

Discussion Paper:

**The Forensic DNA Sampling
of Serious Indictable Offenders**

Under Part 7 of the *Crimes (Forensic
Procedures) Act 2000*

December 2001

NSW Ombudsman
Level 24, 580 George Street
Sydney NSW 2000

Phone: (02) 9286 1000

Toll free (outside Sydney Metro Area): 1800 451 524

Facsimile: (02) 9283 2911

Telephone typewriter: (02) 9264 8050

Email: nswombo@ombo.nsw.gov.au

Website: www.ombo.nsw.gov.au

NSW Government Publication

© Crown Copyright, NSW Ombudsman

Contents

Introduction	4
Background.....	5
The significance of forensic DNA evidence.....	5
Before the <i>Crimes (Forensic Procedures) Act 2000</i>	6
The new law.....	6
Objectives of the <i>Crimes (Forensic Procedures) Act 2000</i>	7
Role of the NSW Ombudsman	7
Role of the NSW Police Service	8
NSW Police Service policies and procedures.....	8
Issues.....	9
Forensic DNA samples	9
Correct identification of serious indictable offenders	10
DNA Sampling in juvenile detention centres	11
Correct identification of ‘incapable’ inmates	12
Correct identification of inmates who require an interpreter	13
Notice given to inmates about forensic procedures.....	14
Interview friends and legal representatives	15
Informed consent	16
Factors that may affect consent	16
Initiatives to reduce the use of force to take samples	17
Non-consensual, but compliant inmates.....	17
The ‘cooling off’ period	18
Persons present during forensic procedures	18
Use of force	20
Appendix 1: Key dates in the history of DNA profiling	21
Appendix 2: Flowchart of procedures for taking forensic DNA samples from serious indictable offenders	23
Appendix 3: Glossary	24
Appendix 4: Summary of questions for consideration	27

Introduction

Since 1 January 2001 NSW police officers have had the power to take forensic DNA samples from inmates who have been convicted of a ‘serious indictable offence’.¹

The law that creates these new powers—the *Crimes (Forensic Procedures) Act 2000* requires that the Ombudsman scrutinise the way that police officers use their new powers, and report to Parliament on his findings after July 2002.

Although the Act provides police officers with many new functions, this discussion paper focuses on the way that NSW police officers are using their new powers to take forensic DNA samples from inmates.

At the time of writing the forensic DNA sampling of inmates in Department of Juvenile Justice Centres had not yet begun, and for this reason most of the issues brought to the attention of our office to date relate to adult inmates. However, your comments and submissions do not need to be limited to adult inmates.

Some questions have been included for your consideration but comments on all aspects of the forensic DNA sampling of serious indictable offenders are welcome.

The aim of this Discussion Paper is to:

- outline some of the issues that have been brought to our attention, and
- provide an opportunity for persons and organisations with an interest in the forensic DNA sampling of inmates to make their views known to us.

Any submissions or correspondence relating to this project should be sent to:

Forensic Procedures Review
NSW Ombudsman

Level 24, 580 George Street
Sydney NSW 2000

Phone: 02 9286 1000
Toll Free: 1800 451 524

Fax: 02 9283 2911
TTY: 02 9264 8050

Email: forensic.project@ombo.nsw.gov.au
Website: www.ombo.nsw.gov.au

Due date for submissions: 28 February 2002

¹ A serious indictable offence is an offence that carries a maximum penalty of 5 years (or more) imprisonment. A person who has been sentenced to a shorter period of imprisonment is considered to be ‘a serious indictable offender’ if the offence they have been convicted of carries a penalty of 5 years or more. For example, someone who is serving a sentence of two weeks for stealing a car (under s154AA of the *Crimes Act 1900*) would be considered to be a serious indictable offender because the maximum penalty for that offence is 10 years imprisonment.

Background

The significance of forensic DNA evidence

The use of biological material in criminal investigations is not new. There are records of bloodstains being used to establish that a crime has taken place or provide corroborating evidence as early as 384 AD.² However, police have only been using DNA profiling to assist in the identification of suspects in the last 15-16 years.³

DNA stands for 'deoxyribonucleic acid'. Inside most cells in the human body are strands of genetic material called chromosomes. Arranged along these chromosomes, like beads on a thread, are nearly 100,000 genes.⁴ Each gene is composed of DNA which is often described as 'the blueprint of life'. DNA instructs the body cells to make proteins that determine everything from hair colour to our susceptibility to diseases.

It has been estimated that 99.9% of a person's DNA is the same as all other people's DNA.⁵ Some areas of the DNA, however, vary significantly between individuals. It is this variability that provides the basis for distinguishing between individuals through DNA profiling.

The DNA extracted from the nucleus of all cells from the one person will be the same (whether they be white blood cells, hair root cells and cells from the inside of a person's mouth).⁶ This means, for example, that the DNA from blood or other biological material found at a crime scene can be compared with the DNA taken from a person's mouth or hair to determine whether the blood at the crime scene came from their body.

In 1995 the UK set up the first national DNA database for this purpose. Since that time police in a number of jurisdictions have established reference databases of DNA profiles from offenders with which they can compare DNA profiles obtained from crime scenes.⁷ The Commonwealth CrimTrac Agency is currently finalising the Australian National Criminal Investigation DNA Database according to the provisions in the Commonwealth *Crimes Amendment (Forensic Procedures) Act 2000*.⁸

² Whatman Bioscience and Whatman Fitzco, *The Forensic Scientist Calendar 2001*, Shunderson Communications, Ontario, Canada, 2001.

³ See Appendix A—Key dates in the History of DNA Profiling, from CrimTrac website.

⁴ Saferstein, R, *Criminalistics: An Introduction to Forensic Science*, Seventh Edition, Prentice Hall, New Jersey, 2001, p353.

⁵ Fasman, Kenneth H (contributor), Human Genome Project, Microsoft Encarta Online Encyclopaedia 2001, <http://encarta.msn.com> (16 September 2001).

⁶ Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Forensic Procedures Bill and the Proposed National DNA Database – Discussion Paper*, May 1999, p1.

⁷ There are approximately 17 countries that are using the FBI's CODIS system as the software for their database, including Singapore, Hong Kong, Florida, Italy and Canada.

⁸ Senator The Hon Christopher Ellison, Minister for Justice and Customs, Senator for Western Australia, *Media Release*, 20 June 2001.

Before the Crimes (Forensic Procedures) Act 2000

Prior to a case called *Fernando v Commissioner of Police*,⁹ it was thought that the police could legally take blood samples from people accused of offences without their consent. On 29 May 1995, however, the NSW Court of Appeal decided that neither the *Crimes Act* 1900 (as it was written at that time) nor the common law authorised the taking of forensic samples from accused persons without their consent.

In response, the NSW Parliament amended the *Crimes Act* to provide for the taking of blood, hair and saliva samples from accused persons who are ‘in lawful custody upon a charge’ without their consent. This was intended to be an interim measure until a new law was drafted that dealt with this issue and the National DNA Database.

