

DNA IDENTIFICATION AND RAPE VICTIMS

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The members of the Liberal and National parties oppose this legislation. I wonder how Rita Knight, the lady from Wee Waa who was brutally raped, feels?¹

I INTRODUCTION

Politicians promoting the use of DNA identification in the Australian criminal justice system have relied on claims that the technique benefits rape victims. The above statement by the NSW Police Minister, during parliamentary debate on NSW's Crimes (Forensic Procedures) Bill 2000, refers to a mass DNA screening in the country town of Wee Waa just before the Bill was introduced, which successfully identified a rapist.²

However, in contrast to other changes to the investigation and prosecution of rape in recent decades, groups lobbying on behalf of rape victims have had little input into the debate regarding the use of DNA identification as a technique for finding and convicting rapists. Rather, scrutiny of investigative conduct and legislative proposals has been left largely to 'civil liberties' groups who are concerned with the rights of offenders and suspects, or of citizens at large, rather than the victims of crime, including rape victims.³ Of the close to a dozen

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1 New South Wales, *Parliamentary Debates*, Legislative Assembly, 29 June 2000, 7848 (Paul Whelan).

2 Les Kennedy, 'Prime Suspect', *The Sydney Morning Herald* (Sydney), 15 July 2000, 36.

3 See the following lists of written submissions to and consultations with inquiries into Australian DNA legislation:

- Standing Committee on Legislation, Parliament of Western Australia, *Forensic Procedures and DNA Profiling: The Committee's Investigations in Western Australia, Victoria, South Australia, the United Kingdom, Germany and the United States of America*, Report No 48 (1998) Appendices 1 and 2;
- Model Criminal Code Officers' Committee of the Standing Committee of Attorneys-General, *Final Draft: Model Forensic Procedures Bill and the Proposed National DNA Database* (2000) 11 (available only in hard copy), listing written submissions in response to the 1999 Discussion Paper;
- Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Inquiry into the Crimes Amendment (Forensic Procedures) Bill 2000* (2000) Appendix 1;

government inquiries that preceded, accompanied or followed the passage of legislation implementing DNA identification across Australia, groups representing crime victims contributed to just four of them.⁴ In some cases, their contribution was merely to tell legislators to ‘give the police the tools they need’.⁵ Even the recent major report by the Victorian Law Reform Commission on the law and procedure of sexual offences mentioned DNA identification merely to commend increased funding aimed at reducing delays in analysis.⁶

Whether DNA identification should be introduced in Australia is now a moot point. This paper addresses *how* DNA identification works in Australian criminal justice and, in particular, the impact of its regulation and use on rape victims. First, it considers the gathering of bodily tissues from victims. Second, it addresses the ways that rape victims’ DNA profiles can be used by investigators. Third, it discusses investigators’ approach to non-victim samples that are found on victims’ bodies and possessions during a rape investigation.

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- Standing Committee on Law and Justice, Parliament of New South Wales, *Review of the Crimes (Forensic Procedures) Act (2000)* (2002) 167–8;
 - Submissions to the Independent Review of Part 1D (Forensic Procedures) of the Crimes Act 1914 (Cth) (2004) Attorney-General’s Department <http://www.ag.gov.au/agd/WWW/criminaljustice/Home.nsf/Page/Part1D_Publications_Part_1D_Submissions> at 17 March 2005; and
 - Australian Law Reform Commission, *Essentially Yours: The Protection of Human Genetic Information in Australia*, Report No 96 (2003) 21–7.

None of these lists include groups representing victims of crime. Groups representing women did contribute to the Australian Law Reform Commission inquiry (which covered genetic information in criminal and non-criminal contexts).

4 The only contributions I have been able to identify are:

- a submission by the Victims of Crime Association (Qld) Inc in the lead-up to the 1995 version of the Model Forensic Procedures Bill (see Model Criminal Code Officers’ Committee of the Standing Committee of Attorneys-General, *Discussion Paper: Model Forensic Procedures Bill and the Proposed National DNA Database* (1999) 128);
- participation by the NSW Victims of Crime Bureau in a focus group relied upon in an Independent Review of the NSW legislation (see Mark Findlay, *Independent Review of the Crimes (Forensic Procedures) Act 2000* (2003) iv);
- a submission from the President of the Crime Victims Support Association Inc and his testimony and those of two other victim representatives to a Victorian Parliamentary inquiry into DNA identification (see Victorian Parliament Law Reform Committee, *Forensic Sampling and DNA Databases in Criminal Investigations* (2004) 481); and
- responses by Victim Services NSW and its director to an inquiry by the NSW Ombudsman into offender sampling (see NSW Ombudsman, *The Forensic DNA Sampling of Serious Indictable Offenders under Part 7 of the Crimes (Forensic Procedures) Act 2000* (2004) xi).

5 Evidence to Law Reform Committee, Parliament of Victoria, 23 July 2002 (N Halvagas, Crime Victims Support Association).

