CRIMINAL INVESTIGATION (IDENTIFYING PEOPLE) BILL 2001

Second Reading

Resumed from an earlier stage of the sitting.

HON DERRICK TOMLINSON (East Metropolitan) [5.34 pm]: The references I made to the criminal matters involving Pitchfork, Morin and Milgaard in my introductory comments illustrate four matters. First, DNA profiling as an instrument of forensic criminal investigation is relatively new. Second, in the short time that DNA profiling has been available for forensic investigation, great strides forward have been made in the technology and its application. The third point that the Pitchfork, Morin and Milgaard cases illustrate is that DNA profiling is a powerful instrument for not only identifying persons guilty of crimes, but also exonerating suspects of crime. It has been used in numerous cases besides Milgaard and Morin to demonstrate the innocence of people who had been found guilty and had served long periods in prison for crimes they did not commit. The fourth point which is illustrated by these three cases, and which is important for this House and the Government to understand, is that DNA profiling is nothing more than a very effective instrument of criminal investigation. It is not and should not be used to assume and prove guilt. DNA profiling cannot prove guilt; it can only place the suspect at the scene of the crime. Without other conventional criminal investigation procedures to substantiate the guilt, DNA profiling is of minimum value, as powerful as it is as a forensic tool. I will return to that last point at a later stage in my presentation.

I repeat the point that I made at the beginning of my speech: although this is commonly and popularly identified as the DNA Bill, it is not only about DNA. The Criminal Investigation (Identifying People) Bill 2001 performs three functions: first, it replaces section 50 of the Police Act; second, it clarifies and elaborates the powers available to the police under section 50AA of the Police Act and section 236 of the Criminal Code; and third, it establishes a DNA databank and allows the exchange of information between DNA databanks in other state and commonwealth jurisdictions. Although these three things are interrelated insofar as they are about identifying people in criminal investigations, they are included in the Bill for different reasons.

The first area, the replacement of section 50 of the Police Act, is the replacement of a power that has been available to police for a considerable time. The power to ask persons for name and address was well and truly available to police services worldwide before the introduction of the Western Australian Police Act 1892. Although that power has been available to police for some time, the nature of section 50 of the Police Act has been the subject of some considerable criticism because it is alleged that the power has been abused by police officers from time to time.

[Quorum formed.]

Hon DERRICK TOMLINSON: We seem to have established two new conventions of the House today. The Opposition has to present its response in the absence of not only the responsible minister but also all members from the government benches. Perhaps that is a desirable thing, because members will be glued to the television sets in their rooms and I look gorgeous!

The third component in this Bill is to create a DNA database, which is a response to an initiative of the federal Government. In 1986 we saw the emergence of DNA profiling as an instrument for criminal investigation. In the early 1990s, the federal Government and the States, through the Standing Committee of Attorneys General, agreed to the creation of the national CrimTrac system - the electronic exchange of information about criminal investigation - and sponsored a model Bill for the collection, storage, retrieval and exchange of DNA profiles. The Bill that is now before us is the last of the state Bills to take up the model Bill introduced in the first instance in the federal Parliament in, I think, 1994. It lapsed when the federal Parliament was prorogued and was reintroduced in 1997. The first of the States to introduce the legislation, and I could stand corrected on this, was Victoria in 1996. Western Australia is the last of the States to respond to the Commonwealth Government's initiative. That is not in any way to derogate from the importance of DNA profiling as an instrument of criminal investigation to be made available to the Police Service in Western Australia. We have been slow off the mark.

I will deal with each of those components separately because, although interrelated, they address three different issues. The first is the replacement of section 50 of the Police Act, which is the power for police officers to demand name and address. It is interesting that the title of section 50 of the Police Act is, "Police may demand name and address, and apprehend person refusing". In some respects, that is one of the offensive aspects of section 50 that is eliminated by this Bill. Section 50 illustrates the nature of the offence. It reads -

> Any officer or constable of the Police Force may demand from and require of any individual his name and address, and may apprehend without warrant any such person who shall neglect or refuse to give his name and address or either of them when required so to do, or who furnishes information which that officer or constable has reasonable cause to believe to be false, and every such person so neglecting, or

> refusing, or who shall give a false name or address when applied to as aforesaid, shall upon conviction forfeit and pay any sum not exceeding $300, or at the discretion of the convicting Justice be committed to any gaol or lock-up for any term not exceeding 6 calendar months.

Section 50 has two aspects. One is the prolixity of the clause. I had difficulty reading it simply because it is so prolix. The other aspect is the offensive nature of the power that any officer or constable may demand from and require of. Section 50 has been a very useful instrument to deal with the concept of vagrancy. It has also been an instrument available to police officers that has been subject of much criticism because of alleged abuse. It was an instrument too often used in Weld and Wellington Squares. Both of those places were favoured meeting places of Aboriginal persons. Until 1963, Perth was a prohibited area for Aborigines. Under the Aborigines Act 1905, in 1905 Perth was declared a prohibited area. The prohibited area stretched roughly from the Causeway - Plain Street to Milligan Street - to Newcastle Street. Between 1905 and 1963, any Aboriginal person found in that area without having an excuse of employment for being in that area was subject to arrest and carriage from the area. After 1963, when the prohibition on Perth as an area which Aboriginal persons may frequent was lifted, the two favoured areas of congregation for Aboriginal persons - apart from the infamous white city, which was a pre-war attraction for Aboriginal persons, among others - were Wellington and Weld Squares. The police did not have the Aborigines Act 1905 to move Aborigines from a prohibited area, so they simply used section 50 of the Police Act, under which any officer may demand name and address. Many Aborigines were from the Guildford, Queens Park and Forrestfield camps and could not give an address, so they were charged with vagrancy and were subject to imprisonment for six months. It was a power much abused.

It was a power also used to deal with predatory paedophiles at Perth railway station. Perth station was a favourite haunt of predatory paedophiles. I recall on my way home from school, when I attended Perth Boys School in the 1950s, waiting for transport on Perth station and being accosted by one of these predatory paedophiles. As a 14-year-old, I thought the man who took the opportunity to strike up a conversation with me was quite a pleasant, older gentleman. I imagine he was in his twenties. He told me that he had come from Queensland. That led to conversation about the police in Western Australia, who he said were much better than the police in Queensland. I then found him telling me that he was on his way to the Roe Street brothels, but that he would rather spend $10 to get somebody to come up to his room to perform some act of sexual relief upon him, at which stage my transport arrived and I fled. That was not an uncommon experience on Perth railway station. Predatory paedophiles haunted the place.

Section 50 of the Police Act enabled the police to deal with such predatory behaviour, because such persons were asked their name and address. Failing to do so or, as was commonly the case, providing a false name and address caused them to be arrested on suspicion of having given a false name and address. It was a double-edged sword. Although the power under section 50 of the Police Act may have been abused to deal unfairly with minorities in the community, it was also an instrument available to police to combat moral crime when adequate legislation did not exist to deal with it. I suggest that even now, we should examine the legislation dealing with predatory paedophilia. Now that the gay and lesbian reform Bill is behind us, we would be well advised to focus attention on one of the matters that was properly or improperly a focus; that is, predatory paedophilia. The legislation is inadequate; hence the resort by police officers to using section 50, a proper power, for what might be deemed to be improper purposes. This Bill takes that prolix section 50, clarifies it, presents it in a very sensible and readable form and removes the offensive nature of "police may demand name and address".

It provides that further information may be requested, not merely name and address but also date of birth and proof of identity. It also offers the protection that a person so accosted may require of the police officer that he or she identify himself or herself. I commend the authors of the replacement in this Bill of section 50 of the Police Act. It is an initiative to be supported. It will avoid, if not the abuse, the perception of abuse of a legitimate police power.

The second matter deals with section 50AA of the Police Act and section 236 of the Criminal Code. This matter was brought into some doubt as a result of a 1996 case of King v R in the Supreme Court of Western Australia. Section 236 of the Criminal Code and section 50AA of the Police Act purport to give police the power to take identifying material from persons in custody on criminal charges. The original form of section 236 is in the following terms -

> When a person is in lawful custody upon a charge of committing any offence, it is lawful for a police officer to search his person, and to take from him anything found upon his person, and to use such force as is reasonably necessary for that purpose.
>
> When a person is in lawful custody on a charge of committing any offence of such a nature and alleged to have been committed under such circumstances that there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of the offence, it is lawful for a legally qualified medical practitioner, acting at the request of a police officer, and for any person acting

> in good faith and in his aid and under his direction, to make such an examination of the person so in custody as is reasonably necessary in order to ascertain facts which may afford such evidence, and to use such force as is reasonably necessary for that purpose.

The key words in that section are "that an examination of his person" will afford evidence. What does an examination of his person mean? Until 1996 it was taken to mean that an investigating officer could take samples of skin, hair, saliva, blood and semen. To take a sample of hair, whether it be cut for forensic analysis or rooted for mitochondrial DNA analysis, would be a simple, unobtrusive procedure. To take a hair or even two or three hairs would not be intrusive. To take a sample of skin would involve a scraping of skin and does not involve flensing of the body. It may be called intrusive but it would be fairly simple. To take a sample of saliva could raise questions about its intrusiveness. The acquisition of a sample of saliva could be simply obtained in some instances by getting the suspect to spit. However, that would not be a reliable sample; it would be a contaminated sample. A sample of saliva must be swabbed from the mouth to be reliable. Would putting a swab in the mouth of a suspect represent an intrusive procedure? I think the jury is out on that. When the Standing Committee on Legislation examined this Bill two years ago, it concluded that it was not intrusive. However, I think that a minority of the committee said that any insertion -

Hon Bruce Donaldson interjected.