In order to develop a National DNA Database, it was important to try to ensure that the laws of the different states and territories were compatible.¹⁰ Since 1991 a national committee¹¹ consisting of representatives from most Australian jurisdictions had been working on a national criminal code. One of the tasks of the committee was to develop a Model Forensic Procedures Bill, for adoption by all Australian jurisdictions. In February 2000 that committee released the proposed new law—the final draft of the Model Forensic Procedures Bill (hereafter ‘the Model Bill’)—following two public consultations.¹²

The *Crimes (Forensic Procedures) Bill* 2000 was introduced into the NSW Parliament shortly after the ‘mass screening’ or DNA sampling of males between the ages of 18 and 44 at Wee Waa in the state’s Barrier Region.¹³ The amended bill was passed and assented to on 5 July 2000. The law in NSW is fundamentally different in a number of ways from the Model Bill. Most of the provisions in the NSW Act came into operation on 1 January 2001.¹⁴

The new law

The *Crimes (Forensic Procedures) Act* 2000 (hereafter the Act) gives NSW police new and extensive powers to carry out forensic procedures on suspects, persons convicted of serious indictable offences and volunteers.

Some of the forensic procedures that the Act permits police to carry out are:

- taking DNA samples (eg saliva, hair or blood samples),
- taking prints (eg finger, palm, toe and foot),
- taking samples by swabs (eg from hands or under a fingernail),

⁹ (1995) 78 A Crim R 64.

¹⁰ Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Forensic Procedures Bill and the Proposed National DNA Database – Discussion Paper*, May 1999, Preface at ii.

¹¹ The National Model Criminal Code Officers Committee, which consists of an officer from each Australian jurisdiction with expertise in criminal law and criminal justice matters. The National Model Criminal Code Officers Committee (or MCCOC) is a sub-committee of the Standing Committee of Attorneys-General.

¹² Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Forensic Procedures Bill and the Proposed National DNA Database – Discussion Paper*, May 1999; Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Forensic Procedures Bill – DNA Database Provisions – Explanatory Notes*, February 2000.

¹³ Hansard, Legislative Assembly, 31 May 2000, The Hon Paul Whelan, Minister for Police, Second Reading Speech – Crimes (Forensic Procedures) Bill; Smith, Deborah, *Testcase*, Sydney Morning Herald, 22 April 2000.

¹⁴ The exceptions were section 121 relating to the NSW Ombudsman’s role, which commenced operation on the date of assent, and Part 8 of the Act relating to volunteers. At the time of writing amendments to the provisions relating to the carrying out of forensic procedures on volunteers have not yet been finalised.

- taking photographs (eg of tattoos and injuries),
- external examinations,
- taking impressions and casts (eg dental impressions).

The Act also sets out rules relating to the use and destruction of the information obtained from those forensic procedures as well as the rules for placing and matching DNA profiles on a national DNA database. In summary, the Act establishes:

- the *people* from whom forensic samples may be sought,
- the *circumstances* in which samples may be taken,
- the *procedures* which must be followed when those samples are taken,
- the rules relating to the *retention* of the results on the DNA database, and
- the requirements for the *destruction* of forensic material and information derived from forensic procedures.

Objectives of the *Crimes (Forensic Procedures) Act 2000*

The objectives of the Act are to:

lay down a regime for carrying out forensic procedures on persons suspected of having committed certain offences, persons convicted of serious indictable offences and persons who volunteer to undergo forensic procedures;

provide for the storage, use and destruction of material derived from those procedures; and

make provision with respect to a national DNA database system containing information derived from the carrying out of such forensic procedures.¹⁵

Role of the NSW Ombudsman

Most provisions of the *Crimes (Forensic Procedures) Act 2000* became operational on 1 January 2001. Section 121 of the Act commenced on 5 July 2000 and provides:

For the period of 2 years after the commencement of this section the Ombudsman is to keep under scrutiny the exercise of the functions* conferred on police officers under this Act.

* 'function' includes a power, authority or duty.

After the two year review period, the Ombudsman will report to Parliament on his findings about the way that the police have exercised their new functions.

In some cases, stakeholders may have concerns that fall outside the role the Act gives to the Ombudsman. If we are notified of serious concerns which fall outside our legislated role, we will forward the matter to another, more appropriate agency. If serious concerns are not adequately addressed, we can report to the Attorney General on any matter arising out of the operation of this Act.

¹⁵ See Explanatory Note on the *Crimes (Forensic Procedures) Bill 2000*.

Our Forensic Procedures Project includes research in a number of areas, including:

- analysis of complaints and inquiries,
- consultation with relevant stakeholders, and
- inspections of records of the use of the new powers.

This discussion paper focuses on the way that police are using their new functions to take forensic DNA samples from inmates. General issues, particularly those which relate to the transport, storage and destruction of forensic material affect all stakeholders, not just inmates, and will be dealt with at a later stage rather than in this discussion paper.

Role of the NSW Police Service

The Act introduces a range of new responsibilities for police. These responsibilities can be classified into five broad categories:

1. **General** – eg ensuring that the implementation of the Act does not limit the existing rights and protections of persons in police custody.
2. **Pre-collection** – eg ensuring that all relevant parties are notified of the intention of police to conduct a forensic procedure.
3. **Collection** – eg ensuring that forensic procedures are carried out according to the Act.
4. **Post-collection** – eg providing specified material to the suspect, offender or volunteer (free of charge).
5. **Destruction** – eg ensuring that forensic material derived from a forensic procedure is destroyed in certain circumstances.

NSW police have been taking forensic DNA samples from adult inmates under the Act since 8 January 2001. By 22 November 2001, police had collected 8,021 forensic DNA samples from adult inmates in NSW correctional centres.¹⁶

NSW Police Service policies and procedures

Because the Act provides for the carrying out of forensic procedures on people currently serving a sentence of imprisonment, a high degree of cooperation is required between the NSW Police Service and both the Department of Corrective Services (DCS) and the Department of Juvenile Justice (DJJ).

The NSW Police Service has drafted an agreement, or ‘Memorandum of Understanding’ which sets out the respective roles and responsibilities of the Police Service and DCS, such as which agency is responsible for organising interpreters.

The NSW Police Service also drafted Standard Operating Procedures to provide the Inmate Testing Teams with guidelines and protocols for carrying out forensic procedures on inmates.

At the time of writing, neither the Standard Operating Procedures for the Forensic DNA Sampling of Inmates nor the Memorandum of Understanding between the NSW Police Service and DCS have been finalised. The Police Service has, however, advised us that the drafts are being adhered to.

¹⁶ Information provided by the NSW Police Service Forensic Procedures Implementation Team on 29 November 2001.

We have been advised that negotiations between the NSW Police Service and the Department of Juvenile Justice regarding the sampling of inmates in juvenile detention centres are still in progress.

The flowchart in Appendix 2 outlines the process relating to the carrying out of forensic procedures on inmates in correctional centres managed by DCS.

Issues

Forensic DNA samples

Sections 62, 63 and 64 of the Act provide for the types of forensic procedures that can be carried out on serious indictable offenders. Unlike suspects, serious indictable offenders can only be subjected to the following forensic procedures:

- the taking of a sample of blood,
- the taking of samples of hair (other than pubic hair),
- the taking of a hand print, finger print, foot print or toe print,
- the taking of a sample by buccal swab.

