

**MODEL
FORENSIC
PROCEDURES**

Discussion Paper

**MODEL FORENSIC
PROCEDURES BILL
AND THE PROPOSED
NATIONAL DNA
DATABASE**

May 1999

This Discussion Paper was prepared by the Model Criminal Code Officers Committee. It does not represent the views of the Standing Committee of Attorneys-General or the Australasian Police Ministers Council, nor any individual Minister.

MODEL CRIMINAL CODE
OFFICERS COMMITTEE OF
THE STANDING COMMITTEE
OF ATTORNEYS-GENERAL

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PREFACE

On 28 June, 1990, the Standing Committee of Attorneys-General (SCAG) placed the question of the development of a national model criminal code for Australian jurisdictions on its agenda. In order to advance the concept, SCAG established a Committee consisting of an officer from each Australian jurisdiction with expertise in criminal law and criminal justice matters. That Committee was originally known as the Criminal Law Officers Committee, but, in November 1993, the name was changed to the Model Criminal Code Officers Committee (the Committee) in order to reflect the principal remit of the Committee directly.

The first formal meeting of the Committee took place in May 1991 and since then it has developed most of the chapters of the Model Criminal Code. These concern the full range of offences: murder and manslaughter; sexual offences, assault, abduction, theft, fraud, bribery, justice offences like perjury and interfering with witnesses, serious drug offences, contamination of goods and slavery related offences.

In addition to its main task of developing the Model Criminal Code (which will later this year be completed when a report on damage and computer offences is released), the Committee has been asked by SCAG on several occasions to develop model criminal procedural provisions. One of those tasks was to develop a Model Forensic Procedures Bill.

The Committee circulated drafts of a Model Forensic Procedures Bill for public comment during 1994. The Committee received comments from all parts of Australia. It received over 60 detailed submissions. In July 1995, the majority of the Standing Committee of Attorneys-General endorsed the Model Forensic Procedures Bill (1995 Model Bill) and forwarded a proposal that a legislative platform be established for a national DNA database when Governments are able to establish such a database for consideration by the Australasian Police Ministers Council (APMC). At much the same time, the Easteal Committee, (which was chaired by Hon Mr Justice Phillips, Chief Justice of Victoria) had been established by APMC to look into the DNA database issue. The Easteal Committee recommended that the 1995 Model Bill be approved and their recommendations were subsequently endorsed by APMC. The work of the Easteal Committee was preceded by a 1990 report requested by the then Minister for Justice, which was prepared by Patricia Easteal of the Australian Institute of Criminology entitled *Report to the Australian Police Ministers' Council on The Forensic Use of DNA Profiling in Australia: Need for a National Database*.

Since 1995 the Commonwealth, Victorian and South Australian Governments passed legislation which implements the 1995 Model Bill.¹

¹ *Criminal Law (Forensic Procedures) Act 1998 (SA), Crimes Act 1958 (Victoria) - Part 4 and Crimes Act 1914 (Cth) - Part 1D.*

The bulk of the 1995 Model Bill is based on 1989 Victorian amendments, so the recent amendments in that State were less extensive than what is necessary to implement the model elsewhere. Following a case called *Fernando*² where it was found NSW Police had no power to compulsorily acquire blood samples, the NSW Attorney-General also indicated that his Government planned to implement the 1995 Model Bill. It is understood the Western Australian and ACT Governments are currently reviewing their laws.

Queensland passed legislation in 1997 which differs from the Model Bill but contains the basic concepts of the model:

- informed consent,
- appropriately qualified people taking the forensic samples,
- the destruction of identifying particulars after the criminal proceedings have been withdrawn or the suspect is found to be not guilty of the relevant offence; and
- requires magisterial approval of the taking of intimate samples such as mouth swabs.³

The Northern Territory passed legislation in 1998 which moves in a different direction. It categorises the taking of mouth swabs as a non-intimate forensic procedure, which means there is no requirement of magisterial approval of the procedure where the suspect is 14 years of age or older. Where a person is detained as a result of an offence being proved, regardless of the age of the person, a mouth swab may be taken by force.⁴

On 30 October 1998 SCAG agreed to the preparation of this discussion paper for the purpose of consulting the community on the proposed legislation. Likewise on 17 November 1998 the APMC supported the preparation of the paper. Both ministerial councils wish to make it clear that they do not necessarily endorse the recommendations in the discussion paper. They are recommendations of the Committee put forward for discussion. However, both ministerial councils want the shape of the proposed legislation settled as quickly as possible. They will be using the results of consultation to make decisions about the model provisions soon after the consultation period has expired.

The discussion paper is designed to canvass the various issues and achieve a consistent approach to the legislation. Consistency is important because the Commonwealth Government is establishing in cooperation with the

2 (1995) 78 A Crim R 64.

3 *Police Powers and Responsibilities Act 1997* - Part 9.

4 *Police Administration Amendment Act (No.2) 1998, Juvenile Justice Amendment Act (No.3) Act 1998, Prisons Correctional Services Act 1998.*

States and Territories a national DNA law enforcement database as part its CrimTrac initiative. A national DNA law enforcement database is necessary because criminal activity often spans Australia's internal borders and makes it necessary to get forensic evidence from different States and the Territories. It also has advantages in terms of economies of scale. Australia has a relatively small population by world standards. Consistent legislation will simplify the establishment of the database and will ensure the DNA evidence can be appropriately used in any jurisdiction.

The Committee does not propose going into great detail about the need for DNA matching. Its task is to provide an appropriate legislative framework. However, the introduction contains details of the justification given for establishing a DNA law enforcement database.

The 1995 Model Bill included tentative preliminary provisions which would specifically authorise and recognise the establishment of a DNA database and for the transfer of that information between the jurisdictions in anticipation that one day law enforcement would have the technology to establish a national DNA law enforcement database. SCAG recognised those provisions to be of a preliminary nature and deferred consideration of the issue until the idea of a national DNA law enforcement database was closer to reality.

The CrimTrac initiative means that day has arrived so it is now time to develop a consistent approach to the DNA database segment of the 1995 Model Bill. The Committee acknowledges that the development on a national DNA criminal investigation database system as part of CrimTrac is at an early stage, so it is not possible to be categorical about all elements of the national database system at this stage. However, the laws which govern the use of information held on the system will impact on the specifications for the system, so it is important that the laws be settled as soon as possible. This discussion paper proposes the insertion of new model provisions into the original Bill. A complete copy of the 1999 Model Bill with the proposed amendments in bold is contained in Appendix 3.

In preparing the discussion paper, the Committee has conferred with the Office of the Commonwealth Privacy Commissioner and the Police Commissioners Working Group on the National DNA Database. However, the recommendations in the discussion paper are only those of the Committee. They have not been endorsed by anyone else. The Committee has also reviewed legislation from other countries. Appendix 1 contains a summary of developments in other countries.

As with its previous publications, the Committee has attempted to produce a document which is comprehensive, concise and capable of being understood by the general public as well as those who have some legal expertise.

The discussion paper is organised with the proposed Model provision on one page and a commentary explaining the Committee's reasoning and intentions about it on the facing page. The Committee is very grateful for the assistance of the Parliamentary Counsels' Committee for its prompt and thoughtful drafting.

The closing date for submissions is 17 June, 1999. Submissions should be sent to:

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INTRODUCTION

The advance in terms of what information can be obtained from a small sample of human tissue, blood or excretion in recent years has been amazing. This has been possible because most cells in the human body contain a nucleus which in turn contains chromosomes and DNA which is often described as the 'blueprint of life.' The DNA extracted from the nucleus of all cells from the one person will be the same (whether they be white blood cells, muscle cells, buccal cells on the inside of the mouth or skin cells).

Not surprisingly Governments are attracted to the potential for solving crimes through the use of DNA information. While it is not possible to be exact about the benefits of DNA matching in terms of the crime clear-up rate, because there are many factors to a successful police investigation, there is no doubt DNA matching can play an important role.

While it should be borne in mind that the UK has 3 times the population of Australia, police advise that since 1995 the UK national DNA database :

- has been used to make over 10,000 matches between crime scenes and suspects;
- has been used in clearing up on average 333 crimes per month;
- there is a 'cold hit' rate of 18% (matches arising from comparing whole indexes, eg the whole crime scene index against the whole of the serious offenders index). This is better than fingerprints where the hit rate is 10%;
- has seen over 600,000 samples being submitted for analysis. Of these, just over 500,000 have been 'profiled' and included on the database;
- during the period April 1998 to the end of January 1999 there have been the following person to crime matches:

- murder/manslaughter:	35
- rape	112
- sexual assault	41
- grievous bodily harm	40
- serious robbery	88
- aggravated burglary	51
- arson	46 ⁵

5 Statistics provided by Chief Constable Ben Gunn, UK Police, Huntingdon (26 February 1999).

It has been suggested by members of the Australian Police Commissioners Working Group on the DNA Database that fingerprints solve about 7% of burglaries while if the UK experience is reflected here, DNA matching can solve up to 14%. The fingerprint figures may surprise some readers as being lower than they would expect, but they are still significant results. It is clear that if the expected improved results occur in relation to burglary alone, the DNA database will make a significant impact on crime.

A hidden and impossible to assess benefit of DNA matching is its value as a deterrent. Greater awareness of the technique should deter criminals from highly physical criminal activity such as burglary and serious assaults where it is likely evidence that can be examined for DNA will be left at the scene of the crime. It is therefore hoped the database will in that way work to reduce some of the more frightening and invasive crimes.

Crime rates are on the decline in the UK and USA where there is extensive DNA matching, but it is difficult to apportion the degree to which this can be attributed to the use of the DNA databases. Other important factors include demographic changes, improved economic conditions and a greater emphasis on crime prevention and community policing.

There is of course the view that if the DNA matching only solves a few horrible murders or serial rapes each year, it will be worth it. Clearly no one would want to argue against anything which would solve or reduce the prevalence of such ghastly crimes. However, it should also be remembered that identification of the suspect is often not an issue in murders as they often occur in domestic or social contexts where there are witnesses and the perpetrator is known. In the case of rape the problem is often lack of reporting more so than identification. Nevertheless, there is no doubt some terrible crimes have been solved overseas through DNA matching and that Australia needs to maximise the benefits it can obtain by Governments working together to establish a comprehensive and reliable database.

Now we have examined the benefits it may be that many will conclude we should just get on with it - give the police the basic powers and let them do their job. Those who have nothing to hide should have nothing to fear, so there should be no need for any elaborate legislative procedure.

The Committee disagrees with that view and in this discussion paper will propose comprehensive statutory procedures. The reasons for the various provisions are contained in the commentary on each provision, but the general reasons for the comprehensive approach are as follows:

- DNA material contains a large amount of information about a person (more than fingerprints⁶) so it is important that there should be legislation to protect the privacy of citizens from those who might use the information for illegitimate purposes;
- evidence concerning DNA matching relies on scientific expertise - it can be very convincing, so it is important to have safeguards which work against tampering;
- the success of the DNA database often depends on the cooperation of volunteers - the legislative procedures are necessary to give the public confidence that samples given to the police are used strictly in accordance with the terms of their consent;
- those convicted of serious offences, particularly those in prison, are vulnerable to harassment - high recidivism rates are well known, so there is little sympathy for these people. However, harassment is unacceptable, it does not solve crime and can even work against it (from time to time serious offenders cooperate with investigations);
- there will be many people supplying, administering and using the DNA database - it would be naive to assume every person involved will be always committed to performing these functions appropriately. Accountability mechanisms are necessary to deter rogue conduct;

6 For example, Mr Bruce Phillips, Privacy Commissioner of Canada remarks to the Standing Committee on Justice and Human Rights, Parliament of Canada, 12 February 1998:

"There is a serious flaw in equating traditional fingerprints and DNA samples. Fingerprints are static; they reveal nothing other than the person's identity. DNA samples do far more; while they can identify individuals, they also contain the individual's genetic blueprint.

(Also)..... retaining a databank of genetic samples from convicted offenders will inevitably attract researchers who want to analyse the samples for purposes that have nothing to do with forensic identification. This scientific curiosity, coupled with growing pressure to reduce crime by whatever means, no matter how intrusive, will almost certainly lead to calls to use samples to look for genetic traits common to 'criminals'."

He is not on his own. The same point is being made in the UK by Mike Redmayne, *The Criminal Law Review*, July 1998, 'The DNA Database: Civil Liberty and Evidential Issues at p 441:

"The database in England and Wales uses STR (short tandem repeat) loci which are currently believed to be non-coding. However, some STR loci (though not ones which are used in forensic work) have been linked to diseases, and it has even been suggested that there may be a connection between a STR locus used in the United Kingdom and manic depression. Quite simply, until more is known about the regions used in forensic work, one should be cautious about claiming that they will never reveal significant information about an individual

- the effectiveness of the DNA matching will depend very much on how well it is received in court. The reputation of the DNA database as a reliable investigative tool will have an effect on the extent to which the courts are prepared to rely on evidence derived from the databases. The procedures are designed to protect the integrity of the database and hence its reputation for reliability.

An important feature of the DNA database is that it can also be a tool for eliminating people from suspicion. It can be used to reduce the impact of investigations on innocent people and at the same time will work to make investigations more efficient by reducing the number suspects. It is in that way that the DNA database can be a step forward for civil liberties in Australia. Justice is about getting to the truth, anything that helps in that process should enhance the quality of our justice system.

The Committee has therefore tried to develop procedures that are practical and at the same time contain accountability measures which should work to prevent inappropriate use of the DNA databases. Hopefully the consultation process which will follow the release of the discussion paper will result in improvements.

Division 1 - General

1. Definitions (former cl 1)

(1) In this Part:

adult means a person of or above 18 years of age.

appropriately qualified person to carry out a forensic procedure means a person (such as a police officer) who is qualified as prescribed by the regulations to carry out the forensic procedure.

authorised applicant for an order means:

- (a) the police officer in charge of a police station, or
- (b) the investigating police officer, or
- (c) the Director of Prosecutions [*an appropriate reference should be inserted in each jurisdiction to ensure that this covers any person prosecuting a relevant offence*].

child means a person who is under 18 years of age.

Commissioner of Police includes a police officer to whom the Commissioner has delegated the functions conferred or imposed on the Commissioner under this Act.

corresponding law is defined in section 88.

exercise a function includes perform a duty.

DNA database means the DNA matching database or DNA identification database.

DNA identification database is defined in section 83.

DNA matching database is defined in section 83.

forensic material means:

- (a) samples, or
- (b) handprints, fingerprints, footprints or toeprints, or
- (c) photographs, or
- (d) casts or impressions,

taken from or of a person's body by a forensic procedure.

Definitions

Many of the definitions are from the 1995 Model Bill but are reproduced here because they also have relevance to the new provisions which are concerned with the DNA databases. The use of these definitions in relation to the general provisions of the Model Forensic Procedures Bill can be examined by referring to the complete Bill which is contained in Appendix 3.

However, for the convenience of readers the following is a summary of how other parts of the Model Bill operate: It contains:

- A procedure for taking samples from any suspect - someone suspected on reasonable grounds as having committed an indictable offence.
- Allows samples to be taken by informed consent and provides a procedure for this.
- Allows *non-intimate*, loose samples, hair, fingerprints, etc to be taken compulsorily by a police officer where the person is in custody and there are reasonable grounds to believe the suspect committed the offence, and the procedure is likely to produce relevant evidence and the procedure is justified in all the circumstances.
- Allows non-intimates samples to be taken compulsorily where the person is a suspect but not in custody if the police obtain an order from a magistrate, (under the Queensland legislation the suspect must be in custody).
- Allows *intimate samples* to be taken compulsorily where the person is a suspect, and whether or not he or she is in custody, if the police obtain an order from a magistrate. An intimate forensic procedure involves any situation where taking the sample involves examining or photographing the genital or anal area, the buttocks or female breasts, taking blood samples, taking of a mouth swab, pubic hair or a dental impression.
- Where the sample is taken other in accordance with the procedures, the sample and any record of the results (including DNA data) becomes inadmissible unless the suspect agrees or a court is satisfied it is justifiable (eg the failure was inadvertent or petty).
- It is an offence for a person to obstruct a forensic procedure, however the model specifically provides an expert (eg medical practitioner) is not required to carry out the procedure.⁷

7 This approach was supported by the AMA in consultation on 3 February 1995.

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- (a) samples, or
- (b) handprints, fingerprints, footprints or toeprints, or
- (c) photographs, or
- (d) casts or impressions,

taken from or of a person's body by a forensic procedure.

- The right of police to ask for and obtain with consent forensic samples from *people who are not suspects* is preserved.

‘Appropriately qualified person’

This definition is important in the context of proposed changes to Table 2 of Clause 38 of the Model Bill (see Appendix 3). Table 2 of the 1995 Model Bill provided that the intimate forensic procedure of taking saliva or buccal swabs (mouth swabs) should only be carried out by a medical practitioner, dentist, dental technician or nurse. It is now proposed that Table 2 be revised to also allow saliva or buccal swabs to be taken by an ‘appropriately qualified person.’

The Committee has been persuaded this change is justified because it would appear the taking of such samples can be achieved safely by appropriately trained police or civilian staff members of law enforcement agencies or forensic facilities. The Committee notes that this issue is about safety, not intimacy. The Committee continues to be of the view that the taking of saliva or buccal swabs is an intimate procedure and one that should not just be authorised by a senior police officer. The right to magisterial consideration of whether the procedure is justified should be preserved.

The carrying out of these procedures by an ‘appropriately qualified person’ is a feature of Part 1D of the Commonwealth *Crimes Act 1914* which in most other respects implements the 1995 Model Bill.

Other new definitions

These are opposite but will be explained elsewhere in this discussion paper.

forensic procedure means:

- (a) an intimate forensic procedure, or
- (b) a non-intimate forensic procedure,

but does not include any intrusion into a person's body cavities except the mouth or the taking of any sample for the sole purpose of establishing the identity of the person from whom the sample is taken.

function includes a power, authority or duty.

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 or not he or she consents or does not consent to a forensic procedure being carried out.

in custody is defined in subsection (2).

informed consent:

- (a) **in relation to a suspect—is defined in section 6, and**
- (b) in relation to a volunteer or parent or guardian of a volunteer—is defined in section 60.

interview friend is defined in section 2.

intimate forensic procedure means the following forensic procedures:

- (a) an external examination of the genital or anal area, the buttocks, or, in the case of a female, the breasts, or
- (b) the taking of a sample of blood, or
- (c) the taking of a sample of saliva, or a sample by buccal swab, or
- (d) the taking of a sample of pubic hair, or
- (e) the taking of a sample by swab or washing from the external genital or anal area, the buttocks, or, in the case of a female, the breasts, or
- (f) the taking of a sample by vacuum suction, by scraping or by lifting by tape from the external genital or anal area, the buttocks, or, in the case of a female, the breasts, or
- (g) the taking of a dental impression, or
- (h) the taking of a photograph of, or an impression or cast of a wound from, the genital or anal area, the buttocks, or, in the case of a female, the breasts.

These definitions remain unchanged from the 1995 Model Bill. The exception is that the definition of informed consent now needs to also refer to the provisions concerning volunteers. The 1995 Model Bill did not provide for comprehensive provisions in relation to volunteers. The proposal to retain the definition of 'intimate forensic procedure' is not supported by everyone. Some believe the taking of saliva and mouth swabs should be classified as a non-intimate procedure.⁸ The following is an explanation of why the Committee continues to favour retaining the procedure as an intimate procedure.

'intimate forensic procedure'

Classifying the taking of saliva and mouth swabs as an intimate procedure will mean that the person from whom it is taken will have a right to have the procedure considered by a magistrate. In the few cases where the accused does not consent to giving the sample, authorisation by a magistrate rather than a senior police officer will involve more work for law enforcement officers. Those who disagree with the proposal take the view that it adds unnecessarily to the work of police and that the procedure for taking the saliva is not really intimate. They point out that taking the sample involves little more than scraping the inside of the mouth with something similar to a cotton bud. No doubt many will find it much more preferable to being punctured by a syringe for blood.

The Committee agrees that where the person from whom the sample is being taken agrees to the procedure it can be very simple and is not invasive. However, where a person does not consent and resists the procedure, the procedure could not fairly be described as being non-intimate. Placing something inside someone's mouth against the person's consent is invasive.

The Committee is aware that mouth swabs are categorised as a 'non-intimate' procedure in the UK.⁹ However, the UK motivation for categorising mouth swabs in this way was different. In the UK intimate samples can only be taken if the request is authorised by a superintendent and the person consents. If the person refuses to consent or cooperate, the sanction is that the jury may draw adverse inferences about the refusal. Law enforcement cannot use force to take an intimate sample. Making the taking of mouth swabs a non-intimate procedure had more to do with ensuring that they could be taken compulsorily rather than determining whether it was invasive. The 1993 Royal Commission into Criminal Justice, which recommended the change, said:

8 Note the Northern Territory *Police Administration Amendment Act (No.2) 1998*, *Juvenile Justice Amendment Act (No.3) Act 1998*, *Prisons Correctional Services Act 1998* where the taking of saliva and mouth swabs is classified as a non-intimate procedure.

9 *Criminal Justice and Public Order Act 1984* (PACE) - s.58

intimate forensic procedure means the following forensic procedures:

- (a) an external examination of the genital or anal area, the buttocks, or, in the case of a female, the breasts, or
- (b) the taking of a sample of blood, or
- (c) the taking of a sample of saliva, or a sample by buccal swab, or
- (d) the taking of a sample of pubic hair, or
- (e) the taking of a sample by swab or washing from the external genital or anal area, the buttocks, or, in the case of a female, the breasts, or
- (f) the taking of a sample by vacuum suction, by scraping or by lifting by tape from the external genital or anal area, the buttocks, or, in the case of a female, the breasts, or
- (g) the taking of a dental impression, or
- (h) the taking of a photograph of, or an impression or cast of a wound from, the genital or anal area, the buttocks, or, in the case of a female, the breasts.

investigating police officer means the police officer in charge of the investigation of the commission of a relevant offence.

magistrate means *[an appropriate definition should (if necessary) be inserted by each jurisdiction to ensure that the provisions relating to magistrates do not apply to lay justices]*.

non-intimate forensic procedure means the following forensic procedures:

- (a) an examination of a part of the body other than the genital or anal area, buttocks, or, in the case of a female, the breasts, that requires touching of the body or removal of clothing, or
- (b) the taking of a sample of hair other than pubic hair, or
- (c) the taking of a sample from a nail or under a nail, or
- (d) the taking of a sample by swab or washing from any external part of the body other than the genital or anal area, the buttocks, or, in the case of a female, the breasts, or
- (e) the taking of a sample by vacuum suction, by scraping or by lifting by tape from any external part of the body other than the genital or anal area, the buttocks, or, in the case of a female, the breasts, or

The police service argue that swabs taken from a person's mouth should be classed as non-intimate, thus enabling them to be taken without consent if the requirements described in paragraph 26 are met. *They told us that mouth swabs may be taken without consent in Northern Ireland and that the provision has worked satisfactorily there.* Saliva can readily be used to obtain a DNA profile. We therefore think there is merit in the police service's proposal and recommend that saliva be reclassified as a non-intimate sample for the purpose of section 65 of PACE, thus enabling mouth swabs to be taken without consent under section 63 of PACE.¹⁰

Under the Model Bill classification of a procedure as being an intimate procedure does not rule out the compulsory taking of the sample. It just requires that there be court authorisation.

The Committee notes that in Canada, New Zealand and in some parts of the US, the compulsory taking of mouth swabs is categorised as a procedure requiring judicial authorisation. The 'Gibbs Committee' Review of Commonwealth Criminal Law, Fifth Interim report (June 1991) had the same view and a requirement of court approval is consistent with earlier Australian reviews (some of which opposed the taking of saliva).

The procedure is intimate and a number of commentators in the UK have come to a similar conclusion.¹¹

The Committee notes that the overwhelming response in consultation and the reception of the legislation based on the 1995 Model Bill in the 4 Parliaments that have enacted it or similar legislation would suggest many people are of the same view. For example, the Commonwealth Parliament spent some time investigating whether the legislation should include the taking dental impressions at all let alone categorising the procedure as something other than an intimate procedure. The Senate Standing Committee on Constitutional and Legal Affairs report mentioned but ignored submissions from the SA and NT Police to re-categorise the taking of mouth swabs as non-intimate procedures. The Standing Committee's 1995 report rejected the inclusion of dental impressions as a forensic sample which could be taken under the proposed legislation.¹² While Parliament eventually accepted the inclusion of dental impressions, it would be surprising if many would entertain categorising the taking of mouth swabs as a non-intimate procedure.

10 (July 1993) cm 2263, HMSO, paragraph 29 at pp.14-15.

11 'Journal of Criminal Law' November 1995, *Creating a DNA database*, by Beverley Steventon at 412.

12 The Parliament of the Commonwealth of Australia, *Crimes Amendment (Forensic Procedures) Bill 1995*, at p 15, Report by the Senate Legal and Constitutional Committee, October 1995.

- (f) the taking of a handprint, fingerprint, footprint or toe print, or
- (g) the taking of a photograph of, or an impression or cast of a wound from, a part of the body other than the genital or anal area, the buttocks, or, in the case of a female, the breasts.

order means:

- (a) order of a magistrate under section 18, or
- (b) interim order of a magistrate under section 26, or
- (c) order of a court under section 57 or 58, or
- (d) order of a magistrate under section 63 or 64.**

It also occurs to the Committee that it was quite inconsistent for the UK Parliament to conclude that the taking of dental impressions should remain an intimate procedure but that the taking of mouth swabs or even searching the inside of a person's mouth was non-intimate.

It is also noted that the 1995 Easteal Committee, (which included senior police and prosecution representation from the Western Australia, Queensland, Tasmania and the Commonwealth) came out in support of the Model Bill as a "properly accountable set of powers."¹³

The 1995 consultations on the Model Bill produced only 3 submissions out of 64 (see Attachment 3 for the list of organisations and individuals who made comments) which disagreed with the categorisation of mouth swabs as an intimate sample. They were the Senior Managers of Australian and New Zealand Forensic Laboratories, Victoria Police and the Australian Defence Force Academy. The 1995 consultations produced wary but generally supportive response from groups who would normally be concerned about privacy issues. An example is the comment of Greg James QC from New South Wales:

Generally, although there is a widely held but vaguely expressed opposition to some of the concepts of the draft Bill on civil liberties grounds, and similarly widely held and expressed support for much tougher proposals, since it is clear that unless there is such a model as this, a confusion of legislation unlikely to embody the positive features of the draft Bill, will result.

And the then Federal Privacy Commissioner, Kevin O'Connor:

I support the idea of developing a consistent national regime to govern the carrying out of forensic procedures and to provide appropriately detailed safeguards for the rights of suspects.

In the main it seems to me that the Bill is a reasonable attempt to strike a balance between the rights of suspects and the public interest in effective law enforcement of the law. I am however concerned about extensive intrusions upon personal privacy.¹⁴

Watering down a category of sample from being intimate to non-intimate cannot be justified.

¹³ *Report Easteal Working Party, DNA Sampling*, March 1995, p. 10.

¹⁴ His submission went on to detail some specific concerns.

parent of a child includes a person who:

- (a) is legally entitled to, and who has, custody of the child, or
- (b) is legally responsible for the day-to-day care, welfare and development of the child and has the child in his or her care (not being a teacher, person who is in charge of a child care centre or other person who has a child in his or her care for the purpose of educating or minding the child).

participating jurisdiction is defined in section 88.

prison medical officer means, in relation to a prison or other place of detention, a person appointed or acting as medical officer for the prison or other place of detention.

[Note: an appropriate definition should be inserted by each jurisdiction]

relevant offence, in relation to a person who is a suspect on whom a forensic procedure is carried out or proposed to be carried out, means:

- (a) if the forensic procedure is a forensic procedure other than the taking of a handprint, fingerprint, footprint or toeprint:
 - (i) the indictable offence in relation to which the person is a suspect, or
 - (ii) any other indictable offence arising out of the same circumstances, or
 - (iii) any other indictable offence in respect of which the evidence likely to be obtained as a result of carrying out the proposed forensic procedure on the suspect is likely to have probative value, or
- (b) if the forensic procedure is the taking of a handprint, fingerprint, footprint or toe print:
 - (i) the indictable offence or summary offence (other than an offence that may be dealt with by way of penalty notice) in relation to which the person is a suspect, or
 - (ii) any other indictable offence or summary offence (other than an offence that may be dealt with by way of penalty notice) arising out of the same circumstances, or

These are in the main definitions which were contained in the 1995 Model Bill. The definition of 'relevant offence' is used in the procedure for taking forensic samples from suspects and is therefore not the main focus of this discussion paper. The Committee does not believe that the procedure for taking samples from suspects needs to be changed. The discussion paper focuses on what happens to the samples later - when the person is either convicted or acquitted of the offence. The proposed new definitions are:

'participating jurisdiction' which is used in the context of the establishment and use of the DNA databases and will be discussed later in the paper.

'prison medical officer' which is a new definition and is relevant to the procedure in relation to the taking of samples from prisoners which is discussed later in the paper.

'responsible person' which is a new definition which is used in relation to obligations concerning the DNA database which are discussed later in the paper.

- (iii) any other indictable offence or summary offence (other than an offence that may be dealt with by way of penalty notice) in respect of which the handprints, fingerprints, footprints or toe prints are likely to have probative value.

[Note: the appropriate term to cover the concept of a penalty notice (or whatever term is used to describe an expiation notice in the particular jurisdiction) should be inserted in each jurisdiction]

responsible person, in relation to the DNA database, means the person responsible for the care, control and management of the database.

serious offence means an offence under a law of this State or of a participating jurisdiction that is punishable by a maximum penalty of 5 or more years of imprisonment.

serious offender means a person who is found guilty of a serious offence.

suspect, in relation to an offence, means:

- (a) if a forensic procedure other than the taking of handprints, fingerprints, footprints or toeprints is carried out or proposed to be carried out and the offence is an indictable offence:
 - (i) a person whom a police officer suspects on reasonable grounds has committed the indictable offence, or
 - (ii) a person charged with the indictable offence, or
 - (iii) a person who has been summonsed to appear before a court in relation to the indictable offence, or
- (b) if handprints, fingerprints, footprints or toeprints are taken or proposed to be taken and the offence is an indictable offence or a summary offence (other than a summary offence that may be dealt with by penalty notice):
 - (i) a person whom a police officer suspects on reasonable grounds committed the offence, or
 - (ii) a person charged with the offence, or
 - (iii) a person who has been summonsed to appear before a court in relation to the offence.

[Note: the appropriate term to cover the concept of a penalty notice (or whatever term is used to describe an expiation notice in the particular

Note. Section 77* states that the burden lies on the prosecution to prove on the balance of probabilities that a police officer had a belief on reasonable grounds.

'unrestricted purposes index' is defined in section 83.

'volunteer' is defined in section 59*.

