-intimate' procedure
Tas	Buccal swab classified as a 'non-intimate' procedure
WA	Buccal swab classified as a 'non-intimate' identifying procedure
ACT	Buccal swab classified as a 'non-intimate' procedure
NT	Buccal swab classified as a 'non-intimate' procedure

	Categories of persons on whom procedures are carried out
Cth	<ul style="list-style-type: none"> • Volunteers • Suspects in relation to indictable offences • Offenders in relation to prescribed and serious offences
NSW	<ul style="list-style-type: none"> • Suspects • Volunteers (not including victims) • Offenders in relation to prescribed and serious offences

Vic	<ul style="list-style-type: none"> • Suspects and people charged or summonsed to answer to a charge in relation to indictable offences • Volunteers for use in the investigation of an indictable offence • Offenders found guilty of 'forensic sample' offences, as listed in Schedule 8 of the Crimes Act (which includes most serious indictable offences)
SA	<ul style="list-style-type: none"> • Volunteers and victims including protected persons (mentally incapable or child under 16 years) • Suspects in relation to a serious offence • Offenders (1) serving a term of imprisonment, detention or home detention in relation to an offence, or (2) convicted of a serious offence, or (3) being detained as a result of being declared liable to supervision under Part 8A of the <i>Criminal Law Consolidation Act 1935</i>
Qld	<ul style="list-style-type: none"> • Suspect in relation to an indictable offence • Offenders found guilty of indictable offences • Volunteers • Prisoners who had previously not had a DNA sample taken and from prisoners who are transferred from inter-state • If procedures are by consent: Parent consent for child under 14, consent of child over 14 with support person present, consent of impaired person or their parent
Tas	<ul style="list-style-type: none"> • Suspects and charged persons 10 years of age or older • Prescribed offenders • Volunteers • Police Officers and Members of the Police Service
WA	<ul style="list-style-type: none"> • Volunteers • Charged and uncharged suspects • Protected suspects • Deceased persons • Police officers • Victims and witnesses
ACT	<ul style="list-style-type: none"> • Suspects • Serious offenders • Volunteers
NT	<ul style="list-style-type: none"> • Person in lawful custody on a charge of an offence • Suspects • Volunteers • Prisoner under sentence of imprisonment for a crime

	Authorisation required for procedure without consent
Cth	<ul style="list-style-type: none"> • Senior constable if the suspect is an adult in custody and the procedure is non-intimate. • Magistrate for any procedure on a suspect, including a child or incapable person.
NSW	<ul style="list-style-type: none"> • Senior police officer if the suspect is an adult who is under arrest and the procedure is non-intimate. • Magistrate for any procedure on a suspect, including a child or incapable person. <p><i>(senior police officer means a police officer of or above the rank of sergeant)</i></p>
Vic	<ul style="list-style-type: none"> • Senior police officer who is not involved in investigating the offence for which the procedure is required may authorise non-intimate procedure for a suspect who is an adult who is either under lawful arrest or in custody • Magistrates' court may order: (1) an incapable person to undergo a forensic procedure (2) a non-consenting relevant suspect to undergo a forensic procedure, and (3) an offender found guilty of a Schedule 8 offence to undergo a forensic procedure • A children's court may order a child aged 10 years or more (no forensic procedures allowed on children under age 10) <p><i>(senior police officer means a member of the police force of or above the rank of senior sergeant)</i></p>
SA	<ul style="list-style-type: none"> • Senior police officer for victims if not protected persons but Senior police officer for protected persons if impracticable or inappropriate to obtain consent • Senior police officer for suspects whether or not in lawful custody if simple identifying procedure, by order of senior police officer after informal hearing if intrusive procedure

	<ul style="list-style-type: none"> • Reasonable force may be used, resisting can be used as evidence in further proceedings and is an offence <p><i>(senior police officer means a police officer of or above the rank of inspector)</i></p>
Qld	<p><i>Forensic Procedure Orders</i></p> <ul style="list-style-type: none"> • Police officer may apply to a magistrate for a forensic procedure order authorising a qualified person to perform an intimate or non-intimate forensic procedure • If the person is a child, the application must be made to a Children’s Court magistrate. <p><i>DNA samples</i></p> <ul style="list-style-type: none"> • Senior police officer if proceeding has started or continued against an adult by arrest, notice to appear or complaint and summons etc in relation to an indictable offence • Children’s Court where a proceeding for an indictable offence has started against a child by arrest, notice to appear or complaint and summons. • If proceedings commence/continue and the person is released, senior police officer can approve written DNA Sample notice requesting person attend for DNA samples • Court can order taking of a DNA sample during a proceeding for an indictable offence (adult), offence not to comply • Following finding of guilt (adult) court can order DNA samples, offence to contravene • All DNA samples only to be taken by a “DNA sampler” or a police officer authorised by the commissioner • Power to detain but NO power to use force in order to obtain samples <p><i>(authorised police officer means— (a) if the police officer seeking approval— (i) holds rank below the rank of senior sergeant—a police officer of at least the rank of senior sergeant; or (ii) holds the rank of senior sergeant or above—a police officer who is more senior than the police officer seeking approval; or (b) in any case— (i) the police officer in charge of a police station or Police establishment; or (ii) a police officer performing functions for the police service as a scientific officer or scenes of crime officer.)</i></p>
Tas	<ul style="list-style-type: none"> • Suspect or charged person is 15 years or older - order of an Officer of Police if non-intimate and order of a magistrate if intimate. • Suspect or charged person is under the age of 15 years – with consent of child and parent or on the order of a magistrate <p><i>(Officer of Police means a commissioned police officer)</i></p>
WA	<ul style="list-style-type: none"> • Officer if suspect is uncharged and procedure is non-intimate and consent given • Senior officer if suspect is uncharged and procedure is non-intimate • Senior officer with consent from responsible person if uncharged “protected suspect” • Magistrate if uncharged protected suspect and no consent from responsible person • JP must issue a warrant if suspect is uncharged and procedure is intimate • Officer, using reasonable force if necessary, if suspect is charged <p><i>(senior officer means — (a) a police officer who is, or is acting as, a sergeant or an officer of a rank more senior than a sergeant; (b) a public officer who is prescribed by the regulations to be a senior officer for the purpose of this Act)</i></p>
ACT	<ul style="list-style-type: none"> • Police officer if the suspect is an adult in custody or a serious offender and the procedure is non-intimate. • Magistrate for any forensic procedure on a suspect, including an adult not in custody who has not given informed consent, a child or incapable person. • Reasonable force allowed
NT	<ul style="list-style-type: none"> • A member of the Police Force holding the rank of Senior Sergeant for a non-intimate procedure on adult suspects or an adult in lawful custody charged with an offence punishable by imprisonment • Reasonable force is allowed • Magistrate or written consent for any intimate procedure on a person in lawful custody on a charge of an offence + belief on reasonable grounds that procedure may provide evidence relating to an offence punishable by imprisonment

