

DNA : DON'T NEED ALIBI

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There is no doubt that DNA technology has revolutionised many aspects of our lives and will only continue to do so in ever more dramatic ways as the human genome yields yet more of its secrets and as our analytical capacities increase:

- in particular DNA will assume a more central role in the crime and criminal justice system
- it will bring about major changes in the way in which medicine is practiced
- it has major implications for our familial and social relationships.

Within the Criminal Justice system we have already seen:

- major advances in the identification of samples found at crime scenes or taken from people in a variety of circumstances eg:
 - compulsory testing of prisoners
 - mass screening programmes for whole populations
 - extensive screening of "persons of interest" in criminal investigations

DNA testing has great potential to assist in the protection of the innocent by allowing people to be definitively excluded as suspects - there has been great attention paid to various "Innocence Projects" in places such as the United States where life and death decisions may depend upon such identifications.

DNA testing may have a major role in helping to combat the growth in Identity Theft and Identity Fraud which have been identified throughout the "western" world as major areas for the growth of crime and criminal activity. It is already being used in the authentication of works of art to try to eliminate the possibility of forgery.

However DNA testing is not foolproof:

- New Zealand's *Report on DNA Anomalies* (Eichelbaum and Scott)
- the Easton Case in the United Kingdom
- the "Prosecutor's Fallacy" - the failure to understand the meaning of statistics by judges, lay people and the media

Any new technology seems to carry within it the seeds of inevitable "function creep". The dangers clearly exist that DNA taken for one purpose or in one set of circumstances may end up being used in a quite different, and perhaps inappropriate fashion - almost always without any informed consent on the part of the data subject - for example the use of so-called "Guthrie Cards" by police and other law enforcement agencies.

The advantages of DNA must be balanced against serious potential for misuse:

- any loss of genetic privacy has vast social implications for example:
 - the sale of the entire Icelandic health database to deCode Genetics, a private company
 - proposals to sell the Nauru health database to an Australian private company
 - proposals by the British government to sell genetic information from national health databases to pharmaceutical companies
- the major issues which are arising in relation to unregulated paternity testing where we know that significant numbers of children have as fathers a man other than the one shown on birth certificates. This has implications in
 - social relationships
 - privacy (eg Prince Harry, Jimmy Barnes, Steve Bing)
 - welfare payment - child support - recovery of payments
 - *Trisha Exposes ... Britain's Biggest Love Rats* : a daytime TV show which reveals the results of paternity testing on air
 - the use of DNA testing to establish family linkages for the purposes of "proving Aboriginality" in Australian land rights cases and in recent elections to Aboriginal controlled political organisations
- the use of DNA tests as pre-employment screening tools
- the possibility of unlawful and covert discrimination arising from access to genetic information - see report of the Australian Law Reform Commission *Protection of Human Genetic Information*
- should politicians submit to genetic testing - was it relevant to know that candidate Reagan would one day - inevitably - be too incompetent to even recognise members of his own family - is this relevant for electors to know in advance of allowing him to have his finger on the nuclear button ? Would it have excluded Kennedy or Churchill for being elected ?
- how do we guard against social pressures being used by the Police to force people into giving DNA samples in mass testing/screening scenarios : the pressures place on populations in places such as Wee Waaa (NSW) or Norfolk Island for everyone to submit to tests to "solve" horrendous crimes.
- should Parliament be allowed to retrospectively authorise the retention of DNA samples when they have been unlawfully collected or retained - the UK Parliament did this when it was pointed out that some 80,000 samples were held unlawfully on its database and it is permissible under the provisions of current Australian legislation for the Courts to admit DNA evidence even when it has been improperly obtained
- how will we avoid the use of DNA to revive the discredited practices of eugenics - *Brave New World, Gattaca* ?

The key issue, it seems to me is to have public trust and confidence that any system which involves the establishment of DNA databases, for either medical or law enforcement purposes is ethically run and democratically controlled. At present in Australia one cannot be entirely sure that this is the case.

- there is little transparency in the way in which DNA databases are run
- the mechanisms for public accountability and democratic control are weak - as has been shown by a recent review of Part 1D of the Australian federal government's *Crimes (Forensic Procedures) Act*
- so-called "Innocence Panels" (such as the one established in New South Wales) run the risk of becoming mere window dressing or public relations for the Police Services
- deliberate hype by law enforcement authorities - against a background of increasing community concern about crime and terrorism (much of it ill-informed and synthetic) has the effect - as is clearly intended - to intimidate politicians and civil libertarians from insisting on limits and control on the development and use of these databases by law enforcement authorities
- in federal states (and perhaps internationally) common rules are always set at the lowest common denominator never at the level of best available practice.

There is plenty of science and many "expert" opinions, what is lacking is an informed public debate about the uses and misuses of DNA databases - in this debate Privacy Commissioners and advocates must play a leading role.