6 Victorian Law Reform Commission, *Sexual Offences*, Final Report (2004) 135–6.

II GATHERING BODILY TISSUE FROM RAPE VICTIMS

DNA identification is a specialised way of analysing bodily tissue.⁷ Its discovery during the 1980s and subsequent introduction into criminal investigations was soon followed by a perceived need for law reform to regulate the investigative gathering of bodily tissue. In Australia, a desire for uniform rules to underpin the proposed Crimtrac database of forensic information led to an instruction to the Model Criminal Code Officers' Committee of the Standing Committee of Attorneys-General, who were developing Australia's Model Criminal Code, to draft model legislation on forensic procedures.⁸ The Committee's first model bill regulated forensic procedures on investigative suspects and convicted offenders.⁹ The second, more significant, model bill, finalised in 2000, augmented the existing schemes and added provisions regulating the remainder of forensic procedures performed on people by investigators.¹⁰ This addition covered procedures on individuals whose bodies contain forensically significant information but who, being neither formal suspects nor convicted offenders, could not be forced to yield this information to the police; instead, they may 'volunteer' to do so.¹¹ This aspect of the model legislation has since been enacted (but with sometimes considerable modification) by the Commonwealth, Australian Capital Territory, New South Wales, Norfolk Island, Tasmania and Victoria.¹²

Rape victims, are, of course, 'volunteers'. However, the Committee's approach of applying common rules to *all* voluntary forensic procedures neglects the considerable difference between procedures on rape victims and those typically performed on other volunteers. In rape investigations, the purpose of the forensic examination of rape victims is to learn as much as possible *about the rapist's bodily characteristics*, because the victim's body and clothing are the major source of such information. Such procedures must be performed as soon as possible after the rape and need to be thorough, extensive and intrusive. By contrast, the typical purpose of forensic examination of other 'volunteers' involved in rape investigations – eg witnesses and police officers who visited the scene, as well as people who are subject to mass screenings – is to gain

7 For an overview of the technique as used by Australian police and courts, see Jeremy Gans and Gregor Urbas, 'DNA Identification in the Criminal Justice System' (2002) 226 *Trends and Issues in Crime and Criminal Justice* 1.

8 For a description and critique of this drafting process, see Jeremy Gans, 'The Quiet Devolution: How the Model Criminal Code Officers' Committee Botched New South Wales's DNA Law' (2002) 14 *Current Issues in Criminal Justice* 210.

9 Model Forensic Procedures Bill, 21 December 1994, cl 2(2), 28 (copy on file with the author).

10 Model Forensic Procedures Bill 2000, div 8.

11 Model Forensic Procedures Bill 2000, cl 64(1). See Model Criminal Code Officers' Committee of the Standing Committee of Attorneys-General, above n 4: 'The Committee has opted for a simple definition of 'volunteer' ... There is no point in putting restrictions on the definition of volunteer': at 63 (footnotes omitted).

12 See *Crimes Act 1914* (Cth) pt 1D, div 6B; *Crimes (Forensic Procedures) Act 2000* (ACT) pt 2.8; *Crimes (Forensic Procedures) Act 2000* (NSW) pt 8; *Crimes (Forensic Procedures) Act 2002* (NI) s 4; *Forensic Procedures Act 2000* (Tas) pt 4; *Crimes Act 1958* (Vic) ss 464ZGB–464ZGF.

information about the volunteers' own bodily characteristics, for comparison with what police have learnt about the rapist. Because the genetic characteristics relied on for DNA identification are permanently stored throughout the body, the required forensic procedures can be performed at any time and in a minimal, non-intrusive manner, ie a single mouth swab, pulled hair or pricked thumb.

The Committee's model legislation has, as its major regulatory feature for forensic procedures performed on volunteers, a requirement that the volunteers give 'informed consent'.¹³ While such a requirement is suited to bystanders providing elimination samples, it is a peripheral issue in examinations of rape victims.¹⁴ Indeed, the Committee's version of informed consent, focussing on the detailed provision of legal information by police, would seem to be at best distracting and at worst insulting in the context of procedures performed in the aftermath of a rape. Is it really appropriate for rape victims to be advised after their rape that they have a right to call their lawyer?¹⁵

Moreover, the Committee added injury to insult by lazily transposing many of the rules it had formulated for the compulsory sampling of suspects to procedures on volunteers, including rape victims.¹⁶ While this transposition does impose some desirable constraints on the way investigators treat rape victims,¹⁷ it also makes rape victims subject to some very inapposite rules. For example, the model Bill requires the police to record the entire forensic examination of a rape victim on video, 'unless the [victim] objects'.¹⁸ Victims who do object must be told by police that the reason for the video recording is 'to avoid disputes ... between the [victim] and the person carrying out the procedure'.¹⁹ Rape victims who do not object will have a copy of the video given to them or made available for viewing.²⁰ Some victims must be given a further unwanted memento of their examination: any samples taken from their body (for example, the rapist's semen) that are left over after the DNA analysis is completed.²¹ The model Bill also authorises police and anyone assisting the police to use 'reasonable force' to

13 Ibid 63–9.

14 See Findlay, above n 4, 69.

15 Model Forensic Procedures Bill 2000, cl 65(1)(e). See *Crimes Act 1914* (Cth) s 23XWR(1)(e); *Crimes (Forensic Procedures) Act 2000* (ACT) s 80(1)(e) (applicable in Norfolk Island: see *Crimes (Forensic Procedures) Act 2002* (NI) s 4); *Crimes Act 1958* (Vic) s 464ZGB(1)(e). In Commonwealth and (perhaps) Victorian investigations, victims must also be told that they have the right to remain silent but anything they say may be used in evidence: *Crimes Act 1914* (Cth) s 23XIB, applied to volunteers by s 23XWQ(5) and *Crimes Act 1958* (Vic) s 464Y, possibly picking up volunteers because of s 464ZGD(1)(a).

