



NSW Ombudsman

DNA sampling and other
forensic procedures
conducted on suspects
and volunteers under
the *Crimes (Forensic
Procedures) Act 2000*

October 2006



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NSW Ombudsman

October 2006

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Dear Mr Debus

Under section 121 of the *Crimes (Forensic Procedures) Act 2000* I have been required to keep under scrutiny the exercise of powers conferred on police officers to conduct forensic procedures.

I am pleased to provide you with my report, which details the activities undertaken, and my findings and recommendations that are a result of the review.

I note that NSW Police was provided with a draft of the report. Where appropriate, comments by NSW Police in response to the draft have been incorporated into the final report.

I draw your attention to section 121(6) of the Act which requires you to lay a copy of this report before both Houses of Parliament as soon as practicable.

Yours sincerely

Bruce Barbour
Ombudsman



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October 2006

The Honourable Carl Scully MP
Minister for Police
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1 Farrer Place
Sydney NSW 2000

Dear Mr Scully

Under section 121 of the *Crimes (Forensic Procedures) Act 2000* I have been required to keep under scrutiny the exercise of powers conferred on police officers to conduct forensic procedures.

I am pleased to provide you with my report, which details the activities undertaken, and my findings and recommendations that are a result of the review.

I draw your attention to section 121(6) of the Act which requires the Attorney General to lay a copy of this report before both Houses of Parliament as soon as practicable.

Yours sincerely

Bruce Barbour
Ombudsman



NSW Ombudsman

October 2006

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Dear Mr Moroney

Under section 121 of the *Crimes (Forensic Procedures) Act 2000* I have been required to keep under scrutiny the exercise of powers conferred on police officers to conduct forensic procedures.

I am pleased to provide you with my report, which details the activities undertaken, and my findings and recommendations that are a result of the review.

I note that you were provided with a draft of the report. Where appropriate your comments have been incorporated into the final report.

I draw your attention to section 121(6) of the Act which requires the Attorney General to lay a copy of this report before both Houses of Parliament as soon as practicable.

Yours sincerely

Bruce Barbour
Ombudsman

Foreword

The *Crimes (Forensic Procedures) Act 2000* clarified and expanded the power of police officers to take DNA samples and conduct other types of forensic procedures. The Act required my office to keep under scrutiny the exercise of these powers for the first four years of their use.

We have previously reported on the DNA sampling of people convicted of a serious indictable offence. This second report deals with DNA sampling and other forensic procedures conducted on suspects and volunteers. The focus of our review is on whether police officers and others involved in forensic procedures are complying with their legislative obligations, and are discharging their functions fairly and effectively.

We found that the implementation of the *Crimes (Forensic Procedures) Act* has provided police with further tools for use in the investigation and prosecution of criminal offences. This has generally been achieved with due regard to the rights and interests of people police wish to undergo forensic procedures. However, we did identify a number of legislative and procedural issues for consideration by Parliament and relevant agencies, and other key issues that should be kept under scrutiny into the future.

We also found that the long term position on the provision of DNA analysis services in New South Wales is unclear. As the demand for DNA analysis services continues to increase, there is a significant risk that without a clear and well planned way forward, the objects of the Act may not be met effectively. I trust the research and observations in this report will make a positive contribution to this debate.



Bruce Barbour
Ombudsman

Contents

Executive summary	i
Background to this report	i
Key provisions of the Act	i
How we conducted our review	ii
Our main findings	ii
Our main recommendations	vii
Conclusions	viii
List of Recommendations	ix
Chapter 1. Background	1
1.1. Introduction	1
1.2. Review mechanisms	1
1.3. Structure of our review	1
1.4. DNA and criminal investigations	2
1.5. Methodology	4
1.6. Confidentiality	8
Chapter 2. Key provisions of the Act	10
2.1. What is a forensic procedure?	10
2.2. Who can undergo a forensic procedure?	12
2.3. Who can conduct a forensic procedure?	13
2.4. What happens after a DNA sample has been taken?	14
2.5. Destruction of forensic material	14
2.6. Safeguards for people undergoing forensic procedures	15
Chapter 3. DNA sampling in Australia and overseas	18
3.1. History of forensic procedures in New South Wales	18
3.2. Plans for a national DNA database in Australia	20
3.3. DNA sampling in other Australian jurisdictions	21
3.4. DNA sampling in other countries	25
3.5. International DNA databases	32
Chapter 4. Implementation of the Act	40
4.1. NSW Police at a corporate level	40
4.2. NSW Police at a local level	43
4.3. NSW Health and the Division of Analytical Laboratories (DAL)	52
4.4. Who is responsible for the DNA database?	54

Chapter 5: A snapshot of forensic procedures	57
5.1. How many forensic procedures have police conducted?	57
5.2. Where are forensic procedures being conducted?	59
5.3. Who are police conducting forensic procedures on?	61
5.4. Outcomes	64
Chapter 6. Legal advice and information provided	71
6.1. Providing information about forensic procedures	71
6.2. Access to legal advice	77
Chapter 7. Authority to conduct a forensic procedure.....	84
7.1. The distinction between suspects and volunteers	84
7.2. Suspects: proceeding by consent	88
7.3. Suspects: proceeding by order of a senior police officer	100
7.4. Suspects: proceeding by court order	105
7.5. Volunteers: proceeding by consent	117
7.6. Volunteers: proceeding by court order	122
7.7. Mass Screenings	122
Chapter 8. Conducting a forensic procedure	134
8.1. Cautioning suspects and volunteers	134
8.2. Access to interview friends, independent witnesses and interpreters	135
8.3. Time limits	138
8.4. Privacy.....	141
8.5. Electronically recording forensic procedures	141
8.6. DNA samples	146
8.7. Other types of procedures conducted	152
8.8. Questions and comments by suspects and volunteers	154
8.9. Use of force.....	156
8.10. Sharing samples and providing results	158
Chapter 9. Procedures outside the Act.....	167
9.1. Other procedures – prints, photos, urine samples, medical examinations.....	167
9.2. Covert DNA sampling	171
9.3. Obtaining DNA from deceased persons	174
9.4. Victims of crime and other “excluded volunteers”	175
9.5. Children under the age of 10	176
Chapter 10. DNA analysis	181
10.1. Our investigation of DAL	181
10.2. Between the police station and the laboratory	182

Chapter 17. Conclusion	289
Appendix. Implementation of recommendations on DNA sampling of serious indictable offenders	290
Glossary.....	293
Acknowledgements.....	299
List of submissions	299

Executive summary

Background to this report

The Ombudsman is required to keep under scrutiny the exercise of functions conferred on police officers under the *Crimes (Forensic Procedures) Act* (the Act) from July 2000 to November 2004, and provide a report on our work and activities to the Attorney General, Minister for Police and Commissioner for Police as soon as practicable after the expiration of the review period.¹ We provided an initial report, on the DNA sampling of serious indictable offenders, in August 2004. This second report deals with DNA sampling and other forensic procedures conducted on suspects and volunteers.

This report follows two other reviews of the legislation. First, the NSW Parliamentary Standing Committee on Law and Justice inquired into the operation of the Act, focusing on the effectiveness of DNA evidence and the implications of its use in criminal investigations. The Committee reported its findings to Parliament in February 2002. Second, the Attorney General reviewed the Act to determine whether its policy objectives remain valid, and whether the terms of the Act remain appropriate to securing those objectives. The Attorney General's report was finalised in April 2003.

This review focuses on whether police officers and others involved in forensic procedures are complying with their legislative obligations, and are exercising their powers fairly and effectively.

Key provisions of the Act

A forensic procedure is a way to obtain evidence that relates to the investigation and prosecution of a crime. The Act authorises three different categories of forensic procedures – buccal swabs (for DNA sampling); non-intimate forensic procedures (which includes photographs, swabs, nail scrapings, fingerprints, hair samples and visual examinations of the body); and intimate forensic procedures (including blood samples, dental impressions, pubic hair samples, intimate photographs and visual examinations of genitals, buttocks or breasts). Most forensic procedures are conducted by police officers, although some may be conducted by other experts, such as medical practitioners or dentists.

Forensic procedures can be conducted on suspects, volunteers and certain convicted offenders. A suspect is a person who police believe on reasonable grounds has committed an offence. Volunteers are generally people who have some connection to a crime or crime scene, but are not suspects, for example witnesses, residents of a place where a crime has been committed, and partners of people who have been sexually assaulted by somebody else. Convicted offenders are people who have been convicted of a “serious indictable offence”; that is, an offence which carries a maximum penalty of five years imprisonment or more. Victims of crime are specifically excluded from the operation of the Act.

Volunteers can only undergo forensic procedures by consent, but suspects and convicted offenders can undergo forensic procedures by consent, senior police order or court order. For a forensic procedure to be conducted on a suspect in the absence of consent, the suspect must be under arrest, there must be reasonable grounds to believe the procedure might produce evidence tending to confirm or disprove the suspect committed the offence, and carrying out the procedure must be justified in all the circumstances. Police may use reasonable force to conduct a forensic procedure, but cannot conduct the procedure in a cruel, inhuman or degrading manner.

The Act provides for a DNA database system, which contains indexes of DNA profiles obtained from crime scenes, suspects, volunteers, convicted offenders, missing persons and unknown deceased persons. When DNA profiles are put on the database, only certain types of matching are permitted. DNA profiles obtained from suspects and convicted offenders can be matched against the entire crime scene index, while profiles obtained from volunteers can only be used for a purpose permitted by the volunteer, and are usually only used in relation to the investigation of a particular offence.

The Act contains a number of safeguards, to protect the rights and interests of people on whom police would like to conduct a forensic procedure. Police must inform the person of the nature and consequences of the proposed procedure, give the person reasonable opportunity to communicate with a legal practitioner before asking for consent, and electronically record the request for consent and, unless the person objects, the procedure itself. Forensic procedures cannot be conducted during questioning, and there are limits on the amount of time a person can be kept in custody for the purpose of conducting a forensic procedure. There are particular provisions relating

to children, incapable persons and Aboriginal or Torres Strait Islander suspects. Evidence obtained through a forensic procedure where there has been a breach of the Act is generally inadmissible.

How we conducted our review

We used a range of research strategies to scrutinise the exercise of police powers under the Act, to ensure the review was balanced and comprehensive. This included:

- consulting a variety of stakeholders
- surveying every police local area command
- auditing a selection of police commands (which included examining forensic procedure records, watching video recordings of forensic procedures, and interviewing police officers and others involved in the implementation of the Act)
- interrogating records on the police computer system and analysing statistics
- analysing complaints about forensic procedures made to the Ombudsman and to NSW Police
- investigating the DNA laboratory directly; comparing records held by police with those held by the laboratory; and observing DNA Advisory Committee meetings
- surveying judicial officers and monitoring relevant court proceedings, and
- tracking media coverage of forensic procedures.

We also set out our preliminary findings and recommendations about the way the forensic procedures legislation is working at a local level in a discussion paper, and used this as a basis for consulting key representatives of NSW Police.

Our main findings

1. Forensic procedure powers are widely used

The power to conduct forensic procedures has had a significant impact on the way police investigate and prosecute crime, and forensic procedures are now conducted day in, day out all over New South Wales for matters ranging from minor property offences to the most serious types of crime.

In the first four years after the Act came into force, police conducted over 10,000 forensic procedures on suspects and volunteers. The vast majority of these were DNA samples, while photographs were the second most common procedure. The number of DNA samples taken from suspects and volunteers increased significantly during each year of the review period. Metropolitan police conducted significantly more forensic procedures than police in rural and regional areas. Far more forensic procedures were conducted on suspects than on volunteers. Many more men than women undergo forensic procedures, both as suspects and as volunteers, and forensic procedures are conducted on children at a much lower rate than on adults. Of the forensic procedures conducted on suspects, six per cent involved people police identified as Aboriginal or Torres Strait Islander, although the actual proportion of procedures conducted on Aboriginal and Torres Strait Islander suspects is likely to be much higher as police recorded the person's status as 'unknown' for more than half the forensic procedures conducted. Limited record keeping means we are unable to comment on the number of forensic procedures conducted on incapable persons.

2. DNA analysis provides evidence of guilt more often than innocence

NSW Police, the Director of Public Prosecutions and the DNA laboratory, DAL, have achieved some good results through forensic procedures. DAL estimates that it made over 3,000 'warm links' during the review period, which means that about a third of the forensic procedures conducted on suspects resulted in the suspect being positively linked to the offence under investigation. DAL also made over 4,000 'cold links' during the review period, where a suspect or crime scene is linked to another unsolved crime scene through matches made on the DNA database. The majority of cold links were for high volume property crimes, but a significant number were for serious offences, including murder and manslaughter, sexual assault and robbery. We were unable to assess how often DNA analysis results in a suspect being convicted of an offence, as neither DAL nor NSW Police kept complete records relating to criminal proceedings stemming from DNA links.

It is not possible to report on the number of people eliminated from police investigations through DNA analysis, as the fact that there is no “DNA match” does not necessarily exclude a suspect from investigation. It could be that no forensic material was found on an item submitted for analysis, or that somebody else’s DNA was on it, but this does not mean the suspect was not involved. This is especially so in cases involving multiple offenders. In some cases, most notably sexual assaults involving only one offender, suspects can be positively eliminated through DNA analysis, and DAL estimates that about 480 suspects were eliminated during the review period. This indicates that for every elimination, there are between six and seven warm links, and shows that DNA analysis is, in the majority of cases, used to produce evidence to confirm, rather than disprove, a suspect committed an offence. Given that police must suspect on reasonable grounds that a person has committed an offence before asking the person to provide a DNA sample, we would expect that DNA analysis is used more often to implicate than exculpate suspects.

3. The legislation is complex and compliance with legal obligations can be difficult

The *Crimes (Forensic Procedures) Act* is long and complex and in parts difficult to follow. The fact that it deals with DNA sampling as part of a general forensic procedures regime, when really it raises significantly different issues, creates some awkward obligations for police officers, for example having to videotape the taking of a photograph. Some elements of the DNA sampling regime itself are ill conceived, such as the requirement that police share a person’s own DNA sample with the person, when a person’s DNA does not change and a sample can be taken for independent analysis at any time.

Despite the significant impact forensic procedure powers have had on policing, we found that many officers are extremely reluctant to conduct the procedures, due to:

- the complexity of the legislation and there being so much to remember for officers who do not conduct forensic procedures very often
- lack of experience in conducting procedures despite widespread training and accreditation
- fear that doing something wrong may lead to the evidence being excluded and the suspect being acquitted, and
- a perception that forensic procedures are cumbersome and time consuming.

In some commands, reluctance to conduct forensic procedures has contributed to a low level of use of the powers available under the Act. Some commands end up relying on one or two officers to conduct all their forensic procedure work although most officers have completed the relevant training.

Many of the forensic procedures we audited had been conducted in a professional and competent manner. However, we also found evidence of non-compliance with various aspects of the legislation, for example where officers failed to record the provision of information to the suspect, or the request for consent. Other problems related to difficulties obtaining court orders, the length and complexity of the information provided to people undergoing procedures, difficulty conducting procedures within the prescribed time limits, difficulty arranging for support persons, delays in obtaining DNA analysis results, and storage and security of forensic material.

Many police officers expressed frustration that, while they had been taught how to conduct the procedures themselves, they would like more specific guidance on how forensic procedures as a whole should be managed within a local police command. Few commands had clear strategies for the management of forensic procedures, which made it difficult for police – let alone our office – to assess whether forensic procedure powers are being used effectively and appropriately.

In our view, having a single person responsible for running forensic procedures within a command, or having a specialised forensic procedures unit rather than mass training and accreditation, would improve compliance with legislative obligations, and enable police to measure the use and effectiveness of their forensic procedure powers more effectively.

4. The distinction between suspects and volunteers is not always clear

Our review shows there is some confusion among police officers about the difference between suspects and volunteers. The proper classification will depend on the circumstances, in particular whether the evidence supports a reasonable suspicion that the person committed an offence, and hence is a suspect. We argue that, in the event of uncertainty, police should err on the side of treating potential suspects as volunteers. Although there are few restrictions on who police can ask to volunteer to undergo a forensic procedure, the person can at least decline to participate.

The distinction between suspects and volunteers is central to the forensic procedures regime. Suspects can be ordered by senior police officers to undergo forensic procedures, and their samples can be matched against all crime scenes. By contrast, volunteers must generally consent, and their samples are only used in a particular case, unless specific permission is given to use the sample for other purposes.

In some cases, mistakes were due to poor understanding of the legislation, for example where a police officer treats a suspect as a volunteer because the suspect consents to the procedure. In other cases, though, it simply wasn't clear whether the person was best classified as a suspect or volunteer. This occurred in particular where the person was described by police as a "person of interest".

5. Some forensic procedures are conducted without appropriate authorisation

Most forensic procedures conducted by police officers are appropriately authorised. However, we found that some procedures are conducted in circumstances where they are not authorised. This sometimes occurs because of a mistaken belief as to what constitutes a 'forensic procedure' for the purposes of the Act. For example, in one case police had a doctor conduct searches of a suspect's vaginal and rectal cavities, pursuant to a court order authorising these "intimate forensic procedures." However, the Act specifically excludes searches of body cavities. We are not aware of any law authorising police officers to carry out, or cause to be carried out, searches of people's body cavities. It is of serious concern that such intrusive searches were carried out, without consent, and without any legal basis, ostensibly under the authority of the *Crimes (Forensic Procedures) Act*.

Police sometimes take covert DNA samples, by retrieving discarded items like cigarette butts or tissues, or through some other investigative procedure, like a random breath test. The Act does not specifically prohibit police from taking covert DNA samples, and this type of conduct is essentially unregulated. However, a court may find the evidence inadmissible, if it has been obtained improperly. We do not know how often police are submitting covert DNA samples for analysis, or the circumstances in which covert samples are being taken. In our view, this issue should be specifically considered by Parliament.

Another area where forensic procedures are being carried out without proper authority are procedures carried out on children under the age of ten. The Act states that it does not authorise the carrying out of forensic procedures on children under ten, but it does not prohibit it either. This area is essentially unregulated. We found that police officers are DNA testing young children, usually because the child's DNA may be at a crime scene and a sample is required for elimination purposes, or because the paternity of the child is of evidentiary value in the prosecution of a sexual assault offence. We found that there are occasions where police investigating an offence have good reason for wanting to take a DNA sample from a young child. We have recommended that the Act should be amended to provide for this.

We also found evidence of forensic procedures being conducted in circumstances where there were insufficient grounds to believe the procedure might produce evidence tending to confirm or disprove the suspect committed the offence. This included cases where the identity of the offender was not at issue, either because the person was caught in the act, or because of the nature of the offence, such as sexual assault proceedings which turn on the issue of consent.

6. Forensic procedures are almost always conducted on the basis of consent

Forensic procedures are almost always conducted on the basis of consent. About 96 per cent of the 7,000 DNA samples taken from adult suspects during the review period were taken by self-administered buccal swab. While there are no accurate records of the number of DNA samples taken by senior police order or court order, we know it is very few, and that the vast majority of samples are taken by consent. Volunteers, of course, can only undergo forensic procedures by consent.

Although the numbers suggest that suspects almost always undergo forensic procedures by consent, many agree to the procedure because they believe they have no choice. Further, many officers see it as their role to encourage suspects to consent, and tell the suspect they will conduct the procedure whether the suspect consents or not. Most officers do not appreciate that the criteria for requesting consent and for making an order are quite different.

First, to ask for consent to a procedure, the police officer need only *suspect* on reasonable grounds that the person has committed an offence. However, to order a procedure be carried out in the absence of consent, the senior police officer must be satisfied that "there are reasonable grounds to *believe* that the suspect committed an offence," which creates a much higher threshold. Although a reasonable suspicion involves more than a mere possibility, and must have some factual basis, it involves less than a reasonable belief.

Second, to ask for consent to a procedure, the police officer must be satisfied that “the request for consent to the procedure is justified in all the circumstances.” However, to order a procedure be carried out, the police officer must be satisfied that “the carrying out of the forensic procedure without consent is justified in all the circumstances” – which is quite different. Carrying out a forensic procedure against a person’s will is much more intrusive than merely asking for consent to a procedure.

Third, police can only order forensic procedures be carried out on suspects who are under arrest. To ask for consent to a procedure, the suspect need not be under arrest.

We found that many officers do not fully understand these differences, and regard the consent process as an opportunity for the suspect to elect how a DNA sample will be taken – by buccal swab if the suspect consents, otherwise by hair sample – rather than an opportunity for the suspect to decline to undergo the proposed procedure. Our findings suggest that the real proportion of forensic procedures conducted by consent would be much lower than the 96 per cent indicated by police records.

7. Police rarely use force to conduct forensic procedures

The Act authorises police to use reasonable force to carry out a forensic procedure, or to prevent the loss, destruction or contamination of any sample. We examined every incident during the review period that we could identify where force was used. We found little evidence of force being used inappropriately, although in one case, police took a buccal swab by force, when in the circumstances they should have taken a hair sample. We found that forensic procedures are almost always carried out without any force being used (other than the force required to pull a person’s hair out).

We also found that in almost all cases where a hair sample was taken, the same result could have been achieved, at greater convenience to police and the person undergoing the procedure, had a self administered buccal swab been taken instead. We have recommended that buccal swabs should be made available to suspects who comply with police directions, even though they may object to the procedure – and that hair samples should only be taken from suspects who are uncooperative and refuse to provide a sample by buccal swab even when ordered to do so.

8. The information given to suspects and volunteers is confusing

NSW Police has developed information sheets, which are designed so that officers can meet their legislative obligation to provide certain information to the person undergoing the procedure, simply by reading through the relevant sheet. The information currently provided to suspects and volunteers is long, complex and confusing. It is obvious that many police officers, as well as people undergoing forensic procedures, do not understand it. Many stakeholders expressed concern that suspects and volunteers cannot give informed consent if the information they are provided is unintelligible. Many police officers argued that the information sheet is so complex that the essential points – how a sample will be taken, what it will be used for, and that the person can decline if they wish – are lost. Simplifying the information provided to suspects and volunteers would be enormously beneficial, both for police officers and for people undergoing forensic procedures. We also recommend that children and incapable persons should be given information about forensic procedures, in a manner appropriate to their age and understanding.

9. Few suspects access legal advice about forensic procedures

Very few suspects obtain legal advice before consenting to a forensic procedure, although the Act requires that police give suspects reasonable opportunity to communicate with a legal practitioner before requesting consent. Many of the submissions we received explained that legal advice is not readily available for people whom police may wish to undergo forensic procedures. Often, a suspect will have been in custody for considerable time before being asked to consent to a forensic procedure, and may have already obtained legal advice about other matters, but not the forensic procedure. We recommend that police consider informing suspects who have been taken into custody where they may wish to conduct a forensic procedure, and that information about forensic procedures be provided to those suspects when police give the summary of rights in accordance with Part 9 of the *Law Enforcement (Powers and Responsibilities) Act*. We also recommend that police be required to give people who are not under arrest a period of notice before asking for consent to a forensic procedure, to enable the person to obtain legal advice if they wish.

10. Some DNA samples are being unlawfully retained

NSW Police and DAL are not meeting their legislative obligations to destroy forensic material taken from suspects and volunteers. DNA and other forensic material taken from suspects must be destroyed if the evidence is

inadmissible, the suspect is acquitted, or proceedings are not commenced within 12 months of police taking the sample. We found that police are not identifying all the samples which require destruction, or are not notifying DAL of the need for destruction until some time after the period for lawful retention has expired. Extension orders are available, but are not always obtained when they should be. It is of concern that forensic material taken from suspects is being retained unlawfully – not only is it unfair to the person who provided the sample, it may be an offence. Further, any evidence obtained as a result of the unlawful retention will not be admissible in any proceedings against the suspect anyway.

Forensic material taken from volunteers should be destroyed as soon as practicable after the agreed retention period ends. However, the current practice is that it is retained by DAL indefinitely, unless the volunteer subsequently writes to NSW Police, requesting that it be destroyed. This is despite the fact that the volunteer may have indicated at the time of sampling that the forensic material was to be used within that case only, may have been advised it would not be put on the database, and may not have been told that it would be retained indefinitely unless the volunteer specifically requests it be destroyed.

11. The laboratory cannot meet the police demand for DNA analysis

We conducted an own motion investigation into the DNA analysis service provided by DAL. During the review period, DAL loaded almost 40,000 DNA profiles from convicted offenders, suspects, volunteers and crime scenes onto the DNA database.

Our investigation found that DNA analysis is not reaching its potential in New South Wales. DAL receives more crime scene samples for analysis than it has the capacity to process, and while it is generally able to meet urgent requests on an ad hoc basis, it is unable to meet agreed turnaround times for the majority of its casework. This results in a growing backlog of unexamined crime scene samples, which causes long delays for investigating police and court proceedings. Many crime scene samples simply remain unexamined, even if they are likely to be of significant probative value. DAL is well aware of the risk of examining only a limited number of items submitted for DNA analysis, and in its words, is only providing a “reduced service.” DAL is also concerned about staff shortages, lack of space and ageing infrastructure at the laboratory.

DAL has made great efforts to address the problems it faces, and where possible has implemented strategies to improve its service delivery. However, it appears that DAL cannot significantly improve its DNA analysis service without additional resources.

NSW Police is currently conducting a trial outsourcing some DNA analysis to a private laboratory.

12. DNA mistakes have led to people being wrongfully charged and convicted

We are aware of two people who were wrongfully convicted due to DNA mix-ups. In one case, this was because the investigating police officer misread the DNA analysis report, thinking it said the suspect was positively linked to the crime scene, when in fact it merely confirmed the substance found at the crime scene was blood.

In the other case, a police officer merged the records of two different people, thinking they were the same person, so although they had different DNA profiles and different fingerprints, they were recorded on the police computer system as being the one person. Police arrested and charged the wrong person after “his” DNA profile was linked to a crime scene through the DNA database. We are currently monitoring the investigation of this and another incorrectly linked record, which resulted in a person being wrongly charged and held on remand.

13. DNA records are not always accurate

There are two main problems with the accuracy of DNA records. First, records of forensic procedures on the police computer system can be moved from one person’s record to another. Police officers routinely move records, for example where a person uses a false name on arrest, it would be appropriate to move the information relating to the arrest onto the correct person’s police record. However, there are occasions where police officers have moved forensic procedure records onto another person’s police record, when they should not have – usually because the officer mistakenly believes that two people are the same person. In addition to the two matters listed above, we are aware of at least 11 other occasions where this mistake has been made, but has been picked up before any action was taken against the wrong person. NSW Police has set up a working group to find a solution to this problem. We will continue to monitor this issue.

Second, we found a number of discrepancies between NSW Police records and those held by DAL. Many of the names on the DNA database are aliases, because DAL relies on the name recorded by police at the time the sample is taken, which may not be correct. It is unlikely this problem would lead to a person being wrongfully convicted, but it may result in a person being investigated by police unnecessarily. Further, we believe there is an inherent public interest in the information on the New South Wales DNA database being correct, and in personal information held by different government agencies being consistent. This problem could be addressed through a better IT system, but in the meantime we recommend an audit process be established between DAL and NSW Police to ensure the information on the DNA database is correct.

14. The risk of contamination could be better managed in some areas

Concern about contamination is one of the most widely held concerns about the use of DNA analysis in the investigation and prosecution of crime. Contamination may be deliberate or accidental, and may occur before, during or after an offence is committed, at the crime scene or in the laboratory. There have been many well documented contamination incidents in other jurisdictions, both in Australia and overseas.

We are not aware of any significant contamination incidents in New South Wales. However, we identified a number of areas where contamination risks could be better managed, for example in relation to the way crime scene exhibits are packaged, and the way DNA samples are taken. There is also a persuasive case for considering whether police officers, forensic officers, scene of crime officers and laboratory staff should have their DNA profiles on a nominated 'elimination' database, specifically to reduce the impact and unnecessary cost of irrelevant linking, caused by contamination.

15. No single person is responsible for the DNA database

The Act provides for a "responsible person" to be responsible for the care, control and management of the DNA database system. The key responsibilities of this person are to determine who may access information stored on the DNA database, and to ensure forensic material is destroyed, as required by the Act. Although these responsibilities are crucial to the operation and security of the DNA database, the legislation does not specify who the "responsible person" is. Our investigation of services provided by DAL demonstrated that this may be directly impacting on compliance with relevant legal obligations. The Attorney General's Department has advised that it is currently preparing a bill that will allow the responsible person to be more readily identified.

16. The future of DNA analysis in New South Wales is unclear

A related issue is the long term position on the provision of DNA analysis services in New South Wales. With increasing work, and an increasing backlog, there is a significant risk that the objects of the Act will not be met effectively. There is no clear agreement on a way forward at present. We have recommended that the evaluation of the current outsourcing trial be used as an opportunity to consider issues of funding, independence, and research and development. This is necessary for the community to have full confidence in our DNA analysis services.

Our main recommendations

We identified many areas of concern through our review. Some of our recommendations aim to clarify the law, while others aim to improve compliance with legislative obligations through better police practice. Our main recommendations relate to:

- simplifying the information which is given to suspects and volunteers so they understand the key points, and also requiring police to provide information about forensic procedures to children and incapable persons
- enabling child volunteers aged 15 and over to consent to forensic procedures on their own behalf – but still requiring police to obtain a court order before conducting a forensic procedure on a child suspect
- removing unnecessary requirements for police to share samples
- requiring police officers to conduct forensic procedures as quickly as reasonably possible within the permitted two hours, and enabling time taken to conduct forensic procedures to be considered 'time out' for the purposes of calculating the investigation period, for suspects who are under arrest
- requiring police officers to take DNA samples by the least intrusive method available – and enabling senior police officers to order suspects to provide a DNA sample by self-administered buccal swab rather than by hair sample

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- establishing ‘best practice’ for the conduct of DNA sampling, and making the senior police order process more accountable and transparent
 - improving the way forensic procedures are managed at a local level – including the development of a forensic procedures portfolio in each police command, with a designated forensic procedures officer responsible for the portfolio and a small team of officers who are responsible for conducting forensic procedures in the command
 - improving and streamlining record keeping by NSW Police and DAL, particularly in relation to police computer records of forensic procedures and DNA analysis results, to improve accuracy and reduce duplication
 - establishing an audit process between DAL and NSW Police, to ensure information on the database is correct, including that DNA profiles are identified by a person’s real name and not an alias
 - taking away the ability of ordinary police officers to transfer forensic procedures from one person’s record to another
 - establishing new turnaround times for DNA analysis, to reflect DAL’s current workload
 - clarifying who is the “responsible person” for the DNA database
 - considering whether all police officers, forensic officers, scene of crime officers and laboratory staff should have their DNA profiles on an elimination database
 - considering whether the covert collection of DNA samples should be regulated, and
 - requiring NSW Police to include information about covert DNA sampling, forensic procedures conducted by force and DNA analysis results in its Annual Report

NSW Police and other agencies support the majority of our recommendations.

Conclusions

The implementation of the *Crimes (Forensic Procedures) Act* has provided police with further tools in the investigation and prosecution of criminal offences. This has generally been achieved with due regard to the rights and interests of people police wish to undergo forensic procedures.

We have identified a number of legislative and procedural issues for consideration by Parliament and relevant agencies. We have also identified key issues that should be kept under scrutiny into the future.

List of Recommendations

	Recommendation	Paragraph number
1	Audits of local area commands include a review of records and systems relating to other types of forensic procedures, as well as DNA samples.	4.1.5
2	For each of the procedures selected for auditing, the auditor reviews the authority for the procedure (consent form, senior police order or court order) and watches the video of the procedure.	4.1.5
3	<p>NSW Police ensure officers conducting forensic procedures have appropriate training and experience. In particular, NSW Police consider implementing the following reforms.</p> <ul style="list-style-type: none"> a. NSW Police develop a forensic procedures portfolio in each local area or specialist command, with a designated and fully trained forensic procedures officer responsible for the portfolio. b. Individual commands consider developing a small team of officers with forensic procedures expertise who will primarily be responsible for conducting forensic procedures in those commands. c. Accreditation for a police officer to conduct any forensic procedure be conditional upon annual training. 	4.2.6
4	NSW Police finalise, as a matter of priority, a single forensic procedures register for use in commands.	4.2.8.4
5	NSW Police review present electronic (COPS and custody management) recording of procedures to ensure a standard process which enables meeting legal requirements including detention requirements.	4.2.8.4
6	NSW Police consider the development of a hard copy forensic procedures manual.	4.2.8.4
7	NSW Police take into account problems with recording forensic procedures demonstrated in this review in its mainframe replacement program.	4.2.8.4
8	NSW Police clarify in SOPs for how long and in what circumstances electronic recordings of forensic procedures (video tapes) should be kept, and provide this advice to commands.	4.2.8.4
9	The Attorney General clarify who is the “responsible person” for the purposes of the <i>Crimes (Forensic Procedures) Act 2000</i> .	4.4
10	The Attorney General develop a plain English version of the information that is required to be provided under the <i>Crimes (Forensic Procedures) Act 2000</i> , as a matter of urgency, and consider whether this should be prescribed by regulation or included in a schedule to the <i>Crimes (Forensic Procedures) Act 2000</i> .	6.1.3
11	The <i>Crimes (Forensic Procedures) Act 2000</i> be amended so that police are required to inform volunteers that the forensic procedure may produce evidence against the volunteer that might be used in a court of law.	6.1.4

	Recommendation	Paragraph number
12	Police inform volunteers who provide DNA samples that their DNA profile will be stored on the DNA database but will only be matched within the particular case, and will not be matched against anything else on the database, unless the volunteer indicates that he or she agrees to his or her DNA profile to be used for unlimited purposes.	6.1.4
13	The <i>Crimes (Forensic Procedures) Act 2000</i> be amended to require police to provide information about forensic procedures to child suspects and volunteers, and develop plain English versions of this information for children of different ages in consultation with the Commission for Children and Young People.	6.1.5
14	The <i>Crimes (Forensic Procedures) Act 2000</i> be amended to require police to provide information about forensic procedures to incapable persons, and develop plain English versions of this information suitable to persons with an intellectual disability in consultation with the Intellectual Disability Rights Service.	6.1.6
15	Police consider informing suspects who have been taken into detention after arrest, and who are likely to undergo a forensic procedure, that police may wish to conduct a forensic procedure on the person, such as a DNA sample, and that this information be provided when police give suspects their summary of the provisions of Part 9 of the <i>Law Enforcement (Powers and Responsibilities) Act 2002</i> .	6.2.4
16	The <i>Crimes (Forensic Procedures) Act 2000</i> be amended so that: <ul style="list-style-type: none"> a. Police officers are required to give volunteers and suspects who are not under arrest a period of notice, specified in the Act or Regulation, before asking them to provide a DNA sample. b. Police need not wait until the end of the notice period to take the DNA sample, if the suspect or volunteer has expressly and voluntarily waived his or her right to the period of notice. 	6.2.5
17	The forensic procedure SOPs include guidelines on identifying and communicating with incapable people. These guidelines should be established in consultation with the Guardianship Tribunal and disability advocates and should cover the information and factors to be considered in assessing a suspect or volunteer's capacity.	7.2.3.3
18	NSW Police provide further training and guidance to police officers on the practical and legal considerations in dealing with 'incapable persons' under the <i>Crimes (Forensic Procedures) Act 2000</i> .	7.2.3.3
19	The <i>Crimes (Forensic Procedures) Act 2000</i> be amended so that a senior police officer order can authorise a suspect to provide a DNA sample by self-administered buccal swab.	7.2.8
20	The form used for recording senior police officer orders be amended so that the senior police officer who makes an order authorising a forensic procedure can record their reasons for believing the suspect committed an offence, the grounds on which the officer believes the procedure might produce evidence tending to confirm or disprove that the suspect committed the offence, and the reasons why carrying out of the procedure without consent is justified in all the circumstances. The amended form should also include information about any submissions received from the suspect, their legal representative or interview friend. Any amended form for senior police officer orders should also be included in the proposed forensic processes book.	7.3.3

	Recommendation	Paragraph number
21	The <i>Crimes (Forensic Procedures) Act 2000</i> be amended to provide clearer guidance to senior police officers about when carrying out a forensic procedure without consent will be “justified in all the circumstances”, including factors which must be considered in making this decision.	7.3.3
22	The <i>Crimes (Forensic Procedures) Act 2000</i> be amended to require a senior police officer making an order under sections 18 or 19 to be independent of the investigation.	7.3.4
23	NSW Police clarify to officers in the field that an acting sergeant is a “senior police officer” for the purposes of the <i>Crimes (Forensic Procedures) Act 2000</i> .	7.3.5
24	The <i>Crimes (Forensic Procedures) Act 2000</i> be amended to provide clearer guidance to magistrates about when carrying out a forensic procedure without consent will be “justified in all the circumstances”, including factors which must be considered in making this decision.	7.4.5
25	Magistrates be provided with appropriate advice or guidance as to the hearing of applications under the <i>Crimes (Forensic Procedures) Act 2000</i> .	7.4.5
26	The definition of ‘volunteer’ in the <i>Crimes (Forensic Procedures) Act 2000</i> be amended so that it provides words to the effect that a volunteer is a person (other than a suspect or excluded volunteer) who consents to a request by a police officer to undergo a forensic procedure, or in the case of a child or incapable person, whose parent or guardian consents to a request by a police officer that the child or incapable person undergo a forensic procedure.	7.5.1
27	The <i>Crimes (Forensic Procedures) Act 2000</i> be amended in respect of the child volunteer provisions for children aged between 15 and 17, allowing these children to consent to forensic procedures for within case matching or limited purposes on their own behalf.	7.5.3
28	The <i>Crimes (Forensic Procedures) Act 2000</i> be amended to provide that, where a forensic procedure is conducted on a volunteer who is a child or incapable person, and a DNA profile obtained, the profile only be used within the case for which it was provided, and not permitted to be matched against any other indexes on the DNA database, unless otherwise authorised by a court.	7.5.5
29	The Minister regulate arrangements for mass screenings. This should include: <ul style="list-style-type: none"> a. a definition of what constitutes a “mass screening” b. a requirement that mass screenings only be conducted in the approved manner c. a requirement that a senior officer (Superintendent or above) approve the undertaking of a mass screening d. the criteria to be met before a senior officer approves a mass screening e. that samples obtained during a mass screening only be used for “within case matching” with the relevant criminal investigation f. a requirement that samples be destroyed within a specified period after the relevant case or investigation is finalised g. the information to be provided to volunteers, and 	7.7.3

	Recommendation	Paragraph number
29 cont.	h. the arrangements for conduct of mass screening procedures.	7.7.3
30	That the SOPs specifically state that the caution be electronically recorded.	8.1
31	That the caution be included at the beginning of the information sheet.	8.1
32	That commands develop and keep up to date lists of names and contact details of acceptable community members and representatives from local service providers who can be used as interview friends and independent persons.	8.2.2
33	NSW Police consider translating the information sheet into the most commonly used community languages.	8.2.3
34	Section 117 of the <i>Law Enforcement (Powers and Responsibilities) Act 2002</i> be amended so that time taken to conduct a forensic procedure is to be regarded as 'time out' in determining how much of an investigation period has elapsed.	8.3.2.3
35	The <i>Crimes (Forensic Procedures) Act 2000</i> specify that police must conduct all forensic procedures as quickly as is reasonably possible, and that the maximum time permitted to conduct any forensic procedure is two hours.	8.3.2.3
36	NSW Police amend the SOPs to reflect the best practice for video recording of forensic procedures. In particular we recommend: <ul style="list-style-type: none"> a. Where an officer takes measures to minimise contamination, for example by cleaning the table, that this be done on video b. The testing officer and person being tested are clearly visible at all times c. The testing officer states the date and time at the start and end of the procedure d. The testing officer introduces himself or herself e. The testing officer identifies by name and role any other persons present, including other police officers f. The testing officer provides an overview of the forensic procedure and process g. The testing officer cautions the person being tested h. The testing officer reads out all relevant information to the suspect or volunteer i. The testing officer obtains both the written and verbal consent of the suspect or volunteer j. The testing officer asks the suspect or volunteer whether they consent to the electronic recording of the conducting of the forensic procedure after consent has been obtained and prior to commencing the procedure 	8.5.8

	Recommendation	Paragraph number
36 cont.	<p>k. Where the forensic procedure is the taking of a DNA sample, the opening of the DNA sample kit, the sampling process and the sealing of the tamper-evident bag are clearly visible and the contents of the DNA sample kit are visible at all times, and</p> <p>l. The testing officer at the completion of the forensic procedure asks the suspect or volunteer if they have any complaints about the way the procedure was conducted.</p>	8.5.8
37	NSW Police consider clarifying their training and procedures to reflect that where possible, every effort should be made to obtain DNA person samples using the least intrusive method available.	8.6.3
38	When police officers seek an order for a person DNA sample, the request include that the order permit the option for the sample to be taken as either a buccal swab, a hair sample or a blood sample and that these choices be provided to the person being tested.	8.6.3
39	NSW Police procedures clarify that only one DNA sample is required from any person.	8.6.4
40	NSW Police retain its current practice of obtaining confirmation samples for all identifications made through “cold links”.	8.6.5
41	NSW Police consider reviewing all directives issued to forensic service group and crime scene officers so that they not only reflect the provisions of the <i>Crimes (Forensic Procedures) Act 2000</i> but also assist in ensuring that relevant evidence is not lost.	8.7.3
42	NSW Police be required to report on the number of occasions forensic procedures are conducted using force, in its Annual Report.	8.9
43	<p>NSW Police ensure that SOPs require officers to:</p> <p>a. Review and consider alternatives prior to force being used to carry out, or facilitate carrying out forensic procedures</p> <p>b. Document their consideration of alternatives to the use of force and the reasons why they believe that these options are not practicable in the circumstances.</p>	8.9
44	<p>NSW Police ensure that regular and timely review of documents and recordings of the use of force are carried out by either specialised forensic procedure officers as described in recommendation 3(a) or FPIT so as to assess the:</p> <p>a. Appropriateness of the use of force</p> <p>b. Reasonableness of the use of force</p> <p>c. Appropriateness of the methods applied by the officers concerned</p> <p>d. Any training needs identified for the officers concerned.</p>	8.9
45	NSW Police ensure that forensic procedures involving the use of force are carried out in appropriately sized and equipped areas, which minimise the likelihood of injury to the testing officers and suspects.	8.9

	Recommendation	Paragraph number
46	NSW Police amend its SOPs to ensure that all communication and negotiation with the suspect by testing officers and/or senior police officers is recorded on video prior to the use of force.	8.9
47	NSW Police ensure that SOPs relating to the identification of all persons present and the explanation of their role are complied with.	8.9
48	The <i>Crimes (Forensic Procedures) Act 2000</i> be amended so that Part 6 Division 6 reflects the following principles: <ul style="list-style-type: none"> a. it is unnecessary to share person DNA samples b. the provision of other material is also unnecessary, unless material remains available (after the initial analysis) that is sufficient for independent analysis and the suspect has requested this c. if there is more than sufficient material available (for the initial analysis) at the time the sample is collected, and a request is made by the suspect, the testing officer should supply a share of the sample at this time d. the results of DNA analysis, or the analysis of other samples taken under the Act, only be required to be provided to persons where the results are to be used in evidence in proceedings, or if a request is received e. photographs only be provided where they are to be used as evidence in proceedings or if a specific request is received. 	8.10.6
49	The Attorney General consider amending the <i>Crimes (Forensic Procedures) Act 2000</i> so that Part 6 Division 6 does not apply to volunteers.	8.10.6
50	NSW Police develop and implement strategies to ensure officers are complying with the current procedures for sharing forensic material and photographs with suspects.	8.10.6
51	NSW Police consider expanding the use of digital photographs for forensic procedures to ensure copies of photographs can be provided expeditiously and receipts obtained.	8.10.6
52	NSW Police provide clear advice to officers about when photographs can be taken under sections 133 and 136 of the <i>Law Enforcement (Powers and Responsibilities) Act 2002</i> , and when photographs can be taken under the <i>Crimes (Forensic Procedures) Act 2000</i> .	9.1.2
53	NSW Police keep records of the number of covert DNA samples submitted for analysis, the reason why the sample was taken covertly, and the results of the analysis, and includes these in its Annual Report.	9.2.4
54	Parliament consider regulating the collection of covert samples to include under what circumstances covert samples can be collected, whether a court order should be required, and how profiles obtained from covert samples should be managed on the New South Wales DNA database.	9.2.4
55	The Attorney General's Department and NSW Police consider whether the current protocol for conducting forensic procedures on victims is appropriate, particularly in relation to consent and information requirements, and make changes to the Victim's Protocol and NSW Police SOPs as necessary.	9.4

	Recommendation	Paragraph number
56	<p>The <i>Crimes (Forensic Procedures) Act 2000</i> be amended to specifically provide the following:</p> <ul style="list-style-type: none"> a. the taking of a DNA sample from a child under the age of 10 be prohibited except when a court order authorises the sample having given due consideration to the age of the child and where: <ul style="list-style-type: none"> i. the paternity of the child is of evidentiary value in an indictable or prescribed offence; or ii. the DNA is required for exclusionary purposes. b. the only permitted matching for a DNA profile obtained from a DNA sample from a child under the age of 10 is within case matching, and that the profile not be placed on any index of the DNA database. 	9.5.1
57	Training for forensic procedures include information that the primary reason for rejecting DNA person samples is that there is insufficient material on the FTA card and therefore reinforce the need to obtain sufficient forensic material when taking a DNA sample by buccal swab.	10.3.4
58	NSW Police remove the option of 'other' on the sample information form.	10.3.5
59	The Attorney General consider including in the regulations provision for an additional index on the New South Wales DNA database that allows DAL to continue its practice of holding profiles where the purpose for which the sample was provided is not clear from the documentation accompanying the sample.	10.3.5
60	NSW Police and DAL implement a process so that DAL only accepts DNA samples from suspects and volunteers where there are sufficient details enabling DAL to identify the case to which the sample belongs.	10.3.6
61	DAL reviews its processes for storing firearms and takes all reasonable precautions to ensure they are kept safely, in accordance the Firearms Act 1996.	10.3.10
62	Part 11 of the <i>Crimes (Forensic Procedures) Act 2000</i> be amended to permit the matching of DNA profiles within the suspects index.	10.4.1
63	DAL continues to use volunteer samples only within the case for which the sample was provided, unless it has confirmed with the relevant police officer that the volunteer did actually intend that his or her profile be placed on the "unlimited purposes" index.	10.4.2
64	DAL deletes all profiles provided by volunteers for 'within case matching' from the database, once the relevant court proceedings have been finalised.	10.4.2
65	NSW Police remove the option of samples not being placed on any index from the volunteer consent form.	10.4.2
66	DAL and NSW Police standardise their methods of recording cold links, warm links and eliminations.	10.6.4
67	DAL in consultation with NSW Police develop a set of agreed outcomes for analysis conducted in relation to suspect samples, and record an outcome for each case in which a suspect sample is submitted.	10.6.4

	Recommendation	Paragraph number
68	DAL provide an appropriate central unit in NSW Police (such as FPIT or FSG) with DNA analysis results for each sample analysed.	10.6.4
69	DAL and NSW Police consider publishing outcomes from all links made from the New South Wales DNA database, not just cold links, in their respective annual reports.	10.6.6
70	DAL and NSW Police include explanations on how they calculate links in their respective annual reports.	10.6.6
71	DAL and NSW Police consider regularly publishing this information on their respective websites.	10.6.6
72	NSW Police, in addition to the information currently included in its Annual Report on the number of cold links and person DNA tests undertaken, include information on: <ul style="list-style-type: none"> a. how many DNA samples have been analysed (including person samples and crime scene samples) b. how many profiles are on the database c. the results of analysis d. how many samples have been rejected and the reasons for this e. how many samples are submitted to the National DNA database (NCIDD) when it becomes operational, and f. how many matches are made on the National DNA database (NCIDD) when it becomes operational. 	10.6.6
73	NSW Police commence recording how many non DNA forensic procedures are undertaken by type and the results achieved following these procedures.	10.6.6
74	NSW Police and DAL agree on new turnaround times (for items as well as cases), based on DAL's current caseload.	10.7.7
75	Appropriate changes be made to DAL's case management system, so DAL can state how many cases are on hand, and the status of each; and any cases which are overdue, according to any agreed turnaround times, are flagged.	10.7.8
76	As well as providing monthly reports detailing turnaround times for cases completed and cases finalised, DAL provide NSW Police with monthly reports detailing cases on hand. This should include the number of cases and items awaiting analysis, and how long they have been at DAL. For cases which have been finalised, the length of time between a case being received and it being started, and between it being completed and filed, should also be indicated.	10.7.8
77	NSW Police implement a reliable system for ensuring DAL is informed about key information affecting case prioritisation, including advice about when analysis is no longer needed.	10.7.9
78	Cabinet consider, in addition to the specific outcomes of the DNA outsourcing trial, the broader question of the long term position of DNA analysis services in NSW, including issues of funding, independence, and research and development.	10.8.1

	Recommendation	Paragraph number
79	The Parliament give further consideration to the recommendations of the NSW Standing Committee on Law and Justice and the Public Accounts Committee regarding the establishment of an independent State Institute of Forensic Sciences.	10.8.1
80	The Attorney General and NSW Police take all necessary steps to permit the sharing of appropriate unlimited purpose volunteer, suspect and serious indictable offender DNA profiles via the National Criminal Investigation DNA Database (NCIDD).	10.9.1
81	An audit process be established between DAL and FPIT to ensure the information on the database is correct, including that DNA profiles are identified by a person's real name and not an alias.	11.1.3
82	The NSW Attorney General consider implementing, and/or facilitating the implementation of, recommendations 15 to 20 made by the Commonwealth Independent Review as they relate to the functions of the NSW Government. It is also recommended that: <ul style="list-style-type: none"> a. The <i>Crimes (Forensic Procedures) Act 2000</i> be amended to enable the implementation of recommendations 15-20 made by the Commonwealth Independent Review as they relate to NSW b. The NSW Parliament consider establishing a scheme similar to that in the <i>Law Enforcement (Controlled Operations) Act 1997</i> and the <i>Telecommunications (Interception) (NSW) Act 1987</i>, to regulate external audits of records relating to forensic material obtained under the <i>Crimes (Forensic Procedures) Act 2000</i>. 	11.1.3
83	NSW Police conduct a comprehensive audit of COPS records to identify where forensic procedure records have been linked to a CNI number other than the original one, and check, on each occasion where this has occurred, that the decision to link the records was sound.	11.2.2
84	NSW Police take immediate steps to prevent ordinary police officers from being able to alter forensic procedure records on COPS, and instead allow only a small group of appropriately trained officers, such as FPIT, to perform this function.	11.2.2
85	NSW Police develop and implement business rules which specify who can perform CNI linking, what training is required, and what checks must be undertaken before two CNI numbers can be linked. These rules could be developed in conjunction with the NSW Police Data Cleansing Project.	11.2.2
86	Officers who are authorised to conduct forensic procedures be provided with best practice training to reduce the risk of contamination when conducting forensic procedures.	12.2.1
87	NSW Police work with the DNA Advisory Committee or Attorney General's working group to establish protocols and guidelines for the management of crime scene evidence by FSG in line with any quality control and assurance procedures already implemented by DAL.	12.2.2.2
88	If NSW Police introduces barcoding of exhibits at the crime scene, DAL work with NSW Police to consider whether this tracking system can be carried through from collection to the proposed initial FSG examination and finally to the DAL analysis of the evidence.	12.2.2.2

	Recommendation	Paragraph number
89	Staff in all laboratories which provide DNA analysis services to NSW Police be required to provide a DNA sample, to be included on DAL's staff elimination database.	12.4.1
90	Consideration be given to establishing a DNA elimination database for all police officers, forensic officers and scene of crime officers in NSW.	12.4.2
91	The DNA Advisory Committee consider consulting with the manufacturers of the equipment used for taking DNA samples about the risk of contamination.	12.4.3
92	NSW Police amend COPS to include new fields for the date destruction of forensic material is due, and a field to commence recording the date the sample is either destroyed or converted to a convicted offender profile.	14.2.2.1
93	NSW Police consult with the Attorney General's Department to develop appropriate formats for electronic notification of court results and extension orders under section 88(5) of the Act via CourtLink once it becomes operational.	14.2.2.1
94	When DAL receives a destruction request, it deletes the DNA profile from the database, as well as destroying the forensic material and identifying information.	14.2.3
95	Volunteers be given the opportunity to nominate an agreed retention period, and that this information be recorded on the volunteer consent form. Any destruction date nominated should be recorded on COPS so that FPIT is automatically notified of any samples which need to be destroyed.	14.2.7.1
96	DAL delete all profiles provided by volunteers for 'within case matching' from the database, once the relevant court proceedings have been finalised.	14.2.7.1
97	DAL's case management system be developed so that any cases where a destruction date is approaching, and the relevant crime scene evidence has not been examined, are flagged for prioritised examination.	14.2.9
98	Section 87 of the <i>Crimes (Forensic Procedures) Act 2000</i> be amended to require forensic material taken from a suspect be destroyed as soon as practicable if the suspect is convicted and the conviction is subsequently set aside, unless there is a reasonable prospect of a retrial or rehearing.	14.2.10
99	The <i>Crimes (Forensic Procedures) Act 2000</i> be amended to provide further guidance on what constitutes special reasons for making an extension order and that a finite extension period be determined by Parliament and included in the Act.	14.2.11
100	The Attorney General implement a system to ensure that magistrates notify the responsible person of any extension given under section 88, as required by the <i>Crimes (Forensic Procedures) Act 2000</i> .	14.2.11
101	That section 81 of the <i>Crimes (Forensic Procedures) Act 2000</i> be clarified to make clear its application to volunteers including whether it only applies to volunteers whose parent or guardian has withdrawn consent.	14.2.12
102	The responsible person consider whether sample material obtained from volunteers should be retained once a profile has been loaded onto the database and the relevant proceedings have been finalised.	14.3

	Recommendation	Paragraph number
103	NSW Police implement a system to ensure that prints taken from volunteers for elimination purposes are either destroyed or returned to the volunteer as soon as practicable after they have been used to exclude the person from the investigation, in accordance with section 87A of the <i>Crimes (Forensic Procedures) Act 2000</i> .	14.4.1
104	NSW Parliament consider what, if any, regulation is required of the way in which material obtained from forensic procedures may be analysed and compared.	16.1.4

Endnotes

¹ *Crimes (Forensic Procedures) Act 2000* s 121.

Chapter 1. Background

1.1. Introduction

The *Crimes (Forensic Procedures) Act 2000* (the Act) created new police powers to carry out forensic procedures, such as taking DNA from a person's saliva, hair or blood. Other forensic procedures include external examinations of a person's body, taking photographs of tattoos or scars, taking fingernail scrapings, swabbing a person's hands, or taking a dental impression.

The Act sets out the circumstances in which police can conduct forensic procedures. It also sets out how forensic material from those procedures may be used, and when that material must be destroyed. It also provides for a DNA database system to be established, so that DNA profiles from certain people can be matched against DNA obtained from unsolved crime scenes. The Act also outlines the rules for participation by NSW in the National Criminal Identification DNA Database.

The Act commenced on 1 January 2001, but Part 8, which deals with volunteers, did not commence until 1 June 2003.

1.2. Review mechanisms

The Act provides for three different review mechanisms:

- **Inquiry by the Standing Committee on Law and Justice.** The NSW Parliamentary Standing Committee on Law and Justice was required to undertake an inquiry into the operation of the Act, and report to Parliament as soon as possible after 18 months from the Act's assent.² It reported its findings in February 2002.³ The inquiry focused on the "reliability and effectiveness of DNA evidence, and the legal and social implications of its use in criminal investigations."⁴
- **Review by the Attorney General.** The Attorney General was required to review the Act to determine whether its policy objectives remain valid, and whether the terms of the Act remain appropriate to securing those objectives. The review was to be undertaken as soon as possible after 18 months from the date of assent, and the Attorney General was required to report to Parliament on the outcome of the review within the following 12 months.⁵ The Criminal Law Review Division of the NSW Attorney General's Department invited Professor Mark Findlay, Deputy Director of the Institute of Criminology, University of Sydney, to conduct the required review on behalf of the Attorney General. The Findlay report was finalised in April 2003.
- **Monitoring of the operation of the Act by the Ombudsman.** The Act initially required the Ombudsman to keep under scrutiny the exercise of functions conferred on police officers under the Act for two years from the date of assent – that is from 5 July 2000. As Part 8 of the legislation did not commence until 1 June 2003, the review period was extended, requiring the Ombudsman to scrutinise functions conferred on police for 18 months following the commencement of Part 8.⁶ The Ombudsman is required to prepare a report of the work and activities under this section, as soon as practicable after the expiration of the review period. The report is provided to the Attorney General, Minister for Police and Commissioner for Police. The Attorney General must provide a copy of this report to Parliament as soon as practicable after receipt.

1.3. Structure of our review

The Act enables police to conduct forensic procedures on three different categories of people – convicted offenders, suspects and volunteers.

Because the mass testing of inmates and detainees was largely conducted in the first two years of the Act's operation, and raises considerably different issues from conducting forensic procedures on people suspected of having committed an offence and people who volunteer to undergo a procedure, we conducted our review in two stages.

The first stage of our review focused exclusively on the DNA sampling of people serving a sentence of imprisonment for an offence carrying a maximum penalty of five years imprisonment or more.⁷ Since the Act commenced, NSW Police has attempted to obtain DNA samples from all people who fall within this category, which amounts to approximately 75 per cent of the NSW correctional centre population. We reported to the Attorney General on this aspect of our review in August 2004, in our report, *The Forensic DNA Sampling of Serious Indictable Offenders under*

Part 7 of the Crimes (Forensic Procedures) Act 2000. We have included a brief update on the implementation of the recommendations made in our 2004 report, in an appendix to this report.

This report deals with the second stage of the review, our scrutiny of police officers conducting forensic procedures on suspects and volunteers. Chapter 2 outlines the key provisions of the NSW Act and Chapter 3 provides an overview of DNA sampling in Australia and overseas. Chapter 4 explains how the Act has been implemented by police and other agencies. Chapter 5 provides a snapshot of the way the legislation is being used, including a statistical analysis of forensic procedures conducted during the review period.

Chapter 6 discusses the provision of information and legal advice to suspects and volunteers. Chapter 7 discusses the various ways forensic procedures can be authorised, and whether forensic procedures are being conducted with appropriate authority. Chapter 8 examines the way forensic procedures are actually conducted, and Chapter 9 discusses the relationship between forensic procedures and other investigative procedures which fall outside the scope of the Act.

Chapter 10 examines the way DNA is analysed at the DNA laboratory and the purposes for which DNA profiles are used, and Chapter 11 looks at the accuracy of information on the DNA database, and on the police computer system.

Chapter 12 discusses DNA and contamination risks. Chapter 13 looks at evidence obtained through forensic procedures in criminal proceedings, and Chapter 14 at the processes in place for ensuring that forensic material is destroyed according to legislative requirements.

Chapter 15 describes the types of complaints and inquiries about forensic procedures the Ombudsman received during the review period, and the action NSW Police and the Ombudsman took to address these issues. The report concludes with a brief discussion of possible future uses of DNA in police investigations in Chapter 16.

There is a glossary at the end of the report.

1.4. DNA and criminal investigations

1.4.1. What is DNA?

DNA stands for 'deoxyribonucleic acid'. There are two types of DNA: mitochondrial DNA and nuclear DNA.

A person inherits mitochondrial DNA only from his or her biological mother. Mitochondrial DNA will be the same in all people who share the same maternal genetic material. For example, siblings who have the same biological mother will all have the same mitochondrial DNA.⁸

By contrast, nuclear DNA is inherited in different combinations from both biological parents, and therefore more combinations are possible. It is believed that – with the exception of identical twins – the possibility of two people having exactly the same nuclear DNA is extremely unlikely.⁹ For this reason, the preferred type of DNA for establishing identity is nuclear DNA. DNA databases use mainly nuclear DNA – DNA obtained from the nucleus of a cell.

Most cells in the human body contain a nucleus. Inside the nucleus are strands of genetic material called chromosomes. Arranged along these chromosomes, like beads on a thread, are nearly 100,000 genes.¹⁰ Each gene is composed of DNA, which is often described as 'the blueprint of life'.

This genetic or 'coding' DNA instructs the body cells to make proteins that determine everything from hair colour to our susceptibility to diseases. There is very little difference in these coding areas of DNA between different people. It has been estimated that 99.9% of a person's DNA is the same as the DNA in all other human beings.¹¹

Some areas of the DNA, found between the coding DNA, are made up of DNA that does not code for physical features or chemical processes. Scientists have not yet identified the function of these non-coding regions, although they have discovered that these areas of DNA vary extensively from person to person. It is this variability that provides the basis for distinguishing between individuals through DNA profiling.

All DNA extracted from the nucleus of any cell from the one person is the same, whether it is taken from white blood cells, hair root cells or cells from the inside of a person's mouth. A person's DNA remains the same throughout his or her life. It can be used for a range of purposes, including medical research, determining biological parentage, and the investigation and prosecution of crime.

1.4.2. What is a DNA profile?

The areas of DNA that are non-coding have been labelled 'junk' DNA. DNA profiles consist of a list of the variations obtained from certain sites (called loci) on the junk DNA plus the sex gene (XX for female, XY for male). The areas on the junk DNA that are examined are called Short Tandem Repeats (STRs). These are small sections of DNA that are repeated end on end. Different people have a different number of repeats, and therefore have different lengths of DNA. Analysing and measuring the different lengths of DNA at these sites is the basis of DNA profiling.¹²

DNA laboratories in all Australian jurisdictions use the 'Profiler Plus' system of DNA profiling.¹³ Forensic scientists do not examine the whole DNA, but only a certain number of loci on the DNA. The more loci examined the greater the likelihood that samples with the same profile came from the same person. In New South Wales, the DNA laboratory examines nine loci.

A DNA profile is different from a DNA sample. A sample contains the whole of a person's DNA, while a profile is a series of numbers and letters derived from only a small portion of a person's DNA. A DNA sample contains a great deal of information about a person, including predictive health information. While some genetic information can be derived from a DNA profile, including the person's sex and whether he or she may be related to another person whose profile is known, a profile contains far less genetic information than a DNA sample.

1.4.3. How is DNA used in criminal investigations?

DNA from biological material found at a crime scene can be compared with the DNA police take directly from a person, to determine whether the biological material found at the crime scene is likely to have come from that person.

If police suspect that a person has committed a particular offence, they can take a DNA sample from the person, and send it to the laboratory for comparison with DNA obtained from the crime scene. DNA profiles are extracted from both the person and crime samples. If the profiles match, this may be evidence, in some circumstances, that the person was involved in the crime. Further, the person's profile will be put on the DNA database, and may link the offender to other unsolved crime scenes.

Police may send forensic material from crime scenes to the laboratory for analysis even where they have not been able to identify a suspect, as it may match a profile on the DNA database from another crime scene, or a suspect or convicted offender whose profile has already been put on the database.

DNA evidence has been used as a tool in many high profile criminal investigations, including the Ivan Milat backpacker murder cases, the investigation of the attempted extortion of Arnotts Biscuits and the investigation into the disappearance of English backpacker, Peter Falconio.

Because DNA is very stable, and can withstand significant environmental impact, DNA profiles can be developed from biological material which is decades old. For this reason the new technology has also enabled police to reopen investigations of old unsolved crimes.

DNA is not only helpful to convict offenders; it can also be used to exclude suspects from police investigations. This can prevent unnecessary investigation and save valuable police resources.

Development of DNA technology has also meant that people can appeal against older convictions, if they can show that DNA taken from the perpetrator at the time of the offence does not match their own DNA.

DNA technology has also been used for identifying disaster victims, including those killed in the 2002 Bali bombings and the 2004 tsunami in south east Asia.

1.4.4. The DNA database

The DNA database is used for identifying links between offenders and crime scenes. It is primarily an intelligence tool. If a link is established between a person and a particular crime scene, this does not mean the person is guilty – it simply means that police have further information which they may be able to use to progress their investigation.

Over 25,000 person samples have been loaded onto the New South Wales DNA database, including about 19,000 samples from convicted offenders, 8,000 from suspects and 800 from volunteers. Over 14,000 crime scene samples have been loaded onto the database.¹⁴

It is not possible to say exactly how many people have their DNA on the database, as the Act prohibits profiles taken from suspects to be compared against samples taken from suspects which are already on the database.¹⁵ This

means that a significant number of people have had their DNA profile put on the database more than once. Although we can determine the number of profiles which have been put on the database, we cannot determine the number of people who have had their DNA profile put on the database, which will be fewer.

1.4.5. Limitations of DNA evidence

Because DNA is highly discriminating, DNA profiling is a powerful tool in the investigation and prosecution of crime. However, it is by no means a universal remedy. For a start, DNA evidence is only relevant in a small proportion of offences. For example, if a person has been sexually assaulted, DNA evidence would be highly relevant if the identity of the perpetrator is at issue, as DNA from the defendant could be compared with DNA found on the complainant's body or clothes. However, most sexual assault cases turn on the issue of consent. If the defendant admits having had sex with the complainant, but claims it was by consent, then DNA evidence will probably have no bearing on the trial.

Where a person's DNA is found at a crime scene, there may be a legitimate reason for it being there. As one legal practitioner has pointed out:

*All that a DNA test does is show that there is a link between a crime scene and a suspect. How that link came about is still a matter for evidence at trial.*¹⁶

For example, the person may have visited the place, and left DNA there, possibly long before the crime was committed. In this situation a DNA match can link the person to the crime scene, but cannot establish whether or not the person committed the offence. It is also possible that a person's DNA may have been transferred to the scene without the person having physically been there, either deliberately or unintentionally.

As discussed above, DNA analysis can be used to exclude suspects from police investigations. However, while any difference between a sample taken from a suspect and a sample taken from a crime scene proves that the two samples are not from the same person, it does not necessarily follow that the suspect is in fact innocent. For example, there may be multiple offenders involved in a particular offence, such as a home invasion. Just because a particular suspect's DNA does not match forensic material found at the crime scene does not mean that the suspect was not involved in the crime. By contrast, in the case of an offence where there is only one perpetrator, such as a single sexual assault, the fact that the suspect's DNA did not match the DNA obtained from the victim would probably be a good basis for excluding the suspect.

Even where there is a DNA match, and the evidence is relevant to the investigation, the evidence will never be entirely conclusive. While any difference between samples at any of the loci examined proves that the samples came from different people, the reverse is not true – if the number of sequences repeated at each of the loci is the same, this means that the two samples *could* have come from the same person, but it does not prove that they *did*. For this reason, a "match" between a person's DNA profile and a DNA profile found at a crime scene really indicates only a chance or probability that the two samples came from the same person. The more loci examined, the greater the likelihood that samples with the same profile came from the same person.¹⁷ By contrast, it is more likely that samples coming from two different people will match if the profiles are partial, or the two people are related.¹⁸

DNA evidence is only ever 'circumstantial' evidence – it is evidence of a fact from which the decision maker is asked to conclude that a further fact existed. Circumstantial evidence is sometimes contrasted with direct evidence, which is evidence given by a person that he or she actually saw, heard or otherwise perceived that a particular fact existed. For this reason, DNA evidence must be considered in the context of the other evidence adduced at trial. It will never be enough for the prosecution to rely on DNA evidence alone.

There have also been difficulties associated with the way DNA evidence is presented in court. While the scientific basis of DNA profiling is now widely accepted, there are a number of different ways of expressing statistical evidence. There has been some criticism of the way DNA evidence is explained to the jury, particularly about the statistical significance of a match and the probability of a match occurring by coincidence. This had led to concerns about juries making improper inferences of guilt.¹⁹

1.5. Methodology

This report documents our work and activities scrutinising the exercise of police functions under the Act.²⁰ Our research was guided by the scope of our review powers, as defined by section 121 of the Act. There are some related police functions which we have not examined, as they are not within the scope of our review. For example, taking DNA samples from victims of crime, or photographing their injuries, are not functions of police under the Act. We have, however, included some information about these activities.

In order to conduct a thorough and balanced review, we sought the views of people who have been directly affected by the legislation. This included people in the community who have undergone forensic procedures; police officers who carry out forensic procedures; the Forensic Procedures Implementation Team (FPIT), which coordinates DNA sampling by police officers at a management level; the Division of Analytical Laboratories (DAL), which analyses DNA samples and manages the DNA database. We sought information from a range of sources on the central research question of whether police officers are exercising their functions under the Act in a proper, fair and effective manner. By adopting this method, we also aimed to minimise reliance on any one source of information or research method.

For the first part of this review, of the DNA sampling of serious indictable offenders, we interviewed nearly 200 inmates who had provided a DNA sample under the Act. Through these interviews we were able to obtain information directly from inmates about their experiences of DNA sampling.²¹ For this part of our review, which deals with suspects and volunteers, it has been difficult to obtain information directly from people who have undergone forensic procedures. We considered advertising for submissions from people who had undergone forensic procedures but decided against it due to the significant cost involved and the likelihood of receiving a very limited response. We also sought to access the views of these people through legal centres, but without success. We were, however, able to review the responses of people undergoing forensic procedures through watching videos of the procedures, and through reviewing the consent forms filled in by police officers, which provide for the person's response, if any, to be recorded in writing. Some of our interviews with police officers also gave us an insight into the experience of people undergoing forensic procedures, for example where police raised concerns about the complexity of the information provided to suspects and volunteers.

In some of our activities, time and resources limited us to auditing small samples. The size of the samples examined means it was not always possible to draw conclusions about the way forensic procedures have been conducted throughout New South Wales through the whole of the review period. However, these audits were extremely useful in providing a context for the findings from our other research activities, and enabled us to identify areas of concern.

From time to time during our review, our research pointed to areas of police practice or policy which were of concern. In these situations, we brought the issue to the attention of NSW Police and provided an opportunity for police to respond to our concerns. This approach was consistent with the Ombudsman's role in assisting agencies to remedy deficiencies and improve service delivery. This report describes the actions taken by NSW Police and other relevant agencies in response to concerns we have raised during the course of our review.

Details of our main research strategies are set out below.

1.5.1. Examining police computer records

We examined information from the NSW Police Computerised Operational Policing System (COPS). COPS provides a structure for police officers to record details of forensic procedures, including the name of the person undergoing the procedure, as well as the date, location and type of procedure.

COPS also contains a 'narrative' field, which allows officers to describe an event in their own words, and to record other important features of the incident. We examined information in the 'narrative' field for events which resulted in police conducting forensic procedures, to get an idea of the types of circumstances in which police are conducting forensic procedures. Many of the case studies in this report are based on information from COPS narratives.

We discussed the limitations of the COPS system in a previous report, *Policing Public Safety*.²² We found similar problems during the current review, the main problems being incorrect or incomplete entries of information about forensic procedures on the COPS database.

In our report on the DNA sampling of serious indictable offenders, we noted that data entry was carried out by small teams of police officers who were responsible for carrying out the mass sampling of inmates, and for this reason there were fewer errors on COPS.²³ By contrast, forensic procedures conducted on suspects and volunteers are carried out by police officers with different levels of skills and experience in police stations across the whole of New South Wales. As expected, inaccurate information on COPS was a more significant problem for this part of our review.

1.5.2. Audit of police local area commands

We audited eight police local area commands, which is ten per cent of the total number of commands in New South Wales. In determining which commands to audit, we decided to select at least one command from each of the five regions of NSW Police;²⁴ four metropolitan and four regional commands; and some commands which conducted a large number of forensic procedures and some which conducted a small number of forensic procedures, compared to the rest of the state.

The aim of the audit was to observe the implementation of the Act by NSW Police, to identify any problems experienced with the implementation of the Act, to assess the level of compliance with the provisions of the Act by those administering forensic procedures, and to assess the level of compliance with NSW Police policies relating to forensic procedures.

In each of the commands selected, we examined the facilities and equipment used to conduct forensic procedures. We examined the rooms where forensic procedures are conducted, the video facilities for recording procedures, and any training material on hand. We also examined the storage practices at each command, for example where DNA sample kits are kept, where samples are kept before being sent to the DNA laboratory, and where videos of procedures are kept.

We also interviewed each of the eight local area commanders, and other key police officers who are involved in the carrying out of forensic procedures. We asked officers how the Act had been implemented in their command, whether they had encountered any problems with it, and whether they had any good ideas which could be shared with other commands across the state.

We also audited records of individual forensic procedures conducted between 1 January 2001 and 30 April 2004 (the audit period), to assess the level of compliance with the Act, the level of compliance with NSW Police policy, and the accuracy of hard copy data kept at the command. We did this by examining the relevant documentation, including registers established for recording the use of sample kits and video tapes, consent forms, exhibits books, custody management records and video tapes of forensic procedures.

To assist us in conducting the audits, the NSW Police Forensic Procedures Implementation Team (FPIT) provided us with a download from the Computerised Operational Policing System (COPS) of all recorded forensic procedures conducted during the audit period. We checked this information against the hardcopy records held at each command. We also reviewed the event narratives for each procedure audited to establish whether the narrative referred to the procedure being conducted, and whether the person undergoing the procedure was a suspect or a volunteer.

According to the COPS download provided by FPIT, the eight commands conducted a total of 533 forensic procedures during the audit period. Due to time constraints, we did not audit every individual procedure. For those commands which conducted less than 50 forensic procedures during the audit period, we sought to audit every procedure. For those commands which had conducted more than 50 forensic procedures in the audit period, we sought to audit between 50 and 75 procedures.

Some of the procedures we had selected for auditing we were unable to audit, for example because the location recorded on COPS was inaccurate, and the procedure had in fact been conducted at another command, or because the COPS record was a duplicate of another procedure we had already audited. We excluded these, which meant the total number of procedures actually audited was moderately less than anticipated. We sought to audit 451 of the 529 procedures conducted during the audit period. However, 80 procedures were excluded. This resulted in an audit of 371 individual procedures.

We also watched a number of video recordings of forensic procedures. Some videos were selected because something about the procedure was unusual (for example, the person being tested was a child, or an interpreter was present). Some videos were selected because the documentation available was incomplete and it appeared additional information could be obtained by watching the video. Most of the videos, however, were selected at random. We watched a total of 146 videos. We sought to watch approximately 15 videos at each command, or more if time permitted. At some commands this was not possible because some videos had been destroyed, or were kept on the brief of evidence and were not accessible at the time of our audit visit.

In this report, percentages are generally expressed as a proportion of the 371 procedures actually audited. Where the information was obtained through watching videos, percentages are expressed as a proportion of the 146 videos watched.

1.5.3. Discussion Paper

Following our audit of local area commands, we provided NSW Police with a Discussion Paper, which provided an overview of the audit process and our main findings. We identified some areas of concern, and set out our preliminary views and recommendations. We asked that each of the commands audited be given the opportunity to review and comment on the Paper. We met representatives of NSW Police to discuss our preliminary findings and recommendations.

We did not release the Discussion Paper to the broader community as most of the issues discussed related to police procedure, and also because we identified and commented on individual commands and included details of specific forensic procedures which were not appropriate for general disclosure.

1.5.4. Survey of local area commands

We conducted a written survey of all 80 police local area commands. We asked about officer accreditation, the frequency and types of procedures conducted, use of force to conduct procedures, how easy it is for police officers to comply with the Act and the police forensic procedures policy, how DNA links are managed in the command, the effect of delays in DNA analysis on the command, any problems the command may have experienced with the Act, and future directions for the use of DNA in criminal investigations. We received a written response from every command surveyed.

1.5.5. Consultation letter

We wrote to over 70 stakeholders, including government organisations, relevant health and other service providers, Aboriginal organisations, community groups and legal practitioners. We asked whether the Act had had any impact on the organisation, its members or clients, and whether they had identified any problems or concerns about the Act or its operation. We received 19 responses from a range of agencies and many of the issues they raised became the subject of further inquiry.

1.5.6. Survey of magistrates

We conducted a written survey of magistrates about any experience they may have had with the Act. We focused on applications for court orders to conduct forensic procedures, and on the use of DNA evidence in proceedings for an offence. We received six responses from magistrates.

1.5.7. Publicising our review in the Law Society Journal

We published an article in the Law Society Journal, outlining the key provisions of the Act and explaining how legal practitioners may become involved where police wish to conduct a forensic procedure on a suspect or volunteer. We asked about any issues or problems legal practitioners may have encountered through their experience with the Act, and requested comments or submissions.

1.5.8. Statistical analysis of procedures conducted

We have analysed statistical material obtained from NSW Police about the location, frequency and type of forensic procedures conducted during the review period, and some demographic information, including certain characteristics of people who have undergone forensic procedures.

1.5.9. Analysis of complaints and inquiries received by Ombudsman

We analysed all complaints and inquiries about forensic procedures conducted on suspects and volunteers. We were able to identify trends in the kinds of complaints and whether there were any systemic issues which needed to be addressed.

1.5.10. Inquiries into the DNA analysis service provided by the laboratory

NSW Police has entered into a contract with DAL, which is part of the Western Sydney Area Health Service, to analyse DNA samples obtained from people and crime scenes for police, and to operate the DNA database.

We visited the laboratory, to gain an insight into the way it manages, stores and records information about DNA samples taken under the Act.

We also conducted an investigation under Section 18 of the *Ombudsman Act 1974* into the handling of DNA samples by DAL. We obtained information about systems and processes for the receipt, analysis and destruction of forensic material obtained under the Act. We also obtained information about the factors which contribute to the length of time taken to analyse DNA samples, and provide analysis results to NSW Police.

We followed up 180 of the 371 forensic procedures we examined during our audit of police local area commands, to assess consistency between data held by police and data held by the laboratory. We also reviewed the amount of time taken to transport samples from police stations to the laboratory and the turnaround times between police submitting DNA samples to the laboratory and the laboratory providing an analysis report to police.

1.5.11. Observation of DNA Advisory Committee meetings

DAL is a division of the Institute of Clinical Pathology and Medical Research. The Institute established a DNA Advisory Committee as a forum for comment, advice and review of the DNA profiling laboratory. Key stakeholders are represented, including DAL, NSW Police, Legal Aid NSW, the Director of Public Prosecutions, Privacy NSW and the Ministry of Police. We attended several of the DNA Advisory Committee meetings as observers to monitor the issues arising for the different agencies in relation to their involvement in the use of DNA profiling.

1.5.12. Court proceedings

We monitored the outcomes of prosecutions involving evidence obtained under the Act, and proceedings where the accused challenged evidence obtained through a forensic procedure.

1.5.13. Media monitoring

We monitored Australian and overseas media throughout the review period for developments in DNA laws, and the use of DNA technology in the investigation and prosecution of criminal offences.

1.5.14. Ombudsman website

Our review was publicised on our website. We asked for comments or submissions from interested organisations or individuals.

1.6. Confidentiality

We have treated the sources of information obtained through the course of our review as confidential. In this report, we have attempted to exclude any information which could be used to identify any individual.

1.7 Recent developments: the Crimes (Forensic Procedures) Amendment Bill 2006

On 28 September 2006, as this report was going to print, the Government introduced into Parliament the *Crimes (Forensic Procedures) Amendment Bill*. If passed, it would make changes including the following:

- Facilitating New South Wales' participation in the national DNA database.
- Police will be permitted to take a DNA sample from a person who has previously served a custodial sentence for a serious offence, if the person is charged with another serious offence and the person's DNA profile is not on the database yet.
- Suspects who are ordered by police to provide a DNA sample will be able to provide it by self-administered buccal swab, rather than having to provide a hair sample. Further, buccal swabs would no longer be a separate category of forensic procedure – they would be considered non-intimate forensic procedures when self-administered, and intimate forensic procedures when administered by somebody else.
- Police would be required to provide better information to volunteers, and forensic procedures could only be conducted on a child volunteer with the informed consent of the child.
- The regulations would specify who the "responsible person" is.
- Time spent conducting a forensic procedure would be considered "time out" for the purpose of calculating any investigation period.
- Police would no longer be required to record non-intimate photographs on video.
- Magistrates would have to consider specific criteria when determining whether to order a suspect to undergo a forensic procedure.
- Several areas of the legislation would be clarified – including what is required where police provide suspects with DNA analysis results, what "destruction" of forensic material means, and when police can request a suspect to undergo a forensic procedure.

Most of these proposals are consistent with the recommendations contained in this report.

Endnotes

- ² *Crimes (Forensic Procedures) Act 2000* s 123.
- ³ NSW Legislative Council Standing Committee on Law and Justice, Review of the *Crimes (Forensic Procedures) Act 2000* (7 February 2002).
- ⁴ NSW Legislative Council Hansard, 13 March 2002, The Hon Ron Dyer MLC, p. 298.
- ⁵ *Crimes (Forensic Procedures) Act 2000* s 122.
- ⁶ *Crimes (Forensic Procedures) Act 2000* s 121.
- ⁷ *Crimes (Forensic Procedures) Act 2000* s 3 and Part 7.
- ⁸ Richard Saferstein, *Criminalistics: An Introduction to Forensic Science*, Seventh Edition, Prentice Hall, New Jersey, 2001.
- ⁹ Robert Goetz, 'DNA For Lawyers: Unraveling the Mystery', Paper presented at the Sixth International Conference and General Meeting of the International Association of Prosecutors, Sydney, 2-7 September 2001.
- ¹⁰ Richard Saferstein, *Criminalistics: An Introduction to Forensic Science*, Seventh Edition, Prentice Hall, New Jersey, 2001.
- ¹¹ Roger Highfield, "DNA survey finds all humans are 99.9% the same", <http://www.telegraph.co.uk/news/>, 20 December 2002.
- ¹² NSW Police, Forensic Services Group, DNA Sampling presentation, 2001.
- ¹³ For a more detailed explanation of the profiling process used in the NSW DNA laboratory, see *R v Gallagher* [2001] NSWSC 462 (Barr J).
- ¹⁴ DAL draft business case, January 2005.
- ¹⁵ *Crimes (Forensic Procedures) Act 2000* s 93.
- ¹⁶ Andrew Haesler, Public Defender, "DNA – An Overview of Testing and the *Crimes (Forensic Procedures) Act 2000*" (June 2003).
- ¹⁷ See *R v Gallagher* [2001] NSWSC 462 (Barr J) at paragraph 19.
- ¹⁸ United Kingdom Forensic Science Service, *National DNA Database Annual Report 2002-2003*, p. 15.
- ¹⁹ See Graham Hazlitt, "DNA Statistical Evidence – Unravelling the Strands", *Judicial Officer's Bulletin*, Volume 14 Number 9.
- ²⁰ Other than functions exercised under Part 7 of the Act, as we have reported on this separately: see NSW Ombudsman, *The Forensic DNA Sampling of Serious Indictable Offenders under Part 7 of the Crimes (Forensic Procedures) Act 2000* (August 2004).
- ²¹ NSW Ombudsman, *The Forensic DNA Sampling of Serious Indictable Offenders under Part 7 of the Crimes (Forensic Procedures) Act 2000* (August 2004), p. 22.
- ²² NSW Ombudsman, *Policing Public Safety: Report under section 6 of the Crimes Amendment (Police and Public Safety) Act 1998* (November 1999).
- ²³ NSW Ombudsman, *The Forensic DNA Sampling of Serious Indictable Offenders under Part 7 of the Crimes (Forensic Procedures) Act 2000* (August 2004), p. 21.
- ²⁴ During the review period, NSW Police was divided into five regions – Inner Metropolitan, Greater Metropolitan, Northern, Southern and Western regions.

Chapter 2. Key provisions of the Act

The Act facilitates the collection of DNA samples and other forensic material by police, and safeguards the rights and interests of people who police wish to undergo forensic procedures. Below we have provided a synopsis of the Act in what we hope is a simple format. The Act is complex and we have summarised relevant portions where appropriate. Corresponding sections have been endnoted for appropriate reference. In addition, relevant provisions are explained in greater detail in relevant parts of the report.

2.1. What is a forensic procedure?

A forensic procedure is a way to obtain evidence that relates to the investigation and prosecution of a crime.

A forensic procedure cannot be conducted for the sole purpose of establishing the identity of the person who provides the sample.²⁵ For example, police could take a DNA sample from a suspect to compare to DNA found at a crime scene. However, police could not take a DNA sample from a person purely to establish that person's identity.

The Act authorises three different categories of forensic procedures – buccal swabs, non-intimate forensic procedures and intimate forensic procedures.

2.1.1. Buccal swabs

A buccal swab is taken to obtain a sample of a person's DNA. It is the most common type of forensic procedure.

A buccal swab is completely painless, and is self-administered. The person providing the sample gently scrapes the inside of his or her mouth with a foam tipped plastic swab, which looks a bit like a cotton bud. The person hands the foam swab to a police officer, who then presses it onto specially treated paper, to transfer saliva and cheek cells from the swab onto the paper. The paper is sealed in a small envelope, identified with a barcode and put with the relevant documentation into a tamper-evident bag. The swab is then given back to the person who has provided the sample. Police send the tamper-evident bag to the DNA laboratory for analysis. This process has changed since we completed our first report on serious indictable offenders. The change has come about as police comply with the requirement to share the sample with the person supplying the forensic material.²⁶ We discuss this requirement further in section 8.10 of this report.

2.1.2. Non-intimate forensic procedures

Section 3 of the Act authorises the following non-intimate forensic procedures:

- (a) *an external examination of a part of the body other than:*
 - (i) *the genital or anal area or the buttocks, or*
 - (ii) *the breasts of a female or a transgender person who identifies as a female, that requires touching of the body or removal of clothing,*
- (b) *the taking of a sample of hair other than pubic hair,*
- (c) *the taking of a sample from a nail or under a nail,*
- (d) *the taking of a sample by swab or washing from any external part of the body other than:*
 - (i) *the genital or anal area or the buttocks, or*
 - (ii) *the breasts of a female or a transgender person who identifies as a female,*
- (e) *the taking of a sample by vacuum suction, by scraping or by lifting by tape from any external part of the body other than:*
 - (i) *the genital or anal area or the buttocks, or*
 - (ii) *the breasts of a female or a transgender person who identifies as a female,*

- (f) *the taking of a hand print, finger print, foot print or toe print,*
- (g) *the taking of a photograph of a part of the body other than:*
 - (i) *the genital or anal area or the buttocks, or*
 - (ii) *the breasts of a female or a transgender person who identifies as a female,*
- (h) *the taking of an impression or cast of a wound from a part of the body other than:*
 - (i) *the genital or anal area or the buttocks, or*
 - (ii) *the breasts of a female or a transgender person who identifies as a female,*
- (i) *the taking of physical measurements (whether or not involving marking) for biomechanical analysis of an external part of the body other than:*
 - (i) *the genital or anal area or the buttocks, or*
 - (ii) *the breasts of a female or a transgender person who identifies as a female.²⁷*

The hair samples described at (b) above require the police officer taking the sample to only take as much hair as is necessary for analysis of the sample to be carried out. The strands of hair can be taken from the head, arms or legs and are to be extracted using the least painful technique known and available.²⁸ Police officers in New South Wales have been taught to use the 'lever arch method', where the officer grasps a few hairs between the thumb and forefinger, and pulls the hairs out in a rolling motion. The roots of the hair must be included, and the sample should contain at least six plucked hairs.²⁹ This is the second most common type of DNA forensic procedure conducted by NSW Police.

2.1.3. Intimate forensic procedures

Section 3 of the Act authorises the following "intimate forensic procedures":

- (a) *an external examination of:*
 - (i) *the genital or anal area or the buttocks, or*
 - (ii) *the breasts of a female or a transgender person who identifies as a female,*
- (b) *the taking of a sample of blood,*
- (c) *the taking of a sample of saliva (otherwise than by buccal swab),*
- (d) *the taking of a sample of pubic hair,*
- (e) *the taking of a sample by swab or washing from:*
 - (i) *the external genital or anal area or the buttocks, or*
 - (ii) *the breasts of a female or a transgender person who identifies as a female,*
- (f) *the taking of a sample by vacuum suction, by scraping or by lifting by tape from:*
 - (i) *the external genital or anal area or the buttocks, or*
 - (ii) *the breasts of a female or a transgender person who identifies as a female,*
- (g) *the taking of a dental impression,*
- (h) *the taking of a photograph of:*
 - (i) *the genital or anal area or the buttocks, or*
 - (ii) *the breasts of a female or a transgender person who identifies as a female,*
- (i) *the taking of an impression or cast of a wound from:*
 - (i) *the genital or anal area or the buttocks, or*

(ii) the breasts of a female or a transgender person who identifies as a female.³⁰

The Act does not authorise any intrusion into a person's body cavities other than the mouth.³¹

2.2. Who can undergo a forensic procedure?

The Act enables police to conduct forensic procedures on three categories of people – convicted offenders, suspects and volunteers.

2.2.1. Convicted offenders

Part 7 of the Act authorises the carrying out of forensic procedures on most people who are serving a sentence of imprisonment for a serious indictable offence. A "serious indictable offence" is an offence which carries a maximum penalty of five years imprisonment or more.³² People who have been convicted of a serious indictable offence make up approximately 75 per cent of the correctional centre population in New South Wales.

Since the Act commenced in January 2001, NSW Police has attempted to obtain DNA samples from all people who have been convicted of a serious indictable offence, in order to build a substantial archive of profiles for the DNA database. NSW Police anticipated that the mass sampling of these convicted offenders would provide a valuable tool to assist in the investigation of crime.

The Ombudsman has already reported on the DNA sampling of serious indictable offenders.³³

2.2.2. Suspects

Parts 2 to 6 of the Act provide for the carrying out of forensic procedures on suspects. A suspect is a person whom a police officer suspects on reasonable grounds has committed an offence, a person who has been charged with an offence, or a person who has been summoned to appear before a court in relation to an offence allegedly committed by the person.³⁴

Before requesting a suspect to undergo a forensic procedure, police must be satisfied that:

- the person is a suspect
- the person is not a child or incapable person
- there are reasonable grounds to believe that the forensic procedure might produce evidence tending to confirm or disprove that the suspect committed an offence, (or an indictable or prescribed offence for intimate forensic procedures, the taking of a sample by buccal swab or hair sample), and
- the request for consent is justified in all the circumstances.³⁵

Where the suspect is an adult, police may conduct a forensic procedure with the person's informed consent. Strict rules apply to 'informed consent' under the Act.³⁶ If a suspect does not consent to a forensic procedure (or withdraws consent before or during the carrying out of the procedure), police can only proceed by order of a senior police officer, (that is, an officer at or above the rank of sergeant) or of a magistrate or other authorised justice.³⁷ A senior police officer order will suffice if the suspect is under arrest, and the proposed procedure is a 'non-intimate' forensic procedure (including a hair sample, other than pubic hair).³⁸ However, police must obtain an order from a magistrate or other authorised justice if the suspect is not under arrest, or the procedure proposed is an 'intimate' forensic procedure or a buccal swab.

Where the suspect is aged between 10 and 18 years, or is an adult who is incapable of understanding the general nature and effect of a forensic procedure or of indicating whether he or she consents to the procedure, police can only proceed to conduct a forensic procedure by order of a magistrate or other authorised justice.³⁹

Police may use reasonable force to enable a forensic procedure to be carried out on a suspect, or to prevent the loss, destruction or contamination of a sample.⁴⁰

2.2.3. Volunteers

Part 8 of the Act authorises the carrying out of forensic procedures on volunteers. A volunteer is a person who is not a suspect, who volunteers to undergo a forensic procedure.

If the volunteer is a capable adult, police can only conduct a forensic procedure with the person's informed consent. If the person does not consent, or withdraws consent before or during the forensic procedure, the procedure cannot proceed.⁴¹

If the volunteer is a child or incapable person, a forensic procedure can be carried out either with:

- the informed consent of the person's parent or guardian, or
- by order of a magistrate.⁴²

A magistrate may order a forensic procedure if:

- the consent of the parent or guardian cannot reasonably be obtained
- the magistrate is satisfied the child or incapable person, or the parent or guardian, is a suspect and the forensic procedure is likely to produce evidence tending to confirm or disprove that he or she committed an offence, or
- the parent or guardian consents but subsequently withdraws the consent.⁴³

However, the procedure cannot proceed if the child or incapable person objects to or resists the carrying out of the procedure.⁴⁴

A person may volunteer to give police a DNA sample because there is good reason for the person's DNA to be at a crime scene, but the person is not a suspect. This may include, for example, a witness to a crime, or a person who normally resides at the place where a crime has been committed. It would also include the consensual sexual partner of a person who has been sexually assaulted by somebody else. In these cases the volunteer's DNA can be compared against any forensic material found at the crime scene, which may enable the laboratory to create a DNA profile of the offender.

In a different context, a person may volunteer a DNA sample as part of a mass screening, where police ask all members of a certain group to provide a sample (for example, all men of a certain age who live in a particular town). Police may conduct a mass screening in the hope that the offender will volunteer a sample along with everybody else in the group, or alternatively that by eliminating a large number of people from the investigation, police can focus inquiries on any people who do not volunteer a sample.

2.2.4. Victims of crime and other "excluded volunteers"

The Act does not apply to forensic procedures carried out on people who are "excluded volunteers".⁴⁵ This includes victims of offences against the person (under Part 3 of the *Crimes Act 1900*) and victims of robbery offences (under Subdivision 2 of Division 1 of Part 4 of the *Crimes Act*). For example, police may wish to photograph a victim's injuries, to use as evidence in criminal proceedings. Victims may also be sampled for biological material, for example victims of sexual assault may be asked to undergo a genital swab.

Also excluded from the Act are people who volunteer their fingerprints or handprints for elimination purposes in relation to a property offence (under Part 4 of the *Crimes Act*). For example, police may wish to obtain prints from a person whose house has been broken into, for the purpose of elimination.

NSW Police has developed its own policies for carrying out forensic procedures on victims of crime and other 'excluded volunteers'. We note that the NSW Police policies for conducting forensic procedures on victims of offences against the person largely mirror the legislative requirements in relation to volunteers.

Because 'excluded volunteers' are not covered by the Act, the way police conduct forensic procedures in these circumstances is beyond the scope of this review.

2.3. Who can conduct a forensic procedure?

Depending on the type of procedure, a forensic procedure can be conducted by an appropriately qualified police officer, medical practitioner, nurse, dentist, dental technician or other appropriately qualified person.⁴⁶ Buccal swabs are self-administered under the supervision of an appropriately qualified police officer or person.⁴⁷

A suspect is entitled to have a medical practitioner of the suspect's choice present while any of the following procedures is carried out: an external examination of the person's genital area, anal area, buttocks or breasts; the taking of blood; the taking of a sample of pubic hair; the taking of a sample by swab or washing, vacuum suction,

scraping or lifting by tape from the person's genital area, anal area, buttocks or breasts; the taking of a photograph or impression or cast of a wound from the person's genital area, anal area, buttocks or breasts; or the taking of an impression or cast of a wound from another external part of the body.⁴⁸

A suspect is entitled to have a dentist of the suspect's choice present during the making of a dental impression.⁴⁹

2.4. What happens after a DNA sample has been taken?

2.4.1. From police station to laboratory

The Act is silent on how DNA samples should be stored or transported to the DNA laboratory. However, it is NSW Police policy to store samples in a cool, dry place, and to send DNA samples to the laboratory as soon as possible if the suspect is in custody, and in any event within five days. If the sample is taken in a metropolitan area, it is taken to the laboratory by police, like any other exhibit. If the sample is taken in a regional area, police arrange for it to be collected by TNT Failsafe from the nearest major police station. The courier then takes it to the DNA laboratory.⁵⁰

The Act provides for a DNA database system, which contains indexes of DNA profiles obtained from crime scenes, suspects, volunteers, convicted offenders, missing persons and unknown deceased persons.⁵¹ When DNA profiles are put on the database, only certain types of matching are permitted:⁵²

- DNA samples taken from suspects may be matched against the entire crime scene index. This means that where police obtain forensic material from a crime scene, and take a sample from the person suspected of having committed the offence, the laboratory can compare the two samples to see if the DNA profile of the suspect matches the forensic material from the crime scene. Further, the laboratory can compare the suspect's DNA profile to all the other DNA profiles derived from crime scenes, even though the person may not previously have been identified as a suspect in relation to those matters.
- DNA samples taken from a volunteer may only be used for a purpose permitted by the volunteer. A volunteer may consent to his or her profile being placed on the DNA database for the limited purpose of comparison against forensic material obtained in relation to the particular offence being investigated. Alternatively, a volunteer may consent to his or her profile being placed on the DNA database for unlimited purposes, in which case the sample may be matched against crime scene, missing persons and unknown deceased persons indexes.
- DNA samples taken from convicted offenders may be matched against the entire crime scene index and other indexes (except the volunteers (limited purpose) index).

The Act creates certain offences for the supply of forensic material for prohibited analysis, unauthorised access to information on the DNA database, unauthorised matching of DNA profiles and disclosure or misuse of information obtained from forensic procedures.⁵³

2.4.2. Repeat sampling

The DNA laboratory may reject certain samples, for example because the tamper-evident bag in which the sample was stored had not been sealed properly, or because police did not provide sufficient forensic material for analysis.

In these circumstances, police may approach the person sampled to seek consent to a further procedure. Where that is not possible, the Act also provides that police may apply to a magistrate for an order authorising a forensic procedure to be carried out on a suspect for a second time, where the forensic material obtained from the first forensic procedure cannot be analysed, provided that repeating the forensic procedure is justified in all the circumstances.⁵⁴

2.5. Destruction of forensic material

The Act provides for the destruction of forensic material in certain circumstances. This means destroying any means of identifying the forensic material or information with the person from whom it was taken or to whom it relates. The physical destruction of the forensic material – the actual saliva or cheek cells or blood cells, for example – is not necessary.⁵⁵

Forensic material taken from convicted offenders remains on the DNA database, unless the offender's conviction is quashed, in which case it must be destroyed.⁵⁶

Forensic material taken from a suspect must be destroyed if the person is found to have committed the offence but no conviction is ordered, or the person is acquitted of the offence, provided no appeal is lodged (or the acquittal is confirmed or the appeal withdrawn), and the suspect is not being investigated for, or has a proceeding against them for another offence. If proceedings have not commenced within 12 months of police taking a suspect's DNA sample, it must be destroyed, unless a warrant has been issued for the apprehension of the suspect. Police or the Director of Public Prosecutions may also apply to a magistrate to extend the 12 month period. The magistrate may extend the period if there are special reasons for doing so.⁵⁷

The Act does not specifically provide for the destruction of forensic material taken from volunteers. However, it does provide that any identifying information (that is, information which could be used to discover the identity of the person who provided the DNA sample) relating to a volunteer must be removed from the database as soon as practicable after the agreed retention period ends.⁵⁸

2.6. Safeguards for people undergoing forensic procedures

The Act contains a number of safeguards, to protect the rights and interests of people on whom police would like to conduct a forensic procedure. The safeguards in the Act focus on protecting the civil liberties of the person undergoing the procedure, by making sure the person is informed about the nature and consequences of the procedure, receives adequate support and is not kept in custody for an unreasonable length of time. In addition to some of the protections offered above the following are provided for:

- Before asking a suspect to consent to a forensic procedure, police must give the suspect reasonable opportunity to communicate in private with a legal practitioner of the suspect's choice.⁵⁹ Before asking a volunteer to consent to a forensic procedure, police must inform the volunteer that he or she may consult a legal practitioner of choice before deciding whether or not to consent to the procedure.⁶⁰
- Police must inform suspects and volunteers of certain matters before asking for consent to conduct a forensic procedure. Police must inform suspects of matters such as the purpose for which the procedure is required, the way it will be carried out, that it may produce evidence against the suspect which might be used in a court of law, that consent may be refused, the consequences of refusing consent, and that information obtained from DNA analysis may be put on the DNA database.⁶¹ Police must inform volunteers of matters such as the way the proposed procedure will be carried out, that the volunteer is under no obligation to undergo the procedure, that consent might be withdrawn at any time, that it may produce evidence that may be used in court of law, that information obtained from DNA analysis may be put on the DNA database, and that information put on the database may be retained for such period as the Commissioner of Police and volunteer agree, and then must be removed from the system.⁶²
- Where a police officer believes on reasonable grounds that a suspect is unable to communicate with reasonable fluency, because of inadequate knowledge of English or a physical disability, police must arrange for an interpreter to be present (including by telephone) before taking certain action, including asking for consent to a forensic procedure, ordering a forensic procedure to be carried out, cautioning a suspect or carrying out the forensic procedure.⁶³
- Police must caution a person undergoing a forensic procedure that he or she does not have to say anything while the procedure is carried out, and that anything the person does say may be used in evidence.⁶⁴
- A forensic procedure cannot be carried out while a suspect is being questioned. If questioning has not been completed before the procedure is conducted, it must be suspended.⁶⁵
- There are limits on the amount of time a person may be detained for the purpose of undergoing a forensic procedure. If a suspect is under arrest, police must carry out the procedure within two hours of the usual investigation period.⁶⁶ If a suspect is not under arrest, police must carry out the procedure as quickly as reasonably possible, but in any case within two hours after the suspect presents to the investigating officer.⁶⁷
- Forensic procedures must be carried out in circumstances affording reasonable privacy to the person undergoing the procedure, and must not be carried out in the presence or view of any person whose presence is not necessary or of a person of the opposite sex.⁶⁸
- Forensic procedures cannot be carried out in a cruel, inhuman or degrading manner.⁶⁹
- A person authorised to carry out a forensic procedure may use reasonable force.⁷⁰
- A suspect is entitled to have a medical practitioner or dentist of choice present when certain procedures are carried out.⁷¹

- Some people have the right to have an interview friend with them when they are asked to consent to a forensic procedure, at any hearing for a court order authorising a forensic procedure, and while the procedure is carried out.⁷²
- Police must, if practicable, electronically record the provision of information to a suspect, and the suspect's response. Police must also electronically record the procedure itself, unless it is not practicable, or the suspect objects to the recording. The suspect must also be informed of the reasons for recording the procedure, including the protection this provides the suspect. Suspects must also be given the opportunity to view any recording made.⁷³
- Following the taking of a sample, where there is sufficient material to share, police must ensure part of the material (sufficient for analysis) is made available to the suspect.⁷⁴ Where the forensic procedure involves taking a photograph of part of a suspect's body, police must ensure that a copy of the photograph is made available to the suspect.⁷⁵
- Police must ensure that a copy of the results of DNA analysis is available to a suspect, unless this would prejudice the investigation of an offence.⁷⁶

The Act provides that evidence obtained through a forensic procedure is inadmissible where there has been any breach or failure to comply with any provision of the Act in relation to a forensic procedure, or the recording or use of the DNA database, unless the person does not object or the court is of the opinion that the desirability of admitting the evidence outweighs the undesirability of admitting the evidence that was not obtained in compliance with the provisions of the Act or the mistake arose out of a mistaken belief as to the age of a child.⁷⁷

The Act does not specifically prohibit police from taking covert DNA samples, and this type of conduct is essentially unregulated. However, a court may find the evidence inadmissible, if it has been obtained improperly. Further information on covert sampling can be found in section 9.2.

Endnotes

²⁵ *Crimes (Forensic Procedures) Act 2000* s 3.

²⁶ *Crimes (Forensic Procedures) Act 2000* s 58.

²⁷ *Crimes (Forensic Procedures) Act 2000* s 3.

²⁸ *Crimes (Forensic Procedures) Act 2000* s 49.

²⁹ Memorandum of Understanding between NSW Police and the DNA laboratory.

³⁰ *Crimes (Forensic Procedures) Act 2000* s 3.

³¹ *Crimes (Forensic Procedures) Act 2000* s 3.

³² *Crimes (Forensic Procedures) Act 2000* s 3.

³³ NSW Ombudsman, *The Forensic DNA Sampling of Serious Indictable Offenders under Part 7 of the Crimes (Forensic Procedures) Act 2000* (August 2004).

³⁴ *Crimes (Forensic Procedures) Act 2000* s 3.

³⁵ *Crimes (Forensic Procedures) Act 2000* s 12 and 20.

³⁶ *Crimes (Forensic Procedures) Act 2000* s 7.

³⁷ *Crimes (Forensic Procedures) Act 2000* s 14, 17 and 22.

³⁸ *Crimes (Forensic Procedures) Act 2000* s 17.

³⁹ *Crimes (Forensic Procedures) Act 2000* s 3, 8 and 23.

⁴⁰ *Crimes (Forensic Procedures) Act 2000* s 47(1).

⁴¹ *Crimes (Forensic Procedures) Act 2000* s 79.

⁴² *Crimes (Forensic Procedures) Act 2000* s 76.

⁴³ *Crimes (Forensic Procedures) Act 2000* s 80.

⁴⁴ *Crimes (Forensic Procedures) Act 2000* s 76.

⁴⁵ *Crimes (Forensic Procedures) Act 2000* s 76A.

⁴⁶ *Crimes (Forensic Procedures) Act 2000* s 50.

⁴⁷ *Crimes (Forensic Procedures) Act 2000* s 50(4).

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- ⁴⁸ *Crimes (Forensic Procedures) Act 2000* s 50.
- ⁴⁹ *Crimes (Forensic Procedures) Act 2000* s 50.
- ⁵⁰ NSW Police, "Standard Operating Procedures – Forensic Procedures".
- ⁵¹ *Crimes (Forensic Procedures) Act 2000* s 90.
- ⁵² *Crimes (Forensic Procedures) Act 2000* s 93.
- ⁵³ *Crimes (Forensic Procedures) Act 2000* s 91 to 94.
- ⁵⁴ *Crimes (Forensic Procedures) Act 2000* s 27.
- ⁵⁵ *Crimes (Forensic Procedures) Act 2000* s 3(5).
- ⁵⁶ *Crimes (Forensic Procedures) Act 2000* s 87.
- ⁵⁷ *Crimes (Forensic Procedures) Act 2000* s 88.
- ⁵⁸ *Crimes (Forensic Procedures) Act 2000* s 94(2) and 94(4).
- ⁵⁹ *Crimes (Forensic Procedures) Act 2000* s 9(2)(d).
- ⁶⁰ *Crimes (Forensic Procedures) Act 2000* s 77(1)(e).
- ⁶¹ *Crimes (Forensic Procedures) Act 2000* s 13.
- ⁶² *Crimes (Forensic Procedures) Act 2000* s 77.
- ⁶³ *Crimes (Forensic Procedures) Act 2000* s 98.
- ⁶⁴ *Crimes (Forensic Procedures) Act 2000* s 46.
- ⁶⁵ *Crimes (Forensic Procedures) Act 2000* s 45.
- ⁶⁶ *Crimes (Forensic Procedures) Act 2000* s 7, 17 and 42.
- ⁶⁷ *Crimes (Forensic Procedures) Act 2000* s 16 and 40.
- ⁶⁸ *Crimes (Forensic Procedures) Act 2000* s 44.
- ⁶⁹ *Crimes (Forensic Procedures) Act 2000* s 48.
- ⁷⁰ *Crimes (Forensic Procedures) Act 2000* s 47.
- ⁷¹ *Crimes (Forensic Procedures) Act 2000* s 50.
- ⁷² *Crimes (Forensic Procedures) Act 2000* s 10, 30, 33, 54 and 55.
- ⁷³ *Crimes (Forensic Procedures) Act 2000* s 15, 57 and 100.
- ⁷⁴ *Crimes (Forensic Procedures) Act 2000* s 58.
- ⁷⁵ *Crimes (Forensic Procedures) Act 2000* s 59.
- ⁷⁶ *Crimes (Forensic Procedures) Act 2000* s 60.
- ⁷⁷ *Crimes (Forensic Procedures) Act 2000* s 82.

Chapter 3. DNA sampling in Australia and overseas

This chapter takes a brief look at the history of forensic procedures in New South Wales. It then compares our forensic procedure regime with those in other Australian and overseas jurisdictions.

3.1. History of forensic procedures in New South Wales

Since 1924, police officers in New South Wales have had the power to search, photograph, fingerprint or ask a medical practitioner to examine a person in custody who has been charged with an offence.⁷⁸

The power to conduct a medical examination has been interpreted quite narrowly. In *Fernando v Commissioner of Police*, the court found that it permits “no more than an external examination by sight or touch.”⁷⁹ Specifically, it did not authorise police to take a blood sample from an accused without consent.

After the *Fernando* decision, the NSW Parliament amended the *Crimes Act* to provide for medical practitioners to take blood, hair or saliva samples from people in custody who have been charged with an offence.⁸⁰ This was intended to be an interim measure until new legislation dealing with this issue was drafted.

In 1999, police officers were given the power to require a driver who refuses to submit to a sobriety assessment, or who police reasonably believe is under the influence of a drug, to provide a blood and urine sample (whether or not the person consents to them being taken) in accordance with the directions of a medical practitioner.⁸¹ In addition, medical practitioners and nurses are under a duty to take blood samples from drivers and certain others involved in road accidents.⁸²

In 2000, Parliament passed the *Crimes (Forensic Procedures) Act*, creating specific police powers to carry out forensic procedures on suspects, volunteers and certain convicted offenders. It also specified how material from those procedures may be used, and when that material (or information derived from that material) must be destroyed.

3.1.1. Objectives of the new Act

In his second reading speech, the Hon Paul Whelan MP, then Police Minister, described the forensic procedures bill as “a comprehensive regime regulating the taking and use of forensic material for the purposes of criminal investigation.”⁸³ He stated:

*It will enable law enforcement agencies to identify or exclude suspects by comparing forensic material taken from them with material found at crime scenes. It will link seemingly unrelated crimes by comparing DNA profiles found at different crime scenes. This legislation has the potential to assist victims of crime in New South Wales by encouraging guilty pleas and hence avoiding often traumatic and lengthy court proceedings...this bill will reform policing as we know it in New South Wales. DNA is the fingerprint of the twenty-first century. It will allow police to work smarter using forensically driven intelligence to solve crime.*⁸⁴

He also noted that DNA testing and other forensic procedures may be used to eliminate an innocent person from suspicion.

The second reading speech also stressed that DNA testing, while useful, would not replace more traditional forms of police investigation:

*It is important to note that DNA will be only one tool in the police officer's kit. They will still need to assemble a brief of evidence against the offender; DNA alone will not convict!*⁸⁵

Other members of Parliament hailed the Act as “probably the most important legislation to come before the House this session.”⁸⁶ Many were impressed by the impact the DNA database in the United Kingdom has had on clear-up rates of crimes.⁸⁷

A further objective of the legislation is to deter offenders by increasing the likelihood of apprehension, which is accepted by many as more effective than increasing penalties:

*The deterrent to an increased volume of serious crime is not so much heavier sentences as the impression in the minds of those who are persisting in a course of serious crime that detection is likely and punishment will be certain.*⁸⁸

Since the Act came into operation, the courts have emphasised that it seeks to strike a balance between preserving a citizen's right not to assist law enforcement authorities, and the public interest in the administration of justice:

*The Forensic Procedures Act conferred new and unprecedented powers upon, inter alia, magistrates that would have the result of compelling persons suspected of criminal offences (including those against whom charges have not been laid) to cooperate in the investigation of the crime(s) of which they are suspected, and to provide, from their own bodies, evidence which may be used against them (and which, of course, may also be used to exonerate them). The Parliament was, in my view, seeking to maintain a delicate balance between preserving the traditional rights of citizens and individuals, including those suspected of crime, to decline to participate in investigations or to cooperate with investigating authorities, and the overall interests of the community and of justice in facilitating the investigation of crime, and the administration of justice, in securing the conviction of the guilty and the non-prosecution or acquittal of the not guilty. The Act was a specific response to scientific and technological developments, but in the context of valued traditional civil liberties.*⁸⁹

3.1.2. The need for safeguards

Some people argue that DNA sampling by law enforcement authorities is the modern equivalent of fingerprinting – and as such should be conducted routinely on arrest. However, others argue that it raises significantly different issues than taking a person's fingerprints.⁹⁰

During Parliamentary debates, many members of Parliament expressed concerns about the Act. Some were concerned about the breadth of the legislation, in particular the large number of suspects and volunteers who would be subjected to DNA sampling.⁹¹ Others had qualms about DNA sampling being conducted by NSW Police, and the potential for bias or corruption by police officers, who are responsible for the investigation of crime.⁹² Some argued that where a person does not consent to a forensic procedure, only a court (rather than a senior police officer) should be able to authorise police to go ahead and conduct the procedure against the person's will.⁹³

Since the Act came into force, concerns have been expressed about the operation of the Act and related issues by legal practitioners, academics, members of Parliament and the media. Concerns have been raised about:⁹⁴

- **The invasiveness of DNA sampling.** A DNA sample can be taken quite painlessly, and with minimal inconvenience to the subject. However, some DNA sampling can be quite invasive (such as a blood or hair sample), as it allows the State to interfere with the liberty and bodily integrity of the individual (in some circumstances against the person's will and with the use of reasonable force).
- **Protection of genetic information.** Apart from being regarded as a unique identifier, DNA has the capacity to deny or reveal familial relationships, and can be used to predict whether a person is likely to have certain diseases. DNA also contains information about a person's appearance, such as hair colour, eye colour and height. It may be possible in the future to derive highly personal information from a very small amount of biological material – a spot of blood, a single hair – and there are fears that DNA samples may end up being used for purposes other than those for which they were taken.⁹⁵ For example, there is some concern about genetic information being disclosed to employers or insurers.
- **Contamination risks.** DNA evidence can be extremely persuasive. However, there is a risk of contamination at each of the various stages between the commission of the offence and prosecutors presenting the evidence in court. For example, biological material could be left at crime scenes, deliberately or unintentionally, by other criminals or by law enforcement officials. Police could inadvertently contaminate crime scene evidence, by allowing exhibits to come into contact with each other. Staff at the forensic laboratory could inadvertently contaminate evidence by allowing an exhibit from one crime scene to come into contact with an exhibit from another. Any of these incidents could result in a person other than the true offender being implicated in the offence being investigated.
- **Perceived lack of independence of forensic service providers.** While the DNA laboratory is separate from law enforcement authorities, and should not have an interest in the outcome of prosecutions, the fact that it is run by the State and provides the vast bulk of its DNA analysis services to NSW Police raises the question of whether the alliance between police and the laboratory could influence the interpretation of DNA analysis results. A related concern is that where DNA evidence is adduced in criminal proceedings, defendants have limited opportunities to have the evidence against them independently analysed.

- **Security issues.** There are concerns about how to ensure the security of the DNA samples taken by police, and how to prevent unauthorised access to and disclosure of information stored on the DNA database.
- **Use of DNA evidence in court proceedings.** DNA evidence is now widely used in criminal proceedings, and can be extremely persuasive.⁹⁶ It involves complex science and statistics, and match probabilities are often expressed in terms of billions, for example, “There is DNA evidence which may be interpreted as establishing that there exists only a one in ten billion chance that the accused was not the assailant.”⁹⁷ Given the potentially overwhelming impact of this type of evidence, it is vital that safeguards are applied to the way DNA samples are taken and used. While the scientific basis of DNA profiling is now accepted, there remain concerns about the way in which the evidence is presented in court, in particular about whether juries give appropriate weight to complex statistical evidence. This is discussed further in chapter 13.
- **Inadequacy of legislative safeguards.** The Act contains many safeguards, to protect the rights and interests of people who police want to undergo forensic procedures. For example, police must provide information about the proposed procedure before asking a person to agree to it, cannot question a person while the procedure is being carried out, and must electronically record the procedure. However, concerns have been raised about some legislative safeguards being “more apparent than real.”⁹⁸ An example of this is the failure of the Act to prohibit DNA analysis otherwise than in accordance with the Act. Police can take covert DNA samples, for example by sending a cigarette butt or tissue a person has discarded for DNA analysis, instead of taking a sample directly from the person, with the person’s knowledge. This type of activity is outside the scope of the Act and is essentially unregulated. For further information, see section 9.2 for discussion on covert sampling.
- **Erosion of long established rights.** All common law jurisdictions recognise a right to silence when being questioned by police.⁹⁹ This right flows from the fundamental principle that the prosecution bears the burden of proving an offence beyond reasonable doubt, without any assistance from the defendant.¹⁰⁰ Allowing police to take DNA samples from a suspect, by force if necessary, reflects a departure from this general position.¹⁰¹
- **Complexity of the legislation.** Some commentators have raised concerns about the legislation being unnecessarily complex, and in parts unclear. They argue that the Act impedes rather than facilitates the use of DNA in the investigation and prosecution of crime.¹⁰²

Many of these concerns raise policy considerations which are outside the scope of this review.¹⁰³ For this reason, we do not explore these issues in great detail. However, we have taken them into account where they are relevant to our scrutiny of the exercise of functions conferred on police officers under the Act.

3.2. Plans for a national DNA database in Australia

In 1998, the federal government committed \$50 million to establish CrimTrac, an agency aiming to support Australian police services through the provision of national information systems and investigative tools. One of CrimTrac’s key roles is to coordinate a National Criminal Investigation DNA Database (NCIDD).

In Australia, criminal law is generally a matter for states and territories to govern, rather than the federal government. As a result, there are significant differences in the various criminal laws of the various states and territories.

In order to develop an Australian National DNA Database, it was important to try to ensure that the laws regulating the sharing of database information between the different states and territories were compatible.¹⁰⁴ Since 1991, a national committee consisting of representatives from most Australian jurisdictions has been working on a national criminal code.¹⁰⁵ One of the tasks of the committee was to develop a ‘model forensic procedures bill’ for adoption by all Australian jurisdictions. In 1999, the committee circulated a discussion paper on the “Model Forensic Procedures Bill and Proposed National DNA Database”, following extensive consultation. In February 2000, a final model bill was released, which set out a comprehensive legislative regime dealing with DNA sampling and other forensic procedures.¹⁰⁶

Uniform adoption of the model bill by states and territories would have ensured consistency in the laws relating to forensic procedures across all Australian jurisdictions. However, through the parliamentary process of law making, all jurisdictions departed from the model bill to some extent. New South Wales is considered to be one of the few jurisdictions in which the forensic procedures legislation is largely consistent with the model bill.¹⁰⁷

The effect of these legislative variations has stalled the operation of NCIDD. This is because it is not clear whether information obtained from forensic procedures can be legally shared between jurisdictions which have different laws governing the taking of forensic DNA samples.

In mid 2005, Queensland and Western Australia uploaded data onto NCIDD, and can now search each other's data for possible links. Since the data was amalgamated, over a hundred links have been made.¹⁰⁸

3.3. DNA sampling in other Australian jurisdictions

There are now laws in every Australian state and territory governing DNA sampling and other types of forensic procedures. While they differ to varying degrees from the model bill, none are vastly different from the New South Wales Act. Rather than provide a comprehensive explanation of each jurisdiction we have outlined the key provisions of the relevant legislation, and noted any significant differences from New South Wales' position. We also focus on provisions affecting suspects and volunteers, as we have already reported on the DNA sampling of convicted offenders.¹⁰⁹

Each jurisdiction adopts the distinction between "intimate" and "non-intimate" forensic procedures,¹¹⁰ but there are some differences in how certain procedures are categorised. For example, some jurisdictions treat buccal swabs as intimate procedures, while others treat them as non-intimate or separately (as in New South Wales). The distinction is important, as there are greater limitations on when intimate procedures can be conducted than when non-intimate procedures can be conducted.

Each jurisdiction's police service uses a particular laboratory to conduct the bulk of its forensic work, including DNA analysis. About half the laboratories are controlled by the relevant police service, and the other half are part of the state or territory's health department. As well as the government laboratories, there are also several private and academic forensic service providers.¹¹¹

3.3.1. Commonwealth

Part 1D of the *Crimes Act 1914* (Cth) sets out a comprehensive regime for forensic procedures in the federal jurisdiction. It is largely the same as the New South Wales Act, as both closely follow the model bill. The types of forensic procedures covered are the same, and may be carried out on suspects, volunteers and certain convicted offenders. Part 1D sets out how forensic procedures must be carried out, when forensic material must be destroyed, and also provides for the establishment of a DNA database. As in the New South Wales Act, there are specific legislative safeguards for Aboriginal and Torres Strait Islander suspects and volunteers.

There are some differences between the Commonwealth and New South Wales legislation:

- Under the New South Wales Act, police must consider whether requesting or ordering a forensic procedure is "justified in all the circumstances", before asking for consent or making the order.¹¹² The Commonwealth legislation goes further, by requiring police to balance the public interest in obtaining evidence against the public interest in upholding the physical integrity of the suspect. It also specifies a number of factors the officer must consider in conducting this balancing exercise, including the seriousness of the offence, the circumstances surrounding its commission, the degree of the suspect's alleged participation, personal characteristics of the suspect (including age, health, cultural background), whether evidence of the suspect's involvement in the offence can be gained in a less intrusive way, any reasons given for refusing consent, and other relevant matters.¹¹³ Magistrates hearing applications for orders authorising forensic procedures receive similar guidance under the Commonwealth Act, but not under the New South Wales Act.¹¹⁴
- The Commonwealth legislation only provides for forensic procedures to be conducted in relation to indictable offences. Under the New South Wales Act, certain forensic procedures (although generally not DNA sampling) can be conducted in relation to summary offences as well as indictable offences.¹¹⁵
- Time limits for conducting forensic procedures are longer under the Commonwealth Act – generally a procedure must be conducted within four hours. Under the New South Wales Act, the time limit is generally two hours.¹¹⁶
- Under the Commonwealth legislation, buccal swabs are classified as intimate procedures. Under the New South Wales Act, they are categorised separately.¹¹⁷

Part 1D was reviewed in March 2003. The main deficiency identified by the review was that because CrimTrac is not operational, there was very little experience of the operation of Part 1D to review. However, the review emphasised the need for improved accountability arrangements both within and across Australian jurisdictions.¹¹⁸

3.3.2. Australian Capital Territory

The *Crimes (Forensic Procedures) Act 2000* (ACT) is substantially based on the model bill, so is largely the same as the New South Wales Act. There are some differences, however:

- Buccal swabs are classified as non-intimate procedures.¹¹⁹
- Police must balance the public interest in obtaining evidence against the public interest in upholding the physical integrity of the suspect before asking a person to consent to a procedure, or ordering that it be conducted. The factors police must consider are the same as those set out in the Commonwealth legislation.¹²⁰ Magistrates hearing applications for orders authorising forensic procedures must undertake the same balancing exercise.¹²¹
- There are no specific safeguards for Aboriginal and Torres Strait Islander people.

3.3.3. Victoria

Forensic procedures in Victoria are governed by Part III, Division 1(30A) of the *Crimes Act 1958* (Vic). The legislation was amended in 2002 to allow for self-administered buccal swabs, under police supervision.¹²² Prior to this, only doctors or nurses could administer buccal swabs. The 2002 amendments also enabled Victoria to enter into arrangements for the exchange of DNA information between jurisdictions, to facilitate Victoria's participation in the national DNA database.¹²³

The legislation was further amended in 2004, to enable senior police officers to authorise the carrying out of non-intimate forensic procedures, including DNA samples, on suspects.¹²⁴ Before this, a suspect could only be compelled to undergo a forensic procedure by court order.

Now, the Victorian legislation is not substantially different from the New South Wales legislation. There are, however, some remaining differences:

- Buccal swabs are classified as intimate procedures.¹²⁵
- There are no specific safeguards for Aboriginal and Torres Strait Islander people.