Hon DERRICK TOMLINSON: Yes. The Bill regards it as not intrusive. A civil libertarian may ask whether a swab from the mouth would be intrusive. However, to take a sample of blood would be undoubtedly intrusive. A sample of blood could pretty much be taken as simply as a sample of saliva could be taken, by causing the person to spit. However, instead of causing the person to spit, a sample of blood could be taken by causing the person to slip and bleed, but it would be contaminated. For the purpose of forensic evidence, the sample of blood must be taken from a vein of the person under strictly controlled medical procedures. We cannot argue that that is not an intrusive procedure. I do not need to explain the intrusiveness of taking a sample of semen. That can be taken only by swabbing the penis of the suspect. That is intrusive. Is taking any of those samples - hair, skin, saliva or semen - merely an examination of the person? In 1996 the Supreme Court in King v R raised doubts about that.

Sitting suspended from 6.00 to 7.30 pm

Hon DERRICK TOMLINSON: Before the dinner break I told the House that section 236 of the Criminal Code allowed the examination of a person in custody for the collection of evidence that may be relevant to demonstrate guilt in a crime. It was interpreted that examination of a person enabled police officers to undertake either invasive or non-invasive procedures to take from the person in custody samples of hair, saliva, blood, skin and semen. That interpretation relied upon a decision in the South Australian Court of Criminal Appeal in R v Franklin. The court held that a provision of the South Australian Criminal Code substantially similar to section 236 of the Western Australian Criminal Code meant that examination of a person could be the external taking of, for example, hair, or the internal taking of, for example, a blood sample. The phrase "an examination of the person" was taken to mean more than simply examining; that is, it was taken to mean invading the body to take a blood sample. That interpretation was thrown into some doubt in the Western Australian Supreme Court in King v R, in which Justice Rowland, with whom Justice Ipp agreed, indicated that he was not happy with the broad interpretation of the word "examination". In fact, he indicated that he was unlikely to support it. The Standing Committee on Legislation report on the Criminal Law Amendment Bill (No 1) 1998 quotes Justice Rowland as follows -

> "I say no more about s236 other than to note that if it be thought desirable to continue what appears to be the general practice in this State of permitting investigating officers to demand samples from persons in custody on a charge of committing an offence, then it would be preferable for the legislature to make express that which has been taken for granted, but on which I have grave doubts."

In the same case, Justice Wallwork gave a much more restrictive definition of the term "examination". The report quotes him as follows -

> "With respect to s236 of the *Criminal Code* (WA), which allows a search and "an examination of the person", in my view that section does not authorise the taking of a blood sample from a person without that person's consent."

Even though practice was based on the Franklin determination that "examination" meant the taking of samples of bodily tissue, all three justices involved in King v R indicated their disquiet about that interpretation.

The Government of the day responded with the Criminal Law Amendment Bill (No. 1) 1998. I refer members to the Legislation Committee's report on that Bill, because it is an important precursor to the Bill now before the House.

When the then Commissioner of Police, Mr Falconer, appeared before the committee to discuss the Bill, he expressed reservation about the value of the legislation, even though it remedied the problem that had been identified by the three justices. His reservation related to the fact that the Bill did not enable the taking, storage and retrieval of samples for DNA analysis. The committee's report on forensic procedures and DNA profiling presented by Hon Bruce Donaldson quotes the commissioner's response -

Mr FALCONER: *We want a convicted persons' DNA national database.*

As a member of the committee, I responded -

Hon DERRICK TOMLINSON: *Therefore, this Bill is totally inadequate.*

In his characteristic, straightforward fashion, Mr Falconer said -

It is useless, without being too unchristian.

The Bill remedied the problem that had been identified in the Western Australian Supreme Court, but it was inadequate. That inadequacy is addressed in the Bill before the House. Therefore, on behalf of the Opposition, I not only support the amendment, but also commend the Government for proposing it.

The Opposition supports the first two functions of the Bill, that is, to clarify police powers under sections 50 and 50AA of the Police Act and section 236 of the Criminal Code.

The substantial part of the Bill relates to the identifying procedures; in particular, authorising the taking of body tissue samples for forensic analysis and the establishment of a DNA forensic database. It not only clarifies the problems identified with section 396 but also extends the authority of police officers to take samples of tissue for forensic analysis. I strongly commend to the House the report of the Standing Committee on Legislation on forensic procedures and DNA profiling. In the time that I served on the Legislation Committee, I participated in some very interesting investigations by the committee, but that was one of the most interesting. The report is regarded as one of the most comprehensive analyses of DNA law as it relates to not only Western Australia but also Australia. My parliamentary colleagues in Queensland sought copies of our report, and it helped shape the Queensland legislation as well. Therefore, I strongly recommend that members familiarise themselves with that report. It will help them to understand not only the complexity of DNA forensic procedures but also some of the contentious issues relating to DNA profiling in forensic investigation.

The Bill allows police officers or investigating officers to take prints of persons, whether they be fingerprints, feet prints, toe prints or ear prints. It is somewhat surprising that our ear prints are as identifying as fingerprints - each person has a unique shape of the ear. The Bill also allows investigating officers to take photographs, including of identifying features such as scars and blemishes on any part of the body; to take impressions, such as dental impressions and impressions of wounds; to take samples of hair, whether that be cut hair or hair with roots for mitochondrial DNA analysis; and it enables the taking of a person's DNA profile.

The Bill identifies seven categories of persons upon whom identifying procedures may be performed - volunteers, deceased persons, police officers, victims and witnesses of crime, uncharged suspects, charged suspects, and people in custody. Of these, I suggest that the question of performing identifying procedures on, or taking identifying particulars from, volunteers is a contentious issue. The Bill addresses the major aspects of that contentious issue of the DNA sampling of volunteers in that it allows the volunteer to have the information withdrawn at any time. There are no problems with deceased people - they most often do not object! The situation with police officers is very important. If it is not intended, I commend to government the need to take tissue samples - preferably blood samples - of all police officers; that the DNA profile of every police officer be generated; and that that profile be stored on the forensic database, separate from criminals and volunteers. It should be stored on the DNA database for the protection of police officers and for the elimination of samples which may come up in criminal investigations and which are from the police officers themselves. That would eliminate those persons from suspicion, or, surprisingly, might identify them as suspects. However, it is most important that police officers be protected in this forensic procedure, and the most reliable way of protecting police officers from suspicion is to have their DNA profiles stored on a database. It should be compulsory to have the DNA profiles of police officers recorded.

Hon Bruce Donaldson will probably comment at length on the question of enabling volunteers to undergo identifying procedures, because he has a very strong conviction - if he does not have a strong conviction, he is at least favourably disposed to the view - that all persons should have their DNA profiles recorded on a public record. I believe Hon Bruce Donaldson would suggest that since a sample of blood is taken from the foot of every infant at birth, a DNA analysis could be taken of an infant at birth and recorded. Some people would object to that as an invasion of privacy. In much the same way, I recall early last decade that the fingerprinting of volunteers was mooted. In fact, as I recall, a Bill was, or may have been, introduced into this House by Hon

Joe Berinson to enable the voluntary fingerprinting of citizens. It was resoundingly rejected as an invasion of civil liberties.

This Bill enables the DNA profiling of volunteers. However, it imposes constraints upon the use of identifying information from volunteers. I wholeheartedly support those constraints, although I await with some anticipation what some of my colleagues will say. I suppose I am a civil libertarian in that respect. I do not support anything that gives police officers or any other public officer the right to invade our personal liberties. However, that is a personal view.

The DNA database is really the crux of the Bill. The use of a DNA profile for criminal investigation is a powerful instrument in an individual case, particularly in crimes of violence when most often the offender will leave a sample of tissue on the body of his or her victim. In cases of sexual assault, it is unavoidable that the criminal will leave a sample in or on his victim. In other cases of violent crime, it is likely that the offender will leave a sample of tissue sufficiently robust to generate a DNA profile either on the victim or at the scene of the crime. Therefore, in crimes of violence, DNA is an exceedingly useful instrument to place the offender at the scene of the crime - and useful to that extent only.

DNA profiling becomes a powerful instrument of investigation when it is possible for investigative authorities, such as the Police Service, to maintain a database. If the database is sufficiently large and robust, it enables crime scene samples, DNA profiles, to be matched with DNA profiles on the database. It is a simple procedure for identifying suspects; and, I might add, a simple procedure for eliminating the innocent. Why is it simple? It is simple because the DNA profile is readily translated into data for electronic storage and retrieval. If we have electronic storage and retrieval of data, the processes of eliminating or identifying suspects from as large a database as we like to generate takes mere seconds. What could take months or even years in the case of conventional police investigation - knocking on doors, scouring suburbs and pursuing leads - can be done in a matter of seconds once a DNA profile is available from a crime scene. That DNA profile can be compared with data stored on an electronic database. Its value is that whereas DNA is an exceedingly powerful instrument of investigation for crimes against the person, the DNA profiles are stored in databases and DNA profiling becomes an exceedingly useful and powerful instrument in solving volume crimes.