16 Model Forensic Procedures Bill 2000, cl 64(4). See also Model Criminal Code Officers' Committee of the Standing Committee of Attorneys-General, above n 4, stating that such a clause 'ensures that all the requirements concerning the manner in which the forensic procedures are carried out that apply to suspects also apply to volunteers': at 65. See also *Crimes Act 1914* (Cth) s 23XWQ(5); *Crimes (Forensic Procedures) Act 2000* (ACT) s 79(3) (applicable in Norfolk Island: see *Crimes (Forensic Procedures) Act 2002* (NI) s 4); *Crimes Act 1958* (Vic) s 464ZGD(1)(a).

17 See, eg, rules prohibiting degrading procedures, minimising intrusiveness and regulating who can perform or be present during the procedures: Model Forensic Procedures Bill 2000, div 6.

18 Model Forensic Procedures Bill 2000, cl 44(1), applied to volunteers by cl 64(4).

19 Model Forensic Procedures Bill 2000, cl 44(2)(a), applied to volunteers by cl 64(4).

20 Model Forensic Procedures Bill 2000, cl 89(1)(a).

21 Model Forensic Procedures Bill 2000, cl 45(2)(a), applied to volunteers by cl 64(4).

enable forensic examinations of rape victims to be carried out and to prevent loss, destruction or contamination of any sample on the victim's body.²² Those who hinder the police are liable to a maximum of two years imprisonment.²³ Alas, the model legislation was a political success and the above rules now apply to examinations of rape victims in the Commonwealth,²⁴ the Australian Capital Territory,²⁵ Norfolk Island²⁶ and (with variations) Victoria.²⁷

Across Australia, the regulation of forensic examinations of rape victims is also subject to arbitrary loopholes. The model bill exempts 'intrusion[s] into a person's body cavities except the mouth' from the legislation, presumably to avoid providing a general authority for non-consensual cavity searches of suspects; the result is that in the Commonwealth, the ACT, Norfolk Island and (possibly) Victoria, post-rape forensics on the victim's skin and *external* genitalia are subject to all the model rules (beneficial or otherwise), but internal examinations are left wholly unregulated.²⁸ Moreover, jurisdictions that have declined to apply the model Bill provisions to victims have done so by excluding victims entirely from their legislation.²⁹ Thus, in New South Wales and Tasmania, forensic procedures on victims are now not regulated by statute at all.³⁰ The same is true in jurisdictions that never adopted the model scheme; Queensland's statute does not cover procedures on victims, while in South Australia, the Northern Territory and Western Australia, regulation of post-rape

22 Model Forensic Procedures Bill 2000, cl 35(1), 40(3), applied to volunteers by cl 64(4).

23 Model Forensic Procedures Bill 2000, cl 48, applied to volunteers by cl 64(4).

24 *Crimes Act 1914* (Cth) ss 23XJ(1), 23XO(3), 23XU(2)(a), 23XV(1), 23XV(2)(a), 23XWA (all applied to volunteers by s 23XWQ(5)), s 23YF(1)(a).

25 *Crimes (Forensic Procedures) Act 2000* (ACT) ss 50(1), 55(3), 59(1), 59(2)(a), 60(2), 63 (all applied to volunteers by s 80(1)(e)), s 104.

26 *Crimes (Forensic Procedures) Act 2002* (NI) s 4, applying the ACT legislation to Norfolk Island.

27 *Crimes Act 1958* (Vic) ss 464ZC(1), 464ZGD(1)(b), 464ZGD(2). See also s 464Z(6)(ab) (applied to volunteers by s 464ZGD(1)(a)), providing that an examination of a rape victim 'must be conducted ... in the presence of a member of the police force who is present to witness ... the conduct of the examination'.

28 See Model Forensic Procedures Bill 2000, cl 1 for the definition of 'forensic procedure'. See *Crimes Act 1914* (Cth) s 23WA, *Crimes (Forensic Procedures) Act 2000* (ACT) s 5(3) (applicable in Norfolk Island: see *Crimes (Forensic Procedures) Act 2002* (NI) s 4). Arguably, Victoria's scheme also only covers external sampling: See *Crimes Act 1958* (Vic) s 464(2), where definitions of 'intimate sample', 'non-intimate sample' and 'physical examination' only refer to external sampling, but cf the inclusive definition of 'forensic procedure'.

29 In NSW, the problem was not recognised until after the legislation was passed and it was two years before amending legislation was passed. In the meantime the executive, apparently not wanting to delay its prisoner sampling programme, proclaimed the statute but excluded all the volunteer provisions from the proclamation. In the interregnum, the legality of volunteer sampling, previously allowed at common law, was left in doubt. No mass screenings occurred during this period in NSW.