- (2) In this Part, a reference to a person in custody is a reference to a person who is in the lawful custody of a police officer.
- (3) In this Part, a reference to a sample taken from a person includes a reference to a sample taken from the person that consists of matter from another person's body.

'serious offence'

This is an important definition. It was located at subclause 69(1) of the 1995 Model Bill. Many more of the new provisions rely on this definition, so it is more appropriate to include it in clause 1. It will be discussed in the context of other provisions later in the paper.

'volunteer' and 'unrestricted purposes index'

These are also a new definitions better discussed later in the paper.

The other definitions are the same as those in the 1995 Model Bill.

Subclause 1(5) - interpretation of 'destruction'

Forensic scientists advise that once samples have been subjected to the various processes of analysis in a forensic laboratory it would be extremely difficult to trace all remnants of the samples and destroy them. The same also goes for all the different records of the DNA profile. However, they point out that the material is often labelled with a numerical Code which if destroyed makes it impossible to identify the sample. It would therefore appear to be reasonable to include the proposed interpretation clause in the Model Bill. Under the proposal there must be no means of identifying the forensic material - leaving identifying initials or clues such as file that it is kept on and the name of a case officer will mean that the material has not been destroyed and there has been a breach of the legislation.

- (4) In this Part, a reference to informing a person of a matter is a reference to informing the person of the matter, through an interpreter if necessary, in language (including sign language or braille) in which the person is able to communicate with reasonable fluency.
- (5) For the purposes of this Part, a person destroys forensic material taken from another person by a forensic procedure if the person destroys any means of identifying the forensic material with the person from whom it is taken.

Division 7 - Carrying out of certain forensic procedures after conviction of serious offenders

49. Forensic procedures to which Division applies

- (1) This Division applies to the following forensic procedures:
 - (a) the taking of a sample of hair other than pubic hair,
 - (b) the taking of a fingerprint,
 - (c) the taking of a sample of blood,
 - (d) the taking of a buccal swab.
- (2) This Division applies to all serious offences and, in relation to the forensic procedure of the taking of a fingerprint, this Division also applies to all indictable offences.
- (3) In any other sections of this Division and in Division 11, a reference to a serious offence or serious offender, in relation to the forensic procedure of the taking of a fingerprint, includes a reference to any indictable offence or to any offender convicted of an indictable offence.

1995 MODEL BILL

Division 11 - Taking of blood samples and fingerprints after conviction

Orders for taking of blood samples and fingerprints following conviction

69 (1) In this section:

“serious offence” means an offence punishable by a maximum penalty of 5 or more years of imprisonment.

- (2) If a court finds a person guilty of a serious offence a police officer may apply to the court for an order directing the person to give a blood sample.
- (3) If a court finds a person guilty of an indictable offence a police officer may apply to the court for an order directing the person to permit a police officer to take fingerprints.
- (4) An application under subsection (2) or (3):
 - (a) may only be made after the expiration of any appeal period or after the final determination of any appeal, whichever is later; and

Procedures for taking samples from serious offenders.

Divisions 2 to 6 contain the detailed procedural requirements in relation to the taking of samples from suspects. Apart from the change discussed above concerning the qualifications of the person who make take saliva or a mouth swab (Table 2, Clause 38), it is not proposed that those procedures will be changed from the 1995 Model Bill. The discussion paper will therefore now move on to Division 7 which contains the first of the major changes to the Model Bill. However each clause of Divisions 2 to 6 is at Appendix 3.

Clause 49 - Forensic Procedures to Which this Division Applies

This issue was mainly dealt with by Division 11 of the 1995 Model Bill. For the convenience of readers we have reproduced the provisions of old Division 11 in the boxed segment on the left page.

Clause 49 differs from subclause 69(2) of the 1995 Model Bill in that it allows a wider range of procedures to be used to obtain samples from serious offenders. The 1995 Model Bill only allowed the taking of blood samples and fingerprints. Clause 49 would include the taking of a non-intimate hair sample and a mouth swab. These changes reflect advances in the capacity of Australia's forensic laboratories to make use of hair and saliva for the purposes of DNA analysis and offer alternative methods of collecting the necessary information.

Many of those asked to provide a sample will prefer to provide a mouth swab or hair sample. The Police Commissioners Working Group on this issue advises the Committee that in some cases where an offender resists providing the sample, obtaining a hair sample will be the easiest way to get the required DNA material. However, the decision about seeking a hair sample will depend very much on the purpose for which the law enforcement agency hopes to use the sample and the analysis capacity of the forensic laboratory. The Committee therefore includes it as an option. Clause 37 of Division 6 makes it clear the Model does not authorise the taking of the hair root. It has been suggested to the Committee by the National Institute of Forensic Science that contrary to previous advice the roots of the hair are required for effective analysis. The Committee would be grateful for submissions on whether anyone disagrees as it may recommend that roots should be included.

In some cases the law enforcement agency may assess that it needs a blood sample to get the best results, but will be satisfied with saliva or hair as second or third choices. The policy of the Bill is that they can apply for alternatives - it will be for the magistrate to determine whether it is appropriate in the particular circumstances.

It should also be noted that consistent with the policy of the 1995 Model Bill under subclause 49(2) it is proposed that fingerprints be taken where the offender has committed an indictable offence. This is consistent with existing practice and can be justified because fingerprints provide less information than DNA.

1995 MODEL BILL (continued)

- (b) may only be made if, at that time, the conviction stands.
- (5) In determining whether to make such an order, the court is to take into account:
 - (a) the seriousness of the circumstances surrounding the commission of the offence for which the person was convicted and the gravity of the offence; and
 - (b) in the case of an application for an order to give a blood sample - whether there are reasonable grounds to believe that the person may have committed some other serious offence or may commit some other serious offence in the future; and
 - (c) in the case of an application for an order for the taking of fingerprints - whether there are reasonable grounds to believe that the person may have committed some other indictable offence or may commit some other indictable offence in the future.

Taking of blood samples and fingerprints following conviction

70(1) If a court orders the person to give a blood sample or to permit fingerprints to be taken, the court may order:

- (a) the person to attend at a police station; or
- (b) that a police officer, together with a person who, under section 38, may carry out the taking of a blood sample or fingerprints, be permitted to attend on the person in a place of detention,

to allow the blood sample or fingerprints to be taken.

- (2) The person ordered to give the blood sample must not intentionally refuse or fail to allow the blood sample, or permit the fingerprints, to be taken, without reasonable excuse.

Maximum penalty: 12 months imprisonment.

50. Application of Division 6 (former cl 71)

Division 6 applies to the carrying out of a forensic procedure to which this Division applies as if the references to the suspect in that Division were references to a serious offender.

Subdivision 2 - Carrying out of forensic procedures on serious offenders in prison and other places of detention

51. Forensic procedures authorised to be carried out on certain serious offenders in prison and other places of detention

(1) A person is authorised to carry out a forensic procedure to which this Division applies on a person (other than a child or an incapable person) who:

(a) is a serious offender, whether found guilty of the serious offence concerned before or after the commencement of this section, and

(b) is serving a term of imprisonment in a prison or other place of detention for the offence,

unless an objection to the carrying out of the forensic procedure is made under section 55* and upheld.

(2) A person is authorised by this section to carry out a forensic procedure in accordance with Division 6 as applied by section 56 and not otherwise.

(3) Nothing in this section authorises the carrying out of a forensic procedure on a person serving a sentence of imprisonment by means of home detention.

52. Forensic procedures authorised to be carried out on serious offenders who are not in prisons or other places of detention

(1) A person is authorised to carry out a forensic procedure to which this Division applies on a person (including a child or incapable person) who:

(a) is a serious offender found guilty of the serious offence concerned on or after the commencement of this section, and

(b) is not a person on whom the forensic procedure is authorised to be carried out by section 51,

by order of a court under section 57.

(2) A person is authorised by this section to carry out a forensic procedure in accordance with Division 6 as applied by section 50 and not otherwise.

Clause 50. Application of Division 6

This is the same as the 1995 Model Bill in that it ensures that all the requirements concerning the manner in which the forensic procedures are carried out that apply to suspects also apply to serious offenders. Division 6 deals with performing the procedure in a dignified manner, the force that may be used, the qualifications and gender of the person performing the procedure, who may be present, recording, safe handling of the samples and provision for the results to be given to the person who gives the sample. It also contains an offence with a maximum penalty of 2 years imprisonment for obstructing or resisting the carrying out of the procedure where it is properly authorised. For further details see Appendix 3.

Serious offenders

Clauses 51 and 52 contain the key procedures in relation to serious offenders. Clause 51 deals with those who are actually in prison. Clause 52 with those who are serious offenders after they have been released into the community.

In both cases for some reason samples were not taken when the offender was a suspect. There will be plenty of cases where the offender could be convicted on non-forensic evidence. In other cases the offender may have been imprisoned prior to the use of DNA profiles for investigative purposes. Where a sample has been taken when the offender was a suspect, and the person is convicted of the offence, the sample and any DNA profile can be retained under subclause 71(3) which is the destruction procedure in the 1995 Model Bill (previously subclause 55(3)).

The Committee makes a distinction between the procedure in relation to serious offenders and the one that applies to suspects because the reasons for taking the sample are different. The motivation here is much more speculative. It is based on the experience that many convicted criminals have a propensity to commit crime again or, if that is not the case with the particular crime, the consequences of the person committing the crime again are so serious that society must take precautions against it.

Clauses 69 and 70 of the 1995 Model Bill provide for a separate mechanism for collecting samples for the purpose of DNA analysis. It provides that where a person is guilty of a serious offence punishable by a period of 5 or more years imprisonment, and appeal periods have expired, the police may get a court order directing the person to give a blood sample. The police must satisfy the court that the circumstances of the offence for which the person was convicted are serious; that there are reasonable grounds to believe that the person may have committed some other serious offence or may commit some other serious offence in the future. Separate rules apply to fingerprints - they may be collected in relation to less serious 'indictable offences' (maximum penalty of 2 or more years imprisonment). As mentioned in the introduction, there are strong

- 51. Forensic procedures authorised to be carried out on certain serious offenders in prison and other places of detention**
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 - (b) is serving a term of imprisonment in a prison or other place of detention for the offence,
- unless an objection to the carrying out of the forensic procedure is made under section 55 and upheld.
- (2) A person is authorised by this section to carry out a forensic procedure in accordance with Division 6 as applied by section 56 and not otherwise.
- (3) Nothing in this section authorises the carrying out of a forensic procedure on a person serving a sentence of imprisonment by means of home detention.

arguments that the taking of fingerprints is far less invasive of privacy and that the taking and use of the DNA samples should therefore be restricted to more serious offences.

Under the 1995 Model Bill the grounds for obtaining the blood samples after conviction reveal a restricted purpose for the procedure - again it is an investigation of the conduct or prospective conduct of the person who was convicted. There have to be reasonable grounds to believe the person will commit some other serious offence, so there would need to be evidence that the person was recidivist (for example, a paedophile).

This is much more restrictive than the UK (where any suspect who is not exonerated and is convicted of one of a wide range of offences can have their DNA data added to the identifying database). It is also more restrictive than European or US models where having the status of being convicted of a long list of offences against the person and some other offences (eg burglary) means that the law enforcement agency or prison is automatically entitled to take and add DNA information to their database. Indeed trends in North America and the recent legislation in Victoria allows the taking of samples where the person has been convicted of offences pre-dating the DNA sampling legislation. In recent years there have been large scale round ups of parolees in the USA for the purpose of adding their details to the database.¹⁵

The rationale for targeting serious offenders is very much to do with the likelihood that they have or will again commit other crimes. For example, all US legislation includes convicted sex offenders. This could be justified on the basis that there is evidence many sex offenders have offended on more than one occasion (the FBI suggests on average 5 times, but in some cases over 50 times)¹⁶. The FBI evidence is conservative compared to some studies based on self-reporting by sexual offenders which indicate the average is 7.5 times (4.7 undetected, 2.8 detected).¹⁷ High recidivism rates in relation to sexual offences are supported by studies conducted elsewhere in the world and a significant reputable study in Western Australia of sex offenders in that state for the period 1975-1989 which noted that while approximately 50% of sex offenders never return to prison, 41% of those in prison for rape had a prior rape offence and 57% had, or go on to commit other violence offences.¹⁸

15 <http://www.cjp.usdoj.gov/nij/dnamtgtrans/trans-e.html>, Evidence from Steve Niezgoda and Dawn Herkenham of the FBI before the US 'National Commission on the Future of DNA Evidence', second page of testimony from Ms Herkenham of the FBI and *ibid* footnote 11 at p.2

16 *ibid* footnote 10.

17 Groth A.N., Longo R E & McFaden J B (1982), "Undetected Recidivism Among Rapists and Child Molesters", *Crime and Delinquency*, 23, 450-458.

18 *Sex Offending and Recidivism*, Research Report No.3, The University of Western Australia, Crime Research Centre (1991), Roderick G. Broadhurst and Ross A Maller at 31, 37, 46, 63-64

51. Forensic procedures authorised to be carried out on certain serious offenders in prison and other places of detention

(1) A person is authorised to carry out a forensic procedure to which this Division applies on a person (other than a child or an incapable person) who:

(a) is a serious offender, whether found guilty of the serious offence concerned before or after the commencement of this section, and

(b) is serving a term of imprisonment in a prison or other place of detention for the offence,

unless an objection to the carrying out of the forensic procedure is made under section 55* and upheld.

(2) A person is authorised by this section to carry out a forensic procedure in accordance with Division 6 as applied by section 56 and not otherwise.

(3) Nothing in this section authorises the carrying out of a forensic procedure on a person serving a sentence of imprisonment by means of home detention.

While there is unlikely to be an argument about sexual offences, the list of offences is being continually expanded on the basis of statistics that those who commit other offences of violence (assault) or other violation (burglary) will often commit sexual assault, homicide and other serious offences. It is noted that while the Western Australian study shows there is a recidivism link between sexual and other violence offences, it also suggests recidivism is low in relation to homicide and even serious drug trafficking offences.¹⁹

This broader use of the recidivism rationale is completely different to the approach of the 1995 Model Bill which provides the prosecution must establish on a case by case basis that there are reasonable grounds the person has or will commit other serious offences. The 1995 Model Bill effectively puts a brake on large scale screenings and is very much based on the philosophy that people are innocent until there are demonstrable grounds to suggest otherwise and that offenders who have served their sentence have paid their price to society and should not be subject to further impositions. This is discussed further below in the commentary on clause 56.

The approach proposed in this discussion paper is based on view that if a person is convicted of a serious offence, then it is reasonable for society to expect that person to not only surrender their freedom to mix with society for some time, or to live in accordance with conditional freedom, (imprisonment or release on a recognisance or parole conditions), but to also be required to give samples to assist with the detection of a repeat offence. Indeed providing the sample may even deter the offender for committing further crime.²⁰

This rationale has more to do with the fact the person belongs to a class of people likely to offend rather than the specific circumstances of the person (as it is in the case of suspects) and the giving of the sample is part of the consequences of being found guilty of an offence. The Committee is therefore firmly of the view the procedure should only apply to serious offenders. These are people who have committed a crime where the maximum penalty is 5 or more years imprisonment.

Some jurisdictions, like Victoria and Canada, have chosen to list the offences. The Committee has examined these lists and notes that all the offences are punishable by 5 or more years imprisonment. While the lists show some effort on the part of those governments to discriminate between offences, there is really no convincing rationale for this. Recidivism is a consideration but what level should justify a different approach? In the case of some offences, for example murder, recidivism levels are very low, but no one would argue the samples should not be collected from murderers. However there are some serious crimes, like theft and fraud, where recidivism may be high but commentators might argue the likelihood of using forensic evidence is low.

19 'An analysis of the recidivism of sex offenders in Western Australia', *British Journal of Criminology* (1990).

20 *Report Eastaest Working Party, DNA Sampling*, March 1995.

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 - (b) is serving a term of imprisonment in a prison or other place of detention for the offence,
- unless an objection to the carrying out of the forensic procedure is made under section 55* and upheld.
- (2) A person is authorised by this section to carry out a forensic procedure in accordance with Division 6 as applied by section 56 and not otherwise.
- (3) Nothing in this section authorises the carrying out of a forensic procedure on a person serving a sentence of imprisonment by means of home detention.
- 52. Forensic procedures authorised to be carried out on serious offenders who are not in prisons or other places of detention**
- (1) A person is authorised to carry out a forensic procedure to which this Division applies on a person (including a child or incapable person) who:
- (a) is a serious offender found guilty of the serious offence concerned on or after the commencement of this section, and
 - (b) is not a person on whom the forensic procedure is authorised to be carried out by section 51,
- by order of a court under section 57.
- (2) A person is authorised by this section to carry out a forensic procedure in accordance with Division 6 as applied by section 50* and not otherwise.

The Committee considers that the complication and artificiality of a list is such that it is better to rely on a more general criteria: giving a sample should be a consequence of committing any serious offence. This means theft and fraud will be caught. In our view it should be caught. While forensic evidence can be used in theft and fraud investigations, it is used quite frequently in the related but more serious offences of burglary and robbery. It would not be unusual for a thief or fraudster to also commit the more serious offences.

The Committee notes that in the Northern Territory samples may be taken from less serious offenders: when the person commits any indictable offence. Our inclination is to think this is too low - applied nationally those offences would include: motor vehicle offences, breaches of health legislation, less serious corporations law, occupational health and safety and minor taxation offences and a host of other regulatory type offences.

The Committee considers the 5 year threshold provides recognition of the rationale for taking the sample. Some have argued that 'volume' crime leads to 'serious crime' and that therefore minor offences should be caught by the requirement to give samples. It is the Committee's view that a policy based on that approach would be extending the speculative nature of the existing rationale beyond what is reasonable. Providing a sample is an imposition on people's liberties. There is a remote possibility that samples can be misused - there is some risk - it is therefore unreasonable to include minor offenders.

The Committee also floats the possibility of providing for a more restricted limited list of serious offences in the regulations where the serious offender was in prison prior to the commencement of the proposed legislation in recognition of the retrospective nature of that aspect of the model.

Clause 51. Forensic procedures authorised to be carried out on certain serious offenders in prison and other places of detention

For practical reasons the procedure needs to be different for serious offenders who are still in prison. It is the Committee's view that just as it is the case in relation to other matters that prisoner's liberties are curtailed for the safe and convenient running of the institution, it is appropriate a different procedure should apply in relation to the taking of their samples. This does not mean the prisoner should have no rights at all. The prisoner's rights are modified only to the extent that it is necessary to avoid unduly disrupting the prison or where the procedure is an appropriate consequence of serious offending.

The main differences are that clause 51 gives the prisoner the right to object to the procedure and the procedure may apply to those who offended prior to the commencement of the proposed legislation. A sample may not be taken from a serious offender who is not in prison unless the procedure is first authorised by a magistrate and only in relation to offences committed after the commencement of the legislation (clause 52).

- 51. Forensic procedures authorised to be carried out on certain serious offenders in prison and other places of detention**
- (1) A person is authorised to carry out a forensic procedure to which this Division applies on a person (other than a child or an incapable person) who:
- (a) is a serious offender, whether found guilty of the serious offence concerned before or after the commencement of this section, and
 - (b) is serving a term of imprisonment in a prison or other place of detention for the offence,
- unless an objection to the carrying out of the forensic procedure is made under section 55* and upheld.
- (2) A person is authorised by this section to carry out a forensic procedure in accordance with Division 6 as applied by section 56 and not otherwise.
- (3) Nothing in this section authorises the carrying out of a forensic procedure on a person serving a sentence of imprisonment by means of home detention.

Why provide for a different type of magisterial review for prisoners?

The Committee accepts that the distinction between the wrong done by a serious offender in prison, and an offender who is not, will in some cases be difficult to discern. However, imprisonment is an indication of how serious the court saw the particular crime on sentencing and the impact of a compulsory procedure on a person living in the community will usually be more significant. The Committee therefore believes prior authorisation of a magistrate is a mark of the person's freedom, while the objection procedure gives the prisoner rights it is a more convenient procedure in the prison environment. The Committee would particularly appreciate advice as to whether it is right in its judgment that this procedure would be more convenient. If it is not, it will favour prior authorisation.

The Committee believes the same procedure would not be appropriate where the person is living in the community where at the end of the objection period police would need to locate and detain the person to carry out the procedure, (often interrupting their family or work life). These considerations are not problems where a person is in prison.

The Committee comes to this conclusion noting that apart from confinement, there are many other restrictions which are much more significant than the proposed procedures. In many cases the procedures are designed to facilitate the running of the prison. The requirements are usually prescribed in local legislation and procedures, but for the purposes of this paper we shall refer to the Minimum Standard Guidelines for Australian Prisons (MSGAP)²¹ as a general indicator of the requirements. Prisoners:

- must wear prescribed clothing (MSGAP r.17(a));
- minimum 1 hour access to open air weather permitting (MSGAP r 21(a));
- can be more closely confined and have their privileges withdrawn for the purposes of discipline (MSGAP r 30);
- have strict limits on contact with the outside world (visiting hours and telephone calls) (MSGAP r 37);
- have only restricted access to personal property, including medication. The medication they possess must be determined by the prison medical officer (MSGAP r 21);
- must meet standards of cleanliness (MSGAP r 15);
- may be asked to work, providing not "especially dangerous or unhealthy" (MSGAP r 67);

21 Discussion Paper edited by C R Bevan, Australian Institute of Criminology Canberra 1984 which is largely based on the United Nations Standard Minimum Rules for the Treatment of Prisoners.

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- (1) A person is authorised to carry out a forensic procedure to which this Division applies on a person (other than a child or an incapable person) who:
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 - (b) is serving a term of imprisonment in a prison or other place of detention for the offence,
- unless an objection to the carrying out of the forensic procedure is made under section 55 and upheld.
- (2) A person is authorised by this section to carry out a forensic procedure in accordance with Division 6 as applied by section 56 and not otherwise.
- (3) Nothing in this section authorises the carrying out of a forensic procedure on a person serving a sentence of imprisonment by means of home detention.

- only receive limited remuneration for work and there are restrictions on how much may be used personally, allocated to the family or saved (MSGAP r 72).
- have no choice about who they have contact with (implied in MSGAP r 80(a))
- can be restrained with handcuffs and shackles to prevent escape and to protect other inmates, prison staff and property;²²
- have limited legal capacity to make civil claims for damages;²³ and
- apart from South Australia, cannot vote in any election if he or she has committed a serious offence.²⁴

The Committee notes that while there are these restrictions on the liberties of prisoners care must be taken to ensure there is protection against abuses of power.

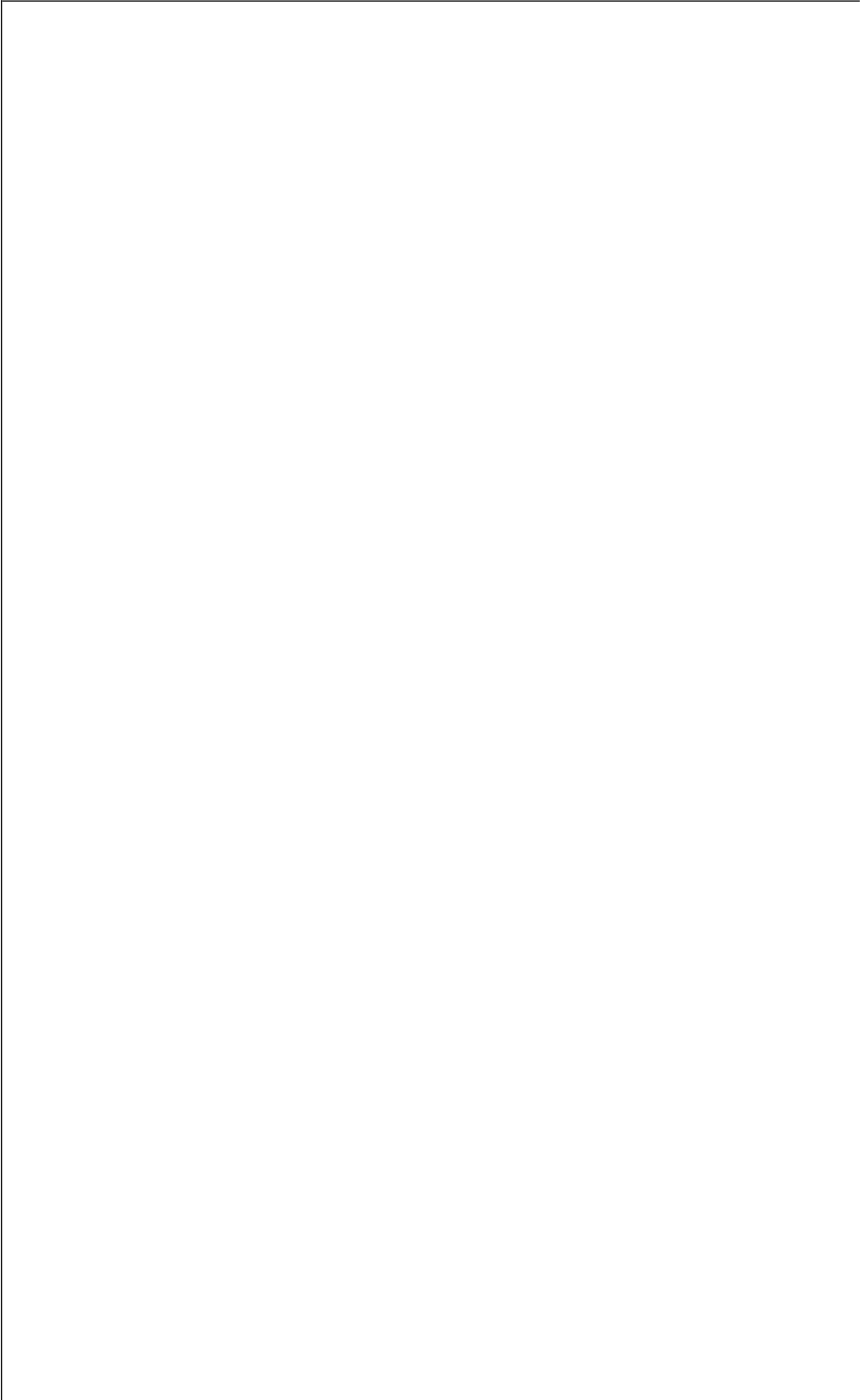
The need for mechanisms to protect prisoners from abuse is recognised in the MSGAP:

- there is a legal process, including hearings for the handling of breaches of prison discipline (r 31-32);
- a prison complaints mechanism (r 35-36);
- the availability of prison medical services (r 22-26);

²² *Binse v Williams* (1997) 91 A Crim R 340.

²³ In *Dugan v Mirror Newspapers Limited* (1978) 142 CLR 583 the High Court held that under the common law a prisoner still under sentence for a capital offence could not maintain an action for a civil wrong. Barwick CJ (587) left open the question of whether a prisoner convicted of a non-capital felony could sue in the courts while serving a sentence. In *Macari v Mirror Newspapers Limited* (unreported) 4 March 1980, Cantor J held a person convicted of a non-capital felony who had not finished serving his or her sentence could not bring civil proceedings in the Supreme Court. Following that case the NSW Government enacted the *Felons (Civil Proceedings) Act 1981* which enabled a prisoner convicted of a felony to sue with leave of a court. The legislation was recently tested in *Jal v NSW* Unreported, NSW CA 40300/97, 4.12.1998 where the Court of Appeal granted leave after the commencement of proceedings against the Government in relation to injuries suffered by the prisoner in prison.

²⁴ *Commonwealth Electoral Act 1918*, s.93(8)(b) provides a person may not vote in a Federal election if he or she "is serving a sentence of 5 years or longer for an offence against the law of the Commonwealth or of a State or Territory." The majority of the Joint Standing Committee on Electoral Matters has recommended the prohibition be extended to cover all people serving a prison sentence. South Australia removed the restriction in 1976 following an amendment to the Constitution of that State. Victoria, Queensland, ACT and NT electoral legislation provide for the same restrictions as those in the Commonwealth Act; NSW and WA, where the sentence is 12 months or longer; and Tasmania has a complete prohibition. For more details see 'Ballotless and Behind Bars - The Denial of Franchise to Prisoners' by Graeme Orr, *Federal Law Review* (Volume 26, No.1, 1998), Australian National University, Faculty of Law at p 55.



- the basic principle that “prisoners shall at all times be addressed in a fashion commensurate with the respect due to them as human beings” (r 6(c)).

There is no question in the mind of the Committee that the capacity in clause 51 for the prisoner to object is necessary and consistent with the type of protections contained in the MSGAP.

Samples from those convicted prior to the legislation

The Committee’s decision to recommend that it should be possible to take samples from those imprisoned prior to the commencement of the legislation recognises there is an overwhelming public interest in having them available where the offender has committed a serious offence. Again, we are proposing different standards for prisoners. We have concluded that it is warranted. If a court considered the conduct which led to the sentence was such that it justified imprisoning the person in relation to a serious offence, that in itself is an indication that there is a need to collect the sample.

In the US the sampling of those with convictions prior to the enactment of the legislation has been extended to prisoners who have been released on parole. As a result thousands have been rounded up by the police and subjected to compulsory sampling. The Committee did not consider this type of provision because it would be overly disruptive.

However, the recent Victorian amendments provide that with court approval a sample may be taken from: anyone convicted of listed serious offences or any person who was convicted of one of the listed offences prior to the commencement of the legislation who is still being detained as a result of committing the offence.

The court hearing the application must:

- take into account the seriousness of the circumstances of the offence; and
- be satisfied that, in all the circumstances, the making of the order is justified.²⁵

The Committee also notes that in Canada, (which has a Bill of Rights), the proposed legislation provides for court authorised retrospective taking of the samples in similar circumstances to those allowed in Victoria.²⁶

25 Act 81 of 1997 - Amendment to the *Crimes Act 1958* - s.464ZF.

26 *DNA Identification Act* - Amendment to the *Criminal Code* - s.487.052.

51. Forensic procedures authorised to be carried out on certain serious offenders in prison and other places of detention

(1) A person is authorised to carry out a forensic procedure to which this Division applies on a person (other than a child or an incapable person) who:

(a) is a serious offender, whether found guilty of the serious offence concerned before or after the commencement of this section, and

(b) is serving a term of imprisonment in a prison or other place of detention for the offence,

unless an objection to the carrying out of the forensic procedure is made under section 55* and upheld.

(2) A person is authorised by this section to carry out a forensic procedure in accordance with Division 6 as applied by section 56 and not otherwise.

(3) Nothing in this section authorises the carrying out of a forensic procedure on a person serving a sentence of imprisonment by means of home detention.

52. Forensic procedures authorised to be carried out on serious offenders who are not in prisons or other places of detention

(1) A person is authorised to carry out a forensic procedure to which this Division applies on a person (including a child or incapable person) who:

(a) is a serious offender found guilty of the serious offence concerned on or after the commencement of this section, and

(b) is not a person on whom the forensic procedure is authorised to be carried out by section 51,

by order of a court under section 57.

