



New South Wales
Council for
Civil Liberties



**NSW Council for Civil Liberties and
Liberty Victoria**

Joint submission to:

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

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Acronyms

CCL	New South Wales Council for Civil Liberties
CCL-LV	New South Wales Council for Civil Liberties and Liberty Victoria
CESCR	International Convention on Economic, Social & Cultural Rights
DAL	Division of Analysing Laboratories
DNA	Deoxyribonucleic Acid
LV	Liberty Victoria (Victorian Council for Civil Liberties)
NCIDD	National Criminal Investigation DNA Database

Introduction

1. This submission is made as part of the Further Review of Part 1D of the *Crimes Act 1914* by invitation of the Criminal Justice Division of the Commonwealth Attorney-General's Department signed by Peter Ford.
2. This is a joint submission by the New South Wales Council for Civil Liberties ('CCL') and Liberty Victoria (Victorian Council for Civil Liberties) ('LV').
3. CCL-LV's submissions and recommendations are made herein.
4. CCL and LV here attach information about their mandates and operations: see 'Appendix 1: About the New South Wales Council for Civil Liberties' and 'Appendix 2: About Liberty Victoria'.

Executive Summary

5. CCL-LV recognizes the immense investigative power of forensic policing technology in Australia. At the same time CCL-LV understands that forensic policing technology is a rapidly developing field, with new and exciting applications becoming available every year. Because of the power of this technology, and because of the intimate way in which it affects peoples' lives, CCL-LV believes that the greatest benefit to society will come from a technology that is properly regulated and administered, and which operates with the proper oversight and in a way which is transparent and open to public scrutiny.
6. CCL-LV is extremely grateful for the opportunity to submit its opinions on the current Federal system embodied in part 1D of the *Crimes Act 1914* (Cth), and supports this Further Review in achieving the responsible and effective use of forensic policing technology in Australia.
7. CCL-LV makes a number of recommendations regarding Part 1D of the *Crimes Act 1914* (Cth). The key recommendations are:
 - (3) **CCL-LV recommends that the Federal government pass a constitutional or statutory Bill of Rights to better protect people from potential abuse of Part 1D and the DNA database. (see p.6)**
 - (5) **A body responsible for the DNA, biometric and genetic functions of CrimTrac should be established by statute. This agency should have its organization and oversight mechanisms clearly stipulated to lessen the risk of contamination and build public confidence in the DNA database. (see p.10)**
 - (8) **The DNA database should be created by statute. In giving a statutory basis to the database, the purposes for such a database should be clearly stated. This will protect against 'function creep' and 'function leap', and will strengthen the basis of administrative challenges to abuses of the forensic system. (See p.12)**
 - (9) **DNA evidence should only be used in the most serious types of offences, being: murder, manslaughter, robbery and sexual offences. (See p.12)**
 - (12) **CCL-LV recommends that a suspect's DNA should only be able to be matched against the scene of the crime for which they are a suspect (within the meaning of the Act). (See p.15)**

1. Independence of review

8. CCL-LV notes that this Further Review is being undertaken by the Attorney-General's office. With all due respect to the good name of the Attorney-General and the *bona fides* of this committee, it must be stated that this is not the sort of distance that can seriously claim 'independence' from the government of the day. CCL-LV believes that distancing the review process from the Cabinet and Attorney General's office will help make these recommendations properly independent. Such distance will strengthen public support for the recommendations, and may assist the government in making desirable changes to the legislative regime.

Recommendation 1: CCL-LV notes that it is the NSW Ombudsman that has reviewed the DNA database in NSW. CCL-LV suggests therefore that any future reviews of this Part be undertaken by the Commonwealth Ombudsman.

2. Implementation of the 2003 recommendations¹

9. In addition to section 1, CCL-LV would like to voice its skepticism about the current review process. In this regard, CCL-LV notes the government's failure to implement recommendations arising from the 2003 *Report of Independent Review of Part 1D of the Crimes Act 1914 – Forensic Procedures*.² Unfortunately a great number of these recommendations remain unimplemented and unaddressed at the Federal level. Some important recommendations include:
- Allowing convicted persons access to relevant person samples and crime scene samples to establish their innocence;³
 - Changing the meaning of "destroy" to actually mean "destroy", and not merely "de-identify";⁴
 - Specifically excluding testing of DNA for the purposes of detecting phenotypically-expressed information.⁵

¹ All references made to the "2003 recommendations" are references to the recommendations made in the 2003 *Report of Independent Review of Part 1D of the Crimes Act 1914 – Forensic Procedures*.

² The 2003 *Report of Independent Review of Part 1D of the Crimes Act 1914 – Forensic Procedures* shall hereafter be referred to as the "2003 Review"

³ Attorney-General's Department (2003) *Report of Independent Review of Part 1D of the Crimes Act 1914 – Forensic Procedures* - Recommendation no 5

⁴ *Ibid* - Recommendation no 6

⁵ *Ibid* - Recommendation no 23

- Expressly prohibiting DNA matching outside any database which is not regulated by statute for law enforcement purposes, such as other genetic registers like Guthrie cards or tissue banks.⁶

10. The 2003 recommendations address issues that are fundamental to the operation of the entire criminal justice system. The failure to adopt these recommendations reflects a general lack of leadership in respect of these important issues.

Recommendation 2: CCL-LV urges the government to reexamine the 2003 Review and implement the rights-protective recommendations of that review. In particular, CCL-LV urges the government to:

- a) allow convicted persons access to relevant samples on the database for the purposes of establishing innocence;**
- b) change the meaning of “destroy” to actually mean destroy and not “de-identify”;**
- c) exclude DNA testing for the purpose of detecting phenotypically-expressed information;**
- d) expressly prohibit DNA matching outside any database which is not regulated by statute for law enforcement purposes.**

In CCL-LV’s opinion, these recommendations are crucial to creating a just and rights-conscious DNA system.