The method preferred by police to take forensic DNA samples from inmates is by a self-administered buccal (or mouth) swab,¹⁷ which involves the inmate soaking up the saliva and cheek cells from the inside of her or his cheek using a foam-tipped plastic swab. If the inmate does not consent, a senior police officer can make an order for a sample of hair with roots to be taken, with force if necessary. Alternatively, the police can apply for a court order to take the sample.

The Police Service has informed us that samples of blood are taken only as a last resort, such as when an inmate does not consent to the mouth swab, *and* has ‘shaved down’¹⁸ in an attempt to avoid a sample of hair being taken.

During the public consultations in the preparation of the Model Bill, it became clear that in order to conduct ‘proper forensic analysis’, it is necessary for a hair sample to contain the roots of the hair.¹⁹

Section 49 of the Act states that a person is authorised to take a sample of hair by removing the root only if ‘the person takes only so much hair as the person believes is necessary for analysis of the sample, or other examination of the hair, to be carried out’, and ‘strands of hair are taken using the least painful technique known and available to the person’.

The NSW Police Service procedure for taking a forensic DNA hair sample is ‘the lever arch method’, where 15-20 hairs are levered out, placing even pressure on the hair that is being pulled out.²⁰

¹⁷ NSW Police Service, *Mandatory Continuing Police Education M020 – Crimes (Forensic Procedures) Act 2000*, January 2001.

¹⁸ Removal of all body hair.

¹⁹ Model Criminal Code Officers Committee, *Final Draft – Model Forensic Procedures Bill and the Proposed National DNA Database*, February 2000, p9.

²⁰ Evidence given by Linzi Wilson-Wilde to Standing Committee on Law and Justice Inquiry into the Operation of the *Crimes (Forensic Procedures) Act 2000*, 26 July 2001.

Earlier this year a community-based organisation²¹ raised concerns with our office that this method of taking hair was more painful than that employed by police in other jurisdictions such as the UK and Canada. It cited UK policies which specify that the hair must be taken one strand at a time and that the prisoner or suspect be allowed to specify from which part of the body the hair is to be collected.²²

In his evidence to the Standing Committee on Law and Justice on 7 August 2001, the President of the NSW Council for Civil Liberties stated that:

The way the Act is operating at the moment, if you do consent you get a lesser treatment in terms of the DNA extraction, if you do not consent you have a harsher procedure.²³

Questions for consideration

- 1.(a) Is the current method of taking a forensic sample of hair appropriate?
- 1.(b) What are the reasons for your view?
- 1.(c) Do you have any suggestions for improvements?

Correct identification of serious indictable offenders

It has been estimated that approximately 75% of the sentenced adult inmate population in NSW are 'serious indictable offenders'.²⁴ The Department of Corrective Services estimates that in addition to these figures, approximately 63% of all newly sentenced inmates received into their correctional centres every week are serious indictable offenders.²⁵

A serious indictable offender is a person who has been convicted of a 'serious indictable offence'. A 'serious indictable offence' is defined in section 3(1) of the Act and is dependent on:

- a) the maximum penalty of the offence being 5 years' imprisonment or more,
- b) whether it was a NSW offence or an offence in another jurisdiction, and
- c) if it was an offence in another jurisdiction, whether that jurisdiction is a 'participating jurisdiction' within the meaning of the Act.

This means that inmates who are serving sentences for a serious offence under Commonwealth law, or a serious offence of another state or territory, may not be included in the definition of a 'serious indictable offender' under the Act.

²¹ Justice Action.

²² Note 5D of the UK Codes of Practice (Revised Edition) of the *Police and Criminal Evidence Act 1984*. See submission by Justice Action to the Standing Committee on Law and Justice Inquiry into the *Crimes (Forensic Procedures) Act 2000*.

²³ Evidence given by Mr Cameron Murphy to *NSW Standing Committee Law and Justice Inquiry into the Operation of the Crimes (Forensic Procedures) Act 2000*, 7 August 2001.

²⁴ Minister for Corrective Services, submission to the Standing Committee on Law and Justice Inquiry into the Operation of the *Crimes (Forensic Procedures) Act 2000*.

²⁵ Evidence given by Mr Ken Middlebrook to *NSW Standing Committee Law and Justice Inquiry into the Operation of the Crimes (Forensic Procedures) Act 2000*, 24 September 2001. In his evidence to the Committee Mr Middlebrook estimated that approximately 160 newly sentenced inmates enter the prison system every week. Of these, he estimated that approximately 100 are serious indictable offenders.

In his recent submission to the Standing Committee on Law and Justice Inquiry into the Review of the *Crimes (Forensic Procedures) Act 2000*, the Minister for Corrective Services indicated that:

At the beginning of 2001, there were approximately 1,000 Commonwealth and Australian Capital Territory offenders accommodated in New South Wales' correctional centres. Around half of these were serving either a Commonwealth or ACT sentence only.²⁶

We have been advised by the NSW Police Service that police will not take forensic DNA samples from these inmates until the Attorney General's Department issues a regulation that clearly identifies which jurisdictions are 'participating jurisdictions'.²⁷

We are aware of a number of allegations that the police have taken samples without authority from inmates who have been convicted only of a Commonwealth or ACT offence. We have asked the NSW Police Service to advise us whether or not any DNA samples have been taken without authority from Commonwealth or interstate offenders. We have also asked for confirmation of the date that the samples (if any) were destroyed, and what advice (if any) was provided to those inmates. In addition, we asked the police to advise us of any steps that they have taken to prevent potential errors in the identification of serious indictable offenders.

Questions for consideration

- 2.(a) Are you aware of any inmates who have had a forensic DNA sample taken from them, but who do not fall within the definition of 'serious indictable offender'?
- 2.(b) Please provide details about the particular case/s, including the date that the sample was taken.

DNA Sampling in juvenile detention centres

At the time of writing the forensic DNA sampling of children and young people in Department of Juvenile Justice centres had not yet begun. We have been informed that this is partially due to the difficulty in identifying exactly which of the children and young people (ie. those aged 10-17 years, as children under the age of 10 years cannot be subject to forensic procedures) are eligible to be sampled under the Act.²⁸

As discussed earlier, the Act provides for forensic procedures to be conducted upon a person who have been convicted of a serious indictable offence and who is serving a sentence of imprisonment.²⁹ Some children and young people who are in juvenile detention have not had a conviction recorded against them, despite being charged and found guilty of a serious indictable offence, and being placed into the care of the Department of Juvenile Justice. In addition, there are only about 38-45 children and young people in juvenile detention centres who are serving *sentences of imprisonment*. The remainder of detainees—approximately 130 children and young people – are the subject of control orders (that is, an order committing the person to the care of the Department of Juvenile Justice for a maximum of two years).

²⁶ Minister for Corrective Services, *Submission to NSW Standing Committee Law and Justice Inquiry into the Operation of the Crimes (Forensic Procedures) Act 2000*, July 2001.

²⁷ Telephone advice from NSW Police Service Court and Legal Services Branch, 16 August 2001.

²⁸ Telephone advice from representative of the NSW Department of Juvenile Justice, 4 October 2001.

²⁹ See section 61 and Part 7 generally of the *Crimes (Forensic Procedures) Act 2000*.