	<ul style="list-style-type: none"> • Medical practitioner or registered dentist to carry out the intimate procedure, police may assist with reasonable force • For youths (being a person who is less than 18 years old) a support person must be present for intimate and non-intimate procedures. • For youths, a police officer of at least the rank Superintendent or a police officer in charge of a police station may arrange for an intimate procedure to be carried out by a medical practitioner or dentist. The intimate procedure must only be carried out with the approval of a magistrate. • A non-intimate procedure may be carried out if approved by a magistrate for youths of all ages or a police officer of at least the rank Superintendent if the youth is 14 years of age or older.
--	--

Offences for misuse of DNA databases	
Cth	<ul style="list-style-type: none"> • Supply of forensic material to another person which is required to be destroyed • Unauthorised access to a DNA database • Impermissible matching of DNA profiles • Recording or retaining information on a DNA database after it is to be destroyed • Failure to remove a profile from the volunteers index as soon as practicable after the end of the identifying period • Failure to remove the profile of a serious offender after they have been pardoned, acquitted or the conviction has been quashed.
NSW	<ul style="list-style-type: none"> • Supply of forensic material to another person for prohibited analysis • Supply of forensic material to another person for analysis for purpose of deriving a DNA profile for DNA database system purposes • Unauthorised access to a DNA database • Impermissible matching of DNA profiles • Recording or retaining information on a DNA database after it is to be destroyed • Failure to remove a profile from the volunteers index as soon as practicable after the end of the identifying period • Failure to remove the profile of an offender after they have been pardoned, acquitted or the conviction has been quashed.
Vic	<ul style="list-style-type: none"> • Failure to destroy a sample or related information which is required to be destroyed • Uses or causes or permits to be used forensic material which is required to be destroyed • Uses, or causes or permits to be used, or otherwise disseminates information derived from, any sample or related material and information required to be destroyed • Supply of forensic material to another person for prohibited analysis • Supply of forensic material to another person for analysis for purpose of deriving a DNA profile for DNA database system purposes • Unauthorised access to a DNA database • Impermissible matching of DNA profiles • Recording or retaining information on a DNA database after it is to be destroyed • Failure to remove identifying information from the volunteers index as soon as practicable after the end of the identifying period • Failure to remove identifying information of an offender after they have been pardoned, acquitted or the conviction has been set aside. • Unauthorised disclosure of Victorian information stored on a DNA database.
SA	<ul style="list-style-type: none"> • Storage of a DNA profile on a database other than DNA database • Intentionally or recklessly causing the supply of biological material for the purpose of storage on the DNA database when that is not authorised • Unauthorised storage of a DNA profile on the DNA database • Unauthorised access to DNA database • Retaining information on the DNA database after it is required to be destroyed • Unauthorised intentional or reckless disclosure of information on the DNA database • Unauthorised intentional or reckless publication by newspaper, radio, television or in any other way, a report of proceedings under this Act containing the name of a person suspected of a serious offence, or other information tending to identify the person.
Qld	<ul style="list-style-type: none"> • Unlawful supply of destroyable DNA sample to another person for prohibited analysis for the purposes of including the results on a DNA database • Unlawful supply of DNA sample to another person for prohibited analysis for the purposes of

	<p>including the results on a DNA database</p> <ul style="list-style-type: none"> • Unlawful use of information stored on the DNA database • Impermissible matching of DNA profiles • Unlawful recording of identifying information on DNA database • Unlawful retention of information on DNA database after it is to be destroyed • Unlawful disclosure of information on the DNA database
Tas	<ul style="list-style-type: none"> • Supply of forensic material to another person for prohibited analysis • Supply of forensic material to another person for analysis for purpose of deriving a DNA profile for DNA database system purposes • Unauthorised access to a DNA database • Impermissible matching of DNA profiles • Recording or retaining information on a DNA database after it is to be destroyed • Failure to remove a profile from the volunteers index as soon as practicable after the end of the identifying period • Failure to remove the profile of a serious offender after they have been pardoned, acquitted or the conviction has been quashed
WA	<ul style="list-style-type: none"> • Unauthorised disclosure of identifying information • Use of illegal identifying information • Improper use of information obtained in accordance with the Act • Creation, keeping operation, control or management of DNA database without the Minister's authorisation
ACT	<ul style="list-style-type: none"> • Intentionally or recklessly publish the name of the suspect on whom a forensic procedure is carried out or proposed to be, or any information likely to enable the ID of the suspect, unless the suspect has been charged or the magistrate has authorised publication • Supply of forensic material to another person for prohibited analysis • Supply of forensic material to another person for analysis for purpose of deriving a DNA profile for DNA database system purposes • Unauthorised access to a DNA database • Impermissible matching of DNA profiles • Recording or retaining information on a DNA database after it is to be destroyed • Failure to remove identifying information from the volunteers index as soon as practicable after the end of the identifying period • Failure to remove identifying information of a serious offender after they have been pardoned, acquitted or the conviction has been quashed. • Failure to remove identifying information from the suspect index as soon as practical after the information is required to be removed.
NT	No specific offence but may come under offence in relation to communication of any fact or document which comes to the knowledge or into the possession of the member in the course of his duties – penalty \$1,000 and/or 6 months prison