3. DNA and human rights

3.1 The need for a Human Rights Act

11. CCL-LV would like to restate its support for a constitutional Bill of Rights or a statutory Human Rights Act at the federal level to assist in the protection of human rights and, in particular, the prevention of abuse of a DNA database. CCL-LV notes that the most successful challenges to the flawed DNA database in the United Kingdom have been made by virtue of that country’s Human Rights Act.⁷ CCL-LV recommends therefore that this committee urges the Federal government to pass either a proposal for constitutional amendment or a domestic Human Rights Act as part of this Further Review.

12. In particular, CCL-LV would like to draw attention to one aspect of Part 1D that goes to the core of why a Human Rights Act is so crucial to the proper functioning of forensic science and the NCIDD. Part 1D operates at the level of the individual, that is, an individual is classed as a “suspect” or a

⁶ *Ibid* - Recommendation no 24

⁷ *S. and Marper v The United Kingdom* [2008] ECHR, (Applications nos. 30562/04 and 30566/04; judgment delivered 4 December 2008) available at <http://www.echr.coe.int/echr/> - [accessed 23/12/2009]

“missing person” and then the Crimes Act treats that individual in accordance with the terms of the Act. Yet any challenge to the operation of the Act has to be brought as an administrative law review which essentially operates at the structural level, that is, by asking questions such as “was the Act lawfully passed?” and “did the official act within the terms of the Act?” A Human Rights Act will more emphatically and properly place the individual complainant at the centre of the inquiry, and this will lead to a fairer system and better service delivery.

Recommendation 3: CCL-LV recommends that the Federal government pass a constitutional or statutory Bill of Rights to better protect people from potential abuse of Part 1D and the DNA database.

3.2 This Further Review, federalism and rights protection

13. CCL-LV understands the reasons for a national DNA database and the decision to publish a national model bill for forensic procedures in 1999.⁸ The divergence between the various jurisdictions in Australia is typical of the federal structure. However, CCL-LV wishes to voice its concern about the push now to further standardize the DNA databases in Australia. Such an exercise seems to inevitably push in the least rights-protective direction as various governments seek to outdo each other in getting “tough on crime.” In this sense, this exercise itself is facilitating a “race to the bottom” which CCL-LV cautions against.
14. As an example, CCL-LV would draw your attention to the *Supplementary Explanatory Memorandum* that accompanied the *Crimes Act (Forensic Procedures Amendment) Act 2006 (Cth)*.⁹ One of the amendments concerned opening up the “matching tables” for suspects, so that these could be checked against “volunteers”, a practice which is not permitted in New South Wales.¹⁰ The reasons given for the changes at the Commonwealth level deserve contemplation:

These amendments bring the Commonwealth table of permissible matching in line with Queensland and Western Australia. Other jurisdictions are considering amending their matching tables to...avoid a situation where States and Territories allow DNA profile matching in certain circumstances but the Commonwealth does not, a situation that would impede the usefulness of NCIDD...¹¹

⁸ Model Criminal Code Officers’ Committee (2000) *Model Forensic Procedures Bill and the Proposed National DNA Database – Final Draft*

⁹ The Parliament of the Commonwealth Of Australia, Senate (2006) *Crimes Act Amendment (Forensic Procedures) Bill (no. 1) 2006 – Supplementary Explanatory Memorandum*

¹⁰ *Crimes (Forensic Procedures) Act 2000 (NSW)* s 93

¹¹ Above, n 7, ‘Amendment 4’ - pp.2-3

15. The substantive reason given for changing the matching tables is dealt with in section 5, but for the moment it should be noted that this is not the sort of reason CCL-LV finds acceptable for changing the law. Further, the “usefulness” of the NCIDD (ambiguous itself since the purpose of the NCIDD is not explicit) is not affected by slight variations between jurisdictions. Alternatively, if the usefulness is affected, it should be recognized that this is one price that has to be paid in having a federal structure, designed to protect rights and avoid tyranny.

Recommendation 4: CCL-LV recommends that if the Commonwealth is going to change its laws to be uniform with state legislation, then it should change the law to accord with the most rights-protective jurisdiction.

4. CrimTrac and NCIDD

16. Section 4 examines the operation and interaction of CrimTrac and NCIDD. CCL-LV considers that deficiencies and ambiguities in both CrimTrac’s mandate and NCIDD’s constitution has left Australia’s forensic policing regime without proper oversight mechanisms, lacking transparency and without clear limitations on the uses of forensic information. Section 4.1 explores the general lack of oversight and considers the need for the statutory reconstitution of CrimTrac. The result of the lack of oversight is demonstrated in 4.1.1 in the case example of Mr. Farah Jama. Section 4.2 builds on 4.1 by examining and differentiating the purposes and uses of CrimTrac and NCIDD.

4.1 CrimTrac, lack of oversight, and the need for a statutory body

17. NCIDD is central to the operation of Part 1D of the Commonwealth’s *Crimes Act*. The operation of NCIDD is currently overseen by CrimTrac. Any body such as CrimTrac that oversees the operation of a national database of highly personal information relies on widespread public trust and support if it is to enjoy ongoing success. Transparency and constant scrutiny are essential in building public understanding and support for such a scheme.
18. CrimTrac is currently established by an inter-governmental agreement between the various executives in Australia.¹² Structurally, the nature of this arrangement means that there is little legislative oversight and, in a situation such as now where one political party dominates the national and

¹² *The Inter-governmental Agreement Between the Commonwealth, States and Territories of Australia for the Establishment and Operation of “CrimTrac”, A National Law Enforcement Information System for Australia’s Police Services* - 13 July 2000 – available online at http://www.crimtrac.gov.au/corporate_information/Inter-GovernmentalAgreement.html [last accessed 30 Dec 2009]

state governments, there is serious potential for the extinguishment of rights by ministerial decree.