We have been informed that the information that will assist in identifying which people in juvenile detention are eligible for DNA sampling is held by the courts and not the Department of Juvenile Justice, and that this has added an extra step to the process of identifying which detainees in juvenile detention centres are eligible to have DNA samples taken.³⁰

Another issue relating to which juvenile detainees can have samples taken from them is the definition of ‘serious indictable offence’. Section 3(1) of the *Children (Criminal Proceedings) Act* 1987 provides a separate category of ‘serious children’s indictable offences’. A ‘serious children’s indictable offence’ is defined narrowly and includes only:

- homicide
- an offence punishable by penal servitude for life or for 25 years;
- some sexual assault offences

This is quite different to the definition of ‘serious indictable offence’ under the Act, which is those offences that ‘are punishable by imprisonment for life or a maximum penalty of 5 or more years imprisonment’. Under the definition in the Act, the theft of a stick of bubble gum from a milk bar is larceny³¹ and would, prima facie, fall into the category of a ‘serious indictable offence’.

The Department of Juvenile Justice has indicated that it is of the view that serious children’s indictable offenders are the only group caught by the provisions of the Act.³²

Questions for consideration

- 3.(a) Does Part 7 of the Act relating to serious indictable offenders apply only to those persons aged 10 to 17 years who have been convicted of a ‘serious children’s indictable offence’ as defined by the *Children (Criminal Proceedings) Act* 1987?
- 3.(b) *Should* Part 7 of the Act relating to serious indictable offenders apply only to those persons aged 10 to 17 years who have been convicted of a ‘serious children’s indictable offence’ as defined by the *Children (Criminal Proceedings) Act* 1987?
- 3.(c) What are the reasons for your view?
- 3.(d) What specific issues do you think will arise in relation to the taking of DNA samples from children and young people in juvenile detention centres?
- 3.(e) What are the reasons for your view?

Correct identification of ‘incapable’ inmates

The Act provides certain safeguards for inmates who are children or who are ‘incapable’. For example, police are not permitted to ask an ‘incapable’ inmate for her or his consent to undertake a forensic procedure. Instead, the police are required to obtain a court order authorising the forensic procedure to be carried out on that inmate. In addition, if an inmate is deemed to be ‘incapable’, the inmate is entitled to have either an interview friend or a legal representative or both present whilst the forensic procedure is being carried out.

³⁰ Telephone advice from representative of the Department of Juvenile Justice, 8 October 2001.

³¹ Punishable by imprisonment for five years, see section 117 *Crimes Act* 1900.

³² Correspondence from the Department of Juvenile Justice, 24 October 2001.

The definition of ‘incapable person’ is very broad:

incapable person means an adult who:

- (a) is incapable of understanding the general nature and effect of a forensic procedure, or
- (b) is incapable of indicating whether he or she consents or does not consent to a forensic procedure being carried out.

This definition suggests that a person could be deemed to be ‘incapable’ if they are under the influence of drugs and alcohol.

The advice provided to us by the NSW Police Service is that the current policy is for the identification of ‘incapable’ inmates to be made by DCS staff, who inform police of the inmates’ status and location prior to the visit by Inmate Testing Team.

Statistics provided to us by the Police Service show that as at 1 November 2001, only 17 (or approximately 0.22%) of 7,636 inmates had been deemed to be ‘incapable’. This figure can be contrasted with the available statistics on the numbers of people with intellectual disabilities in NSW correctional centres. One study estimated that people with intellectual disabilities made up 12-13% of the NSW prison population.³³

Questions for consideration

- 4.(a) Is the current practice for identifying ‘incapable’ inmates appropriate?
- 4.(b) What are the reasons for your view?
- 4.(c) Do you have any suggestions for improvement?

Correct identification of inmates who require an interpreter

The Act requires that inmates be provided with a range of information prior to the forensic procedure and that this must be done

...through an interpreter if necessary, in a language (including sign language or Braille) in which the other person is able to communicate with reasonable fluency.³⁴

As at 1 November 2001 there had been 65 requests for the use of interpreters for 15 different languages for inmate sampling. The majority of these requests were for Vietnamese speaking interpreters.

Questions for consideration

- 5.(a) Are you aware of any inmates who have had a forensic DNA sample taken from them without an interpreter/signer, who required the use of an interpreter/signer?
- 5.(b) Please provide details about the particular case(s).

³³ SC Hayes and D McIlwain, *The Prevalence of Intellectual Disability in the New South Wales Prison Population: An Empirical Study* (November 1988), cited in NSW Law Reform Commission, *Issues Paper 8—People with an Intellectual Disability and the Criminal Justice System*, 1992.

³⁴ Section 3(4) *Crimes (Forensic Procedures) Act 2000*.

Notice given to inmates about forensic procedures

The 1999 draft of the Model Bill included a 5 day period for inmates to formally object to the request by police to undertake a forensic procedure. If the inmate did not formally object during that five day period, the draft Model Bill stated that she or he should be given ‘at least two hours notice’ before police carried out a forensic procedure. The rationale for the two hour period was that it was ‘a courtesy’.³⁵ The final draft of the Model Bill did not include this formal objection provision due to concerns that ‘the use of court resources should be minimised’.³⁶ The ‘courtesy’ notification period was also omitted.

In the NSW legislation there is no formal objection procedure or notification period. Section 67 of the Act, however, requires the police officer requesting consent from a serious indictable offender to give the offender the opportunity to communicate, or attempt to communicate with a legal practitioner of the serious indictable offender’s choice. This communication should be allowed to occur in private in most circumstances.³⁷

Aboriginal inmates and Torres Strait Islander inmates, inmates who are children (ie aged 10-17 years) and inmates deemed to be ‘incapable’ are entitled to have an ‘interview friend’,³⁸ a legal representative³⁹ or both present during the forensic procedure.

The Act is silent on whose responsibility it is to organise and finance the attendance of legal representatives and interview friends. It appears that the NSW Police Service has interpreted the Act in a way that places the responsibility with the inmate.

If an inmate is to have adequate time to access legal advice, organise interview friends, etc, then it is appropriate that they be provided with the opportunity to do so before a police officer formally requests them to consent to the procedure.

The draft MOU between the NSW Police Service and DCS states that DCS will:

- Ensure that all inmates are informed of their right to seek, or attempt to seek, legal advice from a legal practitioner of the inmate’s choice.
- Ensure that those inmates identified as Aboriginal and Torres Strait Islander (ATSI) or as incapable are provided with the opportunity to arrange for interview friends and legal representatives to be present, if practicable, during the forensic procedure.⁴⁰

We have been advised by the Police Service that police will give DCS at least 48 hours notice of an intended visit to take forensic DNA samples from inmates.

The Department of Corrective Services policies state that inmates will be notified as soon as practical of the date that testing will commence. The NSW Police Service draft *Standard Operating Procedures for the Forensic DNA Sampling of Inmates* emphasises that ‘it is also the responsibility of the Inmate Testing Team to ensure that inmates have

³⁵ Model Criminal Code Officers Committee, *Discussion Paper – Model Forensic Procedures Bill and the Proposed National DNA Database*, May 1999, p47.

³⁶ Model Criminal Code Officers Committee, *Final Draft – Model Forensic Procedures Bill and the Proposed National DNA Database*, February 2000, p3.