3.3.4. South Australia

Forensic procedures in South Australia are governed by the *Criminal Law (Forensic Procedures) Act 1998* (SA), which was substantially revised in 2003.¹²⁶ The amendments included provisions for conducting forensic procedures on volunteers, and provisions to facilitate South Australia's participation in the national DNA database.¹²⁷ The key differences now between the law in South Australia and in New South Wales are:

- There are different understandings of how intrusive various procedures are. In South Australia, buccal swabs and blood samples taken by fingerprick are "non-intrusive" forensic procedures.¹²⁸ Hair samples are "intrusive". Hair samples may be taken for the purpose of conducting hair comparison tests, but cannot be taken for the purposes of DNA analysis, unless the person specifically requests that the DNA profile be obtained in this way.¹²⁹ In New South Wales, blood samples are "intimate", hair samples are "non-intimate" and buccal swabs are categorised separately. Generally, a hair sample would be taken for DNA analysis if the person is providing a DNA sample under compulsion.¹³⁰
- South Australia has four categories of procedures, depending on the person's involvement in the offence being investigated, and whether the person's profile will be included on the DNA database. Category 1 ("consent") procedures are procedures conducted on a person who is not under suspicion, where the person's profile will not be stored on the DNA database.¹³¹ Category 2 ('volunteers') procedures are procedures conducted on a person who is not under suspicion, whose DNA profile will be stored on the DNA database, either on the volunteers (limited purposes) or volunteers (unlimited purposes) index.¹³² Category 3 ('suspects') procedures and Category 4 ("offenders") procedures relate to suspects and convicted offenders, respectively.¹³³
- The South Australian legislation provides for "assimilation orders", where police or the DPP may apply to a court to have material taken from a volunteer treated as material obtained from a suspect.¹³⁴ This means that where, as an investigation progresses, a volunteer emerges as a suspect, the person's DNA profile can be used as if it were taken from a suspect, and may be put on the DNA database. If an assimilation order is made, the person's DNA profile is transferred from the relevant volunteer index to the suspects index.¹³⁵ This does not occur in New South Wales.

- In South Australia, before ordering a forensic procedure, the senior police officer or magistrate must be satisfied that the public interest in obtaining the evidence outweighs the public interest in ensuring that private individuals are protected from unwarranted interference, having regard to the seriousness of the offence, the extent to which the procedure is necessary for the proper investigation of the offence, any likely effects on the person's welfare (taking into account age, health, and cultural and ethnic background), whether the evidence can be obtained in a less intrusive way, and any reasons given for refusing consent.¹³⁶
- There are no specific safeguards for Aboriginal and Torres Strait Islander people.

3.3.5. Western Australia

DNA sampling in Western Australia is governed by the *Criminal Investigation (Identifying People) Act 2002 (WA)*. The Act has a different focus from the equivalent legislation in other Australian jurisdictions, as it deals exclusively with "identifying" rather than "forensic" procedures. Identifying procedures are procedures where one or more identifying particulars of a person are obtained, such as prints from hands, feet and ears; photographs of any identifying feature (defined as a permanent or semi-permanent physical feature of the person that helps to identify the person, such as a tattoo, scar or birth mark); dental impressions; hair for hair comparison; and DNA profiles.¹³⁷

While many of these procedures are permitted in New South Wales, our Act also provides for procedures which may provide forensic evidence for the investigation of an offence, such as a scraping taken from under a person's nails or a gun shot residue test. Such procedures must be taken as soon as possible, or the evidence will be lost. Further, the New South Wales Act specifies that "forensic procedure" does not include "the taking of any sample for the sole purpose of establishing the identity of the person from whom the sample is taken."¹³⁸

The Western Australian legislation differs from the New South Wales legislation in several respects:

- There are separate provisions for volunteers, protected people (children and people who are incapable of consenting to a procedure), deceased people, involved people (people who are not suspects, but who are involved with the offence, such as victims or witnesses), uncharged suspects, charged suspects, and people in the corrections system (including people on remand, serving custodial sentences, on parole or on supervised release orders).¹³⁹
- The Act provides for a system of identifying procedure warrants, known as "IP warrants". Police may apply to a magistrate for a warrant authorising an identifying procedure, if police suspect that the investigation would be prejudiced if the person was asked to undergo the procedure. Warrants may be sought in relation to suspects or involved protected persons.¹⁴⁰
- The criteria for requesting a suspect to undergo a procedure are less stringent. In Western Australia, police may ask a charged suspect to consent to an identifying procedure if the officer suspects that WA Police does not already hold all the suspect's identifying particulars.¹⁴¹ In New South Wales, by contrast, there must be reasonable grounds to believe the procedure might produce evidence tending to confirm or disprove a suspect committed the offence – the procedure must have some relevance to the progress of the investigation.
- Where an adult does not consent to a procedure, it may be authorised by a senior police officer (if it is a non-intimate procedure) or a justice of the peace (if it is an intimate procedure).¹⁴² A magistrate can authorise, by warrant, a procedure to be conducted on a protected person.¹⁴³
- There are separate provisions for police officers. The Commissioner of Police may require a police officer to undergo an identifying procedure for prescribed forensic purposes. The information must be destroyed if the person leaves WA Police, and requests that it be destroyed.¹⁴⁴
- DNA samples are taken by buccal swab, hair sample, blood sample or pubic hair sample. The latter cannot be conducted unless it is impracticable to use one of the former.¹⁴⁵
- Information obtained through an identifying procedure will not be destroyed automatically at the end of the period for which the information may be retained. It will only be destroyed if the person undergoing the procedure (or the person's guardian or advocate) specifically requests that it be destroyed.¹⁴⁶
- There are no specific safeguards for Aboriginal and Torres Strait Islander people.

3.3.6. Queensland

Forensic procedures in Queensland are governed by Chapter 8A of the *Police Powers and Responsibilities Act 2000* (Qld). There are several significant differences between the Queensland and New South Wales legislation:

- The Queensland Act does not have separate provisions for volunteers. Police can request any person, whether a suspect or not, to undergo a forensic procedure. There are no criteria governing when police may make such a request – any person may be approached and asked to provide a DNA sample.
- There are however criteria for conducting procedures in the absence of consent. Police can only apply for a court order authorising a forensic procedure if the officer is satisfied the procedure may provide evidence of the commission of an indictable offence. The magistrate must consider whether the procedure is justified in all the circumstances, taking into account the rights and liberties of the suspect, the public interest, and the other factors set out in the Commonwealth Act.¹⁴⁷ Where proceedings against a person for an indictable offence have commenced, the person's DNA can be taken with the approval of a senior police officer rather than a court.¹⁴⁸
- DNA samples can only be taken by buccal swab or hair sample.¹⁴⁹ However, there are some types of procedures which are permitted in Queensland which are not covered by the New South Wales Act, including cavity searches, removing a substance or thing from a body cavity, taking a blood or urine sample and taking an X-ray.¹⁵⁰
- Children over the age of 14 and adults with impaired capacity can consent to forensic procedures, provided a support person is present when the relevant information is provided, and the person being asked to consent is given the opportunity to speak to the support person in private.¹⁵¹
- The Act provides for a Queensland DNA database. A very broad comparison of profiles is allowed. The Commissioner of Police may transfer information from one index to another, use information in one index for the purposes of another index, compare information within an index and compare information in one index with information in another.¹⁵² There are more restrictive matching rules for comparison of DNA profiles using the CrimTrac database.¹⁵³
- There are no specific safeguards for Aboriginal or Torres Strait Islander people.

3.3.7. Northern Territory

Forensic examinations, including DNA sampling, can be conducted under Division 7 of the *Police Administration Act* (NT) and the *Juvenile Justice Act* (NT). Forensic procedures in the Northern Territory are less regulated than anywhere else in Australia, so there is significant disparity between the Northern Territory and New South Wales laws:

- Buccal swabs are classified as non-intimate procedures.¹⁵⁴
- Any person can undergo a non-intimate procedure by consent. There are no criteria governing when police may make such a request.¹⁵⁵ In the absence of consent, non-intimate procedures can be carried out by order of a senior police officer. It is enough that police reasonably suspect the person has committed a crime, or that the person has been charged with an offence punishable by imprisonment – there is no requirement, for example, that DNA analysis be of some investigative value, or that asking for consent is justified in the circumstances.¹⁵⁶
- Intimate procedures can be carried out by consent or by order of a magistrate. The person must have been charged with an offence, and police must believe the procedure may provide evidence relating to the offence.¹⁵⁷
- A magistrate's approval is required to conduct a procedure on a child aged under 14, but a non-intimate procedure, including a DNA sample, can be conducted on a child aged 14 or above with the approval of a senior police officer. The child must be a suspect or be charged with committing a crime.¹⁵⁸
- DNA samples are taken by buccal swab only, and can be taken by force if necessary.¹⁵⁹ As in Queensland, a number of procedures are allowed which are not covered by the New South Wales Act, including internal examinations of the body, taking from the body a substance on or in the body, taking a urine sample and taking an X-ray.¹⁶⁰
- Comparison of DNA profiles is essentially unregulated – the Commissioner of Police may maintain databases of any information obtained from carrying out forensic procedures.¹⁶¹ Samples can be subject to any analysis the Commissioner thinks fit, and any information obtained can be recorded on the database.¹⁶² There are also provisions for sharing information kept on the database with other jurisdictions.¹⁶³

- There are no special provisions for people incapable of understanding or consenting to a forensic procedure.
- There are no specific safeguards for Aboriginal or Torres Strait Islander people.
- There are no provisions for destruction of forensic material, or requirements that profiles be deleted. Samples can be retained for such period as the Commissioner thinks fit.¹⁶⁴

In November 2004 the legislation was amended to allow Northern Territory police to take DNA samples for other police forces, and vice versa. The new legislation also made some minor changes to the way DNA samples taken from volunteers could be used.¹⁶⁵ During Parliamentary debates about the amendments, the Minister for Police claimed that the Northern Territory “has the most effective and uncomplicated DNA legislation for law enforcement in Australia”, and that it has “successfully resisted Commonwealth pressure to ‘re-model’ the legislation.”¹⁶⁶

Since late 2002, police in the Northern Territory have conducted a number of “Genesweep” operations, which focus on identifying property offenders through fingerprint and DNA analysis. The operations have resulted in a high number of arrests but many prosecutions have failed because of a lack of other evidence.¹⁶⁷

3.3.8. Tasmania

The *Forensic Procedures Act 2000* (Tas) differs significantly from the New South Wales Act in a number of ways:

- Buccal swabs are categorised as non-intimate forensic procedures. Some types of procedures permitted in Tasmania are not covered by the New South Wales Act, including X-rays and internal examinations of body cavities.¹⁶⁸
- There are no criteria governing when police may ask a suspect to consent to a forensic procedure.¹⁶⁹ A police officer can order a person in custody who has been charged with a serious offence to undergo a forensic procedure, including a DNA sample by buccal swab. If a suspect is not in custody, police can order a forensic procedure, but only if there are reasonable grounds to suspect the procedure may produce evidence tending to confirm or disprove that the suspect committed a serious offence.¹⁷⁰
- Forensic procedures can be conducted on a child under the age of 15 either with the consent of the child and the child’s parent, or by order of a magistrate.¹⁷¹ Children aged 15 and above are treated the same as adults.¹⁷²
- There are no provisions for people incapable of understanding or consenting to a forensic procedure.
- There are no specific safeguards for Aboriginal and Torres Strait Islander people.
- Where police apply to a court for an order authorising a forensic procedure, the magistrate must be satisfied that carrying out the procedure is justified in all the circumstances, after balancing the public interest in obtaining the evidence against the public interest in upholding the physical integrity of the suspect.¹⁷³

The permitted matching and destruction provisions are similar to those in New South Wales.

The Tasmanian legislation was amended in 2003 to facilitate the sharing of DNA profiles with other Australian jurisdictions.¹⁷⁴

3.4. DNA sampling in other countries

Ten years ago, DNA profiling was still relatively new. Although the validity of DNA evidence was gradually being accepted by the courts, DNA profiling was still only used on a case by case basis, as evidence linking a particular suspect to a particular crime. As the technology has developed, and the use of DNA profiling in the investigation and prosecution of crime has increased, there has been a rapid expansion all over the world of large, centrally coordinated databases of crime scene and convicted offender profiles. The rationale for developing a DNA database is to enable police, by comparing DNA obtained from victims or unsolved crime scenes to the DNA of people who police know or suspect are criminally active, to better target their investigations.

There is much greater variance between DNA databases overseas than those found within Australia. The most significant differences relate to:

- **The power to take DNA**, or the circumstances in which a person can be compelled to provide a DNA sample to investigating authorities. In some jurisdictions a person must be convicted of a very serious offence before his or her DNA profile can be “banked” on the relevant database. In other jurisdictions, a person may have a DNA sample taken on arrest. Another key difference relating to the DNA sampling of suspects is whether DNA

analysis must be relevant to the offence being investigated, or whether the person's alleged criminality of itself is enough to warrant taking a sample, for the investigation of other (possibly future) criminal offences.

- **Size, scope and projected growth of the database** – some databases have millions of profiles on them, while others are much smaller. Some databases are regional, some are national, and some are international. Many databases have been rapidly populated through the mass sampling of convicted offenders. There has also been a trend towards expanding the types of offences for which DNA samples can be taken, with many jurisdictions now taking DNA in relation to high volume property offences, like burglary and car theft, as well as for serious offences such as murder and sexual assault.¹⁷⁵ Whether a database continues to expand rapidly may depend on whether suspect samples are retained on the database indefinitely, or are routinely deleted (for example, where a suspect is not ultimately convicted of the offence for which the sample was taken). It is likely that the number of crime scene profiles on databases will continue to expand rapidly.
- **Retention of genetic data** – some systems retain the DNA sample (i.e. the biological material itself), while others retain the DNA profile derived from the sample, and destroy the sample. Most jurisdictions retain DNA profiles of convicted offenders indefinitely, and provide for the destruction of profiles taken from suspects who are ultimately acquitted. Others retain all DNA profiles – whether from convicted offenders, suspects or merely people who have been arrested – on the database indefinitely.
- **Administration of the database** – whether it is by the government, a private company, or a combination. For example, in New South Wales the DNA database is wholly government owned and funded. The laboratory is part of NSW Health. In some places, the database is maintained by the government and private companies are contracted to provide some forensic services (for example, routine DNA analysis). Elsewhere, the database is hosted by a government owned but independent research institute. Others are publicly funded but are otherwise fully privatised.

Some database hosts have their own websites and Annual Reports, and regularly publish statistics on the number of profiles on the database, the percentage of crime scene samples which are linked to profiles already on the database, DNA 'success stories', contamination incidents and advances in technology. Other database hosts are less visible, attracting attention only when, for example, problems with funding or backlogs are made public.

We have looked at a selection of other jurisdictions, whose DNA sampling regimes differ significantly from our own.

3.4.1. United Kingdom

The United Kingdom was the first country to establish a national DNA database, in 1995. In 2000, the government allocated £182 million to the DNA Expansion Programme, with the aim of collecting DNA samples from all active offenders over a four year period. It also aimed to increase the retrieval of biological material left by offenders in relation to high volume property crime, such as burglary and car theft, rather than limiting DNA profiling to serious crime. A further £58.8 million was allocated for the 2004/2005 financial year and funding is expected to continue, "to ensure that the database remains fully populated with the DNA profiles of all possible offenders coming to police attention."¹⁷⁶ The database is now the largest of its kind, holding over 3 million DNA profiles taken directly from people, and approximately 250,000 profiles derived from biological material obtained from unsolved crime scenes.¹⁷⁷

Police powers to take DNA have increased over recent years, and are now extremely broad. Since 2004, police have had the power to take a DNA sample, without consent, from any person "in police detention in consequence of his arrest for a recordable offence" (generally, an offence which carries a penalty of imprisonment).¹⁷⁸ DNA can be taken upon arrest "whether or not the sample is required for the investigation of an offence in which the person is suspected of being involved."¹⁷⁹ Samples can also be taken from anyone suspected of, charged with, convicted of or cautioned in relation to a recordable offence.¹⁸⁰

Case Study 01

In 1999, police took a DNA sample from a man arrested on a drink driving charge. The man's DNA profile was put on the national database. His profile linked him to the sexual assault and murder of a teenage boy in 1968. The man pleaded guilty to the offence and was sentenced to life imprisonment.¹⁸¹

For each person tested, police take two DNA samples. One is sent to the laboratory for analysis, so a DNA profile can be obtained and loaded onto the database. The other sample is kept in storage as a back-up.¹⁸² The person's name, date of birth, gender and ethnic appearance are recorded on the database, along with person's DNA profile.¹⁸³

DNA samples and the information derived from them may be checked against other samples or information held by or on behalf of police or other law enforcement agencies.¹⁸⁴ This is known as a "speculative search", and people providing a DNA sample must be informed that the sample taken may be used for this purpose.¹⁸⁵ Since the database came into operation, almost 600,000 links between suspects and crime scenes have been made. Approximately 40,000 links between crime scenes have been made.¹⁸⁶ In 80 per cent of matches between person samples and crime scene samples the match related to an offence other than the one in relation to which the DNA sample was taken.¹⁸⁷

DNA samples and information derived from them can be kept until the person's death, provided the sample has been lawfully obtained.¹⁸⁸ Previously, samples from people who were acquitted or not prosecuted had to be destroyed. The law changed in 2001 following two high profile cases, one involving rape and one involving murder, where convictions were quashed because the DNA evidence adduced at trial should have been destroyed prior to the link being made.¹⁸⁹ Now, whether profiles should remain on the database is a matter of operational discretion for the police force which takes the original sample.¹⁹⁰ An extra 128,000 DNA profiles have been retained on the database since this amendment came into force.¹⁹¹ Use of samples and information derived from them is still limited to the detection, investigation and prosecution of crime.¹⁹²

There have been several challenges to the indefinite retention of a person's DNA in circumstances where the person has not been convicted of any offence. The House of Lords recently heard two appeals together. The first, *R v Chief Constable of South Yorkshire Police ex parte S*, involved an 11 year old boy with no previous convictions, cautions or warnings. He had his fingerprints and DNA taken in relation to an attempted robbery. He was acquitted of the charge, but the relevant police agency retained the prints and samples. The second case, *R v Chief Constable of South Yorkshire Police ex parte Marper* involved a 38 year old man who was arrested for harassing his partner. Police took his fingerprints and DNA. The matter was ultimately discontinued but again police retained the prints and samples. Both appellants argued that the legislation allowing their DNA profiles to be retained in the absence of conviction for an offence breached Article 8 (which establishes a right to privacy) and Article 14 (which prohibits discrimination) of the *European Convention on Human Rights*. The validity of the United Kingdom legislation was upheld and the appeals dismissed. In relation to concerns about DNA samples (rather than profiles) being retained, one judge commented that "fears of what may happen in the future in light of the expanding frontiers of science is not relevant in respect of contemporary use of retained samples in connection with the detection and prosecution of crime."¹⁹³

In the last decade, police in the United Kingdom have conducted almost 300 mass screenings, resulting in over 85,000 DNA samples being processed.¹⁹⁴ Samples taken from volunteers as part of mass screenings are not routinely put on the database. Changes to the legislation in 2001 provided for profiles from volunteers to be kept on the DNA database, with the volunteer's consent. Once consent is given it cannot be withdrawn – the volunteer's profile is added to the database and from then until the person's death it can be searched against profiles obtained from unsolved crime scenes.¹⁹⁵ Retaining profiles of volunteers in mass screenings has been described as "beneficial", on the basis that it helps increase the number of profiles on the database.¹⁹⁶

To help identify contamination of DNA samples by police officers, a Police Elimination Database has been established. Over 82,000 police officers have provided DNA samples to be kept on the database for elimination purposes. Providing a sample was voluntary for existing officers but is now a condition of employment for new officers.¹⁹⁷

Laboratories who process the DNA samples and manufacturers who make the equipment (such as the swabs and the plastic containers they are kept in) have also established databases of staff DNA profiles to help detect contamination.¹⁹⁸ There have been a number of incidences of contamination, including two high profile murder investigations which were erroneously linked. It turned out the common profile came from a person who worked for the supplier of swab tubes, not from the crime scene.¹⁹⁹

The Forensic Science Service (FSS) maintains the IT infrastructure for the database and, for the first few years of operation, was also the only supplier of DNA profiles. Over time, other organisations sought approval as suppliers, including some regional police laboratories, and a number of private companies. Concerns grew about the FSS being both custodian of the database and the preferred supplier of forensic services, and in 2003 a Home Office review recommended that control of the national database be separated from the FSS. Accordingly, the DNA database is now independently governed by a board comprising the Home Office, Association of Chief Police Officers, Association of Police Authorities and a representative from the Human Genetics Commission. There is also a custodian, within the Home Office, who is responsible for scientific advisory, accreditation and monitoring. The FSS became a government owned company in December 2005 and is still responsible for the day to day running of the database, under contract to the Home Office.²⁰⁰

The FSS is still the largest forensic services provider in the United Kingdom, with 77 per cent of the market share of the crime scene and person samples loaded onto the database. The FSS also plays a major role in developing new forensic technology. In November 2004, the FSS reported that it now processes over 40,000 DNA samples a month, using a fully automated system. DNA samples are now processed by machine from beginning to end without human intervention, to speed up the process.²⁰¹ In May 2005, the FSS announced the launch of its Forensic Response Vehicle, a mobile laboratory which travels to crime scenes to perform on the spot forensic services. The vehicle is currently being trialled in five regional police services. The FSS explained:

Samples will be fed into the van, analysed, and checked against the National DNA Database and police will have a match report back in approximately eight hours. As well as being at least three times faster than the current DNA turnaround time, this cuts out administration effort as items of evidence have until now been passed along a supply chain which eventually sees them arrive at a laboratory. The advance has been made possible through technological developments allowing the condensing of an entire DNA-processing line (whole building size) into a mobile environment.²⁰²

Fingerprints and footprints can also be captured digitally, analysed in the van, and compared with prints on relevant databases through satellite links, providing prompt results to police at the crime scene.²⁰³

3.4.2. New Zealand

New Zealand established its national DNA Databank in 1996 – the second country in the world to do so, after the United Kingdom. The database has 50,000 profiles from suspects and offenders on it, and a further 10,000 profiles from unsolved crime scenes.²⁰⁴ The database is administered by the Institute of Environmental Science and Research, which is owned by the New Zealand Government, but operates with an independent board of directors.²⁰⁵

The power to take people's DNA and put it on the DNA Databank comes from the *Criminal Investigations (Bodily Samples) Act 1995*. Police officers can take samples from certain suspects and convicted offenders for comparison against samples obtained from crime scenes.

DNA samples can be taken from suspects by consent. If a suspect does not consent to giving a sample, a commissioned police officer may apply to a court for a "compulsion order" authorising police to take the sample. Unlike the position in New South Wales, there is no mechanism for police officers to compel a suspect to provide a DNA sample. Police officers can compel certain convicted offenders to provide a sample, but there is a mechanism for a hearing if the convicted offender objects to the compulsion notice.

DNA profiles of convicted offenders are stored on the database. Profiles of suspects can only be stored on the database if the suspect is convicted of the offence for which the sample was taken.²⁰⁶

The New Zealand legislation was recently amended so that:²⁰⁷

- DNA samples could be taken by buccal swab. Previously, if a person's DNA profile was going to be put on the database, a blood sample had to be taken, either by fingerprick or directly from the vein.
- Compulsory DNA samples could be taken from convicted offenders for a broader range of offences, including burglary.
- Samples could be taken from people currently serving sentences for serious crimes, who were sentenced before the legislation commenced.

There was some consideration of whether police should be able to compel any person to provide a DNA sample on arrest, but this was rejected on the basis that it would be too great a departure from the current regime, which aims to allow police to take DNA samples with minimal infringement on people's fundamental rights and freedoms.²⁰⁸

New Zealand Police is required to publish detailed information about DNA sampling in its Annual Report, including:

- the number of samples taken by consent
- the number of applications for compulsion orders (for suspects and convicted offenders)
- the number of compulsion orders granted and refused (again for suspects and convicted offenders)
- the number of prosecutions where DNA evidence has been adduced and the result of the prosecution
- the number of occasions a police officer has used force to obtain a sample
- the total number of DNA profiles stored on the DNA database during the relevant period (broken down by number taken by consent and number taken by compulsion order)

- the number of links between crime scene and suspect samples, and
- the number of links between crime scene and convicted offender samples.²⁰⁹

People who provide DNA samples to the database are asked to volunteer detailed ethnic information, going back four generations. The Institute of Environmental Science and Research uses this information to compile population data for statistical use in the interpretation of DNA profiling in New Zealand.²¹⁰

On occasion, police have used very large screenings for serious crimes which remained unsolved for a long time.

Case Study 02

An unknown offender was linked to eight different sexual assaults, committed between 1988 and 1996 in New Zealand. Voluntary DNA samples were taken from over 3,000 men. The offender was identified through this process, and was subsequently convicted.²¹¹

3.4.3. Ireland

Since 1994, DNA casework in Ireland has been conducted by the Forensic Science Laboratory, which is part of the Department of Justice, Equality and Law Reform. The laboratory has a database of about 700 DNA profiles obtained from unsolved crime scenes.²¹² However, at this stage there is no routine DNA sampling of suspects or convicted offenders the way there is in New South Wales and other jurisdictions.

In 2005, the Law Reform Commission of Ireland published a report on the establishment of a national DNA database. It made a number of recommendations, including the following:²¹³

- A national DNA database should be established, containing DNA profiles of certain convicted offenders and people reasonably suspected of committing a serious crime. Profiles of convicted offenders should be retained indefinitely but profiles of suspects should be destroyed if proceedings have not commenced within 12 months, or the suspect is acquitted.
- DNA samples should only be taken under a clear legislative framework. Analysis of samples beyond the generation of a DNA profile should be prohibited.
- DNA sampling should not occur routinely on arrest. It should be limited to those suspected of having committed a serious offence (which includes the majority of assault, sexual offences, property offences and drug offences, but does not include public order offences). The DNA sample need not be relevant to the offence under investigation; it should be permissible to take a sample for speculative searching on the database, once a person is suspected of having committed a serious offence.
- The explanation for taking samples should be given in ordinary language, in a readily understandable manner.
- DNA samples should be taken by mouth swab, but alternative options should be available should the person providing the sample object to the proposed procedure.
- Mass screenings should have to be authorised in writing by a Chief Superintendent, after considering whether it is necessary for the proper investigation of the offence, and whether the same objectives could be achieved by less intrusive means.
- Biological samples from crime scenes should be retained indefinitely. DNA samples taken from people should be retained under strict security after the person's DNA profile has been generated and loaded onto the database, but this should be reassessed in five years to see if the retention of samples – in addition to profiles – is actually necessary.
- All police officers and laboratory workers should be required to provide a DNA sample for inclusion on an elimination database. In addition, people working at crime scenes and relevant manufacturing staff should be encouraged to volunteer a sample for inclusion on an elimination database.
- An independent Forensic Science Agency should be created to store samples and manage the database, and should be oversighted by an external oversight commissioner.

The Garda Commissioner (the Irish equivalent of our Commissioner of Police) recently commented that the lack of a DNA database leaves police in Ireland “at a distinct disadvantage in crime investigation.”²¹⁴ The Director of Public Prosecutions has also backed calls for the establishment of a DNA database.²¹⁵

3.4.4. Canada

A DNA warrant scheme has been in place in Canada, under the *Criminal Code*, since 1995. Police may apply to a court for a DNA warrant authorising them to take a DNA sample from a person believed to have committed a designated criminal offence.²¹⁶ The procedure is *ex parte*; meaning that police apply to the court in the absence of the person whose DNA is being sought.²¹⁷ The application can be made by telephone if it is impractical to appear in person.²¹⁸

The threshold for obtaining a DNA warrant for a suspect is quite high. The court must be satisfied there are reasonable grounds to believe that a designated offence has been committed, there is a sample from the crime scene or victim available for comparison and the suspect was a party to the offence. Further, the court must be satisfied that issuing the warrant is in the best interests of the administration of justice, having regard to matters including the nature of the offence, and the circumstances of its commission.²¹⁹

In 1998, the Canadian government considered whether police should be able to take DNA samples from people on arrest or charge without prior judicial authorisation, but concluded this would be contrary to the Canadian *Charter of Rights and Freedoms*.²²⁰ It referred to decisions from the Supreme Court of Canada which recognises that there is a heightened expectation of privacy in regard to taking bodily substances, and in particular DNA, and that taking a DNA sample is a very serious intrusion into an individual's security and privacy.²²¹

A national DNA database was established in 2000, under the *DNA Identification Act 1998*. It has a convicted offenders index and a crime scene index, and is operated by the Royal Canadian Mounted Police.²²²

The *Criminal Code* was also amended so that a court can make an order authorising a DNA sample to be taken from a convicted offender for inclusion on the national database. If a person is convicted of a “primary designated offence” (such as murder, sexual assault or hijacking), there is a presumption in favour of the person's DNA profile being stored on the database – the court must make the order, unless the impact on the offender's privacy would be grossly disproportionate to the public interest in the administration of justice. If a person is convicted of a “secondary designated offence” (such as assault, arson, or break and enter), a DNA sample will be stored on the database only if the Crown applies for it, and the court is satisfied that it is in the best interests of justice to make the order. In these circumstances, the court must consider the person's criminal record, the nature of the offence and the circumstances surrounding its commission, and the impact that retaining the DNA profile on the database would have on the offender's privacy.²²³

Case Study 03

A man was convicted of assault. The judge ordered him to provide a DNA sample to be stored on the national database. His profile linked him to a fatal stabbing in a convenience store nine years earlier. The man pleaded guilty to murder and was sentenced to life imprisonment.²²⁴

Convicted offenders who were in a correctional centre at the time the legislation commenced could only have samples taken for the database in limited circumstances – if declared dangerous, if convicted of more than one sexual offence, or convicted of more than one murder. This is much more restrictive than DNA database schemes in other jurisdictions, where people serving custodial sentences for serious crimes are routinely DNA sampled.

DNA profiles from convicted offenders generally stay on the database indefinitely.²²⁵ If the person is found guilty but no conviction is recorded, the person's profile only stays on the database for a year (or three years, if the person is conditionally discharged), provided the person does not reoffend in that period. A young person who is convicted of an offence has his or her DNA profile deleted if the young person's criminal record is destroyed.²²⁶ DNA profiles from suspects can only be used in the investigation and prosecution of the offence for which they were taken – they cannot be included on the DNA database. DNA profiles from suspects must be destroyed if the person is excluded as a suspect, or is ultimately acquitted.²²⁷

The Canadian National DNA Databank website publishes statistics (updated every fortnight) on how many DNA samples have been taken and how many people have been linked to crime scenes. It also gives details of the number of DNA samples rejected by the laboratory, and the reasons for this (for example, the wrong sample kit was used, or the offence for which the sample taken was not a “designated offence”).²²⁸ The database has over 77,000 DNA profiles on its convicted offender index, and over 21,000 profiles on its crime scene index.²²⁹

The most recent Annual Report of the DNA database states that its priorities for the coming year are to increase the number of profiles on the database, and to expand the use of automation to boost the volume of samples processed, and the speed at which they are handled.²³⁰ Robotic processing is already used to speed up the analysis of DNA samples.²³¹

The Canadian Working Group on the Prevention of Miscarriages of Justice recently made recommendations aiming to ensure the DNA database is used to its full potential. It recommended that forensic materials be made available for independent testing at the request of the defence, that access to post-conviction DNA testing be considered, that education packages be developed for police, crown prosecutors and the judiciary, and that the expansion of the database be considered.²³²

In May 2005, a number of amendments to the DNA legislation were passed, which expanded the types of offences for which compulsory DNA samples can be taken from convicted offenders.²³³ It is anticipated that an additional 4,700 convicted offenders will be eligible for compulsory DNA sampling as a result of this legislation.²³⁴

A Parliamentary review of the DNA database legislation was conducted in late 2005.²³⁵

3.4.5. United States

The United States has had a national DNA database since 1998.²³⁶ It has two indexes, one of convicted offenders (which currently contains over 2.3 million profiles) and one of DNA obtained from crime scenes (which currently contains over 100,000 profiles).²³⁷

The national database is part of a three tiered Combined DNA Database Index System, known as CODIS. Profiles obtained at a local level can be uploaded onto a state database, and from the state database to the national database. The relevant authorities at the lower tiers decide which profiles will be uploaded to the higher tiers. The higher tiers also decide whether, according to the relevant state and federal legislation, profiles from the lower tiers can be accepted.²³⁸ The legislation governing the DNA database was recently amended to allow states to include profiles of all people “whose DNA samples are collected under applicable legal authorities.” However, profiles from people who have a DNA sample taken on arrest who are not subsequently charged, and from people who voluntarily provide a DNA sample for the purpose of elimination, cannot be included on the national DNA database.²³⁹

Initially, states only collected DNA profiles from people convicted of sexual assault and other violent crimes. Many states have since amended their legislation, to allow for the DNA sampling of a much broader range of convicted offenders. Approximately 70 per cent of states have adopted “all felony” provisions, requiring all convicted felons to provide a DNA sample. Some states require DNA sampling for conviction of “any crime”, which is a broader again. Very few states provide for inclusion of DNA profiles from suspects on the DNA database. Those which do, require the information to be removed from the database if the person is acquitted.²⁴⁰

When DNA sampling was implemented widely across the United States, many local and state laboratories did not have the capacity to process the large number of DNA samples taken from convicted offenders and crime scenes. The *DNA Analysis Backlog Elimination Act of 2000* set up a federal grant program, to reduce the national backlog. Under the scheme, laboratories could apply for funding to increase their own capacity for DNA analysis, or to outsource forensic services to accredited private laboratories.²⁴¹

In 2000 the Department of Justice created a “Convicted Offender DNA Backlog Reduction Program”, to pay for the processing of DNA samples taken from convicted offenders. At the time the program began, there were about 745,000 convicted offender samples awaiting analysis. The program aimed to accelerate the analysis of convicted offender samples so offender profiles could be uploaded onto the national database. In its first year of operation, approximately 40 per cent of states received grants. While these enabled almost 300,000 convicted offender samples to be analysed, the program did not clear the backlog, as many states were at the same time increasing the list of offences for which DNA samples could be taken. This meant that while more funding was available to process samples, more and more offenders were becoming eligible for DNA sampling. The program was also hampered by significant delays by states in uploading DNA profiles onto the national DNA database.²⁴²

In 2001 the Department of Justice created a “No Suspect Casework DNA Backlog Reduction Program”, to pay for the analysis of biological material obtained from crime scenes, where no suspect has been identified. In its first year

of operation, 50 per cent of states received grants. However, the program does not appear to have achieved the results anticipated as the allocated funding has not all been drawn, and again there have been significant delays in uploading the relevant profiles onto the national database. In April 2004, it was estimated that over 540,000 criminal cases with biological evidence were awaiting DNA analysis.²⁴³

The *Advancing Justice Through DNA Technology Act of 2003* and *Justice for All Act of 2004* contained further measures to reduce the national backlog of crime scene and convicted offender samples. They also provided for improved access to post-conviction DNA testing by offenders.²⁴⁴ Eligibility depends on factors including the gravity of the offence for which the person has been convicted, whether the offender is currently in prison, whether identity was at issue in the trial, whether biological evidence from the crime scene has been maintained and whether there is good reason for it to be retested.²⁴⁵ Approximately 76 per cent of states have also enacted legislation providing for convicted offenders to apply for DNA testing. Some also provide for compensation for convicted offenders who are exonerated through post-conviction DNA analysis.²⁴⁶ The federal government has established a grant program where states can apply for funding to help cover the costs of post-conviction DNA testing.²⁴⁷

The United States Department of Justice has conducted a number of reviews related to DNA sampling in the criminal justice system, and has found that laboratory practices and protocols were vulnerable to undetected non compliance by laboratory staff, that some unallowable and inaccurate DNA profiles have been uploaded onto the national DNA database, that laboratory backlogs have not been reduced in a timely manner, although funding has been allocated to address the problem, and that many DNA samples have been analysed but have not been uploaded onto the national DNA database.²⁴⁸

There is some concern in the United States about the impact television shows about criminal investigations are having on trial outcomes. The so called “CSI effect” contends that juries are more likely to make a finding of guilt if DNA evidence is adduced, regardless of the weight the evidence should be given, and correspondingly that juries are reluctant to convict in the absence of forensic evidence, even if it has little weight or is not relevant in the circumstances.²⁴⁹

Case Study 04

A 23 year old man had his DNA profile added to the Texas DNA database after being convicted of burglary. His profile linked him to the sexual assault of a young girl in 2001. The man alleged that his twin brother, who had the same DNA profile, was the perpetrator. After further investigation police alleged that both were involved, and that the first twin drove the car while the second twin sexually assaulted the girl in the back. Both were charged with aggravated sexual assault and aggravated kidnapping. The first twin pleaded guilty and testified against his brother at trial. The second twin was convicted as well.²⁵⁰

3.5. International DNA databases

3.5.1. Europe

In 1996, Interpol established a European Working Party on DNA Profiling.²⁵¹ Soon afterwards, the working party recommended that all countries in Europe be encouraged to introduce DNA profiling, if they had not already. It also examined the possibility of exchanging DNA profiles between European countries. It looked at two different options – establishing one large database of DNA profiles, or facilitating the exchange of information between national databases.

In 1997, the Council of the European Union (the main decision making body of the European Union) passed a resolution inviting member states to consider establishing national DNA databases, in accordance with the same standards and in a compatible manner. It recommended that further study be conducted with a view to establishing a system for DNA profiles to be exchanged at a European Union level.²⁵²

In 2001, the Council made a further resolution to facilitate the exchange of DNA analysis results between member states. The Council commented that the exchange of DNA analysis results in Europe is essential to address crime in a systematic way, and stressed that the exchange of DNA analysis results “should only be carried out when there are reasons to believe that such an exchange would provide relevant information in a criminal investigation.”²⁵³

The resolution established a European standard set of markers, to enable the comparison of samples analysed in different countries.²⁵⁴

Although the exchange of profiles between European countries is encouraged, there is no European DNA database. However, the issue is still being debated. In July 2004 at a European Union meeting of interior ministers, the Home Secretary of the United Kingdom put forward a proposal for the development of a European DNA database.²⁵⁵ The proposal largely stemmed from media attention given to the murder of an English school girl in France in 1996. It was not until 2004 that a suspect was identified in the United States by a DNA match and was extradited to France to stand trial. The investigation has brought about changes to the French DNA database, and has prompted further discussion of the merits of a European DNA database.²⁵⁶

In May 2005, seven European countries (Belgium, Germany, Luxembourg, the Netherlands, Austria, France and Spain) announced they would sign an agreement to allow automatic access to each other's DNA and fingerprint databases. It appears that other European countries may join the arrangement some time in the future.²⁵⁷

3.5.2. A global DNA database?

In 1998, the Interpol European Working Party on DNA Profiling expanded, so that all continents would be represented.²⁵⁸ The group became known as the Interpol DNA Monitoring Expert Group. In 1999, it recommended that an Interpol DNA database be created, so DNA profiles could be exchanged by member countries through Interpol.

In 2001, Interpol indicated that it proposed to establish an international database of DNA profiles, for use by its member states. Member states would be able to submit DNA profiles for addition to the Interpol DNA database, and would be able to search the database, using an Interpol Internet browser. The system would compare profiles added to the database with those already on it, and would notify the member states involved in the event of a match. It would be the responsibility of the member states to act on this information.

Interpol made it clear that the database would be limited to the investigation of crime connected to more than one country:

*The Interpol database is not intended to be a substitute for countries' national databases. The only profiles submitted should be those of known criminals operating internationally or those of unknown stains found at crime scenes when it is suspected that the offender might be a foreign national.*²⁵⁹

No biological material would be submitted to Interpol, only the DNA profile, which would be submitted electronically.²⁶⁰

In 2002, the Interpol DNA Unit reported on its global DNA database inquiry. At the time, 179 countries were Interpol member states. The inquiry concluded that 43 per cent of these countries perform forensic DNA analysis, and 23 per cent have a DNA database. A further 15 per cent were planning to install a national DNA database in the near future.²⁶¹ Interpol also reported that as a result of its inquiry, many countries requested Interpol's assistance to help set up a national DNA database.²⁶²

In 2003, a DNA database pilot project was set up at the Interpol General Secretariat. It aimed to provide an additional resource for member countries "to track down and identify those who commit cross border crimes."²⁶³ In 2004, the first hit from the database was announced, after a request from Slovenia was matched to a profile previously submitted by Croatia.

Endnotes

⁷⁸ *Crimes Act 1900* s 353A, inserted by *Crimes Amendment Act 1924* s 13.

⁷⁹ *Fernando v Commissioner of Police* (1995) 36 NSWLR 567 at 593 (Powell JA).

⁸⁰ *Crimes Act 1900* s 353A(3A) (repealed).

⁸¹ *Road Transport (Safety and Traffic Management) Act 1999* s 27.

⁸² *Road Transport (Safety and Traffic Management) Act 1999* s 20.

⁸³ NSW Legislative Assembly Hansard, 31 May 2000, Mr P Whelan MP, p. 6293.

⁸⁴ NSW Legislative Assembly Hansard, 31 May 2000, Mr P Whelan MP, p. 6293.

⁸⁵ NSW Legislative Assembly Hansard, 31 May 2000, Mr P Whelan MP, p. 6293.

- ⁸⁶ For example, NSW Legislative Assembly Hansard, 7 June 2000, Mr M Richardson MP, p. 6736.
- ⁸⁷ For example, NSW Legislative Council Hansard, 21 June 2000, the Hon M J Gallacher MLC, p. 7275.
- ⁸⁸ *Griffith v R* (1977) 137 CLR 293 at 327 (Jacobs J).
- ⁸⁹ *Orban v Bayliss* [2004] NSWSC 428 at paragraph 30 (Simpson J).
- ⁹⁰ For example, see Australian Law Reform Commission, *Essentially Yours: The Protection of Human Genetic Information in Australia* (March 2003) at paragraph 39.12; Law Reform Commission of Ireland, "Consultation Paper on the Establishment of a DNA Database" (March 2004) at 46; and the United Kingdom Human Genetics Commission, "Inside Information: Balancing Interests in the use of Personal Genetic Data" (May 2002).
- ⁹¹ For example, NSW Legislative Assembly Hansard, 7 June 2000, Mr M Richardson MP, p. 6738.
- ⁹² NSW Legislative Council Hansard, 28 June 2000, the Hon R S L Jones MLC, p. 7658.
- ⁹³ NSW Legislative Council Hansard, 28 June 2000, Ms L Rhiannon MLC, p. 7662.
- ⁹⁴ See, for example, Commonwealth of Australia, "*Report of Independent Review of Part 1D of the Crimes Act 1914 – Forensic Procedures*", March 2003, chapter 3; the Hon Michael Kirby, "DNA Evidence: Proceed with Care", based on an address to a seminar at the University of Technology, Sydney, 16 March 2000; Andrew Haesler, Public Defender, "*DNA – An Overview of Testing and the Crimes (Forensic Procedures) Act 2000*" (June 2003); Ben Saul, "*Genetic Policing: Forensic DNA Testing in New South Wales*", 13(1) *Current Issues in Criminal Justice* at page 74 (July 2001); Evidence by former Privacy Commissioner Chris Puplick before the Standing Committee on Law and Justice Inquiry into the Operation of the *Crimes (Forensic Procedures) Act 2000*, 8 August 2001; Dr Jeremy Gans, "Submission to the Independent Review of Part 1D (Forensic Procedures) of the *Crimes Act 1914* (Cth), available at www.ag.gov.au accessed 3 February 2006 and Australian Law Reform Commission, *Essentially Yours: The Protection of Human Genetic Information in Australia* (March 2003).
- ⁹⁵ GeneWatch UK, "The Police National DNA Database: Human rights and privacy", Briefing Number 31 June 2005, p. 5. Accessible at <http://www.genewatch.org/Publications/Briefs/Brief31.pdf>
- ⁹⁶ See M Findlay and J Grix, "Challenging Forensic Evidence" 14 *Current Issues in Criminal Justice* 269 and A Haesler SC, "DNA for Defence Lawyers" (May 2005) on the website of the Public Defenders Office, http://www.lawlink.nsw.gov.au/lawlink/pdo/ll_pdo.nsf/pages/PDO_index accessed 16 August 2005.
- ⁹⁷ *R v Daley* [2001] NSWSC 1211 (14 September 2001) at paragraph 62 (Simpson J).
- ⁹⁸ Andrew Haesler, Public Defender, "*DNA – An Overview of Testing and the Crimes (Forensic Procedures) Act 2000*" (June 2003).
- ⁹⁹ NSW Law Reform Commission, *The Right to Silence*, Report 95 (2000) at 2.2.
- ¹⁰⁰ *Petty v The Queen* (1991) 173 CLR 95 at 128 to 129 (Gaudron J). See also John Nicholson, "The 'Right' to Silence – Only Half a Right" (2000), available from the website of the Public Defenders Office, http://www.lawlink.nsw.gov.au/lawlink/pdo/ll_pdo.nsf/pages/PDO_index accessed at 17 September 2004.
- ¹⁰¹ There are other examples of the general right to silence being modified by statute: see NSW Law Reform Commission, *The Right to Silence*, Report 95 (2000) at 2.24.
- ¹⁰² For example, see Dr Jeremy Gans, "Submission to the Independent Review of Part 1D (Forensic Procedures) of the *Crimes Act 1914* (Cth), available at www.ag.gov.au accessed 3 February 2006. Although this submission discusses the Commonwealth legislation, it is largely the same as the New South Wales Act.
- ¹⁰³ The Act required the Attorney General to review its policy objectives: see *Crimes (Forensic Procedures) Act 2000* s 122.
- ¹⁰⁴ Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General (MCCOC), *Model Forensic Procedures Bill and the Proposed National DNA Database*, May 1999, preface at 11.
- ¹⁰⁵ 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.
- ¹⁰⁶ Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Forensic Procedures Bill – DNA Database Provisions – Explanatory Notes*, February 2000.
- ¹⁰⁷ Standing Committee on Law and Justice, Report No. 18: *Review of the Crimes (Forensic Procedures) Act 2000*, February 2002; Australian Law Reform Commission and the National Health and Medical Research Council (ALRC/NHMR), *Discussion Paper 66: Protection of Human Genetic Information*, August 2002.
- ¹⁰⁸ "WA, Qld pool DNA profiles", *Sydney Morning Herald*, 22 June 2005.
- ¹⁰⁹ NSW Ombudsman, *The Forensic DNA sampling of Serious Indictable Offenders under Part 7 of the Crimes (Forensic Procedures) Act 2000*, August 2004.
- ¹¹⁰ Although in South Australia the terms "intimate", "intrusive" and "non-intrusive" are used: *Criminal Law (Forensic Procedures) Act 1998* (SA) s 3.

- ¹¹¹ Commonwealth of Australia, *Report of Independent Review of Part 1D of the Crimes Act 1914 – Forensic Procedures*, March 2003 at paragraph 5.24. For a list of government forensic service providers in Australia, see the National Institute of Forensic Science Australia website, <http://www.nifs.com.au>. Accessed 25 May 2005.
- ¹¹² *Crimes (Forensic Procedures) Act 2000* s 12(g) and 20(e).
- ¹¹³ *Crimes Act 1914* (Cth) s 23WI and 23WO.
- ¹¹⁴ See *Crimes (Forensic Procedures) Act 2000* s 25(g) and *Crimes Act 1914* (Cth) s 23WT.
- ¹¹⁵ See *Crimes (Forensic Procedures) Act 2000* s 12(d) and *Crimes Act 1914* (Cth) s 23WI(1)(b) and 23WA.
- ¹¹⁶ See *Crimes (Forensic Procedures) Act 2000* s 6 and *Crimes Act 1914* (Cth) s 23WCA.
- ¹¹⁷ See *Crimes Act 1914* (Cth) s 23WA and *Crimes (Forensic Procedures) Act 2000* s 3.
- ¹¹⁸ See Commonwealth of Australia, “*Report of Independent Review of Part 1D of the Crimes Act 1914 – Forensic Procedures*”, March 2003.
- ¹¹⁹ *Crimes (Forensic Procedures) Act 2000* (ACT) s 7.
- ¹²⁰ These include the seriousness of the offences, the circumstances surrounding its commission, the degree of the suspect’s alleged participation, personal characteristics of the suspect (including age, health, cultural background), whether evidence of the suspect’s involvement in the offence can be gained in a less intrusive way, any reasons given for refusing consent (if applicable) and any other relevant matters: *Crimes (Forensic Procedures) Act 2000* (ACT) s 23 and 29.
- ¹²¹ *Crimes (Forensic Procedures) Act 2000* (ACT) s 34.
- ¹²² *Crimes Act 1958* (Vic) s 464Z(3A), as amended by the *Crimes (DNA Database) Act 2002* (Vic).
- ¹²³ *Crimes Act 1958* (Vic) s 464ZGG to 464ZGO, as amended by the *Crimes (DNA Database) Act 2002* (Vic).
- ¹²⁴ *Crimes Act 1958* (Vic) s 464SA, as amended by the *Crimes (Amendment) Act 2004* (Vic).
- ¹²⁵ *Crimes Act 1958* (Vic) s 464.
- ¹²⁶ See *Criminal Law (Forensic Procedures) (Miscellaneous) Amendment Act 2002* (SA), which commenced in April 2003.
- ¹²⁷ *Criminal Law (Forensic Procedures) Act 1998* (SA) Parts 2B and 5A.
- ¹²⁸ *Criminal Law (Forensic Procedures) Act 1998* (SA) s 3. Prior to 2002, buccal swabs were categorised as “intrusive forensic procedures”.
- ¹²⁹ *Criminal Law (Forensic Procedures) Act 1998* (SA) s 13.
- ¹³⁰ See *Crimes (Forensic Procedures) Act 2000* s 3 and *Criminal Law (Forensic Procedures) Act 1998* (SA) s 3.
- ¹³¹ *Criminal Law (Forensic Procedures) Act 1998* (SA) Part 2A.
- ¹³² *Criminal Law (Forensic Procedures) Act 1998* (SA) Part 2B.
- ¹³³ *Criminal Law (Forensic Procedures) Act 1998* (SA) Part 3 and Part 3A.
- ¹³⁴ *Criminal Law (Forensic Procedures) Act 1998* (SA) s 44.
- ¹³⁵ *Criminal Law (Forensic Procedures) Act 1998* (SA) s 46E.
- ¹³⁶ *Criminal Law (Forensic Procedures) Act 1998* (SA) s 26.
- ¹³⁷ *Criminal Investigation (Identifying People) Act 2002* (WA) s 3, 11 and 61.
- ¹³⁸ *Crimes (Forensic Procedures) Act 2000* s 3. This means the Act only applies to samples taken for forensic purposes, and not to samples taken purely to establish the identity of a person. Further, the Act does not limit other laws relating to the taking of identification evidence: *Crimes (Forensic Procedures) Act 2000* s 114.
- ¹³⁹ See *Criminal Investigation (Identifying People) Act 2002* (WA) Parts 4 to 7.
- ¹⁴⁰ See *Criminal Investigation (Identifying People) Act 2002* (WA) s 3, 31 and 42.
- ¹⁴¹ *Criminal Investigation (Identifying People) Act 2002* (WA) s 49.
- ¹⁴² *Criminal Investigation (Identifying People) Act 2002* (WA) s 40(2), 42 and 44.
- ¹⁴³ *Criminal Investigation (Identifying People) Act 2002* (WA) s 26, 28 and 31.
- ¹⁴⁴ *Criminal Investigation (Identifying People) Act 2002* (WA) s 22 and 64.
- ¹⁴⁵ *Criminal Investigation (Identifying People) Act 2002* (WA) s 8.
- ¹⁴⁶ *Criminal Investigation (Identifying People) Act 2002* (WA) s 64 to 67 and 69.
- ¹⁴⁷ See *Police Powers and Responsibilities Act 2000* (Qld) s 284 and 288 and *Crimes Act 1914* (Cth) s 23WI and 23WO.
- ¹⁴⁸ *Police Powers and Responsibilities Act 2000* (Qld) s 308 and 309.
- ¹⁴⁹ *Police Powers and Responsibilities Act 2000* (Qld) s 305.

- ¹⁵⁰ *Police Powers and Responsibilities Act 2000* (Qld) Schedule 4. Note that police officers in New South Wales may search by way of medical imaging a person who is suspected of having internally concealed drugs: *Police Powers (Internally Concealed Drugs) Act 2001* (NSW). A review by the Ombudsman found that this legislation is unworkable and has recommended it be repealed: see NSW Ombudsman, *Review of the Police Powers (Internally Concealed Drugs) Act 2001*, July 2005.
- ¹⁵¹ *Police Powers and Responsibilities Act 2000* (Qld) s 277 and 279.
- ¹⁵² *Police Powers and Responsibilities Act 2000* (Qld) s 318I.
- ¹⁵³ See *Police Powers and Responsibilities Act 2000* (Qld) s 318L(2) and *Police Powers and Responsibilities Regulation 2000* cl 8L and Schedule 1.
- ¹⁵⁴ *Police Administration Act* (NT) s 4.
- ¹⁵⁵ *Police Administration Act* (NT) s 145B.
- ¹⁵⁶ *Police Administration Act* (NT) s 145A.
- ¹⁵⁷ *Police Administration Act* (NT) s 145.
- ¹⁵⁸ *Juvenile Justice Act* (NT) s 31 and 31B.
- ¹⁵⁹ *Police Administration Act* (NT) s 145A(4).
- ¹⁶⁰ *Police Administration Act* (NT) s 4. As noted above, police officers in New South Wales may search by way of medical imaging a person who is suspected of having internally concealed drugs.
- ¹⁶¹ *Police Administration Act* (NT) s 147.
- ¹⁶² *Police Administration Act* (NT) s 147C(2).
- ¹⁶³ *Police Administration Act* (NT) s 147A.
- ¹⁶⁴ *Police Administration Act* (NT) s 147C(1).
- ¹⁶⁵ See *Police Administration Amendment (Forensic Procedures) Act* (NT).
- ¹⁶⁶ Northern Territory Legislative Assembly Hansard, 19 August 2004, Mr Henderson, Minister for Police, Fire and Emergency Services, Parliamentary Record No. 21.
- ¹⁶⁷ "DNA fails to catch crims", *Northern Territory News*, 19 April 2004.
- ¹⁶⁸ *Forensic Procedures Act 2000* (Tas) s 3. As noted above, police officers in NSW may search by way of medical imaging a person who is suspected of having internally concealed drugs.
- ¹⁶⁹ *Forensic Procedures Act 2000* (Tas) s 9.
- ¹⁷⁰ *Forensic Procedures Act 2000* (Tas) s 12.
- ¹⁷¹ *Forensic Procedures Act 2000* (Tas) s 8(3).
- ¹⁷² *Forensic Procedures Act 2000* (Tas) s 8.
- ¹⁷³ *Forensic Procedures Act 2000* (Tas) s 17.
- ¹⁷⁴ See *Forensic Procedures Amendment Act 2003* (Tas).
- ¹⁷⁵ Laws in the United States, United Kingdom, Canada and New Zealand have been amended in recent years to expand the types of offences for which DNA samples can be taken.
- ¹⁷⁶ United Kingdom Forensic Science Service, *The National DNA Database Annual Report 2003-2004*, p. 23.
- ¹⁷⁷ United Kingdom Forensic Science Service press releases, "DNA technology to progress more cold cases", 8 December 2004 and "Double the number of DNA profiles processed with automation", 3 November 2004 and fact sheet, "The National DNA Database", November 2005.
- ¹⁷⁸ *Police and Criminal Evidence Act 1984* (UK) s 63(2A) as amended by the *Criminal Justice Act 2003* (UK).
- ¹⁷⁹ Explanatory notes to the *Criminal Justice Act 2003* (UK) at paragraph 136. Formerly, a DNA sample could only be taken in the absence of consent if the person was suspected of having committed a serious offence, and the sample was likely to prove or disprove the person's involvement.
- ¹⁸⁰ *Police and Criminal Evidence Act 1984* (UK) s 63.
- ¹⁸¹ The Home Office, "DNA – 21st century crime fighting tool" (2003), p. 5.
- ¹⁸² Forensic Science Service fact sheet, "DNA Profiling", 30 November 2002.
- ¹⁸³ United Kingdom Forensic Science Service, *The National DNA Database Annual Report 2003-2004*, p. 30.
- ¹⁸⁴ *Police and Criminal Evidence Act 1984* (UK) s 63A (1).
- ¹⁸⁵ *Police and Criminal Evidence Act 1984* (UK) s 63(8B) and 65.
- ¹⁸⁶ Forensic Science Service press release, "Double the number of DNA profiles processed with automation", 3 November 2004.

- ¹⁸⁷ United Kingdom Forensic Science Service, *The National DNA Database Annual Report 2002-2003*, p. 26.
- ¹⁸⁸ See *Criminal Justice and Police Act 2001* (UK).
- ¹⁸⁹ See Attorney General's Reference No 3 of 1999 [2000] UKHL 63 (14 December 2000).
- ¹⁹⁰ United Kingdom Forensic Science Service, *The National DNA Database Annual Report 2003-2004*, p. 5.
- ¹⁹¹ United Kingdom Forensic Science Service, *The National DNA Database Annual Report 2003-2004*, p. 30.
- ¹⁹² *Police and Criminal Evidence Act 1984* (UK) s 64(1A).
- ¹⁹³ *R v Chief Constable of South Yorkshire Police ex parte S and R v Chief Constable of South Yorkshire Police ex parte Marper* [2004] UKHL 39 (22 July 2004) at paragraph 28 (Lord Steyn).
- ¹⁹⁴ United Kingdom Forensic Science Service fact sheet, "Intelligence-led screens", updated March 2005.
- ¹⁹⁵ See *Criminal Justice and Police Act 2001* (UK).
- ¹⁹⁶ United Kingdom Forensic Science Service, *The National DNA Database Annual Report 2002-2003*, p. 7.
- ¹⁹⁷ United Kingdom Forensic Science Service, *The National DNA Database Annual Report 2003-2004*, p. 13.
- ¹⁹⁸ United Kingdom Forensic Science Service, *The National DNA Database Annual Report 2002-2003*, p. 19.
- ¹⁹⁹ United Kingdom Forensic Science Service, *The National DNA Database Annual Report 2003-2004*, p. 17.
- ²⁰⁰ United Kingdom Forensic Science Service, *The National DNA Database Annual Report 2003-2004*, p. 8; and fact sheet, "The National DNA Database", 5 December 2005; and United Kingdom Parliamentary Office of Science and Technology, "The National DNA Database", POSTnote 258 (February 2006).
- ²⁰¹ United Kingdom Forensic Science Service press release, "Double the number of DNA profiles processed with automation", 3 November 2004.
- ²⁰² United Kingdom Forensic Science Service press release, "Bringing the lab to the crime scene – a world first from the Forensic Science Service and BT", 13 May 2005.
- ²⁰³ Forensic Science Service press release, "Bringing the lab to the crime scene – a world first from the Forensic Science Service and BT", 13 May 2005.
- ²⁰⁴ Media release, "50,000th DNA profile a crime fighting milestone", 21 April 2005, from www.beehive.govt.nz, accessed 13 May 2005.
- ²⁰⁵ "About ESR", Environmental Science and Research Limited website, www.esr.cri.nz, accessed 12 May 2005.
- ²⁰⁶ *Criminal Investigations (Bodily Samples) Act 1995* (NZ) s 26.
- ²⁰⁷ *Criminal Investigations (Bodily Samples) Amendment Act 2004* (NZ).
- ²⁰⁸ Report from the New Zealand Government Law and Order Committee on the *Criminal Investigations (Bodily Samples) Amendment Bill*, at 6.
- ²⁰⁹ *Criminal Investigations (Bodily Samples) Act 1995* (NZ) s 76.
- ²¹⁰ "The DNA Databank", Environmental Science and Research Limited website, www.esr.cri.nz, accessed 12 May 2005.
- ²¹¹ "DNA Successes", Environmental Science and Research Limited website, www.esr.cri.nz, accessed 12 May 2005.
- ²¹² Law Reform Commission of Ireland, "Consultation Paper on the Establishment of a DNA Database" (March 2004) at p. 38.
- ²¹³ Law Reform Commission of Ireland, "Report on the Establishment of a DNA Database" (November 2005) at chapters 2 and 6.
- ²¹⁴ "DNA database needed for detection", *Irish Examiner*, 27 April 2005.
- ²¹⁵ "DPP backs calls for DNA database", *RTE News*, 28 May 2005.
- ²¹⁶ In Canada "peace officers" apply to courts for warrants to take DNA samples. "Peace officer" includes police officers, mayors, wardens, Reeves, sheriffs, deputy sheriffs, sheriff's officers, justices of the peace and others: see *Criminal Code* (Canada) s 2.
- ²¹⁷ *Criminal Code* (Canada) s 487.05(1).
- ²¹⁸ *Criminal Code* (Canada) s 487.05(3).
- ²¹⁹ *Criminal Code* (Canada) s 487.05(1) and (2).
- ²²⁰ See Department of Justice Fact Sheet, "DNA Sampling: the Federal Government's Position", www.justice.gc.ca/en/news/nr/1998/dnafact.html accessed 16 May 2005.
- ²²¹ See Department of Justice Fact Sheet, "DNA Sampling: the Federal Government's Position", www.justice.gc.ca/en/news/nr/1998/dnafact.html accessed 16 May 2005.
- ²²² *DNA Identification Act 1998* (Canada) s 5.
- ²²³ *Criminal Code* (Canada) s 487.051.
- ²²⁴ The National DNA Data Bank of Canada, *Annual Report 2003-2004* at p. 32. Available online at <http://www.nddb-bndg.org>.
- ²²⁵ *DNA Identification Act 1998* (Canada) s 9.

- ²²⁶ *DNA Identification Act 1998* (Canada) s 9.1.
- ²²⁷ *Criminal Code* (Canada) s 487.09.
- ²²⁸ Canadian National DNA Data Bank website, <http://www.nddb-bndg.org>, accessed 19 May 2005.
- ²²⁹ Canadian National DNA Data Bank website, <http://www.nddb-bndg.org> accessed 19 May 2005.
- ²³⁰ The National DNA Data Bank of Canada, *Annual Report 2003-2004* at 7. Available online at <http://www.nddb-bndg.org>, accessed 19 May 2005.
- ²³¹ The National DNA Data Bank of Canada, *Annual Report 2003-2004* at p. 10 and 24. Available online at <http://www.nddb-bndg.org>, accessed 19 May 2005.
- ²³² Canada, *Report of the Working Group on the Prevention of Miscarriages of Justice*, 25 January 2005, www.justice.gc.ca/en/dept/pub/hop/p8.html accessed 20 May 2005.
- ²³³ See Bill C-13: *An Act to amend the Criminal Code, the DNA Identification Act and the National Defence Act*. The Act was assented to on 19 May 2005 but at the time of writing had not yet come into force.
- ²³⁴ Canada Senate Hansard, 16 May 2005, the Hon Landon Pearson MP.
- ²³⁵ *DNA Identification Act 1998* (Canada) s 13.
- ²³⁶ Legislative authority for establishing a national DNA database comes from the *DNA Identification Act of 1994* (USA).
- ²³⁷ FBI website, <http://www.fbi.gov/hq/lab/codis/clickmap.htm> accessed 3 June 2005.
- ²³⁸ United States Office of the Inspector General, "The FBI DNA Laboratory: A Review of Protocol and Practice Vulnerabilities" (May 2004), chapter 3.
- ²³⁹ See *Advancing Justice Through DNA Technology Act of 2003* (USA) s 103 and *Justice For All Act of 2004* (USA) s 203.
- ²⁴⁰ See Seth Axelrad, American Society of Law, Medicine and Ethics, "Users Guide to the survey of State DNA Database Statutes", available online at http://www.aslme.org/dna_04/grid/guide.pdf accessed 3 June 2005.
- ²⁴¹ Congressional Testimony of Dwight Adams, Deputy Assistant Director, Laboratory Division, FBI, before the House Committee on Government Reform, 12 June 2001.
- ²⁴² US Department of Justice, Office of the Inspector General, *Audit Report on the Office of Justice Programs Convicted Offender DNA Sample Backlog Reduction Grant Program* (May 2002).
- ²⁴³ US Department of Justice, Office of the Inspector General, *Audit Report on the No Suspect Casework DNA Backlog Reduction Program* (November 2004).
- ²⁴⁴ See in particular the *Justice For All Act of 2004* (USA) s 3600.
- ²⁴⁵ See Seth Axelrad, American Society of Law, Medicine and Ethics, "Users Guide to the Survey of Post-Conviction DNA Testing Statutes", available online at http://www.aslme.org/dna_04/grid/GuideConviction.pdf accessed 3 June 2005.
- ²⁴⁶ See Seth Axelrad, American Society of Law, Medicine and Ethics, "Users Guide to the Survey of Post-Conviction DNA Testing Statutes", available online at http://www.aslme.org/dna_04/grid/GuideConviction.pdf accessed 3 June 2005.
- ²⁴⁷ *Justice For All Act of 2004* (USA) s 412.
- ²⁴⁸ See Congressional Testimony of Glenn Fine, Inspector General, US Department of Justice, before the Senate Committee on Appropriations Subcommittee on Commerce, Justice, State and the Judiciary, 3 February 2005.
- ²⁴⁹ "Defense, Prosecution Play to New 'CSI' Savvy: Juries Expecting TV-Style Forensics", *Washington Post*, 22 May 2005.
- ²⁵⁰ See "Twin with identical DNA testifies against his brother in rape trial", *Houston Chronicle*, 2 June 2005; "Rape trial riddled by identical DNA of suspects", NBC News, 3 June 2005; "Twin convicted in rape of girl, 9", *Houston Chronicle* 4 June 2005.
- ²⁵¹ Interpol is the International Criminal Police Organisation.
- ²⁵² European Union Council of Ministers Resolution on the Exchange of DNA Analysis Results, 9 June 1997. Available online at <http://ue.eu.int>.
- ²⁵³ European Union Council of Ministers Resolution on the Exchange of DNA Analysis Results, 25 June 2001. Available online at <http://ue.eu.int>.
- ²⁵⁴ European Union Council of Ministers Resolution on the Exchange of DNA Analysis Results, 25 June 2001.
- ²⁵⁵ 'Blunkett to call for European DNA database' *The Guardian* (UK), 5 July 2004.
- ²⁵⁶ "DNA lessons of Caroline murder", *The Observer*, 13 June 2004.
- ²⁵⁷ "EU members to swap crime data", *Washington Times*, 21 May 2005.
- ²⁵⁸ To date, Australia, Argentina, Austria, Belgium, China, France, India, Norway, South Africa, Spain, the United Kingdom and the United States have all been represented. The 2000 meeting of the Interpol DNA Monitoring Expert Group took place in Melbourne.

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- ²⁵⁹ Interpol, "Handbook on DNA data exchange and practice: recommendations from the Interpol DNA Monitoring Expert Group", 2001, p. 35. Available online at <http://www.interpol.int/Public/Forensic/dna/HandbookPublic.pdf>, accessed 20 May 2005.
- ²⁶⁰ Interpol, "Handbook on DNA data exchange and practice: recommendations from the Interpol DNA Monitoring Expert Group", 2001, p. 35. Available online at <http://www.interpol.int/Public/Forensic/dna/HandbookPublic.pdf>, accessed 20 May 2005.
- ²⁶¹ Interpol DNA Unit, "Global DNA Database Inquiry: Results and Analysis", p. 26. Available online at <http://www.interpol.int/Public/Forensic/dna/Inquiry/InquiryPublic2002.pdf> accessed 20 May 2005.
- ²⁶² Interpol DNA Unit, "Global DNA Database Inquiry: Results and Analysis", p. 26. Available online at <http://www.interpol.int/Public/Forensic/dna/Inquiry/InquiryPublic2002.pdf> accessed 20 May 2005.
- ²⁶³ "First hit from Interpol DNA database", <http://www.interpol.int/Public/News/dna20040505.asp> accessed 20 May 2005.

Chapter 4. Implementation of the Act

This chapter describes the way the Act is implemented and the roles of each of the main stakeholders. The Attorney General is the minister responsible for the Act, but its implementation is largely split between NSW Police (investigation and sampling) and NSW Health (DNA analysis and database management). Experts who have specific skills or training also play a small role.

4.1. NSW Police at a corporate level

NSW Police implements the Act at a corporate level by maintaining Standard Operating Procedures (SOPs), training officers in forensic procedures, providing specialist forensic services and liaising with NSW Health.

4.1.1. The Forensic Services Group (FSG)

The NSW Police Forensic Services Group (FSG) provides specialist skills in the collection and preservation of physical evidence from crime scenes, suspects, victims and witnesses. Several units within FSG are involved with forensic procedures:

- The Forensic Procedures Implementation Team (FPIT) was created specifically to oversee the implementation and operation of the Act. FPIT maintains a webpage on the police intranet with practical information about forensic procedures, including answers to frequently asked questions and the forms police may need, such as applications for court orders. The site is easy to navigate and has all the relevant NSW Police policies and procedures in the one place. FPIT also runs a 24 hour hotline for officers seeking advice about forensic procedures, and distributes information about cold links to relevant local area commands. It is also responsible for notifying the laboratory when DNA profiles taken from suspects and volunteers are due for destruction. FPIT will also oversee the transference of DNA profiles from the NSW database to CrimTrac, the National DNA database, if it goes ahead.
- The Crime Scene Operations Branch is responsible for attending crime scenes to take photographs and collect physical evidence, including fingerprints and biological samples, like blood stains.
- The Criminal Identification Specialist Branch deals with fingerprints taken as forensic procedures.
- The Disaster Victim Identification Unit obtains DNA samples taken from relatives to help identify disaster victims.

The NSW Government announced in March 2005 that it will provide \$26 million for forensic services equipment and personnel.²⁶⁴ This will be used to create 147 new forensic officer positions, in addition to the existing 345 scene of crime officers. It will also be used to create a new forensic science centre, which will amalgamate a number of existing forensic services within NSW Police into one central branch. It will examine, prioritise and analyse crime scene exhibits. However, it will not conduct DNA analysis – this will still be done by DAL with some analysis work being outsourced to a private laboratory.

4.1.2. Standard Operating Procedures (SOPs)

FPIT developed SOPs for police officers to use when conducting forensic procedures. There are 18 different SOPs, depending on the type of procedure and the attributes and circumstances of the person being tested, such as whether:

- the person is a suspect, volunteer or victim
- the person is an adult, child or incapable person
- the person is under arrest
- the person is Aboriginal or Torres Strait Islander
- the procedure is intimate or non-intimate, and
- the procedure is conducted by consent, court order or senior police officer order.

While some officers find this confusing, the idea is that once an officer has selected the appropriate SOP, he or she will be prompted at each step of the way, which makes it much easier for the officer to fulfil all the legislative requirements.

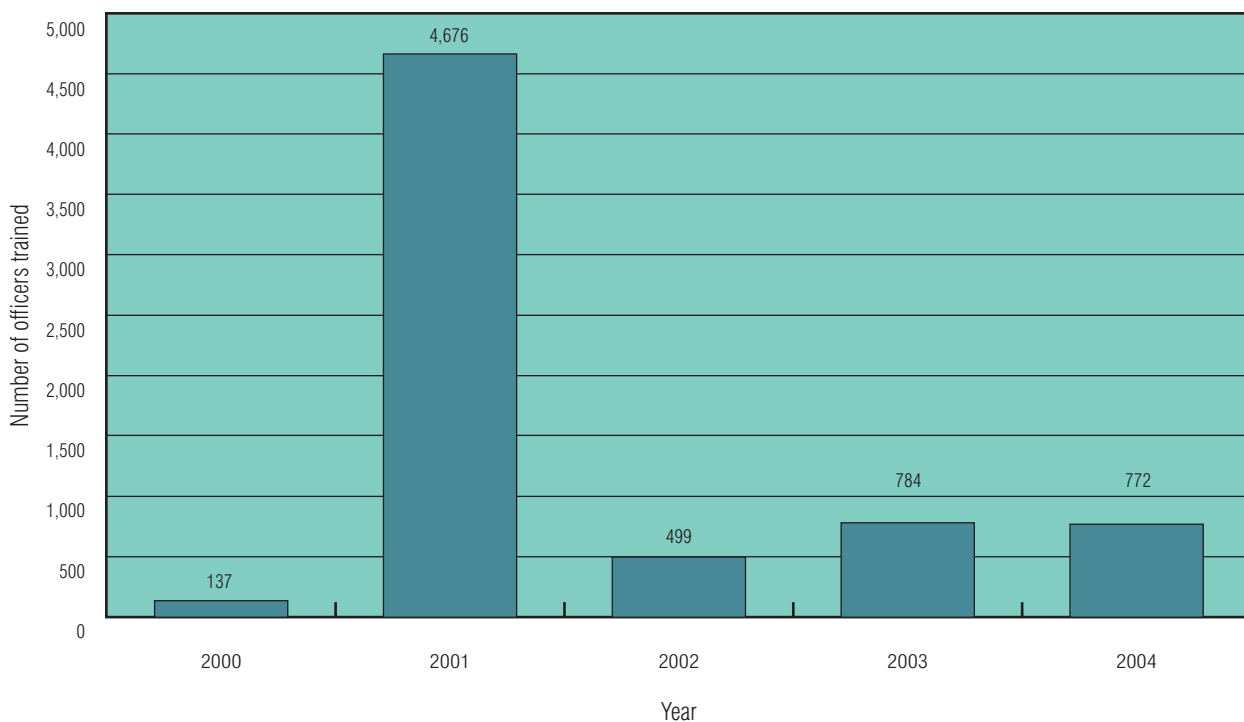
4.1.3. Training and accreditation

When the Act commenced, FPIT developed a training course so police officers could become appropriately qualified to conduct forensic procedures. The Act defines “appropriately qualified” as having suitable professional qualifications or experience to conduct the procedure.²⁶⁵

Training is usually conducted by FPIT or by a local area command’s education and development officer. The training course provides a comprehensive introduction to the Act, explaining police powers and responsibilities and giving an overview of the types of circumstances in which police can conduct forensic procedures. Ombudsman officers attended one of the forensic procedures training days run by FPIT and found the information relevant and appropriate.

Almost 7,000 officers have been trained in forensic procedures since the Act came into force. As figure 1 shows, the bulk of these were in the first year.

Figure 01: Number of officers accredited by year.



Source: NSW Police advice received 22 June 2005. (n = 6,868)

During the training session, police officers get hands on experience in how to take DNA by buccal swab and hair sample. The training does not cover how to take photographs or fingerprints, as police officers routinely take these at the time of charging. It does however cover the circumstances in which police can take photos or finger, hand, toe or foot prints as forensic procedures.

After completing the initial training course, there are no further assessment or training requirements. Officers remain accredited whether they conduct any procedures or not. However, FPIT still runs training continuously, for new officers and for officers who may already be accredited but would benefit from a refresher course. Some of the larger commands run forensic procedures training up to four times a year. FPIT also constantly monitors which ten commands are conducting the least training, and organises training for those commands. The Police Association of NSW suggested that forensic procedures training should be mandatory each year.²⁶⁶

Separate training courses are run for scene of crime officers, forensic service group officers and forensic investigators. These cover the collection of crime scene samples and specialist forensic procedures that require additional skills, such as gunshot residue tests, scrapings or lifting by tape, technical photographs and swabbing for trace DNA. NSW Police was unable to advise how many officers are accredited to conduct these types of procedures.²⁶⁷

4.1.4. Publications

Since 2000, NSW Police has published 58 articles about forensic procedures in the *Police Weekly* magazine. This magazine is distributed to every police station and is also available on the police intranet so that every police officer has access to it. Articles advise officers of changes to legislation and policy, promote success stories where forensic procedures have produced good results, and discuss scenarios where the use of forensic procedure powers may be problematic.

Issues which have been covered include:

- compliance with court orders
- changes to procedures for submitting exhibits for DNA analysis
- picture identification; obtaining evidence from discarded items
- conducting forensic procedures on children and young people
- sharing forensic material with suspects
- recording forensic procedures on the custody management system
- the need to take a confirmation sample from a suspect identified through a cold link
- conducting forensic procedures on volunteers
- destruction of DNA samples taken through mass screenings, and
- police access to Guthrie cards (blood samples taken from babies at birth by heel prick).

These articles show that NSW Police and FPIT in particular have made a considerable effort throughout the review period to ensure officers are aware of their obligations under the Act, and are using their powers to conduct forensic procedures effectively and appropriately.

4.1.5. Monitoring by NSW Police

FPIT monitors implementation of the Act in many ways, such as keeping statistics of the number of forensic procedures conducted and outcomes for cold links, checking that forensic procedures have been recorded on COPS properly, and requesting the laboratory to destroy DNA samples which can no longer be retained.

The NSW Police Audit Group monitors the implementation of the Act through its audits of local area and specialist commands. Auditors examine the records and systems of individual commands to assess compliance with various legislative, procedural and policy requirements. The forensic procedures component of the audit involves selecting five DNA samples and checking that:²⁶⁸

- the procedure was electronically recorded, was taken for an indictable offence and was taken by an appropriately qualified person
- the DNA sample was properly handled, by reviewing exhibit book entries, storage facilities (including temperature and security) and how long police took to send the sample to DAL, and
- police have taken appropriate action after receiving the DNA analysis results.

The auditors also examine the DNA kit register to account for the kits which have been used, and those which are still on hand.

It is positive to see that NSW Police is monitoring the systems and practices in individual commands to assess compliance with the legislative and policy requirements relating to forensic procedures. However, there are some aspects of the audit which in our view could be improved.

First, the current audit practice only deals with DNA samples. As discussed throughout this report, the Act provides for a variety of forensic procedures. Given that the majority of forensic procedures are DNA samples, it is appropriate

that the audit focuses on DNA sampling. However, there would be some merit in assessing records and systems relating to other types of forensic procedures as well.

Second, the audit does not appear to check the authority for conducting procedures. In our audit of local area commands, we found it difficult locating consent forms, senior police officer orders and court orders. Those which could be found were sometimes inaccurate. In our view, checking that procedures have been properly authorised should be a crucial part of the audit process.

Third, we gained an enormous amount of information through watching videos of forensic procedures. We saw whether the person undergoing the procedure had been provided with the right information, whether the person was cautioned, whether the procedure itself was conducted properly and whether the testing officer was sufficiently prepared. There would be considerable merit in the Audit Group watching the videos for the five procedures selected for auditing. We found that forensic procedures took an average of 23 minutes, so we estimate this would take approximately two hours. The length of time taken to conduct forensic procedures is discussed in section 8.3.2.

Recommendation 01

Audits of local area commands include a review of records and systems relating to other types of forensic procedures, as well as DNA samples.

NSW Police supports this recommendation. It also advised that Organisational Review and Support Teams, which perform functions previously performed by the Audit Group, currently audit fingerprint as well as DNA forensic procedures.²⁶⁹

Recommendation 02

For each of the procedures selected for auditing, the auditor reviews the authority for the procedure (consent form, senior police order or court order) and watches the video of the procedure.

NSW Police does not agree that for each of the procedures selected for auditing, the auditor should watch the video of the procedure. Rather, videos should be viewed according to the level of risk determined during the review. According to NSW Police, mandatory viewing of forensic procedure videos “would have considerable resource implications and risk assessment issues.”²⁷⁰

While we recognise that watching videos requires some time, we found watching videos of forensic procedures enormously beneficial for our review, especially for identifying good and poor practice, and urge NSW Police to give this recommendation further consideration.

4.2. NSW Police at a local level

NSW Police implements the Act at a local level through its local area and specialist commands. We surveyed all 80 local area commands about how they use their powers under the Act, and any difficulties they have identified. We also audited eight local area commands (four metropolitan and four regional) to see whether police at a local level are complying with their legislative obligations.

We found that most of the forensic procedures we audited had been conducted in a professional and competent manner. Some commands had developed good systems and processes and had clear strategies in place for the management of forensic procedures. However, we did identify some areas of concern.

We set out our observations and preliminary recommendations in a Discussion Paper, which we provided to NSW Police at a corporate level and to each of the local area commands we audited. We met representatives from FPIT, FSG and the Audit Group to discuss our preliminary findings and recommendations.

4.2.1. How easy is it for police officers to comply with the Act and SOPs?

In our survey, we asked local area commands how easy it is to comply with the legislation and SOPs. About half the commands said it was easy, and about half said it was difficult.²⁷¹ Only three commands said it was very easy, and only one said it was very difficult.

Commands which had difficulty complying with the SOPs generally said there are too many to choose from. As discussed above, there are 18 different SOPs, depending on the type of procedure and attributes and circumstances of the person being tested. While this may appear daunting for officers, we note that the SOPs have been designed to maximise compliance with the legislation. To assist officers in selecting the correct SOPs, FPIT have included on their intranet site separate flowcharts on how to select appropriate SOPs. Separate flowcharts have been established for suspects, volunteers and procedures conducted in accordance with a court order. Once the appropriate flowchart has been selected, the officer can then use this to select the SOPs suitable to the status of the individual undergoing the procedure. The SOPs then take the officer through the process of conducting the forensic procedure and provide prompts at each step within the process. In our view, this is the best way to ensure officers who are not familiar with the Act meet their legislative obligations.

Over half of local area commands advised they had experienced problems with the Act. These related to:

- the complexity of the legislation
- difficulty arranging interview friends and independent persons for suspects and volunteers
- having to obtain court orders to conduct forensic procedures on children and the length of time it takes to obtain an order
- the length and complexity of the information sheet
- having to record forensic procedures on video
- sharing samples with suspects
- conducting procedures within the time limits specified in the Act
- difficulty transporting DNA samples to the lab for analysis (both metropolitan and regional commands made this comment)
- delays in obtaining DNA analysis results, and
- difficulty of obtaining DNA information from interstate.

We have addressed these issues in detail in the relevant parts of this report.

4.2.2. Impact of forensic procedure powers on police practice

The power to conduct forensic procedures has had a significant impact on the way police investigate and prosecute crime. Forensic procedures are conducted in every local area command in New South Wales, and some specialist commands as well, in relation to offences ranging from minor property offences through to the most serious types of crime. Police officers regard the power to conduct forensic procedures as extremely useful:

*It's a fantastic investigative tool – it's already had a huge impact, it's the greatest step forward in investigation since finger printing.*²⁷²

*It's a great power, which police should have had ages ago.*²⁷³

Some officers advised they consider using their power to conduct forensic procedures as a matter of course:

*Generally I refer, consider or use the Forensic Procedures Act with every arrest and/or investigation I undertake.*²⁷⁴

*Instead of asking, 'Why should I do this procedure?', police should be asking themselves, 'Why shouldn't I do this procedure?... Buccal swabs should be part and parcel of the charge process... We're getting everyone accredited and trying to encourage officers to take a buccal swab where they can.'*²⁷⁵

Many officers emphasised that forensic analysis is a useful investigative tool, but that it cannot replace other avenues of investigation:

DNA evidence is not the “ultimate” evidence. We hear that is it not an exact science. I have always been of the opinion, “Try and not go to court with only DNA.” However, in saying that, I am aware that we could not justify a lack of action just because DNA evidence is the only evidence. Investigators need to be aware that DNA evidence should only be used (where possible) as a supplement to the prosecution case.²⁷⁶

DNA puts the person at the scene of the crime but does not put them there when the crime occurred. Therefore it is a good investigative tool but investigators still need to fully investigate all aspects of the matter.²⁷⁷

Interestingly, about a quarter of the local area commands we surveyed expressed concern about police officers becoming increasingly reliant on forensic analysis and losing traditional investigative skills:

Police may place too much reliance on DNA evidence and may neglect other more traditional methods of investigation and corroboration rather than using DNA matching as one of a number of tools available to them.²⁷⁸

Investigation processes used would totally rely on DNA and other investigation methods may decline. DNA is a good tool for indicative investigations and provides reasonable cause to suspect, but is NOT the be all of investigation process.²⁷⁹

Other investigative tools or methods may be overlooked or discounted. Investigations may be delayed whilst awaiting DNA results, risking the loss of other valuable evidence. There may be a loss of basic investigative skills amongst practitioners who rely too heavily on DNA or other similar procedures.²⁸⁰

Some officers also commented that they anticipate offenders will change the way they operate as DNA analysis becomes more routine:

Offenders will go to further lengths to avoid leaving DNA evidence at a crime scene.²⁸¹

People will stop smoking.²⁸²

Criminals will realise the useful technique of gathering DNA and will become more careful i.e. wearing gloves.²⁸³

4.2.3. Reluctance to conduct forensic procedures

Despite the significant impact forensic procedure powers have had on policing, we found that many officers are extremely reluctant to conduct the procedures. This is due to a number of factors. First, many officers commented that the legislation was too complex, and that there is too much to remember for people who do not conduct forensic procedures very often. One commented, “The complexity of procedures not only confuses the suspects, it actually confuses police... They made something which should be simple into something really complicated.”²⁸⁴ Another commented, “If you ever want to clear a room, just ask who wants to do a forensic procedure.”²⁸⁵ Another officer, who demonstrated a thorough understanding of the Act himself, said that others “avoid it like the plague.”²⁸⁶

Second, a large number of officers had been trained in forensic procedures but had no actual experience in conducting them. One officer told us it was two years since he had been trained, but at the time of the audit he had never conducted a forensic procedure. He indicated there would be many other officers in the same position. Another officer saw his name on a list of accredited officers and exclaimed, “What, am I accredited?” Another said of the other officers in his command, “Most of them are trained, but won’t admit it,” because they do not want to be asked to conduct a forensic procedure.

Some of the videos we watched showed officers who were ill prepared, the officer conducting the procedure spending a long time sifting through documentation, and sometimes reading out information which was not relevant in the circumstances.

Third, some officers objected to the length of time taken to conduct a forensic procedure. One officer said, “You have a five minute procedure but it takes two hours,” and commented that this was unfair and inconvenient for the suspect, as well as being impractical for police. Another officer commented that youth crime was a significant problem in the area, and that it was cumbersome having to obtain a court order to conduct a forensic procedure on a young person.

Some officers indicated they were reluctant to carry out procedures for fear of doing something wrong, which could lead to the evidence being excluded and the accused being acquitted:

Who wants to shoulder this responsibility if you took the DNA for the Inner West rapist or a serial killer?²⁸⁷

Given the widespread reluctance to conduct forensic procedures, some commands end up relying on one or two officers to conduct all their forensic procedure work. Some officers resent this:

I'm sick of having to drop everything I do and go to another station (a custody station) and obtain the sample and then enter it up in the exhibits register.²⁸⁸

In some areas, reluctance to conduct forensic procedures has contributed to a low level of use of the powers available under the Act. One commander we interviewed said that in his command, there had so far been only one DNA match, and no eliminations, despite the Act having been in force for several years. He realised that officers were hardly conducting any forensic procedures, even though there were many occasions where suspects fit the criteria. He attributed this to a lack of confidence among officers and the perceived length of time it takes to conduct a procedure.

The commands we audited had generally recognised this problem, and some had taken steps to address it.

4.2.4. Education and refresher training

We asked commands in our survey how often they ran forensic procedures training with 28 commands advising they conducted training at least once a year. Another 28 commands indicated they conducted training as the need arose. Some commands had not conducted any since the initial training when the Act came into force. In our view, officers should be required to complete refresher training in forensic procedures in order to remain accredited. It is clear that many officers have conducted very few, if any procedures, yet remain accredited.

One command we audited, which had identified that it was conducting very few forensic procedures, focused on education and training as a way of encouraging officers to conduct procedures more frequently. It promoted examples of successful investigations involving forensic procedures, and publicised information about forensic procedures internally.

Some officers we spoke to also suggested that videos of forensic procedures could be shown to the command so officers can see how procedures are conducted. Inexperienced officers could also start by getting involved in an easier role, like operating the camera, which may improve their confidence when it comes to conducting an actual procedure for the first time.

4.2.5. Specialist forensic procedure units

Another way of addressing widespread reluctance to conduct forensic procedures is to have a smaller group of officers who specialise in DNA and other forensic procedures. One command we audited had established a small team of officers who follow up links, investigate offences and interview suspects in relation to DNA. The command said this worked well, as these officers developed strong skills and experience in the area. Another command was canvassing the idea of having a specialist DNA unit within the command, but at the time of the audit, it was not clear whether this was possible given resource constraints.

We support the idea of having a smaller group of specialist officers conducting forensic procedures. In most commands, we found that this was happening in practice anyway, as the command tended to rely on a small group of officers who were competent and confident to conduct forensic procedures, while large numbers of accredited officers were not conducting any.

We also noted that in commands where a small group of officers conducted procedures on a regular basis and a senior officer had been appointed to oversee the process, there was greater compliance with the legislation. These commands also had clear policies that the staff were familiar with. Rather than avoid forensic procedures “like the plague,” we found the officers who routinely conducted forensic procedures demonstrated a good understanding of the legislation when interviewed and appeared confident and professional in the videos we watched. Several officers said they are comfortable with the legislation now, although it had been daunting at first:

I don't have any problems with it. I love it. It's a hassle to do it, yeah the paperwork's annoying, but it's part of the legislation. You should use it.²⁸⁹

There is often criticism of the procedures by those who are not au fait with the SOPs. When an officer conducts a procedure it quickly becomes apparent that the actual procedure is straight forward.²⁹⁰

In our view, having a smaller group of officers who are specially trained in forensic procedures would promote consistency and would be of benefit both to police and the people undergoing forensic procedures. The officers

conducting procedures would be more familiar with the equipment, processes and legislative requirements, and this would in turn minimise mistakes due to inexperience or nerves. The Police Association of NSW indicated in its submission that it would prefer forensic procedures to be conducted by a smaller group of specialists rather than by all general duties police officers.²⁹¹

We understand that NSW Police may not support this proposal, although we have never been formally advised of this. While no reasons have been provided, it appears that NSW Police prefers mass training and accreditation so that rostering and staff movements do not have to take into account who is accredited in forensic procedures. While NSW Police may not support the creation of specialist forensic procedures units across the board, it appears that this may suit some commands. In any case, as we have already found, this is what tends to happen in practice.

4.2.6. Creating a specialist forensic procedures portfolio

Several commands we surveyed indicated they had assigned responsibility for forensic procedures to the station manager, or some other person within the command. Others had gone further and created a specialist forensic procedures position within their command management framework. One commander we interviewed who had done this commented that “forensic procedures has basically become an industry of its own,” and saw the need for a specialist position, like the youth liaison officer, domestic violence liaison officer and crime manager positions.²⁹²

The introduction of a dedicated forensic procedures officer might also address many of the concerns identified during our audits. These concerns include:

- consent issues – ensuring records of consent are centrally maintained within in the command and easily accessible
- senior police officer orders – ensuring these are centrally recorded within the command and that the senior officer is independent to the investigation
- court orders – establishing a record of court orders sought and granted within the command, especially those relating to extension of the retention period for DNA profiles
- forensic procedures records – establishing systems within the command to record all types of forensic procedures conducted, not just DNA procedures
- electronic recordings – maintaining the video recordings of forensic procedures, and
- accountable items – regularly auditing the accountable items relating to forensic procedures, such as the sample kits, consent and exhibit books.

A dedicated forensic procedures officer could also be held accountable for maintaining good record keeping systems, ensuring all forensic procedures equipment is operating correctly, reviewing videos to assess compliance with the legislation and SOPs, identifying training needs in the command and auditing accountable items. He or she could also manage the way forensic procedures are used in the command to see whether they are effective in the investigation and prosecution of crime – something which we found does not generally occur.

Creating a forensic procedures portfolio would also give other stakeholders – including FPIT, FSG and DAL – a central point of contact within each command, which they have indicated would be enormously helpful.²⁹³ It would create a forensic procedures network, which does not exist at the moment. Officers from all over the state contact FPIT if they have problem, but there is no way FPIT can get in touch with commands easily. At the moment, FPIT is limited to publishing information on the intranet or in the Police Weekly, but this largely relies on individual officers seeking out the information. Having a designated forensic procedures officer in each command would ensure key information about forensic procedures actually reaches its audience.

Having a designated forensic procedures officer in every command is a good initiative, and seems like it may be more achievable than setting up specialist forensic procedures units.

Recommendation 03

NSW Police ensure officers conducting forensic procedures have appropriate training and experience. In particular, NSW Police consider implementing the following reforms.

- a. NSW Police develop a forensic procedures portfolio in each local area or specialist command, with a designated and fully trained forensic procedures officer responsible for the portfolio.
- b. Individual commands consider developing a small team of officers with forensic procedures expertise who will primarily be responsible for conducting forensic procedures in those commands.
- c. Accreditation for a police officer to conduct any forensic procedure be conditional upon annual training.

In its response to the draft report, NSW Police stated that it supports recommendation 3(a) and “will determine the appropriate area to undertake its implementation.”²⁹⁴ With regard to recommendation 3(b) which received in principle support, NSW Police agreed that better control and management of forensic procedures is required and advised that it is assessing methods for improvement in this area.

NSW Police did not support recommendation 3(c) and stated that it will review this area to ensure issues concerning adequate training are addressed. However, NSW Police does not believe that annual retraining of police officers in conducting forensic procedures is appropriate.²⁹⁵

4.2.7. Posters, quick guides and access to reference material

We were pleased to see that many of the commands we audited kept hardcopies of information sheets to be given to people undergoing forensic procedures, lists of accredited officers, names of acceptable persons from local community groups to act as interview friends and instructions on how to conduct forensic procedures. However, the information at some commands was out of date.

Some commands had put together their own comprehensive forensic procedure information kit, which included copies of all the relevant SOPs, information sheets, application forms for orders and instructions on how to use video cameras. Some also included information specific to the command, such as contact details for independent persons and interview friends. Most commands had dedicated storage areas for all the equipment and police policies relating to forensic procedures next to or in the testing area. This was fairly standard across the eight commands we audited.

4.2.7.1. Electronic or hardcopy SOPs?

Most of the commands we audited kept hardcopies of the SOPs with the rest of their forensic procedures equipment, although some had only printed out copies of the SOPs most frequently used, usually those for taking buccal swabs and hair samples from adult suspects.

Representatives from FPIT and the NSW Police Audit Group have indicated a preference for police officers to use electronic rather than hardcopy versions of the SOPs, as this ensures they are always relying on the most complete and up to date version. Although the SOPs are easily accessible on the FPIT intranet site, many officers prefer a hardcopy, especially if they need the SOPs in front of them while conducting the procedure (forensic procedures are usually conducted in an interview room, with no intranet access). We also note that 94 per cent of commands have printed a hardcopy of the SOPs to keep on hand – so this is clearly what happens in practice.²⁹⁶

If each command had a designated forensic procedures officer, as we recommend, this person could be responsible for ensuring the hardcopy SOPs are complete and up to date.

In addition, and so that NSW Police supports the preferred practice of its officers, FPIT could establish a hard copy manual as well as electronic material and provide updates as they occur.

4.2.8. Recording forensic procedures

Most of the problems we identified through our survey and audits stemmed from incomplete or inaccessible records, rather than the forensic procedures themselves. Indeed, we found records management systems and practices varied considerably between commands, and sometimes within a single command. This means that officers have to learn different processes each time they move within the organisation. Not only is this inefficient, it poses a risk to NSW

Police, if it means accurate records are not being kept. As one officer explained, “The mechanics fall over, because there are so many different people doing it so many different ways.”²⁹⁷

Many of the officers we interviewed indicated they would like to receive advice and support from a corporate level about how to manage documentation relating to forensic procedures. As one officer commented, “The emphasis has been on taking samples, not on what to do with them afterwards.”²⁹⁸

Most of the commands we surveyed were unable to provide all the information we requested, either because it had not been kept, or because it was not accessible on COPS. This included fairly basic information, such as:

- the number and type of DNA forensic procedures conducted in the command
- the number of non-DNA forensic procedures conducted in the command (in some cases, commands were unable to advise if any non-DNA procedures had been conducted), and
- the number of applications made for court orders for juveniles or incapable persons, and whether any of these applications were refused by magistrates.

4.2.8.1. Forensic procedure records on COPS

We found significant problems with the way forensic procedures are recorded on the police computer system, COPS. Records varied greatly – some detailed the bag and/or barcode numbers for DNA samples, and others only included exhibit references. Records relating to non-DNA forensic procedures often had even less information recorded. We also found a number of duplicate entries for forensic procedures where it was unclear if the same procedure had been recorded more than once by mistake, or whether police had in fact conducted more than one procedure.²⁹⁹

Dates were often inaccurate, because the information had been recorded some time after the procedure had been conducted, or because the date had been changed to reflect when the DNA analysis results were received.³⁰⁰ This is of particular concern given the legal requirement that samples may have to be destroyed after 12 months. If the date is not recorded correctly, FPIT will not be alerted if the sample is due for destruction.

Locations were often incorrect too. This could be because the COPS record referred to the location of the offence rather than the location where the procedure had been conducted.³⁰¹ Sometimes the officer who had conducted the procedure had moved to another command and the COPS record showed the officer’s current location, instead of where the procedure was conducted.³⁰² In many cases the location record was correct, but the documentation relating to the procedure had been taken to another command which was investigating the offence.

We also had difficulty interrogating COPS for information about procedures conducted by order of a court or senior police officer. In some cases it was recorded in the event narrative that police had applied for an order, but it would be better for this to be recorded in the specific forensic procedures record.

The reason for this is that, each week, FPIT compares the records of DNA samples submitted to DAL against the relevant forensic procedure record on COPS. FPIT checks that a COPS entry has been made, and checks that the bag identification number and sample barcodes are the same in the police and DAL records. FPIT acknowledges that, contrary to police policy, not all officers are recording forensic procedures properly. FPIT has put instructions about how to record a forensic procedure on COPS on its website.³⁰³

4.2.8.2. Recording forensic procedures in the custody management system

Forensic procedures can also be recorded in the custody management system, which is also part of COPS. Custody records include such information as when the procedure was conducted and how long it took, whether the person resisted the procedure, whether the person is Aboriginal or Torres Strait Islander and whether police have assessed the person to determine if they are capable of understanding the general nature and effect of the procedure.

We examined the custody records relating to each of the forensic procedures we audited. Very few had complete records. Some did not refer to the forensic procedure at all; although it was clear from other documentation that one had been conducted.³⁰⁴ Others referred to it in one of the other fields – such as the record of the suspect’s movements or communication – rather than in the designated forensic procedure field.

Since the Act came into force, officers have been able to record the forensic procedures either as separate ‘forensic procedure’ incidents on COPS, or in the custody management system. NSW Police is considering whether to change this so that all forensic procedures conducted on volunteers and convicted offenders would be recorded as ‘forensic procedure’ incidents on COPS, while all forensic procedures conducted on suspects would be recorded in the custody management system.³⁰⁵

NSW Police has long term plans to replace its computer mainframe and for this reason is reluctant to make significant changes to the current capabilities of COPS, such as including prompts to remind officers of the information which needs to be included in the electronic record. Clearly, NSW Police should take into account the current difficulties in recording forensic procedures in its development of the new computer system. In the meantime, efforts should be focussed on ensuring officers make appropriate records of forensic procedures. We again note that having a small number of specialist officers in each command would facilitate this outcome.

4.2.8.3. Proposed forensic procedures register

We note that NSW Police is in the process of reviewing the way commands keep records of forensic procedures. The Audit Group is developing a single book where all the relevant information can be recorded – the DNA kit register, the exhibit book, the tape register, and a copy of the source of authority for the procedure (i.e. the consent form, senior police officer order or court order).

A standardised forensic procedure book would mean that every command has an easily accessible central record of information relating to forensic procedures. At the moment, this information is scattered across a variety of sources, if it is recorded at all. As one officer commented:

There are problems in the recording of forensic procedures and the data this report requires cannot accurately be ascertained from the records currently kept. There are too many books... There needs to be one book for all procedures.³⁰⁶

Having a single register would streamline the paperwork associated with forensic procedures, which is currently repetitive and time consuming. In our survey, many officers complained about there being too many different forms and books to fill in, which can be confusing. In the videos we watched, it was not unusual for police to ask a suspect or volunteer for the same information several times – once when the information was being provided, again when filling in the consent form, and a third time when completing the form in the DNA sample kit. As one officer commented:

By the time people have come around to have the forensic procedure conducted, they've gone through the custody process, the ERISP [Electronic Recorded Interview of Suspected Person]... Sometimes they're asked the same question, like "Are you Aboriginal?" four or five times. It's like, don't you blokes listen?³⁰⁷

The new register should reduce this replication wherever possible.

The new register should also make it clear that the person undergoing the procedure is either a suspect or a volunteer, and cannot be both. We found many instances where officers did not understand this distinction. This is discussed further in section 7.1.

4.2.8.4. Recording forensic procedures on video

The Act provides that an electronic recording of a forensic procedure which is no longer required for investigative or evidentiary purposes may be retained for such other purposes, and for such period, as the Commissioner of Police directs. It must be stored in a way that protects it from any unauthorised access or use.³⁰⁸ We understand it is current police policy to keep all forensic procedure videos indefinitely.

We found that most commands kept forensic procedure videos centrally, in the exhibits room or a locked cupboard, although some kept the tape on the relevant brief of evidence or at another location, in storage. Some commands had a clear system for identifying individual forensic procedure videos, while others had them all in a box, with no way of finding a particular tape.

Many commands keep tapes indefinitely, while others keep them for a specified number of years. Some destroy tapes when the case is finalised, or when the sample taken is due for destruction. Some indicated they kept tapes of procedures taken in relation to serious crimes, otherwise they destroyed them after the matter went to court. Some officers requested clearer guidance on how long videos should be kept.³⁰⁹

It is not clear for what purpose forensic procedure videos are kept, especially if the matter has gone to court, or the sample itself has been destroyed. This is something which should be clarified by NSW Police and communicated in relevant SOPs and training.

Recommendation 04

NSW Police finalise, as a matter of priority, a single forensic procedures register for use in commands.

Recommendation 05

NSW Police review present electronic (COPS and custody management) recording of procedures to ensure a standard process which enables meeting legal requirements including detention requirements.

Recommendation 06

NSW Police consider the development of a hard copy forensic procedures manual.

Recommendation 07

NSW Police take into account problems with recording forensic procedures demonstrated in this review in its mainframe replacement program.

Recommendation 08

NSW Police clarify in SOPs for how long and in what circumstances electronic recordings of forensic procedures (video tapes) should be kept, and provide this advice to commands.

NSW Police is largely supportive of these recommendations. It supports recommendations 4, 5, 7 and 8 in full. Recommendation 4 has already been partially implemented, and a project to address recommendation 5 is currently being undertaken. In response to recommendation 6, NSW Police has advised that it will “assess the way it delivers SOPs to officers including ease of access to printed material and methods to ensure currency of information”.³¹⁰

NSW Police has also recently advised that it has applied for funding for a new forensic information management system.³¹¹

4.2.9. Auditing at a local level

The Audit Group advised that commands should be auditing forensic procedures as part of the command management framework (CMF), the NSW Police mandatory risk based compliance system. Conducted at a local level by command officers, CMF audits include checking procedural requirements have been met, the quality of records, security and disposal of exhibits.³¹² The Audit Group visits commands to check that audits are being conducted properly.

Through our survey and audits of local area commands, we found that some commands were conducting regular audits of consent books, DNA sample kits and forensic procedure exhibit records. Some had also reviewed a proportion of forensic procedure videos to assess compliance with the Act and identify areas which could be improved. However, there was little consistency between commands in the frequency and thoroughness of audits, and it was clear that commands would benefit from more specific guidance on this.

The Audit Group has advised that it has recently revised the audit tool, and that the new tool, and the new forensic procedures register, should make it easier for commands to comply with forensic procedure auditing requirements. The proposed forensic procedures portfolio and designated officer could support this process by reviewing the electronic recording of procedures on COPS and in custody management records.

4.3. NSW Health and the Division of Analytical Laboratories (DAL)

The Division of Analytical Laboratories (DAL) in Lidcombe is responsible for analysing DNA and maintaining the DNA database.

DAL is part of NSW Health, and provides services to a number of government agencies, including NSW Police, the Coroner, the Director of Public Prosecutions, Corrective Services and the Defence Force. DAL provides laboratory services other than DNA analysis, such as toxicology and drug analysis. DAL also gives expert evidence in court proceedings.

To gain an understanding of how the DNA analysis process works and the interaction between DAL and NSW Police, we conducted an investigation into the services provided by DAL. The information obtained during our investigation is used throughout this report.

4.3.1. Arrangements for the DNA analysis service

In December 2000, DAL and NSW Police entered a Deed of Agreement for the provision of DNA analysis services in accordance with the Act. DAL agreed to carry out DNA testing, provide reports to NSW Police, give evidence in court and create and maintain the DNA database system. The Deed of Agreement commenced on the day the Act came into force, and expired at the end of 2003. The original Deed of Agreement has been extended as an interim measure, while DAL and NSW Police discuss the terms of a new agreement.

DAL's provision of DNA analysis services to NSW Police is oversighted by the DNA Advisory Committee, which has representatives from DAL, NSW Police, Legal Aid, NSW Privacy, the Director of Public Prosecutions and the National Institute of Forensic Science.

DAL currently uses the "Profiler Plus" system of DNA analysis. For a detailed explanation of this system, see *R v Gallagher* [2001].³¹³

4.3.2. Accreditation

DAL is reviewed every two years by the National Association of Testing Authorities (NATA), and was most recently reaccredited in July 2004. NATA reported that the laboratory "demonstrated a good level of compliance with NATA's accreditation requirements," and commented that DAL staff "demonstrated a good level of knowledge and sound judgment in their areas of expertise."³¹⁴ However, it also commented that DAL has a significant backlog, which "is having an impact on staff morale," and recommended "that a case be made to address the resource workload imbalance that is apparent."³¹⁵ NATA reviewed a number of areas, including DAL's document control and internal auditing, as well as technical requirements. It made some observations and recommendations, which DAL has since addressed to NATA's satisfaction.³¹⁶ DAL's continued accreditation is also contingent on meeting NATA's research and development requirements. DAL has expressed concern that it does not receive funding for research and development. DNA technology is changing rapidly, and new methods need to be tested before they can be introduced at DAL.

Until recently, DAL was the only laboratory accredited to conduct DNA analysis for NSW Police. However, NSW Police is currently conducting a three month trial (from May to August 2006) outsourcing some DNA analysis to a private laboratory.³¹⁷

4.3.3. Costs of the DNA analysis service

The NSW Treasury provided the initial funding required to set up the DNA analysis service at DAL. Since then, DAL has been funded in part by NSW Health (approximately \$0.9m) and in part by NSW Police (approximately \$4.1m).³¹⁸ NSW Police pays for the DNA analysis on a lump sum basis rather than fee for service model.

In 2002, the Public Accounts Committee's inquiry into court waiting times recommended, as an immediate measure to improve the effectiveness and efficiency of exhibit analysis, that the Deed of Agreement between NSW Police and

DAL be reviewed, and that consideration be given to a fee for service payment system and the devolution of the Forensic Service Group budget to local area commands and crime agencies.³¹⁹ We understand that there has been some discussion about developing a fee for service costing model, but this has been difficult due to a number of factors, including how to charge for additional work, such as report writing and further analysis of complex samples, and whether to charge a premium for urgent cases requiring immediate turnaround. We understand that DAL continues to send NSW Police an invoice for forensic services each month, which is not based on the number of samples processed.

DAL has reviewed the funding provided to other laboratories in Australia, and found that New South Wales spent 79c per resident on DNA analysis last year, which is less per capita than Victoria (\$1.08), Queensland (\$1.70), South Australia (\$3), Northern Territory (\$3.65) or the United Kingdom (\$8.75). In addition, New South Wales has a higher crime rate than some of these jurisdictions.

4.3.4. Benchmarking

The Public Accounts Committee's Inquiry into court waiting times recommended in 2002 that DAL review best practice in other Australian states and territories (and overseas where relevant) both in terms of funding and laboratory operation for all forms of criminal exhibit analysis undertaken.³²⁰ As well as reviewing funding, we understand DAL has also examined the output of other laboratories, their turnaround times, and the development of new technologies, including robotics.

4.3.5. Difficulties at DAL

It is clear that DAL experiences significant difficulties in providing its DNA analysis services to NSW Police. DAL receives more crime scene samples for analysis than it has the capacity to process, which results in a growing backlog of unexamined crime scene samples. While DAL is generally able to meet urgent requests on an ad hoc basis, it is unable to meet the turnaround times set out in the initial agreement between NSW Police and DAL. DAL is also concerned about staff shortages, lack of space and ageing infrastructure at the laboratory. We found that DAL has made great efforts to address the problems it faces, and where possible has implemented strategies to improve its service delivery. However, it appears that DAL cannot significantly improve its DNA analysis service without additional resources.

In September 2004, NSW Police set up a DNA Liaison Unit on the premises at DAL. The purpose of the unit was twofold – first, to remove unnecessary casework from the system, by culling exhibits no longer requiring analysis; and second, by screening casework coming in, to ensure that only suitable items were submitted. The Liaison Unit was initially set up as a trial but NSW Police has recently advised that it has made an ongoing commitment with DAL to continue to staff this unit.³²¹

As outlined above, the NSW Government announced in March 2005 that it would provide \$26 million for a new police forensic science centre, and 147 additional forensic officer positions, which means more forensic evidence will be collected for use in the investigation and prosecution of crime. However, DAL will still conduct most of the DNA analysis, and has not at this stage received any extra funding. NSW Police anticipates that DAL will benefit indirectly from the new arrangement, as the proposed forensic science centre in NSW Police will assess all casework being submitted to DAL for analysis and filter out any unnecessary work. It is not clear at this stage whether this will actually reduce the amount of casework DAL ultimately has to examine.

The role of DAL and the difficulties outlined above are discussed in more detail in chapter 10 on DNA analysis and permitted matching and chapter 14 on destruction of forensic material.

4.3.6. Other health professionals

Doctors, nurses, dentists and dental technicians may be asked to carry out certain types of forensic procedures, like blood samples, genital swabs, pubic hair samples and dental impressions. However, there is no obligation on health professionals to carry out forensic procedures.³²²

Suspects are also entitled to have a medical practitioner or dentist of choice present while a forensic procedure of this type is carried out.³²³

We note that in 2000, NSW Health issued a circular outlining its position on the carrying out of forensic procedures. It notes that medical staff are not required to carry out forensic procedures and that "NSW Health does not regard

the carrying out of these forensic procedures to be a part of its overall functions and health service staff will not be expected to perform the functions.”³²⁴

The Australian Dental Association advised that it is not aware of any problems relating to the Act and that it was satisfied the interests of dentists have been taken into consideration.³²⁵

4.4. Who is responsible for the DNA database?

The Act provides for a “responsible person” to be responsible for the care, control and management of the DNA database system. The key responsibilities of this person are:

- To determine who may access information stored on the DNA database. Only people who have been authorised by the responsible person may access this information.³²⁶
- To ensure forensic material is destroyed, as required by the Act.³²⁷ It is an offence to cause any identifying information about a person obtained from forensic material taken from the person under the Act to be retained on the database at any time after the Act requires it to be destroyed. This includes being reckless as to the recording or retention of information after the required destruction date.³²⁸

Although these responsibilities are crucial to the operation and security of the DNA database, the legislation does not specify who the “responsible person” is. Our investigation of services provided by DAL demonstrated that this may be directly impacting on compliance with relevant legal obligations. DAL sought legal advice on this issue, and was advised that it is not clear who the “responsible person” is. For the avoidance of doubt, the Commissioner of Police and Chief Executive Officers of Western Sydney Area Health Service and ICPMR/DAL signed a minute of authorisation in January 2005, authorising appropriate senior scientists to access information on the database.³²⁹ We understand DAL has requested that this issue be clarified by a working group run by the Criminal Law Review Division of the Attorney General’s Department.³³⁰ In our view, this is a matter that requires speedy resolution and absolute clarity.

Recommendation 09

The Attorney General clarify who is the “responsible person” for the purposes of the *Crimes (Forensic Procedures) Act 2000*.

In its response to our draft report, the Attorney General’s Department advised it is “currently instructing in the preparation of a Bill that will allow the responsible person for the DNA database to be more readily identified.”³³¹

NSW Police supports the recommendation.³³²

Endnotes

²⁶⁴ NSW Government press release, “Premier Carr details \$26 million forensic policing plan”, 19 March 2005.

²⁶⁵ Or is qualified under the regulations: *Crimes (Forensic Procedures) Act 2000* s 3.

²⁶⁶ Police Association of NSW submission, March 2005.

²⁶⁷ NSW Police advice received 22 June 2005.

²⁶⁸ Audit tool used by the NSW Police Audit Group, accessed on the NSW Police intranet in May 2005.

²⁶⁹ NSW Police response to Ombudsman draft report, 2 June 2006.

²⁷⁰ NSW Police response to Ombudsman draft report, 2 June 2006.

²⁷¹ 38 commands said it was easy and 35 said it was difficult, three commands did not answer the question.

²⁷² Ombudsman audit of local area commands, confidential interview with police officer, 27 September 2004.

²⁷³ Ombudsman audit of local area commands, confidential interview with police officer, 27 September 2004.

²⁷⁴ Police Association of NSW submission, March 2005.

²⁷⁵ Ombudsman audit of local area commands, confidential interview with local area commander, 6 September 2004.

²⁷⁶ Confidential LAC survey response.

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- 277 Confidential LAC survey response.
- 278 Confidential LAC survey response.
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- 284 Ombudsman audit of local area commands, confidential interview with police officer, 6 September 2004.
- 285 Ombudsman audit of local area commands, confidential interview with police officer, 23 August 2004.
- 286 Ombudsman audit of local area commands, confidential interview with police officer, 29 September 2004.
- 287 Police Association of NSW submission, March 2005.
- 288 Police Association of NSW submission, March 2005.
- 289 Ombudsman audit of local area commands, confidential interview with police officer, 8 September 2004.
- 290 Confidential LAC survey response.
- 291 Police Association of NSW submission, March 2005.
- 292 Ombudsman audit of local area commands, confidential interview with police officer, 6 September 2004.
- 293 Meeting to discuss Ombudsman Discussion Paper, 21 April 2005.
- 294 NSW Police response to Ombudsman draft report, 2 June 2006.
- 295 NSW Police response to Ombudsman draft report, 2 June 2006
- 296 Responses to Ombudsman LAC survey.
- 297 Meeting to discuss Ombudsman Discussion Paper, 21 April 2005.
- 298 Ombudsman audit of local area commands, confidential interview with police officer, 6 September 2004.
- 299 Information obtained through Ombudsman review of COPS records.
- 300 Information obtained through Ombudsman review of COPS records.
- 301 Information obtained through Ombudsman review of COPS records.
- 302 Information obtained through Ombudsman review of COPS records.
- 303 FPIT FAQ page on NSW Police Intranet accessed 14 September 2005.
- 304 See further discussion of custody management records in section 8.3.2.1.
- 305 NSW Police response to Ombudsman draft report, 2 June 2006 and further advice from FPIT, 30 June 2006.
- 306 Confidential LAC survey response.
- 307 Ombudsman audit of local area commands, confidential interview with police officer, 3 August 2004.
- 308 *Crimes (Forensic Procedures) Act 2000* s 10.
- 309 Responses to Ombudsman LAC survey.
- 310 NSW Police response to Ombudsman draft report, 2 June 2006.
- 311 NSW Police further response to Ombudsman draft report, 28 July 2006.
- 312 NSW Police Command Management Framework auditing tool for DNA exhibits, provided 2 June 2006.
- 313 *R v Gallagher* [2001] NSWSC 462 (Barr J).
- 314 National Association of Testing Authorities Australia, *Report on Reassessment*: ICPMR, 30 July 2004.
- 315 National Association of Testing Authorities Australia, *Report on Reassessment*: ICPMR, 30 July 2004.
- 316 Fax from DAL, 15 August 2005.
- 317 Legislative Assembly Hansard, 18 October 2005, the Hon Carl Scully MP, Minister for Police and Minister for Utilities; and Attorney General's Department response to Ombudsman draft report, 5 May 2006.
- 318 DAL comments on Ombudsman statement of provisional findings, 17 October 2005.
- 319 Public Accounts Committee Inquiry into Court waiting times Report June 2002 at p. 23 to 24.
- 320 Public Accounts Committee Inquiry into Court waiting times Report, June 2002 at 23 to 24.
- 321 Letter from NSW Police, 12 July 2005.

³²² *Crimes (Forensic Procedures) Act 2000* s 50 and 108. We received a complaint regarding a blood sample which was taken from a suspect just after the Act commenced. This complaint is discussed in detail in section 15.3.4, see complaint number 5. The requirements for taking blood samples are detailed in section 8.6.3.

³²³ *Crimes (Forensic Procedures) Act 2000* s 50(2).

³²⁴ NSW Health Circular, "NSW Health Position on the Carrying Out of Forensic Procedures", 22 December 2000.

³²⁵ Chris Wilson, President, Australian Dental Association, advice received 16 February 2005.

³²⁶ *Crimes (Forensic Procedures) Act 2000* s 92.

³²⁷ *Crimes (Forensic Procedures) Act 2000* Part 10 and s 94.

³²⁸ *Crimes (Forensic Procedures) Act 2000* s 94(1).

³²⁹ DAL is a division of the Institute of Clinical Pathology and Medical Research, which is part of the Western Sydney Area Health Service.

³³⁰ Professor Mark Findlay, in the Independent Report of the *Crimes (Forensic Procedures) Act 2000*, University of Sydney, 2003 recommended that resolution of this issue lies in the redefinition of 'responsible person' p. 27.

³³¹ Attorney General's Department response to Ombudsman draft report, 5 May 2006.

³³² NSW Police response to Ombudsman draft report, 2 June 2006.

Chapter 5: A snapshot of forensic procedures

This chapter provides an overview of how forensic procedures are used by NSW Police. In it we look at who forensic procedures are being conducted on and the types of crimes where forensic procedures are used. We also consider the geographic spread of forensic procedures across the state to see whether there are any differences in the way the forensic procedures legislation is used in metropolitan and regional areas. We found that the most common type of forensic procedure is a DNA sample conducted by buccal swab on a male suspect in a metropolitan area.

Our review period began when the Act commenced, on 1 January 2001, and finished on 30 November 2004.³³³ In this chapter, we have included data up to 31 December 2004, so we have four complete years of data.

5.1. How many forensic procedures have police conducted?

In the first four years after the Act came into force, police conducted over 10,000 forensic procedures on suspects and volunteers.³³⁴

5.1.1. How many of these were DNA samples?

Table 1 shows the total number of forensic procedures conducted on suspects and volunteers between 1 January 2001 and 31 December 2004, by procedure type.

Table 01: Total number of forensic procedures conducted.

	DNA	Photo	Prints	Other	TOTAL
Suspects	7,309	1,719	120	307	9,455
Volunteers	814	39	29	11	893
TOTAL	8,123	1,758	149	318	10,348

Source: COPS download data provided by FPIT on 15 July 2005.

This shows that that the vast majority of forensic procedures conducted during the review period were DNA samples. In particular:

- 77 per cent of the forensic procedures conducted on suspects were DNA samples. Photographs were the second most common procedure, at 18 per cent.
- 91 per cent of the forensic procedures conducted on volunteers were DNA samples.

However, we found it difficult to ascertain the exact number of DNA samples taken from suspects and volunteers during the review period, as the information we received from NSW Police and DAL was inconsistent.

FPIT provided COPS records which indicated that of the 10,348 forensic procedures conducted on suspects and volunteers, 8,123 were DNA samples. We also asked NSW Police how many DNA samples it had submitted to DAL for analysis during the same period, expecting it would be the same number. However, NSW Police advised that it had submitted 9,618 DNA samples taken from suspects and volunteers for analysis – almost 1,500 more than had been recorded on COPS.

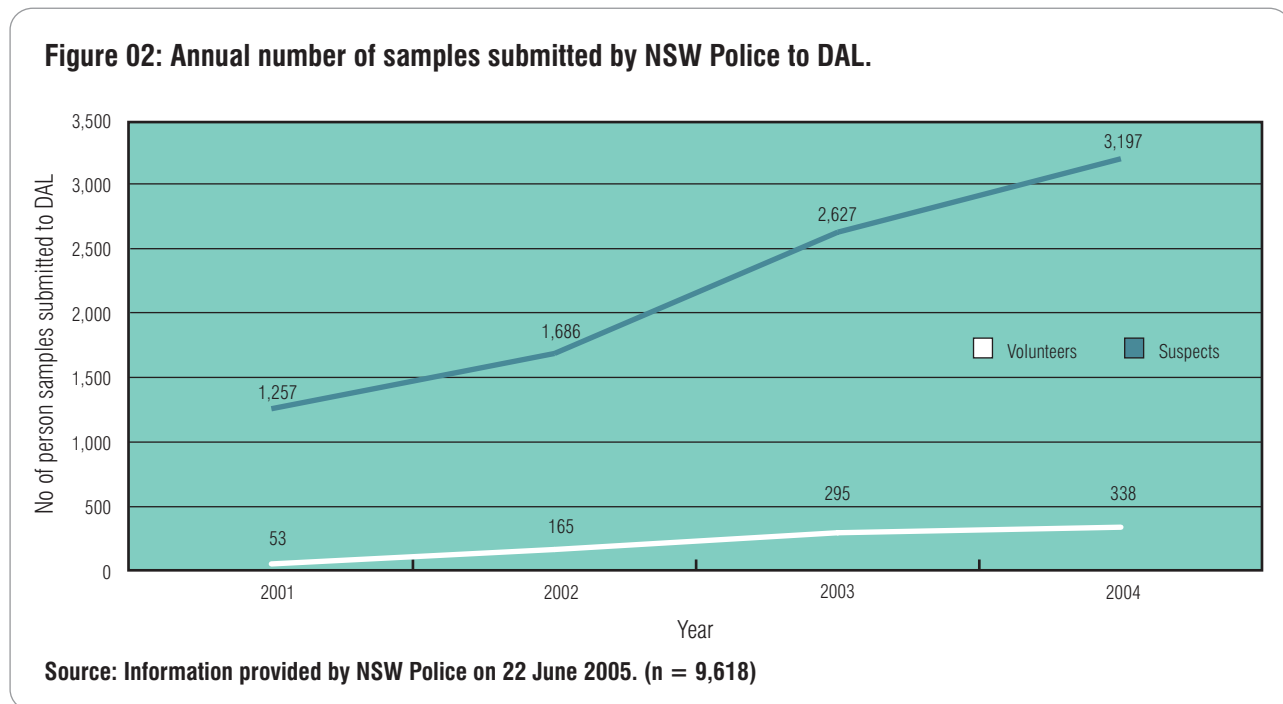
We also asked DAL how many DNA samples from suspects and volunteers it had received from NSW Police during the same period. It advised that it had received a total of 9,797 samples, which is closer to the second figure provided by NSW Police.³³⁵

We asked NSW Police why there is such a significant discrepancy in its records, and were advised it is largely due to recording errors on COPS. FPIT tries to correct these, by monitoring samples submitted to DAL for analysis, and checking them against the relevant COPS entries.³³⁶

It is not clear why there are discrepancies between police and DAL records as to the number of DNA samples submitted for analysis. However, this discrepancy is much smaller.

5.1.2. The numbers are going up

Figure 2 shows the annual number of DNA samples submitted by NSW Police to DAL for each of the years since the Act came into force.



Despite the discrepancies in records of forensic procedures, it is clear that more and more forensic procedures are being conducted each year. Figure 2 shows that the number of DNA samples taken from suspects rose significantly for each year of the review period. The number of samples taken from volunteers has also increased significantly.

5.1.3. How many profiles are on the DNA database?

During the review period, DAL loaded over 25,000 DNA profiles from people onto the DNA database, including 8,699 from suspects and 831 from volunteers.³³⁷ We understand the rest were from serious indictable offenders.

DAL has also loaded over 14,000 DNA profiles derived from crime scene samples onto the database.³³⁸

5.1.4. 'Other' forensic procedures

'Other' procedures include hand swabs (including swabs taken for gunshot residue tests); samples taken by scraping, vacuum suction or lifting by tape; physical measurements taken for biomechanical analysis; dental impressions; and impressions of wounds.

COPS records indicate that 318 'other' procedures were conducted. However, there is no further information about the type of procedure.