19. CCL-LV recognizes the important role played by CrimTrac in investigating serious crime, and understands that overregulation can unnecessarily hamper the investigative process. However, there is currently a significant lack of oversight mechanisms relating to CrimTrac and the information it is holding. This is reflected in:
 - (a) the lack of independent, quantitative, readily-accessible data regarding the information being held by CrimTrac;
 - (b) the lack of independent, qualitative analysis of the effectiveness of the NCIDD, to ascertain whether on balance it is worth the invasion into the intimate personal sphere of the individual in Australia, and to assess the value of NCIDD to the Australian taxpayer;
 - (c) the lack of any clearly independent specialist body overseeing the operations of the NCIDD and the genetic information of people in Australia being held by the authorities.

A lack of oversight has two related effects: First, a lack of oversight is damaging to CrimTrac because the perception that it operates outside of public scrutiny can undermine confidence in the system. Second, a lack of oversight can allow abuse of the system by corrupt officials or organized crime.

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

4.1.1 A case example: Mr. Farah Jama

21. The recent case of Mr. Farah Jama is illustrative of concerns about DNA storage. As you may be aware, Mr. Jama was wrongly convicted by a Victorian court of raping a woman at a nightclub. The conviction was based on DNA evidence which was later revealed to have been contaminated. Strikingly, the DNA evidence was considered so conclusive that it effectively nullified several eye-witness statements that placed Mr. Jama elsewhere at the time the crime was committed.
22. The case unfortunately highlights some of the ongoing weaknesses of forensic data used in criminal investigations in Australian jurisdictions. Two particular risks are contamination and a lack of sufficient oversight.

23. The NSW ombudsman identifies numerous stages in the investigation process where contamination was likely.¹³ Broadly, contamination can occur prior to, or during the analysis of a crime scene, or crime scene exhibit, or in a laboratory during analysis. In Mr Jama's case, while it is not entirely clear at what stage his DNA sample had been mixed up, it is clear that it was some time after collection – possibly in the laboratory.¹⁴
24. Worryingly, it seems that Victoria's ongoing problems with forensic procedures are a potentially endemic problem in all Australian jurisdictions. The NSW Ombudsman observed many weaknesses in NSW laboratory conditions and laboratory processes, chief of which concerned a lack of adequate work and storage space, and lack of resources.¹⁵ Similarly, the National Association of Testing Authorities (NATA) noted in a 2004 assessment of NSW forensic laboratories (Division of Analysing Laboratories - DAL) that the DAL laboratories were dated and cramped.¹⁶ Similar concerns emanate from DAL itself,

“Our accommodation is way below standard. There is simply not enough space, that could impact on contamination between cases. The key issue is to enlarge the lab. Or do we have to wait until a court case fails?”¹⁷

25. As DAL's concerns suggest, and Mr Jama's case illustrates, the cost of leaving reform until something in the system breaks down can be a tragic and costly practice.
26. The overarching weakness which compounds the danger of the contamination risks is the lack of sufficient oversight. CCL-LV has discussed oversight issues at the Federal level, and the case of Mr. Jama sees these problems reflected at the State level. Professor Gans has observed that a number of warning signs in the Jama case went undetected.¹⁸ As a result a young man spent sixteen months in jail for a very serious crime he did not commit. Additionally his family suffered the anguish and communal condemnation that accompanies convictions of this nature.
27. This case reveals yet again that the oversight mechanisms put in place to prevent these sorts of incidents are simply not sufficient. CCL-LV urges

¹³ NSW Ombudsman (2006) *DNA Sampling and Other Forensic Procedures Conducted on Suspects and Volunteers under the Crimes (Forensic Procedures) Act 2000*

¹⁴ Rout, M. (2009) “DNA in the dock”, *The Australian*, 11 December 2009

¹⁵ NSW Ombudsman (2006), above, n 13, - see pp.231-243

¹⁶ National Association of Testing Authorities Australia, (2004) *Report on Reassessment*. ICPMR, 30 July 2004. See also: NSW Ombudsman (2006), above, n 13, p.236.

¹⁷ Minutes of meeting between NSW Police Forensic Services Group and DAL, 1 June 2004 – in NSW Ombudsman (2006) above, n 13, p.236

¹⁸ Rout, M. (2009) “DNA in the dock”, *The Australian*, 11 December 2009

the Federal government to recognize the tragic gravity of Mr. Jama's case, and to take a leading role in overhauling oversight and accountability mechanisms built into *Crimes Act 1914*.

28. Considering section 4.1, and Mr. Jama's case, CCL-LV makes the following three recommendations:

Recommendation 5: A body responsible for the DNA, biometric and genetic functions of CrimTrac should be established by statute. This agency should have its organization and oversight mechanisms clearly stipulated to lessen the risk of contamination and build public confidence in the DNA database.

Recommendation 6: The statutory establishment of CrimTrac must be accompanied by a commitment to sensible transparency. Anonymous statistical information pertaining to CrimTrac records should be made publicly available and readily accessible.

Recommendation 7: An independent body should be commissioned to provide periodic assessment of the operation and efficiency of the organization responsible for the DNA, biometric and genetic functions of CrimTrac.

4.2 NCIDD: purposes and uses

29. Sub-section 4.2 discusses the purposes and the uses of NCIDD. CCL-LV considers the 'purposes' of NCIDD to be the reasons for the establishment of the DNA database. Section 4.2.1 focuses on the guiding philosophy of NCIDD and addresses the dangers of 'function creep' and 'function leap'. On the other hand, 'uses' refers to the specific authorization given to law enforcement officials or other agents wishing to use NCIDD by Part 1D. Section 4.2.2 discusses the crimes that NCIDD can (or should) be used for, before addressing issues of use and access.

4.2.1 Purposes of NCIDD

30. One important example of how a statutory foundation for CrimTrac might improve the protection of rights in Australia is through a clear definition of the purpose of the NCIDD. It is obvious from various sections of the *Crimes Act 1914* (Cth) for what purpose NCIDD is established. Nevertheless, as was noted in the 2003 recommendations (and elsewhere), technology such as NCIDD is exceptionally prone to 'function creep' and 'function leap'. An example of function creep might be for example, the development of criminogenics or racial profiling as a means of law enforcement. An example of function leap might be, for example, to begin to use NCIDD in the administration of health and social welfare (say,

to determine whether people are predisposed towards certain types of diseases).