³⁷ The exception is if the police officer suspects on reasonable grounds that the offender might attempt to destroy or contaminate any evidence that might be obtained by carrying out the forensic procedure (section 67(2)).

³⁸ This person can be chosen by, or acceptable to, the inmate.

³⁹ This means a legal practitioner acting for the inmate.

⁴⁰ Draft Memorandum of Understanding between the Commissioner of Corrective Services and the Commissioner of Police, (draft as at 8 February 2001), p4.

had the opportunity to seek this legal advice prior to the forensic testing procedure taking place.⁴¹

Questions for consideration

- 6.(a) Are inmates being given sufficient notice to obtain information, seek legal advice and organise the attendance of interview friends and legal practitioners?
- 6.(b) What are the reasons for your view?
- 6.(c) Do you have any suggestions for improvements?

Interview friends and legal representatives

Section 55⁴² of the Act permits Aboriginal inmates and Torres Strait Islander inmates, inmates who are children and inmates who are ‘incapable’ to have either an interview friend or a legal representative present while the forensic procedure is carried out, unless the inmate waives the right to have them present.

The Department of Corrective Services has indicated that less than 23% of Aboriginal people and Torres Strait Islander people have exercised their right to have an interview friend present during the forensic procedure.⁴³ The Department has also stated that:

Of the 3,000 inmates who provided samples of forensic material prior to May 2001, more than 500 were entitled to ask for their legal representative to be present whilst the forensic procedure was carried out. In only one instance was a legal representative present while a forensic procedure was carried out.⁴⁴

On 2 February 2001, when the NSW Police Service had been taking DNA samples from serious indictable offenders for 4 weeks, several Aboriginal legal services raised concerns with our office that they had not been informed about the new legislation and that they were not aware of their special role in relation to the procedures.⁴⁵

Questions for consideration

- 7.(a) Are inmates exercising their rights to have an interview friend and/or legal representative present during the forensic procedures?
- 7.(b) What do you think are the reasons for this?
- 7.(c) Do you have any suggestions for improvements?

⁴¹ NSW Police Service, *Draft Standard operating Procedures: Forensic DNA Sampling of Inmates – Part 7 of the Crimes (Forensic Procedures) Act 2000*, Draft version 3.0 July 2001, p40.

⁴² In conjunction with subsection 65(1).

⁴³ Minister for Corrective Services, Submission, op cit, p3.

⁴⁴ Ibid.

⁴⁵ Our Office raised this issue with the Police Service, the Attorney General’s Department and the Interdepartmental Committee on the Implementation of the *Crimes (Forensic Procedures) Act 2000* and suggested that more information should be provided to the legal community.

Informed consent

A number of stakeholders, including the NSW Police Service, have raised concerns about the complexity of the information that must be provided to an inmate in order to obtain 'informed' consent. For example,

Section 13(1)(k) requires police to inform a suspect of the rules concerning the disclosure and use of DNA profiles on the national database. This requires an explanation of sections 92 and 109. Section 109 alone has some 22 points that need to be addressed, including reference to disclosure of information in accordance with the provisions of the Mutual Assistance in Criminal Matters Act and the Extradition Act.⁴⁶

In its submission to the Standing Committee on Law and Justice Inquiry into the Operation of the *Crimes (Forensic Procedures) Act 2000*, the NSW Police Service asserts that either the information that is to be provided to people who are requested to consent to forensic procedures should be simplified, or the onus should be on the person's own legal advisers (rather than the Police Service) to explain the intricacies of the legislation.

Questions for consideration

- 8.(a) Is the information that must be provided to inmates before they consent to forensic DNA sampling too complex?
- 8.(b) What are the reasons for your view?
- 8.(c) Do you have any suggestions for improvements?
- 8.(d) Who should be responsible for explaining this information to inmates?
- 8.(e) What are the reasons for your view?

Factors that may affect consent

The MOU between the NSW Police Service and DCS recognises the need to ensure that forensic procedures are carried out on inmates in a manner that minimises any negative impact on the 'good order and safety' of correctional centres. In addition, DCS can legally transfer an inmate or change the classification of inmate's security status, if it has information which suggests that the inmate may be a security risk. The Department of Corrective Services can base its decision on a reasonable suspicion, and does not need to have definite proof that the inmate is a security risk.

Concerns have been raised⁴⁷ that the consent of inmates is being heavily influenced by the possibility that if they indicate that they do not intend to consent, they may be considered a security risk and could be subject to reclassification, transfer to a higher security centre and/or loss of privileges.

⁴⁶ NSW Police Service, Submission to the Standing Committee on Law and Justice Inquiry into the Operation of the *Crimes (Forensic Procedures) Act 2000*.

⁴⁷ For example, Graham Bellamy, submission to the Standing Committee on Law and Justice Inquiry into the Operation of the *Crimes (Forensic Procedures) Act 2000*; evidence given by Michael Strutt of Justice Action to the Standing Committee on Law and Justice Inquiry, 7 August 2001; Tony Savage, submission to the Standing Committee on Law and Justice Inquiry into the Operation of the *Crimes (Forensic Procedures) Act 2000*.

At least one commentator has argued that the concept of informed consent by suspects and serious indictable offenders to undertake forensic procedures is flawed. Gans has argued that police have been given generous powers to obtain DNA samples from inmates who do not consent, and that in this context a consensual alternative is not necessary. He states:

While true consents in these contexts can occur, distinguishing them from sham consents is impossible.⁴⁸

Questions for consideration

- 9.(a) Are you aware of any inmates who have consented because they believed that they would experience negative consequences if they did not consent?
- 9.(b) Please give details about the particular case(s).

Initiatives to reduce the use of force to take samples

The Act requires that police initially make a request for an adult (and capable) inmate's informed consent to carry out a forensic procedure to obtain a DNA sample. If the consent is not given, the police can either make a senior police officer order or apply for a court order to carry out a non-intimate forensic procedure without the inmate's consent.

The NSW Police Service and DCS have initiated a number of policies which attempt to minimise the number of forensic procedures requiring force. The Police Service has advised us that by 1 November 2001 force had been used in only 10 out of 7,636 (or approximately 0.13%) of forensic procedures carried out on inmates.

Those initiatives include 'non-consensual, but compliant inmates' and the cooling off period.

Non-consensual, but compliant inmates

'Non-consensual, but compliant' was developed to describe those inmates who want to exercise their right to refuse consent, but could still be compliant and not actively resist the compulsory taking of a hair sample authorised by a senior police officer order.

At the outset both the DCS and Police Service policies assumed that where an inmate did not consent, it was inevitable that they would be non-compliant and resist (perhaps violently) the taking of a forensic DNA sample. Following consultations with the Prisoners Legal Service, our office and a community-based organisation,⁴⁹ the policies of DCS and the NSW Police Service were changed.

Questions for consideration

- 10.(a) Is the additional category of 'non-consensual, but compliant' inmate useful?
- 10.(b) What are the reasons for your view?
- 10.(c) Do you have any suggestions for improvements?

⁴⁸ Jeremy Gans, *A Critique of the Police's Right to Ask for DNA*, paper presented at Use of DNA in the Criminal Justice System, Sydney Institute of Criminology Seminar, 11 April 2001.