30 See *Crimes (Forensic Procedures) Amendment Act 2002* (NSW) (inserting s 76A and modifying s 76(1) of the *Crimes (Forensic Procedures) Act 2000* (NSW)); *Forensic Procedures Act 2000* (Tas) s 5.

forensics is limited to minimalist procedures to obtain samples of the victims' saliva, blood and hair.³¹

III USING RAPE VICTIMS' DNA

The botched attempt at the regulation of forensic examinations of victims, while producing legal uncertainty and revealing policy neglect, is unlikely to have any actual impact on victims. No well-intentioned investigator, in the presence of a rape victim in the aftermath of a rape, would apply inapposite rules simply because they appear in legislation. However, once the victim has left the police station, the humane treatment of victims cannot be assumed. The remainder of this paper discusses the decisions made by investigators about what to do with information they have obtained through post-rape forensics.

While the purpose of post-rape examinations is to obtain information about the rapist, forensic examiners will inevitably gather samples from the victim's body too, as the victim's bodily tissue will typically be mixed with and even indistinguishable from samples from the rapist. In the hands of modern forensic investigators, a victim's bodily tissue can be very revealing. Once investigators have obtained a suitable sample from any person, they can use it to obtain that person's 'DNA profile', ie, a set of unchanging biochemical characteristics of that person. The key feature of DNA profiles is that they are highly likely to be unique to an individual. Matched DNA profiles between a person and an unidentified sample can only be explained in a handful of ways, one explanation being that the person is the source of the sample in question.³²

All Australian jurisdictions except the Northern Territory have enacted legislation that purports to place restrictions on when investigators can use DNA profiles they have obtained via forensic procedures.³³ These schemes bar investigators from comparing DNA profiles obtained from volunteers for a particular investigation to profiles from an unrelated investigation and from retaining the profiles after the investigation has concluded (unless the volunteer

31 *Police Administration Act 1978* (NT) s 145B (covering only non-intimate procedures); *Police Powers and Responsibilities Act 2000* (Qld) ch 8A, pt 2 (covering only procedures on suspects and to identify dead or missing persons: see s 275(1)); *Criminal Law (Forensic Procedures) Act 1998* (SA) pt 2B (covering only procedures to derive the victim's DNA profile: see s 13E(2)); *Criminal Investigation (Identifying People) Act 2002* (WA) pt 4 (covering only procedures to obtain the victim's DNA profile: see definition of 'identifying procedure' (s 3) and 'identifying particular' (s 23)).

32 The other explanations are that sample comes from a different person who, coincidentally, has the same DNA profile or that there has been some sort of contamination or contact between the sample and tissue from the person. See above n 1, 1–3.

33 See *Crimes Act 1914* (Cth) div 8A; *Crimes (Forensic Procedures) Act 2000* (ACT) pt 2.11 (applicable in Norfolk Island via *Crimes (Forensic Procedures) Act 2002* (NI) s 4); *Crimes (Forensic Procedures) Act 2000* (NSW) pt 11; *Police Powers and Responsibilities Regulation 2000* (Qld) pt 2A; *Criminal Law (Forensic Procedures) Act 1998* (SA) pt 5A; *Forensic Procedures Act 2000* (Tas) pt 8; *Crimes Act 1958* (Vic) ss 464ZGG–464ZGK; *Criminal Investigation (Identifying People) Act 2002* (WA) pts 9–10. All these approaches, apart from pt 9 of the WA legislation, are derived from the Model Forensic Procedures Bill 2000, div 11. The Northern Territory's regulation of DNA databases is mild to the point of non-existence: *Police Administration Act 1978* (NT) ss 147–147C.

agrees).³⁴ However, the rules on volunteers' DNA are not the final word on what can be done with victims' DNA profiles obtained during post-rape forensic examinations.

Rather, victims' DNA profiles also fall within a different set of rules governing profiles gathered from a 'crime scene', which includes the victim's body, clothing and other nearby possessions. These rules are intended to control what investigators can do with samples they believe have been left behind by criminals, for example semen from a rapist. However, presumably for administrative convenience, Australian legislation classifies profiles as crime scene profiles based on *where* the samples were found, rather than whose profile has been taken or the forensic significance of the sample.³⁵ In rape cases, this approach makes victims' DNA profiles subject to the same matching rules as profiles from their rapists, as they are both typically found in the same place: the victim's body and possessions.