	Definition of 'serious offence'
Cth	Part 1D - Section 23WA Definitions serious offence means an offence under a law of the Commonwealth, or a State offence that has a federal aspect, punishable by a maximum penalty of imprisonment for life or 5 or more years.
NSW	No definition of 'serious offence' Section 3 Interpretation (1) Definitions - serious indictable offence means: (a) an indictable offence under a law of the State or of a participating jurisdiction that is punishable by imprisonment for life or a maximum penalty of 5 or more years imprisonment, or (b) an indictable offence under a law of the State that is punishable by a maximum penalty of less than 5 years imprisonment, being an offence the elements constituting which (disregarding territorial considerations) are the same as an offence under a law of a participating jurisdiction that is punishable by a maximum of 5 or more years imprisonment.
Vic	No definition
SA	3—Interpretation <i>serious offence</i> means— (a) an indictable offence; or (b) a summary offence that is punishable by imprisonment

Qld	<p>Schedule 6 - Definitions</p> <p><i>serious indictable offence</i> means an indictable offence involving any of the following—</p> <ul style="list-style-type: none"> (a) serious risk to, or actual loss of, a person’s life; (b) serious risk of, or actual, serious injury to a person; (c) serious damage to property in circumstances endangering the safety of any person; (d) serious fraud; (e) serious loss of revenue to the State; (f) official corruption; (g) serious theft; (h) money laundering; (i) conduct related to prostitution or SP bookmaking; (j) child abuse, including child pornography; (k) an offence against the <i>Drugs Misuse Act 1986</i> punishable by at least 20 years imprisonment; (l) an offence against the <i>Weapons Act 1990</i> involving the trafficking of weapons or explosives or the unlawful supply or unlawful manufacture of weapons. <p><i>serious violent offence</i> means—</p> <ul style="list-style-type: none"> (a) an offence involving deprivation of liberty; or (b) a 7 year imprisonment offence involving violence or a threat of violence to a person.
Tas	<p>Section 3 Interpretation</p> <p>serious offence means an offence –</p> <ul style="list-style-type: none"> (a) under the law of this State or of a participating jurisdiction that is punishable on indictment even though in some instances it may be dealt with summarily, or (b) against section 13A, 13B, 13C, 21, 21A, 34B, 35, 37, 37B or 39 of the <i>Police Offences Act 1935</i>, or (c) against section 20, 21, 26 or 27 of the <i>Misuse of Drugs Act 2001</i>.
WA	<p>Section 3 Terms used</p> <p>Serious offence means an offence the statutory penalty for which is or includes life imprisonment or imprisonment for 12 months or more.</p> <p>Statutory penalty, in relation to an offence, means the penalty specified by a written law for the offence.</p>
ACT	<p>Section 9. Meaning of serious offence and serious offender</p> <p>(1) A serious offence is –</p> <ul style="list-style-type: none"> (a) an offence against a territory law punishable by imprisonment for longer than 12 months, or (b) an offence against the law of another participating jurisdiction punishable by imprisonment for life or by a maximum penalty of 2 or more years of imprisonment.
NT	No definition

	Definition of ‘offender’
Cth	<p>Section 23WA Definitions</p> <p><i>offender</i> means:</p> <ul style="list-style-type: none"> (a) a serious offender; or (b) a prescribed offender. <p><i>prescribed offender</i> means a person who is under sentence for a prescribed offence.</p> <p><i>prescribed offence</i> means an offence under a law of the Commonwealth, or a State offence that has a federal aspect, punishable by a maximum penalty of imprisonment for life or 2 or more years.</p> <p><i>serious offender</i> means a person who is under sentence for a serious offence.</p>
NSW	<p>Section 3 Interpretation</p> <p>(1) Definitions</p> <p><i>offender</i> means:</p> <ul style="list-style-type: none"> (a) a serious indictable offender, or (b) a prescribed offender. <p><i>serious indictable offender</i> means a person who has been convicted of a serious indictable offence.</p> <p><i>prescribed offender</i> means a person who is convicted of a prescribed offence.</p> <p><i>prescribed offence</i> means:</p>

	(a) an indictable offence, or (b) any other offence under a law of the State prescribed by the regulations for the purposes of this paragraph.
Vic	No definition
SA	Division 3—Offenders procedures 20—Offenders procedures (1) A simple identity procedure authorised under this Division is an <i>offenders procedure</i> . (2) A simple identity procedure may be carried out on a person under this Division if the person— (a) is serving a term of imprisonment, detention or home detention in relation to an offence; or (b) is being detained as a result of being declared liable to supervision under Part 8A of the <i>Criminal Law Consolidation Act 1935</i> by a court dealing with a charge of an offence; or (c) is convicted of a serious offence by a court; or (d) is declared liable to supervision under Part 8A of the <i>Criminal Law Consolidation Act 1935</i> by a court dealing with a charge of a serious offence. (3) This section applies whether the relevant offence was committed before, on or after the commencement of this section.
Qld	No definition
Tas	Section 3 Interpretation serious offender means a person who has been convicted of a serious offence.
WA	No definition
ACT	Section 9 Meaning of serious offence and serious offender (2) A serious offender is a person who is convicted of a serious offence.
NT	No definition

	Definition of ‘suspect’
Cth	Section 23WA Definitions <i>suspect</i> , in relation to an indictable offence, means: (a) a person whom a constable suspects on reasonable grounds has committed the indictable offence; or (b) a person charged with the indictable offence; or (c) a person who has been summonsed to appear before a court in relation to the indictable offence.
NSW	Section 3 Interpretation (1) Definitions <i>suspect</i> means the following: (a) a person whom a police officer suspects on reasonable grounds has committed an offence, (b) a person charged with an offence, (c) a person who has been summoned to appear before a court in relation to an offence alleged to have been committed by the person.
Vic	Part 3 Procedure and Punishment Section 464 Definitions <i>suspect</i> means a person of or above the age of 18 years who— (a) is suspected of having committed an offence; or (b) has been charged with an offence; or (c) has been summonsed to answer to a charge;
SA	3—Interpretation (4) For the purposes of this Act, a person is <i>suspected of a serious offence</i> if the police officer by or on whose instructions a forensic procedure is to be carried out on the person suspects the person, on reasonable grounds, of having committed a serious offence (whether or not the person has been charged with the offence).
Qld	No definition
Tas	Section 3 Interpretation <i>suspect</i> means a person whom a police officer suspects on reasonable grounds has committed a serious offences but who has not been arrested and charged with the serious offence.
WA	Section 34 Terms used In Part 6, <i>suspect</i> means a person who is reasonably suspected of having committed a serious offence but who has not been charged with the offence, and, for the purposes of this definition, it

	does not matter whether or not the person is in lawful custody.
ACT	Section 8 Meaning of suspect A suspect is any of the following: (a) a person suspected by a police officer, on reasonable grounds, to have committed an offence, (b) a person charged with an offence, (c) a person who has been summonsed to appear before a court for an offence, (d) a person who has entered into a voluntary agreement to attend court for an offence.
NT	No definition