In our survey, we asked all 80 local area commands which of these procedures they had used. 20 commands (25 per cent) advised they had conducted gun shot residue tests. The other procedures were conducted even less frequently; eight commands (10 per cent) had taken samples by scraping, vacuum suction or lifting by tape, and five (6 per

cent) had taken physical measurements for biomechanical analysis. None had any records of having taken dental impressions.³³⁹

5.2. Where are forensic procedures being conducted?

During the time of our review, New South Wales was divided into five policing regions, each of which was further divided into a number of local area commands. Depending on its size, a local area command may have more than one police station in it. The five regions were:

- Inner Metropolitan – which has 47 police stations (including 2 shopfronts) across 23 commands
- Greater Metropolitan – which has 52 police stations (including 3 shopfronts) across 24 commands
- Southern – which has 130 police stations across 11 commands
- Northern – which has 107 police stations across 11 commands
- Western – which has 119 police stations across 11 commands

Not all police stations have facilities for charging suspects. Forensic procedures are only conducted in stations with suitable charge facilities.

Figure 03: Regional Commands Map.



Source: NSW Police Intranet.

Table 2 shows the rate at which forensic procedures were conducted in each region during the first four years of the Act's operation.

Table 02: Procedures conducted on suspects and volunteers by region.

Region	Population of region*	Procedures conducted on suspects and volunteers**	Rate of forensic procedures conducted per 100,000 of the region population
Inner Metropolitan	1,584,297	2,971	188
Greater Metropolitan	2,108,993	3,326	158
Southern	1,938,394	1,046	54
Northern	1,014,010	1,597	157
Western	477,364	880	184

* Region population is the total of the relevant local area command populations, according to NSW Police. NSW Police based its figures on the 2001 census data.

** Procedures conducted on suspects and volunteers reflects the total number of forensic procedures conducted on suspects and volunteers between 1 January 2001 and 31 December 2004. These figures represent the total number of forensic procedures conducted and not the number of individual persons undergoing forensic procedures. They do not include forensic procedures conducted by specialist commands.

Source: NSW Police Intranet as at 16 February 2005.

Table 2 shows that, as expected, a very small proportion of the population in each region underwent a forensic procedure during the review period. Southern Region conducted significantly fewer forensic procedures per capita (54 per 100,000) than the other regions (between 157 and 188 per 100,000).³⁴⁰

NSW Police also has a number of specialist commands, which are not attached to a particular geographic area. Some of these conduct forensic procedures, for example the State Crime Command (which focuses on organised crime, fraud, child protection and sex crimes, homicides and other operations), the Forensic Services Group, the Counter Terrorism Command, the Firearms Registry and the Professional Standards Command. We have included forensic procedures conducted by specialist commands in our overall statistical analysis, but not in the regional analysis.

5.2.1. Difference between metropolitan and regional areas

Metropolitan police are conducting significantly more forensic procedures than regional police. This would be expected, given there are more people and higher levels of crime incidents recorded in metropolitan areas. However, it also appears that distance and a lack of appropriate facilities in some regional police stations may contribute to lower numbers of forensic procedures. We also found that some regional commands may prefer to rely on more traditional policing methods, rather than wait for long periods for DNA analysis results which constitute the vast majority of forensic samples.³⁴¹

We also found that many police officers are quite reluctant to conduct forensic procedures, which in some areas has contributed to a low level of use of the powers available under the Act. For example, one commander we interviewed said that in his command, which is in a rural area, there had so far been only one DNA match, and no eliminations, despite the Act having been in force for several years. He realised that officers were conducting very few forensic procedures, even though there were many occasions where suspects fit the criteria. He attributed this to a lack of confidence among officers and the length of time it takes to conduct a procedure.³⁴² We found this reluctance to conduct forensic procedures in both metropolitan and regional areas, but it appears that its effect is less pronounced in metropolitan areas as there are generally more officers who are willing to conduct procedures.

5.3. Who are police conducting forensic procedures on?

Figure 4 shows the number of forensic procedures conducted on suspects and volunteers, by region.

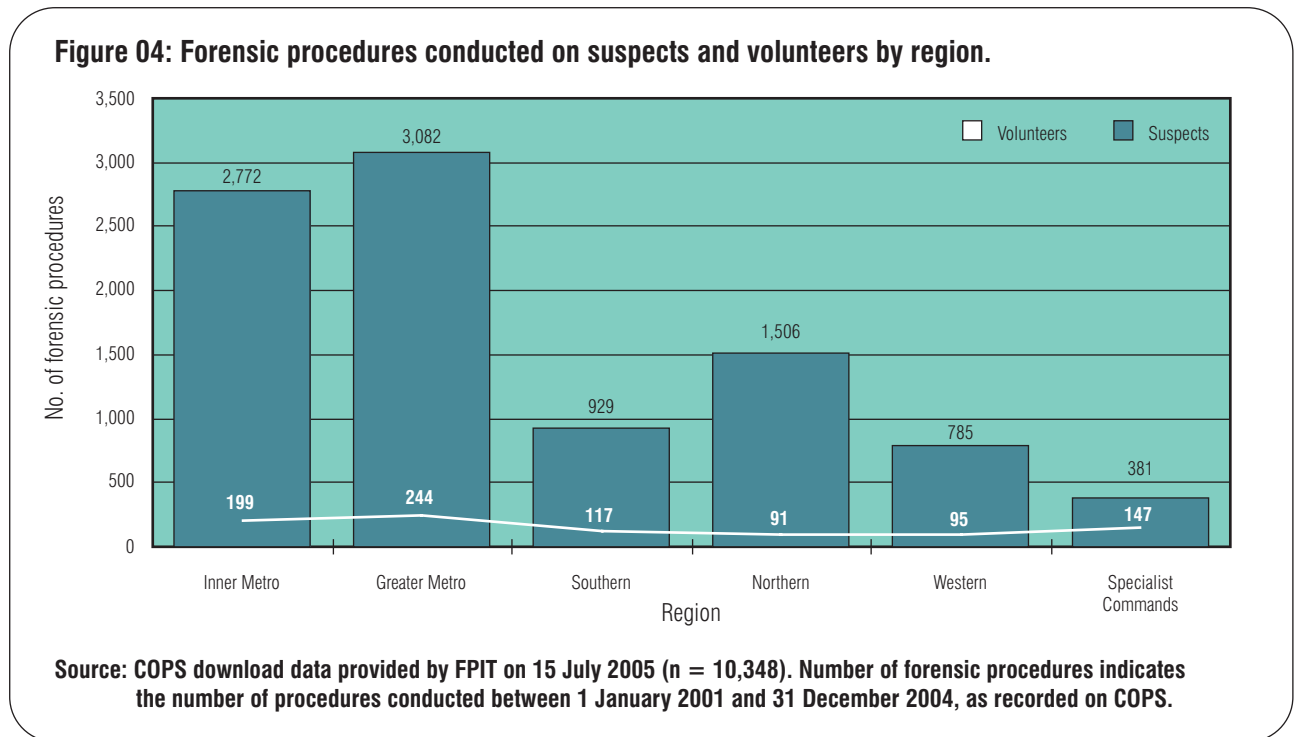


Figure 4 shows that police conduct many more forensic procedures on suspects than on volunteers. In the five regions, police conducted between six and 11 per cent of their forensic procedures on volunteers.³⁴³ However, specialist commands conducted a higher proportion of their forensic procedures on volunteers – 28 per cent.³⁴⁴

5.3.1. Procedures by gender

Figure 5 compares the number of forensic procedures conducted on male and female suspects in each region.

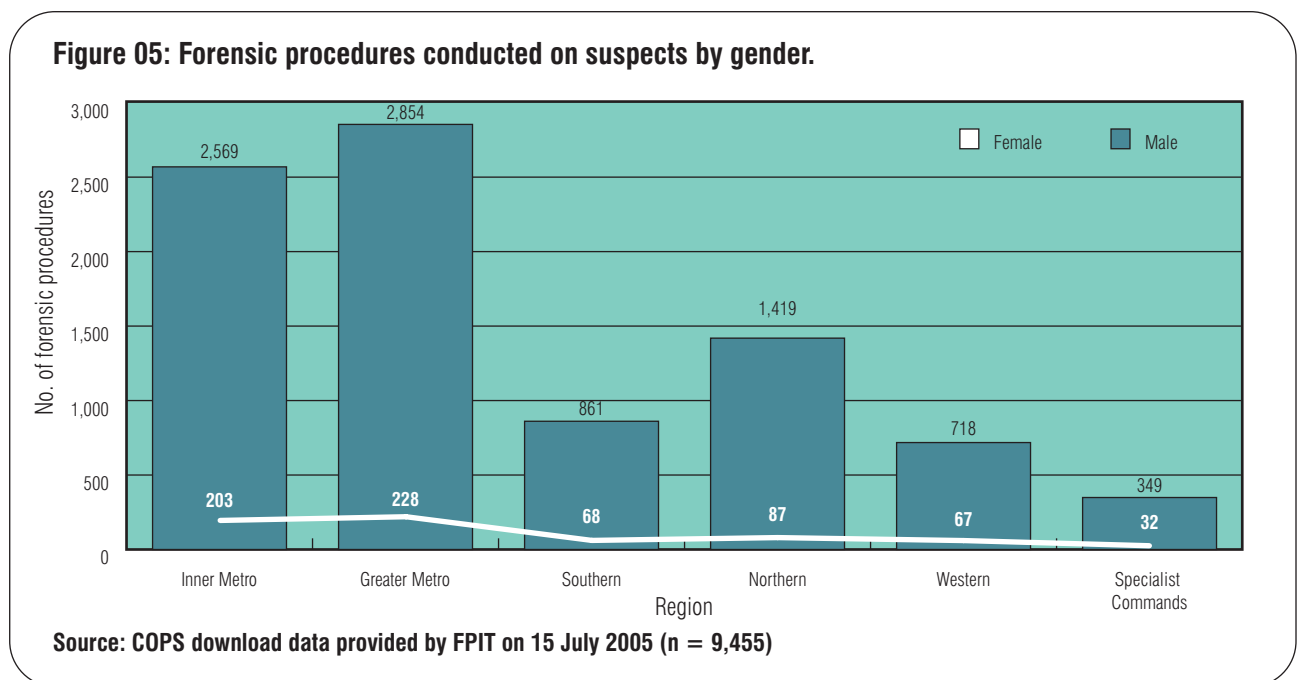


Figure 5 shows that, of the forensic procedures police conducted on suspects, 93 per cent were on men and seven per cent were on women.³⁴⁵ This was fairly constant across the five regions and the specialist commands, ranging from six per cent of procedures being conducted on women (in Northern region) to nine per cent of procedures being conducted on women (in Western region).

Figure 6 compares the number of forensic procedures conducted on male and female volunteers in each region.

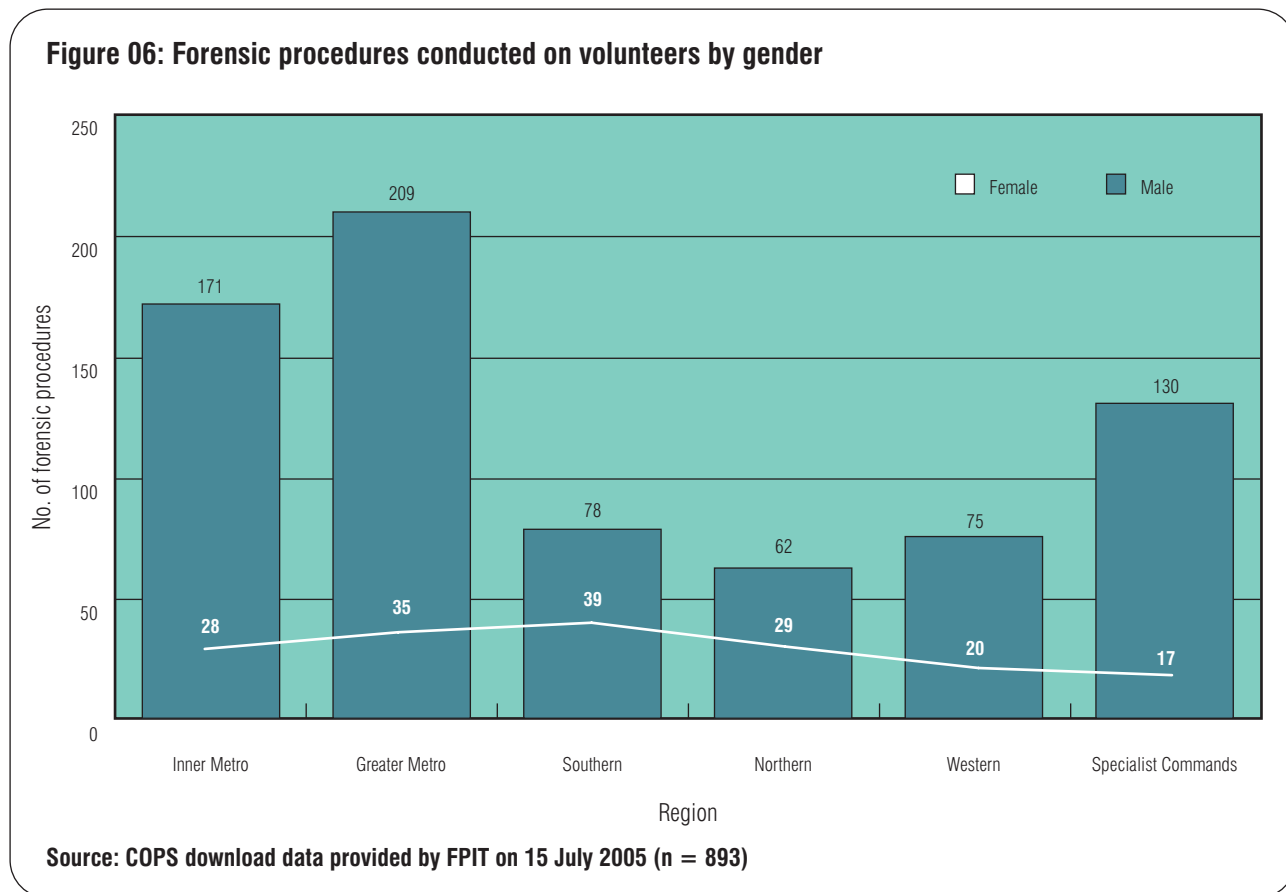


Figure 6 shows that, of the forensic procedures police conducted on volunteers, 81 per cent were on men and 19 per cent were on women. It is not clear why there are so many more male than female forensic procedure volunteers. Volunteers are typically people who have a legitimate reason for leaving their DNA at a crime scene or on a victim. For this reason we would expect that the number of forensic procedures conducted on male and female volunteers would be more representative of the general population.

5.3.2. Procedures conducted on children and young people

Police conducted less than 500 forensic procedures on children and young people in the four years since the Act commenced (450 on child suspects and 27 on child volunteers).³⁴⁶ Again, DNA samples were the most common type of procedure conducted on children, and photographs were the next most common.³⁴⁷

We found that forensic procedures were conducted in the child population at a much lower rate than in the adult population, at 67 per 100,000, compared to 206 per 100,000.³⁴⁸

Figure 7 shows the number of forensic procedures conducted on child suspects, by the age of the child.

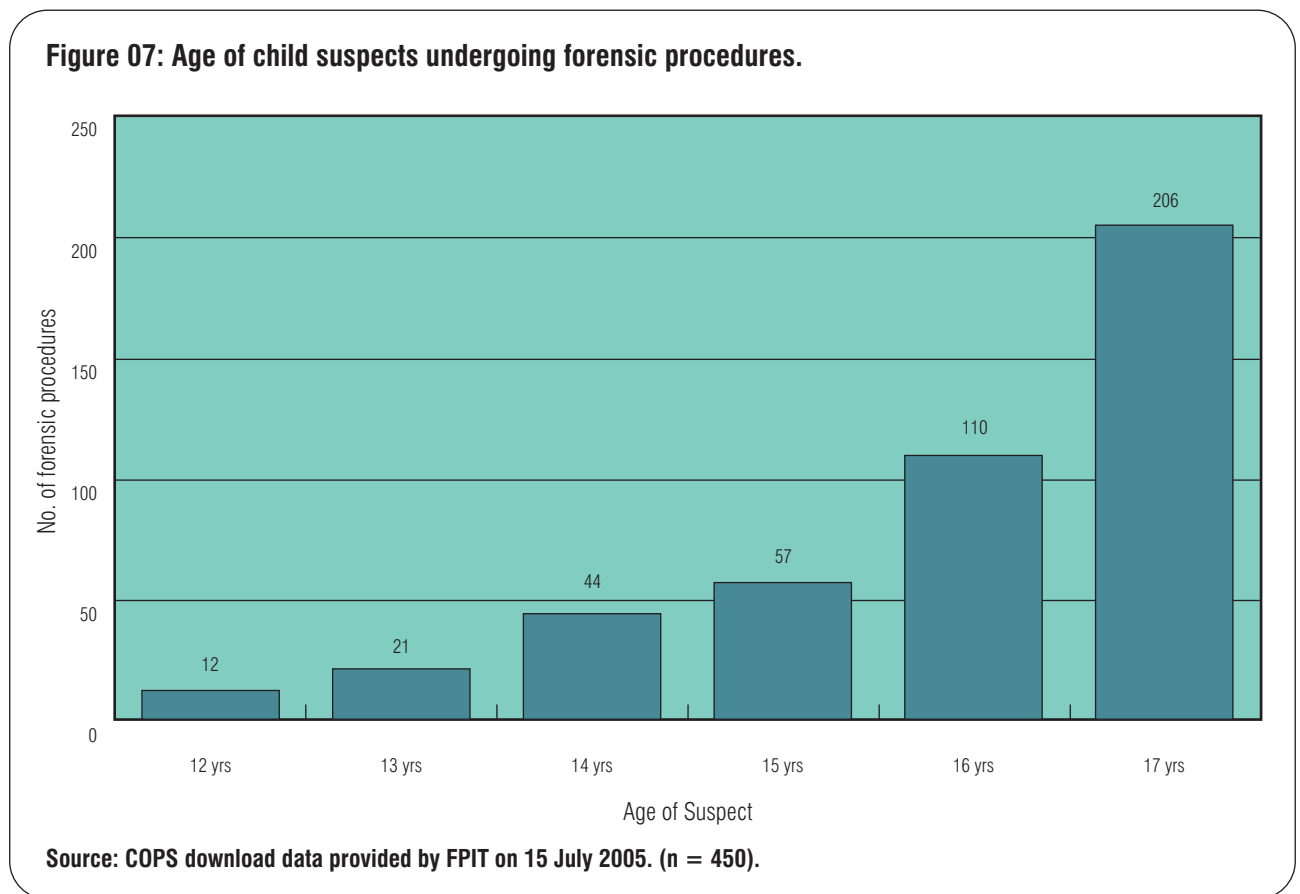


Figure 7 shows that most forensic procedures conducted on child suspects (70 per cent) were conducted on children aged 16 or over.³⁴⁹

About half of the 27 forensic procedures conducted on child volunteers were conducted on children over 16.³⁵⁰

Police conducted only slightly fewer forensic procedures on children in regional areas than they did on children in metropolitan areas. By contrast, they conducted only about half as many forensic procedures on adults in regional areas as they did on adults in metropolitan areas.³⁵¹

Of the forensic procedures police conducted on child suspects, 96 per cent were on boys and only four per cent were on girls. This imbalance is slightly more pronounced than the overall figure, of 93 per cent on male suspects and seven per cent on female suspects.³⁵²

By contrast, 44 per cent of child volunteers were male and 56 per cent were female. This is closer to the general population than the overall figures for forensic procedure volunteers, 81 per cent of whom were male and 19 per cent were female.³⁵³

5.3.3. Procedures conducted on Aboriginal and Torres Strait Islanders

Of the procedures conducted on suspects six per cent involved people police identified as Aboriginal or Torres Strait Islander. This was higher in some regions (14 per cent in Western Region, and eight per cent in Northern Region) and lower in others (three per cent in Southern Region, and four per cent in the metropolitan regions). However, the proportion of procedures conducted on Aboriginal or Torres Strait Islander suspects is likely to be higher than these figures suggest as for almost 6,000 procedures (or 61 per cent of procedures conducted on suspects) police recorded the person's Aboriginal or Torres Strait Islander status as unknown.³⁵⁴ It is of significant concern that the Aboriginal or Torres Strait Islander status was unknown for such a large proportion of suspects undergoing forensic procedures.

For procedures conducted on child suspects, nine per cent of procedures involved children police identified as Aboriginal or Torres Strait Islander.³⁵⁵ We note this is higher than the overall proportion of Aboriginal or Torres Strait Islander suspects, which is six per cent.

Of the forensic procedures conducted on Aboriginal or Torres Strait Islander suspects, 90 per cent were conducted on men and 10 per cent on women. This indicates the proportion of forensic procedures conducted on women was slightly higher for Aboriginal and Torres Strait Islander suspects than in the general population.³⁵⁶

NSW Police did not record Aboriginal or Torres Strait Islander status for volunteers. We understand this is because the status is recorded in the custody management system, and volunteers are generally not in police custody when undergoing forensic procedures.

5.3.4. Procedures on identical twins and triplets

DNA evidence is compelling because it is generally regarded as a unique identifier. However, identical twins have the same DNA profile. This can be a problem where DNA evidence has implicated a twin, but there is no evidence indicating which twin committed the offence.

We are aware of one instance where this has occurred in New South Wales. Police investigating a break and enter offence obtained a blood sample from clothing and bed sheets at the crime scene. A profile derived from the bloodstain matched the profile of a convicted offender on the DNA database. This person was a one of three triplets, each of whom had an extensive criminal record. Two of the brothers were identical, and shared the same DNA profile, while the third had a different profile. The identical brothers were both interviewed in relation to the offence and neither made any admissions. DNA obtained from various other crime scenes implicated one or both of the brothers. We understand these matters are still under investigation but without any further evidence, it is unlikely the investigations will progress.³⁵⁷

5.3.5. Procedures on incapable persons

We were unable to comment on the number of forensic procedures conducted on incapable persons. The information provided from COPS does not include information on procedures conducted on incapable persons nor are any accurate records maintained of applications for court orders.

5.4. Outcomes

Police conduct forensic procedures in relation to all sorts of offences, ranging from the less serious “volume crime” offences (typically property crimes such as break, enter and steal, and steal motor vehicle) through to the most serious types of offences (murder, manslaughter and sexual assault). The following discussion briefly examines outcomes from DNA sampling of suspects. The distinctions between warm and cold links, and DNA sampling outcomes, are detailed in section 10.6 of this report.

5.4.1. Warm links

A “warm link” occurs where police take a DNA sample from a person because they suspect it will link the person to DNA obtained from the crime scene or victim, and it does. NSW Police does not keep any central record of warm links, so it is not possible to state in how many cases a DNA sample taken from a suspect resulted in the suspect being linked to the crime scene. However, DAL estimates that about 3,170 warm links were made during the review period.³⁵⁸ This suggests that suspects have been positively linked to crime scenes in about a third of the DNA samples police have submitted for analysis.³⁵⁹ However there is no accurate way to review the number of convictions resulting from warm link, as this information is not collected.

We have made a number of recommendations regarding the recording of database links in chapter 10.

5.4.2. Cold links

When DAL puts a suspect’s DNA profile on the database, and it matches a profile obtained from some other unsolved crime scene, this is called a “cold link”. Cold links can also be made between profiles obtained from crime scenes. While this does not identify an individual, it does indicate the same unidentified person may have been present at both

crimes scenes and therefore it may provide valuable intelligence information to investigating police. Both NSW Police and DAL keep records of cold links.³⁶⁰

DAL advised it made over 4,000 cold links during the review period. The majority of these were for high volume offences, including break, enter and steal (2,884), stolen motor vehicle (585), steal from vehicle (245) and malicious damage (47). However, a significant number were for serious offences, including murder and manslaughter (13), sexual assault (68), robbery (267) and assault (25).³⁶¹ These results are very good – they demonstrate that DNA analysis is providing further evidence in unsolved crimes, including the most serious types of offences.

DNA profiling may link an offender to more than one crime scene. DAL advised that during the review period, 124 people were each linked to between five and ten crime scenes, and 17 people were linked to more than 10 crime scenes (including one person who was linked to 25 different crime scenes). In total, 2,251 people have been linked to crime scenes through cold links. These results demonstrate that DNA analysis has been useful in identifying patterns of possible repeated criminal conduct.³⁶²

5.4.3. Convictions

We sought to assess how often DNA analysis results in a suspect being prosecuted for or convicted of an offence. Looking at the number of convictions stemming from cold links is a limited way of measuring the effectiveness of forensic procedures.³⁶³ However, it appears that neither DAL nor NSW Police keep complete records relating to criminal proceedings stemming from all DNA links.

FPIT has kept records of convictions stemming from cold links since the New South Wales DNA database commenced operation in late 2001.³⁶⁴ Table 3 shows the number of suspects identified through cold links and any convictions recorded, from January 2002 to December 2004, for some categories of crime.

In this table, identifications are recorded by FPIT as the number of instances that a person is ‘cold’ linked to a crime scene. Included in this figure will be persons counted more than once when they have had multiple links. The number of convictions recorded represents the number of offences that have been finalised in court, not necessarily the number of people convicted. This is because one person may be convicted of multiple offences.³⁶⁵

Table 03: Results of cold links by offence type 2002 to 2004

Offence	No. of person identifications	No. of convictions recorded*
Murder	15	1
Attempted murder	3	4
Armed robbery	200	32
Aggravated robbery	55	3
Sexual assault	30	2
Aggravated sexual assault	35	18
Assault	13	3
Aggravated assault	13	3
Home invasion	13	7
Break enter and steal	2,917	1,512
Aggravated break enter and steal	73	27
Steal motor vehicle	589	229
Malicious damage	50	17
Steal from motor vehicle	286	166
Stealing	50	27

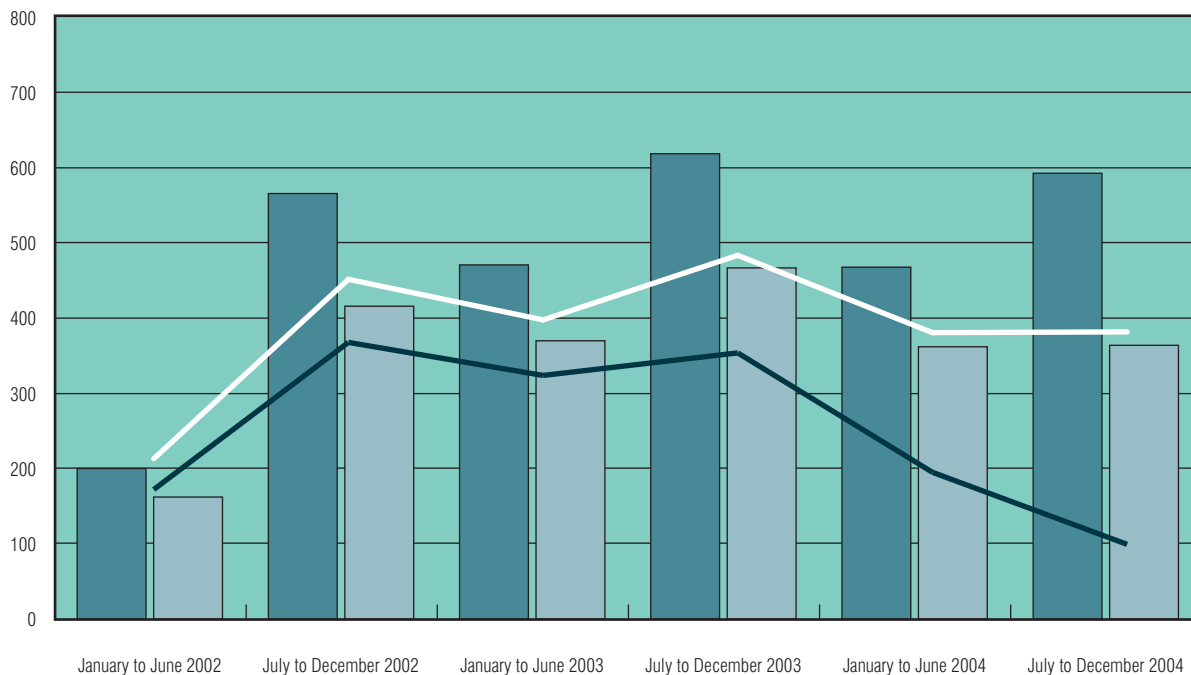
* Convictions are recorded against the period in which the identification occurred. The number of convictions may be higher than the number of identifications because a person may be identified for one type of offence but convicted for another.

Source: Information supplied by FPIT on 22 June 2005.

These figures show that the number of identifications and convictions stemming from cold links are much higher for less serious types of crime than for more serious types of crime. This may be expected given that police would put considerably more resources into the investigation of serious crime at the time, rather than waiting for a suspect to be identified through a cold link, which may occur some time later. Also, by definition, volume crime offences are significantly more common.

Figure 8 shows the trends for the volume crime of break, enter and steal.

Figure 08: Cold links for offence of break, enter and steal between January 2002 and December 2004

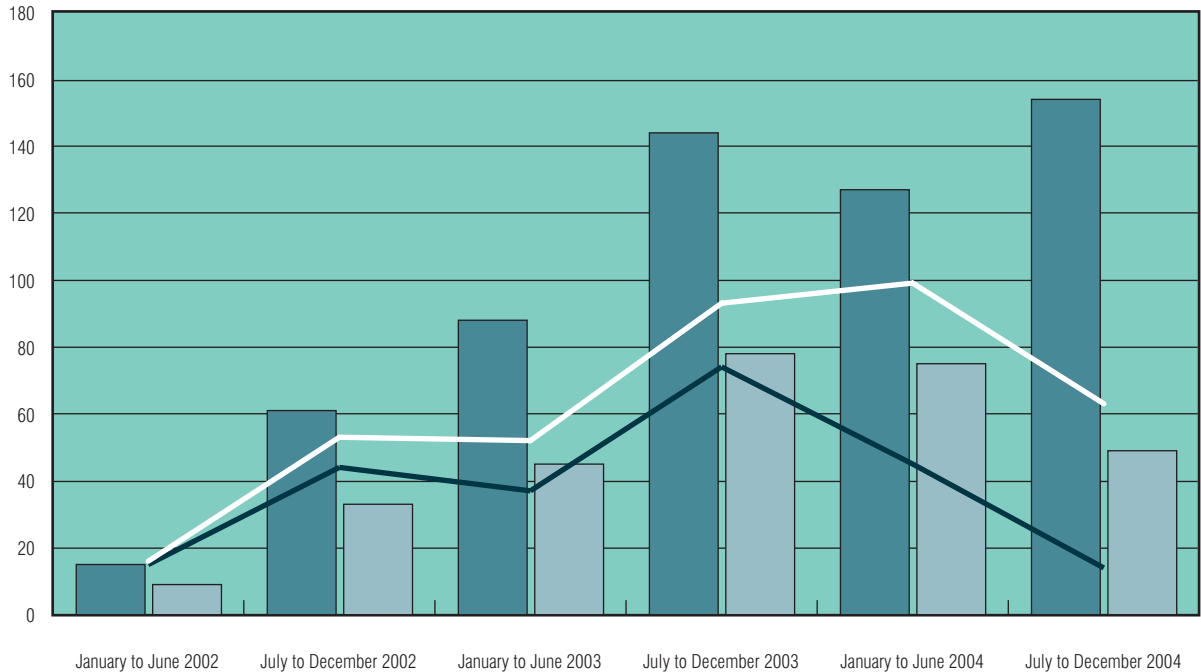


	January to June 2002	July to December 2002	January to June 2003	July to December 2003	January to June 2004	July to December 2004
Identification	200	566	471	619	468	593
Charges	162	416	370	467	362	364
Offences	213	452	398	484	381	382
Convictions	172	368	324	354	195	99

Source: Information provided by FPIT on 22 June 2005. Convictions are recorded against the period in which the identification occurred.

Figure 9 illustrates similar trends for steal motor vehicle offences.

Figure 09: Cold links for offence of steal motor vehicle between January 2002 and December 2004



	January to June 2002	July to December 2002	January to June 2003	July to December 2003	January to June 2004	July to December 2004
Identification	15	61	88	144	127	154
Charges	9	33	45	78	75	49
Offences	16	53	52	93	99	63
Convictions	15	44	37	74	45	14

Source: Information provided by FPIT on 22 June 2005. Convictions are recorded against the period in which the identification occurred.

In figures 8 and 9, the differences between identifications, charges, offences and convictions result because identifications relate to the number of persons identified by a cold link (persons linked to multiple crime scenes are counted more than once), the charges relate to the number of persons charged (not the number of offences they are charged with as offences are listed separately) and the convictions are the number of offences that have been finalised by a court. In looking at the convictions, less convictions are recorded for more recent identifications/charges as more of these matters have not, as yet, been finalised in court hearings. In addition, as more profiles are placed on the DNA database, more identifications have occurred over time.

5.4.4. Eliminations

DAL advised that it is not possible to report on the number of people eliminated from police investigations through DNA analysis, but estimates that about 480 suspects have been eliminated since the Act commenced.³⁶⁶

The fact that no warm link is made does not necessarily exclude a suspect from investigation. For example, it could be that no DNA was found on the item submitted for analysis, or that somebody else's DNA was on the item. This does not mean the suspect was not involved. This is especially so in cases where there are multiple offenders.

The estimates provided by DAL suggest that for every elimination, there are between six and seven warm links. Expressed another way, of all the cases where DNA analysis results in either a warm link or an elimination, 87 per

cent result in a warm link and 13 per cent result in an elimination.³⁶⁷ We note that this does not include the significant number of cases where there is no warm link but the suspect could not be eliminated either. However, it does suggest that DNA analysis is, in the majority of cases, used to produce evidence tending to confirm, rather than disprove, a suspect committed an offence. Given that police must suspect on reasonable grounds that a person has committed an offence before asking the person to provide a DNA sample, we would expect that DNA analysis is used in the majority of cases to implicate rather than exculpate suspects.³⁶⁸

5.4.5. Cases pending analysis

In August 2004, there were over 7,000 cases awaiting analysis at DAL.³⁶⁹ A case may involve single or multiple items of crime scene evidence requiring analysis. Analysis had been started in about half of these cases.³⁷⁰ Most of the cases in the backlog are less serious, high volume offences, such as break, enter and steal (2,633 cases), stolen motor vehicle (1,188), steal from vehicle (279) and malicious damage (169). However, there are also a significant number of serious offences, including murder and manslaughter (116), attempted murder (42), sexual assault (504), robbery (903), assault (219) and home invasion (40).³⁷¹

5.4.6. DNA and the reinvestigation of old cases

DAL advised that there are crime scene samples from about 1,500 criminal offences committed between years 1986 and 2000 which are being held in storage. DAL has examined samples relating to 164 of these cases, most of which were unsolved sexual assaults. DNA testing has been completed in relation to 100 of these, and DNA profiles were obtained from 84. Half of these matched profiles already on the database – 33 to convicted offender profiles and the rest to other cases.³⁷²

Case Study 05

21 year old Natalie Henderson was murdered in her home in 1990. Her clothes had been removed and she had been strangled with a football sock. Police were unable to identify the offender, but retained a blood stained pillowcase and shirt which had been found at the scene. In 2002, DAL retrieved the items from the freezer, for forensic analysis. DAL obtained a DNA profile from the items, which implicated Peter Stone, a convicted offender whose profile had been put on database while he was serving a custodial sentence between 1998 to 2001 for threatening to inflict actual bodily harm on his partner's daughter. Stone pleaded guilty to the offence and was sentenced to 21 years imprisonment.³⁷³ This was the first murder conviction in New South Wales where the offender was identified through a cold link.

Case Study 06

24 year old Johanne Hatty was murdered in a reserve near her house in 1984. She had been strangled with a rope and then sexually assaulted. Police were unable to identify the offender at the time, but reopened the case in 2004. DAL obtained a DNA profile from sperm left on the deceased's clothes and body. Police obtained DNA profiles from a number of people who had been under investigation for the offence when it was first investigated, including David Fleming, who had since moved to Victoria. Fleming's profile matched the profile obtained from the crime scene, and he was extradited to Sydney for the court proceedings.³⁷⁴

DAL is of the view that many more old unsolved crimes, particularly sexual assaults, could be resolved if it had the resources to analyse all the crime scene samples in storage.

5.4.7. Outcomes for procedures other than DNA sampling

NSW Police does not keep central records on outcomes for other types of forensic procedures, so it is difficult to gauge how effectively these powers are being used. This is especially so for the procedures other than prints and photographs, where the type of procedure is not even recorded on COPS. It appears that with improved record keeping, NSW Police would be in a better position to assess whether it is using its powers to conduct forensic procedures effectively, which would be beneficial both to NSW Police and the broader community. We note that we have made recommendations to this effect in chapter 4.

Endnotes

- ³³³ *Crimes (Forensic Procedures) Act 2000* s 121.
- ³³⁴ We asked FPIT for details of all forensic procedures recorded on COPS between the commencement of the Act and 31 December 2004, for all suspects and volunteers. FPIT advised that 10,553 forensic procedures had been conducted. We reviewed this information and found that 205 procedures should not have been included, because the procedures related to victims (196), convicted offenders (3) or were samples taken from crime scenes, rather than forensic procedures conducted on people. We have reported on the DNA sampling of convicted offenders separately: see NSW Ombudsman, *The Forensic DNA Sampling of Serious Indictable Offenders under Part 7 of the Crimes (Forensic Procedures) Act 2000* (August 2004), and victims are excluded from the Act. We excluded these 205 procedures from our statistics, which left 10,348 forensic procedures conducted on suspects and volunteers.
- ³³⁵ DAL response to Ombudsman investigation notice, 24 February 2005.
- ³³⁶ FPIT further explained: "Where samples are taken in conjunction with another forensic procedure (such as a hand-swab) where the officer had recorded both samples as DNA samples with the same barcode for example; or where two officers involved in an investigation have entered the same procedure (with one of them having to 'dummy' the barcode to get it into the system). What this means is that a total download of forensic procedures (rather than Buccal/Hair/Blood) will produce a level of incorrect or duplicate entries which are sometimes difficult to distinguish in a report from 'correct' entries. This does not pose a great problem on a case-by-case basis when one persons record is being assessed, as the record of the valid sample is normally apparent": Advice from FPIT received on 1 September 2005.
- ³³⁷ DAL response to Ombudsman investigation notice, 24 February 2005. This includes profiles taken from 421 volunteers after Part 8 of the Act commenced and 410 prior to Part 8 commencing. This is the number of profiles which have been put on the database, not the number of people whose profile is on the database.
- ³³⁸ DAL, Draft Business Case, January 2005.
- ³³⁹ Responses to Ombudsman LAC survey.
- ³⁴⁰ Forensic procedures conducted on correctional centre inmates who are being investigated for further offences are included in the number of forensic procedures conducted on suspects. For this reason, it is expected that regions with higher prison populations would have a higher rate of forensic procedures conducted per capita.
- ³⁴¹ Responses to Ombudsman LAC survey.
- ³⁴² Ombudsman audit of local area commands, confidential interview with local area commander, 6 September 2004.
- ³⁴³ Proportion of forensic procedures conducted on volunteers for each region was 6 per cent for Northern region, 7 per cent for both metropolitan regions, and 11 per cent for Southern and Western regions: COPS download data provided by FPIT on 15 July 2005.
- ³⁴⁴ COPS download data provided by FPIT on 15 July 2005.
- ³⁴⁵ COPS download data provided by FPIT on 15 July 2005. Note that COPS records indicate the number of forensic procedures conducted, not the number of people who have undergone procedures. People who have undergone more than one procedure should be counted each time. We also note that gender was not recorded for 85 forensic procedures. We determined gender for each of these by reviewing the COPS narrative.
- ³⁴⁶ This figure reflects the forensic procedures conducted on children aged between 10 and 17. It does not include forensic procedures conducted on children under 10, who are not covered by the Act. These are discussed separately at 9.5.
- ³⁴⁷ 277 DNA samples were taken from child suspects and 21 from child volunteers. 128 photographs were taken of child suspects, but only 4 of child volunteers: COPS download data provided by FPIT on 15 July 2005.
- ³⁴⁸ Based on a New South Wales adult population of 4,793,462 and a child population (10 to 17 year olds) of 709,959: ABS 2001 Census data for NSW located at <http://www.abs.gov.au> accessed on 18 February 2005.
- ³⁴⁹ The number of 17 year olds includes some suspects police recorded as being under 18, although the procedure date indicates they would have been 18 or 19. We found that procedure dates on COPS are often incorrect so we have included these procedures, as police treated the person as a child for the purposes of the Act.
- ³⁵⁰ Of the 27 procedures conducted on child volunteers, 4 were conducted on children aged 12 and 13; 9 on children aged 14 and 15; and 14 on children aged 16 and 17.
- ³⁵¹ Police conducted 243 forensic procedures on children in metropolitan areas and 201 on children in regional areas. They conducted 6,050 procedures on adults in metropolitan areas and 3,316 on adults in regional areas. These figures do not include forensic procedures conducted by specialist commands (33 on children and 486 on adults). COPS download data provided by FPIT on 15 July 2005.
- ³⁵² Of the 450 child suspects, 431 were male and 19 were female. COPS download data provided by FPIT on 15 July 2005.
- ³⁵³ Of the 27 child volunteers, 12 were male and 15 were female. COPS download data provided by FPIT on 15 July 2005.
- ³⁵⁴ Of the 9,455 forensic procedures conducted on suspects, Aboriginal or Torres Strait Islander status was recorded as "yes" for 523 procedures, "no" for 3,197 procedures and "unknown" for 5,735 procedures: COPS download data provided by FPIT on 15 July 2005.

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- ³⁵⁵ 40 out of 450 child suspects: COPS download data provided by FPIT on 15 July 2005.
- ³⁵⁶ COPS download data provided by FPIT on 15 July 2005. As indicated above, seven per cent of forensic procedures conducted on suspects were conducted on women.
- ³⁵⁷ Information obtained through Ombudsman review of COPS records.
- ³⁵⁸ DAL, Draft Business Case, January 2005.
- ³⁵⁹ Based on COPS download data provided by FPIT on 15 July 2005, which indicates that NSW Police that conducted 9,455 DNA samples on suspects during the review period.
- ³⁶⁰ These include DNA samples taken from suspects and convicted offenders.
- ³⁶¹ DAL response to Ombudsman investigation notice, 24 February 2005.
- ³⁶² DAL response to Ombudsman investigation notice, 24 February 2005. DAL advised it made 4,207 cold links during the review period.
- ³⁶³ We received one complaint where the prosecution case almost failed when a victim sample was not provided to the laboratory and no comparison could be made with biological material taken from the suspect's shoes. The DNA analysis was essential to a successful conviction as there were no independent witnesses to the incident. This is complaint number 3, discussed at 15.3.3.
- ³⁶⁴ Email advice from FPIT received 14 December 2005.
- ³⁶⁵ Email advice from FPIT received 14 December and 15 December 2005.
- ³⁶⁶ DAL, Draft Business Case, January 2005.
- ³⁶⁷ Based on the estimates that during the review period, DAL made 3,170 warm links and 480 eliminations: DAL response to Ombudsman investigation notice, 24 February 2005 and Draft Business Case, January 2005.
- ³⁶⁸ *Crimes (Forensic Procedures) Act 2000* s 3, 12(a) and 20(c).
- ³⁶⁹ We understand that the term "backlog" includes all cases which DAL has not finalised, rather than a distinct set of matters which DAL has consciously decided should be allocated backlog status.
- ³⁷⁰ Minutes of the DNA Advisory Committee, 6 August 2004.
- ³⁷¹ Advice provided by DAL, 2 August 2004.
- ³⁷² DAL, Draft Business Case, January 2005.
- ³⁷³ *R v Stone* [2004] NSWSC 224.
- ³⁷⁴ "DNA leads cold-case squad to first arrest", *Sydney Morning Herald*, (19 January 2005).

Chapter 6. Legal advice and information provided

This chapter examines whether people undergoing forensic procedures have adequate access to legal advice, and are properly informed about the proposed procedure, before deciding whether to consent or not.

6.1. Providing information about forensic procedures

Before asking for consent to conduct a forensic procedure, police must provide certain information.

Suspects must be informed of the purpose for which the procedure is required, the offence to which it relates, the way it will be carried out, that it may produce evidence against the suspect, that consent may be refused, the consequences of refusing consent, and that information obtained from DNA analysis may be put on the DNA database.³⁷⁵

Volunteers must be informed of the way the proposed procedure will be carried out, that the volunteer is under no obligation to undergo the procedure, that consent may be withdrawn at any time, that it may produce evidence that may be used in court, that information obtained from DNA analysis may be put on the DNA database, and that information put on the database may be retained for such period as the Commissioner of Police and volunteer agree, and then must be removed from the system. Volunteers must also be informed that the DNA database has two indexes relevant to volunteers, a “volunteers (limited purposes)” index and a “volunteers (unlimited purposes)” index, and that the volunteer may consent to the procedure on the condition that the information obtained will only be placed on one of the specified indexes, or will not be placed on either index.³⁷⁶

6.1.1. How are police officers providing information about forensic procedures?

NSW Police has developed information sheets, which are designed so that officers can largely meet their legislative obligations simply by reading through the information. Some of the information, however, depends on the circumstances. Separate information sheets have been developed for suspects and for volunteers.

For each of the 146 videos we watched during our video audit, we recorded how the information was provided. In most cases (132 procedures, or 90 per cent), it was provided orally. In about a third of procedures (49 procedures, or 34 per cent) the information was provided in writing as well. In some cases the information was not provided in writing but the officer told the person that he or she would be given a copy of the information sheet before leaving the police station. There was only one procedure where the information was provided in writing but not orally. In the remaining cases (13 procedures, or 9 per cent) we were unable to determine whether or how the information was provided, as the provision of information was not recorded on video.

The Act requires the information to be given “personally or in writing”, it does not require both.³⁷⁷ We note that it is police policy to read the information to the suspect or volunteer before asking for consent, and then provide a copy of the information sheet after the procedure has been completed.³⁷⁸

In our video audit, we found people appeared more likely to understand the information when police provided a copy of the information sheet and took the person through it, by reading it aloud and stopping to ask whether the person understood everything. In our view, providing the information in writing before asking for consent is preferable to providing it after the procedure has been conducted. The better the person’s understanding, the more likely they are to make an informed decision about whether to consent or not, and the less likely the evidence will be challenged in court on the basis that consent was not informed.

6.1.2. Concerns about the way forensic procedures are explained

In its 2002 report, the Legislative Council Standing Committee on Law and Justice found that the information provided to people undergoing forensic procedures “is convoluted and confusing, and there is a great deal of doubt whether it is understood by the majority of test subjects.” It commented that this could result in a court questioning whether a person’s consent was valid, and recommended that a plain English version of the information be drafted.³⁷⁹

In our 2004 report on the DNA sampling of serious indictable offenders, we also identified significant problems with the provision of information about forensic procedures, and recommended that the Attorney General prepare a plain English version of the information that is required to be provided under the Act, which could be prescribed by the regulations or included in a Schedule to the Act.³⁸⁰ We understand that this recommendation is under consideration.³⁸¹

Consistent with those earlier findings, we have again found in this review that the information provided to suspects and volunteers is seriously inadequate, in particular because it is far too complex. We received many submissions which strongly advocated the development of a plain English version of the information which is provided.³⁸² Legal Aid NSW commented:

*The Act is premised upon informed consent by suspects and volunteers... Despite the current legislative provisions, in general our clients do not sufficiently understand the nature of the procedure and their option not to consent, and therefore they are not giving informed consent.*³⁸³

Police officers are also extremely critical of the information they provide to suspects and volunteers. In every command we audited, officers criticised the information sheet for being too long and too difficult to understand. Similar comments were made in submissions and survey responses we received. For example:

*You need a bottle of water to finish reading it.*³⁸⁴

*You need a law degree to follow it.*³⁸⁵

*There's so much information, the person is bamboozled. It should be much simpler.*³⁸⁶

*Some suspects aren't very well educated and it goes straight over their heads. You give them all the information, but most of it they don't need.*³⁸⁷

*They inevitably don't understand 99% of what is read to them, or just switch off and don't listen.*³⁸⁸

*You read the information sheet, and guaranteed, they don't understand it. And [when asked whether they understand] they say yes.*³⁸⁹

*When you read the three-page information sheet to the [suspect] it is confusing to nearly every one of them. At the end you ask them, 'Do you understand that?' They all say yes, which in my opinion is untrue.*³⁹⁰

*It is the most confusing document and serves little purpose in assisting suspects making an informed decision... It is long, convoluted and of little value to the majority of persons being tested.*³⁹¹

Some police officers commented that even they do not understand the information. For example:

*I've read it a number of times and I don't understand it. And I'm not the village idiot.*³⁹²

*Nobody's understanding it, police or suspect... It's going to mean nothing to them.*³⁹³

*I don't even understand it, let alone the bad guy which is ironic as the last question is 'Do you understand this?' They always answer yes because they are bored senseless by us reading out these sheets of irrelevant information.*³⁹⁴

*When you ask the suspect if they understand what has just been read out to them, I generally get a blank look from the suspect (or they have fallen nearly asleep). Luckily, I have not had any state that they do not understand it because I have problems getting my own head around it.*³⁹⁵

*I know I've mentioned it but I will keep mentioning it. It is way too long. Too much information that the suspect would not understand, although at the end we ask them if they understood it. It's obvious they didn't because some of the police don't understand it.*³⁹⁶

The Police Association of NSW shares this view:

*Many police officers themselves do not fully understand all the information associated with the Information Sheet. If a suspect answered 'no' to the question, 'Do you understand?', an explanation would be very difficult, time consuming and require more knowledge than is possessed by the average police officer.*³⁹⁷

Many officers were of the view that the information sheet contained information which simply was not relevant. For example, it refers to various pieces of legislation, including the *Mutual Assistance in Criminal Matters Act 1987* and the

*Extradition Act 1988.*³⁹⁸ Officers we interviewed expressed concern that the length and complexity of the information did not help suspects and volunteers to make an informed decision about whether to consent to the procedure or not:

*A more concise and simpler information sheet is required. The current sheet can actually confuse suspects, rather than inform them. It should in simple terms advise them how the DNA will be taken and what it will be used for. Also, that apart from possibly proving or disproving their involvement in that particular alleged offence, the DNA will also be placed on a database and used to compare with unsolved crime scene samples.*³⁹⁹

The NSW Police Legislative Changes Working Group has also expressed concern about the information sheet being too long and unnecessarily complex, arguing that the information provided could be simplified without compromising the person's ability to make an informed decision about participating in the procedure.⁴⁰⁰

For each video we watched during our audit of local area commands, we assessed whether or not the person undergoing the procedure appeared to understand the essence of the information provided.

For 73 per cent of the procedures we watched, the suspect or volunteer appeared to understand the information. They appeared most likely to understand the information when police began with a simple explanation or overview, then provided a copy of the information sheet, and took the suspect through the information by reading it aloud and stopping to ask whether they understood. It also helped if the testing officer gave a short introduction explaining who was present, their respective roles, what the procedure involved and why it was needed.

For 12 per cent of the procedures we watched, it was not possible to assess the person's understanding of the information, for example where the person was placid throughout the procedure, spoke only when asked, and only answered "yes" or "no" to questions.

In the remaining 15 per cent of procedures, there was clear evidence the person did not understand the information, as the person specifically stated that he or she did not understand the information, or asked questions or made comments which suggested he or she did not understand. In these circumstances, police usually explained the information again. However, given the complexity of the information it was not always possible to break it down into simpler ideas.

Some of the consent forms we reviewed also indicated the person undergoing the procedure did not understand the information. For example, one person who was asked whether the information had been provided, responded, "Yeah but I don't know what the hell you just said." Another stated, "Didn't understand it but yeah I was given that information."⁴⁰¹

Some police officers we interviewed expressed concern that despite providing all the information required under the Act, the length and complexity of the information sheet means that the essential points are lost on the person being asked for consent. There are ways to address this. For example, some officers gave the person being tested a brief explanation or overview before going into the detail. It is also a good idea to tell the person what is involved before reading through the information sheet in its entirety. For example, in one video we watched, the testing officer told a suspect, "This is the information sheet, it's very long winded but I've got to read it to you, so bear with me." In another video, the testing officer said, "I'm going to read quite a bit of information to you. While we're going, if you don't understand any of it, stop me, and I'll explain it to you." This is good practice and should be encouraged.

One officer told us that he usually says to a suspect before the video recording commences, "There's all this legal stuff we have to tell you", and answers any questions the suspect may have before turning the video on and reading out the information sheet. This is not good practice as the person could argue in court that he or she did not understand the information. It would be better both for police and the person being tested for the provision of information and any response to be recorded in its entirety, to ensure the requirements under section 15 of the Act are met.⁴⁰²

It is clear from our monitoring activities that simplifying the information provided to suspects and volunteers would be enormously beneficial, both for police officers and for people undergoing forensic procedures. For this reason, we reiterate our initial recommendation that the Attorney General develop a plain English version of the information that is required to be provided under the Act. This should be in a form that can be provided to the suspect or volunteer. We later recommend this be provided prior to the procedure, for the person (and their legal advisor, if any,) to go through together.

6.1.3. Does it matter whether the person understands?

In its submission, the Police Association of NSW commented:

*Realistically, the suspect's understanding of the use of the DNA at the time of testing is not all that important because if they refuse to undergo the procedure then a senior officer could order compliance to the procedure or alternatively, a court order or an interim order would be issued.*⁴⁰³

We disagree that it is “not all that important” that a person being asked to undergo a forensic procedure may not fully understand the implications of the procedure, especially in the case of DNA sampling. The Act is based on the principle of informed consent, and provides that the carrying out of a forensic procedure in the absence of consent is permitted only in very limited circumstances. This is discussed in detail in chapter 7.

It is vital that both suspects and volunteers be given all the appropriate information, and that police officers endeavour to explain anything which the person does not understand. Otherwise, the person is unable to make an informed decision as to whether to consent to the procedure or not.

Recommendation 10

The Attorney General develop a plain English version of the information that is required to be provided under the *Crimes (Forensic Procedures) Act 2000*, as a matter of urgency, and consider whether this should be prescribed by regulation or included in a schedule to the *Crimes (Forensic Procedures) Act 2000*.

In its response to our draft report, the Attorney General's Department advised that it does not oppose this recommendation, but commented:

*The issue is more likely to be whether the content of plain English version of the required information should be set out in legislation at all. The alternative is that the legislation authorises the required information being provided in a plain English form without specifying the wording to be used. If the content is to be contained within the legislation, it would more logically be contained in the Regulations where small refinements of nuance and expression will not require legislative intervention.*⁴⁰⁴

NSW Police supports the recommendation.⁴⁰⁵

6.1.4. Providing information to volunteers

We found that police officers are generally aware of their legislative obligation to provide information to people undergoing forensic procedures, but did not always provide the right information. In the videos we watched, some officers read out the wrong information sheet, which meant they provided incorrect, misleading or irrelevant information to the person being asked to consent to the procedure. Even where the testing officer has the correct information sheet, he or she cannot just read it out without thinking about it, as the purpose of conducting the procedure, and what any samples will be used for, will depend on the circumstances of the case.

Providing information to volunteers was more of a problem than for suspects, probably because significantly fewer procedures are conducted on volunteers and, unlike suspects, volunteers can choose what samples can be used for, and how long they can be kept. The information sheet NSW Police developed for volunteer DNA samples instructs police officers:

*You need to decide on which index of the database, if any, the profile obtained from the volunteer is to be placed. In the majority of cases, the profile will not be placed on any index and will simply be matched within the case itself.*⁴⁰⁶

This advice is incorrect. DAL had advised that it puts all DNA profiles obtained from volunteers on the DNA database. Although they are stored on a volunteers index, they are only used within the particular case, and are not matched against anything else on the database. It is of concern that police officers are informing volunteers that their DNA profiles will not be put on any index of the DNA database, when DAL puts all volunteer profiles on the database. It is clear that many DNA profiles from volunteers have been put on the DNA database without the person's knowledge or consent.

Further, DAL has advised that it very rarely uses the volunteers (unlimited purposes) index. It finds that police officers who have indicated that a volunteer's profile is to be used for unlimited purposes often do not have a good understanding of what this means. Before putting a volunteer profile on the unlimited purposes index, DAL always contacts the officer who took the sample, to confirm whether the volunteer did actually specify that his or her DNA sample could be used for unlimited purposes. Police usually advise that they cannot be sure of this and that the person's profile should only be matched within the case for which it was provided. Accordingly, DAL has only put volunteer profiles on the unlimited purposes index once or twice.⁴⁰⁷ For a more detailed discussion of the DNA database and permitted matching, see chapter 10.

In order to give informed consent, volunteers need to be provided the right information about what their DNA samples will be used for. In our view, police officers should tell volunteers:

- that their DNA profile will be stored on the DNA database, and
- that their profile will only be matched within the particular case, and will not be matched against anything else on the database, unless they indicate they would like their DNA profile to be used for unlimited purposes.

We also note that while suspects must be informed "that the forensic procedure may produce evidence *against the suspect* that might be used in a court of law," volunteers need only be informed "that the forensic procedure may produce evidence that might be used in a court of law."⁴⁰⁸ As discussed at 7.1.3, police may treat potential suspects – or "people of interest" – as volunteers for the purposes of the Act. For this reason, we are of the view that all volunteers should be informed that the forensic procedure may produce evidence which can be used against them, should they become a suspect at some stage during the investigation.

Recommendation 11

The *Crimes (Forensic Procedures) Act 2000* be amended so that police are required to inform volunteers that the forensic procedure may produce evidence against the volunteer that might be used in a court of law.

NSW Police does not support this recommendation, on the basis that "the current caution for volunteers is appropriate."⁴⁰⁹

The Attorney General's Department expressed some concern about Recommendation 11, commenting:

The intention of providing further protections for volunteers who may also be 'persons of interest' is sensible; but the Department is doubtful about the appropriateness of proposed Recommendation 11 in the broad form in which it is currently drafted. As acknowledged in the draft report (for example paragraph 7.5.1), a number of volunteers are witnesses or other categories of person who may be asked to provide an exclusionary (or elimination) sample, but who will never become suspects. To always require Police to warn such persons that information arising from the forensic procedure may be used in court 'against them', would serve no purpose other than possibly to intimidate or frighten the volunteer. On the other hand, a volunteer who agrees to have his or her DNA profile placed on the 'volunteers (unlimited purposes)' index of the DNA database, should always be warned that by consenting to being placed on that database, it becomes possible for the volunteer's DNA profile to be used against him or her in a subsequent court proceeding.

Any amendment arising from the proposed Recommendation would need to be carefully drafted to ensure that it did not require invariable warnings to be given, in cases where there is no realistic prospect that the volunteer might have evidence from his or her forensic sample used in a case where she or he is a defendant.⁴¹⁰

It is true that many volunteers who provide DNA samples from police will never become suspects, and in these cases it may not be relevant to warn the person that evidence obtained from the procedure may be used against them. The example provided in the Attorney General's response as to when a caution may be appropriate is one instance. More importantly, as outlined above, some volunteers are people who are under suspicion, but are not 'suspects' for the purposes of the Act. It is particularly important that a person in these circumstances be informed that evidence obtained from a forensic procedure may be used in proceedings against them. The police officer who is taking the sample should be able provide further explanation to allay any fears held by a volunteer who is not under suspicion and is not likely to become a defendant in the case. One possible solution to ensure consistent advice is given to volunteers, NSW Police could include the information and an explanation as to why it is provided in its information sheet for volunteers.

The distinction between suspects and volunteers is discussed at 7.1. Whether people of interest to police should be treated as suspects or volunteers is discussed at 7.1.3.

Recommendation 12

Police inform volunteers who provide DNA samples that their DNA profile will be stored on the DNA database but will only be matched within the particular case, and will not be matched against anything else on the database, unless the volunteer indicates that he or she agrees to his or her DNA profile to be used for unlimited purposes.

NSW Police supports this recommendation.⁴¹¹

6.1.5. Providing information to children and young people

Forensic procedures can only be conducted on child suspects by order of a court. There is no legislative requirement that the child be provided with any information about the proposed procedure, although the SOPs instruct police to “advise the suspect of the details of the court order,” and that the procedure may be conducted by force if necessary.⁴¹²

Forensic procedures can only be conducted on child volunteers with the consent of the child’s parent or guardian, or by order of a court. The crucial information – that the procedure is not obligatory, how it will be carried out, how samples will be used and how long they will be kept – must be provided to the child’s parent or guardian, but not to the child. Police are, however, required to inform the child that the procedure will not be carried out if he or she objects or resists.⁴¹³

In its submission, the Commission for Children and Young people argued that the Act be amended “to provide children and young people with the right to receive information on the procedure”, and that this should be provided “in a manner and language that the child or young person can understand.”⁴¹⁴

We agree that although children cannot consent to forensic procedures, they should still receive key information about the procedure. In the case of child suspects, the child should be told why the procedure is required, the offence to which it relates, the way it will be carried out, that it may produce evidence against them, and that information obtained from DNA analysis may be put on the DNA database. In the case of child volunteers, the child should be told why the procedure is required, the way it will be carried out, how samples will be used, how long they will be kept, that the procedure might produce evidence against them, and that they do not have to undergo the procedure if they do not want to. Providing this information would enable child suspects and volunteers to understand the decision which has been made and how it will affect them.

Obviously, the child’s capacity to understand information about forensic procedures would depend on the child’s age. Information provided to a 10 year old would be quite different from information provided to a 17 year old. However, most children who undergo forensic procedures are over 16, and a large proportion are over 14, and have the capacity to understand the key information.⁴¹⁵ The capacity of children to consent to forensic procedures is discussed further at 7.4.7.

Recommendation 13

The *Crimes (Forensic Procedures) Act 2000* be amended to require police to provide information about forensic procedures to child suspects and volunteers, and develop plain English versions of this information for children of different ages in consultation with the Commission for Children and Young People.

NSW Police and the Attorney General’s Department both support this recommendation.⁴¹⁶ NSW Police notes that this should be the responsibility of the Attorney General’s Department.

6.1.6. Providing information to incapable persons

As with children and young people, forensic procedures on incapable persons can only be conducted by order of a court and there is no legislative requirement that the incapable person be provided with information about the proposed procedure. The Anti-Discrimination Board in its submission stated:

*The provision of comprehensive information in a format suited to the person is critical to the issue of informed consent to testing. This is likely to be particularly an issue for people with a disability....*⁴¹⁷

Incapable persons should be provided with the same crucial information about the procedure that we have discussed above for children and young people. The Intellectual Disability Rights Service also raised the issue of plain language information in their submission and offered assistance in the development of appropriate material.⁴¹⁸

Recommendation 14

The *Crimes (Forensic Procedures) Act 2000* be amended to require police to provide information about forensic procedures to incapable persons, and develop plain English versions of this information suitable to persons with an intellectual disability in consultation with the Intellectual Disability Rights Service.

NSW Police and the Attorney General's Department both support this recommendation.⁴¹⁹ NSW Police notes this should be the responsibility of the Attorney General's Department.

6.2. Access to legal advice

Before asking a suspect to consent to a forensic procedure, police must give the suspect reasonable opportunity to communicate with a legal practitioner of the suspect's choice.⁴²⁰ Before asking a volunteer to consent to a forensic procedure, police must inform the volunteer that he or she may consult a legal practitioner of choice before deciding whether or not to consent to the procedure.⁴²¹

6.2.1. How often do police give reasonable opportunity to obtain legal advice?

During our audit of local area commands we examined consent forms to see how often suspects and volunteers are given reasonable opportunity to communicate with a legal practitioner. Police records indicate that in most cases, but not all, officers are complying with this requirement.

The consent form designed by NSW Police asks whether the person has been given an opportunity to communicate, or attempt to communicate, with a legal practitioner of choice, and then provides a space for police to write down the person's reply. Of the 211 consent forms we viewed, 159 indicated the person had been given the opportunity to communicate with a legal practitioner. For example:

Yes I have been given this option.

Yes I had the choice.

Yeah I could of.

Yeah I guess so.

Some indicated that the question on the consent form prompted police to check whether the person had been given the opportunity to obtain legal advice. For example:

No. Would you like to? Nup.

No. Do you wish to do so? No.

No, but I haven't asked. Were you given the opportunity to contact legal advice? Not really. Q. Do you want legal advice? A. For this procedure, No.

He is not here yet. [The form then indicates that police waited until the suspect had spoken to a legal practitioner before proceeding.]

However, 15 consent forms indicated the person had not been given the opportunity to obtain legal advice, and did not explain why. For example:

Not that I am aware of.

No, not tonight.

No. I wish to contact a solicitor.

One form had “N/A. Elimination only” written on it. We note police taking DNA samples from suspects for elimination purposes are still required to provide the suspect with reasonable opportunity to obtain legal advice.

For the rest of the procedures we audited, we could not gauge whether the person was given reasonable opportunity to obtain legal advice, as the consent form failed to indicate either way (in 37 procedures), the consent form could not be located (for 131 procedures), or the procedure was not conducted by consent and there was no record of whether the requirement had been met (for 29 procedures).

6.2.2. How often is legal advice obtained?

Only a small proportion of suspects and volunteers obtain legal advice before deciding whether to consent to a procedure. They rarely have a legal practitioner present during the provision of information, consent process or the procedure itself.

Many consent forms indicated the suspect had been given the opportunity to seek legal advice, but had chosen not to:

That's all right, we'll just do it.

No thanks.

No, there's no need for that.

I've done it all by myself.

Don't want one, I've got nothing to worry about.

Some suspects gave reasons for not seeking legal advice, although they may have wanted to:

Too complicated.

I can't call no one. It'll cost me two grand for them to come here.

Some of the submissions we received raised concerns that police may interpret the requirement to give suspects reasonable opportunity “to attempt to communicate” with a legal practitioner too narrowly, and so deprive suspects of any real opportunity to obtain legal advice:

A very narrow interpretation might be that one phone call to a solicitor to discover that the solicitor was presently on the phone might be construed as meeting the requirements of the section.⁴²²

The consent forms we reviewed did show that some suspects were unsuccessful in their attempts to obtain legal advice:

They tried to get him for me but he wasn't available.

Yes, I have attempted but there was no answer.

Attempt only didn't get through.

No access to phone.

I can't do this at present time I don't have phone.

They refused me a phone. No.

Without further information we are unable to determine whether these suspects were in fact given reasonable opportunity to attempt to communicate with a legal practitioner. However, it would appear that police could have given some suspects greater opportunity to obtain legal advice. They should at least provide phone access, and allow the suspect reasonable time to get through.

6.2.3. Difficulties obtaining legal advice

Many of the submissions we received explained that legal advice is not readily available for adult suspects and volunteers. The NSW Law Society stated:

*A very small percentage of people actually contact a lawyer to obtain legal advice as to whether they should or should not consent to the forensic procedure. Children have access to Legal Aid NSW's Under 18s Hotline and can be advised by that service, but, other than through the Aboriginal and Torres Strait Islander Services, there is no corresponding provision for free legal advice for adult suspects and volunteers.*⁴²³

Although free legal advice should be available for Aboriginal and Torres Strait Islander suspects and volunteers, this is not always the case. As the NSW Department of Aboriginal Affairs explained:

*There are practical limitations to all Aboriginal suspects obtaining legal advice while in police custody due to Aboriginal legal services not being sufficiently staffed to attend all matters.*⁴²⁴

The Intellectual Disability Rights Service commented:

*This right [to seek legal advice] is greatly weakened by the fact that there are very few avenues for free legal advice. Very few offenders can afford to pay a private solicitor to advise them about whether or not they must submit to DNA sampling.*⁴²⁵

The Service further commented that it is particularly difficult for people with intellectual disabilities to access legal advice:

*People with an intellectual disability have even greater barriers to accessing legal advice as they may not appreciate the need for the advice or they may not know where to find legal advice.*⁴²⁶

It is not clear from the information available exactly what impact obtaining legal advice has on whether a person consents or not. However, we did find some evidence to suggest that suspects may be less likely to consent to a forensic procedure after obtaining legal advice on the issue.⁴²⁷

6.2.4. Relationship with Part 9 of the Law Enforcement (Powers and Responsibilities) Act

Part 9 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (formerly Part 10A of the *Crimes Act 1900*) sets out the rights of people detained in police custody after arrest. Before conducting any investigative procedure, such as questioning or searching a suspect, police must tell the suspect that he or she may attempt to communicate with a legal practitioner, and must provide reasonable facilities for this. Police must suspend the investigative procedure while the person attempts to obtain legal advice, and must wait if the person has asked a legal practitioner to attend the police station.⁴²⁸

Some of the police officers we interviewed advised that suspects often seek legal advice when they are first taken into custody. At this stage, they may not be aware that police intend to ask them to consent to a forensic procedure. By the time police do ask for consent, the suspect may have been in custody for some time, and may be reluctant to go back and seek further legal advice about the matter. This may be one reason why only a very small proportion of suspects obtain legal advice about forensic procedures.⁴²⁹

Police are required to give suspects a summary of their rights under Part 9 of the *Law Enforcement (Powers and Responsibilities) Act*.⁴³⁰ Suspects could then seek legal advice on this issue when they are first taken into custody.

Advising suspects when they are taken into custody that police may wish to conduct a forensic procedure would not replace suspects being given reasonable opportunity to seek legal advice about proposed forensic procedures. Police would still have to ask, when completing the consent form, whether the suspect has had reasonable opportunity to communicate with a legal practitioner. If the suspect indicates they have not, police must then provide this opportunity.⁴³¹

Recommendation 15

Police consider informing suspects who have been taken into detention after arrest, and who are likely to undergo a forensic procedure, that police may wish to conduct a forensic procedure on the person, such as a DNA sample, and that this information be provided when police give suspects their summary of the provisions of Part 9 of the *Law Enforcement (Powers and Responsibilities) Act 2002*.

NSW Police supports this recommendation and has advised that it will consider updating its procedures to include this information.⁴³²

6.2.5. Improving access to legal advice

Many submissions argued that access to legal advice should be improved. Some advocated establishing a 24 hour telephone hotline for people who have been detained by police.⁴³³

There were also suggestions that suspects and volunteers be given notice prior to police requesting consent to a forensic procedure, so they can seek legal advice if they wish. The Anti-Discrimination Board argued this would enable suspects and volunteers to be better informed about the procedure and its consequences before deciding whether to consent or not.⁴³⁴ The Police Association of NSW also suggested that suspects and volunteers be given a copy of the information sheet beforehand, to give them the opportunity to go through the information with a legal practitioner.⁴³⁵

Some other jurisdictions provide for notice periods before taking DNA samples.⁴³⁶ These tend to relate to samples taken by compulsion, but could be adapted for samples taken by consent.

Obviously it would not be appropriate to give notice for some types of forensic procedures, like gun shot residue tests, nail scrapings or photographs of injuries. These have to be taken while the suspect is in custody or the evidence will be lost. However, a person's DNA can be taken at any time. As discussed above, giving notice before asking for consent to a forensic procedure, and providing information about the procedure with the notice, could improve access to legal advice, ensure suspects and volunteers are better informed, and shorten the length of time the person spends in police custody receiving information and waiting for legal advice.

There are several reasons why providing notice may not be appropriate where police wish to take a DNA sample from a suspect who is under arrest. First, it is much more convenient to conduct the procedure while police have the person in custody, rather than attempting to carry it out at a later date. Second, police may wish to carry out other forensic procedures, which have to be carried out straight away, before the evidence is lost. In those circumstances, police would still have to provide the suspect with the relevant information and the opportunity to seek legal advice. Third, police will in some circumstances have the power to compel the person to provide the sample regardless of consent. Finally, there is the possibility that providing advice in advance of a forensic procedure may increase the risk of the person absconding.

These considerations do not apply to volunteers or suspects who are not under arrest, and in our view there would be considerable merit in providing these people with notice about intended forensic procedures. This approach seems to be supported by the Police Association of NSW. In its submission, the Association suggested that "one better option would be to give the suspect the Information Sheet prior to the procedure for them to read or go over with their lawyer and then simply explain the gist of the information in language more suitable".⁴³⁷

In our draft report, we made a provisional recommendation, that the Act be amended "so that police are required to give volunteers and suspects who are not under arrest a period of notice, specified in the Act or Regulation, before asking them to provide a DNA sample."

NSW Police did not support this recommendation, commenting:

*NSW Police has reservations about being able to comply with such requirements. Additionally, it is believed that investigations may be unnecessarily hampered or delayed, and suspects and volunteers may be unnecessarily inconvenienced.*⁴³⁸

The Attorney General's Department also expressed concern about mandatory notice periods:

Proposed Recommendation 16 appears appropriate in relation to many volunteers (including any volunteer who Police intend to request consenting to having his or her profile placed on the 'volunteers: unlimited purposes' index), and suspects who are not under arrest. However, in relation to victims of non-violent offences and third parties who are witnesses or whose sample is taken only for exclusion purposes, it is questionable whether any utility in imposing a mandatory statutory period for advice and cooling off will be outweighed by the inconvenience to the person. Persons in that second category are more likely to prefer to have their dealings with Police finalised in one transaction; a mandatory statutory waiting period will require that these persons are given information, sent away, and then required to attend on a second occasion to actually provide a sample.⁴³⁹

Most of these concerns can be addressed by allowing the suspect or volunteer to waive his or her right to a notice period. Suspects and volunteers who prefer to have their dealings with police finalised in one transaction can do so, and those who would prefer some time to consider the police request or seek legal advice would have the benefit of the notice period. In relation to police concerns about investigations being hampered, we note that the notice period would not relate to suspects who are under arrest. In our view providing notice of a police request for a DNA sample with a right to waive the notice period strikes an appropriate balance between the needs of police and the rights and interests of suspects and volunteers.

Recommendation 16

The *Crimes (Forensic Procedures) Act 2000* be amended so that:

- a. Police officers are required to give volunteers and suspects who are not under arrest a period of notice, specified in the Act or Regulation, before asking them to provide a DNA sample.
- b. Police need not wait until the end of the notice period to take the DNA sample, if the suspect or volunteer has expressly and voluntarily waived his or her right to the period of notice.

Endnotes

³⁷⁵ *Crimes (Forensic Procedures) Act 2000* s 13.

³⁷⁶ *Crimes (Forensic Procedures) Act 2000* s 77 and *Crimes (Forensic Procedures) Regulation 2000* cl 7A.

³⁷⁷ *Crimes (Forensic Procedures) Act 2000* s 13(1).

³⁷⁸ NSW Police, "Standard Operating Procedures – Forensic Procedures".

³⁷⁹ NSW Legislative Council Standing Committee on Law and Justice, *Review of the Crimes (Forensic Procedures) Act 2000*, 7 February 2002, at paragraph 5.108 and Recommendation 24.

³⁸⁰ NSW Ombudsman, *The Forensic DNA Sampling of Serious Indictable Offenders under Part 7 of the Crimes (Forensic Procedures) Act 2000*, August 2004, Recommendation 19, p. 104.

³⁸¹ Letter from the Director General, NSW Attorney General's Department dated 25 February 2005.

³⁸² Legal Aid NSW submission, 28 February 2005, Law Society of NSW submission 9 March 2005, Police Association of NSW, March 2005.

³⁸³ Legal Aid NSW submission, 28 February 2005.

³⁸⁴ Police Association of NSW submission, March 2005.

³⁸⁵ Police Association of NSW submission, March 2005.

³⁸⁶ Ombudsman audit of local area commands, confidential interview with police officer, 2 August 2004.

³⁸⁷ Ombudsman audit of local area commands, confidential interview with police officer, 3 August 2004.

³⁸⁸ Police Association of NSW submission, March 2005.

³⁸⁹ Ombudsman audit of local area commands, confidential interview with police officer, 3 August 2004.

³⁹⁰ Confidential LAC survey response.

³⁹¹ Confidential LAC survey response.

³⁹² Ombudsman audit of local area commands, confidential interview with police officer, 27 September 2004.

- ³⁹³ Ombudsman audit of local area commands, confidential interview with police officer, 29 September 2004.
- ³⁹⁴ Police Association of NSW submission, March 2005.
- ³⁹⁵ Police Association of NSW submission, March 2005.
- ³⁹⁶ Confidential LAC survey response.
- ³⁹⁷ Police Association of NSW submission, March 2005.
- ³⁹⁸ Taken from the Forensic Procedures Information Sheet for Volunteers.
- ³⁹⁹ Confidential LAC survey response.
- ⁴⁰⁰ NSW Police Legislative Changes Working Group, "Proposed Amendments to the *Crimes (Forensic Procedures) Act 2000*", undated.
- ⁴⁰¹ Consent form reviewed during Ombudsman audit of local area commands, dated 10 January 2003.
- ⁴⁰² Section 15 requires that police must electronically record the provision of information. See discussion at 8.5.
- ⁴⁰³ Police Association of NSW submission, March 2005.
- ⁴⁰⁴ Attorney General's Department response to Ombudsman draft report, 5 May 2006.
- ⁴⁰⁵ NSW Police response to Ombudsman draft report, 2 June 2006.
- ⁴⁰⁶ NSW Police Forensic Procedures Information Sheet Volunteer, Version 2003/1.
- ⁴⁰⁷ Telephone advice from DAL, 3 March 2005, and meeting at DAL, 5 October 2005.
- ⁴⁰⁸ *Crimes (Forensic Procedures) Act 2000* s 77(1)(c) and 13(1)(e) (emphasis added).
- ⁴⁰⁹ NSW Police response to Ombudsman draft report, 2 June 2006.
- ⁴¹⁰ Attorney General's Department response to Ombudsman draft report, 5 May 2006.
- ⁴¹¹ NSW Police response to Ombudsman draft report, 2 June 2006.
- ⁴¹² NSW Police Standard Operating Procedure No. 9, "Suspect Under Arrest or Not Under Arrest – Juvenile or Incapable."
- ⁴¹³ *Crimes (Forensic Procedures) Act 2000* s 76(2)(b)(ii) and 77.
- ⁴¹⁴ NSW Commission for Children and Young People submission, 11 February 2005.
- ⁴¹⁵ See figure 7 at section 5.3.2.
- ⁴¹⁶ NSW Police response to Ombudsman draft report, 2 June 2006; and Attorney General's Department response to Ombudsman draft report, 5 May 2006.
- ⁴¹⁷ Anti-Discrimination Board submission dated 18 February 2005.
- ⁴¹⁸ Intellectual Disability Rights Service submission dated 11 March 2005.
- ⁴¹⁹ NSW Police response to Ombudsman draft report, 2 June 2006; and Attorney General's Department response to Ombudsman draft report, 5 May 2006.
- ⁴²⁰ *Crimes (Forensic Procedures) Act 2000* s 9(2)(d).
- ⁴²¹ *Crimes (Forensic Procedures) Act 2000* s 77(1)(e).
- ⁴²² Intellectual Disability Rights Service submission, 11 March 2005.
- ⁴²³ Legal Aid NSW submission, 28 February 2005. The Law Society of NSW raised similar concerns in its submission, 9 March 2005.
- ⁴²⁴ NSW Department of Aboriginal Affairs submission, 11 April 2005.
- ⁴²⁵ Intellectual Disability Rights Service submission, 11 March 2005.
- ⁴²⁶ Intellectual Disability Rights Service submission, 11 March 2005.
- ⁴²⁷ Review of custody records, interviews with police officers and the Police Association of NSW submission, March 2005.
- ⁴²⁸ *Law Enforcement (Powers and Responsibilities) Act* s 123, formerly *Crimes Act 1900* s 356N.
- ⁴²⁹ Ombudsman audit of local area commands, confidential interview with police officer, 27 September 2004.
- ⁴³⁰ *Law Enforcement (Powers and Responsibilities) Act* s 122, formerly *Crimes Act 1900* s 356M.
- ⁴³¹ NSW Police, "Standard Operating Procedures – Forensic Procedures".
- ⁴³² NSW Police response to Ombudsman draft report, 2 June 2006.
- ⁴³³ Intellectual Disability Rights Service submission, 11 March 2005; and Anti-Discrimination Board submission, 18 February 2005.
The NSW Legislative Council Standing Committee on Law and Justice also recommended this in its *Review of the Crimes (Forensic Procedures) Act 2000* (7 February 2002), Recommendation 27.
- ⁴³⁴ Anti-Discrimination Board submission, 18 February 2005. The Intellectual Disability Rights Service made similar comments in its submission, 11 March 2005.
- ⁴³⁵ Police Association of NSW submission, March 2005.

⁴³⁶ For example, the Queensland legislation provides for “DNA sample notices” where it is not necessary to take the DNA sample immediately – see the *Police Powers and Responsibilities Act 2000* (Qld) s 309.

⁴³⁷ Police Association of NSW submission, March 2005.

⁴³⁸ NSW Police response to Ombudsman draft report, 2 June 2006.

⁴³⁹ Attorney General's Department response to Ombudsman draft report, 5 May 2006.

Chapter 7. Authority to conduct a forensic procedure

Forensic procedures can be conducted by consent, by order of a senior police officer or by order of a court. This chapter examines how often procedures are conducted by consent, and whether forensic procedures are being conducted with the appropriate authority.

7.1. The distinction between suspects and volunteers

The Act draws a distinction between ‘suspects’ and ‘volunteers’. A ‘suspect’ is a person whom police suspect on reasonable grounds has committed an offence, a person who has been charged with an offence, or a person who has been summoned to appear before a court in relation to an offence allegedly committed by the person.⁴⁴⁰ A ‘volunteer’ is a person, other than a suspect or victim, who volunteers to police to undergo a forensic procedure.⁴⁴¹

7.1.1. Why is the distinction important?

The distinction between suspects and volunteers is important for several reasons. First, there are different criteria for taking a sample. For suspects, police must be satisfied that the person is a suspect, that there are reasonable grounds to believe that the forensic procedure might produce evidence tending to confirm or disprove that the suspect committed an offence (and in the case of a DNA sample, that the suspect committed an indictable offence), and that the request for consent is justified in all the circumstances.⁴⁴² These criteria do not apply to volunteers – a volunteer can be any person, other than a suspect or victim, who volunteers to a police officer to undergo a procedure.⁴⁴³

Second, the basis of authority for a procedure is different for forensic procedures conducted on suspects and volunteers. In some circumstances, a suspect may be compelled to undergo a forensic procedure, by a senior police officer or a court.⁴⁴⁴ A volunteer can never be compelled to undergo a forensic procedure. Another important distinction is that a court order is required to conduct a forensic procedure on a child or incapable person who is a suspect, but is not required if the child or incapable person is treated as a volunteer, provided the person’s parent or guardian consents to the procedure.⁴⁴⁵

Third, the Act sets out different obligations on the person conducting the procedure, depending on whether the person providing the sample is classified as a suspect or volunteer. The information the person must be given before giving consent is different, and when a volunteer gives consent, it must be in writing, and be witnessed by an independent person.⁴⁴⁶

Fourth, the consequences of providing a DNA sample differ, depending on whether the person providing the sample is classified as a suspect or volunteer. A sample taken from a suspect may be matched against the entire crime scene index on the DNA database. However, a sample taken from a volunteer may only be used for a purpose permitted by the volunteer. A volunteer may consent to his or her profile being placed on the DNA database for the limited purpose of comparison against forensic material obtained in relation to the particular offence being investigated. Alternatively, a volunteer may consent to his or her profile being placed on the DNA database for unlimited purposes, in which case the information may be used for the purpose of a criminal investigation or any other purpose for which the DNA database may be used under the Act.⁴⁴⁷ Further, forensic material taken from a suspect must be destroyed if proceedings have not been commenced within 12 months, or if the person is acquitted of the offence, and the person is not being investigated for another offence.⁴⁴⁸ By contrast, forensic material taken from a volunteer may be retained for such period as police and the volunteer agree, and then must be removed from the system.⁴⁴⁹

The form NSW Police uses when sending DNA samples to the laboratory indicates whether the person is a volunteer or suspect.⁴⁵⁰ The laboratory relies on this information to determine what the person’s DNA profile can be used for. If the officer completing the form does not have a good understanding of the distinction between suspects and volunteers, and fills in the form incorrectly, this error will be carried over to the laboratory.

7.1.2. Confusion about suspects and volunteers

We found through our monitoring activities that police are usually clear about whether the person undergoing the procedure is a suspect or a volunteer. However, some officers are confused about the distinction. In some matters, police treated the person as a volunteer, although the circumstances suggest the person was actually a suspect. In some cases police appear to have treated the person as both a suspect and volunteer, presumably because the person consented to the procedure. For example:

Case Study 07

Police flagged down a driver for a random breath test. Police had information which suggested that the vehicle was being used for interstate drug trafficking. Police searched the vehicle and found a large amount of cash, some electronic scales and a number of resealable plastic bags of what appeared to be heroin. The driver was interviewed and admitted the car was his, and that nobody else had driven it recently. He was arrested and taken to the police station, where he provided a DNA sample, by consent. He was then charged. Police records indicate that the driver was “a suspect under arrest”, but that he “voluntarily supplied police with a sample of his... DNA”. He is recorded as being both a “person of interest” and a “forensic procedure volunteer.”⁴⁵¹

Case Study 08

A 15 year old girl reported that she had been sexually assaulted at a party by an 18 year old who she knew from school. The 18 year old was arrested later that night for an unrelated matter. At the police station, he was asked to undergo various forensic procedures in relation to the sexual assault allegation. Police swabbed his fingers, took photographs and took a buccal swab. Police records indicate he was treated as a volunteer and not as a suspect. The following exchange took place:

Suspect: “Can I ask how I got this against me? Like, how did they accuse me?”

Police officer: “Your name has been suggested as a suspect, so from that, we have to follow up certain things, OK? And this is part of that process.”

Suspect: “OK.”

Police: “And you’ve cooperated and said yeah, you’ll volunteer whatever samples we’ve asked for, so that’s your choice. So that’s how you’ve come to be here, OK?”⁴⁵²

Case Study 09

Over some months, a couple received a large number of threatening and sexually explicit letters and text messages. An intruder broke into the couple’s house while they were out, leaving lacy underwear, further letters and a threat written in lipstick on the bathroom door. It was suspected that the man’s former partner may have committed the offence. She was interviewed about the matter and provided a DNA sample by buccal swab, as a volunteer, for comparison with DNA found on the underwear and letters.⁴⁵³

Case Study 10

An unknown offender broke into a house and stole jewellery, a camera and a kitchen knife. Police seized a pair of blood stained gardening gloves left at the scene which did not belong to the occupant. DNA analysis indicated that the profile on the gloves was the same as the DNA profile of a convicted offender who was by that time serving a custodial sentence for a number of other offences. The offender was taken from the correctional centre to a metropolitan police station to have a further DNA sample taken, in relation to the break and enter offence. The testing officer advised him, "Now I've been told that you're going to be charged with an offence, and that you're a suspect in relation to that, and that you're volunteering to provide a buccal swab, which is the saliva swab, do you understand that? And you're volunteering to give that?" The testing officer appeared to read the information pertaining to suspects, but used the consent form for volunteers.⁴⁵⁴

Case Study 11

Police found over \$2,000 in a man's wallet and prohibited drugs with an estimated street value of \$100,000 in the sleeve of his jumper. The man admitted possession of the package and consented to having his finger prints taken, as a forensic procedure, for comparison with any prints found on the package. Police records indicate he undertook the forensic procedure as a volunteer.⁴⁵⁵

In each of the above case studies, the circumstances suggest that the person who took part in the forensic procedure was in fact a suspect. The decision to record or treat the person as a volunteer may have stemmed from a poor understanding of the Act.

The distinction between suspects and volunteers is central to the Act and it is of concern that some police officers do not have a good understanding of the difference between the two. The danger of treating a suspect as a volunteer is that police may conduct a forensic procedure without the proper authority. This would occur where a forensic procedure is conducted on a child or incapable person, with the consent of the person's parent or guardian, when in fact the person was a suspect and a court order is required.

Treating a capable adult suspect as a volunteer is of less concern to the person being sampled, but may be of concern to police, as it means that the person's DNA sample may be used for much more limited purposes than is provided for by the Act – the person's sample may only be used in the investigation of a particular offence, when the Act envisages that samples taken from suspects be matched against the entire crime scene index.

The danger of treating a volunteer as a suspect is that the person may not be given appropriate information, may not be protected by the safeguards in the Act, and may have his or her profile placed on the DNA database and used for an unauthorised purpose. Police sometimes used suspect consent forms or information sheets for volunteers, but we did not find any evidence of police treating volunteers as suspects in the documentation which is sent to the laboratory.

FPIT has recently added a "suspects v volunteers" section on the frequently asked questions page of its website. It explains that forensic procedures can be conducted on suspects "by CONSENT (adult and capable suspects) or by an ORDER (senior police or court order)." It emphasises that "suspects cannot *volunteer* to a forensic procedure." It also explains that "typical volunteers may be witnesses, consensual sex partners or 'mass screen' DNA volunteers."⁴⁵⁶

7.1.3. "Persons of interest"

Police officers use the term "person of interest" (or POI) very broadly, to describe a person who is a suspect or who may, at some point during an investigation, become a suspect. Police investigating an offence may initially identify a number of "persons of interest," which they narrow down to one or more suspects as the investigation progresses.

The Act does not specify whether a person of interest should be considered a suspect or volunteer. It may depend on how much evidence police have against the person. Consider the following examples:

Case Study 12

A woman was sexually assaulted on a train station in the early hours of the morning. The assault was captured on closed circuit television. Police identified several possible suspects. According to police records, one “denied any involvement and was subsequently offered the opportunity to undergo a forensic procedure. A buccal swab procedure was volunteered to.” Another attended the police station and “consented to supplying police a mouth buccal swab to rule out himself as a suspect in the commission of this offence.” A third person of interest was questioned about the incident but did not have a DNA sample taken as police knew his profile was already on the DNA database.⁴⁵⁷

Case Study 13

A 36 year old man was at home with his girlfriend and three young children when he heard a knock at the door. He opened the door and saw two unknown men, asking for pot. When the man replied he did not have any, they asked for money, then pushed past him and went into the house. One pulled out a claw hammer and tried to strike the man. After a short struggle the two men ran from the house, taking two wallets with them. A short time later police arrested two men whose descriptions matched those of the offenders. The men agreed to have fingerprints and photographs taken. Both denied being involved in the incident, and gave similar accounts as to their movements. Investigating police formed the view that they were not the offenders after all, and released them without charge. Police records stated that “both volunteers agreed to participate in a forensic procedure photograph and fingerprinting.”⁴⁵⁸

Case Study 14

A woman alleged she had been sexually assaulted and identified a particular man as the perpetrator. There was some evidence that the man was in another town at the time of the incident. Police took a DNA sample from the man, as a volunteer, to eliminate him from the investigation.⁴⁵⁹

In these case studies, it appears the person was treated as a volunteer because there was insufficient evidence to suspect on reasonable grounds that the person committed the offence. This is consistent with the NSW Police position that ‘volunteer’ includes “persons who have not been excluded as POIs but are not yet suspects.”⁴⁶⁰

In some circumstances, police will not ask people of interest to undergo forensic procedures as volunteers because they do not want to alert them to the fact they are under investigation. For example, in *R v White* (2005), police investigating a murder case identified about twenty people of interest. Police obtained covert DNA samples from five of them, who were then eliminated from the investigation. DNA analysis implicated a sixth person, who subsequently pleaded guilty to the offence. The police officer in charge of the investigation gave evidence that he did not attempt to take DNA samples under the Act because in his view, the people of interest, including the person subsequently identified as the offender, were not at that time ‘suspects’ for the purposes of the Act.⁴⁶¹

During proceedings in *White*, the judge commented that he thought suspects and people of interest were “one and the same.”⁴⁶² When asked how a person of interest differs from a suspect, the police officer gave evidence that “a suspect is a subset of a group of people we call persons of interest and a person of interest is a very broad term and describes a lot of people.”⁴⁶³

Should people of interest be considered suspects for the purposes of the Act? The problem with interpreting ‘suspect’ too broadly is that police could compel people who fall short of being suspected on reasonable grounds of having committed an offence to undergo forensic procedures. Further, DNA samples taken from suspects can be used much more broadly than samples taken from volunteers – they can be used for searching against the entire crime scene index on the DNA database.

In any event, not all people of interest could be considered 'suspects' – reasonable suspicion involves more than a mere possibility, it must have some factual basis.⁴⁶⁴ The courts have been critical of police treating people of interest as suspects, in the absence of evidence to support a reasonable suspicion. In *Orban v Bayliss* (2004), the court commented that "the purpose of the legislation is not to enable investigating police (or other authorised persons) to identify a person as a suspect; it is to facilitate the procurement of evidence against a person who is already a suspect."⁴⁶⁵ Similarly, in *Maguire v Beaton* (2005), the court set aside an order for a person of interest to undergo a forensic procedure on the basis that police sought her fingerprints to identify whether she was a suspect or not, although it was "no more than a possibility" that she had committed the offence.⁴⁶⁶

The problem with interpreting 'suspect' too narrowly, though, is that there are few restrictions on police asking volunteers to undergo forensic procedures. For volunteers, there is no requirement that the procedure be of investigative value (i.e. that it is likely to confirm or disprove the person's involvement in an offence) or that it be justified in the circumstances. One submission we received raised concerns about police placing pressure on people of interest to undergo forensic procedures as volunteers.⁴⁶⁷ It may also be easier to conduct a forensic procedure on a child who is considered a volunteer rather than a suspect, as a court order is required if the child is considered a suspect but the consent of the child's parent or guardian is sufficient if the child is considered to be a volunteer. The same goes for incapable persons.

Whether a person of interest is a suspect or volunteer will depend on the circumstances, in particular whether the evidence supports a reasonable suspicion that the person committed an offence. In our view, police should in the event of uncertainty err on the side of treating people of interest as volunteers. Although there are few restrictions on who police can ask to volunteer to undergo a forensic procedure, the person can at least decline to participate.

7.2. Suspects: proceeding by consent

7.2.1. How often are procedures conducted by consent?

Forensic procedures are almost always conducted on the basis of consent.

Police records indicate that during the review period, 6,718 buccal swabs were taken from adult suspects, compared to 289 hair samples. As buccal swabs can only be taken by consent, this suggests that at least 96 per cent of DNA samples taken from adult suspects were taken by consent.⁴⁶⁸ We understand this figure includes some buccal swabs taken by order of a court, where the suspect was sufficiently cooperative to self-administer a buccal swab, but the basis of authority was actually a court order and not consent. For this reason, the actual number of DNA samples taken on the basis of the suspect's consent would be slightly lower.

It is not possible from COPS records to gauge how often forensic procedures other than DNA samples are conducted by consent.

7.2.2. Records of consent

During our audit of local area commands, we sought to review the basis of authority for each of the forensic procedures we audited, to gauge how many of these were conducted by consent. We were able to review consent forms for 198 of the 343 forensic procedures on suspects. We found evidence that a further 29 procedures had been conducted by order of a court or senior police officer rather than by consent. However, we were unable to locate the consent form or other source of authority for the remaining 116 procedures – a third of those included in the audit.

There are several reasons why so many consent forms could not be located. We discovered that some officers were printing consent forms from the intranet instead of using the NSW Police issue consent books. It is preferable to use the books, as this ensures there is a central record of consent, and includes a duplicate, which should be provided to the suspect. At our request FPIT has since marked the intranet form "SAMPLE ONLY."

In our video audit, we saw that some police officers asked the suspect to sign the information sheet rather than a consent form. We note that NSW Police has developed consent forms which reflect the requirements of the Act and having the suspect sign the information sheet will not on its own meet the relevant legislative requirements.

Further, while most police officers are aware of the requirement to complete consent forms for DNA samples, it appears that consent forms are not always used for forensic procedures other than DNA samples.

We have noted that NSW Police is developing a new forensic procedures register, so that information relating to forensic procedures can all be kept in a single book. We understand that the source of authority for the procedure

– the consent form or the order – will be kept in the new register, and that this should address the problems we encountered (or anyone else would encounter) in trying to access records of consent. The forensic procedures register is discussed in detail at 4.2.8.3.

7.2.3. When can police ask a suspect to consent to a forensic procedure?

Before asking a suspect to consent to a forensic procedure, police must be satisfied that:⁴⁶⁹

- the person is in fact a suspect
- the suspect is a capable adult
- there are reasonable grounds to believe that the forensic procedure might produce evidence tending to confirm or disprove that the suspect committed an offence, and
- the request for consent is justified in all the circumstances.

We scrutinised the way police officers use their powers to conduct forensic procedures to check whether these criteria are being satisfied. We found that generally, they are. However, it appears that some police officers may have, on occasion, asked for consent in circumstances where they should not have.

7.2.3.1. That the person is a suspect

As discussed above, there is some confusion about the distinction between suspects and volunteers and, in some circumstances, whether a person is a suspect or volunteer will depend on whether the evidence supports a reasonable suspicion that the person committed an offence. We found that police sometimes conduct forensic procedures on people who appear to be suspects as though they were volunteers.⁴⁷⁰

7.2.3.2. That the person is an adult

Before asking a suspect to consent to a forensic procedure, police must be satisfied that the person “is not a child.”⁴⁷¹ Evidence obtained through a forensic procedure is still admissible if police officers breach the Act because of a mistaken but reasonable belief as to the age of a child.⁴⁷² We are not aware of any problems police may have had in identifying whether a person is a child for the purpose of the Act.

7.2.3.3. That the person is a capable adult

Before requesting a suspect consent to a forensic procedure, a police officer must also be satisfied that the person is not an incapable person. An “incapable person” is an adult who is incapable of understanding the general nature and effect of a forensic procedure, or is incapable of indicating whether he or she consents to a forensic procedure being carried out. An incapable person cannot be asked to consent to a forensic procedure; police must apply for a court order.⁴⁷³

It is the responsibility of police to identify whether a person is incapable for the purposes of the Act. Police officers may refer to the following legislation and policies to help determine whether a person may be incapable:

- Part 9 of the *Law Enforcement (Powers and Responsibilities) Act* (formerly Part 10A of the *Crimes Act*) deals with detention after arrest for the purpose of investigation. It contains a number of safeguards for certain “vulnerable persons,” including people with impaired intellectual functioning. “Impaired intellectual functioning” is defined as the total or partial loss of a person’s mental functions, a disorder resulting in learning difficulties or a disorder, illness or disease that affects a person’s thought processes, perceptions of reality, emotions or judgement, or that results in disturbed behaviour.⁴⁷⁴
- Schedule 2 of the *Law Enforcement (Powers and Responsibilities) Regulation 2005* (formerly the *Crimes (Detention After Arrest) Regulation 1998*) sets out a number of factors police officers should consider to help determine whether a detained person has impaired intellectual functioning – whether the detained person appears to have difficulty understanding questions and instructions, to respond inappropriately or inconsistently to questions, to have a short attention span, to receive a disability support pension, to reside at a group home or institution, or be employed at a sheltered workshop, to be undertaking education, or to have been educated at a special school or in special education classes at a mainstream school, or to have an inability to understand a caution.⁴⁷⁵
- The NSW *Police Code of Practice for Custody, Rights, Investigation, Management and Evidence* provides further guidance for officers dealing with people with impaired intellectual functioning. It adopts the same definition and indicators as the *Law Enforcement (Powers and Responsibilities) Regulation*, but includes a number of additional factors – whether the person identifies himself or herself as someone with impaired

intellectual functioning, someone else (carer, family member or friend) tells the police officer the person is or may be someone with impaired intellectual functioning, the person exhibits inappropriate social distance, such as being overly friendly and anxious to please, the person acts much younger than their age group, the person is dressed inappropriately for the season or occasion, the person has difficulty reading and writing, the person has difficulty identifying money values or calculating change, the person has difficulty finding his or her telephone number in a directory, or the person displays problems with memory or concentration.⁴⁷⁶

- The NSW Police *Guidelines for Police when Interviewing People with Impaired Intellectual Functioning* aims to facilitate communication between police and people with an intellectual disability, mental illness, acquired brain injury or learning difficulty, whether the person being interviewed is a victim, suspect or witness.⁴⁷⁷

In our report on the first part of this review, which dealt with the DNA sampling of convicted offenders, we noted that the identification of incapable persons is a difficult issue. Our research strongly suggested that some incapable persons who had been sampled as convicted offenders had not been identified as being incapable, and accordingly were not afforded the protections specified under the Act.⁴⁷⁸

We have found similar problems through our scrutiny of forensic procedures conducted on suspects and volunteers. Some stakeholders pointed out that different factors may affect a person's capacity:

*A person's capacity to make decisions may be impaired by a range of conditions including a mental illness, intellectual disability, dementia, brain injury or stroke. Capacity may also be impaired if the person cannot effectively communicate because of a disability, illness, injury or accident.*⁴⁷⁹

And further, that a person's capacity may depend on the way the information is explained and the degree of support provided:

*It is not unusual for a person with an intellectual disability to agree to a certain course of action because the person wants to please the figure seen to be in authority. To what extent consent given in those circumstances could be said to be truly voluntary is open to question. [By contrast] other people with an intellectual disability are capable of making decisions if information is communicated in a way that is appropriate to their abilities and usual methods of understanding.*⁴⁸⁰

The Anti-Discrimination Board argued that police should be flexible in how they provide information, and should take all reasonable steps to provide information and support that is appropriate to the ability of the person being asked for consent.⁴⁸¹

The Intellectual Disability Rights Service stressed, however, that a person with an intellectual disability may be able to understand the nature of a forensic procedure, without necessarily understanding its effect.⁴⁸² We note that the Act defines an incapable person as one "who is incapable of understanding the general nature *and* effect of a forensic procedure."⁴⁸³ This includes a person who cannot appreciate the implications and consequences of undergoing the procedure, for example that evidence obtained through the procedure may link the person to a particular crime, or that the person's DNA profile may be put on a database and used in speculative searching against evidence from other crime scenes. If a person is unable to understand this, the person is incapable for the purposes of the Act.

Some of the submissions we received raised concerns about how police identify and support people who are incapable for the purposes of the Act.⁴⁸⁴ The Intellectual Disability Rights Service explained:

Real difficulties arise when police are required to pick up whether a person has an intellectual disability... These difficulties arise largely because of:

- *A lack of knowledge and understanding about intellectual disability on the part of police.*
- *The fact that many people with an intellectual disability appear to understand what is being said and can effectively hide their disability because they generally do not wish to be identified as having a disability.*
- *The adoption by police of inappropriate means of assessing... capacity. The practice of reading out the information and concluding with the question, 'Do you understand that?' will be of very limited utility where people with an intellectual disability are concerned. Many people with an intellectual disability will agree and say 'yes' they understand, when in fact they do not. This can be exacerbated by a tendency to want to please authority figures, such as police officers.*⁴⁸⁵

The Anti-Discrimination Board made the similar comment, that:

*The identification of suspects and volunteers who may be in need of a greater degree of assistance can be subjective, relying on the ability of custodial officers to recognise when assistance may be required despite the lack of any request.*⁴⁸⁶

The Anti-Discrimination Board expressed concern that people with disabilities which affect capacity are “particularly vulnerable” and suggested police officers should be given greater assistance to help determine whether a person may be incapable for the purposes of the Act.⁴⁸⁷

We note that many police officers told us they regularly conduct forensic procedures on suspects who appeared not to understand the information provided by police, although they generally attributed this to the length and complexity of the information rather than the capacity of the suspect. We discussed our concerns about the way forensic procedures are explained to suspects and volunteers above, at 6.1.2.

Through our monitoring activities, we found that police officers have made very few applications for orders authorising forensic procedures to be conducted on incapable persons. None of the magistrates who responded to our survey had dealt with an application involving an incapable person. In our audit of police local area commands, there were no records of any such applications, and none of the police officers we interviewed could recall ever having made one. In our survey of local area commands, almost every command advised either that it had never obtained a court order in relation to an incapable person, or did not know whether it had. One command advised it had obtained four orders, and another that it had obtained one. No further information about the circumstances surrounding these applications could be obtained.

The very small number of applications for orders made in relation to incapable people, in conjunction with comments by police that they regularly conduct forensic procedures on people who do not understand the information provided, suggests that police may not in fact be identifying people as being incapable.

The Intellectual Disability Rights Service gave several examples of police either failing to identify a person as incapable for the purposes of the Act, or otherwise treating the person inappropriately.

In January 2005 a client with an intellectual disability was arrested and taken to a police station. Police told her that she would have to agree to a buccal swab or three police officers would hold her down and sit on her and use force to pull out 10 hairs. This left the client shaking and crying. A solicitor from our service indicated to police that our client did not have capacity to understand the enormity of the decision and that she was not in a position to consent to the procedure. Police asked the solicitor to put this view in writing, which he did. Police said that the custody sergeant could order that the procedure occur by force. The IDRS solicitor was then called away to assist another client but requested that police do nothing until a witness was present from our Criminal Justice Support Network... Police did not ultimately proceed with the taking of hairs. Police made an application to court but there is no outcome as yet.⁴⁸⁸

Another incident involved a suspect charged with a serious assault matter, who had an acquired brain injury and a mental illness:

Police requested that he provide a sample by buccal swab. The support worker assisted the suspect to obtain telephone legal advice. The police officer proceeded to read out word for word the required (s 13) information. He/she said that the suspect would probably not understand but that he/she would read out the information anyway. The support person then proceeded to explain the s 13 information in a way that the suspect could understand.⁴⁸⁹

The Intellectual Disability Rights Service commented that the police officer had a poor understanding of how to communicate effectively with a person with an intellectual disability, and that if the support person had not been present to explain the information in a more appropriate way, the suspect may have consented to the procedure without understanding its nature or effect.⁴⁹⁰

Through our monitoring activities, we also came across instances where it appears that the person being asked to consent to a forensic procedure may have been incapable.

Case Study 15

An elderly woman was holding her purse while waiting for the bus. A young man asked her for money and when she declined, grabbed her purse. A struggle ensued, during which the man indicated a number of burns on his arm, which he said he had done himself, and threatened to do the same to the woman if she did not let go of her purse. She eventually let go, and the man ran off. Several bystanders chased the man and held him on the ground until police arrived. Police arrested the man and recorded that while in custody, he continually cried, punched himself in the head, and at times became aggressive. Police decided not to interview the man on account of “his rather odd behaviour.” However, they did ask him to consent to a forensic procedure, which he did. Police then took a number of photographs of the man.⁴⁹¹

We note with concern that in these instances police conducted forensic procedures by consent, when it appears from the circumstances described that it may have been necessary to seek a court order before proceeding.

The legislation and policies referred to above should assist officers in identifying and dealing with incapable people. However, neither the Act nor the NSW Police SOPs for forensic procedures provide any information to assist officers in determining whether a person is incapable for the purposes of the Act. The Act sets out a test, but not a procedure for identifying whether a person is capable of giving informed consent.

Recommendation 17

The forensic procedure SOPs include guidelines on identifying and communicating with incapable people. These guidelines should be established in consultation with the Guardianship Tribunal and disability advocates and should cover the information and factors to be considered in assessing a suspect or volunteer’s capacity.

Recommendation 18

NSW Police provide further training and guidance to police officers on the practical and legal considerations in dealing with ‘incapable persons’ under the *Crimes (Forensic Procedures) Act 2000*.

NSW Police does not support recommendation 17 on the basis that “any such progression should be considered in a general nature from an organisational viewpoint.”⁴⁹² However, it supports recommendation 18, and has advised it will “examine current training material with a view to improving aspects relating to incapable persons”.⁴⁹³

7.2.3.4. That the forensic procedure might produce evidence confirming or disproving the suspect committed an offence

Before asking a suspect to consent to a forensic procedure, police must be satisfied that there are reasonable grounds to believe that the forensic procedure might produce evidence tending to confirm or disprove that the suspect committed an offence, another offence arising out of the same circumstances, or another offence in respect of which evidence likely to be obtained as a result of carrying out the procedure on the suspect is likely to have probative value.⁴⁹⁴

If the relevant offence is an indictable offence, police may request consent to any type of forensic procedure. If the relevant offence is a summary offence, for example offensive conduct or language, possession of a knife in a public place or defacing walls with graffiti,⁴⁹⁵ police may only request consent to a non-intimate forensic procedure.⁴⁹⁶ This means that police can only request a DNA sample if there are reasonable grounds to believe that it might produce evidence tending to confirm or disprove that the suspect committed an indictable offence. An indictable offence can include property, drug, personal violence, fraud and arson offences,⁴⁹⁷ and can be dealt with by the District Court before a judge and jury. Some indictable offences can be dealt with in the Local Court by a magistrate unless either the accused person or prosecuting authority elects to have the matter heard in the District Court.

We found that forensic procedures are normally conducted in circumstances where there are reasonable grounds to believe the procedure might produce evidence tending to confirm or disprove that the suspect committed an offence. The following case studies illustrate the types of circumstances in which police have conducted forensic procedures.

Case Study 16

Police were speaking to a 19 year old man when they saw him move something under a shrub with his foot. Police subsequently retrieved a car CD player, which had been stolen from a car nearby. It had some blood on it. A short time later, the young man went to the police station and said that he wanted to confess to a crime. He was cautioned, arrested and interviewed. He said that he had acted as a look out when two men he did not know broke into the car and stole the CD player. He said he did not break into the car or remove the CD player. The young man had cuts on his fingers, and had blood on his shirt and jacket. Police asked the young man to provide a DNA sample, which he did.⁴⁹⁸

Case Study 17

A 24 year old man was dancing with a woman in a club when another man walked towards him, lunged out and hit him in the chin. The man's face bled profusely and he had to go to hospital, to have a 20 cm cut on his face surgically repaired. A witness reported seeing the attacker drop a glass after he had lunged at the man. Police interviewed a suspect, who admitted being in an altercation but denied hitting the man with a glass. The suspect had a cut on the webbing of his right hand, and blood on his clothes. Police conducted various forensic procedures, taking a DNA sample, photographing the suspect's injured hand, examining his injuries for fragments of glass and retaining his clothing so the blood on it could be analysed. Police also recovered some broken glass from the scene which was retained for fingerprint and DNA testing.⁴⁹⁹

However, some forensic procedures appear to have been conducted in circumstances where it would not appear that the procedure would produce evidence tending to confirm or disprove the suspect committed an offence.

Case Study 18

A woman was staying at a friend's house. She slept on a divan next to a man who was also staying there. The following day, the woman reported that she had been sexually assaulted in the early hours of the morning. She was medically examined and provided a DNA sample to investigating police. She informed police that she had recently been diagnosed with cervical cancer and was still recovering from a recent operation. Police interviewed the man, who admitted having sex with the woman but said that it was consensual. He too provided a DNA sample, and was then charged with having sexual intercourse without consent.⁵⁰⁰

DNA evidence is useful in the investigation and prosecution of sexual assault matters where the identity of the perpetrator is at issue. However, where the suspect admits having sex with the complainant, it is difficult to see how taking a DNA sample might produce evidence tending to confirm or disprove that the suspect committed the offence.

We also found matters where there was considerable direct evidence implicating a suspect, and it is not clear from the information available how the forensic procedure might produce evidence confirming or disproving the suspect committed the offence. As one magistrate asked, "If a DNA analysis of a blood stain is, for example, only to prove the defendant was at the scene when ten witnesses say he was and he admits being there then what is the point?"⁵⁰¹ Legal Aid NSW raised similar concerns.⁵⁰²

During our audit of local area commands, some police officers advised they did not take DNA samples from suspects who are caught in the act: "Not everybody's getting tested – we're pretty stringent with that part of the Act."⁵⁰³ Some advised they only consider asking for a DNA sample if it is needed to prosecute the person, or where police suspect the person has committed other offences and a DNA sample might confirm the person's involvement.

Even where there is direct evidence of a suspect's involvement, police may be of the view that forensic evidence is needed to bolster the prosecution case. However, we found through our monitoring activities that some police officers have asked suspects to consent to forensic procedures, in circumstances where there is direct evidence of the suspect's involvement, and the procedure did not appear to be of any investigative or evidentiary value.

Case Study 19

A member of university staff was on the way towards an office area when he saw a man urinating on a wall, in a staff only area. The member of staff approached the man and asked if he was all right. The man turned around and punched the member of staff in the face. The man and the member of staff continued to struggle, and more punches were thrown. University security arrived and separated the two. The man was extremely abusive towards the security officers. The man was detained by security until police arrived, when he was arrested and taken to the police station for questioning. At the police station the man was asked to provide a DNA sample by buccal swab. He indicated that he did not consent to the procedure so a hair sample was taken.⁵⁰⁴

Case Study 20

A 21 year old man indicated to sales staff in a telecommunications shop that he wanted to buy a mobile phone on a \$150 a month plan, for his girlfriend. He produced a number of forms of identification and staff prepared the appropriate documentation, which the man then signed. During this process, staff became suspicious about the whether the identification produced actually belonged to the man, and called police. Police arrived and spoke to the young man. Without warning, the young man ran from the shop. Police chased him to the car park, where they saw a car driving very fast from the car park. Police stopped the vehicle, and requested that the driver open the boot, which he did. The young man was lying in the boot, taking off the clothes he had been wearing. Police searched the vehicle and found, in the boot, the forms of identification the young man had produced in the shop and a business card from the telecommunications shop. After making inquiries police established that the identification actually belonged to a man who had lost his wallet some months before. The young man was arrested and taken to the police station. He declined to be interviewed but agreed to provide a DNA sample. Police took the sample by buccal swab and charged him with fraud.⁵⁰⁵

It is possible that investigating police officers may have had other reasons for taking the DNA samples, which are not set out in the COPS records on which the case studies are based. For example, if police suspected the man they charged with fraud had stolen the wallet in circumstances where DNA evidence was available for comparison, this may be sufficient grounds for believing the procedure might produce evidence tending to confirm or disprove that the suspect committed that offence. Without further information it is not possible for us to determine whether in fact there were reasonable grounds for conducting the procedure, but we stress that before asking a suspect to consent to a forensic procedure, police must have reasonable grounds to believe that the procedure might produce evidence tending to confirm or disprove that the suspect committed an offence.

Legal Aid NSW also expressed concern about forensic procedures being conducted on suspects after they have entered a plea of guilty.⁵⁰⁶ We are not aware of any specific instances of this occurring. We note however that police may request consent to a forensic procedure on the basis that it may confirm or disprove that the suspect committed *another* offence.⁵⁰⁷ For this reason, the fact a suspect has pleaded guilty to an offence does not preclude police from requesting consent to a forensic procedure.

In determining whether there are reasonable grounds to believe the procedure might produce evidence confirming or disproving the suspect committed an offence, police must also consider what the sample will be used for. Taking a DNA sample from a suspect will not confirm or disprove that the suspect committed an offence unless there is a comparison sample available, from a crime scene or from a victim. On this point, Legal Aid NSW submitted:

*Many applications by police are premature, as suitable comparisons will not be available until a later date, or may never be available.*⁵⁰⁸

We disagree that a comparison sample must be available at the time police request the suspect to consent to the procedure. It may be some time before the laboratory can extract a usable DNA profile from the relevant crime scene exhibits. However, to ask a suspect to consent to a forensic procedure, there must be some factual basis for the belief that it might produce evidence confirming or disproving that the suspect committed an offence.

This issue was considered recently in *Walker v Budgen* (2005), an appeal against a court order authorising police to take a DNA sample from a 14 year old in relation to an aggravated robbery.⁵⁰⁹ The court allowed the appeal on the basis that police had not provided any evidence that biological material had been obtained from the crime scene, emphasising that there must be a factual foundation sufficient to constitute reasonable grounds for the belief that the forensic procedure might, in those circumstances, produce evidence confirming or disproving the suspect committed the offence. The court rejected the submission that the expression “might produce” denotes “a relatively low threshold of probability.” Rather:

*The expression... ‘might produce’ cannot be divorced from the preceding expression ‘reasonable grounds to believe’... Firstly, the notion of a belief is a different concept from suspicion. Facts that can reasonably ground a suspicion may be substantially less than would be reasonably required to ground a belief. Secondly, although a reasonable suspicion involves less than a reasonable belief, nonetheless, it still requires more than a possibility.*⁵¹⁰

The court also emphasised that the process of consideration required by the Act entails an assessment of existing facts, and “is not merely a ritualistic one to be addressed in a peremptory fashion without due regard to the import of those provisions.”⁵¹¹

Through our investigation of DAL, we followed up the results of 145 of the DNA samples taken from suspects which were included in our audit of local area commands. DAL advised that DNA analysis could not be conducted in relation to four of these, in three because no biological material could be found on the crime scene sample, and in one because police did not submit any crime scene evidence for analysis (see case study 21).⁵¹² If there is no crime scene evidence to submit for analysis, then there are no reasonable grounds for believing that taking a DNA sample might produce evidence tending to confirm or disprove that the suspect committed an offence. It is of concern that police are conducting forensic procedures in these circumstances.

Case Study 21

A man in central western New South Wales spent several nights shooting pigs and kangaroos with his friend and his friend’s father. One night, while his friend was retrieving a carcass, the man shot his friend in the abdomen. The victim’s father asked why he did this and he replied that the victim had raped his mother, sister and grandmother. The victim died in the early hours of the morning. The man had chronic paranoid schizophrenia, which had not been diagnosed at the time of the shooting. At trial, the court found that the shooting was a reaction to the sudden onset of a florid psychotic episode.

Police arrested the man after the victim’s father told them what had happened. The man declined to be interviewed, but provided a DNA sample by consent. He was then charged with murder and remanded in custody. Police did not submit any exhibits for DNA analysis in connection with the case.⁵¹³

We note the FPIT website instructs officers:

*You cannot legally obtain a DNA sample from a suspect unless there is biological material at the crime scene, on the victim, or on some other object or item connected to the offence, against which the suspect’s DNA can be compared. If the crime scene etc has not yet been examined, you will need to make an objective assessment of the likelihood of biological material being found during such an examination.*⁵¹⁴

We agree with this approach. In addition to the issues of fairness and appropriateness, DNA samples taken with no probative value are a waste of money and contribute to the backlog of work at the DNA laboratory. From every perspective, this approach should be discouraged.

7.2.3.5. That the request for consent is justified in all the circumstances

Although the Act requires that a request for consent be justified in all the circumstances, it does not provide any guidance on how to determine whether a request for consent is justified or not. By contrast, the Commonwealth forensic procedures legislation requires police to balance the public interest in obtaining evidence against the public

interest in upholding the physical integrity of the suspect. It also specifies a number of factors police must consider in conducting this balancing exercise, including the seriousness of the offence, the circumstances surrounding its commission, the degree of the suspect's alleged participation, personal characteristics of the suspect (including age, health, cultural background), whether evidence of the suspect's involvement in the offence can be gained in a less intrusive way, and other relevant matters.⁵¹⁵ The 2000 model bill for forensic procedures contained guidelines for balancing the competing public interests, but these were not ultimately included in the New South Wales Act. The model bill is discussed in detail in section 3.2 of this report.

Some of the submissions we received raised concerns about forensic procedures being conducted in circumstances where they are not warranted.⁵¹⁶ Some recommended that guidelines be developed to assist police officers in determining whether a forensic procedure request is justified.⁵¹⁷ We note that the Legislative Council Standing Committee on Law and Justice has previously recommended that guidelines to assist police officers in determining whether a request of order for a DNA sample is justified in all the circumstances be inserted into the New South Wales Act.⁵¹⁸

Despite the calls for further guidance about when a request for consent will be "justified in all the circumstances," our research does not suggest this would be of significant value. While we did find instances of forensic procedures which appeared unwarranted, this was because other criteria were not satisfied, for example where the person was not a suspect, or there were no reasonable grounds for believing the procedure would confirm or disprove the suspect committed an offence. We also note that the discussion above only deals with whether a request for consent by a suspect to a forensic procedure is "justified in all the circumstances". Whether conducting a forensic procedure in the absence of consent is justified raises very different issues, which we address below, at 7.2.6.

7.2.4. Factors affecting whether a suspect consents to a procedure

In our work scrutinising the operation of the Act, we identified a number of different factors which affected a suspect's decision to consent to a forensic procedure, including:

- a wish to cooperate with police
- a desire to show the suspect has nothing to hide: "I've got nothing to hide and I know this will clear me... I'm innocent and forensics will prove that."⁵¹⁹
- a belief that there is no choice about the matter and the procedure will be conducted regardless: "I had to do it. You would get a sample anyway."⁵²⁰
- the threat of being subjected to a more painful procedure, on the basis that police may order a hair sample be taken if a person does not consent to a buccal swab
- fear that police may take a sample by force, and
- the length of time spent in police custody and a desire to be released as soon as possible: "I want it done to get out of here."⁵²¹

Several submissions we received raised concerns about suspects undergoing forensic procedures without having given properly informed consent. Legal Aid NSW advised that:

*In general our clients do not sufficiently understand the nature of the procedure and their option not to consent... For example, clients often indicate that they were scared that police would forcibly take samples from them, which they try to avoid by consenting to the procedure.*⁵²²

The NSW Department of Aboriginal Affairs similarly commented:

*There is anecdotal evidence that some police officers are advising suspects that if they don't consent to a buccal swab the police have the power to use reasonable force to take a sample of growing hairs. In such cases a suspect would be misled as to their rights to decline to participate in DNA forensic procedures.*⁵²³

Our monitoring of police suggests these concerns are well founded. In particular, we found that most police officers do not appreciate that the criteria for requesting consent and for making an order are quite different. First, to ask for consent to a procedure, the police officer need only *suspect* on reasonable grounds that the person has committed an offence.⁵²⁴ But to order a procedure be carried out in the absence of consent, the police officer must be satisfied that "there are reasonable grounds to *believe* that the suspect committed an offence,"⁵²⁵ which creates a much higher threshold. Although a reasonable suspicion involves more than a mere possibility, and must have some factual basis, it involves less than a reasonable belief.⁵²⁶ Second, to ask for consent to a procedure, the police officer must be satisfied that "the request for consent to the procedure is justified in all the circumstances."⁵²⁷ However, to order a

procedure be carried out, the police officer must be satisfied that “the carrying out of the forensic procedure without consent is justified in all the circumstances”⁵²⁸ – which is quite different. Carrying out a forensic procedure against a person’s will is much more intrusive than merely asking for consent to a procedure. It is, in effect, an assault. Another difference is that to order a procedure be carried out a suspect must be under arrest.

We found that some officers do not fully understand these differences and regard the consent process as an opportunity for the suspect to elect how a DNA sample will be taken – by buccal swab if the suspect consents, otherwise by hair sample – rather than an opportunity for the suspect to decline to undergo the proposed procedure.

*It’s strange – you ask people for their consent but if they say no, you can get it anyway.*⁵²⁹

*I find the whole concept of consent for forensic procedures illogical.*⁵³⁰

Further, many officers see it as their role to encourage suspects to consent to a forensic procedure. One explained:

*I always have a word before going in to gauge whether they’ll do it... Generally you talk people around. When they realise you can get it, they come round. So I have a fair idea before going in whether they’ll consent. [I tell them] let’s just do the swab – otherwise it’s going to be painful for you.*⁵³¹

Another officer explained that he tells suspects:

*We can do this the pleasant way or the unpleasant way, either way we’ll do it, so you may as well [consent].*⁵³²

We found other evidence of police officers convincing suspects to consent to forensic procedures when initially they declined. A number of officers had written on consent forms, as to whether the suspect consented or not, “~~No~~ Yes.” Others crossed out consent forms which indicated the suspect did not consent, and on the following form indicated they did. For example, one form we examined indicated that when asked whether he consented to the carrying out of a forensic procedure, the suspect replied, “I object to it. No.” The form was crossed out and marked “see next entry.” The following form indicates that the suspect, when asked again whether he consented to the procedure, replied, “I object to it but you’re going to do it anyway,” and when asked whether he consented to it, replied “Yes.” There are also many references in COPS records to suspects changing their minds about consenting to procedures.