For example, in Western Australia, the motor theft capital of Australia if not the world, or the home invasion capital of Australia if not the world, an offender will often leave a sample, even a fingerprint, at the scene of the crime. This question was discussed in the corridors today. The home of one of my colleagues had been invaded, the police had attended the scene of the crime and dusted for fingerprints but could not get a sufficiently robust fingerprint for identification purposes. The point was made that had DNA sampling been available, that crime scene sample, the body oil that created the fingerprint, could be sufficient to generate a robust DNA profile. Very few criminals can leave the scene of a crime without leaving a sample of tissue behind. For example, the oil from the fingers or from any part of the body; the hair which we are constantly shedding; the skin which is constantly flaking from our bodies; the saliva on the cigarette butt that the nervous offender takes a puff from just before he opens the window and unwittingly drops on the ground, leaving his identification on it; the sample of tissue on the orange juice container left by the person who goes to the refrigerator in the house that he or she has broken into and takes a swig; or the saliva of the criminal in a more leisurely home invasion who pours himself a scotch from the household bar and then, with his gloves on so he leaves no fingerprints, puts the glass down but leaves samples of his saliva on the rim of the glass. That crime scene sample is sufficient, if one has a robust database, to link a suspect whose profile is on the database with the DNA profile from the crime scene. It does not prove guilt; all it demonstrates is that that person, on the basis of 99.999 per cent probability, was at the scene of the crime. However, he or she could have been at the scene of the crime 24 hours before the crime was committed, smoked his or her cigarette and thrown the butt on the ground, but not committed the crime. The value is in the DNA database for those high volume crimes - what we in Western Australian society would call nuisance crimes, because they are nothing more than a nuisance.

People say that when they find their homes have been invaded, they feel like they have been violated. It is a sense of violation, but within a few weeks it is remedied. Why is that? It is because, if people are sensible and their household goods are insured, within weeks the goods are replaced: new for old is what most household insurance policies offer these days. These crimes are nothing more than an invasion of privacy - nothing more than a nuisance - hence one in 12 households in Perth is invaded or experiences a break and enter. We take it for granted that only one in 13 of those one in 12 crimes is resolved. However, in the United Kingdom using the DNA profiling crime scene sample matched with DNA profiles on the national database, the resolution rate in the initial period was 40 per cent for these volume or nuisance crimes - home invasions, breaking and entering and car theft. For that reason I argue in favour of and commend the notion of a DNA database for Western Australia. It would be a most effective instrument that would assist the Western Australia Police Service to deal with those volume crimes.

As an aside, although DNA profiling is a powerful tool for the investigation of crimes of violence against the person, the resolution rate of such crimes in Western Australia is high: 95 per cent in the case of murder and manslaughter and 80 per cent in the case of criminal assault. In some respects, DNA profiling in Western Australia will not be as powerful an instrument as it will be for the resolution of nuisance crimes or, as some people call them, volume crimes.

As important as I believe a DNA database to be, I will raise three issues regarding such a database: first, the field of criminal investigation to which a DNA database might be applied; second, the management of the DNA information on that database; and third, the training of police investigators. I will look first at the question of the field of criminal investigation. In its examination of forensic procedures and DNA profiling, the Standing Committee on Legislation of the last Parliament visited, as well as other jurisdictions in Australia, the United Kingdom, Germany and the United States. In each of those places, DNA databases were applied to different fields of criminal investigation. In the United Kingdom, the Government of the day had allocated a substantial sum of money for the generation of a very large database that the police forces - I think there are at least 24 separate police forces in the UK - are able to use for the investigation and resolution of volume crimes. The proposition that was pursued in the UK was that there had to be a critical mass of DNA information to ensure that the unit cost was acceptable. Therefore, large volumes of DNA analysis were undertaken at minimum cost. The UK Forensic Science Service, which is contracted to do DNA analysis, was able to generate profiles for storage on the database at £5 a procedure or, in round figures, $A15. When the committee asked PathCentre in Western Australia what it would cost to generate a DNA profile, the figure started at $126. After some refinement of the calculations, PathCentre reported to the committee that it could generate DNA profiles for $36 each. That is roughly double the cost of a profile in the United Kingdom. The United Kingdom created a database with a critical mass for two reasons. The first was the statistical reliability of the comparisons. That is now unnecessary because statistical procedures no longer rely on a critical mass of information being in the database; they simply rely on the prediction of statistical probability. The second reason the United Kingdom opted for the critical mass, or large, database was that undertaking volume DNA profiling would result in a reduction of the unit cost. Overall, the cost is massive, but the unit cost is relatively small at £5 a procedure.

Some of the questions that must be asked in Western Australia are how much the State Government is prepared to invest in this DNA database and how much investment in the DNA database it will be able to negotiate with the Commonwealth. The database is a commonwealth-initiated national program, although each state jurisdiction is responsible for its own database and the generation and storage of its data. The Commonwealth provided the initiative and the financial incentive for CrimTrac to proceed. If we are to have the critical mass in the database that will enable the volume crimes to be tackled in Western Australia, we will require an investment in per capita terms comparable to that of the United Kingdom. The Government must ask if that is a worthwhile investment. It is a worthwhile investment for solving the volume crimes. However, the Government must also ask if the resolution of those volume crimes could be achieved in other ways.

We found in Germany that the German Federal Criminal Police Office had eschewed using DNA profiling for volume crimes. It did that for two reasons. First, it said that although DNA profiling is a valuable and useful instrument of criminal investigation, it is no more valuable than a fingerprint database. The German federal police argued that fingerprint identification techniques were just as powerful an instrument as DNA profiling for the investigation of volume crimes. Their financial reason was much more compelling. Whereas the UK used an automated process of DNA profiling, the German federal police preferred DNA profiling using a DNA locus that generated 13 points of comparison. The profiling system used in the UK and the United States used somewhere between six or 10 points of comparison. The Germans preferred to have thirteen points of comparison, and the particular locus they preferred was a powerful predictor of the ownership of the DNA. The disadvantage of the German system was that each of the DNA analyses at that locus had to be done manually. It could not be automated using the technology then available.

Hence it was a slow procedure. It was a manual procedure and therefore an expensive procedure. It is obligatory in the German police investigation to use that sample, but on an effective cost per unit basis, the German police could not generate the volume of database comparable with the United Kingdom database. In Germany the use of DNA profiling is mainly confined to crimes of violence against the person. That is a preference of the German federal police and I would assume the German federal Government.

The United States of America is as diverse as its number of States. However, the Federal Bureau of Investigation prefers to limit the database to narrow investigative purposes - crimes of violence against the person. The question that the Government has to ask in this is how much it is prepared to invest in the generation of the database.

The profiling procedure that has been adopted in Australia is the same as the procedure that is used in the United Kingdom. There has been continuing dialogue between the responsible authorities in Australia and the Forensic

Science Service in the United Kingdom, which is responsible for generating and maintaining DNA profiles. Even though the procedure is relatively cheap compared with the German procedure, the volume is such that the cost will be substantial. If the Government is to realise the expectations that DNA databases will be used to resolve volume crimes, it must be prepared to invest the necessary capital to generate the number of profiles to make it an effective instrument.

I gather that the issue of the management of the database has not been resolved. One of the matters impressed upon the Legislation Committee when it visited the United Kingdom, Germany and the United States was that there should be a separation of the agency responsible for the DNA analysis and the agency responsible for the DNA profile data, storage and retrieval. Furthermore, the agency responsible for the DNA analysis and profiling should be further removed from the criminal investigators. Three agencies should be involved. The first is the criminal investigators who collect the crime scene samples and gather the samples from the suspects and the person charged. The samples, carefully protected from contamination, are then transmitted to a separate agency. In the case of the United Kingdom, the Forensic Science Service is contracted to undertake the DNA analysis and profiling for all police jurisdictions in the United Kingdom and is quite separate from the investigating authorities. That is so that no doubt about the veracity of the DNA analysis from samples collected by the investigators could ever be raised in a court. Tampering with DNA analysis by the investigators to strengthen their case could never be in doubt. Once the DNA analysis is completed and the profile is generated, the storage of the DNA database is the third issue to be resolved. Should that be with the police investigators, the agency responsible for generating the profiles or a separate agency altogether? The important issue impressed upon the Legislation Committee in the United Kingdom, in particular, was that there must be a separation of the agency responsible for the criminal investigation and the agency responsible for the DNA profiling to eliminate any doubt about the validity of the DNA profile so there can be no challenge to the validity of the information provided in a court of law. Of course, the DNA profile has also to be available to the defence as well as to the prosecution, strengthening the argument that the agency responsible for the generation of the profile for the database must be separate from the investigators.