	Definition of ‘volunteer’
Cth	Section 23WA Definitions <i>volunteer</i> is defined in section 23XWQ. 23XWQ Carrying out of forensic procedures on volunteers (1) In this Part: <i>volunteer</i> means a person: (a) who volunteers to a constable to undergo a forensic procedure; or (b) in the case of a child or incapable person—whose parent or guardian volunteers on the child or incapable person’s behalf to a constable that the child or incapable person undergo a forensic procedure.
NSW	Section 3 Interpretation (1) Definitions <i>volunteer</i> is defined in section 76. Section 76 Carrying out of forensic procedures on volunteers (1) In this Act, <i>volunteer</i> means: (a) a person (other than a child or an incapable person) who consents to a request by a police officer for the person to undergo a forensic procedure, or (b) a child who consents, and whose parent or guardian consents, to a request by a police officer for the child to undergo a forensic procedure, or (c) an incapable person whose parent or guardian consents to a request by a police officer for the person to undergo a forensic procedure, but does not include a suspect or an excluded volunteer.
Vic	Part 3 Procedure and Punishment Section 464 Definitions <i>volunteer</i> means a person who volunteers to give a sample under section 464ZGB; 464ZGB Samples given voluntarily (1) A person of or above the age of 18 years may volunteer to give a sample (whether an intimate or non-intimate sample) to a member of the police force.
SA	Part 2—Authorisation of forensic procedures Division 1—Volunteers and victims procedures 6—Interpretation In this Division— <i>protected person</i> means— (a) a child under the age of 16 years; or (b) a person physically or mentally incapable of understanding the nature and consequences of a forensic procedure; <i>relevant person</i> , in relation to a forensic procedure proposed to be carried out on a person under this Division, means— (a) if the person on whom the procedure is to be carried out is not a protected person—that person; or (b) if the person on whom the procedure is to be carried out is a protected person— (i) in the case of a child—the closest available next of kin of the child; or (ii) in any other case—the person’s guardian or, if the person does not have a guardian, the closest available next of kin of the person.
Qld	No definition
Tas	Section 3. Interpretation <i>volunteer</i> means a person who volunteers to a police officer to undergo a forensic procedure.
WA	Section 3 Terms used <i>Volunteer</i> has the meaning given by section 17. Section 17 Terms used

	In Part 4, Volunteer means a person who is – (a) an adult to whom section 19(1)(a) applies, (b) an incapable person to whom section 19(1)(b) applies, or (c) a child to whom section 19(1)(c) applies.
ACT	Section 10. Meaning of volunteer A volunteer , in relation to a forensic procedure, is a person – (a) who volunteers to a police officer to undergo the forensic procedure, or (b) if the person is a child or incapable person – whose parent or guardian volunteers on the child’s or incapable person’s behalf to a police officer that the child or incapable person undergo the forensic procedure.
NT	No definition

	Definition of ‘child’
Cth	23WA Definitions child means a person who is at least 10 years of age but under 18 years of age.
NSW	Section 3 Interpretation child means a person who is at least 10 years of age but under 18 years of age.
Vic	For the purposes of section 464ZF (Forensic procedure following the commission of forensic sample offence) and section 464ZFAAA (Forensic procedure following finding of not guilty because of mental impairment) child means a child aged 10 years or more but under 18 years
SA	3—Interpretation child means a person under the age of 18 years
Qld	No definition. However, distinguishes between obtaining consent of a child under and over age 14. Section 450 - For a child of at least 14 years of age, the police officer may ask the child to give a forensic procedure consent. However, a support person must be present. Section 451 - For a child under age 14, the police officer may ask a parent of the child to give a forensic procedure consent for the child.
Tas	No definition 4. Non-application of Act to young child Nothing in this Act authorises the carrying out of a forensic procedure on a person who is under the age of 10 years.
WA	3. Terms used child means a person who is under 18 years of age and in respect of whom there are no reasonable grounds to suspect that he or she is an incapable person
ACT	14 Meaning of child and parent of a child (1) Child means a person under 18 years old.
NT	6 Meaning of youth (Youth Justice Act) (1) In this Act, a youth is: (a) a person under 18 years of age; or (b) in the absence of proof as to age, a person apparently under 18 years of age. (2) If the context requires, a youth includes a person who committed an offence as a youth but has since turned 18 years of age.

	Definition of ‘incapable person’
Cth	23WA Definitions incapable person means an adult who: (a) is incapable of understanding the general nature and effect of, and purposes of carrying out, a forensic procedure; or (b) is incapable of indicating whether he or she consents or does not consent to a forensic procedure being carried out.
NSW	Section 3 Interpretation incapable person means an adult who: (a) is incapable of understanding the general nature and effect of a forensic procedure, or (b) is incapable of indicating whether he or she consents or does not consent to a forensic

	procedure being carried out.
Vic	No definition
SA	protected person means— (a) a child; or (b) a person physically or mentally incapable of understanding the nature and consequences of a forensic procedure;
Qld	No definition. Section 452 - if a police officer reasonably suspects the relevant person is a person with impaired capacity, the police officer may ask the person to give a forensic procedure consent. However, the police officer must ensure a support person is present.
Tas	No definition
WA	3. Terms used incapable person means a person of any age — (a) who is unable by reason of a mental disability (which term includes intellectual disability, a psychiatric condition, an acquired brain injury and dementia) to understand the general nature and effect of, and the reason for and the consequences of undergoing, an identifying procedure; or (b) who is unconscious or otherwise unable to understand a request made or information given under this Act or to communicate whether or not he or she consents to an identifying procedure being done on him or her
ACT	15 Meaning of incapable person An incapable person means an adult who is incapable of— (a) understanding the general nature and effect of, and purposes of carrying out, a forensic procedure; or (b) indicating whether or not he or she consents or does not consent to a forensic procedure being carried out.
NT	No definition

Attachment E - Indicative form of notification of information to be provided when consent is sought to the conduct of a forensic procedure

Oral notification

I am seeking your consent to the conduct of a forensic procedure to obtain a DNA sample.
The purpose of the procedure is to ...