31. There is no specific statement of purpose for NCIDD. Instead, NCIDD relies on the purposes outlined in the inter-governmental agreement establishing CrimTrac. The danger of function creep or function leap is insufficiently prevented in this agreement.¹⁹ The purposes of CrimTrac according to its own founding charter could be summarized as follows:²⁰

- (a) “to enhance Australian policing” and “meet the needs of the Australian policing community”; and
- (b) to support Australian governments in “the implementation and use of CrimTrac services”; and
- (c) to “provid[e] controlled access to appropriate information by duly accredited third parties.”

The first purpose is insufficiently defined. The second is regrettably vague. It is clear that the third purpose is capable of exceedingly wide interpretation and insufficiently limits the use of NCIDD. None of these purposes provide clear limitations on the use of the material held. These purposes would be unlikely to operate in a way that would support an administrative review, and thus as a matter of administrative law they are virtually worthless.

32. It is also unclear from this charter that the specific purpose of the NCIDD is for use by the police to investigate the most serious types of offences in Australia. Indeed, this type of limited role for NCIDD is exceedingly complex for an organization like CrimTrac because it oversees so many functions, such as the National Vehicle of Interest database and the National Firearm License and Registration System. A separate body to properly oversee the DNA, biometric and genetic functions of CrimTrac is strongly recommended so that the purposes of the NCIDD can be properly outlined. Such a body ought to be established by statute so that the Parliament can properly and fully debate the purposes of the NCIDD, now and in the future.

¹⁹ See Attorney-General’s Department (2003) *Report of Independent Review of Part 1D of the Crimes Act 1914 – Forensic Procedures* – [7.13 – 7.26]; also, for a discussion of function creep in the United Kingdom and the United States see: Edwards, K. (2006) “The Dangers of DNA Databases re-examined”, *Current Issues in Criminal Justice*, vol.18 no.1, pp.92-124 (esp. pp.94-95)

²⁰ Inter-Governmental Agreement for the establishment and operation of CrimTrac, 13 July 2001, Article 3.1 – available at http://crimtrac.gov.au/corporate_information/Inter-GovernmentalAgreement.html [accessed 23/12/2009]

Recommendation 8: CCL-LV strongly urges that the DNA database should be created by statute. In giving a statutory basis to the database, the purposes for such a database should be clearly stated. This will protect against ‘function creep’ and ‘function leap’, and will strengthen the basis of administrative challenges to abuses of the forensic system.

4.2.2 Uses of NCIDD

33. CCL-LV would now like to make some comments regarding the permissible uses of the NCIDD under Part 1D. It is hoped that in doing so a distinction between “the purposes of NCIDD” and the “permissible uses of NCIDD under the *Crimes Act 1914 (Cth)*” will become clearer. From the previous part it can be seen that no parliament in Australia has made any limitation upon the purposes of NCIDD. As a result any administrative law review would be very difficult given the wide purposes of CrimTrac. This Part will deal with some of the more specific problems of the uses of NCIDD under Part 1D.
34. There has been a debate for some time as to whether DNA evidence should be reserved for only the most serious types of offences, or whether it should be used in all cases. CCL-LV notes that the NSW Ombudsman highlights certain offences as being more important, in particular with regards to the use of DNA evidence. For example, the NSW analysis of the comparable Act highlights four types of offences for which DNA has rendered particular assistance: murder, manslaughter, robbery and sexual offences.²¹ Despite the utility of forensic policing being the highest in regards to these more serious offences, forensic sampling remains central in policing of criminal matters right across the board. However, as discussed in the Human Genetics Commission review of the UK DNA database,²² reliance on DNA evidence is changing the nature of how crimes are committed.²³
35. Since DNA evidence is most valuable in more serious criminal investigations CCL-LV strongly urges the government to prevent over-reliance on DNA in law enforcement by limiting the use of DNA to these most serious types of offences.

Recommendation 9: CCL-LV submits that DNA evidence should only be used in the most serious types of offences, being: murder, manslaughter, robbery and sexual offences.

²¹ NSW Ombudsman (2006), above, n 13, p.12

²² The HGC review is more fully discussed below in 6.1

²³ Human Genetics Commission (2009) *Nothing to Hide, Nothing to Fear? – Balancing Individual Rights and the Public Interest in the Governance and Use of the National DNA Database*. UK: Human Genetics Commission – see p 21 at [1.18]

36. CCL-LV notes that in general terms Part 1D appears to restrict the use of NCIDD for the investigation of more serious types of crimes. Several factors contribute to this appearance. For one, 'suspect' is defined as someone suspected of an indictable offence, so presumably forensic sampling and data use is restricted to the investigation of indictable offences. For another, the operation of the Part is reserved in part for 'serious' and 'prescribed' offenders. These definitions may appear to offer some protection, or tether to the use of NCIDD. However, CCL-LV contends that Part 1D contains one highly concealed loophole that may circumvent some of the protections of the Act.
37. Section 23YDAE(2)(d) authorizes the participating governments to make arrangements to access NCIDD for the purposes in section 23YUD(1) or (1A). Section 23YUD(1A) identifies one purpose as "using information", subject to section 23YUD(1B). Paraphrased, subsection (1B) states that information may only be used in the "investigation of a matter" relating to the participating jurisdiction or the Commonwealth, or proceedings in respect of that matter. Section 23YUD defines "investigation of a matter" as, among other things, the investigation of an offence against the law of that jurisdiction. An "offence" is defined in section 3C as an offence against the law of the Commonwealth, or a State offence that has a federal aspect.²⁴
38. The sum of this complicated chain of legislative rules is that while it may appear on the surface that the use of NCIDD is restricted by Part 1D to the investigation of more serious offences, in reality information on NCIDD can be used for the investigation of any 'offence'. This may include both statutory and regulatory offences.
39. CCL-LV suggests that these provisions have to potential to undermine popular conceptions about the use of NCIDD in Australia, and the protections given in the legislation. On this basis Part 1D is deceptive. CCL-LV believes that the integrity of Part 1D depends on its transparent and honest operation. Deceptive construction and illusory protections pose a significant threat to such integrity. CCL-LV believes that the provisions discussed above present a significant loophole to perceived statutory protections, and strongly recommends that these sections should be amended to remove such a loophole.