(2) A person is authorised by this section to carry out a forensic procedure in accordance with Division 6 as applied by section 50* and not otherwise.

The Committee recognises that the collection of these samples in the prison environment is not as difficult to justify as chasing down parolees who have been released in the community. However, the Committee recognises that with offenders who have committed very serious offences, such murder, or where recidivism is high, (such as sexual offences or other offences which link with re-offending in relation to other serious crimes) the balance is in favour of the public interest in protecting the community rather than the public interest in not having retrospective legislation.

The Committee suggests that perhaps the power to take the samples should be restricted to a list of offences whose selection is based on reputable research into recidivism or the particular severity of the offence. Clause 51 could refer to 'prescribed serious offences'. It may be that a broader 'serious offence' test which is not as strictly based on the recidivism rationale can be justified for those found guilty of offences after the commencement of the legislation, but a more restrictive rationale is warranted in relation to the taking of samples from people imprisoned before the legislation was commenced. However, that approach would complicate the Model Bill further and the Committee is not convinced it is justified.

The Committee proposes that the grounds for taking these samples be similar to those in the Victorian legislation. Court consideration of the Victorian legislation suggests that judges will take into account the likelihood of reoffending, so it is probably not necessary to complicate the legislation further by prescribing a more restricted list of serious offences. Details of court consideration of the grounds is discussed below in the commentary on clause 56.

A term of imprisonment in a prison or other place of detention

Subclause 51(3) makes it clear the Committee does not believe this procedure should apply to those on home detention. As mentioned above, the Committee considers the status of being imprisoned in an institution is an important consideration in its decision to recommend a different procedure for prisoners. Carrying out the procedure in the person's home, or by extracting the person from the home, where there may be other family members and a neighbourhood to disturb, is different. Further, the practical considerations concerning the prison environment will be less of a problem.

Clause 52. Forensic procedures authorised to be carried out on serious offenders who are not in prison and other places of detention

The rationale for treating serious offenders who are not in prison differently is dealt with in the Committee's discussion of clause 51. Clause 52 provides for a procedure which is very similar to clause 69 of the 1995 Model Bill. The grounds for the court authorisation are less difficult for the applicant to establish. This will be discussed in further detail in the commentary on clause 56.

53. Scope of authorisation

Nothing in this Subdivision authorises the carrying out of a forensic procedure on a serious offender who is a suspect otherwise than in accordance with Divisions 2-5.

Clause 53. Scope of authorisation

This clause makes it clear that where the serious offender is a 'suspect' for the purposes of the legislation, he or she should be treated like any other suspect. See clause 1 of the Model Bill for the definition of 'suspect' (Appendix 3).

54. Carrying out forensic procedure on serious offender in prison or other place of detention

- (1) A police officer may request a serious offender (other than a child or incapable person) who is serving a sentence of imprisonment in a prison or other place of detention to permit a forensic procedure to which this Division applies to be carried out on the serious offender.
- (2) The police officer must inform the serious offender of the following:
 - (a) the purpose for which the forensic procedure is required,
 - (b) if the police officer wants the forensic procedure carried out in relation to an offence-the offence concerned,
 - (c) the way in which the forensic procedure is to be carried out,
 - (d) that the forensic procedure may produce evidence against the serious offender that might be used in a court of law,
 - (e) that the forensic procedure will be carried out by a person who may carry out the procedure under Part 6 as applied by section 50,

Note. See section 38.

- (f) if the forensic procedure is the taking of a sample of blood, that the serious offender may request that the prison medical officer be present while the blood is taken,
 - (g) that the serious offender may object to the carrying out of the forensic procedure within a period of 5 days after being requested to permit it to be carried out,
 - (h) the consequences of not objecting, as specified in subsection (3).
 - (3) The police officer must inform the serious offender that:
 - (a) if the serious offender does not object to the carrying out of the forensic procedure within a period of 5 days after being requested to permit it, the forensic procedure will, after the police officer has given the serious offender at least 2 hours notice, be carried out in accordance with Division 6 as applied by section 50, and
 - (b) that information obtained from analysis of forensic material obtained may be placed on a DNA database and used for the purposes of a criminal investigation or for any other purpose for which a DNA database may be used under Division 12.

Clause 54. Carrying out forensic procedure on serious offender in prison or other place of detention

Consistent with the approach of the whole Bill this clause is designed to ensure the person who will be the subject of the procedure is fully informed of what is involved with the procedure and his or her options. This includes the option of objecting which was discussed above.

Paragraph (3)(a) is important because it requires the prisoner to be specifically informed that a failure to object will give the police full authority to carry out the procedure after 5 days if the person does not object. As a courtesy, the Committee felt that the prisoner should be given at least 2 hours notice of the time that the procedure is to be carried out. It was felt it would often be difficult to nominate a time 5 days in advance of the procedure and that it would be disruptive not to give the prisoner a reminder prior to the carrying out of the procedure. The 2 hour time period seemed reasonable, but the Committee was not certain about what would be most appropriate and would be grateful for any suggestions in support of a different period from those with experience of the prison system.

Paragraph (3)(b) is to ensure the prisoner is informed that the information will be placed on the DNA database and the purposes for which it may be used.

55. Objections

- (1) A serious offender may object to the carrying out of a forensic procedure on the serious offender within a period of 5 days after being requested to permit the carrying out of the forensic procedure.
- (2) The forensic procedure must not be carried out:
 - (a) before the end of the period of 5 days or, if an objection is made, until the objection is determined, and
 - (b) unless the serious offender is given at least 2 hours notice of the date and time at which it is to be carried out.
- (3) An objection is to be made in writing and must include the grounds upon which the serious offender intends to rely.
- (4) The objection is to be lodged with the person for the time being in charge of the prison or other place of detention in which the serious offender is serving a term of imprisonment.
- (5) The person with whom the objection is lodged must refer the objection to the appropriate officer of a court prescribed by regulations for the purposes of this section for determination of the objection.
- (6) The objection is to be referred as soon as practicable after it is lodged.
- (7) Rules of court may be made with respect to objections made under this section and the giving of notice of the hearing of any objection to any interested person.

Clause 55. Objections

The rationale for having the right to object and the period of notice is discussed above in the commentary on clauses 51 and 54.

Subclause 55(4) provides that the objection must be lodged with the person in charge of the prison or place of detention. It would not appear to be practical for a prisoner to lodge it with the police or the court.

Subclause 55(7) will enable the courts to determine appropriate rules for the service of the notice of hearing and objection document.

56. Determination of objection

- (1) A court to which an objection is made is to hear and determine the objection as soon as possible after it is referred.
- (2) The court may:
 - (a) uphold the objection, or
 - (b) order the serious offender to permit the forensic procedure to be carried out.
- (3) In determining an objection, the court is to take into account the following:
 - (a) whether this Part would authorise the forensic procedure to be carried out but for the objection,
 - (b) the seriousness of the circumstances surrounding the commission of the serious offence,
 - (c) whether the carrying out of the forensic procedure is justified in all the circumstances.

1995 MODEL BILL

Division 11 - Taking of blood samples and fingerprints after conviction

Orders for taking of blood samples and fingerprints following conviction

69 (1) In this section:

“**serious offence**” means an offence punishable by a maximum penalty of 5 or more years of imprisonment.

- (2) If a court finds a person guilty of a serious offence a police officer may apply to the court for an order directing the person to give a blood sample.
- (3) If a court finds a person guilty of an indictable offence a police officer may apply to the court for an order directing the person to permit a police officer to take fingerprints.
- (4) An application under subsection (2) or (3):
 - (a) may only be made after the expiration of any appeal period or after the final determination of any appeal, whichever is later; and
 - (b) may only be made if, at that time, the conviction stands.

Clause 56. Determination of objection

This provision empowers the court to determine the objection.

Subclause 56(3) details the matters the court must take into account. As has been mentioned above in the commentary at the beginning of this Division, these are much more permissive than subclause 69(5) of the 1995 Model Bill (see opposite in boxed segment).

Clauses 69 and 70 of the 1995 Model Bill provide for a separate mechanism for collecting samples for the purpose of DNA analysis. It provides that where a person is guilty of a serious offence punishable by a period of 5 or more years imprisonment, and appeal periods have expired, the police may get a court order directing the person to give a blood sample. The police must satisfy the court that the circumstances of the offence for which the person was convicted are serious; that there are reasonable grounds to believe that the person may have committed some other serious offence or may commit some other serious offence in the future. Separate rules apply to fingerprints - they may be collected in relation to less serious 'indictable offences' (maximum penalty of 2 or more years imprisonment). As mentioned in the introduction, there are strong arguments that the taking of fingerprints is far less invasive of privacy and that the taking and use of the DNA samples should therefore be restricted to more serious offences.

Under the 1995 Model Bill the grounds for obtaining the blood samples after conviction reveal a restricted purpose for the procedure - again it is an investigation of the conduct or prospective conduct of the person who was convicted. There have to be reasonable grounds to believe the person will commit some other serious offence, so there would need to be evidence that the person was recidivist (for example, a paedophile).

The approach proposed in this discussion paper is based on view that if a person is convicted of a serious offence, then it is reasonable for society to expect that person to not only surrender their freedom to mix with society for some time, or to live in accordance with conditional freedom, (imprisonment or release on a recognisance or parole conditions), but to also be required to give samples to assist with the detection of a repeat offence. Indeed providing the sample may even deter the offender from committing further crime.

This rationale has more to do with the fact the person belongs to a class of people who are likely to reoffend rather than the specific circumstances of the person.

The matters that are to be taken into account are identical to what the court will need to consider when authorising the taking of a sample from serious offenders who are not in prison. They are also much the same as what

- (5) In determining whether to make such an order, the court is to take into account:
 - (a) the seriousness of the circumstances surrounding the commission of the offence for which the person was convicted and the gravity of the offence; and
 - (b) in the case of an application for an order to give a blood sample - whether there are reasonable grounds to believe that the person may have committed some other serious offence or may commit some other serious offence in the future; and
 - (c) in the case of an application for an order for the taking of fingerprints - whether there are reasonable grounds to believe that the person may have committed some other indictable offence or may commit some other indictable offence in the future.

56. Determination of objection

- (1) A court to which an objection is made is to hear and determine the objection as soon as possible after it is referred.
- (2) The court may:
 - (a) uphold the objection, or
 - (b) order the serious offender to permit the forensic procedure to be carried out.
- (3) In determining an objection, the court is to take into account the following:
 - (a) whether this Part would authorise the forensic procedure to be carried out but for the objection,
 - (b) the seriousness of the circumstances surrounding the commission of the serious offence,
 - (c) whether the carrying out of the forensic procedure is justified in all the circumstances.

is taken into account in the Victorian legislation.²⁷ We have the benefit of some court consideration of the Victorian provisions. In *Faure*²⁸ Hampel J differed from a decision of Judge Kelly of the County Court in *Simeth-Hackling and Florence*²⁹ who had taken the view that the applicant needed to show the probability of reoffending (reading the provision down to the point it had a similar meaning to subclause 69(5) of the 1995 Model Bill). Hampel J adopted an approach which the Committee considers to be a more appropriate and likely interpretation of proposed clause 56:

“I do not think it is necessary to formulate a precise test for the purpose of the exercise of this aspect of the discretion. It is sufficient to look at all the circumstances and in a commonsense way assess the significance of the risk of reoffending.

The fact that the conviction is for a serious offence has two aspects. One is that it brings it into the category of offences in respect of which such the section applies. But, in the discretionary area, the consideration is not just the seriousness of the offence, but also the nature of the offence. For example, murder or manslaughter may be committed in circumstances which are confined and peculiar so that the risk of re-offending is slight despite the fact that the offence is a very serious one. On the other hand there may be a series of other offences which show a significant risk of repetition by their very nature and the circumstances in which the offences are committed. Those are all discretionary considerations which are relevant.

....The question is whether I should make an order in this case. The conviction of the respondent is for murder in circumstances in which he fired a revolver at the head of the deceased. It was a revolver which he had with him for some time. Although the offence took place in the context of a relationship between the two people, nevertheless, it involved the use of a firearm, which he had been carrying for purposes that have not been properly explained. I note that, whilst the theft convictions are of less significance, the conviction for possession of a proscribed weapon is.

I think the combination of the possession of the revolver, the prior conviction for having a proscribed weapon and the nature and seriousness of the offence for which the respondent has been convicted, calls for the exercise of the discretion in favour of granting the order sought. I propose to make the order.”

27 *Crimes Act 1958* - subsection 464ZF(8).

28 Unreported, 15 December 1998, Supreme Court.

29 Unreported, 6 July 1998, County Court.

The cases of *Simeth-Hackling and Florence* and *Faure* show in very clear terms how difficult it would have been to get an order under clause 69 of the 1995 Model Bill. The cases also show that it is unlikely the proposed matters to be taken into account will result in applications being rubber-stamped by the courts.

There is no requirement of proof of propensity to reoffend in the legislation we have reviewed from other countries. For example, the proposed Canadian legislation is in similar terms to the model and the New Zealand legislation³⁰ requires authorisation of a judge where he or she is satisfied:

- that the respondent has been convicted of the relevant offence to which the application relates; and
- that the conviction has not been quashed.

Where there is court authorisation in the US, the discretion of the court is limited to determining whether the taking of the samples comes within the legislation.³¹ In many places the taking of the samples from serious offenders is automatic.³² The proposed Model Bill provides for a high level of accountability by world standards. Clause 69 of the 1995 Model Bill is the most restrictive approach the Committee has seen anywhere.

³⁰ *Criminal Investigations (Blood Samples) Act 1995*, sections 39 and 40.

³¹ For example, *State DNA Data Bank and To Genetic Testing Act (No. 160) 1998* (Vermont) - section 1935(d).

³² For example, German amendments passed during 1998.

57. **Order for taking of blood samples, samples by buccal swab, hair samples or fingerprints of serious offender who is not in prison or other place of detention (former cl 69)**
- (1) A police officer may at any time apply to the sentencing court for an order directing a serious offender who is not a person on whom a forensic procedure is authorised to be carried out by section 51 to permit a forensic procedure to which this Division applies to be carried out on the serious offender.
 - (2) A police officer may at any time make such an application to the sentencing court at the time the serious offender is sentenced.
 - (3) An order under this section:
 - (a) does not have effect until after the expiration of any appeal period or after the final determination of any appeal in relation to the serious offence concerned, whichever is later, and
 - (b) has effect only if, at that time, the conviction stands.
 - (4) In determining whether to make an order under this section, a court is to take into account:
 - (a) whether this Part would authorise the forensic procedure to be carried out in the absence of the order,
 - (b) the seriousness of the circumstances surrounding the commission of the serious offence,
 - (c) whether the carrying out of the forensic procedure is justified in all the circumstances

Clause 57. Order for the taking samples from a serious offender who is not in prison or other place of detention.

Clause 57 provides the basis for prior court authorisation of the procedure where the serious offender is not in prison, but that is as far as it goes in terms of its similarity to clause 69 of the 1995 Model Bill. The matters that are to be taken into account by the court when making the order are identical to what is proposed in clause 56 and explained in the accompanying commentary. The same concerns about the overly restrictive requirements of clause 69 also apply here.

This clause also makes it clear the order can be made at the time of sentencing. For reasons of efficiency and convenience to all involved, particularly the offender, it is desirable that the order be made at sentencing.

58. Taking of blood samples, samples by buccal swab, hair samples and fingerprints following conviction (former cl 70)

- (1) If a court orders a serious offender who is in prison or another place of detention to permit a forensic procedure to be carried out, the court may order that a police officer, together with a person who, under Part 6 as applied by section 50*, may carry out the forensic procedure, be permitted to attend on the serious offender in the prison or place of detention to allow the forensic procedure to be carried out.
- (2) If a court orders a serious offender who is not in a prison or another place of detention to permit a forensic procedure to be carried out, the court may order the serious offender to attend at a police station (or other place specified by the court) within a period specified by the court to allow the forensic procedure to be carried out.
- (3) A serious offender ordered to permit the carrying out of a forensic procedure must not intentionally refuse or fail to permit the forensic procedure to be carried out.

Maximum penalty: 12 months imprisonment.

- (4) A serious offender who does not object to the carrying out of a forensic procedure within 5 days after being requested to permit it to be carried out must not intentionally refuse or fail to permit the forensic procedure to be carried out.

Maximum penalty: 12 months imprisonment.

Clause 58. Taking of blood samples, samples by buccal swab, hair samples and fingerprints following conviction

This provision obliges the serious offenders to co-operate with the carrying out of forensic procedures which are authorised by the court.

Readers will note that the offences do not specify a defence of 'reasonable excuse.' The offences are drafted on the assumption that the Model Criminal Code will apply in each jurisdiction. Chapter 2 of the Model Criminal Code provides for a range of general defences which make it unnecessary to provide for this type of vague defence. Jurisdictions which have not adopted the Model Criminal Code at the time they implement the Model Bill should consider whether they need to include the defence of reasonable excuse.

Division 8 - Carrying out of forensic procedures on volunteers

59. Carrying out of forensic procedures on volunteers

(1) In this Part:

volunteer means a person:

- (a) who volunteers to a police officer to undergo a forensic procedure, or
- (b) in the case of a child or incapable person - whose parent or guardian volunteers to a police officer that the child or incapable person undergo a forensic procedure.

(2) A person is authorised to carry out a forensic procedure:

- (a) on a volunteer other than a child or incapable person—with the informed consent of the volunteer given in accordance with section 60, or
- (b) on a volunteer who is a child or an incapable person—with the informed consent of the parent or guardian of the volunteer given in accordance with section 60 or with the consent given by order of a magistrate under section 63.

(3) Nothing in this section authorises a person to carry out a forensic procedure on a child or an incapable person who objects to or resists the carrying out of the forensic procedure.

(4) Division 6 applies to the carrying out of a forensic procedure under this Division as if the references to the suspect in that Division were references to volunteers and other persons referred to in this section. A person is authorised by this section to carry out a forensic procedure on a volunteer or other person in accordance with Division 6 as so applied and not otherwise.

Division 8 Carrying out of forensic procedures on volunteers.

Division 8 deals with volunteers. The 1995 Model Bill was limited to suspects and some serious offenders. Section 72 of the 1995 Model Bill mentions that it does not in any way affect the right of police from asking non-suspects to undergo a forensic procedure or carrying out such a procedure on a non-suspect who has consented. There is nothing to stop police from persuading a whole town or suburb to consensually give forensic samples for the purpose of DNA testing. This has happened at least on one occasion in Australia (on a limited basis in Western Australia), often in the United Kingdom and recently in Germany.

It would appear that if Governments see fit to regulate the consensual taking of samples from suspects (recording consent, ensuring the person understands the procedure, etc), it is also important to regulate the taking of samples from non-suspects. In some cases the volunteers may be potential suspects (where suspicion is based on a hunch but not on reasonable grounds as required in the Model Bill - see clause 1, the definition of 'suspect'). Without proper safeguards, there is potential for the legislation to be side-stepped. In other cases the volunteers may simply be in a large pool for comparison purposes, but those cooperating are surely entitled to some statutory safeguards concerning informed consent, the ability to withdraw consent, proper procedures and controls over the storage, security, use and disclosure of information. The consequences of mixing up the data with someone else's or using it for purposes other than the immediate investigation or something other than traditional law enforcement will be of concern to participants.

The Committee therefore believes the legislation should have more comprehensive procedures for the taking of samples from volunteers (many of whom will be victims).

The recent Victorian and South Australian legislation provides for more comprehensive procedures which should now be incorporated into the Model Bill. The legislation in those States provide a forensic procedure may be carried out consensually on a person who is not under suspicion and rules which safeguard informed consent and the ability to withdraw consent.³³. The Victorian legislation provides for a procedure where the police can obtain court authorisation to keep the sample where consent from a 'non-suspect' and is later withdrawn during the investigation of the commission of an indictable offence:

- there is material reasonably believed to be from a person at a crime scene, and

³³ Sections 464ZGB - 464 ZGF, *Crimes Act 1958*(Vic) and sections 7(1), 8 and 9, *Criminal Law (Forensic Procedures) Act 1998* (SA)

59. Carrying out of forensic procedures on volunteers and others

(1) In this Part:

volunteer means a person:

- (a) who volunteers to a police officer to undergo a forensic procedure, or
- (b) in the case of a child or incapable person - whose parent or guardian volunteers to a police officer that the child or incapable person undergo a forensic procedure.

(2) A person is authorised to carry out a forensic procedure:

- (a) on a volunteer other than a child or incapable person—with the informed consent of the volunteer given in accordance with section 60, or
- (b) on a volunteer who is a child or an incapable person—with the informed consent of the parent or guardian of the volunteer given in accordance with section 60 or with the consent given by order of a magistrate under section 63.

(3) Nothing in this section authorises a person to carry out a forensic procedure on a child or an incapable person who objects to or resists the carrying out of the forensic procedure.

(4) Division 6 applies to the carrying out of a forensic procedure under this Division as if the references to the suspect in that Division were references to volunteers and other persons referred to in this section. A person is authorised by this section to carry out a forensic procedure on a volunteer or other person in accordance with Division 6 as so applied and not otherwise.

- police reasonably believe the data from the sample from the volunteer has probative value in relation to the indictable offence being investigated.

The court has to be satisfied on the balance of probabilities that there are reasonable grounds to believe that the volunteer has committed the offence and that making an order is justified in all the circumstances. This streamlines the procedure by relieving everyone involved from having to start the procedure again under the general provisions in relation to suspects.

DNA analysis can be used in many different ways outside the criminal justice system. In the US it has been used in the workplace and by the insurance industry to assess risk. There are no doubt countless possible applications in various sectors of the economy. Calls for more general regulation of the collection and use of these samples were made during the Senate debate of the Commonwealth *Crimes Amendment (Forensic Procedures) Act 1998*.³⁴ The Committee's focus is on the collection and use of such information in the criminal justice system. It is quite clear these broader issues need to be addressed, but they are general privacy policy issues. In the meantime the Committee recognises that more effective use of the information in the criminal justice system needs to proceed and that its collection and use in that context should be regulated separately.

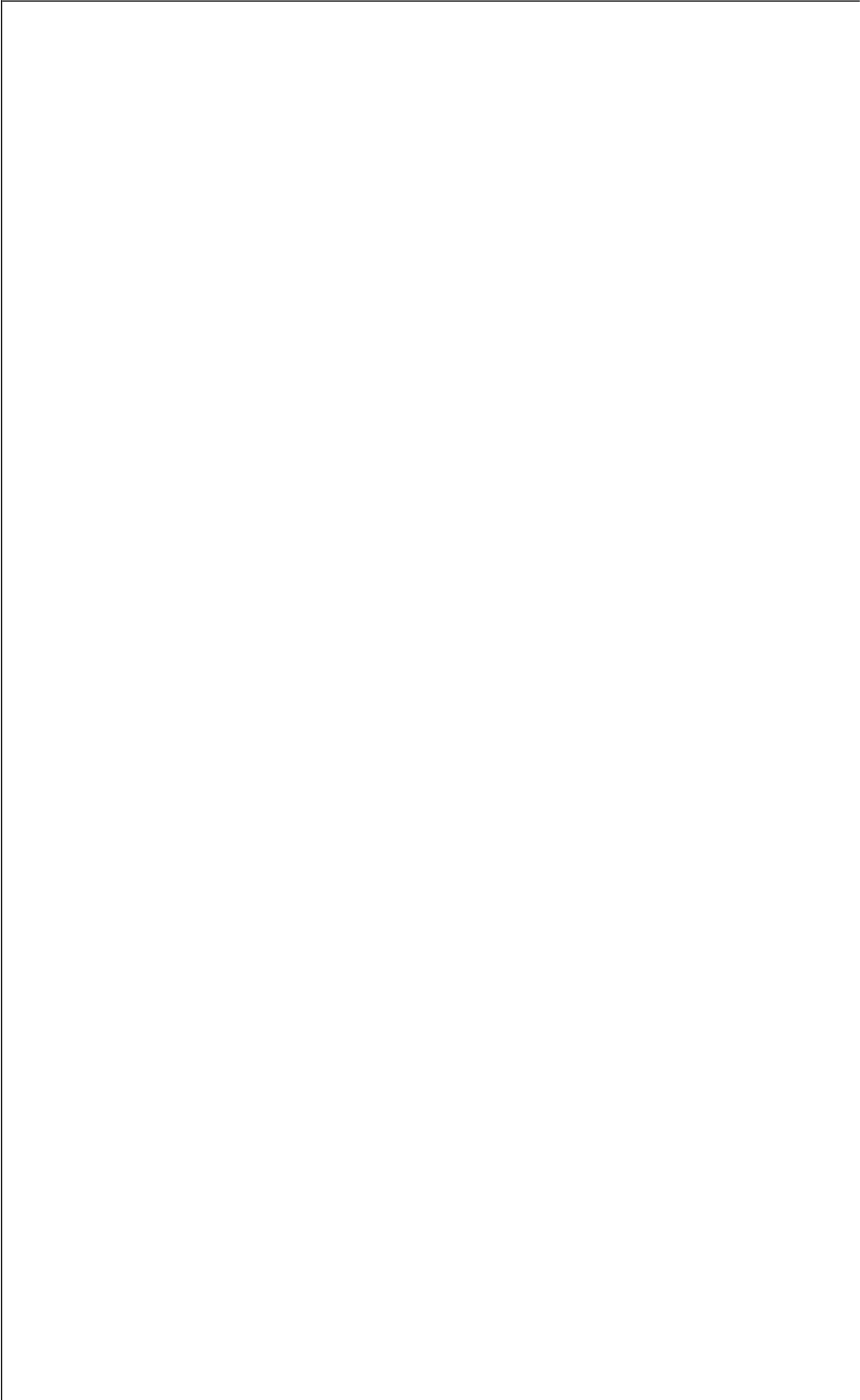
The development of the general legislation may ultimately involve consequential changes to the model proposed by the Committee, but any such changes can be addressed later.

Clause 59. Carrying out of forensic procedures on volunteers and others

The Committee has opted for a simple definition of 'volunteer'. Consideration was given to specifically excluding 'suspects', but there is a clear procedure in relation to them elsewhere in the Model Bill. Where someone is identified as being a suspect, those procedures should be followed. There is no point in putting restrictions on the definition of volunteer.

Subclause 59(2) provides that the procedure is only authorised if there is informed consent from the volunteer, or parent or guardian where the volunteer is a child or incapable person, or by order of a magistrate under clause 63. This is consistent with the procedures elsewhere in the Model Bill that operate in

³⁴ Australian Democrat Senator Stott Despoja tabled the *Genetic Privacy and Non-discrimination Bill 1998*. It contains provisions governing proper and specific authorisation of disclosure of DNA data to third persons; the capacity for those who have had data collected about them to inspect and copy the information, and the ability to obtain amendments where appropriate; provisions governing the storage of the information; prohibitions on discrimination on the basis of DNA data by employers or potential employers and insurers; requirements in relation to research protocols; the power for the award of damages where there is a breach and authorisation of the Privacy Commissioner to investigate breaches. Similar legislation is being developed in the USA.



relation to suspects who are children or incapable, and other comprehensive police powers legislation.³⁵ The Committee has created a special procedure which recognises that parents or guardians will not always look after the best interests of the child (for example the parent may be a suspect in the investigation of an assault on the child).

Subclause 59(3) recognises that while a child or incapable person may not be able to consent, the procedure should not proceed if they are opposed to participating. This procedure is for victims and others who wish to help police investigations. It has been made clear that there is no authorisation if the child or incapable person objects or resists.

As with serious offenders, subclause 59(4) ensures that all the requirements concerning the manner in which the forensic procedures are carried out that apply to suspects also apply to volunteers. Division 6 deals with performing the procedure in a dignified manner, the force that may be used, the qualifications and gender of the person performing the procedure, who may be present, recording, safe handling of the samples and provision for the results to be given to the person who gives the sample. For further details see Appendix 3.

³⁵ For example, s.3ZN, Part 1AA of the Commonwealth *Crimes Act 1914*.

- 60. Informed consent of volunteer or parent or guardian of volunteer**
- (1) A volunteer, or parent or guardian of a volunteer, gives informed consent in accordance with this section if the volunteer, parent or guardian consents in the presence of an independent person (not being a police officer) after a police officer informs the volunteer, parent or guardian of the following matters:
 - (a) the way in which the forensic procedure is to be carried out,
 - (b) that the volunteer is under no obligation to undergo the forensic procedure,
 - (c) that the forensic procedure may produce evidence that might be used in a court of law,
 - (d) to the extent that they are relevant, the matters specified in subsection (2),
 - (e) that the volunteer or the parent or guardian may consult a legal practitioner of the volunteer's or parent or guardian's choice before deciding whether or not to consent to the forensic procedure,
 - (f) that the volunteer or parent or guardian may at any time withdraw consent to undergoing the forensic procedure or retention of the forensic material taken or of information obtained from the analysis of that material.
 - (2) The police officer must inform the volunteer, or parent or guardian of the volunteer, of the following:
 - (a) that information obtained from analysis of forensic material taken may be placed on the DNA matching database,
 - (b) if the police officer intends the information to be placed on the limited purposes index of that database - the purpose for which it is to be placed on that index and that the information may be used only for that purpose,
 - (c) if the police intends the information to be placed on the unrestricted purposes index of that database - that the information may be used for the purposes of a criminal investigation or any other purpose for which the database may be used under Division 12,
 - (d) that information as to the identity of the volunteer may be placed on the DNA identification database.

Clause 60. Informed consent of volunteer or parent or guardian of volunteer

This clause provides detail of what the volunteer must be informed. The standards take into account that the volunteer may be someone who later becomes a suspect (hence the requirement to inform the person that the procedure may produce evidence that may be used in court and of the option of getting legal advice).

Subclause 60(2) focuses on ensuring the volunteer is properly informed about the DNA databases and the purposes for which the information will be used. The different types of databases will be explained below where the commentary deals with Division 12, but it is envisaged that DNA profiles obtained from volunteers will be used in different ways. The Committee considers the descriptions here of what the volunteer will be informed as a summary which when the database is established will be elaborated upon with plain language documentation and, if helpful, illustrations designed to ensure there is informed consent. The Committee strongly recommends that such material should be devised with the aid of those appropriately qualified in plain language methods and in consultation with the privacy and other bodies with an interest in this issue.

61. Recording of giving of information and consent

- (1) The police officer must, if practicable, ensure that the giving of the information about the proposed forensic procedure and the volunteer's or volunteer's parent's or guardian's responses (if any) are recorded by audio tape, video tape or other electronic means.
- (2) If tape recording the giving of information and the volunteer's, parent's or guardian's responses (if any) is not practicable, the police officer must ensure that a written record of the giving of the information and the volunteer's, parent's or guardian's responses (if any) is made, and then a copy of the record is made available to the volunteer, parent or guardian.