Case Study 22

Police arrested an Aboriginal suspect in relation to an assault. When reading out the information sheet, the testing officer said, “There’s a lot, isn’t there?” The suspect replied, “I can’t get it in my head.” When the testing officer referred to the suspect being under arrest, the suspect said, “I still don’t personally know that I’m under arrest.” The testing officer told the suspect, “You are under arrest, you’ve been told that you’re under arrest, informed of your rights and you’ve also been interviewed.” The suspect replied, “I’m sorry, I’m a bit slow, but I don’t understand, OK?” The suspect initially consented to a forensic procedure, but then withdrew consent before signing the consent form. The testing officer got a senior officer to come in, who told the suspect he would be held in custody until police obtained a court order authorising the procedure to be conducted. The suspect did not seek legal advice. He eventually signed the consent form rather than remain in custody any longer. He did not seek legal advice about the forensic procedure.⁵³³

Case Study 23

Police arrested a suspect in relation to an assault and affray. The suspect agreed to be interviewed about the matter and admitted being present but denied any involvement in the offence. COPS indicates that he “initially declined to consent to a forensic procedure, however changed his mind prior to the Senior Officer order being made.” Police took a DNA sample by consent, and then charged him with the offence.⁵³⁴

The Police Association of NSW has suggested that the request for consent be simplified, and that officers should ask, “Will you consent – Yes/No?” followed by, ‘Do you understand that if you do not consent, police will endeavour to take a sample by force – Yes/No?’⁵³⁵ We do not agree to this approach, however, because: firstly it does not reflect the substantially different criteria which must be satisfied before police can order that a sample be taken in the absence

of consent; and secondly, it suggests that police are using the threat of force to persuade people to undergo forensic procedures hence possibly negating that consent was voluntary.

7.2.5. Should buccal swabs be available where senior police order a DNA sample?

In our survey of local area commands, some officers recommended that buccal swabs be available where a senior police officer orders a DNA sample be taken.⁵³⁶ We strongly agree that this option should be available. We note that buccal swabs can already be taken by order, where the forensic procedure is authorised by a court.

We found evidence that some suspects consent to a buccal swab in order to avoid having a DNA sample taken by hair sample, which is more painful. One police officer we interviewed described a matter where a suspect's solicitor advised the suspect not to consent to a buccal swab, but to provide a hair sample if police made an order authorising the procedure. The suspect told his solicitor that he could come to the police station and have his hair ripped out if he wanted to, but that he was not going to. The suspect consented to the buccal swab.⁵³⁷

Further, as discussed in section 8.9 of this report, we found that very few of the several hundred hair samples which were taken from suspects actually involved the use of force (other than the force required to obtain a hair sample). It is clear that in almost all cases where a hair sample was taken, the same result could have been achieved, at greater convenience to police and the person undergoing the procedure, had a self administered buccal swab been taken instead.

Equivalent legislation in some other jurisdictions allows the person providing the sample to choose how the sample will be taken.⁵³⁸ Alternatively, some specify that DNA samples can be taken by buccal swab, hair sample, blood sample or pubic hair sample, and that a latter procedure cannot be conducted unless it is impracticable to use one of the former.⁵³⁹

In our view, police officers in New South Wales should be able to conduct the least intrusive procedure available in the circumstances, rather than tie the type of procedure to whether consent is provided or not. Hair samples should only be taken if a person is uncooperative and refuses to provide a sample by buccal swab, even if ordered to do so. The availability of buccal swabs by order of senior police officer may also result in officers considering whether orders authorising forensic procedures should be sought instead of trying to convince suspects to consent.

In our report on the DNA sampling of convicted offenders, we recommended that the Act be amended to allow serious indictable offenders to provide DNA samples by buccal swab, if ordered to provide a DNA sample.⁵⁴⁰ We reiterate this recommendation in relation to suspects.

7.2.6. Doing away with consent altogether

Some police officers have argued that DNA samples should be taken as part of the charge process, like fingerprints and photographs, and that consent should not play any role: "It should simply be that where someone is arrested etc for an indictable matter they have to supply a DNA sample."⁵⁴¹

Being able to conduct forensic procedures without consent as a matter of course would represent a significant departure from the current legislative regime. The courts have pointed out that a forensic procedure "necessarily involves, to a greater or lesser extent, some invasion of the personal privacy and personal bodily integrity of the person concerned."⁵⁴² Providing information about a proposed forensic procedure and asking for consent gives suspects a sense of control, as they can participate in the decision about whether to permit this invasion in order to assist law enforcement authorities.

In our report on the DNA sampling of convicted offenders, we recommended that the consent provisions applying to serious indictable offenders be removed from the Act.⁵⁴³ However, serious indictable offenders are automatically eligible for DNA sampling, and the consent provisions are quite artificial. By contrast, suspects are not automatically eligible for DNA sampling or other forensic procedures, and are entitled to decline to consent to the procedure. Refusal to consent requires police to consider very carefully whether the proposed procedure is warranted – in particular whether there are reasonable grounds to believe the procedure might produce evidence tending to confirm or disprove the suspect committed the relevant offence, and whether conducting the procedure without consent is justified in the circumstances. While it is ultimately a matter for the Parliament, nothing in this review evidences a strong need for altering the present consent requirements.

7.2.7. What if consent is withdrawn?

The Act provides that if a person withdraws consent before or during the carrying out of the procedure, the person is deemed to have refused to consent to the procedure, and it cannot proceed except by order of a senior police officer or a court.⁵⁴⁴

Some submissions raised concerns about what may happen to any forensic material which may have been obtained before consent was withdrawn.⁵⁴⁵ Legal Aid NSW suggested that any forensic material obtained before consent is withdrawn should have to be destroyed, and that a court could order that it be retained if satisfied that the probative value of the evidence would otherwise be lost.

In practice, we found that if a suspect withdraws consent before or during a forensic procedure, police would only proceed by order of a senior police officer or a court.

Case Study 24

A man was arrested after assaulting security officers at a university. Police asked him to provide a DNA sample by buccal swab, and he declined. Police explained that a senior officer could make an order to take a DNA sample if he did not consent. The man again declined to provide a sample by buccal swab but changed his mind before a hair sample was taken. Police recorded his consent on video and began to take the swab. However, the man withdrew consent. A senior officer from another police station attended and made an order for a DNA sample to be taken by hair sample, and the hair sample was taken.⁵⁴⁶

The Act already provides that if a person withdraws consent before or during a forensic procedure, police cannot proceed unless they obtain an order. There is no provision for a person withdrawing consent after the procedure has been conducted. In our view this is not required.

7.2.8. Concluding comment

There are a number of factors which are impacting on police processes to obtain DNA or other forensic samples by consent. These include the fact that inexperienced officers are undertaking procedures, and the complexity of information required to be given. We have made a number of recommendations to address these issues, in particular Recommendations 3 and 10. The only substantial matter raised here that requires further response is the issue of self administered buccal swabs:

Recommendation 19

The *Crimes (Forensic Procedures) Act 2000* be amended so that a senior police officer order can authorise a suspect to provide a DNA sample by self-administered buccal swab.

Both NSW Police and the Attorney General's Department support this recommendation.⁵⁴⁷ The Attorney General's Department also advised it is already being implemented:

My Department is currently instructing in the preparation of a Bill that will include self-administered buccal swabs in the definition of "non-intimate forensic procedure". The Bill as currently drafted will also specifically provide (both in relation to serious indictable offenders, and suspects) that a senior police officer who is considering whether to order the taking of a sample by removal of hair, or by self-administered buccal swab, must take the option of self-administered buccal swab, unless the person from whom the sample is to be taken has indicated that he or she will not perform a self-administered buccal swab (or indicates that he or she prefers to have the sample taken by removal of hair).

7.3. Suspects: proceeding by order of a senior police officer

7.3.1. Criteria for making an order

A senior police officer, being a police officer of, or above, the rank of sergeant⁵⁴⁸ may order the carrying out of a non-intimate forensic procedure on a suspect under sections 18 and 19 of the Act. The orders can be made once the senior police officer is satisfied that the following conditions in section 20 of the Act have been met:

- the suspect has not consented to the procedure
- the suspect is under arrest
- the suspect is not a child or incapable person
- there are reasonable grounds to believe that the suspect committed an offence, or another offence arising out of the same circumstances, or another offence in respect of which evidence likely to be obtained as a result of carrying out the procedure is likely to have probative value
- there are reasonable grounds to believe the forensic procedure might produce evidence tending to confirm or disprove that the suspect committed such an offence, and
- the carrying out of the procedure without consent is justified in all the circumstances.⁵⁴⁹

It is important to note, as discussed above, that the criteria for ordering a procedure and for requesting consent to a procedure are different – first, because there must be reasonable grounds to believe (as opposed to suspect) that the suspect committed the offence; and second, police must be satisfied that conducting the procedure in the absence of consent is justified in all the circumstances (as opposed to the request for consent being justified).

Under section 21 of the Act, these orders can be made by the senior police officer in person, or if this is not practicable by telephone, radio, telex, facsimile or other means of transmission. The suspect, or any legal representative or interview friend of the suspect are to be provided the opportunity to make a submission to the senior police officer making the order. These submissions can be made either orally or in writing depending on the format the senior police officer order will take. If a senior police officer does make an order for a hair sample to be taken from a suspect, the officer must, as soon as practicable after the order is made, record the date and time the order was made together with his or her reasons for making the order and provide a copy of the order to the suspect.⁵⁵⁰

7.3.2. How often are forensic procedures conducted by senior police officer order?

NSW Police has developed a form for senior police officers to fill in when ordering forensic procedures. The form sets out the relevant test but does not allow any provision for the senior police officer to record the reasons for making the order.

We sought to review how often forensic procedures are conducted by order of a senior police officer, as opposed to by consent or by order of a court. However, we found very limited information about procedures conducted by order of a senior police officer. The local area commands we audited usually kept such orders on the individual briefs of evidence, and did not keep any central record. We were able to identify procedures which had been conducted by order of senior police officer only because one of the officers present during our audits remembered the details, or because it was apparent from the video that a senior police officer order had been made. In some cases it was unclear whether a procedure was conducted by consent or by order, because police had completed a consent form, but recorded on it that the suspect did not in fact consent. Often there was no way of checking whether a senior police officer order had been made.

We also asked each local area command in our survey, how many of its forensic procedures had been authorised by order of a senior police officer. 21 commands advised they had not conducted any forensic procedures by order of a senior police officer, and 32 commands advised they had. 27 commands were unable to provide this information, as they did not keep any central record of procedures conducted by order:

*There are no records held which indicate on what basis the forensic procedure was taken.*⁵⁵¹

*The data presented is presented as the best estimate in many cases, and may not reflect the exact position.*⁵⁵²

*The answers have been supplied based on recollection only, and as no recollection of such events occurring I can only assume that the answer is nil.*⁵⁵³

Again, we know that only a small proportion of DNA samples are taken by order of senior police officer, as the vast majority are taken by buccal swab. There is no way to gauge what proportion of forensic procedures other than DNA samples were taken by order of a senior police officer.

We also asked each command on how many occasions senior police officers had refused to make an order authorising a forensic procedure, on request from another officer. Only one command indicated this had occurred. The others either did not know (35 commands) or advised it had not occurred (44 commands). In our interviews with officers, some indicated that if there is any doubt about whether a senior police officer order can be made in the circumstances, they would apply for a court order to authorise the procedure.⁵⁵⁴

We expect that record keeping will improve with the forensic procedures register the NSW Police Audit Group is developing, as we understand officers conducting procedures will have to include a copy of the source of authority (consent form, police order or court order) for each procedure.

7.3.3. Circumstances in which senior police officer orders are made

We sought to review the circumstances in which senior police officers ordered suspects to undergo forensic procedures, to determine whether the legislative test was properly applied and accordingly, whether the procedures were properly authorised. In our survey of local area commands, we asked each command for details of any senior police officer orders made, and reviewed the relevant event narratives on COPS. During our audit of local area commands, we reviewed each of the orders the command was able to locate. The following case studies illustrate the types of circumstances in which police have ordered suspects to undergo forensic procedures.

Case Study 25

A homeless man died after being bashed in a park one night. After interviewing a number of witnesses, police identified and arrested a suspect. The suspect declined to be interviewed and did not consent to having his photograph or DNA taken. A senior police officer made an order authorising the procedures be conducted and the photo and hair sample were taken.⁵⁵⁵

Case Study 26

Police heard an alarm sounding and drove towards the place it was coming from. They saw two people crouching outside a newsagent putting things into a bag. The two people ran off when police approached, and police saw the glass door of the newsagent was broken. A short time later, police stopped a man nearby, who was breathing heavily and sweating. On the footpath nearby police found a green garbage bag, containing 35 packets of cigarettes. Police arrested the man, who declined to be interviewed or provide a DNA sample. A senior police officer authorised a hair sample to be taken.⁵⁵⁶

Case Study 27

A suspect was arrested several days after the Redfern Riots of February 2004. It appeared that the clothes he was wearing may have been the same as those worn during the incident. Police sought to photograph the suspect's face and body, while he was in the clothes in question, but the suspect did not consent to the procedure. A senior police officer made an order authorising the procedures to be carried out. The photographs were taken and the suspect was subsequently charged.⁵⁵⁷

From the information available, the orders we reviewed appeared to have been warranted in the circumstances. However, our capacity to determine whether the legislative test was properly applied and accordingly, whether the procedure was properly authorised, was limited first by the fact that no central records of orders were kept; and

second because the orders we were able to locate contained very little information. They included objective details, like the suspect's name and the type of procedure. But there was no record of the reasons supporting the decision to conduct the procedure, in particular the grounds for believing the suspect committed the offence, or the reasons why carrying out the procedure without consent was justified in all the circumstances.⁵⁵⁸ Without this information, we were unable to determine whether the procedure was properly authorised. In our view, there would be considerable merit in the person making the order recording:

- what the reasonable grounds are for believing that the suspect committed an offence
- what the reasonable grounds are for believing that the procedure might produce evidence tending to confirm or disprove that the suspect committed the offence,
- whether it was possible to give the suspect the opportunity to provide a submission, and if so, the nature of the submission, and
- why the carrying out of the procedure without consent is justified in all the circumstances.

Recording the reasons for making an order would be of benefit to NSW Police because it would demonstrate that the senior officer making the order had sufficient knowledge of the circumstances before deciding to order a forensic procedure.

As with the requirement that police only request consent in circumstances where it is justified, we are of the view that further guidance should be given to police officers about when carrying out a forensic procedure without consent will be justified in all the circumstances. This is consistent with the view of the Legislative Council Standing Committee on Law and Justice.⁵⁵⁹

Justice Kirby has commented on this matter:

*Amongst the considerations which need to be taken into account in placing effective controls over the procurement of body samples from individuals for DNA testing [is] that where an individual objects to the provision of a body sample, whether for DNA testing or otherwise, such objection is decided by reference to legal criteria which take into account the need to establish a strong reason to authorise the state to extract a body sample from a suspect in the face of that person's non-consent.*⁵⁶⁰

The model code suggests that, before ordering a forensic procedure, the senior police officer should consider, in addition to the issue of non-consent, the seriousness of the offence and the circumstances surrounding its commission, the degree of the suspect's alleged participation, whether evidence of the suspect's involvement in the offence can be gained in a less intrusive way, any reasons given for refusing consent and, in the case of DNA samples, whether a comparison sample from the crime scene has been or is going to be obtained. This is perhaps at least some appropriate guidance to senior police officer when considering an order.

Recommendation 20

The form used for recording senior police officer orders be amended so that the senior police officer who makes an order authorising a forensic procedure can record their reasons for believing the suspect committed an offence, the grounds on which the officer believes the procedure might produce evidence tending to confirm or disprove that the suspect committed the offence, and the reasons why carrying out of the procedure without consent is justified in all the circumstances. The amended form should also include information about any submissions received from the suspect, their legal representative or interview friend. Any amended form for senior police officer orders should also be included in the proposed forensic processes book.

Recommendation 21

The *Crimes (Forensic Procedures) Act 2000* be amended to provide clearer guidance to senior police officers about when carrying out a forensic procedure without consent will be "justified in all the circumstances", including factors which must be considered in making this decision.

NSW Police does not support recommendation 20, on the basis that it “would add additional unnecessary delay and workload to the process for undertaking a forensic procedure.”⁵⁶¹ We believe that a record of the decision making process for senior police officer orders should be documented. Given that the matters we have outlined must be considered by the senior police officer, requiring a brief note recording the matters cannot conceivably result in unnecessary delay and workloads. It will, however, ensure compliance with legal obligations under the Act.

NSW Police supports recommendation 21.⁵⁶²

7.3.4. Soliciting consent as an alternative to making an order

As discussed above, police officers appear to sometimes seek to convince suspects they should consent to a proposed procedure, or police will simply make an order and carry it out anyway. We found evidence of this in the very low number of procedures conducted by order, through interviews with officers who saw it as their role to persuade suspects to consent, and in the many references in consent forms and COPS records to suspects initially declining to undergo forensic procedures, and then changing their minds at some point while in police custody. We recognise that in the case of DNA samples, many officers are acting in good faith, on the basis that the suspect should be convinced to consent to a buccal swab to avoid having a hair sample taken.

The Act clearly anticipates that if a suspect does not consent to a forensic procedure, whether a DNA sample or another type of procedure, police should not proceed without an order. Our recommendation 19, about making buccal swabs available in the case of senior police officer orders, may go some way towards encouraging officers to seek orders by senior police officers in circumstances where suspects do not consent to procedures.

As an additional safeguard, consideration could be given to amending the Act to require any senior police officer making an order for a forensic procedure to be independent of the investigation. This in conjunction with our earlier recommendation regarding the recording of the reasons for making the order would ensure the process is transparent.

Recommendation 22

The *Crimes (Forensic Procedures) Act 2000* be amended to require a senior police officer making an order under sections 18 or 19 to be independent of the investigation.

NSW Police does not support this recommendation, on the basis that it is unnecessary.⁵⁶³ However, the Attorney General’s Department advised it has no objection to the recommendation, and commented:

*It appears to be implicit in the legislative scheme that the senior police officer exercising the power of considering whether to make an order must act objectively according to the statutory criteria, and so does not have carriage of the investigation in relation to which the order is being sought.*⁵⁶⁴

This is consistent with our own view, and should be made clear in the Act.

7.3.5. How senior does an officer have to be to authorise a forensic procedure?

The Act specifies that a “senior police officer” means a police officer of or above the rank of sergeant.⁵⁶⁵ Some officers have asked whether this includes an officer who is an acting sergeant. The Police Association of NSW gave the following example:

*The suspect refused to take part in the conducting of the forensic procedure, so he had the supervisor in charge of the station at the time direct him. The officer was not a sergeant, but an acting sergeant. Later, an Inspector spoke with the officer and stated that the acting sergeant was not allowed to direct the suspect as per the Act, as the officer was not a substantive sergeant and therefore the procedure could be challenged at court... The officer has since spoken with other police who have done forensic procedures at other locations and they have had an acting sergeant direct the suspect to complete the mouth swab.*⁵⁶⁶

The Police Association of NSW requested that this issue be clarified.⁵⁶⁷ We note that section 48(2) of the *Interpretation Act 1987* provides:

If an Act or instrument confers or imposes a function on a particular officer or the holder of a particular office, the function may be exercised (or, in the case of a duty, shall be performed) by the person for the time being occupying or acting in the office concerned.

Accordingly, a person acting in the office of sergeant may exercise the functions of a senior police officer under the Act. Perhaps NSW Police should clarify this for its officers.

Recommendation 23

NSW Police clarify to officers in the field that an acting sergeant is a “senior police officer” for the purposes of the *Crimes (Forensic Procedures) Act 2000*.

NSW Police supports this recommendation.⁵⁶⁸

7.3.6. Suspects on remand

Section 3(2) of the Act provides that, “for the purposes of this Act, a person is under arrest if he or she is a person to whom Part 9 of the *Law Enforcement (Powers and Responsibilities) Act 2002* applies.” Part 9 of the *Law Enforcement (Powers and Responsibilities) Act* (formerly Part 10A of the *Crimes Act*) sets out the rights of people detained in police custody after arrest. It applies “to a person, including a person under the age of 18 years, who is under arrest by a police officer for an offence.”⁵⁶⁹ Further, “a person ceases to be under arrest for an offence if the person is remanded in respect of the offence.”⁵⁷⁰

The difficulty this presents for police is that a senior police officer can only order a forensic procedure be conducted on a person who is “under arrest.” Once a suspect has been charged and remanded in custody, any forensic procedures can only be conducted by consent or by order of a court. Some of the police officers we surveyed identified this as a problem:

*Once a person in custody has been charged and is no longer under Part 10A, to conduct a forensic procedure a court order is required if he/she does not consent. This causes unnecessary inconvenience on the person in custody, the police involved and the authorising justice... [The Act] should be amended so that the requirements to perform a forensic procedure upon a person to whom Part 10A of the Crimes Act applies, also apply to a person who is charged with an offence, but is no longer in Part 10A custody.*⁵⁷¹

The NSW Police Legislative Changes Working Group has also described this as a “significant problem” for police officers, arguing that:⁵⁷²

- Charge documentation cannot be prepared until after all forensic procedures have been completed, which delays the entire process – officers would prefer to be able to prepare charge documentation while forensic procedures are being carried out.
- Investigating police may not be aware that a particular procedure should be carried out until after the initial investigation period has ended, and the suspect has been charged. For example, additional evidence may be found at the crime scene.

This group has suggested that a suspect who is remanded in custody be treated as a suspect who is under arrest, so that forensic procedures may be carried out by order of a senior police officer, if the suspect does not consent.⁵⁷³

In our draft report, we recommended that the Act be amended to allow senior police officers to order a forensic procedure be conducted on a suspect who has been charged and remanded in police custody, as if the suspect were still under arrest. Our view was that police should not delay the charging of a suspect so that a forensic procedure could be conducted. Since a senior police officer has the authority to order a forensic procedure be conducted on a suspect who is under arrest, we reasoned that this authority should continue while the suspect is in police custody in relation to that offence. This would not be an extension of the authority of senior police officers to order forensic procedures, but an extension of the time in which the power may be exercised. Given that the suspect will be in custody anyway, it would not be a serious imposition on the suspect, but would provide greater flexibility to

police. Further, it would remove any incentive police may have to conduct a forensic procedure when otherwise they might not, for fear of forfeiting the opportunity.

NSW Police supported the proposed recommendation.⁵⁷⁴ However, the Attorney General's Department expressed concern about it, pointing out:⁵⁷⁵

- there is nothing preventing police from preparing charge documentation while other steps, including forensic procedures, are occurring
- it would be undesirable if suspects held in court cells managed by NSW Police had different legal rights from suspects in court cells managed by the Department of Corrective Services
- there is a risk of suspects being detained in court cells longer while forensic procedures are carried out, rather than being transferred to a remand centre, and
- police must bring the person before a court anyway, once the charge process has been finalised, and can apply for a court order authorising a forensic procedure then.

In its 2002 review of the Act, the Standing Committee on Law and Justice considered a proposal by NSW Police that all suspects on bail or held on remand be considered 'under arrest' for the purpose of the Act. The Committee concluded there was insufficient justification for removing the requirement that police obtain a court order to conduct forensic procedures on charged suspects.

In this report, we recommend that time taken to conduct a forensic procedure be regarded as 'time out' for the purpose of calculating the investigation period (see discussion at 8.3 and Recommendation 34). NSW Police supports this recommendation and the Attorney General's Department advised it is already being implemented.⁵⁷⁶ We anticipate that designating time spent conducting forensic procedures as 'time out' will give police greater flexibility in deciding when to conduct the procedures and, in light of the comments made by the Attorney General's Department, this would appear to be a better solution than enabling senior police officers to order post-remand forensic procedures.

However, if this change does not resolve the issues confronting police, a further consideration of our draft recommendation, or some variation of it may be appropriate.

7.3.7. Appealing against senior police officer orders

There is no provision in the Act for suspects to appeal against a decision by a senior police officer to order a forensic procedure. However, if police breach any provision of the Act in relation to a forensic procedure carried out on a suspect, the evidence generally will not be admissible in any proceedings against the suspect.⁵⁷⁷

7.4. Suspects: proceeding by court order

In certain circumstances police may apply to a court for an order authorising a forensic procedure. The magistrate must specify the type of procedure authorised, give reasons for making the order, and inform the suspect that reasonable force may be used to ensure he or she complies with the order. The magistrate may give directions as to the time and place at which the procedure is to be carried out, and must order the suspect to attend. The suspect must be present at the hearing, unless the magistrate makes a contrary order. The suspect may be represented and may cross-examine the applicant for the order and, with leave, any other witnesses.⁵⁷⁸

7.4.1. Why proceed by court order?

Police officers would generally only apply for a court order if the suspect does not (or cannot) consent to the proposed procedure, and a senior police officer order is not available. Accordingly, police apply for court orders in the following circumstances:

7.4.1.1. Because the suspect is not under arrest and does not consent to the procedure

As discussed above, senior police officers can only order forensic procedures on suspects who are under arrest. If a suspect is not under arrest (whether they have been charged or not), police must obtain a court order before conducting a forensic procedure in the absence of consent.⁵⁷⁹

Case Study 28

A homeless man died after being bashed in a park one night. Police arrested a suspect, who did not consent to having his photograph or DNA taken. These procedures were carried out by order of a senior police officer. In the following weeks police conducted further inquiries and identified several other suspects. Each declined to provide a DNA sample. Police applied to the local court for an order authorising DNA samples to be taken from these suspects, none of whom had been arrested. The court granted the orders and the suspects provided DNA samples by buccal swab.⁵⁸⁰

Case Study 29

In April 2004 a man was charged with two counts of causing a grievous bodily disease, after knowingly infecting tourists from Ireland and Germany with HIV. Investigating police obtained a court order authorising a forensic procedure to be conducted, to confirm the man was HIV positive.⁵⁸¹

7.4.1.2. Where police propose to conduct an intimate forensic procedure without consent

Senior police officers can only authorise non-intimate forensic procedures. If they propose to conduct an intimate forensic procedure in the absence of consent, a court order is required.⁵⁸²

Case Study 30

An 82 year old woman woke up in the early hours of the morning to find a young man in her bedroom. He sexually assaulted her and then asked for money. He took food from the fridge, ate it and then left. After making inquiries police identified a suspect, who denied being involved and did not consent to any forensic procedures. Police applied for a court order authorising photographs to be taken of the suspect's genitals, as well as a DNA sample. The order was granted and the photos and sample were subsequently taken.⁵⁸³

7.4.1.3. Where the suspect is a child

Children cannot consent to forensic procedures; a court order is required.⁵⁸⁴

Case Study 31

A 40 year old man was struck on the side of his face with a baseball bat by an unknown young person. The young person drove off, but left a baseball cap at the scene. After making inquiries police identified a 17 year old suspect, and applied for a court order authorising a DNA sample to be taken. The sample was taken and sent to the laboratory for analysis. The DNA profile obtained from the baseball cap "matched" the profile obtained from the suspect, and the suspect was charged with the assault.⁵⁸⁵

Case Study 32

Police called a pursuit after seeing two men driving a stolen Subaru WRX. The pursuit was called off after the officers lost sight of the vehicle. Two suspects, aged 26 and 17, were located in the area a short time later. The vehicle was examined for fingerprints and DNA. The 26 year old suspect provided police with a DNA sample by consent. Police obtained a court order authorising a DNA sample to be taken from the 17 year old.⁵⁸⁶

Case Study 33

A young man was walking home from the pub late at night when he was assaulted. He suffered serious facial injuries from being kicked in the head, and also had his wallet stolen. Witnesses reported seeing the three offenders run from the scene, with blood on their hands, clothes and shoes. Police identified three suspects, who were aged 16, 18 and 22. Police seized the clothes and shoes the suspects were wearing when the offence was committed. They took DNA samples, by consent, from both adult suspects. They obtained a court order authorising a DNA sample and photograph of the 16 year old suspect.⁵⁸⁷

7.4.1.4. Where the suspect is incapable

A court order is required to conduct a forensic procedure on a suspect who is incapable of understanding the general nature and effect of a forensic procedure, or of indicating whether he or she consents to the procedure being carried out.⁵⁸⁸ Where police apply for a court order, the incapable person must have an interview friend present at the hearing, and may also have legal representation.⁵⁸⁹

Case Study 34

A woman in a country town flagged down a passing police car and alleged she had been sexually assaulted by a man who was hiding in the bushes. Police arrested the man and took him back to the police station. Investigating police wished to take a DNA sample and genital swabs from the suspect, but formed the view that he was an incapable person for the purposes of the Act. Police applied to the on call duty magistrate for an interim court order. The order was granted, the procedures were conducted and the man was charged with aggravated sexual assault.⁵⁹⁰

As discussed above, at 7.2.3, police officers have made very few applications for orders authorising a forensic procedure on incapable persons, and many officers have advised that they regularly conduct forensic procedures on people who do not understand the information provided. We are concerned that police officers may not in fact be identifying people as being incapable, and are conducting forensic procedures by consent, when the Act requires a court order be made before police can proceed. To address this issue, we reiterate our recommendation 17 that the forensic procedure SOPs include guidelines to help police officers identify and communicate with incapable people, and that NSW Police provide further training and guidance to police officers in this area.

7.4.2. Criteria for making an order

Before making an order, the magistrate must be satisfied that the person is a suspect, there are reasonable grounds to believe that the suspect committed an offence and that the procedure might produce evidence tending to confirm or disprove that the suspect committed the offence, and that the procedure is justified in all the circumstances.⁵⁹¹ If the relevant offence is an indictable offence, the magistrate may order any type of procedure, but if it is a summary offence, the magistrate may only order a non-intimate procedure (except a hair sample).⁵⁹² This means that a DNA sample can only be ordered by a magistrate where there are reasonable grounds to believe the suspect has committed an indictable offence.

Again, the criteria for making an order for the carrying out of a forensic procedure on a suspect are different from the criteria for requesting consent to a procedure – the magistrate must be satisfied that there are reasonable

grounds to believe the suspect committed the offence, and that the carrying out of the procedure is justified in all the circumstances.⁵⁹³

7.4.3. How often are forensic procedures conducted by court order?

To find out how often forensic procedures are conducted by court order, we reviewed records of court orders held by police and the courts. We also became aware of some forensic procedures conducted by court order through media coverage.

The Court Statistics Unit of the Attorney General's Department advised that 327 final orders for forensic procedures had been made between July 2003 and December 2004. It did not distinguish between orders made in relation to adults and children and it appears that records of forensic procedure orders were not kept before July 2003.⁵⁹⁴

We were unable to ascertain the number of procedures conducted by court order from police records, because police usually keep records of court orders on the relevant brief of evidence, and do not keep a central record of court orders. During our audit of local area commands, we were able to identify some procedures which had been conducted by court order when one of the officers present remembered the details, or because it was clear from the circumstances that the procedure could not have been conducted without a court order (for example where the person undergoing the procedure was a child). In our survey, we asked each command how many of its forensic procedures had been authorised by order of a court. A total of 37 commands were able to advise how many forensic procedures they had conducted by court order, which amounted to 175 procedures – 88 in relation to children, 82 in relation to capable adults and five in relation to incapable adults. While 12 commands advised they had not conducted any forensic procedures by court order, and the remaining 31 commands did not know how many forensic procedures they had conducted by court order. Many commands indicated the figures they provided were unreliable, as no central records of procedures conducted by court order were kept:

*I believe that the figures for the 'by order of a magistrate' should be higher than two for this command. Perhaps there is a recording issue.*⁵⁹⁵

*A manual analysis of the relevant COPS events narratives does not necessarily indicate the exact nature of the forensic procedure. The majority indicate that a "forensic procedure" was carried out, but generally does not go into specific details as requested. Any specific figures obtained from this manual review would only be approximate and therefore unreliable.*⁵⁹⁶

If we extrapolate on the figures provided by those commands which were able to advise how many procedures had been conducted by court order, it seems that approximately 380 forensic procedures were conducted by court order during the review period, or about four per cent of the total number of forensic procedures conducted. The figures provided by the courts, on the other hand, suggest that approximately 850 forensic procedures were conducted by court order, or about eight per cent. The difference may be accounted for by police underreporting the number of court orders. It is also possible that more forensic procedures were conducted in the later part of the review period, when courts started keeping records, compared to when the Act first came into force. Although these are only rough estimates based on the limited information available, it is clear that only a small proportion of forensic procedures (somewhere between four and eight per cent) are conducted by court order.

We expect that record keeping by police local area commands will improve with the forensic procedures register the NSW Police Audit Group is developing. A central record of court applications and orders would ensure that police keep accurate records of the authority for the procedure, and would create an easily accessible file of successful applications for other officers to consult. The register could include copies of both interim and final orders, and could be used to track compliance with requirements to obtain a final order before any sample taken under an interim order is analysed.⁵⁹⁷ It could also be used to keep a record of any applications refused, and the reasons for this.

7.4.4. How often do magistrates refuse to make a forensic procedure order?

We also sought to review how often applications for forensic procedures are refused. The Court Statistics Unit of the Attorney General's Department advised that 23 applications for final orders for forensic procedures were refused between July 2003 and December 2004. Compared to the number of final orders which were made (327), it appears that forensic procedure orders are granted for the majority (93 per cent) of applications made.⁵⁹⁸

One magistrate we surveyed advised he had made "dozens" of orders authorising forensic procedures on capable adult suspects, and that he had never refused an application.⁵⁹⁹ Another advised he had heard "maybe a dozen" applications for capable adult suspects, and had only occasionally refused to make an order, on the grounds that it was unnecessary for the prosecution case.⁶⁰⁰ Other reasons magistrates refused to make orders included:

*There is not enough evidence to show that the young person is a suspect.*⁶⁰¹

*Because it is a request for a picture for identification when the offence occurred some time before and the ID would be quite unreliable.*⁶⁰²

*[The application] was for photographs for identification where the witnesses were aged about 10 or 11. The offence occurred some three months earlier. The witnesses had not given to the police at the time any substantial description or identification that would be able to identify the defendant. The chance of a reliable identification seemed in those circumstances to be remote and unlikely to advance the police investigation.*⁶⁰³

Police sources also described occasions where a court order was granted for a photograph but not for a DNA sample, on the basis that the sample was not in the circumstances of any investigative or evidentiary value.⁶⁰⁴

The Police Association of NSW claimed that “in nearly every case, a court order is contested.”⁶⁰⁵ By contrast, one of the magistrates we surveyed estimated that submissions are made in about two thirds of cases, and that the suspect or suspect’s representative cross-examines the police applicant in only about half the cases.⁶⁰⁶

7.4.5. Determining applications for forensic procedures

One magistrate we surveyed raised concerns about other magistrates making orders “purely on receipt of the application,” that is, without properly considering whether the criteria set out in the Act have been met.⁶⁰⁷ On a number of occasions, orders have been set aside on appeal and remitted to the local court for redetermination on the basis that the magistrate failed to give due consideration to whether there were in fact reasonable grounds to believe the procedure might produce relevant evidence or was justified in all the circumstances.⁶⁰⁸

The courts have commented that determining whether a forensic procedure is justified in all the circumstances requires the court to balance, among other things, “the invasiveness of the compulsory forensic procedure, against the anticipated evidence to be obtained from it, and the requirements of the administration of justice in the most accurate solution of a particular crime.”⁶⁰⁹ However, the Act does not offer any specific guidance to magistrates in determining whether a forensic procedure is justified in all the circumstances. The Law Society of NSW and Legal Aid NSW recommended in their submissions that magistrates be given greater assistance in this area.⁶¹⁰ We also note that the Legislative Council Standing Committee on Law and Justice has previously recommended that guidelines to assist magistrates in determining whether an order for a DNA sample is justified in all the circumstances be inserted into the Act.⁶¹¹

In our view, there is considerable merit in providing further guidance to magistrates about when carrying out a forensic procedure without consent will be justified in all the circumstances. In particular, before ordering a suspect to undergo a forensic procedure, the magistrate should consider the seriousness of the offence and the circumstances surrounding its commission, the degree of the suspect’s alleged participation, whether evidence of the suspect’s involvement in the offence can be gained in a less intrusive way, any reasons given for refusing consent (where applicable) and, in the case of DNA samples, whether a comparison sample from the crime scene has been or is likely to be obtained. For children and incapable persons, to the extent it is able to be obtained and/or relevant, their views should also be considered.

One magistrate we surveyed also pointed out that the Act “does not clearly indicate whether an application is to be heard in open court or chambers.”⁶¹² Our understanding is that applications are normally heard in open court, and that this would be more appropriate, given that the suspect must be present, may have legal representation, and is entitled to cross-examine the police applicant and, with leave, any other witnesses. In our draft report, we proposed that the *Crimes (Forensic Procedures) Act 2000* be amended to clarify that applications may be heard in open court. The Attorney General’s Department expressed reservations about this approach, for the following reasons:

In practice, there have been no identified problems with applications for final orders being improperly made in places other than open court. As acknowledged in the draft Report, it would be impractical to comply with the requirements of section 30 of the Act if an application for final order was made in chambers. The use of the word “may” in the proposed Recommendation, raises the issue (that is not currently raised in the Act) of whether applications for final orders may be made somewhere other than open court, and so might increase ambiguity rather than diminish it.

In addition, it is important to distinguish between applications for interim orders and applications for final orders: it is implicit in section 32 of the Act that applications for interim orders may be made in chambers.

If the legislature specified in every Act that creates a power in Magistrates, that those powers “may” or “must” be exercised in open court, this would appear to add unnecessary complexity to legislation, and give rise to a

concern that, in any Act where no such specific reference was made, the legislature has by omission allowed some powers to be exercised in secret. The strong common law presumption that justice must be open in the absence of legislative indication to the contrary, is adequate; and so the proposed Recommendation appears unnecessary.⁶¹³

Given these objections, and the grounds for them, another solution is that advice be provided to magistrates about this matter through the Bench Book or other resource.

Recommendations 24

The *Crimes (Forensic Procedures) Act 2000* be amended to provide clearer guidance to magistrates about when carrying out a forensic procedure without consent will be “justified in all the circumstances”, including factors which must be considered in making this decision.

Recommendations 25

Magistrates be provided with appropriate advice or guidance as to the hearing of applications under the *Crimes (Forensic Procedures) Act 2000*.

7.4.6. How long is a court order enforceable?

Magistrates must order the suspect to attend for the carrying out of the forensic procedure, and may give directions as to the time and place at which the procedure is to be carried out.⁶¹⁴ If the suspect is not under arrest, the procedure must be carried out as quickly as possible after the suspect presents to investigating police, and in any case within two hours of this, excluding any time out.⁶¹⁵ If the suspect is under arrest, he or she may be detained for as long as is reasonably necessary for police to carry out the procedure, but for no longer than two hours after the end of the investigation period, beginning when the order is made and excluding any time out.⁶¹⁶

The Police Association of NSW raised concerns about some court orders being unduly restrictive, arguing that a two hour period is “totally unreasonable.” It recommended that the Act specify how long police have to conduct a procedure after an order is made, and that it should be a longer period than two hours.⁶¹⁷

It is not clear why the time periods already specified in the Act are not workable. If the suspect is under arrest, police have two hours to conduct the procedure, which is the same as for procedures conducted by consent or by order of a senior police officer.⁶¹⁸ Any reasonable delay, such as time reasonably required to take the suspect to the police station where the forensic procedure facilities are, or time spent waiting for facilities or equipment to become available, is deemed to be ‘time out’ and will not count towards the permitted two hours.⁶¹⁹ If the suspect is not under arrest, police have two hours from the time the suspect presents to investigating police, again excluding any time out.

Other than the Police Association of NSW submission there was little evidence that the two hour period was presenting a difficulty to operational police. The only problem we have identified is where courts specify a time as opposed to granting a period. This can be dealt with by police requesting appropriate orders. Without further evidence we would not support additional detention of a suspect for the purpose of performing a forensic procedure.

7.4.7. Should child suspects be able to consent to forensic procedures?

The Act currently provides that a child is unable to consent to a forensic procedure.⁶²⁰ If the child is a suspect, a forensic procedure can only be conducted by order of a court.⁶²¹

A wide range of stakeholders criticised the fact that children are deemed incapable of consenting to forensic procedures. There were two recurring themes – first, that young people who are sufficiently mature should be able to participate in decisions affecting them; and second, that having to apply for a court order is inconvenient and takes too long.

7.4.7.1. A child's right to participate in decision making

Several stakeholders objected to the fact that children are not able to consent to forensic procedures, describing the current position variously as “highly unsatisfactory”,⁶²² “unsatisfactory and unfair”⁶²³ and “impractical”.⁶²⁴ The NSW Commission for Children and Young People commented:

*Children and young people, whether as suspects or volunteers, are treated as not having the competence to give or refuse consent on their own behalf. Under the Act a [volunteer] child or young person can only avoid a procedure by objecting or resisting... in comparison, adult volunteers are given a choice to refuse or agree. Children and young people are treated less favourably than adults... allowing children and young people to participate in decisions affecting them provides them with some control over their own bodies and wellbeing.*⁶²⁵

We note also that Article 12 of the United Nations Convention on the Rights of the Child provides that parties to the convention “shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.” It also provides that parents and others should provide appropriate direction and guidance in a manner consistent with the evolving capacities of the child.

Several stakeholders argued that the Act should recognise the capacity of children at differing ages to make decisions about forensic procedures, although they expressed a range of views as to what age would be appropriate. For example:

- The NSW Commission for Children and Young People recommended “that the Act be amended so that young people 15 years and above, whether suspects or volunteers, are able to consent to forensic procedures.”⁶²⁶
- Legal Aid NSW and the Law Society of NSW suggested that child volunteers should be able to consent to forensic procedures, but neither recommended enabling child suspects to consent to forensic procedures.⁶²⁷
- The Police Association of NSW and a number of individual police officers argued that suspects and volunteers over the age of 14 should be able to consent to forensic procedures, provided a responsible adult is present.⁶²⁸

The age of consent to undergo forensic procedures varies between jurisdictions. For example, in Queensland, a child over the age of 14 can consent to a forensic procedure, provided a support person is present when the information is provided. In Tasmania, children over 15 can consent. In New Zealand, children aged 14 and over can provide a DNA sample by consent, although parental consent must also be obtained if the child is under 17.⁶²⁹ In the majority of Australian jurisdictions, however, a child is defined as a person under the age of 18, and cannot consent to a forensic procedure. This reflects the position in the 2000 model bill which is discussed in further detail at 3.2.

The NSW Law Reform Commission considered a similar issue in its paper on the capacity of children to consent to medical treatment. At common law, a child's capacity is not based on a fixed age, but depends on the child's intellectual maturity and social development. The Commission explained:

*Research suggests that, in early adolescence, young people have a greater tendency than at any other time toward conformity, with the risk of deferential responses to requests for consent being at its greatest until the ages 15-17. Each young person's decision-making capacity should be assessed with reference to the range of his or her experiences, and individual qualities, such as his or her abilities and confidence, relational style with authority and emotional state. A young person's decision-making capacity will also be affected by external factors, such as the nature and circumstances of the particular decision, the nature of the information provided to the young person and the way in which it is communicated, and the expectations of the adults involved in the decision.*⁶³⁰

Unlike consent to medical treatment, whether a child should be able to consent to a forensic procedure raises fundamental questions about the degree to which children should assist law enforcement agencies in criminal investigations by providing evidence which might incriminate them. While some children may be capable of making this decision, others may not. It is also relevant that a child's response to a request for consent tends to be affected by the nature and circumstances of the decision, the information provided to the child and the expectations of the adults involved in the decision, which in the case of forensic procedures would be police officers. The interests of police officers in the investigation and prosecution of crime is distinct from the interests of medical professionals in the patient's health and welfare. And unless the legislation fixed a certain age, the child's capacity would have to be determined on a case by case basis by police officers, which would be difficult to administer and in our view would not be desirable.

We found that it is not uncommon for police to solicit consent from adult suspects, on the basis that the procedure will be ordered by a senior police officer or a court if consent is withheld. It is likely that, if child suspects could undergo

forensic procedures by consent, police officers (whether in good faith or not) would advise child suspects that they may as well consent, or police will obtain a court order and conduct the procedure regardless.

The Act as it currently stands protects the interests of children by ensuring judicial oversight of every police decision to conduct a forensic procedure on a child suspect. In addition, having to obtain a court order means that the child has the benefit of legal representation. As one magistrate, who had heard over a hundred applications for orders authorising forensic procedures on children, commented:

*The young person always had legal representation. This will often have an impact – sometimes to persuade the young person that there is no basis for opposing the order, sometimes to advance good reasons for not making the order, most frequently to ensure that the terms of the order are appropriate/convenient for the young person to comply with.*⁶³¹

Other magistrates commented that legal representation was beneficial as the process and any order made could be properly explained to the child.⁶³²

After careful consideration, our view is that the protection afforded child suspects by requiring judicial oversight of the police decision to conduct a forensic procedure outweighs the child's interest in being able to make the decision about whether to consent or not. Firstly, a child can give instruction to their legal representative in court proceedings, including instructions that an order not be opposed. It is not correct to say that children are uninvolved in decisions. We also note that some of our other recommendations would facilitate the participation of children in decision-making around forensic procedures, especially recommendation 13, about providing more information about forensic procedures to child suspects, and recommendation 25, about providing further guidance to magistrates about when a forensic procedure will be justified in all the circumstances. In particular, requiring magistrates to consider whether a child consents to the procedure, and any reasons given for not consenting, would increase the child's participation in the process. In our view this model recognises the young person's right to be informed about the procedure and have his or her views taken into account, while ensuring the child's rights and interests are sufficiently protected.

Whether child volunteers should be able to consent to forensic procedures is discussed at 7.5.3.

7.4.7.2. Inconvenience of obtaining court orders

In our survey of local area commands, many police officers objected to having to obtain court orders to conduct forensic procedures on children, especially for photographs. They described the process as cumbersome and time consuming:

*It makes policing very difficult when you have to go to such lengths to get a photo of an offender. It's very prohibitive, to be honest.*⁶³³

Some magistrates made similar comments:

*The requirement for a court order for the taking of photographs for identification purposes with consent of a juvenile accused (especially one over the age of 16) seems to be a significant imbalance of form over substance – especially given that such a juvenile can voluntarily participate in a line up process (which I would have thought was more intrusive than the taking of a photograph)... Probably the greater number of applications before the Children's Court are in fact to obtain an order for photographs for identification purposes. It seems to tie up quite a deal of police and court time and resources where no submission is made on behalf of the suspect opposing the application.*⁶³⁴

The Police Association of NSW argued that having to apply for court orders authorising forensic procedures on children caused unnecessary delays in investigations.⁶³⁵

Other stakeholders commented that delays between the offence being committed and police applying for a court order to take photographs meant they either were not useful, as victims and other witnesses were no longer interested in pursuing the matter, or the child's appearance had substantially changed, which in some cases led to the court order being refused.⁶³⁶ One magistrate attributed delays to police officers, while police officers argued that defence counsel adjourn matters "to a date so far away that the memory of the witness/victim is not reliable and the procedure is futile."⁶³⁷

In our view, there is insufficient evidence to recommend changing the current regime on the basis that having to apply for a court order is inconvenient and time consuming. We note that most of the police officers we interviewed who had actually applied for orders commented that once familiar with the legislative requirements, they were comfortable with the process. If there is considerable delay between an offence being committed and police officers applying for an order, this is a matter for NSW Police to address. If the delay is because a child suspect's legal representative has

sought an adjournment, the police applicant should raise any concerns about the resulting delay with the magistrate. We also note that police can already photograph children over the age of 14 at the time of charging, without having to obtain a court order, under 133 of the *Law Enforcement (Powers and Responsibilities) Act* (formerly section 353A(3) of the *Crimes Act*).⁶³⁸ This is discussed in further detail at 9.1.2.

7.4.8. Interim orders

In urgent circumstances, police may seek an interim order authorising a forensic procedure. An authorised justice may make an interim order if satisfied that the person is a child, incapable person or suspect who has not consented to the procedure; the probative value of the evidence is likely to be lost or destroyed if there is a delay in carrying out the procedure; and that there is sufficient evidence to indicate that a magistrate is reasonably likely to make a final order when the application is determined.⁶³⁹ A sample taken under an interim order cannot be analysed until a final order is made, unless it is likely to perish before then. If the order is ultimately disallowed, the sample cannot be analysed. If a person analyses a sample prior to the final order being determined, he or she cannot disclose the results of the analysis to anyone other than the suspect.⁶⁴⁰

The Court Statistics Unit of the Attorney General's Department advised that 184 interim orders for forensic procedures were made during normal working hours between July 2003 and December 2004. It is not known what proportion of these were confirmed with final orders. However, since 327 final orders were made in the same period, it is clear that interim orders are reasonably common.⁶⁴¹

Case Study 35

A member of staff at a school for children with physical and intellectual disabilities found an 8 year old student crying in the boys' toilets, with blood on her underpants. A 16 year old boy with an intellectual disability was in a nearby cubicle. The boy was arrested and interviewed, with his mother and step father present. Police obtained an interim court order authorising fingernail clippings, a photograph and swabs from the boys hands and penis to be taken, in the presence of a doctor. A final order was subsequently made, and the samples were analysed.⁶⁴²

Because interim orders are only available where delay will affect the probative value of the evidence, they will usually only be granted for procedures like nail scrapings and hand swabs, rather than DNA samples, which can be taken at any time.

Case Study 36

Police arrested two Aboriginal children in relation to a robbery. They applied to the on call magistrate for an interim order authoring a forensic procedure. The application was refused on the basis that police could apply for an order at the suspects' first appearance in court.⁶⁴³

Case Study 37

Several young men stole a car and drove to a post office. They ordered staff and customers to the ground, jumped the counter and removed cash from the tills. They drove off and police pursued the vehicle for a short time. The vehicle crashed and the occupants all ran off. Police subsequently arrested three suspects, aged 22, 20 and 15. They were taken to the police station, where they were interviewed and charged with robbery. Police conducted forensic procedures on the 22 and 20 year olds. They applied for an interim order authorising a DNA sample to be taken from the 15 year old, but the application was refused, on the basis that police could apply for it at the suspect's first court appearance. In the end, police abandoned the application, as the suspect made admissions and the procedure was not necessary to secure a conviction.⁶⁴⁴

The Police Association of NSW expressed concern about having to apply for an interim order before taking any action to preserve evidence, arguing:

*In special circumstances, such as stopping a suspect from destroying possible evidence, there should be emergency provisions allowing police to take the sample/s and apply for an order retrospectively.*⁶⁴⁵

While we note that there are circumstances in which a forensic procedure may need to be carried out without delay, it is an important safeguard for suspects that forensic procedures cannot be carried out by force unless authorised by a senior police officer or a court. The Act does not require that the suspect be brought before the authorised justice for an interim order to be granted. Further, if it is not practicable for police to apply for the interim order in person, it can be made by fax or over the phone.⁶⁴⁶ We have not been provided with any instances in this review of practical difficulties with the current process. In our view this provides sufficient flexibility where the urgency of the circumstances makes it impractical to apply for a final order.

Further, section 37 of the Act provides that "a police officer may use reasonable force... to prevent loss, destruction or contamination of any sample." In our view, the current provisions strike an appropriate balance between the interests of police and the interests of the suspect, and there is no need for extra "emergency provisions" enabling police to conduct procedures without obtaining authorisation.

7.4.9. Disclosure of information at the hearing

Many police officers expressed concern about having to disclose information to suspects when applying for forensic procedure orders. In particular, officers are concerned that disclosing information increases the risk of suspects interfering with witnesses and gives the suspect an opportunity to concoct a story about why his or her DNA was found at the crime scene.⁶⁴⁷ The Police Association of NSW described instances where officers applying for orders had to choose between disclosing all the relevant evidence at the risk of compromising the investigation, and disclosing only some of the evidence, at the risk of the application being rejected.⁶⁴⁸ However, we have not been provided, and are unaware of any actual circumstances, in the hundreds of procedures ordered by courts, where these fears have been realised.

We note that under New South Wales law, the prosecution is already required to disclose its case to the defence before a criminal trial starts. In summary proceedings, the prosecution generally has to serve a copy of the brief of evidence at least 14 days before the hearing. In indictable proceedings, the prosecution generally has to serve a copy of the brief of evidence at least 28 days before the committal hearing. Courts may also impose pre-trial disclosure requirements on a case by case basis in order to reduce delays in complex criminal trials.⁶⁴⁹ Proposed changes to criminal case processing also aim for full disclosure of the brief of evidence at a much earlier stage in indictable matters, to enable the defence to make an informed decision about how to plead while the matter is still in the local court.⁶⁵⁰ In the context of these broad disclosure requirements, our view is that disclosing information at forensic procedure hearings is not a significant issue. The risks cited by police officers – that suspects may interfere with witnesses or fabricate an explanation for their DNA being at crime scenes – are no more significant for forensic procedure hearings than for trials in general. If police officers are concerned about compromising an investigation, then they should conduct all other relevant inquiries before applying for the forensic procedure order. It appears that any tension between compromising an investigation by disclosing evidence too early, and ensuring enough evidence is disclosed to obtain the forensic procedure order, must be managed on a case by case basis by investigating police.

In some jurisdictions, police can apply for court orders authorising forensic procedures without the suspect being present. For example, police in Canada apply for "DNA warrants" on an ex parte basis. The Canadian courts upheld

the constitutionality of this scheme when it was challenged on the basis that suspects should be given notice of DNA sampling and should have an opportunity to appear before the judge who issues the warrant.⁶⁵¹

Moving towards *ex parte* DNA hearings in New South Wales would represent a substantial departure from the current provisions, which provides that suspects must generally be present at the hearing, may be represented, and may cross-examine the applicant and other witnesses.⁶⁵² From the information available, our view is that such a departure is not warranted.

Further, the Act provides that an application and any order must be made in the presence of the suspect, “subject to any contrary order made by the magistrate.”⁶⁵³ If police held genuine concerns that their investigation might be compromised through a hearing in respect of a forensic procedure, they could make an application to the court that an order be made that the suspect is not present for the hearing of the application.

7.4.10. Effect of application on suspect’s plea

Some police officers reported that applying for a court order authorising a forensic procedure may prompt the suspect to plead guilty.

Case Study 38

Police applied for an order authorising a forensic procedure to be conducted on a child suspect. The child’s legal representative requested an adjournment, which was granted. The child and his father went to the police station and the child made full admissions to the offence. Police subsequently withdrew the forensic procedure application.⁶⁵⁴

Case Study 39

Several cars were broken into and clothes, CDs and stereo parts were stolen. There was blood left on the cars. Police identified three suspects, aged 13, 14 and 15. Police interviewed the 14 year old, who made full admissions. He implicated the 15 year old but denied that the 13 year old was in any way involved. Police suspected that the 13 year old was involved, as he had a small cut on his hand and glass on his shoes. Police applied for court orders authorising DNA samples to be taken from the 13 and 15 year old suspects. After obtaining legal advice, both suspects went to the police station and made full admissions. They pleaded guilty and police withdrew the forensic procedure applications.⁶⁵⁵

Some police officers have also speculated that offenders plead guilty to avoid having their DNA profile put on the database, which may link them to other unsolved crimes.⁶⁵⁶ While there is anecdotal evidence of suspects pleading guilty after police apply for an order authorising a forensic procedure, it is not possible to gauge the full extent to which pleas are affected by applications for forensic procedure orders.

7.4.11. Appealing against court orders

A suspect can appeal against a magistrate's order authorising a forensic procedure. In cases where an order is refused, police can appeal against the decision to refuse the order.⁶⁵⁷

Case Study 40

Undercover police officers submitted the packaging from several heroin purchases for forensic analysis. The laboratory located DNA from saliva on one of the exhibits. The DNA did not match any of the profiles recorded on the DNA database. Investigating police asked a man suspected of supplying the heroin from his hair dressing business for a buccal swab. The man declined and police obtained a court order authorising a DNA sample to be taken. On appeal, the court set aside the order, on the basis that the magistrate had failed to consider whether there were in fact reasonable grounds for suspecting the man committed the offence, or whether the procedure was justified in all the circumstances. The court commented that "the purpose of the legislation is not to enable investigating police (or other authorised persons) to identify a person as a suspect; it is to facilitate the procurement of evidence against a person who is already a suspect." The matter was remitted to the local court for redetermination.⁶⁵⁸

Case Study 41

A middle aged woman was ordered by a court to provide fingerprints and palm prints to police after they found firearms and tens of thousands of pseudoephedrine based tablets in a locker which appeared to have been rented by her son in her name. The woman appealed against the order on the basis that she was not a suspect for the purposes of the Act. The court commented that as a hairdresser in her late fifties, with no criminal record and no trappings of unexplained wealth, and with no evidence of her ever having been to the storage facility in question, it was "no more than a possibility" that she had committed the offence. As there were no reasonable grounds for treating her as a suspect, the order authorising the forensic procedure was set aside.⁶⁵⁹

Case Study 42

A security guard found what appeared to be a shrink wrapped listening device on the nature strip opposite Nicole Kidman's house. DNA profiles from two people were derived from forensic material on the device. Police suspected that a professional photographer, whose image had been captured on closed circuit television outside the house, had planted the listening device, and obtained a court order authorising a buccal swab to be taken from the photographer. The photographer successfully appealed against the order. The court found that there was no evidence before the magistrate that the device was ever used to record or listen to a conversation, and the absence of any such evidence meant that there were no reasonable grounds for suspecting the photographer had committed any offence.⁶⁶⁰

There is no legislative prohibition on the analysis of samples taken by forensic procedure order while an appeal is pending. However, a suspect may seek an order from the court restraining NSW Police from testing or otherwise examining the samples taken until the appeal is heard.⁶⁶¹

7.4.12. Orders to repeat a procedure

Section 27 of the Act provides that a magistrate may order a forensic procedure to be carried out a second time, where the forensic material obtained under a court order and carried out in accordance with the Act on the first occasion is insufficient for analysis, has been contaminated, has been lost, or is otherwise not available for analysis, and the second procedure is justified in all the circumstances.

In our survey of magistrates, we asked how many of these types of applications had been heard, and whether the orders sought were granted. One magistrate described having made three such orders. In one case, it was because the initial buccal swab did not have enough biological material on it to analyse. In another case it was because police used the wrong type of camera to take the initial photographs.

We are not aware of any difficulties with these provisions.

7.4.13. Further applications

If a magistrate refuses an application for an order authorising a forensic procedure on a suspect, police cannot reapply unless they provide additional information that justifies the making of the further application.⁶⁶²

One magistrate described having made an order after the initial application had been refused:

Another magistrate had refused an application where the magistrate was not satisfied... that an adequate description of the suspect was given in the application to say the respondent was reasonably suspected. The police then came back with very detailed descriptions of the suspect that had been given by witnesses. The defence argued that this was not additional information because police already had these descriptions when the first application was made. I held in favour of the applicant that it was "additional" material in relation to the application.⁶⁶³

Again, we are not aware of any difficulties with these provisions.

7.5. Volunteers: proceeding by consent

7.5.1. When can police ask a volunteer to undergo a forensic procedure?

Volunteers can only undergo a forensic procedure by consent. The Act does not set out any criteria for when police may ask an adult volunteer to consent to a forensic procedure – it simply defines a volunteer as a person, other than a suspect or excluded volunteer (victim), who volunteers to police to undergo a forensic procedure.⁶⁶⁴ If the volunteer is a child or incapable person, the proposed procedure may be carried out with the informed consent of the person's parent or guardian, provided the child or incapable person does not object to or resist the procedure.⁶⁶⁵

A typical volunteer is a person who, while not a suspect, has good reason for his or her DNA to be on a victim (such as the partner of a person who has been sexually assaulted by someone else) or at a crime scene (such as a witness, or a person who lives at or has recently been to the place where a crime has been committed). DNA samples obtained from crime scenes are often mixed, and the laboratory may be able to determine the DNA profile of an unknown offender if it has the DNA profiles of the other people whose DNA is also present in the mixture.

Case Study 43

A 25 year old woman went to the toilet in the shopping centre where she worked. A young man climbed into her cubicle, held up a knife and put a hand over her face. He threatened her, told her to turn around and not to pull up her pants. One of the other toilets flushed and hearing this the offender unlocked the door and ran away. There was security footage of the offender entering and leaving the complex, but it was not of very good quality. After making further inquiries police identified a 14 year old suspect, who was arrested and interviewed. He admitted being in the vicinity but denied any involvement in the assault. Police obtained a DNA sample from the toilet cubicle wall, which contained DNA from two people, one male and one female. Police applied to a court to have a DNA sample taken from the 14 year old suspect. The mixed sample was analysed and compared to the sample provided by the suspect. Police were advised that the suspect could be the male contributor, but this could only be verified with a high degree of certainty if the female contributor could also be identified. Police asked all women known to have been in the toilets around the time of the assault to provide a DNA sample for elimination purposes. Samples were taken from a number of people, including cleaners, security officers and other people who worked at the complex. The suspect subsequently pleaded guilty to being armed with intent to commit an indecent assault.⁶⁶⁶

In this case, the 14 year old was sampled as a suspect, while the others (the people who worked at the shopping centre who had a legitimate reason for their DNA being at the crime scene) were sampled as volunteers.

Case Study 44

A woman was unable to find a taxi in the early hours of the morning and accepted a lift from an unknown man. She directed him to her house but he refused to let her out of the car. He kept driving for a while, then stopped the car, reclined her seat, climbed on top of her and sexually assaulted her. He then drove her back to her house and let her out of the car. On arrival she told her husband what had just happened and he contacted police. Police immediately identified a suspect. The woman was taken to hospital to be examined, and a DNA sample was taken from her husband for elimination purposes.⁶⁶⁷

People may also volunteer a DNA sample to police help identify a deceased relative:

Case Study 45

A woman reported not having seen an elderly neighbour for a couple of weeks. Police entered the premises and found the woman, deceased and badly decomposed. After extensive inquiries, police were unable to locate dental records, so they asked the woman's brother to provide a DNA sample, so the identity of the deceased could be confirmed.⁶⁶⁸

The definition of a volunteer, as a person "who volunteers to a police officer to undergo a forensic procedure," is not very clear. Does it require the person to volunteer the sample of their own volition? Or can police ask the person to undergo the procedure? Some other jurisdictions have interpreted 'volunteer' very narrowly, for example the explanatory memoranda to the equivalent legislation in the Australian Capital Territory, which is substantially similar to the New South Wales Act, explains:

*The power to take a DNA sample cannot be exercised automatically... For suspects and offenders the circumstances in which consent may be requested are limited, and include a requirement that the request be justified. There is no power to 'solicit' consent from volunteers – people cannot be asked by police to consent to a procedure if they are not suspects or serious offenders, but they may come forward at their own initiative... A police officer can only request a person's consent to a forensic procedure under the provisions dealing with suspects and serious offenders.*⁶⁶⁹

In our view, this is not very useful. It would certainly be most unusual for a person to walk into a police station and volunteer to provide a DNA sample in the interests of law enforcement. Further, it is unlikely people would know that police would like their DNA sample to use in the investigation of an offence to which they have some connection. In case study 43, it is unlikely the people who may have contributed to the mixed DNA sample – cleaners, security officers and other people who worked at the shopping centre – would have volunteered to provide a sample unless police asked them to provide one.

In its submission, Legal Aid NSW recommended changing the definition of volunteer to “a person, other than a suspect, who consents to a request by a police officer to undergo a forensic procedure.”⁶⁷⁰ We agree that this is clearer than the current definition of a person other than a suspect “who volunteers to a police officer to undergo a forensic procedure.” We also note that the equivalent legislation in South Australia specifies that a forensic procedure can only be conducted on a volunteer if “the person on whom the procedure is carried out is not under suspicion.”⁶⁷¹ This may also clarify that a person who is under suspicion cannot be treated as a volunteer.

In our draft report, we made a provisional recommendation, that the definition of volunteer be changed to “a person who is not under suspicion, who consents to a request by a police officer to undergo a forensic procedure.” Or, in the case of a child or incapable person, “whose parent or guardian consents to a request by a police officer that the child or incapable person undergo a forensic procedure.”

NSW Police did not support this change, simply commenting, “this recommendation is problematic and provides fewer clarifications in some aspects.”⁶⁷²

The Attorney General’s Department advised that it is currently implementing part of the recommendation. It is preparing a Bill that will “change the definition of volunteer to include the new test that the person (or parent or guardian where appropriate) consent to a request by a police officer to undergo the procedure.” However, it raised concerns about the proposal to define a volunteer as “a person who is not under suspicion”:

For the reasons set out in paragraph 7.1 of the draft Report, the distinction between a suspect and volunteer is a very significant one under the Act. A person may be “under suspicion” by investigating police but may not fit the definition of “suspect” under the Act. Any definition that created a lacuna where a person might be neither a suspect nor a volunteer for the purpose of the Act, would be highly undesirable. This portion of the draft Recommendation may need to be reconsidered.

As discussed in paragraph 7.1.3, the distinction between suspects and volunteers is not always clear. Whether a “person of interest” should be considered a suspect or volunteer will depend on the circumstances, in particular whether the evidence supports a reasonable suspicion that the person committed an offence. We concluded in our above discussion that in the event of uncertainty, police should err on the side of treating people of interest as volunteers. After further consideration, we agree that the definition of a volunteer should remain “a person other than a suspect” rather than “a person who is not under suspicion.” We also note here that Recommendation 11, which relates to the cautioning of volunteers, would address some of the concerns we have outlined above.

Recommendation 26

The definition of ‘volunteer’ in the *Crimes (Forensic Procedures) Act 2000* be amended so that it provides words to the effect that a volunteer is a person (other than a suspect or excluded volunteer) who consents to a request by a police officer to undergo a forensic procedure, or in the case of a child or incapable person, whose parent or guardian consents to a request by a police officer that the child or incapable person undergo a forensic procedure.

7.5.2. Records of consent

The consent form must state the name of the person giving consent, a description of the forensic procedure, the name of the police officer who requested consent, a statement that the required information has been provided, the name of the independent person in whose presence the consent is given, and a statement indicating whether consent is given subject to a condition about which index of the DNA database, if any, the volunteer’s profile will be placed on.⁶⁷³ The consent form must be signed by the volunteer, or parent or guardian where applicable. The signature must be witnessed by an independent person, who cannot be a police officer, or other person

involved in the investigation of the offence. A copy of the consent form must be given to the volunteer, parent or guardian as soon as practicable.⁶⁷⁴

NSW Police has developed separate consent forms for suspects, volunteers, and children and incapable people, to reflect the legislative requirements relating to each category. During our audits, we found that some commands were not aware that NSW Police had issued separate consent pads for volunteers and for children and incapable people. Some had volunteers sign the volunteer information sheet, while others were using suspect consent forms for all forensic procedures. This raises concerns that forensic procedures may have been conducted on volunteers without complying with the requirements set out in the legislation – specifically, that the volunteer signed the consent form in the presence of an independent person, and that the volunteer specified whether his or her DNA profile would be put on the DNA database and what it would be matched against.

We also have concerns about whether volunteers are giving informed consent to forensic procedures. As discussed in chapter 6, police are not always providing the correct information to volunteers. In particular, there is considerable confusion among police officers about whether volunteer profiles are put on the DNA database, and what index they should be put on. As discussed at 6.1.4, DAL puts all volunteer profiles on the DNA database. It does not match them against any of the other indexes, unless it confirms with the officer who took the sample that the volunteer did actually specify that his or her DNA sample could be used for unlimited purposes.

We are concerned that many volunteers have provided DNA samples on the basis that their profile would not be put on the DNA database, when in fact it has been.

Our recommendations 11 and 12 about providing accurate information to volunteers about forensic procedures should address our concerns about whether volunteers are giving informed consent. In addition, our recommendation 3(b) as to which police officers should perform forensic procedures will increase the likelihood that officers seeking consent from volunteers understand the distinctions between volunteer and suspect testing. The proposed forensic procedures book will include a copy of the volunteers form, allowing for easy auditing and education plus other remedial responses where necessary. Given the development and the practice of DAL to date, we do not propose to make any further recommendations on this issue.

7.5.3. Should child volunteers be able to consent to forensic procedures?

A forensic procedure may be carried out on a child volunteer with the consent of the child's parent or guardian, provided the child does not object to or resist the procedure.⁶⁷⁵ Unlike child suspects, child volunteers can never be compelled to undergo a forensic procedure, and any DNA sample taken from the child volunteer will normally be used within the case for which it was provided, and will not be matched against the entire crime scene index.

We note the 2002 recommendation by the Legislative Council Standing Committee on Law and Justice that the Attorney General consider amending the child volunteer provisions so that forensic procedures can be conducted on volunteers between the ages of 10 and 14 with the consent of the child and the child's parent, and volunteers aged 15 to 17 can consent to forensic procedures themselves.⁶⁷⁶ In submissions to our review, Legal Aid NSW and the Law Society of NSW suggested that a volunteer aged between 14 and 16 should be able to consent, provided the child's parent or guardian also consents, and that a volunteer aged between 16 and 18 should be able to consent to the procedure without the involvement of a parent or guardian.⁶⁷⁷

We generally support the recommendation that child volunteers who are sufficiently mature should be able to consent to forensic procedures. Our only concern is that, because the distinction between suspects and volunteers is not always clear, police officers may treat children who are under investigation for an offence but who do not meet the threshold of 'suspect' for the purposes of the Act, as 'volunteers'. If the child consents to the forensic procedure (or can be persuaded to consent), this obviates the need for police to obtain a court order. The Act as it currently stands protects children against this, to a limited extent, by requiring consent from the child's parent or guardian before the procedure can be conducted.

In our view these concerns could be adequately addressed by ensuring that child volunteers are given appropriate information about the proposed procedure, including why the procedure is required, that it might produce evidence against them, and that they do not have to undergo the procedure if they do not want to. Our recommendation 13, about providing child volunteers with information about forensic procedures, seeks to address this problem. On this basis, we agree with the recommendation of the Standing Committee that volunteers aged between 15 and 17 should be able to consent to forensic procedures. However, an appropriate safeguard would be to ensure that child volunteers could only consent to providing a DNA sample for use within a particular case, and not for unlimited purposes.

For volunteers aged 10 to 14, our view is that the current position should remain – that forensic procedures can be conducted with the consent of the child’s parent or guardian, provided the child does not object to or resist the procedure.⁶⁷⁸ While the Act does not explicitly require the consent of the child, our recommendation 13, about providing information about forensic procedures to child volunteers, would increase the child volunteer’s participation in the process.

Recommendation 27

The *Crimes (Forensic Procedures) Act 2000* be amended in respect of the child volunteer provisions for children aged between 15 and 17, allowing these children to consent to forensic procedures for within case matching or limited purposes on their own behalf.

NSW Police supports this recommendation.⁶⁷⁹

7.5.4. Authorisation by consent on behalf of an incapable person

A forensic procedure may be carried out on a volunteer who is an incapable person with the consent of the person’s parent or guardian, provided the person does not object to or resist the procedure.⁶⁸⁰

The Intellectual Disability Rights Service argued that it was inappropriate to permit the parent or guardian of an incapable person to consent to a forensic procedure on the person’s behalf, describing it as “scandalous” that “someone who is not in a position to consider his or her own interests can be ‘volunteered’ by a third person to give a DNA sample to police.”⁶⁸¹

In our view, there are clearly some circumstances where it is appropriate to allow a parent or guardian to authorise a forensic procedure being conducted on an incapable person, for example where a DNA sample is taken for the purpose of elimination, and the person’s DNA profile is not matched against anything else on the DNA database. However, we understand concerns about a parent or guardian being able to consent to a procedure on behalf of an incapable person, given that:

- The parent or guardian may authorise the use of the person’s DNA profile for “unlimited purposes,” which includes criminal investigations and any other purpose for which the DNA database may be used.
- The parent or guardian may specify the length of time for which the person’s DNA profile is to be retained on the DNA database.

There are good reasons why DNA profiles obtained from volunteers who are incapable persons should only be used within the case for which the sample was provided, and should not be matched against any other indexes on the DNA database. This is in effect a balance between the competing considerations. We note that this is in effect, the present practice of DAL.

7.5.5. Use of forensic material provided by child or incapable volunteers

In our draft report, we made a provisional recommendation, that the Act be amended “to provide that where a forensic procedure is conducted on a volunteer who is an incapable person, and a DNA profile obtained, the profile only be used within the case for which it was provided, and not permitted to be matched against any other indexes on the DNA database.” The Attorney General’s Department commented that this recommendation seems appropriate, and that it “appears to simply propose that the existing practice regarding incapable persons be formalised in legislation.”⁶⁸²

NSW Police, however, did not support the recommendation, on the basis that it “can foresee circumstances where it may be in the interests or at the request of such a volunteer, for example in relation to missing persons.”⁶⁸³

We remain of the view that an incapable person’s parent or guardian should not be able to authorise use of the person’s DNA profile for “unlimited purposes.” If the person’s DNA profile were needed for purposes other than the case for which it was provided, it would be more appropriate for a court to determine whether the sample should be taken, rather than the person’s parent or guardian. We also consider this safeguard should apply to child volunteers as well as incapable adults. For these reasons, we now recommend that where police seek to

use a DNA profile from a volunteer who is a child or incapable person for other purposes, this should have to be authorised by order of a court.

Recommendation 28

The *Crimes (Forensic Procedures) Act 2000* be amended to provide that, where a forensic procedure is conducted on a volunteer who is a child or incapable person, and a DNA profile obtained, the profile only be used within the case for which it was provided, and not permitted to be matched against any other indexes on the DNA database, unless otherwise authorised by a court.

Section 80 of the Act, which sets out the circumstances in which a magistrate may order the carrying out of a forensic procedure on a child or incapable person, may need to be amended to enable magistrates to authorise a forensic procedure in such circumstances.

7.6. Volunteers: proceeding by court order

Courts only authorise forensic procedures on volunteers in very limited circumstances. A court can only authorise the carrying out of a forensic procedure on a volunteer if the volunteer is a child or incapable person, and consent cannot reasonably be obtained from the volunteer's parent or guardian, or where the parent or guardian who refuses consent is a suspect and there are reasonable grounds to believe the procedure is likely to produce evidence tending to confirm or disprove he or she committed an offence.⁶⁸⁴

There are additional factors a magistrate must take into account when deciding whether to authorise the carrying out of a forensic procedure on a volunteer who is a child or incapable person. These include the seriousness of the offence being investigated, the best interests of the child or incapable person, and any wishes the child, incapable person, parent or guardian may have as to whether the procedure should be carried out.⁶⁸⁵

It would appear these provisions are not used very often and we are not aware of any difficulties with them.

7.7. Mass Screenings

In some circumstances, investigating authorities may decide to take DNA samples from large numbers of volunteers in the hope of identifying an offender. Mass screenings can be very resource intensive, and so tend to be used only for unsolved violent or sexual offences where other investigative avenues have been exhausted.

The rationale for DNA sampling masses of volunteers is that the offender might volunteer a DNA sample. Even if they do not, police can better target the investigation by excluding large numbers of potential suspects. Further, the offender may attract attention by refusing to supply a sample or by trying to get somebody else to provide a sample in their place.

7.7.1. Mass screenings in other jurisdictions

Mass screenings in the United Kingdom are called "intelligence led screenings." Police conducted their first such screening in the late 1980s after two girls were raped and murdered. Police took blood samples from 600 men in three small villages surrounding the murder sites. A local baker persuaded a friend to stand in for him during the blood sampling. When police heard of this they interviewed him and took a blood sample, which confirmed the baker's involvement in both offences. He was subsequently sentenced to life imprisonment.⁶⁸⁶

In the last ten years, law enforcement agencies in the United Kingdom have taken over 85,000 DNA samples in almost 300 mass screenings.⁶⁸⁷ In some of these, the offender has volunteered a DNA sample to police. For example, in 1999, police conducted a mass screening in an area of Northern Ireland where a 91 year old woman had died after being sexually assaulted. The DNA profile from one of the men who had volunteered a sample matched the profile obtained from the victim. The volunteer argued that the sample had been contaminated during transportation, but subsequent tests showed the same result. He was convicted and sentenced to 16 years imprisonment.⁶⁸⁸

Some mass screenings have enabled police to solve crimes from some time ago. For example, in 2000 police took DNA samples from 540 volunteers in the investigation of a 1977 murder in Leeds. One of the profiles obtained

matched the DNA profile obtained from the deceased's clothing. The person who had provided the sample subsequently pleaded guilty to the murder.⁶⁸⁹

Previously, DNA samples obtained through mass screenings in the United Kingdom were not routinely kept on the national DNA database. However, changes to the legislation in 2001 provided for volunteer profiles to be kept on the database, with the volunteer's consent. Once consent is given it cannot be withdrawn – the volunteer's profile is added to the database and from then until the person's death it can be searched against profiles obtained from unsolved crime scenes.⁶⁹⁰ Retaining profiles of volunteers in mass screenings has been described as "beneficial" by the custodian of the database, on the basis that it helps increase the number of profiles on the database.⁶⁹¹

Mass screenings in the United States are called DNA "dragnets" or "sweeps". They have been conducted in a number of states, including Florida, California, Maryland, Louisiana and Michigan.⁶⁹²

A recent study by the Department of Criminal Justice at the University of Nebraska at Omaha on mass screenings found that they are not particularly effective in identifying offenders – in the 18 mass screenings considered in the review, only one offender was identified, and that was in a targeted screening of only 25 men.⁶⁹³

In one mass screening in the United States, police took DNA samples from over 1,200 men in Louisiana, in the hope of identifying a serial killer. One man, who declined to provide a sample, was told by police that they would obtain a court order and his lack of co-operation would "get in the newspapers." Police obtained a court order and the man was compelled to provide a DNA sample, despite the fact he did not match the physical description of the offender. The offender was eventually identified through other means, and the man sought to have his DNA sample destroyed. The case raised concerns about people who refuse to participate in mass screenings attracting undue suspicion.⁶⁹⁴

Mass screenings have been used with some success in New Zealand. In 1998, a serial rapist was convicted after being identified through a mass screening of over 3,000 men. The offender had been linked to eight different sexual assaults, committed between 1988 and 1996, but had not been identified prior to the screen.⁶⁹⁵

Some countries have conducted extremely large mass screenings – for example in Germany in 1998, an investigation involving the rape and murder of a young girl⁶⁹⁶ resulted in DNA samples being collected from over 16,000 men⁶⁹⁷ and the eventual identification of the offender.

7.7.2. Mass screenings in New South Wales

The *Crimes (Forensic Procedures) Act* does not specifically deal with mass screenings. Police can, however, conduct mass screenings under the volunteer provisions. There is no specific authority required for mass screenings although, being resource intensive, it is unlikely that a mass screening would be conducted without oversight by senior police officers.

The size and scope of a mass screening will vary according to the circumstances. It might be quite broad, for example where police ask whole sections of the population of a particular town to provide DNA samples. Other screens may be narrower, focusing on smaller groups of people, such as residents of a particular building, acquaintances of a particular victim or patrons of a particular pub. For the purposes of our review, we considered a mass screening to be the collection of DNA samples from 10 or more volunteers in relation to a single offence. Because the gender of the offender can be determined by the DNA profile obtained from the relevant crime scene evidence, usually only people of the relevant gender are asked to participate in mass screenings (in practice, typically men).

The most well known mass screening in New South Wales was conducted in Wee Waa, before the volunteer provisions of the Act commenced. Police took DNA samples from almost 500 local men following the violent sexual assault of an elderly woman. Most of the samples were taken in people's homes, although some volunteers went to the police station to provide a sample. The offender provided a sample, but made admissions before it was analysed and subsequently pleaded guilty to the offence. The Wee Waa screening was quite controversial, with some participants accepting that it was a useful way of identifying the offender and others criticising it as a publicity stunt to smooth the way for the introduction of the forensic procedures legislation. It was also criticised for placing pressure on residents to participate in order to avoid attracting suspicion.⁶⁹⁸

Several targeted screens have been conducted in New South Wales since the volunteer provisions of the Act came into force:

Case Study 46

In 2003, police officers conducted a targeted screen of about 80 men in relation to the unsolved murder of a young woman in the Southern Highlands in 1999. Media reports stated that police were asking for DNA samples from various groups, including the deceased's male acquaintances, work colleagues, and all those who had been to the Bargo Hotel on the night she died.⁶⁹⁹ We understand the matter is still under investigation.

Case Study 47

In 2004, police officers conducted a targeted screen in relation to allegations by a Coffs Harbour woman that she had been sexually assaulted by various players from the Bulldogs Rugby League Club. We understand the players were sampled as volunteers. Media reports stated that police interviewed 25 players, and all but one provided DNA samples.⁷⁰⁰ It appears investigating police considered applying for a court order compelling the last player to provide a DNA sample, but decided against this course of action,⁷⁰¹ we presume because there were no reasonable grounds for believing the player had committed an offence.

Case Study 48

A young woman disappeared after going to a party in a small country town. Her body was found nearby some days later. Police have approached people in the local community for DNA samples and so far have obtained over 25 samples from people who were at the party and other locals. We understand the matter is still under investigation.⁷⁰²

In our survey, we asked local area commands whether they had conducted any mass screenings. Apart from those detailed above, none had.

7.7.3. Issues raised by mass screenings

A mass screening may be a useful investigative strategy in appropriate circumstances. However, mass screenings raise a number of different issues:⁷⁰³

- people who are approached to provide a sample may feel compelled to comply – in which case it is questionable whether the forensic procedure is truly voluntary
- people who decline to participate may attract unreasonable suspicion by police and other members of the community
- people asked to provide a DNA sample may have legitimate concerns about how long their sample will be kept, what it will be used for, and whether it will be put on the DNA database
- DNA sampling large numbers of people in the hope of identifying an offender undermines established legal principles, including the presumption of innocence and privilege against self-incrimination
- unlike other forensic procedure volunteers, who are not suspects but have a legitimate reason for their DNA to be on the victim or at the crime scene, mass screening volunteers may have no connection at all to the crime
- given that the majority of volunteers will have no connection to the crime, the intrusion into their personal and genetic privacy may not be warranted
- there are no limits on who can be asked to volunteer a sample, meaning that requests can be excessive, and
- mass screenings are expensive and may not be very effective.

Other reviews of forensic procedures legislation have considered whether mass screenings need to be more closely regulated. The Standing Committee on Law and Justice recommended that the Attorney General consider amending the Act so that police would have to obtain a court order before conducting a mass screening, and would have to satisfy the court that it was justified in all the circumstances, taking into account whether a smaller number of potential suspects could instead be tested, and whether any other less intrusive investigative means are available.⁷⁰⁴ The Australian Law Reform Commission considered it necessary “to ensure that individuals who would not otherwise be considered suspects in a criminal investigation do not feel undue pressure to ‘volunteer’ for a forensic procedure in order to eliminate themselves from potential suspicion,” but decided against requiring court orders to authorise mass screenings. Instead, it recommended (in the context of the equivalent federal legislation) that the government develop guidelines for mass screenings, to cover both the process for approving the screening and the manner in which it is to be conducted.⁷⁰⁵

One of the difficulties in regulating mass screenings is that the term is difficult to define. Wee Waa is a clear example of a mass screening. However, there are other circumstances where police officers seek DNA samples from a smaller group of people over a period of time, as the investigation progresses, rather than masses of people who have only a very tenuous connection to the crime, if any.

In addition, we note that mass screenings are expensive to run and may not be the most effective investigative strategy. Police officers are required, in accordance with the Act, to provide each volunteer with the relevant information, obtain his or her written consent, electronically record the procedure and so on. The samples then have to be sent to the laboratory for analysis. Given that mass screenings are so resource intensive, and may be of limited investigative value, it would be hoped that police would not conduct a Wee Waa style mass screening unless it was reasonably necessary and had been approved at a fairly senior level within NSW Police. We note that no Wee Waa style mass screenings have been conducted in New South Wales since the volunteer provisions of the Act came into force.

Our primary concern about police conducting mass screens is whether the testing officers are providing accurate advice to volunteers, and consequently whether volunteers are giving properly informed consent. In particular, police are likely to tell volunteers that their profile will only be used to eliminate them from suspicion, and will not be used for any other purpose. However, we know that DAL puts all volunteer samples on the DNA database, and does not destroy them unless the volunteer makes a written request to NSW Police that the sample be destroyed.

We are also concerned that, unlike suspects, people who participate in mass screenings as volunteers need not be informed that the procedure may produce evidence against them.⁷⁰⁶ This was discussed previously at 6.1.4. This would be adequately addressed by our recommendation 11, that police be required to inform all volunteers that the forensic procedure may produce evidence against them, which can be used in court.

Mass screen volunteers, like people of interest, differ from ‘true’ volunteers in that they are asked to provide a DNA sample because they are potential suspects, not because they have a legitimate reason for their DNA being at the crime scene. In our view, police officers should be required by law to inform all volunteers that the forensic procedure may produce evidence against them, which might be used in a court or law.

Otherwise, we agree with the position of the Australian Law Reform Commission, that there should be guidelines covering the process for approving mass screenings, and the manner in which they are to be conducted. The guidelines should also clarify what constitutes a mass screening, and what information should be provided to mass screen volunteers. In our view, given the special nature of mass screenings, it is appropriate they are adequately regulated.

Recommendation 29

The Minister regulate arrangements for mass screenings. This should include:

- a. a definition of what constitutes a “mass screening”
- b. a requirement that mass screenings only be conducted in the approved manner
- c. a requirement that a senior officer (Superintendent or above) approve the undertaking of a mass screening
- d. the criteria to be met before a senior officer approves a mass screening
- e. that samples obtained during a mass screening only be used for “within case matching” with the relevant criminal investigation
- f. a requirement that samples be destroyed within a specified period after the relevant case or investigation is finalised
- g. the information to be provided to volunteers, and
- h. the arrangements for conduct of mass screening procedures.

NSW Police indicated it supports the recommendation, and will provide further comment once the proposed arrangements are developed.⁷⁰⁷

The Attorney General's Department commented in part:

There is a certain level of ambiguity in the discussion between in-case matching and off-database matching. In true 'in-case matching', there is no legislative need for the DNA profile to be loaded to the database at all—the Act does not prevent the matching of two DNA samples, neither of which are on the database. However, in practice, as set out in paragraph 6.1.4 of the report, all volunteer samples are currently loaded to the volunteers (limited purposes) index of the database, presumably as this is the most efficient way of DAL performing the matching. It is unclear whether proposed Recommendation 30(d) is intended to prevent the placing of the person samples from volunteers on the volunteers (limited purposes) index of the database.⁷⁰⁸

Our recommendation that “that samples obtained during a mass screening only be used for ‘within case matching’ within the relevant criminal investigation” is not intended to prevent the placing of profiles obtained through mass screenings on the volunteers (limited purposes) index of the database. Whether profiles obtained through a mass screening are placed on the volunteers (limited purposes) index, or are not put on the database at all, may be a matter for consideration by the Minister in developing arrangements for mass screenings. Our concern is that DNA samples provided by mass screen participants should not be used beyond the case for which they were provided, for example by matching them against the unsolved crime scenes index. We also stress that should profiles obtained from volunteers during mass screenings be put on the database, as would appear to be the current practice by DAL, this should be explained to volunteers. The Attorney General's Department also commented:

The proposed Recommendation raises the broader question of whether the Crimes (Forensic Procedures) Act is intended to be a code; or alternatively whether any forensic investigative conduct not specifically mentioned in the Act is completely unregulated. The Courts have taken the view that the latter formulation is the correct interpretation of the Act as it now stands... The current state of affairs provides little incentive for investigating police officers to work within the confines of the Act, rather than arranging their investigation so that the Act does not apply at all. This issue may need to be considered in due course.⁷⁰⁹

Our own view is that it is clearly the intention that persons who provide samples as part of mass screenings do so as volunteers. If there is room for these to take place outside the Act, this discretion should be removed. We have amended our recommendation accordingly.

Endnotes

- ⁴⁴⁰ *Crimes (Forensic Procedures) Act 2000* s 3.
- ⁴⁴¹ *Crimes (Forensic Procedures) Act 2000* s 76.
- ⁴⁴² *Crimes (Forensic Procedures) Act 2000* s 12 and 20.
- ⁴⁴³ *Crimes (Forensic Procedures) Act 2000* s 76(1).
- ⁴⁴⁴ *Crimes (Forensic Procedures) Act 2000* s 14, 17 and 22.
- ⁴⁴⁵ *Crimes (Forensic Procedures) Act 2000* s 8, 24, 76 and 77.
- ⁴⁴⁶ *Crimes (Forensic Procedures) Act 2000* s 13, 77 and 78.
- ⁴⁴⁷ *Crimes (Forensic Procedures) Act 2000* s 93.
- ⁴⁴⁸ *Crimes (Forensic Procedures) Act 2000* s 88.
- ⁴⁴⁹ *Crimes (Forensic Procedures) Act 2000* s 77(2)(d).
- ⁴⁵⁰ The Sample Information Form (P377).
- ⁴⁵¹ Information obtained through Ombudsman review of COPS records.
- ⁴⁵² Information obtained through Ombudsman review of COPS records.
- ⁴⁵³ Information obtained through Ombudsman review of COPS records.
- ⁴⁵⁴ Information obtained through Ombudsman review of COPS records.
- ⁴⁵⁵ Information obtained through Ombudsman review of COPS records.
- ⁴⁵⁶ FPIT intranet site, frequently asked questions page, accessed 8 September 2005.
- ⁴⁵⁷ Information obtained through Ombudsman review of COPS records.
- ⁴⁵⁸ Information obtained through Ombudsman review of COPS records.
- ⁴⁵⁹ Information obtained through Ombudsman review of COPS records.
- ⁴⁶⁰ "Forensic procedures involving volunteers and excluded volunteers", *Police Weekly* Volume 15, Number 20, 26 May 2003 at p. 10.
- ⁴⁶¹ *R v White* [2005] NSWSC 60 and transcript of proceedings, 14 February 2005.
- ⁴⁶² *R v White* [2005] NSWSC 60, transcript of proceedings, 14 February 2005, p. 5 line 28.
- ⁴⁶³ *R v White* [2005] NSWSC 60, transcript of proceedings, 14 February 2005, p. 12 line 5.
- ⁴⁶⁴ *R v Rondo* [2001] NSWCCA 540 (24 December 2001) at paragraph 53 (Smart AJ).
- ⁴⁶⁵ *Orban v Bayliss* [2004] NSWSC 428.
- ⁴⁶⁶ *Maguire v Beaton* (unreported) NSWSC (11 May 2005) (Latham J).
- ⁴⁶⁷ NSW Department of Aboriginal Affairs submission, 11 April 2005.
- ⁴⁶⁸ COPS download data provided by FPIT on 15 July 2005. This does not include the 26 blood samples taken from suspects as most of these either were taken under other legislation or were not forensic procedures for the purposes of the Act: see discussion of blood samples at 8.6.3.
- ⁴⁶⁹ *Crimes (Forensic Procedures) Act 2000* s 12.
- ⁴⁷⁰ This is discussed in more detail at 7.1.2.
- ⁴⁷¹ *Crimes (Forensic Procedures) Act 2000* s 12(b).
- ⁴⁷² *Crimes (Forensic Procedures) Act 2000* s 82(4)(c).
- ⁴⁷³ *Crimes (Forensic Procedures) Act 2000* s 3, 12(b), 8(2) and 23.
- ⁴⁷⁴ See *Law Enforcement (Powers and Responsibilities) Act* s 112 (formerly *Crimes Act 1900* s 356A).
- ⁴⁷⁵ *Law Enforcement (Powers and Responsibilities) Regulation 2005*, Schedule 2, clause 3 (formerly *Crimes (Detention After Arrest) Regulation 1998*, Schedule 1).
- ⁴⁷⁶ NSW Police *Code of Practice for Custody, Rights, Investigation, Management and Evidence*.
- ⁴⁷⁷ NSW Police, *Guidelines for Police when Interviewing People with Impaired Intellectual Functioning*.
- ⁴⁷⁸ NSW Ombudsman, *The Forensic DNA Sampling of Serious Indictable Offenders under Part 7 of the Crimes (Forensic Procedures) Act 2000* (August 2004) at p. 129 to 137.
- ⁴⁷⁹ Anti-Discrimination Board submission, 18 February 2005.
- ⁴⁸⁰ Anti-Discrimination Board submission, 18 February 2005.
- ⁴⁸¹ Anti-Discrimination Board submission, 18 February 2005.

- ⁴⁸² Intellectual Disability Rights Service submission, 11 March 2005.
- ⁴⁸³ *Crimes (Forensic Procedures) Act 2000* s 3. Emphasis added.
- ⁴⁸⁴ Intellectual Disability Rights Service submission, 11 March 2005; NSW Department of Ageing, Disability and Home Care submission, 9 March 2005; and Anti-Discrimination Board submission, 18 February 2005.
- ⁴⁸⁵ Intellectual Disability Rights Service submission, 11 March 2005.
- ⁴⁸⁶ Anti-Discrimination Board submission, 18 February 2005.
- ⁴⁸⁷ Anti-Discrimination Board submission, 18 February 2005.
- ⁴⁸⁸ Intellectual Disability Rights Service submission, 11 March 2005.
- ⁴⁸⁹ Intellectual Disability Rights Service submission, 11 March 2005.
- ⁴⁹⁰ Intellectual Disability Rights Service submission, 11 March 2005.
- ⁴⁹¹ Information obtained through Ombudsman review of COPS records.
- ⁴⁹² NSW Police response to Ombudsman draft report, 2 June 2006.
- ⁴⁹³ NSW Police response to Ombudsman draft report, 2 June 2006.
- ⁴⁹⁴ *Crimes (Forensic Procedures) Act 2000* s 12(c) to (f).
- ⁴⁹⁵ *Summary Offences Act 1988* (NSW).
- ⁴⁹⁶ *Crimes (Forensic Procedures) Act 2000* s 12(c), (d), (e) and (f).
- ⁴⁹⁷ *Crimes Act 1900* (NSW) s 4.
- ⁴⁹⁸ Information obtained through Ombudsman review of COPS records.
- ⁴⁹⁹ Information obtained through Ombudsman review of COPS records.
- ⁵⁰⁰ Information obtained through Ombudsman review of COPS records.
- ⁵⁰¹ Confidential Magistrate survey response, 13 January 2005.
- ⁵⁰² Legal Aid NSW submission, 28 February 2005.
- ⁵⁰³ Ombudsman audit of local area commands, confidential interview with police officer, 13 July 2004.
- ⁵⁰⁴ Information obtained through Ombudsman review of COPS records.
- ⁵⁰⁵ Information obtained through Ombudsman review of COPS records.
- ⁵⁰⁶ Legal Aid NSW submission, 28 February 2005.
- ⁵⁰⁷ *Crimes (Forensic Procedures) Act 2000* s 12.
- ⁵⁰⁸ Legal Aid NSW submission, 28 February 2005.
- ⁵⁰⁹ *Walker v Budgen* [2005] NSWSC 898 (7 September 2005).
- ⁵¹⁰ *Walker v Budgen* [2005] NSWSC 898 (7 September 2005) at paragraph 37 (Hall J). See *George v Rockett* (1990) 170 CLR 104 at 115; and *R v Rondo* [2001] NSWCCA 540 (24 December 2001).
- ⁵¹¹ *Walker v Budgen* [2005] NSWSC 898 (7 September 2005) at paragraph 28 (Hall J).
- ⁵¹² DAL further response to Ombudsman investigation notice, 24 March 2005.
- ⁵¹³ Information obtained through Ombudsman review of COPS records. See *R v Hucker* [2002] NSWSC 1068 (6 November 2002) (Howie J).
- ⁵¹⁴ NSW Police intranet FPIT website accessed 29 September 2005.
- ⁵¹⁵ *Crimes Act 1914* (Cth) s 23WI and 23WO.
- ⁵¹⁶ Law Society of NSW submission, 9 March 2005; Legal Aid NSW submission, 28 February 2005.
- ⁵¹⁷ Law Society of NSW submission, 9 March 2005.
- ⁵¹⁸ NSW Legislative Council Standing Committee on Law and Justice, *Review of the Crimes (Forensic Procedures) Act 2000* (7 February 2002), Recommendation 15.
- ⁵¹⁹ Ombudsman video audit, 25 August 2004.
- ⁵²⁰ Consent form reviewed during Ombudsman audit of local area commands, dated 31 July 2001.
- ⁵²¹ Ombudsman video audit, 8 November 2004.
- ⁵²² Legal Aid NSW submission, 28 February 2005.
- ⁵²³ NSW Department of Aboriginal Affairs submission, 11 April 2005.
- ⁵²⁴ *Crimes (Forensic Procedures) Act 2000* s 3 and 12(a).
- ⁵²⁵ Or another offence arising out of the same circumstances as that offence, or another offence in respect of which evidence likely to be obtained as a result of carrying out the procedure on the suspect is likely to have probative value: *Crimes (Forensic Procedures) Act 2000* s 20(c).

- ⁵²⁶ *R v Rondo* [2001] NSWCCA 540 (24 December 2001) at paragraph 53 (Smart AJ).
- ⁵²⁷ *Crimes (Forensic Procedures) Act 2000* s 12(g).
- ⁵²⁸ *Crimes (Forensic Procedures) Act 2000* s 20(e).
- ⁵²⁹ Ombudsman audit of local area commands, confidential interview with police officer, 2 August 2004.
- ⁵³⁰ Police Association of NSW submission, March 2005.
- ⁵³¹ Ombudsman audit of local area commands, confidential interview with police officer, 29 September 2004.
- ⁵³² Ombudsman audit of local area commands, confidential interview with police officer, 13 July 2004.
- ⁵³³ Information obtained through Ombudsman video audit, 25 August 2004.
- ⁵³⁴ Information obtained through Ombudsman review of COPS records.
- ⁵³⁵ Police Association of NSW submission, March 2005.
- ⁵³⁶ Responses to Ombudsman LAC survey.
- ⁵³⁷ Ombudsman audit of local area commands, confidential interview with police officer, 2 August 2004.
- ⁵³⁸ Law Reform Commission of Ireland, "Report on the Establishment of a DNA Database" (November 2005) at paragraphs 2.33 and 2.34.
- ⁵³⁹ *Criminal Investigation (Identifying People) Act 2002 (WA)* s 8.
- ⁵⁴⁰ NSW Ombudsman, *The Forensic DNA Sampling of Serious Indictable Offenders under Part 7 of the Crimes (Forensic Procedures) Act 2000* (August 2004), Recommendation 22.
- ⁵⁴¹ Confidential LAC Survey Response
- ⁵⁴² *Orban v Bayliss* [2004] NSWSC 428 at paragraph 32 (Simpson J).
- ⁵⁴³ NSW Ombudsman, *The Forensic DNA Sampling of Serious Indictable Offenders under Part 7 of the Crimes (Forensic Procedures) Act 2000* (August 2004), Recommendation 21.
- ⁵⁴⁴ *Crimes (Forensic Procedures) Act 2000* s 14.
- ⁵⁴⁵ Law Society of NSW submission, 9 March 2005; and Legal Aid NSW submission, 28 February 2005.
- ⁵⁴⁶ Information obtained through Ombudsman review of COPS records.
- ⁵⁴⁷ NSW Police response to Ombudsman draft report, 2 June 2006; and Attorney General's Department response to Ombudsman draft report, 5 May 2006.
- ⁵⁴⁸ *Crimes (Forensic Procedures) Act 2000* s 3.
- ⁵⁴⁹ *Crimes (Forensic Procedures) Act 2000* s 18 and 20.
- ⁵⁵⁰ *Crimes (Forensic Procedures) Act 2000* s 21.
- ⁵⁵¹ Confidential LAC survey response.
- ⁵⁵² Confidential LAC survey response.
- ⁵⁵³ Confidential LAC survey response.
- ⁵⁵⁴ Ombudsman audit of local area commands, confidential interview with police officer, 3 August 2004.
- ⁵⁵⁵ Information obtained through Ombudsman review of COPS records.
- ⁵⁵⁶ Information obtained through Ombudsman review of COPS records.
- ⁵⁵⁷ Information obtained through Ombudsman review of COPS records.
- ⁵⁵⁸ As required by *Crimes (Forensic Procedures) Act 2000* s 20(c) and 20(e).
- ⁵⁵⁹ See NSW Legislative Council Standing Committee on Law and Justice, *Review of the Crimes (Forensic Procedures) Act 2000* (7 February 2002), Recommendation 15.
- ⁵⁶⁰ The Hon Michael Kirby, "DNA Evidence: Proceed with Care", based on an address to a seminar at the University of Technology, Sydney, 16 March 2000. Available from the High Court website: http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_dna.htm accessed 23 May 2005.
- ⁵⁶¹ NSW Police response to Ombudsman draft report, 2 June 2006.
- ⁵⁶² NSW Police response to Ombudsman draft report, 2 June 2006.
- ⁵⁶³ NSW Police response to Ombudsman draft report, 2 June 2006.
- ⁵⁶⁴ Attorney General's Department response to Ombudsman draft report, 5 May 2006.
- ⁵⁶⁵ *Crimes (Forensic Procedures) Act 2000* s 3.
- ⁵⁶⁶ Police Association of NSW submission, March 2005.
- ⁵⁶⁷ Police Association of NSW submission, March 2005.
- ⁵⁶⁸ NSW Police response to Ombudsman draft report, 2 June 2006.

- ⁵⁶⁹ *Law Enforcement (Powers and Responsibilities) Act 2002* s 111(1) (formerly section 356(1) of the *Crimes Act 1900*).
- ⁵⁷⁰ *Law Enforcement (Powers and Responsibilities) Act 2002* s 110(4) (formerly section 355(4) of the *Crimes Act 1900*).
- ⁵⁷¹ Confidential survey response. This problem still continues under Part 9 of the *Law Enforcement (Powers and Responsibilities) Act 2002*.
- ⁵⁷² NSW Police Legislative Changes Working Group, "Proposed Amendments to the *Crimes (Forensic Procedures) Act 2000*", undated.
- ⁵⁷³ NSW Police Legislative Changes Working Group, "Proposed Amendments to the *Crimes (Forensic Procedures) Act 2000*", undated.
- ⁵⁷⁴ NSW Police response to Ombudsman draft report, 2 June 2006.
- ⁵⁷⁵ Attorney General's Department response to Ombudsman draft report, 5 May 2006.
- ⁵⁷⁶ NSW Police response to Ombudsman draft report, 2 June 2006; and Attorney General's Department response to Ombudsman draft report, 5 May 2006.
- ⁵⁷⁷ *Crimes (Forensic Procedures) Act* s 82.
- ⁵⁷⁸ *Crimes (Forensic Procedures) Act 2000* s 30 and 31.
- ⁵⁷⁹ *Crimes (Forensic Procedures) Act 2000* s 18 and 23.
- ⁵⁸⁰ Information obtained through Ombudsman review of COPS records.
- ⁵⁸¹ "Married man knowingly infected tourists with AIDS virus, police claim", *Sydney Morning Herald*, 14 April 2004.
- ⁵⁸² *Crimes (Forensic Procedures) Act 2000* s 23.
- ⁵⁸³ Information obtained through Ombudsman review of COPS records.
- ⁵⁸⁴ *Crimes (Forensic Procedures) Act 2000* s 8.
- ⁵⁸⁵ Information obtained through Ombudsman review of COPS records.
- ⁵⁸⁶ Information obtained through Ombudsman review of COPS records.
- ⁵⁸⁷ Information obtained through Ombudsman review of COPS records.
- ⁵⁸⁸ *Crimes (Forensic Procedures) Act 2000* s 3, 8(2) and 23.
- ⁵⁸⁹ *Crimes (Forensic Procedures) Act 2000* s 30(2)(b).
- ⁵⁹⁰ Information obtained through Ombudsman review of COPS records.
- ⁵⁹¹ *Crimes (Forensic Procedures) Act 2000* s 25.
- ⁵⁹² *Crimes (Forensic Procedures) Act 2000* s 25(b), (c), (d) and (e).
- ⁵⁹³ *Crimes (Forensic Procedures) Act 2000* s 25.
- ⁵⁹⁴ Advice from the Attorney General's Department, Court Statistics Unit, 23 April 2004 and 13 September 2005.
- ⁵⁹⁵ Confidential LAC survey response.
- ⁵⁹⁶ Confidential LAC survey response.
- ⁵⁹⁷ *Crimes (Forensic Procedures) Act 2000* s 38.
- ⁵⁹⁸ Advice from the Attorney General's Department, Court Statistics Unit, 23 April 2004 and 13 September 2005.
- ⁵⁹⁹ Confidential Magistrate survey response, 19 January 2005.
- ⁶⁰⁰ Confidential Magistrate survey response, 20 January 2005.
- ⁶⁰¹ Confidential Magistrate survey response, 13 January 2005.
- ⁶⁰² Confidential Magistrate survey response, 13 January 2005.
- ⁶⁰³ Confidential Magistrate survey response, 13 January 2005.
- ⁶⁰⁴ Information obtained through Ombudsman review of COPS records.
- ⁶⁰⁵ Police Association of NSW submission, March 2005.
- ⁶⁰⁶ Confidential Magistrate survey response, 13 January 2005.
- ⁶⁰⁷ Confidential Magistrate survey response, undated.
- ⁶⁰⁸ See *Orban v Bayliss* [2004] NSWSC 428; and *Walker v Budgen* [2005] NSWSC 898 (7 September 2005).
- ⁶⁰⁹ *Orban v Bayliss* [2004] NSWSC 428 at paragraph 54 (Simpson J).
- ⁶¹⁰ Law Society of NSW submission, 9 March 2005; and Legal Aid NSW submission, 28 February 2005.
- ⁶¹¹ NSW Legislative Council Standing Committee on Law and Justice, *Review of the Crimes (Forensic Procedures) Act 2000* (7 February 2002), Recommendation 15.
- ⁶¹² Confidential Magistrate survey response, undated.

- ⁶¹³ Attorney General's Department response to Ombudsman draft report, 5 May 2006.
- ⁶¹⁴ *Crimes (Forensic Procedures) Act 2000* s 31.
- ⁶¹⁵ *Crimes (Forensic Procedures) Act 2000* s 40.
- ⁶¹⁶ *Crimes (Forensic Procedures) Act 2000* s 42.
- ⁶¹⁷ Police Association of NSW submission, March 2005.
- ⁶¹⁸ *Crimes (Forensic Procedures) Act 2000* s 16 and 17.
- ⁶¹⁹ *Crimes (Forensic Procedures) Act 2000* s 3.
- ⁶²⁰ *Crimes (Forensic Procedures) Act 2000* s 8.
- ⁶²¹ *Crimes (Forensic Procedures) Act 2000* s 23(c).
- ⁶²² NSW Commission for Children and Young People submission, 11 February 2005.
- ⁶²³ Legal Aid NSW submission, 28 February 2005.
- ⁶²⁴ Police Association of NSW submission, March 2005.
- ⁶²⁵ NSW Commission for Children and Young People submission, 11 February 2005.
- ⁶²⁶ NSW Commission for Children and Young People submission, 11 February 2005.
- ⁶²⁷ Legal Aid NSW submission, 28 February 2005. The Law Society of NSW endorsed this view in its submission dated 9 March 2005.
- ⁶²⁸ Police Association of NSW submission, March 2005 and confidential survey responses from police local area commands.
- ⁶²⁹ See *Police Powers and Responsibilities Act 2000* (Qld) s 277; *Forensic Procedures Act 2000* (Tas) s 8; and *Criminal Investigations (Bodily Samples) Act 1995* (NZ) s 8.
- ⁶³⁰ NSW Law Reform Commission, *Minors' consent to medical treatment*, Issues Paper 24 (2004) at 1.15.
- ⁶³¹ Confidential Magistrate survey response, 13 January 2005.
- ⁶³² Confidential Magistrate survey responses.
- ⁶³³ Ombudsman audit of local area commands, confidential interview with police officer, 2 August 2004.
- ⁶³⁴ Confidential Magistrate survey response, 13 January 2005.
- ⁶³⁵ Police Association of NSW submission, March 2005.
- ⁶³⁶ Confidential survey responses from police officers and magistrates.
- ⁶³⁷ Confidential survey response.
- ⁶³⁸ Formerly section 353A(3) of the *Crimes Act*.
- ⁶³⁹ *Crimes (Forensic Procedures) Act 2000* s 32.
- ⁶⁴⁰ *Crimes (Forensic Procedures) Act 2000* s 38.
- ⁶⁴¹ Advice from the Attorney General's Department, Court Statistics Unit, 23 April 2004 and 13 September 2005.
- ⁶⁴² Information obtained through Ombudsman review of COPS records.
- ⁶⁴³ Confidential survey response.
- ⁶⁴⁴ Information obtained through Ombudsman review of COPS records and confidential email from investigating police officer dated 24 June 2005.
- ⁶⁴⁵ Police Association of NSW submission, March 2005.
- ⁶⁴⁶ *Crimes (Forensic Procedures) Act 2000* s 33.
- ⁶⁴⁷ Ombudsman audit of local area commands, confidential interviews with police officers, 2 August 2004.
- ⁶⁴⁸ Police Association of NSW submission, March 2005.
- ⁶⁴⁹ *Criminal Procedure Act 1986* s 75, 134 and 183.
- ⁶⁵⁰ See Sophia Beckett, "Criminal Case Processing: Practice and procedure of indictable matters set for reform," *Law Society Journal* (June 2005) at p. 32.
- ⁶⁵¹ *F(S) v Canada (Attorney General)* (1998) 11 CR (5th) 232 (Ont. Court of Justice – Gen. Div) at paragraph 83.
- ⁶⁵² *Crimes (Forensic Procedures) Act 2000* s 30 and 31.
- ⁶⁵³ *Crimes (Forensic Procedures) Act 2000* s 26(2)(d) and 30(1).
- ⁶⁵⁴ Confidential survey response.
- ⁶⁵⁵ Information obtained through Ombudsman review of COPS records and confidential survey response.
- ⁶⁵⁶ Confidential LAC survey response.

- ⁶⁵⁷ *Crimes (Forensic Procedures) Act 2000* s 115A.
- ⁶⁵⁸ *Orban v Bayliss* [2004] NSWSC 428.
- ⁶⁵⁹ *Maguire v Beaton* (unreported) NSWSC (11 May 2005) (Latham J).
- ⁶⁶⁰ *Fawcett v Nimmo and Gilmour* [2005] NSWSC 1047 (18 October 2005) (Grove J). See also "Photographer must give DNA", *Sydney Morning Herald*, 7 April 2005; and "Kidman snapper wins DNA plea", *Sydney Morning Herald*, 18 October 2005.
- ⁶⁶¹ For example, see *Kerr v Commissioner of Police* [2001] NSWSC 637 (27 July 2001) (Studdart J).
- ⁶⁶² *Crimes (Forensic Procedures) Act 2000* s 26(3).
- ⁶⁶³ Confidential Magistrate survey response, 13 January 2005.
- ⁶⁶⁴ *Crimes (Forensic Procedures) Act 2000* s 76(1).
- ⁶⁶⁵ *Crimes (Forensic Procedures) Act 2000* s 76(2) and 76(3).
- ⁶⁶⁶ Information obtained through Ombudsman review of COPS records.
- ⁶⁶⁷ Information obtained through Ombudsman review of COPS records.
- ⁶⁶⁸ Information obtained through Ombudsman review of COPS records.
- ⁶⁶⁹ Explanatory memorandum to the *Crimes (Forensic Procedures) Act 2000* (ACT).
- ⁶⁷⁰ Legal Aid NSW submission, 28 February 2005.
- ⁶⁷¹ *Criminal Law (Forensic Procedures) Act 1998* (SA) s 13E(2)(a).
- ⁶⁷² NSW Police response to Ombudsman draft report, 2 June 2006.
- ⁶⁷³ *Crimes (Forensic Procedures) Regulation 2000* cl 8.
- ⁶⁷⁴ *Crimes (Forensic Procedures) Act 2000* s 78.
- ⁶⁷⁵ *Crimes (Forensic Procedures) Act 2000* s 76(2) and 76(3).
- ⁶⁷⁶ NSW Legislative Council Standing Committee on Law and Justice, *Review of the Crimes (Forensic Procedures) Act 2000* (7 February 2002), at paragraph 5.108 and Recommendation 39.
- ⁶⁷⁷ Legal Aid NSW submission, 28 February 2005. The Law Society of NSW endorsed this view in its submission dated 9 March 2005.
- ⁶⁷⁸ *Crimes (Forensic Procedures) Act 2000* s 76(2) and 76(3).
- ⁶⁷⁹ NSW Police response to Ombudsman draft report, 2 June 2006.
- ⁶⁸⁰ *Crimes (Forensic Procedures) Act 2000* s 76(2) and 76(3).
- ⁶⁸¹ Intellectual Disability Rights Service submission, 11 March 2005.
- ⁶⁸² Attorney General's Department response to Ombudsman draft report, 5 May 2006.
- ⁶⁸³ NSW Police response to Ombudsman draft report, 2 June 2006.
- ⁶⁸⁴ *Crimes (Forensic Procedures) Act 2000* s 80(1).
- ⁶⁸⁵ *Crimes (Forensic Procedures) Act 2000* s 80(2).
- ⁶⁸⁶ Robin Napper, "A National DNA Database: The United Kingdom Experience," *Australian Journal of Forensic Sciences*, Volume 32 (2000) p. 65 to 66.
- ⁶⁸⁷ Forensic Science Service, Fact Sheet on Intelligence-led Screens located at http://www.forensic.gov.uk/forensic_t/inside/news/docs/Intelligence_led_screens.doc, accessed on 29 June 2005.
- ⁶⁸⁸ *R v Foley* [2005] NICA 10, Northern Ireland Court of Appeal (2 March 2005).
- ⁶⁸⁹ Forensic Science Service, Fact Sheet on Intelligence-led Screens located at http://www.forensic.gov.uk/forensic_t/inside/news/docs/Intelligence_led_screens.doc, accessed on 29 June 2005.
- ⁶⁹⁰ See *Criminal Justice and Police Act 2001* (UK).
- ⁶⁹¹ United Kingdom Forensic Science Service, *The National DNA Database Annual Report 2002-2003*, p. 7.
- ⁶⁹² R Willing, "ACLU seeks end to Mass DNA collections", USA Today, 10 January 2005 located at http://www.usatoday.com/tech/news/techpolicy/2005-01-10-dna_x.htm?csp=34 accessed on 19 May 2005.
- ⁶⁹³ S. Walker, *Police DNA 'Sweeps' Extremely Unproductive, A National Survey of Police DNA 'Sweeps': A Report by the Police Professionalism Initiative*, Department of Criminal Justice, University of Nebraska at Omaha, September 2004, located at <http://www.policeaccountability.org/dnareport.pdf>
- ⁶⁹⁴ D M Halbfinger "police Dragnets for DNA Tests Draw Criticism" located at <http://www.nytimes.com/2003/01/04/national/04DNA.html> accessed 4 January 2003.
- ⁶⁹⁵ "DNA Successes", Environmental Science and Research Limited website, www.esr.cri.nz accessed 12 May 2005.

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- ⁶⁹⁶ Greg Palkot "Child's murder in Germany prompts debate over mandatory DNA testing" 17 March 2001 located at http://foxnews.com/world/031701/germany_palkot.sml, accessed on 17 March 2001.
- ⁶⁹⁷ Australian Law Reform Commission, *Essentially Yours* at 41.79.
- ⁶⁹⁸ Transcript from Radio National (13 April 2000), www.abc.net.au/pm/stories, accessed 13 October 2005.
- ⁶⁹⁹ Les Kennedy, "Country pub patrons line up for DNA swab over woman's murder", *Sydney Morning Herald* (27 May 2003).
- ⁷⁰⁰ "Court order sought for El Masri DNA" located at http://news.ninemsn.com.au/sport/story_3715.asp accessed 5 March 2004.
- ⁷⁰¹ Cindy Wockner and Steve Gee, "Police drop demand for El Masri DNA", *Daily Telegraph*, 9 March 2004.
- ⁷⁰² COPS Event and advice from investigating officer, 17 February 2006.
- ⁷⁰³ See NSW Legislative Council Standing Committee on Law and Justice, *Review of the Crimes (Forensic Procedures) Act 2000* (7 February 2002) at paragraph 3.125 to 3.134 and 5.82 to 5.96; Justice James Wood AO Forensic Sciences from the Judicial Perspective 16th International Symposium on Forensic Sciences, Canberra 13-17 May 2002; Australian Law Reform Commission, *Essentially Yours: The Protection of Human Genetic Information in Australia* (March 2003) at paragraph 41.78 to 41.96.
- ⁷⁰⁴ NSW Legislative Council Standing Committee on Law and Justice, *Review of the Crimes (Forensic Procedures) Act 2000* (7 February 2002), Recommendation 23.
- ⁷⁰⁵ Australian Law Reform Commission, *Essentially Yours: The Protection of Human Genetic Information in Australia*, Report 96 (2003) at 41.93 and Recommendation 41-6.
- ⁷⁰⁶ *Crimes (Forensic Procedures) Act 2000* s 77(1)(c) and 13(1)(e).
- ⁷⁰⁷ NSW Police response to Ombudsman draft report, 2 June 2006.
- ⁷⁰⁸ Attorney General's Department response to Ombudsman draft report, 5 May 2006.
- ⁷⁰⁹ Attorney General's Department response to Ombudsman draft report, 5 May 2006.

Chapter 8. Conducting a forensic procedure

This chapter examines the way forensic procedures are conducted. The general rules for carrying out forensic procedures on suspects and volunteers are set out in Part 6 of the Act. Forensic procedures cannot be carried out otherwise than in accordance with Part 6.⁷¹⁰

8.1. Cautioning suspects and volunteers

Section 46 of the Act provides that before anyone starts to carry out a forensic procedure, the suspect or volunteer must be cautioned that they do not have to say anything while the procedure is being carried out, but that anything they do say may be used in evidence. Accordingly, the SOPs instruct officers:

After obtaining consent and prior to the commencement of the forensic procedure, caution the suspect as follows:

*'I wish to advise you that you do not have to say anything while the forensic procedure is being carried out but anything you do say may be used in evidence. Do you understand that?'*⁷¹¹

The Act does not require the caution to be electronically recorded. Nor do the SOPs specifically instruct officers to record the caution.

During our audit of local area commands, we watched 146 videos of forensic procedures. We found:

- In 60 procedures (or 41 per cent) the person was cautioned on video.
- In 86 procedures (or 59 per cent) the person was not cautioned on video.⁷¹²

We note that in our report on the DNA sampling of convicted offenders, we recommended that NSW Police amend its SOPs to include a requirement that police electronically record the caution, and that the caution be given after the provision of information and immediately before the DNA sampling.⁷¹³ This is an appropriate and sensible approach.

Given that officers did not record the caution in over half of the procedures we watched, there may be some merit in the SOPs specifying that the caution should be electronically recorded. It might also help to include the caution at the beginning of the information sheet (including any revised sheet).

Recommendation 30

That the SOPs specifically state that the caution be electronically recorded.

Recommendation 31

That the caution be included at the beginning of the information sheet.

NSW Police advised in its response to the draft report that it does not support recommendation 30 as the SOPs already require the caution to be electronically recorded. NSW Police stated that it is “only after the caution is given that the suspect is asked whether he/she wishes the forensic procedure to be recorded. Up to this point, all information provided to the suspect is recorded.”⁷¹⁴ As is evidenced by our research, the SOPs are not sufficiently clear and should be amended.

NSW Police is still considering recommendation 31, commenting, “there may be confusion created if the suspect is advised that he/she does not have to say anything but police then start asking the suspect the questions required by the Information Sheet and Consent Form.”⁷¹⁵

8.2. Access to interview friends, independent witnesses and interpreters

8.2.1. Interview friends

The Act gives certain suspects the right to have an 'interview friend' present. An interview friend is essentially a support person and advocate for the suspect. An interview friend includes persons such as a parent, guardian, legal representative, or other person acceptable to the suspect.⁷¹⁶ Where the Act provides that a suspect must be informed about a matter and an interview friend is present, the interview friend must also be informed. Interview friends may also make requests or objections on the suspect's behalf.⁷¹⁷

The Act provides for interview friends in the following circumstances:

- **Children and incapable persons** can only undergo a forensic procedure by order of a court, and must have an interview friend present at the hearing (or for interim orders only when this is reasonably practicable). The forensic procedure must generally (i.e. if reasonably practicable) be carried out in the presence of the interview friend or a legal practitioner.⁷¹⁸
- **Aboriginal and Torres Strait Islander suspects** must have an interview friend present when police ask the suspect to consent to a forensic procedure. If police apply for a court order, the suspect must have an interview friend present at the hearing. The forensic procedure must generally (i.e. if reasonably practicable) be carried out in the presence of the interview friend or a legal practitioner. Aboriginal and Torres Strait Islander suspects may waive their right to have an interview friend present.⁷¹⁹

The court may exclude an interview friend if the interview friend unreasonably interferes or obstructs the hearing of the application. An interview friend (other than a legal representative) may also be excluded from the request for consent or the place where the forensic procedure is to be carried out if:

- (a) the interview friend unreasonably interferes with or obstructs the carrying out of the procedure, or*
- (b) the investigating police officer forms a belief based on reasonable grounds that the presence of the interview friend could be prejudicial to the investigation of an offence because the interview friend may be a co-offender of the suspect or may be involved in some other way, with the suspect, in the commission of the offence.*⁷²⁰

If an interview friend (other than a legal representative) is excluded under either of these provisions, the suspect or volunteer may choose another person as their interview friend. In the case of a child or incapable person, if the suspect or volunteer does not choose another interview friend, the police officer conducting the procedure "may arrange for any person who may act as an interview friend to be present".⁷²¹ A similar provision applies if the suspect or volunteer is an adult Aboriginal or Torres Strait Islander, and does not waive their right to have an interview friend present. The interview friend can be a relative, legal practitioner or other person chosen by the suspect or volunteer.⁷²²

8.2.1.1. Compliance with the Act

There are two ways in which an interview friend is obtained for a suspect or volunteer entitled to one. Firstly, the person may identify the person (such as a parent). Secondly, local area commands may have a list of persons able to assist. Some of the commands we audited indicated they did not arrange for interview friends, on the basis that these persons may appear partial. Others indicated they did arrange for interview friends, and kept lists of names and contact details for people who could be used. One command had good relations with a local resident who was in the Salvation Army, who could be contacted at any time. Another command kept a list of Aboriginal elders with whom police have built relations with over time to refer to if they needed. Another command, which had a reasonably high Aboriginal population, said it was used to organising support people for Aboriginal suspects and that arranging for an interview friend for a forensic procedure was just as straightforward: "We do it every day."

Some officers said the main problem with interview friends is that it may take some time for an interview friend to attend. We acknowledge that waiting for an interview friend may cause delays, but note that this will be 'time out' under section 3 of the Act. Further, if police liaise with local community members and service providers, and keep a list of contact details of people who can act as interview friends or independent persons, this may reduce any such delays and also the time the suspect spends in custody.

We also examined this issue in our survey of local area commands where responses indicated that 16 commands had problems arranging appropriate interview friends. These problems mainly related to the person chosen being unsuitable. For example:

*The availability of persons is sometimes a problem. This can be due to a variety of reasons, such as; the day and hour, willingness to participate, unsuitable persons selected by the subject, travel arrangements, etc. This LAC now uses a volunteer group, Criminal Justice Support, which offers a 24/7 service.*⁷²³

*The location of "acceptable" support people is an issue in the LAC. When dealing with the Aboriginal community it has been identified that there is a resistance to assist (or be seen to assist) Police by some groups (specific families and associates). I believe this is not a local issue, however endemic to throughout the state.*⁷²⁴

*Problems locating interview friends willing to attend or persons who are not intoxicated.*⁷²⁵

Despite these difficulties, no commands were aware of any instances where interview friends had been excluded.

A total of 60 commands reported having no problems complying with the interview friends provisions, and the remaining four commands were unable to comment on this issue.⁷²⁶

To ensure that interview friends are available to all entitled suspects and volunteers, we suggest that every command maintain a list of appropriate people to use as interview friends. This networking process might also assist local service providers in understanding their role as an interview friend or independent person.