Not surprisingly, the rules applicable to crime scene profiles are very permissive.³⁶ In particular, crime scene profiles can be compared with each other, so that investigators can determine whether the same person is connected to more than one crime. Moreover, profiles placed on the database's crime scene index remain there forever. So, Australian legislation leaves rape victims, just like their rapists, permanently exposed to investigation aimed at determining their connection with any unsolved crime.³⁷ Recent events in Victoria show that a rape

34 See *Crimes Act 1914* (Cth) ss 23YDAF–23YDAG; *Crimes (Forensic Procedures) Act 2000* (ACT) ss 97–98 (applicable in Norfolk Island via *Crimes (Forensic Procedures) Act 2002* (NI) s 4); *Crimes (Forensic Procedures) Act 2000* (NSW) ss 93–94; *Police Powers and Responsibilities Act 2000* (Qld) ss 318ZU, 318ZW. Cf *Police Powers and Responsibilities Regulation 2000* (Qld) cl 8L and sch 1; *Criminal Law (Forensic Procedures) Act 1998* (SA) ss 46C(1), 46D(2); *Forensic Procedures Act 2000* (Tas) ss 54–55; *Crimes Act 1958* (Vic) ss 464ZGI–464ZGJ; *Criminal Investigation (Identifying People) Act 2002* (WA) ss 62, 78. However, these provisions, derived from clauses 82 and 83 of the Model Forensic Procedures Bill 2000, are not comprehensive, as they only apply to profiles placed on a DNA database. So, volunteer profiles, including victim profiles, can be permanently recorded in a police file and matched manually by investigators with any other profile of interest (cf the possible different result in WA because of Part 9 of its legislation). Also, in NSW, victims are excluded from the regulation of database volunteer profiles: see s 90 ('volunteers (limited purposes) index' and 'volunteers (unlimited purposes) index', which pick up Part 8's exclusion of victims in s 76(1)).

35 See *Crimes Act 1914* (Cth) s 23YDAC ('crime scene index', (b)–(c)); *Crimes (Forensic Procedures) Act 2000* (ACT) s 94 ('crime scene index', (a)(ii)–(iii)) (applicable in Norfolk Island via *Crimes (Forensic Procedures) Act 2002* (NI) s 4); *Crimes (Forensic Procedures) Act 2000* (NSW) s 90 ('crime scene index', (b)–(c)); *Police Powers and Responsibilities Regulation 2000* (Qld) cl 8D(1)(a); *Criminal Law (Forensic Procedures) Act 1998* (SA) s 46A ('crime scene index', (b)–(c)); *Forensic Procedures Act 2000* (Tas) s 3(1) ('crime scene index', (b)–(c)); *Crimes Act 1958* (Vic) s 464(2) ('crime scene index', (b)); *Criminal Investigation (Identifying People) Act 2002* (WA) s 76 ('crime scene index', (b)–(c)).

36 Above n 34.

37 The possible exception is Western Australia which, uniquely, has enacted some specific rules governing dealings with information obtained from victims: *Criminal Investigation (Identifying People) Act 2002* (WA) s 65(1)(c) requires destruction of victim profiles within two years unless the investigation or prosecution is ongoing. Also, query the effect of s 65(1)(b) on matching of victim profiles: but see s 78. See also *Police Administration Act 1978* (NT) s 145B(4) which does not bar the matching of volunteer profiles to unsolved crimes, but does bar their admission as evidence against the victim in prosecutions for unrelated crimes; but note s 145B(5) which permits admission for serious crimes (punishable by 14 years or more imprisonment).

victim's DNA profile has been used in this way at least once, to the considerable detriment of that victim.

In mid-1997, a 16 year old known only as 'P' was raped in Altona, a suburb in Melbourne's west. In June that year, 14 month old Jaidyn Leskie disappeared from a house in Moe, a town in eastern Victoria. Later that year, Leskie's body was found in a nearby dam. Victorian police obtained a female DNA profile from baby clothing found with the body, which they then compared to the 19 000 other profiles on Victoria's investigative database. Six years later, they revealed to a coronial inquest that the DNA profile from Leskie's clothing matched one of those 19 000: P's profile, derived from the outside of the condom used by her rapist.³⁸

In early 2003, Victorian police approached P and repeatedly asked her to explain why her DNA was on Leskie's clothing. The questioning forced her to relive the trauma of her own rape. The prospect of connection to the notorious Leskie case scared her, especially since she was now the mother of a similarly aged child. She said that the police 'kept coming back and back thinking I was hiding something, which I am not'. Rather, she told them that, not only did she have nothing to do with the Leskie case, but that she had never been to Moe.³⁹ The police ultimately told the coroner that they did not believe there was any link between P and the toddler's death. Various experts testified that the DNA match between P and the clothing might be a rare coincidence or, more likely, contamination while the clothing and the condom were processed in the forensic lab.⁴⁰ However, these assurances were rejected by Greg Domaszewicz, the man who, despite being acquitted of Leskie's murder, remained the subject of suspicion.⁴¹ He questioned the police's investigation of P and his lawyer foreshadowed an application to have P questioned during the coronial inquest.⁴² At the present time, the inquest itself has been suspended following an unrelated legal challenge.⁴³

While P's entanglement in a notorious murder case is appalling, the implications of this chain of events are still worse: it is possible that, in the future, a rape victim might be *correctly* linked to an unsolved crime through a database match. Proponents of DNA identification routinely champion such serendipitous database 'cold hits' as the *raison d'être* of the technique. But when the cold hit is with a rape victim's profile, then the only serendipity is that the now-detected criminal was raped and then decided to tell the police about the

38 See Keith Moor, 'New Clues in Death of Jaidyn', *Herald Sun* (Victoria), 2 October 2003, 4; Stephen Cauchi, 'Leskie Bib Puts Science in the Dock', *The Age* (Victoria), 22 November 2003 9.