62. Withdrawal of consent

- (1) If a volunteer, parent or guardian expressly withdraws consent to the carrying out of a forensic procedure under this Division (or if the withdrawal of such consent can reasonably be inferred from the volunteer's, parent's or guardian's conduct) before or during the carrying out of the forensic procedure:
 - (a) the forensic procedure is to be treated from the time of the withdrawal as a forensic procedure for which consent has been refused, and
 - (b) the forensic procedure is not to proceed except (in the case of a child or incapable person) by order of a magistrate under section 63.
- (2) If, after the carrying out of a forensic procedure under this Division on a volunteer, the volunteer, or the parent or guardian of the volunteer, expressly withdraws consent to retention of the forensic material taken or of information obtained from the analysis of that material the forensic material and any information obtained from analysis of the material is, subject to any order made under section 64, to be destroyed as soon as possible after the consent is withdrawn.

Clause 61. Recording of giving of information and consent

Some may think this requirement is excessive. Recording is now a standard procedure in most jurisdictions for suspects. It is only reasonable the same standard applies to volunteers. Recording was initially resisted by police when it was proposed it should be introduced in relation to the investigation of suspects. Now it is almost universally accepted and methods have improved to the point now where hand-held recording devices can be used on the field. The Committee therefore believes the requirement is reasonable and should be able to be met even in relation to mass screenings.

Clause 62. Withdrawal of consent

Like any volunteer, there should always be the right to withdraw consent. This could be for all sorts of reasons including misgivings about the system for dealing with DNA profiles. It is therefore appropriate that the legislation should have a simple procedure for withdrawal. Given the voluntary nature of the procedure, it is not proposed that it should be required in writing. A verbal objection or non-verbal resistance should be sufficient. Once consent is withdrawn, unless there is a court order to the contrary, material and information that has already been collected should be destroyed.

63. Circumstances in which magistrate may order carrying out of forensic procedure

- (1) A magistrate may order that consent is given to the carrying out of a forensic procedure on a child or incapable person if:
 - (a) the consent of the parent or guardian of the child or incapable person to the carrying out of the forensic procedure cannot reasonably be obtained from a parent or guardian of the child, or
 - (b) the parent or guardian of the child or incapable person consented to the carrying out of the forensic procedure, but subsequently withdraws that consent.
- (2) In determining whether to make an order under this section, the magistrate is to take into account the following:
 - (a) whether this Part would authorise the carrying out of the forensic procedure apart from this section,
 - (b) if the forensic procedure is being carried out for the purposes of the investigation of a particular offence—the seriousness of the circumstances surrounding the commission of the offence,
 - (c) the best interests of the child or incapable person,
 - (d) so far as they can be ascertained, any wishes of the child or incapable person with respect to whether the forensic procedure should be carried out,
 - (e) any wishes expressed by the parent or guardian of the child or incapable person with respect to whether the forensic procedure should be carried out.
 - (f) whether the carrying out of the forensic procedure is justified in all the circumstances.

Clause 63. Circumstances in which magistrate may order carrying out of forensic procedure on a child or incapable person

As mentioned above, there will be uncommon situations where it is necessary to carry out a forensic procedure on a child or incapable person because the parent or guardian is for some reason not looking after the best interests of the child or incapable person. The parent or guardian may have his or her own interests at heart, rather than those of the child or incapable person. There are plenty of situations where the suspect is a parent or guardian and their child is a victim or witness. There also may be situations where it is not possible to find a parent or guardian because the child or incapable person either does not know where they are or will not reveal the identity or whereabouts of the parent or guardian.

Subclause 63(2) requires the magistrate to take into account the best interests and wishes of the child or incapable person, and the wishes of the parent or guardian. There will be other situations where the parent may have legitimate reservations.

64. Retention of forensic material by order of a magistrate after volunteer withdraws consent

- (1) An authorised applicant may apply to a magistrate for an order under subsection (2).
- (2) A magistrate may order that forensic material taken or information obtained from carrying out of a forensic procedure on a volunteer who withdraws consent to the retention of the material be retained if the magistrate is satisfied:
 - (a) that during an investigation into the commission of a serious offence material reasonably believed to be from the body of a person who committed the offence had been found:
 - (i) at the scene of the offence, or
 - (ii) on the victim of the offence or anything reasonably believed to have been worn or carried by the victim when the offence was committed, or
 - (iii) on the volunteer or anything reasonably believed to have been worn or carried by the volunteer at the scene of the offence or when the offence was committed, or
 - (iv) on an object or person reasonably believed to have been associated with the commission of the offence, and
 - (b) there are reasonable grounds to believe that information obtained from analysis of the forensic material taken from the volunteer is likely to produce evidence of probative value in relation to the serious offence being investigated, and
 - (c) the retention of the forensic material taken from the volunteer is justified in all the circumstances.

Clause 64. Retention of forensic material by order of a magistrate after volunteer withdraws consent

This is based on the Victorian legislation. It covers the situation where the person who committed the offence being investigated for some reason volunteered. It could be that the person thought it might throw suspicion on someone else and would buy time that could be used to escape. There could be any number of reasons for this to happen.

Given that the sample has already been taken, it would be pointless to require the police to go through the whole process again using the procedures that apply to suspects.

It also covers situations where the volunteer has been intimidated into withdrawing consent because the person who committed the offence recognises the evidence from the person might result in the police finding out the truth.

Finally, it would cover people who become tired of the process, but where the evidence is a very important part of the investigation of a particularly serious offence.

The listed matters to be taken into account covers different types of volunteers and requires the magistrate to be satisfied the retention of the material is justified in all the circumstances. An order for the retention of material is less onerous than one requiring someone to give a sample, but it can be expected magistrates will only make the order where the circumstances in favour of it are compelling.

Division 9 - Admissibility of evidence

Subdivision 1 - Forensic evidence

65. **Inadmissibility of evidence from improper forensic procedures etc (former cl 49)**

- (1) This section applies if:
- (a) a forensic procedure has been carried out on a **person**, and
 - (b) there has been a breach of, or failure to comply with, any provision of this Part in relation to the forensic procedure (including, but not limited to, any breach or failure to comply with a provision requiring things to be done at any time before or after the forensic procedure is carried out) **or any provision of Division 12 with respect to the recording or use of information on a DNA database.**

- (2) This section does not apply if:
- (a) a provision of this Part required forensic material to be destroyed, and
 - (b) the forensic material has not been destroyed.

Note. Section 66* applies where this Part requires forensic material to have been destroyed.

- (3) This section applies to:
- (a) evidence of forensic material, or evidence consisting of forensic material, taken from the **person** by the forensic procedure, and
 - (b) evidence of any results of the analysis of the forensic material, and
 - (c) any evidence obtained as a result of or in connection with the carrying out of the forensic procedure.
- (4) If this section applies, evidence described in subsection (3) is not admissible in any proceedings against the **person** in a court unless:
- (a) the **person** does not object to the admission of the evidence, or
 - (b) the court is satisfied on the balance of probabilities of matters that justify admission of the evidence in the proceedings despite the failure to comply with the provisions of this Part.

Clause 65 Inadmissibility of evidence from improper forensic procedures

This provision mirrors the 1995 Model Bill but has been extended to cover the procedures governing the use of the DNA databases including those which regulate the taking of samples from volunteers and serious offenders and the use of information derived from those samples. It is a key provision in that it underpins compliance with the requirements of the proposed legislation. It is a strict test commensurate to the importance that the justice system has and should continue to attach to compliance with statutory criminal investigative procedures.³⁶ This approach has been accepted in the Parliaments that have implemented the 1995 Model Bill.

³⁶ *Bunning v Cross* (1978) 141 CLR 54, *Ridgeway v R* [1994-1995] 184 CLR 19, Mason CJ, Deane J and Dawson J at 37, and see *Evidence Act 1995* (Cth,NSW,ACT): s.138 which is a general and less onerous provision.

- (5) The matters that may satisfy the court justify admission of the evidence are the following:
 - (a) the probative value of the evidence, including whether equivalent evidence or evidence of equivalent probative value could have been obtained by other means,
 - (b) the reasons given for the failure to comply with the provisions of this Part,
 - (c) the gravity of the failure to comply with the provisions of this Part,
 - (d) whether the failure to comply with the provisions of this Part was intentional or reckless,
 - (e) the nature of the provision of this Part that was not complied with,
 - (f) the nature of the offence concerned and the subject matter of the proceedings,
 - (g) any other matters the court considers relevant.
- (6) The probative value of the evidence does not by itself justify the admission of the evidence.

- 66 Inadmissibility of evidence where forensic material required to be destroyed (former cl 50)**
- (1) If this Part requires forensic material taken from a **person** by a forensic procedure to be destroyed, subsection (2) applies to:
 - (a) evidence of the forensic material, and
 - (b) if the material has not been destroyed—evidence consisting of the forensic material, and
 - (c) any results of the analysis of the forensic material, and
 - (d) any other evidence made or obtained as a result of or in connection with the carrying out of the forensic procedure.
 - (2) Evidence of the results of the analysis, and the other evidence, is not admissible in any proceedings against the **person**.

Subdivision 2 - Other evidence

- 67 Admissibility of evidence relating to consent to forensic procedures (former cl 51)**

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

- 68 Admissibility of evidence relating to carrying out of forensic procedure (former cl 52)**

Despite section 65 (4), evidence of how a forensic procedure was carried out is admissible in proceedings against a **person** in a court:

- (a) to establish or rebut an allegation that unreasonable force was used to enable the procedure to be carried out, or
- (b) to determine the admissibility of a confession or admission or other evidence adverse to the **person** if the **person** alleges that the evidence was induced or obtained by the use of unreasonable force, or
- (c) to establish or rebut an allegation that the forensic procedure was not carried out in accordance with Division 6.

Clause 66 Inadmissibility of evidence where forensic material required to be destroyed

This is the same clause 50 of the 1995 Model Bill but is extended to cover the new procedures. This approach has been accepted in the Parliaments that have implemented the 1995 Model Bill.

Clause 67 Admissibility of evidence relating to consent to forensic procedures

This is the same clause 51 of the 1995 Model Bill. This approach has been accepted in the Parliaments that have implemented the 1995 Model Bill.

Clause 68 Admissibility of evidence relating to carrying out of forensic procedure

This is the same clause 52 of the 1995 Model Bill but is extended to cover the new procedures. This approach has been accepted in the Parliaments that have implemented the 1995 Model Bill.

69 Obstructing etc the carrying out of forensic procedure (former cl 53)

- (1) This section applies if a police officer or magistrate has ordered the carrying out of a forensic procedure on a suspect under this Part.
- (2) Evidence that the suspect:
 - (a) refused to comply with any reasonable direction in connection with the carrying out of the forensic procedure, or
 - (b) obstructed, resisted, hindered, used violence against, threatened or intimidated a person in connection with the carrying out of the forensic procedure,is admissible in any proceedings against the suspect in respect of a relevant offence.
- (3) Evidence described in subsection (2) is not admissible unless it is established that the suspect:
 - (a) had been informed by a police officer as described in section 1 (4), or
 - (b) otherwise knew,that the fact of refusing to comply with the direction, or obstructing, resisting, hindering, using violence against, threatening or intimidating the person, in connection with the carrying out of the forensic procedure might be used in evidence against the suspect.
- (4) The court or jury may draw such inferences from the evidence described in subsection (2) as appear to the court or jury to be proper in the circumstances, having regard to any evidence given by or on behalf of the suspect.

Clause 69 Obstructing etc the carrying out of forensic procedure

This is the same clause 53 of the 1995 Model Bill and only applies to suspects. It would be inappropriate for it to apply to anyone who has not been identified as a suspect.

Note that this provision only applies where the forensic procedure has been authorised in accordance with the Model Bill. Evidential provisions are used to get law enforcement officers to comply with the requirements of the legislation. Here they are used to encourage compliance on the part of those who are required by the legislation to submit to the procedures. While obstruction can result in prosecution for an offence under clause 48, in the case of very serious charges, the threat of prosecution will not always persuade the person to cooperate. This approach has been accepted in the Parliaments that have implemented the 1995 Model Bill.

Division 10* - Destruction of forensic material

70 Destruction of forensic material where interim order disallowed (former cl 54)

If an interim order for the carrying out of a forensic procedure made under section 26 is disallowed after the forensic procedure is carried out, the investigating police officer must ensure that:

- (a) all forensic material is destroyed, and
- (b) a copy of the results of any analysis of the forensic material is made available to the suspect.

Note. Division 11* contains provisions about making copies of material available to the suspect.

71 Destruction of forensic material after 12 months (former cl 55)

(1) This section applies where forensic material has been taken from a suspect by a forensic procedure carried out under **Division 3, 4 or 5**.

(2) If:

- (a) forensic material has been taken from a suspect, and
- (b) a period of 12 months has elapsed since the forensic material was taken, and
- (c) proceedings in respect of an offence to which the forensic material relates have not been instituted or have been discontinued,

the forensic material must be destroyed as soon as possible.

(3) If forensic material has been taken from a person **who is a suspect** and:

- (a) the person is found to have committed an offence to which the forensic material relates but no conviction is recorded, or
- (b) the person is acquitted of such an offence and:
 - (i) no appeal is lodged against the acquittal, or
 - (ii) an appeal is lodged against the acquittal and the acquittal is confirmed or the appeal is withdrawn,

the forensic material must be destroyed as soon as practicable unless an investigation into, or a proceeding against the person for, another offence to which the forensic material relates is pending.

Division 10 Destruction of forensic material

Clauses 70 to 72 are the same as clauses 54 to 56 of the 1995 Model Bill. The general requirement to destroy the material within 12 months is restricted to situations where the person is a suspect. The destruction of material obtained from volunteers will depend upon what the person agrees. It is also not proposed that there be any obligation to destroy the material after a particular time where the person is a serious offender. A volunteer or serious offender may be content to have the information kept and matched by law enforcement for as long as they like. We have been advised by police that some serious offenders prefer that the DNA profile be kept so that the police do not approach them whenever a similar offence is committed. They value DNA matching as a procedure which can exclude them from investigations.

Where no offence is proved or the charges are dropped the suspect should be entitled to be treated in no way different from anyone else in the community. To do otherwise would undermine the justice system by enabling police to take action which would result in the giving and retention of forensic material regardless of whether it is shown later to be justified.

One important change from the 1995 Model Bill which the Committee would like to canvass is a proposal that subclause 1(5) should provide:

“For the purposes of this Part, a person destroys forensic material taken from another person by a forensic procedure if the person destroys any means of identifying the forensic material with the person from whom it was taken.”

Forensic scientists advise that once samples have been subjected to the various processes of analysis in a forensic laboratory it would be extremely difficult to trace all remnants of the samples and destroy them. The same also goes for all the different records of the DNA profile. However, they point out that the material is often labelled with a numerical Code which if destroyed makes it impossible to identify the sample. It would therefore appear to be reasonable to include the proposed interpretation clause in the Model Bill. Under the proposal there must be no means of identifying the forensic material - leaving identifying initials or clues such as the file that it is kept on and the name of a case officer will mean that the material has not been destroyed and there has been a breach of the legislation. Subclause 82(1) provides that it is an offence to use forensic material which is required to be destroyed. The maximum penalty is 2 years imprisonment.

- (4) A magistrate may, on application by a police officer or the Director of Prosecutions *[an appropriate reference should be inserted in each jurisdiction to ensure that this covers any person prosecuting a relevant offence]*, extend for a period not exceeding 12 months the period for which forensic material may be retained under this section, if the magistrate is satisfied there are special reasons for doing so.
- (5) An extension in relation to particular forensic material may be given on more than one occasion.

72 Destruction of forensic material where related evidence is inadmissible (former cl 56)

If a court finds that evidence described in section 65 (4)* relating to a forensic procedure is inadmissible under section 65*, the Commissioner of Police must, as soon as reasonably practicable, ensure that any forensic material taken from the suspect by that forensic procedure is destroyed.

Most of **Division 11** (clauses 73 to 81) is not reproduced here but can be examined in detail at Appendix 3. Division 11 provides for the powers of legal representatives and interview friends; the obligations of investigating police officers relating to tape recordings; the material that must be made available to those who have given samples; requirements of proof; liability and clear statement that health professionals are not required by law to carry out the procedures. It also includes the general prohibitions against disclosure of information collected under the general provisions of the Model Bill (clause 81). These are important provisions but were settled during the consultation on the 1995 Model Bill. However clause 82 of Division 11 is a very important provision which will particularly affect the concept of a national DNA database and has been developed with that in mind.

82 Taking, retention and use of forensic material (former cl 68)

- (1) Nothing in this Part affects the taking, retention or use of forensic material, or information obtained from forensic material, if the taking, retention or use of the material is authorised by or under another law of the State [or Territory] or a law of the Commonwealth.
- (2) Forensic material, or information obtained from it, that is taken in accordance with the law of another State or a Territory may be retained or used in this State [Territory] for investigative or evidentiary purposes even if its retention or use would, but for this subsection, constitute a breach of, or failure to comply with any provision of this Part relating to the carrying out of forensic procedures.

Alternative should it not be possible to achieve substantially consistent legislative schemes:

- (2) Forensic material taken, or information obtained from it, in accordance with the law of another State or a Territory must not be retained or used in this State [Territory] for investigative or evidentiary purposes if, had the forensic material been taken or information obtained in this State [Territory] its retention or use for those purposes would constitute such a serious breach of, or failure to comply with any provision of this Part relating to the carrying out of forensic procedures that it would be inadmissible.

Clause 82. Taking, retention and use of forensic material

While it is hoped that all jurisdictions will enact consistent legislation, Australia's record at achieving national consistency is not good. A consequence of this could be that a jurisdiction which has loose controls and allows the collection of samples in a wider range of circumstances could undermine appropriate restrictions on the use of the DNA database in another jurisdiction.

For example, 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 the 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.

While collusion which involved arranging for the suspect to be charged with a minor offence in State B just to get the sample for investigation in State A would probably be inadmissible on the basis that it had been improperly obtained, the type of activity in the first example is less likely to result in the evidence being held to be inadmissible under the 'Uniform Evidence Act'. It would not contravene the law in State B and is unlikely to be held to be improper:

“138(1) Evidence that was obtained:

- (a) improperly or in contravention of an Australian law; or
- (b) in consequence of an impropriety or of a contravention of an Australian law;

is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.”³⁷

Under the common law prosecution evidence may be excluded on public policy grounds in circumstances where it has been obtained by unlawful conduct on the part of the police. It also covers conduct which is while not unlawful, is improper conduct.³⁸ The High Court has held:

“The effective investigation by police of some types of criminal activity may necessarily involve subterfuge, deceit and the intentional creation of opportunities for the commission by a suspect of a criminal offence. When those tactics do not involve illegal conduct, their use would ordinarily be legitimate

³⁷ *Evidence Act 1995* (Cth,NSW,ACT): s.138.

³⁸ *Bunning v Cross* (1978) 141 CLR 54

82 Taking, retention and use of forensic material (former cl 68)

- (1) Nothing in this Part affects the taking, retention or use of forensic material, or information obtained from forensic material, if the taking, retention or use of the material is authorised by or under another law of the State [or Territory] or a law of the Commonwealth.
- (2) Forensic material, or information obtained from it, that is taken in accordance with the law of another State or a Territory may be retained or used in this State [Territory] for investigative or evidentiary purposes even if its retention or use would, but for this subsection, constitute a breach of, or failure to comply with any provision of this Part relating to the carrying out of forensic procedures.

Alternative should it not be possible to achieve substantially consistent legislative schemes:

- (2) Forensic material taken, or information obtained from it, in accordance with the law of another State or a Territory must not be retained or used in this State [Territory] for investigative or evidentiary purposes if, had the forensic material been taken or information obtained in this State [Territory] its retention or use for those purposes would constitute such a serious breach of, or failure to comply with any provision of this Part relating to the carrying out of forensic procedures that it would be inadmissible.

notwithstanding that they are conducive to the commission of a criminal offence by a person believed to be engaged in criminal activity. The most that can be said is that the stage of impropriety will be reached in the case of conduct which is not illegal only in cases involving a degree of harassment or manipulation which is clearly inconsistent with acceptable police conduct in all the circumstances,”³⁹

The High Court went on to note that whether what was done was unfair to the accused is ordinarily of “peripheral” importance compared to “the public interest in maintaining the integrity of the courts and insuring the observance of the law and minimum standards of propriety by those entrusted with powers of law enforcement”.⁴⁰

Although it is probably the case that obtaining evidence in the way outlined in the first example may not mean it will be excluded, it raises an issue that must be faced. It is not desirable that variations of the nature described even in the first example should be allowed to undermine the DNA database legislative requirements. The Committee therefore believes a consistent approach between jurisdictions is very important in combating this type of problem. Therefore the Committee only favours recommending the first provision if there is consistency and does so on the basis that in preparing the model it must assume there will be consistency. If there is, then the proposed approach will also be in line with section 138(1) of the Uniform Evidence Act.

The alternative provision would depart from the policy of the Uniform Evidence Act and would be unique in that it would involve excluding evidence obtained lawfully and which would be acceptable to a court in another part of Australia. It would be a most unfortunate outcome, but it may be necessary if the disparity between jurisdictions is too great.

The Committee notes that this problem has not arisen in other countries because most have national legislation. In the USA the national database is controlled by the FBI who through funding incentives have been successful at persuading participating States to enact similar legislation, thereby maintaining the standards of the national database. In other countries the criminal law is usually the responsibility of the national government.

³⁹ *Ridgeway v R* [1994-1995] 184 CLR 19, Mason CJ, Deane J and Dawson J at 37.

⁴⁰ Above at 38.

Division 12 - DNA databases (former cll 65–66B)

83 DNA matching database and DNA identification database

(1) In this Act:

crime scene index means an index of DNA profiles derived from forensic material found:

- (a) at any place (whether within or outside Australia) where a serious offence was committed, or
- (b) on or within the body of the victim of a serious offence, or
- (c) on anything worn or carried by the victim at the time when a serious offence was committed, or
- (d) on or within the body of any person or thing or at any place associated with the commission of a serious offence.

DNA identification database means a database (whether in computerised form or otherwise and however described) containing the following information in relation to DNA profiles on the DNA matching database:

- (a) in the case of a profile in a crime scene index or a missing and unknown deceased persons index - the case number of the investigation associated with the forensic material from which the profile was derived,
- (b) in the case of a profile in a serious offenders index, limited purposes index or unrestricted purposes index- the identity of the person or deceased person from whose forensic material the profile was derived.

DNA Databases

The Committee believes it is important that the legislation accurately describes the DNA databases and the way in which different information may be held and matched. The establishment of a national DNA criminal investigation database system is a key element of the Commonwealth Government's CrimTrac initiative and as the development of CrimTrac is at an early stage, the final composition of this system has not yet been settled. The appropriate framework and composition for the system will be developed in consultation with the States and Territories, so the Committee has been careful not to assign aspects of the database as being the responsibility of particular jurisdictions. While the Commonwealth Government has promised funding for a law enforcement tracking database called CrimTrac which will include a national DNA database, it is not settled as to who will be responsible for different aspects of the database. Fortunately it is not necessary for the Model Bill to be specific about jurisdictional responsibility issues as it does not purport to be the legislation of a particular jurisdiction. Further, the Model Bill does not create the databases. There is nothing in the model to prevent them from being created by administrative means. However, the model is descriptive of the various elements of the database and how they may be used for criminal investigation purposes. Under the Model Bill, the national DNA database system will be able to hold discrete compartments of information. This will enable the controlled matching of information in the way proposed in the model for the information to be used in criminal investigations and court proceedings.

The descriptive approach of Division 12 draws on concepts contained in the Canadian legislation which creates that country's national database.⁴¹ The difference between Canada and Australia is that in Canada the Federal Government can place all the controls in one Act. In Australia we will need to enact legislation at the State, Territory and Federal level. We therefore need a model if there is to be a simple and comparable system throughout the country.

Clause 83. DNA matching database and DNA identification database

The following definitions in subclause 83(1) describe the databases and indexes and provides a framework for where the information may be kept and how it may be used.

'Crime scene index'

This closely follows the equivalent Canadian provision and is self-explanatory. Clearly the crime scene DNA profiles need to be kept separate from the profiles of individuals with whom they will be matched.

'DNA identification database'

This is the most sensitive database of them all as it contains the link between particular individuals or crime scenes and the results of any matching of the persons DNA profile with other profiles. A DNA profile is a type of code which records the characteristics of an individual's DNA but is course useless if

⁴¹ *DNA Identification Act 1998* - section 5.

DNA matching database means a database (whether in computerised or other form and however described) containing:

- (a) the following indexes of DNA profiles:
 - (i) a crime scene index,
 - (ii) a missing and unknown deceased persons index,
 - (iii) an unrestricted purposes index,
 - (iv) a serious offenders index,
 - (v) a limited purposes index,and identification codes, and
- (b) a statistical index, and
- (c) any other index prescribed by the regulations.

identification code means a code linking a DNA profile to information in a DNA identification database that may be used to identify the person from whose forensic material the DNA profile was derived.

limited purposes index means an index of DNA profiles derived from forensic material taken:

- (a) in accordance with Division 3, 4 or 5 or under a corresponding law of a participating jurisdiction from suspects, or
- (b) in accordance with Division 8 or under a corresponding law of a participating jurisdiction from volunteers (or whose parents and guardians) have been informed that information obtained will be used only for a purpose specified to them under section 60(2)(b).

missing and unknown deceased persons index means an index of DNA profiles derived from forensic material of persons who are missing and deceased persons whose identity is unknown.

serious offenders index means an index of DNA profiles derived from forensic material taken from:

- (a) serious offenders in accordance with Division 7 or under a corresponding law of a participating jurisdiction, or
- (b) suspects who have been convicted of the relevant offence concerned (being a serious offence or other indictable offence).

it cannot be connected to a particular individual. As a security measure, under the Model Bill the link between the code and the individual is to be kept on a separate database from the one where the profiles of individuals will be matched those found at crime scenes. The definition makes it clear that missing or unknown deceased persons profiles are similar to and are to be treated the same as crime scenes (identified by a case number), while profiles from suspects, serious offenders, various types of volunteers and known deceased persons are also similar (identified by a name).

'DNA matching database'

This database uses codes. It is not to be possible for an individual or particular crime scene to be identifiable in this database. This database is for the purpose of matching the codes. However it is recognised that for ease of reference and to facilitate appropriate use of the various classes of profiles within this database that the codes should be sorted into indexes. Those that are self-explanatory are the crime scene index, the missing and unknown deceased persons index and the serious offenders index. There is also a statistical index and the possibility of prescribing another one by regulations. The two indexes that require further explanation and reference to other definitions are the 'limited purposes index' and the 'unrestricted purposes index'.

'Limited purposes index'

This is to contain the codes that relate to suspects and volunteers and who have been informed that the profile will only be used for a limited purpose, for example it might be for a particular investigation.

In the case of suspects the Model Bill makes it clear that their profiles may only be used to investigate the offence about which they are a suspect or other offences (paragraphs 81(2)(d)(e)(f) and (g) provide that information revealed by a forensic procedure may only be disclosed for the purpose of investigating or making a decision about a particular offence or offences generally). It follows that a suspects profile should only be used for those limited purposes. The suspects profile can be matched against anything on the crime scene index but unlike the serious offenders index, should not be available for unrestricted comparison as part of a pool of suspects that can be matched with profiles from any index. For example, it is not intended that the whole index of suspects could be compared with all crime scene profiles. To do so would go far beyond the purpose for which the forensic material was obtained in the first place and may expose suspects to random searching by police anywhere in the country who are quite separate from the particular investigation and who are just fishing for matches on the crime scene index.

The grounds for ordering a forensic procedure to be carried out on a suspect are that there are reasonable grounds to suspect he or she committed a 'relevant offence' (clauses 14 and 19). Clause 1 defines a 'relevant offence' to include the

statistical index means an index of information obtained from the analysis of forensic material taken from persons in accordance with this Part or under a corresponding law of a participating jurisdiction that has been compiled for statistical purposes, being information that cannot be used to identify the persons from whom the forensic material was taken.

missing and unknown deceased persons index means an index of DNA profiles derived from forensic material of persons who are missing and deceased persons whose identity is unknown.

unrestricted purposes index means an index of DNA profiles derived from material taken:

- (a) in accordance with Division 8 or under a corresponding law of a participating jurisdiction, from volunteers (or whose parents or guardians) have been informed under section 60(2)(c) that information obtained may be used for the purpose of criminal investigation or any other purpose for which a DNA database may be used under this Division, and
- (b) from deceased persons whose identity is known.⁴²

serious offenders index means an index of DNA profiles derived from forensic material taken from:

- (a) serious offenders in accordance with Division 7 or under a corresponding law of a participating jurisdiction, or
- (b) suspects who have been convicted of the relevant offence concerned (being a serious offence).

statistical index means an index of information obtained from the analysis of forensic material taken from persons in accordance with this Part or under a corresponding law of a participating jurisdiction that has been compiled for statistical purposes, being information that cannot be used to identify the persons from whom the forensic material was taken.

42 The order of this definition is changed to make comparison easier.

offence for which the person is a suspect or an offence arising out of the same circumstances or in respect of which evidence is likely to be obtained.

Some may take the view that the Model Bill should restrict the matching of suspects profiles to crime scene profiles which are strictly within the grounds for ordering the procedure as provided for in clauses 14 and 19. The Committee has always taken a broader view. The general purpose for ordering the taking of the forensic sample is that the person is a suspect in relation to one or more crimes. That while the order may only be granted if there is a reasonable suspicion about these crimes, if there are some upon which to ground the order, it is sufficient to justify more general matching with the crime scene database.

The Committee notes that its proposal effectively limits the people who are responsible for initiating the matching to the investigators who obtained the consent of the suspect or the order. This ensures the small group conducting the investigation are identified and can be held responsible for the way in which the profiles are being used. It would not be possible to monitor its use as closely if the suspects profiles were available for any police in Australia to initiate general matches. This approach is justified because as opposed to serious offenders the allegations against the suspects are unproved.