²⁴ Note: s23WA excludes "an offence against a law of a Territory", except the Australian Capital Territory, as part of the definition of "offence" for the purposes of Part 1D

Recommendations 10: In order to ensure that the DNA database is used for the purposes for which it was intended, and for those that the public have endorsed, CCL-LV recommends that Part 1D be amended to remove the ability to use the database to investigate minor offences and regulatory breaches. Such action will clarify the uses of the DNA database and enhance public understanding and discussion of the scheme.

5. The matching tables

40. CCL-LV is concerned by the liberal use of “suspect” or “crime scene” DNA that can take place within the matching table regime.²⁵ Samples taken from crime scenes and placed on the Crime Scene Index could be victims or even innocent parties whose only connection to an offence was to have at some point been in the vicinity. The danger is that a match of any of the suspect samples with DNA from a past offence (a ‘cold hit’) will become grounds for an investigation. However, as evidenced by the Jama case,²⁶ this is not an accurate way of building an investigation and will result in wrongful convictions. It could also encourage poor policing in other ways, as noted below in 6.1
41. This demonstrated danger of lab contamination is accompanied by other problems for the criminal justice system: the statistical significance of DNA evidence may be overstated and there is serious potential for corruption by officials or organized crime.²⁷ There are therefore good grounds for limiting the ways DNA should be used.
42. One of the ways to limit reliance on DNA evidence is to limit the ways in which it can be used to build an investigation. There are at least two ways this can be done. First, as suggested above, the purposes of NCIDD can be limited to specified types of crimes, such as only the most serious types of offences (see 4.2.2 above). Second, ‘cold hits’ can be limited.
43. One way of limiting the ability to make ‘cold hits’ is to limit the classes of individuals able to be checked against the Crimes Scene Index. To allow a suspect, an innocent witness to a crime, a person who simply happened to have at some point been at a crime scene, or a victim all to be run through the system to see what other past crimes they may have been (in a potentially very tangential way) connected to, seems to CCL-LV to so invert the nature of criminal law in this country as to be abhorrent to fundamental principles of justice. It is particularly unsavory to allow the state to investigate a person in relation to a crime that they are not

²⁵ *Crimes Act 1914* (Cth) s 23YDAF

²⁶ Discussed above in 4.1.1

²⁷ Edwards, K. (2006) “The Dangers of DNA Databases Re-Examined”, *Current Issues in Criminal Justice* vol. 18 no.1 pp125-146

reasonably thought to have been involved in, but for some DNA evidence at a crime scene.

44. CCL-LV notes that similar concerns about ‘cold hit’ investigations were raised in the 2003 Review.²⁸ The 2003 Review responded to those concerns by citing legislative purpose as the justification for what Dr Gans called “bad policy”. As is emphasized elsewhere in this submission,²⁹ citing legislative purpose as reasonable justification for policy which is under independent scrutiny is a highly dubious practice. The point of this Further Review, and the review conducted in 2003 is to critically analyse the legislation – such analysis must necessarily include a critique of the purpose or intent as well. CCL-LV considers that legislative intent has only a small role to play in the consideration of the strengths and weaknesses of a legislative regime.

Recommendation 11: CCL-LV recommends that law enforcement officials should have to have some other reasonable grounds for matching a suspect’s DNA with the general crime scene database, other than that the DNA was found at a crime scene. While a suspect must be ‘reasonably suspected’ of committing a relevant offence, the mere presence of DNA should not be enough to found a reasonable suspicion.

Recommendation 12: CCL-LV recommends that a suspect’s DNA should only be able to be matched against the scene of the crime for which they are a suspect (within the meaning of the Act).

45. Regarding victims, Part 1D should provide that DNA taken of someone who is reasonably suspected to be a victim should not be able to be matched with the general databases. Victim DNA should only be used for the purpose of discarding that evidence from the investigation, unless there is some compelling reason that the evidence should be kept. One compelling reason may be that law enforcement officers are unable to reasonably conclude that someone was a victim, as in the case of a complex and on-going investigation. But most of the time this would ensure victim’s protection. One of the problems with the current regimes is that victims of crime who suspect that their DNA may have been collected for investigation of another crime (which they may or may not have committed) will not come forward to police for fear of prosecution. This is poor public policy.

Recommendation 13: CCL-LV strongly urges the government to ensure that any person reasonably suspected of being a victim should under

²⁸ Attorney-General’s Department (2003) *Report of Independent Review of Part 1D of the Crimes Act 1914 – Forensic Procedures* – [3.188 - 3.230]

²⁹ See paragraph 72

no circumstances be checked against any of the DNA database indices.

46. CCL-LV believes that persons no longer reasonably suspected of having committed the offence in question are insufficiently protected under the Act. Currently, only 'suspect' samples are to be 'destroyed'³⁰ after 12 months if proceedings have not been instituted or have been discontinued.³¹ This offers insufficient protection for victims and for anyone whose DNA has been collected from a crime scene. Part 1D should provide for the immediate destruction of forensic material and the removal of details from the DNA database of any person connected to a crime, who is subsequently cleared, or if the investigation is discontinued or concluded. This would include destroying DNA taken from a crime scene which has not been identified as belonging to a suspect, volunteer or person convicted of the crime, and where the investigation has been concluded. Law enforcement officers and CrimTrac must be placed under an obligation to ensure that this happens as soon as reasonably practicable.

Recommendation 14: CCL-LV recommends that Part 1D should be amended to ensure that any person's forensic material and identifying details be removed from all parts of the DNA database as soon as reasonably practicable from the discontinuance or conclusion of investigation of the crime for which that person's material was collected, unless the person has been charged or there are reasonable grounds for keeping all the forensic material relating to the crime.