The assumption at the time that the original Bill was first introduced into the Assembly and into this House in 2000 was that there would be a separate agency responsible for the DNA analysis. It was assumed that the forensic laboratories of PathCentre, the Western Australian Centre for Pathology and Medical Research, would continue to be the agency responsible for DNA analysis. A memorandum of understanding was generated between PathCentre, the Chemistry Centre (WA) and the Western Australia Police Service that the forensic laboratories of PathCentre would be relocated from Nedlands - the Queen Elizabeth II Medical Centre precinct - to the police precinct at Midland. It would be separate from the Western Australia Police Service but collocated, so that samples gathered by the police in their investigations could be delivered to the PathCentre in Midland, and that information generated by the PathCentre about the DNA profile passed onto the investigators domiciled at the Midland police headquarters. There would be a separation of the two agencies. Even though they would be collocated, they would be two quite separate authorities, thereby protecting the veracity of the information that would be used in prosecution. Now I understand that is in doubt.

The memorandum of understanding is being reconsidered. The Police Service is not quite sure what it would prefer. Clearly it would prefer to have management of the whole process. My understanding is that the Government may release this whole process of DNA analysis to tender. Whatever the Government's decision - I do not know whether the Government has made a decision on this - I urge that the DNA analysis and profiling not be within the province of the forensic section of the Western Australia Police Service. That is not casting any reflection on the people in the forensic section of the Western Australia Police Service, because they have demonstrated that they are an admirably competent team of people. However, there should never be allowed into any criminal prosecution any doubt that the prosecution may have tampered with the crime scene sample and the suspect sample in the generation of DNA profiles. The only way to ensure that in the courts, as has been demonstrated in the United Kingdom, is through the separation of the two authorities. I strongly urge that even though government may not prefer to use PathCentre as the laboratory for DNA analysis that, whoever is granted the contract, it not be the forensic section of the Western Australia Police Service. The other point about the management of the DNA database is one to which I have already alluded; that is, whoever is responsible for maintaining the DNA database, whether it be the Police Service, PathCentre or a third agency - I am inclined towards the third, a separate agency, not that which generates the profile nor that which gathers the tissue samples - the procedures must include provision for equal access to the prosecution information relating to DNA by the prosecution and the defence.

In the United Kingdom the defence has access to not only all information on DNA profiles, but also a portion of the material used to generate a DNA profile. We observed in the forensic science laboratories the procedure for taking a sample of blood on a card. It was nothing more than a pinprick on a card. The volume of blood on the

card necessary to generate a DNA profile was about the size of a microdot. Even though it is only a pinprick sample of blood, it can be subdivided and used many times.

The buccal swab, obtained by simple swabbing of the mouth, is divided in the UK Forensic Science Service laboratory. Half is used for DNA analysis and the other half is kept for either the defence, which may have its own analysis of the sample taken, or for future reference in case a challenge is made to any part of the criminal proceedings. The important aspect is that if justice is to be done and to be seen to be done, both the prosecution and the defence must have equal access to the DNA information. Just as in criminal prosecutions there must be discovery of all prosecution evidence by the defence before trial, so too must DNA profiling be available equally to the defence and the prosecution.

I refer, finally, to the vexing question of the protection of DNA information. I think it has two dimensions. The first is a popular concern that the sample used for forensic investigation to generate DNA profiles might be used to generate information other than that which could identify a person. The DNA profile data using the loci on the DNA double helix are such that they can identify gender and then generate up to 10 sections of the profile that can be matched. They cannot identify anything more than that. Concern has been expressed that DNA profiles could be used to identify all sorts of private information about an individual. The portion of DNA that is used for forensic analysis is commonly referred to as rubbish DNA, simply because physiologists do not understand its functions. They say that because it does not have a function it is rubbish DNA. That simply says something about the state of the science of DNA analysis.

However, there is the concern that DNA analysis for forensic purposes might be used for purposes other than forensic criminal investigation. The present state of the science of DNA analysis using the loci of DNA in the DNA helix is such that even using current technology, it cannot generate anything more than very powerful, but comparatively simple, identifying information. I would not care to predict whether future developments in DNA analysis will enable the use of that so-called rubbish DNA for other identifying purposes. In fact, given the exponential rate of growth of human knowledge, particularly in human physiology, I dare not predict what might be the case in even one year from now. Given that it is exceedingly important that very strict controls be imposed on the use of information generated for forensic investigation purposes, it should be clear in legislation that that data may be used for only the purposes of criminal investigation and criminal prosecution. The UK Government has enacted the Data Protection Act 1984, which was amended in 1988, for that purpose.

The other aspect of the protection of the DNA data is an extension of that argument. Whereas the concern about future use of DNA material for other than criminal investigation is a question of crystal-ball gazing, the other aspect is the unlawful use of DNA information stored on databases. The United Kingdom experience has been that the more of this information generated about individuals that is an invasion of conventional privacy, the more important it is that it be strongly protected from abuse. Just as I urge the Government to consider carefully how much it will invest in the generation of a database, I also urge it to bend its mind now to legislation to protect that database - whether it be the responsibility of the current Government or a different Government in 2005 - from unlawful use.

I will explore in Committee some details in the Bill. The examination of that detail is not appropriate for the second reading stage of a Bill when we simply examine its principles. The Opposition supports the legislation. I have given reasons for its support, apart from the practical issue that Western Australia is the last State to legislate for the national database even though the financial incentive came from the Commonwealth, I think, in 1995. There are significant societal reasons for supporting this instrument of investigation, which should and must be available to our Police Service. I therefore commend the Bill to the House.

HON BRUCE DONALDSON (Agricultural) [8.31 pm]: Members would acknowledge the excitement, enthusiasm and passion that Hon Derrick Tomlinson indicated in the Opposition's support of the Bill. I guess not too many members have read the Standing Committee on Legislation's report; it is 373 pages long. I said when we discussed the report in the House that it was a credit to the committee staff, Mia Betjeman and Connie Fierro. It was an interesting subject with which to be involved. I recall that when the committee visited the PathCentre, we were very green and raw about forensic science terminology. The officers there were very good and explained the terminology in laymen's terms. The first thing we saw was a DNA profile in black and white that looked as though it was about 35 years old. We were then shown a newer profile, the age of which the committee was asked to guess. We guessed that it was about 15 to 20 years old, but it was only three to four years old. The advances in that short time were crazy. Every day was a new day and every day saw a new step taken in forensic science.

Professor Alec Jeffreys of the University of Leicester used a DNA technique in 1984 to detect genetic diseases. It was obvious then that DNA could be used in criminal investigation, paternity testing and forensic science. Paternity testing was 75 per cent of one laboratory's business in the United Kingdom. We said that the people in England must be very naughty! Advances in DNA technology are taking place daily. We saw a database that

had been set up to track ethnic groups based on a statistical analysis of probability. That is a very important tool because statistical evidence can be presented in court by defence lawyers to challenge court findings. With the rapid advances in technology, statisticians can say with absolute certainty that the chance of being wrong is one in 80 million or one in 100 million.

Hon Barbara Scott: Not Kim?

Hon BRUCE DONALDSON: Not Kim.

Hon Derrick Tomlinson: A slim chance.

Hon BRUCE DONALDSON: I should have said a slim chance. I digress.

It was spelt out clearly to the committee by the defence lawyers whom we met in the countries we visited that DNA testing is not an issue now because cases are not fought only on forensic evidence. As Hon Derrick Tomlinson said, if DNA samples are taken and tested correctly, the question comes down to whether the person from whom the sample was taken was at the scene of the crime three to five days before the sample was taken. Chief Constable Gunn from the UK constabulary said that it did not obviate good police investigative procedures. There remains the need for the old hoof beat and doing the hard yards. However, as Hon Derrick Tomlinson spelt out, the use of DNA excludes far more people than it includes; it is exclusive rather than inclusive. The committee became fascinated with the whole subject. I cannot remember how long the committee took to report.

Hon Derrick Tomlinson: It was a short, sharp report.

Hon BRUCE DONALDSON: It took 18 months to two years. I became very passionate about the subject and at times over-exuberant. I was also critical of our Government for not bringing the legislation into Parliament sooner than it did. The police in the UK found a great advantage in DNA testing. They were not having the greatest of success with high profile, serious crimes but they had an unintended success in clearing up volume crimes such as burglary. Members should think about what crimes really affect most people in Western Australia. It is not the more serious crimes; it is burglary and breaking and entering crimes.

Hon Kim Chance: And some lesser crimes of violence.

Hon BRUCE DONALDSON: Yes, but mostly burglary. Some 20 000-odd homes are broken into each year. Many women feel violated when burglars have gone through their drawers of underclothes or whatever.

Hon Derrick Tomlinson: It is not only women who feel violated. I felt violated when I was burgled and the burglars did not touch my drawers of underclothes.

Hon BRUCE DONALDSON: I think Hon Derrick Tomlinson has spoken about that three times. People find that, with the good insurance system we have, invariably burglars return because they know that the items have been replaced.

Hon Kim Chance: Yes, you hear often that homes have been revisited a month later.

Hon BRUCE DONALDSON: Yes. That point of view furthered our enthusiasm and passion for what we believed in, because volume crime was the unintended beneficiary of DNA profiling in the UK, where the clearance rate of volume crime is more than 40 per cent. In Western Australia the figure languishes between 15 and 18 per cent and, in some cases, drops down to about 12 per cent. Irrespective of more serious crimes, the committee believed that DNA profiling was very worthwhile.