'Missing and unknown deceased persons index'

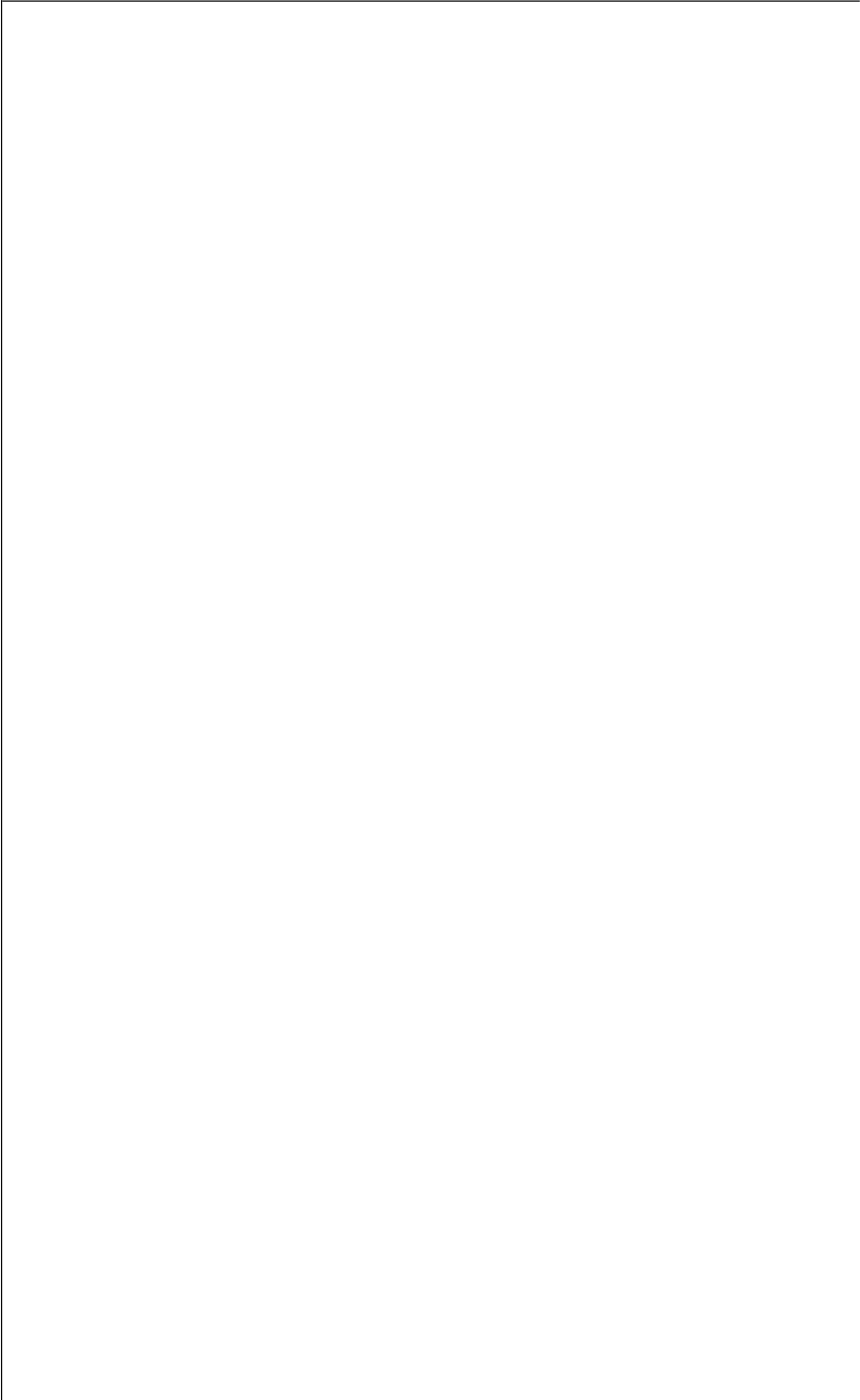
Another grouping of DNA profiles are those from someone who is missing⁴³ and those from the dead bodies of people who are unknown. The DNA database has tremendous potential for determining whether someone who is missing is dead. In this case even the matching of DNA profiles within the index may produce results. The unknown body may be that of a missing person.

Matched against the crime scene index it may be found that the missing person's profile matches that of a victim. In other cases it may be shown the unknown body comes from a crime scene. Matched against the serious offenders index it may be that the identity of the dead person is discovered through the fact that the person was once an offender. Matched against the unrestricted purposes index it may be found the person was once a volunteer. Indeed it is even possible some will volunteer so that they can be more easily identified in these circumstances. This index should be open to unrestricted matching, but needs to be in a separate index because of its peculiar nature and the likelihood that the purpose of the matching will often not be to investigate a crime.

'Unrestricted purposes index'

Profiles on this index may be matched against anything on the database. The whole of this index can be matched against the whole of another index on the

43 Forensic material from someone who is missing may come from the person's dwelling - a DNA profile can be obtained from a small splattering of blood or other human tissue, including hair, loose skin and from things that the missing person has touched.



DNA matching database. For example all the profiles in this index against all those on the crime scene index.

This index is made up of profiles from volunteers who have agreed to the unrestricted purpose. An example might be someone who has a criminal record and wishes reduce the number of times he or she is approached by the police by giving them a way to eliminate the person from their enquiries (the UK police have advised us that this occurs in their country). Alternatively, it might be a civic minded citizen who is concerned to assist the police with efforts to build up a large database.

The other group of DNA profiles suitable to place on this index are those deceased people whose identity is known. In some cases it may be uncertain how the deceased person died and there is some value in matching the sample against the crime scene databases. It may be there is a sample elsewhere which together with other evidence at that location suggests the person did meet foul play. It could be a person who appears to have committed suicide at one location but in fact was murdered elsewhere.

This index will also be useful where the deceased person is one of several suspects. Matching of the deceased person's profile with the crime scene index could eliminate those that are alive from suspicion. Committee members are aware of a serial killing case where matching this type of profile with the crime scene index could have reassured the community that a particular serial killer was dead and no longer a threat.

'Serious offenders index'

The DNA profiles of serious offenders may also be matched with any index. However the Committee favours also including them in a separate index in recognition that they are collected in a different way and that the people involved are a distinct category. It should be noted that a person may be removed from this index if they receive a pardon or the conviction is quashed. Where the profile comes from a sample collected from a suspect who is convicted of an indictable offence, the profile is to be placed on this index. Some may view this as an inconsistency, but the Committee considers that if a sample has not been obtained in the first place, and the convicted person has the proceedings behind them, the disturbance of having to give a sample should only occur where the person is convicted of a serious offence.

'Statistical index'

This a separate index from which no one can be identified by code or other means. Its purpose is to examine the characteristics of profiles in Australia so that an accurate assessment can be made about the probability that particular indicators are unique. The statistical index is valuable as the Committee understands that there are variations in the genetic make up of different nations.

84 Use of forensic material for DNA databases

(1) A person:

- (a) whose conduct gives rise to the supply of forensic material taken from any person under this Part to any person for analysis for the purpose of deriving a DNA profile for inclusion on an index of the DNA matching database if the forensic material is required to be destroyed by this Part or under a corresponding law of a participating jurisdiction, and
- (b) who intends or is reckless as to the supply of material of that kind,

is guilty of an offence.

Maximum penalty: 2 years imprisonment.

(2) A person:

- (a) whose conduct gives rise to the supply of forensic material (other than excluded forensic material) to any person for analysis for the purpose of deriving a DNA profile for inclusion on an index of the DNA matching database, and
- (b) who intends or is reckless as the supply of that material of that kind,

is guilty of an offence.

Maximum penalty: 2 years imprisonment.

(5) In this section:

excluded forensic material means forensic material

- (a) found at a crime scene, or
- (b) taken from a suspect in relation to a related offence (being a serious offence or other indictable offence) in accordance with Division 3, 4 or 5 or under a corresponding law of a participating jurisdiction and the suspect is convicted of the offence, or
- (c) taken from a serious offender or a volunteer or other person in accordance with Division 7 or 8 or under a corresponding law of a participating jurisdiction, or
- (d) taken from the body of a deceased person, or
- (e) that is from the body of a missing person.⁴⁴

⁴⁴ The order of these provisions is changed to suit the style of this discussion paper.

Clause 84. Use of forensic material for DNA databases

Clause 84 has 4 offences. They regulate the use of the material collected for the DNA databases:

(1) *No analysis if the forensic material is required to be destroyed*

This offence is necessary to stop anyone from supplying the material for someone for analysis as soon as the legislation requires the material to be destroyed. Division 10 outlines the circumstances where material is required to be destroyed, for example, where an interim order that allowed the taking of forensic material from a suspect is disallowed after the forensic procedure is carried out (clause 70).

The offence would apply at any stage of the process prior to analysis. This would include where the police still had the material, but also after the material has arrived at the forensic laboratory. Even if it has been partly analysed, the material cannot be supplied to someone else in the laboratory for the next stage of the analysis. However, the officer would need to be aware of the changed status of the material to be guilty of the offence. The offence is drafted in harmony with the Model Criminal Code which makes it necessary to isolate the fault elements which apply to the result of supplying the material to another person. In this case a person must not intend or be reckless as to that result when he or she gives rise to the supply. These are the usual fault elements for this type of offence.

It should also be noted that this safeguard also applies to material which comes from participating jurisdictions. The Model Bill offences are designed to facilitate a cooperative scheme of similar legislation.

The maximum penalty is 2 years imprisonment. This reflects the seriousness of statutory breaches of this nature. It is very important that those involved in handling the forensic material do not undermine the integrity of the scheme by breaching the procedure.

(2) *Only excluded forensic material may be placed on the DNA matching database indexes*

Excluded forensic material is defined in subclause 84(5) to mean material found at a crime scene or taken from a suspect, serious offender, volunteer, deceased person or missing person. The offence prohibits the placing of material derived from other sources on the DNA matching database. It is critical to maintaining the integrity of the DNA matching database. Forensic material picked up by the police from an item touched by someone in a place which has nothing to do with a crime scene is prohibited by this provision

It should also be noted that the definition of 'excluded forensic material' only includes material taken from suspects, serious offenders and volunteers under the proposed legislation or under a corresponding law of a participating

- (3) A person:
- (a) whose conduct gives rise to inclusion of any information (other than an identification code) on the DNA matching database that would identify the person from whom the forensic material was taken under this Part or under a corresponding law of a participating jurisdiction, and
 - (b) who intends or is reckless as to the inclusion of information of that kind,
- is guilty of an offence.
- Maximum penalty: 2 years imprisonment.
- (4) A person:
- (a) whose conduct gives rise to the matching of DNA profiles on the limited purposes index of the DNA matching database for the purpose of determining whether any DNA profile on the crime scene index is on the limited purposes index, and
 - (b) who intends or is reckless as to any such matching of profiles,
- is guilty of an offence.
- Maximum penalty: 2 years imprisonment.
- (5) In this section:
- excluded forensic material*** means forensic material
- (a) found at a crime scene, or
 - (b) taken from a suspect in relation to a related offence (being a serious offence or other indictable offence) in accordance with Division 3, 4 or 5 or under a corresponding law of a participating jurisdiction and the suspect is convicted of the offence, or
 - (c) taken from a serious offender or a volunteer or other person in accordance with Division 7 or 8 or under a corresponding law of a participating jurisdiction, or
 - (d) taken from the body of a deceased person, or
 - (e) that is from the body of a missing person.⁴⁵

45 The order of these provisions is changed to suit the style of this discussion paper.

jurisdiction. Therefore this offence prohibits the supply of forensic material for analysis for the purpose of including a DNA profile on the DNA matching database where it does not come from a participating jurisdiction.

The commentary on the fault elements and penalty in relation to the previous offence also applies to this offence and will not be repeated. However it should be noted that in addition to the proposed offence, other more serious offences such as the falsifying evidence and perverting the course of justice (or attempting that offence) may also apply in such cases (at section 7.3.1 and 7.5.1 of Chapter 7 of the Model Criminal Code the Committee recommended that the maximum penalty for making or using false evidence be 7 years imprisonment and perverting the course of justice 5 years imprisonment).

(3) *Nothing that would identify an individual may be placed on the DNA matching database*

Like Canadian and US models, the Model Bill includes an extra layer of security by prohibiting through this offence the inclusion of anything else than a code as an identifier for each profile. This promotes more arms length matching - a straight forward matching of codes without any idea of where it comes from. It is necessary to underpin this with an offence because it is a feature of the scheme designed to increase confidence in the fairness of the matching process. Once there is a match, the matched codes can then be sent to the DNA identification database where the identification code can be used to reveal the identity of the person or crime scene from which it was taken.

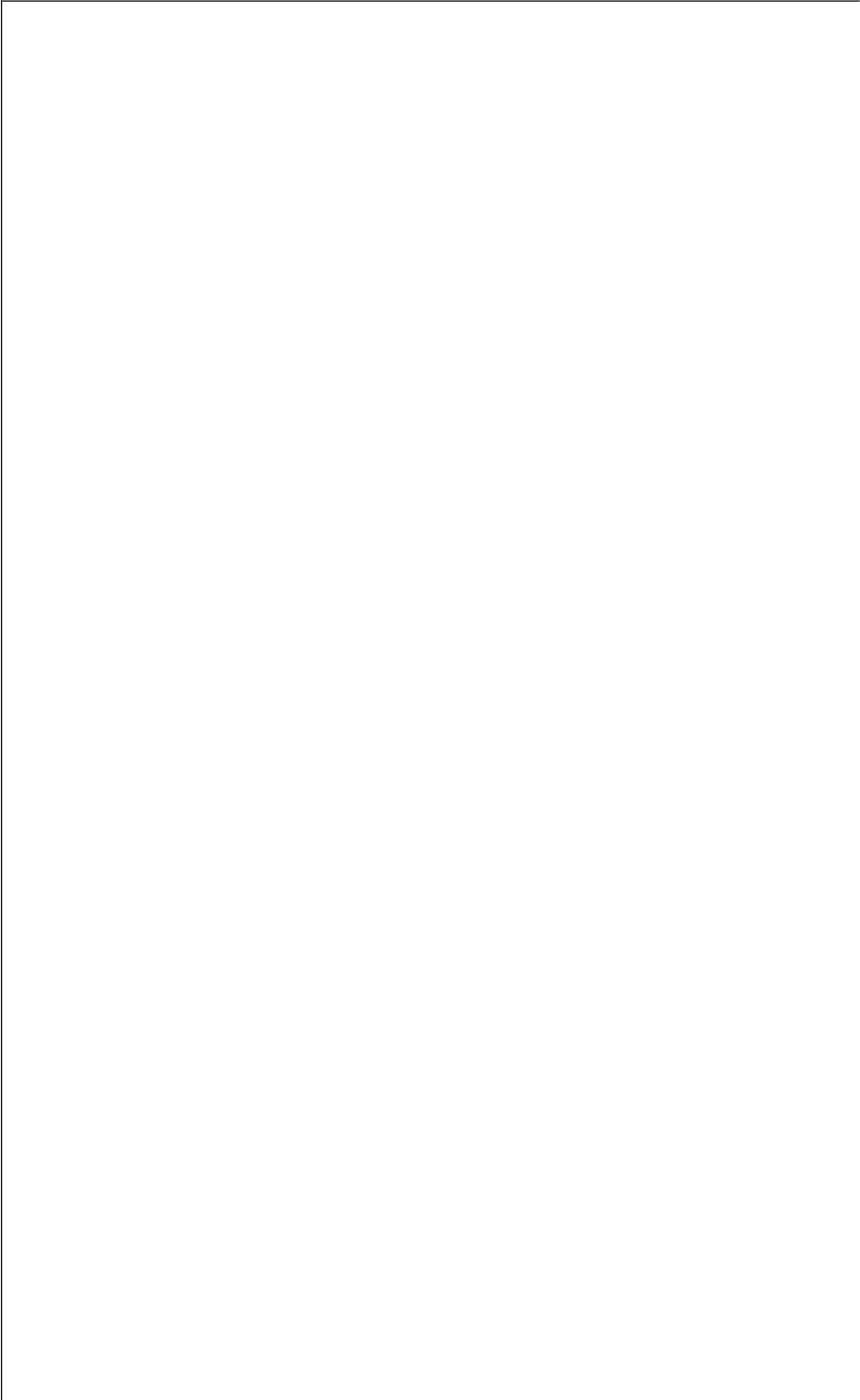
It should also be noted that this safeguard also applies to the identification of people in participating jurisdictions. The Model Bill offences are designed to facilitate a cooperative scheme of similar legislation.

The commentary on the fault elements and penalty in relation to the previous offences also applies to this offence and will not be repeated.

(4) *Matching must be limited to the purposes provided for in the legislation*

This offence is designed to make sure that profiles which are held for a limited purpose are not open to unrestricted comparison to whole indexes of the DNA matching database. For example, as discussed above, in recognition that no offence has been proved against a suspect, the profile should not be pooled with that of other suspect profiles and included in a match of all suspect profiles against say the whole crime scene index.

Another example might be a volunteer who is happy to have the profile matched against crime scenes in relation to a particular investigation. The investigation may be in relation to a serial rapist/murderer where police want the cooperation of everyone, including those who may not want to give a profile because they may have committed serious but less important offences such as burglary. Some volunteers may be suspicious about the procedure and will want to help with the investigation of the death of the little girl down the street, but fear long



term retention of the profile may result in them being wrongly accused of an offence at some future date. While these fears may not be justified (in view of the safeguards in the legislation and accompanying police and laboratory protocols), they will be a concern for some people. The proposed offence provides that if a police officer or forensic scientist abuses the trust of the volunteer who has provided material by using it for other purposes they can be prosecuted.

It should also be noted that this safeguard also applies to purposes for which material is collected in participating jurisdictions. As mentioned above, the Model Bill offences are designed to facilitate a cooperative scheme of similar legislation.

The commentary on the fault elements and penalty in relation to the previous offences also applies to this offence and will not be repeated.

85 Recording, retention and removal of identifying information on DNA identification database

- (1) A person:
- (a) whose conduct gives rise to any identifying information about a person obtained from forensic material taken from the person under this Part being recorded or retained in a DNA identification database at any time after this Part requires the forensic material to be destroyed, and
 - (b) who intends or is reckless as to the recording or retention, is guilty of an offence.

Maximum penalty: 2 years imprisonment.

- (2) The responsible person must ensure that any identifying information on the DNA identification database relating to a person from whose forensic material a DNA profile on the unrestricted purpose index of the DNA database was derived is removed from the DNA identification database as soon as practicable after the end of the identifying period for the profile.

Maximum penalty: 2 years imprisonment

- (3) The responsible person must remove from the DNA identification index any identifying information relating to a DNA profile on the serious offenders index of the DNA matching database as soon as practicable after becoming aware that the serious offender has been pardoned or acquitted of the serious offence concerned or the conviction has been quashed.

Maximum penalty: 2 years imprisonment

- (4) In this section:

identifying information means any information that, if linked with the identification code relating to a DNA profile on the DNA matching database, could be used to discover the identity of the person from whose forensic material the DNA profile was derived or to get information about an identifiable person.

identifying period for a DNA profile means the following:

- (a) except as provided by paragraphs (b) and (c), the period of 12 months after the DNA profile is placed on the DNA matching database,
- (b) if the DNA profile is derived from forensic material taken from a volunteer - such period after the DNA profile is placed

Clause 85. Recording, retention and removal of identifying information on DNA identification database

The offences in clause 85 focus on the next step of the process. The recording, retention and removal of identifying information from the DNA identification database:

(1) *Identifying information must not be kept after the legislation requires destruction*

Like subclause 84(2), this offence underpins the destruction requirements in Division 10. It deals with the situation where the forensic material has been analysed and the identifying material could be or has been recorded in the DNA identification database. The offence requires the removal of ‘identifying information.’ Subclause 85(4) defines this as any information which if linked with the identification code could produce information about an identifiable person. Once the identifying link is destroyed other information concerning the person will be useless. Clearly this offence is also an essential part of the proposed system. The penalty is the same as that for subclause 84(2) - a maximum of 2 years imprisonment.

(2) *Ensuring material on the unrestricted purposes index is only kept as long as there is permission to keep it.*

Subclause 85(2) deals with the unrestricted purposes index. You will note from the definition on ‘unrestricted purposes index’ that it contains material from volunteers who agree to allowing it to be used widely and deceased people whose identity is known. The offence encourages police to find out how long they may keep the material if it comes from a volunteer. If the volunteer does not agree to it being kept for a longer period, then the offence requires the material to be destroyed after 12 months. Note that paragraph 85(4)(a) the definition of ‘identifying period’ provides for the 12 month limit and paragraph 85(4)(b) enables the police to get the agreement of the volunteer for it to be kept longer.

The unrestricted purposes index may also be used for deceased people whose identity is not known. The Commissioner of Police can determine how long the material will be kept in those circumstances.

(3) *Identifying information must not be kept where person on the serious offenders index and the person has been pardoned, acquitted or the conviction quashed*

Generally the material on the serious offenders index may be kept for an unrestricted period. The exception is where the person is pardoned or acquitted, or the conviction is quashed. Sometimes this can happen some years after the conviction but when it does there should be just as strong an obligation on the person responsible for the DNA identification database to remove the identifying information as there is under the other offences. The ‘responsible person’ is defined in subclause 1(1) as “in relation to a DNA database, means the person responsible for the care and management of the database.”

on the DNA matching database as the Commissioner of Police, with the consent of the volunteer (or, in the case of a volunteer who is a child or an incapable person, a parent or guardian of the volunteer) orders the responsible person to retain identifying information relating to the profile,

- (c) if the DNA profile is derived from forensic material taken from a deceased person whose identity is known - such period as the Commissioner of Police orders the responsible person to retain identifying information relating to the profile.

86 Access to and disclosure of information on DNA identification databases (former cl 66B)

- (1) A person must not access, or disclose to any person, information stored on a DNA database unless the information is accessed or disclosed for one or more permissible purposes.

Maximum penalty: 2 years imprisonment.

- (2) In this section:

permissible purposes means the following purposes:

- (a) the purposes of forensic comparison in the course of a criminal investigation by a police officer or other person prescribed by the regulations,
 - (b) the purpose of making the information available, in accordance with the regulations, to the person to whom the information relates,
 - (c) the purpose of administering a DNA database,
 - (d) the purposes of according with any arrangement entered into between the State *[or Territory]* and another State or Territory or the Commonwealth for the provision of access to information contained in a DNA database by law enforcement officers and persons prescribed by the regulations,
 - (e) the purpose of the investigation of a complaint by the Privacy Commissioner (however described in each jurisdiction).
- (3) Nothing in this section applies in relation to information that does not identify any person.

Clause 86. Access to, disclosure of information on DNA databases

This is the basic offence protecting the confidentiality of the DNA databases. Immense damage could be done to the reputation of someone if the information was publicly disclosed. This offence would also cover any police officer who discloses information to a colleague other than in the course of an investigation. The reputation of the DNA database and the level of trust in it will depend very much on strict confidentiality. If someone discloses the information other than for the listed 'permissible purposes' it is appropriate that they should face the sanctions proposed in this offence.

Readers will note that it is envisaged there will be some people authorised by regulations to have access to the information who are not law enforcement officers. These would include laboratory staff at the forensic laboratories and others who assist with the administration of the database.

The provision also recognises the Model Bill is designed to facilitate a cooperative scheme of similar legislation by allowing access and to officers in other jurisdictions the Model Bill offences are designed to facilitate a cooperative scheme of similar legislation in accordance with arrangements between Australian Governments. The Committee has not included provision for arrangements between countries though that is something which might occur in the future.

It is also proposed that the Privacy Commissioner or equivalent officer at the State and Territory level have access to the DNA databases for the purpose of investigating complaints. It is important that there be the capacity for independent review of the operation of the DNA databases in the event that there is a complaint.

Division 13 - Operation of this Part and effect on other laws

87 Application of other Acts (former clause 87)

- (1) This Part is not intended to limit or exclude the operation of another law of the State *[or Territory]* relating to:
 - (a) the carrying out of forensic procedures, including procedures not referred to in this Part, or
 - (b) without limiting paragraph (a), the carrying out of breath analysis or a breath test or the production of samples of blood and urine to determine the alcohol or drugs present in a person's body, or
 - (c) the taking of forensic samples, including samples not referred to in this Part, or
 - (d) the carrying out of searches of the person.
- (2) To avoid any doubt, it is declared that even if another law of the State *[or Territory]* provides power to do one or more of the things referred to in subsection (1), a similar power conferred by this Part may be exercised despite the existence of the power under the law.

Division 13 - Operation of this Part and effect on other laws

Clause 87. Application of other Acts

Clause 87 preserves the right to for police or other officials to ask people to undergo forensic procedures for other purposes. So, for example, there might be separate legislation dealing with the reception of prisoners into prison where fingerprints are required for identification purposes. Clause 87 makes it clear that the Model Bill is not meant to over-ride legislation which performs other purposes. Another example is the taking of samples for blood alcohol analysis. The same provision was at clause 73 of the 1995 Model Bill.

Division 14 - Interstate enforcement

88 Definitions (cl 74)

In this Part:

appropriate authority means:

- (a) in relation to a participating jurisdiction other than the Australian Capital Territory—an authority exercising, in relation to the police force of that jurisdiction, functions corresponding to those of the Commissioner of Police and any other authority prescribed by the regulations, or
- (b) in relation to the Australian Capital Territory—the Commissioner of the Australian Federal Police and any other authority prescribed by the regulations.

corresponding law means a law relating to the carrying out of forensic procedures that substantially corresponds to this Part or is prescribed by the regulations for the purposes of this definition.

DNA database means:

- (a) in relation to this State *[Territory]*—a DNA database, and
- (b) in relation to a participating jurisdiction—a DNA database that is kept under a corresponding law of the participating jurisdiction,

participating jurisdiction means a State or Territory in which there is a corresponding law in force.

responsible Minister of a participating jurisdiction means a Minister of that jurisdiction who is responsible for administration of a corresponding law.

89 Registration of orders (former cl 75)

- (1) The Minister may enter into arrangements with the responsible Ministers of the participating jurisdictions for the establishment and maintenance, in one of those jurisdictions, of a register of orders for the carrying out of forensic procedures made under corresponding laws of participating jurisdictions.
- (2) An order is registered when a copy of the order (being a copy certified by the person who made it) is registered in accordance with the law of the participating jurisdiction in which the register is kept.
- (3) A person is authorised to carry out the forensic procedure authorised by an order that is registered in accordance with such

Clause 88. Definitions

The definitions are self-explanatory and coincide with clause 74 of the 1995 Model Bill.

Clause 89. Registration of orders

While this provision was also in the 1995 Model Bill (Clause 75), it requires some explanation. Provision for the registration of orders to carry out forensic procedures on people in other States and Territories is something that would be useful under existing practices, it is expected the practice will become more common once CrimTrac is established. The national DNA database should generate more cooperation in the collection of and sharing of forensic evidence.

an arrangement in this State. The person is authorised to carry out the procedure in accordance with Division 6 and not otherwise.

- (4) An application for registration of an order, or for cancellation of registration of an order, may be made by an appropriate authority.

90 Database information (former cl 76)

- (1) The Minister may enter into arrangements with a responsible Minister of a participating jurisdiction under which:
 - (a) information from a DNA database of this State *[Territory]* that may be relevant to the investigation of an offence against the law of the participating jurisdiction is to be transmitted to the appropriate authority in that jurisdiction for the purposes of the investigation of, or proceedings in respect of, that offence, and
 - (b) information from a DNA database of the participating jurisdiction that may be relevant to the investigation of an offence against the law of this State *[Territory]* is to be transmitted to the Commissioner of Police for the purposes of the investigation of, or proceedings in respect of, that offence.
- (2) 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 get 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.

[This provision could be modified to enable information on the databases of every participating jurisdiction to be centralised in one State [Territory]]

Clause 90. Database information

This provision provides for the entry of arrangements between jurisdictions under which information from a DNA database may be transmitted elsewhere in Australia. The nature of these arrangements depends very much on the final shape of CrimTrac.

FORENSIC PROCEDURES - INTERNATIONAL COMPARISONS

The trend elsewhere is also towards more comprehensive accountable procedures and the creation of legislation which regulates the storage, flow and use of information collected on databases. This appendix contains a review of legislation in New Zealand, Canada, the UK, Germany, the Netherlands and several States in the USA which should provide readers with some useful comparisons.

Law enforcement agencies in most developed countries are calling for the use of large national DNA databases following the establishment of one in the UK in 1995 and the pooling of data from 8 US States in 1997 using FBI software. Starting with Colorado in 1988, during the 1990's every US State has enacted DNA databank legislation.⁴⁶

The UK and US law enforcement agencies are enthusiastic about DNA data matching. In both those countries the procedure has involved the sampling and use of samples from large numbers of people - thereby having a hitherto unprecedented impact on the community. Straight after establishment of the UK data base, the police arrested 900 suspects for theft and firearms offences in the South of England and Wales and subjected them to mass DNA testing. In the UK it is estimated 135,000 DNA samples are to be processed annually (650 per day). By March 1998 the UK database contained DNA profiles on more than 255,000 suspects and convicted persons, and 30,000 profiles developed from material found at crime scenes. The database is generating 300 matches per week.⁴⁷

However, there are people in those countries who are concerned about the sheer size of these databases and the grounds for collecting the data. It is therefore not surprising that people fear the potential for the information to be used for other purposes (using the data to identify say whether the person has a particular mental illness and then placing the person on a short list of suspects who law enforcement think have a propensity to commit crime). It is therefore necessary to consider the potential for errors and misuse of the information and to develop procedures which work to minimise these problems. There are concerns overseas that there is potential for misuse because DNA evidence can be used in a convincing way through use of scientific jargon and because law enforcement is seen to control much of the process involved in preparing and presenting DNA identification evidence.⁴⁸

46 http://www.pbs.org/newshour/forum/july98/dna_legislation.html. 'On line Newshour DNA Databank Legislation: A State-By-State Analysis' Source: FBI Laboratory Division.

47 Figures from Forensic Science Service Fact Sheet 002/98 quoted in 'The Criminal Law Review', July 1998, *The DNA Database: Civil Liberty and Evidentiary Issues* at 437, by Mike Redmayne.

48 Ibid at 438 - 446; 'Journal of Criminal Law' November 1995, *Creating a DNA database*, by Beverley Steventon at 411; 'American Journal of Law and Medicine' Vol XVI No.3, *The Advent of DNA Databanks: Implications for Information Privacy*, at 381, by Andrea D Gorgey.

Details of the position in the other countries is as follows:

New Zealand

New Zealand has legislation which is very similar to the Model Bill. Enacted in 1995, it provides for magisterial approval of the taking of samples and applies to suspects (not just people who are charged with an offence). It was enacted at the time the 1995 Model Bill was being circulated for public comment. Indeed the database provisions in the 1995 Model Bill were based on the New Zealand legislation. However the New Zealand legislation is only concerned with the taking of blood samples. An important difference from the 1995 Model Bill is that the grounds for taking blood samples from those convicted of serious offences are less onerous for law enforcement. There is no requirement to demonstrate propensity to the commit these offences.

Canada

The existing Canadian legislation provides for a detailed list of offences against the person and terrorist offences. Like Australia and New Zealand, it requires court authorisation for the compulsory taking of samples. It requires police to obtain a warrant for taking the sample from a suspect from a 'provincial judge.' Where there are practical problems the warrant can be obtained by telephone.