39 Keith Moor, 'I Did Not Kill Jaidyn', *Herald Sun* (Victoria), 18 November 2003 1.

40 See Dan Krane, *Victoria State Coroner's Inquest into Death of Jaidyn Leskie* (2003) <<http://bioforensics.com/articles/Kranereport.pdf>> at 17 March 2005; William Thompson, *Victoria State Coroner's Inquest into Death of Jaidyn Leskie* (2003) <<http://bioforensics.com/articles/Thompsonreport.pdf>> at 17 March 2005.

41 Keith Moor, 'Don't Ignore Bib Link', *Herald Sun* (Victoria), 3 October 2003, 3.

42 Above n 38.

43 See *Domaszewicz v The State Coroner* [2004] VSC 528. The Coroner has recently announced a fresh inquest into the Leskie case: Keith Moor, 'Jaidyn Inquest Called', *Herald Sun* (Victoria), 27 April 2005, 2.

rape and undergo a forensic examination to help catch the rapist. Thus, to the already considerable burdens for rape victims of reporting a rape must be added the possibility of being permanently placed on the DNA database. This burden will fall hardest on an especially vulnerable group: rape victims who have committed undetected crimes or who fear that their relatives have committed such crimes⁴⁴ or who would otherwise have difficulty explaining a DNA match to an unsolved crime.

Since the passage of DNA database legislation across Australia, reviews in three jurisdictions have recommended amendments to bar the comparison of victims' DNA profiles with profiles on the crime scene index of the database.⁴⁵ To date, no Australian jurisdiction has followed these recommendations.

IV OTHER SAMPLES GATHERED DURING A RAPE INVESTIGATION

Of all the samples that might be gathered from a rape victim's body or possessions, the victim's own bodily tissue is the simplest for investigators to deal with. The victim's tissue is easy to identify, because investigators can simply compare its profile to a reference sample from the victim.⁴⁶ Moreover, once identified, the significance of the sample to the investigation is obvious. So, the problem outlined above is a regulatory one; investigators are simply given no reason to identify victim samples or deal with them appropriately.

The situation is very different for any other samples connected to a rape investigation. Distinguishing these samples from the victim's tissue does not resolve whether the remaining samples are from the rapist or even whether the samples are significant at all. Indeed, even if the sample is matched to someone else, that matching alone will not reveal how that sample came to be on the victim's body or possessions, much less that the other person raped the victim.

44 See above n 40. Krane observes that P's 16 half-siblings are more likely to coincidentally share her DNA profile than an unrelated person, and that the possibility would be still higher for a full sibling. Identity of DNA profiles is a certainty for monozygotic (identical) twins: see above n 7. See also Frederick R Bieber and David Lazer, 'DNA Sweep Must be Accompanied by Informed Consent' (2005) Harvard University John F Kennedy School of Government <http://www.ksg.harvard.edu/news/opeds/2005/012605_lazer.htm> at 30 April 2005.

45 Standing Committee on Law and Justice, above n 3, Recommendation 45; Australian Law Reform Commission, above n 3, Recommendations 41–5; Victorian Parliament Law Reform Committee, above n 4, Recommendation 7.1. Two other reviews have refused to make such a recommendation. Findlay, above n 4, did so after being assured that 'there is no matching of victims' profiles with other indices': at 158. A (so-called) independent review of the Commonwealth legislation was not persuaded of the need for such a change but proposed that the matter 'be revisited in a future view in the light of more experience': *Report of the Independent Review of Part 1D of the Crimes Act 1914* (2003) 33. Both of these reviews were published within weeks of P being questioned by Victorian police about her possible involvement in the death of Jaidyn Leskie.

46 If the victim's sample is mixed with someone else's, then analysis may reveal a mixed profile. The problem for investigators here is not in identifying the victim's portion of the profile, but rather in attempting to derive the other person's profile.

This part examines the possible negative consequences that this ambiguity holds for rape victims.

The first question posed by unidentified samples from a rape investigation is whether or not to have them analysed by technicians for the purpose of obtaining a DNA profile. Despite the considerable refinement of DNA identification technology, this decision is not straightforward. A forensic examination of the victim's body, clothing and other items connected to the rape might yield dozens of unidentified samples of varying quality. Police must not only manage the resource implications of ordering testing, but must also decide which samples should be accorded priority in backlogged DNA labs. Investigators may often wish to avoid the complications of information overload generated by the derivation of multiple mystery DNA profiles. Further, technicians must decide whether to risk error and complications by attempting to profile degraded or mixed samples.