A huge amount of interest was generated in the media when we conducted the inquiry. I am pleased to say that Norman Aisbett of *The West Australian* wrote a number of articles on the issue of DNA, including what the committee found and what a Bill could do. A public poll was taken to which there was a great response. It indicated overwhelming support for the use of DNA, the setting up of a database and the widening of police powers. The time was right to proceed. A few hiccups occurred with the commonwealth model. Arguments were raised about who in the Police Service would be involved. Hon Derrick Tomlinson mentioned that issue.

I am pleased that this legislation has been introduced. Most of the clauses were in the November 2000 Bill and some changes have been made in response to the Commonwealth Government's concerns. The changes were designed to enable Western Australia to participate in the national DNA database known as CrimTrac. When this Government decided to proceed with the legislation, the federal Minister for Justice and Customs, Senator Ellison, wrote stating that, such was the magnitude of the Commonwealth's concerns, further amendments would have to be made for Western Australia to be considered eligible to participate in CrimTrac. This Bill was based largely on the former Government's 2000 Bill to facilitate its speedy passage through Parliament. The Commonwealth was particularly concerned about the 2000 Bill's divergence from its model forensic procedures Bill. What were the Commonwealth's concerns? What problems were caused by the Bill that would prevent Western Australia's participating in the national database? I am sure members are interested in the reasons -

Hon Kim Chance: We must be on top of it.

Hon BRUCE DONALDSON: It is not a matter of holding up the legislation.

Odontology expert, Dr Kenneth Brown from the University of South Australia, presented evidence to the Legislation Committee about dental impressions. Victoria introduced its enhanced laws by amending its Crimes Act and South Australia developed separate legislation to handle all forensic procedures. However, both States had to amend their legislation because they forgot to include provisions dealing with odontology. Members were very impressed by what Dr Brown had to say. He advised the committee not to make the same mistake and to ensure that any Western Australian legislation contains provisions dealing with odontology. The committee sent him a copy of the final report, which is now in the University of South Australia's dentistry school reference library. He was delighted to note that the committee had acted on his recommendation.

Dr Brown also took great delight in showing the committee many gruesome slides. After seeing about 20 slides, members told him we had had enough. It was disturbing to see evidence of the viciousness of the attacks on women. He said he would like to show us more slides but, out of respect for the two staff members, his offer was declined. His evidence had an impact on members and, in response, the committee recommended that provisions dealing with odontology be included in the legislation.

Citizens of the United States are given a social security number on the day they are born. That is the authority under which they obtain a work permit and access many services and rights. I asked the civil libertarians in the United States what the difference would be if authorities were to retain the blood samples taken from newborn babies when checking for abnormalities. They said that would be unacceptable. How would that be different from being given a number at birth? I do not see any difference.

The issue was also raised in Australia, and the Australian Medical Association came out fighting. Parents are asked when a baby is born whether the medical staff can take a small blood sample to check for abnormalities. People with certain religious beliefs and others may not allow that sample to be taken if they are told that the blood will be retained. They might be concerned that it could be used to raise a profile. The tests undertaken at birth are so important that the AMA does not believe it is appropriate to risk parents refusing permission. I understand that position. Many people would not object to a profile being raised, but privacy does become an issue. The committee felt it was vital that people support the use of DNA procedures as an investigative tool in solving crimes, or assisting in solving crimes. Members were afraid that if they pursued that suggestion, the public would switch off. I still believe the public is very strongly in favour of the expansion of police powers contained in this Bill.

It is also important to separate the police officers collecting the samples from the scientists testing them. Hon Derrick Tomlinson was correct when he said that the forensic science service in the United Kingdom that does most of the testing has addressed that issue. One side of its facility houses the crime scene sample laboratories and the other side houses the person sample laboratories. Every police sample that arrives at the central counter is labelled with a bar code. Anyone wanting to corrupt the system would have to get past more than 100 people in the person sample area to access a sample. The scientists do not know whose sample they are testing. A DNA profile is raised from the bar code.

Hon Derrick Tomlinson: The sample is completely anonymous.

Hon BRUCE DONALDSON: It is completely anonymous. When that profile is raised, a bar code is created. Every time that sample is used or tested throughout the process, two people must sign a book to indicate when the bar code has been used. There is double-checking at all times, so that the sample does not get mixed up somewhere. When the profile is raised, it goes on the database. If the national database has a hit, or a match, the identifying part of the bar code is held by the police, and they know the name that matches the bar code. There is a huge separation between the two. That makes people feel a lot more comfortable about the way it is being done. Defence lawyers can even have another sample run if they wish. In most cases it is not the first sample that is the evidentiary sample. After there is a match, a blood sample can be microdotted or another sample of the blood can be taken. That is then used as evidence in court. That also is a double-checking mechanism. At the crime scene, the chemists need to know what they should be looking for, and so the type of crime is explained to them. Then they start looking for the DNA samples that they can gather, whether it be from sheets, the body etc. Scientists investigating one case that we saw in the United States were looking at very fine pine needles that were collected from around a body. They wanted to determine where they actually came from.

Hon Derrick Tomlinson: At the FBI laboratory.

Hon BRUCE DONALDSON: Yes, at the Federal Bureau of Investigation laboratory. It was quite interesting. A buccal swab was taken from me.

We also looked at the issue of photography. A number of samples had been taken by a professional group in the Claremont serial killings. The photographer from *The West Australian* said that a photograph would pick up some names. He could see the names through the camera lens and he asked Clive Cooke to turn them around, because the photograph could be enlarged so that the names could be read and people could determine who was in the photograph. Most people would never think of it, but as a photographer, he was well aware of what could be done.

When committee members last visited the PathCentre just before the report was finalised, the people at the PathCentre were quite amazed at how much we had learnt. We told them about bar coding and suggested that they look very closely at using that type of system. I do not know whether such a system is used at the PathCentre to this day, because I have not been back since. Those people were most impressed with how much we had learnt and with our general enthusiasm and support for what they were doing.

Hon Bill Stretch: We should re-form that committee.

Hon BRUCE DONALDSON: Yes, and have another look at it. I cannot emphasise enough the fact that there needs to be a clear separation. Hon Derrick Tomlinson spelt that out and I could not agree more. I hope that the Government moves down that path and uses a system like that used in the United Kingdom. It is important that the Government do so, because it removes a lot of doubts from people's minds about whether the system is being contaminated or whether some funny business or corruption is going on.

The Bill refers to police officers, and I know this is a duplication of what Hon Derrick Tomlinson has said. The Bill states -

> The Commissioner of Police may require a person who at the time is appointed under Part I, III or IIIA of the *Police Act 1892* to undergo an identifying procedure for or in connection with the forensic purposes prescribed by the regulations for the purposes of this subsection.

The second reading speech also refers to police officers taking part in an identifying procedure, so it is not a question of whether the Commissioner of Police "may require" them to do so. At present, all officers have their fingerprints taken and put on file. There are a lot of very good reasons for that, and it happens quite regularly overseas. Sometimes a police officer gets a bit excited about finding a wonderful fingerprint, which in fact turns out to be his own. It is easy to do; he just leans against something. Police officers can also leave a smudged print, but it is enough to enable a sufficiently robust sample to be taken for DNA. When the procedures are then followed, people automatically think they have another contaminated sample because they get a different DNA profile. I mean no disrespect, but it is important to understand this.

Every technician, scientist or other person who has any access to the forensic science laboratory in London and at the FBI office in Washington is DNA profiled. That profile then goes on a separate database. As Hon Derrick Tomlinson pointed out, the police officers' profiles would be put into the same database, but those profiles would be separate from the profiles of convicted people. Instead of the Bill stating that the "Commissioner of Police may require" people to undergo an identifying procedure, it should be compulsory; just as at present it is compulsory for police officers to give fingerprints. That is very important, and I support it wholeheartedly. It also illustrates to the wider community that the Government is trying to set the guidelines that will help protect those people who are innocent of crimes that are being investigated.

There were some humorous moments during the committee's trip. We went to the Goethe institute -

Hon Derrick Tomlinson: The Goethe University in Frankfurt.

Hon BRUCE DONALDSON: Visiting that university was most interesting. We finished up in the mortuary, where a lot of autopsies are conducted, and not only crime-related autopsies. They were very busy -

Hon Derrick Tomlinson: People queuing up to be dissected.

Hon BRUCE DONALDSON: There were a few open body bags lying around. Our two staff members rightly decided that they would not go down to the mortuary, but Hon Derrick Tomlinson, Hon Bill Stretch and I did. The blokes in the mortuary get pretty excited. They love their work. One person was opened up, or should I say he was being dissected -

Hon Derrick Tomlinson: "Opened up" is the better term.

Hon BRUCE DONALDSON: He had a very yellow look about him.

Hon Derrick Tomlinson: He didn't feel very well either.

Hon Giz Watson: Because he was dead.

Hon BRUCE DONALDSON: He was very dead. A man with a very quick wit and humour, Hon Derrick Tomlinson, turned to the professor and said, "Gee, I don't think that bloke looks very well." I assure members that it was a most interesting highlight. The worst part was when we were having lunch later on, and as I breathed, I had the smell of death in my nose. It took me hours to get rid of it. I almost stopped breathing through my nose. I do not know how people do it, but the people there seemed laid back about it and they got very excited about what they were showing us.