We note that some commands do not arrange for interview friends, on the basis that this would appear partial. In our view, a person should be able to choose his or her own interview friend, but if the person has difficulty finding an appropriate interview friend, police should, so far as is reasonably practical, attempt to find the person an interview friend.

8.2.1.2. Lists of interview friends for Aboriginal and Torres Strait Islander suspects

Section 116 of the Act requires the Attorney General to establish and keep up to date lists of people in different parts of New South Wales who are suitable and willing to act as interview friends for Aboriginal and Torres Strait Islander suspects who are under arrest. The Attorney General must consult relevant Aboriginal legal aid organisations about this.⁷²⁷

We discussed the problems the Attorney General's Department has had in complying with this requirement in our report on the DNA sampling of serious indictable offenders. We noted that the Attorney General's Department wrote to all Aboriginal Legal Services in February 2002, seeking nominations for people to be included on the required list. However, no nominations were received. In June 2002, the Coalition of Aboriginal Legal Services advised the Attorney General's Department that nominations would only be provided if the Act were amended to prevent interview friends being called as witnesses for the prosecution. We noted that neither of the previous reviews of the Act had made such a recommendation.⁷²⁸

We also noted that as forensic procedures are generally video recorded, the need to call interview friends as witnesses for the prosecution from incidents occurring during a forensic procedure would be quite limited. However, the fact remained that section 116 was essentially inoperable. For this reason we recommended that the Attorney General consider whether the Act should be amended to prevent an interview friend being called as a witness to the prosecution for matters directly relating to forensic procedures.⁷²⁹

As part of our consultation progress for this phase of our review, we wrote to the organisations which are prescribed as Aboriginal legal aid organisations for the purpose of the Act, but did not receive any comments about this issue.⁷³⁰

Through our monitoring activities, we found that commands which maintained lists of suitable people were best able to comply with the provisions of the Act relating to interview friends. We are not aware of any instances where interview friends have been called as witnesses for the prosecution and are not aware of any instances where people asked to act as interview friends were concerned about this either.

Given this, in our view local area commands should maintain lists of names and contact details of people who are suitable and willing to act as interview friends for the purposes of the Act.

8.2.2. Independent witnesses

Where police wish to conduct a forensic procedure on a volunteer, the volunteer's consent must be obtained in the presence of an independent person.⁷³¹ The volunteer's consent is not effective unless it is in writing, signed, and witnessed by an independent person. An independent person is a person other than a police officer or other person involved in the investigation.⁷³²

We found that these requirements are not always being met.

In our audit of local area commands, we found that some police stations did not have consent books for volunteers, and had only been using the consent book which was designed for suspects. In this case, there is no prompt to obtain the volunteer's consent in the presence of an independent person, or to have an independent person witness the volunteer's signature, and there was no evidence that the independent person requirements had been met.

In our survey of local area commands, most commands advised that volunteers nominated their own independent persons, but that independent persons could be found through the community, emergency services or local legal services, if required.

A total of seven commands responded that they either had used, or would use, police officers as independent persons. One command, where police officers had acted as independent persons on three occasions, advised, *"We now realise that police cannot be used and will ensure staff are informed to ensure compliance in the future."*⁷³³ Another 10 commands indicated they either did not conduct forensic procedures on volunteers or that they had not established any procedure for arranging independent persons. One command indicated it would have difficulty arranging for independent persons.⁷³⁴

Recommendation 32

That commands develop and keep up to date lists of names and contact details of acceptable community members and representatives from local service providers who can be used as interview friends and independent persons.

NSW Police supports this recommendation.⁷³⁵

8.2.3. Interpreters

If a suspect is unable to communicate orally with reasonable fluency in English (because of inadequate knowledge of English or a physical disability), police must arrange for an interpreter to be present before:

- asking a suspect to consent to a procedure
- ordering a procedure
- applying for a court order authorising a procedure,
- cautioning the suspect
- carrying out a procedure, or
- giving a suspect an opportunity to view a video recording taken under the Act.

If it is not reasonably practical for an interpreter to be present, police can arrange for a telephone interpreter.⁷³⁶

During our audit of local area commands, we watched two videos of forensic procedures where interpreters were used. Both procedures were conducted professionally and there did not appear to be any problems with the use of interpreters, although the provision of information took considerably longer than usual. We note that if a plain language version of the information sheet were developed, this would be much easier to translate than the current information sheet, which is complex and lengthy.

In our survey of local area commands, some commands commented on the length and complexity of the information sheet, and the length of time it takes to provide information when an interpreter is used. For example:⁷³⁷

Instructions [are] extremely long and when dealing with offenders, victims, witnesses, etc. from non-English speaking backgrounds interpreters find it difficult to translate all information. This procedure requiring an interpreter can take almost an hour before the actual forensic procedure has begun.

Others commented that even with an interpreter, it is difficult to explain all the information:

The Act is somewhat long winded and difficult to understand, especially when trying to explain it to a person that has a low grasp of the English language (even with the use of an interpreter).

Some metropolitan commands suggested that the information sheet, as well as being shorter, should be available in different languages.⁷³⁸ We agree this is a good idea. Information sheets in other languages could be available on the FPIT intranet site, and those local area commands with significant populations who speak languages other than English could keep hardcopies of the translated information sheet in their command. We note this would be in addition to the use of an interpreter.

Recommendation 33

NSW Police consider translating the information sheet into the most commonly used community languages.

NSW Police supports this recommendation, commenting that it should be addressed by the Attorney General's Department.⁷³⁹

8.3. Time limits

Police generally have two hours to conduct a forensic procedure. For example, where a suspect is under arrest, police have 2 hours in addition to the usual investigation period of 4 hours to conduct the forensic procedure. In circumstances where the procedure is conducted in response to a court order on a suspect who is not under arrest, the procedure must be carried out as quickly as reasonably possible and within 2 hours of the suspect arriving at the police station or testing area.⁷⁴⁰ Procedures conducted on suspects under arrest in accordance with a court order also have the same time provisions of 2 hours from the end of the investigation period. The only difference is the calculation of the commencement of the investigation period which starts from when the magistrate orders the carrying out of the procedure, or the suspect is arrested pursuant to a warrant under section 41 of the Act.⁷⁴¹

The permitted detention period may be suspended to enable certain things to happen. Time which is disregarded for the purpose of calculating the time for a forensic procedure to be carried out is called 'time out'. Time outs include:

- the time required to convey a suspect to the nearest premises with facilities for carrying out the procedure
- any time spent waiting for facilities or equipment to become available
- delays to allow the suspect to communicate with a legal practitioner, interview friend or interpreter
- any time spent waiting for a legal practitioner, interview friend or interpreter to arrive
- delays to allow the suspect to recover from the effects of intoxication or receive medical advice
- delays at the suspect's request, and
- time spent waiting for a senior police officer or magistrate to make an order authorising a forensic procedure.⁷⁴²

8.3.1. At what stage of the investigation period is the forensic procedure conducted?

The Act specifies that a suspect who is under arrest may be detained for up to two hours after the investigation period permitted under 115 of the *Law Enforcement (Powers and Responsibilities) Act* (formerly section 356D of the *Crimes Act*) expires, for the purpose of carrying out a forensic procedure. A forensic procedure may be carried out during the investigation period, but the investigation period itself cannot be extended.⁷⁴³ This means that police officers must choose between conducting a forensic procedure before a person is interviewed, in which case the forensic procedure counts towards the permitted investigation period, or conducting it after the investigation period expires, in which case police have an additional two hours.

In our audit of local area commands, some police officers we interviewed expressed concern that to avoid reducing the investigation period, forensic procedures have to be conducted at the end of the investigation period. While some types of procedures, such as DNA samples, can be carried out after a suspect has been interviewed, other types, such as hand swabs or gun shot residue tests, should be conducted as soon as possible. One regional command described conducting a gun shot residue test in relation to a shooting incident within the investigation period because the swab had to be taken within three hours of the incident, and it took police an hour and a half to drive to the police station where the suspects were being held.⁷⁴⁴

In our view whether a forensic procedure is conducted at the beginning or end of the investigation period is a matter for investigating police to decide. Enabling police officers to conduct forensic procedures at the beginning rather than the end of the investigation period would not increase the length of time a suspect is in detention.

We note that NSW Police has suggested that conducting a forensic procedure be time out for the purpose of calculating the investigation period. It gave the following example:

*30 minutes of forensic procedures could be performed at the beginning of the four hours of investigation time. Another 30 minutes of forensic procedure may be performed after two hours of investigation time, with the last hour of forensic procedures being used after the investigation time has elapsed.*⁷⁴⁵

NSW Police argued that being able to conduct forensic procedures at the beginning of the investigation period would mean that evidence could be obtained before it degraded, and police could still have a four hour investigation period, without having to apply for an extension warrant. NSW Police advised this would require changes to the way COPS custody management records are maintained, but that these changes would be warranted given improvements in quality of evidence and time saved overall.

We support this proposal. Provided that all forensic procedures are still conducted within reasonable time, and that the maximum time permitted to conduct forensic procedures (excluding time outs) is still two hours, it does not disadvantage the suspect.

8.3.2. How long police take to conduct forensic procedures

During our audit of local area commands, we sought to find out how long forensic procedures generally take, and to check that they are being conducted within the permitted 2 hours.

8.3.2.1. Audit of local area commands

We attempted to review each custody management record for the forensic procedures included in our audit. However, not all forensic procedures were recorded on the custody management system. We undertook an in depth analysis of the custody management records from four of the eight commands audited by reviewing 259 procedures from two metropolitan and two rural commands. For these 259 procedures, we were provided with 123 custody management records. The results from our review of these 123 custody management records were indicative of all the commands audited. We found that of the 123 records:

- 73 custody management records had included the forensic procedure as a specific item providing details of the type of procedure undertaken and the time the procedure started and finished
- 27 custody management records had a reference made to a forensic procedure being conducted in either the 'move location' or 'general comments' and provided miscellaneous details about the forensic procedure, and
- 23 custody management records had no mention of a forensic procedure being conducted.

This left 136 forensic procedures where there were no custody management records. This was because the person undergoing the procedure was a volunteer or a suspect who was not under arrest, or because police had recorded the forensic procedure in COPS instead of the custody management system.⁷⁴⁶

For those forensic procedures which were recorded through the custody management system, we found the records were often incomplete. Custody management records include three sets of questions relating to forensic procedures, about:

1. the request for consent for the procedure to be conducted
2. whether the person was capable of understanding the process and giving consent, and
3. the performance of the forensic procedure, including whether the person had been cautioned and whether the person resisted the procedure.

Where the forensic procedure was recorded on the custody management record, it was often only the third set of questions which had been answered. We noted that of the 73 custody management records reviewed in-depth, only six had all three sets of questions completed, a further 22 had two sets completed and the remaining 45 had only one of the three sets of questions completed.

For each of the procedures conducted at the eight commands audited where sufficient information was included in the custody management record, we calculated the length of time the person was in custody for the purposes of

conducting forensic procedures (taking into account any time out). We did not find any procedures where it appeared a person had been kept in custody for longer than two hours after the investigation period expired.

We have discussed at 4.2.8.2 (see also recommendation 5), that NSW Police review procedures for custody management records, to ensure standard processes enabling the meeting of legal requirements, including detention requirements. If adopted, this should also go some way to remedying the inadequate custody records identified in our review.

8.3.2.2. Video audit

We also noted the length of time taken to conduct the forensic procedures included in our video audit. We were able to calculate the length of the procedure for 73 of the 146 videos we watched.⁷⁴⁷ The forensic procedures we watched took, on average, 23 minutes. Only five took longer than 45 minutes, and the longest time was 1 hour and 8 minutes.

The procedure itself usually only took a few minutes. The bulk of the time was spent providing information about the procedure to the suspect or volunteer. The longer ones were those where an interpreter was used, or multiple forensic procedures were conducted (for example a DNA sample, photographs and hand swabs).

The results of our video audit show that forensic procedures are being conducted well within the two hours permitted by the Act.

8.3.2.3. Survey of local area commands

We also asked commands about compliance with the statutory time limits in our survey, with only four commands advising they had difficulty completing procedures within two hours. However, none provided advice that the procedure could not be completed within the permitted timeframe. The issues related to:

- **Use of interpreters.** As we have previously explained, it takes longer to conduct a forensic procedure with an interpreter. If the information sheet is translated into a variety of community languages, as per recommendation 33, this may reduce the overall length of time a procedure takes. As it appears that no procedures have fallen outside the two hour timeframe, it would not be appropriate to suggest any increased period because of a possibility a procedure may not be completed.
- **Police having to cover long distances in regional commands.** In one case police described having to take suspects to a hospital to conduct a forensic procedure authorised by a court. In another case, police had to drive an hour and a half to conduct gun shot residue tests on suspects in a shooting incident. However, time required to convey a suspect to facilities for carrying out the procedure and time spent waiting for an appropriately qualified person to arrive at the place where the procedure is to be carried out will be 'time out', and does not count towards the two hours permitted to conduct the procedure. Although, having to cover long distances may still be an issue where a court makes an order authorising a particular procedure, and specifies a time limit in the order. We have canvassed this issue previously at 7.4.6, and noted that the solution lies in police officers seeking appropriate orders.

Recommendation 34

Section 117 of the *Law Enforcement (Powers and Responsibilities) Act 2002* be amended so that time taken to conduct a forensic procedure is to be regarded as 'time out' in determining how much of an investigation period has elapsed.

NSW Police supports this recommendation.⁷⁴⁸ The Attorney General's Department advised this recommendation is already being implemented:

*My Department is currently instructing in the preparation of a Bill that will add to the list of 'times out' under Part 9 of the [Law Enforcement (Powers and Responsibilities)] Act, any time that is reasonably required to carry out a forensic procedure, or to prepare, make or dispose of the making of an order for the carrying out of a forensic procedure.*⁷⁴⁹

Recommendation 35

The *Crimes (Forensic Procedures) Act 2000* specify that police must conduct all forensic procedures as quickly as is reasonably possible, and that the maximum time permitted to conduct any forensic procedure is two hours.

NSW Police indicated it does not support this recommendation, on the basis that it is not justified.⁷⁵⁰ Our view is that it is a necessary corollary of our recommendation that time taken to conduct forensic procedures be considered “time out.” Counting forensic procedures as ‘time out’ would mean the investigation period could in effect be extended by up to two hours, when the procedure itself should ordinarily take much less than that. Requiring police to conduct forensic procedures as quickly as reasonably possible would ensure that forensic procedures are not inappropriately used to extend the investigation period. We note that police are already required to conduct forensic procedures on suspects who are not under arrest “as quickly as reasonably possible.”⁷⁵¹ In our view, this should apply to suspects who are under arrest as well.

8.4. Privacy

Section 44 of the Act provides that forensic procedures must be carried out in circumstances affording reasonable privacy to the suspect or volunteer and must not be carried out in the presence or view of a person who is of the opposite sex to the suspect or volunteer (except for buccal swabs) or a person whose presence is not necessary for the purpose of the procedure. For certain intimate procedures (like genital swabs, pubic hair samples or intimate photographs) the person conducting the procedure and any person asked to help carry out the procedure must, if practicable, be of the same sex as the suspect or volunteer.⁷⁵²

For each of the videos we watched, we described the location of the procedure and whether it appeared the privacy requirements of the Act were met. We found:

- 121 procedures (or 83 per cent) were conducted in the police station ERISP or interview room.
- 16 procedures (or 11 per cent) were conducted in an office in the police station.
- Four procedures (or 3 per cent) were conducted in another location – one in a court, one in a hospital and two in the home of the person being tested.

For the remaining five procedures we were unable to determine the location, for example due to the camera angle of the video.

We also assessed whether the procedure appeared to be carried out in reasonable privacy. Only two procedures were carried out in rooms which did not appear to have afforded reasonable privacy – for example where a procedure was carried out in a conference room with the door open.

It was difficult to assess whether procedures were carried out in the view of people whose presence was not necessary for the procedure. In many procedures there were other people present, who may have been legal representatives or interview friends, but unless police identified each person and explained his or her role, we were unable to assess whether their presence was necessary or permitted by the Act.

One procedure was conducted in the presence of six police officers. The testing officer was trying to take a hair sample, and the suspect was being very uncooperative. It appears the extra officers were called in for the safety of the testing officer, should the suspect become violent.⁷⁵³

We suggest that officers conducting forensic procedures identify, by name and role, all the people present during the procedure, including any other police officers. This would ensure the person being tested knew who was present and why, and would also enable any person watching the video to assess compliance with the privacy provisions contained in the Act.⁷⁵⁴ We have noted this in our ‘best practice’ observations in the next section, 8.5.1.

8.5. Electronically recording forensic procedures

Section 15 of the Act provides that police must, if practicable, electronically record the provision of information to suspect and volunteers, and the person’s response, if any. If electronic recording is not practicable, police must make a written record of the provision of information and the person’s response.

Section 57 of the Act provides that police must electronically record the carrying out of the forensic procedure, unless it is impractical, or the suspect objects to the recording. The suspect must be informed of the reasons for recording the procedure, including the protection this provides for the suspect. The suspect must also be informed that he or she may object to the procedure being recorded.

The SOPs include instructions on how to record forensic procedures, and include prompts to make sure officers comply with the legislative requirements.

8.5.1. How procedures are recorded

We watched 146 videos of forensic procedures during our audit. The standard of recording varied. On some videos the sound or picture quality made it difficult to determine what was happening. Some showed the whole testing area and each of the people present, while others showed only the person being tested or the police officer carrying out the procedure. Not all videos showed the opening or sealing of the tamper-evident bag.

For example, one video showed only a very limited area of the room in which the procedure was conducted. There was a partial view of the suspect, and only the shoulder of the testing officer was visible. The DNA sample kit or table were not shown in the video. It appeared that the camera was on a tripod and it was only the testing officer and the person undergoing the procedure present, but this was not clear. There may have been other people in the room.⁷⁵⁵

After reviewing the videos of forensic procedures, we consider the following to be best practice:

- where an officer takes measures to minimise contamination, for example by cleaning the table, that this be done on video
- the testing officer and person being tested are clearly visible at all times
- the testing officer states the date and time at the start and end of the procedure
- the testing officer introduces himself or herself
- the testing officer identifies by name and role any other persons present, including other police officers
- the testing officer provides an overview of the forensic procedure and process
- the testing officer cautions the person being tested
- the testing officer reads out all relevant information to the suspect or volunteer
- the testing officer obtains both the written and verbal consent of the suspect or volunteer
- the testing officer asks the suspect or volunteer whether they consent to the electronic recording of the conducting of the forensic procedure after consent has been obtained and prior to commencing the procedure
- where the forensic procedure is the taking of a DNA sample, the opening of the DNA sample kit, the sampling process and the sealing of the tamper-evident bag are clearly visible and the contents of the DNA sample kit are visible at all times, and
- the testing officer at the completion of the forensic procedure asks the suspect or volunteer if they have any complaints about the way the procedure was conducted.

There were few videos where the testing officer identified the other people present or explained their roles. This made it difficult to assess whether certain legislative obligations were being met, for example whether an interview friend was present where one was required, or whether the procedure was carried out in reasonable privacy, with only the necessary people present (as required by section 44 of the Act).

8.5.2. Recording the provision of information

We found that contrary to their legislative requirements, police are not always recording the provision of information to a suspect. In a number of videos we watched, the provision of information was not recorded, although the fact that the procedure itself was recorded suggested that it was actually practicable to record the provision of information.⁷⁵⁶ In some cases, the testing officer referred to having provided the information before starting to record the process.⁷⁵⁷

8.5.3. Recording the consent process

We also found that police are not always recording the consent process, which includes the request for consent, and completion of the consent form. Section 15 of the Act requires police to record any response to the information

provided to the suspect. The SOPs also instruct police to read out and complete the consent form on video. However, in 14 of the videos we watched (or 10 per cent), it was not possible to determine from the video whether the person consented to the procedure. In a number of these, it appeared the consent process may have occurred prior to the start of the recording, and although the police officer referred to having obtained consent previously, this could not be verified.

8.5.4. Recording the procedure itself

We also sought to assess the extent to which police are complying with section 57 of the Act, which provides that officers must record the carrying out of the forensic procedure unless the suspect objects to the recording. The suspect must be informed of the reasons for recording the procedure, including the protection this provides for the suspect. The suspect must also be informed that he or she may object to the procedure being recorded. We found:

- In 69 procedures (or 47 per cent), the person agreed to the procedure being recorded.
- In three procedures (or 2 per cent), the person did not agree to have the procedure recorded.
- In the remaining 74 procedures, we were unable to determine whether the person agreed to the procedure being recorded or not, in many cases because the person was not asked (in 52 procedures), and in some cases because the person was asked but did not respond (in four procedures).

We note that in over a third of procedures the person was not asked on video whether he or she objected to the procedure being recorded. This is an issue which could be addressed with further training.

8.5.5. Interactions between officers and suspects or volunteers

For each of the videos we watched, we characterised the interaction between police and the person undergoing the procedure according to a number of different types of behaviour.

There were no procedures where police used physical force to restrain the person undergoing the procedure.

We found that in the great majority of procedures, the person undergoing the procedure was cooperative and compliant, and police were generally patient and friendly. The other procedures included circumstances where the person was uncooperative, antagonistic, or appeared reluctant to comply with police requests. In circumstances where the person was being uncooperative, police generally handled the situation professionally.⁷⁵⁸

In five procedures (or 3 per cent) police made comments or actions which rejected, disapproved of, or criticised either the statements or behaviour of the person undergoing the procedure, or police behaved in a way that could be perceived as threatening by the person undergoing the procedure. In these procedures, the person being tested was being particularly uncooperative and in our view the behaviour of police was not of concern.

8.5.6. Recording of photographs

During our audit of local area commands, we found that while officers were generally aware of the need to record forensic procedures on video, we found that forensic procedures involving the taking of a photograph were in many cases not recorded. Some officers stated they did not think it was necessary, on the basis that the photograph itself provided an adequate record. We note that the Act requires that all forensic procedures (other than hand, finger, foot or toe prints) must be electronically recorded, unless the suspect objects to the recording, or it is impracticable.

Other officers knew that forensic procedure photographs had to be recorded, but objected to having to do this. One command, in its survey response, agreed that DNA sampling should be electronically recorded, but described the recording of photographs as “over the top”.⁷⁵⁹ The Police Association of NSW argued in its submission that the Act should be amended so that police do not have to electronically record the taking of photographs, or any of the associated processes, such as the provision of information, caution or obtaining consent.⁷⁶⁰ NSW Police has also indicated this would save time and the money spent on purchasing, storing and auditing videotapes.⁷⁶¹

We note that the requirement that forensic procedures be electronically recorded means there is an objective record, for both police and the person undergoing the procedure, of the provision of information, caution, consent process and the procedure itself. Whilst we note our view differs from the findings in the Findlay review,⁷⁶² we do not feel that there is sufficient evidence to suggest that this procedure should change.

8.5.7. Recording a forensic procedure on the Electronic Recorded Interview of Suspected Person (ERISP) camera

Several survey responses indicated that commands had difficulty electronically recording forensic procedures because of the cost of the tapes, camera maintenance and having to train officers to use the camera.

Some of the police officers we interviewed during our audits suggested that instead of recording forensic procedures on a separate video, they should be conducted immediately after an interview, and recorded on ERISP. This has several advantages – it would save time and be more convenient, as police would not have to set up any additional equipment; the quality of the recording would be more consistent; and the continuity it would provide would ensure the provision of information and consent process were captured on video. It may also address some of the concerns police have about having to record the processes associated with the taking of photographs.

We understand that forensic procedures are currently recorded on a separate video for a number of reasons:⁷⁶³

- It was originally anticipated that forensic procedures be conducted in a separate, dedicated forensic procedures room. We note this is rarely the case – in almost every police station forensic procedures are conducted in the ERISP room.
- ERISP cameras are fixed, and zoom in and out at regular intervals, to show expressions on the suspect's face as well as who is present in the room. This was developed to address criticism from the courts about not being able to see the suspect's face properly. Having a hand operated video camera may be better for forensic procedures so that all the people in the room can be identified, and so that the opening and sealing of the tamper evident bag can be captured on video.
- Not all forensic procedures are conducted after an interview. The person undergoing the procedure may be a volunteer, or a suspect who is not under arrest.
- Not all forensic procedures are conducted in police stations. Some may be conducted in hospitals or on some occasions in a person's house.
- Transcription costs for ERISPs would increase dramatically. We note this could be easily overcome, by transcribing only the interview, and not the forensic procedure.
- It would not be possible to destroy the record of the forensic procedure without destroying the entire tape. We note that the Act provides that an electronic recording of a forensic procedure may be retained for such period as the Commissioner of Police directs, provided that it is stored so as to protect it against unauthorised access or use.⁷⁶⁴

We also note that many police stations now have digital video facilities, and that video cameras are being more widely used, for example in search warrants and in police vehicles. As the equipment becomes more widely used, police may experience fewer difficulties with it.

However, recording a forensic procedure at the end of an ERISP, where possible, may streamline the procedure and may benefit both police and the suspect by minimising the length of time the person spends in custody, and by ensuring there is an objective record of all that is said and done in relation to the procedure. Provided any technical issues can be resolved, this may be the most efficient and effective manner to record forensic procedures, especially for suspects under arrest.

8.5.8. Choosing not to have the procedure recorded

Police must inform suspects and volunteers that they may object to having the procedure recorded. If the forensic procedure is not electronically recorded, it must be carried out in the presence of an independent person, who is not a police officer. The suspect or volunteer may waive the right to have an independent person present.⁷⁶⁵

Case Study 49

A suspect who was having a buccal swab and photographs taken asked the police officer, "Do I have to have a video?" The officer replied, "I have to record the reading of the information so it can be seen I'm reading this information to you. If you don't want the buccal swab recorded we can cancel that but we have to get someone, an independent person in here." The suspect made an inaudible reply. The officer asked, "So we'll continue the recording?" The suspect replied, "No, really, I don't want that on." The officer said, "So you don't want this on? OK, I'll continue reading this information so you'll understand it on here and when we get to the buccal swab we'll stop the recording and work out process we'll have to follow from there. OK?" The officer finished providing the information.

The suspect asked for his mate who was also at the police station to act as an independent person. One of the police officers present said, "He's not independent" and that it had to be "someone who doesn't know you or us." One of the other officers explained to the suspect that he could waive his right to have an independent person present. She also advised that the purpose of recording the procedure was to "show everything's OK."

The suspect asked, "How long would it take to get someone?" Police advised they did not know. The suspect said, "Leave it on," and the procedure was electronically recorded.⁷⁶⁶

We note that the Act requires that if a forensic procedure is not electronically recorded, it must be carried out "in the presence of an independent person who is not a police officer."⁷⁶⁷ In our view it would have been appropriate for police in the above case study to allow the suspect's friend to act as an independent person. It appears that the suspect did not want the procedure to be electronically recorded, but eventually agreed to it because he did not want to have to wait for police to arrange for another person to attend.

In its submission, the Police Association of NSW argued that the suspect should not be able to choose not to have the forensic procedure recorded, on the basis that it creates an objective record of the procedure which can be used in court, if required.⁷⁶⁸

The suspect or volunteer may have particular reasons for not wanting a forensic procedure to be recorded, for example where the procedure requires the person to remove items of clothing. In our view it is important that suspects and volunteers are allowed to choose not to have a procedure electronically recorded. In addition, we note that through our monitoring activities, we found very few instances where the person objected to a forensic procedure being electronically recorded.

Recommendation 36

NSW Police amend the SOPs to reflect the best practice for video recording of forensic procedures. In particular we recommend:

- a. Where an officer takes measures to minimise contamination, for example by cleaning the table, that this be done on video
- b. The testing officer and person being tested are clearly visible at all times
- c. The testing officer states the date and time at the start and end of the procedure
- d. The testing officer introduces himself or herself
- e. The testing officer identifies by name and role any other persons present, including other police officers
- f. The testing officer provides an overview of the forensic procedure and process
- g. The testing officer cautions the person being tested
- h. The testing officer reads out all relevant information to the suspect or volunteer
- i. The testing officer obtains both the written and verbal consent of the suspect or volunteer

- j. The testing officer asks the suspect or volunteer whether they consent to the electronic recording of the conducting of the forensic procedure after consent has been obtained and prior to commencing the procedure
- k. Where the forensic procedure is the taking of a DNA sample, the opening of the DNA sample kit, the sampling process and the sealing of the tamper-evident bag are clearly visible and the contents of the DNA sample kit are visible at all times, and
- l. The testing officer at the completion of the forensic procedure asks the suspect or volunteer if they have any complaints about the way the procedure was conducted.

NSW Police supports this recommendation in principle, and “agrees to amend its recording procedures and take these recommendations into consideration”.⁷⁶⁹

8.6. DNA samples

This section provides a brief overview of the different ways DNA samples can be taken, and discusses any problems police have experienced in taking DNA. We found that generally, DNA samples are taken without any difficulties.⁷⁷⁰

8.6.1. Buccal swabs

During the review period, the vast majority of DNA samples (96 per cent) were taken by buccal swab.⁷⁷¹ All police officers who are trained in forensic procedures are accredited to take buccal swabs.

A buccal swab is completely painless, and is self-administered. The person providing the sample gently scrapes the inside of his or her mouth with a foam tipped plastic paddle, which looks a bit like a cotton bud. The process is similar to that used for brushing teeth, except the foam is rubbed against the cheek rather than the teeth. Police often encourage the person to do this on both sides of the mouth, to make sure enough saliva and skin cells adhere to the paddle. The person then hands the paddle back to the police officer, who presses it onto specially treated paper, to transfer the DNA onto the paper. Police seal the paper in a small envelope, and put it with the relevant documentation into a tamper-evident bag. The swab is returned to the person who provided the sample. Police then send the tamper-evident bag to the laboratory for analysis.

8.6.1.1. Multiple attempts

Some officers took more than one attempt to take a DNA sample. For example, in one video we watched, the police officer voided the first buccal swab because the swab did not appear moist, and the officer doubted whether it had sufficient DNA on it. He also voided the second kit used as he inadvertently removed the bag seal. He was satisfied with the third attempt.⁷⁷² In another video we watched, the officer conducting the procedure failed to seal the bag correctly, so he disposed of the contents and started again, taking a new buccal swab and this time sealing the bag correctly.⁷⁷³

In almost all buccal swabs we watched, the swab was taken on the first attempt, without incident.

8.6.1.2. Taking sufficient DNA

We obtained a list of the DNA samples DAL rejected during the last 18 months of the review period.⁷⁷⁴ During this period, DAL rejected 123 person samples. In most cases, this was because there was insufficient DNA in the sample.

We checked the details of these procedures and found that 60 of these samples were from suspects and volunteers.⁷⁷⁵ Over this period, DAL received 5,040 samples from suspects and volunteers.⁷⁷⁶ The number of DNA samples rejected by DAL represents 1.2 per cent of samples taken from suspects and volunteers. While this is only small, in our view this is still a significant issue, especially since some police officers we interviewed advised that where a suspect sample is rejected, they would rarely follow the matter up by seeking a further sample.

We suggest that this be addressed through NSW Police forensic procedures training.

8.6.1.3. Taking a buccal swab by force

Buccal swabs should not be taken from people who are providing a DNA sample against their will. The Act provides that buccal swabs can be taken from adult suspects by consent, and that non-intimate procedures (in practice,

normally hair samples) can be taken from adult suspects who do not consent to a buccal swab. Courts may order any type of forensic procedure.⁷⁷⁷

We found that in general, police understood that where a person did not consent to a buccal swab, they could consider taking a sample without the person's consent, and in this case a hair sample should be taken.

However, we received a complaint relating to a suspect who had a buccal swab taken by force. This complaint is discussed in more detail at 15.3.4 as complaint number 6.

8.6.2. Hair samples

Hair samples are generally only taken where a suspect does not consent to a buccal swab, or in rare cases where the actual hair (rather than the person's DNA) is required for forensic analysis. During the review period, less than four per cent of DNA samples were taken by hair sample.⁷⁷⁸ All police officers who are trained in forensic procedures are accredited to take hair samples. Neither the training or SOPs specify where hair must be taken from, but both the information available on the NSW Police intranet and training course use the example of hair taken from a person's head.⁷⁷⁹

It is NSW Police policy to take between 15 and 20 hairs, by the "lever arch" method. This involves grasping the hair near the skin between the thumb and fingers and turning the wrist whilst pulling the hairs, to ensure they come out with the hair root attached. Once sufficient hairs have been obtained they are placed in an envelope and sent to DAL for analysis.

Police normally take hair from a person's head, but it can be taken from anywhere on the body. However, pubic hair can only be taken by order of a court.⁷⁸⁰

We watched a number of hair samples during our video audit. Generally, although not always, the person providing the sample was cooperative, and did not flinch or complain about the procedure. Some officers had difficulty pulling out the hair, and it usually took several attempts to get enough hair. It was especially difficult where the suspect had short hair and the police officer was wearing rubber gloves. Sometimes the officer was able to take the hair from the person's head easily, but then struggled to get the hair off the rubber gloves and into the envelope.

Case Study 50

After receiving legal advice, a suspect declined to undergo a forensic procedure. A senior police officer order was made for a hair sample to be taken. The suspect had a closely shaved head, and it took police 20 attempts to get enough hair for analysis. The suspect grimaced as if in pain, and said "ow" a number of times. The police officer was successful on his twelfth attempt, and then told the suspect, "I need to get at least 12 hairs mate." The suspect asked, "Are you serious? Can't you use scissors or something?" The police officer replied, "No, you need the root." The officer was successful on the fifteenth and sixteenth attempts. After the eighteenth attempt, the suspect asked, "How many in that, seven?" The police officer replied, "No, about four." The police officer stopped taking hair after the twentieth attempt. He was polite throughout, but it was clear he had considerable difficulty conducting the procedure. The suspect was cooperative and did not complain, but seemed to be in considerable discomfort.⁷⁸¹

Case Study 51

A suspect was informed that a hair sample would be taken, by order of a senior police officer. The suspect said, "OK." He did not flinch when the sample was taken but did scratch his head afterwards. Police asked whether he had any complaints. He replied, "No. I don't think it should have been undertaken but the way it was undertaken was fine."⁷⁸²

Case Study 52

Police took a hair sample from an Aboriginal suspect. The police officer apologised for causing any pain. The suspect said, “No worries”, and did not appear uncomfortable. Police asked whether he had any complaints. He replied, “No.”⁷⁸³

Case Study 53

Police took a hair sample from a suspect who did not consent to a sample being taken, and did not cooperate with police. When police explained that a hair sample would be taken, the suspect offered to take the hair sample himself, on the basis that he wasn't fond of having other people pull his hair out. Police explained that the suspect could not take the hair sample himself, but could avoid having a hair sample taken by consenting to a buccal swab. The suspect continued to be difficult and five more officers entered the room. The suspect then submitted to the procedure and the hair was taken without incident.⁷⁸⁴

8.6.3. Blood samples

Blood samples are intimate forensic procedures and are only permitted for suspects where a suspect consents under Part 3 of the Act or a magistrate orders that it may be taken under Part 5 of the Act.⁷⁸⁵ Blood samples can be taken by a medical practitioner, nurse, appropriately qualified police officer or other appropriately qualified person.⁷⁸⁶ Police are not trained to take blood samples in their forensic procedures training – a police officer would generally only be qualified to take a blood sample if the officer had some other relevant qualification.⁷⁸⁷

In our view, the only reason a blood sample should be taken to obtain a person's DNA is where the person does not consent to a buccal swab, and the person does not have enough hair for police to take a hair sample or expresses a preference for a blood sample to be taken. We are not aware of any instances where this happened.

Blood samples are taken very rarely. Police records indicate that during the review period, only 28 out of over 8,000 DNA samples taken from suspects and volunteers were blood samples.⁷⁸⁸ Of these, 26 were conducted on suspects, and two on volunteers.

We reviewed each of these on COPS to determine why a blood sample was taken. We found that 13 of the records either did not refer to a forensic procedure being conducted, or did not specifically refer to a blood sample being taken. It appears some of these may have been recorded as blood samples erroneously.

One blood sample was taken because analysis of the person's blood was necessary for investigative purposes:

Case Study 54

A 30 year old woman was arrested for stealing. At the police station, the woman grabbed a police officer's hand and forced it against her body. The police officer immediately felt pain in her left hand. The woman was searched and an uncapped used syringe was located in her left shirt pocket. Police obtained a court order authorising a doctor to take a blood sample from the woman. The blood sample was used to obtain the woman's DNA profile, and was also screened for infectious diseases. The blood tested positive for hepatitis C and syphilis, and the woman was charged with attempting to cause another person to contract a grievous bodily disease.⁷⁸⁹

In 10 other cases, it was not clear from the police records why blood samples were taken. The samples were taken in relation to a range of offences, including murder, assault, break and enter offences, supply of a prohibited drug, and a hit and run. It appears these samples were taken to obtain the person's DNA profile, but it is not clear from the circumstances why the DNA profile was taken by blood sample when there are less intrusive means of obtaining the same evidence.

Case Study 55

The owner of a country pub saw the power cut out and heard glass smashing. He found somebody had smashed a side window and saw a person running off. Police found the electricity had been turned off. They found blood on the kitchen window, which was retained for DNA analysis. Police formed the view the blood may have been the owner's, as he had a cut on his foot. The owner provided a blood sample, as a volunteer, for elimination purposes.⁷⁹⁰

The remaining four blood samples appear to have been taken in relation to driving offences, and may have been taken under the *Road Transport (Safety and Traffic Management) Act 1999*. In at least one of these, blood was taken for DNA analysis as well as to determine the amount of alcohol or drugs in the person's body:

Case Study 56

An unknown offender broke into a veterinary clinic and stole drugs. Police found a window had been smashed and located a small amount of blood on the blind. A short time later police arrested a driver who they believed was under the influence of an intoxicating drug, for the purpose of obtaining blood and urine samples. Police subsequently searched the vehicle, and found the drugs which had been taken from the vet. The driver was taken to hospital, where he consented to providing a blood sample for the purpose of obtaining his DNA profile, to be compared against the blood located on the vet's blind. A medical practitioner took three vials of blood from the driver. He was released pending the results of the analysis.⁷⁹¹

For the other three blood samples taken in relation to driving offences, it is not clear from the information available whether the person's DNA profile was obtained from their blood sample or not. We note that where blood samples are taken for more than one purpose, police should still comply with the requirements of the *Crimes (Forensic Procedures) Act*, if they are going to derive the person's DNA profile from the blood sample.

While it happened only rarely, it is less than ideal that some police officers may have taken blood samples from people when the same evidence could have been obtained by taking a buccal swab or, if the person did not consent to the procedure, by hair sample. In this respect, we feel that police training and procedures should reflect the need to take DNA samples, where practicable, by the least intrusive method. In this respect, when applying for a court order, police should request magistrates to make an order allowing police to take either a buccal swab or a hair sample or a blood sample. This allows police to provide the suspect with a choice of sampling method when submitting to the order.

Recommendation 37

NSW Police consider clarifying their training and procedures to reflect that where possible, every effort should be made to obtain DNA person samples using the least intrusive method available.

Recommendation 38

When police officers seek an order for a person DNA sample, the request include that the order permit the option for the sample to be taken as either a buccal swab, a hair sample or a blood sample and that these choices be provided to the person being tested.

NSW Police supports these recommendations.⁷⁹²

8.6.4. Taking DNA samples by more than one method

We found some instances where police took DNA samples by more than one method. This might happen when police apply for a court order authorising a buccal swab and hair sample, and then go ahead and take both, even though only the buccal swab was needed to obtain the person's DNA profile.⁷⁹³

It may be prudent for police who are applying for a court order authorising a DNA sample to include both a hair sample and buccal swab in the application, in case the suspect declines to self-administer the buccal swab. However, there is no need to take the hair sample if the buccal swab is obtained.

Recommendation 39

NSW Police procedures clarify that only one DNA sample is required from any person.

NSW Police supports this recommendation.⁷⁹⁴

8.6.5. Taking further DNA samples from people already on the database

It is NSW Police policy to take a fresh DNA sample each time a suspect is going to be prosecuted, even if the suspect's DNA profile is already on the database. There are two reasons for this – first, to confirm the suspect's DNA profile is in fact the same as the profile obtained from the crime scene; and second, so the evidence will be admissible in court. Evidence of an accused's criminal record is generally not admissible, and taking a fresh sample overcomes the need to disclose that the accused's profile is already on the DNA database. Given that it may take months or even years for crime scene exhibits to be examined, cold links may not be made until a long time after the offence was committed. By then, the suspect may already be serving a custodial sentence for another offence. In these circumstances, police generally take the suspect from the correctional centre to the nearest police station to conduct the forensic procedure.⁷⁹⁵

Taking further samples from people already on the database creates a significant amount of work for NSW Police, and for DAL. We do not know what proportion of the 7,000 or so DNA samples taken from suspects during the review period were taken to confirm a cold link, rather than for any investigative value. But in our small audit of samples analysed by DAL, we found that 20 out of 140 DNA samples taken from suspects (or 14 per cent) were taken to confirm a cold link.⁷⁹⁶

In the videos we watched, some suspects asked why police were taking another sample, when the suspect's DNA profile was already on the database. Some officers were not able to give adequate responses. For example, one officer said, "It has to be done each time. There's DNA leftover at the scene of the crime."⁷⁹⁷ Another told the suspect the new sample would be used only in relation to the offence being investigated, although DNA profiles taken from suspects are actually added to the database. One magistrate we surveyed also questioned the need for police to apply for orders to obtain further samples:

*Police are asking for orders to duplicate evidence they already have: eg they have DNA from crime scene and on gaol file. Why?*⁷⁹⁸

Many police officers argued that suspects who are already on the database should not have to provide further DNA samples. Some pointed to the inconvenience this caused for police and for the suspect:

Say you have a suspect who has left DNA at eight different break and enter crime scenes. He is a suspect for one of them, the sample is taken and matched against the crime scene being investigated, and there may be one or more cold links to other crime scenes. But then two weeks later DAL puts another crime scene sample on the database and you get another cold link, police have to possibly arrest the suspect and take another sample. And then a month after that you get another one. And 6 months later another. You keep getting cold hits into the future, why do you have to keep taking samples?⁷⁹⁹

The Police Association of NSW acknowledged the legal reasons for taking further samples, but argued that it should not be necessary:

Once an initial DNA sample from a suspect is properly taken and recorded, there should be no need to continually take additional samples each time an additional offence is detected in the future. This seems to be a substantial waste of time and resources. Even suspects have complained to police officers when they have already had more than one DNA sample taken previously and ask why an additional sample needs to be taken again.⁸⁰⁰

Others argued that taking further samples from suspects only contributes to the already sizeable workload of DAL. While person samples are much easier to process than crime scene samples, time and resources still have to be spent on taking the sample, transporting it to DAL, analysing it, communicating analysis results and monitoring it for possible destruction.⁸⁰¹ Another problem with the current practice is that, because suspect samples cannot currently be matched against the suspects index, duplicate profiles are constantly being added to the database.

We understand that FPIT has proposed that no further samples be taken from suspects once they have provided DNA samples on two separate occasions, provided that if a person under arrest claims to be on the DNA database already, police verify the person's identity on the spot through Livescan fingerprinting, and check that the person's profile is actually on the DNA database. FPIT argued that in criminal trials, there is no need to inform the court as to how police obtained the accused's DNA sample, and that if it became an issue, the judge could hear the evidence on voir dire.

While this model appears to have some merit, we remain concerned about whether such a system would be adequate. We are aware of at least two matters where police charged the wrong person because of errors in police records of forensic procedures:

- In 2004, police arrested and charged a man for shoplifting, self administering a prohibited drug and a break, enter and steal offence, based on a link between a crime scene and a profile already on the DNA database. However, the wrong person was charged with the offences, as the forensic procedure was on the wrong person's records on the police computer system. By the time the mistake was discovered, the person had been convicted, and was serving a custodial sentence.⁸⁰²
- In 2005, police arrested and charged a man with a break and enter offence, based on a link between a crime scene and a profile already on the DNA database. The suspect was denied bail and spent three weeks in custody before DAL notified police that the profile obtained from the suspect on arrest did not match the profile obtained from the crime scene. The matter was withdrawn, and the suspect was released the following day.⁸⁰³

In both cases, the error only came to light when DAL analysed the confirmation sample and found that the suspect's DNA profile was *not* the same as the profile obtained from the crime scene. These matters are of serious concern, and clearly should be taken into account before any decision is taken to abandon repeat sampling to confirm cold links.

Also relevant to this debate is the fact that, through our audits, we identified a number of discrepancies in the information held on the DNA database. Of the 153 DNA samples we followed up with DAL, the name recorded on the DNA database was an alias for nine profiles, and was spelled differently from the name recorded by police for a further six profiles. In most cases DAL relied on the handwritten information provided with the DNA sample, and had no way of verifying whether the information was actually correct. The accuracy of the information on the DNA database is discussed in further detail at 11.1.

While the FPIT proposal has merit, and we agree that it is inconvenient and possibly inefficient to take repeat samples, the possible criminal justice issues raised require very careful consideration. We note the Attorney General's working group is considering the Findlay report's recommendations and that this group seems well placed to consider this matter and make suitable recommendations. In the meantime, the safer course from a criminal justice perspective is to continue to require samples on each occasion.

Recommendation 40

NSW Police retain its current practice of obtaining confirmation samples for all identifications made through “cold links”.

8.7. Other types of procedures conducted

This section provides a brief overview of some of the other types of procedures which can be conducted under the Act, and any problems police had conducting them.⁸⁰⁴ Again, we found that most forensic procedures are conducted without any difficulties.

Forensic procedures other than DNA samples may need to be conducted by specialists. Some can only be conducted by doctors, nurses, dentists or dental technicians. Others may be conducted by appropriately qualified police officers.

8.7.1. Photographs

Photographs taken under the Act may be intimate (photographs of the genital area, anal area, buttocks of a person and breasts of a female or transgender person) or non-intimate (photographs of other parts of the body).⁸⁰⁵

Forensic procedure photographs are taken by appropriately qualified police officers. Accreditation for photographs falls into two categories – technical and non-technical photos. Any appropriately qualified officer can take non-intimate photographs that do not require any specialist technical skills. Specially trained officers take photographs of injuries and other specialist photos, including intimate photographs and photographs requiring additional technical skills.

For example, police may wish to photograph blood on a suspect’s hands, or a suspect’s injuries (such as injuries to the hand of a person suspected of assault). Police may wish to photograph distinctive marks on a suspect’s body, such as tattoos or scars, if they are relevant to a witness’ description of an offender. They may wish to take a photograph of something visually distinctive about the suspect, which may easily be changed, such as hair colour. Police may also want to take photographs to compare to other evidence, like closed circuit television (CCTV) footage.

Case Study 57

A fight in a hotel was captured on closed circuit television. The recording showed the offender take a schooner, smash it on a chair and then stab the victim in the cheek with it, causing a severe laceration. It then showed the offender quickly leave the hotel. Police identified a suspect, who was arrested and interviewed. Police took a photograph of the suspect under the Act to compare it to the CCTV footage.⁸⁰⁶

Generally, forensic procedure photographs are taken without any difficulty. However, we did identify some problems:

- Uncertainty about whether a photograph is a forensic procedure – as discussed at 9.1.2, there is some confusion about the circumstances in which taking a photograph is a forensic procedure.
- Electronic recording of the procedure – as discussed at 8.5.6, we found that some officers were not aware that forensic procedure photographs had to be electronically recorded. Others knew about the requirement, but argued that it should be abolished.
- Treating photographs of victims as a forensic procedure – as discussed at 9.4, many officers we spoke to objected to having to take victims of personal violence offences through the forensic procedure process. We note that this is NSW Police policy and is not required by the Act.
- Length of time taken to conduct the procedure – the Police Association of NSW argued that it takes approximately two hours to take forensic procedure photographs. We note that we watched a number of videos of forensic procedure photographs being taken, and none took this long.

8.7.2. Prints

As discussed at 9.1.1, prints may be taken as a forensic procedure under the *Crimes (Forensic Procedures) Act*, or for identification purposes under Part 10 of the *Law Enforcement (Powers and Responsibilities) Act*. Forensic procedure prints may include hand, finger, foot and toe prints.

Prints are taken using Livescan, an inkless process which uses digital technology to scan finger and hand prints. Where Livescan is not available yet, police can use the old method of printer's ink, roller and slab. Prints taken for identification purposes are emailed to the Criminal Identification Specialist Branch (CISB) and the National Automated Fingerprint Identification System (NAFIS).

Where prints are taken as a forensic procedure, the Livescan device is used in "stand alone" mode, which ensures the prints are sent to the printer in the police station where they have been taken. The hard copy version of the print is recorded at the police station as an exhibit, and is then taken to CISB. Before checking the print for any matches, CISB acknowledges receipt of the exhibit and records the print in its own exhibits log before comparing the print to the crime scene evidence.⁸⁰⁷

Any appropriately qualified police officer or other appropriately qualified person may take forensic procedure prints.⁸⁰⁸ Unlike all the other forensic procedures, police do not have to electronically record the taking of prints.⁸⁰⁹ This does not negate the requirement to record the provision of information and the consent process.

Prints would generally only be taken as a forensic procedure where police cannot take them under Part 10 of the *Law Enforcement (Powers and Responsibilities) Act*, for example because police wish to take a foot print, or because the suspect is not in police custody.

Case Study 58

A family was out of town for a wedding when their house was broken into. The intruder set alight clothes in wardrobes in the children's bedrooms, and the fire spread through the house, causing extensive damage. Police identified a suspect, a 14 year old girl who knew one of the children in the family. The girl denied having been to the house, and said she was shopping with friends at the time of the fire. However, the friends she nominated denied she had been with them. Police obtained a court order authorising them to take the girl's fingerprints. These were compared to fingerprints found at the entrance to the house. The prints matched and the girl was charged.

We are not aware of any problems associated with forensic procedure prints.

8.7.3. Swabs and scrapings

Police may take samples by swabbing or scraping parts of a suspect's body. Often these procedures need to be completed quickly so that evidence is not lost or damaged. Swabs and scrapings can be taken by a medical practitioner, nurse, appropriately qualified police officer or other appropriately qualified person.⁸¹⁰ For intimate swabs and scrapings (those taken from the genital area, anal area, buttocks of a person and the breasts of a female or transgender person), the suspect is entitled to request a medical practitioner of choice to be present while the procedure is carried out.⁸¹¹

Through our monitoring activities, we found that some officers are concerned that evidence may be lost while waiting for a medical practitioner to attend. However, we note that the suspect's medical practitioner of choice must be present for the procedure, unless he or she is unable, or does not wish to attend, or cannot be contacted, within a reasonable time the procedure must be carried out if it is to be effective in affording evidence of the relevant offence.⁸¹²

We understand that, although the Act enables police to conduct a swab or scraping without a medical practitioner being present in these limited circumstances, it is NSW Police policy not to do so. One survey response explained:

*Although crime scene officers are qualified to take swabs from the body, there is a direction, as I understand it from the Director FSG that they are not to do so. It is difficult to find a medical practitioner to do them. This could result in significant evidence being lost.*⁸¹³

It is unclear whether this directive and advice is part of the training provided to SOCOs or a formal policy or procedure document. While we support appropriate safeguards being implemented by NSW Police, if such a direction does exist, in our view it should be amended to ensure relevant evidence is not lost.

Recommendation 41

NSW Police consider reviewing all directives issued to forensic service group and crime scene officers so that they not only reflect the provisions of the *Crimes (Forensic Procedures) Act 2000* but also assist in ensuring that relevant evidence is not lost.

NSW Police does not support recommendation 41, but advised that it is currently conducting discussions with NSW Health to clarify roles and responsibilities, and will issue a further directive if necessary.⁸¹⁴

8.7.3.1. Gunshot residue tests

The Act does not specifically provide for gun shot residue tests, but these may be conducted under the swabbing provisions. Police may wish to swab a person's hands where they suspect the person has recently fired a gun. They may also collect physical evidence, such as the suspect's clothing, or take swabs from other surfaces, such as car windows (although this would not be a forensic procedure). These methods are generally more successful than taking swabs from the suspect's body, as gunshot residue does not remain on the skin very long, and is easier to remove from the skin than from other surfaces. Police Crime Scene Investigators are the only people currently trained in the collection of gunshot residue samples, as these procedures usually relate to serious crimes.

Gunshot residue tests are managed by the Forensic Microanalysis Laboratory (FML), at the University of Technology, Sydney. FML has developed SOPs for collecting gunshot residue samples, which include instructions for using the sampling kits and information about how to minimise contamination. The SOPs specify that gunshot residue samples need to be taken within six hours of the gun being fired, to be effective. FML advised that regardless of this advice, police still send in samples collected outside this timeframe.⁸¹⁵ As discussed above, enabling police to conduct forensic procedures during the investigation period may reduce these delays, and reduce the risk of evidence being lost.

8.7.4. Other procedures

The Act also provides for taking a sample by tape or vacuum suction, for example where police attempt to find evidence on a suspect which links them to a crime scene or to a victim. These can be taken by an appropriately qualified police officer or other person or, in the case of intimate procedures, by a medical practitioner or nurse.

The Act also provides for taking physical measurements for biomechanical analysis. For example, police may wish to compare a suspect's physical measurements against CCTV footage of an offender. Physical measurements can be taken by an appropriately qualified police officer or other person.

These types of procedures are conducted very rarely. We are not aware of any problems associated with these procedures.

8.8. Questions and comments by suspects and volunteers

During our video audit, we noted whether the person undergoing the procedure asked any questions or made any comments. We found that the person asked questions or made comments in 69 of the 146 procedures we watched. Comments related to:

DNA sampling in general:

"Amazing stuff, it's really good they've got these kind of things today, especially for rapists and murders. I reckon anyway."

DNA sampling being unfair or unwarranted in the circumstances:

"Taking a swab off me is too much."

"I think it's very unfair."

"I don't know why I'm here... I don't know what my rights are."

what the suspect anticipated the results of DNA analysis would show:

"This will prove my innocence won't it? The DNA will prove that."

"It's all right, I've got nothing to hide... I haven't killed anyone or raped anyone, so I'm sweet."

"I've got nothing to hide and I know this will clear me... I'm innocent and forensics will prove that."

and the length of time the person had already been in custody:

"I'm going to be done one way or another... I want it done to get out of here."

"I just want to get this thing over with."

Some suspects told police how the procedure should be conducted, either because they had provided buccal swabs before or could read the instruction sheet on the wall.

People undergoing forensic procedures asked questions about why they were being DNA tested. Some asked how taking DNA was relevant to the charge, or how it was of any investigative value:

"I'm not denying that I had sex with her therefore why is this necessary?"

Others asked whether police routinely take DNA:

"Everyone that's charged now for anything, do they have DNA test?" Police responded, "For serious offences they do."

One suspect asked why he was having a DNA sample taken, and police said they had just decided to take one, and did not give any further explanation.

Others asked what the sample would be used for:

"Who uses this DNA, for what matters?"

"How do I find out about a DNA match?"

"So you can use my DNA for other investigations?" The police officer said, "At this stage I'll let the investigating officers explain that to you." The suspect said, "I already asked them and they said they didn't know." The police officer replied, "Well I think that will have to go back to the magistrate."

Some volunteers asked whether the sample they provided would only be used within that particular case.

Some suspects and volunteers asked about contamination issues, for example about why police wore gloves when taking the sample. One asked for a new pen to sign the consent form as he thought the officer conducting the procedure might have touched the gun which was involved in the offence being investigated.

Some asked about the equipment used to conduct the procedure:

"What are all the barcodes for? How come there are so many?" Police explained, "It's so your DNA doesn't get mixed up with anyone else's at the lab."

Many suspects appeared tired and asked when they would be released:

"Do I get to go home after this?"

"After this, can I go?"

"After this I can go home hey?"

Other questions related to the information sheet or consent form, access to legal advice or interview friends, how the procedure would be conducted, including how long it would take, and why it had to be electronically recorded. Some asked about the offence being investigated, or whether they would be charged.

Generally, police provided adequate responses to questions by suspects and volunteers, although some found it difficult answering questions about the relevance of the forensic procedure to the offence being investigated, why further samples have to be taken from suspects whose DNA profile is already on the database, and what the person's DNA profile would be used for. In some of the videos we watched, police were fairly cursory and it appeared the person undergoing the procedure would have liked more information about why the procedure was being conducted. However, in the majority of cases police were patient and professional, and answered questions as best they could.

We note our recommendation 3(b) concerning specialist forensic officers in each command, if adopted, will assist in ensuring that the information provided to suspects and volunteers in response to their questions is complete and accurate.

8.8.1. Questioning by police

The Act prohibits police from questioning suspects or volunteers while a forensic procedure is being carried out. If questioning has not been completed before the procedure is conducted, it must be suspended while the procedure is carried out.⁸¹⁶

We found that police generally comply with this requirement. However, we did find two forensic procedures during our video audit where police questioned the suspect during the procedure:

- A 21 year old man suffered head injuries in an assault, after an argument in a pub. Police identified a suspect, who admitted being involved in a scuffle with the victim but stated the victim had no injuries when he left him. Police took a buccal swab and some photographs of the suspect. During the forensic procedures, police asked the suspect a number of questions about injuries he had, including how he got them. The suspect said he played football that day and that the injuries were from football.⁸¹⁷
- A couple reported that their neighbour broke into their house while they were upstairs, and smashed a number of things in their living room. He told them he had a gun and would shoot them. He left and the couple called police before going downstairs to assess the damage. Police found a piece of metal in the living room, which they believed was the bolt action of a firearm and a .22 calibre round. They also took swabs of blood which they thought had been left by the neighbour. Police arrested the neighbour, and took a buccal swab and some photographs. During these procedures, police asked the suspect, "Are you right or left handed?" The suspect replied that he was ambidextrous. Police asked, "What's your hobbies?" The suspect replied, "Cars, tennis and women." Police then asked the suspect, "Do you have any normal contact with firearms during course of work or play?" The suspect replied that he did not.⁸¹⁸

8.9. Use of force

Section 47 of the Act provides that a person authorised to carry out a forensic procedure on a suspect may use reasonable force to enable the procedure to be carried out, or to prevent the loss, destruction or contamination of any sample. Reasonable force can be used to take hair samples, blood samples, photographs, fingerprints and other procedures. Use of force is not permitted in the case of buccal swabs as these are self-administered by the person providing the sample.⁸¹⁹ A person who is asked to help carry out a forensic procedure may also use reasonable force to enable the procedure to be carried out.⁸²⁰

During our audit of local area commands we did not find any forensic procedures which had been conducted using force. There was one procedure, a hair sample, where five police officers entered the room because the suspect was being uncooperative. The additional police presence appeared to be for the safety of the officer conducting the procedure. Although the suspect objected to the procedure, it was ultimately carried out without incident.⁸²¹

In our survey, we asked local area commands whether any forensic procedures they had conducted involved the use of force. We obtained and viewed all available videos of procedures mentioned in the survey results. We did not identify any concerns with the conduct or management of these procedures. As the nature of our survey involved commands either reviewing COPS records or interviewing other staff to obtain information about procedures conducted by force, much of the information provided is anecdotal. This is because there is currently no requirement to report on the use of force during the conduct of a forensic procedure, and as such, reviewing COPS records is of limited use to identify procedures involving the use of force.

Considering this, seven commands advised that they had conducted procedures by force.⁸²² We sought to review the circumstances in which forensic procedures were conducted by force and sought further information from these commands. Following this request, three commands advised they were unable to provide any further details. We reviewed the COPS records of the procedures the other four commands advised had been conducted by force. Three

appeared to be hair samples, taken in relation to a ram raid, drug offences and a spate of armed robberies. The other was a photograph taken in relation to an assault. There was no indication of what force was used, or why.

Through our monitoring activities, we did not find any evidence of force being used inappropriately by police conducting forensic procedures. We found very little other evidence of force being used at all and received only two complaints regarding forensic procedures on suspects involving the use of force. These complaints are discussed in chapter 15 as complaints 5 and 6.

While it is clear that force is used very rarely to conduct forensic procedures, it is of concern that many commands (12, or 15 per cent) were unable to advise whether any procedures had been conducted by force. We later make recommendations (66 to 71) to address problems with reporting of DNA sampling. In our view, NSW Police should be required to report in addition to that information on the number of times forensic procedures are conducted using force, in its Annual Report. There may also be some merit in the forensic procedures officer proposed in recommendation 3(a), or if this recommendation is not implemented, FPIT reviewing all videos where force is used, to identify any training needs in the command.

We also reiterate a number of recommendations made in our earlier report on the sampling of serious indictable offenders where we discussed the use of force in detail. We continue to support the recommendations we made in our Part 7 report as best practice for procedures involving the use of force. These recommendations are outlined below.

Recommendation 42

NSW Police be required to report on the number of occasions forensic procedures are conducted using force, in its Annual Report.

Recommendation 43

NSW Police ensure that SOPs require officers to:

- a. Review and consider alternatives prior to force being used to carry out, or facilitate carrying out forensic procedures
- b. Document their consideration of alternatives to the use of force and the reasons why they believe that these options are not practicable in the circumstances.

Recommendation 44

NSW Police ensure that regular and timely review of documents and recordings of the use of force are carried out by either specialised forensic procedure officers as described in recommendation 3(a) or FPIT so as to assess the:

- a. Appropriateness of the use of force
- b. Reasonableness of the use of force
- c. Appropriateness of the methods applied by the officers concerned
- d. Any training needs identified for the officers concerned

Recommendation 45

NSW Police ensure that forensic procedures involving the use of force are carried out in appropriately sized and equipped areas, which minimise the likelihood of injury to the testing officers and suspects.

Recommendation 48

NSW Police amend its SOPs to ensure that all communication and negotiation with the suspect by testing officers and/or senior police officers is recorded on video prior to the use of force.

Recommendation 47

NSW Police ensure that SOPs relating to the identification of all persons present and the explanation of their role are complied with.

NSW Police supports recommendation 42 but advised its implementation depends on changes to COPS. It supports recommendation 43(a) but not 43 (b), on the basis that it is unnecessary. As with other decision making processes relating senior police officer orders, we think the reasons for decisions should be documented.

NSW Police supports recommendations 44, 45 and 47. It does not support recommendation 46, arguing that the recommendation is too broad, and its operational feasibility is doubtful.⁸²³ We remain of the view that recording discussions with suspects before resorting to force would be good practice.

8.10. Sharing samples and providing results

8.10.1. Sharing DNA samples with suspects

Section 58 of the Act requires that if enough forensic material is taken from a suspect, police must make part of the material available to the suspect for independent analysis. Police can send the material to the suspect or their legal practitioner, or if there is no known address, may make it available for collection at the police station where the investigator was based at the time the procedure was carried out. Material must be made available within 90 days.⁸²⁴

The FPIT site on the NSW Police intranet has instructions on how to share forensic material, for each of the following DNA procedures:

Buccal swab:

After a suspect's DNA material has been transferred onto the FTA card, the buccal swab should be placed back in the sterile packet from which it was originally obtained and the packet sealed with one of the spare barcodes. The packet should then be handed to the suspect. There is no need to obtain a receipt from the suspect unless the forensic procedure is not being videotaped.

Hair sample:

After you have obtained a hair sample from a suspect, the suspect should be asked whether he/she wishes to have a further 15 to 20 hairs removed to enable him/her to have the DNA independently analysed and profiled. If the suspect answers 'yes', a further 15 to 20 hairs should be removed from the suspect's head or arms using the lever arch method. These hairs should be placed in an envelope and the envelope sealed with one of the spare barcodes before being handed to the suspect. There is no need to obtain a receipt from the suspect unless the forensic procedure is not being videotaped.

Blood sample:

Before a blood sample is obtained from a suspect, the suspect should be asked whether he/she would like some of the blood to be returned to him/her to enable him/her to have the DNA independently analysed and profiled. If the suspect answers 'yes', an FTA card should be obtained from another Blood Sampling Kit. After the suspect's DNA material has been transferred onto the FTA card for analysis by the Division of Analytical Laboratories, further blood should be transferred onto the FTA card that was obtained from the second Blood Sampling Kit. This second card should then be placed in the envelope from which it was originally obtained and the envelope sealed with one of the spare barcodes from the first kit before being handed to the suspect. There is no need to obtain a receipt from the suspect unless the forensic procedure is not being videotaped.

The second kit should be sealed and sent the Division of Analytical Laboratories for destruction. The only items that will have been used from this second kit are the FTA card and the envelope.

We assessed the sharing of forensic material taken by buccal swab or hair sample through our video audit. In many cases, police followed the procedures outlined above.⁸²⁵ However, for a significant number of buccal swab procedures, police put the swab in the tamper-evident bag, instead of giving it back to the suspect.⁸²⁶ When the legislation was first implemented, police were instructed to place the swab in the tamper-evident bag, and some of the older sampling kits still contain these instructions.

We did not view any procedure where a suspect wished to have additional hairs removed for independent analysis. Many suspects found the offer quite offensive, as police officers were offering to pull out even more hairs, for no apparent reason. In a number of the buccal swab videos, the suspect stated that he or she did not wish to retain the swab, and in these cases the swab was often returned to the tamper evident bag and sent to the laboratory. Our audit did not include any blood samples so we were unable to comment on the process for sharing this sample type.

We also reviewed procedures for sharing samples with suspects in our survey of local area commands. Responses varied greatly. Many commands advised that they complied with the SOPs, or at least indicated they were aware of the sharing requirements. However, eight commands responded that they did not have SOPs in place to manage sharing forensic material, or had no record of samples being shared. An additional four commands advised they share samples with suspects only if the suspect requests this in writing, and one command had "never heard of it." It is clear that a significant number of commands are not aware of the requirement that forensic material be shared with suspects.

Police officers who were aware of the requirement that DNA samples be shared with suspects were universally critical of it. We agree that application of section 58 to a person's own DNA sample is ill conceived. A person's DNA is with them all the time and a sample can be taken for independent analysis at any time. There is no difficulty with the police policy of returning the used buccal swab to the person who provided the sample if requested, but the apparent requirement that a police officer offer to take a further hair sample from a suspect who has just had between 15 and 20 hairs pulled out is unnecessary and inappropriate.

8.10.2. Other forensic material

Unlike DNA samples, forensic procedures like nail scrapings, gun shot residue tests and swabs of hands or genitals cannot be replicated at any time. The section 58 sharing requirement means that if enough forensic material is taken, part of it must be made available to the suspect for independent analysis.

In these circumstances, it is sometimes unlikely there would be sufficient material to share with the suspect, at least not at the police station at the time the procedure is carried out. In addition, given the evidence cannot be replicated, an officer is unlikely to share material in circumstances where the officer is not absolutely certain material collected for analysis is entirely sufficient. It is NSW Police policy to advise suspects that if they wish to be provided with a portion of any material remaining after analysis, they should put this request in writing to the investigating police officer. The investigating police officer is responsible for ensuring any remaining material is made available to the suspect within 90 days of receiving the request.⁸²⁷

While this approach is not consistent with the legal requirements of section 58, it appears a sensible compromise between the suspect's rights and the investigation's integrity. However, we found little evidence of commands providing this advice to suspects.

8.10.3. Photographs

Section 59 of the Act provides that where a forensic procedure involves the taking of a photograph of a part of the suspect's body, police must ensure that a copy of the photograph is made available to the suspect. The FPIT site on the NSW Police intranet has instructions on how to provide copies of photographs to suspects:

A copy of any photograph taken of a suspect's body as a forensic procedure e.g. a photograph of the face of a suspect to be shown to witnesses or a photograph of a wound or tattoo on a suspect's body, is required to be provided to the suspect as a matter of course. Photographs can either be sent to the suspect's last known address or kept for collection at the place where the forensic procedure was carried out.

Officers are instructed to ensure they make at least three copies of any photos – one for the investigator, one for the brief of evidence and one for the suspect.⁸²⁸

During our audit of local area commands, we found that commands generally only provide suspects with a copy of forensic procedure photographs if the matter goes to court, and they are included in the brief of evidence. We found little evidence of commands complying with the section 59 requirements.

In response to our survey, commands generally showed greater awareness of the need to share photographs than to share DNA or other forensic material. However, two commands were unaware of the SOPs or legislative requirements for sharing photographs. A further 12 commands considered that providing copies of photos in the brief of evidence met the legislative requirements. Photos are taken on a digital camera at six commands and are printed and provided to the suspect on the spot. Some also mentioned they asked the suspect to sign a receipt for the digital photos, and put the receipt on the brief of evidence. Another two commands indicated that they still used film and that once the suspect was advised of the time required to develop the photos, they often declined the offer of receiving copies. A further two commands indicated that they also used film but they had systems in place to notify the suspect once the photos became available.

In our view, the provision of photographs is unnecessary unless they are to be used in a brief of evidence. We note that providing photographs with the brief of evidence will not meet the section 59 requirements in matters which do not go to court, or where it takes more than 90 days to provide the brief of evidence. To overcome this problem, we feel that consideration should be given to amending section 59 so that it is met by NSW Police including photographs as part of the brief of evidence or providing copies in response to a written request from the person undergoing the forensic procedure.

8.10.4. Providing analysis results to suspects

Section 60 provides that if material taken from a suspect is analysed in the investigation of an offence, the investigating police officer must ensure a copy of the analysis result is made available to the suspect. Analysis results must be made available within 90 days. This is not required where providing a copy of the results would prejudice the investigation. However, the result must be made available "a reasonable time before evidence of it is adduced in any prosecution of the suspect for the offence." Police can send results to the suspect or their legal practitioner, or if there is no known address, may make it available for collection at the police station where the investigator was based at the time the procedure was carried out.⁸²⁹

It is not clear from the Act exactly what "results of the analysis" means. As explained in chapter 10, laboratory staff generally derive the person's DNA profile within a few days of receiving the DNA sample, and upload it onto the database. At this stage, the person's profile and any cold links to other crime scenes would be available. However, it may be some time before evidence from the relevant crime scene is examined and a DNA profile obtained for comparison with the suspect's DNA profile. Further, DNA analysis does not always give clear results. The results may be open to interpretation and testing may be ongoing.

As with photographs, it appears that police officers generally only provide suspects with a copy of DNA analysis results if the matter goes to court, and the results are included in the brief of evidence. Police do not inform suspects of their DNA profile once it is derived, or of any links to crime scenes, unless they decide to prosecute the suspect for the offence. We note that providing DNA analysis results with the brief of evidence will not meet the requirements of the Act where links to crime scenes do not ultimately go to court, or where it takes more than 90 days from the results becoming available to provide the brief of evidence. Our view is that there is little benefit in providing the DNA profile, as this is merely a series of numbers (see 1.4.2). Only where the results are to be used in a criminal justice proceeding does fairness require they be made available to suspects or volunteers. Police practice appears consistent with fair practice in this matter, and we consider the Act should be amended so that results be provided in these circumstances.

8.10.5. Sharing samples and providing analysis results to volunteers

Because Part 6 of the Act applies to volunteers as if references to suspects were references to volunteers, the sharing requirements set out in Division 6 of Part 6 apply to volunteers.⁸³⁰ This means that police officers who take a sample from a volunteer (whether a DNA sample or some other type of sample) must make part of the sample available to the volunteer for independent analysis. It also means police must ensure a copy of any photograph of a volunteer is made available to the volunteer. Further, if material from a forensic procedure sample is analysed in the investigation of an offence, police must ensure that a copy of the analysis results is made available to the volunteer.

In our view, it is generally inappropriate for police officers to share samples and analysis results with volunteers. As with suspects, there is no reason why police should provide a volunteer with a sample of his or her own DNA for independent analysis. If some other type of sample is taken from a volunteer, like a nail scraping or swab, which may have some other person's DNA in it, it is not clear why the volunteer should receive part of the material taken or the results of its analysis.

Further, where a DNA sample is taken from a volunteer for elimination purposes, the analysis results are likely to include details about other people's DNA profiles, for example those of the victim or offender. Consider case study 43, at 7.5.1, where a number of people who worked in a shopping centre – including cleaners and security officers – were asked to provide DNA samples to help identify the offender who attempted to indecently assault a woman in the shopping centre toilets. Why should these volunteers be provided with the DNA analysis results?

We found little evidence of police officers complying with the requirements to share samples with and provide analysis results to volunteers.

8.10.6. Discussion

In our view, Part 6 Division 6 of the Act does not appear to be working effectively and does not reflect the practicalities of policing. To overcome this, a different approach is required for the sharing of photographs, DNA samples and the provision of analysis results.

The need to share a DNA person sample with the individual supplying the sample is unnecessary, and in the case of a hair sample, inappropriate. In these cases, the person can arrange to have their own DNA independently analysed at any time and do not need NSW Police to provide them with a share of the sample.

As to the provision of analysis results or photographs, these need only be supplied by NSW Police in cases where the results are going to be used in evidence. If the information is not to be used as part of a brief evidence there is no need for NSW Police to provide this information unless a specific request is made in writing. This is particularly relevant where volunteers have provided elimination samples. Providing the volunteer with an analysis report that they are unlikely to understand the intricacies of is not constructive.

Lastly, the sharing of other material obtained as a result of a forensic procedure is in most cases not possible due to the nature of the analysis and small amounts of material involved. In these cases, if a person makes a specific request in writing for a share of the material and there is sufficient available for independent analysis, this should be provided. Otherwise, the provision of the analysis results in the brief of evidence is the most appropriate response and we make the following recommendations supporting this approach.

Recommendation 48

The *Crimes (Forensic Procedures) Act 2000* be amended so that Part 6 Division 6 reflects the following principles:

- a. it is unnecessary to share person DNA samples
- b. the provision of other material is also unnecessary, unless material remains available (after the initial analysis) that is sufficient for independent analysis and the suspect has requested this
- c. if there is more than sufficient material available (for the initial analysis) at the time the sample is collected, and a request is made by the suspect, the testing officer should supply a share of the sample at this time
- d. the results of DNA analysis, or the analysis of other samples taken under the Act, only be required to be provided to persons where the results are to be used in evidence in proceedings, or if a request is received
- e. photographs only be provided where they are to be used as evidence in proceedings or if a specific request is received.

Recommendation 49

The Attorney General consider amending the *Crimes (Forensic Procedures) Act 2000* so that Part 6 Division 6 does not apply to volunteers.

However, in the interim and so that compliance with the present requirements is achieved, we recommend the following steps.

Recommendation 50

NSW Police develop and implement strategies to ensure officers are complying with the current procedures for sharing forensic material and photographs with suspects.

Recommendation 51

NSW Police consider expanding the use of digital photographs for forensic procedures to ensure copies of photographs can be provided expeditiously and receipts obtained.

NSW Police supports recommendations 48 to 51.⁸³¹

In response to recommendation 48(e), the Attorney General's Department advised that it is preparing a bill that will clarify the circumstances in which the results of forensic analysis are made available to the suspect, and give greater certainty of meaning to the term "results of analysis."⁸³² The Attorney General's Department also notes that persons should be advised of their right to make a request. This is something that is perhaps most appropriately included in the plain English version of information required to be given to persons, presently being developed by the Department.

Endnotes

- ⁷¹⁰ *Crimes (Forensic Procedures) Act 2000* s 7(1) and 76(4).
- ⁷¹¹ NSW Police, Forensic Procedures - Standard Operating Procedure No. 1 – Buccal Swab procedure for non ATSI consenting adult suspect under arrest, NSW Police Intranet as at 17 February 2005.
- ⁷¹² This figure includes both suspects and volunteers as the NSW Police, “Standard Operating Procedures – Forensic Procedures for volunteers” includes instructions on providing the caution to the volunteer.
- ⁷¹³ NSW Ombudsman, “*The Forensic DNA Sampling of Serious Indictable Offenders under Part 7 of the Crimes (Forensic Procedures Act) 2000*” (August 2004), Recommendations 27 and 28.
- ⁷¹⁴ NSW Police response to Ombudsman draft report, 2 June 2006.
- ⁷¹⁵ NSW Police response to Ombudsman draft report, 2 June 2006.
- ⁷¹⁶ *Crimes (Forensic Procedures) Act 2000* s 4.
- ⁷¹⁷ *Crimes (Forensic Procedures) Act 2000* s 99.
- ⁷¹⁸ *Crimes (Forensic Procedures) Act 2000* s 30, 33 and 54.
- ⁷¹⁹ *Crimes (Forensic Procedures) Act 2000* s 10, 30, 33 and 55.
- ⁷²⁰ *Crimes (Forensic Procedures) Act 2000* s 54(3) and 55(4).
- ⁷²¹ *Crimes (Forensic Procedures) Act 2000* s 54(4).
- ⁷²² *Crimes (Forensic Procedures) Act 2000* s 4.
- ⁷²³ Confidential LAC survey response.
- ⁷²⁴ Confidential LAC survey response.
- ⁷²⁵ Confidential LAC survey response.
- ⁷²⁶ Responses to Ombudsman LAC survey.
- ⁷²⁷ *Crimes (Forensic Procedures) Act 2000* s 116.
- ⁷²⁸ NSW Ombudsman, *The Forensic DNA Sampling of Serious Indictable Offenders under Part 7 of the Crimes (Forensic Procedures) Act 2000*, (August 2004) p. 78.
- ⁷²⁹ NSW Ombudsman, *The Forensic DNA Sampling of Serious Indictable Offenders under Part 7 of the Crimes (Forensic Procedures) Act 2000*, (August 2004) recommendation 18.
- ⁷³⁰ These are the Kamilaroi Aboriginal Legal Service, Many Rivers Aboriginal Legal Service, South Eastern Aboriginal Legal Service, Sydney Regional Aboriginal Legal Service, Western Aboriginal Legal Service and Central Southern Aboriginal Corporation for Management and Accounting Services (the Wiradjuri Aboriginal Service): *Crimes (Forensic Procedures) Regulation 2000* cl 5.
- ⁷³¹ *Crimes (Forensic Procedures) Act 2000* s 78(c); and NSW Police, “Standard Operating Procedures – Forensic Procedures for volunteers”.
- ⁷³² *Crimes (Forensic Procedures) Act 2000* s 77(1) and 78(c). The only time an independent person is used in relation to a suspect is where the forensic procedure is not electronically recorded, in which case it must be carried out in the presence of an independent person who is not a police officer (unless the suspect expressly and voluntarily waives the right to have an independent person present): *Crimes (Forensic Procedures) Act 2000* s 57(4) and (5). This is discussed further at 8.5.8.
- ⁷³³ Confidential LAC survey response.
- ⁷³⁴ Responses to Ombudsman LAC survey.
- ⁷³⁵ NSW Police response to Ombudsman draft report, 2 June 2006.
- ⁷³⁶ *Crimes (Forensic Procedures) Act 2000* s 98.
- ⁷³⁷ Confidential LAC survey responses.
- ⁷³⁸ Confidential LAC survey responses.
- ⁷³⁹ NSW Police response to Ombudsman draft report, 2 June 2006.
- ⁷⁴⁰ *Crimes (Forensic Procedures) Act 2000* s 40.
- ⁷⁴¹ *Crimes (Forensic Procedures) Act 2000* s 42.
- ⁷⁴² *Crimes (Forensic Procedures) Act 2000* s 3(1).
- ⁷⁴³ *Crimes (Forensic Procedures) Act 2000* s 6 and 7.
- ⁷⁴⁴ Confidential LAC survey response.
- ⁷⁴⁵ NSW Police submission dated 16 February 2005.

- ⁷⁴⁶ Since the Act came into force, officers have been able to record the procedure on COPS or in the custody management system. We understand NSW Police is considering changing this policy so all forensic procedures conducted on suspects are recorded only in the custody management system: NSW Police response to Ombudsman draft report, 2 June 2006 and further advice from FPIT, 30 June 2006.
- ⁷⁴⁷ The others we were not able to calculate because the video did not record the procedure continuously, or the start and/or finish times were not stated.
- ⁷⁴⁸ NSW Police response to Ombudsman draft report, 2 June 2006.
- ⁷⁴⁹ Attorney General's Department response to Ombudsman draft report, 5 May 2006.
- ⁷⁵⁰ NSW Police response to Ombudsman draft report, 2 June 2006.
- ⁷⁵¹ *Crimes (Forensic Procedures) Act 2000* s 40.
- ⁷⁵² *Crimes (Forensic Procedures) Act 2000* s 51.
- ⁷⁵³ Information obtained through Ombudsman review of COPS records.
- ⁷⁵⁴ We made a similar recommendation in our report on Part 7: see recommendation 36 which stated that police conducting the DNA sampling should provide the name and place of duty, and explain the role of, all persons present to the person who is the subject of the procedure. This should be done at the beginning of the interaction and be electronically recorded. NSW Ombudsman, *The Forensic DNA Sampling of Serious Indictable Offenders under Part 7 of the Crimes (Forensic Procedures) Act 2000*, (August 2004) p. 153.
- ⁷⁵⁵ Information obtained through Ombudsman review of COPS records.
- ⁷⁵⁶ We received one complaint where the complainant indicated that he had not been given full and accurate information about how his sample would be used. This complainant also stated he was not allowed time to read the information sheet himself. See complaint number 4 at 15.3.4.
- ⁷⁵⁷ Information obtained through Ombudsman review of COPS records.
- ⁷⁵⁸ Information obtained through Ombudsman review of COPS records.
- ⁷⁵⁹ Confidential LAC survey response.
- ⁷⁶⁰ Police Association of NSW submission, March 2005.
- ⁷⁶¹ NSW Police submission, 16 February 2005.
- ⁷⁶² Professor Mark Findlay, in the *Independent Report of the Crimes (Forensic Procedures) Act 2000*, University of Sydney, 2003 suggested that police should be relieved of the obligations under the Act which require that taking photographs of a suspect be visually recorded.
- ⁷⁶³ Advice obtained during meeting with NSW Police Forensic Services Group staff on 21 April 2005.
- ⁷⁶⁴ *Crimes (Forensic Procedures) Act 2000* s 110.
- ⁷⁶⁵ *Crimes (Forensic Procedures) Act 2000* s 57.
- ⁷⁶⁶ Ombudsman video audit, 20 July 2004.
- ⁷⁶⁷ *Crimes (Forensic Procedures) Act 2000* s 57(4).
- ⁷⁶⁸ Police Association of NSW submission, March 2005
- ⁷⁶⁹ NSW Police response to Ombudsman draft report, 2 June 2006.
- ⁷⁷⁰ For a more detailed description of the DNA sampling techniques, see chapter 17 of NSW Ombudsman, *The Forensic DNA Sampling of Serious Indictable Offenders under Part 7 of the Crimes (Forensic Procedures) Act 2000*, 2004.
- ⁷⁷¹ COPS download data provided by FPIT on 15 July 2005.
- ⁷⁷² Ombudsman video audit, 24 November 2004.
- ⁷⁷³ Ombudsman video audit, 20 July 2004.
- ⁷⁷⁴ We initially asked for details of DNA samples rejected during the entire review period, but DAL advised that records prior to June 2003 could only be accessed manually. We decided that for the purpose of this review it would be sufficient to examine DAL's electronic records, which covered the last 18 months of the review period – from June 2003 to November 2004.
- ⁷⁷⁵ 52 from suspects and eight from volunteers, according to COPS records.
- ⁷⁷⁶ 4,619 from suspects and 421 from volunteers: DAL response to Ombudsman investigation notice, 24 February 2005.
- ⁷⁷⁷ See *Crimes (Forensic Procedures) Act 2000* Parts 3, 4 and 5.
- ⁷⁷⁸ NSW Police, COPS download data provided by FPIT on 15 July 2005.
- ⁷⁷⁹ NSW Police, "Standard Operating Procedures – Forensic Procedures" and FPIT intranet page.
- ⁷⁸⁰ See *Crimes (Forensic Procedures) Act 2000* s 3(1), 19 and 25.

- ⁷⁸¹ Ombudsman video audit, 13 August 2004.
- ⁷⁸² Ombudsman video audit, 20 July 2004.
- ⁷⁸³ Ombudsman video audit, 28 September 2004.
- ⁷⁸⁴ Ombudsman video audit, 29 September 2004.
- ⁷⁸⁵ We received a complaint during the review period regarding a blood sample being taken from a suspect in the absence of consent and a court order, see complaint number 5 at 15.3.4.
- ⁷⁸⁶ *Crimes (Forensic Procedures) Act 2000* s 50.
- ⁷⁸⁷ Blood samples are classed as intimate forensic procedures under the Act and NSW Police stipulates that Red Cross certification is the minimum requirement for obtaining a blood sample.
- ⁷⁸⁸ NSW Police, COPS download data provided by FPIT on 15 July 2005.
- ⁷⁸⁹ Information obtained through Ombudsman review of COPS records.
- ⁷⁹⁰ Information obtained through Ombudsman review of COPS records.
- ⁷⁹¹ Information obtained through Ombudsman review of COPS records.
- ⁷⁹² NSW Police response to Ombudsman draft report, 2 June 2006.
- ⁷⁹³ We are aware of at least two occasions where both a hair sample and buccal swab were taken from a child, on the same day. Information obtained through Ombudsman review of COPS records.
- ⁷⁹⁴ NSW Police response to Ombudsman draft report, 2 June 2006.
- ⁷⁹⁵ Under section 25 of the *Crimes (Administration of Sentences) Act 1999*.
- ⁷⁹⁶ Information provided by DAL, October 2005. Our audit sample included 180 forensic procedures but only 140 were DNA samples taken from suspects. The others were taken from volunteers, victims, were not DNA samples or had been destroyed.
- ⁷⁹⁷ Ombudsman video audit, 24 August 2004.
- ⁷⁹⁸ Confidential Magistrate survey response, 20 January 2005.
- ⁷⁹⁹ Meeting with NSW Police representatives to discuss Ombudsman Discussion Paper, 21 April 2005.
- ⁸⁰⁰ Police Association of NSW submission, March 2005.
- ⁸⁰¹ Ombudsman audit of local area commands; confidential interview with police officers, 27 September 2004 and 21 April 2005; and discussions with FPIT 25 October 2005.
- ⁸⁰² This matter is discussed in more detail at 11.2.1 as case study 74, and in Chapter 15 as complaint number 2.
- ⁸⁰³ This matter is discussed in more detail at 11.2.1 as case study 75.
- ⁸⁰⁴ For a more detailed description of the DNA sampling techniques, see chapter 17 of NSW Ombudsman, *The Forensic DNA Sampling of Serious Indictable Offenders under Part 7 of the Crimes (Forensic Procedures) Act 2000*, 2004.
- ⁸⁰⁵ *Crimes (Forensic Procedures) Act 2000* s 3(1).
- ⁸⁰⁶ Information obtained through Ombudsman review of COPS records.
- ⁸⁰⁷ Telephone conversation with CISB fingerprint section on 7 July 2005.
- ⁸⁰⁸ *Crimes (Forensic Procedures) Act 2000* s 50.
- ⁸⁰⁹ *Crimes (Forensic Procedures) Act 2000* s 57(1).
- ⁸¹⁰ *Crimes (Forensic Procedures) Act 2000* s 50.
- ⁸¹¹ *Crimes (Forensic Procedures) Act 2000* s 53.
- ⁸¹² *Crimes (Forensic Procedures) Act 2000* s 53(2).
- ⁸¹³ Confidential LAC Survey response.
- ⁸¹⁴ NSW Police response to Ombudsman draft report, 2 June 2006.
- ⁸¹⁵ Telephone conversation with FML on 1 July 2005.
- ⁸¹⁶ *Crimes (Forensic Procedures) Act 2000* s 45.
- ⁸¹⁷ Ombudsman video audit, 20 July 2004.
- ⁸¹⁸ Ombudsman video audit, 10 November 2004.
- ⁸¹⁹ *Crimes (Forensic Procedures) Act 2000* s 49A.
- ⁸²⁰ *Crimes (Forensic Procedures) Act 2000* s 52(3).
- ⁸²¹ Ombudsman video audit, 29 September 2004.
- ⁸²² 61 commands advised no procedures had been conducted by force, and the remaining 12 were not able to advise whether any procedures had been conducted by force.

⁸²³ NSW Police response to Ombudsman draft report, 2 June 2006.

⁸²⁴ *Crimes (Forensic Procedures) Act 2000* s 58 and 101.

⁸²⁵ Information obtained through Ombudsman review of COPS records.

⁸²⁶ Information obtained through Ombudsman review of COPS records.

⁸²⁷ NSW Police Intranet, FPIT page on "Sharing of forensic material" accessed 18 January 2006.

⁸²⁸ FPIT FAQ page on the NSW Police Intranet accessed 24 June 2005.

⁸²⁹ *Crimes (Forensic Procedures) Act 2000* s 60 and 101.

⁸³⁰ *Crimes (Forensic Procedures) Act 2000* s 76(4).

⁸³¹ NSW Police response to Ombudsman draft report, 2 June 2006.

⁸³² Attorney General's Department response to Ombudsman draft report, 5 May 2006.

Chapter 9. Procedures outside the Act

Police have powers other than those contained in the *Crimes (Forensic Procedures) Act* which enable them to conduct various forensic procedures. For example, they may conduct breath analysis on drivers, or take identification photographs of people in custody for an offence. The Act specifically states that it does not limit or exclude the operation of other laws relating to the carrying out of forensic procedures.

Through our monitoring activities, we found that there is some confusion about whether certain types of procedures are ‘forensic procedures’ for the purposes of the *Crimes (Forensic Procedures) Act*. Further, some officers have conducted certain types of procedures ostensibly under the authority of the Act when in fact there is no law authorising those types of procedures.

This chapter examines the relationship between the *Crimes (Forensic Procedures) Act* and other powers police have to conduct ‘forensic procedures’.

9.1. Other procedures – prints, photos, urine samples, medical examinations

9.1.1. Fingerprints

The Act states that a forensic procedure includes “the taking of a hand print, finger print, foot print or toe print.” However, it does not include prints taken for the sole purpose of establishing the identity of the person from whom they are taken.⁸³³

Police routinely take fingerprints from suspects at the time of charging, under Part 10 of the *Law Enforcement (Powers and Responsibilities) Act* (formerly under section 353A(3) of the *Crimes Act*). A police officer may take “all particulars that are necessary to identify a person who is in lawful custody for any offence.” This may include the person’s photograph, fingerprints and palm prints. Where a child under the age of 14 is in custody for an offence, police may apply to a court for an order authorising police to take the child’s fingerprints and palm prints, for the purpose of identifying the child.⁸³⁴

9.1.2. Photographs

Photographs as forensic procedures involve taking a photograph of a part of the body. These photographs can be taken under the Act as either intimate or non-intimate forensic procedures. Photographs taken as an intimate forensic procedure will include a photograph of the genital or anal area or the buttocks of a person, or the breasts of a female or a transgender person who identifies as a female. A non-intimate forensic procedure photograph would be a photo of any other part of the body.⁸³⁵

Police routinely photograph suspects at the time of charging, under Part 10 of the *Law Enforcement (Powers and Responsibilities) Act* (formerly under section 353A(3) of the *Crimes Act*).⁸³⁶ A photograph may be taken under this provision to show to a witness, if an identification parade cannot be held (for example, because the suspect has declined to participate, or has altered his or her appearance).

We understand that NSW Police initially advised officers that all identification photographs should be taken under the *Crimes (Forensic Procedures) Act*: “A photograph for a photograph identification is a photograph of a part of the body, namely the head and shoulders. Accordingly, it must be treated as a forensic procedure under the Act.”⁸³⁷ However, after obtaining legal advice on this issue, the current NSW Police position is that photographs can be taken under the provisions of the *Law Enforcement (Powers and Responsibilities) Act*, provided the suspect is in custody for an offence, and the photograph is deemed necessary for the identification of the person. Officers need only proceed under the *Crimes (Forensic Procedures) Act* if the provisions of the *Law Enforcement (Powers and Responsibilities) Act* do not apply, either because the photograph is not for identification purposes, or the suspect is not in custody for an offence.⁸³⁸

However, we found there is still considerable confusion among police officers about when photographs can be taken under the provisions of the *Law Enforcement (Powers and Responsibilities) Act*, and when they must be taken under the *Crimes (Forensic Procedures) Act*. For example, one police officer we interviewed commented:

*Sometimes it's not clear whether – or why – a procedure falls within the Act. Why do you have to go through the Act to take a photo?*⁸³⁹

In our survey of local area commands, some commands singled out the taking of photographs as one of their main problems in implementing the Act:

*A little confusion has arisen over the taking of photographs of suspects. Initially a full forensic procedure needed to take place whereby the information sheet had to be read and consent given. Now it appears to be a complete turnaround, whereby a photo during the charging process is sufficient. Even if the suspect is not charged, it appears just taking a photograph is acceptable... [We would like] confirmation on photographing suspects, confirmation on the difference between photographing for identification purposes as opposed to evidentiary purposes.*⁸⁴⁰

*The use of arrest photos is still very ambiguous.*⁸⁴¹

*Opinions can vary... for example the use of photographs... whether existing photos or new photos need to be obtained.*⁸⁴²

Several police officers suggested that the Act should not deal with photographs at all, that they should not be treated as forensic procedures.⁸⁴³

During the review period, we received some complaints about photographs being taken in breach of the Act.

Case Study 59

Police interviewed an 18 year old man in relation to his involvement in an assault. Police asked him to participate in an identification parade, but he declined. Police advised that he would be charged, and would have his fingerprints and photographs taken. The young man's legal representative left the room briefly, leaving the young man alone with police. Police then informed the young man that they were not going to charge him, but they went ahead and took his photograph.

When he returned, the man's legal representative immediately asked why the photograph had been taken. Police obtained legal advice about the matter and subsequently decided to destroy the photograph.

Police applied for a court order authorising a photograph to be taken under the *Crimes (Forensic Procedures) Act*. The court made the order and police took the young man's photograph again.⁸⁴⁴

Case Study 60

A police officer arrested a boy at school in relation to an assault which had occurred some time previously. The officer took him to the police station, and took his photograph, to show to people who witnessed the assault. The matter went to court and the magistrate made serious adverse comments about the police officer involved. In particular:

- The police officer arrested the young person at school to prevent him from seeking legal advice, knowing that the young person was represented in the matter and that the photograph would not be taken if the legal representative was present to advise the young person.
- The police officer acted unlawfully by arresting the young person for the purpose of taking a photograph, rather than for the purpose of charging him with an offence.
- The police officer took the photograph on the basis of the young person's consent, despite the fact that the Act states that children cannot consent to forensic procedures. The police officer should not have taken the photograph without obtaining a court order.
- The police officer separated the young person from his support person, his father, while the photograph was being taken.

The magistrate found the police officer lacked credibility, some of his responses to questioning were implausible and dishonest, and that his behaviour during the investigation was “completely unacceptable.” The magistrate commented:

The reason for the failure to comply [with the Act] at best was ignorance, a less charitable view was that the constable’s conduct was deliberate and deceitful...

The constable’s conduct is clearly illegal and improper in... arresting the child for the purpose of taking a photo and not for the purpose of charging... It is clear that nothing had changed with the young person’s attendance at the police station except that the police now had his photo. And I note that he was still summonsed, he was not arrested for the purpose of charging. He was clearly arrested for the purpose of obtaining a photograph for use in this investigation.

The magistrate ruled that the picture identification evidence was inadmissible as it was unlawfully obtained.

NSW Police investigated the matter and disagreed with the magistrate’s findings. The police investigator concluded that the young person’s photograph had been taken under section 353A of the *Crimes Act*, and that the only issue raised by the officer’s conduct was his failure to seek permission from the officer in charge of the police station before taking the photograph, as required by section 353A. The police investigation found that police had contacted the young person’s legal representative a number of times previously, including the day the photograph was taken.

The police investigator did not agree that the young person had been arrested for the purpose of taking the photograph. Rather, he was arrested for the purpose of being charged, but police ultimately decided to proceed by way of future court attendance notice rather than formally charging him.

We oversighted the police investigation and agreed it could not be determined that the police officer involved deliberately circumvented the provisions of the *Crimes (Forensic Procedures) Act* in order to obtain evidence against the young person. The evidence suggested the officer believed he was acting within his powers when he asked the young person to consent to the photograph.⁸⁴⁵

We note that police cannot arrest a suspect in order to take the person’s photograph, as there is no power to arrest solely for the purpose of investigation. It has long been established that police can only arrest a person in order to take the person before an authorised justice as soon as practicable, to be dealt with according to law.⁸⁴⁶ Further, the *Law Enforcement (Powers and Responsibilities) Act* specifies that police can only arrest a purpose where necessary, to ensure the person appears at court, to prevent another offence, to prevent the loss of evidence or harassment of witnesses, to prevent fabrication of evidence or to preserve the person’s safety or welfare.⁸⁴⁷ For this reason, if a suspect is not under arrest, police can proceed under the *Crimes (Forensic Procedures) Act* but not under Part 10 of the *Law Enforcement (Powers and Responsibilities) Act*.

In some circumstances, police may arrest a person and after conducting further inquiries, decide to release the person without charge. Police may decide to proceed by court attendance notice at a later date, if further evidence comes to light. Police do not need to charge a suspect to be able to take a photograph under Part 10 of the *Law Enforcement (Powers and Responsibilities) Act*.⁸⁴⁸ However, the original arrest must have been valid – that is, the suspect must have been arrested for the purpose of being brought before an authorised justice, to be dealt with according to law.

In our view, the legal position is clear. It appears, however, that NSW Police clarify when officers can take photographs under Part 10 of the *Law Enforcement (Powers and Responsibilities) Act*, and when they can take photographs under the *Crimes (Forensic Procedures) Act*. In particular, NSW Police may consider including advice on this issue in the frequently asked questions section of the FPIT intranet site, where there is already a section on photographs. NSW Police may also update the law notes which are still on the intranet to indicate that they have been superseded. Any advice provided to officers should emphasise that a person cannot be arrested for the sole purpose of taking a photograph.

Recommendation 52

NSW Police provide clear advice to officers about when photographs can be taken under sections 133 and 136 of the *Law Enforcement (Powers and Responsibilities) Act 2002*, and when photographs can be taken under the *Crimes (Forensic Procedures) Act 2000*.

This recommendation is supported by NSW Police.⁸⁴⁹

9.1.3. Cavity searches

The Act provides for various intimate forensic procedures to be conducted, but specifically excludes body cavity searches: “A forensic procedure... does not include any intrusion into a person’s body cavities except the mouth.”⁸⁵⁰ We are not aware of any law authorising police officers in New South Wales to carry out, or cause to be carried out, searches of people’s body cavities.⁸⁵¹

Despite this prohibition, we found that some police have conducted cavity searches, ostensibly under the authority of the *Crimes (Forensic Procedures) Act*.

Case Study 61

Police executed a search warrant on a house and found some green vegetable matter, small resealable plastic bags and an amount of cash. Police suspected that one of the occupants was hiding a package of prohibited drugs in her vaginal cavity. Police strip searched the woman and asked her to remove the suspected item, but the woman declined. Police arrested the woman and applied to a magistrate for an interim order authorising an “intimate forensic procedure,” a search of her vaginal cavity. The magistrate made the order, and police took the woman to a hospital, where a doctor performed the procedure. Nothing was found. Police applied for another interim order, this time authorising a search of the suspect’s rectal cavity. Again, the order was granted, the search was conducted, and nothing was found. The suspect was released without charge.⁸⁵²

It is of serious concern that such intrusive searches were carried out, without consent, and without any legal basis. Further, in the absence of legislative protection, a cavity search may constitute an assault.

We obtained copies of the court orders and immediately wrote to the relevant local area commander. He considered that the police officers involved “were not aware of what their actual powers in relation to [the Act] were at the time although it is thought that all were acting in good faith but on a power which they did not have.” He advised that command’s education and development officer would research and deliver training to officers in the command on the issue.⁸⁵³

We also raised the issue with NSW Police at a corporate level, on the basis that it would be appropriate to provide all police officers with advice about searches permitted, and not permitted, under the Act and other legislation. The Deputy Commissioner of Police subsequently advised that he sent a memo by email to all officers reminding them that they do not have the power to search body cavities and discussing their various related powers. The memo was also scheduled for publication in the *Police Weekly*.⁸⁵⁴

It is also of concern that a magistrate made orders specifically authorising the search of a suspect’s vaginal and rectal cavities as “intimate forensic procedures” under the Act. We raised the matter with the Chief Magistrate of the Local Court, who shared our concerns, and advised that he sent an email to all magistrates bringing to their attention that the Act does not make provision for cavity searches.⁸⁵⁵

With the consent of NSW Police, we also raised the matter with NSW Health, on the basis that it would be appropriate to provide advice to medical practitioners and other hospital personnel about the types of searches permitted under the Act. We also suggested it might be appropriate to review processes where medical practitioners are presented by police with court orders for searches, to ensure they have access to appropriate advice if required. NSW Health subsequently advised that it is considering writing a policy on this issue.⁸⁵⁶ We note that NSW Health had previously issued a circular outlining its position on the carrying out of forensic procedures, in 2000. It notes that medical staff are not required to carry out forensic procedures and that “NSW Health does not regard the carrying out of these forensic procedures to be a part of its overall functions and health service staff will not be expected to perform the functions.”⁸⁵⁷

NSW Police has previously proposed legislative changes to enable officers to ask medical practitioners to examine a suspect’s body cavities, in the context of our review of the *Police Powers (Internally Concealed Drugs) Act 2001*, which has since been incorporated into the *Law Enforcement (Powers and Responsibilities) Act 2002*. However, NSW Police subsequently retracted its proposal, commenting that cavity searches are degrading and may contravene the *International Covenant on Civil and Political Rights 1975*.⁸⁵⁸ Submissions from other stakeholders were overwhelmingly

opposed to enabling police to order cavity searches. NSW Health described the potentially harmful consequences of cavity searches, and the significant risk of causing physical or psychological harm.⁸⁵⁹ The Australian Law Reform Commission has also described the risks associated with cavity searches:

*There are obvious problems associated with these searches. The first is the simple medical danger. Considerable harm, in a medical sense, could come to an individual from a body cavity search that was carried out incorrectly or unhygienically. Secondly, a body cavity search, especially one carried out without consent, is likely to be degrading. It is an intensely personal intrusion that is an unwelcome and demeaning experience.*⁸⁶⁰

9.1.4. Medical examinations

At common law, there is no power to conduct a medical examination without the consent of a suspect, either before or after arrest.⁸⁶¹ However, section 138 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (formerly section 353A(2) of the *Crimes Act 1900*) provides that police may request a medical practitioner to examine a person in custody who has been charged with an offence. The consent of the person is not required.

The power to conduct a medical examination has been interpreted quite narrowly – it permits “no more than an external examination by sight or touch.”⁸⁶² The courts have commented that the legislation authorises an infringement of fundamental rights (the privilege against self incrimination and the right not to be assaulted), and therefore must be read restrictively.⁸⁶³

Police also have a limited power to conduct internal searches, under the Part 11, Division 3 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (formerly under the *Police Powers (Internally Concealed Drugs) Act 2001*). Police may take a suspect to a medical facility to be searched by way of medical imaging, if there are reasonable grounds to suspect the person has swallowed or is otherwise internally concealing a prohibited drug for the purpose of supply. Searches can be conducted by X-ray, MRI, CT scans or other forms of medical imaging.⁸⁶⁴ The Act does not permit any intrusion into a person’s body cavities, or authorise police or medical practitioners to remove any internally concealed matter from a person’s body.⁸⁶⁵

Apart from the cavity search issue, we are not aware of any problems with the interaction of the medical examination powers and the forensic procedures legislation.

9.1.5. Urine samples

Nothing in the *Crimes (Forensic Procedures) Act* allows police to take urine samples. However, under the *Road Transport (Safety and Management) Act 1999* police have the power to require a driver who refuses to submit to a sobriety assessment, or who police reasonably believe is under the influence of a drug, to provide a blood and urine sample (whether or not the person consents to them being taken) in accordance with the directions of a medical practitioner.⁸⁶⁶

We are aware of some instances where police have taken urine samples and recorded them as forensic procedures. However, it appears that the samples were taken under the provisions of the *Road Transport (Safety and Management) Act 1999* and were recorded incorrectly. It does not appear that police have taken urine samples ostensibly under the *Crimes (Forensic Procedures) Act*.

9.2. Covert DNA sampling

Police sometimes take covert DNA samples, by retrieving an item discarded by a person who is under investigation (such as a cigarette butt, drink container or tissue) or through some other type of investigative procedure (such as a random breath test).⁸⁶⁷

The Act does not specifically prohibit police from taking a covert DNA sample, and this type of conduct is essentially unregulated. However, a court may find the evidence inadmissible, if it has been obtained improperly.

9.2.1. Case law

This issue was considered in *R v Daley* (2001),⁸⁶⁸ where police used a supposedly random breath test as a pretext for obtaining a DNA sample from a man suspected of multiple robbery and sexual assault offences. Police arrested the suspect for driving an unregistered vehicle, and took him to the police station, where they took his clothes and submitted them for DNA analysis. Two weeks later police were advised that the DNA profile obtained from the breath

test container and the man's t-shirt matched the profile obtained from the clothes and body of two of the victims. Police arrested the man again, and took a buccal swab. Again, the profile from the swab matched the profile obtained from the victims. At trial, defence counsel argued that because the original DNA sample was obtained by trickery, all the DNA evidence should be excluded.

The court found that the true purpose of the random breath test and arrest was not to enforce traffic laws, it was to obtain samples of the accused's bodily fluids for the purpose of DNA analysis. Despite having "misgivings" about the conduct of police, the court admitted the evidence, on the basis that it was highly probative, and that the offender was likely to strike again, unless apprehended quickly. The court stated that only in an exceptional case would it condone the use of the power of arrest and detention for an ulterior purpose – and that this was such a case.

Covert DNA sampling was considered again in *R v Nicola* (2002).⁸⁶⁹ In that case, police interviewed the accused about a sexual assault allegation. He denied having had sex with the victim. Police asked him to provide a DNA sample, but he declined. Some time later, the accused went to the police station to ask for the return of some boxer shorts which had been taken for forensic examination. While he was there, he asked for a cup of coffee. One of the police officers who saw him throw his styrofoam cup in the bin retrieved it and submitted it for DNA analysis. The profile obtained from the cup matched the profile obtained from the victim's body and clothes and the accused was convicted on this evidence.

On appeal, the defence argued that the DNA evidence should not have been admitted, as the accused had made it clear that he did not want to provide a DNA sample, but police ignored his express wishes, and examined the cup anyway. The court dismissed the appeal, upholding the trial judge's conclusion that there was nothing improper about police retrieving the cup and submitting it for DNA analysis.

Both *Daley* and *Nicola* dealt with DNA samples which were taken before the Act commenced, and the admissibility of evidence was determined according to section 138 of the *Evidence Act 1995*. The *Crimes (Forensic Procedures) Act* specifically provides, in section 82, that evidence obtained through a forensic procedure is inadmissible where there has any breach of any provision of the Act, unless the court is of the opinion that the desirability of admitting the evidence outweighs the undesirability of admitting the evidence.

R v Kane (2004) considered covert DNA sampling in the context of the Act.⁸⁷⁰ The accused was convicted for armed robbery of a TAB. Police retrieved a cigarette butt the accused dropped on the footpath, after TAB staff identified the offender as a regular customer. The profile obtained from the butt was found to match remnants of skin left on a balaclava discarded by the robber just after he committed the offence.

On appeal, the accused argued that the retrieval and forensic examination of the cigarette butt amounted to a 'forensic procedure' for the purposes of the Act, and that as the requirements of the Act had not been met, the evidence should have been excluded. The appeal was peremptorily dismissed, on the basis that this argument misconceived the purpose and scope of the Act:

*What is contemplated by the notion of a forensic procedure, whether intimate or non-intimate, is that it is a procedure actually carried out on the person of some specific individual. The chance circumstance that a person throws away, relevantly, a cigarette butt which is retrieved without any reference to, or interference with the person, and which turns out to have significant probative value in terms of what it says about the relevant DNA profile, does not seem to me to satisfy, either in principle or in practice, either in law or in fact, what is contemplated by the Crimes (Forensic Procedures) Act 2000.*⁸⁷¹

The issue was considered again in *R v White* (2005).⁸⁷² This was a murder case, where a DNA profile of the offender was obtained from material found under the fingernails of the deceased. This profile was put on the DNA database, and was found to match DNA from an unsolved break and enter. Police investigated the break and enter offence, and narrowed their investigation down to six people. On the basis that none of the people met the threshold of being a suspect for the purposes of the Act, police took covert DNA samples from each "person of interest", in the hope of obtaining a match. One of these samples, again taken from a discarded cigarette butt, matched the profile obtained from the deceased's fingernails. Police then arrested the accused and took a subsequent sample – a buccal swab – under the provisions of the Act. At trial, the DNA evidence was held to be admissible, for the same reasons as in *Kane* – that obtaining a DNA profile from an item discarded by a suspect is not a 'forensic procedure', and so is not evidence to which section 82 of the Act applies.

However, the court did go on to consider whether police took a covert sample in order to circumvent the requirements of the Act. The court was satisfied that the police conduct was not in defiance of the Act, accepting that the officer in charge was of the view there was insufficient evidence available at that time to identify the accused as a suspect for the purposes of the Act.⁸⁷³

9.2.2. Police policy on covert DNA sampling

FPIT has the following advice on its intranet site:

The provisions of the Crimes (Forensic Procedures) Act 2000 do not cover the obtaining of covert DNA. Advice should be sought on a case-by-case basis. It is important to avoid possible criticism in relation to circumventing provisions of the Crimes (Forensic Procedures) Act in obtaining DNA from suspects.⁸⁷⁴

Another policy guide on the intranet states:

If the collection of a covert sample was used to circumvent the provisions of the Act any evidence obtained from that sample may not be admissible at court. In any case if a covert sample results in a match to a crime scene sample, a sample from the suspect should be obtained pursuant to the Act. The evidence from this sample should form part of the brief.⁸⁷⁵

There are a number of reasons why police may prefer to take covert samples than conduct forensic procedures under the Act. First, police may not want to alert people to the fact they are under investigation. Second, police may decide they cannot ask for a sample, if the person falls short of the definition of 'suspect'. Third, it may be much easier to submit a discarded item for analysis than to comply with the various requirements of the Act, which some police officers find quite onerous.

9.2.3. How covert DNA samples are handled at the lab

We asked DAL whether DNA samples taken covertly are treated as "person samples" or "crime scene samples". DAL advised that the police officer who submits the sample may mark it either as a crime scene sample, or as 'other' on the accompanying form. However, DAL treats samples taken covertly as a different category entirely. If a DNA profile is obtained, it is put on the database, but is not searched against any of the indexes. It is only compared to other evidence within the particular case.⁸⁷⁶

We note that while the Act does not specifically deal with covert DNA sampling, comparison of profiles from covert samples against any of the indexes on the database is effectively prohibited.⁸⁷⁷ For this reason we support DAL's approach to the issue. We do however note that if a sample taken covertly is linked to the offence in relation to which it was taken, police may take a further sample under the provisions of the Act, which may then be searched against the other indexes.

9.2.4. Discussion

The Australian Law Reform Commission has discussed the issue of police collecting genetic material by stealth, and has expressed concern about covert sampling resulting in "a parallel system for the collection and use of genetic samples falling outside the formal regulatory framework established under Part 1D of the [Commonwealth] *Crimes Act*", which is substantially similar to our Act. The Commission commented that the Commonwealth legislation "provides a formal framework for collecting samples from suspects," and that "it is likely that Parliament intended that this legislation should be the sole authority by which police might collect such samples." However, it noted that there was no specific prohibition on police obtaining forensic samples through the collection of discarded samples, or through other lawful investigative procedures. It recommended that the legislation be amended so that police could only obtain genetic samples from individuals either through the forensic procedures legislation, or from a stored sample (with the individual's consent or by court order).⁸⁷⁸

We do not know how often police in New South Wales are submitting covert DNA samples for analysis, or the circumstances in which covert samples are being taken. Unless the accused objects to the evidence being admitted, as happened in *Kane* and *White*, it is unlikely the reasons for taking a covert sample will be reviewed.

For this reason, in our view it is important that NSW Police keep and publish records of the number of covert DNA samples which are submitted for analysis; the reasons for the sample being taken covertly rather than through the provisions of the Act; and the results of the analysis – whether the covert sample implicated the person under investigation or not.

In addition, this is a matter that we consider should be specifically considered by Parliament in considering this report. If it was not intended that covert samples be permitted, the Act should specifically provide for this. Conversely, if it is considered that for some persons (for example, persons who are not yet suspects) covert sampling should be permitted, the appropriate regulation (such as permitted matching) should be considered. We note the considerable criminal justice outcomes achieved in at least two matters, which will obviously be a significant factor in those

considerations. Alternatively, the Australian Law Reform Commission has made recommendations which are against current police practice and require due consideration. A middle course may be for courts to be permitted in certain circumstances to order that covert samples be collected by police officers.

Recommendation 53

NSW Police keep records of the number of covert DNA samples submitted for analysis, the reason why the sample was taken covertly, and the results of the analysis, and includes these in its annual report.

Recommendation 54

Parliament consider regulating the collection of covert samples to include under what circumstances covert samples can be collected, whether a court order should be required, and how profiles obtained from covert samples should be managed on the New South Wales DNA database.

NSW Police is still considering recommendation 53, but supports recommendation 54.⁸⁷⁹ The Minister for Police commented that he could not endorse this recommendation until he had the opportunity to consult further with operational police. Given the complexity of the legislation, the Minister did not support any further restrictions on police collecting covert samples, and advised that admissibility of such evidence should be left to the courts.⁸⁸⁰ In its submission, the Attorney General's Department noted the courts' view that any investigative conduct not specifically mentioned in the Act is unregulated, and commented:

*The current state of affairs provides little incentive for investigating police officers to work within the confines of the Act, rather than arranging their investigation so that the Act does not apply at all. This issue may need to be considered in due course.*⁸⁸¹

9.3. Obtaining DNA from deceased persons

The Act does not specify the circumstances in which police can take a DNA sample from a deceased person. However, it does specify that forensic material "taken from the body of a deceased person" may be supplied for the purpose of DNA analysis, for inclusion on one of the indexes of the DNA database.⁸⁸² Profiles from deceased persons can be put on the "volunteers (unlimited purposes)" index where the person's identity is known, and on the "unknown deceased persons" index where the person's identity is not known.⁸⁸³

Case Study 62

Police were reinvestigating a sexual assault and murder which had been committed almost 20 years before. Police took covert DNA samples from a number of suspects – in one case by retrieving a glass the suspect had used, in another by buying a baseball cap from the suspect. Police identified a fifth suspect, who had recently been killed in a road accident. Police obtained a blood sample which had been taken during the autopsy, and submitted it for DNA analysis. Relying on DNA evidence, the coroner concluded that the deceased committed the murder. A relative of the deceased made a complaint about a number of aspects of the police investigation.

In our oversight role, we indicated that police investigating the complaint should consider why covert samples were taken from suspects when the Act provides the regulatory framework for taking DNA samples from suspects. The police investigator advised that the strategies used by police in reinvestigating the murder depended on the operation remaining covert in its early stages, and further, that all of the living suspects were interstate, so samples could not be taken under the Act. The investigator concluded that "police were entirely within their powers to take such samples and analyse those samples in a criminal investigation through common law powers to seize exhibits."

We also indicated that the police investigation should consider what authority NSW Police used to obtain the blood sample taken during the autopsy, when it appeared the blood had not originally been taken for the purpose of DNA analysis. The investigator noted that the Act only deals with forensic procedures conducted on people, by consent or by order, and that there is no provision for taking samples from deceased persons. He concluded that the sample had been taken for a lawful purpose (that is, for tests carried out by the forensic pathologist conducting the autopsy), and that police had seized the sample under their common law power to seize exhibits relevant to the investigation of the offence. The investigator also pointed out that under the *Coroners Act 1980*, a coroner may give a police officer directions concerning investigations to be carried out for the purposes of an inquest. The investigator concluded that as the sample had been lawfully taken, police were entitled to examine it for the purpose of DNA analysis.

The investigator made no adverse findings against the police officers who were involved. We were satisfied with the explanations provided.

9.4. Victims of crime and other “excluded volunteers”

The Act does not apply to forensic procedures carried out on people who are deemed to be “excluded volunteers”. This includes:⁸⁸⁴

- victims of offences against the person
- victims of robbery offences, and
- people who volunteer their fingerprints or handprints for elimination purposes in relation to a property offence.

For example, if police wish to photograph a victim’s injuries, to use as evidence in criminal proceedings, this procedure is not governed by the *Crimes (Forensic Procedures) Act*.

NSW Police has developed its own policies for carrying out forensic procedures on victims of crime and other “excluded volunteers.” In many ways these procedures reflect the legislative position on volunteers.

Because “excluded volunteers” are not covered by the Act, the way police conduct forensic procedures in these circumstances is beyond the scope of this review. However, we did identify some concerns through our monitoring activities, and have included these for the consideration of NSW Police.

Many police officers we interviewed criticised the application of forensic procedures policies to victims of crime. Some argued it was inappropriate to ask a victim of crime to sign a consent form when police proposed to photograph injuries. Some were surprised to learn that victims of crime are not covered by the Act, and that the policy for conducting forensic procedures on victims a matter for NSW Police to determine.

Although we did not specifically ask about forensic procedures conducted on victims, many officers we surveyed argued that the current policy should be changed:

*The photographing of victims is a difficult process... The Act was not really meant for this, it was for securing suspect, volunteer and inmate samples.*⁸⁸⁵

*The fact that photographing injuries of a victim is now interpreted as falling under the ambit of this Act causes an unnecessary impediment on police especially when these are all taken with consent.*⁸⁸⁶

*The current requirement of a victim being photographed to be treated as a forensic procedure needs to be removed.*⁸⁸⁷

*The process for dealing with victims needs to be streamlined or the legislation clarified.*⁸⁸⁸

*Remove the strict SOP and conditions when it comes to obtaining forensic samples from victims of crime... especially photographs of victims injuries.*⁸⁸⁹

*Forensic procedures on victims is too complex, time consuming for offences involving high volume crime. Police are still confused on this issue.*⁸⁹⁰

We reviewed a small proportion of the forensic procedures conducted on volunteers, to see in what types of circumstances police are asking people to voluntarily undergo forensic procedures. We found many instances where

police appear to have treated victims of crime as volunteers for the purposes of the Act. For example, the following people were recorded on COPS as being 'volunteers':

- the manager of a car wash who was held up and had the weekend's banking stolen⁸⁹¹
- a woman who was sexually assaulted while staying at a friend's house⁸⁹²
- a man who was stabbed in the shoulder and abdomen during a fight⁸⁹³
- a woman who was assaulted by her partner's ex girlfriend⁸⁹⁴
- a man who was assaulted by an acquaintance who had come to his house to return some property,⁸⁹⁵ and
- a middle aged woman who was assaulted by a young woman in a café.⁸⁹⁶

It appears that some police officers are not clear about how the forensic procedures legislation applies to victims. This may be because the policies NSW Police has developed for conducting forensic procedures on victims largely mirror those developed for volunteers.

In light of these findings, NSW Police may wish to consider SOPs which are specific to victims. Our view is that those SOPs need not necessarily reflect the processes in the Act, especially as regards to formal consent and information requirements. They should be as streamlined as possible, so that victims are dealt with sensitively and appropriately.

In our draft report, we recommended that "NSW Police consider amending SOPs for forensic procedures conducted on victims in particular as concerns consent and information requirements." NSW Police did not support our recommendation, as the police SOPs are based on the Attorney General's Department's Victim's Protocol.⁸⁹⁷ It appears NSW Police and the Attorney General's Department need to work together to resolve this issue.

Recommendation 55

The Attorney General's Department and NSW Police consider whether the current protocol for conducting forensic procedures on victims is appropriate, particularly in relation to consent and information requirements, and make changes to the Victim's Protocol and NSW Police SOPs as necessary.

9.5. Children under the age of 10

Section 111 of the Act provides, "This Act does not authorise the carrying out of a forensic procedure on a person who is under 10 years of age."

While the Act does not authorise the carrying out of forensic procedures on children under 10, it does not prohibit it either. It would seem that 'forensic procedures' carried out on children under the age of 10 are not covered by the Act. Indeed, the legislative heading for section 111 is, "Act does not apply to persons under 10."

Despite this provision, we found 16 instances of police conducting forensic procedures on children under the age of 10.

Case Study 63

A woman was found strangled in her car. During the investigation, DNA was located on the inside of the car, on some double sided tape which had been stuck to the door handle. The deceased's 9 year old nephew said that he had put the tape there. To eliminate the nephew's DNA from the investigation, police took a DNA sample by buccal swab from the child. This sample was used to confirm that the only DNA on the tape was from the nephew. This aided the police investigation by eliminating one line of inquiry and ensuring that the DNA evidence on the tape did not come from anyone else, such as the offender.⁸⁹⁸

Almost all of the forensic procedures conducted on children under the age of 10 were DNA samples taken from babies or toddlers, where police were investigating sexual assaults on young girls which had resulted in pregnancies.

Case Study 64

A woman in her late twenties told police that her father had sexually assaulted her on a regular basis since she was 11. She had six children, aged between 3 and 15. Four of the children had been placed in foster care by DOCS, and the other two had been adopted at birth by other families. The woman alleged that her father was the father of some if not all of her children.

Police explained that the paternity of the children could be verified through DNA analysis. The woman agreed to provide a DNA sample, and gave written consent for DNA samples to be taken from each of her children.

Police took DNA samples from the four children who were in the care of DOCS, but not the two who had been adopted, as their adoptive parents indicated they did not want the samples to be taken. A DNA sample was also taken from the suspect.

DNA analysis revealed that there was an extremely strong probability that the suspect was the biological father of one of the children. The child had been conceived when the woman was 16, and was born with medical problems associated with genetic complications. The suspect was charged with the offence.

In the above case study, the woman, for the purposes of the Act, was an “excluded volunteer” (being a victim of personal violence offence), and the man was a ‘suspect’. However, the basis on which the children were sampled is less clear. Arguably, children over the age of 10 could be treated as ‘volunteers’ for the purpose of the Act. In the case of a child, a volunteer is defined as a person other than a suspect or excluded volunteer (victim) whose parent or guardian volunteers to police that the child undergo a forensic procedure.⁸⁹⁹

However, as the Act does not authorise the carrying out of forensic procedures on children under the age of 10, taking DNA samples from the younger children appears to fall outside the scope of the Act.

We watched the video of the DNA sampling of the three year old in case study 64. The police officer taking the sample read the volunteer information sheet to the mother of the child, and in all other respects treated the procedure as an ordinary forensic procedure under the Act. Although the Act did not apply in the circumstances, it appears police acted as though it did, in much the same way as the NSW Police policy on conducting forensic procedures on excluded volunteers (victims) reflects the legislative position on volunteers.

While there appears to be no legal reason why police should not do this, NSW Police may wish to consider whether treating young children as forensic procedure volunteers is the most appropriate way of obtaining the evidence they seek. For example, it may not be necessary to conduct the procedure in a police station.

It seems that occasions will arise where police investigating an offence have a good reason for wanting to take a DNA sample from a child under the age of 10. These appear to fall into two distinct categories – where the paternity of the child is of evidentiary value in the prosecution of a criminal offence (as in case study 64), or where police seek a child’s DNA profile for elimination purposes (as in case study 63). In these examples, we recognise the need exists to obtain DNA samples from a child under the age of 10. However, we feel that these elimination samples should only be taken if a court order has been made and that the Act should be amended to reflect these special circumstances for obtaining volunteer samples from a person under the age of 10 years.

As discussed above, the current position appears to be that the taking of DNA samples from children under the age of 10 is essentially unregulated. It is not authorised by the forensic procedures legislation, but is not specifically prohibited either. In our view there would be considerable merit in clarifying whether police are able to conduct forensic procedures on children under the age of 10, and if so, in what circumstances.