⁴⁹ Justice Action.

The ‘cooling off’ period

The cooling off period is an extra period of notification time provided to inmates who initially indicate that they will actively resist if the police attempt to take a forensic DNA sample, as opposed to being ‘non-consensual, but compliant’. This cooling off period can be anything between a few hours and a few weeks for an inmate to seek further information before they are requested to consent again.

Feedback from the NSW Police Service and DCS indicates that at the end of the cooling off period, most inmates who initially indicated non-compliance, subsequently agree to comply (if not consent) with the forensic procedure.

The cooling off policy may not be applied consistently throughout the prison system. Some inmates who have not yet decided whether to consent are apparently not being offered a cooling off period.⁵⁰

The length of the cooling off period is jointly determined by the NSW Police Service and DCS and varies according to factors such as the date that the inmates are to be released, any possible disruption to the correctional centre and the ability of the Inmate Testing Team to return to the centre at a later date. We are aware that two inmates were released before the Inmate Testing Team returned to the Centre following a cooling off period.

Questions for consideration

- 11.(a) Is the current policy of providing a cooling off period useful?
- 11.(b) What are the reasons for your view?
- 11.(c) Do you have any suggestions for improvements?

Persons present during forensic procedures

On 31 May 2001 the SBS television program *Insight* showed a video of an inmate at Bendigo Prison in Victoria being held down by three officers in riot uniforms whilst a sample of blood was taken by force by another person in the presence of an additional five officers and a police dog. In total—apart from the inmate and the person who took the sample—there were eight officers (both prison officers and police officers) and a police dog. This generated considerable discussion about the DNA sampling of inmates in NSW.

Section 48 of the Act states:

Nothing in this Act authorises the carrying out of a forensic procedure in a cruel, inhuman or degrading manner but the carrying out of a forensic procedure on a suspect in accordance with this Act is not of itself taken to be cruel, inhuman or degrading to the suspect.

Subsection 44(b) of the Act states that a forensic procedure:

... must not be carried out in the presence or view of a person whose presence is not necessary for the purposes of the forensic procedure or required or permitted by another provision of this Act.

⁵⁰ Evidence given by Cameron Murphy, President of the NSW Council for Civil Liberties, Standing Committee on Law and Justice Inquiry into the Operation of the *Crimes (Forensic Procedures) Act 2000*, 7 August 2001.

However, there is no limit on the number of police officers or other persons⁵¹ who are permitted to be present for the taking of a non-intimate hair sample.⁵²

We have been advised by the NSW Police Service that in most cases, there are five people (other than the inmate) present in the 'Inmate Testing Area' when a forensic DNA sample is taken from an inmate. Four of these are members of the Inmate Testing Team and the fifth is a DCS officer who is usually the Correctional Centre Forensic Procedures Liaison Officer. We have been advised that one police officer is required to operate the video camera, one police officer is required to complete the checklist of procedures and one police officer is responsible for making the request and ensuring that the forensic procedure is carried out properly. The CCEO is required to formally confirm each inmate's identity, and also to carry out the role of the independent person if the inmate objects to the procedure being electronically recorded.

Evidence given by DCS representatives at the NSW Standing Committee on Law and Justice indicated that depending upon the consent/compliance status of individual inmates, up to 10 DCS and Police officers could be present during the forensic procedure.⁵³

Many stakeholders have commented on the difficulty in maintaining the balance between the requirements of those conducting the forensic procedures and the protection of the privacy and civil rights of those persons subject to the procedures.

Certain safeguards in the Act, such as the provision to electronically record the procedure and the provision for an independent person to be present (in some circumstances) have financial and resource implications for both the NSW Police Service and DCS. In the same vein, some stakeholders have indicated that a large number of people being involved in the testing can be intimidating.

In a recent submission to the Standing Committee on Law and Justice, one prisoner stated:

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

Questions for consideration

- 12.(a) How many people do you believe should be present during the taking of a forensic DNA sample from a serious indictable offender?
- 12.(b) What are the reasons for your view?

⁵¹ See section 52.

⁵² See subsection 56(3)(b).

⁵³ Standing Committee on Law and Justice Inquiry into the Operation of the *Crimes (Forensic Procedures) Act 2000*, 24 September 2001.

⁵⁴ Prisoner, submission to the Standing Committee on Law and Justice Inquiry into the Operation of the *Crimes (Forensic Procedures) Act 2000*.

Use of force

As with all cases of the use of force, it is difficult to prescribe in advance what constitutes 'reasonable' force as it is often dependent on the circumstances of the particular case.

As indicated earlier, the Police Service has advised us that reasonable force had been used in only 10 out of 7,636 (or approximately 0.13%) of forensic procedures carried out on.⁵⁵ In addition, at the time of writing, we have not received any complaints alleging unreasonable force by the police Inmate Testing Teams.

Questions for consideration

- 13.(a) Are you aware of any cases where the police Inmate Testing Team used force that could be considered to be 'unreasonable'?
- 13.(b) Please provide details about the particular case(s).

⁵⁵ As at 1 November 2001.

Appendix 1: Key dates in the history of DNA profiling

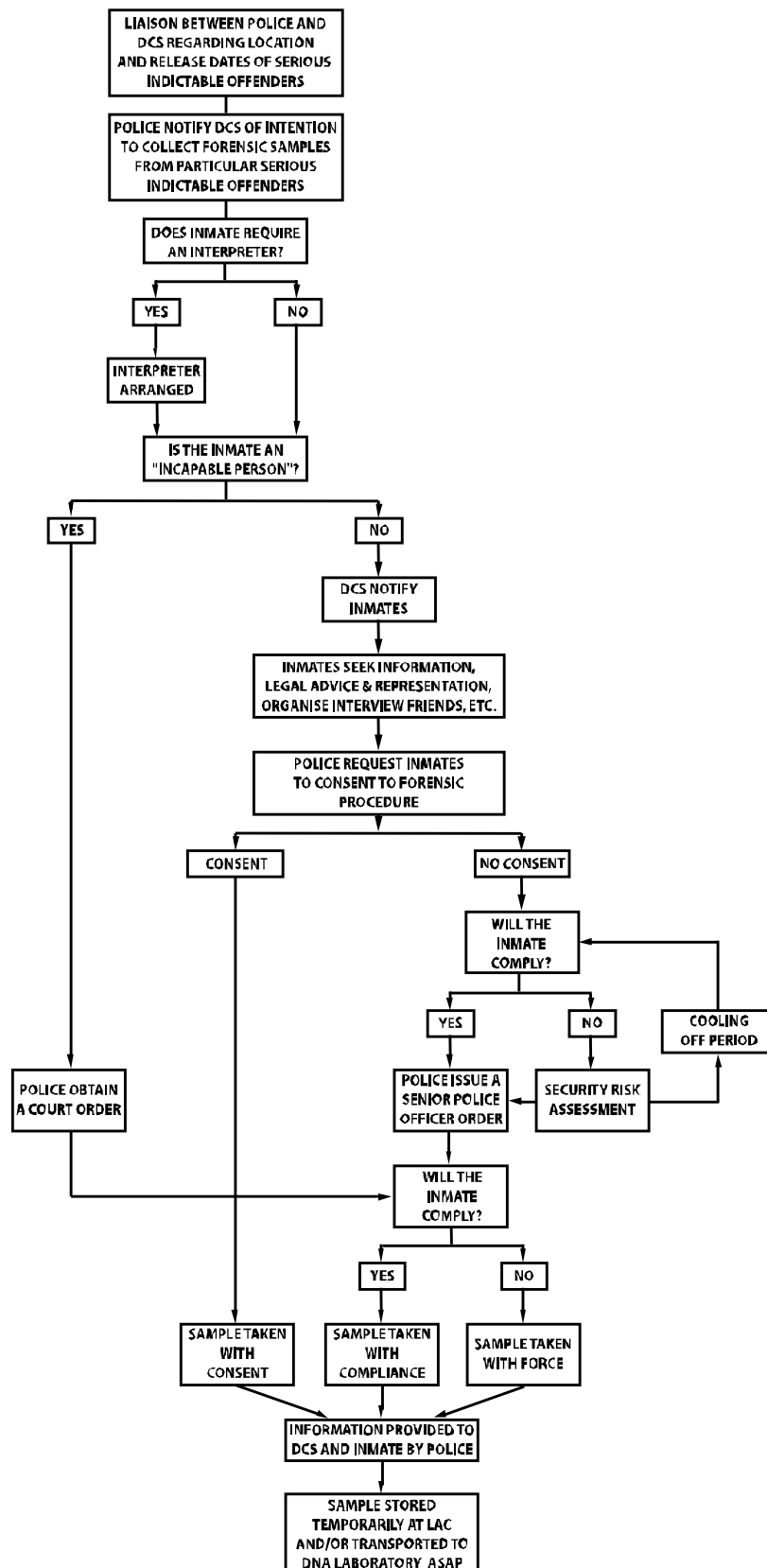
Source: website of the Commonwealth CrimTrac Agency—www.crimtrac.gov.au