Hon Derrick Tomlinson: Especially the bloke on the slab who was open.

Hon BRUCE DONALDSON: The staff member said that he was running out of space because of all the blood the office had drawn. He was very excited and showed us all the tissue samples. He got very carried away about what he did. I suppose it is because he was lonely. He would not have had anyone to talk to except his colleagues.

Hon Bill Stretch: And visiting Australians.

Hon BRUCE DONALDSON: Yes.

The Government responded to our report, which most members are aware is the normal procedure for this House. The Police Service also responded to the issues raised in the report. It misjudged or incorrectly interpreted a number of areas. although it was generally supportive of the recommendations. It was easy for us to put up recommendations because we had looked at the good and the bad systems and were able to sort those out and determine the best way to go. We decided that a separate piece of legislation rather than legislation to amend the Criminal Code should be enacted. That is now happening. That is very important. The Police Service agreed with that separation of legislation. It also did not have a problem with the profiling of police officers. The committee was able to respond to the concerns of the Police Service.

The second reading speech states that the report formed the basis for the legislation and was comprehensive, insightful and extremely useful. We are proud of what we were able to achieve over a long time, and, as we all said earlier, we became very passionate about the benefits of DNA profiling. We felt that if we could help reduce the clearance rate of volume crime in Western Australia, it would be a great boost to society as a whole. I think we have general public support for that.

I will also discuss the collection of the DNA samples. We understand that those who are incarcerated and on remand will be profiled. I do not know whether that will include people on parole. I believe it is very important that they be captured. I have always believed that a profile should be developed for every prisoner. This legislation will allow the police to use force if they have problems in obtaining a sample. Release on parole should be conditional upon providing a DNA sample. That would remove the need to use reasonable force with incarcerated prisoners. The Bill states -

> **"serious offence"** means an offence the statutory penalty for which is strict security life imprisonment, life imprisonment or imprisonment for 12 months or more;

This worries me because there has been a move away from imprisoning people for less than six months. I hope this Bill will capture people who commit a burglary and are imprisoned for nine months. Will this Bill restrict the police from obtaining a DNA sample from such people? In any case, a sample could be taken after a person is charged; and, if he is convicted, the profile should be put on the database. It may not be a concern. The committee debated at great length whose profiles should be included on the database. It was easy to determine that prisoners should be captured. Another argument was that those who were incarcerated but were unfit to plead should also be profiled. We need to capture those types of people because the rate of recidivism is greatest in the area of volume crime. The authorities in the United Kingdom have found that people tend to gravitate from burglary to more serious crimes. People start by burgling houses, and if they then come across a woman within the house, the crime can turn to rape. People then start breaking and entering not to steal goods but to commit sexual offences. That pathway has been picked up in statistics in the United Kingdom.

The United Kingdom is a leader in the field of forensic science and criminal investigation. It has been the trendsetter. The American Federal Bureau of Investigation has access to some of the most sophisticated equipment to assist it in its criminal investigations. Within two days of our leaving Washington, the police in Perth made another visit to the FBI with more samples relating to our high-profile crimes; that is, the Claremont serial killings and the disappearance in Rockingham of young Gerrard Ross. Although we have some good scientists here, the Police Service in Western Australia visited the United States to utilise the FBI's equipment in the hope it would assist in solving those crimes.

As an aside, the FBI officer in Washington showed us some black elbow-shaped polyvinyl chloride pipe fittings. He asked what I thought they were, and I said they were pipe fittings. He said that I would be surprised at what

was in them. We looked through them, and he then told us that the fittings were impregnated with cocaine. The sniffer dogs had walked straight past them. I do not know whether the FBI was tipped off.

Hon Simon O'Brien: Was the cocaine inside the pipes or within the fabric of the plastic?

Hon BRUCE DONALDSON: The cocaine was impregnated in the fabric of the plastic. The FBI officer said that that demonstrated the lengths to which people went to smuggle drugs into the United States. It was unbelievable. It did not seem profitable, especially considering the processing that would be needed to first manufacture the pipes and then later to extract the cocaine. The FBI officer said that we would be surprised by how much cocaine was in the pipes. The real concern was that the dogs were useless in that situation. They were unable to pick the scent as it was impregnated within the pipe fittings.

The storage of DNA used to be a real problem. Refrigeration systems were originally needed for the cotton swab samples. That would have cost a small fortune in the United Kingdom, let alone Western Australia. The high humidity in Western Australia meant that there was a danger that the cotton wool buds could be contaminated if the samples were put in their glass files when the temperature was not properly controlled. The United Kingdom developed a buccal swab and comb kit. Some members may remember that I showed it to this place when I discussed the committee report. The kit contains compressed paper, which better absorbs the cells in the inside of the mouth, and provides easier storage.

Hon Derrick Tomlinson: They learnt that dry samples were more effective than wet samples.

Hon BRUCE DONALDSON: That was a quick move from A to B. The kit is very effective. I demonstrated how to click the probe on the comb and drop the sample into the bag, and then put the bar codes on the sample. Tamper-proof bags are used. If they are found to have been tampered with, they are quickly scrapped. The real safeguards involve the sample being taken by an authorised person, including a doctor, nurse or whoever it may be, and put into tamper-proof bags with bar codes and placed in a file. At that stage, the police are the only people who know to whom the samples belong. The police record the name, which is kept to one side, and then give the bar code to the PathCentre. The PathCentre enters the bar code, tears off another slip and slaps it on to the bag. That is how people at the PathCentre work with a sample.

After considering the issues for a long time, I feel comfortable with this legislation. At times I probably drove Hon Giz Watson mad with my enthusiasm. However, I witnessed the safeguards that will be provided in the Bill. It is important that they are in place. I was comforted even more to hear some very high-profile criminal defence lawyers whose assessment of the safety procedures in place, the excellence and integrity of sampling and the raising of the profile had substantially increased. The procedures have left people feeling more comfortable. It is not bad when defence lawyers say that they cannot argue against the provisions. The defence wants proof of why a suspect who has no alibi must have been at the scene.

Many people in the United Kingdom and the United States have been released from prisons because of DNA profiles. Some people who had served in jail for long periods were lucky that the crime scene samples still existed. The DNA profiles of those people were raised and it was discovered that there was no way in the world that those people could have committed the offences of which they had been accused because the DNA profile did not match the crime scene samples.

I understand that the PathCentre has many samples of DNA profiles that will be raised. It will be interesting to find out whether some hits are made from that DNA that point to some persons who are currently incarcerated. That is exactly what the Police Service in the United Kingdom discovered. The number of hits it has made has been fantastic. It is interesting that once prisoners are told that they must have done this or that crime because their profiles match the DNA at the crime scene, invariably, they admit to not only two or three crimes but also to a string of crimes across the United Kingdom. They voluntarily give up that information because if it is treated right and the penalties are not increased too much, people will possibly own up to crimes that they have committed. That would solve an awful lot of cases that would otherwise be pending on the books.

I support Hon Derrick Tomlinson. As a member of the Opposition who was also involved in the Standing Committee on Legislation along with one of my colleagues and other members of staff, I wholeheartedly support the Bill. It is long overdue. I hounded the leader of the Government in this House to get this legislation drafted a lot sooner. He will remember rightly that I was happy to see the electoral reform Bill drop off the Notice Paper last December so that we could get stuck into this.

Hon Kim Chance: I recall that.

Hon BRUCE DONALDSON: I thought that this legislation was important for the people of Western Australia. I am pleased that the State is proceeding to join the CrimTrac program to give police an added tool in its investigation procedures. Detectives and members of the Police Force will not move away from good investigative work because of this legislation. I hope that in his reply to the second reading debate, Hon Nick

Griffiths will deal with a couple of the issues I have raised. I look forward to the committee stage. I do not see a great problem with the legislation, but we will probably flesh out a few issues in some of the clauses and consider whether we can make any improvements to it. If not, it will have my support.

HON SIMON O'BRIEN (South Metropolitan) [9.14 pm]: I support this Bill. This is a well-constructed Bill that, to some extent, probably reflects the consideration that has gone into it and the length of the gestation process. I will refer to one element that deserves more attention, which is found at the end of the Bill. I congratulate the Standing Committee on Legislation, which was chaired by Hon Bruce Donaldson, from whom we have just heard, on an extensive job. We have previously considered in a Committee of the Whole House the report referred to by the previous speakers. It is a very useful addition to the reference material that is available to Parliament and elsewhere on this type of technology. I congratulate and thank members of the committee for that. They did a great deal of work over many hours, which involved some plucky and arduous itineraries to visit different places.

It has been mentioned before that it would have been good had this Bill been passed before now. Now that we have it, I welcome it. My region and every other members' region have problems, particularly in distinct localities that have what has been described as high-volume crime. It has also been described as nuisance crime. I understand what members mean by that term; however, the word "nuisance" is too mild. It can be misrepresented to mean something that has a trivial impact on people's lives in the medium to long term. In many cases, I find that high-volume crime, including break and entering, home invasions and car thefts that have been referred to traumatise people for a considerable time after the incident has occurred. Not everybody has the ability to put it all behind them after the initial shock is over. That is particularly true of the elderly and other people who live alone or are vulnerable. It is more traumatic for those people to become victims of this type of crime and helps to weaken their own sense of independence. That is absolutely appalling, especially if one considers the types of crime to which we have referred are generally entered into quite lightly by many of the perpetrators.