The offence to which the procedure relates is.....

The procedure may produce evidence against you which may be used in court.

You have the right to refuse consent but there is a possibility that an application may be made for authority to conduct the test without your consent.

You must read and sign the attached document if you wish to consent to this procedure.

[Where applicable] You may choose the form of procedure from those listed on the attached document and, if you choose a 'buccal swab' you may carry it out yourself.

Written notification

You are here to undergo a forensic procedure to supply a DNA sample because...*[set out whether a volunteer, suspect etc]*

The procedure may be carried out by ...*[set out types of procedures that may be applicable]*

[unless self-administered] The procedure may be carried out by a person authorised to do so under the *Crimes Act 1914*.

The information obtained from your DNA sample will be placed on the DNA database system that is operated on behalf of all Australian jurisdictions and used for one or more of the following purposes:

- criminal investigation
- matching with information from other DNA samples
- other purposes set out in the *Crimes Act 1914*

Evidence of your refusal, or failure to consent, or withdrawal of consent to this forensic procedure may not be used against you but may be used in a proceeding against another person who is alleged to have acted contrary to law in conducting the procedure.

You have the right to seek legal advice before consenting to this procedure.

Attachment F - Summary of meetings with stakeholders in Sydney, Melbourne and Brisbane

Sydney

Date: 16 February 2010
Time: 10am – 12pm
Location: Amora Hotel Jamison Sydney
11 Jamison St, Sydney

Agencies and organisations represented includes:

- NSW Police Force;
- NSW Department of Justice and Attorney General;
- NSW Public Defenders Office;
- Australian Privacy Foundation;
- University of Sydney;
- NSW Council for Civil Liberties;
- CrimTrac; and
- Office of the Privacy Commissioner (Australia).

1. How effective is the scheme established by the legislation?

- It was recognised that the system is working well and that numerous safeguards are in place in relation to the NCIDD (that is, no personal information is kept on the database and in order to match profiles with identities, the relevant jurisdictions must be in contact).
- Two key issues were identified:
 - complexity of the NSW legislative regime, including the inability to match crime scene to crime scene, and
 - differences in the legislative regimes across the jurisdictions, which has an impact on the ability to identify offenders.
- There was discussion around the differences between the handling of DNA and the sharing of fingerprint information. It was queried whether the greater restrictions or barriers on the handling of DNA was due to uncertainty or concern within the general population and whether these restrictions could be relaxed so as to enable law enforcement agencies to have access to the NCIDD, similar to what is done with NAFIS. This point raised concerns in relation to privacy issues and the need to identify the best State privacy practices as a best practice model for the rest of

Australia. Other members of the group considered DNA distinctly different from fingerprints and thus requiring greater safeguards.

- There was also discussion surrounding the taking of volunteer samples and a suggestion that there is a current disincentive for victims to come forward as their samples might be used in implicating them in other crimes. Some participants argued that it would be appropriate for a separate database to be established for victim profiles. Other participants advised that under the current system volunteer samples are taken for a limited purpose and therefore, cannot be matched against another crime scene. For example, in sexual assault cases, the victim's DNA sample is only used for in-case matching.
 - Reference was made to recommendation 1 of NSW Report 41 – *The use of victims' DNA*, Standing Committee on Law and Justice, NSW Parliament, December 2009 which provides that “the Attorney General undertake a targeted public education campaign for victims of crime who provide DNA samples to inform victims of how their profiles can be used and what protections are afforded to them”.
 - The general complexities in determining who is a victim and who is an offender based on DNA found at a crime scene were discussed and the Sydney airport bikie brawl was provided as an example.
 - There was general support for destruction of DNA profiles and samples. However, the administrative difficulties associated with destroying all derivative information were identified and it was suggested that people should be advised of this when providing a sample.
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?*
- A suggestion was made that complexity would be reduced if all jurisdictions were covered by one piece of legislation. However, the difficulty in achieving this was also recognised.
 - Further round table discussions of all stakeholders were suggested as a mechanism of ensuring that all issues were being considered.
 - Current sampling and consent processes were outlined. It was suggested that although a buccal swab takes only five minutes, the whole police process of obtaining a DNA sample can take up to two hours. The time taken is dependent on whether video recording is required, or whether the police officer needs to obtain authorisation from a sergeant or a court order. The question whether obtaining informed consent was a complex task that could be simplified through the use of a simple oral statement coupled with a fact sheet was posed to the group.
 - No example could be provided of a situation where a suspect who did not give consent would then later not be subject to providing a DNA sample. In all cases this suspect

would be subject to an order from a Sergeant or a court. Based on this, the need for informed consent was raised, and participants considered whether it would be appropriate to move towards a scheme based on acknowledgement when dealing with suspects. There were differing views over this question. Some members of the group considered that a suspect needs to be made aware of what is being done to them and that obtaining consent is still a valid and worthwhile step in the process of obtaining a DNA sample. Other members considered that it is important to make the consent process as simple as possible and to remove as much stress as possible for all parties. It was also questioned whether any mechanisms are in place for someone to consent and then later change their mind.

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

- Some members of the group suggested that it was the Commonwealth's responsibility to set minimum standards at the highest level, so that States then can measure against these standards.
- The introduction of minimum standards raised privacy protection concerns for some members of the group. In order to develop national minimum standards, it was suggested that an examination of States that provide the highest level of privacy protection should be undertaken and that this best practice model should be adopted as a national approach.
- Some members noted that a Charter of Rights would be a useful means of providing privacy protection and preventing undue expansion in the purpose and use of the NCIDD and the State database. There was general agreement among participants that providing information obtained by law enforcement agencies outside this context would be inappropriate. Some participants noted that there remained public concern that the ability of law enforcement to collect and use samples was too broad.
- It was also recognised that the collection and use of DNA evidence is still a relatively new area and that there is uncertainty about how it might develop or be used in 10-15 years. To overcome this, it was suggested that basic privacy rights need to be built into any national scheme.
- It was recognised that there are discrepancies across Australia in relation to the rank of police officer who can order that a DNA sample be taken from a suspect who does not consent.
- Concerns were raised that there is a perception that law enforcement agencies want to build up their DNA databases by collecting as many samples as possible. Other participants noted that the collection and analysis of DNA samples was a resource intensive process and that the time and expenditure involved provided a deterrent to inappropriate testing. The need to satisfy a threshold requirement requiring a reasonable belief that biometric material was relevant to an investigation and