Unlike the Model Bill, there was no procedure regulating the consensual taking of samples. The warrant must be obtained for plucking hairs, taking mouth swabs or blood and may be subject to conditions. The suspect may be detained 'for a period that is reasonable'. The data may only be used for the investigation or proceedings in relation to the offence. Like the Model Bill it must be destroyed within 12 months if the proceedings are not commenced or if the proceedings are discontinued/dismissed. The Canadian privacy legislation regulates the maintenance of the database. The Canadian Privacy Commissioner has recommended against permanent databases from the general population or from people convicted of serious offences.⁴⁹

On 24 August 1995 the Canadian Association of Chiefs of Police passed resolutions calling for the creation of a nation DNA database and legislation for the "mandatory taking and retention of DNA samples from persons charged with a designated offence for the purpose of data banking, the sample and result to be destroyed upon request if the person is found not guilty, or a stay is entered" and the "taking and retention" of samples from people convicted of a designated offence as well as those currently serving sentences and on parole.

49 The Privacy Commissioner of Canada, *Genetic Testing and Privacy* 1992 pp 43-50.

The Canadian Government responded in 1997 by introducing the *DNA Identification Bill* which was enacted in 1998. The new legislation provides for:

- the creation of a national DNA data bank;
- regulates the use of information collected including transmission of the information within and outside Canada;
- that if a person is convicted of a listed offence *the information may be kept indefinitely* unless
 - the conviction of the offence which was the basis for the taking of the data is overturned;
 - he or she is conditionally discharged of a conviction (if they do not reoffend within prescribed periods; or
 - the person is a juvenile and the specified retention period has expired.

The Act would allow a judge to order the taking of samples from people convicted of a range of offences including even common assault and makes provision for court authorisation of taking samples from people convicted of a listed offence prior to the commencement of the legislation. The court must be satisfied it is in the interests of the administration of justice, taking into account:

- the criminal record of the person;
- the nature of the offence;
- the circumstances surrounding its commission;
- the impact of the order on the privacy and security of the person.

However the Act provides for a less discretionary approach to court authorisation where the person from whom police wish to take a sample:

- has been declared a 'dangerous offender' (the *Canadian Criminal Code* already has a procedure where someone who has committed a very serious violence offence (eg rape or murder) and, following an assessment as to persistent aggressiveness, is declared to be a 'dangerous offender');
- convicted of more than one murder at different times;
- convicted of more than one serious sexual offence and is still serving a sentence of 2 or more years imprisonment for one or more of the offences; and

obtaining the sample is *reasonably required*.

United Kingdom

The UK *Police and Criminal Evidence Act 1984* was developed many years before the Australian, Canadian and New Zealand models. While it provided for very comprehensive police procedures hitherto unknown in most places, the legislation allowed the taking of 'intimate samples' from any person in police detention on the authorisation of a police superintendent where he or she has reasonable grounds for suspecting the involvement of the person concerned in a 'serious arrestable offence' **and** for believing the sample will tend to confirm or disprove involvement; **and** the person had given written consent. It included saliva and urine samples as intimate samples that did not need to be taken by a registered medical practitioner.

Non-intimate samples could be taken without consent where the person was in police detention and it is authorised by a police superintendent on grounds of suspicion of involvement in a serious arrestable offence and belief the sample will tend to confirm or disprove involvement in the offence. There was provision for the destruction of samples where proceedings were discontinued but the question of whether the data could be retained after the destruction of the samples was not addressed in the legislation.

In 1994 the UK Act was amended to enable non-intimate samples to be taken compulsorily where the person is suspected by the superintendent of committing a 'recordable offence' as opposed to a 'serious arrestable offence.' However, if the person has not been charged or informed he or she will be reported for the offence, the superintendent must still have reasonable grounds for believing the sample will tend to prove or disprove involvement in the offence. Under these changes it would be possible to take a sample on the basis of minor 'recordable offences' such as fraudulently using a motor vehicle license.

The second change authorised the taking of the samples without consent for the database from people who are charged with or convicted of a 'recordable offence' - there is no requirement of police detention or even authorisation by the police superintendent. This, along with the reclassification of mouth swabs as a non-intimate procedure, allowed a massive increase in the size of the database.

The procedure for the taking of intimate samples was also relaxed in that it could now be used in relation to 'recordable offences'. However, there are requirements that there be consent as well as the authorisation of the superintendent on reasonable grounds for believing involvement in the offence and that the sample would tend to confirm or disprove involvement in the offence. In the UK the taking of a blood sample, an intimate procedure, cannot be done without the consent of the suspect. The Model Bill allows the taking of intimate samples without consent providing it is authorised by a court.

The classification of mouth swabs as a non-intimate procedure has a quite different background to the situation in Australia. Interestingly, like the Model

Bill, dental impressions are specifically included as an 'intimate sample'. This follows a recommendation of the UK Royal Commission on Criminal Justice.⁵⁰

The destruction requirements were also changed. The legislation provided that while the samples must be destroyed where the suspect is exonerated or charges are withdrawn, the DNA data could be kept but not used in evidence against the person or for the investigation of an offence. This enables the use of the data in a statistical database established to make comparisons between the pool of local DNA data and specific individual DNA and crime scene profiles for the purpose of calculating probabilities. The UK Royal Commission on Criminal Justice suggested the statistical database should be maintained by an independent body to reassure people it is not used for investigative purposes or there is no doubling up of data put into the system, however that suggestion was not taken up by the Government.

The amendments clearly authorised the creation of a separate investigative database which can be used to conduct indefinite speculative searches with the remaining data (ie data obtained from suspects and those convicted of 'recordable offences'). It allows the data to be used in evidence against the suspect or others.

Germany

The German Parliament has just passed a new *DNA Identification Act*. On 28 May 1998 the Interior Minister, Mr Kanther said:

Whereas hitherto a DNA analysis could be initiated solely with a view to convicting a criminal offender, it shall in future be admissible for the purposes of future criminal proceedings. A regulation relating to past cases also allows for offenders to be registered who have already been convicted and are about to be released.⁵¹

While, as with the police in other civil law countries, there are extensive powers to gather evidence and genetic testing has been used for years to 'clarify crimes', up until the passage of the new legislation, DNA data was usually scrapped for privacy reasons after cases were finally dealt with by the courts.

The new law is said to be needed to enable the retention of genetic data on all people convicted of serious crime following a match in a child rape/murder case with the DNA of someone who had been convicted of rape in 1990. The match came about after a large scale DNA testing exercise in the particular city which it is now being claimed would have been unnecessary if a DNA database of convict records was available.⁵²

50 (July 1993) cm 2263, HMSO.

51 Translated press statement provided by the Australian Embassy in Bonn on 20 August 1998.

52 <http://www.netlink.de/gen/Zeitung/1998/980625b.htm> *German Parliament Approves Creation of Gene Bank*, OTC 25.06.98 01.33

A 1993 Report of the Project Group on Data Protection for the Council of Europe accepts the use of DNA sampling for identification purposes. Use of the data for asserting pre-disposition to crime was rejected.

The Netherlands

Forensic DNA testing in criminal cases was first introduced in 1989 and was accepted as exculpatory evidence by the Dutch Supreme Court in 1990. However, defendants who refused to cooperate with DNA testing could not be forced to provide blood samples for analysis.⁵³

The Government therefore legislated on 8 November 1993 to force non-consenting defendants to give samples and authorised the use of the results of DNA testing as evidence of guilt. The taking of the sample must be authorised by the 'Investigating Judge' after a request from the 'Public Prosecutor' or on the initiative of the 'Investigating Judge', however it can only be authorised where the offence is serious (maximum penalty 8 years imprisonment or certain specified violent offences which have a lower penalty - eg sexual assault). The samples must be taken by a 'surgeon'. The legislation includes strict procedures preserving the chain of evidence, quality control and right of the defendant to conduct his or her own tests from a spare sample.

The legislation authorises the creation of a national DNA database which includes DNA profiles of suspects in previous cases and DNA data collected at crime scenes. It is used for matching for the purpose of criminal prosecutions but also for identifying deceased people and people who are unable to identify themselves.

Provision is made to remove the data on people who are wrongly considered as being a suspect, however other data (eg convicted people) may be kept for up to 30 years. Crime scene data for 18 years.

The Dutch report that due to the serious nature of the offences involved, there are about 1000 crime scene profiles and 250 from suspects each year.⁵⁴

United States of America

While there are US Department of Justice Guidelines on DNA sampling which apply to the FBI and other federal law enforcement agencies, the enacting of sampling and database procedures have been left to State Governments. Creating a permanent database of convicted offenders has found favour and the FBI has developed a national database model called CODIS. This style of database was supported in the Eastal Committee report and we understand is the concept which is the basis of the APMC proposals for a national database.

53 'Forensic Science International, 1997 Elsevier Science Ireland Ltd, *Forensic DNA testing and its legislation in the Netherlands* at p 55, Ate Kloosterman and Harrie Janssen of the Dutch Forensic Science Laboratory.

54 *Ibid*, p 58.

In the US it is reported that there have been over 200 cases where matching resulted in 'cold hits' - the completed identification of offenders for unsolved crimes. Many of the 'cold hits' concern rapes and murders and repeat offenders. Like the UK, some States are moving to take samples on a very large scale. In Virginia 160,000 samples have been gathered and they have moved to a policy of gathering samples from all convicted felons, including some juveniles. The same is also said to be happening in Alabama, New Mexico and Wyoming. In South Dakota the samples are taken routinely upon arrest (like fingerprints) and in Massachusetts thousands of convicts, probationers and parolees have been rounded up for the taking of samples.⁵⁵

Evidence from Steve Niezgoda and Dawn Herkenham of the FBI before the US "National Commission on the Future of DNA Evidence" ⁵⁶ suggests that by mid 1997 450,000 samples had been collected in 35 States but they have a large backlog of samples to be analysed. All States collect samples from sex offenders, half cover homicide and assault offences, and half cover robbery and kidnapping. One third include juvenile offenders.

According to the FBI evidence the US State legislation has the following features:

- authorisation of collectors;
- indemnification for collectors from civil or criminal liability if generally accepted medical practices have been followed;
- a 'contributors' right of access to the information and to know it is included on the database;
- a right to expungement of the record on request where the particular conviction is reversed;
- criminal penalties for unauthorised disclosure of the information and tampering with samples.

These laws have been challenged and upheld on Constitutional grounds on several occasions. Generally the State legislation follows the FBI guidelines, however there are variations which is evident in the following comparison of legislation in Virginia, Massachusetts and Vermont:

Virginia

- an adult or juvenile 14 years or older convicted of a felony since 1 July 1990 must give a sample of blood, saliva or tissue for DNA analysis.
- after 1 July 1990 the blood, saliva or tissue shall be taken prior to release from custody, or where there is no custodial sentence, as a condition of the sentence.

55 <http://www.ishipress.com/dnacrine.htm> 'The New York Times on the Webb' February 19, 1998. 'DNA Databanks Giving Police Powerful Weapon - The Instant Hit' by Carey Goldberg.

56 <http://www.ojp.usdoj.gov/nij/dnamt/trans/trans-e.html>

Appendix 1

- procedures require those taking the samples to be qualified (includes nurses) and proper labelling and sealing of samples.
- the results of DNA analysis must be maintained and may be presented as evidence of the facts to the court in the form of a prescribed certificate.
- the results must be made available to federal, state and local law enforcement authorities, but non-disclosure requirements apply, unless there is a match.
- provides for the creation of a non-identifying statistical database.

Massachusetts

- any person (including children) convicted of a range of specified offences against the person and other serious offences must submit a sample for DNA analysis within 90 days of the conviction.
- results must be placed in State DNA database.
- ‘includes blood samples’ - does not exclude saliva.
- procedures require those taking the samples to be qualified (includes nurses) and proper labelling and sealing of samples.
- the results must be made available to federal, state and local law enforcement authorities, but non-disclosure requirements apply, unless there is a match.
- provides for the creation of a non-identifying statistical database.
- the data can be used to identify deceased persons, for missing persons and “advancing other humanitarian purposes.”
- any person can apply to a superior court to have their data removed from the database where the conviction has been overturned/expunged/dismissed; providing 12 months have expired and the DA is not contemplating further charges for the same conduct.
- Any person on probation or parole for such a conviction must submit a sample within 90 days of the commencement of the legislation (1997).

Vermont

- any person (presumably including children) convicted of a range of specified violent crimes (list of serious assaults, sexual assaults and lewd behaviour, burglary, unlawful trespass) on or after the commencement of the legislation (1998) **or before** the legislation where still in custody, on parole, probation or under supervision

for a violent crime, must submit DNA sample for analysis.

- shall be obtained by drawing blood, unless Department determines that a less intrusive method of collection is available, in which case it must be used.
- procedures require those taking the samples to be qualified (includes nurses) and proper labelling and sealing of samples.
- if a person refuses to provide the required sample - the responsible public officers must make an application to the district court for an order requiring the person to provide the sample.
- if the court determines the person is required under the legislation to provide the sample (no discretion, only to satisfy itself there is compliance with the legislation) - the court can make an order to authorise the use of force.
- database must be compatible with the national FBI CODIS database - cooperation with federal, state, local and foreign law enforcement (Canada also provides for this).
- use limited to criminal investigations.
- provides for the creation of a non-identifying statistical database.
- where the conviction for the violent crime is reversed, etc it is for the court to notify the holders of the DNA data; the sample and record must be destroyed.
- where a crime scene sample is matched with someone who is eliminated as a suspect; that person's details should be removed from the database.

Conclusion

There is also legislation in many other European countries which we have not examined. The Netherlands was chosen as a country similar to Australia in population size and Germany as an example of a larger European country.

**LIST OF THOSE WHO CONTRIBUTED SUBMISSIONS DURING 1994
WHICH WERE USED IN THE DEVELOPMENT OF THE 1995 MODEL
BILL**

1. NSW Crown Prosecutors' Chambers - Peter Berman,
2. SA - National Police Research Unit (NPRU)
3. WA Judge P J Healy, Chief Judge's Chambers
4. UK Stephen Silber QC, Law Commission, London
5. Qld - Peter E Gorman, Inns of Court, Brisbane
6. NSW - Trevor Nyman
7. NSW - Greg James QC
8. WA Mary Ann Yeats, Judges' Chambers, District Court
9. NSW - P Bradley, New South Wales Crime Commission
10. Qld -John Jerrard, QC, Inns of Court, Brisbane
11. Qld - Queensland DPP - R N Miller, QC,
12. Qld - The Hon Mr Justice G N Williams, LRC
13. Sir Harry Gibbs.
14. Tas - Tas Law Society
15. Vic - David Lanham, The University of Melbourne
16. Tas - Gunson, Pickard & Hann, A G Melick,
17. SAPOL - Trevor R Killmier, South Australia Police Comm
18. Cth- Dept of Environment, Sport and Territories - C Cory,
19. Vic - Law Institute of Victoria - Roderick Smith,
20. ACT - ACT Attorney-General's Department - D Merryful
21. Cth - Lynne Ashpole, Criminal Law Division, AG's Dept
22. Cth - Law Enforcement Board - including National Institute of Forensic Science (NIFS), NSW Health Dept, QldPOL and Victorian Institute of Forensic Pathology
23. Vic - DPP of Victoria - Janet Atkinson.
24. Qld - Office of the Information Commissioner
25. Qld - Qld Indeterminate Sentenced Prisoners Association
26. Qld - I. Davies, Victims of Crime Association (Qld) Inc.
27. Vic - Council for Civil Liberties Vic - Robert Richter, QC,

28. ACT - Women's Electoral Lobby- Ann Wentworth,
29. Cth - Australian Federal Police Association (AFPA)
30. WA Murray J per David Malcolm, CJ, Supreme Court, WA
31. NSWPOL - Minister -T Griffiths,
32. SA - SA Attorney-General's Department - M Goode
33. ACT - Hugh Selby, Legal Workshop, Faculty of Law ANU
34. NSW - Older Women's Network Incorporated - L Anike.
35. NSW - Paul Byrne, Forbes Chambers
36. NZ - Law Commission
37. Cth - The Department of The Prime Minister and Cabinet
38. NZ - Ministry of Women's Affairs
39. WA - Geoffrey Miller, QC, Bar Chambers
40. ACT - Australian Federal Police Association (addendum)
41. NSW - Redfern Legal Centre
42. Vic -Victorian Bar Council
43. ACT - The Law Society of the ACT
44. NTPOL
46. Cth - Department of Defence
47. VICPOL
48. Cth - Office of Legislative Drafting Division, AG's Dept
49. Qld - The National Council of Women of Australia Inc Ltd
50. Cth - Australian Federal Police
51. WAPOL
52. Cth - Commonwealth Ombudsman - Sue Pidgeon,
53. Cth - Adam McCarthy, DFAT
54. NSW Ministry for Advancement and Status of Women
55. Vic -Magistrates' Court of Victoria - N Papas,
56. NSW - National Children's & Youth Law Centre
57. Qld - Prisoners' Legal Service Inc. - Laurie Cullinan.
58. NSW - University of NSW, Law Faculty - J Hunter & D Boniface -

Appendix 2

59. Queensland Law Society Inc. - Scott S Carter, Solicitor.
60. Queensland Police Service - Sergeant Scott Trappett
61. NTPol views via Director, Policy, NT Dept of Law (expressed as not reflecting views of A-G or Dept of Law)
62. Cth - ATSIC
63. Qld Legal Aid Office
64. NSW Bar Association
65. NSW - Law Society of NSW.
66. NSW - Council for Civil Liberties - John Marsden.
67. WA - Office of Women's Interests
68. WA - Western Australian Women's Advisory Council

MODEL FORENSIC PROCEDURES BILL 1999

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ADDITIONS AND CHANGES TO THE 1995 MODEL BILL ARE IN BOLD

Division 1 - General

1. Definitions (former cl 1)

(1) In this Part:

adult means a person of or above 18 years of age.

appropriately qualified person to carry out a forensic procedure means a person (such as a police officer) who is qualified as prescribed by the regulations to carry out the forensic procedure.

authorised applicant for an order means:

- (a) the police officer in charge of a police station, or
- (b) the investigating police officer, or
- (c) the Director of Prosecutions *[an appropriate reference should be inserted in each jurisdiction to ensure that this covers any person prosecuting a relevant offence]*.

child means a person who is under 18 years of age.

Commissioner of Police includes a police officer to whom the Commissioner has delegated the functions conferred or imposed on the Commissioner under this Act.

corresponding law is defined in section 88.

exercise a function includes perform a duty.

DNA database means the DNA matching database or DNA identification database.

DNA identification database is defined in section 83.

DNA matching database is defined in section 83.

forensic material means:

- (a) samples, or
- (b) handprints, fingerprints, footprints or toeprints, or
- (c) photographs, or
- (d) casts or impressions,

taken from or of a person's body by a forensic procedure.

forensic procedure means:

- (a) an intimate forensic procedure, or
- (b) a non-intimate forensic procedure,

but does not include any intrusion into a person's body cavities except the mouth or the taking of any sample for the sole purpose of establishing the identity of the person from whom the sample is taken.

function includes a power, authority or duty.

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 or not he or she consents or does not consent to a forensic procedure being carried out.

in custody is defined in subsection (2).

informed consent:

- (a) in relation to a suspect—is defined in section 6, and
- (b) in relation to a volunteer or parent or guardian of a volunteer—is defined in section 60.

interview friend is defined in section 2.

intimate forensic procedure means the following forensic procedures:

- (a) an external examination of the genital or anal area, the buttocks, or, in the case of a female, the breasts, or
- (b) the taking of a sample of blood, or
- (c) the taking of a sample of saliva, or a sample by buccal swab, or
- (d) the taking of a sample of pubic hair, or
- (e) the taking of a sample by swab or washing from the external genital or anal area, the buttocks, or, in the case of a female, the breasts, or
- (f) the taking of a sample by vacuum suction, by scraping or by lifting by tape from the external genital or anal area, the buttocks, or, in the case of a female, the breasts, or
- (g) the taking of a dental impression, or

- (h) the taking of a photograph of, or an impression or cast of a wound from, the genital or anal area, the buttocks, or, in the case of a female, the breasts.

investigating police officer means the police officer in charge of the investigation of the commission of a relevant offence.

limited purposes index is defined in section 83.

magistrate means [an appropriate definition should (if necessary) be inserted by each jurisdiction to ensure that the provisions relating to magistrates do not apply to lay justices].

non-intimate forensic procedure means the following forensic procedures:

- (a) an examination of a part of the body other than the genital or anal area, buttocks, or, in the case of a female, the breasts, that requires touching of the body or removal of clothing, or
- (b) the taking of a sample of hair other than pubic hair, or
- (c) the taking of a sample from a nail or under a nail, or
- (d) the taking of a sample by swab or washing from any external part of the body other than the genital or anal area, the buttocks, or, in the case of a female, the breasts, or
- (e) the taking of a sample by vacuum suction, by scraping or by lifting by tape from any external part of the body other than the genital or anal area, the buttocks, or, in the case of a female, the breasts, or
- (f) the taking of a handprint, fingerprint, footprint or toe print, or
- (g) the taking of a photograph of, or an impression or cast of a wound from, a part of the body other than the genital or anal area, the buttocks, or, in the case of a female, the breasts.

order means:

- (a) order of a magistrate under section 18, or
- (b) interim order of a magistrate under section 26, or
- (c) order of a court under section 57 or 58, or
- (d) order of a magistrate under section 63 or 64.

parent of a child includes a person who:

- (a) is legally entitled to, and who has, custody of the child, or
- (b) is legally responsible for the day-to-day care, welfare and development of the child and has the child in his or her care (not being a teacher, person who is in charge of a child care centre or other person who has a child in his or her care for the purpose of educating or minding the child).

participating jurisdiction is defined in section 88.

prison medical officer means, in relation to a prison or other place of detention, a person appointed or acting as medical officer for the prison or other place of detention.

[Note: an appropriate definition should be inserted by each jurisdiction]

relevant offence, in relation to a person who is a suspect on whom a forensic procedure is carried out or proposed to be carried out, means:

- (a) if the forensic procedure is a forensic procedure other than the taking of a handprint, fingerprint, footprint or toeprint:
 - (i) the indictable offence in relation to which the person is a suspect, or
 - (ii) any other indictable offence arising out of the same circumstances, or
 - (iii) any other indictable offence in respect of which the evidence likely to be obtained as a result of carrying out the proposed forensic procedure on the suspect is likely to have probative value, or
- (b) if the forensic procedure is the taking of a handprint, fingerprint, footprint or toe print:
 - (i) the indictable offence or summary offence (other than an offence that may be dealt with by way of penalty notice) in relation to which the person is a suspect, or
 - (ii) any other indictable offence or summary offence (other than an offence that may be dealt with by way of penalty notice) arising out of the same circumstances, or
 - (iii) any other indictable offence or summary offence (other than an offence that may be dealt with by way of penalty

notice) in respect of which the handprints, fingerprints, footprints or toe prints are likely to have probative value.

[Note: the appropriate term to cover the concept of a penalty notice (or whatever term is used to describe an expiation notice in the particular jurisdiction) should be inserted in each jurisdiction]

responsible person, in relation to a DNA database, means the person responsible for the care and management of the database.

serious offence means an offence under a law of this State or of a participating jurisdiction that is punishable by a maximum penalty of 5 or more years of imprisonment.

serious offender means a person who is found guilty of a serious offence.

suspect, in relation to an offence, means:

- (a) if a forensic procedure other than the taking of handprints, fingerprints, footprints or toeprints is carried out or proposed to be carried out and the offence is an indictable offence:
 - (i) a person whom a police officer suspects on reasonable grounds has committed the indictable offence, or
 - (ii) a person charged with the indictable offence, or
 - (iii) a person who has been summonsed to appear before a court in relation to the indictable offence, or
- (b) if handprints, fingerprints, footprints or toeprints are taken or proposed to be taken and the offence is an indictable offence or a summary offence (other than a summary offence that may be dealt with by penalty notice):
 - (i) a person whom a police officer suspects on reasonable grounds committed the offence, or
 - (ii) a person charged with the offence, or
 - (iii) a person who has been summonsed to appear before a court in relation to the offence.

[Note: the appropriate term to cover the concept of a penalty notice (or whatever term is used to describe an expiation notice in the particular

Note. Section 77* states that the burden lies on the prosecution to prove on the balance of probabilities that a police officer had a belief on reasonable grounds.

***unrestricted purposes index* is defined in section 83.**

***volunteer* is defined in section 59.**

- (2) In this Part, a reference to a person in custody is a reference to a person who is in the lawful custody of a police officer.
- (3) In this Part, a reference to a sample taken from a person includes a reference to a sample taken from the person that consists of matter from another person's body.
- (4) In this Part, a reference to informing a person of a matter is a reference to informing the person of the matter, through an interpreter if necessary, in language (including sign language or braille) in which the person is able to communicate with reasonable fluency.
- (5) **For the purposes of this Part, a person destroys forensic material taken from another person by a forensic procedure if the person destroys any means of identifying the forensic material with the person from whom it is taken.**

2. Interview friend (former cl 2)

- (1) In this Part, an ***interview friend*** of a suspect, **serious offender or volunteer** who is a child or an incapable person is:
 - (a) a parent, guardian or other person chosen by, or acceptable to, the **suspect serious offender or volunteer, or**
 - (b) a legal representative of the suspect, serious offender or volunteer, or
 - (c) if there is no available person who is covered by either paragraph (a) or (b)—a person who is not a police officer or person who is in any way involved in the investigation of the offence in relation to which the person is a suspect, serious offender or volunteer chosen by an authorised applicant for an order in relation to the carrying out of a forensic procedure **on the suspect, serious offender or volunteer.**
- (2) A suspect, **serious offender or volunteer** who has a legal representative may also have an interview friend who is not the suspect's, **serious offender's or volunteer's** legal representative.

Division 2 - Circumstances in which forensic procedures on suspects may be authorised

3. How forensic procedures may be authorised in different circumstances (former cl 3)

The following Table shows the circumstances in which a forensic procedure may be carried out on a suspect, and shows the provisions that authorise the carrying out of the procedure.

Table 1

Sections	Suspect	Intimate forensic procedure	Non-intimate forensic procedure
[to be inserted]	adult not in custody	with informed consent under Division 3	with informed consent under Division 3
		by order of a magistrate under Division 5	by order of a magistrate under Division 5
	adult in custody	with informed consent under Division 3	with informed consent under Division 3
		by order of a magistrate under Division 5	by order of a police officer under Division 4
	incapable adult (whether or not in custody)	by order of a magistrate under Division 5	by order of a magistrate under Division 5
	child (whether or not in custody)	by order of magistrate under Division 5	by order of a magistrate under Division 5

Division 3 - Forensic procedures by consent of suspect

- 4 Forensic procedure may be carried out with informed consent of suspect** (former cl 4)
- (1) A person is authorised to carry out a forensic procedure on a suspect with the informed consent of the suspect. The person is authorised to carry out the procedure in accordance with Division 6 and not otherwise.
 - (2) This Division does not authorise the carrying out of a forensic procedure on a suspect who:
 - (a) is a child, or
 - (b) is an incapable person.
- 5 Persons who cannot consent to forensic procedures** (former cl 5)
- (1) A child cannot consent to the carrying out of a forensic procedure.
 - (2) An incapable person cannot consent to the carrying out of a forensic procedure.
- 6 Informed consent to forensic procedures** (former cl 6)
- (1) A suspect gives informed consent to a forensic procedure if the suspect consents after a police officer:
 - (a) requests the suspect to consent to the forensic procedure under section 7, and
 - (b) informs the suspect about the forensic procedure in accordance with section 9, and
 - (c) gives the suspect the opportunity to communicate, or attempt to communicate, with a legal practitioner of the suspect's choice.
 - (2) The police officer must allow the suspect to communicate, or attempt to communicate, with the legal practitioner in private unless the police officer suspects on reasonable grounds that the suspect might attempt to destroy or contaminate any evidence that might be obtained by carrying out the forensic procedure.

Note. Section 77 states that the burden lies on the prosecution to prove on the balance of probabilities that a police officer had a belief on reasonable grounds.

7 Police officer may request suspect to consent to forensic procedure (former cl 7)

A police officer may request a suspect to undergo a forensic procedure if the police officer is satisfied as required by section 8.

8 Matters to be considered by police officer before requesting consent to forensic procedure (former cl 8)

- (1) The police officer must be satisfied on the balance of probabilities that:
 - (a) the person on whom the procedure is proposed to be carried out is a suspect, and
 - (b) there are reasonable grounds to believe that the forensic procedure is likely to produce evidence tending to confirm or disprove that the suspect committed a relevant offence, and
 - (c) the request for consent to carry out the forensic procedure is justified in all the circumstances.

Note Section 77 states that the burden lies on the prosecution to prove on the balance of probabilities that a police officer had a belief on reasonable grounds.

- (2) In determining whether a request is justified in all the circumstances, the police officer must balance the public interest in obtaining evidence tending to confirm or disprove that the suspect committed the offence concerned against the public interest in upholding the physical integrity of the suspect.
- (3) In balancing those interests, the police officer must have regard to the following matters:
 - (a) the seriousness of the circumstances surrounding the commission of the relevant offence and the gravity of the relevant offence,
 - (b) the degree of the suspect's alleged participation in the commission of the relevant offence,
 - (c) the age, physical and mental health and cultural background of the suspect, to the extent that they are known to the police officer,
 - (d) whether there is a less intrusive but reasonably practicable way of obtaining evidence tending to confirm or disprove that the suspect committed the relevant offence,

- (e) if the suspect gives any reasons for refusing to consent—the reasons,
- (f) any other matter considered relevant to balancing those interests.

9 Matters that the suspect must be informed of before giving consent (former cl 9)

- (1) The police officer must inform the suspect of the following matters:
 - (a) that the giving of information under this section, and the giving of consent (if any) by the suspect, is being or will be recorded by audio tape, video tape or other electronic means, or in writing, and that the suspect has a right to a copy of that record in a form provided by **section 75**.

[Note: adjustments will be required in each jurisdiction to ensure that this paragraph complies with local requirements for provision of transcripts]

- (b) the purpose for which the forensic procedure is required,
 - (c) **the fact that the person is a suspect and** the offence in relation to which the police officer wants the forensic procedure carried out,
 - (d) the way in which the forensic procedure is to be carried out,
 - (e) that the forensic procedure may produce evidence against the suspect that might be used in a court of law,
 - (f) that the forensic procedure will be carried out by an appropriately qualified person,
 - (g) if relevant, the matters specified in subsection (2) or (3),
 - (h) that the suspect may refuse to consent to the carrying out of the forensic procedure,
 - (i) the consequences of not consenting, as specified in subsection (4), (5) or (6) (whichever is applicable),
 - (j) the effect of **section 67**.
- (2) **Suspect's right to have medical practitioner present during certain forensic procedures.** The police officer must inform the suspect that the suspect may request that a medical practitioner of his or her choice be present while an intimate forensic procedure is carried out.