9.5.1. Young children who have come to the adverse attention of police

The Act defines a child as “a person who is at least 10 years of age but under 18 years of age”, and provides that “a child cannot consent to a forensic procedure”. However, it does not specify that a person under the age of 10 (who is not a “child” for the purposes of the Act) cannot be asked to undergo a forensic procedure, or cannot consent to it. It simply states that the Act does not authorise the carrying out of a forensic procedure on a child under the age of 10. For this reason, it would not be unlawful for police to ask a person under the age of 10 who had come to their attention to undergo to a forensic procedure.

We found no evidence to suggest that police have asked any people under the age of 10 to undergo forensic procedures in this context, and it would certainly be contrary to the spirit of the legislation if this were to occur.

We also note that children under the age of 10 cannot be convicted of an offence, being conclusively presumed to be below the age of criminal responsibility, so there would be no evidentiary value in police conducting a forensic procedure on a child this young.⁹⁰⁰ However, if a young child had come to the adverse attention of police, then taking a DNA sample for intelligence purposes may be of interest to police. The young child's profile could not be put on the DNA database, but could be analysed within a particular case.

While we are of the view it is highly unlikely this would occur, given section 111 of the Act, in our view there would be merit in specifying that conducting a forensic procedure on a suspect or person of interest under the age of 10 is prohibited.

Recommendation 56

The *Crimes (Forensic Procedures) Act 2000* be amended to specifically provide the following:

- a. the taking of a DNA sample from a child under the age of 10 be prohibited except when a court order authorises the sample having given due consideration to the age of the child and where:
 - i. the paternity of the child is of evidentiary value in an indictable or prescribed offence; or
 - ii. the DNA is required for exclusionary purposes.
- b. the only permitted matching for a DNA profile obtained from a DNA sample from a child under the age of 10 is within case matching, and that the profile not be placed on any index of the DNA database.

This recommendation is supported by NSW Police.⁹⁰¹

Endnotes

⁸³³ *Crimes (Forensic Procedures) Act 2000* s 3(1).

⁸³⁴ *Law Enforcement (Powers and Responsibilities) Act 2002* s 133 and 136.

⁸³⁵ *Crimes (Forensic Procedures) Act 2000* s 3.

⁸³⁶ The *Crimes (Forensic Procedures) Act 2000* does not apply to the taking of photographs under Part 10 of the *Crimes Act 1900: Crimes (Forensic Procedures) Act 2000* s 112.

⁸³⁷ "Taking photographs of suspects for use in identification procedures", NSW Police Law Notes (12 of 2002).

⁸³⁸ "Photographing of suspects", advice on NSW Police intranet dated 25 June 2004 and accessed on 8 September 2005.

⁸³⁹ Confidential interview with police officer, 3 August 2004.

⁸⁴⁰ Confidential LAC survey response.

⁸⁴¹ Confidential LAC survey response.

⁸⁴² Confidential LAC survey response.

⁸⁴³ Responses to Ombudsman LAC survey.

⁸⁴⁴ Complaint 11.

⁸⁴⁵ Complaint 12.

⁸⁴⁶ See *Williams v R* (1986) 161 CLR 278 and *R v Dungay* [2001] NSWCCA 443. See also former section 352 of the *Crimes Act 1900*, which has been replaced by section 99 of the *Law Enforcement (Powers and Responsibilities) Act 2002*.

⁸⁴⁷ *Law Enforcement (Powers and Responsibilities) Act 2002* s 99.

⁸⁴⁸ See *DPP v Nicholls* [2001] NSWSC 523; and *R v Daley* [2001] NSWSC 2111 at paragraph 153 (Simpson J). These discuss the equivalent provisions of the *Crimes Act 1900*, which preceded Part 10 of the *Law Enforcement (Powers and Responsibilities) Act 2002*.

⁸⁴⁹ NSW Police response to Ombudsman draft report, 2 June 2006.

⁸⁵⁰ *Crimes (Forensic Procedures) Act 2000* s 3(1). We note that police in some other jurisdictions can conduct cavity searches, under the equivalent forensic procedures legislation. See *Police Powers and Responsibilities Act 2000* (Qld) s 318ZA and schedule 4; *Police Administration Act* (NT) s 4 and 145; *Misuse of Drugs Act* (NT) s 35A; and *Forensic Procedures Act 2000* (Tas) s 3.

- ⁸⁵¹ The *Law Enforcement (Powers and Responsibilities) Act 2002*, which codifies police search powers, specifies that a strip search does not allow police officers to search body cavities: see section 3.
- ⁸⁵² Information obtained through Ombudsman review of COPS records.
- ⁸⁵³ Letter from local area commander, 21 October 2005.
- ⁸⁵⁴ Letter from T Collins, Deputy Commissioner Specialist Operations, 15 November 2005.
- ⁸⁵⁵ Letter from the Chief Magistrate of the Local Court, 26 August 2005.
- ⁸⁵⁶ Advice from NSW Health, 15 December 2005.
- ⁸⁵⁷ NSW Health Circular, "NSW Health Position on the Carrying Out of Forensic Procedures", 22 December 2000.
- ⁸⁵⁸ NSW Police submission to Ombudsman review of the *Police Powers (Internally Concealed Drugs) Act*, 23 August 2004.
- ⁸⁵⁹ NSW Health submission to Ombudsman review of the *Police Powers (Internally Concealed Drugs) Act*, 25 August 2004.
- ⁸⁶⁰ Australian Law Reform Commission, *Privacy*, Volume 2 (1983) at paragraph 1107.
- ⁸⁶¹ *R v Boulton* (1871) 12 Cox CC 87 at 92 to 93 (Cockburn CJ).
- ⁸⁶² *Fernando v Commissioner of Police* (1995) 36 NSWLR 567 at 593 (Powell JA).
- ⁸⁶³ *Fernando v Commissioner of Police* (1995) 36 NSWLR 567 at 573 (Priestly JA) and 592 (Powell JA); *Dickson v Commissioner of Police* [1999] NSWSC 1100 (16 November 1999) at paragraph 19 (Bell J).
- ⁸⁶⁴ MRI is Magnetic Resonance Imaging. CT scans use Computerised Axial Tomography.
- ⁸⁶⁵ The Ombudsman reviewed the *Police Powers (Internally Concealed Drugs) Act 2001* and found that it was used only once in its first two years of operation. We found the Act was not meeting its objectives and recommended that Parliament consider whether it should remain in force. See NSW Ombudsman, *Review of the Police Powers (Internally Concealed Drugs) Act 2001* (July 2005).
- ⁸⁶⁶ *Road Transport (Safety and Traffic Management) Act 1999* s 27.
- ⁸⁶⁷ For example, in *R v Nicola* [2002] NSWCCA 63 (11 March 2002) police retrieved a styrofoam cup from the bin after the suspect had asked for a coffee at the police station. In *R v Daley* [2001] NSWSC 1211, police conducted an ostensibly random breath test, to obtain a sample of the suspect's saliva.
- ⁸⁶⁸ *R v Daley* [2001] NSWSC 1211.
- ⁸⁶⁹ *R v Nicola* [2002] NSWCCA 63 (11 March 2002).
- ⁸⁷⁰ *R v Kane* [2004] NSWCCA 78 (19 March 2004).
- ⁸⁷¹ *R v Kane* [2004] NSWCCA 78 (19 March 2004) at paragraph 13 (Sully J).
- ⁸⁷² *R v White* [2005] NSWSC 60.
- ⁸⁷³ *R v White* [2005] NSWSC 60 at paragraph 30(d) (Studdert J).
- ⁸⁷⁴ Advice on the NSW Police intranet, accessed 8 September 2005.
- ⁸⁷⁵ NSW Police Legal Services, "Carrying Out Forensic Procedures: A guide for Criminal Investigators" (11 November 2001). Accessed 8 September 2005.
- ⁸⁷⁶ Telephone advice from DAL, 3 March 2005.
- ⁸⁷⁷ Section 91(2) of the *Crimes (Forensic Procedures) Act 2000* prohibits the supply of forensic material (other than permitted forensic material) for the purpose of deriving a DNA profile for inclusion on an index of the DNA database system; section 93 sets out the different types of permitted forensic material – and does not include covert DNA samples; and section 92 sets out the limited circumstances in which a person may access information on the DNA database – which includes access for the purpose of forensic matching permitted under section 93 but, relevantly, no other type of matching.
- ⁸⁷⁸ Australian Law Reform Commission, *Essentially Yours: The Protection of Human Genetic Information in Australia*, Report 96 (2003) at 41.197 to 41.213.
- ⁸⁷⁹ NSW Police response to Ombudsman draft report, 2 June 2006.
- ⁸⁸⁰ Letter from the Hon Carl Scully MP, Minister for Police and Minister for Utilities, 2 June 2006.
- ⁸⁸¹ Attorney General's Department response to Ombudsman draft report, 5 May 2006.
- ⁸⁸² *Crimes (Forensic Procedures) Act 2000* s 91.
- ⁸⁸³ *Crimes (Forensic Procedures) Act 2000* s 90.
- ⁸⁸⁴ *Crimes (Forensic Procedures) Act 2000* s 76A.
- ⁸⁸⁵ Confidential LAC survey response.
- ⁸⁸⁶ Confidential LAC survey response.
- ⁸⁸⁷ Confidential LAC survey response.

⁸⁸⁸ Confidential LAC survey response.

⁸⁸⁹ Confidential LAC survey response.

⁸⁹⁰ Confidential LAC survey response.

⁸⁹¹ Information obtained through Ombudsman review of COPS records.

⁸⁹² Information obtained through Ombudsman review of COPS records.

⁸⁹³ Information obtained through Ombudsman review of COPS records.

⁸⁹⁴ Information obtained through Ombudsman review of COPS records.

⁸⁹⁵ Information obtained through Ombudsman review of COPS records.

⁸⁹⁶ Information obtained through Ombudsman review of COPS records.

⁸⁹⁷ NSW Police response to Ombudsman draft report, 2 June 2006.

⁸⁹⁸ Information obtained through Ombudsman review of COPS records.

⁸⁹⁹ *Crimes (Forensic Procedures) Act 2000* s 76(1).

⁹⁰⁰ *Children (Criminal Proceedings) Act 1987* s 5.

⁹⁰¹ NSW Police response to Ombudsman draft report, 2 June 2006.

Chapter 10. DNA analysis

We set out the arrangements for the DNA analysis service at 4.3.1. This chapter details our audit and investigation findings on how the laboratory handles DNA samples, and how the DNA database is used. We examined a number of areas, including the receipt of DNA samples, analysis results, permitted matching, delays in DNA analysis and the accuracy of information on the database. Our findings are discussed below.

10.1. Our investigation of DAL

Through our monitoring of the Act, we became aware of concerns held by some stakeholders about the DNA analysis service provided by DAL. Many of the police officers we interviewed raised concerns about the length of time taken to obtain DNA analysis reports from DAL. The Chief Magistrate of NSW also raised concerns about delays, commenting that delays in obtaining DNA analysis “undoubtedly are significantly contributing to the disappointing level of compliance with time standards.”⁹⁰² There have also been various reports in the media about the impact of DNA processing times on court delays.⁹⁰³

Having regard to these concerns, we decided it would be appropriate to initiate an own motion investigation into DAL. We issued a notice of investigation in January 2005, requiring DAL to produce certain information and documents, and giving DAL the opportunity to outline any problems it has with the way the Act is being implemented, and any steps it has taken to address these. DAL provided responses in February and March 2005.

We provided DAL with our statement of provisional findings and recommendations in August 2005 and discussed it with representatives of DAL at a meeting in October 2005. We subsequently met representatives from DAL, NSW Police and the Ministry of Police, to discuss the issues affecting both DAL and NSW Police. We incorporated information supplied during this meeting and provided our report to the Minister for Health in December 2005.

10.1.1. Follow up audit of forensic procedures

Through our investigation of DAL, we followed up 180 of the 371 forensic procedures we examined during our audit of police local area commands, to assess consistency between data held by police and data held by the laboratory, to review the amount of time taken to transport samples from police stations to the laboratory, and to review turnaround times between police submitting DNA samples to the laboratory and the laboratory providing an analysis report to police. For each procedure we checked:

- that DAL received the sample
- whether the profile was on the DNA database and, if so, that it was on the correct index
- whether the profile should have been destroyed, and
- that the identifying information on the database was consistent the identifying information held by NSW Police.

Our audit findings are discussed in more detail below.

10.1.2. Our findings

We found that DAL has delivered some good results in providing a DNA analysis service to NSW Police. During the review period, DAL loaded over 25,000 DNA profiles from people onto the DNA database, including 8,699 from suspects and 831 from volunteers.⁹⁰⁴ DAL has also loaded over 14,000 DNA profiles derived from crime scene samples onto the database.⁹⁰⁵

During the review period, DAL made cold links in over 4,207 cases. The majority of these were for high volume offences, but a significant number were for serious offences, including murder and sexual assault. DAL estimates that about 3,170 warm links were made during the review period, and about 480 suspects were eliminated from investigations through DNA analysis.⁹⁰⁶

While these outcomes demonstrate that DAL is achieving good results, it is clear that DAL experiences significant difficulties in providing its DNA analysis services to NSW Police. DAL receives more crime scene samples for analysis than it has the capacity to process, which results in a growing backlog of unexamined crime scene samples. While DAL is generally able to meet urgent requests on an ad hoc basis, it is unable to meet the turnaround times set out in

the initial agreement between NSW Police and DAL. DAL is also concerned about staff shortages, lack of space and ageing infrastructure at the laboratory.

It is clear that DNA analysis is not reaching its potential in New South Wales. NSW Police and DAL have achieved some good results in obtaining evidence for the prosecution of crime and in linking suspects and convicted offenders to other unsolved crime scenes. However, DAL is unable to meet the demand for DNA analysis, and many crime scene samples remain unexamined. This seriously limits the efficacy of DNA analysis both in prosecuting offenders and as an intelligence tool.

We also found that it is difficult to track DNA samples through the system from receipt to destruction or case finalisation; there needs to be a better way of measuring and recording results of DNA analysis; some of the information on the DNA database is inaccurate or incomplete; and the destruction requirements in the Act are not being met. These issues are discussed in more detail below.

Through our investigation, we found that DAL has made great efforts to address the problems it faces, and where possible has implemented strategies to improve its service delivery. However, it appears that DAL cannot significantly improve its DNA analysis service without additional resources. We identified a number of areas where DAL could make changes to improve its service delivery. These changes can be presently considered, and would enhance the DNA analysis service already provided by DAL.

10.1.3. Consideration by the DNA Advisory Committee

The DNA Advisory Committee discussed our investigation report at its February 2006 meeting. However, it did not address our findings or recommendations in any significant way.⁹⁰⁷ It is clear there are major problems with the provision of DNA analysis services in New South Wales, which require consideration at a senior government level as a matter of urgency.

10.2. Between the police station and the laboratory

The local area commands we audited treated DNA samples obtained through forensic procedures like other police exhibits. This process ensures the location and movement of DNA samples is clearly documented, and the evidentiary chain of custody is preserved. Samples are generally kept in the fridge until they are transported to the laboratory.

Some commands used a separate exhibit book for exhibits relating to forensic procedures, which appeared to work well. We expect this will occur in every command in future, with the introduction of the new forensic procedures book being developed by the NSW Police Audit Group.

10.2.1. Transportation to DAL

Most metropolitan commands have one of their police officers transport DNA samples directly to the laboratory. Regional commands generally use couriers to transport DNA samples to the laboratory, unless an officer is otherwise coming to Sydney.

The NSW Police standard operating procedures state that DNA samples taken from suspects should be sent to DAL "as soon as possible,"⁹⁰⁸ and that samples taken from volunteers should be sent to DAL "within five days." In order to assess compliance with this policy, we asked DAL to provide the date each of our 180 audit samples was received at DAL. DAL provided dates, which referred to the date the sample was entered onto the system at DAL, rather than date the sample was actually received. DAL advised that to obtain the actual dates of receipt, it would have to look up the hardcopy records for each. We reconsidered our request and identified 48 procedures where the difference between the date the procedure was conducted⁹⁰⁹ and the date the sample was entered onto the system at DAL appeared to be greater than five days, and asked DAL for the dates these samples were actually received.

With this further information we identified 19 forensic procedures where NSW Police took longer than five working days to deliver the DNA sample to DAL. Four samples took over 20 days to deliver, and one sample took over 80 days. We made inquiries about the reasons for the delay in the sample which was not taken to DAL for over 80 days. The relevant command advised that the forensic procedures was conducted on a child, by interim court order, and the sample was not sent to the laboratory for analysis until the final order was made, some months later. Another reason for the delay in transporting samples was the limited availability of couriers on particular days in particular areas.

We do not have particular concerns about delays in transporting DNA samples to the laboratory, provided samples are kept secure while at the police station, police record the location and movement of samples, and the delay is not significant.

10.2.2. Adequacy of systems for handling DNA exhibits

The processes outlined above usually work to ensure the location and movement of DNA samples is clearly documented. However, it depends on individual police officers keeping proper records of exhibit movements. As the following case study illustrates, this does not always occur.

Case Study 65

Police in a country town took a DNA sample from a young suspect in relation to a sexual assault investigation. As the suspect was a child, the sample was authorised by court order. It was recorded in the DNA register and the exhibit book at the police station, and was put in a cardboard box in the exhibit room. Police arranged for the courier to collect the sample the following day, for transportation to DAL.

It appears the DNA sample was taken out and left on a counter in the exhibit room, ready for collection by the courier. But when the courier arrived to collect the sample, it could not be found. The police station was searched but the DNA sample could not be located anywhere.

After discussing the situation with an officer from the DPP, the investigating police officer applied for a court order authorising a further sample to be taken from the suspect under section 27 of the Act, which provides that a forensic procedure can be repeated if the forensic material originally obtained is “insufficient for analysis or has been contaminated.” The court rejected the police officer’s application to take the second sample, on the basis that the first sample was neither insufficient nor contaminated, but had simply been lost.

The suspect ultimately pleaded guilty to the sexual assault, without police relying on the DNA evidence. Section 27 has since been amended, so police can apply for a forensic procedure to be repeated if the forensic material originally taken “has been lost or is for any other reason not available for analysis.” However, this is subject to the requirement that carrying out the forensic procedure a second time is justified in all the circumstances.⁹¹⁰

NSW Police investigated the matter as a complaint as not only had the suspect’s DNA sample been lost, but it appeared that a police officer may have lied in his affidavit in support of the application to take a second sample. The officer stated that the first sample “was entered into the Exh. [exhibit] Book and placed in a Fail Safe Delivery bag and forwarded to DAL,” but that “there is no evidence of that sample arriving at DAL,” implying the sample had actually been collected by the courier and had been lost at some point between leaving the police station and arriving at DAL. When questioned about his capacity to give such a definitive answer, despite the lack of evidence of the exhibit ever being collected for transportation to DAL, the officer said that at the time he believed the sample had been collected. He attributed the confusion to the fact that another officer had written the date in the column in the exhibit book headed “to DAL.” The officer maintained that “it was very ambiguous as to what had occurred... according to the exhibit book, it is still on hand at the police station [but] according to the bag register it’s been forwarded.” Ultimately, no adverse findings were made against the officer. However, the police officer who investigated the complaint did identify a number of systems failures:

- DNA samples were kept in a box in the exhibit room as opposed to a lockable refrigerator, as required
- the supervising sergeant did not take possession of the exhibit and ensure that the exhibit was stored in the exhibit room
- control and accountability of exhibit keys was ‘virtually non-existent’
- the supervisor’s keys were all on the one key ring, which meant that any officers requiring the keys to the firearm room also had the keys to the exhibit room
- checking of exhibits on a regular basis did not occur, and
- recording of TNT Failsafe security bags was not recorded on DNA Forensic Bag Register or in the exhibit book for cross referencing.

The local area command developed new SOPs for the handling of DNA exhibits. It also bought a lockable refrigerator and implemented better security arrangements, in particular by limiting access to keys to a small number of supervisory staff.⁹¹¹

10.3. Receipt of DNA samples

DNA samples submitted to DAL for analysis fall into two categories, person samples and crime scene samples. Person samples are taken directly from the person through a forensic procedure. The biological material will be a saliva or blood sample on an FTA card, or a sample of hair. Crime scene samples may be swabs of biological material, like blood, or may be any type of item obtained from a crime scene, and include clothes, hats, bed sheets, cigarette butts, bottles, weapons and housebreaking implements.

10.3.1. Receipt of person samples

Person samples are delivered to DAL either directly by NSW Police or by TNT Failsafe Couriers. Each person sample is entered onto the DNA Laboratory Information Management System (LIMS) and given a unique "A" number. Person samples taken in relation to the investigation of a particular offence should be given an "FS" case number which links the sample to the relevant crime scene evidence.

All items submitted to the laboratory are received in accordance with the procedures detailed in DAL's "Forensic Biology Procedures Manual." Person samples are checked for sample integrity, which involves a review of the sample bag and the tamper evident seals, and confirmation that the correct documentation is present. If the sample information form is incomplete or appears to be incorrect, DAL seeks clarification from FPIT before proceeding.

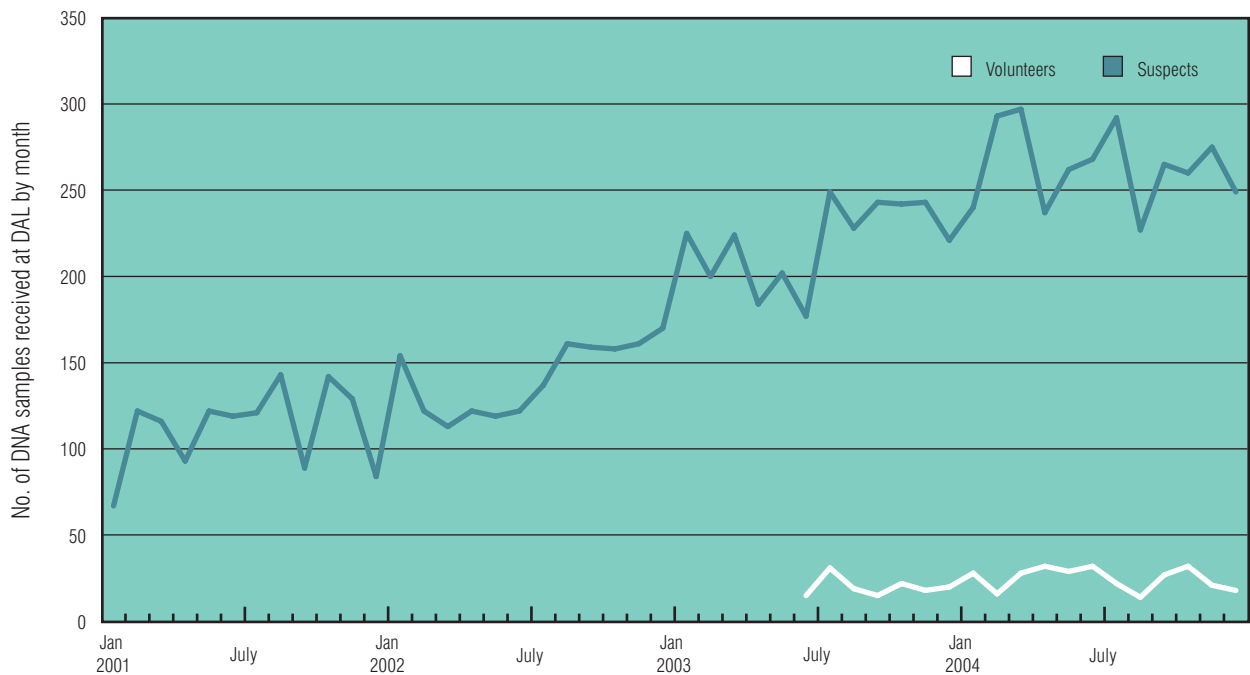
If the sample is acceptable, barcodes are printed. For samples taken by buccal swab, barcodes are placed on the yellow envelope containing the FTA paper, the protective plastic sheet and the sample information form. For blood samples and hair samples, barcodes are placed on the envelope containing the FTA paper or hair, the protective plastic sheet, the sample information form and the DNA submission sheet.

Any samples which do not meet the sample integrity criteria are marked as rejected on LIMS. They are, in the first instance, returned to FPIT, along with the reasons for the sample being rejected.

10.3.2. How many person samples have been received?

We asked DAL to provide the number of samples taken from suspects and volunteers, received at DAL during the review period.

Figure 10. DNA samples taken from suspects and volunteers received at DAL during review period



Source: DAL response to Ombudsman investigation notice, 24 February 2005. Volunteer samples are measured from the time the relevant legislative provisions commenced, June 2003.

Figure 10 shows that the number of samples taken from suspects each month has increased since the legislation commenced, but appears to have stabilised over the last 12 months of the review period, at between 200 and 300 samples a month. The number of samples taken from volunteers each month is much lower than the number of samples taken from suspects, and has remained stable at between 14 and 32 samples a month.

10.3.3. Date of receipt

As discussed above, the date of receipt recorded by DAL refers to the date the sample is entered onto DAL's case management system, rather than the date the sample is actually received by DAL. However, DAL has also advised that all exhibits are barcoded on receipt, and that "since the barcodes are scanned the date of receipt is recorded as are the dates of all movements of the exhibits."⁹¹² It is not clear why, if samples are barcoded on receipt, the actual date of receipt is not being recorded electronically. It may be because DAL checks every item for sample integrity, and ensures the correct documentation is present, before the sample is barcoded. If this is not done straight away, there will be a delay between the sample being received and it being entered onto the system at DAL.

10.3.4. Rejection of person samples by DAL

We sought information about how many DNA samples DAL rejected during the review period, and for what reasons. DAL advised that it could provide electronic records of the samples it had rejected since 1 June 2003, but that records would have to be accessed manually for the period before this. We decided that for the purposes of our review it would be sufficient to examine the electronic records, which covered the last 17 months of the review period. During this period, DAL rejected 123 DNA samples. In most cases this was because there was insufficient DNA on the FTA card.

Table 04: Person samples rejected between 1 June 2003 and 30 November 2004.

Reason for rejection	Number
The sample failed to amplify as there was insufficient DNA in the sample.	107
The bag was sealed incorrectly or the contents were accessible.	8
The sample information form was absent, was stapled to the outside of the bag, or had not been filled in.	4
The FTA card appeared damaged or was not sealed inside the FTA envelope.	3
There was no barcode on the sample information form.	2
The sample took over 3 months to reach the laboratory.	2
A hair sample contained insufficient hairs for DNA analysis.	2
The sample was submitted in a plain plastic sleeve.	1
The officer who took the sample advised of procedure errors.	1

Source: DAL advice received 28 February 2005 in response to investigation notice. The reasons for rejection exceed the total number of samples rejected as some samples were rejected for more than one reason.

We checked the details of these procedures and found that 60 of these samples were from suspects and volunteers (the rest being from convicted offenders or victims).⁹¹³ Over this period, DAL received 5,040 samples from suspects and volunteers.⁹¹⁴ These figures suggest that DAL rejected 1.2 per cent of the DNA samples it received from suspects and volunteers. While this is only small, in our view it is still a significant issue, especially since some police officers we interviewed advised that where a suspect sample is rejected, they would rarely follow the matter up by seeking a further sample. Perhaps FPIT could include in its training, that the most common reason for DNA samples to be rejected is that there is insufficient material on the FTA card.

Recommendation 57

Training for forensic procedures include information that the primary reason for rejecting DNA person samples is that there is insufficient material on the FTA card and therefore reinforce the need to obtain sufficient forensic material when taking a DNA sample by buccal swab.

NSW Police supports this recommendation.⁹¹⁵

10.3.5. Samples classified by police as ‘other’

During the review period, DAL received 868 person samples which were categorised as ‘other’ – rather than, for example, as having come from a ‘suspect’, ‘volunteer’ or ‘convicted offender’.⁹¹⁶ DAL advised that these are often samples taken from suspects by court order, or from police officers for elimination purposes, and have been erroneously classified as ‘other’.

DAL routinely sends lists of samples classified as ‘other’ to FPIT, who determines the true status of the person who provided the sample. DAL would like the ‘other’ category to be removed from the sample information form so that the person completing the form does not have this option.

DAL still accepts samples marked as ‘other’. To minimise delays, DAL obtains the DNA profile from the sample and puts the profile on the database. However, person samples marked ‘other’ are not matched against any of the indexes on the database until NSW Police advises DAL of the correct status of the sample.⁹¹⁷

This practice by NSW Police of marking person samples as 'other', especially in relation to elimination samples, places police officers in jeopardy of acting in contravention to section 91(2) of the Act, which provides:

A person:

- (a) whose conduct causes the supply of forensic material (other than permitted forensic material) to any person for analysis for the purpose of deriving a DNA profile for inclusion on an index of the DNA database system, and*
 - (b) who intends or is reckless as to the supply of material of that kind,*
- is guilty of an offence.*⁹¹⁸

In this respect, we note there is no 'other' index (see 10.4). Nor is the legal basis for storing 'other' profiles on a separate index of the database entirely clear.

To ensure that officers' actions are consistent with the Act, we support DAL's suggestion that the category of 'other' be removed from the sampling information form.

Recommendation 58

NSW Police remove the option of 'other' on the sample information form.

NSW Police has already implemented recommendation 58.

In our draft report, we also recommended that the Attorney General consider including an additional index in the regulations to allow DAL to continue its practice of segregating profiles that are used for in case matching purposes.

NSW Police indicated that it did not support this recommendation, commenting that "in case matching is being removed from the volunteer's documentation and the 'limited purpose' index will be used in all appropriate instances."⁹¹⁹ The Attorney General's Department similarly commented that once other problems relating to the use of volunteer profiles have been resolved, there would be no need for an additional index for 'other' samples. The Attorney General's Department also argued that adding a further index to the New South Wales DNA database would further complicate and delay the implementation of the national DNA database.⁹²⁰

As NSW Police has removed the option of 'other' from the sample information form, and DAL puts volunteer profiles on the limited purposes index unless advised they have been provided for unlimited purposes, we agree there should not be any need for an 'other' index. However, we note that DAL's current practice is to use the 'other' index as a holding index for samples arriving at the lab with incomplete or incorrect documentation. The improved processes should reduce the number of profiles being put on the 'other' index, but we anticipate police will continue to send some samples where the status of the person providing the sample will need to be clarified before DAL can put the profile on the correct index of the database. In our view, the practice currently adopted by DAL is generally sound. It does not add to the delay in processing samples, but ensures that profiles are not put onto the wrong index. We disagree that recognising the 'other' index would complicate the implementation of the national DNA database, as profiles on this index would not be uploaded onto the national database, unless they were transferred onto one of the other New South Wales indexes first. Although we support DAL's approach, there is currently no legal basis for DAL dealing with profiles in this way. For this reason we remain of the view that the 'other' index should be given legislative recognition.

Recommendation 59

The Attorney General consider including in the regulations provision for an additional index on the New South Wales DNA database that allows DAL to continue its practice of holding profiles where the purpose for which the sample was provided is not clear from the documentation accompanying the sample.

10.3.6. Samples unconnected to a case

DAL has advised that sometimes police officers deliver person samples without indicating the case to which the sample is connected. DAL accepts these, provided there is sufficient documentation to allow the continuity of the sample to be followed.⁹²¹ We note that, while some DNA samples may not be connected to a particular case – for example, where the sample has been taken from a convicted offender – all samples taken from suspects and volunteers should be connected to a case.

In our view, DAL should consider not accepting DNA samples taken from suspects or volunteers unless there are sufficient details enabling DAL to identify the case to which the sample belongs, so that DAL can allocate a case number at the time of receipt. NSW Police should ensure there is or will definitely be crime scene evidence available for comparison before forwarding the sample to DAL. The person sample would still have to arrive at DAL with the tamper evident bag intact.

Recommendation 60

NSW Police and DAL implement a process so that DAL only accepts DNA samples from suspects and volunteers where there are sufficient details enabling DAL to identify the case to which the sample belongs.

NSW Police does not support this recommendation, on the basis it would be “severely detrimental to current operations.”⁹²² NSW Health does not support the recommendation either, commenting:

*If samples are legally taken then DAL is obliged to accept them. It is therefore a Police policy issue whether they would want DAL to refuse to accept victim and/or suspect person samples for which crime scene evidence has not as yet been received. This matter has been discussed by the DNA advisory committee which agreed that DAL should accept samples submitted to them by Police and should not be required to conduct a vetting process to attempt to determine the legality of the sample.*⁹²³

10.3.7. Covert samples

In some circumstances police may take a DNA sample covertly, for example by retaining a cigarette butt discarded by a known person of interest.⁹²⁴ As noted at 9.2, the Act does not specifically deal with covert samples.

We asked DAL whether such samples are treated as “person samples” or “crime scene samples”.

DAL advised that the police officer who submits the sample may mark it either as a crime scene sample, or as ‘other’ on the accompanying form. However, DAL treats samples taken covertly as a different category entirely. If a DNA profile is obtained, it is put on the database, but is not searched against any of the indexes. It is only compared to other evidence within the particular case.⁹²⁵ We note that supplying forensic material obtained through covert sampling for the purpose of delivering a profile for matching against crime scene evidence is possibly inconsistent with part 11 of the Act including section 91(2). Part 11 of the Act operates to prohibit comparison of DNA samples taken covertly against any of the indexes on the database. For this reason we support DAL’s approach to the issue. Our recommendation 59 for the addition of an “in-case” database together with our earlier recommendation 54 that Parliament consider regulating the collection of covert samples will go some way towards rectifying any potential issues related to this policing technique.

10.3.8. Receipt of crime scene samples

Police officers deliver crime scene exhibits to DAL for forensic analysis either directly, or using couriers. Upon receipt, DAL staff check that the accompanying documentation has been completed in full (including the name of the submitting officer, details of the case and any relevant court dates), all the items listed have been received, and the bags containing the items are properly sealed. DAL also clarifies what is required in the examination.⁹²⁶

DAL sometimes receives items which are not listed on the police form, or fails to receive items which are listed. In these cases, DAL staff notify the relevant police officer and amend the form to verify what was or was not received. If for any reason an item is not accepted into the laboratory the staff member notes this against the item and initials the fact.

After completing these checks, DAL staff register the case, sign and date the police form, and put barcodes on the form. If the exhibits were hand delivered, a copy of the form is also given to the submitting officer.

In 2004, FSG conducted a review of all casework being submitted to DAL. This included reviewing the documentation accompanying crime scene samples submitted. The review found that one in five cases submitted had significant errors or omissions in the accompanying paperwork.⁹²⁷ FSG has recommended changes to the submission form, so that it has to be completed electronically, in full, on the FSG intranet site, before the relevant items will be accepted.⁹²⁸

10.3.9. Tracking crime scene samples at DAL

DAL currently barcodes all exhibits on receipt, and is able to track their progress through the laboratory. Exhibits are linked to investigations through the relevant COPS Event number. While this is generally sufficient, if a COPS number has been incorrectly transcribed by the submitting police officer, or is difficult to read, DAL staff may have considerable difficulty locating the exhibit at a later date. This problem is exacerbated by the length of time between an exhibit being received at DAL and its examination, and also by the lack of storage space at the laboratory.

As discussed later in this report, at 12.2.2.2, FSG proposes to introduce a barcoding system, which would presumably be used in the screening, storage and analysis of exhibits. If this were introduced, it would make it easier for DAL to track exhibits awaiting analysis. NSW Police has advised it is consulting with DAL on the use of barcoding for all exhibits and tracking of cases and samples within the laboratory.

10.3.10. Storage of firearms at DAL

DAL keeps exhibits awaiting analysis in boxes in a large storeroom. There are no separate procedures for storing firearms; they are kept in boxes along with all the other crime scene exhibits. We are concerned that this is not safe, and in addition may breach DAL's legislative obligations under the *Firearms Act 1996*. Having raised this matter with DAL, DAL has agreed with the proposal to store firearms in a safe.⁹²⁹

Recommendation 61

DAL reviews its processes for storing firearms and takes all reasonable precautions to ensure they are kept safely, in accordance the *Firearms Act 1996*.

NSW Health supports this recommendation and advised that DAL is purchasing a suitable firearms cabinet to be installed in July 2006.⁹³⁰

10.4. Permitted matching

Part 11 of the Act deals with the DNA database system. The DNA database contains the following indexes:

- crime scene index
- missing persons index
- offenders index
- suspects index
- unknown deceased person's index
- volunteers (limited purposes) index, and
- volunteers (unlimited purposes) index.

The New South Wales DNA database also contains a statistical index. DNA profiles derived through forensic procedures or from crime scenes are stored on the relevant index of the DNA database. Section 93 of the Act specifies the circumstances in which DNA profiles can be matched against others on the database. In our investigation of DAL, we examined the laboratory's compliance with the legislative provisions for permissible matching.

10.4.1. Suspect-suspect matching

Suspect profiles can be matched against the unsolved crime scenes, convicted offenders and unknown deceased persons indexes, but cannot be matched against profiles taken from other suspects, volunteers or missing persons.⁹³¹

DAL has advised that prohibiting the comparison of new suspect profiles with suspect profiles already on the database is a significant problem, for two reasons. First, it is not possible to state how many people have their DNA sample on the database. DAL advised that in February 2005, there were 6,066 suspect profiles on the database.⁹³² However, this figure includes samples from people who are represented more than once on the database, so the number of individual suspects who have their DNA on the database will actually be lower. Given that a new DNA sample is taken in relation to each cold link which results in prosecution, there are a significant number of suspects who have had their DNA profile put on the database more than once.

Second, DAL cannot detect inconsistencies on the database in identifying information relating to suspects. The information DAL enters onto the database comes from the sample information form completed by the submitting police officer. If any of that information is incorrect – for example, if the suspect uses an alias, or the officer makes a transcription error – there is no way DAL can identify this.

Being able to compare suspect samples against the suspect index would allow DAL to state how many suspects have their DNA profile on the database at any given time, and to identify multiple submissions from the same person where there are discrepancies in the identifying information.

We note that the report on the independent review of Part 1D of the *Crimes Act 1914* (Cth) made similar comments. It also pointed out that “it is not uncommon for persons who engage in criminal conduct to use different identities. Matching suspects to suspects will assist in determining whether persons with different identities are in fact the same person,” and recommended that suspect-suspect matching should be permitted.⁹³³

NSW Police has also indicated that it would welcome a change in the legislation to allow suspect-suspect matching.⁹³⁴

We agree with NSW Police and DAL that limited suspect-suspect matching of a type which would address the issues discussed above should be permitted in New South Wales.

Recommendation 62

Part 11 of the *Crimes (Forensic Procedures) Act 2000* be amended to permit the matching of DNA profiles within the suspects index.

NSW Police and NSW Health both support this recommendation.⁹³⁵ The Attorney General’s Department advised it did not object to the recommendation but noted:

*Not only the Commonwealth, but all jurisdictions that have legislation containing a ‘matching table’, currently prohibit matching suspect samples to the suspect index. Therefore, ultimately progressing this recommendation might best be achieved at a national level.*⁹³⁶

10.4.2. Volunteer profiles provided for limited purposes

Volunteer profiles which have been provided for a limited purpose can only be used for that purpose. They can be matched against the unsolved crime scenes, convicted offenders, missing persons and unknown deceased persons indexes, but only if the volunteer has consented to the profile being used for this purpose. These profiles cannot be matched against profiles taken from other suspects or volunteers.⁹³⁷

Volunteer profiles which have been provided for unlimited purposes can be matched against the unsolved crime scenes, convicted offenders, missing persons and unknown deceased persons indexes. They cannot, however, be matched against profiles taken from other suspects or volunteers.⁹³⁸

Through our scrutiny of the Act, we found that NSW Police and DAL had different understandings of how samples taken from volunteers are to be used.

NSW Police had based its volunteer information sheet on clause 7A of the Crimes (Forensic Procedures) Regulation 2000, which provides that volunteers must be informed:⁹³⁹

- (a) *that the DNA database system includes two indexes relevant to volunteers, a volunteers (limited purposes) index and a volunteers (unlimited purposes) index,*
- (b) *that the volunteer, or parent or guardian of the volunteer, may give consent subject to the condition that information obtained from the analysis of forensic material taken in accordance with the consent will only be placed on a specified index of that system, or will not be placed on either index.*

In this way, the legislation essentially sets up three options for volunteer profiles – they can:

- 1) be placed on the volunteers (limited purposes) index
- 2) be placed on the volunteers (unlimited purposes) index, or
- 3) not be placed on any index.

However, DAL advised that it actually puts all DNA profiles obtained from volunteers on the DNA database. It considers that “samples taken for use within a case are a form of limited purposes volunteer,” and advised that “we do not see a distinction between ‘only matched within the case itself and placed on the limited purposes index’ – the effect is the same.”⁹⁴⁰ DAL essentially treats the first and third options as the same thing. Further, DAL very rarely uses the volunteers (unlimited purposes) index. It finds that police officers who have indicated that a volunteer’s profile is to be used for unlimited purposes often do not have a good understanding of what this means. Before putting a volunteer profile on the unlimited purposes index, DAL always contacts the officer who took the sample, to confirm whether the volunteer did actually specify that his or her DNA sample could be used for unlimited purposes. Police usually advise that they cannot be sure of this and that the person’s profile should only be matched within the case for which it was provided. Accordingly, DAL has only put volunteer profiles on the unlimited purposes index once or twice.⁹⁴¹

Through our scrutiny of the Act, we have found that some police officers have a very poor understanding of the distinction between suspects and volunteers. We have also identified serious problems with the provision of information about forensic procedures to both suspects and volunteers. We are not convinced that volunteers consenting to forensic procedures have a good understanding of the implications of the procedure, or that they fully understand what their DNA sample will be used for.

By treating all volunteers as having provided their DNA for the limited purpose of examination within a particular case, DAL is essentially applying a safeguard in case the police officer who conducted the forensic procedure has not complied with the legislation. Given the preliminary findings of our review, we support DAL’s approach in relation to using volunteer samples for limited rather than unlimited purposes.

However, we are concerned that volunteers are providing DNA samples on the basis that they will not be put on the database, when in fact they will be.

We raised these concerns with both agencies in October 2005. NSW Police agreed to remove the references to ‘within case matching’ from the volunteer information sheet, to ensure that volunteers know their DNA profile will be put on the DNA database. DAL also agreed that profiles taken for ‘within case matching’ could be deleted from the database provided the relevant court proceedings have been finalised. NSW Police has since advised us formally that it will remove ‘within case matching’ from its standard operating procedures, and that all volunteers will, in future, be made aware that their profiles will be put on the DNA database.⁹⁴² We note as well as removing references to ‘within case matching’ from the volunteer information sheet, NSW Police should remove the option that a volunteer’s profile not be placed on any index from the volunteer consent form.

Recommendation 63

DAL continues to use volunteer samples only within the case for which the sample was provided, unless it has confirmed with the relevant police officer that the volunteer did actually intend that his or her profile be placed on the “unlimited purposes” index.

Recommendation 64

DAL deletes all profiles provided by volunteers for 'within case matching' from the database, once the relevant court proceedings have been finalised.

Recommendation 65

NSW Police remove the option of samples not being placed on any index from the volunteer consent form.

NSW Police supports recommendations 63, 64 and 65.⁹⁴³

NSW Health supports recommendation 63 and will continue to use this protocol. NSW Health supports recommendation 64 in principle, but commented that it is a matter for NSW Police whether volunteer profiles should be removed from the database and the samples destroyed. NSW Health also indicated that DAL has held discussions with NSW Police to put in place mechanisms to ensure DAL is notified of finalised cases.⁹⁴⁴

10.5. Access to information on the DNA database

The Act prohibits access to information on the DNA database other than by an authorised person. An authorised person can only access or disclose information from the database or from a forensic procedure for one of the purposes specified by the Act. These include permissible database matching, providing information to the person who provided the sample, administering the database system, coronial inquiries, and the investigation of complaints against police officers or complaints relating to privacy.⁹⁴⁵

A person can only be authorised to access information on the database by the "responsible person." As discussed at 4.4, the Act does not specify who the responsible person is. For the avoidance of doubt, the Commissioner of Police and Chief Executive Officers of Western Sydney Area Health Service and ICPMR/DAL signed a minute of authorisation in January 2005. The 52 people who are currently authorised to access the database are listed in a schedule to the minute.

This arrangement is clearly not ideal, and means a new schedule has to be signed every time DAL takes on new staff that need access to the database. DAL has requested that this issue be clarified by the working group run by the Criminal Law Review Division of the Attorney General's Department, which formed in response to the Findlay review of the Act. In our view, there should be no question as to who is the 'responsible person'. This should be made very clear in relevant legislation and administrative arrangements. In keeping with this, it would be preferable if the Act specified who is the responsible person. We previously discussed this in chapter 4 where we made recommendation 9 about clarification of the responsible person.

10.5.1. Access to Guthrie cards

Since the 1970s, most children born in Australia have a blood sample taken by heel prick shortly after birth, to test for medical disorders. The blood samples are stored on Guthrie cards by health agencies around Australia. Although developed for a different purpose, this practice has resulted in a collection of DNA samples from almost all people born in Australia over the last 30 years or so. Each state's health service has its own policies for regulating access to and retention of Guthrie cards. NSW Health's cards are generally retained for 25 years.⁹⁴⁶

NSW Police has, on occasion, obtained access to Guthrie cards for investigative purposes.⁹⁴⁷ In 2002, NSW Health developed a protocol to govern access to Guthrie cards by police, in consultation with Privacy NSW. Privacy NSW emphasised the protocol should not enable police officers to circumvent the requirements of the Act. Accordingly, the protocol allows police officer to apply for access to Guthrie cards only in very limited circumstances – to identify bodies, and to identify remains where the victim is missing and presumed dead. Consent from the next of kin is also required.⁹⁴⁸

10.6. Analysis results

The Act provides that police can only ask a suspect to provide a DNA sample if there are reasonable grounds to believe that it might produce evidence tending to confirm or disprove that the suspect committed an offence.⁹⁴⁹ We sought to review how often DNA analysis produces evidence confirming the suspect committed the offence in question, and how often it eliminates the suspect from investigation.

In our investigation notice, we asked DAL to provide details of the number of suspect and volunteer samples analysed, which were received at DAL during the review period. Given that all suspect and volunteer samples are submitted in relation to the investigation of a particular offence, and sent to DAL for comparison against samples taken from the relevant crime scene, we wanted to know how many of the cases submitted had been finalised, and what the results of the comparison were.

DAL advised that for each suspect and volunteer sample received during the review period, the person's DNA profile had been derived, put on the database and (where relevant) matched against the appropriate index.⁹⁵⁰ However, DAL could not advise in how many cases it had compared the person profile against the crime scene evidence, or the results of the comparisons conducted.

10.6.1. Warm links

A warm link occurs where police take a DNA sample from a suspect, and it matches DNA from the crime scene or victim, as suspected.

Case Study 66

A man in a balaclava and gloves robbed a convenience store in the early hours of the morning. He was armed with an iron bar, and took \$1,200 in cash, 20 packets of cigarettes and the shop assistant's mobile phone. He drove off in a stolen car. The shop assistant hit the alarm and contacted police. Police identified a car matching the description given by the shop assistant, driving well above the speed limit. Police followed the car to a house where the suspect got out, and dropped a backpack on the footpath. Police arrested the suspect and took him to the police station. They found the cash and cigarettes in the backpack, and sent the backpack and the items in it to DAL, for analysis. They also examined the car for fingerprints and DNA. Police took a DNA sample from the suspect. DAL confirmed that the DNA obtained from the crime scene evidence matched the DNA profile obtained from the suspect, and he was subsequently convicted.⁹⁵¹

Case Study 67

Police attended an office, which had been broken into. It appeared the offender had scaled a high wall and broken a glass balcony door to get in, but had not taken anything. Police examining the crime scene located some blood on the wall, where the offender had broken in, and took a swab for forensic analysis. A short time later, police arrested a man at a nearby construction site, and police took him to the police station to charge him with trespass. They decided to take a DNA sample from him, after noticing that he had a small laceration on his forearm. DAL confirmed that the DNA profile derived from the blood stain matched the profile derived from the suspect's DNA sample. The suspect was charged with the break and enter, and the matter is currently before the courts.⁹⁵²

Where the victim's DNA is found on the suspect's clothes or body, this is also counted as a warm link.

Case Study 68

Four young people left a nightclub in a small country town just after midnight. A man walked towards them, yelling and swearing, and pushed one of the young people. The young people walked around the corner and called a taxi. The man was joined by two others, who followed the group around the corner and took their shirts off. One of them ran at the young man he had pushed, and punched him in the jaw. One of his companions tackled one of the young people and kicked and punched him while he was on the ground. Police attended the scene and took the four young people to hospital for treatment, and photographed their injuries. A short time later police stopped the others involved in the fight outside the nightclub. There was a red substance, which appeared to be blood, on the boot of one of the suspects, and took the boots for DNA testing. Police subsequently took a DNA sample from the victim, who alleged he had been kicked by the suspect during the assault. DAL confirmed that the DNA profile derived from the blood found on the suspect's boot matched the victim's DNA profile. The suspect was charged with the assault and was subsequently convicted.⁹⁵³

Case Study 69

A man alleged he had been stabbed outside a service station by his partner. She admitted being at the crime scene and arguing with the victim. She said she had punched him in the chest but denied stabbing him, telling investigating police that she believed he had subsequently inflicted the wound himself. Police seized her clothes, which had blood spattering on them, and took a DNA sample from the victim. DAL found that the blood on the suspect's clothes was indeed from the victim, and the suspect was convicted.⁹⁵⁴

We asked DAL how many warm links were made, by offence type, each month during the review period. DAL advised that when the Act commenced, it recorded warm links within individual case records. It did not otherwise record them and so has no central record of warm links from that period. For this reason, DAL was unable to advise the number of links made each month, or the number of links made in the investigation of different types of offences. However, it estimated that it has made 3,170 warm links during the review period. We understand that DAL now records warm links on LIMS.

DAL reports warm links directly to the investigating police officer or police station. NSW Police does not have any way of centrally recording the number or details of warm links advised by DAL.

10.6.2. Cold links

A cold link is a link between the DNA of a suspect or convicted offender and DNA obtained from an unsolved crime scene, made when the second profile (whether the person sample or the crime scene sample) is loaded onto the database. The term cold link generally refers to links where the person linked to the crime had not previously been identified as a suspect.

Case Study 70

An unknown person broke into a house through the rear bedroom window, and stole various items belonging to the residents. On returning, one of the residents noticed that the lid was missing from a bottle of coke which they had left, with the lid on, in the fridge. A scene of crime officer examined the scene for fingerprints, and took swabs from the coke bottle. DAL obtained a DNA profile from the swab, and uploaded it onto the DNA database. It matched the profile of a person whose profile was already on the database. Police arrested the suspect, and took a further buccal swab to confirm the cold link. The suspect was then charged with the offence.⁹⁵⁵

Case Study 71

An unknown offender broke into a house through the window, and stole a briefcase, handbag, keys and the owner's car. Police recovered the car the following afternoon, and found a partially eaten sausage roll inside. DAL obtained a profile from the sausage roll and uploaded it onto the DNA database. It matched the profile of a person who was already on the database. Police arrested the suspect, conducted a further forensic procedure to confirm the cold link, and commenced proceedings against the suspect.⁹⁵⁶

Cold links can also be made between crime scenes, where the same unknown offender has left DNA at more than one crime scene. Linking crime scenes is of significant intelligence value to investigating police officers.

Case Study 72

In June 2002, an unknown offender broke through the roof of a shopping centre, cutting both the telephone and alarm wires. The offender broke into a fruit and vegetable shop, and stole cash from the safe and cash registers. The offender also attempted to steal two ATMs, using the fruit shop's forklift to remove several pallets of fruit and vegetables, to make room for a stolen vehicle to be driven through the shop to the ATM. Investigating police attended the crime scene, and took swabs from the controls of the forklift. DAL derived a DNA profile from the swabs and uploaded it onto the DNA database. It did not match anyone already on the database.

A year later, police were investigating a break, enter and steal offence at a warehouse. Again, the unknown offender had cut the alarm wires, and had used the company's forklift to move the stolen goods, this time fishing reels. Investigating police officers took swabs from the forklift, and the DNA profile was put on the DNA database. It matched the DNA profile obtained from the fruit shop forklift, but again, did not match any of the profiles obtained from person samples on the database.

18 months later, police arrested and charged a suspect in relation to various property offences. While in custody, police took a DNA sample from the suspect by buccal swab. DAL uploaded the suspect's profile onto the database and found that it matched the DNA profile obtained from the forklifts used in the fruit shop and warehouse offences. Police made further inquiries and neither the fruit shop nor the warehouse were able to explain why the suspect's DNA was found at the controls of their respective forklifts. Investigating police subsequently interviewed the suspect about his involvement in those two offences too.

We asked DAL to provide the number of cold links, by offence category, made during the review period. DAL advised that cold links were made in 4,207 cases during the review period. The majority of these were for high volume offences, including break, enter and steal (2,884), stolen motor vehicle (585), steal from vehicle (245) and malicious damage (47). However, a significant number were for serious offences, including murder and manslaughter (13), sexual assault (68), robbery (267) and assault (25). These results are extremely good – they demonstrate that DNA analysis is providing further evidence in unsolved crimes, including the most serious types of offences.

DAL also provided information about the number of people who have been linked to crime scenes:

- 1,405 people were linked to only one crime scene
- 705 people were linked to between 2 and 4 crime scenes
- 124 people were linked to between 5 and 10 crime scenes
- 17 people were linked to more than 10 crime scenes, including one person who was linked to 25 different crime scenes.

In total, 2,251 people have been linked to crime scenes through cold links. These results show that DNA analysis is useful in identifying patterns of possible repeated criminal conduct.

We sought to analyse the number of cold links made each month, to see whether there were any trends in the number or types of cold links made since the Act commenced, but DAL was unable to provide this information. However, we understand that the number of cold links increased rapidly as large numbers of convicted offenders had their DNA

profiles put on the database, but cold hits are being made at a slower rate now, since the database is no longer expanding so rapidly.⁹⁵⁷ The rate of cold links also fluctuates according to the number of cases DAL examines, the number of profiles uploaded onto the database and staff availability. DAL reported that the number of cold links spikes when staff work overtime.⁹⁵⁸

DAL reports scene to scene links to FPIT, but does not record these separately, the way it records person to scene links. DAL is of the view that counting scene to scene links is not particularly useful, given the large numbers involved – for example the 25 crimes scenes which were linked to the one person would result in hundreds of scene to scene links.⁹⁵⁹

We found that NSW Police and DAL count cold links in different ways. DAL calculates cold links according to laboratory standards, focusing on the number of links made on the database, while NSW Police uses the link information provided by DAL to calculate links from the perspective of clearing up crime. It appears NSW Police has a higher number of cold links than DAL, because certain links are counted more than once. DAL on the other hand does not add up the links, where they are simply different ways of measuring the same result.

As well as adopting different ways of counting cold links, it appears DAL and NSW Police are recording links under different sets of offence types. For example, NSW Police has separate categories for aggravated assault, aggravated robbery, aggravated sexual assault, attempted sexual assault and stealing, which DAL does not appear to use. DAL has categories for abduction, hit and run and fire cases, which NSW Police does not appear to use. It is not clear why NSW Police and DAL use different categories of crime in calculating cold links.

It may be more appropriate for NSW Police to report on cold links rather than DAL. DAL has indicated that the only reason it does report on cold links is because of the limited IT capabilities of NSW Police, and that DAL reporting on cold links is the only way NSW Police can get this information.⁹⁶⁰ In our view, it would be beneficial for NSW Police and DAL to develop an agreed method of how cold links are calculated.

10.6.3. Eliminations

As indicated above, we sought to discover how often powers available under the Act are used to eliminate suspects from investigation. DAL advised that it is not possible to report on the number of people eliminated from police investigations through DNA analysis, but estimates that about 480 suspects have been eliminated since the Act commenced.⁹⁶¹

DAL explained that the fact that no warm link is made does not necessarily exclude a suspect from investigation. For example, it could be that no DNA was found on the item submitted for analysis, or that somebody else's DNA was found on the item. This does not mean the suspect was not involved. This is especially so in cases where there are multiple offenders – for example if a number of unknown offenders are involved in a home invasion, and the DNA of one of the suspects is not found on any of the exhibits submitted for analysis, this does not necessarily mean the suspect was not involved. By contrast, suspects can be eliminated from an investigation where the offender's DNA profile is known, and there was only one person involved in the commission of the offence. This is often the case in sexual assault investigations.

The estimates provided by DAL suggest that for every elimination, there are between six and seven warm links. Expressed another way, of all the cases where DNA analysis results in either a warm link or an elimination, 87 per cent result in a warm link and 13 per cent result in an elimination.⁹⁶² We note that this does not include the significant number of cases where there is no warm link but the suspect could not be eliminated either. However, it does suggest that DNA analysis is, in the majority of cases, used to produce evidence tending to confirm, rather than disprove, a suspect committed an offence.

Given that police must suspect on reasonable grounds that a person has committed an offence before asking the person to provide a DNA sample (and further, that to order a DNA sample be taken in the absence of consent, police must *believe* on reasonable grounds that the suspect committed an offence), we would expect that DNA analysis is used in the majority of cases to implicate rather than exculpate suspects.⁹⁶³

10.6.4. Provision of outcomes to NSW Police

In our statement of provisional findings, we recommended that DAL should provide FPIT with a copy of all case work sample reports at the time the report is provided to the investigating police officer or local area command. This would enable NSW Police to keep a centralised record of all analysis outcomes, in particular of all warm links and eliminations. NSW Police would then be in a much better position to assess whether its officers are using their power

to conduct forensic procedures effectively. NSW Police acknowledged that it needs to improve its IT systems, data collection and intelligence before it can evaluate how the powers available under the Act are being used.⁹⁶⁴

After further discussions, DAL agreed to provide all DNA analysis results to FPIT, and to consider whether results should be provided electronically or in hardcopy.⁹⁶⁵ We note that if results are provided electronically, they could be provided automatically at the time the results are provided to the investigator. If provided in hardcopy, DAL could perhaps make copies of analysis results and send these regularly (say, on a monthly basis) to FPIT. Sending hardcopies may be a good interim measure until IT systems can be improved.

We also recommended that, for each case in which a suspect sample is submitted, DAL record a result – for example ‘warm link’, ‘exclusion’, ‘no DNA’ (where no DNA could be found on the exhibit) or ‘no link’ (where the suspect was neither implicated nor excluded by the analysis). During further discussions, DAL advised that it currently records outcomes for crime scene samples – ‘warm link’, ‘exclusion’, ‘upload’ (where a DNA profile is uploaded onto the database, but does not result in a warm link) and ‘check’ (where the exhibit is examined but there is no DNA located, or no suitable profile could be derived for placement on the database). DAL agreed that it could develop a set of outcomes for person samples so that for each person sample submitted, there is a result recorded when it has been compared to the relevant crime scene evidence.⁹⁶⁶

In addition to the above, NSW Police has asked for monthly reports detailing the number of samples received and the number of samples analysed in relation to suspects, volunteers, excluded volunteers, convicted offenders, missing persons and deceased persons. It has also asked for the number of cases received, the number of evidence samples analysed, and the number of evidence samples entered onto the database. NSW Police has also asked for various statistics relating to cases in the backlog, including the number of cases and crime scene samples awaiting analysis (divided into serious and volume crime) and the years in which the cases awaiting analysis were received. We understand that DAL is providing most of these, but is still considering some aspects of the request.

Recommendation 66

DAL and NSW Police standardise their methods of recording cold links, warm links and eliminations.

Recommendation 67

DAL in consultation with NSW Police develop a set of agreed outcomes for analysis conducted in relation to suspect samples, and record an outcome for each case in which a suspect sample is submitted.

Recommendation 68

DAL provide an appropriate central unit in NSW Police (such as FPIT or FSG) with DNA analysis results for each sample analysed.

NSW Police supports recommendations 66 to 68.⁹⁶⁷ In response to recommendation 66, NSW Health commented:

It is important that not only that DAL and the NSW Police have a standard approach to these recordings but also there is a national approach to the collection of such data. The Senior Managers of the Australian and New Zealand Forensic Laboratories (SMANZFL) have a draft programme in place that is currently under review. This matter will be raised at their next meeting and an assessment made of the terminology, and discussions of its national implementation. Once this is done DAL will implement the SMANZFL recommendations in collaboration with NSW Police.⁹⁶⁸

NSW Health supports recommendation 67 and advised that DAL will consult with FPIT to establish a set of agreed outcomes. DAL will need to make changes to its IT system, and expects that from March 2007, an outcome will be assigned to each suspect sample analysed.⁹⁶⁹

NSW Health supports recommendation 68 but commented:

Cost effective implementation of this recommendation involves a suitable IT interface between the NSW Police and DAL, as providing an additional hardcopy is a significant impost to DAL. The IT interface is currently being investigated, and will also require significant resources to be transferred to IT development for the process to be successful in providing a secure network that does not add to the time taken for DAL to complete cases. In the present staffing of both DAL and FPIT sending an additional 9,000 report to FPIT per year will significantly affect both areas performance.⁹⁷⁰

10.6.5. Results of our audit of DAL

As explained above, we followed up 180 of the 371 forensic procedures we examined during our audit of police local area commands, at DAL.

Given that all the samples included in our audit were taken in relation to the investigation of a particular offence, and sent to DAL for comparison against samples taken from the relevant crime scene, we expected that DAL would be able to provide results for each sample. These results would include any matches or links arising from the comparison, and for those which had not been finalised, an expected date of completion.

We asked DAL, in relation to the 180 audit procedures, for the following information:

- whether the person sample has been compared against a crime scene sample or samples from the particular offence police are investigating
- whether an analysis report has been sent to police, if so the results of the analysis (ie whether there was a link or not), and
- where samples had not already been compared with crime scene samples, the expected date a result would be reportable to police.

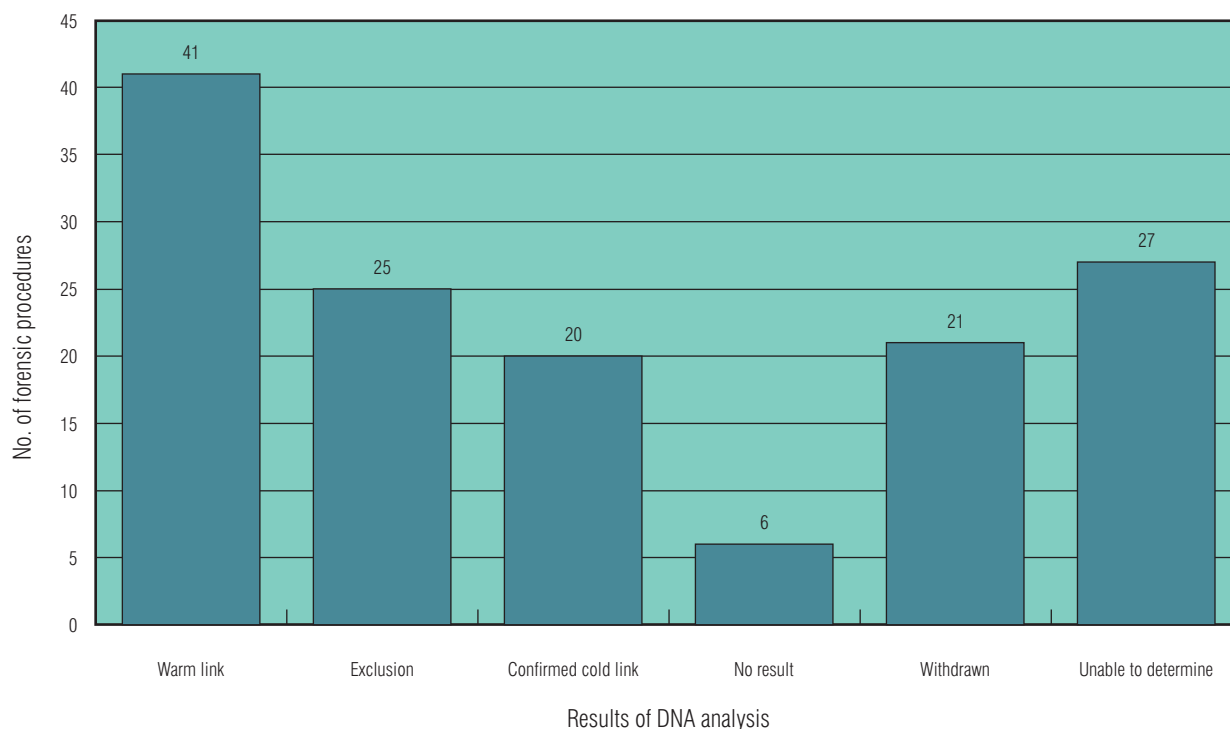
We disregarded 27 of the forensic procedures included in the audit, either because the sample had been destroyed pursuant to Part 10 of the Act, or because the forensic procedure was not a DNA sample. A further five we disregarded because they were DNA samples taken from victims (which we had initially included in our audit sample because the police records indicated that they were volunteers). Of the remaining 148 forensic procedures, 140 were DNA samples taken from suspects and eight were DNA samples from volunteers.

10.6.5.1. Suspects

Of the 140 suspect samples, we found:

- 41 resulted in warm links. This includes 33 forensic procedures where the suspect's DNA matched DNA from crime scene or the victim, and eight forensic procedures which otherwise implicated the suspect, for example, where the victim's DNA was found on the suspect's clothes or body.
- 25 resulted in exclusions. This does not necessarily mean that the suspect was positively eliminated from the investigation, only that the suspect was not implicated through the DNA analysis. It is not clear from the information available how many of these suspects were positively eliminated from the investigation.
- 20 resulted in a prior cold link being confirmed. We understand this means the forensic procedure included in the audit was taken by police to confirm a cold link which had already been made.
- In six cases no comparison could be made – in five because insufficient biological material could be found on the crime scene sample to obtain a DNA profile, and in one because no crime scene exhibits were received from police.
- In 21 cases the suspect's profile was not compared against crime scene evidence because the case was withdrawn.
- DAL was not able to provide any information in relation to the remaining 27 cases.

Figure 11: Results of DNA analysis for forensic procedures in audit sample.



Source: DAL further response to Ombudsman investigation notice, October 2005. (n=140)

Figure 11 shows that where DNA analysis is conducted, it usually yields a result, and it is more common that DNA analysis implicates a suspect than not. It shows that NSW Police and DAL expend considerable resources taking further samples from suspects who have previously been identified through the DNA database (confirmed cold link). It also shows that a significant number of cases are withdrawn before the laboratory is able to complete its analysis.

Figure 11 also shows that DAL is unable to identify the relevant case for a large number of forensic procedures – almost a fifth of the suspect samples included in our audit sample. Given that police can only take a suspect's DNA if this is likely to confirm or disprove the suspect's involvement in a particular offence, in our view DAL should be able to identify the case to which each forensic procedures relates.

DAL explained that because person samples are much easier to process, they are completed before the crime scene samples being analysed. DNA profiles are obtained from person samples soon after receipt and suspect profiles are uploaded onto the database for comparison against the unsolved crimes index. The profile is put on the database without any record of the case it is attached to – the FS number relating to the offence for which the sample was taken is only added later.⁹⁷¹ Accordingly, DAL's inability to identify cases for 27 suspect samples may be because:

- the profile was deleted and no record was kept of this (DAL now keeps records of when profiles have been deleted, but has not always done this)
- police did not submit any exhibits from the crime scene and so DAL did not allocate a case number, or
- police did not provide DAL with an Event number.

It is of concern that in at least one of the procedures we audited, police did not submit any crime scene evidence to DAL (the facts of that matter are set out in case study 21, at 7.2.3.4). Given that police can only ask a suspect to provide a DNA sample for the purpose of obtaining evidence confirming or disproving the suspect's involvement in the relevant offence, this suggests there may not have been a proper basis for police taking the suspect's DNA. We reiterate our recommendation 60, that DAL should not accept DNA samples taken from suspects unless there are sufficient details enabling DAL to identify the case to which the sample belongs, so that DAL can allocate a case number at the time of receipt.

10.6.5.2. Volunteers

For each of the eight forensic procedures conducted on volunteers included in the audit, we found that the person sample had been compared against the crime scene sample. In four of these, the volunteer's DNA was used for exclusion purposes. In the other four, it is not clear from the information available what the outcome was.

10.6.6. Are police officers using their powers under the Act effectively?

Our capacity to assess whether police officers are using their forensic procedure powers effectively was seriously limited by the fact that neither DAL nor NSW Police have maintained complete or accurate records for the whole of the review period. While record keeping has improved since the Act came into force in 2001, there are still a number of areas where complete records would enable both DAL and NSW Police to better measure their performance. In particular, it is not possible to gauge how often taking a DNA sample from a suspect confirms the person's involvement in the offence or eliminates the person from the investigation, although this would appear to be a key indicator of whether the powers available under the Act are being used effectively.

This situation should improve as DAL has agreed, following our investigation, to provide FPIT with a copy of all case work sample reports at the time the report is provided to the investigating police officer or local area command. This will enable NSW Police to keep a centralised record of all analysis outcomes, in particular of all warm links and eliminations. It will permit monitoring across NSW Police, and indicate commands or areas where inquiries into the use of the Act should be initiated.

As discussed above, it would also be beneficial to both agencies to standardise their methods of recording and reporting links. The current difference between the way DAL and NSW Police record links makes it difficult to compare figures. Some forensic service providers in other jurisdictions regularly publish statistics of how many DNA samples they have analysed (including person samples and crime scene samples), how many profiles are on the database, the results of analysis, and how many samples have been rejected and the reasons for this. Some publish statistics in annual reports or on their website. Given the good results DAL has achieved, there may be some merit in DAL keeping better records of outcomes and providing this information to the public. We raised this issue in discussions with DAL, and DAL indicated that it used to provide this type of information to NSW Police.⁹⁷²

NSW Police provide some information in their annual reports on the number of DNA person samples collected, number of cold links made and the cumulative number of arrests and convictions since the New South Wales DNA database commenced. There are no accurate records reported regarding non-DNA forensic procedures and their effectiveness in aiding investigations. In our view, it would be beneficial for NSW Police to consider collecting information that reflects all aspects of the Act and publishing this information in their annual report.

Recommendation 69

DAL and NSW Police consider publishing outcomes from all links made from the New South Wales DNA database, not just cold links, in their respective annual reports

Recommendation 70

DAL and NSW Police include explanations on how they calculate links in their respective annual reports.

Recommendation 71

DAL and NSW Police consider regularly publishing this information on their respective websites.

Recommendations 72

NSW Police, in addition to the information currently included in its annual report on the number of cold links and person DNA tests undertaken, include information on:

- a. how many DNA samples have been analysed (including person samples and crime scene samples)
- b. how many profiles are on the database
- c. the results of analysis
- d. how many samples have been rejected and the reasons for this
- e. how many samples are submitted to the National DNA database (NCIDD) when it becomes operational, and
- f. how many matches are made on the National DNA database (NCIDD) when it becomes operational.

Recommendations 73

NSW Police commence recording how many non DNA forensic procedures are undertaken by type and the results achieved following these procedures.

NSW Health supports recommendations 69 to 71 in principle. DAL does not issue an Annual Report, but NSW Health has advised it will liaise with NSW Police to consider the best method for conveying this information to the public.⁹⁷³

NSW Police has indicated it supports recommendations 69 to 72. It supports recommendation 73 in principle, but noted that its implementation would require amendments to its computer system.⁹⁷⁴

10.6.7. Tracking DNA samples through the system

In our statement of provisional findings, we recommended that DAL make changes to its case management system, so that each case can be tracked from its receipt, to DAL beginning its analysis, to DAL completing its analysis (and advising police of the result), to DAL finalising its analysis (and providing its analysis report to police). In its response, DAL advised that it already does this.

Our preliminary recommendation stemmed from DAL's inability to provide certain information we asked for in our investigation notice. This included general information about the number of samples analysed during the review period, which was crucial to establish the legislative basis for taking the samples in the first place – that there were reasonable grounds for believing that taking the sample would confirm or disprove the suspect committed an offence. We wanted to find out how many profiles obtained from suspects had been compared against the relevant crime scene evidence, to compare this to the number of samples taken from suspects overall. DAL subsequently confirmed that it could not provide any of this information.⁹⁷⁵

The information DAL was unable to provide also included information about specific forensic procedures included in our audit. For each procedure selected, we asked whether the person sample had been compared against a crime scene sample or samples from the particular offence being investigated, whether an analysis report had been sent to police, if so the results of the analysis and if not, the expected date a result would be reportable to police. As discussed above, DAL was unable to identify the relevant case for 27 of the DNA samples taken from suspects, either because the profile had been deleted and no record had been kept; police did not submit any exhibits from the crime scene so no case number was allocated; or police did not advise DAL of the relevant COPS Event number.

We anticipate that these problems will be adequately addressed through the measures discussed elsewhere in this report. In particular, DAL now keeps records of profiles which have been deleted. Further, DAL has agreed, following our investigation, to record a result for each suspect sample submitted, when it has been compared to the relevant crime scene evidence.⁹⁷⁶ In addition, we have recommended DAL should only accept DNA samples from suspects and volunteers where there are sufficient details enabling DAL to identify the case to which the sample belongs (Recommendation 60).

10.6.8. DNA analysis in relation to old crimes

DAL advised that there are crime scene samples from about 1,500 criminal offences committed between years 1986 and 2000 which are being held in storage. DAL has examined 164 old cases, most of which were unsolved sexual assaults. DNA testing has been completed in relation to 100 of these. DNA profiles were obtained from 84. Half of these matched profiles already on the database – 33 to convicted offender profiles and the rest to other cases.⁹⁷⁷ DAL is of the view that many more unsolved crimes, particularly sexual assaults, could be resolved if the crime scene samples in the freezer could all be analysed.

DNA analysis of old crimes is outside the scope of our review of the forensic procedures legislation. However, we note the results DAL has achieved in this area, and that DAL's capacity to conduct further work in this area is limited because of resource issues.

10.7. Delays in DNA analysis

10.7.1. Why does DNA analysis take so long?

In our investigation of DAL, we made inquiries about the factors which contribute to the length of time taken to provide DNA analysis reports to NSW Police. DAL explained that processing a person sample is reasonably straightforward, and a profile can be obtained within a matter of days of the sample arriving at the laboratory:

Person samples are the easiest to work with. There are comparatively large quantities of DNA, the DNA is known to be from a single source, the sample has been placed freshly onto special paper designed to reduce breakdown of the DNA and the analysis has been modified to speed up the processing with the knowledge that there is plenty of sample available for repeating if necessary.

By contrast, obtaining a DNA profile from crime scene evidence can be difficult, and extremely time consuming. Some exhibits are tested numerous times in the hope of obtaining a good profile. As DAL explained:

A biology case is not simply a DNA test but a complex series of decision-making and scientific testing... In order to maximise the potential evidence from each item careful management of the recording and examination of the items, the use of best practice quality scientific examinations, the decision making process in continuing the testing beyond non-DNA levels, the DNA profiling methodology, the interpretation of the data in the context of the case scenario(s), the provision of a statistical weighting, and the application of benchmarked quality standards through casework reviews are essential for the provision of quality results. These processes take time.⁹⁷⁸

Even for reasonably straightforward crime scene samples, DAL has to locate forensic material on the exhibit (which may require examination of a number of different areas on the exhibit), conduct the DNA analysis, interpret the results, upload the profile onto the database and report on the results. If a profile suitable for upload to the database cannot be obtained first time around, DAL may retest the exhibit. This requires further processing and further interpretation. Trace DNA analysis is even more complicated and time consuming. DAL explained this in more detail:

There is an initial requirement to fully document the examination of the item, find potential biological material, possibly identify the origin of the biological material first and then submit the sample for DNA testing. These samples are often 'invisible' material containing only a few cells that are invisible to the naked eye and there may be insufficient material available to repeat. Evidence items may have been subjected to adverse environmental impact such as heat, sunlight, dirt and moisture and then deposited on items from which it is often very difficult to remove sufficient material for examination. DNA testing may be compromised where the DNA is being inhibited by dyes in the fabric or by other biological or chemical factors. Consequently, evidence samples often have to be reanalysed a number of times before a reportable result is obtained or before it is decided that a reportable result is not obtainable. It may take weeks or months simply to obtain a reportable DNA profile from one item. Then there are interpretation difficulties when dealing with low level samples or with samples that originate from more than one person. Such interpretation is not straightforward and may require discussion with a number of other scientists before it is determined whether a result is reportable or not...

The production of a DNA profile in a criminal investigation is not a simple one-step process. It can be a long complex task because of the age, the trace amounts of biological material present, the presence of inhibitors, the variability of sample types and the environmental conditions in which the material was kept prior to collection...

Objects on which only small amounts of DNA are present may require a number of resamples of the original item or retesting of the extracted DNA before a successful DNA profile is obtained. This may take many weeks or months. Further, the DNA profile that is obtained is often difficult to interpret because it contains evidence of DNA from more than two people or DNA at the lowest levels of reportability.⁹⁷⁹

Other factors impacting on the length of time taken to process a sample include the number of items submitted for analysis, the time frame over which police deliver these, the caseload of the reporting biologist and the priority given to the case.⁹⁸⁰ DAL also routinely reviews some of its cases as part of the quality checks required for its accreditation.

Serious cases are generally given priority, but these may also take months or even years to complete, given that DAL is more likely to continue testing in an attempt to obtain a profile which is good enough to use in court. DAL advised, in words to the following effect:

They do drag out, for example the murder samples take about a year or so. Police want more and more work – for instance you can tell police a result within a couple of weeks, so police have a suspect, but they may want more evidence. It really is a question of how much evidence they want. It can be difficult, there can be a pivotal item. For example, there was one matter where the sample was tested 24 times before we got a result, and even then it wasn't really good enough.⁹⁸¹

Less serious cases tend to fall into two groups – those which are easy to process and are of high probative value, which are turned around quickly, and those which are complex or are of low probative value, which are not prioritised and take a very long time to be turned around, if they are processed at all.⁹⁸²

Case Study 73

A 19 year old man charged with murder spent 10 months in custody while police waited to obtain the results of DNA analysis from DAL. The committal hearing could not be held until police served the brief of evidence, including the DNA analysis results, on the suspect's legal representative. The magistrate criticised DAL for not giving the case priority. DAL spent considerable time trying to obtain a useable profile from the crime scene evidence, without success. In the end the man was committed to trial and found guilty on the other evidence.⁹⁸³

10.7.2. Effect of delays on police investigations

During our review, we surveyed each of the 80 police local area commands about various aspects of the forensic procedures legislation. One issue we asked about was the length of time DNA analysis takes and the impact this may have on the way the command manages investigations. Many responses expressed frustration about delays, especially in relation to high volume offences. They indicated that turnaround times for serious offences were generally better, provided that individual police officers actively pursued the matter with DAL. Commands expressed concerns about:

The length of time taken to obtain analysis results:⁹⁸⁴

'Delays always inhibit the effectiveness to address crime issues promptly... In many instances, investigations cannot progress while awaiting forensic examination of samples. Cold links often come years after the crime, by which time the offender has possibly served a sentence for crimes committed around the time of the identified offence.'

'It would appear that matters are rated on a priority basis as such, many matters result in lengthy delays, for example multiple BES [break, enter and steal] offences, as there are constantly more serious matters arising that take priority.'

'Volume crime samples take up to 12 months to be returned. Usually the suspect is in custody for other offences by that time. By the time the hit comes back and the suspect arrested for the first response, follow up inquiries are required even though the suspect is in custody. Hits are still being received for up to months after. Victims have trouble remembering details of offence if BES [break, enter and steal] etc.'

'Depends on seriousness of offence and amount of harassment of DAL. Normal crime can take between 8 weeks and 3 months. High volume crime can be up to 6 months. If suspect in custody or serious crime then generally 1 or 2 weeks. Investigations are delayed and everything just takes that much longer.'

'Delays can be extensive. Investigators pursue results with DAL where they are aware of available DNA samples from crime scene and suspect... Where results are actively pursued delays are generally minimal.'

Suspects and victims of crime forgetting about the incident, or losing interest in the process:⁹⁸⁵

'Delay may mean suspect cannot recall movements at time of offence and/or reason for being at crime scene.'

'Witnesses and victims have moved on or forgotten the incident. Other evidence lost or destroyed. Some hits are not followed through with charge as it could be seen as a miscarriage of justice due to the lengthy delays.'

'[Delays] can effect the investigation in relation to evidence gathering and direction of investigation.'

Suspects remaining at large while DNA analysis is pending, and the impact this has on crime levels within the command:⁹⁸⁶

'Generally the delays enable the suspect to continue to offend until arrested. The shorter turnaround lessens the opportunity to commit more crime. Especially volume crimes such as BES [break, enter and steal] and SMV [steal motor vehicle].'

'Up to 6 months delay. In that period, offender is in community committing further offences.'

'Offenders can still be offending during that period where earlier matching may result in earlier detection and intervention. Cases may then be fairly old and may not receive high priority if current crime level is high.'

'DNA identifications... do not have the impact on providing quick clear ups for volume crime.'

'Delays allow an unknown offender to commit further crime.'

The impact of delays on victims of crime:⁹⁸⁷

'The main issue is customer service – it is very hard explaining to members of the public why there has been a delay in the investigation.'

We questioned whether, given the length of time taken to obtain DNA analysis results, any commands are deciding against using DNA, particularly in relation to high volume offences. However, we did not find any evidence of this through our monitoring activities. Rather, we found that police still submit exhibits for analysis, and factor associated delays into their management of the investigation. Where possible cases are pursued without relying on DNA evidence, but in these cases DNA is still submitted for analysis. As one command commented, the "investigation goes as it did prior to having the DNA technology," and when results are available they are added to the other evidence gathered.⁹⁸⁸

Many commands (25 out of 80) acknowledged in their survey responses that delays are largely due to DAL's limited resources and ever increasing workload. Despite their frustration with delays, many also commended DAL on the good results it achieves:⁹⁸⁹

'The service provided by DAL for a number of serious matters (murder and riot) has been ideal. Cold links are a timely issue, however considering the amount of samples to be examined, I do not have any criticism.'

'Greater funding needs to be given to DAL so that they can clear the backlog of cases. They are having extremely good results and it could be even better with more staff/resources, especially where serious crime is concerned.'

'The delays are often frustrating for investigators, however it is understood how much work is incumbent upon the forensic biologists. It appears that the only way to overcome this problem is to provide additional resources to the biologists.'

'The delays for less serious matters are generally several months, more serious matters can be processed more quickly on request. Unfortunately these delays also delay the investigation. It would be of great assistance to police if these delays were minimised by an increase of staff at DAL.'

We note that DAL has raised similar concerns about the length of time taken to process crime scene samples, reporting that in some cases, an offender has been convicted of another offence, served a custodial sentence and been released before work on the evidence submitted has begun.⁹⁹⁰

We also note that delays in DNA analysis may result in innocent people remaining under investigation, or in some cases remaining in custody for an unnecessarily long time. The Ombudsman has previously reported to Parliament about an innocent person remaining in custody unnecessarily because of the length of time police took to get the relevant DNA samples to the laboratory.⁹⁹¹

10.7.3. Effect of delays on court proceedings

Lengthy delays in DNA analysis are undesirable for all involved in the justice system – police, the DPP, people awaiting trial (especially those in custody), and the courts. Many of the police officers we surveyed commented that they are unable to prepare briefs of evidence in time for court proceedings because of long turnaround times. Some had found that delays have an adverse impact on the prosecution of crime:

'High risk offenders or very active offenders can be arrested and charged and the results do not come through until well after the event when offenders have been dealt with through the court. If this is the case, and the offender doesn't admit to a crime, he gambles on it not being picked up or being lost within the system. The original offences he doesn't admit to may remain unresolved by the court and further action may have to take place.'

'Some investigators have found the delays significant and a hindrance to prosecution. One investigator believed the courts were becoming increasingly intolerant of DNA delays. Further the courts were placing less weight on DNA evidence.'

'Currently DAL advise 2 months plus in processing specimen. This adversely affects prosecution, courts not accepting delays.'

Other officers commented that matters were simply adjourned until the evidence is available.⁹⁹²

'[This command] has encountered significant delays in timely delivery of DNA results for supply to court, however DPP are aware of this and generally obtain lengthy adjournments for brief service.'

'There have been no incidents where court matters have been compromised due to delays at DAL. There have been some minor delays in the preparation of the statement.'

The Police Association of NSW also expressed frustration about delays:

*[DAL] does not have the resources to keep up with the demand placed on it by police... NSW Police welcome the introduction of legislation that will help solve crime, but this must be matched by the physical capability to do the second part of the job – the analysis and production of documents.'*⁹⁹³

The magistrates we surveyed also commented on the effect delays in DNA analysis have on proceedings. Some argued that excessive delays are unfair to the accused, especially those in custody, and indicated their reluctance to allow adjournments because of delays in obtaining DNA analysis results:

*Delays are the biggest source of unfairness [in the way the Act is being implemented].*⁹⁹⁴

*I try to allow only short adjournments.*⁹⁹⁵

*The accused is often in custody, bail refused, and delays are significant. I have threatened to grant bail in a few cases if DNA evidence is not hurried up. So far this has produced results.*⁹⁹⁶

*Delays are notorious... almost always with a brief including DNA evidence it is the last part of a brief to be served. The only action that I have taken which has been fair to all interests is to reduce the strictness of bail conditions because the delay has made them harsh.*⁹⁹⁷

One magistrate argued that court delays could be reduced if both the prosecution and defence could be more discerning about when DNA evidence is a pivotal issue in the case:

I am sure the nature or scope of the examination could be reduced if there was a provision for both the prosecution and defence to agree on the purpose of the analysis. If a DNA analysis of a blood stain is, for example, only to prove the defendant was at the scene when 10 witnesses say he was and the [defendant]

*admits being there then what is the point. Even if the DNA relates to an issue that is at the end of the day (or otherwise) contentious, unfortunately in my experience, both the prosecution (and more so the defence) wish to have every potential piece of evidence disclosed before any significant decision is made regarding the future conduct of the case. One suspects that many defendants are sitting in gaol bail refused awaiting DNA results that are going to have absolutely no impact on the real issues in their cases.*⁹⁹⁸

In 2002, the Public Accounts Committee found that DAL was not providing an effective, efficient and timely laboratory service to the criminal justice system, although the widespread use of DNA profiling in criminal proceedings meant that it was “an issue of the highest priority.”⁹⁹⁹ In 2002 and 2003, the Chief Magistrate of the Local Court issued practice notes setting out procedures to ensure time standards are met for cases committed for trial. The practice notes specify that where results of DNA analysis are required for a brief, “directions will be given such as to ensure no undue delays occur, particularly where the defendant is in custody.” They recommend the brief of evidence be served within six weeks of a suspect’s first appearance in court.¹⁰⁰⁰ However, in its 2004 Annual Review, the Local Court again identified the provision of DNA analysis results as a factor contributing to delays in finalising committal proceedings.¹⁰⁰¹ DAL has advised it is unable to meet the recommended turnaround time of six weeks in all cases:

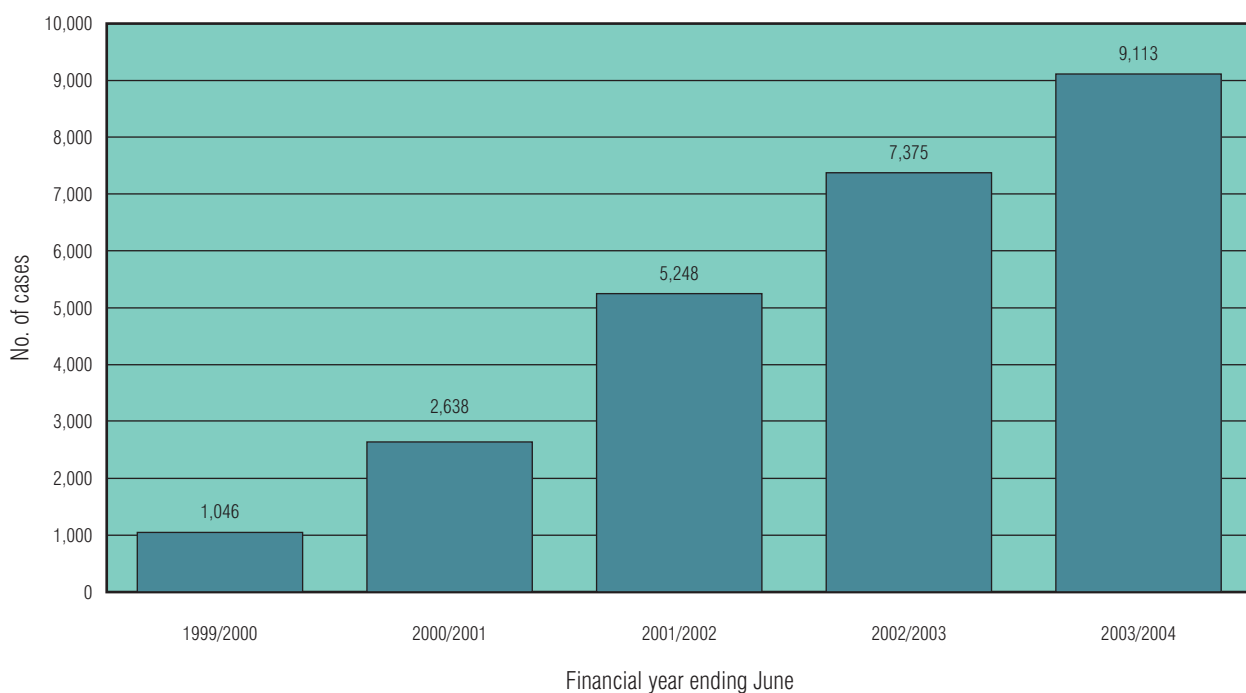
*There are a large number of cases where this period is impossible to meet because of the delay that occurred between the time of the offence and the date of receipt of the case at [DAL]. Other cases are simply too large for analysis to be completed in the suggested time.*¹⁰⁰²

10.7.4. The backlog

When DNA profiling started being used on a large scale, NSW Police trained its staff to conduct forensic procedures on eligible people and to collect forensic evidence from crime scenes. Police and scene of crime officers could be brought up to speed in a matter of months. By contrast, it takes years of training to become a forensic biologist. When the Act commenced, the laboratory had difficulty recruiting enough qualified staff, and could not meet the demand for DNA samples being submitted for analysis. Samples waiting to be processed quickly accumulated, and a backlog formed.

Since then, the use of DNA profiling in the investigation and prosecution of crime has continued to increase. More and more forensic evidence is being sent to DAL each year. Since 2000, the number of cases being submitted to DAL for analysis has increased more than eightfold:

Figure 12: Number of cases received at DAL by financial year.



Source: DAL Draft business case, January 2005. Number of cases refers to the number of cases received by DAL in the 12 months ending June.

Further, more items are being submitted in each case. Before the Act commenced, FSG estimated that only one item would be submitted for each offence; and for serious crimes, such as murder, about five items would be submitted. However, DAL has advised that an average of 22 items are submitted in relation to a murder case, and that investigating police frequently request more than one item to be examined in relation to less serious, high volume offences, particularly where they suspect more than one offender was involved, or a profile could not be obtained from the first item examined.

The number of items submitted in relation to each case has also increased as DNA technology has advanced. Where police submit exhibits with only trace amounts of DNA, this may require multiple testing to obtain a usable profile. There are now more items being submitted which require retesting and interpretation of complex results.

Another factor contributing to the increased number of items submitted for analysis is that NSW Police has little control over which exhibits individual police officers or scene of crime officers are submitting for analysis. This leads to DAL receiving some unnecessary casework.¹⁰⁰³

Staff shortages at DAL also contributed to the backlog developing. When staff members leave DAL, they may not be replaced, which reduces its capacity. If staff members are replaced, training new staff members takes time, while the backlog continues to grow. When staff numbers were down in 2004, DAL was only working on urgent cases where the evidence was needed for court proceedings, and all other cases had to wait.¹⁰⁰⁴

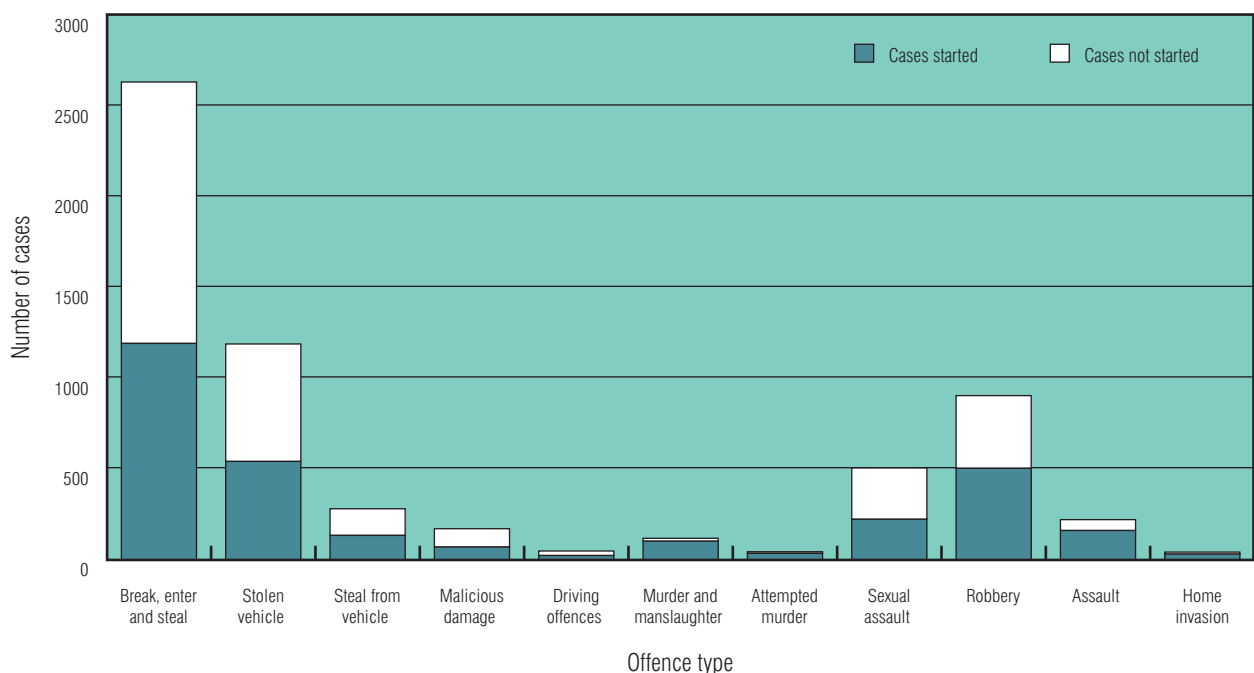
10.7.5. What is in the backlog?

We understand that the term “backlog” includes all the cases DAL has not finalised, rather than a distinct set of matters which DAL has consciously decided should be allocated backlog status.

In August 2004, there were over 7,000 cases in DAL’s backlog. We note that each case in the backlog may include any number of items. At that time, analysis of about half the cases in the backlog had been started.¹⁰⁰⁵

Most of the cases in the backlog are less serious, high volume offences, such as break, enter and steal (2,633 cases), stolen motor vehicle (1,188), steal from vehicle (279) and malicious damage (169). However, there are also a significant number of serious offences, including murder and manslaughter (116), attempted murder (42), sexual assault (504), robbery (903), assault (219) and home invasion (40).

Figure 13: What is in the backlog.



Source: DAL attachment to agenda for DNA Advisory Committee meeting 6 August 2004. This does not show the total number of cases in the backlog, only certain offence types.

Figure 13 indicates there are a large number of serious offences, such as sexual assault and robbery cases, which had not been started at that time.

10.7.6. Is the backlog still growing?

Although NSW Police and DAL have implemented some strategies to streamline service delivery, the backlog continues to grow, as NSW Police continues to submit more casework than DAL has the capacity to process. In August 2004, DAL estimated that it was receiving 30 per cent more casework than it could process.¹⁰⁰⁶ DAL has been negotiating to either receive more funding, or less casework, so far without success:

As the impact of DNA testing has grown so has the demand for it... New South Wales has the largest state police numbers, the highest crime rate and the highest population yet, pro rata, analysis on any of these indicators shows that it has the smallest investment in DNA analysis amongst all Australian jurisdictions. The courts and [NSW Police] now require us to examine more exhibits in serious cases, to examine a number of areas per exhibit, to increase the amount of high volume work so as to solve more property crimes, to perform more complicated trace DNA analyses on items that prior to the year 2000 were not examined, yet to provide all these analyses in a shorter time frame.¹⁰⁰⁷

We note that many forensic laboratories around Australia and overseas have developed backlogs as DNA analysis becomes used more widely in the investigation and prosecution of crime. In some jurisdictions, specific funding has been allocated to enable laboratories to reduce their backlogs.¹⁰⁰⁸

10.7.7. Turnaround times

The original Deed of Agreement between NSW Police and DAL specified the following agreed turnaround times for cases requiring DNA analysis:

- Person samples – within one calendar month of receipt at DAL. For urgent person samples, 80 per cent would be finalised within three days and 95 per cent within five days.
- Cases (offences being investigated requiring comparison of person and crime scene samples):
 - for simple cases, typically volume crime, 80 per cent would be finalised within 30 days and 95 per cent within 120 days of receipt. For urgent cases 80 per cent would be completed within 10 days.
 - for complex cases, typically major crime, 60 per cent would be finalised within 30 days and 95 per cent within 120 days of receipt. For urgent cases 80 per cent would be completed within 20 days.

The Agreement specifically stated that these turnaround times were estimates based on DAL's understanding of the likely caseload and nature of cases to be examined. DAL indicated that it could provide more precise targets once the system was up and running. It quickly became clear that DAL could not meet the targets set out in the Deed of Agreement.

We understand that DAL and NSW Police have not been able to reach agreement on new turnaround times. Compliance with turnaround times is a key indicator of DAL's performance, and in our view new turnaround times, based on DAL's actual caseload, need to be negotiated as a matter of priority.

Recommendation 74

NSW Police and DAL agree on new turnaround times (for items as well as cases), based on DAL's current caseload.

NSW Police supports this recommendation.¹⁰⁰⁹ NSW Health supports the recommendation in principle, but commented:

NSW Health will negotiate with Police on developing agreed turnaround time for high priority cases. Samples accorded a lower priority are completed when resources permit.¹⁰¹⁰

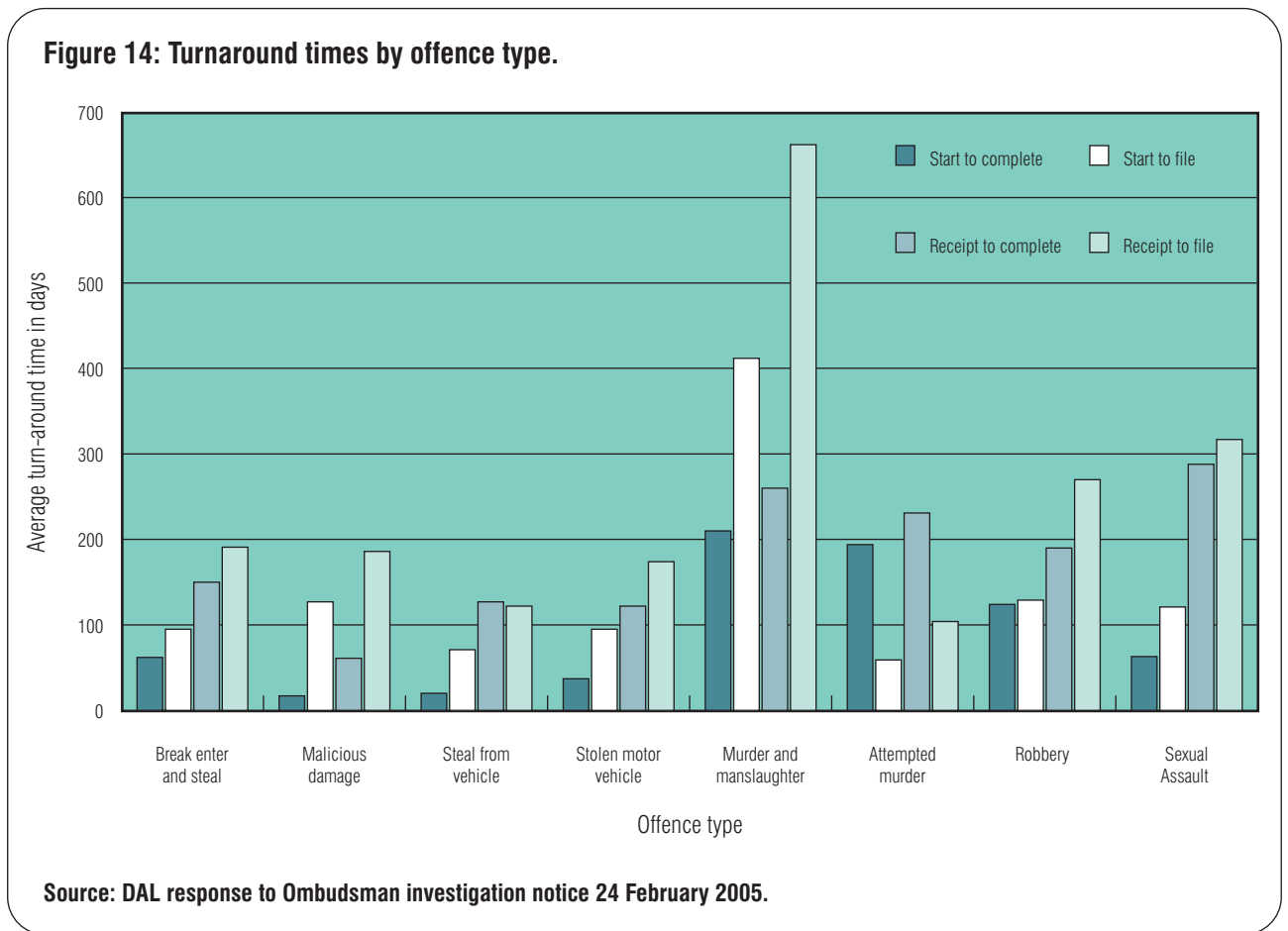
10.7.8. Turnaround time reports

DAL started providing monthly reports of turnaround times to NSW Police in January 2005. It does not have any turnaround time reports from before then. Each report details the number of cases (by offence type) which have been finalised in the previous month. Turnaround times are expressed in months, and are measured in four different ways:

- date received to date completed (the time from the sample being received at DAL to a verbal result being provided to NSW Police)
- date received to date filed (the time from the sample being received at DAL to the analysis report being provided to NSW Police)
- date started to date completed (the time from DAL beginning its analysis of the sample to a verbal result being provided to NSW Police), and
- date started to date filed (the time from DAL beginning its analysis of the sample to the analysis report being provided to NSW Police).

The reports also indicate the average turnaround time in days for each type of offence.

Figure 14 shows the average turnaround times for the cases DAL finalised in December 2004:



This shows that the more serious offences tend to take longer to finalise. We understand this is because there is a greater imperative to obtain a profile from non-ideal samples, more complex analysis will be undertaken, and more items will be tested.

DAL has also advised that pivotal items in exceptionally urgent cases can be turned around in between two and five days. This requires the case to be given immediate attention and may require lab staff to work through the night.¹⁰¹¹

We understand that DAL decided at the end of 2004 to report item turnaround time as well as case turnaround time to police.¹⁰¹² We support this approach, given that item turnaround times can be useful in explaining the length of case

turnaround times (in particular, where items remain unexamined for some time, pending results obtained from other items within the same case).

We note that the turnaround time reports provide only a snapshot of the cases which have been finalised in the previous month. They do not indicate how many cases or items are on hand at DAL, or how long they have been there. There is no way of measuring the length of time between a case being received, and the analysis starting. Nor do they provide any information about the length of time between a verbal result and the analysis report being provided to NSW Police.

In our view, it would be more useful to measure the turnaround time for each sample by tracking its progress, from receipt at DAL, to the analysis being started, to the case being completed and the case being filed. DAL could then provide details, each month, of the number of cases on hand, by offence type, and their status. This would better enable DAL and NSW Police to monitor how long cases have been on hand.

Recommendation 75

Appropriate changes be made to DAL's case management system, so DAL can state how many cases are on hand, and the status of each; and any cases which are overdue, according to any agreed turnaround times, are flagged.

NSW Police supports this recommendation.¹⁰¹³ NSW Health advised:

*DAL's case management system can now provide data on the status of each case. Overdue notifications can be provided and will be routinely provided once the lab processing capacity matches the demand and the backlog has been curtailed.*¹⁰¹⁴

Recommendation 76

As well as providing monthly reports detailing turnaround times for cases completed and cases finalised, DAL provide NSW Police with monthly reports detailing cases on hand. This should include the number of cases and items awaiting analysis, and how long they have been at DAL. For cases which have been finalised, the length of time between a case being received and it being started, and between it being completed and filed, should also be indicated.

NSW Police supports this recommendation.¹⁰¹⁵ NSW Health supports the recommendation in part, commenting:

*DAL now provides almost all of this information. Monthly reports are provided covering turnaround time for cases completed, cases finalised and cases on hand. The reports include data concerning the time that a case takes to be started, completed and filed. For cases on hand (not yet started) we also provide information on the type of case and the approximate length of time since receipt at DAL.*¹⁰¹⁶

However, NSW Health also advised:

*DAL is not able to list how many items an unstarted case may involve because this is not known until the case is started.*¹⁰¹⁷

10.7.9. Which cases are given priority?

Cases which will generally be used for intelligence purposes rather than prosecution are given a low priority. For example, police routinely submit cigarette butts in relation to break and enter or stolen vehicle offences. Butts are a good source of DNA and are reasonably quick to process, compared to other types of crime scene evidence. On their own they would generally not be sufficient to support a prosecution, but obtaining a DNA profile may still be of value to investigating police as it may help identify people who are criminally active, or link unsolved crime scenes. Complex crime scene samples which will only be used for intelligence purposes are given very low priority.

In our investigation of DAL, we examined the systems in place to determine what priority samples should be given. As would be expected, DAL gives serious crimes higher priority than less serious crimes. Priority is also given to cases where:

- NSW Police or the DPP has advised the analysis is urgent
- a deadline has been imposed by the courts
- DAL has been informed the person who provided the sample is in custody
- the sample was taken from a sexual assault victim (on the basis that DNA testing is useful in identifying unknown offenders), or
- the likelihood of obtaining a single DNA profile is very high (that is, simple rather than complex cases).

However, there is no formal system for prioritising cases. DAL has advised that “often case prioritisation fails because of the failure to inform the laboratory of the urgency of the case.”¹⁰¹⁸ We understand that individual officers who are managing the investigation are responsible for notifying DAL if the suspect is in custody, or if court dates have been set, but this does not always happen. In fact, some of the police we interviewed during our audit of local area commands assumed that DAL had information like court dates, whether the suspect was in custody, and whether the evidence is crucial to the prosecution. Some also assumed that DAL would know if the matter had already been to court and DNA analysis was no longer needed. It appears that a better mechanism is needed to ensure DAL is informed about key information, and updated when this information changes.

Recommendation 77

NSW Police implement a reliable system for ensuring DAL is informed about key information affecting case prioritisation, including advice about when analysis is no longer needed.

NSW Police and NSW Health both support this recommendation.¹⁰¹⁹

10.7.10. Which items within each case are given priority?

Many of the crime scene samples received by DAL are never examined. DAL advised that it currently examines approximately two thirds of the items submitted for analysis.¹⁰²⁰ This is for two reasons – firstly, because police submit a significant amount of unnecessary casework; and secondly, because DAL does not have the capacity to analyse every item within a case, even if it is of significant probative value.

As discussed above, police and scene of crime officers are submitting far more items for each case than was originally estimated. Further, there is little consistency in the number or type of items DAL receives. Some officers send in everything which may be relevant, while others are more selective. FSG is of the view there should not be a predetermined number of exhibits which can be submitted in relation to a particular type of offence, and that it should continue to be determined on a case by case basis.¹⁰²¹

For high volume offences, DAL generally only processes simple samples, for example, bloodstains, or saliva from cigarette butts. They only process more complex samples for serious offences. DAL also makes a decision about which items within a case are likely to produce the most relevant evidence. For example, if police submit a bag of clothes in relation to an armed robbery, DAL will not examine every item of clothing. If DAL obtains a useable profile from one of a number of exhibits submitted, the others generally remain unexamined. In some cases, where the initial analysis results are compelling, examination of other items may be of little worth.

We note that in Queensland, in the case of *R v Button* (2001), the appellant was convicted of rape and spent 10 months in custody, because bedding which police provided to the laboratory for analysis was never examined, on the basis that it would not assist in identifying the appellant as the perpetrator. The appellant appealed, the bedding was examined, and somebody else was identified as the perpetrator. The court pointed out that “DNA testing has a two-fold purpose: that of identifying the perpetrator of a crime, and secondly, that of excluding a possible offender as being the perpetrator of the crime.” It also commented, “today is a black day in the history of the administration of criminal justice in Queensland.”¹⁰²² The Button case illustrates the danger of examining only a limited number of items submitted for analysis, particularly when the selection is motivated by the desire for a particular result.

In New South Wales, police or the DPP may request more items to be examined in particularly serious cases, for the sake of completeness. We note that some forensic scientists have been asked in court why they have only examined some of the evidence.¹⁰²³ However, due to DAL's limited capacity, many items submitted by police are never examined. Even for serious offences, including murder and sexual assault, many items received are not examined, despite them often having some probative value.¹⁰²⁴

DAL is well aware of the risk of examining only a limited number of items submitted for DNA analysis, and is aware that it is only providing, in its words, a "reduced service."¹⁰²⁵ However, at this stage, it is not in a position to examine all the items it receives. DAL notes that NSW Police preserves items which are not examined, which provides a limited safeguard, as items can always be examined at a later stage, as happened in the *Button* appeal.

10.7.11. Proposed system for casework submission

As a result of a review conducted in 2004, NSW Police has decided to screen all items submitted for DNA analysis, to filter out any unnecessary casework, and to determine what priority should be given to items within a case.

There will also be changes made to the way exhibits are submitted to DAL. The exhibit information form will have to be completed electronically, from the FSG intranet site (and will be designed so it cannot be printed until it has been completed). FSG will have to assess and authorise all crime scene samples before they can be submitted to DAL. DAL will not accept any cases which have not been authorised by FSG, and FSG will reject inappropriate cases and exhibits.¹⁰²⁶

DAL has expressed concern about FSG screening all items submitted:

*Potential risks have been identified with the introduction of such a scheme through suggestions of bias and incomplete investigations based solely on financial restraint, police deciding which items are to be examined, and the perception that the laboratory loses its notional independence by only examining items that the police indicate will inculpate the accused.*¹⁰²⁷

In addition, FSG intends to perform some of the preliminary analysis, for example by cutting out bits of material or obtaining swabs from evidence and sending them to the laboratory, rather than submitting the whole sheet or garment and DAL staff determining which parts should be examined. DAL has expressed concern that "it is at the cut-out stage where the majority of tampering allegations can be made."¹⁰²⁸

We note that police already play a significant role in determining which evidence to collect in the investigation of an offence. In our view, both DAL and NSW Police have a role to play in deciding which crime scene evidence should be analysed. It is clear that police and scene of crime officers need to be given better guidance about what types of exhibits should be submitted for analysis. However, there is considerable merit in DAL having a say in decisions about which items within a case should be examined. Further, DAL should be able to examine all items which are of probative value, to minimise the risk that relevant evidence is overlooked. The DNA Advisory Committee may want to consider monitoring this issue. We also note our Recommendation 78 that the question of independence is part of the review of the outsourcing trial discussed below.

10.7.12. Strategies adopted for improving timeliness

In addition to this proposed casework screening DAL and NSW Police have adopted the following strategies to speed up DNA analysis:¹⁰²⁹

- targeting crime scene samples with the highest success rates
- streamlining DNA analysis in relation to volume crime, for example through using pro forma DNA analysis reports, and
- introducing a barcoding system to manage the large number of cases.

We also note that DAL has prepared a detailed business case, which aims to improve forensic service delivery by reducing the backlog and improving turnaround times. It also addresses facilities and equipment, salary and wages, goods and services, research and development and examination of crime scene exhibits from before the Act commenced (known as 'backcapture cases'). DAL has also considered:

- Introducing shift work, to maximise the use of lab space. Conditions are so cramped that more staff cannot be recruited unless some staff work at night. DAL is reluctant to introduce shift work due to the cost, the increased risk of contamination, staff preferences for working regular hours and the difficulties in supervising and training staff working at night. However, DAL is considering introducing shift work as a short term solution to its increase in casework.

- Refusing certain types of casework. In August 2004, DAL proposed to restrict the amount of casework being submitted by declining samples taken in relation to certain types of offences. Specifically, it proposed not to accept crime scene samples in relation to stolen vehicles, firearm possession, drug possession or cultivation, bag snatching and break and enter offences, unless the evidence is likely to yield a single-source DNA profile, such as a blood swab or cigarette butt. It proposed to focus its limited resources on DNA analysis in relation to serious crimes such as murder, assault and sexual assault. DAL recognised that this would significantly limit use of the DNA database for intelligence purposes in relation to volume crime. However, it was of the view that refusing some casework was necessary in order to continue to provide a high quality DNA analysis service in relation to serious crime. NSW Police did not support this proposal. We understand that it has not been implemented, but that it remains under consideration by DAL, should the laboratory's funding not increase.¹⁰³⁰
- Closing one of its six laboratories. DAL is extremely reluctant to close one of the serious crime labs, but has considered closing a high volume crime lab. We understand that at this stage, no labs have been closed, but again, the proposal remains under consideration.
- Introducing robotics to speed up DNA analysis, as some forensic laboratories in other jurisdictions have done. DAL is of the view that moving to robotics at this stage would not significantly improve turnaround times, as the delay is usually in the examination of the item, location of biological material on it and interpretation of evidence after profiles are generated, none of which can at this time be done through automation.

10.7.12.1. DNA Liaison Unit

In September 2004, NSW Police set up a DNA Liaison Unit on the premises at DAL. The purpose of the unit was twofold – firstly, to remove unnecessary casework from the system, by culling items in the backlog which no longer required analysis. They did this by checking the status of each case on COPS, and where necessary contacting investigating officers directly. This resulted in 527 cases (comprising 1,616 crime scene samples) being culled. Cases were culled where the exhibits submitted were of little evidentiary value, where there was enough other evidence for the matter to go to court without any DNA evidence, or where the case had already been resolved. At least half the backlog of sexual assault cases could be removed, because they had either been resolved, or consent became the issue at trial and DNA analysis would have little relevance.¹⁰³¹ We understand that not all items in the backlog were reviewed during the trial period. NSW Police has estimated that if the entire backlog were reviewed, up to 10,000 items could be culled.¹⁰³² In July 2004 after review of the backlog FSG estimated that 39 per cent of the backlog no longer required analysis.¹⁰³³

Secondly, the DNA Liaison Unit screened casework coming in, to ensure that only suitable items were submitted for DNA analysis. DAL reported that while this reduced the number of items being submitted by up to 16 per cent, the number of items submitted was still well over the number submitted in the same period the previous year. This suggests that having dedicated police officers vetting items submitted for analysis will not necessarily offset the large increase in the overall number of items being put forward for DNA analysis.

The Liaison Unit was initially set up as a trial but NSW Police has since advised that it has made an ongoing commitment with DAL to continue to staff this unit.¹⁰³⁴ FSG has proposed to assess the remainder of the backlog to cull any cases which have been resolved or discontinued.¹⁰³⁵ DAL has advised that even when a case is deemed active, unless the evidence is likely to be of significant probative value, DAL will cull the case and return the exhibits to NSW Police.¹⁰³⁶

DAL has emphasised the need for the laboratory to remain independent from NSW Police, and has expressed concern about the DNA Liaison Unit, which is staffed by police, being physically located at DAL. In particular, DAL is concerned about becoming too involved in the management of criminal investigations.

Given the difficulties faced by the laboratory, and what appears to be some good success in removing unnecessary work, the continuation of the liaison unit until the backlog project is finalised appears sensible. Provided any concerns about DAL's independence are adequately addressed in both physical conditions and work protocols, we are of the view that it should be permitted to complete the backlog task. This issue may be one the DNA Advisory Committee may want to consider. In addition, it is a measure that could be considered as part of the recommended review of the outsourcing trial outlined below.

10.7.12.2. New Forensic Science Services Branch

The NSW Government announced in March 2005 that it will provide \$26 million for a new forensic science centre, which will amalgamate a number of existing forensic services within NSW Police into one central branch. It will examine, prioritise and analyse crime scene exhibits. However, it will not conduct any DNA analysis – this will still be done by DAL.

The funding will be used to create 147 new forensic officer positions, in addition to the existing 345 scene of crime officers. NSW Police has explained that only 75 of these will be scene of crime officers; the rest will be photographers, vehicle inspectors and other specialist forensic officers. Further, some of the new positions will do forensic work which is currently being performed by general duties police officers. For these reasons it is likely that more exhibits will be sent to DAL, but not the equivalent of 147 new members of staff collecting exhibits from crime scenes.¹⁰³⁷

In the media release about the new funding, the Minister for Police, the Hon Carl Scully MP, stated:

*There are a number of [DNA] cases that are backlogged and we will deal with it. Understandably the demand for DNA analysis and DNA evidence has been great over the years and that's why there is a backlog. Part of this initiative will contribute to narrowing that backlog.*¹⁰³⁸

We understand that none of the funding is going directly to DAL. NSW Police anticipates that DAL will benefit indirectly, as the new Forensic Science Services Branch (FSSB) will assess all casework submitted for DNA analysis. The FSSB will filter out any unnecessary casework and determine whether the sample should be given any priority. The assessment will be based on factors such as the seriousness of the offence; whether analysis will be simple or complex; whether the defendant has been refused bail; and whether the evidence is crucial to the prosecution. NSW Police anticipates this will greatly improve the management of crime scene samples sent to DAL:

*By establishing the FSSB as a focal point for all NSW Police forensic exhibits, the quality of exhibits forwarded for further analysis will be greatly enhanced. It will also triage exhibits so that only the best and most evidentially meaningful samples are forwarded to DAL. This will greatly reduce the amount of unnecessary exhibits being received at DAL and allow them to better concentrate their resources on DNA analysis and examination of backlog items.*¹⁰³⁹

However, we note that with significantly more scene of crime officers gathering evidence, there will likely be even more crime scene samples put forward for DNA analysis. It is not clear at this stage whether having the new forensic branch screen all samples submitted will reduce the amount of casework DAL ultimately has to examine. As noted above, DAL currently only examines about two thirds of the items submitted for analysis.¹⁰⁴⁰ It is in the interest of investigating police to have more rather than fewer items examined, and (as DAL has pointed out) it is not clear how having NSW Police acting as a gatekeeper would be any more effective in restricting the overall amount of casework received.

10.7.12.3. Outsourcing trial

Until recently, DAL was the only laboratory accredited to conduct DNA analysis for NSW Police. However, NSW Police is embarking on a three month, \$1.5m trial outsourcing some DNA analysis to a private laboratory, Genetic Technologies Corporation Pty Limited.

All straightforward, high volume crime scene samples collected during the trial period will be sent to Genetic Technologies for analysis rather than DAL. However, any complex volume crime scene samples will generally be sent to DAL for analysis.¹⁰⁴¹ Genetic Technologies will also provide reports for court proceedings, and analyse person samples taken to confirm cold links.¹⁰⁴² We understand that DAL will remain the only agency with access to the DNA database. Genetic Technologies will provide DNA profiles to DAL, and DAL will then upload them onto the database.¹⁰⁴³

During the trial DAL should be free to work on backlogged crime scene samples as most of the incoming crime scene samples collected during the trial period will be sent elsewhere for analysis.¹⁰⁴⁴ NSW Police has advised that a further reason for conducting the trial is because outsourcing is being used in some other Australian jurisdictions. DAL has advised, however, that Queensland is the only other jurisdiction in Australia which is outsourcing DNA analysis, and that funding has been allocated specifically to outsource the backlogged samples.¹⁰⁴⁵

Before the trial began, DAL expressed the view that outsourcing is inappropriate, and will not result in any significant savings in time or money, as it would only be the simple samples which are outsourced, which DAL turns around quickly anyway.¹⁰⁴⁶ DAL expressed frustration that it was not able to tender for the job and argued that the funding allocated to the outsourcing trial would be better spent at DAL, where there is a clear need for further funding, and systems and processes have already been established.¹⁰⁴⁷ Further, there are implications for ensuring the chain of evidence is maintained, and in requiring staff from a private laboratory to give evidence in court.

The trial will run between May and August 2006 and is being oversighted by a steering committee, with representatives from DAL, the Attorney General's Department, NSW Police and the Police Ministry.¹⁰⁴⁸ It is also being evaluated by a New Zealand laboratory, Environmental Science and Research Limited, which will provide a report to Cabinet for consideration.¹⁰⁴⁹

10.7.12.4. Case conferencing

We understand that NSW Police is also considering case conferencing, where DAL, FSG and investigating police meet to discuss and agree on a forensic strategy for each complex case received.¹⁰⁵⁰ There is some merit in this approach, however it is not clear in how many of the thousands of cases submitted to DAL each year this would occur. Given that DAL's resources are already stretched, this proposal may not be realistic.

While case conferencing may enable DAL to ensure investigating police have clear expectations about what forensic analysis is possible, it may also compromise DAL's independence from the law enforcement agencies. This issue would need to be considered prior to case conferencing being introduced.

10.8. The future of DNA analysis in New South Wales

It is clear that while DAL is achieving some good results, there are significant problems with the DNA analysis service it provides to NSW Police. In particular:

- DAL is unable to process the amount of DNA casework submitted by NSW Police
- DAL cannot provide DNA analysis results in some cases, including some serious offences, in a reasonable timeframe
- the capacity to analyse crime scene samples from serious 'old' unsolved crimes is very limited
- there is an unknown amount of inaccurate information on the DNA database system
- DAL needs a better system for tracking samples from receipt through to destruction, and
- DAL could improve the way it measures and reports on outcomes.

We acknowledge that DAL has made significant efforts to improve its service delivery, and that many of the factors contributing to the situation are beyond DAL's control. We also note that the new procedures proposed by NSW Police, including screening all crime scene samples prior to submission, have the potential to lead to improvements in the system.

However, there are significant risks associated with the service DAL is currently providing. While DAL continues to receive more casework than it can process, exhibits (including some with significant probative value) will continue to remain unexamined. This negates some aspects of the Act, including the requirement that DNA samples can only be taken from suspects where this is likely to confirm or disprove the suspect committed an offence, if the relevant crime scene evidence cannot be examined prior to the retention period expiring. In addition, the risk of contamination increases and the use of the database as an intelligence tool is hampered. It appears that DAL cannot significantly improve its DNA analysis service without additional resources.

10.8.1. Preferred model for the DNA analysis service

NSW Police's preference is for DAL to maintain the DNA database and remain the principal service provider in DNA analysis, while some simple analysis is outsourced to a private laboratory and some of the preliminary examination of crime scene samples is conducted within NSW Police, in the new forensic service centre.

DAL's preference, on the other hand, is for a single, independent, adequately funded DNA analysis service. It also appears DAL supports direct funding rather than a fee for service model, on the basis that it provides a quality service including ongoing research and development, rather than simply providing the cheapest testing.¹⁰⁵¹

The proposal for a DNA analysis service that is not only financially independent but also self-governing provides the community with greater confidence in the justice system and the legitimacy of the analysis results provided. This is the approach adopted by a number of other jurisdictions, such as New Zealand's Environmental Science and Research Limited (ESR) and the United Kingdom's Forensic Science Service (FSS). Both of these agencies are self-funded organisations that have entered into contracts with their relevant police forces to provide analysis services.