safeguards in place in relation to the destruction of samples and the removal of certain profiles from DNA databases were also raised to counter the notion of DNA sampling as a ‘fishing exercise’. Issues relating to recidivism were also raised by some participants. Information was provided in relation to the operation of the NCIDD, including that the number of rules has been reduced from 36 to three, making it simpler to manage and operate. It was pointed out that CrimTrac has no control over the collection of DNA samples as this is the responsibility of the States and that it is administratively burdensome for CrimTrac to monitor what profiles need to be deleted from the NCIDD. Any decision to delete a profile from the NCIDD is not made by CrimTrac, but by the relevant jurisdiction who must then notify CrimTrac. It was also identified that responsibility for determining whether a profile match is a true match falls with the forensic laboratories and that differences in legislative regimes across the States and Territories have not raised an issue for the administration of the NCIDD.

- An update was provided in relation to implementation of recommendations arising from the ALRC report on Australian Privacy Law for national consistency in privacy laws. The Commonwealth is developing model privacy principles and still needs agreement from States and Territories.

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

- It is the responsibility of States and Territories to audit the DNA information they collect and there is currently no regular scheme of auditing the NCIDD. As the NCIDD is not solely a Commonwealth database, there is uncertainty whether a Commonwealth agency, such as the Australian National Audit Office, would have jurisdiction to conduct an audit. Even if States and Territories conduct their own audits, this still leaves open potential gaps in relation to what happens with inter-jurisdictional matching.
- It was suggested that oversight mechanisms for the NCIDD and CrimTrac should be contained in legislation and that there could be a legislative requirement for the Commonwealth Ombudsman to be responsible for auditing the database. Another suggestion was that the responsibilities of CrimTrac, and auditing bodies, be set out in Commonwealth and state legislation. There was also a suggestion that there be a legislative requirement for a monitoring report setting out statistical information such as the requests to CrimTrac for NCIDD matching, whether these were provided or denied, and confirmations of record destructions to be provided on a regular basis. This raised a series of questions in relation to what would be audited, including, access to the database, number of matches and number of convictions arising from matches.
- The complication in conducting an audit of the NCIDD is that it is not purely a Commonwealth database and that any change to the operation of the NCIDD would require the agreement of the Board of Management. It was noted that CrimTrac

operates only as an ‘introduction agency’ for the purposes of assisting jurisdictions in finding DNA profile matches and plays no role in what happens before or after a match occurs.

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

- Recommendations were made to provide:
 - convicted persons with a simplified means of accessing their sample in order to test innocence, and
 - a legislative requirement which expressly prohibits the use of DNA matching for things outside of criminal procedures.
- The members were unaware of any occasion where the NSW innocence panel had been used.
- The use of voluntary mass testing was discussed and it was recognised that it has only been used on very few occasions in NSW. Some members suggested that the purpose of voluntary testing is for people to come forward on their own account. Any proposal to move towards a court order system would mean that it would no longer be voluntary. However, it was recognised that there might be community or peer pressure for people to participate and that relying on a court order would assist in alleviating this.
- Voluntary mass screening is used for a limited purpose and therefore, there can be no matching against other profiles on the database. This information should be provided to the volunteers.
- It was also identified that the development of guidelines for mass screening could be useful. However, the public interest needs to substantially outweigh any personal interest before mass screening should occur.
- Some participants argued that the use of DNA in the context of criminal trials and investigations should be restricted to only those involving serious offences.
- The group was asked about their views in relation to familial searching. Some members suggested that DNA profiles are only intelligence information and that police are still required to undertake further investigation. There is currently no opportunity to conduct familial searching on the NCIDD.
- Other issues raised included:
 - the use of force when obtaining DNA samples;
 - the status of DNA theft model law; and

- obtaining access to the AFP Commissioner's order number three for the purposes of evaluating the use of force.

Melbourne

Date: 17 February 2010
Time: 10am – 12pm
Location: Mercure Welcome Hotel, Arbour Conference Room
265-285 Little Bourke Street, Melbourne

Agencies and organisations represented includes:

- Liberty Victoria;
- The Victorian Bar;
- Victorian Department of Justice;
- Liberty Victoria;
- Office of Public Prosecutions (Victoria);
- Western Australian Police;
- Victoria Privacy Commission;
- Australian Law Council;
- CrimTrac;
- Commonwealth Ombudsman's Office;
- Australia New Zealand Policing Advisory Agency – National Institute of Forensic Science; and
- Australian Federal Police.

1. How effective is the scheme established by the legislation?

- There are varying degrees of effectiveness across Australia which are dependent on the legislation in place in that particular jurisdiction.
- Some participants suggested standardisation of approaches or that regulation should be more appropriately made at the Commonwealth level to provide for national standards. It was noted that constraints and restrictions existed in the Australian scheme that did not exist within comparable international schemes. A UK example was provided in relation to the Omagh bombing case which led to a 2008 review conducted by Professor Brian Caddy. Following this review, the Forensic Science Regulator is now responsible for ensuring that the provision of forensic science services across the criminal justice system is subject to an appropriate regime of scientific quality standards. Further information about the Forensic Science Regulator can be found at: <http://police.homeoffice.gov.uk/operational-policing/forensic-science-regulator/index.html>
- Participants recognised that there are many pre-existing specialist advisory groups which would have information that could assist in developing standards. For example, the National Institute of Forensic Science (NIFS) is developing a holistic

overview of standards and will then focus on specific standards. NIFS is also investigating with CrimTrac the feasibility of examining standards for the collection of DNA evidence which will eventually form a profile on the NCIDD.