- 1953** James Watson and Francis Crick publish landmark paper identifying the structure of DNA.
- 1980** American geneticists discover a region of DNA that does not hold any genetic information and which is extremely variable between individuals.
- 1984** Alec Jeffreys discovers a method of identifying individuals from DNA—Restriction Fragment Length Polymorphism (RFLP). He dubs it 'DNA Fingerprinting'.
- 1985** Police in the UK first use forensic DNA profiling.
- 1986** Kary Mullis discovers Polymerase Chain Reaction (PCR) method of replicating particular regions of a DNA molecule.
- 1987** In the UK, police use DNA profiling in the celebrated Pitchfork case to clear a seventeen year old suspect of two rape-murders. Police collect blood samples from over 5,000 local men to identify the perpetrator, Colin Pitchfork.
- 1987** Also in the UK, Robert Melias is convicted of rape. He becomes the first person to be convicted of a crime on the basis of DNA evidence.
- 1989** In the USA, Gary Dotson becomes the first person to have a conviction overturned on the basis of DNA evidence. Dotson has served 8 years of a 25—50 year sentence for rape.
- 1989** Australia's first court case involving DNA evidence. In an ACT court, Desmond Applebee is convicted of three counts of sexual assault. Applebee changes his defence from "I wasn't there" to "the woman consented" after a blood sample matches him to DNA extracted from blood and semen on the victim's clothes.
- 1989** In Victoria, police secure the conviction of George Kaufman who raped sixteen women over a four year period in Melbourne's south eastern suburbs. Confronted with DNA evidence, Kaufman confesses.
- 1989** The Federal Government and several States and Territories begin developing regulatory standards for DNA collection and handling procedures.
- 1992** National Institute of Forensic Science commences operations. Amongst its roles are the development of national standards of quality control and accreditation of forensic laboratories throughout Australia.
- 1995** The world's first national DNA database commences operations in the UK on 10 April 1995.
- 1996** In the USA, mitochondrial DNA evidence is used in a court for the first time. Paul Ware is convicted of the rape and murder of a four year old girl after mitochondrial DNA profiling matches him to a hair found on the body of the child.
- 1996** Rodney Winters is convicted of the rape and murder of a woman at South Australia's Edinburgh Air Force base 14 years earlier. After DNA profiling matches him to semen found on the dead woman, Winters confesses.

- 1997** Police services endorse the establishment of a national criminal DNA database and form a working party.
- 1997** Victoria becomes the first jurisdiction in Australia to enact legislation regulating the use of a DNA database.
- 1998** In the USA, the FBI sets up the National DNA Index System, enabling city, county, state and federal law enforcement agencies to compare DNA profiles electronically.
- 1998** Australian forensic laboratories agree to a common national standard for obtaining DNA profiles.
- 1998** The Australian Federal Government commits \$50m to establish CrimTrac, with a national DNA database as a central element.
- 1999** Victorian police obtain first 'cold' hit from state DNA database—the DNA profile of convicted thief Wallid Haggag is matched to blood found in a car used in a burglary for which he was not previously a suspect.
- 2000** Following the sexual assault of a 91 year old woman in Wee Waa, New South Wales police take DNA samples from 500 local men aged between 18 and 45. Stephen Boney confesses shortly afterwards, before his sample can be analysed.
- 2000** In the UK, the Forensic Science Service announces that the number of DNA profiles of suspects and convicted criminals on the national DNA database has reached one million or roughly one third of the estimated criminally active population.

Appendix 2: Flowchart of procedures for taking forensic DNA samples from serious indictable offenders

PROCEDURES FOR TAKING FORENSIC DNA SAMPLES FROM SERIOUS INDICTABLE OFFENDERS IN DEPARTMENT OF CORRECTIVE SERVICES' CENTRES



Appendix 3:Glossary

Term	Definition/background
the Act	<i>Crimes (Forensic Procedures) Act 2000</i>
Buccal swab	A mouth swab taken to collect a sample of cheek cells and saliva.
Cooling off period	Is defined in the NSW Police Service Draft Standard Operating Procedures as a period of up to 7-10 days (in Metropolitan correctional centres only) given to inmates who indicate that they will resist police when they attempt to take a DNA sample. If the inmate resides in a correctional centre outside the Metropolitan area, or if the inmate is due for release before the end of the 7-10 day cooling off period, the inmate will be given a shorter period of time to reconsider.
CCLO	Correctional Centre Liaison Officer. The correctional centre staff person who liaises with the Inmate Testing Team about the DNA sampling of inmates. The CCLO usually remains in the Inmate Testing Area to witness the DNA sampling.
CrimTrac	National shared information system to provide Australia's police services with enhanced access to operational information. Not yet operational, although was due to become operational on 1 January 2001. Will include the National DNA Database, National Sex Offenders Register and the National Automated Fingerprint Identification System.
CrimTrac Agency	The CrimTrac Agency was established as an Executive Agency in the Commonwealth Attorney-General's portfolio on 1 July 2000. The federal government has committed \$50 million over a 3-year period for its establishment. The Agency is underpinned by an agreement of all Australian police ministers. The Australasian Police Ministers' Council is responsible for defining the Agency's strategic directions and key policies. The CEO, Mr John Mobbs, reports to the Federal Minister for Justice and Customs.
DCS	The Department of Corrective Services
DJJ	The Department of Juvenile Justice
DNA	Deoxyribonucleic Acid (either nucleic or mitochondrial). Often called the genetic 'blueprint of life'. Most DNA analysis involved the analysis of nucleic DNA.