A recent investigation in the United States illustrates how the choices made by police can be controversial. In the space of four weeks during 2003, three schoolgirls were raped in the suburbs surrounding Shenandoah Park in Miami. DNA analysis of semen samples from the rapes soon revealed that they were the common act of a single unknown offender. Some weeks later, the police revealed that the same offender had raped four adults in the preceding seven months. However, the samples derived from the earlier attacks had not been analysed immediately, because no suspects for comparison had been identified. As the media was quick to point out, immediate DNA profiling of those earlier samples would have alerted the area's residents to the presence of a serial rapist prior to the later rapes.⁴⁷

In Australia's first – and, to date, only – post-conviction DNA exoneration, investigators' decisions about whether to analyse a sample were highly costly for a rape victim. In February 1999, a child in a Queensland country town told friends and then the police that a shadowy figure had entered her bedroom and raped her. Forensic examiners found semen in her vagina and on her bed sheet. During further police questioning, the victim named a man living in her house as the attacker, while others told police that the same man had confessed to being the rapist. Meanwhile, a technician tried and failed to obtain a DNA sample from the vaginal swab. The technician also decided not to analyse the semen on the sheet, because a match to a resident of the house would not prove that the resident was the rapist. It was only after the man was convicted, based in part on the confused testimony of the victim, that analysis of the semen stain, requested by the defence, revealed a profile that excluded the defendant. Further testing of the vaginal swab generated a male DNA profile that matched the sheet, but not the defendant.⁴⁸

47 David Kidwell and Oscar Corral, 'Police, Lab Trade Charges over Delay in DNA Tests', *The Miami Herald* (Miami), 13 June 2003, Section A, 1.

48 See *R v Button* [2001] QCA 133; Crime and Misconduct Commission, Queensland, *Forensics under the Microscope* (2002) <<http://www.cmc.qld.gov.au/library/CMCWEBSITE/ForensicScienceUndertheMicroscope.pdf>> at 17 March 2005.

The costs of these events for the defendant – who spent 10 months in prison and himself became a victim of rape – have been rightly highlighted. However, the victim also paid a high price for the initial decision not to test the sheet. From her and her supporters' point of view, the delayed forensics meant that the man who she still insists is a rapist had to be freed because the new exculpatory DNA evidence could have changed the jury's verdict.⁴⁹ Inevitably, others will lay the blame partly on her for identifying the wrong man and, also, for refusing to recant and allow the prosecution of the person whose profile matched that eventually derived from the semen. Some might even doubt her account altogether. More broadly, the child shares the same fate as rape victims in the many American cases where delayed DNA identification has exonerated a rape defendant convicted through traditional methods such as visual identification and interrogations; in such cases, victims' trauma in testifying at trial not only fails to punish their rapist but also leaves them implicated in an injustice imposed on another.⁵⁰

A second problem raised by non-victim samples is their investigative significance, even if matched to a known person. In the Queensland case, the DNA profile from the semen samples were eventually matched to a resident of the victim's community, since convicted of other crimes. Facing criticism for his initial failure to test the sheet, the lab technician told an inquiry that the subsequent identification of the source of the semen on the sheet and in the victim's vagina did *not* resolve what had happened to the victim. In particular, he observed that either sample could be 'the result of a consensual or non-consensual act', and the sheet stain may have been left at a much earlier time.⁵¹ While these comments correctly state the limits of DNA identification of forensic samples in rape cases, they also demonstrate the potential for post-rape forensics to stigmatise a rape victim, such as the child in this case who had testified that she was a virgin until raped by the defendant. A victim's prior sexual activity can even be blamed for delayed testing; in attempting to explain the errors in the case, the Queensland Director of Public Prosecutions publicly claimed that the victim had gonorrhoea, which made the vaginal swab difficult to profile; a subsequent inquiry found that the suggestion that the victim had a sexual transmitted disease (apparently sourced from the lab itself) was false.⁵²

The ambiguity of samples had a dramatic impact on a rape victim and her boyfriend during the Miami police's search for the Shenandoah rapist. The police, weathering intense criticism for their delay in detecting the presence of a serial rapist, initiated a mass DNA screening of residents of the area who resembled descriptions supplied by the victims. Within weeks, the police proudly

49 See ABC Television, 'A Black Day for Justice', *Four Corners*, 18 March 2002 <<http://www.abc.net.au/4corners/stories/s507423.htm>> at 17 March 2005.

50 For poignant accounts of some victims' experiences of DNA exonerations, see Public Broadcasting Corporation, 'What Jennifer Saw', *Frontline*, 25 February 1997, <<http://www.pbs.org/wgbh/pages/frontline/shows/dna/etc/script.html>> at 17 March 2005; Trisha Meili, *I am the Central Park Jogger: A Story of Hope and Possibility* (2004).