6. DNA, the authorities and the community

47. This section deals with the relationship between law enforcement authorities (including the courts) and the community, and the effects of Part 1D on that relationship. Generally, CCL-LV warns against any and all measures imposed that threaten the amicable and trusting relationship between the community and these authorities. Such relationships are vital for the expedient and equitable functioning of the law in this country. Issues addressed in this section are: policing (6.1); admissibility of evidence (6.2); and the use of force.

6.1 DNA and policing

48. CCL-LV notes that the DNA database and forensic regime is being treated by the Commonwealth (and the States) as if it is simply an extension of the usual investigative techniques. On one level, this is no doubt true –

³⁰ CCL-LV notes that 'destroy' presently means 'de-identify', not physical destruction – *Crimes Act 1914* (Cth) s23WA(5)

³¹ *Crimes Act 1914* (Cth) s 23YD

we might think of DNA samples as a more sophisticated finger print. But on another level, DNA and forensic advances have fundamentally changed the nature of policing and, indeed, of crime itself. As was well noted by the Human Genetics Commission in the United Kingdom, in its review of the UK's database:

DNA analysis has entered the context of crime management and investigation [and] its introduction has been able to shape the legal, operational and political context...[A] decision to create a national DNA database can result in changes to police practice, to the likelihood and procedure of arrest, to decisions about which crimes are investigated, to the way crimes are committed and even to the sorts of crimes that are committed...[B]y shaping the context in which it is used, DNA-based forensic policing produces the conditions for establishing acceptance of its own legitimacy and for increasing the criminal justice system's dependence upon it. Once this is accomplished, arguments about the creation of these conditions become harder to have.³²

49. As you may be aware, the report of the Human Genetics Commission was accompanied by allegations that police only investigate crimes that reveal DNA evidence.³³ Further, it was alleged that arrest has become a point of first call for officers in the UK, so that samples can be immediately taken (which is a substantial change to the way police had previously been interacting with their communities).³⁴

"It is now the norm to arrest offenders for everything if there is a power to do so... It is apparently understood by serving police officers that one of the reasons, if not the reason, for the change in practice is so that the DNA of the offender can be obtained: samples can be obtained after arrest but not if there is a report for summons."³⁵

50. In Australia the foundations of a similar trend in favor of arrest are replicated in the *Crimes Act 1914* (Cth) through provisions that favour the sampling of people in custody. Under the current regime a suspect in custody can be subjected to a non-intimate forensic procedure by order of a senior constable. By contrast suspects not in custody may only be subjected to a procedure by order of a magistrate.³⁶ These sorts of provisions present an incentive for police to make arrests and may seriously threaten the important relationship between the police and the community.

³² Human Genetics Commission (2009) *Nothing to Hide, Nothing to Fear? – Balancing Individual Rights and the Public Interest in the Governance and Use of the National DNA Database*. UK: Human Genetics Commission, p 21 at [1.18]

³³ *Ibid* at [1.19]

³⁴ *ibid*

³⁵ *Ibid*, p.22 at [1.19]

³⁶ *Crimes Act 1914* (Cth) s 23WC

Recommendation 15: CCL-LV strongly urges the government to enact changes that will shift the bias away from arrest for the purposes of DNA collection in the infant stages of a criminal investigation. One such change might make the order of a police officer of an appropriate senior rank (ordinarily sergeant in charge of a police station or above – not senior constable as currently is provided) effective only for adults who are suspected of *serious* indictable offences, and where community safety necessitates a swift response.

6.2 Admissibility of evidence

51. CCL-LV submits that the discretionary test in relation to illegally obtained DNA evidence under section 23XX of the *Crimes Act 1914* (Cth) is inappropriate. Apart from running against clearly established notions of procedural justice, a discretionary test in relation to improperly obtained DNA evidence will be highly likely to promote a culture of investigative short-cutting. This position is supported by Dr Gans in the 2003 Review,

“Any court confronted with the issue [of admissibility] at a voir dire will be placed in an impossible position... if the courts consistently balk at excluding the evidence due of the probative value of the evidence, then there will be every incentive for investigators to ignore the rules”³⁷

52. CCL-LV suggests that public confidence in forensic policing is only sustainable by the application of admissibility requirements that properly reflect public notions of procedural justice.

Recommendation 16: CCL-LV strongly recommends that all DNA evidence resulting from a breach of Part 1D be made inadmissible, as is the case where the evidence should have been destroyed under section 23XY. In pursuit of this goal CCL-LV recommends that all discretionary tests relating to the admissibility of DNA evidence in Part 1D be replaced with a clear, unambiguous prohibition on the use of improperly obtained DNA evidence in criminal proceedings.

6.3 The use of force

53. CCL-LV notes that the 2003 Review left open the question of the use of force in conducting forensic procedures.³⁸ CCL-LV is concerned there is ambiguity in the text of the sections limiting the use of force. Section 23XJ(2) makes it clear that it is the forensic procedure itself must accord with appropriate medical or other professional standards. However, the definition of ‘forensic procedure’ describes only the physical taking of

³⁷ Attorney-General’s Department (2003) *Report of Independent Review of Part 1D of the Crimes Act 1914 – Forensic Procedures* – [3.130]

³⁸ Attorney-General’s Department (2003) *Report of Independent Review of Part 1D of the Crimes Act 1914 – Forensic Procedures* – [at 7.12]

forensic material from the body of a person, and potentially not the force used in enabling such a procedure.³⁹ Therefore, in a strict sense the use of force may not be regulated by subsection 23XJ(2) at all. Rather, force remains reasonable in achieving the aims of section 23XJ(1) up and until the threshold of cruel, degrading and inhuman treatment.

Recommendation 17: CCL-LV strongly recommends that section 23XJ(2) make it explicit that the limiting requirement of conformity with medical or other professional standards applies both to the conduct of a forensic procedure, and the use of force to enable a forensic procedure to be carried out.