Term	Definition/background
DNA Analysis/Profiling	<p>DNA analysis involves several stages:</p> <ul style="list-style-type: none"> • Extraction (of DNA from cellular material) • Quantitation (of available DNA) • Amplification (of specific sites of 'junk' DNA) • Electrophoresis (separation and detection of areas of variability of the DNA sites) • Analysis and verification of results • Interpretation (genetics, comparison to probability of random match)
Incapable person	<p>Is defined in s3(1) of the Act as an adult who:</p> <p>(a) is incapable of understanding the general nature and effect of a forensic procedure, or</p> <p>(b) is incapable of indicating whether he or she consents or does not consent to a forensic procedure being carried out.</p>
Inform	<p>Is defined in section 3(4) of the Act and requires that a person be informed:</p> <p><i>through an interpreter if necessary, in a language (including sign language or Braille) in which the other person is able to communicate with reasonable fluency.</i></p>
Informed consent	<p>In relation to a serious indictable offender is defined in section 67 of the Act and requires that the police officer who asks the inmate to consent:</p> <p>a) Makes the request in accordance with the Act</p> <p>b) Informs the inmate about the matters identified by the Act</p> <p>c) Gives the inmate the opportunity to communicate, or attempt to communicate with a legal practitioner in accordance with the Act</p>
Inmate Testing Area	<p>Specific location within a correctional centre that is separate from the main prison and out of sight of people not involved in the DNA sampling of inmates.</p>
Inmate Testing Team	<p>Team of specially trained police from the Operational Support Group section of the Police Service. The teams can consist of three or four people.</p>
Interview friend	<p>Section 4 of the Act lists the people who may act as an interview friend (or support person) of a suspect or serious indictable offender. Different people may act as interview friends of a suspect or offender depending upon the circumstances.</p>

Term	Definition/background
LAC	Local Area Command—an operational policing region. There are 80 Local Area Commands throughout NSW.
Model Bill	Model Forensic Procedures Bill drafted by the Model Criminal Code Officers Committee
MOU	Memorandum of Understanding
Senior police officer order	An order made by a police officer who holds the rank of sergeant or above to authorise the taking of a non-intimate sample (eg hair) without a person’s consent. NB. Senior police officer orders cannot be used to obtain samples from children or ‘incapable’ people – whose sampling must be authorised by a court order.
Serious children’s indictable offence	<p>(a) Is defined in s3(1) of the <i>Children (Criminal Proceedings) Act 1987</i> as:</p> <p>(b) homicide,</p> <p>(c) an offence punishable by imprisonment for life or for 25 years,</p> <p>(d) an offence arising under section 61J (otherwise than in circumstances referred to in subsection (2) (d) of that section) or 61K of the <i>Crimes Act 1900</i> (or under section 61B of that Act before the commencement of Schedule 1 (2) to the <i>Crimes (Amendment) Act 1989</i>),</p> <p>(e) the offence of attempting to commit an offence arising under section 61J (otherwise than in circumstances referred to in subsection (2) (d) of that section) or 61K of the <i>Crimes Act 1900</i> (or under section 61B of that Act before the commencement of Schedule 1 (2) to the <i>Crimes (Amendment) Act 1989</i>), or</p> <p>(f) an indictable offence prescribed by the regulations as a serious children's indictable offence for the purposes of this Act.</p>
Serious indictable offence	<p>Is defined in s3(1) of the Act as:</p> <p>(a) an indictable offence under a law of the State or of a participating jurisdiction that is punishable by imprisonment for life or a maximum penalty of 5 or more years imprisonment, or</p> <p>(b) an indictable offence under a law of the State that is punishable by a maximum penalty of less than 5 years imprisonment, being an offence the elements constituting which (disregarding territorial considerations) are the same as an offence under a law of a participating jurisdiction that is punishable by a maximum of 5 or more years' imprisonment.</p>
Serious indictable offender	Is defined in s3(1) of the Act as ‘a person who has been convicted of a serious indictable offence.

Appendix 4: Summary of questions for consideration

- 1.(a) Is the current method of taking a forensic sample of hair appropriate?
- 1.(b) What are the reasons for your view?
- 1.(c) Do you have any suggestions for improvements?
- 2.(a) Are you aware of any inmates who have had a forensic DNA sample taken from them, but who do not fall within the definition of ‘serious indictable offender’?
- 2.(b) Please provide details about the particular case/s.
- 3.(a) Does Part 7 of the Act relating to serious indictable offenders apply only to those persons aged 10 to 17 years who have been convicted of a ‘serious children’s indictable offence’ as defined by the *Children (Criminal Proceedings) Act 1987*?
- 3.(b) *Should* Part 7 of the Act relating to serious indictable offenders apply only to those persons aged 10 to 17 years who have been convicted of a ‘serious children’s indictable offence’ as defined by the *Children (Criminal Proceedings) Act 1987*?
- 3.(c) What are the reasons for your view?
- 3.(d) What specific issues do you think will arise in relation to the taking of DNA samples from children and young people in juvenile detention centres?
- 3.(e) What are the reasons for your view?
- 4.(a) Is the current practice for identifying ‘incapable’ inmates appropriate?
- 4.(b) What are the reasons for your view?
- 4.(c) Do you have any suggestions for improvement?
- 5.(a) Are you aware of any inmates who have had a forensic DNA sample taken from them without an interpreter/signer, who required the use of an interpreter/signer?
- 5.(b) Please provide details about the particular case/s.
- 6.(a) Are inmates being given sufficient notice to obtain information, seek legal advice and organise the attendance of interview friends and legal practitioners?
- 6.(b) What are the reasons for your view?
- 6.(c) Do you have any suggestions for improvements?
- 7.(a) Are inmates exercising their rights to have an interview friend and/or legal representative present during the forensic procedures?
- 7.(b) What do you think are the reasons for this?
- 7.(c) Do you have any suggestions for improvements?
- 8.(a) Is the information that must be provided to inmates before they consent to the DNA sampling too complex?
- 8.(b) What are the reasons for your view?
- 8.(c) Do you have any suggestions for improvements?
- 8.(d) Who should be responsible for explaining this information to inmates?
- 8.(e) What are the reasons for your view?

- 9.(a) Are you aware of any inmates who have consented because they believed that they would experience negative consequences if they did not consent?
- 9.(b) Please give details about the particular case/s.
- 10.(a) Is the additional category of ‘non-consensual, but compliant’ inmate useful?
- 10.(b) What are the reasons for your view?
- 10.(c) Do you have any suggestions for improvements?
- 11.(a) Is the current policy of providing a cooling off period useful?
- 11.(b) What are the reasons for your view?
- 11.(c) Do you have any suggestions for improvements?
- 12.(a) How many people do you believe should be present during the taking of a forensic DNA sample from a serious indictable offender?
- 12.(b) What are the reasons for your view?
- 13.(a) Are you aware of any cases where the police Inmate Testing Team used force that could be considered to be ‘unreasonable’?
- 13.(b) Please provide details about the particular case/s.