- Improvement of standards could lead to greater public confidence in the system, especially in light of recent controversy in Victoria over DNA evidence in court trials. The group agreed that absolute public confidence was important.
- Both the Vincent and Fraser reports are expected to be released shortly.
- The issue of contamination of DNA samples was discussed. It was recognised that contamination is a risk but is rare. The bulk of processing of DNA samples is undertaken in forensic facilities which must adhere to national standards set by the national accreditation authority.
- The question whether anyone is currently measuring the effectiveness of the system was raised. This was also recognised as an issue in the Sherman Review. However, to date, only the number of matches made can be provided and no other indication of effectiveness is available.
- As the NCIDD is essentially the coordination by CrimTrac of DNA information collected by the States and Territories, any proposal to produce statistics/reports on the operation of the national system would require agreement from all States and Territories. It was also recognised that because the States and Territories are responsible for collecting the DNA samples, there is a certain level of restraint on the Commonwealth in relation to what it can report on, in terms of both access to information held by the States and Territories and also authority to report on that information.
- As the NCIDD is an intelligence database, a simple measure of determining its effectiveness is to monitor the number of matches that are made. There are currently mechanisms in place to provide this type of information. Information on whether a match leads to a conviction would also be useful. The need to distinguish between the utility of DNA as an indicator for law enforcement in identifying suspects and the effect of DNA in a trial was raised by participants. The role of DNA as a useful ‘identifier’ in low level crime was raised, and the utility of DNA as a tool to confine issues in sexual assault cases was noted in this context. It was recognised that this information would need to be provided by the States and Territories and would be cumbersome for CrimTrac to monitor.
- The difficulty in measuring the effectiveness of DNA samples in the prosecution of persons was recognised. In criminal trials, DNA forms only one facet of evidence and it would be rare to find a case where the only evidence is based on DNA alone. It was also recognised that juries are not surveyed on why they reach certain decisions and whether DNA evidence played a role in that decision. Determining how much DNA contributes to a case would require anecdotal evidence and involve speculation.

- In contrast, while DNA evidence plays a minor role in court proceedings, DNA is important in assisting an investigation to get to court. DNA allows investigators to eliminate people or suspects from an investigation and assists them in developing the investigation further.
- The group recognised that there might be a series of objective measures that could be used to determine the success of the scheme, including, what information has been used by police to carry out an investigation and the number of cases where guilty pleas have been entered into once DNA evidence has been made available to the Defendant.
- The following subjective question could also be directed towards prosecutors – Did the prosecutor believe that DNA evidence assisted in obtaining a conviction?
- Paragraph 4.5 of the Part 1D Consultant’s Discussion Paper (extracted below) was considered a useful indicator of the success of the scheme.

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. 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.

- The Telecommunications Interception Annual Report was discussed as a possible example or guide for future reporting on the NCIDD.
 - The legislation doesn’t permit matching on an international level to occur. There are currently international agreements through the G8 countries and Interpol but Australia is one of the few countries that do not participate. It was generally agreed that legislative amendment to enable international matching would be useful. However, some participants considered that the effectiveness of the national database needed to be examined first before participating in DNA matching on an international level. Privacy concerns relating to the provision of DNA matching assistance to overseas countries needs to be taken into account.
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?*
- The differences in forensic procedures legislation across jurisdictions has led to issues when DNA samples are required to be taken in one jurisdiction for the purposes of carrying out the investigation of an offence that has been committed in another jurisdiction (for example, where an offence is committed in NSW but the suspect has moved to Victoria and a sample needs to be taken in Victoria, there have been issues in obtaining court orders to take the sample). A similar problem was raised in respect to prisoners held in one jurisdiction, where another jurisdiction seeks access to obtain a sample from the imprisoned individual. There are currently consultative forums for

the NCIDD, with representatives from all jurisdictions, who are looking into this issue.

- Complexities that might need to be considered in the future include the issue of having people on the database who have not been convicted (for example, police officers or those who have been acquitted of crimes) and where for science purposes, people are granted access to the database and therefore to that information (an issue in the UK). This would not arise in the context of the current legislation. There is strict regulation on who can access the NCIDD, no identifying factors are contained on the NCIDD and there are requirements for destruction of database entries.
 - There was recognition of the impracticalities associated with destroying all derivative material from a DNA sample (for example, notes on physical records relating to the sample and a person's identity).
 - It was agreed that the issue of informed consent is important. Some members of the group suggested that the Victorian legislation is preferred, that is, where no consent is provided, a court order must be obtained before taking the DNA sample. This is compared with many other jurisdictions where a senior police officer (rank of the officers varies across jurisdictions) can authorise that a DNA sample be taken.
3. *Should the Commonwealth seek to negotiate 'minimum standards' as recommended by the Sherman Review?*
- There was general support for national standards to be developed. Concerns were raised in relation to whether the standards would encompass the lowest common denominator or would offer a best practice/model example. Stronger support for a best practice model was offered to ensure that the rights of those who are providing DNA samples are being protected. There was concern raised in relation to the practicality of implementing a best practice model, especially if all States or Territories did not agree to the model adopted by the Commonwealth, and whether that would preclude that particular state from accessing the NCIDD. Questions were also raised in relation to who would set the standards. Would it be a matter for the Commonwealth or the States?
 - Concerns were also expressed about the difficulty of negotiating national standards given the time that the initial set up of interjurisdictional matching took. There was recognition of the many differences in the forensic procedures legislation across all jurisdictions, including differences in definitions, which would make it difficult to implement national standards. For example, the difference in interpretation of whether a buccal swab is an intimate or non-intimate procedure leads to difficulty in determining which interpretation would amount to the highest/best practice standard. Generally, these definitions are a matter of personal interpretation.
 - Some opposition against buccal swabs being classified as a 'non-intimate procedure' was expressed. Objections were based on the possibility that using DNA evidence in

criminal trials infringed the common law privilege against self incrimination. Other participants noted what they considered, comparatively onerous restrictions attaching to the use of DNA information compared to other forensic information.

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

- There was general agreement that there should be a statutory basis for the NCIDD and CrimTrac. There was also support for clarity around who should audit the NCIDD and what should be audited.
- There is currently no request or provision for auditing the NCIDD. However, CrimTrac comprehensively logs everything that is entered into the system. At present, CrimTrac can audit who accesses the NCIDD and can check for when matches occur. However, there are currently issues in auditing the accuracy of data entries as it is the States and Territories who enter the data.
- There was recognition that if the Commonwealth is to be responsible for auditing the NCIDD, then the Commonwealth will need to also encourage States to pursue regular audits of their own databases.