54. A second general issue relates to the availability of use of force standards to the public. CCL-LV understands that the AFP's use of force is guided by Commissioner's Order 3 (CO3). CO3 is an internal document that is not available to the public. CCL-LV finds it unacceptable that during the public review of legislation, certain 'relevant professional standards' contemplated in the act⁴⁰ which govern the use of force, are not available for viewing by the public. CCL-LV is concerned that this sort of secrecy will only impede the intelligent public scrutiny demanded in section 23YV of the *Crimes Act 1914*.

Recommendation 18: While some police matters are, and should, remain secret, CCL-LV recommends that all use of force standards be made readily available to the public in order to encourage transparent and honest operation of the AFP in relation to this Act.

7. Part 1D & prison inmates

55. This section deals with the operation of Part 1D in regards to prison inmates. CCL-LV considers prison inmates to be one of the most vulnerable classes of people under the Part. 7.1 deals with the use of force and 7.2 the presence of others during forensic procedures.

7.1 The use of force

56. CCL-LV is deeply concerned by the use of force in obtaining samples from prisoners. As this committee may be aware, there has been at least one incident in relation to the use of force that illustrates CCL-LV's concern.⁴¹ There is also evidence that potentially life-threatening levels of force are routinely used during cell extractions of non-compliant prisoners for the

³⁹ *Crimes Act 1914* (Cth) s.23WA

⁴⁰ *Crimes Act 1914* (Cth) s 23XJ(2)

⁴¹ Paxinos S. (2001), "Minister defends force to obtain DNA sample", *The Age*, 2 June 2001,

purposes of undergoing a forensic procedure.⁴² CCL-LV is particularly concerned by the use of capsicum spray. While the use of a potentially lethal chemical agent may be 'reasonable' for protecting prison staff in an emergency situation, it may not be reasonable for the purposes of coercing a prisoner to undergo a forensic procedure.

57. CCL-LV understands the use of force by prison officers on prison inmates is governed by the *Crimes (Administration of Sentences) Regulation 2008* (NSW), and the *Crimes (Administration of Sentences) Act 1999* (NSW). According to the regulations, reasonable force may be used,

“to ensure compliance with a proper order, or maintenance of discipline, but only if an inmate is failing to co-operate with a lawful correctional centre requirement in a manner that cannot otherwise be adequately controlled”⁴³

Relevantly, this would cover the scenario where a prisoner refuses to undergo a forensic procedure. A correctional officer may use “batons, chemical aids ... firearms”,⁴⁴ and dogs⁴⁵ to achieve compliance with a proper order.

58. CCL-LV accepts the need to pursue justice on behalf of victims of serious crime. However CCL-LV also notes that the testing of inmates has been by and large for cataloging purposes only.⁴⁶ CCL-LV is extremely concerned that the use of firearms, chemical aids and dogs is a disproportionate response to the need to carry out blanket testing of inmates.

59. In a similar conclusion to the discussion of use of force in 6.3, CCL-LV asserts that there needs to be strict statutory differentiation between what is reasonable for the purposes of a forensic procedure, and what is reasonable for other prison/police matters – the use of capsicum spray, dogs and other extreme measures should not be permitted under Part 1D only by virtue of the fact that class of people concerned are prisoners.

Recommendation 19: CCL-LV strongly urges that Part 1D be amended to ensure that prison officers make all reasonable attempts to coerce

⁴² Minogue C. (2005). “The use of a military level of force on civilian prisoners – strip searching, urine testing, cell extractions and DNA sampling in Victoria”, *Alternative Law Journal*, vol.30 no.4 pp.170-173

⁴³ s121(4)(h)

⁴⁴ *Crimes (Administration of Sentences) Regulation 2008* (NSW), s 122

⁴⁵ *Crimes (Administration of Sentences) Act 1999* (NSW), s.78

⁴⁶ Edwards, K. (2006) “The Dangers of DNA Databases Re-Examined”, *Current Issues in Criminal Justice* vol. 18 no.1 pp125-146 (see esp. pp. 93-94)

non-compliant prison inmates without the use of force.⁴⁷ This should be especially so for procedures which are not urgent.

Recommendation 20: CCL-LV also urges that use of force provisions in Part 1D be amended so there is strict statutory differentiation between what is reasonable for the purposes of a forensic procedure, and what is reasonable for the purposes regulating dangerous behavior in prisons.

7.2 The presence of others

60. CCL-LV would like to voice its concern over the provisions that pertain to the presence of prison officers during forensic procedures on prison inmates. CCL-LV is concerned that the omission of a limiting requirement for prison officers within the text of section 23XSA unjustly threatens the rights and dignity of prison inmates. There have been some unfortunate cases that this committee may be aware of that illustrate CCL-LV's concerns.

61. In 2001 SBS's *Insight* showed a video of three prison officers at Bendigo Prison in full riot gear holding an inmate down while another person took a sample of his blood. Five other officers were present as well as a police dog.⁴⁸ In this case a total of nine people plus a police dog were present during a forensic procedure on an inmate.

62. A second example is found in a prisoner's submission to the NSW Standing Committee on Law and Justice:⁴⁹

"In my own case, whilst I consented under duress and a promise (not kept) that I would receive an "Outside Warrant", there were present some six police officers, three "correctional" officers and three members of the Corrective Services riot squad with paraphernalia. I am 54 years old, overweight, out of condition and in indifferent health."⁵⁰

⁴⁷ There is sufficient scope for the non-violent coercion of prisoners in Part 1D. For example, s.23XWA of the Act imposes a term of two years imprisonment on a person who obstructs, hinders or resists a forensic procedure.

⁴⁸ SBS (2001), "Police Force", *SBS Insight*, aired 31 May 2001, transcript available upon request at <http://news.sbs.com.au/insight/> [last accessed 22/11/2009]

⁴⁹ NSW Standing Committee on Law and Justice Inquiry into the Operation of the *Crimes (Forensic Procedures) Act 2000*

⁵⁰ Prisoner, submission to the Standing Committee on Law and Justice Inquiry into the Operation of the *Crimes (Forensic Procedures) Act 2000* – cited in NSW Ombudsman (2001) *The Forensic DNA Sampling of Serious Indictable Offenders Under Part 7 of the Crimes (Forensic Procedures) Act 2000* (NSW) – Discussion Paper [at p.19]

In this case a total of twelve people were allegedly present for a forensic procedure on an inmate.