- (3) **Suspect's right to have dentist present during taking of dental impression and other material from mouth.** If the forensic procedure is the taking of a dental impression, sample of saliva or buccal swab, the police officer must inform the suspect that the suspect may request that a dentist of his or her choice be present while the procedure is carried out.
- (4) **Effect of failure to consent to non-intimate forensic procedure by suspect in custody.** If the suspect is in custody and the forensic procedure is a non-intimate forensic procedure, the police officer must inform the suspect that, if the suspect does not consent, a police officer may order the carrying out of the forensic procedure under Division 4 if the police officer is satisfied of the matters referred to in section 14.
- (5) **Effect of failure to consent to intimate forensic procedure by suspect in custody.** If the suspect is in custody and the forensic procedure is an intimate forensic procedure, the police officer must inform the suspect that, if the suspect does not consent, an application may be made to a magistrate for an order authorising the carrying out of the forensic procedure.
- (6) **Effect of failure to consent to forensic procedure by suspect not in custody.** If the suspect is not in custody, the police officer must inform the suspect that, if the suspect does not consent, an application may be made to a magistrate for an order authorising the carrying out of the forensic procedure.

10 **Withdrawal of suspect's consent** (former cl 10)

If a **suspect** expressly withdraws consent to the carrying out of a forensic procedure under this Part (or if the withdrawal of such consent can reasonably be inferred from the **suspect's** conduct) before or during the carrying out of the forensic procedure, then:

- (a) the forensic procedure is to be treated from the time of the withdrawal as a forensic procedure for which consent has been refused, and
- (b) the forensic procedure is not to proceed except by order of a police officer under Division 4 or a magistrate under Division 5.

11 **Recording of giving of information and consent** (former cl 11)

- (1) The police officer must, if practicable, ensure that the giving of the information about the proposed forensic procedure and the suspect's responses (if any) are recorded by audio tape, video tape or other electronic means.

- (2) If tape recording the giving of the information and the suspect's responses (if any) is not practicable, the police officer must ensure that a written record of the giving of the information and the suspect's responses (if any) is made, and that a copy of the record is made available to the suspect.

Note. **Division 11** contains provisions about making copies of material (including tapes) available to the suspect.

[Note: adjustments will be required in each jurisdiction to ensure that subclause (2) complies with local requirements for provision of transcripts]

Division 4 - Non-intimate forensic procedures on suspect by order of a police officer

12 Non-intimate forensic procedure may be carried out by order of police officer (former cl 12)

- (1) A person is authorised to carry out a non-intimate forensic procedure on a suspect in custody by order of a police officer under section 13. The person is authorised to carry out the procedure in accordance with Division 6 and not otherwise.
- (2) This Division does not authorise the carrying out of a forensic procedure on a suspect who:
 - (a) is a child, or
 - (b) is an incapable person.

13 Circumstances in which police officer may order non-intimate forensic procedures (former cl 13)

A police officer may order the carrying out of a non-intimate forensic procedure on a suspect who is in custody if:

- (a) the suspect has been asked under Division 3 to consent to the carrying out of the forensic procedure, and
- (b) the suspect has not consented, and
- (c) the police officer is satisfied as required by section 14.

14 Matters to be considered by police officer before ordering forensic procedure (former cl 14)

- (1) The police officer must be satisfied on the balance of probabilities that:

- (a) the suspect is in custody that is lawful custody, and
- (b) there are reasonable grounds to believe that the suspect committed a relevant offence, and
- (c) there are reasonable grounds to believe that the forensic procedure is likely to produce evidence tending to confirm or disprove that the suspect committed a relevant offence, and
- (d) the carrying out of the forensic procedure without consent is justified in all the circumstances.

Note. Section 77 states that the burden lies on the prosecution to prove on the balance of probabilities that a police officer had a belief on reasonable grounds.

- (2) In determining whether the carrying out of the forensic procedure without consent is justified in all the circumstances, the police officer must balance the public interest in obtaining evidence tending to confirm or disprove that the suspect committed the offence concerned against the public interest in upholding the physical integrity of the suspect.
- (3) In balancing those interests, the police officer must have regard to the following matters:
 - (a) the seriousness of the circumstances surrounding the commission of the relevant offence and the gravity of the relevant offence,
 - (b) the degree of the suspect's alleged participation in the commission of the relevant offence,
 - (c) the age, physical and mental health and cultural background of the suspect, to the extent that they are known to the police officer,
 - (d) whether there is a less intrusive but reasonably practicable way of obtaining evidence tending to confirm or disprove that the suspect committed the relevant offence,
 - (e) if the suspect gives any reasons for refusing to consent—the reasons,
 - (f) any other matter considered relevant to balancing those interests.

- 15 Record of police officer's order** (former cl 15)
- (1) The police officer must, at the time of, or as soon as practicable after, making an order under section 13, make a record of:
 - (a) the order, and
 - (b) the date and time when the order was made, and
 - (c) the reasons for making it,and sign the record.
 - (2) The police officer must ensure that a copy of the record is made available to the suspect as soon as practicable after the record is made.

Division 5 - Forensic procedures on suspect by order of a magistrate

Subdivision 1 - General

- 16 Forensic procedure may be carried out by order of a magistrate** (former cl 16)
- A person is authorised to carry out a forensic procedure on a suspect by order of a magistrate under section 17. The person is authorised to carry out the procedure in accordance with Division 6 and not otherwise.
- 17 Circumstances in which magistrate may order forensic procedure** (former cl 17)
- A magistrate may, under section 18 or 26, order the carrying out of a forensic procedure on a suspect if:
- (a) the suspect is not in custody and has not consented to the forensic procedure, or
 - (b) the suspect is in custody, has been requested to consent and has not consented to the forensic procedure, and the procedure is an intimate forensic procedure, or
 - (c) the suspect is in custody and the investigation period during which the suspect may lawfully be held has not yet expired, or
 - (d) the suspect is a child or an incapable person.

Subdivision 2 - Final orders

- 18 Final order for carrying out of forensic procedure (former cl 18)**
A magistrate may order the carrying out of a forensic procedure on a suspect if:
- (a) section 17 applies, and
 - (b) the magistrate is satisfied as required by section 19.
- 19 Matters to be considered by magistrate before ordering forensic procedure (former cl 19)**
- (1) The magistrate must be satisfied on the balance of probabilities that:
 - (a) the person on whom the procedure is proposed to be carried out is a suspect, and
 - (b) on the evidence before the magistrate, there are reasonable grounds to believe that the suspect committed a relevant offence, and
 - (c) there are reasonable grounds to believe that the forensic procedure is likely to produce evidence tending to confirm or disprove that the suspect committed a relevant offence, and
 - (d) the carrying out of the forensic procedure is justified in all the circumstances.
 - (2) In determining whether the carrying out of the forensic procedure is justified in all the circumstances, the magistrate must balance the public interest in obtaining evidence tending to confirm or disprove that the suspect committed the offence concerned against the public interest in upholding the physical integrity of the suspect.
 - (3) In balancing those interests, the magistrate must have regard to the following matters:
 - (a) the seriousness of the circumstances surrounding the commission of the relevant offence and the gravity of the offence,
 - (b) the degree of the suspect's alleged participation in the commission of the relevant offence,
 - (c) the age, physical and mental health and cultural background of the suspect, to the extent that they are known to the magistrate,

- (d) if the suspect is a child or an incapable person—the **best interests** of the suspect,
- (e) whether there is a less intrusive but reasonably practicable way of obtaining evidence tending to confirm or disprove that the suspect committed the relevant offence,
- (f) if the suspect gives any reasons for refusing to consent—the reasons,
- (g) if the suspect is covered by section 17 (c):
 - (i) the period for which the suspect has already been detained, and
 - (ii) the reasons for any delay in proposing the carrying out of the forensic procedure,
- (h) any other matter considered relevant to balancing those interests.

20 Application for order (former cl 20)

- (1) An authorised applicant (but no other person) may apply to a magistrate for an order under section 17 authorising the carrying out of a forensic procedure on a suspect.
- (2) An application for an order must:
 - (a) be made in writing, and
 - (b) be supported by evidence on oath or by affidavit dealing with the matters referred to in section 19 (1), and
 - (c) specify the type of forensic procedure sought to be carried out, and
 - (d) be made in the presence of the suspect (subject to any order to the contrary made by the magistrate).

21 Securing the presence of suspects at hearings—suspect in custody (former cl 21)

- (1) If the suspect is in the custody of a police officer or is otherwise detained under the law of the State [or Territory] (*original custody*), the magistrate may, on the application of a police officer, issue a warrant directing the person holding the suspect in original custody to deliver the suspect into the custody of the police officer (*temporary custody*) for the hearing of an application for an order under this Division.

- (2) The police officer given temporary custody must return the suspect to the place of original custody:
 - (a) if the application for the order is refused—without delay, or
 - (b) if the order is made—without delay after such period after the order is made as is reasonably necessary to carry out the forensic procedure.

22 Securing the presence of suspects at hearings—suspect not in custody (former cl 22)

- (1) If the suspect is not in custody, the magistrate may, on the application of a police officer:
 - (a) issue a summons for the appearance of the suspect at the hearing of the application, or
 - (b) issue a warrant for the arrest of the suspect for the purpose of bringing the suspect before the magistrate for the hearing of the application.
- (2) The magistrate may issue a warrant only if satisfied:
 - (a) that the arrest is necessary to ensure the appearance of the suspect at the hearing of the application, or
 - (b) that the suspect might destroy evidence that might be obtained by carrying out the forensic procedure, or
 - (c) that the issue of the warrant is otherwise justified.

[Note: procedures concerning application for summons and warrant are covered by separate provisions in each jurisdiction.]

23 Procedure at hearing of application for order (former cl 23)

- (1) An order may only be made in the presence of the suspect concerned.
- (2) A suspect who:
 - (a) is a child, or
 - (b) is an incapable person,must be represented by an interview friend and may also be represented by a legal practitioner.
- (3) Any other suspect may be represented by a legal practitioner.

- (4) The suspect or his or her representative:
 - (a) may call or cross-examine any witnesses, and
 - (b) may address the magistrate.

24 Action to be taken on making of orders (former cl 24)

- (1) If a magistrate makes an order for the carrying out of a forensic procedure the magistrate must:
 - (a) give reasons for making the order, and
 - (b) ensure that a written record of the order is kept, and
 - (c) inform the suspect that reasonable force may be used to ensure that he or she complies with the order.
- (2) The magistrate may give directions as to the time, place and manner in which a forensic procedure is to be carried out.

25 Suspect may be kept in custody for carrying out of forensic procedure (former cl 25)

- (1) If a magistrate orders the carrying out of a forensic procedure on a suspect, the suspect may be detained in custody for so long as is reasonably necessary to carry out the forensic procedure.
- (2) If a magistrate makes an order in the circumstances set out in section 17 (c) the order operates despite any other law.

Subdivision 3 - Interim orders

26 Interim orders for the immediate carrying out of a forensic procedure (former cl 26)

- (1) A magistrate may make an interim order authorising the immediate carrying out of a forensic procedure on a suspect if:
 - (a) section 17 applies, and
 - (b) the magistrate is satisfied that the probative value of evidence obtained as a result of the forensic procedure concerned is likely to be lost or destroyed if there is delay in carrying out the procedure, and
 - (c) the magistrate is satisfied that there is sufficient evidence to indicate that a magistrate is reasonably likely to be satisfied of the existence of the matters referred to in section 19 (1) when the application is finally determined.

- (2) An interim order operates as provided by this Subdivision until a magistrate, at a hearing held as referred to in section 29 (2), confirms the interim order or disallows the interim order.
- (3) Subdivision 2 applies to the making of an order confirming the interim order in the same way as it applies to the making of an order under section 18, and an order confirming the interim order is taken to be an order under section 18.

27 Applications for interim orders (former cl 27)

- (1) An authorised applicant may, without bringing a suspect before a magistrate and without obtaining an order under section 18, make an application seeking an order (*interim order*) authorising the immediate carrying out of a forensic procedure on a suspect.
- (2) An application for an interim order must:
 - (a) be supported by evidence on oath or by affidavit dealing with the matters referred to in section 26 (1), and
 - (b) specify the type of forensic procedure sought to be carried out.
- (3) An application for an interim order may be made in person or, if that is not practicable, by telephone, radio, facsimile or other means of communication.
- (4) The suspect must be in the presence of the authorised applicant when the application is made.
- (5) If the suspect is:
 - (a) a child, or
 - (b) an incapable person,the suspect's interview friend or legal representative must also be in the presence of the authorised applicant.
- (6) Despite subsection (5), the suspect's interview friend may be excluded from the presence of the authorised applicant if the interview friend unreasonably interferes with or obstructs the making of the application.

28 Procedure at hearing of application for interim order (former cl 28)

- (1) If the application is made in person, or by telephone, radio or other form of oral communication, the magistrate must ensure that:
 - (a) the suspect, and

- (b) the suspect's legal representative, if any, and
- (c) the suspect's interview friend, if any,

are given an opportunity to speak to the magistrate.

(2) If the application is made by telex, facsimile or other form of written communication, the magistrate must ensure that:

- (a) the suspect, and
- (b) the suspect's legal representative, if any, and
- (c) the suspect's interview friend, if any,

are given an opportunity to make a written submission to accompany the application, or to speak to the magistrate by telephone, radio or other form of oral communication.

29 Action to be taken on making of interim orders (former cl 29)

(1) A magistrate who makes an interim order must inform the applicant for the order personally, or by telephone, radio, telex, facsimile or other means of communication:

- (a) that the order has been made, and
- (b) of the terms of the order, including the matters mentioned in subsection (2), and
- (c) of any orders or directions given under subsection (3) in relation to the order.

(2) An interim order must specify the date, time and place at which a further hearing on the application will take place and the application will be finally determined by the making of an order confirming or disallowing the interim order.

(3) A magistrate may make orders and give such a directions in relation to an interim order as a magistrate may make or give in relation to an order under section 18.

30 Records of applications and interim orders (former cl 30)

(1) The applicant for an interim order must, at the time of, or as soon as practicable after, applying for the interim order, make a record (the *applicant's record*) of:

- (a) the application, and
- (b) the grounds for seeking the order, and
- (c) the date and time when the order was made, and

- (d) the order made, and
 - (e) the magistrate's name.
- (2) The magistrate must, at the time of, or as soon as practicable after, making an interim order, make a record (the *magistrate's record*) of:
- (a) the date and time when the order was made, and
 - (b) the order made, and
 - (c) the reasons for making it,
- and sign the magistrate's record and send it to the applicant.
- (3) The applicant must ensure that a copy of the magistrate's record and a copy of the applicant's record are made available to the suspect as soon as practicable after the applicant receives the magistrate's record.

31 Suspect may be prevented from destroying or contaminating evidence (former cl 31)

- (1) Any police officer may, while waiting for the application seeking an interim order to be determined, use reasonable force to prevent the suspect destroying any evidence that might be obtained by carrying out the forensic procedure if the order is made.
- (2) Nothing in this section authorises any person to carry out a forensic procedure before an interim order is made.

32 Results of forensic procedures carried out under interim order (former cl 32)

- (1) A sample taken under an interim order must not be analysed unless:
- (a) the sample is likely to perish before a final order is made, or
 - (b) a final order is made confirming the interim order.
- (2) A person who conducts an analysis in the circumstances set out in subsection (1) must not intentionally or recklessly disclose the results of the analysis to any person:
- (a) during the period before a final order is made, or
 - (b) if the interim order is disallowed.

Maximum penalty: 12 months imprisonment.

Subdivision 4 - Reports of proceedings under this Division

33 Restrictions on publication (former cl 33)

A person must not intentionally or recklessly, in any report of a proceeding under this Division, publish:

- (a) the name of the suspect, or
- (b) any information likely to enable the identification of the suspect,

unless the suspect has been charged with a relevant offence or the magistrate, by order, has authorised such publication.

Maximum penalty: 12 months imprisonment.

Division 6 - Carrying out forensic procedures

Subdivision 1 -General provisions

34 General rules for carrying out forensic procedures (former cl 34)

A forensic procedure:

- (a) must be carried out in circumstances affording reasonable privacy to the suspect, and
- (b) except as permitted by other provisions of this Part, must not be carried out in the presence or view of a person who is of the opposite sex to the suspect, and
- (c) must not be carried out in the presence or view of a person whose presence is not necessary for the purposes of the forensic procedure or required or permitted by another provision of this Part, and
- (d) must not involve the removal of more clothing than is necessary for carrying out the procedure, and
- (e) must not involve more visual inspection than is necessary for carrying out the procedure.

35 Use of force in carrying out forensic procedures (former cl 35)

(1) A person authorised to carry out a forensic procedure on a person, or a police officer, may use reasonable force:

- (a) to enable a forensic procedure to be carried out, or
- (b) to prevent loss, destruction or contamination of any sample.

- (2) All forensic procedures are to be carried out in a manner consistent with appropriate medical or other relevant professional standards.

36 Forensic procedures not to be carried out in cruel, inhuman or degrading manner (former cl 36)

- (1) Nothing in this Part authorises the carrying out of a forensic procedure in a cruel, inhuman or degrading manner.
- (2) For the purposes of this section, the carrying out of an intimate forensic procedure is not in itself regarded as degrading to the suspect.

37 Taking samples of hair (former cl 37)

Nothing in this Part authorises the intentional taking of a sample of hair by removing the root of the hair.

Subdivision 2 - Persons involved in forensic procedures

38 Persons who may carry out forensic procedures (former cl 38)

- (1) Table 2 shows, for each forensic procedure, the persons who may carry out the procedure under this Part. A person not specified in the second column of the Table is not authorised to carry out a forensic procedure under this Part except as mentioned in section 40.
- (2) The third column of Table 2 shows, for each forensic procedure, whether a medical practitioner or dentist of the suspect's choice may be present while the forensic procedure is carried out.

Note. Section 41 makes detailed provisions for the presence of a medical practitioner or dentist of the suspect's choice while a forensic procedure is carried out.

Table 2

Forensic procedure	Persons who carry out forensic procedure	May medical practitioner or dentist of suspect's choice be present?
1 external examination of the genital or anal area, the buttocks, or, in the case of a female, the breasts	medical practitioner nurse appropriately qualified person	medical practitioner

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2	the taking of a sample of blood	medical practitioner nurse appropriately qualified person	medical practitioner
3	the taking of a sample of saliva, or a sample by buccal swab	medical practitioner dentist dental technician nurse appropriately qualified person	dentist medical practitioner
4	the taking of a sample of pubic hair	medical practitioner nurse	medical practitioner
5	the taking of a sample by swab or washing from the external genital or anal area, the buttocks, or, in the case of a female, the breasts	medical practitioner nurse	medical practitioner
6	the taking of a sample by vacuum suction, scraping or lifting by tape from the external genital or anal area, the buttocks, or, in the case of a female, the breasts	medical practitioner nurse	medical practitioner
7	the taking of a dental impression	medical practitioner dentist dental technician	dentist
8	the taking of a photograph of, or an impression or cast of a wound from, the genital or anal area, the buttocks, or, in the case of a female, the breasts	appropriately qualified person	medical practitioner

9	external examination of a part of the body other than the genital or anal area, the buttocks, or, in the case of a female, the breasts, that requires touching of the body or removal of clothing	medical practitioner nurse appropriately qualified person	no
10	the taking of a sample of hair other than pubic hair	medical practitioner nurse police officer	no
11	the taking of a sample from a nail or from under a nail	medical practitioner nurse	no
12	the taking of a sample by swab or washing from any external part of the body other than the genital or anal area, the buttocks, or, in the case of a female, the breasts	medical practitioner nurse appropriately qualified person	no
13	the taking of a sample by vacuum suction, scraping or lifting by tape from any external part of the body other than the genital or anal area, the buttocks, or, in the case of a female, the breasts	medical practitioner nurse appropriately qualified person	no
14	the taking of a handprint, fingerprint, footprint or toeprint	appropriately qualified person	no

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- 15 the taking of a photograph of, or an impression or cast of wound from, an external part of the body other than the genital or anal area, the buttocks, or, in the case of a female, the breasts
- appropriately qualified person no

Note. *Appropriately qualified person* is defined in section 1.

39 Certain forensic procedures generally to be carried out by person of same sex as suspect (former cl 39)

- (1) If practicable, an intimate forensic procedure (other than the taking of a sample of blood, a sample of saliva, a buccal swab or a dental impression) is to be carried out by a person of the same sex as the suspect.
- (2) If practicable, a non-intimate forensic procedure for which the suspect is required to remove clothing other than his or her overcoat, coat, jacket, gloves, socks, shoes and hat is to be carried out by a person of the same sex as the suspect.
- (3) If practicable, a person asked under section 40 to help carry out a forensic procedure covered by subsection (1) or (2) is to be a person of the same sex as the suspect.

40 Person may get help to carry out forensic procedure (former cl 40)

- (1) An order by a police officer or magistrate authorising the carrying out of a forensic procedure authorises the person who is to carry out the procedure in accordance with section 38 to ask another person to help him or her to carry out the procedure, and authorises the other person to give that help.
- (2) A person who is asked to help carry out a forensic procedure need not be a person mentioned in section 38.

Subdivision 3 - Presence of other people while forensic procedure is carried out

41 Medical practitioner or dentist of suspect's choice may be present for most forensic procedures (former cl 41)

- (1) A suspect is entitled to request a medical practitioner of his or her choice to be present while an intimate forensic procedure (other than the taking of a dental impression or the taking of a sample of saliva, or a sample by buccal swab) is carried out.
- (2) A suspect is entitled to request a dentist of his or her choice to be present while a dental impression, sample of saliva or buccal swab is taken.

Note. Section 73 provides that the request may be made by the suspect's legal representative or interview friend.

- (3) The medical practitioner or dentist chosen is to be present at the carrying out of the forensic procedure unless he or she:
 - (a) is unable, or does not wish, to attend, or
 - (b) cannot be contacted,

within a reasonable time or, if relevant, within the time in which the person responsible for the effective carrying out of the forensic procedure considers the forensic procedure should be carried out if it is to be effective in affording evidence of the relevant offence.

42 Presence of interview friend or legal representative while forensic procedure is carried out (former cl 42)

- (1) If the suspect on whom a forensic procedure is to be carried out:
 - (a) is a child, or
 - (b) is an incapable person,

then either the suspect's interview friend or the suspect's legal representative (if he or she is not the interview friend) must be present while the forensic procedure is carried out. Both an interview friend and the legal representative may be present.

- (2) An interview friend (other than a legal representative) of a suspect covered by subsection (1) may be excluded from the place where the forensic procedure is being carried out if the interview friend unreasonably interferes with or obstructs the carrying out of the procedure.

43 Presence of police officers while forensic procedure is carried out (former cl 43)

- (1) The number of police officers that may be present during the carrying out of a forensic procedure must not exceed that which is reasonably necessary to ensure that the procedure is carried out effectively and in accordance with this Part.
- (2) A police officer who is of the opposite sex to that of the suspect may only be present during the carrying out of a forensic procedure if:
 - (a) it would not be reasonably practicable to carry out the forensic procedure without the presence of the police officer, and
 - (b) there is no police officer of the same sex as the suspect who, at the time the forensic procedure must be carried out, is available to be present instead of the police officer of the opposite sex.
- (3) This section does not apply to the following forensic procedures:
 - (a) the taking of handprints, fingerprints, footprints or toeprints, or
 - (b) any non-intimate forensic procedure that may be carried out without requiring the suspect to remove any clothing except his or her overcoat, coat, jacket, gloves, socks, shoes and hat.

Subdivision 4 - Carrying out of forensic procedure to be recorded

44 Recording of forensic procedure (former cl 44)

- (1) The carrying out of a forensic procedure (other than the taking of a handprint, fingerprint, footprint or toeprint) must be video recorded unless:
 - (a) the suspect objects to the video recording, or
 - (b) the video recording is not reasonably practicable.
- (2) Before the forensic procedure is carried out, the suspect must:
 - (a) be given an explanation of the value of making a video recording of the carrying out of the forensic procedure so as to avoid disputes about how it was carried out that might otherwise arise between the suspect and the person carrying out the procedure after it is carried out, and

- (b) be informed that the suspect may object to the video recording.

[Note: adjustments will be required in each jurisdiction to ensure that this provision complies with local requirements concerning video recording of suspects.]

- (3) If the carrying out of the forensic procedure is not to be video recorded, the forensic procedure must be carried out in the presence of an independent person (not being a police officer).

Subdivision 5 - Procedure after forensic procedure is carried out

45 Samples (former cl 45)

- (1) This section applies to a sample taken from a suspect under this Part if there is sufficient material for an analysis to be carried out by not only the police investigating the offence but also by or on behalf of the suspect.
- (2) The investigating police officer must ensure that:
 - (a) a part of the material sufficient for analysis is made available to the suspect as soon as practicable, and
 - (b) that reasonable care is taken to ensure that the suspect's part of the material is protected and preserved until the suspect receives it, and
 - (c) that reasonable assistance is given to the suspect to ensure that the material is protected and preserved until it is analysed.

Note. Division 11 contains provisions about making material available to the suspect.

46 Photographs (former cl 46)

If a forensic procedure involves the taking of a photograph of a part of a suspect's body, the investigating police officer must ensure that a copy of the photograph is made available to the suspect.

Note. Division 11 contains provisions about making material available to the suspect.

47 Results of analysis (former cl 47)

If material from a sample taken from a suspect is analysed in the investigation of the offence, the investigating police officer must ensure that a copy of the results of the analysis is made available to the suspect.

Note. Division 11 contains provisions about making material available to the suspect.

48 Preventing the carrying out of forensic procedure (former cl 49)

A person must not intentionally obstruct, hinder or resist a police officer or other person authorised by or under this Act to exercise functions relating to the carrying out of a forensic procedure.

Maximum penalty: 2 years imprisonment.

Division 7 - Carrying out of certain forensic procedures after conviction of serious offenders

Subdivision 1 - Interpretation

49. Forensic procedures to which Division applies

(1) This Division applies to the following forensic procedures:

- (a) the taking of a sample of hair other than pubic hair,
- (b) the taking of a fingerprint,
- (c) the taking of a sample of blood,
- (d) the taking of a buccal swab.

(2) This Division applies to all serious offences and, in relation to the forensic procedure of the taking of a fingerprint, this Division also applies to all indictable offences.

(3) In any other sections of this Division and in Division 11, a reference to a serious offence or serious offender, in relation to the forensic procedure of the taking of a fingerprint, includes a reference to any indictable offence or to any offender convicted of an indictable offence.

50. Application of Division 6 (former cl 71)

Division 6 applies to the carrying out of a forensic procedure to which this Division applies as if the references to the suspect in that Division were references to a serious offender.

Subdivision 2 - Carrying out of forensic procedures on serious offenders in prison and other places of detention

51. Forensic procedures authorised to be carried out on certain serious offenders in prison and other places of detention

(1) A person is authorised to carry out a forensic procedure to which this Division applies on a person (other than a child or an incapable person) who:

- (a) is a serious offender, whether found guilty of the serious offence concerned before or after the commencement of this section, and
- (b) is serving a term of imprisonment in a prison or other place of detention for the offence,

unless an objection to the carrying out of the forensic procedure is made under section 55 and upheld.

[Note. Consideration will need to be given in each jurisdiction as to whether any forms of detention should be excluded from the reference to “place of detention” eg in NSW sentences of imprisonment may be served by way of home detention.]

- (2) A person is authorised by this section to carry out a forensic procedure in accordance with Division 6 as applied by section * and not otherwise.

52. Forensic procedures authorised to be carried out on serious offenders who are not in prisons or other places of detention

- (1) A person is authorised to carry out a forensic procedure to which this Division applies on a person (including a child or incapable person) who:

- (a) is a serious offender found guilty of the serious offence concerned on or after the commencement of this section, and
- (b) is not a person on whom the forensic procedure is authorised to be carried out by section 51,

by order of a court under section 57.

- (2) A person is authorised by this section to carry out a forensic procedure in accordance with Division 6 as applied by section 50 and not otherwise.

53. Scope of authorisation

Nothing in this Subdivision authorises the carrying out of a forensic procedure on a serious offender who is a suspect otherwise than in accordance with Divisions 2–5.

54. **Carrying out forensic procedure on serious offender in prison or other place of detention**
- (1) **A police officer may request a serious offender (other than a child or incapable person) who is serving a sentence of imprisonment in a prison or other place of detention to permit a forensic procedure to which this Division applies to be carried out on the serious offender.**
 - (2) **The police officer must inform the serious offender of the following:**
 - (a) **the purpose for which the forensic procedure is required,**
 - (b) **if the police officer wants the forensic procedure carried out in relation to an offence-the offence concerned,**
 - (c) **the way in which the forensic procedure is to be carried out,**
 - (d) **that the forensic procedure may produce evidence against the serious offender that might be used in a court of law,**
 - (e) **that the forensic procedure will be carried out by a person who may carry out the procedure under Part 6 as applied by section 50*,**
 - (3) **The police officer must inform the serious offender that:**
 - (a) **if the serious offender does not object to the carrying out of the forensic procedure within a period of 5 days after being requested to permit it, the forensic procedure will, after the police officer has given the serious offender at least 2 hours notice, be carried out in accordance with Division 6 as applied by section 50, and**

Note. See section 38.

- (f) **if the forensic procedure is the taking of a sample of blood, that the serious offender may request that the prison medical officer be present while the blood is taken,**
- (g) **that the serious offender may object to the carrying out of the forensic procedure within a period of 5 days after being requested to permit it to be carried out,**
- (h) **the consequences of not objecting, as specified in subsection (3).**

- (b) that information obtained from analysis of forensic material obtained may be placed on a DNA database and used for the purposes of a criminal investigation or for any other purpose for which a DNA database may be used under Division 12.

55. Objections

- (1) A serious offender may object to the carrying out of a forensic procedure on the serious offender within a period of 5 days after being requested to permit the carrying out of the forensic procedure.
- (2) The forensic procedure must not be carried out:
 - (a) before the end of the period of 5 days or, if an objection is made, until the objection is determined, and
 - (b) unless the serious offender is given at least 2 hours notice of the date and time at which it is to be carried out.
- (3) An objection is to be made in writing and must include the grounds upon which the serious offender intends to rely.
- (4) The objection is to be lodged with the person for the time being in charge of the prison or other place of detention in which the serious offender is serving a term of imprisonment.
- (5) The person with whom the objection is lodged must refer the objection to the appropriate officer of a court prescribed by regulations for the purposes of this section for determination of the objection.
- (6) The objection is to be referred as soon as practicable after it is lodged.
- (7) Rules of court may be made with respect to objections made under this section and the giving of notice of the hearing of any objection to any interested person.

56. Determination of objection

- (1) A court to which an objection is made is to hear and determine the objection as soon as possible after it is referred.
- (2) The court may:
 - (a) uphold the objection, or
 - (b) order the serious offender to permit the forensic procedure to be carried out.

- (3) In determining an objection, the court is to take into account the following:

 - (a) whether this Part would authorise the forensic procedure to be carried out but for the objection,
 - (b) the seriousness of the circumstances surrounding the commission of the serious offence,
 - (c) whether the carrying out of the forensic procedure is justified in all the circumstances.