Whilst New South Wales at this stage has a forensic service separate from NSW Police, the proposal by NSW Police to have some in-house analysis and examination of crime scene samples would be inconsistent with current trends. A recent report by the Law Reform Commission of Ireland recommended the establishment of an independent statutory body that would incorporate the Forensic Science Laboratory and the DNA database in one agency, which would be governed by a board of representatives such as:

- representatives from human rights organisations
- forensic experts who are independent of both the Forensic Science Laboratory and the government
- representatives with experience in data protection
- police representatives, and
- representatives from the DNA profiling laboratory.¹⁰⁵²

This model is also being considered in Victoria, where the Law Reform Committee has recommended that a separate forensic service that is “autonomous in its operations and accessible to prosecution and defence”¹⁰⁵³ should be established. The Committee further recommended that the independent service should be managed by an independent board made up of representatives from the client groups, and that it should be accountable through annual reporting to Parliament, be at arm’s length from its major clients, and be funded by a body or department separate from Victoria Police.¹⁰⁵⁴

The NSW Standing Committee on Law and Justice in its review of the Act has made similar recommendations for the development of a State Institute of Forensic Sciences. This Institute, if developed, would be responsible for the management of the use of technology in criminal investigations and prosecutions.¹⁰⁵⁵ The development of this Institute has also been raised by the Public Accounts Committee’s Inquiry into Court waiting times, which recommended:

- *As a matter of urgency, the establishment of a State Institute of Forensic Science be considered by the State Institute of Forensic Services Committee, and*
- *The Division of Analytic Laboratories (or a State Institute of Forensic Services) should be part of the Justice System Information Sharing project.*¹⁰⁵⁶

The current proposal to outsource some DNA services provides a further opportunity to consider these issues, especially in analysing issues of independence, and the outcomes of any trial as against enhanced funding to DAL. In our draft report, we made a preliminary recommendation that the DNA Advisory Committee and/or the Attorney General’s working group participate in any review of the outsourcing trial, and that this review should properly consider, in addition to the specific outcomes of the trial, the broader question of the long term position of DNA analysis services in New South Wales, including issues of funding, independence, and research and development.

The outsourcing trial has progressed since we made our preliminary recommendation, and is being scrutinised through the following mechanisms:¹⁰⁵⁷

- a steering committee, with representatives from DAL, the Attorney General’s Department, NSW Police and the Police Ministry will oversight the trial
- the DNA Advisory Committee is monitoring the trial, and
- the New Zealand laboratory, Environmental Science and Research Limited, will conduct an independent evaluation of the trial and will report to Cabinet at the end of the trial.¹⁰⁵⁸

The outsourcing trial presents a good opportunity to consider the broader question of the long term position of DNA analysis services in New South Wales and we recommend that Cabinet consider these issues in its response to the independent evaluation report.

Recommendation 78

Cabinet consider, in addition to the specific outcomes of the DNA outsourcing trial, the broader question of the long term position of DNA analysis services in NSW, including issues of funding, independence, and research and development.

Recommendation 79

The Parliament give further consideration to the recommendations of the NSW Standing Committee on Law and Justice and the Public Accounts Committee regarding the establishment of an independent State Institute of Forensic Sciences.

In response to our draft recommendations, NSW Health reiterated that it supports a financially independent DNA analysis service which is funded according to the nature and volume of the services provided. It also supports a separation between the DNA analysis service and NSW Police.¹⁰⁵⁹ NSW Police advised that it supports recommendation 79 in principle, and noted that the DNA Advisory Committee is currently considering the establishment of an Institute of Forensic Sciences.¹⁰⁶⁰

10.9. Interstate enforcement and CrimTrac

Part 12 of the Act deals with interstate enforcement of forensic procedure laws. It provides that the Attorney General may enter into arrangements with the responsible Minister in other Australian states and territories, so that police officers in New South Wales can conduct forensic procedures on behalf of police forces in other jurisdictions; and so information on the New South Wales DNA database can be shared with other jurisdictions.¹⁰⁶¹

To enter into an agreement, the participating jurisdiction must have a “corresponding law.” Every Australian state and territory now has laws corresponding to the New South Wales Act.¹⁰⁶² However, the only arrangement New South Wales has entered into is with the Commonwealth. This enables DNA profiles on the New South Wales DNA database to be transferred to the national database, but the information can only be accessed by the Commonwealth, not by any of the other states or territories.

Some other jurisdictions have arranged to share information obtained through forensic procedures. In mid 2005, Queensland and Western Australia uploaded their DNA data onto the national database, and can now search each other’s data for possible links. Comparing the 60,000 West Australian profiles with the 66,000 Queensland profiles reportedly resulted in over a hundred links.¹⁰⁶³ This has reportedly prompted Queensland to enter into negotiations with the Northern Territory, South Australia, Tasmania and the ACT to develop agreements with these states for sharing information obtained through forensic procedures.¹⁰⁶⁴

10.9.1. CrimTrac

The CrimTrac Agency was established in July 2000 as a national policing initiative. It plays a coordination and support role to police forces around Australia. It manages several national databases, including the National Automated Fingerprint Identification System, National Criminal Investigation DNA Database, National Criminal History Record Checking, National Handgun Buyback Support System, Minimum Nationwide Person Profile and National Child Offender Register.¹⁰⁶⁵

As discussed at 3.2, the National Criminal Investigation DNA Database (NCIDD) is essentially inoperative because the relevant Ministers have not entered into arrangements to share information obtained through forensic procedures with other states and territories. We understand negotiations have been hampered because of differences in the laws governing the circumstances in which DNA can be taken, and what it can be used for.

If fully operational, the NCIDD would contain DNA profiles from convicted offenders, unsolved crime scenes suspects and some volunteers, from each of the Australian states and territories. This would allow police forces around Australia to identify suspects, and link crime scenes, in much the same way as the New South Wales DNA database works. It would not replace state and territory databases, but would facilitate the investigation of crime in border areas, and crimes where offenders have moved interstate.

The national database has privacy and legal safeguards built in and would operate in accordance with relevant Commonwealth, state and territory legislation governing the collection and matching of DNA profiles. Each state and territory would provide DNA profiles for the database and these would be removed from the database in accordance with destruction dates notified by the jurisdictions.

Other safeguards within the national database include the requirement to remove the identities of persons who have supplied samples for DNA profiling. The only information available on the database will be the numeric representation of the DNA profile provided by the state or territory. CrimTrac explained:

*Identity fields will be removed from records before they are transmitted to the national DNA database. Only State and Territory forensic laboratories supplying the DNA profiles will know the identities of the providers of the profiles. So, when a sample profile is matched to a crime scene profile on the database, the CrimTrac Agency will not have access to identity details.*¹⁰⁶⁶

We sought information from CrimTrac on their role in managing the operation of the national DNA and fingerprint databases. We also asked how many DNA profiles and prints have been provided by participating states. CrimTrac advised it was unable to provide this information. We understand, however, that DAL has so far submitted only one

large batch of serious indictable offender profiles to the national DNA database. There are currently no arrangements in place for regular transfer of profiles to the national database. NSW Police anticipates that should the database become operative at a national level, it would transfer the profiles from the suspects index, volunteer (unlimited purposes) index and crime scenes index, as well as the new profiles from the convicted offender index, to the national database. NSW Police has advised that it is not clear whether profiles from the volunteers (limited purposes) index would be transferred. Our strong view is that profiles obtained from volunteers for limited purpose should not be transferred.

NSW Police in its submission to this review argued strongly that the Act should be amended to allow for the exchange of all legally obtained DNA profiles between New South Wales and other states and territories. NSW Police also suggested that mutual recognition legislation could be extended to facilitate the sharing of forensic information with certain overseas jurisdictions. DAL has also expressed frustration at the lack of interstate enforcement arrangements, arguing that the models proposed so far are too restrictive.¹⁰⁶⁷

Recommendation 80

The Attorney General and NSW Police take all necessary steps to permit the sharing of appropriate unlimited purpose volunteer, suspect and serious indictable offender DNA profiles via the National Criminal Investigation DNA Database (NCIDD).

NSW Police supports this recommendation.¹⁰⁶⁸ The Attorney General's Department advised that rolling out the national DNA database is a very high priority.¹⁰⁶⁹

Endnotes

⁹⁰² Chief Magistrate's Circular #433.

⁹⁰³ "Magistrate Slams Cops", *The Illawarra Mercury*, 10 February 2004; "Rape Victim's long wait for DNA tests", *The Daily Telegraph*, 27 May 2004; "DNA wait leaves victims in limbo — 'disgrace' as raped mum suffers", *The Sun-Herald*, 30 May 2004; and "Long-term trends in trial court delay in NSW"; NSW Bureau of Crime Statistics and Research media release issued 30 September 2004.

⁹⁰⁴ DAL response to Ombudsman investigation notice, 24 February 2005. This includes profiles taken from 421 volunteers after Part 8 of the Act commenced and 410 prior to Part 8 commencing.

⁹⁰⁵ DAL, Draft Business Case, January 2005.

⁹⁰⁶ DAL, Draft Business Case, January 2005.

⁹⁰⁷ Minutes of the DNA Advisory Committee, 3 February 2006.

⁹⁰⁸ During the review period we received one complaint involving a delay of 19 days for transportation of a suspect sample from the police station to DAL. The matter went before the court and no adverse findings were made. The complaint is discussed in more detail in chapter 15 as complaint number 3.

⁹⁰⁹ For some procedures, the date the procedure was recorded on COPS was not the same as the date the procedure was actually conducted. For this reason, we used hardcopy records, such as consent forms, to establish the date the procedure was conducted. Where no hardcopy records were available, we included the date as indicated by COPS.

⁹¹⁰ *Crimes (Forensic Procedures) Act 2000* s 27(3).

⁹¹¹ This is also discussed as complaint number 8 in chapter 15.

⁹¹² DAL comments on Ombudsman statement of provisional findings, 17 October 2005.

⁹¹³ 52 from suspects and eight from volunteers, according to information obtained through Ombudsman review of COPS records.

⁹¹⁴ 4,619 from suspects and 421 from volunteers: DAL response to Ombudsman investigation notice, 24 February 2005.

⁹¹⁵ NSW Police response to Ombudsman draft report, 2 June 2006.

⁹¹⁶ DAL response to Ombudsman investigation notice, 24 February 2005.

⁹¹⁷ Telephone advice from DAL, 3 March 2005.

⁹¹⁸ *Crimes (Forensic Procedures) Act 2000* s 91(2).

⁹¹⁹ NSW Police response to Ombudsman draft report, 2 June 2006.

- ⁹²⁰ Attorney General's Department response to Ombudsman draft report, 5 May 2006.
- ⁹²¹ DAL response to Ombudsman investigation notice, 24 February 2005.
- ⁹²² NSW Police response to Ombudsman draft report, 2 June 2006.
- ⁹²³ NSW Health response to Ombudsman draft report, 7 June 2006.
- ⁹²⁴ For example, see *R v White* [2005] NSWSC 60.
- ⁹²⁵ Telephone advice from DAL, 3 March 2005.
- ⁹²⁶ Excerpt from the Forensic Biology Procedures Manual, provided by DAL 24 February 2005.
- ⁹²⁷ FSG presentation to DAL, attached to agenda for DNA Advisory Committee meeting 6 August 2004.
- ⁹²⁸ "Changes to forensic exhibit submission procedures," *Police Weekly*, Volume 17 Number 9 (28 March 2005).
- ⁹²⁹ Discussion at meeting with representatives of FSG and DAL, 24 October 2005.
- ⁹³⁰ NSW Health response to Ombudsman draft report, 7 June 2006.
- ⁹³¹ *Crimes (Forensic Procedures) Act 2000* s 93.
- ⁹³² DAL response to Ombudsman investigation notice, 24 February 2005.
- ⁹³³ *Report of Independent Review of Part 1D of the Crimes Act 1914 (Cth)* p. 54 to 55.
- ⁹³⁴ Letter from NSW Police Forensic Services Group, 8 November 2005.
- ⁹³⁵ NSW Police response to Ombudsman draft report, 2 June 2006 and NSW Health response to Ombudsman draft report, 7 June 2006.
- ⁹³⁶ Attorney General's Department response to Ombudsman draft report, 5 May 2006.
- ⁹³⁷ *Crimes (Forensic Procedures) Act 2000* s 93.
- ⁹³⁸ *Crimes (Forensic Procedures) Act 2000* s 93.
- ⁹³⁹ NSW Police Forensic Procedures Information Sheet Volunteer, Version 2003/1.
- ⁹⁴⁰ DAL comments on Ombudsman statement of provisional findings, 17 October 2005.
- ⁹⁴¹ Telephone advice from DAL, 3 March 2005; and meeting at DAL, 5 October 2005.
- ⁹⁴² Letter from NSW Police Forensic Services Group, 8 November 2005.
- ⁹⁴³ NSW Police response to Ombudsman draft report, 2 June 2006.
- ⁹⁴⁴ NSW Health response to Ombudsman draft report, 7 June 2006.
- ⁹⁴⁵ *Crimes (Forensic Procedures) Act 2000* s 92 and 109.
- ⁹⁴⁶ NSW Health, Health Records And Information Manual For Community Health Facilities, page 228, October 1991 located at www.health.nsw.gov.au accessed on 25 August 2005.
- ⁹⁴⁷ For example, see *R v McIntyre* [2001] NSWSC 311 (11 April 2001).
- ⁹⁴⁸ Information on NSW Guthrie cards access policy available at www.lawlink.nsw.gov.au accessed on 4 October 2005.
- ⁹⁴⁹ *Crimes (Forensic Procedures) Act 2000* s 12.
- ⁹⁵⁰ Except for those few which had been rejected: DAL response to Ombudsman investigation notice, 24 February 2005.
- ⁹⁵¹ Information obtained through Ombudsman review of COPS records.
- ⁹⁵² Information obtained through Ombudsman review of COPS records.
- ⁹⁵³ Information obtained through Ombudsman review of COPS records.
- ⁹⁵⁴ Information obtained through Ombudsman review of COPS records.
- ⁹⁵⁵ Information obtained through Ombudsman review of COPS records.
- ⁹⁵⁶ Information obtained through Ombudsman review of COPS records.
- ⁹⁵⁷ Telephone advice from DAL, 3 March 2005.
- ⁹⁵⁸ DAL comments on Ombudsman statement of provisional findings, 17 October 2005.
- ⁹⁵⁹ Telephone advice from DAL, 3 March 2005.
- ⁹⁶⁰ Discussion at meeting with DAL, 5 October 2005.
- ⁹⁶¹ DAL, Draft Business Case, January 2005.
- ⁹⁶² Based on the estimates that during the review period, DAL made 3,170 warm links and 480 eliminations: DAL response to Ombudsman investigation notice, 24 February 2005 and Draft Business Case, January 2005.
- ⁹⁶³ *Crimes (Forensic Procedures) Act 2000* s 3, 12(a) and 20(c).
- ⁹⁶⁴ Discussion at meeting with representatives from NSW Police and DAL, 24 October 2005.

- ⁹⁶⁵ Discussion at meeting with DAL, 5 October 2005.
- ⁹⁶⁶ Discussion at meeting with representatives from NSW Police and DAL, 24 October 2005.
- ⁹⁶⁷ NSW Police response to Ombudsman draft report, 2 June 2006.
- ⁹⁶⁸ NSW Health response to Ombudsman draft report, 7 June 2006.
- ⁹⁶⁹ NSW Health response to Ombudsman draft report, 7 June 2006.
- ⁹⁷⁰ NSW Health response to Ombudsman draft report, 7 June 2006.
- ⁹⁷¹ Telephone advice from DAL, 15 July 2005.
- ⁹⁷² Discussion at meeting with DAL, 5 October 2005.
- ⁹⁷³ NSW Health response to Ombudsman draft report, 7 June 2006.
- ⁹⁷⁴ NSW Police response to Ombudsman draft report, 2 June 2006.
- ⁹⁷⁵ Email from DAL, 11 October 2005.
- ⁹⁷⁶ Discussion at meeting with representatives from NSW Police and DAL, 24 October 2005.
- ⁹⁷⁷ DAL, Draft Business Case, January 2005.
- ⁹⁷⁸ DAL response to Ombudsman investigation notice, 24 February 2005.
- ⁹⁷⁹ DAL response to Ombudsman investigation notice, 24 February 2005.
- ⁹⁸⁰ DAL response to Ombudsman investigation notice, 24 February 2005.
- ⁹⁸¹ Telephone advice from DAL, 3 March 2005.
- ⁹⁸² Telephone advice from DAL, 3 March 2005. This is illustrated by the turnaround times provided for cases finalised in December 2004. Of the 208 break, enter and steal cases finalised in the month, 91 had been there less than a month; while 59 had been there longer than 6 months: DAL response to Ombudsman investigation notice, 24 February 2005.
- ⁹⁸³ "Magistrate slams cops", *Illawarra Mercury*, 10 February 2004; and telephone advice from Director of Public Prosecutions (Wollongong) and DAL in February 2004.
- ⁹⁸⁴ Comments from confidential LAC survey responses.
- ⁹⁸⁵ Comments from confidential LAC survey responses.
- ⁹⁸⁶ Comments from confidential LAC survey responses.
- ⁹⁸⁷ Confidential LAC survey response.
- ⁹⁸⁸ Confidential LAC survey response.
- ⁹⁸⁹ Comments from confidential LAC survey responses.
- ⁹⁹⁰ DAL, Draft Business Case, January 2005.
- ⁹⁹¹ NSW Ombudsman, *The Norford Report* (August 1999), available at www.ombo.nsw.gov.au.
- ⁹⁹² Comments from confidential survey responses.
- ⁹⁹³ Police Association of NSW submission, March 2005.
- ⁹⁹⁴ Confidential Magistrate survey response, 13 January 2005.
- ⁹⁹⁵ Confidential Magistrate survey response, 20 January 2005.
- ⁹⁹⁶ Confidential Magistrate survey response, undated.
- ⁹⁹⁷ Confidential Magistrate survey response, 13 January 2005.
- ⁹⁹⁸ Confidential Magistrate survey response, 13 January 2005.
- ⁹⁹⁹ Public Accounts Committee Inquiry into Court waiting times Report June 2002, p. 23.
- ¹⁰⁰⁰ Local Court Practice Notes 6/2001 (30 September 2002) and 9/2003 (13 August 2003).
- ¹⁰⁰¹ Local Court of New South Wales, Annual Review 2004, p. 11.
- ¹⁰⁰² DAL response to Ombudsman investigation notice, 24 February 2005.
- ¹⁰⁰³ We note that in 2002, the Public Accounts Committee's inquiry into court waiting times recommended, as a matter of urgency, that the NSW Police Forensic Services Group develop and distribute its proposed guidelines to assist investigating officers in screening and prioritising DNA exhibits: Public Accounts Committee, *Inquiry into court waiting times* (June 2002) p. 23 to 24.
- ¹⁰⁰⁴ Minutes of meeting between NSW Police Forensic Services Group and DAL, 20 July 2004.
- ¹⁰⁰⁵ Minutes of the DNA Advisory Committee, 6 August 2004.
- ¹⁰⁰⁶ Minutes of the DNA Advisory Committee, 6 August 2004.
- ¹⁰⁰⁷ DAL response to Ombudsman investigation notice, 24 February 2005.

- ¹⁰⁰⁸ For example, in Queensland and Victoria. In the United States, a federal grant program was established, so individual states could apply for funding to increase their own capacity for DNA analysis, or to outsource forensic services to accredited private laboratories.
- ¹⁰⁰⁹ NSW Police response to Ombudsman draft report, 2 June 2006.
- ¹⁰¹⁰ NSW Health response to Ombudsman draft report, 7 June 2006.
- ¹⁰¹¹ DAL response to Ombudsman investigation notice, 24 February 2005.
- ¹⁰¹² Minutes of meeting between NSW Police Forensic Services Group and DAL, 4 December 2004.
- ¹⁰¹³ NSW Police response to Ombudsman draft report, 2 June 2006.
- ¹⁰¹⁴ NSW Health response to Ombudsman draft report, 7 June 2006.
- ¹⁰¹⁵ NSW Police response to Ombudsman draft report, 2 June 2006.
- ¹⁰¹⁶ NSW Health response to Ombudsman draft report, 7 June 2006.
- ¹⁰¹⁷ NSW Health response to Ombudsman draft report, 7 June 2006.
- ¹⁰¹⁸ DAL response to Ombudsman investigation notice, 24 February 2005.
- ¹⁰¹⁹ NSW Police response to Ombudsman draft report, 2 June 2006; and NSW Health response to Ombudsman draft report, 7 June 2006.
- ¹⁰²⁰ DAL, Draft Business Case, January 2005.
- ¹⁰²¹ FSG presentation to DAL, attached to agenda for DNA Advisory Committee meeting 6 August 2004.
- ¹⁰²² *R v Button* [2001] QCA 133 (Williams JA).
- ¹⁰²³ Minutes of meeting between NSW Police Forensic Services Group and DAL, 10 May 2004.
- ¹⁰²⁴ DAL response to Ombudsman investigation notice, 24 February 2005.
- ¹⁰²⁵ DAL response to Ombudsman investigation notice, 24 February 2005.
- ¹⁰²⁶ "Changes to forensic exhibit submission procedures," *Police Weekly*, Volume 17 Number 9 (28 March 2005).
- ¹⁰²⁷ DAL, Draft Business Case, January 2005.
- ¹⁰²⁸ DAL comments on Ombudsman statement of provisional findings, 17 October 2005.
- ¹⁰²⁹ DAL response to Ombudsman investigation notice, 24 February 2005; "Revised casework acceptance criteria", 6 August 2004; and Draft Business Case, January 2005.
- ¹⁰³⁰ DAL, Draft Business Case, January 2005.
- ¹⁰³¹ Minutes of the DNA Advisory Committee, 13 October 2004.
- ¹⁰³² Minutes of the DNA Advisory Committee, 13 October 2004.
- ¹⁰³³ FSG presentation to DAL, attached to agenda for DNA Advisory Committee meeting 6 August 2004.
- ¹⁰³⁴ Letter from NSW Police, 12 July 2005.
- ¹⁰³⁵ FSG presentation to DAL, attached to agenda for DNA Advisory Committee meeting 6 August 2004.
- ¹⁰³⁶ DAL, Draft Business Case, January 2005.
- ¹⁰³⁷ Discussion at meeting with representatives of NSW Police and DAL, 24 October 2005.
- ¹⁰³⁸ "NSW govt admits DNA backlog problem", *Ninemsn News* (19 March 2005) located at www.news.ninemsn.com accessed on 21 March 2005.
- ¹⁰³⁹ Letter from NSW Police, 12 July 2005.
- ¹⁰⁴⁰ DAL, Draft Business Case, January 2005.
- ¹⁰⁴¹ Legislative Assembly Hansard, 18 October 2005, the Hon Carl Scully MP, Minister for Police and Minister for Utilities; and letter from the Hon Carl Scully MP, 2 June 2006.
- ¹⁰⁴² Legislative Assembly Hansard, 18 October 2005, the Hon Carl Scully MP, Minister for Police and Minister for Utilities; and letter from the Hon Carl Scully MP, 2 June 2006.
- ¹⁰⁴³ Discussion at meeting with representatives from NSW Police and DAL, 24 October 2005.
- ¹⁰⁴⁴ Letter from the Hon Carl Scully MP, Minister for Police and Minister for Utilities, 2 June 2006.
- ¹⁰⁴⁵ Email from DAL, 26 October 2005.
- ¹⁰⁴⁶ Email from DAL, 26 October 2005.
- ¹⁰⁴⁷ DAL comments on Ombudsman statement of provisional findings, 17 October 2005.
- ¹⁰⁴⁸ Discussion at meeting with representatives from NSW Police and DAL, 24 October 2005; and Attorney General's Department response to Ombudsman draft report, 5 May 2006.
- ¹⁰⁴⁹ Letter from the Hon Carl Scully MP, Minister for Police and Minister for Utilities, 2 June 2006.

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- ¹⁰⁵⁰ FSG presentation to DAL, attached to agenda for DNA Advisory Committee meeting 6 August 2004.
- ¹⁰⁵¹ DAL comments on Ombudsman statement of provisional findings, 17 October 2005.
- ¹⁰⁵² The Law Reform Commission of Ireland, *The Establishment of a DNA Database (LRC 78-2005)* (November 2005) p. 70, available from <http://www.lawreform.ie/publications/reports.htm> accessed on 3 February 2006
- ¹⁰⁵³ Victorian Parliament Law Reform Committee, *Forensic Sampling and DNA Databases in Criminal Investigations*, Government Printer, Melbourne 2004, p. 368.
- ¹⁰⁵⁴ Victorian Parliament Law Reform Committee, *Forensic Sampling and DNA Databases in Criminal Investigations*, Government Printer, Melbourne 2004, p. 361-369.
- ¹⁰⁵⁵ NSW Standing Committee on Law and Justice, *Review of the Crimes (Forensic Procedures) Act 2000* (2002)
- ¹⁰⁵⁶ Public Accounts Committee Inquiry into Court waiting times, Report June 2002 p. 23 to 24.
- ¹⁰⁵⁷ NSW Health response to Ombudsman draft report, 7 June 2006, Attorney General's Department response to Ombudsman draft report, 5 May 2006 and NSW Police response to Ombudsman draft report, 2 June 2006.
- ¹⁰⁵⁸ Letter from the Hon Carl Scully MP, Minister for Police and Minister for Utilities, 2 June 2006.
- ¹⁰⁵⁹ NSW Health response to Ombudsman draft report, 7 June 2006.
- ¹⁰⁶⁰ NSW Police response to Ombudsman draft report, 2 June 2006.
- ¹⁰⁶¹ *Crimes (Forensic Procedures) Act 2000* s 96 and 97.
- ¹⁰⁶² The corresponding laws prescribed by the regulations are the *Crimes (Forensic Procedures) Act 2000* (ACT); Part 1D of the *Crimes Act 1914* (Cth); Division 7 of Part VII of the *Police Administration Act* (NT); Part 4 of Chapter 8 of the *Police Powers and Responsibilities Act 2000* (Qld); the *Criminal Law (Forensic Procedures) Act 1998* (SA); the *Forensic Procedures Act 2000* (Tas); Subdivision (30A) of Division 1 of Part 3 of the *Crimes Act 1958* (Vic); section 236 of the *Criminal Code* (WA) as in force before its amendment and the *Criminal Investigation (Identifying People) Act 2002* (WA).
- ¹⁰⁶³ See "Qld negotiating more DNA data swaps", *ABC News Online*, 6 July 2005 located at www.abc.net.au, accessed on 7 July 2005; Selina Mitchell "States break DNA roadblock", *The Australian*, 21 June 2005 located at www.australianit.news.com.au, accessed on 23 June 2005; and Tim Clarke, "DNA Database holds 130,000 profiles" located at www.news.com.au, accessed on 23 June 2005.
- ¹⁰⁶⁴ "Qld negotiating more DNA data swaps", *ABC News Online*, 6 July 2005 located at www.abc.net.au, accessed on 7 July 2005.
- ¹⁰⁶⁵ CrimTrac website, <http://www.crimtrac.gov.au/aboutus.htm> accessed 27 June 2005.
- ¹⁰⁶⁶ CrimTrac website, <http://www.crimtrac.gov.au/dna.htm> accessed 27 June 2005.
- ¹⁰⁶⁷ Dr John West, DAL response to investigation notice received 28 February 2005.
- ¹⁰⁶⁸ NSW Police response to Ombudsman draft report, 2 June 2006.
- ¹⁰⁶⁹ Attorney General's Department response to Ombudsman draft report, 5 May 2006.

Chapter 11. Accuracy of DNA records

DAL is responsible for the creation and day to day maintenance of the DNA database, including uploading profiles onto the database, deleting profiles and generating links through the comparison of new profiles with those already on the database. NSW Police does not have access to the DNA database. It submits DNA samples to DAL and receives advice from DAL as to any links. However, NSW Police does keep records of forensic procedures on its computer system, and relies on these records when taking action in relation to advice from DAL that DNA links have been made.

This chapter discusses the accuracy of DNA records on the DNA database and the NSW Police computer system, and the implications of inaccurate information being retained on these systems.

11.1. Accuracy of information on the DNA database

11.1.1. Identification of samples

We have previously described our audit of forensic procedures (see 10.1.1). We provided DAL with a list of 180 forensic procedures conducted by police, including records of the station where the procedure was conducted, the type of procedure, the DNA sample bag number and barcode.¹⁰⁷⁰ We asked DAL for details such as the person's name and status (i.e. suspect, volunteer, convicted offender or victim), to see whether the records held by NSW Police and by DAL were consistent.

Some of these procedures DAL was unable to identify because the sample had been destroyed or because the procedure was of a type other than a buccal swab or hair sample. However, there were 13 procedures conducted which DAL could not identify, although the information available from police suggests that they should have been received at DAL.

We provided DAL with additional details for these procedures, including name of the person who provided the sample, the person's Central Names Index (CNI) number, the date of the procedure and the FS number (where known). We asked DAL to provide advice as to whether it had in fact received these samples, and if so, the date of receipt, and whether the records DAL has of the person's name, type of procedure, sample bag number and barcode are the same as those held by police.

Of the 13 procedures, DAL identified five of these with the additional information. The remaining eight still could not be identified. DAL explained that it was possible that some of these samples may have been deleted and without the correct barcode from NSW Police they would be unable to detect this.

11.1.2. Discrepancies between records held by NSW Police and DAL

11.1.2.1. Bag numbers and barcodes

On reviewing DAL's first response, we identified some discrepancies between the information held by NSW Police and the information provided in DAL's response:

- For two procedures, we found that the sample bag number, name and/or type of procedure provided by DAL differed from the information provided by police.
- For 15 procedures, the bag number DAL provided was different from the bag number provided by police
 - in seven of these it appeared that the DAL records were correct and the police records were wrong.
 - in four, it appeared the police records were correct and the DAL records were wrong.
 - the remaining four we were unable to determine from the information available which of the records were correct.

We asked for advice as to why the DAL and police records may be different. We also asked DAL why there may be inaccuracies in its records of sample bag numbers and the consequence, if any, of this. DAL advised that:

The only valid identifier is the sample barcode and possibly the person's name. Our experience is that other details such as bag barcode from the Police system are not as reliable for identifying samples... Bag barcodes are more prone to transcription problems and we would not identify a sample that way without checking other details such as the name.¹⁰⁷¹

DAL confirmed that its records were correct for the barcode numbers provided from our audit of police records on COPS.¹⁰⁷² The barcode numbers on COPS matched the names provided by DAL. This meant that police had entered the wrong barcode numbers onto COPS, and we had passed this incorrect information onto DAL.

DAL uses a scanner to read sample barcodes and bag barcodes, and for this reason the DAL records are more likely to be accurate than the NSW Police records, which rely on individual officers manually entering the numbers into COPS.

The only information DAL enters manually onto the DNA database is the person's name, date of birth and any other information included on the sample information form. DAL also cross checks the information on the database against the sample information form once it has been entered.

11.1.2.2. Names

It is important that the DNA profiles on the database have the correct identifying information. If a profile has the wrong name with it, this may mean that another person – who may or may not have had a DNA sample taken by police – may have a DNA profile stored on the database under his or her name. In the event of a link, that person may be investigated by police unnecessarily.

On comparing the records held by NSW Police and the records held by DAL, we also identified some discrepancies between the names of people who had provided DNA samples. For nine procedures, we found that the name DAL provided was an alias. For another six procedures, we found that the name DAL provided was spelled differently from the name provided by police. We asked DAL to describe the arrangements in place for recording the names of people who provide DNA samples to DAL, including whether DAL checks whether the name is an alias, and whether the name is spelled correctly.

DAL explained that the information stored on the DNA database is taken from the sample information form completed by the police officer conducting the forensic procedure. DAL checked its records against the sample information form for each of the procedures we identified where the name recorded was an alias or was spelled differently. DAL found that in one case it had transcribed the person's name incorrectly, and has since corrected this. For the other 14 procedures, the information on the database matched the information provided by police on the sample information form. That is, there was no error on the part of DAL.

DAL also advised that if the sample information form is incomplete or appears to be incorrect, it seeks clarification from FPIT. However, in most cases DAL will not know whether the information accompanying the sample is correct or not.

DAL may be alerted to inaccuracies on the DNA database where two profiles match, but have different identifying information, such as the name or date of birth. Where this occurs, DAL asks FPIT to ascertain the correct details. This may happen, for example, where DNA obtained from a crime scene matches multiple profiles on the suspect database, and those profiles have different names. However, as discussed above, the prohibition on matching suspect samples against the suspects index means that discrepancies in the identifying information of suspects cannot be detected this way.

Although permitted suspect-suspect matching would enable DAL to identify and rectify some of the incorrect information on the DNA database, this would not identify errors where the person's profile appears only once on the database (or appears more than once, but with the same mistakes each time).

11.1.2.3. Status of person providing sample

Through our comparison of records held by NSW Police and records held by DAL, we also identified some discrepancies in the status of the person who had provided the DNA sample.

Of the 180 forensic procedures included in our audit, police records indicated that 166 were conducted on suspects and 14 were on volunteers.

Of the 166 suspect samples, 59 of these were converted by DAL to convicted offender profiles as the person has subsequently been convicted of the offence in relation to which the DNA sample was taken. A further 67 were still recorded as suspects. The rest had either been destroyed or DAL could not identify them.

Of the 14 volunteer samples, DAL had eight recorded as volunteers, five as victims and one could not be identified.

Again, DAL relies on the information provided by NSW Police when deciding which index of the database a person's profile should be recorded in. In some cases, DAL may correct the status if it appears from the circumstances it is incorrect (for example, where a victim has been recorded as a volunteer). However, in most cases DAL will have to rely on the advice of the officer who conducted the forensic procedure, who may not have a good understanding of the different legislative categories.

11.1.3. Implications of having inaccurate information on the DNA database

It is of concern that in our small audit sample – 180 out of almost 10,000 forensic procedures conducted on suspects and volunteers during the review period¹⁰⁷³ – we identified so many discrepancies between the information held by NSW Police and the information on the DNA database.

In our view, there is an inherent public interest in the information on the New South Wales DNA database system being correct. There is also an interest in personal information held by different government agencies being consistent. DAL is obliged, under section 16 of the *Privacy and Personal Information Protection Act 1998*, to take reasonable steps to ensure the personal information it receives from NSW Police is accurate, before using it:

*A public sector agency that holds personal information must not use the information without taking such steps as are reasonable in the circumstances to ensure that, having regard to the purpose for which the information is proposed to be used, the information is... accurate.*¹⁰⁷⁴

Further, as discussed above, having incorrect details attached to a profile may result in a person being investigated by police unnecessarily.

In our statement of provisional findings, we argued that a better mechanism for ensuring the information on the DNA database is accurate is clearly needed. Given that DAL can only rely on the information provided by police on the handwritten sample information form, and has no way of verifying whether the information is correct, it appears the only way to ensure the information on the database is correct is through auditing. For example, DAL could provide FPIT with a list of the profiles added to the database each month, and FPIT could check that the information on the database is correct, including the person's name, date of birth and status for the purposes of the Act. Ideally, this should occur prior to the profile being matched against any of the other indexes on the database.

DAL commented that auditing every sample submitted would be a huge task, and that it is really the responsibility of NSW Police to ensure the information is correct before passing it onto the laboratory.¹⁰⁷⁵ Further, DAL is reluctant to change information once it is on the database, being the information contained in the official record accompanying the sample to the laboratory.¹⁰⁷⁶

FSG argued that the information on the database could be improved with a better IT system, such as the model used in Queensland, where the same information goes from police to the laboratory and back to police again. The analysis result can be seen by both the laboratory and the police investigator. The information is not changed but any additional information, such as details of any aliases, is available.

In light of our audit results, there is a clear need for a better mechanism for ensuring the information on the DNA database is accurate. One aspect of a comprehensive response to this issue is a better IT system, including appropriate arrangements for information to be shared, but this is likely to take some years to develop. Our view is that an audit system should be set up in the meantime, to ensure that the information going onto the DNA database is accurate.

In our report on the DNA sampling of convicted offenders, we made a recommendation that the Attorney General consider implementing recommendations 15 to 20 from the Commonwealth Independent Review of Part 1D of the Crimes Act 1914.¹⁰⁷⁷ These recommendations relate to:

- the internal auditing of systems and procedures relating to DNA sampling
- agreement between accountability bodies on complaint handling over more than one jurisdiction
- inclusion in annual reports of external audits of state held records that are included on the National Criminal Investigation DNA Database (NCIDD)
- allocation of sufficient resources to law enforcement, forensic laboratories and accountability bodies, and
- adoption of the recommendations arising from the preliminary audit of the NCIDD.

We continue to support this recommendation and reiterate the need for accurate and timely recording of information about forensic procedures and regular auditing to ensure continued confidence in the use of DNA for criminal investigations. In addition, there are issues around the destruction of samples discussed in chapter 14 of the report which further reinforce the need for appropriate auditing procedures. To aid in the adoption of these recommendations, further consideration needs to be given to how accountability bodies in New South Wales, such as the NSW Ombudsman, the Police Integrity Commission and NSW Privacy, can be effective in managing the audits and complaint handling across jurisdictions.

Recommendation 81

An audit process be established between DAL and FPIT to ensure the information on the database is correct, including that DNA profiles are identified by a person's real name and not an alias.

NSW Police supports this recommendation in part, commenting that while auditing would be beneficial to database accuracy, the use of aliases "should not affect the correct identification of persons through database matching."¹⁰⁷⁸ However, NSW Health questioned whether an audit process would be worthwhile, given the resources required:

It would deliver very little benefit because the person's name or alias is almost irrelevant on the database. The DNA profile itself is the crucial identifier that is relevant, not the person's name or the use of an alias. Once a link is obtained to apparently more than one person with different particulars FPIT is notified and asked whether it is the same person or not.

The key to ensure that the correct person has been entered onto the database is to ensure that the barcode is correct. Since this is done through a barcode reader transcription errors are minimised. DAL attempts at all times to ensure that the data on the sample information form that accompanies the person sample is transcribed correctly to its database. However, differences in detail will not affect the reliability or accuracy of links provided the barcode is the same and the other details are then checked. It is, however, considered that IT functionality of the NSW Police should be improved so that details from the Sample Information Sheet can be directly downloaded to DAL. This would mean that the details that the NSW Police supply would be absolutely consistent at DAL.

*Thus at present Health considers that the benefits of an audit process would not justify the considerable cost involved.*¹⁰⁷⁹

The Attorney General's Department commented:

*In order to maintain both the appearance and reality of DAL as an independent body responsible for the NSW DNA database, any audit process would need to be carefully constructed to ensure that no central officer within NSW Police was seen to have carte blanche access to all of the information on the database.*¹⁰⁸⁰

Recommendation 82

The NSW Attorney General consider implementing, and/or facilitating the implementation of, recommendations 15 to 20 made by the Commonwealth Independent Review as they relate to the functions of the NSW Government. It is also recommended that:

- a. The *Crimes (Forensic Procedures) Act 2000* be amended to enable the implementation of recommendations 15-20 made by the Commonwealth Independent Review as they relate to NSW
- b. The NSW Parliament consider establishing a scheme similar to that in the *Law Enforcement (Controlled Operations) Act 1997* and the *Telecommunications (Interception) (NSW) Act 1987*, to regulate external audits of records relating to forensic material obtained under the *Crimes (Forensic Procedures) Act 2000*.

NSW Police supports this recommendation.¹⁰⁸¹ The Attorney General's Department supports the recommendation but commented its implementation requires consideration of resource issues.¹⁰⁸²

11.2. Accuracy of DNA records in the police system

As explained above, NSW Police does not have access to the DNA database. It submits DNA samples to DAL and receives advice from DAL as to any links. However, NSW Police does keep records of forensic procedures on its computer system, and relies on these records when taking action in relation to advice from DAL that DNA links have been made. This means that, even if the information on the DNA database is correct, errors in police records of forensic procedures can lead to action being taken against the wrong person.

11.2.1. Moving forensic procedure records from one CNI number to another

When police officers take a DNA sample, they should record details of the procedure on COPS. The record should include the date, location and the name of the person providing the sample.¹⁰⁸³ The record of the forensic procedure is linked to the person's Central Names Index (CNI) number, which is supposed to be a unique identifier on the police computer system.

Police officers have the capacity to move certain records from one person's CNI number to another. For example, police may issue a court attendance notice to a person in the field. Because police officers do not currently have the capacity to take fingerprints in the field, they may not be able to verify the person's identity on the spot. If the person uses an alias, police may record the details of the court attendance notice against the wrong person's CNI number. Police need the capacity to move certain records on COPS, so they can correct errors such as these.

Police also have the capacity to 'link' records, to remove duplicates from the system. For instance, a person may already have a CNI number from previous contact with police. If police question the person in the field and the person gives particulars which differ from those already on the police computer system, police will give the person a new CNI number. If they subsequently find that the two records belong to the same person, they will rectify the data by 'linking' the two CNI numbers. It is part of the role of police intelligence officers to improve data quality on COPS by linking duplicate CNI numbers in this way.

The danger of this process, though, is that police officers may link CNI numbers which do not in fact belong to the same person. We are aware of at least 13 occasions where a police officer has incorrectly assumed that two people are one and, as a result, a forensic procedure record has been moved onto the wrong person's CNI number. For 11 of these, it appears no action was taken against the wrong person. However, on the other two occasions, the wrong person was charged and, in one case, convicted. Details of these matters are set out below.

Case Study 74

In 2002, an unknown offender broke into two cars and stole some property. Police investigating the incident took swabs from the cars. DAL analysed the swabs and advised police that a DNA profile derived from the swabs matched the DNA profile of Person A. Person A had provided a DNA sample to police in 2001 as a suspect in a robbery incident and his profile had been retained on the DNA database.

In 2003, a police officer linked the CNI numbers of Person A and Person B, in the mistaken belief that they were the same person.

In 2004, police arrested and charged Person B with the 2002 break, enter and steal offence, based on the DNA evidence. As there were two outstanding warrants against Person A, for shoplifting and self administering a prohibited drug, Person B was charged with these offences too. At the time of charging, police took Person B's fingerprints again. Livescan, which uses digital technology to verify a person's identity on the spot, produced a warning indicating that the prints submitted were not those of Person A. However, it appears police did not take any action in response to this information.

At the time of charging, police took a further DNA sample, in line with current policy to confirm all cold links with a subsequent sample. DAL received this sample the following day and finalised its analysis approximately six weeks later. DAL found that the suspect's DNA profile did not match the DNA profile obtained from the crime scene, and notified NSW Police of this. It is not clear what NSW Police did with this information as 12 months later, Person B was convicted and received a custodial sentence for the offences.

NSW Police is still investigating this matter. The officer who made the erroneous link in 2003 has said it was an honest mistake. He never received any formal intelligence training and was taught how to link CNI numbers

by somebody he worked with. He said he made the link at the request of another officer, although it was his usual practice to satisfy himself of the validity of a request before making a link. It is not clear how the wrong person was charged, as it should have been apparent to police at the time of charging that they had the wrong person. This part of the complaint is currently under investigation.

NSW Police has advised that it will seek to have Person B's wrongful convictions annulled.¹⁰⁸⁴

Case Study 75

An unknown offender broke into a house and stole a laptop, camera and some jewellery. Police seized a blood stained shirt left at the scene, which did not belong to the occupant. DNA analysis indicated that the profile on the shirt was the same as a profile already on the DNA database.

Police arrested and charged the suspect, who “was adamant that he had not committed the offence” and “was unhappy that he was charged in relation to it.”¹⁰⁸⁵ He was denied bail and was held on remand awaiting trial.

In accordance with current policy, investigating police took a further DNA sample from the suspect at the time of the arrest. Three weeks later, DAL advised NSW Police that the profile obtained from the suspect on arrest did not match the profile obtained from the crime scene. The charge was withdrawn and the suspect was released from custody the following day. NSW Police subsequently charged the correct person with the offence.

Again, it appears this error occurred because a police officer erroneously moved forensic procedure records from one person's CNI number to another.¹⁰⁸⁶

Given the public interest in the accuracy of DNA records on the police computer system, and the clear criminal justice interests at stake, we decided to monitor the police investigation of these matters. We asked for advice as to:

- 1) how NSW Police intends to identify whether any other CNI numbers have been linked erroneously
- 2) what action NSW Police is going to take in relation to any erroneous linking of CNI numbers which is found to have occurred
- 3) who has the authority to link CNI numbers
- 4) what information is required before CNI numbers can be linked, and
- 5) whether the current arrangements are adequate.

NSW Police has set up a working group to deal with these issues. It is not clear yet how NSW Police intends to identify how widespread this problem is, or how the system can be fixed to prevent it happening again. However, the working group appears to be considering the following:¹⁰⁸⁷

- Conducting an audit of COPS records to identify where forensic procedure records have been moved from one CNI to another, and reviewing each decision to check it was correct. The working group is currently considering the feasibility of this option.
- Limiting who can move forensic procedure records from one person's CNI to another. At the moment, most police officers can perform this function, although they may not have received appropriate training, and may not understand the implications of their actions. One option is to restrict this function to a small group of appropriately trained officers, such as FPIT.
- Removing the 'link all' option from COPS. At the moment, a police officer who decides to move a record from one person's CNI to another has the option of moving all non-fingerprinted records to the new CNI, without reviewing each record to determine whose CNI it should actually be attached to. Removing the 'link all' option would prompt officers to consider each record before moving it to another CNI, rather than moving them all at once.

NSW Police is also conducting a Data Cleansing Project, which aims, among other things, to reduce the number of duplicate CNI numbers on the system. NSW Police is aware of the danger of erroneously linking the CNI numbers of different people:

*The business risk/benefit trade off is very complex in removing duplicates. Determining that two different CNIs refer to the same individual allows for improved police and community safety, and may increase apprehension rates. However, an incorrect judgement that two CNIs refer to the same individual may increase the chances of a false arrest. It is likely that the [proposed data cleansing] system would automate the process of finding likely duplicates, but would rely on uniformed Police to decide that they are almost certainly the same individual.*¹⁰⁸⁸

Given the potential implications of incorrect linking, we question whether police should be linking CNI numbers on the basis that they are “almost certainly” as opposed to definitely the same individual. While we support moves by NSW Police to improve data quality on COPS, we stress that strong safeguards are needed to ensure that records are only linked when they do in fact belong to the same person.

11.2.2. Comments

The implications of police moving forensic procedure records onto the wrong person's CNI number are very serious. Having forensic procedure details attached to the wrong person's CNI number may result in a person being investigated by police unnecessarily. At worst, it can lead to a person being arrested, charged, convicted and sentenced for an offence he or she did not commit.

At this stage, we are not aware how often these mistakes occur. One police officer we spoke to, who is responsible for untangling incorrectly linked COPS records, advised that incorrect CNI links are made on a daily or at least a weekly basis, although these links do not always involve forensic procedure records.¹⁰⁸⁹

We do know that on at least 13 occasions, forensic procedure records have been moved onto the wrong person's record as a result of police officers incorrectly linking CNI numbers. On at least two occasions, the wrong person was charged; including one occasion where the wrong person was convicted and given a custodial sentence. It may well be there are other occasions where similar mistakes were made, which never came to light. For this reason, we urge NSW Police to audit all records where forensic procedure records have been linked to another CNI number, to check that the decision to make the link was sound.

The arrangements in place for CNI linking, particularly in relation to forensic procedure records, are clearly inadequate. Most police officers are able to link CNI numbers, although they may not have received appropriate training, and may not understand the implications of incorrect linking. NSW Police does not have a policy or any business rules stipulating who may perform CNI linking, what training or experience is required, or what checks must be undertaken before two records can be linked. In our view there should be strict limits on who can perform CNI linking and when such links can be made. Stricter controls on CNI linking would improve data quality and reduce the risk of further mishaps, which would be beneficial both for police and the broader community.

Recommendations 83

NSW Police conduct a comprehensive audit of COPS records to identify where forensic procedure records have been linked to a CNI number other than the original one, and check, on each occasion where this has occurred, that the decision to link the records was sound.

Recommendations 84

NSW Police take immediate steps to prevent ordinary police officers from being able to alter forensic procedure records on COPS, and instead allow only a small group of appropriately trained officers, such as FPIT, to perform this function.

Recommendations 85

NSW Police develop and implement business rules which specify who can perform CNI linking, what training is required, and what checks must be undertaken before two CNI numbers can be linked. These rules could be developed in conjunction with the NSW Police Data Cleansing Project.

NSW Police advised that its Criminal Record Section staff have been instructed to link CNI numbers only where the records have matching fingerprints. NSW Police Business and Technology Services is also considering how to reduce the number of police officers who are permitted to link CNI numbers. One such proposal is that only police in certain positions (such as intelligence officers and crime coordinators) would be able to link CNI numbers.¹⁰⁹⁰

Endnotes

- ¹⁰⁷⁰ Where police records did not include the sample bag number or barcode, we provided the name of the person who provided the sample and the person's CNI number.
- ¹⁰⁷¹ DAL response to Ombudsman investigation notice, 24 February 2005.
- ¹⁰⁷² DAL located one sample using the bag number provided on COPS, which was correct. The other sample was located using the name of the person, and it was found that police had switched the last two digits of the barcode number when entering it on COPS.
- ¹⁰⁷³ According to the numbers provided by DAL in its response dated 24 February 2005, DAL received 9,530 DNA samples from suspects and volunteers during the review period – 8,699 from suspects, and 831 from volunteers (including profiles taken from 421 volunteers after Part 8 of the Act commenced and 410 prior to Part 8 commencing).
- ¹⁰⁷⁴ We note that NSW Police is exempt from compliance with the information protection principles set out in the *Privacy and Personal Information Protection Act 1998*, except in relation to its administrative and educative functions: s 27.
- ¹⁰⁷⁵ DAL comments on Ombudsman statement of provisional findings, 17 October 2005.
- ¹⁰⁷⁶ Discussion at meeting with representatives from NSW Police and DAL, 24 October 2005.
- ¹⁰⁷⁷ NSW Ombudsman, *The Forensic DNA Sampling of Serious Indictable Offenders under Part 7 of the Crimes (Forensic Procedures) Act 2000*, 2004 p. 206 to 207.
- ¹⁰⁷⁸ NSW Police response to Ombudsman draft report, 2 June 2006.
- ¹⁰⁷⁹ NSW Health response to Ombudsman draft report, 7 June 2006.
- ¹⁰⁸⁰ Attorney General's Department response to Ombudsman draft report, 5 May 2006.
- ¹⁰⁸¹ NSW Police response to Ombudsman draft report, 2 June 2006.
- ¹⁰⁸² Attorney General's Department response to Ombudsman draft report, 5 May 2006.
- ¹⁰⁸³ We found problems with the quality of these records: see 4.2.8.2.
- ¹⁰⁸⁴ This matter is also discussed at 15.3.2 (Complaint 2).
- ¹⁰⁸⁵ NSW Police investigation report, 27 April 2006.
- ¹⁰⁸⁶ This case study was identified through our monitoring of Complaint 2, which is discussed at 15.3.2.
- ¹⁰⁸⁷ Ombudsman observation of working group meetings, 7 March 2006 and 9 May 2006.
- ¹⁰⁸⁸ NSW Police Data Cleansing Project Business Case at paragraph 3.3.1.
- ¹⁰⁸⁹ Discussion with police officer at working group meeting, 9 May 2006.
- ¹⁰⁹⁰ NSW Police further response to Ombudsman draft report, 28 July 2006.

Chapter 12. Contamination issues

This chapter examines the measures in place to minimise and detect contamination, which is a very broad term, and covers many different situations. Contamination may be deliberate or accidental, and the transfer of forensic material may occur before, during or after the criminal incident being investigated occurs.

Concern about contamination is one of the most widely held concerns about the use of DNA analysis in the investigation and prosecution of crime. As Justice Kirby has commented, effective procedures to minimise and detect contamination are essential:

*Given the likely devastating power of DNA evidence, it becomes doubly important to ensure the integrity of collection of samples and their transmission, storage, testing, reportage and preservation for the scrutiny of independent experts and, ultimately if need be, by the courts.*¹⁰⁹¹

The independent review of the Act on behalf of the Attorney General also foreshadowed the possibility that “with the ever-greater reliance placed upon DNA evidence by the police and prosecution, comes the very real risk that evidence of this kind may be fabricated or tampered with in order to meet burgeoning expectations.”¹⁰⁹²

12.1. Contamination prior to examination of the crime scene

Contamination of a crime scene prior to examination by law enforcement authorities can be deliberate or accidental.

12.1.1. Planting of evidence

Allegations of deliberate contamination of crime scenes by police officers are sometimes raised at trial. For example, in a sexual assault matter, *R v MSK and MAK* (2003), the accused argued that police had planted a condom containing his semen at the crime scene. He argued, “It is a fabricated condom, fabricated by police in order to make their case strong.” The prosecution showed the video of the search of the crime scene to the jury and in summing up, the judge commented that there was “not a crumb of evidence to suggest anything of the kind.”¹⁰⁹³

We are not aware, through our monitoring activities, of any instances of deliberate contamination of crime scenes. However, some police officers expressed concern about DNA evidence being contested in court on the basis that other offenders or unscrupulous investigators may have deliberately deposited DNA samples, such as cigarette butts, hairs or bodily fluids at the crime scene. Others argued that this only emphasised the need for investigating police officers to corroborate forensic evidence with other evidence.¹⁰⁹⁴

Concern about deliberate contamination of crime scenes has also been expressed by some judges. Justice Kirby has commented that:

*The planting of evidence (“giving of presents”) has been a distinct problem for the criminal justice system in the past...[but] contamination or fabrication of evidence by officials is only part of the problem. The planting of false trails by criminals, designed to implicate others as suspects, cannot be ignored.*¹⁰⁹⁵

Justice Wood similarly commented that the possibility of DNA samples being used corruptly requires “vigilance on the part of police services, forensic experts, prosecutors and defence lawyers alike.”¹⁰⁹⁶

There has also been some discussion about deliberate contamination of crime scenes by spraying a crime scene with DNA which has been amplified using similar technology to that used by forensic laboratories.¹⁰⁹⁷

12.1.2. Adventitious or secondary transfer

Unlike deliberate contamination, the term ‘adventitious transfer’ (or secondary transfer) describes the transmission of forensic material from a person who may not be associated with a crime, to the victim or crime scene, through ordinary interactions.¹⁰⁹⁸ Everyone leaves behind tiny particles of DNA every day, just by breathing, talking, sneezing and shedding skin and hair. DNA can be transferred through interactions as brief as brushing against another person and leaving skin cells behind on that person. As forensic technology advances, and the sensitivity of DNA analysis increases, DNA profiles can be obtained from much smaller traces of DNA. While this means that smaller quantities of an offender’s DNA can be identified, it also means that a person entirely unrelated to a criminal incident may have his or her DNA found at a crime scene, after having been present at the scene some time before the crime was committed, or having been in contact with a person who subsequently came into contact with the victim or crime scene.

Case Study 76

A man was arrested and charged in November 2002 for the murder of Karen Allen in Dapto, after his DNA profile was found to match a profile derived from forensic material found on the deceased's bra. The defendant argued that his DNA was found on her bra as a result of secondary transfer – that although he had no recollection of having met the deceased, he may have met her at some point on the night she was murdered, and some of his skin cells may have come into contact with her clothes. The defendant was found not guilty. The murder investigation is now focusing on other evidence, including a DNA profile obtained from the deceased's trousers. It is not known who this second DNA sample came from, but it did not come from the defendant.¹⁰⁹⁹

Nothing can really be done to minimise adventitious transfer, it is simply a product of our daily lives and the capability of analysis techniques to identify smaller and smaller traces of DNA. However, the possibility of adventitious transfer again highlights the need for investigating police to pursue other investigative strategies in addition to any forensic analysis. Many of the police officers we surveyed made this point – that DNA analysis, while effective in many cases, is only one of a number of tools available to them in the investigation and prosecution of crime.

12.2. Contamination by police officers and other evidence gatherers

The term 'cross contamination' generally describes the transfer of DNA at some point after a crime has been committed. It can occur at any stage of the investigation, from the time the crime scene is first examined; during the transportation or storage of exhibits; or during analysis at the laboratory. Contamination by police officers can occur during a forensic procedure, or during the police handling of crime scene evidence.¹¹⁰⁰

Again, the increasing sensitivity of DNA analysis techniques means that there is a greater chance of detecting DNA from more than one person on crime scene evidence. Given that a profile can now be derived from a very small amount of DNA, there is an even greater need for safeguards against the risks of cross contamination by those involved in the investigation of the crime.

12.2.1. Contamination of person samples

The DNA sampling system is designed to minimise contamination. Sampling kits are distributed to police stations in tamper evident bags. The kit contains everything which is needed for the procedure, including rubber gloves, which the police officer puts on before taking the sample. Where the DNA sample is taken by buccal swab, the officer opens the swab packet, and instructs the person providing the sample to take the swab out of the packet. After the person has finished taking the saliva sample, the officer should handle only the stem of the swab. The FTA card is folded up, sealed with an adhesive barcode and put in an envelope which is then sealed with another barcode. In the case of hair samples, the hairs are put in an envelope, which is sealed with a barcode. The envelope containing the FTA card or hairs is then put in a second tamper evident bag, which is sealed in the presence of the suspect, and sent to the laboratory for analysis.

Contamination may also be an issue in forensic procedures other than DNA samples, for example in nail scrapings, swabs from the body and gun shot residue tests. These types of procedures are conducted by specialist forensic officers, rather than general duties police officers. These officers are trained to minimise contamination risks, for example by wearing protective clothing. Where a procedure involves taking forensic material other than the person's own DNA, police may also take measures to prevent contamination, such as asking a suspect to wear gloves while waiting for a hand swab or nail scraping to be taken.

The requirement that forensic procedures be electronically recorded also provides protection, for both police and the person providing the sample, against allegations of contamination.

During our video audit, we reviewed the forensic procedures we watched for any observable contamination risks during the sampling process. We found that officers generally took appropriate steps to minimise the risk of contamination. Some took additional steps, for example by cleaning the testing table with disinfectant before conducting the procedure. However, in 13 (or 9 per cent) of the videos we watched, we had concerns about possible contamination.

For example, we saw a forensic procedure where the suspect was holding a baby while providing a DNA sample by buccal swab, and the baby vomited during the sampling process.¹¹⁰¹ In another procedure, police took a hand swab from a suspect, either for gun shot residue or for traces of another person's DNA. The suspect and the suspect's support person held hands for a significant period prior to the swab being taken.¹¹⁰² There were other procedures where police officers taking samples touched their faces after putting the protective gloves on, talked over the top of the FTA card once the procedure had commenced, or removed the FTA paper without gloves on.¹¹⁰³

In some cases, we were unable to assess contamination risks because parts of the sampling process were not recorded on video. In 12 of the videos we watched (or 8 per cent), the tamper-evident bag was sealed while the video was recording, but out of the view of the camera.¹¹⁰⁴ In five videos (or 3 per cent), the tamper-evident bag was not sealed while the video was recording.¹¹⁰⁵

Some of the officers we interviewed expressed serious concerns about the risk of contamination, where forensic procedures are conducted in interview rooms, by general duties police officers. One commented:

*Samples are taken in rooms where thousands of people have been interviewed. Police are wearing the same clothes they've been in all day. What they need is an independent team to come in, in full suits and masks, to have a room which is sanitised and locked. If they were serious about it. I mean, a bloke's facing 25 years in prison and we're taking his DNA in a room where some pisshead has just thrown up.*¹¹⁰⁶

Another officer who had conducted many forensic procedures himself commented that general duties police do not always have a good awareness of contamination issues. The officer described procedures he had seen where the testing officer put gloves on, then scratched his nose before proceeding. He said that many officers talked throughout the procedure, usually to put the suspect at ease, but this increases the risk of the sample being contaminated by the testing officer. He suggested that training a smaller group of officers to conduct forensic procedures could help reduce contamination risks as they could have information about contamination risks drummed into them.

We also sought information from DAL about any DNA samples obtained through forensic procedures which had to be rejected because of contamination. DAL advised that no samples were rejected because of actual contamination. However, 15 were rejected because of possible contamination, either because the tamper evident bag had not been sealed correctly, or because of the length of time between the sample being taken and it being delivered to DAL.¹¹⁰⁷ This is a tiny proportion of the DNA samples taken during the review period, and shows that police officers taking DNA samples usually take the appropriate steps to minimise the risk of contamination.

While we note concerns expressed by certain police officers about contamination, it is unlikely that every police station would ever have the facilities for a dedicated DNA sampling room, and this is certainly not necessary to ensure that a sample is not contaminated. However, it would be beneficial if police officers conducting forensic procedures were more aware of contamination risks, and how to reduce them. This could be achieved through our recommendations 3(a) and 3(b), about having a smaller group of officers who are specially trained in forensic procedures, and a forensic procedures officer in each command who can address training needs. We also note Recommendation 36 on 'best practice' video recording including the recording of the wiping down of the testing area before procedures are conducted and keeping the testing equipment and bag in the view of the camera at all times. In addition to those recommendations, we note that FPIT's training course on forensic procedures could also be expanded include more information about how contamination might occur and how officers can minimise the risk of contamination.

Recommendation 86

Officers who are authorised to conduct forensic procedures be provided with best practice training to reduce the risk of contamination when conducting forensic procedures.

NSW Police commented that "in light of the absence of any problems in this area, NSW Police does not agree that this is an issue" but still agreed to seek to improve training in this area.¹¹⁰⁸

12.2.2. Contamination of crime scene samples

The risk of contamination is much greater for crime scene samples than for person samples. Person samples are taken in a controlled environment; the sample is taken from one person only, and the sampling is electronically recorded. Crime scene samples, on the other hand, are much more variable, in the type of forensic material, how long

it has been there, whether it has degraded and, if it is a mixed sample, how many people contributed to it, and in what proportions. In all cases, crime scene samples are to be packaged so as to minimise degradation by exposure to heat or chemicals, and to ensure they do not come into contact with one another, and especially so they do not come into contact with any items taken from suspects.¹¹⁰⁹ Police must also ensure that crime scene exhibit movement is carefully controlled and documented.¹¹¹⁰

12.2.2.1. Training provided to NSW Police on minimising crime scene sample contamination

The best way to minimise contamination of crime scene samples is to ensure that police officers and others follow clearly documented policies. NSW Police has developed training packages and SOPs that provide information on ways to minimise contamination. Information on minimising contamination at crime scenes is divided into three streams:

- general training provided to all NSW Police recruits focuses on securing crime scenes and minimising loss and contamination of evidence;
- comprehensive training is provided to all investigators and detectives focusing on cross contamination and crime scenes, while senior detectives are provided with further training on the management of crime scenes and disaster victim identification protocols, and
- provision of detailed SOPs developed specifically for SOCOs and FSG officers on minimising loss or contamination of evidence during collection process.

At the NSW Police College at Goulburn, all new recruits are taught how to identify a crime scene, how to secure the scene, and what their duties are if they are the first officer at a crime scene. The recruits are taught how to avoid the loss or destruction of evidence and what they should do with exhibits encountered at the scene. The course involves both theory and practical scenarios. As an instructor advised:

Students are taught that evidence may be as minute as a few fibres or as delicate as a shoe print in dust. Students are also shown methods by which they can preserve such vital evidence both in an indoor or outdoor situation. The teaching of this subject is scenario based and allows the students to practice acquired skills in a controlled environment. It is emphasised that they can make mistakes whilst at the college and there will be no adverse consequences. Making mistakes whilst 'in the field' will be totally different and could jeopardise any subsequent investigation because of acts or omissions by the first attending officer at a crime/incident scene.¹¹¹¹

The NSW Police Detective Training Unit runs three relevant courses. The first is a 12 month foundational course for investigators, which covers topics including protection and management of crime scenes, contamination risks, how to organise large searches, and types of evidence to be gathered when conducting a crime scene search.¹¹¹² The second course is a detectives' course, which includes five days training on crime scenes, with a specific focus on DNA and cross contamination. The third course offered is the senior detectives' course aimed at detective sergeants who are in middle management positions. It assumes that participants already have a general understanding of crime scene management and the use of DNA. In all three courses, participants are provided with reading material relevant to the subjects being discussed.

NSW Police has developed separate sets of SOPs for SOCOs and FSG officers. This is because SOCOs deal predominantly with volume crime incidents such as break and enters while FSG officers deal with more serious crimes such as murders. In both cases, the SOPs provide step by step directions, from the order that protective clothing is to be put on before entering the crime scene to how these samples and exhibits must be collected, identified, treated and stored. The FSG officer SOPs have detailed instructions on how to collect each different sample type, including reference or control samples.¹¹¹³

12.2.2.2. Packaging and delivering crime scene exhibits

Both DAL and FSG have identified concerns about the way exhibits submitted for forensic analysis are packaged. In 2004, FSG conducted a review of the crime scene samples being submitted to DAL, and found instances of exhibits being delivered in packages which were not sterile; sharp items such as knives being delivered in plastic bags; and exhibits including firearms being delivered to the laboratory in paper bags. Some items were delivered to DAL without any packaging at all. FSG found that 16 per cent of the exhibits reviewed should have been rejected.¹¹¹⁴

Following this review, NSW Police decided that all crime scene samples which are submitted for forensic analysis must be authorised by the NSW Police Forensic Services Group before being sent to DAL. FSG is also training officers on how to package exhibits appropriately and on the importance of wearing protective clothing.¹¹¹⁵ FSG intends that in future all crime scene samples will be packaged, sealed and barcoded at the crime scene before being submitted for analysis.¹¹¹⁶

We support the proposal to package and barcode all exhibits at the crime scene. Poor packaging may lead to the evidence deteriorating, and also leaves NSW Police open to allegations of tampering with evidence, which may have an adverse impact on the credibility of forensic analysis.¹¹¹⁷ It is of serious concern that so many inappropriately packaged exhibits are being sent to DAL for forensic analysis. It is in the interests of both NSW Police and defendants in criminal proceedings that exhibits are handled in a secure way at all times. While FSG screening of exhibits may result in fewer exhibits being rejected by DAL, this alone will not reduce the risk of contamination or allegations of tampering.

Further, it appears that exhibits which are packaged and sealed at the crime scene may be opened by FSG before being repackaged and submitted to DAL for analysis. If FSG receives an exhibit from a scene of crime officer which is not packaged correctly, will FSG reject the exhibit, or simply repackage it and send it to DAL for analysis? NSW Police has indicated that FSG intends to perform some of the preliminary analysis, for example by cutting out bits of material and sending them to the laboratory, rather than submitting the whole sheet or garment to DAL. DAL has expressed concern that “it is at the cut-out stage where the majority of tampering allegations can be made.”¹¹¹⁸

In our view, it would be preferable if crime scene samples were packaged and barcoded at the crime scene, and were submitted to DAL for analysis without any interference with the exhibit by FSG. If FSG are to open exhibits, conduct initial assessments of what is to be analysed and then repackage samples for delivery to DAL it would be beneficial to have either the DNA advisory committee or the Attorney General’s working group assist in developing protocols and guidelines for managing this process. The advisory committee could also be called upon to work with FSG in developing priority levels for filtering out unnecessary casework.

Recommendation 87

NSW Police work with the DNA Advisory Committee or Attorney General’s working group to establish protocols and guidelines for the management of crime scene evidence by FSG in line with any quality control and assurance procedures already implemented by DAL.

NSW Police commented it does not agree with this recommendation “pending the completion of current internal reviews and developments in this area.”¹¹¹⁹

Recommendation 88

If NSW Police introduces barcoding of exhibits at the crime scene, DAL work with NSW Police to consider whether this tracking system can be carried through from collection to the proposed initial FSG examination and finally to the DAL analysis of the evidence.

NSW Police supports this recommendation.¹¹²⁰ NSW Health also advised that it strongly supports the use of a single barcode from crime scene collection to DAL analysis.¹¹²¹

12.3. Contamination within the laboratory

As with crime scene examination, contamination in the laboratory is minimised by ensuring that documented practices are followed at every stage through the receipt, storage and analysis of person and crime scene samples. Poor laboratory procedures – or failure to comply with good procedures – can result in cross contamination between crime scene samples, or contamination by laboratory staff themselves.¹¹²²

12.3.1. Laboratory contamination in other jurisdictions

There have been a number of contamination incidents in laboratories in other jurisdictions, both in Australia and overseas. Some involved accidental cross contamination of crime scene exhibits, while others involved mislabelling of samples and errors in interpreting analysis results. These incidents show that the risk of contamination is very real, and demonstrate the need for constant vigilance by laboratories conducting DNA analysis.

Case Study 77

Police investigating the murder of Victorian toddler Jaidyn Leskie submitted the toddler's clothing for DNA analysis. A profile derived from the clothing matched a profile on the DNA database, which had been obtained in the investigation of an apparently unrelated sexual assault case. It appeared that the deceased's clothes were examined in the same laboratory and on the same day as the condom used in the alleged sexual assault. During the inquest into the murder, the Coroner heard evidence that given the close proximity in both the time and location of the analysis, the DNA match was most likely to be due to accidental cross contamination of the exhibits, rather than the sexual assault victim having anything to do with the toddler's murder.¹¹²³

Case Study 78

A person was murdered in Wellington, New Zealand, in 1998. A DNA profile was derived from blood found under the deceased's fingernails and in his bedroom. Two months later, a man was bashed outside a pub in Christchurch and his DNA profile was obtained as a victim. A match was made between the victim's profile and that obtained from the evidence on the Wellington murder victim. Through other investigative leads, police identified a suspect who made admissions in relation to the Wellington murder and who said he had acted alone. Police conducted further inquiries and concluded the Christchurch man was not the murderer. The only possible explanation for the match between the Christchurch assault victim and the Wellington murder was that the samples had accidentally been contaminated in the laboratory.¹¹²⁴ Since then, the New Zealand forensic laboratory has developed a more rigorous quality assurance program, which includes regular quality assurance trials, audits of the laboratory, staff and procedures, and increased training and accreditation for staff.¹¹²⁵

Case Study 79

Forensic scientists in a laboratory in Michigan, USA were recently re-examining evidence from a 1969 murder case. A DNA profile derived from a blood spot which was recorded as having been found on the deceased's hand matched the profile of a man who had been convicted for another murder. However, that man had only been four years old at the time of the first murder, and there was nothing linking the two cases. The only plausible explanation for the link was cross contamination in the laboratory, as evidence from the 1969 murder and the more recent murder were analysed on the same day in the same laboratory.¹¹²⁶

12.3.2. Processes at DAL

We visited DAL to see how the laboratory is set up, and how DAL manages and processes DNA samples submitted for analysis. Where possible DAL uses different equipment to analyse DNA samples taken from people and from crime scenes. It also runs regular quality assurance tests using a control sample from a DAL staff member. Laboratory procedures are set out clearly in DAL's "Forensic Biology Procedures Manual."

Under the Deed of Agreement, DAL agreed to provide appropriate facilities for storing all samples received from NSW Police, pending analysis, in conditions which are appropriate for the security and preservation of DNA. However, the National Association of Testing Authorities (NATA) observed in its most recent assessment of DAL, in July 2004, that "the laboratory accommodation tends to be dated and in some instances cramped." It noted that DAL has procedures in place to minimise the risk of contamination, but that scientists at DAL need to be especially vigilant as they work in such close proximity.¹¹²⁷ DAL has expressed serious concern itself about its ageing infrastructure, lack of storage space and the urgent need to replace facilities:

*Our accommodation is way below standard. There is simply not enough space, that could impact on contamination between cases. The key issue is to enlarge the lab. Or do we have to wait until a court case fails?*¹¹²⁸

DAL has run out of space to store exhibits awaiting analysis, although it continues to receive more casework than it has the capacity to process. In particular, it needs better storage facilities so that samples obtained from suspects and from victims can be kept in separate areas.

DAL recently advised that it has arranged interim accommodation for 15 extra staff. A new building with increased space has been purchased but needs to be refurbished before it can be used as a DNA laboratory. At this stage, DAL expects to move into the facility in February 2007.¹¹²⁹ We note that DAL will continue to be assessed by NATA as to the adequacy of its accommodations and risk management processes.

12.3.3. Outsourcing DNA analysis to private laboratories

Until recently, DAL was the only laboratory accredited to conduct DNA analysis for NSW Police. However, NSW Police is currently conducting a three month trial outsourcing some DNA analysis to a private laboratory.¹¹³⁰ While the laboratory conducting the trial has been accredited by NATA, we urge the steering committee which is overseeing the trial to ensure any contamination risks associated with outsourcing are minimised.

12.4. Elimination databases

Given that contamination can and does occur, many jurisdictions have established elimination databases of those involved in the handling of DNA samples, to ensure that any accidental contamination is identified early. Elimination databases have been compiled from DNA taken from police officers, laboratory staff and even from the people who manufacture the equipment used by police and in laboratories.

12.4.1. Laboratory staff elimination databases

It is possible for DNA from laboratory staff to contaminate crime scene evidence.

Case Study 80

The director of the Northern Territory's forensic science laboratory was called to give evidence in the Peter Falconio murder trial, after his DNA was found on cable ties allegedly used to bind the hands of the deceased's girlfriend, Joanne Lees. He reportedly gave evidence that he did not know how it got there, but it could have been transferred by sneezing or dropping dandruff. He believed that in line with laboratory protocol, he would have been wearing gloves when he handled the cable ties.¹¹³¹

Contamination of crime scene evidence by laboratory staff is not really a problem, provided that, when it does occur, it is identified. DAL keeps DNA profiles from all staff on an elimination database, against which profiles derived from crime scene evidence are routinely checked:

*At present all DAL staff profiles are checked against profiles recovered from crime scene items. The provision of a reference sample is part of the employment conditions at DAL. Notwithstanding the introduction of many quality measures such as the wearing of gloves, masks, lab coats and hair nets, DNA from examining scientists has still been recovered from a number of items, and the existence of this staff database has allowed police investigators to focus on the evidence relevant to the case.*¹¹³²

Where forensic material on a piece of crime scene evidence is identified as having come from a member of staff, investigating authorities are not left trying to identify a further 'suspect', who does not actually exist.

As discussed above, NSW Police is planning to outsource some DNA analysis to laboratories other than DAL. If this is to occur, these laboratories will need to consider whether staff should be required to provide a DNA sample to DAL for inclusion on a staff elimination database, to ensure that any contamination by staff from these laboratories is identified.

Recommendation 89

Staff in all laboratories which provide DNA analysis services to NSW Police be required to provide a DNA sample, to be included on DAL's staff elimination database.

NSW Police and NSW Health both support this recommendation.¹¹³³

12.4.2. Police elimination databases

The United Kingdom set up a police elimination database in 2000, which now has DNA profiles from over 82,000 officers on it. Providing a sample was voluntary for existing officers but is a condition of employment for new officers.¹¹³⁴ Profiles on the elimination database are not routinely searched against unsolved crime scenes; a particular officer's profile is searched against a particular crime scene sample only where it appears that the sample may have been contaminated.¹¹³⁵ A separate sampling kit has been developed for taking DNA from police officers.¹¹³⁶

At this stage, there is no police elimination database in New South Wales. However, we understand there has been some discussion between DAL and NSW Police about the need to establish one. DAL provided the following example of contamination by a police officer:

Case Study 81

"In a murder case from 2003, the officer in charge of the case and the DPP were extremely concerned about the unknown profile on the victim's jumper that did not match the suspect. Was it relevant and how would the evidence be used in defending the accused? The police were gearing up to screen a number of individuals in the hope of identifying from whom the DNA originated. Then in 2005, a violent armed robbery occurred and the same DNA profile was found. DAL... informed police of the match and suggested that they should look at police who were common to both cases. It turned out that the forensic services investigator was involved in both cases and after the police officer volunteered a sample his DNA was found to match the unknown DNA profile from the murder victim."¹¹³⁷

Of the 180 forensic procedures included in our audit of DAL, at least one was a DNA sample taken from a police officer because it appeared evidence from the crime scene was contaminated. The officer had cut himself while examining the crime scene, and there was forensic material on crime scene evidence which did not come from the suspect. On analysis it was determined that the profile obtained from the officer's buccal swab matched the profile obtained from the crime scene evidence. This meant that the forensic material in question had come from the police officer, and not from some other unknown offender.¹¹³⁸

DAL has told us that it is not at all unusual for DNA from police officers, scene of crime officers and forensic services officers to be found on crime scene evidence, although this would generally only come to light after police and laboratory staff have spent considerable time and resources attempting to identify the contributor. DAL has commented that:

*Many more unidentified profiles sitting on the DNA database and thought to belong to the perpetrators of the crime may in fact belong to other police service employees... the conclusion must be stated explicitly – if the police do not want to have a profile on a police elimination DNA database, they should not be involved in the collection, examination and investigation of crime scene samples. Their reluctance to provide reference samples has resulted in the very thing they have wanted to avoid – namely their profiles being placed onto the crime scene DNA database. This has the potential to jeopardise investigations with detectives wasting time hunting for the source of these unknown 'offenders'. Their reluctance will also inevitably result in a case where the true offender may walk free through the inability of the police to explain adventitious DNA found on an extremely probative piece of evidence.*¹¹³⁹

NSW Police already takes fingerprints from potential police officers, scene of crime officers and special constables when they apply for employment with NSW Police. The prints are used to conduct a criminal history check, and are retained by NSW Police on a database, which can be accessed as required for elimination purposes. Prints taken

from people who are no longer employed by NSW Police are destroyed at the request of the person who provided them.¹¹⁴⁰ However, there is no equivalent requirement to provide a DNA sample. The only circumstances where a police officer would supply a DNA sample would be as a volunteer, if there was reason to believe that the officer may inadvertently have contaminated crime scene evidence.

Obviously, police officers and other technicians attending crime scenes should take all reasonable precautions against contamination. However, it is clear that, despite their best efforts – and due to the fact that DNA profiles can be derived from very small amounts of forensic material – DNA from these people will end up on crime scene evidence. This in itself is not a problem; it is only when the contributor of the forensic material cannot be identified that it is. It is of concern first because unless identified, the officer's DNA profile will be kept indefinitely on the crime scene index of the DNA database; second because investigating authorities may waste time and resources looking for a suspect who does not actually exist; and third because questions may be raised in court by defence lawyers about why, inexplicably, forensic material from somebody other than the accused was found at the crime scene.

In our view, there is a strong case for forensic material from investigating police officers to be easily detected, and for this reason we see considerable merit in a police elimination index being established on the DNA database. However, there must be clear limitations on the use of samples provided for this purpose.

First, the DNA sample itself could be destroyed once the officer's profile had been derived. As discussed at 1.4.2 of this report, DNA samples contain significantly more genetic information than DNA profiles. Profiles are numeric and can only be used to identify a person's gender or relatedness to other people whose DNA profiles have been obtained. It would appear that for the purpose of elimination, the profile alone would be sufficient.

Profiles obtained from police officers need not be matched against the other indexes on the DNA database. Rather, they could be used, like profiles obtained from volunteers for limited purposes, only in those cases where the police officer has attended the crime scene or otherwise come into contact with crime scene evidence, and the laboratory has detected a profile which may have come from a police officer. Use or disclosure of forensic material or information obtained from it for any other purpose should clearly be prohibited.

The Law Reform Committee of Victoria has already raised many of these concerns in their report *Forensic Sampling and DNA Databases in Criminal Investigations* and made the following recommendations:

Recommendation 9.4 Elimination Sampling of Victoria Police members

That police members be required to provide a DNA reference sample for elimination purposes, and that the profiles obtained be stored along with profiles of Victoria Forensic Science Centre laboratory staff, on the internal VFSC staff elimination database.

and

Recommendation 9.5 Guidelines for an elimination sampling policy

That Victoria Police develop a clear policy on elimination sampling outlining:

- (i) when staff samples and profiles may be destroyed;*
- (ii) the uses to which the profile can and cannot be put; and*
- (iii) policies and procedures for the destruction of the material after employment has changed or terminated.¹¹⁴¹*

In Ireland, similar recommendations have been made by the Law Reform Commission to establish elimination databases similar to the United Kingdom's Police Elimination Database that would require:

All members of the Garda Síochána [police] and the proposed Forensic Science Agency should be required to contribute their DNA profile to these databases. Additionally, the Commission recommends that persons who work at the scenes of crime and relevant manufacturing staff should be encouraged to volunteer their DNA profiles to an elimination database.¹¹⁴²

Most recently, the Australian Federal Police have proposed the collection of voluntary DNA samples from serving officers that can be used not only to eliminate officers' DNA from crime scenes but also for identification purposes in the event of a disaster. The Australian Federal Police have developed guidelines for the collection and use of officers' samples.¹¹⁴³ These guidelines, together with overseas examples, could provide a useful starting point for discussion about the development of an elimination database for NSW Police.

We realise this is a sensitive issue, and one which requires appropriate protections, full consultations, detailed information to police and ongoing monitoring. However, given the strong considerations in favour of such a database, we recommend it be further considered.

Recommendation 90

Consideration be given to establishing a DNA elimination database for all police officers, forensic officers and scene of crime officers in NSW.

NSW Health strongly supports this recommendation.¹¹⁴⁴ NSW Police supports the recommendation too.¹¹⁴⁵ However, the Minister for Police commented that “there are significant financial, legislative and industrial implications associated with this recommendation that should be considered.” The Minister’s position is that officers should be able to provide samples for an elimination database on a voluntary basis, but participation should not be compulsory.¹¹⁴⁶

12.4.3. Supplier elimination databases

The United Kingdom also established a manufacturers elimination database to assist in identifying contamination of equipment used by law enforcement agencies in DNA sampling, after two high profile murder investigations were erroneously linked. It turned out that the profile common to both cases came from a person who worked for the company which supplied the DNA swab tubes, not from the crime scenes in question.¹¹⁴⁷

The equipment included in the testing kits currently used by NSW Police has components from both the United Kingdom and the United States.¹¹⁴⁸ It may be possible that police in these areas already have arrangements in place for staff at manufacturers to supply profiles. If this is the case, manufacturers may already be able to supply elimination databases for their staff.

We are not aware of this being a problem in New South Wales. However, this issue may be one the DNA Advisory Committee may want to consider.

Recommendation 91

The DNA Advisory Committee consider consulting with the manufacturers of the equipment used for taking DNA samples about the risk of contamination.

NSW Police supports this recommendation.¹¹⁴⁹ However, NSW Health commented that it could see little benefit in the DNA Advisory Committee undertaking this role. It advised that DAL scientists discuss these matters with manufacturers informally as well as at conferences and special interest groups facilitated by SMANSFL (Senior Managers Australia & New Zealand Forensic Laboratories). NSW Health suggested that DAL could brief the DNA Advisory Committee on the matter.¹¹⁵⁰

Endnotes

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¹⁰⁹³ *R v MSK and MAK*, unreported, Supreme Court 070201/03 and 070002/03, transcript 25 November 2003 at pages 126 and 163.

¹⁰⁹⁴ Confidential survey responses.

¹⁰⁹⁵ The Hon Michael Kirby, “DNA Evidence: Proceed with Care”, based on an address to a seminar at the University of Technology, Sydney, 16 March 2000. Available from the High Court website: http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_dna.htm accessed 23 May 2005.

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- ¹¹⁰¹ Information obtained through Ombudsman review of COPS records.
- ¹¹⁰² Information obtained through Ombudsman review of COPS records.
- ¹¹⁰³ Information obtained through Ombudsman review of COPS records.
- ¹¹⁰⁴ Information obtained through Ombudsman review of COPS records.
- ¹¹⁰⁵ Information obtained through Ombudsman review of COPS records.
- ¹¹⁰⁶ Confidential LAC survey response
- ¹¹⁰⁷ Information supplied by DAL on 28 February 2005.
- ¹¹⁰⁸ NSW Police response to Ombudsman draft report, 2 June 2006.
- ¹¹⁰⁹ During the review period we received one complaint regarding the packaging of crime scene exhibits and possible tampering. This is discussed in chapter 15 as complaint number .
- ¹¹¹⁰ Some jurisdictions have developed best practice guides on DNA sampling, which include information on how to minimise contamination risks. For example, the United Kingdom Association of Chief Police Officers published "Guidelines for the Avoidance of Contamination in the Recovery, Packaging and Submission of Material for DNA Analysis" in its DNA Good Practice Manual: see www.forensic.gov.uk/forensic_t/inside/news/docs/DNA_Good.pdf, accessed 21 November 2005. Interpol published a *Handbook on DNA Data Exchange and Practice in 2001*, which includes quality assurance information for collecting and managing samples: see <http://www.interpol.int/Public/Forensic/dna/HandbookPublic.pdf>, accessed 17 February 2006. See also Justice Wood, "Forensic Sciences from the Judicial Perspective", address to the 16th Symposium on Forensic Sciences, May 2002, available from the Supreme Court website: www.lawlink.nsw.gov.au accessed 22 November 2005.
- ¹¹¹¹ NSW Police College advice on Constable Education Program, received 29 November 2005.
- ¹¹¹² NSW Police Detective Training Unit advice on Specialist Courses, email dated 13 December 2005.
- ¹¹¹³ Control or reference samples are defined in the SOPs as material of similar composition to a suspect sample collected from a scene or item. The purpose of a control sample is to allow an analyst to separate the original material from "introduced substances" resulting from the crime incident.
- ¹¹¹⁴ FSG presentation to DAL, attached to agenda for DNA Advisory Committee meeting 6 August 2004.
- ¹¹¹⁵ Minutes of meeting between NSW Police Forensic Services Group and DAL, 27 April 2004.
- ¹¹¹⁶ Minutes of the DNA Advisory Committee, 13 October 2004.
- ¹¹¹⁷ FSG presentation to DAL, attached to agenda for DNA Advisory Committee meeting 6 August 2004.
- ¹¹¹⁸ DAL comments on Ombudsman statement of provisional findings, 17 October 2005.
- ¹¹¹⁹ NSW Police response to Ombudsman draft report, 2 June 2006.
- ¹¹²⁰ NSW Police response to Ombudsman draft report, 2 June 2006.
- ¹¹²¹ NSW Health response to Ombudsman draft report, 7 June 2006.
- ¹¹²² For an example of quality assurance guidelines, see the FBI's "Standards for Forensic DNA Testing Laboratories", located at <http://www.fbi.gov/hq/lab/codis/qualassur.htm>, accessed 29 July 2005.
- ¹¹²³ J Goodman-Delahunty and B Newell, "One in how many trillion? DNA evidence and the juror", *Australasian Science Magazine*, August 2004, p. 14 to 17.
- ¹¹²⁴ *Sydney Morning Herald*, "Beyond reasonable doubt", 22 April 2000 <http://cjpa.freewriters.com/smh.htm> accessed 20 July 2005.
- ¹¹²⁵ New Zealand Environmental Science and Research Limited website, <http://www.esr.cri.nz>
- ¹¹²⁶ DNAResource.com Report dated 24 June 2005.
- ¹¹²⁷ National Association of Testing Authorities Australia, *Report on Reassessment: ICPMR*, 30 July 2004.
- ¹¹²⁸ Minutes of meeting between NSW Police Forensic Services Group and DAL, 1 June 2004.
- ¹¹²⁹ DAL comments on Ombudsman statement of provisional findings, 17 October 2005.

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- ¹¹³⁰ Legislative Assembly Hansard, 18 October 2005, the Hon Carl Scully MP, Minister for Police and Minister for Utilities.
- ¹¹³¹ Amanda Morgan, "Expert baffled by Falconio evidence DNA contamination" ABC online (11 November 2005), <http://www.abc.net.au>, accessed 22 November 2005.
- ¹¹³² DAL, Briefing Paper, "The need for a DNA database for police personnel", provided 10 October 2005.
- ¹¹³³ NSW Police response to Ombudsman draft report, 2 June 2006 and NSW Health response to Ombudsman draft report, 7 June 2006.
- ¹¹³⁴ United Kingdom, Forensic Science Service, *National DNA Database Annual Report 2003-2004*, p. 13.
- ¹¹³⁵ Association of Chief Police Officers DNA Good Practice Guide located at http://www.forensic.gov.uk/forensic_t/inside/news/docs/DNA_Good.pdf accessed on 20 July 2005
- ¹¹³⁶ United Kingdom Forensic Science Service website <http://www.forensic.gov.uk>.
- ¹¹³⁷ DAL, Briefing Paper, "The need for a DNA database for police personnel", provided 10 October 2005.
- ¹¹³⁸ COPS Event and advice from DAL, October 2005.
- ¹¹³⁹ DAL, Briefing Paper, "The need for a DNA database for police personnel", provided 10 October 2005.
- ¹¹⁴⁰ Telephone advice from Police Academy Goulburn, 16 September 2005; and *Police Act 1990* s 96A.
- ¹¹⁴¹ Victorian Parliament Law Reform Committee, *Forensic Sampling and DNA Databases in Criminal Investigations*, Government Printer, Melbourne, 2004 p. 327 to 329.
- ¹¹⁴² The Law Reform Commission of Ireland *The Establishment of a DNA Database* (LRC 78-2005) (November 2005) p. 83, available from <http://www.lawreform.ie/publications/reports.htm> accessed on 3 February 2006.
- ¹¹⁴³ "AFP dismisses union's DNA concerns", *ABC Premium News*, 6 January 2006 as cited in DNAResource.com report for January 2006, located at <http://www.dnaresource.com/> accessed on 10 February 2006.
- ¹¹⁴⁴ NSW Health response to Ombudsman draft report, 7 June 2006.
- ¹¹⁴⁵ NSW Police response to Ombudsman draft report, 2 June 2006.
- ¹¹⁴⁶ Letter from the Hon Carl Scully MP, Minister for Police and Minister for Utilities, 2 June 2006.
- ¹¹⁴⁷ See the United Kingdom *Forensic Science Service National DNA Database Annual Report 2002-2003*, p. 19 and National DNA Database Annual Report 2003-2004, p. 17.
- ¹¹⁴⁸ E-mail advice received from FPIT on 31 January 2006.
- ¹¹⁴⁹ NSW Police response to Ombudsman draft report, 2 June 2006.
- ¹¹⁵⁰ NSW Health response to Ombudsman draft report, 7 June 2006.

Chapter 13. Criminal proceedings using DNA evidence

The Findlay review of the Act, conducted on behalf of the Attorney General, concentrated on the use of DNA evidence in criminal trials. The purpose of that review was to determine whether the policy objectives of the Act remained valid, and whether the terms of the Act were appropriate for securing those objectives.¹¹⁵¹ The review team interviewed public prosecutors, defence advocates and judges as well as observing trials. The report discussed the main difficulties associated with the use of DNA evidence in criminal proceedings, and made a number of recommendations relating to best practice trial process.

The purpose of our review is to scrutinise the exercise of functions conferred on police officers under the Act.¹¹⁵² For this reason, many of the issues relating to the use of DNA in criminal proceedings is outside the scope of our review. However, it is necessary for us to examine certain aspects relating to the way DNA and other types of forensic evidence are used in criminal proceedings, to determine whether police officers are using their powers to conduct forensic procedures effectively. For this reason, we have reviewed the relevance and weight of DNA evidence in court proceedings; questions of admissibility, particularly where police have failed to comply with the Act; and the outcome of proceedings for matters where forensic procedures were conducted. We also touch on the main grounds for challenging DNA evidence.

13.1. Relevance and weight of DNA evidence

Because DNA profiling is highly discriminating, it is a powerful tool in the investigation and prosecution of crime. However, a 'match' is not always incriminating – all that it establishes is that there is a link between a crime scene and a suspect. Further inquiries and additional evidence are required to establish how the link came about. The person may have visited the place, and left DNA there, possibly long before the crime was committed. It is also possible that a person's DNA may have been transferred to the scene without the person having physically been there, either deliberately or unintentionally. The following case studies show how there can be a legitimate reason for a suspect's DNA or fingerprints being at the crime scene.

Case Study 82

An unknown offender stole and damaged a car. Police sent a pair of latex gloves found in the car for analysis. The laboratory advised that DNA found in the gloves matched the profile of a suspect. Police made further inquiries with the owner of the car, who advised that the suspect was a friend of his, that the gloves were in the car before it was stolen, and that he and the suspect regularly wore latex gloves for their work. Police did not take any further action against the suspect.¹¹⁵³

Case Study 83

Police investigating a break and enter identified a suspect through fingerprints left on some broken glass. The suspect worked as a glazier, and produced records to show that he had gone to the premises to repair the broken window, before the crime scene had been examined by police. He told police it was likely he removed the broken glass from the frame to fix the window, and police took no further action against him.¹¹⁵⁴

Case Study 84

An unknown offender broke into a house and stole several electrical appliances and some money. A cigarette butt was left on the lounge room floor and was sent to the DNA laboratory for analysis. The laboratory advised police that the DNA on the butt matched a profile on the DNA database. Police arrested and interviewed this person, who alleged he was in prison when the offence was committed. After making inquiries with the Department of Corrective Services, police confirmed that the suspect was in fact in custody at the time of the offence. The suspect was released without charge. It is not known how the cigarette butt got there.¹¹⁵⁵

There are many cases where police identify a suspect through DNA or other forensic evidence, but in the absence of any other evidence implicating the suspect, the matter cannot proceed. The following case studies show how DNA can link a person to a crime scene, but on its own cannot establish whether or not the person committed the offence.

Case Study 85

An unknown offender broke into a person's garage and stole a number of cleaning products. A cigarette butt found in the garage was analysed and linked to a suspect, who was subsequently interviewed. The suspect denied any involvement in the offence. He explained that at the time of the offence he had been living nearby with his parents, and often walked his dog in the park which backed onto the garage which had been broken into. The suspect suggested that the butt may have blown or otherwise found its way into the garage. Investigating police decided not to take any further action against the suspect.¹¹⁵⁶

Case Study 86

An unknown offender broke into a house through the back kitchen window. Police officers attended, and took fingerprints and a cigarette butt which had been left in the back yard. DNA on the butt was analysed and linked to a person whose profile was on the database. The suspect was interviewed, denied any involvement and offered no explanation as to why a cigarette butt with his DNA on it was found at the crime scene. Police determined there was insufficient evidence to proceed.¹¹⁵⁷

Police in the Northern Territory have conducted a number of "Genesweep" operations, which focus on identifying property offenders through fingerprint and DNA analysis. The operations have reportedly resulted in a high number of arrests, but many prosecutions have failed, because of the lack of other evidence.¹¹⁵⁸ Even where there is insufficient evidence to support a conviction, DNA links are still of intelligence value to investigating authorities, as they identify possible offenders and enable police to better target their investigations.

The weight of DNA evidence may depend on the type and location of forensic material left at the crime scene. Cigarette butts are a good source of DNA, because they usually have only one person's DNA on them, but on its own, a link between a suspect and a cigarette picked up at the crime scene is unlikely to establish the person committed the offence. It may be more difficult to provide an innocent explanation for other types of forensic material found at the crime scene, for example where a suspect's blood is left on a broken window, or a suspect's skin cells are found under a victim's fingernails. In conjunction with other evidence, a cigarette butt can still be used to convict, as the following case study shows.

Case Study 87

An unknown offender broke into an office and stole a number of laptop computers. A cigarette butt found in the foyer of the office was sent to the laboratory for analysis. A suspect was identified through DNA left on the butt. Police established that the office had been clean at the time of the offence, that the suspect smoked the same brand of cigarettes as the butt found at the scene, and that the suspect had a number of previous convictions for stealing laptops. Police charged the suspect, who was subsequently convicted.¹¹⁵⁹

The Findlay review commented that the compelling nature of DNA gave it a “special relevance” in cases based on circumstantial evidence. In practice, DNA is used “to shore up otherwise fragile prosecutions,”¹¹⁶⁰ and only “slight corroboration” may be needed to secure a conviction. The review found that DNA evidence was the centrepiece of the prosecution case in matters which would not otherwise have been prosecuted.¹¹⁶¹ It also found that while many judges emphasised that DNA evidence is just one component of a circumstantial case, many jurors considered DNA evidence to be “significantly persuasive.”¹¹⁶²

It appears that in many cases DNA evidence which links the offender to the crime scene is led, even though it does not assist in determining whether the accused committed the offence. For example, in the case *R v Styman and Tauber* (2002) the accused was charged after an elderly woman died, after being robbed and left in her home, bound and gagged. A witness gave evidence that she took two shirts from the accused’s wardrobe, and gave them to police. The shirts were examined and evidence was led that the accused’s DNA was found on them. There was considerable time spent cross examining expert witnesses about the DNA evidence. In summing up, the judge said to the jury:

*What do we have? We have a mixture of DNA found on the collar of one of them, DNA which matches [the suspect], and you are asked to conclude he contributed. Well, surprise surprise. A shirt comes out of his wardrobe and it has got his DNA on it. Does that take the Crown case anywhere at all? I would have thought not, but we have this argument about the DNA. You make of it what you will... but really, you wonder what the argument is.*¹¹⁶³

13.2. Effect of delays in DNA analysis on court proceedings

We discussed the effect of lengthy delays in obtaining DNA analysis on police investigations and court proceedings at 10.7.2 and 10.7.3. Police officers expressed concern about suspects and victims of crime forgetting about the incident, suspects committing further offences while the evidence sits at the laboratory, and courts not allowing adjournments because of delays in obtaining analysis results. Magistrates expressed concern about delays being unfair to the accused, particularly when the accused is in custody. We did not find any evidence to suggest that police are holding back from using DNA because of the length of time it takes to obtain analysis results. Rather, police factor delays into their investigation management, and where possible pursue matters without relying on DNA evidence.

13.3. Admissibility of evidence obtained under the Act

Forensic evidence which has been improperly obtained, or unlawfully retained, will generally be inadmissible in court proceedings.

13.3.1. Forensic material which has been improperly obtained

Section 82 of the Act provides that evidence obtained through a forensic procedure or as a result of or in connection with the carrying out of a forensic procedure is inadmissible where there has been any breach or failure to comply with any provision of the Act relating to the carrying out of the procedure, unless

- the person consents to its admissibility
- the court is of the opinion that the desirability of admitting the evidence outweighs the undesirability of admitting the evidence, or
- the breach or failure arose out of a mistake but reasonable belief as to the age of a child.

In making this decision, the court must consider factors including:

- the probative value of the evidence
- the reasons for failing to comply with the Act
- the gravity of the breach and whether it deprived the suspect of significant protection
- whether the failure to comply was intentional or reckless
- the nature of the offence concerned and subject matter of the proceedings, and
- whether admitting the evidence would seriously undermine the protection given to suspects under the Act.

Importantly, the Act specifies that the probative value of the evidence does not by itself justify its admission. If the evidence is admitted, the judge must inform the jury of the breach or failure to comply with the Act, and give a warning as the judge considers appropriate.

To examine this issue, we monitored reported cases, and also asked the DPP whether it was aware of any matters where the defendant has challenged the admissibility of DNA evidence because of the way a forensic procedure was conducted. The DPP advised that it does not keep specific records on this issue, but was able to provide anecdotal information from unreported cases or unreported aspects of reported cases. None of the magistrates who responded to our survey had heard of any proceedings where the defendant challenged the admissibility of DNA evidence because of the way a forensic procedure was conducted.

One case where DNA evidence was excluded because police did not comply with the Act when conducting the forensic procedure involved an accused who was charged with aggravated sexual assault on his 14 year old stepdaughter. The prosecution led evidence that semen from the accused was found on the victim's nightie. The defence objected to the DNA evidence being admitted, on the basis that police had not complied with the Act when taking a DNA sample from the accused by buccal swab. When the police officer asked if the accused consented to a buccal swab, he asked, "What are my rights in relation to that?" The police officer advised that under the Act police could take a DNA sample by force, but that the buccal swab was the easiest option. The accused responded, "OK, well if the law states that I must give a sample, well then I have no objection." Contrary to section 13(1)(j) and 13(6) of the Act, the police officer did not inform the accused of the consequences of refusing to provide the buccal swab – that if he did not consent, there was a procedure which must be followed before a sample can be taken against the suspect's will. Specifically, the officer would have to obtain an order from a senior police officer or a magistrate before the accused could be required to provide the sample. At trial, the police officer gave evidence that the accused had not objected to the forensic procedure. The judge commented:

In my mind to not object does not mean that one consents... Those provisions of s 13(6) are clearly designed to provide a protection to a suspect who is in custody... The effect of that provision means that where an individual does not consent, the police cannot simply move in immediately and use force to extract some sample from him or her. First, an order has to be obtained from either a senior police officer or a magistrate. In other words, from somebody who is independent from the inquiry. Further, the legislation stipulates matters that an individual charged with making such a decision is required to take into account before making the order that they are empowered under the Act to make.¹¹⁶⁴

The judge accepted that the officer's failure to mention the need to obtain an order before proceeding was a genuine oversight on the officer's part. However, he described it as "a blatant breach of the legislation," which "deprived the accused of a protection that the legislature gave him if he chose not to consent by having an independent person decide whether a sample should be obtained or not." The judge found that the police officer misled the accused by failing to provide that information, describing the breach as "a very grave matter" which the court was not prepared to sanction. Accordingly, the judge decided not to admit the DNA evidence. The accused was ultimately convicted on the basis of other evidence.

As discussed at 6.1, many suspects and volunteers clearly do not understand the information provided when deciding whether to consent to a forensic procedure. The Police Association has expressed concern about the effect this may have on admissibility of forensic evidence:

Police can only wonder how this lack of understanding of what has been read to the suspect or volunteer will affect the evidence gained through the forensic procedure if a legal practitioner decides one day to press the issue.¹¹⁶⁵

We reiterate our earlier recommendation 10, that a plain English version of the information be developed as a matter of urgency. We also stress that any additional explanation police officers provide, to clarify the information sheet,

should be electronically recorded along with the request for consent, to ensure there is a record of the explanation given, should the matter be raised at court.

Some police officers have informed us they are reluctant to conduct forensic procedures in case they do something wrong, which could lead to the evidence being excluded and the accused being acquitted. As one officer asked, "Who wants to shoulder this responsibility if you took the DNA for the inner west rapist or a serial killer?"¹¹⁶⁶ We appreciate these concerns, given the complexity of the Act and the inexperience of most police officers in conducting forensic procedures. We also note that through our monitoring activities, we found many instances where police officers failed to comply with the Act, or where we could not determine compliance because the relevant activity was not electronically recorded. We also found that officers who conducted forensic procedures routinely demonstrated a much better understanding of their legislative obligations than officers who had been accredited but had never conducted a procedure, or had done so only rarely.

From our observations of forensic procedures conducted during the review period, we agree there is a significant risk of DNA or other forensic evidence being excluded, unless compliance with the Act improves in future. For this reason, we reiterate our recommendations 3(a) and 3(b), that police commands have a designated forensic procedures officer to monitor the way forensic procedures are conducted in the command, and consider developing specialist forensic procedures teams, instead of expecting all police officers to be able to conduct forensic procedures.

We also note that, in determining whether evidence obtained from a forensic procedure should be admitted, courts will consider the reasons for the breach, including whether it was intentional or reckless; the gravity of the breach; and whether it deprived the suspect of significant protection. The court will also consider the nature of the offence and the probative value of the evidence. This balancing exercise means it is still open to the court to admit evidence obtained through a forensic procedure, if the officer has acted in good faith and the breach has not deprived the person providing the sample of a significant protection.

13.3.2. Failure to share the sample

The Act requires that if enough forensic material is taken from a suspect, police must make part of the material available to the suspect for independent analysis. The analysis results must also be made available. The material and analysis results must be sent to the suspect within 90 days.¹¹⁶⁷ We are aware of several cases where DNA evidence was excluded because police failed to comply with these provisions.

In *R v Ali* (2002), the accused was charged with armed robbery. The prosecution led evidence that he had held up a TAB, stabbed the owner while he was opening the safe, and then left in a stolen car with several hundred dollars in cash. Police took a DNA sample from the accused for comparison with clothing and other items he allegedly discarded during the police chase following the robbery. The judge found that, in taking the sample, police breached the requirement to share the forensic material with the suspect, and provide it within 90 days. After weighing up the desirability of admitting the evidence with the undesirability of admitting evidence which was obtained in breach of the Act, the judge decided not to admit the evidence. The judge commented:

There is no doubt that the DNA evidence has high probative value. However, the probative value of the evidence is not the test. It is but one of the factors to be weighed in considering the desirability of the evidence...

*[Further], the more highly probative the evidence is the more the protections and safeguards provided by the Act should be applied. In my view the protection not afforded to the accused under the Act is for him to have the opportunity to have the DNA material independently tested and if necessary challenge the Crown expert.*¹¹⁶⁸

The judge concluded that the Crown's failure to make the forensic material available seriously undermined the protection afforded the accused, and accordingly decided not to admit the evidence. The accused was however convicted on other evidence.

In *R v Roumi* (2003), the court also held the DNA evidence was inadmissible because police failed to comply with sections 58 and 60 of the Act, which require police to share forensic material with the suspect and ensure the analysis results are available to the suspect. The DNA evidence was not, however, critical to the prosecution case.¹¹⁶⁹

An argument along these lines failed, however, in *R v Sharwood* (2003). In that case, the defence objected to the DNA evidence, on the basis that police failed to comply with the requirement that they share the forensic material with the suspect. The judge reasoned that it would be easy for the accused to obtain a further sample of his own saliva should he wish to have his DNA profile independently determined, and admitted the evidence.¹¹⁷⁰

We discussed the section 58 sharing requirement at 8.10 (see also recommendation 48(a)), that in line with the *Sharwood* decision, it should not apply where police are taking a suspect's DNA sample. The implementation of our recommendation would mean that failure to share the sample would no longer be grounds for excluding the DNA

evidence. Police would still, of course, be required to share where possible, forensic material other than a person's own DNA, such as material obtained through nail scrapings or hand swabs.

13.3.3. Covert DNA sampling

As discussed at 9.2.1, admissibility of DNA evidence has been challenged on the basis the suspect's sample was obtained covertly, instead of through the regime provided for by the Act. Most recently, in *R v White* (2005), the court held that the DNA profile obtained from a discarded cigarette butt was not evidence to which section 82 of the Act applies, so the challenge failed.¹¹⁷¹ However, the court went on to consider whether, if section 82 did apply to forensic material obtained covertly, the evidence would be admissible. The court found that the evidence was highly probative, and accepted that police did not comply with the Act because there was insufficient evidence available at that time to identify the accused as a suspect. The court concluded that the desirability of admitting the evidence outweighed the undesirability of not admitting it.

Section 82 sets out the factors a court must consider in determining whether improperly obtained forensic evidence should be admissible. Many of these factors would be relevant to evidence which has been obtained covertly, including the reasons for failing to comply with the Act, whether it was intentional, and whether admitting the evidence would seriously undermine the protection given to suspects under the Act. These factors suggest that evidence which has been obtained covertly, in defiance of the Act, would not be admissible. Significantly, though, this balancing exercise need not be undertaken in relation to samples obtained through covert means – section 82 applies only where “a forensic procedure has been carried out on a person,” and police have failed to comply with the Act.

Despite this significant limitation, the *White* decision indicates that the courts may nevertheless consider the reasons why police have obtained a covert DNA sample rather than taking a sample through a forensic procedure, in determining admissibility. As discussed at 9.2.4 and in recommendation 53, we feel that NSW Police should be recording information about the collection of covert samples and reporting on this in its annual report. We also recommended that Parliament should consider regulating the collection of covert samples, see recommendation 54.

13.3.4. Forensic material which has been unlawfully retained

Section 83 of the Act provides that any evidence obtained through a forensic procedure, including the results of any forensic analysis, are not admissible in criminal proceedings, if the Act requires that the material be destroyed. Unlike section 82, there is no discretion to admit the evidence if the desirability of admitting it outweighs the undesirability of admitting it. Evidence which has been unlawfully retained is admissible only if adduced by the defence; it cannot be adduced by the prosecution.

As discussed in chapter 14, we found abundant evidence that forensic material is being retained in circumstances where the law requires that it be destroyed. We note that this evidence would not be admissible in criminal proceedings. Section 83(1)(d) also suggests that any other evidence made or obtained as a result of or in connection with the carrying out of the forensic procedure (including preventing a further DNA sample) would not be admissible.

13.4. Challenges to DNA evidence

DNA analysis has been accepted by the courts for many years as a valid scientific technique for identifying the source of biological material. Nonetheless, DNA evidence is still open to challenge. The main types of challenges now relate to: the interpretation of analysis results; the way the statistical evidence was calculated; the way the evidence is presented to the jury; and continuity of the evidence and the possibility of contamination.

13.4.1. Challenges to the science

The validity of DNA profiling was rigorously tested in the courts when it first began to be used in the investigation and prosecution of crime. Ten years ago, in *R v Pantoja* (1996), the defence expert gave evidence that he tested DNA from the crime scene and the accused, with significantly different results than those adduced by the prosecution. On appeal, the court considered whether the conflict in expert testimony was enough to raise a reasonable doubt about the accused's guilt. The court concluded it could not, referring to the many criticisms of the defence expert's evidence at trial, including his excessive caution in interpreting DNA analysis results. The appeal was allowed on another ground, that the prosecution had failed to lead evidence supporting the statistical validity of the databases used. There were further challenges to the DNA evidence at the retrial, but the accused was ultimately convicted.¹¹⁷²

In *R v McIntyre* (2001), the defence argued that the DNA evidence was unreliable, as certain commercially sensitive information about the Profiler Plus system was not publicly available, and so could not be properly discussed in the scientific community. This argument was rejected.¹¹⁷³ In that same year, in *R v Gallagher* (2001), DNA analysis results adduced by the prosecution were questioned by the defence. The judge gave detailed reasons for admitting the evidence, including a detailed explanation of the Profiler Plus system used by DAL to derive DNA profiles from forensic material.¹¹⁷⁴

Subsequent cases have also accepted the validity of the Profiler Plus system and the statistical basis on which the evidence is given. For example, in *R v Yates and others* (2002), the accused argued on appeal that the statistical model on which DNA evidence is given is flawed because it is based on a theoretical population, which breeds at random, and does not in fact exist. The court found this submission had no substantial basis.¹¹⁷⁵

Although the validity of DNA profiling is now widely accepted by the scientific and legal communities, laboratory results may still be challenged. For example, in *R v Ross* (2003), the prosecution led evidence that police attended the home of a 12 year old girl who reported she had been sexually assaulted, and put the child's clothes in a plastic shopping bag. The clothes were subsequently examined, and semen was detected on the underpants. The sample was too small, however, to positively identify the source. At trial, the defence argued that by placing all the clothes in the same bag, there was a possibility of cross contamination from one piece of clothing to another, or from the shopping bag to the clothes. It was also argued that the material identified as semen could in fact have been wet vegetable matter which had already been in the shopping bag. After being debated for several days on voir dire, this evidence was eventually admitted. But the jury was unable to agree on a verdict, and a new trial was ordered. At the retrial, the defence again sought to lead evidence about the possibility of cross contamination, but on this occasion the court dismissed the argument as "fanciful."¹¹⁷⁶ The accused was ultimately acquitted.

Even though DNA analysis using the Profiler Plus system is now widely accepted, DNA analysis results may still be open to interpretation, and so will continue to be challenged. For example, where there is only a partial match, and there are results at fewer than the standard nine loci, the test is less discriminating.¹¹⁷⁷

The Findlay review observed "a prevailing ignorance amongst many lawyers and judges about the nature and potential of DNA evidence," and argued that their reluctance to engage in the science has given the evidence "a degree of legitimacy."¹¹⁷⁸ Indeed, none of the magistrates who responded to our survey had heard any proceedings where the defendant challenged the interpretation of DNA evidence, or had heard any proceedings where the defendant had the forensic material independently analysed. We also asked the DPP whether it was aware of any matters where the defendant has challenged the interpretation of DNA evidence, or has contested the way the forensic matching was carried out by DAL. The DPP advised that in *R v MSK and MAK* (2003), the unrepresented accused challenged the admissibility of DNA evidence in a sexual assault matter, on the basis that DNA "could not be distinguished between brothers from Pakistan as it may be able to with people from Western countries."¹¹⁷⁹ The accused questioned several witnesses from DAL but the challenge was unsuccessful. In summing up, the judge indicated it was not clear what was intended by the challenge, but it appeared to be an attack in some way on the scientific integrity of the DNA testing.¹¹⁸⁰

The DPP also advised that it is aware of some cases where the defendant has had the forensic material independently analysed: "In a number of matters the defence have sought access to the laboratory file and after inspection of that by a defence expert no challenge to the testing has occurred." The DPP gave the example of *R v Fricker* (2003), where the DNA was independently analysed, the accused pleaded guilty, and the DPP was not served with the results of the independent testing.¹¹⁸¹

13.4.2. Challenges to the statistics

The probative value of DNA evidence comes from the high probability that DNA obtained from the crime scene or victim has come from the accused. Defence lawyers may question the method used by the prosecution to arrive at the figures it has. For example, in *R v Styman and Tauber* (2002), the prosecution gave evidence that duct tape found in the accused's ute had blood on it which came from the victim. The defence expert challenged the statistical interpretation of DNA evidence, arguing the statistical probability of the DNA in question having come from the accused was significantly lower than the probability claimed by the prosecution. The challenge was unsuccessful, and the accused was convicted. He appealed but did not raise the issue on appeal.¹¹⁸²

The "match probability" or "likelihood ratio" given in evidence is calculated using the product rule, where the likelihood of finding a match at each of the loci examined are multiplied together. As one judge explained to a jury:

If two samples match, it is possible to say two things: first, that they could have come from the one person and, secondly, that results like the ones produced occur in the population at a particular rate or frequency. If there is an exclusion, there may be no point in considering the result at any other locus but if there is a match, that is what is done. If there is another match, the rate of occurrence of the result achieved at the second locus may be calculated once again by reference to a database. Provided the two tests are independent, that is provided the results at one locus do not influence and are not influenced by the results at another locus, the two individual rates of occurrence can be multiplied together to produce a combined rate of occurrence.

So if the same result at the first locus occurs the population in, say, one in ten people and the results at the second occur in, say, one in fifteen people, you can say that the combination of the two results occurs at the rate of one in ten times fifteen, that is one in one hundred and fifty in the population. And if you keep on doing further tests and getting matches, you can keep on multiplying each new rate of occurrence to produce a new combined rate of occurrence. So if you do many tests and the samples always match, although you will never prove that the two samples came from the one person, you will be able to say that the chances of the sample you are considering having come from someone other than the person you are trying to exclude is small. The more matches you get the smaller becomes the chance that the sample came from somebody else.¹¹⁸³

The product rule assumes that the tests at each locus are independent; that is, that the results at one locus do not influence the results at another.¹¹⁸⁴

The more loci examined, the more discriminating the comparison, and the higher the numbers in the final match probability will be. This explains why such incredibly high numbers are cited, such as, “that profile is expected to occur in fewer than one in ten billion persons,”¹¹⁸⁵ or “the probability of a match by chance was calculated at 10 billion to one.”¹¹⁸⁶ Conversely, the fewer loci examined, the less discriminating the comparison will be.

Case Study 88

In 1999, a disabled man in the United Kingdom was arrested when his six-locus DNA profile was found to match the profile derived from a crime scene several hundred kilometres away. The match probability was reportedly one in 37 million. The man was released after a ten-locus test showed there were differences between the man’s DNA and the DNA from the crime scene.¹¹⁸⁷

Laboratories in New South Wales currently examine nine loci plus the sex indicator, although it is possible that in the future they will examine more, which will be more discriminating again. Laboratories in the United States examine nine loci, as they generally use the Profiler Plus system too.¹¹⁸⁸ The United Kingdom and New Zealand both use the more discriminating SGM Plus system, which examines ten loci and the sex indicator.¹¹⁸⁹

While the match probability is what gives DNA evidence its probative value, there is no clear consensus on how it should be calculated.¹¹⁹⁰ One area of debate is whether (and how) the match probability should account for relatedness. The product rule ignores the fact that there may be reasons why results at certain loci are the same for different people, for example because the people are directly related, or because certain results are found more frequently within some subpopulations. Small or isolated populations may be less genetically diverse than large, urban populations, and it may be necessary to allow for underlying relatedness when calculating the match probability in relation to a particular population.¹¹⁹¹

There have been a number of challenges based on the failure of the reported match probability to take relatedness into account. In *R v Pantoja* (1996), the defence objected to the DNA evidence on the basis that the statistics were based on databases which were unlikely to have included samples from South American Quechua Indians, who could differ from the general population as they had evolved in relative isolation. On appeal, the court rejected this argument, although the appeal was allowed on the basis that the prosecution had not established the statistical validity of the databases used.¹¹⁹²

In *R v To* (2002), the accused appealed on the basis that DAL had consulted both Australian and Asian population databases in producing the statistical evidence, and that the results were not reliable. The prosecution expert gave evidence that in drawing conclusions from the databases he used conservative estimates in deciding what value to use to compensate for interrelatedness in his calculations. The court accepted this approach, and the appeal failed.¹¹⁹³

A challenge of this nature was successful in a recent West Australian case, *R v Bropho* (2004). The complainant, who had a mental illness and experienced delusions, alleged that the accused had raped her 23 years before. The prosecution calculated the likelihood of the accused being the father of a child born at the time to be 3,134 times more likely than a random person being the father. However, the defence argued that a different value should be used to compensate for underlying interrelatedness in the relevant population, which gave a likelihood of only 358 times more likely. The judge found there were no reliable studies of the genetics of the particular population, and so could not determine what the appropriate value would be to compensate for underlying relatedness. In addition, the offence occurred a long time before, close relatives of the accused could not be excluded, and the complainant was not a reliable witness. There was reasonable doubt as to the accused's guilt, and he was acquitted.¹¹⁹⁴

13.4.3. Challenges based on the way the evidence is presented

Even where the DNA evidence is accepted as statistically valid, the defence may challenge the way that evidence is presented to the jury. The general position now is that DNA evidence can be put before the jury, provided it is accompanied by appropriate directions. Previously, however, conflicting DNA evidence had been excluded on the basis that it was inherently confusing and could mislead the jury. In *R v Lisoff* (1999), the accused was charged with assault causing grievous bodily harm. The prosecution sought to adduce evidence that the victim's blood had been found on tracksuit pants the accused was wearing at the time of the assault. The defence submitted that the blood in question was actually "post transfusion blood," and argued that police had planted it to implicate the accused after the victim had received a blood transfusion, following the assault. The trial judge excluded the evidence, on the basis that there was a real danger the jury would be unduly swayed by the scientific nature of the evidence. The prosecution appealed against the decision to exclude the DNA evidence. The appeal court found that the evidence should have been admitted, and that the dispute between the experts should have been left to the jury to determine:

*There is nothing so extraordinary about the conflict in the evidence presented in this case which would justify the conclusion that a careful and sensible jury, properly directed as to the relevant law and as to the relevant evidence, could not decide in a reasoned and responsible way whether or not the Crown had demonstrated beyond reasonable doubt that the body of evidence supporting the Crown case should be preferred to the opposed body of evidence... The essential questions for the jury, if properly formulated and explained by reference to the available evidence, were in our opinion no more essentially complex or difficult than questions of fact that are routinely, and correctly, left to juries in criminal cases.*¹¹⁹⁵

The court ordered a retrial, and the accused was ultimately acquitted.

In the following years, the courts considered whether the statistics relating to DNA analysis, which is essentially opinion evidence, should be put before the jury. In *R v GK* (2001), the accused was charged with sexually assaulting his stepdaughter, and the prosecution led evidence that he was the father of the complainant's baby. The trial judge admitted evidence that DNA testing did not exclude the possibility of paternity, but ruled that "there should not be arithmetical figures put before the jury," on the basis that the probative value of the evidence was outweighed by the danger of unfair prejudice to the accused. The accused was acquitted, and the DPP submitted a question of law to the Court of Criminal Appeal, asking whether the trial judge erred in refusing to admit the statistical evidence. The Court of Criminal Appeal held that the statistical evidence should have been admitted. Although courts may have legitimate concerns about whether DNA evidence is capable of being understood by a jury, these can be addressed through careful directions and warnings to the jury:

*There is, at least as a general rule, nothing so inherently difficult, confusing or misleading about properly qualified expert opinion evidence about DNA testing, either in general or in a particular case, as would justify a perception that a jury, acting reasonably and with the assistance of correct and appropriate directions from the presiding Judge, cannot be entrusted safely with the assessment of that opinion evidence.*¹¹⁹⁶

Further, the fact that DNA evidence may be overwhelmingly probative does not of itself create a danger of unfair prejudice:

*Merely because evidence points overwhelmingly to guilt does not make it unfair to adduce it. And even if evidence carries a prejudicial overlay its genuine probative value must be put in the scales... If relevant DNA statistical evidence is tendered through a witness of due expertise then its probative weight cannot itself be a ground for withholding it from the jury.*¹¹⁹⁷

The court also noted the general move towards admissibility of statistical calculations relating to DNA analysis in other jurisdictions.

Similar issues were considered in *R v Galli* (2001). In that case, the accused was convicted of aggravated sexual assault, after a woman with an intellectual disability conceived while under his care. At trial, the prosecution led evidence relating to the probability of the accused being the father. On appeal, the defence argued that the trial judge failed to give adequate directions to the jury about the DNA evidence. The court found that while it would have been desirable for the trial judge to give the jury better directions in relation to the probability of paternity based on the DNA analysis, it was inevitable that the accused would be convicted, so the failure to direct the jury appropriately did not constitute a miscarriage of justice.¹¹⁹⁸

Although the match probability and the calculations supporting it may be adduced in evidence, care must be taken to ensure that the significance of the match probability is properly explained. It also has to be made clear that a DNA 'match' does not positively identify the source of the forensic material, only that the suspect cannot be excluded; and that it is only a very remote possibility that the DNA in question did not come from the suspect. In *R v Yates and others* (2002), the accused appealed against his conviction on the basis that it had not been made clear to the jury that a match between a DNA sample from the crime scene and a sample from the suspect does not establish that the two are from the same person. The court found that the judge had in fact made this clear, having told the jury, "You have heard many times in this case, that DNA testing does not positively identify a sample of DNA found on an object as coming from a specific person, for the simple reason that it is possible that by mere chance, two people can have the same DNA profile," and that "The DNA evidence does not point conclusively to a particular individual. What it does provide is a calculation of the likelihood that the DNA came from other than the individual in question." The appeal was dismissed.¹¹⁹⁹

Similar concerns were raised in *R v Wakefield* (2004), where the accused was convicted of aggravated armed robbery, after robbing and assaulting an elderly woman in a lift at a shopping centre. The prosecution gave evidence that DNA on a handkerchief left in the lift may have come from the accused. On appeal, the defence argued that the DNA evidence was explained in a way which left the jury with the impression that it was the accused's DNA which was found on the handkerchief, when it should have been made clear that a mixture of DNA was found on the handkerchief, and that the accused could not have been excluded as a contributor, given that his profile was consistent with the mixture. The court accepted that while the prosecution could have been more exact, the accused would have been convicted regardless, and the appeal was dismissed.¹²⁰⁰

Juries should also be warned against taking a strictly mathematical approach to the evidence.¹²⁰¹ For example:

*The use of databases... assumes that patterns of results distributed through those databases occur at the same frequency in the population generally. Whether they do or not can never be precisely known because it is impossible to test every member of the community. What is sought to be achieved is a high level of confidence in the databases as representing the population generally. [Because of this] the figures produced by this method give an appearance of mathematical exactness that in practice they cannot have.*¹²⁰²

DNA evidence has also been challenged where a logical error has crept into the explanation of the statistics, often referred to as the "prosecutor's fallacy." As one commentator has explained, the error occurs where "A implies B" is confused with "B implies A":

*If it is accepted that there is a 90 per cent chance that the culprit is very tall, it does not follow that every tall man has 90 per cent probability of being the culprit.*¹²⁰³

In explaining the statistical relevance of a DNA profile, the statistical probability of the profile occurring in the general population is not the same as the statistical probability of the accused's DNA being found at the crime scene. This means that while it may be true to state, "the probability that the DNA came from the accused, compared to from a person taken at random, is ten billion to one," it is not true to state that "the probability that the DNA came from the accused is ten billion to one," or "there is a less than one in ten billion chance that the DNA at the crime scene did not come from the accused." The match probability has to be expressed in the terms of the first statement to hold true. Further, the statistics have to be explained to members of the jury in a way that ensures the implications of the figures given are properly understood.