63. These unfortunate incidents occurred within the jurisdiction of the corresponding state legislation. However, CCL-LV contends that they are equally possible under Part 1D by virtue of the loose and ambiguous limitation on prison officers' presence during forensic procedures.
64. Under Part 1D the presence of other people during a forensic procedure is limited in a general way by section 23XI(c) of the Act. Presence under this section is limited by the test of 'necessity'. Furthermore, the presence of 'police' is limited to that which is 'reasonably necessary' for the purposes of carrying out a forensic procedure.⁵¹
65. However, there is no such limit within the text of section 23XSA as to how many 'prison officers' may be present during a forensic procedure. The only limit to prison officers' presence is implied by section 23XI(c) as that which is necessary for the purposes of carrying out a forensic procedure.
66. CCL-LV strongly believes that legislation requiring the compulsory performance of a forensic procedure must impose strict requirements on the number of people present to avoid undue embarrassment and intimidation. While it is acknowledged that this is the very aim of the legislation, CCL-LV believes the combined effect of sections 23XI(c) and 23XSA does not sufficiently safeguard against potentially humiliating and intimidating procedures.

Recommendation 21: CCL-LV urges that section 23XSA be amended to expressly limit the presence of prison officers to that which is 'reasonably necessary' for the purposes of conducting a forensic procedure. This will mean that prison officers face the same presence requirements as law enforcement officials in other areas.

8. Compulsory testing of serious offenders

67. CCL-LV is concerned with the regime of compulsory testing of 'serious offenders' established in Division 6A of Part 1D. The regime was criticized in the 2003 Review by Justice Action⁵² and by the NSW Privacy Commissioner.⁵³ The criticisms focused on the fact that compulsory testing is inconsistent with the overall framework of Part 1D which assumes

⁵¹ *Crimes Act 1914* (Cth) s 23XS(1)

⁵² Attorney-General's Department (2003) *Report of Independent Review of Part 1D of the Crimes Act 1914 – Forensic Procedures* [3.49]

⁵³ *Ibid* [3.50]

samples will only be taken when circumstances clearly justify it, and after the proper administrative consideration.

68. The 2003 Review responded to these criticisms by arguing firstly that the compulsory removal of genetic material from 'serious offenders' was justified in the interests of protecting society from crime, and secondly, that leaving regulation to the courts would be overly cumbersome. The 2003 Review also contended that such a regime was in the proper contemplation of the legislature at the time the Part was drafted.
69. CCL-LV has several responses to the 2003 Review's position.
70. First, creating category-based compulsory testing schemes may not be proportionate to the benefit of protecting society from crime if protecting society entails the erosion of those processes (proper judicial scrutiny) which have traditionally protected society from the arbitrary application of the law, and which maintain a high degree of public esteem in Australia's legal system.
71. Second, the quest for economically expedient applications of the law should never be allowed to undermine those principles which form the basis of Australia's legal system.
72. Finally, CCL-LV considers that citing legislative intent as the justification for a piece of legislation under review is a highly dubious exercise. The very point of a review is to bring into question aspects of law that Parliament might not have considered, or which may be now inconsistent with public sentiment. CCL-LV submits that parliamentary intent has only a small role to play in the review of legislation such as this.

Recommendation 22: CCL-LV submits that all compulsory testing should be sanctioned by a judge or magistrate, in open court, taking into consideration those factors required when dealing with other compulsory forensic procedures as defined in the *Crimes Act 1914* (Cth) section 23WT(3). If there are concerns about the cost of this exercise, it should be emphasized that this will be minimized by: (1) limiting the types of offenders which can be placed upon the DNA database; and (2) that over time the decision to include an offender on the DNA database will be incorporated into the sentencing procedure within the administration of justice framework.

9. 'Informed' 'consent'

73. CCL-LV notes that the 2003 Review recommended further conditioning of the information given prior to a 'consensual' forensic procedure taking place. CCL-LV submits that the review should adopt the considerations of the 2003 committee, which suggested a regulatory framework for the giving of consent including a statutory consent form written in plain English to be read and signed by the suspect.⁵⁴ CCL-LV further submits that the provision for an interpreter must be extended to volunteers as well as suspects.

Recommendation 23: CCL-LV urges the government to create a simple form written in plain English to be signed by any person 'consenting' to a forensic procedure. An interpreter should also be provided when necessary, and this service should be extended to 'volunteers' as well as 'suspects'.

⁵⁴ Attorney-General's Department (2003) *Report of Independent Review of Part 1D of the Crimes Act 1914 – Forensic Procedures* - [3.32]

APPENDIX 1: About the NSW Council for Civil Liberties

The New South Wales Council for Civil Liberties ('CCL') is committed to protecting and promoting civil liberties and human rights in Australia. Our aim is to secure the equal rights of everyone in Australia and oppose any abuse or excessive power by the State against its people. CCL was established in 1963 and is one of Australia's leading human rights and civil liberties organisations.

To this end CCL attempts to influence public debate and government policy on a range of human rights issues. We try to secure amendments to laws, or changes in policy, where civil liberties and human rights are not fully respected. We also listen to individual complaints and, through volunteer efforts, attempt to help members of the public with civil liberties problems. We prepare submissions to government, conduct court cases, engage regularly in public debates, produce publications, and conduct awareness-raising activities.

CCL is a non-government organisation of Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

APPENDIX 2: About Liberty Victoria

Liberty Victoria is one of Australia's leading civil liberties organisations. Since 1936 we have worked to defend and extend human rights and freedoms in Victoria.

We believe in a society based on the democratic participation of all its members and the principles of justice, openness, the right to dissent and respect for diversity. We aim to secure the equal rights of everyone, as long as they don't infringe the rights and freedoms of others, and oppose any abuse or excessive power by the state against its people.