- 57. Order for taking of blood samples, samples by buccal swab, hair samples or fingerprints of serious offender who is not in prison or other place of detention (former cl 69)

 - (1) A police officer may at any time apply to the sentencing court for an order directing a serious offender who is not a person on whom a forensic procedure is authorised to be carried out by section 51 to permit a forensic procedure to which this Division applies to be carried out on the serious offender.
 - (2) A police officer may at any time make such an application to the sentencing court at the time the serious offender is sentenced.
 - (3) An order under this section:

 - (a) does not have effect until after the expiration of any appeal period or after the final determination of any appeal in relation to the serious offence concerned, whichever is later, and
 - (b) has effect only if, at that time, the conviction stands.
 - (4) In determining whether to make an order under this section, a court is to take into account:

 - (a) whether this Part would authorise the forensic procedure to be carried out in the absence of the order,
 - (b) the seriousness of the circumstances surrounding the commission of the serious offence,
 - (c) whether the carrying out of the forensic procedure is justified in all the circumstances.

58. **Taking of blood samples, samples by buccal swab, hair samples and fingerprints following conviction (former cl 70)**
- (1) **If a court orders a serious offender who is in prison or another place of detention to permit a forensic procedure to be carried out, the court may order that a police officer, together with a person who, under Part 6 as applied by section 50*, may carry out the forensic procedure, be permitted to attend on the serious offender in the prison or place of detention to allow the forensic procedure to be carried out.**
 - (2) **If a court orders a serious offender who is not in a prison or another place of detention to permit a forensic procedure to be carried out, the court may order the serious offender to attend at a police station (or other place specified by the court) within a period specified by the court to allow the forensic procedure to be carried out.**
 - (3) **A serious offender ordered to permit the carrying out of a forensic procedure must not intentionally refuse or fail to permit the forensic procedure to be carried out.**
Maximum penalty: 12 months imprisonment.
 - (4) **A serious offender who does not object to the carrying out of a forensic procedure within 5 days after being requested to permit it to be carried out must not intentionally refuse or fail to permit the forensic procedure to be carried out.**
Maximum penalty: 12 months imprisonment.

Division 8 - Carrying out of forensic procedures on volunteers

59. **Carrying out of forensic procedures on volunteers**
- (1) **In this Part:**
***volunteer* means a person:**
 - (a) **who volunteers to a police officer to undergo a forensic procedure, or**
 - (b) **in the case of a child or incapable person - whose parent or guardian volunteers to a police officer that the child or incapable person undergo a forensic procedure.**
 - (2) **A person is authorised to carry out a forensic procedure:**
 - (a) **on a volunteer other than a child or incapable person— with the informed consent of the volunteer given in accordance with section 60, or**

- (b) if the police officer intends the information to be placed on the limited purposes index of that database - the purpose for which it is to be placed on that index and that the information may be used only for that purpose,**
 - (c) if the police intends the information to be placed on the unrestricted purposes index of that database - that the information may be used for the purposes of a criminal investigation or any other purpose for which the database may be used under Division 12,**
 - (d) that information as to the identity of the volunteer may be placed on the DNA identification database.**
- 61. Recording of giving of information and consent**
 - (1) The police officer must, if practicable, ensure that the giving of the information about the proposed forensic procedure and the volunteer's or volunteer's parent's or guardian's responses (if any) are recorded by audio tape, video tape or other electronic means.**
 - (2) If tape recording the giving of information and the volunteer's, parent's or guardian's responses (if any) is not practicable, the police officer must ensure that a written record of the giving of the information and the volunteer's, parent's or guardian's responses (if any) is made, and then a copy of the record is made available to the volunteer, parent or guardian.**
- 62. Withdrawal of consent**
 - (1) If a volunteer, parent or guardian expressly withdraws consent to the carrying out of a forensic procedure under this Division (or if the withdrawal of such consent can reasonably be inferred from the volunteer's, parent's or guardian's conduct) before or during the carrying out of the forensic procedure:**
 - (a) the forensic procedure is to be treated from the time of the withdrawal as a forensic procedure for which consent has been refused, and**
 - (b) the forensic procedure is not to proceed except (in the case of a child or incapable person) by order of a magistrate under section 63.**
 - (2) If, after the carrying out of a forensic procedure under this Division on a volunteer, the volunteer, or the parent or guardian of the volunteer, expressly withdraws consent to retention of the forensic material taken or of information obtained from the**

analysis of that material the forensic material and any information obtained from analysis of the material is, subject to any order made under section 64, to be destroyed as soon as possible after the consent is withdrawn.

- 63. Circumstances in which magistrate may order carrying out of forensic procedure**
- (1) A magistrate may order that consent is given to the carrying out of a forensic procedure on a child or incapable person if:
- (a) the consent of the parent or guardian of the child or incapable person to the carrying out of the forensic procedure cannot reasonably be obtained from a parent or guardian of the child, or
 - (b) the parent or guardian of the child or incapable person consented to the carrying out of the forensic procedure, but subsequently withdraws that consent.
- (2) In determining whether to make an order under this section, the magistrate is to take into account the following:
- (a) whether this Part would authorise the carrying out of the forensic procedure apart from this section,
 - (b) if the forensic procedure is being carried out for the purposes of the investigation of a particular offence—the seriousness of the circumstances surrounding the commission of the offence,
 - (c) the best interests of the child or incapable person,
 - (d) so far as they can be ascertained, any wishes of the child or incapable person with respect to whether the forensic procedure should be carried out,
 - (e) any wishes expressed by the parent or guardian of the child or incapable person with respect to whether the forensic procedure should be carried out.
 - (f) whether the carrying out of the forensic procedure is justified in all the circumstances.
- 64. Retention of forensic material by order of a magistrate after volunteer withdraws consent**
- (1) An authorised applicant may apply to a magistrate for an order under subsection (2).

- (2) A magistrate may order that forensic material taken or information obtained from carrying out of a forensic procedure on a volunteer who withdraws consent to the retention of the material be retained if the magistrate is satisfied:
- (a) that during an investigation into the commission of a serious offence material reasonably believed to be from the body of a person who committed the offence had been found:
 - (i) at the scene of the offence, or
 - (ii) on the victim of the offence or anything reasonably believed to have been worn or carried by the victim when the offence was committed, or
 - (iii) on the volunteer or anything reasonably believed to have been worn or carried by the volunteer at the scene of the offence or when the offence was committed, or
 - (iv) on an object or person reasonably believed to have been associated with the commission of the offence, and
 - (b) there are reasonable grounds to believe that information obtained from analysis of the forensic material taken from the volunteer is likely to produce evidence of probative value in relation to the serious offence being investigated, and
 - (c) the retention of the forensic material taken from the volunteer is justified in all the circumstances.

Division 9 - Admissibility of evidence

Subdivision 1 - Forensic evidence

65 Inadmissibility of evidence from improper forensic procedures etc (former cl 49)

- (1) This section applies if:
- (a) a forensic procedure has been carried out on a **person**, and
 - (b) there has been a breach of, or failure to comply with, any provision of this Part in relation to the forensic procedure (including, but not limited to, any breach or failure to comply with a provision requiring things to be done at any time before or after the forensic procedure is carried out) or **any provision of Division 12 with respect to the recording or use of information on a DNA database.**

Appendix 3

- (2) This section does not apply if:
 - (a) a provision of this Part required forensic material to be destroyed, and
 - (b) the forensic material has not been destroyed.

Note. Section 66* applies where this Part requires forensic material to have been destroyed.

- (3) This section applies to:
 - (a) evidence of forensic material, or evidence consisting of forensic material, taken from the **person** by the forensic procedure, and
 - (b) evidence of any results of the analysis of the forensic material, and
 - (c) any evidence obtained as a result of or in connection with the carrying out of the forensic procedure.
- (4) If this section applies, evidence described in subsection (3) is not admissible in any proceedings against the **person** in a court unless:
 - (a) the **person** does not object to the admission of the evidence, or
 - (b) the court is satisfied on the balance of probabilities of matters that justify admission of the evidence in the proceedings despite the failure to comply with the provisions of this Part.
- (5) The matters that may satisfy the court justify admission of the evidence are the following:
 - (a) the probative value of the evidence, including whether equivalent evidence or evidence of equivalent probative value could have been obtained by other means,
 - (b) the reasons given for the failure to comply with the provisions of this Part,
 - (c) the gravity of the failure to comply with the provisions of this Part,
 - (d) whether the failure to comply with the provisions of this Part was intentional or reckless,
 - (e) the nature of the provision of this Part that was not complied with,

- (f) the nature of the offence concerned and the subject matter of the proceedings,
 - (g) any other matters the court considers relevant.
- (6) The probative value of the evidence does not by itself justify the admission of the evidence.

66 Inadmissibility of evidence where forensic material required to be destroyed (former cl 50)

- (1) If this Part requires forensic material taken from a **person** by a forensic procedure to be destroyed, subsection (2) applies to:
- (a) evidence of the forensic material, and
 - (b) if the material has not been destroyed—evidence consisting of the forensic material, and
 - (c) any results of the analysis of the forensic material, and
 - (d) any other evidence made or obtained as a result of or in connection with the carrying out of the forensic procedure.
- (2) Evidence of the results of the analysis, and the other evidence, is not admissible in any proceedings against the **person**.

Subdivision 2 - Other evidence

67 Admissibility of evidence relating to consent to forensic procedures (former cl 51)

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

68 Admissibility of evidence relating to carrying out of forensic procedure (former cl 52)

Despite section 65 (4), evidence of how a forensic procedure was carried out is admissible in proceedings against a **person** in a court:

- (a) to establish or rebut an allegation that unreasonable force was used to enable the procedure to be carried out, or
- (b) to determine the admissibility of a confession or admission or other evidence adverse to the **person** if the **person** alleges that the evidence was induced or obtained by the use of unreasonable force, or

- (c) to establish or rebut an allegation that the forensic procedure was not carried out in accordance with Division 6.

69 Obstructing etc the carrying out of forensic procedure (former cl 53)

- (1) This section applies if a police officer or magistrate has ordered the carrying out of a forensic procedure on a suspect under this Part.
- (2) Evidence that the suspect:
 - (a) refused to comply with any reasonable direction in connection with the carrying out of the forensic procedure, or
 - (b) obstructed, resisted, hindered, used violence against, threatened or intimidated a person in connection with the carrying out of the forensic procedure,is admissible in any proceedings against the suspect in respect of a relevant offence.
- (3) Evidence described in subsection (2) is not admissible unless it is established that the suspect:
 - (a) had been informed by a police officer as described in section 1 (4), or
 - (b) otherwise knew,that the fact of refusing to comply with the direction, or obstructing, resisting, hindering, using violence against, threatening or intimidating the person, in connection with the carrying out of the forensic procedure might be used in evidence against the suspect.
- (4) The court or jury may draw such inferences from the evidence described in subsection (2) as appear to the court or jury to be proper in the circumstances, having regard to any evidence given by or on behalf of the suspect.

Division 10 - Destruction of forensic material

70 Destruction of forensic material where interim order disallowed (former cl 54)

If an interim order for the carrying out of a forensic procedure made under section 26 is disallowed after the forensic procedure is carried out, the investigating police officer must ensure that:

- (a) all forensic material is destroyed, and
- (b) a copy of the results of any analysis of the forensic material is made available to the suspect.

Note. Division 11 contains provisions about making copies of material available to the suspect.

71 Destruction of forensic material after 12 months (former cl 55)

(1) This section applies where forensic material has been taken from a suspect by a forensic procedure carried out under **Division 3, 4 or 5**.

(2) If:

- (a) forensic material has been taken from a suspect, and
- (b) a period of 12 months has elapsed since the forensic material was taken, and
- (c) proceedings in respect of an offence to which the forensic material relates have not been instituted or have been discontinued,

the forensic material must be destroyed as soon as possible.

(3) If forensic material has been taken from a person **who is a suspect** and:

- (a) the person is found to have committed an offence to which the forensic material relates but no conviction is recorded, or
- (b) the person is acquitted of such an offence and:
 - (i) no appeal is lodged against the acquittal, or
 - (ii) an appeal is lodged against the acquittal and the acquittal is confirmed or the appeal is withdrawn,

the forensic material must be destroyed as soon as practicable unless an investigation into, or a proceeding against the person for, another offence to which the forensic material relates is pending.

(4) A magistrate may, on application by a police officer or the Director of Prosecutions [*an appropriate reference should be inserted in each jurisdiction to ensure that this covers any person prosecuting a relevant offence*], extend for a period not exceeding 12 months the period for which forensic material may be retained under this section, if the magistrate is satisfied there are special reasons for doing so.

- (5) An extension in relation to particular forensic material may be given on more than one occasion.
- (6) The magistrate is to ensure that the responsible person in relation to a DNA database is notified of any extension given under this section.

72 Destruction of forensic material where related evidence is inadmissible (former cl 56)

If a court finds that evidence described in section 65 (4)* relating to a forensic procedure is inadmissible under section 65*, the Commissioner of Police must, as soon as reasonably practicable, ensure that any forensic material taken from the suspect by that forensic procedure is destroyed.

Division 11 - General provisions relating to operation of Part

73 Powers of legal representatives and interview friends (former cl 57)

- (1) A request or objection that may be made by a suspect or serious offender under this Part may be made on the suspect's or serious offender's behalf by:
 - (a) the suspect's or serious offender's legal representative, or
 - (b) if the suspect or serious offender is a child or incapable person—the suspect's or serious offender's interview friend.
- (2) If:
 - (a) this Part requires a suspect or serious offender to be informed of a matter, and
 - (b) the suspect's or serious offender's interview friend or legal representative is present when the suspect or serious offender is so informed, and
 - (c) the suspect or serious offender is so informed in a language (including sign language or braille) in which the suspect's or serious offender's interview friend or legal representative is not able to communicate with reasonable fluency,

the interview friend or legal representative must also be informed of the matter in a language in which the interview friend or legal representative is able to communicate with reasonable fluency.

74 **Obligation of investigating police officers relating to tape recordings**
(former cl 58)

- (1) If a recording by audio tape, video tape or other electronic means is made as required by this Part, the investigating police officer must ensure that:
 - (a) if an audio recording only or video recording only is made—the recording, or a copy of it, is made available to **the suspect, serious offender or volunteer concerned**, and
 - (b) if both an audio recording and a video recording are made:
 - (i) the audio recording, or a copy of it, is made available to the **suspect, serious offender or volunteer concerned**, and
 - (ii) the suspect, serious offender or volunteer is given an opportunity to view the video recording, and
 - (c) in any case, if a transcript of the recording is made—a copy of the transcript is made available to the **suspect, serious offender or volunteer**.
- (2) If an investigating police officer is required to ensure that a **suspect, serious offender or volunteer** is given an opportunity to view a video recording made under this Part, the investigating police officer must ensure that the same opportunity is given to:
 - (a) the **suspect's, serious offender's or volunteer's** legal representative, and
 - (b) if the **suspect, serious offender or volunteer** is a child or an incapable person—the suspect's, serious offender's or volunteer's interview friend.

[Note: adjustments will be required in each jurisdiction to ensure that this paragraph complies with local requirements for provision of transcripts]

75 **Material required to be made available to suspect, serious offender or volunteer** (former cl 59)

- (1) Material from samples, copies, or any other material, that must be made available to a **suspect, serious offender or volunteer** under this Part:
 - (a) may be sent to the **suspect, serious offender or volunteer** at his or her last known address (if any), or to the **suspect's, serious offender's or volunteer's** legal representative (if any) at his or her last known address, or

- (b) if there is no known address as mentioned in paragraph (a)—
may be made available for collection by **the suspect, serious offender or volunteer** at the police station where the investigating police officer was based at the time the forensic procedure was carried out.
- (2) Material of any kind (other than material from samples and copies of records made under section 30) that is required by this Part to be made available to a **suspect, serious offender or volunteer** must be made available in accordance with subsection (1):
 - (a) within 4 weeks after the material comes into existence, or
 - (b) if the material is requested by the suspect, serious offender or volunteer or the **suspect's, serious offender's or volunteer's** interview friend or legal representative, within 4 weeks of the request.

Note. Section 45 deals with the timing of making sample material available, Section 30(3) deals with the timing of making copies of section 30 records available.

[Note: adjustments will be required in each jurisdiction to ensure that this paragraph complies with local requirements for provision of transcripts and copies of video tapes.]

76 Suspect not to be charged for material or viewing video (former cl 60)

If this Part requires material of any kind to be given to a **suspect, serious offender or volunteer**, or an opportunity to view a video recording to be given to a **suspect, serious offender or volunteer** the material or the opportunity to view the video must be given without charge.

77 Proof of belief (former cl 61)

In any proceedings, the burden lies on the prosecution to prove on the balance of probabilities that a police officer had a belief on reasonable grounds as to a matter referred to in this Part.

78 Proof of impracticability (former cl 62)

In any proceedings, the burden lies on the prosecution to prove on the balance of probabilities that it was not practicable to do something required by this Part to be done if practicable.

79 Liability for forensic procedures (former cl 63)

No civil or criminal liability is incurred by any person (including a police officer) who carries out, or helps to carry out, a forensic procedure under this Part in respect of anything done by the person in carrying out, or helping to carry out, the forensic procedure if the person believed on reasonable grounds that:

- (a) informed consent had been given to the carrying out of the forensic procedure, or
- (b) the carrying out of the forensic procedure without informed consent had been duly ordered by a police officer or magistrate under this Part,

and the thing was done in good faith and the doing of it was reasonable in all the circumstances.

Note. Section 77* states that the burden lies on the prosecution to prove on the balance of probabilities that a police officer had a belief on reasonable grounds.

80 Experts not obliged to carry out forensic procedures (former cl 64)

Nothing in this Part requires a medical practitioner, nurse, dentist, dental technician or appropriately qualified person to carry out a forensic procedure.

81 Disclosure of information (former cl 67)

- (1) A person (other than a suspect, **serious offender or volunteer**) who has access to information revealed by a forensic procedure carried out on the suspect, serious offender or volunteer must not disclose that information except as provided by this section.
- (2) A person may only disclose information revealed by the carrying out of a forensic procedure:
 - (a) if the information is already publicly known, or
 - (b) in accordance with any other provision of this Part, or
 - (c) **in accordance with the *Mutual Assistance in Criminal Matters Act 1987* or the *Extradition Act 1988* of the Commonwealth,**
 - (d) for the purposes of the investigation of any offence or offences generally, or
 - (e) for the purpose of a decision whether to institute proceedings for an indictable offence, or

- (f) if the procedure is a forensic procedure other than the taking of a handprint, fingerprint, footprint or toeprint—for the purpose of proceedings for an indictable offence, or
 - (g) if the procedure is the taking of a handprint, fingerprint, footprint or toeprint—for the purpose of proceedings for any offence, or
 - (h) for the purpose of a coronial inquest or inquiry, or
 - (i) for the purpose of civil proceedings (including disciplinary proceedings) that relate to the way in which the procedure was carried out, or
 - (j) for the purpose of the suspect's, **serious offender's or volunteer's** medical treatment, or
 - (k) for the purpose of the medical treatment of a victim of a relevant offence in relation to the suspect **or of a serious offender in relation to the serious offence committed by the offender**, or
 - (l) if the suspect, **serious offender or volunteer** consents in writing to the disclosure.
- (3) A person:
- (a) whose conduct gives rise to the disclosure of information in contravention of this section, or
 - (b) who intends or is reckless as to the disclosure,
- is guilty of an offence.

Maximum penalty: 2 years imprisonment

82 Taking, retention and use of forensic material (former cl 68)

- (1) **Nothing in this Part affects the taking, retention or use of forensic material, or information obtained from forensic material, if the taking, retention or use of the material is authorised by or under another law of the State [or Territory] or a law of the Commonwealth.**
- (2) **Forensic material, or information obtained from it, that is taken in accordance with the law of another State or a Territory may be retained or used in this State [Territory] for investigative or evidentiary purposes even if its retention or use would, but for this subsection, constitute a breach of, or failure to comply with any provision of this Part relating to the carrying out of forensic procedures.**

Alternative:

- (2) Forensic material taken, or information obtained from it, in accordance with the law of another State or a Territory must not be retained or used in this State [Territory] for investigative or evidentiary purposes if, had the forensic material been taken or information obtained in this State [Territory] its retention or use for those purposes would constitute such a serious breach of, or failure to comply with any provision of this Part relating to the carrying out of forensic procedures that it would be inadmissible.

Division 12 - DNA databases (former cll 65–66B)**83 DNA matching database and DNA identification database****(1) In this Act:**

crime scene index means an index of DNA profiles derived from forensic material found:

- (a) at any place (whether within or outside Australia) where a serious offence was committed, or
- (b) on or within the body of the victim of a serious offence, or
- (c) on anything worn or carried by the victim at the time when a serious offence was committed, or
- (d) on or within the body of any person or thing or at any place associated with the commission of a serious offence.

DNA identification database means a database (whether in computerised form or otherwise and however described) containing the following information in relation to DNA profiles on the DNA matching database:

- (a) in the case of a profile in a crime scene index or a missing and unknown deceased persons index - the case number of the investigation associated with the forensic material from which the profile was derived,
- (b) in the case of a profile in a serious offenders index, limited purposes index or unrestricted purposes index- the identity of the person or deceased person from whose forensic material the profile was derived.

DNA matching database means a database (whether in computerised or other form and however described) containing:

- (a) the following indexes of DNA profiles:
 - (i) a crime scene index,
 - (ii) a missing and unknown deceased persons index,
 - (iii) a unrestricted purposes index,
 - (iv) a serious offenders index,
 - (v) a limited purposes index,and identification codes, and
- (b) a statistical index, and
- (c) any other index prescribed by the regulations.

identification code means a code linking a DNA profile to information in a DNA identification database that may be used to identify the person from whose forensic material the DNA profile was derived.

limited purposes index means an index of DNA profiles derived from forensic material taken:

- (a) in accordance with Division 3, 4 or 5 or under a corresponding law of a participating jurisdiction from suspects, or
- (b) in accordance with Division 8 or under a corresponding law of a participating jurisdiction from volunteers who (or whose parents or guardians) have been informed that information obtained will be used only for a purpose specified to them under section 60(2)(b).

missing and unknown deceased persons index means an index of DNA profiles derived from forensic material of persons who are missing and deceased persons whose identity is unknown.

serious offenders index means an index of DNA profiles derived from forensic material taken from:

- (a) serious offenders in accordance with Division 7 or under a corresponding law of a participating jurisdiction, or
- (b) suspects who have been convicted of the relevant offence concerned (being a serious offence).

statistical index means an index of information obtained from the analysis of forensic material taken from persons in accordance with this Part or under a corresponding law of a participating jurisdiction that has been compiled for statistical purposes, being information that cannot be used to identify the persons from whom the forensic material was taken.

unrestricted purposes index means an index of DNA profiles derived from material taken:

- (a) in accordance with Division 8 or under a corresponding law of a participating jurisdiction, from volunteers who (or whose parents or guardians) have been informed under section 60(2)(c) that information obtained may be used for the purpose of criminal investigation or any other purpose for which a DNA database may be used under this Division, and
- (b) from deceased persons whose identity is known.

84 Use of forensic material for DNA databases (former cl 66A)

(1) A person:

- (a) whose conduct gives rise to the supply of forensic material taken from any person under this Part to any person for analysis for the purpose of deriving a DNA profile for inclusion on an index of the DNA matching database if the forensic material is required to be destroyed by this Part or under a corresponding law of a participating jurisdiction, and
- (b) who intends or is reckless as to the supply of material of that kind,

is guilty of an offence.

Maximum penalty: 2 years imprisonment.

(2) A person:

- (a) whose conduct gives rise to the supply of forensic material (other than excluded forensic material) to any person for analysis for the purpose of deriving a DNA profile for inclusion on an index of the DNA matching database, and
- (b) who intends or is reckless as to the supply of material of that kind,

is guilty of an offence.

Maximum penalty: 2 years imprisonment.

- (3) A person:
- (a) whose conduct gives rise to inclusion of any information (other than an identification code) on the DNA matching database that would identify the person from whom the forensic material was taken under this Part or under a corresponding law of a participating jurisdiction, and
 - (b) who intends or is reckless as to the inclusion of information of that kind,
- is guilty of an offence.
- Maximum penalty: 2 years imprisonment.
- (4) A person:
- (a) whose conduct gives rise to the matching of DNA profiles on the limited purposes index of the DNA matching database for the purpose of determining whether any DNA profile on the crime scene index is on the limited purposes index, and
 - (b) who intends or is reckless as to any such matching of profiles,
- is guilty of an offence.
- Maximum penalty: 2 years imprisonment.
- (5) In this section:
- excluded forensic material* means forensic material
- (a) found at a crime scene, or
 - (b) taken from a suspect in relation to a related offence (being a serious offence or other indictable offence) in accordance with Division 3, 4 or 5 or under a corresponding law of a participating jurisdiction and the suspect is convicted of the offence, or
 - (c) taken from a serious offender or a volunteer or other person in accordance with Division 7 or 8* or under a corresponding law of a participating jurisdiction, or
 - (d) taken from the body of a deceased person, or
 - (e) that is from the body of a missing person.

85 Recording, retention and removal of identifying information on DNA identification database

(1) A person:

- (a) whose conduct gives rise to any identifying information about a person obtained from forensic material taken from the person under this Part being recorded or retained in a DNA identification database at any time after this Part requires the forensic material to be destroyed, and
- (b) who intends or is reckless as to the recording or retention, is guilty of an offence.

Maximum penalty: 2 years imprisonment.

- (2) The responsible person must ensure that any identifying information on the DNA identification database relating to a person from whose forensic material a DNA profile on the unrestricted purpose index of the DNA database was derived is removed from the DNA identification database as soon as practicable after the end of the identifying period for the profile.

Maximum penalty: 2 years imprisonment

- (3) The responsible person must remove from the DNA identification index any identifying information relating to a DNA profile on the serious offenders index of the DNA matching database as soon as practicable after becoming aware that the serious offender has been pardoned or acquitted of the serious offence concerned or if the conviction has been quashed.

Maximum penalty: 2 years imprisonment

- (4) In this section:

identifying information means any information that, if linked with the identification code relating to a DNA profile on the DNA matching database, could be used to discover the identity of the person from whose forensic material the DNA profile was derived or to get information about an identifiable person.

identifying period for a DNA profile means the following:

- (a) except as provided by paragraphs (b) and (c), the period of 12 months after the DNA profile is placed on the DNA matching database,

- (b) if the DNA profile is derived from forensic material taken from a volunteer - such period after the DNA profile is placed on the DNA matching database as the Commissioner of Police, with the consent of the volunteer (or, in the case of a volunteer who is a child or an incapable person, a parent or guardian of the volunteer) orders the responsible person to retain identifying information relating to the profile,
- (c) if the DNA profile is derived from forensic material taken from a deceased person whose identity is known - such period as the Commissioner of Police orders the responsible person to retain identifying information relating to the profile.

86 Access to and disclosure of information on DNA identification databases (former cl 66B)

- (1) A person must not access, or disclose to any person, information stored on a DNA database unless the information is accessed or disclosed for one or more permissible purposes.

Maximum penalty: 2 years imprisonment.

- (2) In this section:

permissible purposes means the following purposes:

- (a) the purposes of forensic comparison in the course of a criminal investigation by a police officer or other person prescribed by the regulations,
 - (b) the purpose of making the information available, in accordance with the regulations, to the person to whom the information relates,
 - (c) the purpose of administering a DNA database,
 - (d) the purposes of according with any arrangement entered into between the State *[or Territory]* and another State or Territory or the Commonwealth for the provision of access to information contained in a DNA database by law enforcement officers and persons prescribed by the regulations,
 - (e) the purpose of the investigation of a complaint by the Privacy Commissioner (however described in each jurisdiction).
- (3) Nothing in this section applies in relation to information that does not identify any person.

Division 13 - Operation of this Part and effect on other laws

87 Application of other Acts (former clause 87)

- (1) This Part is not intended to limit or exclude the operation of another law of the State *[or Territory]* relating to:
 - (a) the carrying out of forensic procedures, including procedures not referred to in this Part, or
 - (b) without limiting paragraph (a), the carrying out of breath analysis or a breath test or the production of samples of blood and urine to determine the alcohol or drugs present in a person's body, or
 - (c) the taking of forensic samples, including samples not referred to in this Part, or
 - (d) the carrying out of searches of the person.
- (2) To avoid any doubt, it is declared that even if another law of the State *[or Territory]* provides power to do one or more of the things referred to in subsection (1), a similar power conferred by this Part may be exercised despite the existence of the power under the law.

Division 14 - Interstate enforcement

88 Definitions (cl 74)

In this Part:

appropriate authority means:

- (a) in relation to a participating jurisdiction other than the Australian Capital Territory—an authority exercising, in relation to the police force of that jurisdiction, functions corresponding to those of the Commissioner of Police and any other authority prescribed by the regulations, or
- (b) in relation to the Australian Capital Territory—the Commissioner of the Australian Federal Police and any other authority prescribed by the regulations.

corresponding law means a law relating to the carrying out of forensic procedures **and DNA databases** that substantially corresponds to this Part or is prescribed by the regulations for the purposes of this definition.

DNA database means:

- (a) in relation to this State [*Territory*]*—*a DNA database, and
- (b) in relation to a participating jurisdiction*—*a DNA database that is kept under a corresponding law of the participating jurisdiction,

participating jurisdiction means a State or Territory in which there is a corresponding law in force.

responsible Minister of a participating jurisdiction means a Minister of that jurisdiction who is responsible for administration of a corresponding law.

89 Registration of orders (former cl 75)

- (1) The Minister may enter into arrangements with the responsible Ministers of the participating jurisdictions for the establishment and maintenance, in one of those jurisdictions, of a register of orders for the carrying out of forensic procedures made under corresponding laws of participating jurisdictions.
- (2) An order is registered when a copy of the order (being a copy certified by the person who made it) is registered in accordance with the law of the participating jurisdiction in which the register is kept.
- (3) A person is authorised to carry out the forensic procedure authorised by an order that is registered in accordance with such an arrangement in this State. The person is authorised to carry out the procedure in accordance with Division 6 and not otherwise.
- (4) An application for registration of an order, or for cancellation of registration of an order, may be made by an appropriate authority.

90 Database information (former cl 76)

- (1) The Minister may enter into arrangements with a responsible Minister of a participating jurisdiction under which:
 - (a) information from a **DNA database** of this State [*Territory*] that may be relevant to the investigation of an offence against the law of the participating jurisdiction is to be transmitted to the appropriate authority in that jurisdiction for the purposes of the investigation of, or proceedings in respect of, that offence, and

- (b) information from a **DNA database** of the participating jurisdiction that may be relevant to the investigation of an offence against the law of this State *[Territory]* is to be transmitted to the Commissioner of Police for the purposes of the investigation of, or proceedings in respect of, that offence.
- (2) 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 get 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.

[This provision could be modified to enable information on the databases of every participating jurisdiction to be centralised in one State [Territory]]