In my capacity as chairman of a Safer WA committee in the City of Melville, I have become more and more aware of a series of crimes of this type that take place in a particular locality. They are being carried out by people from well outside the area because of nearby transport links. Indeed, those people come from north of the river. I wish they would stay north of the river and not bother the good citizens of the South Metropolitan Region. Perhaps one day we will have a railway we can use to export some of our less desirable types to parts north of the river and give them a dose of their own medicine.

A large number of offences are being committed by a very small number of people. The impact of those offences on people's lives, on their personal sense of wellbeing, their emotional wellbeing and sense of security is out of all proportion to the number of people that are involved in committing them. Normal discretion that applies to our involvement in some of these matters that are of an ongoing operational nature means that I do not intend to talk about that now.

However, particular people about town are reasonably targeted, or suspected by police, and are therefore worth including in the circle of inquiry when trying to establish the authors of crimes. The powers outlined in the Criminal Investigation (Identifying People) Bill 2001 will provide valuable tools to assist in identifying the authors of crime, because 90 per cent of crime - this figure was referred to in the second reading speech - is committed by about 10 per cent of criminals. If the author of one high-volume crime, such as burglary, can be established, chances are we will be able to clear up a heck of a lot more than the one instance of burglary that attracts the immediate attention of the relevant law officers. This Bill will provide that capacity, and it will send a message to housebreakers and car thieves that the chances of their being apprehended will be considerably higher than the seven or eight per cent referred to by Hon Derrick Tomlinson, because of the availability to police of this type of technology. Such criminals will be forced to think twice, and I am confident that such technology will assist in apprehending and convicting offenders. Even if criminals do not learn their lesson - some are stupid enough not to - if we remove them from circulation for a short period, it will give some in society a little more peace. Having said that, we also need to remember that the DNA database alluded to by previous speakers is not intended to cover every person in the community. Previous speakers have stated that samples of blood could be taken from newborn babies, and that a database of all citizens could be created, from which benefits for certain functions in society could conceivably flow. I make it clear to the House, and to anyone who has taken note of this debate, that I am opposed to the universal application of this technology. It is fair that we establish a database of people who are shown to be a certain type of criminal, because statistically they are more likely to commit similar crimes. However, the details of all people should not be kept on a big brother database of DNA samples until it becomes necessary to do so, in much the same way as exists in the area of fingerprinting. The corollary of that attitude is that, although this will be a splendid tool to establish the identity of criminals, it will also be a good tool to establish the innocence of people who might not otherwise have been able to establish their innocence. We must understand that the purpose of an investigation to establish

the author of a crime is as much about clearing the innocent, and determining the people who are not of interest to the inquiry. This technology, and the related powers, will enable that form of justice; that is, the clearing of the innocent through a far more efficient and consistent procedure than is used currently. Hon Bruce Donaldson spoke about the concealment of cocaine in plastic moulded forms -

Hon Bill Stretch: Poly-pipes.

Hon SIMON O'BRIEN: This type of smuggling technique was first identified about 12 years ago. Hon Bruce Donaldson expressed surprise that drug detector dogs that could usually detect cocaine, could not detect cocaine subsumed in PVC. If the honourable member was describing that of which I was already aware, he would find that this is a new substance that is neither polyvinyl chloride nor cocaine hydrochloride, but a new compound that is a chemical combination of the two, and it is a different material. That is why it is extremely hard to detect by normal methods of detection, including sniffer dogs. However, I can also tell the member that because this has caused some concern in law enforcement circles, the Commonwealth Scientific and Industrial Research Organisation undertook some interesting work in an attempt to identify how this new compound could be detected, and how the material could be extracted. However, that is a story for another day.

In my opening remarks, I stated that I wanted to highlight a part of the Bill with which I have some difficulty. Even if I am the only person who has difficulty with this part, I will still inform the House about my concerns, because they are important. I do not like the way the problem to which I am about to refer is sneaking into legislation. Some of this happened during the office of the previous Government, and even if that is the case, it is time to put our foot down.

Hon Ken Travers: How brave of you!

Hon SIMON O'BRIEN: I have had both tablets.

However, jokes and levity aside, this is a problem I have observed creeping into a pattern of legislation. I refer members to clause 93(1), a standard clause that gives the Governor power to prescribe matters by regulation. That is fine and necessary. Clause 93(2) extends that power to also provide for procedures to be followed - again, there are no problems with that, because that is the type of measure that is included in regulations, and they can be changed when necessary. However, I am concerned that clause 93(2) also allows for regulations to create offences, and impose penalties on those offences. In my opinion - perhaps other members share this view to a greater or lesser strength of feeling - legislation that creates offences and imposes penalties should not be created in subsidiary legislation. It should be included in a principal Act. When offences are created in regulations, I get a little bit worried. We tend to gloss over this and let it go, because such offences are typically summary offences, with a pecuniary penalty. They are usually of a minor nature. No prominent instances of abuse have been brought to the attention of the Parliament. However, that does not mean that we should necessarily allow this to occur. I do not know what can be done about this problem in the Bill now before the House. We might be able to explore our options between now and the remaining stages of the debate. However, I raise this matter with the House as a personal concern. I have seen it creeping into a lot of legislation that has not necessarily been passed during my time, but which I have noticed in reviewing regulations as a member of the Joint Standing Committee on Delegated Legislation. Such review has brought me into contact with the parent power. I draw to the attention of the House the fact that many Acts contain a power to create offences by regulation.

Hon Kim Chance: It is a very good point.

Hon SIMON O'BRIEN: We might be able to look at that. In conclusion, I support the Bill. I thank the several past and present members on both sides of the House who have had quite a bit to do with assisting the Parliament in reviewing the legislation that is before us.

HON BILL STRETCH (South West) [9.20 pm]: The Bill is probably one of the most important with which I have been associated during my time in Parliament. The committee of investigation into the forensic procedures undoubtedly undertook one of the most absorbing investigations in which I have been involved. It was a privilege to serve on the committee that was chaired by Hon Bruce Donaldson, and which included members such as you, Mr President, in the earlier days, and to travel extensively and talk face-to-face with world-acclaimed experts in their field.

One message that came out of that should be sent home to the Government; that is, the Government should not be mean-minded about committees travelling. It is a very cheap shot for a Government to say that it will cut down on committee travel because the public sees it as a perk for members of Parliament. That is a very narrow view to take and does a great disservice to the operations of the Parliament. As members of this committee found out, and I have found from other committees on which I have served, people will say things to members off the record, slightly off the record or reasonably openly, that can in effect save the State millions and millions

of dollars. When looking at such a high level of advanced research, enormous savings are to be made by not reinventing the wheel. On many occasions, the only way in which members will get information from people is to look at what they are doing, to talk to them in their laboratories and in the field, and to take their advice, not all of which will be given officially.

The great thing about the scientific community is that, despite the threat of patent and the importance of retaining information for themselves, scientists are very flattered to be asked about their work. A common thread through so-called experts and experts is that they are always very flattered to be asked to share their knowledge. It can be of great benefit if a Government sets in place the machinery for committees to travel and interview those sorts of people. This certainly emerged from the comprehensive report on forensic procedures and DNA profiling that was put together under Hon Bruce Donaldson's chairmanship. As members will recall from the earlier debate on the report, the committee came down with 136 recommendations. Those recommendations have had a major impact on the drafting of this legislation. I urge ministers and the people taking notes on their behalf to bear that in mind. We were very disappointed that one of the members of the committee was not allowed by his parliamentary leader to travel with the committee. We missed his input and he missed a great opportunity to gain experience and make an in-depth input into the legislation. However, I guess that is politics. It was a cheap shot, which I do not think in the long term will have an effect on the efficacy of the legislation - I certainly hope not.

One of the savings that came to light was in the storage of samples, which was referred to by Hon Bruce Donaldson or Hon Derrick Tomlinson. We were looking at the early stages of setting up refrigerated storage for blood samples. The refrigeration cost alone of keeping samples was something in the order of $80 000 a year per refrigerated unit. When we were discussing this with the United Kingdom scientists, they said that if blood samples are freeze-dried correctly, they can be stored in a filing cabinet. We did not very much like the idea of the security when doing that. However, it indicated to us that by following the correct technology, the Western Australian taxpayer could be saved an enormous amount of money. Some samples cannot be stored in that way, so some refrigerated storage costs no doubt will be incurred. Members can pick up these sorts of things only over lunch or coffee. They will certainly not pick them up on the Internet, because people are very possessive about their information. When things relax a bit, members can pick up some useful information.

Together with colleagues on the committee, I have been disappointed that this legislation has taken so long to see the light of day. Members have mentioned the federal legislation and the fact that the Western Australian model did not match the commonwealth model and, therefore, as usual we had to move over. From what I recall, it was evident early in our investigations, following a trip to South Australia and holding discussions, that it seemed the Commonwealth was on the wrong track. It seemed to be taking as a model much of the South Australia legislation. Apparently that is what happened. It is not surprising therefore that the Western Australian model as proposed by the previous Government did not quite fit the commonwealth model. It is always a question, as members will be aware, of who is a little bit right and who is a little bit wrong. Being parochial, I reckon that the Commonwealth was a little wrong and we were very correct. However, when the Commonwealth puts $50 million into the CrimTrac program, the Commonwealth might not be right but the dollars certainly are. The State had to accommodate that. I hope that the State has not moved too far. I have not been able to pick up in the legislation where the accommodation was made, but I think it was fairly minor.