51 Crime and Misconduct Commission, above n 48, 5–6.

52 Ibid 9; above n 49.

announced that this effort had serendipitously identified the culprit in an unsolved rape from seven years earlier. A sample from one of the volunteers in the mass screening, while not matching the profile from the serial rapist, had matched the DNA profile of semen found on the bed of the victim of a 1986 rape. After the man was arrested, the police announced his name and address, stunning his neighbours and ex-wife, who told the media that she couldn't believe her ex-husband was a rapist.⁵³ It soon emerged that the police took these steps without contacting the man's alleged victim. When a local newspaper did so, the victim pointed out that the man not only differed from her description of her rapist, but was actually her boyfriend in 1986.⁵⁴ The police's first response was to suggest to the victim that it was her boyfriend who had raped her. When she maintained her account of a stranger rape, the police released the man, blaming both him (for exercising his right to silence after being told that DNA evidence proved his guilt) and her (for failing to tell police that she had had consensual sex with her boyfriend – she said she was never asked).⁵⁵

The ambiguity of crime scene samples is a problem in all criminal investigations. However, in rape investigations, these problems will often rebound on victims, because the samples are spatially and temporally associated with the victim. Not only can victims be placed under pressure to explain any sample found on their body or possessions, but the presence of other people's samples will also often carry implications about the victim's behaviour, including prior sexual activity. Indeed, the rise of modern forensics reduces the benefits of one of the major successes of the rape law reform movement: rape shield laws. While such provisions bar courts from inquiring into a victim's sexual history as a means of learning about the victim's tendencies or credibility, there is no bar from exploring any of these matters if they potentially cast light on physical evidence.⁵⁶ Moreover, this problem will only grow as DNA analysis itself

53 Susannah Nesmith, '96 Rape Suspect Caught by Chance', *The Miami Herald* (Miami), 26 June 2003, Section B, 1.

54 Susannah Nesmith, 'Police Drop Rape Charges; Wrong Man, Victim Says', *The Miami Herald* (Miami), 27 June 2003, Section A, 1.

55 Susannah Nesmith, 'Ex-Lover Jailed in Rape a Free Man', *The Miami Herald* (Miami), 28 June 2003, Section B, 1. Susannah Nesmith, 'Police Release Man after Clearing up Rape Confusion', *The Miami Herald* (Miami), 30 June 2003, Section B, 1.

56 See Jeremy Gans and Andrew Palmer, *Australian Principles of Evidence* (2nd ed, 2004) 297–302. Cf *Criminal Procedure Act 1986* (NSW) s 293(4)(c)(ii).

develops, allowing the derivation of DNA profiles from smaller and, hence, more ambiguous, samples.⁵⁷

Unlike the other problems discussed in this paper, regulation is neither the cause of nor the solution for the ambiguity of forensic samples in rape cases. Any attempt to bar investigators or courts from exploring the implications of unidentified samples would not only cause miscarriages of justice but would also hamper effective rape prosecutions. Rather, rape victims' interests will only be served by improving the quality of the investigative analysis of the samples yielded by post-rape forensics. In the short term, investigators must develop a rational and comprehensive methodology for identifying suitable samples for DNA analysis, prioritising the processing of different crime scene samples and treating any database matches with suitable caution. In the long term, resources presently devoted to identifying the source of samples must be matched by research into improved techniques for determining a sample's forensic significance (for example, dating of semen samples).

V CONCLUSION

DNA identification, like most other aspects of the investigation and prosecution of rape, is a suitable candidate for law reform. Contemporary Australian rape victims face potential or actual disadvantages from the law and practice of DNA identification in the aftermath of rape, during the course of the investigation and even years down the track. As in other areas of rape law, reducing these problems requires a mixture of straightforward legislative amendments, the development of new regulatory schemes and changes in investigative processes and attitudes.

The flaws in the use and regulation of DNA identification in Australian rape investigations are not due to anyone's bias against rape victims. Rather, they emerge from several factors. First, the failure of policy-makers to give specific attention to rape victims as a source of samples subjected to DNA identification. Second, the general incompetence of Australian legislation on this topic⁵⁸ (of which the regulatory problems outlined in this paper are an example). Third,

57 A number of investigations have focused on minute bodily tissue on crime victims' underclothing yielding a DNA profile, eg the Jon-Benet Ramsey case and (perhaps) the Jaidyn Leskie case, discussed earlier. In one such case, the UK investigation into the murder of 13 year old Milly Dowler, police obtained a database match between 'male DNA' derived from a bodice in the victim's closet and saliva from a communion cup at a church 300 miles away, tested following a robbery. The police screened not only the robbers, but also the church congregation to explore this supposed link to the murder, while the media speculated about the identity of the victim's 'secret boyfriend'. No match was found and the police subsequently disclaimed any link to the case, suggesting that the DNA could have been left on the bra through innocent contact, such as during the bra's manufacture or because someone bought it and then returned it to the shop: see Jamie Wilson, 'DNA link in hunt for girl's killer', *The Guardian* (United Kingdom), 31 January 2003; British Broadcasting Corporation, 'Mystery Milly DNA link rejected' (20 June 2003) British Broadcasting Corporation News <<http://news.bbc.co.uk/1/hi/england/3007854.stm>> at 30 April 2005.

58 Gans, above n 8.

inherent problems posed by the crime of rape as a subject for criminal investigation.⁵⁹

A final factor, which may also explain the inattention of victims groups to issues surrounding DNA identification, is the political treatment of the issue as part of the 'law and order' debate, posing 'crime control' against 'civil liberties'. Pitting prosecutors against defendants, whether inside the courtroom or during political debate, rarely serves rape victims' interests; rather, rape victims must be specifically represented in all debates on changes to the law and practice of investigating and prosecuting rape, even when the proposed reform appears benign.

59 Victorian Law Reform Commission, above n 6, 82–6.