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

- There was broad support for voluntary mass screenings to become subject to judicial oversight. The removal of the need to obtain consent would alleviate some of the stress for those who would be put under pressure to provide a sample under the current arrangements.
- Guidelines on voluntary mass screenings could provide guidance on limiting the class of persons to be screened as much as possible (ie, if the offender is known to be male, of a certain height, nationality etc. the voluntary mass screening could be limited to those who fit this particular description) and limiting the use of the DNA sample for obtaining matches on the NCIDD (ie, so that if a sample is obtained it can only be used for a limited purpose).
- Some participants noted that jurisdictional legislative disparities can result in a jurisdiction with high accountability standards gaining access to a sample taken under a scheme with significantly less safeguards than exist in the requesting jurisdictions.
- Some support for the availability of innocence testing was expressed.

Brisbane

Date: 18 February 2010
Time: 10am – 12pm
Location: Albert 2 Boardroom, The Sebel Suites
95 Charlotte Street, Brisbane

Agencies and organisations represented includes:

- Queensland Police Service;
- Queensland Department of Justice;
- Privacy Queensland;
- Professor Angela Van Daal, Bond University;
- CrimTrac; and
- Queensland Health.

1. How effective is the scheme established by the legislation?

- The effectiveness of the scheme is dependent on the matching tables in place and whether there are any restrictions arising out of differences in legislation across the jurisdictions.
- Some members of the group noted that they regarded the Queensland scheme as being generally effective. However, there were some recurrent issues emerging as a result of the different legislative schemes in place in each jurisdiction. The following examples were raised in this respect:
 - The withdrawal of NSW from allowing crime scene samples to be matched via the NCIDD.
 - Circumstances in which there had been difficulties in obtaining identifying information from the relevant law enforcement agencies due to restrictions in a jurisdiction, even following a successful match.
 - The disparity between definitions of ‘serious’ or ‘indictable’ offence in different jurisdictions impacting effective exchange between jurisdictions.
- Some members considered that victims’ DNA profiles should not be loaded onto the database. However, it was considered that for most offences it is difficult to determine offender DNA profiles compared with victim DNA profiles in a timely manner.
- Qld uses a forensic register as a mechanism of following a case from beginning to end and keeping track of when DNA evidence is used in conducting an investigation. A similar approach is also used in South Australia and Tasmania.

- It is unknown how DNA evidence assists with the prosecution of an alleged offender. However, the group considered the use of DNA evidence valuable as an intelligence tool to assist in the investigative process to find offenders as soon as possible.
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?*
- Qld has guidelines for police when obtaining consent and standard forms. Members of the group noted that the Qld consent processes were regarded as straightforward and that a standard oral statement was made to persons from whom samples were to be collected.
 - In response to a suggestion to establish a separate ‘victims of crime’ index, some participants expressed strong concerns that this would unnecessarily complicate the current scheme by adding to the complexity of the legislation.
 - The following concerns were raised in relation to obtaining informed consent:
 - the issue of collection and destruction of a DNA sample is not covered
 - although Information Privacy Principle 2 is a useful guide on how to obtain informed consent, this principle is expressly excluded from applying to law enforcement
 - If written material is to be provided to people, consideration needs to be given to those who are illiterate or where English is a second language
 - cultural issues must also be considered when obtaining informed consent – there are many examples of cultures where someone will respond ‘yes’ to understanding even if they don’t understand the full extent of what they are being asked to do, and
 - there are difficulties in obtaining informed consent from a child and ascertaining whether a child actually understands the request being made.
 - The Qld Mental Health Act was raised as a good example of overcoming many issues associated with obtaining informed consent. This approach requires the person to provide information in a manner so that the person receiving it can understand what is said.
 - Whether a move away from consent should be made so that acknowledgement could be relied upon instead was discussed. There was recognition by participants that there were advantages to an acknowledgement based approach in relation to a suspect, as long as there are sufficient accountability mechanisms in place. There was also recognition that, at the time consent is obtained, it is usually a stressful situation for the person and removal of consent might assist in alleviating this stress.

3. *Should the Commonwealth seek to negotiate 'minimum standards' as recommended by the Sherman Review?*
- It was recognised that mechanisms are already in place to regulate inter jurisdictional matching. If one jurisdiction has a more restrictive regime than another jurisdiction, it is the most restrictive scheme that comes into operation when matching takes place. Discussion took place of whether an 'opt in' system should operate with respect to any Commonwealth standards in relation to accountability.
 - It was recognised that jurisdictions had already made compromises to enter into the national agreements so that the NCIDD could become operational. These national agreements already represent the lowest common denominator that States and Territories would be willing to agree to and renegotiation would be difficult.
 - The differences in forensic procedure legislation across jurisdictions only cause issues when jurisdictions are seeking to exchange information after a match has been made.
4. *How can inter-jurisdictional accountability be made more effective?*
- Each jurisdiction should have accountability mechanisms in place in relation to the gathering and recording of their own information.
 - There are already auditing, reporting and complaints processes in place in Qld (through CMC, Privacy Commissioner or Ombudsman), including offences for misuse of information under the Police Powers and Responsibilities Act. Several participants noted that these measures could be regarded as sufficient.
5. *Is the current law enforcement/privacy, civil liberties balance right?*
- Qld Police has a well defined document on its website that outlines the use of force. In addition, there are safeguards in place in relation to use of force. For example, police will only use force when there is a court order in place and force would only be used on a suspect.
 - There was limited support for court ordered mass screening system. It was noted that mass screening had taken place in Gympie and resulted in only a single complaint to official oversight bodies (the Police Professional Standards Command and Crime and Misconduct Commission).
 - The Department of Justice is developing draft guidelines on innocence testing. There is currently no process for people to access a sample for independent testing. There are strong views that any independent testing would need to be done by an appropriately accredited laboratory.
 - There are mechanisms in place for the issuing of DNA evidentiary certificates from police and Qld Health. These certificates have evidentiary value unless challenged.

- There was discussion about low copy sampling of DNA material. It was noted that the National Institute for Forensic Science was currently working on standards relating to low copy sampling. The Qld Department of Health is in the process of building a new facility that will be able to undertake low copy testing.