This legislation and the practices that will flow from it undoubtedly have the potential to make a significant impact on the resolution of crime in Western Australia. It has been dwelt on at some length by my colleagues, so I will not spend too much time on it. I am pleased to see several aspects of the legislation, one of which is the perseverance with the use of justices of the peace to approve warrants where necessary. The use of justices is essential in country areas. The accommodation that the Government has made there is a very useful compromise. The police will go to a higher authority where possible, but it is useful that the Government has not ruled out their use in country areas.

Another aspect of DNA profiling that impressed me was the concentration on the education of British police in the collection of DNA samples. The police there told us that a worthwhile database could not be obtained without correct sampling procedures. They had some amusing anecdotes and examples of data that had been incorrectly taken and, in some cases, incorrectly labelled. They had a comprehensive and very good bar coding system, which the chairman of the committee, Hon Bruce Donaldson, commented on earlier. Everything was bar coded with the same bar coding from the time it was collected at the site until it went right through the system. A small slip-up had occurred with one sample of DNA that was received at a laboratory. It had the name of the constable who collected the sample printed on the outside of the bag but there was no mention of the crime site and the suspected victim. The British police said that errors in small aspects of DNA sampling like that can cause major complications and render the whole process worthless.

The Government must accept that there will be a lot of hidden costs when it comes to grips with this legislation. We raised that matter with the police when we returned to Western Australia from our overseas trip and made

them aware of the importance of education in the taking of DNA samples, such as those that eluded the best of the British officers in what appeared to be a totally foolproof system.

Probably the most overlooked benefit of the DNA identification process is the clearing of innocent victims' names. The Federal Bureau of Investigation in the United States explained to the committee in detail the great difficulty it had in convincing some state police authorities that some people on death row were innocent. Some local police were absolutely convinced that they had the right people and they were going to put them in the electric chair come hell or high water - or in colloquial terms they said, "They're gonna fry." It was only by the use of an injunction that the federal authority was able to convince the local police to stop that process and recheck their evidence using DNA. The FBI got 17 people off death row.

Hon Simon O'Brien raised a concern about the fact that not everybody should be on a DNA database. Just as with fingerprints, if people have nothing to fear and nothing to hide, they should have no fear of being on a DNA database. The tragedy on 11 September in New York underlined the importance of DNA in the identification of severely shattered bodies. Although it is no comfort to be told that all that remains of a loved one is a very small remnant, it is at least nice to have a positive identification that the relative or friend perished at that time. DNA is able to identify small remains from human bodies. That tool is also useful in the investigation of house fires and burnt cars in severe car accidents. It is rare for a body to be so totally damaged that DNA identification is impossible. People whose relatives have gone missing can find some comfort when a body is found and identified many years later by DNA identification. Those relatives would then know that the missing person did not disappear into outer Siberia, Africa or somewhere else. A body can be positively identified and a family put to some ease, albeit that it would be cold comfort.

Because DNA is a powerful tool, it needs judicious use and judicious keeping of records. The UK has probably got it right by having its DNA database and samples kept totally separate and under the supervision of different authorities. There can then be no suspicion of cross-identification or wrong identification of samples, which could occur if only one authority had control of both sides of the equation. I guess that process is more expensive and somewhat slower. However, with the speed of transmission of decoded information, as outlined by Hon Bruce Donaldson, it is not a serious impediment to the operation of a totally secure database and sampling system.

I am enthusiastic about the legislation. I am a little disappointed that when the Labor Party was in opposition it was not keen on the legislation. This slowed down the introduction of this very important tool. It is no good people saying now that we are lagging behind the rest of Australia. We are lagging behind for a very good reason; that is, progress was delayed for political reasons before the last election. It could have been, and should have been, implemented some time back. The comments and references to the federal Minister for Justice and Customs, Senator the Hon Chris Ellison, and his need for clarification of some clauses was a minor aspect that could have been quickly overcome at the time.

DNA has been used to clear up some significant historical crimes. Some years back in the UK, a body that had been missing for 14 years was positively identified with the use of modern DNA technology. The effect of DNA testing in prisons is staggering. When the police are hunting one person, it is surprising to note how many more they find. Many people who are on a DNA database are found to have committed many crimes, not just one. When people go on a fishing trip, particularly when they use a net, they never quite know what they will find. Some of the results of dredging using DNA technology that took place in British prisons was quite mind-blowing. Some people have confessed to more than 100 crimes, which is 100 investigations that can be taken off the police books. Some astonishing results have occurred, particularly early in the history of what might be called blanket DNA testing in prisons. Those results have slowed down as time has gone on. The committee was told of a revolting situation in which prisoners spat in one another's mouths so that the result of a buccal swab would be distorted. Once those taking the swabs woke up to what was going on, procedures were put in place to stop that behaviour. The officers concerned can always revert to taking old-fashioned blood samples if they believe they are being impeded.

The transition to this new technology will be interesting. Like Hon Bruce Donaldson, I am enthusiastic about the benefits of the legislation for Western Australia. It is not without danger and it will not be introduced without causing some concern to the more extreme civil libertarians in our midst. However, that must be balanced against the greater good of the majority and the benefits of identifying missing persons, victims of hideous and deforming crimes and people killed by misadventure such as fire, accident and loss at sea. Often the only remains of people lost at sea are body parts found in the gut of a shark. This technology will allow positive identification. That is not much consolation, but may be some comfort to families.

I welcome the legislation. I hope it enjoys speedy passage through the Parliament and speedy acceptance by the Police Service. We are interested to see who ends up with the power and whether the safeguards are adequate. We may ultimately be required to set up a separate body to deal with the issue. I support the Bill.

The minister should not allow his Government to be too penny-pinching about committee travel. It is very enlightening and a cost-effective way of picking up the latest research. Anyone can cause a ruckus talking about perks for pollies. However, in that process some people overlook the enormous benefits that can be gained for the community by the intelligent use and careful selection of the committees and the issues they study.

HON RAY HALLIGAN (North Metropolitan) [9.53 pm]: I, too, support the Bill. We should assist our Police Service in every way possible to bring perpetrators of crime to justice. This legislation is one way of doing that. Like the speakers before me in this debate, I am concerned that it has taken so long for the legislation to reach this stage.

The second reading speech suggests that the Bill is modernising and enhancing police powers. What does the minister mean by "modernising"? Some of these techniques have been around for many years. Does he mean that this technique came into existence only this year or that it has existed for the past 10 or 15 years and that we are modernising the service? We must pursue any technique that assists the police to bring perpetrators to justice.

As Hon Simon O'Brien pointed out, various papers suggest that 90 per cent of crimes are committed by 10 per cent of the population. Unfortunately, many of that 10 per cent are recidivists who, in some instances, repeatedly get away with those crimes. The revolving door is another issue for another day. Some people take up crime as a way of life and pit their intelligence against the police. We must provide the police with every possible tool to overcome the problems they encounter in bringing those people to justice.

Over the years, the police have used a number of techniques to bring criminals to justice - for example, fingerprints, which have been around for years. The police also have a database of photographs from which they produce identikits for people to try to identify those who have committed crimes.

DNA sampling will concern many people. Although there is a plus side to these techniques, some people also see a downside. DNA testing involves retaining samples, and concerns have been raised those samples may be planted at crime scenes to implicate certain people despite the fact that they were not involved in the crime in question and were not at the scene.

The Legislation Committee's report on forensic procedures and DNA profiling refers to the prosecutor's fallacy. The report states -

> 16.59 The prosecution, experts, trial judge and the jury may fall into the trap of what has become known as the "*prosecutor's fallacy*". This involves an error of logic in legal reasoning involving probability in respect of many types of evidence. In criminal trials involving DNA there are two questions to be asked:
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> 1. what is the probability that the defendant's DNA profile matches the crime sample, given that the defendant is innocent? (the match probability); and
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> 2. what is the probability that the defendant is innocent given that the DNA profile matches the profile from the crime sample? (the guilt probability).
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> 16.60 The fallacy occurs when the answer to the first question is given as the answer to the second question. The Committee was informed that the match probability is the domain of the experts, whilst the guilty probability is the question which is of direct relevance to the jury and which requires an assessment of all the evidence, not just the DNA evidence.

The report goes on to state that because this issue relates to the presentation of evidence in court proceedings, the committee did not examine it in any more detail. The committee was regularly advised that prosecutions do not proceed to trial on DNA evidence alone. If that is true, it should allay any fears. Many people believe that if a DNA sample has been taken and a person has been at a crime scene - the scene itself and not necessarily involved in the crime - that person will automatically be taken in as a suspect. The committee's report should also allay those fears. In the eyes of some as well, these DNA procedures are a panacea: once they are in place, every perpetrator will be brought to justice. There need not necessarily be any other evidence; this procedure should be sufficient in itself. Therefore, going down this path can have a plus side as well as a minus side.

Debate interrupted, pursuant to standing orders.