The implications of making this error have been discussed in a number of cases. In *R v GK* (2001), the court stated that the DNA evidence in question should not have been withheld from the jury, but should have been adduced, "accompanied by appropriate directions emphasising the need to avoid the prosecutor's fallacy."¹²⁰⁴ In *R v Galli* (2001), the court stated that it may not be necessary to give a direction about the prosecutor's fallacy in all cases involving DNA evidence, although a warning about impermissible reasoning would be desirable.¹²⁰⁵ The prosecutor's fallacy was not actually made in either of these cases.

Where the prosecutor's fallacy is made, however, this may be grounds for a conviction to be quashed. In *R v Keir* (2002), the accused was convicted of murdering his wife. Her body was never found, but the prosecution case was

that he had buried her beneath the house. The victim's parents provided DNA samples for comparison with bone fragments found under the house. The prosecution expert stated that "it is approximately 660,000 times more likely to obtain this particular DNA profile found in the bones if it comes from a child of [the victim's parents] than from a child of a random mating in the Australian population." However, the trial judge went further than this, telling the jury that, according to the prosecution, "there is a 660,000 to one chance that those are the bones of [the victim] as distinct from any other person." The court found that "if it was proper to leave the jury with odds at all, the jury was left with the potentially misleading odds of 660,000:1 and without guidance on what the DNA statistical evidence really meant." The court could not conclude that the accused would inevitably have been convicted, had the jury not been left with an erroneous appreciation of the statistical evidence adduced at trial. The appeal was allowed, and a new trial was ordered.¹²⁰⁶

DNA evidence has also been challenged where analogies have been drawn to fingerprinting. In *R v Yates and others* (2002), counsel for the defence argued that referring to a DNA profile as "DNA fingerprinting" tended to give it a significance which it did not have. The court commented that while it is highly desirable for judges to avoid this term, it was not misleading in that case, as the judge had given appropriate directions.¹²⁰⁷ The issue was also raised in *R v Wakefield* (2004). On appeal, the defence argued that use of the term "DNA fingerprint" was inaccurate and misleading. However, the prosecution expert had actually commented, "I would prefer the term genetic profile rather than fingerprint. I think fingerprint has got a connotation of uniqueness and we're not talking about uniqueness here," and counsel for the prosecution had referred to the DNA profile as being "like a fingerprint." The court commented that "when explaining DNA profiles the analogy of a fingerprint is not apt and should not be used," but dismissed the appeal, as the evidence had been properly explained during the trial.¹²⁰⁸

13.4.4. Continuity of evidence and possibility of contamination

DNA evidence may also be challenged on the basis that it may have been contaminated or otherwise damaged. For this reason, the prosecution must be able to show that the relevant samples were handled appropriately, including being stored securely in appropriate conditions, throughout the relevant period.

In the Northern Territory case *R v Murdoch* (2005), the accused was charged with the murder of British backpacker Peter Falconio. The defence challenged the DNA evidence on the basis that it may have been contaminated. First, there was evidence that investigating police had taken the cable ties used to bind the hands of the victim's girlfriend to a meeting with the accused in an Adelaide prison, in 2002. Witnesses for the prosecution denied that the accused's DNA could have come into contact with the ties at that time, stating that the ties remained in a paper bag on a table in the room throughout the meeting.¹²⁰⁹ Second, the defence questioned whether the evidence could have been contaminated before being sent to the United Kingdom for analysis. The original examination of the items, in Australia, was inconclusive, and the evidence was sent overseas for examination by a laboratory which uses a more sensitive method of testing (called low copy number, where a DNA profile can be derived from a very small number of cells). The British forensic scientist gave evidence that DNA found inside the cable ties and on the gearstick of the victim's car matched the DNA of the accused. An expert for the defence questioned this evidence, arguing that because the system used is so sensitive, it could have picked the DNA up from somewhere else, for example at the crime scene, during transit or at the laboratory. The accused was ultimately convicted.¹²¹⁰

Inability to account for the movement of crime scene exhibits may be a problem for older offences. For example, a man was charged in the United States after his DNA linked him to a 1979 murder. While there was no evidence that the crime scene evidence had been contaminated, there were conflicting records about where it had been kept for several years following the murder. The prosecution decided not to proceed, as it could not account for the whereabouts of swabs taken from the victim during that period.¹²¹¹

Some of the police officers we consulted predicted that, given how discriminating DNA analysis is, challenges relating to continuity of evidence and the possibility of contamination will be made more frequently:

*Greater scrutiny will be placed on crime scene management and interpretation of that evidence in court.*¹²¹²

*Because it is near impossible to prove that the DNA does not belong to the criminal, it is envisaged that defence solicitors will raise issues of cross contamination, corrupt placing of DNA, strict compliance with police policy and procedures, continuity of the sample.*¹²¹³

*At the moment continuity and integrity of testing procedures are the main issues challenged at trial. This will continue to be a problem... If they can't dismiss the identification, defence will try to have the evidence excluded due to contamination or failure in testing.*¹²¹⁴

Where the defence wishes to challenge evidence relating to the way samples were handled in the laboratory, the prosecution must ensure that all the people involved in the analysis are available to give evidence. In *R v Sing* (2002), the accused was convicted of aggravated sexual assault. At trial, the prosecution adduced evidence that the DNA profile derived from vaginal swabs taken from the victim after the assault matched the accused's DNA profile. Two forensic biologists from DAL gave evidence about the tests done on the evidence under their supervision, and about their interpretation of the analysis results. On appeal, the defence argued that the evidence should be excluded on the basis that it was hearsay – neither of the biologists carried out the actual testing, and the laboratory staff who did were not called. The court concluded that DNA test results could not be proved merely through evidence of the standard procedures and instructions given, and that the prosecution's failure to call all the necessary witnesses deprived the appellant of the opportunity to test the evidence. The conviction was quashed and a new trial ordered. Before this case, there was no practice that all laboratory staff involved in the DNA analysis be called.¹²¹⁵

DAL was obviously concerned about the implications of the *Sing* decision. As discussed at length in this report, the laboratory does not have enough staff or resources to meet the demand for DNA analysis, and requiring more staff to attend court would put further strain on the laboratory.

Usually, however, DNA evidence is adduced by tendering a certificate of expert evidence, pursuant to section 177 of the *Evidence Act 1995*. The prosecution must give the defence notice that it proposes to tender the certificate as evidence of the opinion, and must serve a copy of the notice of the defence at least three weeks before the hearing. The defence must give written notice to the prosecution if it requires the expert to give evidence in person. The court may order the defence to pay costs if it requires the expert to give evidence in person without reasonable cause.

13.5. Outcomes of criminal proceedings involving forensic evidence

We sought to assess how often DNA analysis results in a suspect being prosecuted for an offence, and how often prosecutions result in conviction. However, neither DAL nor NSW Police keep comprehensive records relating to criminal proceedings involving DNA links.

Minutes from DNA Advisory Committee meetings indicate that in August 2004, DNA analysis has resulted in 1,800 arrests and over 1,000 convictions.¹²¹⁶ It is not clear how this figure was reached, given that court results stemming from cold links do not appear to be systematically recorded, and warm links do not appear to be centrally recorded at all. We note that at that time, police had taken over 6,000 DNA samples from suspects.¹²¹⁷

13.5.1. Types of offences

NSW Police only keeps records of charges and convictions in relation to cold links. That is, where a person who has not previously been identified as a suspect is linked to a crime scene. This is a very limited way of measuring how effectively police are using their forensic procedure powers, as it does not include matters where police took a DNA sample from a person they have already identified as a suspect.

We set out the number of charges and convictions stemming from cold links for the final two years of the review period in table 3. The table shows that there have been many more convictions for less serious types of offences, like break, enter and steal (over 1,500 convictions), than for more serious types of offences, like murder (one conviction) and sexual assault (20 convictions). This would be expected, given that the less serious types of offences are committed much more frequently. Further, police are more likely to devote time and resources to the investigation of serious offences, and identify a suspect directly, rather than through a cold link some time later.

Table 3 also shows that in all categories of crime, the number of convictions is significantly less than the number of identifications. For example, there were 15 links for murder, but only one conviction; there were 200 links for armed robbery, but only 32 convictions; and there were 55 links for aggravated robbery, but only three convictions. This trend is also apparent for less serious offences. For example, there were almost 3,000 links for break, enter and steal offences, but only 1,500 convictions; and there were over 500 links for stolen motor vehicles but only 200 or so convictions.¹²¹⁸ There are a number of factors which contribute to this. First, not all links result in prosecution. Police may decide not to pursue a matter, either because there is insufficient evidence or because of the nature of the offence and the length of time which has passed. Second, the number of convictions will lag behind the number of links, because criminal proceedings, particularly for serious offences, may take a long time to finalise. For this reason, the gap between the number of convictions and the number of links may narrow over time.

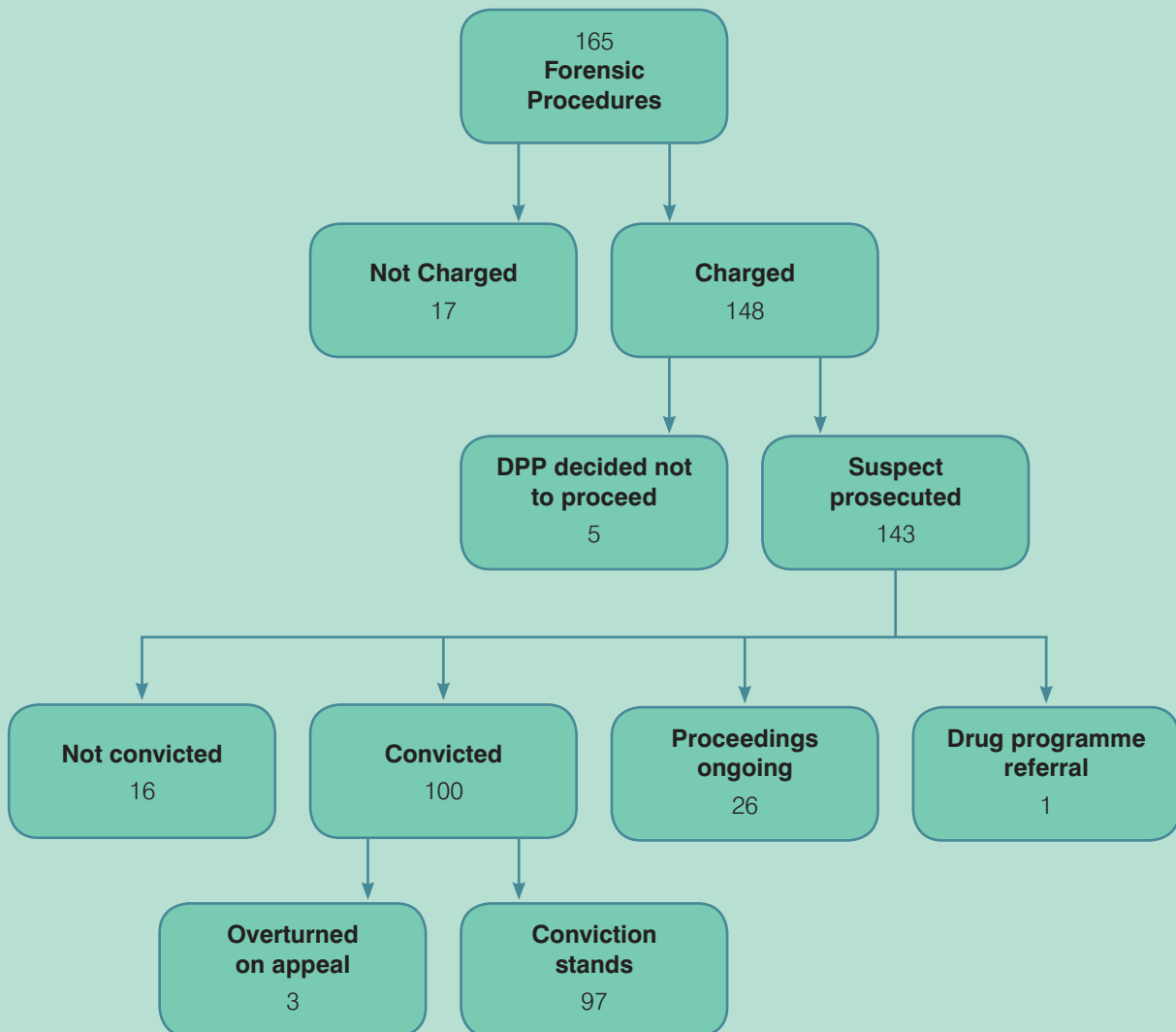
13.5.2. Results of Ombudsman audit

The NSW Police records discussed above only relate to cold links, and so do not provide any information about how often, when police take a DNA sample, the suspect is convicted of the offence in relation to which the sample was taken. For this reason there is no accurate way of measuring how often DNA analysis leads to convictions.

We were able to get an idea of how often suspects are convicted after forensic procedures have been conducted by reviewing the court outcomes of the 180 forensic procedures included in our audits of local area commands and DAL. We found that, of the 165 forensic procedures conducted on suspects:¹²¹⁹

- 17 suspects were not charged for the offence
- 16 suspects were prosecuted, but were not convicted (this includes one who was found not guilty because of mental illness)
- 26 suspects were prosecuted and at the time of writing, the proceedings were ongoing, and
- 100 suspects were convicted, although 3 of these were overturned on appeal.

Outcomes for forensic procedures included in Ombudsman audit



Total: 165 (does not include 5 procedures on victims, 8 on volunteers or 2 on suspects where there was no result recorded).

These results must be interpreted with caution, as the suspects included in our audit may have been charged with more than one count or more than one offence. Police records of criminal proceedings did not always indicate whether the conviction related to the offence for which the forensic procedure was conducted, or another offence. For this reason, some of the suspects recorded as having been convicted may in fact have been convicted of a related offence, and not of the offence for which the forensic procedure was conducted. That said, the results do show that a majority of the suspects included in the audit sample – almost 60 per cent – were convicted of an offence. About a quarter were not convicted of any offence. The rest of the matters were still before the courts.

It was not possible to measure the impact DNA or other forensic evidence had on the outcome of each case. However, comparing the DNA analysis results with the court outcomes shows that DNA analysis results are not determinative – warm links do not always lead to conviction, and exclusions do not always result in acquittal. At least three suspects were acquitted despite warm links to crime scene evidence; and at least 12 were convicted although they were not implicated by the DNA analysis. We were unable to identify the impact analysis results had on the likelihood of convictions because, as discussed at 10.6.5, DAL was unable to provide analysis results for a significant number of matters included in the audit sample.

13.5.3. Effect on plea

In most cases involving DNA evidence, it is not challenged. Some police officers we surveyed suggested that DNA evidence linking a suspect to a crime scene often results in the person pleading guilty to the offence (or, if the person pleads not guilty, the DNA component of the prosecution case is not challenged).¹²²⁰

We asked the DPP whether it is aware of matters where the defendant has changed his or her plea from not guilty to guilty as a result of the DNA evidence being adduced. The DPP advised that it had no particular information about this issue, commenting that while DNA evidence is no doubt a factor in influencing a guilty plea, the DPP is rarely advised of the reasons for a plea or a change of plea.¹²²¹

13.6. Sentencing

13.6.1. Consenting to a forensic procedure

Complying with a request by police to undergo a forensic procedure does not, of itself, entitle a convicted offender to a discounted sentence. However, it is a factor which may be taken into account when considering the degree of assistance the accused has given police.

In *R v Newman* (2004), the accused pleaded guilty to three break, enter and steal offences, and was sentenced to almost five years imprisonment. This included a 12.5 per cent discount for the guilty plea. In interview the accused told police he had no memory of having committed the offences, being drug affected at the time, but he pleaded guilty on the basis of the DNA analysis results. The accused appealed against his sentence on the basis that the court had not given sufficient weight to his guilty plea. The court observed that the extent of the discount is a matter for the discretion of the sentencing judge, although it generally depends on first, the time at which the plea is entered during proceedings; and second, the complexity of the issues and the amount of evidence which has to be adduced to prove the elements of the offence. The appeal failed as the court was not persuaded that the trial judge erred in the discount given.¹²²²

In *R v Fernando* (2004), the accused pleaded guilty to an act of indecency, and was sentenced to nine and a half years imprisonment. The trial judge did not quantify the discount she gave him for pleading guilty, but stated that the sentence did take into account his cooperation with police. The accused appealed against the sentence, arguing that the trial judge placed no significance on the fact the accused provided a DNA sample by consent. On appeal the court acknowledged that it was not certain that, had the accused refused to provide the sample by consent, an order would have been made compelling him to provide the sample. However, it concluded that there was no error because the trial judge failed to provide a specific discount for providing the sample – it was sufficient that she took into account the accused's cooperation with police in general.¹²²³

In *R v Hoskins* (2004), the accused pleaded guilty to malicious wounding, after stabbing another inmate. He was sentenced to six years imprisonment, which allowed for a 25 per cent discount for pleading guilty and a 15 per cent discount for his assistance to the authorities, in making admissions and providing a DNA sample by consent. The Crown appealed against the sentence, on the basis that the trial judge had erred in allowing the discount for assistance to the authorities on top of the general discount for pleading guilty. The court accepted that this was an error, and the accused's sentence was increased.¹²²⁴

These cases show that providing a DNA sample by consent does not entitle an offender to a specific discount at sentencing. However, consenting to a forensic procedure may be considered as evidence of having cooperated with investigating authorities, and so may have some impact on the sentence imposed.

13.6.2. Delays in obtaining analysis results

The length of time taken to obtain analysis results may be grounds for reducing an offender's sentence. For example, in *R v Henry* (2004), the accused appealed against his sentence for various property offences. There was a lengthy delay in processing the crime scene evidence for some of the offences, which meant that the sentence for those offences did not commence until some time after his original sentence commenced. Had the delay not occurred, the offender would have been sentenced at an earlier time, which would have shortened his overall sentence. The court accepted that the delay in the commencement of the later sentences because of delays at DAL constituted special circumstances, and re-sentenced the offender so he would be eligible for parole at an earlier time.¹²²⁵

Endnotes

¹¹⁵¹ *Crimes (Forensic Procedures) Act 2000* s 122.

¹¹⁵² *Crimes (Forensic Procedures) Act 2000* s 121.

¹¹⁵³ Information obtained through Ombudsman review of COPS records.

¹¹⁵⁴ Information obtained through Ombudsman review of COPS records.

¹¹⁵⁵ Information obtained through Ombudsman review of COPS records.

¹¹⁵⁶ Information obtained through Ombudsman review of COPS records.

¹¹⁵⁷ Information obtained through Ombudsman review of COPS records.

¹¹⁵⁸ "DNA fails to catch crims", *Northern Territory News*, 19 April 2004.

¹¹⁵⁹ Information obtained through Ombudsman review of COPS records.

¹¹⁶⁰ M Findlay and J Grix, "Challenging Forensic Evidence? Observations on the use of DNA in certain criminal trials," *Current Issues in Criminal Justice*, Volume 14(3), March 2003, 269 p. 270.

¹¹⁶¹ M Findlay and J Grix, "Challenging Forensic Evidence? Observations on the use of DNA in certain criminal trials," *Current Issues in Criminal Justice*, Volume 14(3), March 2003, 269 p. 272.

¹¹⁶² M Findlay and J Grix, "Challenging Forensic Evidence? Observations on the use of DNA in certain criminal trials," *Current Issues in Criminal Justice*, Volume 14(3), March 2003, 269 p. 273.

¹¹⁶³ *R v Styman and Tauber*, unreported, Supreme Court 02/91/0020, transcript 5 December 2002 p. 142.

¹¹⁶⁴ Unreported judgment, District Court 01/21/3378.

¹¹⁶⁵ Police Association of NSW submission, March 2005.

¹¹⁶⁶ Police Association of NSW submission, March 2005.

¹¹⁶⁷ *Crimes (Forensic Procedures) Act 2000* ss 58, 60 and 101.

¹¹⁶⁸ *R v Ali*, unreported, District Court 01/02/3321.

¹¹⁶⁹ *R v Roumi*, unreported, 03/11/1179 and advice from DPP, 24 March 2005.

¹¹⁷⁰ *R v Sharwood*, unreported, District Court 03/31/0470 and advice from DPP, 24 March 2005.

¹¹⁷¹ *R v White* [2005] NSWSC 60.

¹¹⁷² See *R v Pantoja* (1996) 88 A Crim R 554 and *R v Pantoja* [1998] NSWSC 656.

¹¹⁷³ *R v McIntyre* [2001] NSWSC 311 (11 April 2001).

¹¹⁷⁴ *R v Gallagher* [2001] NSWSC 462 at paragraphs 7 to 20 (Barr J).

¹¹⁷⁵ *R v Yates, Pary, Hyland, Powick* [2002] NSWCCA 520.

¹¹⁷⁶ *R v Ross*, unreported, District Court 02/61/0180 and advice from DPP 24 March 2005.

¹¹⁷⁷ See A Haesler SC, "DNA for Defence Lawyers" (May 2005), available at www.lawlink.nsw.gov.au, accessed 16 August 2005; and M Findlay and J Grix, "Challenging Forensic Evidence? Observations on the use of DNA in certain criminal trials," *Current Issues in Criminal Justice*, Volume 14(3), March 2003, 269 p. 273.

¹¹⁷⁸ M Findlay and J Grix, "Challenging Forensic Evidence? Observations on the use of DNA in certain criminal trials," *Current Issues in Criminal Justice*, Volume 14(3), March 2003, 269 p. 270 and M Findlay, *Independent review of the Crimes (Forensic Procedures) Act 2000* (April 2003) at 6-7-2.

- ¹¹⁷⁹ Letter from DPP, 24 March 2005.
- ¹¹⁸⁰ *R v MSK and MAK*, unreported, Supreme Court 070201/03 and 070002/03. The appeal case was reported at [2004] NSWCCA 308, but the DNA evidence was not raised on appeal.
- ¹¹⁸¹ *R v Fricker*, unreported, District Court 03/51/0165 and advice from DPP 24 March 2005.
- ¹¹⁸² *R v Styman and Tauber*, unreported, Supreme Court 02/91/0020 and advice from DPP, 24 March 2005.
- ¹¹⁸³ *R v Styman and Tauber*, unreported, Supreme Court 02/91/0020, transcript 4 December 2002 at p. 130.
- ¹¹⁸⁴ Known as Hardy-Weinberg equilibrium. See D Balding, *Weight-of-evidence for Forensic DNA Profiles* (2005) p. 69.
- ¹¹⁸⁵ *R v Wakefield* [2004] NSWCCA 288 at paragraph 36 (Smart AJ).
- ¹¹⁸⁶ *R v Yates, Parry, Hyland, Powick* [2002] NSWCCA 520 at paragraph 65 (Wood CJ at CL, Hulme and Buddin JJ).
- ¹¹⁸⁷ D Balding, *Weight-of-evidence for Forensic DNA Profiles* (2005) p. 32.
- ¹¹⁸⁸ Applied Biosystem, Product Bulletin Human Identification located at <http://docs.appliedbiosystems.com/pebiiodocs/00112873.pdf>, accessed on 7 December 2005.
- ¹¹⁸⁹ United Kingdom Forensic Science Service, *The National DNA Database Annual Report 2002-03*, p. 5 and the "Current DNA techniques" page of the New Zealand Environmental Science and Research Limited website <http://www.esr.cri.nz/competencies/forensicscience/dna/currenttechniques.htm> accessed on 7 December 2005.
- ¹¹⁹⁰ Mark Findlay, *Independent review of the Crimes (Forensic Procedures) Act 2000* (April 2003) at 6-7-2.
- ¹¹⁹¹ See *R v Bropho* [2004] WADC 182.
- ¹¹⁹² The DNA evidence was challenged again at the retrial, but the accused was ultimately convicted. See *R v Pantoja* (1996) 88 A Crim R 554 and *R v Pantoja* [1998] NSWSC 656.
- ¹¹⁹³ *R v To* [2002] NSWCCA 247. The relevance of ethnic background was also discussed in *R v Pantoja* (1996) 88 A Crim R 554.
- ¹¹⁹⁴ *R v Bropho* [2004] WADC 182.
- ¹¹⁹⁵ *R v Lisoff* [1999] NSWCCA 364 at paragraph 55 and 64.
- ¹¹⁹⁶ *R v GK* [2001] NSWCCA 413 at paragraph 96.
- ¹¹⁹⁷ *R v GK* [2001] NSWCCA 413 at paragraphs 30 and 39.
- ¹¹⁹⁸ *R v Galli* [2001] NSWCCA 504.
- ¹¹⁹⁹ *R v Yates, Parry, Hyland, Powick* [2002] NSWCCA 520.
- ¹²⁰⁰ *R v Wakefield* [2004] NSWCCA 288.
- ¹²⁰¹ See *R v Milat* (unreported) NSWSC, No. 70114 of 1994: Statistical Validity of Databases, 22 April 1996 (Hunt CJ at CL) and *R v Galli* [2001] NSWCCA 504.
- ¹²⁰² *R v Styman and Tauber*, unreported, Supreme Court 02/91/0020, transcript 4 December 2002, p. 130.
- ¹²⁰³ D Balding, *Weight-of-evidence for Forensic DNA Profiles* (2005) p. 146.
- ¹²⁰⁴ See *R v GK* [2001] NSWCCA 413 at paragraphs 33, 34 and 59.
- ¹²⁰⁵ See *R v Galli* [2001] NSWCCA 504 at paragraphs 79 to 97.
- ¹²⁰⁶ *R v Keir* [2002] NSWCCA 30.
- ¹²⁰⁷ *R v Yates, Parry, Hyland, Powick* [2002] NSWCCA 520 at paragraph 156.
- ¹²⁰⁸ *R v Wakefield* [2004] NSWCCA 288.
- ¹²⁰⁹ "Falconio defence questions DNA 'evidence'", *Sydney Morning Herald*, 25 November 2005.
- ¹²¹⁰ "Forensic experts at odds over evidence", *Sydney Morning Herald*, 2 December 2005.
- ¹²¹¹ DNAResource Report dated 10 June 2005.
- ¹²¹² Confidential survey response.
- ¹²¹³ Confidential survey response.
- ¹²¹⁴ Confidential LAC survey response.
- ¹²¹⁵ *R v Sing* [2002] NSWCCA 20 at paragraph 38. See also *R v Ryan* [2002] VSCA 176.
- ¹²¹⁶ Minutes of the DNA Advisory Committee, 6 August 2004.
- ¹²¹⁷ COPS download data provided by FPIT on 15 July 2005.
- ¹²¹⁸ Information supplied by FPIT on 22 June 2005.
- ¹²¹⁹ Eight procedures were conducted on volunteers and the remaining five were conducted on victims, and were initially included in our audit sample because police records indicated they were volunteers.

¹²²⁰ Minutes of the DNA Advisory Committee, 24 March 2003 and confidential survey responses.

¹²²¹ Letter from DPP, 24 March 2005.

¹²²² *R v Newman* [2004] NSWCCA 113.

¹²²³ *R v Fernando* [2004] NSWCCA 147.

¹²²⁴ *R v Hoskins* [2004] NSWCCA 236.

¹²²⁵ *R v Henry* [2004] NSWCCA 306.

Chapter 14. Destruction of forensic material

Part 10 of the Act sets out the circumstances in which material obtained through forensic procedures must be destroyed. The destruction requirements apply to “forensic material,” which includes DNA samples, fingerprints, photographs, casts or impressions and other types of samples taken from a person’s body.¹²²⁶ This chapter outlines the destruction requirements for material taken from suspects and volunteers, and discusses the adequacy of the mechanisms currently in place to ensure the destruction requirements are met.

14.1. Responsibility for destruction of forensic material

Both NSW Police and DAL play a part in destroying DNA samples – NSW Police identifies which samples need to be destroyed, and DAL carries out the actual destruction. Under the Deed of Agreement, FPIT agreed to provide DAL with destruction requests at least two days prior to the stipulated destruction date. DAL agreed to destroy DNA samples and identifying information only with the express permission of FPIT, and agreed to provide FPIT with a destruction certificate within two days of destroying a sample.

NSW Police and DAL have both pointed out that, under the Deed of Agreement, NSW Police makes the decision about whether to destroy forensic material, although the material itself is stored at DAL.¹²²⁷ We note that regardless of the Deed of Agreement, NSW Police and DAL still have to comply with their legislative obligations. This is complicated by the fact that the Act does not specify who the “responsible person” is, so the functions and responsibilities of the responsible person are shared between the Commissioner of Police and Chief Executive Officers of Western Sydney Area Health Service and DAL.

DAL has requested that this issue be clarified by the working group run by the Criminal Law Review Division of the Attorney General’s Department, which was formed in response to the Findlay review of the Act. As we noted previously at 4.4, in our view, there should be no question as to who is the ‘responsible person’. This should be made very clear in relevant legislation and administrative arrangements. We have recommended that this occur as a matter of priority (see recommendation 9).

14.2. Destroying forensic DNA material

The Act provides that a person destroys forensic material, the analysis results or other information obtained through the forensic procedure (including information on the DNA database) if the person “destroys any means of identifying the forensic material or information with the person from whom it was taken or to whom it relates.”¹²²⁸ Identifying information means any information that could be used to discover the identity of the person who provided the sample, or to get information about an identifiable person.¹²²⁹ In this way, the Act requires de-identification of information and material obtained through forensic procedures, rather than physical destruction of the actual biological material.

At no point does the Act specify that forensic material itself needs to be destroyed.¹²³⁰

14.2.1. When should forensic DNA material be destroyed

14.2.1.1. Volunteers

The Act does not specifically provide for the destruction of forensic material taken from volunteers. However, it does provide that any identifying information (that is, information which could be used to discover the identity of the person who provided the DNA sample) relating to a volunteer must be removed from the database as soon as practicable after the agreed retention period ends.¹²³¹ Rather than specify a period for which information about volunteers can be retained, the Act provides that it can be retained for such period as the volunteer and the Commissioner of Police agree.¹²³² As happens with DNA samples taken from suspects, DAL only destroys volunteer samples with the express permission of FPIT.

14.2.1.2. Implied consent by volunteers to retain DNA indefinitely

Rather than negotiate retention periods on a case by case basis, NSW Police keeps forensic material taken from volunteers indefinitely, unless the volunteer subsequently requests in writing that it be destroyed. NSW Police advised that when a DNA sample is taken, the volunteer is told:

‘Your profile, your DNA material and information which identifies you as the source of that material, will be retained by NSW Police until NSW Police receive a request in writing from you seeking its destruction.’¹²³³

However, we found through our audits of local area commands, including our video audit, that police officers do not always provide the right information to volunteers. In particular, police officers did not demonstrate a good understanding of what DNA samples from volunteers are used for, whether or not they are retained on the DNA database, or the length of time they are kept.¹²³⁴ Contrary to the advice provided by NSW Police, the volunteers included in our audit sample were not all informed that their DNA sample and identifying information would be retained unless they requested in writing that it be destroyed.

Case Study 89

In 2003, police were called to a brawl near the entrance to a railway station and found a young man who was bleeding from a head wound after being stabbed. It appeared the offence took place in a shop. Police located the weapon and wished to take a DNA sample from the shopkeeper for elimination purposes – that is, to make sure the DNA on the weapon came from the offender, rather than the shopkeeper. The shopkeeper agreed to provide a DNA sample by buccal swab. When police cautioned him, he asked whether the evidence would be used only in this particular case. The police officer taking the sample advised him that it would. As he completed the consent form, the police officer said, “I don’t know the difference between the two indexes. It’s something I can find out for you after the procedure.” The shopkeeper volunteering the sample stated, “I want my DNA to be used for this case only and after that, to be destroyed.” The police officer said, “OK.” However, we made inquiries with DAL in 2005 about the status of the man’s DNA sample and found that his profile was still on the volunteers’ index of the DNA database, and his DNA sample remained in storage at the laboratory.¹²³⁵

In light of our findings, our view is that consent to retain forensic material indefinitely cannot reasonably be implied from the fact a volunteer does not, at some point after the time the sample is taken, write to NSW Police requesting that it be destroyed.

NSW Police has also advised that since most volunteer profiles are only used for the limited purpose of comparison against crime scene evidence within a particular case, there is “no real necessity... for such profiles to be removed from the database.”¹²³⁶ We completely disagree. The Act provides that the identifying information must be removed from the database as soon as practicable after the agreed retention period ends.¹²³⁷ If a volunteer has indicated that his or her DNA sample can only be kept for a particular time, or is not even aware that it will be put on the database, it is unreasonable and in some cases will be unlawful for NSW Police to leave the profile on the database indefinitely.

14.2.1.3. Suspects

The Act does provide for the destruction of forensic material taken from a suspect. This must be destroyed where:

- the suspect is acquitted of the offence (or the suspect is found to have committed the offence, but no conviction is recorded) – provided no appeal is lodged, and the suspect is not being investigated for another offence¹²³⁸
- the material was obtained through an interim order which has subsequently been disallowed¹²³⁹
- evidence of the forensic procedure has been ruled inadmissible (in which case the Commissioner must ensure it is destroyed),¹²⁴⁰ or
- proceedings have been discontinued, or have not commenced within 12 months of police taking the sample – unless a warrant has been issued for the apprehension of the suspect or an order to extend the period has been made by a magistrate.¹²⁴¹

14.2.2. Identifying DNA profiles which need to be destroyed

FPIT monitors the progress of investigations and court proceedings involving DNA evidence. FPIT notifies DAL whenever a person is acquitted, charges are dropped, or evidence of the forensic procedure is ruled inadmissible, and instructs DAL to destroy the relevant forensic material. FPIT also notifies DAL where a conviction is recorded, and instructs DAL to convert the status of the person who provided the sample from suspect to “offender” on the DNA database.

NSW Police has advised that FPIT “from time to time” downloads lists of forensic procedures conducted on suspects where after 12 months there has been no action taken either to destroy the sample or convert the suspect’s profile to a convicted offender profile. In each case, FPIT makes inquiries with investigating police to find out the status of the investigation, whether proceedings against the person have been commenced, whether an order has been sought authorising retention of the material or whether a warrant has been issued for the suspect’s apprehension. In addition, there is a police liaison person at DAL who checks with investigators whether items on hand at DAL still require investigation.

14.2.2.1. Problems identifying samples due for destruction

FPIT has advised that monitoring court proceedings to identify forensic material which has to be destroyed is labour intensive and very time consuming. We understand that FPIT does not begin to follow up forensic procedures where no action has been taken until after the first 12 months has passed. It may then take some time to ascertain the status of the matter from the investigating police officer. For this reason, it is not uncommon for forensic material to be retained for some time after the required destruction date has passed.

Further, FPIT has indicated that it has considerable difficulty obtaining court results. Local court results are received electronically, but these are not always accurate. Results from the higher courts are not available electronically, although it is anticipated that this will be possible when the new computer system (CourtLink) is implemented.

FPIT also has difficulty identifying cases where, although the person has been convicted, the DNA profile has to be destroyed because the evidence was ruled inadmissible.¹²⁴² We understand the court registry would not keep a record of this, and that FPIT would not be informed that the material had to be destroyed, unless the DPP or investigating police officer advised FPIT that the evidence had been ruled inadmissible and needed to be destroyed.

The Attorney General’s Department’s CourtLink project confirmed that once CourtLink becomes operational the criminal records section of NSW Police will receive automated destruction notices in relation to fingerprint records taken from child suspects following acquittals.¹²⁴³ It may be possible for NSW Police to negotiate with the Attorney General’s Department for similar electronic notifications to be issued for forensic material in circumstances where the evidence was inadmissible, an interim order was disallowed or the suspect was acquitted.

Another problem with identifying samples due for destruction is that for many forensic procedures, the date the procedure was recorded on COPS is not the same as the date the procedure was actually conducted, as indicated on the hardcopy records of the procedure. We found during our audits of local area commands that in some cases, this was because the information was entered onto COPS at a later date. This was usually within a few days of the procedure being conducted. However, there were other cases where the COPS record appears to have been updated, and the date has changed. For example, for some procedures the date on COPS actually reflected the date the analysis report was received from DAL. In one procedure, the date on COPS had changed from 1 July 2002 to 12 November 2002, over four months later.¹²⁴⁴ Considering how long DNA analysis may take, there could be a large discrepancy between the date indicated by COPS and the date the procedure was actually carried out.

This means that although the Act envisages that the clock starts ticking on the day the DNA sample is taken, FPIT will not be alerted to the retention period having expired if the records on COPS are wrong, and the forensic material will be retained unlawfully.

Improving COPS records of forensic procedures is vital to ensuring the destruction requirements of the Act are met, and for this reason we reiterate our recommendations 1,5 and 7, that NSW Police review its record keeping system to ensure that accurate records of all forensic procedures are kept on COPS, and take into account problems with recording forensic procedures in its mainframe replacement program. In addition, COPS should include fields for the date destruction is due, and the date the sample is either destroyed, or converted to a convicted offender profile.

Recommendation 92

NSW Police amend COPS to include new fields for the date destruction of forensic material is due, and a field to commence recording the date the sample is either destroyed or converted to a convicted offender profile.

NSW Police supports this recommendation and advised that it is already in place.¹²⁴⁵

Recommendation 93

NSW Police consult with the Attorney General's Department to develop appropriate formats for electronic notification of court results and extension orders under section 88(5) of the Act via CourtLink once it becomes operational.

NSW Police supports this recommendation.¹²⁴⁶ The Attorney General's Department also supports the recommendation, noting that "in many instances the triggering event that requires a sample to be destroyed may not be a Court result, and so a range of processes need to be put in place to ensure that the legislative requirements about destruction are met."¹²⁴⁷

NSW Police also recently advised that responsibility for destroying DNA samples and profiles was transferred to its Criminal Record Section in June 2006. The Criminal Record Section is developing standard operating procedures for establishing, implementing and monitoring quality control mechanisms, including a process for identifying outstanding matters for finalisation.¹²⁴⁸

14.2.3. How does DAL destroy DNA?

DAL destroys the identifying information and the actual DNA sample, but does not delete the DNA profile from the database.

DAL generally removes the identifying information from the database as soon as practicable after receiving a destruction request from FPIT. This is usually the same day, or soon after. DAL checks the barcode number, person's name and date of birth are correct before deleting the information.

DAL then destroys the actual forensic sample (as in, the FTA card or hairs). DAL also destroys the hardcopy record of the profile, and all associated paperwork. DAL waits until it has received a number of destruction requests, before destroying the sample and paperwork in batches. Following destruction, DAL returns a signed copy of the destruction request form to FPIT.

DAL considers that identifying information is destroyed if the link between the profile and the information is removed on the searchable database, and the actual sample is destroyed as well. However, it has commented:

*It is not clear how far we have to go with destruction of identifying information – it could be that we have to destroy all knowledge that we received a sample and cut little bits out of our reports, test files and so on.*¹²⁴⁹

In our view, this is not necessary and DAL's current process for destroying the identifying information meets the legislative requirements (see 14.2.4).

However, we note that while DAL destroys the identifying information and actual forensic sample, it does not destroy the DNA profile. The profile remains on the database, although there is no way it can be linked back to its source.

The review of the Commonwealth forensic procedures legislation discussed the distinction between de-identification and destruction of DNA samples, and between destruction of DNA samples and profiles. It commented that in addition to destroying identifying information and the actual biological sample, "any DNA profiles relating to a person sample should also be destroyed because it is the profile that provides the basis for linking." It recommended that DNA profiles should have to be destroyed, in addition to the physical destruction of samples and the electronic separation of profiles from their identifying information.¹²⁵⁰ We agree that there is no good reason for DNA profiles to be retained on the DNA database for those samples which are required to be destroyed. Although the identity of the person who provided the sample cannot be established it can possibly be used to limit a pool of people to those who have had a profile on the database which has been destroyed and the profile can still be used to link the unknown person to other profiles on the database, such as close family members.

Recommendation 94

When DAL receives a destruction request, it deletes the DNA profile from the database, as well as destroying the forensic material and identifying information.

NSW Health advised that it is possible to delete the DNA profile when it receives a destruction request from NSW Police. It is currently pursuing the matter with NSW Police, as the recommendation requires changes to be made to the memorandum of understanding in place between DAL and NSW Police.¹²⁵¹

14.2.4. Keeping records of profiles which have been destroyed

When the Act first came into force, DAL was destroying all records relating to samples which had to be destroyed. We were unable to audit DAL properly, as it had no way of identifying how many or which DNA samples had been destroyed. DAL reviewed this practice during our monitoring of the DNA sampling of serious indictable offenders, and since September 2001 has kept a record of the barcode and destruction date of the samples it has destroyed. We understand DAL discussed this issue with the DNA Advisory Committee before deciding that these records should be retained.¹²⁵²

It is arguable that in the interests of privacy, every record relating to a person's DNA sample should be destroyed when the sample itself and identifying information has to be destroyed. However, there is a strong public interest in ensuring DAL is accountable, and can verify which DNA samples it has received and which it has destroyed. In our view, this outweighs the public interest in destroying every record that a person has ever provided a DNA sample, and ensures DAL complies with its obligations under the *State Records Act 1998* to keep full and accurate records of its activities.¹²⁵³ Further, even where DAL destroys a sample, NSW Police retains records of the forensic procedure, including the COPS record, consent form, exhibit book entry and video.

14.2.5. How many DNA samples have been destroyed?

14.2.5.1. Volunteers

During the review period, NSW Police requested that DAL destroy only five DNA samples taken from volunteers.¹²⁵⁴ This means that less than 1 per cent of DNA samples provided by volunteers during the review period have been destroyed.¹²⁵⁵ The vast majority of volunteer profiles remain on the database, with their identifying information, although they are not matched against any of the indexes.

Our audit of DAL included seven DNA samples which DAL recorded as having been taken from volunteers.¹²⁵⁶ None of these had been destroyed. This would be expected, given that NSW Police only instructs DAL to destroy profiles on written request from the person who provided the sample, which happens very rarely.

14.2.5.2. Suspects

During the review period, NSW Police identified 1,060 samples which had to be destroyed, which is approximately 12 per cent of the DNA samples provided by suspects during the review period.¹²⁵⁷ The proportion of samples which will ultimately be destroyed will be higher than this, given that in many cases court proceedings were ongoing at the end of the review period.

14.2.6. Results of Ombudsman audit

DAL advised that of the 180 forensic procedures we included in our audit, 67 DNA profiles were still on the database as suspects.¹²⁵⁸ We reviewed these and found that for 47 procedures, more than a year had elapsed since the procedure had been conducted. This included 12 procedures where over two years had elapsed, and two procedures where over three years had elapsed. The longest time any of the suspect samples had been kept was 3 years, and 9 months.¹²⁵⁹

We then sought advice from NSW Police as to why each of these 47 procedures had been retained for over a year. The Act only permits suspect samples to be retained beyond 12 months where proceedings have commenced against the person, a warrant has been issued for the person's apprehension, or police or the DPP have obtained an extension from a magistrate. NSW Police advised that:¹²⁶⁰

- 4 profiles should have been destroyed
- 19 profiles should have been converted from 'suspect' to 'convicted offender', but NSW Police had not provided DAL with this information
- 18 profiles related to cases where proceedings had commenced but the court outcome or hearing dates were not yet available, and
- 6 profiles had been destroyed since DAL had provided the information to us, in February 2005.

It is of serious concern that our small audit sample included DNA samples which had been unlawfully retained. In three cases, the sample had not been destroyed because the forensic procedure had not been recorded on COPS correctly, and FPIT had not identified that it needed to be destroyed. In the other case, NSW Police at first advised that the sample should have been destroyed, as FPIT had requested it be destroyed in August 2004.¹²⁶¹ We made further inquiries with DAL, and found that the destruction request submitted by FPIT had a typographical error on it, and FPIT had inadvertently asked that a different sample be destroyed. DAL advised FPIT at the time that that sample had already been destroyed. The sample included in our audit, however, was actually retained, and the DNA profile remained on the database. This error only came to light through our audit process. DAL subsequently destroyed the sample, in April 2005.¹²⁶²

These findings are consistent with our earlier finding, that errors in COPS records of forensic procedures are reasonably common. This suggests that there would be a large number of suspect profiles on the DNA database which by law should have been destroyed. It is of serious concern that forensic material is being retained unlawfully, and again we reiterate our recommendations 1, 5 and 7 about the need for accurate record keeping, to ensure the legislative destruction requirements are met. We also note this as further evidence for the need for auditing of DAL and police records (see 11.1 and recommendations 81 and 82).

14.2.7. Failure to comply with destruction requirements

14.2.7.1. Volunteers

It is clear that NSW Police and DAL are not meeting their obligations to destroy forensic material taken from volunteers. This is because DAL retains volunteer DNA samples and profiles indefinitely, relying on FPIT for notification of the agreed retention period expiring. However, FPIT does not consider the agreed retention period to have expired unless it receives a written request for destruction. This is despite the fact that the volunteer may have indicated at the time of sampling that the forensic material was to be used within that case only, may have been advised it would not be put on the database, and may not have been told that it would be retained indefinitely unless the volunteer subsequently requested it be destroyed.

In our view, it should not be left up to volunteers to check that their DNA sample and profile have been destroyed, when they may believe on the advice provided by police at the time of sampling that the sample would not be retained indefinitely. It would be preferable for the consent form which volunteers have to sign to specify the agreed retention period, for example "until the case has been finalised" or "indefinitely". Then NSW Police would have a specific record of the agreed retention period. NSW Police would also have to monitor the outcomes of proceedings where the volunteer specified the profile could not be kept indefinitely, to ensure the forensic material was destroyed as required.

Alternatively, NSW Police could direct DAL to destroy all DNA samples taken from volunteers, once the case for which the sample was taken has been finalised.

As for the volunteer profiles already on the database, we raised concerns about their retention during discussions with DAL and NSW Police. DAL indicated that profiles which had been taken for "within case matching" could be deleted from the database, provided the relevant court proceedings have been finalised. This would mean that the only profiles retained on the database would be those where the police officer taking the sample indicated to the laboratory that it should be stored on an index of the database.

Recommendation 95

Volunteers be given the opportunity to nominate an agreed retention period, and that this information be recorded on the volunteer consent form. Any destruction date nominated should be recorded on COPS so that FPIT is automatically notified of any samples which need to be destroyed.

Recommendation 96

DAL delete all profiles provided by volunteers for 'within case matching' from the database, once the relevant court proceedings have been finalised.

NSW Police commented that it should not be necessary to give volunteers an opportunity to nominate an agreed retention period, if all volunteer profiles provided for "within case matching" are deleted once the relevant court proceedings have been finalised.¹²⁶³

NSW Health reiterated that DAL's practice is to remove profiles only when directed to do so by police, and commented that DAL is liaising with police to develop better mechanisms to ensure DAL is notified when cases are finalised and profiles should be deleted.¹²⁶⁴

14.2.7.2. Suspects

As with volunteer samples, NSW Police and DAL are not meeting their legislative obligations to destroy forensic material taken from suspects. This is either because FPIT is not identifying all the samples which require destruction, or is not notifying DAL of the need for destruction until some time after the sample should have been destroyed.

Retaining forensic material beyond the required destruction date is unfair to the person who provided the sample, and any evidence obtained as a result of the unlawful retention will not be admissible in any proceedings against the person anyway.¹²⁶⁵ Further, it is an offence to cause any identifying information about a person obtained from forensic material taken from the person under the Act to be retained on the database at any time after the Act requires it to be destroyed. This includes being reckless as to the recording or retention of information after the required destruction date.¹²⁶⁶ It is clear that greater efforts are needed to ensure the destruction requirements in the Act are met. Our recommendations above, and a comprehensive audit program, should go some way to improving outcomes in this respect.

14.2.8. Destruction before comparison can be done

Because analysis of crime scene samples can take such a long time, it may be that a DNA sample taken from a suspect has to be destroyed before it can be compared against evidence from the offence in relation to which it was taken. We are not aware how often retention periods expire before the crime scene evidence is analysed, but given the length of time taken to process crime scene samples, we expect it would not be unusual.

Destroying suspect samples prior to comparison against crime scene evidence not only limits the efficacy of the Act, it thwarts the intention of the legislation, which is that police can only ask suspects for a DNA sample if there are reasonable grounds to believe that it might produce evidence tending to confirm or disprove that the suspect committed an offence.¹²⁶⁷ It appears that DNA samples are taken from suspects and put on the database relatively quickly, for comparison against the unsolved crime scene index, without comparing the profile against the crime scene for which the sample was taken.

It is desirable that DAL complete its DNA analysis prior to the relevant suspect sample having to be destroyed. One way to increase the likelihood of this happening would be to flag any cases where the destruction date is approaching, so DAL can assess whether the relevant crime scene evidence should be examined before then.

14.2.9. Amendments sought by NSW Police

We note in this respect the submission to this review by NSW Police, arguing that suspects should have to make a written request to NSW Police asking for DNA samples and profiles to be destroyed. This would save FPIT from having to monitor the outcome of every DNA sample taken from a suspect to avoid retaining the forensic material unlawfully.¹²⁶⁸

We agree that this model would save NSW Police (and particularly FPIT) considerable time and resources. However, during our audits of local area commands and interviews with police officers, we found serious problems with the information being provided to suspects about forensic procedures. In the videos we watched, many suspects appeared not to understand all the information, and many of the police officers we interviewed confirmed this. It is not clear how NSW Police could ensure that suspects would be adequately informed of their right to request their DNA be destroyed after a certain period.

The Act currently allows investigating authorities to retain a suspect's DNA sample and profile for 12 months to conduct forensic analysis. This period seeks to strike a balance between fairness to suspects and the needs of investigators. Retaining a suspect's DNA beyond this period because of administrative efficiency is not warranted, in the absence of special reasons for doing so. This is especially so where a suspect has been ordered to provide a DNA sample against his or her will. This review supports the need for better processes which will streamline NSW Police's role. Still, no strong case has been made for the amendments requested by NSW Police.

Recommendation 97

DAL's case management system be developed so that any cases where a destruction date is approaching, and the relevant crime scene evidence has not been examined, are flagged for prioritised examination.

NSW Police supports this recommendation.¹²⁶⁹ NSW Health indicated it supports the recommendation in principle, and is currently examining how best to implement it.¹²⁷⁰

14.2.10. Destruction where a suspect's conviction is overturned on appeal

Section 87 of the Act requires forensic material taken from a convicted offender to be destroyed if the offender's conviction is quashed. However, its application is quite limited. First, it only applies to forensic material taken by order of a court or senior police officer. In our 2004 report, we recommended that section 87 be amended so that forensic material obtained from offenders by consent also had to be destroyed, if the offender's conviction is quashed.¹²⁷¹ Second, section 87 applies only to forensic material obtained from serious indictable offenders, under Part 7 of the Act. It does not apply to forensic material taken from suspects, which is taken under Parts 2 to 6 of the Act.

It appears that while the Act requires forensic material to be destroyed where the suspect is acquitted, no conviction is recorded, or proceedings are discontinued, there is no requirement to destroy forensic material where the suspect's conviction is quashed on appeal.¹²⁷² The Act allows for DNA profiles "from suspects who have been convicted of prescribed offences" to be retained on the offenders index, but it does not specify what happens if the person's conviction is quashed.

We understand it is NSW Police policy to destroy forensic material obtained from successful appellants who provided DNA samples as suspects, but only where NSW Police receives a request from the appellant or his or her legal representative. FPIT does not monitor appeals, other than appeals by serious indictable offenders, who provided DNA samples under Part 7. FPIT advised that of the 712 appeals finalised in 2004, 225 were upheld, but it could not advise how many of these involved forensic material taken from the appellant as a suspect.

We can see no reason why the Act should distinguish between suspects who are acquitted at first instance, and those whose conviction is set aside on appeal. For this reason, we are of the view that section 87 should be amended to cover forensic procedures carried out on suspects whose conviction is quashed on appeal. We also recommend that NSW Police implement a reliable system for monitoring appeals where forensic material was obtained from the appellant as a suspect, to ensure that any forensic material which should be destroyed is identified.

In our draft report, we made a provisional recommendation, that the Act be amended to require that forensic material taken from a suspect be destroyed as soon as practicable if the suspect is convicted and the conviction is subsequently quashed. NSW Police indicated that it supports this recommendation.¹²⁷³ The Attorney General's Department did not comment on the policy underpinning the recommendation but commented:

The wording of the Recommendation may need to be reconsidered. It would impede the administration of justice if all forensic material had to be destroyed merely because a conviction was quashed, where a retrial or rehearing was subsequently held or ordered. Such a requirement would mandate the destruction of evidence relevant to an impending trial. The Court of Criminal Appeal regularly orders that a conviction is to be quashed and a retrial held. Also, it is unclear from the terms of the proposed Recommendation whether an application for annulment of conviction in the Local Court granted under Part 2 of the Crimes (Local Courts Appeal and Review) Act 2001 is to be treated as the 'quashing' of a conviction.¹²⁷⁴

We agree that forensic material should not be destroyed where there is a reasonable prospect of a retrial or rehearing. We also clarify that forensic material should be destroyed for convictions which are set aside, whether they are quashed or annulled.

Recommendation 98

Section 87 of the *Crimes (Forensic Procedures) Act 2000* be amended to require forensic material taken from a suspect be destroyed as soon as practicable if the suspect is convicted and the conviction is subsequently set aside, unless there is a reasonable prospect of a retrial or rehearing.

14.2.11. Extension orders

In limited circumstances, police or the DPP can apply to a magistrate for an order extending the 12 month retention period. The suspect must be notified of the application, and must be given reasonable opportunity to speak to or make a submission to the magistrate. The magistrate can only grant the extension if satisfied “that there are special reasons for doing so.” The magistrate must ensure the person responsible for the DNA database is notified of the extension. Extensions may be granted more than once.¹²⁷⁵

Other than requiring the magistrate to be satisfied there are “special reasons” for granting an extension, the Act does not offer any guidance to magistrates in determining whether to make the order. For example, there is no requirement that the magistrate consider whether there is a sample from the crime scene or victim available for comparison; whether there are reasonable grounds to believe that information obtained from analysis of the forensic material is likely to produce evidence of probative value, any reasons why analysis has not been conducted within 12 months, and whether further retention of the forensic material taken from the suspect is justified in all the circumstances. Further, the Act does not specify the period for which the forensic material may be retained – or require the magistrate to fix an expiry date.

We made inquiries with the DPP about any matters where it has applied to a magistrate for an extension order, but the DPP advised it does not keep records of this, and had no anecdotal information on the issue either.¹²⁷⁶ The Local Court does not keep separate records of extension orders either.¹²⁷⁷ Accordingly, it is not possible to gauge how often orders for retaining forensic material taken from suspects are made. However, given the extensive delays in obtaining analysis results, we expect that they would occur. In our view, there would be considerable merit in providing magistrates with specific guidance about what may constitute “special reasons” for making an extension order. Further, the Act should limit the length of the extension, to a period determined by Parliament.

Recommendation 99

The *Crimes (Forensic Procedures) Act 2000* be amended to provide further guidance on what constitutes special reasons for making an extension order and that a finite extension period be determined by Parliament and included in the Act.

The Act also provides that the magistrate must ensure that the responsible person is notified of any extension order made.¹²⁷⁸ As discussed above, the Act does not specify who the “responsible person” is, and the functions and responsibilities of the responsible person are currently shared between the Commissioner of Police and Chief Executive Officers of Western Sydney Area Health Service and DAL.

There is currently no mechanism for ensuring magistrates notify the responsible person of extension orders made, and according to FPIT and the Courts Statistics Unit, the current practice is that magistrates do not notify anyone. There may be scope for automatic notification of extension orders through the new CourtLink system, which aims to replace all current paper flow between courts and agencies with automatic electronic notifications.¹²⁷⁹

The purpose of the notification requirement is presumably to ensure that the laboratory knows not to destroy forensic material in circumstances when an extension has been granted. However, a magistrate’s failure to notify the responsible person of an extension order will not necessarily result in the forensic material being destroyed, as DAL does not destroy forensic material unless it receives a destruction request from FPIT.

In our view, the more significant issue is FPIT’s capacity to monitor investigations where forensic material has been taken to ensure that where proceedings have not commenced within 12 months, the material is either destroyed, or investigating police are aware they need to apply for an extension order. We found that this does not always occur, and as a result, forensic material is being retained unlawfully.

Recommendation 100

The Attorney General implement a system to ensure that magistrates notify the responsible person of any extension given under section 88, as required by the *Crimes (Forensic Procedures) Act 2000*.

NSW Police supports this recommendation.¹²⁸⁰ The Attorney General's Department advised it will endeavour to use CourtLink, or other appropriate means, to ensure magistrates comply with their obligation to notify the responsible person of extensions. It also commented that:

*The obligation to ensure destruction of samples under the Act generally falls upon police officers and there appear to be few additional policy considerations raised by applications for extension of the 12 month destruction period. Therefore, consideration might be given to amending section 88(8) of the Act to require that the applicant under section 88(5), not the Magistrate, has the obligation to inform the person in charge of the DNA database of any extension granted.*¹²⁸¹

14.2.12. Retention orders

Section 81 of the Act provides that police or the DPP may apply for an order that forensic material taken from a volunteer be retained after the volunteer withdraws consent to its retention. These orders are available only in very limited circumstances – where police are investigating a serious offence, and material reasonably believed to be from the offender has been found at the crime scene, on the victim, on the volunteer, or on an object or person reasonably believed to have been associated with the commission of the offence. There must be reasonable grounds to believe that information obtained from analysis of the forensic material is likely to produce evidence of probative value, and retention of the forensic material taken from the volunteer must be justified in all the circumstances. The order may specify the period for which the forensic material may be retained.

Section 81 as currently drafted is very confusing. The legislative heading reads, “Retention of forensic material by order of a magistrate after parent or guardian of child or incapable person withdraws consent.” However, there is no reference in the section to the withdrawal of consent by a parent or guardian, it simply refers to “a volunteer who withdraws consent.” While the heading suggests that the retention orders are available only where a parent or guardian withdraws consent, the text of section 81 could apply to any volunteer who withdraws consent, including, for example, an adult volunteer who has subsequently become a suspect, who wishes his or her forensic material to be destroyed. We also note that section 80 provides specifically for circumstances where a parent or guardian refuses or withdraws consent.

Under the *Interpretation Act 1987*, the heading of a provision does not form part of the Act, but it may be considered to help determine the meaning of the provision if the provision is ambiguous, or if the ordinary meaning conveyed by the text of the provision leads to a manifestly absurd or unreasonable result.¹²⁸² In this case, the text of section 81 is neither ambiguous nor absurd – it simply does not accord with the heading of the provision. In addition, it makes sense that section 81 does apply to all volunteers, and on one reading the heading appears to be a drafting error.

We are not aware of any applications for retention orders under section 81, and cannot comment any further on the issue. However, we expect it would be difficult for all involved – applicants, volunteers and magistrates – to determine whether the provision applies to all volunteers who withdraw consent, or only to volunteers whose parent or guardian has withdrawn consent. We recommend this be clarified.

Recommendation 101

That section 81 of the *Crimes (Forensic Procedures) Act 2000* be clarified to make clear its application to volunteers including whether it only applies to volunteers whose parent or guardian has withdrawn consent.

The Attorney General's Department commented that the recommendation appears sensible, as the policy behind section 81 as currently drafted is not clear.¹²⁸³ NSW Police also supports the recommendation.¹²⁸⁴

14.3. Retaining genetic material from people whose profile is on the database

A separate issue is whether DAL should retain DNA samples from people whose profiles are kept on the database. When a profile is derived, the forensic material is retained, unless FPIT instructs DAL to destroy it. For most people who provide a DNA sample, this means the person's actual DNA will be retained by DAL indefinitely.

A DNA sample contains far more information than a DNA profile. It contains genetic information, and in future may be further analysed to ascertain information about a person's appearance, ethnicity and predisposition to inherited illness. By contrast, a DNA profile is of limited use, and can really only be used to identify a person's gender or relatedness to other people whose DNA profiles have been obtained. For these reasons, our view is that DNA samples should not be retained indefinitely, particularly if the person provided the sample against his or her will, unless there is good reason for doing so.

We asked DAL why person samples are retained, once the person's DNA profile has been put on the database. DAL advised this is for two reasons. First, every time a cold link is made, DAL goes back to the original person sample to check that the correct profile has been derived. DAL commented that "although a discrepancy has never been obtained if this did occur there would be a lack of faith in the system if the wrong person was arrested because the sample has been confused with another."¹²⁸⁵

Second, DAL currently uses the Profiler Plus system of DNA profiling, and examines 9 loci on the DNA. The more loci examined, the greater the likelihood that samples with the same profile came from the same person. If in the future DAL moved a more discriminating system, more detailed DNA profiles could be derived for all the people currently on the DNA database, without having to take new samples from them.¹²⁸⁶ Further, the legislation currently limits the purposes for which DNA samples can be used.

NSW Police advanced the same arguments – that future advances in DNA technology, and cheaper analysis, may allow the DNA samples stored at DAL to be re-analysed, so more discriminatory profiles can be derived.¹²⁸⁷

We agree that in these circumstances, retaining the actual DNA samples from suspects (other than those that are regulated to be destroyed) and serious indictable offenders is warranted. However, we are not aware of any good reason for retaining DNA samples taken from volunteers, once the person's profile has been put on the database and the case for which it was provided has been finalised. Our view remains that these samples should be destroyed.

Recommendation 102

The responsible person consider whether sample material obtained from volunteers should be retained once a profile has been loaded onto the database and the relevant proceedings have been finalised.

NSW Police supports this recommendation.¹²⁸⁸

14.4. Destroying forensic material other than DNA samples

The provisions requiring material obtained through a forensic procedure to be destroyed also apply to prints, photographs, casts or impressions and other samples taken from a person's body.¹²⁸⁹ However, we found there are no clear procedures in place to monitor the destruction of forensic material other than DNA samples.

We reiterate that full and accurate records of all forensic procedures need to be maintained on COPS, and that NSW Police needs to monitor the outcome of every matter where material is obtained through a forensic procedure, to ensure it is destroyed where required.

14.4.1. Destruction of forensic procedure prints

Section 87A of the Act provides that where finger or hand prints have been voluntarily provided for elimination purposes, they must be destroyed or returned to the volunteer as soon as practicable after they have been used to exclude the person from the investigation.¹²⁹⁰ The Fingerprint Technology and Support Section of NSW Police advised that it does not destroy prints, it returns them to the investigating officer by registered mail.¹²⁹¹ It appears therefore that

it is the responsibility of individual investigating officers to ensure prints taken as forensic procedures are destroyed where required. However, we did not find any systems in place during our audit of local area commands to ensure forensic procedure prints were destroyed. It appears that in order to comply with section 87A, systems need to be implemented in local area commands to ensure the destruction requirements relating to prints taken from volunteers for elimination purposes are met.

Recommendation 103

NSW Police implement a system to ensure that prints taken from volunteers for elimination purposes are either destroyed or returned to the volunteer as soon as practicable after they have been used to exclude the person from the investigation, in accordance with section 87A of the *Crimes (Forensic Procedures) Act 2000*.

NSW Police supports this recommendation.¹²⁹²

Endnotes

¹²²⁶ *Crimes (Forensic Procedures) Act 2000* s 3(1).

¹²²⁷ Discussion during meeting at DAL, 5 October 2005 and letter from NSW Police Forensic Services Group, 8 November 2005.

¹²²⁸ *Crimes (Forensic Procedures) Act 2000* s 3(5).

¹²²⁹ *Crimes (Forensic Procedures) Act 2000* s 94(4).

¹²³⁰ *Crimes (Forensic Procedures) Act 2000* s 3(5).

¹²³¹ *Crimes (Forensic Procedures) Act 2000* s 94(2) and (4).

¹²³² *Crimes (Forensic Procedures) Act 2000* s 94(4).

¹²³³ Written advice from NSW Police dated 22 June 2005.

¹²³⁴ See discussion at 6.1.4.

¹²³⁵ Information obtained through Ombudsman review of COPS records and advice from DAL by email, 17 October 2005.

¹²³⁶ Written advice from NSW Police dated 22 June 2005.

¹²³⁷ *Crimes (Forensic Procedures) Act 2000* s 94(2) and (4).

¹²³⁸ *Crimes (Forensic Procedures) Act 2000* s 88(4).

¹²³⁹ *Crimes (Forensic Procedures) Act 2000* s 86.

¹²⁴⁰ *Crimes (Forensic Procedures) Act 2000* s 89.

¹²⁴¹ *Crimes (Forensic Procedures) Act 2000* s 88(2) and (3). If a warrant has been issued, the forensic material must be destroyed as soon as practicable after the warrant lapses.

¹²⁴² Discussion at meeting with NSW Police representatives, 24 October 2005.

¹²⁴³ Advice from Project Manager, eServices and Interfaces for the CourtLink Project on 18 August 2005.

¹²⁴⁴ Information obtained through Ombudsman review of COPS records.

¹²⁴⁵ NSW Police response to Ombudsman draft report, 2 June 2006.

¹²⁴⁶ NSW Police response to Ombudsman draft report, 2 June 2006.

¹²⁴⁷ Attorney General's Department response to Ombudsman draft report, 5 May 2006.

¹²⁴⁸ NSW Police further response to Ombudsman draft report, 28 July 2006.

¹²⁴⁹ DAL response to Ombudsman investigation notice, 24 February 2005.

¹²⁵⁰ Commonwealth of Australia, "Report of Independent Review of Part 1D of the *Crimes Act 1914* – Forensic Procedures", March 2003 at paragraph 3.160 and Recommendation 6(a)(ii).

¹²⁵¹ NSW Health response to Ombudsman draft report, 7 June 2006.

¹²⁵² Advice from DAL at meeting, 5 October 2005.

¹²⁵³ *State Records Act 1998* s 12(1).

¹²⁵⁴ Advice received from NSW Police 22 June 2005.

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- ¹²⁵⁵ Based on DAL's advice in its response to Ombudsman investigation notice, 24 February 2005, that during the review period it loaded 831 DNA profiles from suspects onto the DNA database.
- ¹²⁵⁶ Our audit included 14 samples which police records indicated were volunteers, but of these DAL had 8 recorded as volunteers, 5 as victims and 1 could not be identified.
- ¹²⁵⁷ Based on advice received from NSW Police 22 June 2005 and DAL's advice in its response to Ombudsman investigation notice, 24 February 2005, that during the review period it loaded 8,699 DNA profiles from suspects onto the DNA database.
- ¹²⁵⁸ The others had been destroyed, converted into convicted offender profiles, were not DNA samples from suspects or could not be identified by DAL.
- ¹²⁵⁹ We measured the 12 months from the date DAL provided the information about the sample status, 24 February 2005.
- ¹²⁶⁰ Email from FPIT, 12 August 2005.
- ¹²⁶¹ Email from FPIT, 12 August 2005.
- ¹²⁶² Advice from DAL, 11 November 2005.
- ¹²⁶³ NSW Police response to Ombudsman draft report, 2 June 2006.
- ¹²⁶⁴ NSW Health response to Ombudsman draft report, 7 June 2006.
- ¹²⁶⁵ *Crimes (Forensic Procedures) Act 2000* s 83.
- ¹²⁶⁶ *Crimes (Forensic Procedures) Act 2000* s 94(1).
- ¹²⁶⁷ *Crimes (Forensic Procedures) Act 2000* s 12.
- ¹²⁶⁸ NSW Police submission, dated 16 February 2005.
- ¹²⁶⁹ NSW Police response to Ombudsman draft report, 2 June 2006.
- ¹²⁷⁰ NSW Health response to Ombudsman draft report, 7 June 2006.
- ¹²⁷¹ NSW Ombudsman, "The Forensic DNA Sampling of Serious Indictable Offenders under Part 7 of the *Crimes (Forensic Procedures) Act 2000*" (August 2004), Recommendations 20 and 25.
- ¹²⁷² *Crimes (Forensic Procedures) Act 2000* s 88(4).
- ¹²⁷³ NSW Police response to Ombudsman draft report, 2 June 2006.
- ¹²⁷⁴ Attorney General's Department response to Ombudsman draft report, 5 May 2006.
- ¹²⁷⁵ *Crimes (Forensic Procedures Act) 2000* s 88(5) to (8).
- ¹²⁷⁶ Letter from DPP, 24 March 2005.
- ¹²⁷⁷ Advice from Assist Manager, Court Statistics Unit, NSW Attorney General's Department on 25 August 2005.
- ¹²⁷⁸ *Crimes (Forensic Procedures) Act 2000* s 88(8).
- ¹²⁷⁹ Advice from Project Manager, eServices and Interfaces for the CourtLink Project, on 18 August 2005.
- ¹²⁸⁰ NSW Police response to Ombudsman draft report, 2 June 2006.
- ¹²⁸¹ Attorney General's Department response to Ombudsman draft report, 5 May 2006.
- ¹²⁸² *Interpretation Act 1987* s 34 and 35.
- ¹²⁸³ Attorney General's Department response to Ombudsman draft report, 5 May 2006.
- ¹²⁸⁴ NSW Police response to Ombudsman draft report, 2 June 2006.
- ¹²⁸⁵ DAL comments on Ombudsman statement of provisional findings, 17 October 2005.
- ¹²⁸⁶ Discussion at meeting, 5 October 2005.
- ¹²⁸⁷ Letter from NSW Police Forensic Services Group, 8 November 2005.
- ¹²⁸⁸ NSW Police response to Ombudsman draft report, 2 June 2006.
- ¹²⁸⁹ *Crimes (Forensic Procedures) Act 2000* s 3(1).
- ¹²⁹⁰ *Crimes (Forensic Procedures) Act 2000* s 87A.
- ¹²⁹¹ Written advice from Criminal Identification Specialist Brach, NSW Police dated 16 August 2005
- ¹²⁹² NSW Police response to Ombudsman draft report, 2 June 2006.

Chapter 15. Complaint and misconduct issues

This chapter discusses the complaints and inquiries we received about forensic procedures during the review period.

15.1. Inquiries

During the review period, we received 78 telephone inquiries relating to forensic procedures conducted on suspects and volunteers. Of these, 22 were general inquiries seeking information about the operation of the Act. Others raised specific issues relating to the functioning of the Act, including:

- 5 inquiries raising objections to having to provide a DNA sample
- 12 inquiries about the way DNA samples were taken, including one about the force used to take the sample, and one about police threatening to use force
- 10 inquiries about delays, including three about the length of time it took police to collect a DNA sample or exhibit for analysis, and seven about the length of time taken to obtain DNA analysis results
- 4 inquiries about the failure to take DNA samples, including three made by victims and one by a suspect
- 3 inquiries about the use of DNA evidence in court, including one about a DNA expert giving evidence that the DNA analysis was inconclusive, and two about being convicted on DNA evidence
- 2 inquiries in which an inmate suspected of a further offence disputed being at large when the offence was committed
- 1 inquiry about police keeping photographs of a suspect taken without proper authority
- 3 inquiries about police failing to destroy DNA samples, and
- 16 inquiries about police failing to return exhibits taken for DNA analysis.

Telephone inquiries are generally resolved by providing information or advice to the person making the inquiry.

We note that a significant number of inquiries related to police failing to return exhibits taken for DNA analysis, in particular shoes and other clothes. It is important that police inform suspects of whether items taken for DNA analysis will ever be returned, and if so when this is likely to be. This is especially important given the length of time it may take for exhibits to be examined by DAL, as discussed earlier in this report.

15.2. Complaints

NSW Police is the primary oversight agency for complaints about police conduct. The Ombudsman is notified of serious complaints, determines whether they are investigated, and reviews the police investigation and any action taken to address any specific issues that arise. Moreover, the Ombudsman can make recommendations, directly undertake investigations into police conduct or help to resolve and conciliate complaints about police officers. The Ombudsman receives complaints both from members of the public as well as complaints from police officers.

We identified 23 written complaints relating to forensic procedures conducted on suspects and volunteers made since the Act commenced:

- 8 complaints about the way DNA samples were taken, including one about police using unreasonable force to take the sample
- 3 complaints alleging that police had lost or destroyed exhibits or DNA samples
- 2 complaints by suspects about police failing to take a DNA sample
- 2 complaints about wrongful convictions (one because police misread a DNA analysis report; and one because police erroneously merged the records of two people)
- 2 about police failing to return exhibits taken for DNA analysis
- 2 complaints alleging tampering with DNA evidence

- a complaint about the incorrect receipting of a DNA profile
- a complaint relating to the failure to follow up DNA results
- a complaint alleging harassment by police, and
- a complaint in which only general information was provided.

15.2.1. Action taken by police

Of the 23 complaints about forensic procedures conducted on suspects and volunteers that were either made directly to the police or referred to them by the Ombudsman, 15 were investigated, four were informally resolved and two were declined after inquiries.¹²⁹³

Adverse findings were made against police officers in a number of the complaints which were investigated. The officers involved generally received advice and guidance about their conduct. Further training was also conducted, in some cases for individual officers and in some cases for the command as a whole. Advice, guidance and training were also used in some complaint matters where no adverse findings were made. Changes to NSW Police policies or procedures were made as a result of two complaint matters.

15.2.2. Ombudsman oversight of police investigations

During the review period, we oversaw the police investigation of 15 complaints relating to forensic procedures conducted on suspects and volunteers. In nine of these, we were satisfied with the police investigation and required no further action. In two matters, we were satisfied with the police investigation, but required some further advice. Two other complaints (numbers 2 and 6) were still under investigation at the time of writing.

In the remaining two complaints (numbers 1 and 7), we were not satisfied with either the adequacy of the police investigation, or the timeliness of the investigation.

We also reviewed complaints about forensic procedures to see whether NSW Police has dealt with them in a timely manner. We found that most of them were. We raised concerns about delays in only two matters, one which took five months to finalise and one which took seven months.

15.2.3. Action taken by Ombudsman

Complaints can be made to NSW Police or to the Ombudsman. Of the 23 complaints about forensic procedures, 13 were made directly to the Ombudsman. Of these:

- 11 were referred to police, eight were investigated by police, whilst three resulted in informal resolution.
- 2 were declined at the outset. The complainant requested a review of the original investigation of the complaint for one of these matters, but this request was also declined.

The Ombudsman also has the power to monitor police complaint investigations. This is often appropriate where a complainant is particularly vulnerable or it is critical that the effectiveness of the investigation is not compromised. The Ombudsman usually monitors an investigation by attending police interviews conducted with the complainant, the police officer who is the subject of the complaint, and other key witnesses.

We monitored the investigation of four complaints relating to forensic procedures – one about the illegal taking of a blood sample for DNA testing, one about the misreading of a DAL report, one where police erroneously linking the records of two people resulted in one being wrongfully convicted, and one about the alleged use of unreasonable force during the taking of a DNA sample. The main reason these cases were monitored was the significant public interest in the use of DNA evidence in the criminal justice system.

15.3. Issues raised by complaints

We received complaints about many different aspects of forensic procedures. However, some broad themes emerged from our analysis of complaints – many related to poor knowledge of the Act or SOPs by individual officers, or inadequate record keeping. Others raised more particular issues, such as police failing to read a DNA analysis report correctly or failing to adequately pursue the results of a forensic procedure.

In some cases, the conduct of police had quite serious consequences, including forensic procedures being conducted without proper authority or with unnecessary force. In at least two cases, the police conduct resulted in wrongful convictions.

15.3.1. Wrongful conviction after police misread DNA analysis report

Complaint 01

In October 2001, police charged a man with a number of break, enter and steal offences based on fingerprint evidence. They also took a DNA suspect sample to establish any further offences committed by the man.

The DNA report from DAL stated on the first page “a preliminary or ‘screening’ test for blood was positive on the swab.” The second page of the report stated that the DNA recovered from the swab could not have originated from the accused.

However, when police officer A read the report, he appears to have only read the first page of the report. He interpreted the first page to mean that the accused was positively matched with the crime scene, when it was actually confirming that the substance found was blood.

Officer A then updated COPS to reflect that the suspect had been positively linked to the crime scene, and recorded that the suspect “has been identified by DNA.”

In August 2002, police officer B received notification from FPIT that the sample had been matched to several other crime scenes via ‘cold links.’ Officer B checked on COPS and found the man was wanted for the offence in which he had been incorrectly identified via DNA sampling.

The man was subsequently charged with a number of break, enter and steal offences, including the outstanding incident which DAL had advised was not linked to the suspect. At the time of charging, the suspect made the comment “I honestly don’t remember that one, if I left my blood there then I must have done it.” However, he pleaded guilty to all charges and received a suspended sentence, based on his participation in the Drug Court Program.

In early November 2002, police officer A received a DNA notification from FPIT that the DNA obtained from the first crime scene had been linked to another suspect. On receiving this advice, police officer A immediately organised for the conviction to be removed from the convicted man’s criminal history. He prepared a report for the local area commander and senior prosecutor explaining his error, and identifying himself as the person who had misread the report. However, when the man appeared before the Drug Court in February 2003 due to a breach of the Drug Court program, it appears no steps were taken to raise this. The man was subsequently sentenced to five years and six months imprisonment, due to the breach.

In July 2003, NSW Police made an application for annulment of the conviction and sentence. In August 2003 the matter was annulled and the charge relating to the break and enter was withdrawn on the grounds that there was a ‘misreading of the DNA report.’ However, as the man’s overall sentence was unaltered, he remained in custody.

NSW Police investigated the matter after the man made a complaint to the Ombudsman. The police investigator identified another officer (officer C) as the one who was responsible for misreading the DNA analysis report and advised the man of the outcome. The man told the Ombudsman that he thought the police investigator had identified the wrong officer as being responsible for the error, as officer A had told him that he was responsible while charging him with other offences.

The Ombudsman spoke to the detective who was reviewing the original investigation and he agreed to interview officer A. Prior to the interview, the Detective found the report submitted by officer A requesting that the man’s conviction be annulled on the basis that he had misread the DNA analysis report. It appeared that officer A’s report was available to the original investigating officer, but was overlooked.

The Ombudsman found that the police investigation was deficient due to the lack of thoroughness of the review. In particular:

- In the original investigation, an important report was overlooked. This document contained a request for the conviction concerned to be annulled on the basis that the officer identified by the complainant (officer A) had misread the DNA report.
- Both the investigating officer and the officer who reviewed the investigation failed to identify the subject officer prior to the intervention of the Ombudsman.
- The investigation failed to consider whether a police officer should have gone back to the original DAL report at the time of charging the complainant, rather than simply relying on the notation on COPS.
- Police failed to take a second sample from the man, after he was 'cold linked' to a number of other crime scenes, although it is police policy to do so. The police investigator failed to address this issue.

It is of particular concern that this matter only came to light because DAL found another suspect's DNA profile matched evidence from the crime scene in question. If no such link had been made, it is unlikely the matter would ever have been discovered. This matter demonstrates the need for police to be especially vigilant where DNA evidence is concerned, particularly in cases where there is little other evidence available or where the suspect is vulnerable for some reason.

15.3.2. Wrongful conviction after police merged the records of two different people

Complaint 02

In 2004, police arrested and charged a man for shoplifting, self administering a prohibited drug and a break, enter and steal offence, based on a link between a crime scene and a profile already on the DNA database. However, the wrong person was charged with the offences, as the forensic procedure was on the wrong person's records on the police computer system. By the time the mistake was discovered, the person had been convicted, and was serving a custodial sentence. This matter is discussed in more detail at 11.2.1.

15.3.3. Failure to pursue results of forensic procedures

Complaint 03

Police were called to the scene of a serious assault, where witnesses reported having seen two people repeatedly kicking another person in the head. Police arrested two suspects, and took swabs from their shoes, which they sent to DAL for analysis.

Prior to the matter going to court, the prosecutor identified several flaws in the brief of evidence. In particular, police had failed to obtain a DNA sample from the victim, which was necessary for comparison with other forensic evidence, in particular the biological material taken from the suspects' shoes.

The prosecutor called the laboratory and was advised that blood with the same DNA profile had been found on the swabs taken from the shoes of both accused. DAL staff had left several messages with the police officer who was responsible for the matter, asking her to obtain a DNA sample from the victim and send it to the lab. The police officer said she never received these messages.

The matter went to court and the police prosecutor sought an adjournment so a DNA sample could be obtained from the victim, as this evidence was crucial to the crown case. The adjournment was granted after the prosecution agreed to pay certain costs for the defence. Police subsequently obtained a buccal swab from

the victim. DAL obtained the victim's DNA profile and it was found to be the same as the DNA profile derived from the shoe swabs.

In April 2004, the first accused pleaded 'guilty' to the offence of assault occasioning actual bodily harm. The second man was found guilty by the court.

The prosecutor made a complaint about the matter, pointing out that the prosecution may have failed without the DNA evidence, given that there were no independent witnesses willing to give evidence.

NSW Police investigated the matter. The officer was interviewed about her failure to pursue the DNA analysis results, and admitted that she "completely forgot about it." The officer was given advice and guidance about the need to follow up forensic analysis results, and the need to ensure all investigations are conducted appropriately. Other officers at the command were reminded of the need to follow up evidence, and the command also organised a prosecutor to give a training lecture on the issue.

15.3.4. Poor knowledge of legislative obligations or failure to follow SOPs

The following complaints show how police officers with a poor knowledge of the Act or SOPs have failed to comply with their legislative obligations.

Complaint 04

A man was in custody after being arrested for breaching an AVO. While in custody, police interviewed him in relation to an unrelated armed robbery, and asked him to provide a DNA sample. The man consented and provided the sample.

The man subsequently made a complaint to the Ombudsman about the way he was treated by police. We referred the complaint to NSW Police for investigation.

The police investigation covered a number of issues, including the fact that money taken from the man remained unaccounted for, police interviewed the suspect while he was intoxicated, and records relating to an exhibit appeared to have been altered. The investigator made adverse findings about the failure to record and account for the money taken from the suspect.

We were concerned about a number of issues raised by the complaint, which had not been addressed in the police investigation. In particular:

- Police took the man's DNA sample when he appeared to be intoxicated, which suggested he was not capable of consenting to the procedure. The investigator did not take into account the notes made on the man's custody record which indicated he "was under the influence of something, quietened down after a while and went to sleep" and that he appeared "irrational".
- Police threatened the man that if he did not consent to providing a DNA sample they would take it by force.
- Police misled the man by telling him his DNA profile would only be used in relation to the armed robbery matter, when it would in fact be placed on the 'suspects' index of the DNA database, and would be matched against all the DNA samples from unsolved crime scenes on the database. Section 13(k) of the Act requires police to tell suspects that forensic material taken during the procedure would be used to derive a DNA profile, which may be placed on the DNA database. Police are also required to explain the rules that apply to the disclosure and use of the person's DNA profile and identifying information. There was no record of police having provided the suspect with this information.
- Police did not allow sufficient time for the man to read the information sheet about the proposed procedure.
- The man did not give informed consent to the procedure as he was not provided with the correct information or given enough time to read the information he was given.

- The man was not cautioned prior to the collection of the sample, contrary to section 46 of the Act.
- The DNA sample was not submitted to DAL within 72 hours, as required by the SOPs. It was not received at DAL until 19 days after it was taken.

We requested that police advise us about the court outcome, including any comments or findings of the court in respect of the police investigation or collection of the DNA sample. Police subsequently advised that the judge directed the jury to find the accused not guilty, as records of time for the movement of a crime scene exhibit had been altered. However, the judge did not make any adverse comments about police conduct and the collection of the DNA sample.

We also asked police whether any management response would be taken in relation to the officer concerned. Police subsequently advised that the officer was counselled about the matter.

Complaint 05

Shortly after the Act commenced, police charged an 18 year old man with a property offence. They took him to the emergency department of a large metropolitan hospital, and asked medical staff to take a blood sample from the man so his DNA profile could be compared to blood found at the crime scene. The man did not consent to the procedure.

Police told a junior doctor that the man was legally required to provide the blood sample and that the doctor was legally required to take it. The man continued to resist and hospital security had to be called to help restrain him. The blood sample was ultimately taken, against the man's will.

A senior doctor at the hospital subsequently made a complaint about the matter.

NSW Police investigated the complaint and found that both officers involved were ignorant of the provisions of the Act, but believed the new legislation permitted them to take blood samples for DNA analysis in these circumstances. They had not yet been trained in forensic procedures. They did consult the custody manager who was on duty at the police station at the time, but he was also confused about whether the legislation had come into effect yet, and did not seek advice about whether it had.

We note that police may ask a suspect to provide a DNA sample by buccal swab. If the suspect does not consent to the procedure, a senior police officer may, in certain circumstances, order that a hair sample be taken. A blood sample is an "intimate forensic procedure" and can only be conducted, in the absence of consent, by order of a court.

Further, police cannot compel a medical practitioner to conduct a forensic procedure. The Act specifically states that nothing in the Act requires a medical practitioner or other expert to carry out a forensic procedure.¹²⁹⁴

Police investigated the complaint and made adverse findings against the officers for taking the young man to the hospital to have a blood sample taken without having obtained a court order, instructing a junior doctor to take the blood sample, and for physically restraining the young man to enable the doctor to take a blood sample against his will.

As a result, both officers were required to attend a training day to learn about their powers and responsibilities under the Act. The custody manager also completed the training. The officers were given advice and guidance about their failure to comply with the Act. An internal memo was also circulated in the local area command, reminding police officers of their responsibilities under the Act.

NSW Police also published a warning in the Police Service Weekly about the incident, emphasising its seriousness.

Finally, as the DNA sample had been taken without proper authority, NSW Police ordered that it be destroyed.

The above complaint outlines an incident which occurred within a month of the Act coming into force. While many officers have now undergone forensic procedures training, and have a better understanding of the Act, we dealt with a number of complaints during the review period which indicated that some officers still have a poor knowledge of some of their legislative obligations under the Act.

Complaint 06

Police arrested a suspect in relation to the cultivation of a large cannabis crop. The suspect declined to be interviewed or provide a DNA sample. Police decided against ordering the suspect to provide a DNA sample as the police informant was not present at the time. The suspect was released without charge.

Several weeks later police obtained a court order authorising them to take a buccal swab from the suspect. Police arrested the suspect at the local court and took him to the police station. The testing officer told the suspect, "If you're not prepared to open your mouth, we're physically going to have to force it open. Now I don't want to have to go through that. It's a matter for you. We'll be taking the [buccal swab]."

The suspect replied, "Well you'll have to do it 'cause like I said, I'm not going to have anything to do with it... I'm not going to do anything to help you. But I'm not going to do anything to hurt you either. But there's no way I'm going to open my mouth and put that thing in and do anything... I'm prepared to resist."

Two police officers then took the sample by force.

The suspect made a complaint, alleging police used excessive force to obtain the buccal swab, by pulling back his nose and crushing his throat in order to force him to open his mouth. The police officer who took the sample denied using excessive force, stating, "I acted in an appropriate and professional manner, using the least amount of force required to obtain compliance... I used a pistol grip with my hand on his chin and placed the palm of my hand against his forehead using forefinger and thumb to block his nasal airway in a similar fashion adopted when conducting Expired Air Resuscitation."

We reviewed the video recording of the forensic procedure. We were unable to see exactly what occurred, as the suspect was obscured by the police officers who were standing over him. However, the officers were polite throughout the procedure and did not appear to have used more force than was necessary to take the buccal swab.

Although the officers did not appear to have used excessive force, we remained concerned about the fact that police had taken the suspect's DNA by buccal swab rather than hair sample, given that force was required. Both the Act and the NSW Police forensic procedures SOPs clearly intend that buccal swabs, being self-administered, are only for use in circumstances where the person providing the sample consents to the procedure.

The local area commander reviewed the matter and agreed that the officers who took the DNA sample should have taken a hair sample and not a buccal swab. He advised that police officers in that command would be given further training, to improve their awareness of forensic procedures.

15.3.5. Failure to maintain proper records

Several complaints we received highlighted poor record keeping.

Complaint 04 (continued)

Complaint number 4, outlined above, also involved poor record keeping. A police officer took a makeshift 'balaclava' to DAL for analysis in relation to an armed robbery. At the time of the movement of the exhibit, two Detectives wrote the date in the 'Date/Time out' column of the Specimen/Item Register, but neither wrote the time in the column.

In February 2002, the brief of evidence was served on the accused. At that time, the Specimen/item Register appeared without the time in the correct column. Some weeks later, additional documents, including a further copy of the Specimen/item Register were served on the accused. On perusing those documents, the complainant noted that a time, which appeared to be '8.00am,' had been added to the Date/time out' column.

The subsequent police investigation showed that the 'time' record (8.00am) had been added after the exhibit had been returned from DAL to the local area command.

Neither detective could recall adding the time to the exhibit sheet.

The investigator was unable to establish who made the entry and as such could make no adverse finding against any police officer. The investigator noted that the issue highlighted the need for supervisors to ensure accountable records are completed accurately at the time, and audited on a regular basis. The local area commander advised that police had been reminded about the need to keep accurate and accountable records, and that supervisors' daily checklists had been updated to include checking of accountable records.

The Ombudsman found that given that the exhibit was properly sealed, the issue of adding the time on the sheet did not compromise the continuity of the sample, particularly as the date was correctly recorded.

However, when the matter went to court, the case was dismissed. It was found that there was a lack of continuity of the DNA evidence because of the records of time being altered. The court did not make any adverse comments about the exhibits or the police investigation.

Complaint 07

Police sent a blood stained piece of paper to DAL for DNA analysis, in relation to a break and enter offence. However, DAL returned the exhibit unexamined, as the seal on the exhibit bag had been broken, indicating the exhibit may have been tampered with.

Police investigated the matter and found no evidence that the exhibit had been tampered with. One of the officers involved stated that the other officer had opened the exhibit bag to ensure the exhibit was inside, as the exhibit bag had been sealed by Forensic Services Officers in his absence some months earlier. The exhibit was about to be taken to DAL and as the case officer, he wanted to ensure it was still contained within the bag.

Furthermore, a senior forensic biologist at DAL subsequently advised that the exhibit should not have been returned, but that in the circumstances DAL staff should have resealed the bag themselves. He pointed out that the correct procedure at DAL would have been that the escorting officers be asked to reseal the bag on the spot and then accept the exhibit.

However, in the process of the investigation, the investigator identified some other issues relating to the failure of an officer to reseal a forensic security bag correctly, and the failure of two officers to record the movement of an exhibit.

In recognition that the incident may have revealed a wider failure on the part of police to recognise correctly sealed biological exhibits, the investigator supported a proposal that a presentation on the subject be given at the next command training day to ensure exhibit integrity, and to prevent contamination.

The officer who was present when the bag was opened, who did not record the access in the exhibit book, was reminded of her responsibilities in exhibit handling. No management action was taken in relation to the officer who had failed to reseal the exhibit bag or record its movement, as he was on long term sick leave and was not expected to return to duty.

Complaint 08

A police audit of exhibits found that 44 exhibits which were recorded as being at the police station were unable to be located. The exhibits were not of any monetary value. The investigator found no evidence to suggest that police acted incorrectly or corruptly, but identified several problems with the way exhibits are recorded, retained and moved.

Some of the exhibits had been sent to DAL for DNA analysis. It appeared that exhibits of this kind, relating to the one offender, are often sealed by DAL in a single paper bag marked, “do not open – contaminated – destroy.” It appeared that multiple exhibits returned to the command from DAL in this manner may have been unknowingly destroyed, and therefore not recorded as having been destroyed.

The command addressed this by introducing new SOPs, which clarified that the officer collecting exhibits from DAL should record when multiple exhibits are being placed by DAL into the one ‘contaminated’ bag. The command also held training on the issue, and increased supervision of staff by custody managers and exhibit staff.

15.3.6. Failure to keep DNA samples secure

We also received complaints about police officers failing to keep DNA samples secure.

Complaint 09

Police in a country town took a DNA sample from a juvenile suspect in relation to a sexual assault investigation, by order of a court. The sample was recorded in the DNA register as well as an exhibit book at the police station and placed in a cardboard box within the exhibit room. Arrangements were made on that day for TNT Failsafe couriers to collect the sample on the following day and transport it to DAL.

It appears the DNA sample was taken from the refrigerator in the police station and left on a counter in the exhibit room, for collection by a courier. When the courier arrived at the police station to collect the sample, it could not be found. Furthermore, a search of the police station failed to locate the DNA sample.

A police officer completed an Application for Repeated Forensic Procedure to be taken from the suspect on the grounds that the first sample “...was entered into the Exh. [exhibit] Book and placed in a Fail Safe Delivery bag and forwarded to D.A.L ... There is no evidence of that sample arriving at D.A.L.”

The court rejected this second application on the basis that according to section 27 of the Act, the original sample was neither insufficient for analysis nor contaminated but had simply been lost whilst being transported to DAL. The suspect did however plead guilty to the charge of sexual assault, and was imprisoned. It is expected that under normal Corrective Services procedures further DNA samples will be taken from him.

Furthermore, the DPP suggested that the Act be amended to permit the making of a second order where the original sample was for any reason not available for analysis.¹²⁹⁵

The police investigator identified a number of systems failures, including:

- DNA samples were kept in a box in the exhibit room as opposed to a lockable refrigerator, as required by SOPs

- the supervising sergeant did not take possession of the exhibit and ensure that the exhibit was stored in the exhibit room
- control and accountability of exhibit keys was ‘virtually non-existent’
- the supervisor’s keys were all on the one key ring, which meant that the officer requiring the key to the gun room was then in effect in possession of the exhibit room key
- checking of exhibits on a regular basis did not occur, and
- recording of TNT Failsafe security bags was not recorded on DNA Forensic Bag Register or in the exhibit book for cross referencing.

These findings resulted in new SOPs being developed for the handling of DNA exhibits in that particular command; a lockable refrigerator being purchased; and key systems being modified so as to divide what used to be the combined responsibilities of a small number of supervisory staff.

Complaint 10

When the Act came into force, NSW Police took DNA samples from as many eligible convicted offenders as possible, in order to build a substantial archive of DNA profiles on the DNA database. NSW Police created a number of “inmate testing teams,” of three or four people, to travel to correctional centres in country locations to take DNA samples from those who were eligible. It was police practice to treat the DNA samples as exhibits, which had to be lodged at a local police station until the team returned to Sydney, and the samples could be submitted to DAL for analysis.

We investigated the police management of a complaint that certain officers involved in inmate testing had claimed travel allowances to which they were not entitled. The officers had returned from their DNA sampling trips early, but had claimed allowances for the full time allocated. It appeared the officers had left the DNA samples unsecured in their houses and cars before returning to work some days later.

In addition to the fraud issue, we were concerned about the possible consequences of DNA samples being left unsecured instead of being treated as exhibits. However, the investigation did not reveal any evidence that any of the samples involved had been lost or tampered with. We note that the DNA samples and the accompanying identifying information were in tamper evident bags, and if they had been interfered with in any way DAL would have rejected the sample. Further, we note that convicted offender samples are used for intelligence purposes only, and are not used as evidence in court proceedings. If any of the samples which were left unsecured resulted in links to unsolved crime scenes, police would have to take a further DNA sample from the person, to use as evidence in any subsequent court proceedings.¹²⁹⁶

Endnotes

¹²⁹³ If the Ombudsman disagrees with the NSW Police decision not to investigate a complaint, the Ombudsman can require that it be investigated: *Police Act 1990* s 139(5).

¹²⁹⁴ *Crimes (Forensic Procedures) Act 2000* s 108.

¹²⁹⁵ Correspondence between DPP and Attorney General included in police response to complaint.

¹²⁹⁶ Although this complaint relates to forensic procedures conducted on convicted offenders, rather than suspects or volunteers, we have included it in this report as we only received the NSW Police investigation report in March 2005, well after we finalised our report on the DNA sampling of serious indictable offenders. We have not included this matter in the complaint statistics set out in the first part of this chapter, as they only relate to complaints relating to forensic procedures conducted on suspects and volunteers.

Chapter 16. Future directions for DNA

This chapter looks briefly at some new techniques in DNA analysis, and the impact of advances in technology on police and on public expectations.

16.1. New applications for DNA

The use of DNA in the investigation and prosecution of crime is increasing around the world. In some jurisdictions, including the United Kingdom and United States, DNA is being used in new ways.

16.1.1. DNA low copy number

DNA low copy number involves a profiling technique sensitive enough to extract a DNA profile from just a few cells. The United Kingdom's Forensic Science Service (FSS) explains:

*The main application of this technique is to target areas on items where it is believed that an offender may have transferred DNA through touch, like the residue believed to have come from cells such as skin or sweat, left in a fingerprint. DNA LCN profiles have also been successfully generated from items such as discarded tools, matchsticks, weapon handles and grabbed clothing.*¹²⁹⁷

Low copy number analysis would generally only be considered where other profiling techniques have been exhausted. It takes longer than routine DNA analysis. Given its increased sensitivity, there is also a danger that DNA detected may not in fact be connected to the offence being investigated.

The low copy number technique was used to link Bradley Murdoch to the murder of British backpacker Peter Falconio. The cable ties used to bind the hands of Mr Falconio's girlfriend Joanne Lees were sent to the United Kingdom for analysis by FSS scientists, who were able to obtain a DNA profile using the low copy number technique. Bradley Murdoch was convicted of the murder.¹²⁹⁸

16.1.2. Familial searching

Familial searching is a technique used to identify a suspect where a DNA profile obtained from a known person is similar to, but not the same as, a profile obtained from a crime scene. The similarity suggests that the offender may be a close relative of the person whose DNA profile is known. As the FSS explains:

*Familial searching is based on the way in which DNA is inherited within a particular family group, DNA profiles of individuals who are related to each other being more likely to contain similarities in their DNA profiles than two unrelated individuals.*¹²⁹⁹

Familial searching was used in the United Kingdom in the following cases.

Case Study 90

Three girls were sexually assaulted and murdered in Wales, in 1973. Evidence from the crime scene was preserved, and a DNA profile obtained in 2002. While it did not match any profiles on the DNA database, a number of profiles were considered to be close matches, which suggested a familial relationship to the offender. Having identified relatives, police conducted further inquiries and identified a suspect, who had since died. The suspect's body was exhumed, and a DNA sample taken. The profile obtained from the suspect's body was the same as the profile obtained from the crime scene.¹³⁰⁰

Case Study 91

In 2004, a lorry driver was killed after a brick thrown from a bridge went through his windscreen. A DNA profile obtained from the brick did not match any profiles already on the DNA database. However, a close match suggested that a person already on the database was a relative of the offender. Police used this information to locate a suspect. The suspect provided a DNA sample, and his profile matched the profile obtained from the brick. A police representative commented, 'There is no doubt in my mind that without this groundbreaking technique and the Forensic Science Service, this crime would have remained undetected.'¹³⁰¹

The FSS does not routinely conduct familial searching. It only uses the technique where warranted by the circumstances of the individual case.¹³⁰²

There have also been developments in identifying suspects through the Y Chromosome, which is handed down along the paternal line, and Mitochondrial DNA, which is handed down along the maternal line.¹³⁰³

16.1.3. Predicting an offender's appearance or ethnic background

Another area of development is the use of DNA evidence from crime scenes to predict the offender's physical appearance, or ethnic background. These may be of use to investigators where there is no physical description of the offender.

Ethnic inference testing enables scientists to predict an offender's ethnic background, from DNA left at a crime scene. The FSS explains:

*Gene pools for different populations are believed to have arisen from a single gene pool that originated in Africa and subsequently diverged geographically. Some DNA sequences never left Africa and so a larger gene pool remained. Over time, differences in the sequences arose within isolated populations. The sequences present and their frequencies therefore represent the ancestral gene pools of different races. British Afro-Caribbeans for example, display a greater number of differences and so are more easily discriminated. Using such sequences, the probability of a person's ethnicity can be calculated by comparing their profile with a relevant database of locus sequences and their frequency for different ethnic groups.*¹³⁰⁴

In the UK, the different groups used in ethnic inference testing are white-skinned European, Afro-Caribbean, Indian Subcontinent, South East Asian and Middle Eastern.¹³⁰⁵

Case Study 92

Ethnic inference testing is being used in the United Kingdom in an attempt to determine the ethnic background of an offender who is believed to be responsible for at least 84 offences, including rape and indecent assault. There is no useful physical description of the offender, who reportedly wears a balaclava and a black catsuit.

Without fingerprints or a physical description, police have concentrated on the DNA evidence found at some of the crime scenes. DNA analysis suggested the offender has Caribbean ancestry. The ancestry profile, combined with other intelligence, enabled investigating police to narrow a list of potential suspects from 21,000 to 1,000. Police have since gone to the Caribbean to collect samples from volunteer police officers in five countries, in an attempt to narrow down the offender's ancestry to a specific location within the Caribbean. The investigation is ongoing.¹³⁰⁶

There is currently research being done into predicting other physical characteristics. The FSS is exploring the prediction of hair colour, and has developed a test which reportedly detects 84 per cent of redheads.¹³⁰⁷ A company in the United States, DNAPrint, offers a test to predict eye colour.¹³⁰⁸ We are not aware of any investigations where these techniques have been used to identify a suspect.

In 2005, the Victorian Police Forensic Science Service Centre received a grant to test DNAPrint's eye colour testing package, so this technique may be used in future in Australia.¹³⁰⁹

16.1.4. NSW Police and the new technology

In our survey of the 80 local area commands, we asked officers to consider what impact new technology such as the techniques outlined above would have, if available in New South Wales. Some were positive about new developments:

*"The ability to identify any feature or characteristic of a suspect would be of great importance and an advantage in any investigation, particularly where a suspect is yet to be identified."*¹³¹⁰

*"Such implementations may lead police to target a family and could provide useful circumstantial evidence. I do not believe we could rely heavily on these results, but at least it could point police in the direction of a suspect. However, given the resources (or lack of) at the Forensic Lab, I believe this could be more of a burden on them and create further delays in obtaining the results, particularly for major crimes."*¹³¹¹

*"Certainly would assist in profiling where a suspect is not identified in the initial stages of the investigation. May lead to lines of enquiry not otherwise available. May corroborate other evidence, may identify serial crimes earlier."*¹³¹²

*"If these additional techniques were available they certainly would assist in the investigation of major crime. There have been numerous murder investigations where forensic samples have been located at the crime scene and remain unmatched as the suspect has never had his/her DNA taken, but a member of their family has. If these techniques were available it would certainly assist investigators to concentrate on a certain group of people, as opposed to no suspects at all."*¹³¹³

*"A positive impact. Any assistance with the identification of offenders or possible offenders can only benefit the community. DNA analysis eliminates suspects as well as identifying them, so there are also benefits to innocent persons."*¹³¹⁴

while others were more circumspect, particularly because of the limited resources available for DNA analysis in New South Wales:

*"LAC resources are stretched and any further investigations resulting from DNA would require an increase of staff."*¹³¹⁵

*"Current identification stretch resources at times and uncertain how to deal with increased workload."*¹³¹⁶

*"Create more work and time consumed."*¹³¹⁷

*"These further developments would be of assistance to investigation however unless more resources at DAL to improve turn around time of information the frustration will continue."*¹³¹⁸

The NSW Police Unsolved Homicide Unit submitted that low copy number, ethnic inference analysis and familial searching could be useful in the investigation of unsolved crimes which were committed some time ago. The Unit advised that drawbacks of the low copy number technique include that it is very expensive, as the evidence has to be sent overseas for analysis, and the potential for contamination is higher, given the increased sensitivity of the analysis.¹³¹⁹

In our 2004 report on the DNA sampling of convicted offenders, we recommended that Parliament consider what, if any, regulation is required of the way in which material obtained from forensic procedures may be analysed and compared.¹³²⁰ As the available technology is constantly evolving, how forensic material obtained through forensic procedures can be used should be kept under consideration. For this reason we reiterate our previous recommendation about the use of DNA samples in future.

Recommendation 104

NSW Parliament consider what, if any, regulation is required of the way in which material obtained from forensic procedures may be analysed and compared.

NSW Police supports this recommendation.¹³²¹

16.2. Possible problems with DNA

Below are some potential problems with the use of DNA evidence in the investigation and prosecution of crime.

16.2.1. Adventitious or secondary transfer

Unlike deliberate contamination, adventitious (or secondary) transfer describes the transmission of forensic material from a person who may not be associated with a crime, to the victim or crime scene, through ordinary interactions like talking, sneezing or shedding hair. We discussed adventitious transfer in more detail above, at 12.1.2, and described a case where the defendant argued that his DNA was found on the deceased's bra as a result of secondary transfer and not because he was involved in the offence.

As the sensitivity of DNA analysis continues to increase, it becomes more important to consider the possibility of adventitious transfer.

16.2.2. Framed by DNA?

In September 2004, an episode of *Catalyst* on the ABC looked at the possibility of DNA being planted at a crime scene. The story involved a blood stain left at a hypothetical crime scene. This was covered with a spray made from another person's DNA. The DNA analysis results yielded the profile of the second person, rather than the original contributor. The program explained that the spray could be made by creating copies of DNA, and so could be made from a very small DNA sample, such as a single hair, saliva left on a glass, or a cigarette butt. This would require scientific knowledge but could be done in a home kitchen.¹³²²

We are not aware of any matters where it has been alleged that this has occurred.

16.2.3. Managing public expectations

Many people's understanding of forensic investigation and the use of DNA is influenced by television shows such as *CSI*, *Cold Case*, *Silent Witness* and *Forensic Investigators*. Television shows can highlight the benefits of forensic science, but tend to create unrealistic expectations, in particular about the length of time forensic analysis takes. They may also suggest that forensic evidence is infallible, and that if there is a DNA link, the suspect must be guilty. In the United States, there have been reports of juries being asked whether they watch *CSI*.¹³²³ In Australia, too, police and others involved in the criminal justice system have felt the impact of television shows about forensic investigations.

In our survey of the 80 local area commands in New South Wales, we asked whether people have greater expectations of police investigations, as forensic technology advances. 74 commands said yes, and made comments such as the following:

*"Yes. DNA is portrayed in the media as THE piece of evidence required to straight away prove conviction. This is promoted by the high number of television programs and movies where DNA is referred to in this way. I believe the general public do not have an understanding of the complexities of an investigation, requirements of the Evidence Act and the decisions made by the courts. I believe that there have, and will be great advances in DNA which the police must adopt in the future."*¹³²⁴

*"Media attention has definitely increased the public expectation of results. There is limited understanding on the relationship with DNA evidence and a successful prosecution of a matter, by both the public and some police. It should also be considered that new and emerging technologies often have substantial cost, and it may not be practical to apply some new technologies to all investigations."*¹³²⁵

*"Yes, TV shows depict a perception, which is widely accepted within the community, that DNA technology is put into a computer and the result is back in a very short period of time. The questions are asked of many investigators 'Why does it take so long to get the results back? On TV it comes back quick why can't you.' Very frustrating."*¹³²⁶

*"Yes the Media in particular believe that DNA is the absolute proof of a person's involvement in a crime. They also are heavily influenced by TV shows such as CSI which tend to provide false impressions that DNA testing can be completed in very short time frames. This translates into not being able to comprehend the delays often encountered by investigators from the time samples are collected to the time the results are received."*¹³²⁷

*"If they do, then they watch too much TV. Public need to know that not every police station has analysts to analyse samples. They must be informed that they are sent away and there is at least a 6 to 9 month waiting list."*¹³²⁸

*"Yes. The reality is the analysis takes time (months). The perception of the public gained through TV is Police have all DNA profiles & analysis is done at the office with instant results. The majority of testing is time consuming unless there is significant political or media pressure for a quick result. This is typified in the Bulldogs / Coffs Harbour sexual assault investigation. I would suggest under normal circumstances a sexual assault investigation waiting for DNA would take months to complete. That examination was expedited to satisfy the enormous public, media interest. That investigation & the results are an exception to the general rule."*¹³²⁹

Other commands agreed that expectations are greater, but argued they were not unreasonable:

*"Yes, I suppose we all do. The public has a right to expect police to investigate a crime using all available technologies and methods to bring about a timely completion to any investigation."*¹³³⁰

*"Yes and rightly so. The public demand that the police have the resources and funding to be able to conduct these procedures and would be surprised to know the reality of the situation."*¹³³¹

Endnotes

¹²⁹⁷ United Kingdom Forensic Science Service fact sheet, "DNA Low Copy Number", December 2005.

¹²⁹⁸ United Kingdom Forensic Science Service press release, "New UK DNA technique helps to trap Falconio's Australian killer", 13 December 2005.

¹²⁹⁹ United Kingdom Forensic Science Service fact sheet, "Familial Searching", February 2005.

¹³⁰⁰ United Kingdom Forensic Science Service fact sheet, "Familial Searching", February 2005.

¹³⁰¹ "Killer caught by relative's DNA", BBC News 19 April 2004 available at <http://newsvote.bbc.co.uk> accessed 18 May 2004, and Surrey Police Media Release "First successful prosecution after use of pioneering DNA technique" <http://www.surrey.police.uk> accessed 17 January 2005. See also Matthew Falloon, "DNA traps brick thrower who killed lorry driver", 20 April 2004 located at <http://www.guardian.co.uk> accessed 17 January 2005.

¹³⁰² United Kingdom Forensic Science Service fact sheet, "Familial Searching", February 2005.

¹³⁰³ For further information, see the United Kingdom Forensic Science Service website, www.forensic.gov.uk.

¹³⁰⁴ United Kingdom Forensic Science Service fact sheet, "Commonplace characteristics", September 2002.

¹³⁰⁵ United Kingdom Forensic Science Service fact sheet, "Commonplace characteristics", September 2002.

¹³⁰⁶ "Rapist DNA gives Police vital clue", *The Daily Mail* (UK), 27 April 2004; "DNA breakthrough in hunt for Britain's worst sex offender", *The Independent* (UK), 28 April 2004; "50 Black Policemen were happy to give DNA to help identify a rapist", *The Daily Mail* (UK), 19 May 2004; "Breakthrough in rapist hunt", *Evening Standard* (UK), 8 July 2004; "Black Police undergo DNA tests to trace rapist", *Evening Standard* (UK), 27 July 2004 and "British detectives visit Caribbean countries on trail of London serial rapist", *Comtex News* 2 December 2004 located at <http://www.comtexnews.net> accessed 3 December 2004.

¹³⁰⁷ United Kingdom Forensic Science Service fact sheet, "Commonplace characteristics", September 2002.

¹³⁰⁸ DNAPrint genomics Inc. Media release "DNAPrint Announces the release of RETINOME™ for the Forensic Market: Eye Color Prediction from Crime Scene DNA", 17 August 2004 available at <http://www.dnprint.com> accessed 17 January 2005.

¹³⁰⁹ Department of Education, Science and Training International Science Linkages Competitive Grants - Round Seven 2004-05 Announcement located at <https://sciencegrants.dest.gov.au/ISL/Pages/Doc.aspx?name=CGR7.htm> accessed 20 July 2005.

¹³¹⁰ Confidential LAC survey response.

¹³¹¹ Confidential LAC survey response.

¹³¹² Confidential LAC survey response.

¹³¹³ Confidential LAC survey response.

¹³¹⁴ Confidential LAC survey response.

¹³¹⁵ Confidential LAC survey response.

¹³¹⁶ Confidential LAC survey response.

¹³¹⁷ Confidential LAC survey response.

¹³¹⁸ Confidential LAC survey response.

¹³¹⁹ Letter from Homicide Squad dated 28 April 2005.

¹³²⁰ NSW Ombudsman, *The Forensic DNA Sampling of Serious Indictable Offenders under Part 7 of the Crimes (Forensic Procedures) Act 2000*, (August 2004) recommendation 48.

¹³²¹ NSW Police response to Ombudsman draft report, 2 June 2006.

¹³²² ABC Television, *Catalyst*, "DNA Doubt", 16 September 2004.

¹³²³ "Jurors quizzed on 'CSI effect'", *The Albuquerque Tribune* (US), 7 February 2005; "'CSI' shows foster unrealistic expectations, forensic scientists say", accessed at www.knoxstudio.com on 20 February 2005; "Defense, Prosecution play to new 'CSI' savvy", *The Washington Post* (US), 22 May 2005.

¹³²⁴ Confidential LAC survey response.

¹³²⁵ Confidential LAC survey response.

¹³²⁶ Confidential LAC survey response.

¹³²⁷ Confidential LAC survey response.

¹³²⁸ Confidential LAC survey response.

¹³²⁹ Confidential LAC Survey response.

¹³³⁰ Confidential LAC survey response.

¹³³¹ Confidential LAC survey response.

Chapter 17. Conclusion

The power to conduct forensic procedures has had a significant impact on the way police investigate and prosecute crime. Forensic procedures are now conducted day in, day out all over New South Wales for matters ranging from minor property offences to the most serious types of crime.

After keeping under scrutiny the power of police officers to conduct forensic procedures, we have found that the implementation of the *Crimes (Forensic Procedures) Act* has generally been achieved with due regard to the rights and interests of people police wish to undergo forensic procedures. However, we identified a number of legislative and procedural issues for consideration by Parliament and relevant agencies, and also identified key issues that should be kept under scrutiny into the future. These include:

- The legislation is complex and compliance with legal obligations can be difficult. In particular, the distinction between suspects and volunteers is not always clear.
- Forensic procedures are almost always conducted on the basis of consent, and police rarely use force to conduct forensic procedures. However, some forensic procedures are conducted without appropriate authorisation.
- The information given to suspects and volunteers is confusing, and few suspects access legal advice about forensic procedures.
- DNA records are not always accurate, and mistakes have led to people being wrongfully charged and convicted.
- Some DNA samples are being unlawfully retained.
- The risk of contamination could be better managed in some areas.
- No single person is responsible for the DNA database.
- The DNA laboratory cannot meet the police demand for DNA analysis, and the future of the provision of DNA analysis services in New South Wales is unclear.

Our recommendations, arrived at through consultation with the relevant agencies, provide solutions to many of these issues. If implemented, they will enhance the proper collection and use of forensic evidence.

Appendix. Implementation of recommendations on DNA sampling of serious indictable offenders

The Ombudsman's review of the *Crimes (Forensic Procedures) Act 2000* has been conducted in two parts. The first part of the review focused on the DNA sampling of serious indictable offenders and culminated in the release of our report *The Forensic DNA Sampling of Serious Indictable Offenders under Part 7 of the Crimes (Forensic Procedures) Act 2000*. This report is available in full on the Ombudsman's website. The report included 48 recommendations and was tabled in Parliament in October 2004.

In this section we review the progress of implementing the Part 7 recommendations over the 12 months since the report was tabled. On 13 January 2006, we contacted NSW Police, the NSW Attorney General's Department, the Department of Corrective Services and the Department of Juvenile Justice and provided each with a list of recommendations relevant to their organisation. We asked each agency to provide us with information on the status of their implementation of these recommendations. At the time of writing, we had received responses from NSW Police, the Department of Corrective Services and the Department of Juvenile Justice, which we are closely reviewing. Below is a synopsis of those responses.

NSW Police

Our Part 7 report included 24 recommendations relevant to NSW Police. We received advice from NSW Police regarding its implementation of the Part 7 recommendations in March 2006.¹³³²

NSW Police provided advice that eight recommendations have already been implemented including recommendation 32 which was originally not supported by NSW Police but has since been adopted through changes to procedures. Recommendation 32 requested the SOPs be amended to require the Inmate Testing Team to record the opening and sealing of the DNA sample bag in all procedures, even those where the person has requested that the forensic procedure itself not be recorded. Also included is recommendation 28, which NSW Police stated did not need to be implemented as it was already current practice for Inmate Testing Teams to caution the inmate or detainee immediately after gaining consent and prior to the forensic procedure being conducted.¹³³³

An additional four recommendations have been partially implemented by NSW Police – Recommendations 20, 36, 38 and 45. Recommendation 45 put forward the idea of NSW Police and DAL conducting internal audits of their records to ensure that all information on the collection and analysis of DNA samples is consistent and correct. NSW Police advised that it continues to monitor "receipts and processing reports" issued by DAL. However, no comparison of data recorded on COPS with that recorded on the New South Wales DNA database had been undertaken at the time of writing.

A further five recommendations are still being negotiated with relevant organisations, such as recommendations 4 and 5 relating to agreements between NSW Police, DCS and DJJ. Recommendations 10 and 11 have also been discussed and NSW Police indicated that implementation of these recommendations hinges on the development by the Attorney General's Department of a plain English pamphlet explaining the Act and sampling process.

NSW Police supports Recommendation 27 in principle but does not consider it can be implemented. The recommendation relates to the recording of the caution required by section 46 of the Act. NSW Police stated that there will be occasions where it is not possible to record the caution, especially if the inmate or detainee being tested starts to make admissions regarding prior crimes.

NSW Police advised that only six recommendations will not be implemented. These are Recommendations 14, 15, 16, 17, 26, and 39. These six recommendations were either not supported or not implemented. In most cases, NSW Police indicated in the Part 7 report that they did not support these recommendations and have provided further information on why the recommendations have not been implemented:

- Whilst NSW Police agrees that serious indictable offenders should be given reasonable notice of requests for forensic procedures, NSW Police does not consider that other organisations, such as the legal services listed in Recommendation 14, need to be consulted. NSW Police stated that the current agreements with DCS and DJJ provide for inmates and detainees to be given adequate notice prior to DNA sampling.

- NSW Police reiterated its reasons for not implementing Recommendation 14 when responding to Recommendation 15. As an alternative to amending SOPs for NSW Police, DCS and DJJ, NSW Police propose an alternative solution, that it is more appropriate for serious indictable offenders to be informed at the time of sentencing that in due course they will be asked to provide a DNA sample. NSW Police state that this would provide “more than adequate time to speak to [a] legal adviser or the legal advice hotline”.¹³³⁴
- Recommendation 16 is linked to Recommendation 15 and NSW Police reiterated that it does not believe it is necessary to inform other agencies of policies relating to the amount of notice provided to serious indictable offenders before sampling takes place. NSW Police stated that inmates and detainees are provided with information about contacting a legal practitioner when they are “prepped”.
- Recommendation 17 related to ongoing liaison between NSW Police, DCS and DJJ with interpreting and signing service providers. NSW Police did not consider this to be necessary and argued that the subsequent change to the Act to allow for telephone interpreters has addressed many of the problems identified in our Part 7 report.
- Recommendation 26 was not supported by NSW Police and related to the identification of incapable inmates. NSW Police advised that there are no hard facts to support the proposition that Inmate Testing Teams are not identifying all incapable inmates. In light of this, NSW Police does not consider it is necessary to consult with the Guardianship Tribunal about ways to improve identification of incapable inmates and is of the view that no changes to current procedures are warranted.
- NSW Police declined to amend its SOPs as suggested in Recommendation 39 to require officers to consider alternatives to the use of force and to document their consideration of alternatives. NSW Police believes that the use of force has been extremely low and “that all force used by the Inmate Testing Teams to date has been appropriate.”¹³³⁵

Department of Corrective Services

Our Part 7 review included 17 recommendations relevant to the Department of Corrective Services (DCS). In June 2006, we received advice from DCS about its implementation of these recommendations.¹³³⁶

DCS accepted the majority of our recommendations, and had already implemented 11 of them. These relate to sampling education programs (Recommendations 6, 7 and 13), access to the legislation (Recommendation 8), ensuring information prepared by NSW Police is provided to inmates (Recommendation 10), providing information about DNA sampling to inmate development committees (Recommendation 12), giving inmates adequate notice prior to DNA sampling (Recommendation 15), reviewing and recording any forensic procedures requiring the use of force (Recommendations 39 to 41) and requiring DCS to identify and explain the role of each person present when a DNA sample is taken (Recommendation 43).

DCS accepted a further two recommendations, and advised they are in the process of being implemented. These both relate to the finalisation of a DNA sampling agreement between NSW Police and DCS (Recommendations 4 and 44).

The only recommendation DCS disagreed with, Recommendation 9, was that DCS provide Correctional Centre Liaison Officers with regularly updated lists of serious indictable offences for use during the DNA sampling education program and pre test interviews. DCS argued this would be impractical, “given the size, complexity and dynamic nature of the list.” Rather, the DNA Coordinator generates lists of inmates who are serious indictable offenders, and if an inmate wishes to check whether he or she is eligible for DNA sampling, this can be determined on a case by case basis.

DCS argued that the remaining three recommendations were the responsibility of NSW Police rather than DCS. These relate to the information about DNA sampling which is provided to inmates (Recommendations 11 and 16) and the provision of interpreters (Recommendation 17).

Department of Juvenile Justice

Our Part 7 report included 14 recommendations relevant to the Department of Juvenile Justice (DJJ). In March 2006, we received advice from DJJ detailing the current status of each of these recommendations.¹³³⁷

DJJ has already implemented five recommendations – these are Recommendations 7, 11, 13, 17, and 41. Recommendation 7 required DJJ to continue to provide education programs to detainees. In response to this, DJJ included information for its staff in the ‘Procedures for Juvenile Justice Centres’ and provides training at induction and

at staff development days. In addition, DJJ has also addressed Recommendation 41 stating that it “will ensure that a safe environment is provided to manage non-compliant detainees and in the event that NSW Police intend to use force.”¹³³⁸

A further six recommendations were not unique to DJJ and covered joint issues and responsibilities applicable to NSW Police and DCS. In light of this, these six recommendations have been implemented in part by DJJ, or are still being negotiated with the other relevant organisations. One example is Recommendation 5 regarding the finalisation of an agreement between DJJ and NSW Police covering DNA sampling in juvenile detention centres. The formal agreement was still being negotiated at the time of writing and was expected to be in place in March 2006.

DJJ advised that there are only three recommendations that have not been implemented in any way. These are Recommendations 10, 39 and 40. These recommendations have not been implemented by DJJ for the following reasons:

- DJJ stated that it has no responsibility under the Act for the integrity, transportation, storage, analysis and destruction of samples taken. As a result DJJ stated that it is not in a position to provide the information outlined in Recommendation 10 to young persons being sampled. DJJ also stated that any re-print of the detainee information pamphlet will include basic information provided by NSW Police on the issues outlined in Recommendation 10.
- DJJ stated that its staff do not use force or participate with NSW Police in the use of force to take DNA samples and it is for these reasons that DJJ has not implemented Recommendations 39 and 40. DJJ also advised that to date there have been no forensic procedures undertaken on detainees that have involved the use of force.

Endnotes

¹³³² Letter from Assistant Commissioner R Mahoney, NSW Police, 7 March 2006.

¹³³³ FPIT response attachment to letter from Assistant Commissioner R Mahoney, NSW Police, 7 March 2006.

¹³³⁴ In its review of the Act, the Standing Committee on Law and Justice suggested that a 24-hour legal advice hotline be established.

¹³³⁵ FPIT response attachment to letter from Assistant Commissioner R Mahoney, NSW Police, 7 March 2006.

¹³³⁶ Letter from the Commissioner of Corrective Services, 20 June 2006.

¹³³⁷ Letter from Director General, Department of Juvenile Justice, 28 February 2006.

¹³³⁸ Letter from Director General, Department of Juvenile Justice, 28 February 2006.

Glossary

Term	Definition / explanation
Accredited officer	A police officer who, having completed the training provided by FPIT, can carry out certain forensic procedures such as buccal swabs, hair samples and non-technical photographs.
The Act	The <i>Crimes (Forensic Procedures) Act 2000</i> .
Adventitious transfer	Unlike deliberate contamination, 'adventitious transfer' (or secondary transfer) describes the transmission of forensic material from a person who may not be associated with a crime, to the victim or crime scene, through ordinary behaviour like sneezing or shedding hair.
Appropriately qualified	A person with suitable professional qualifications or experience, or who is qualified under the regulations, to carry out a forensic procedure.
Backlog	The caseload of DNA samples submitted to DAL which have not been analysed yet. These are mostly crime scene samples rather than person samples.
Biomechanics	The study of mechanical movements of biological organisms. The Act permits the taking of physical measurements of parts of the body for biomechanical analysis.
Blood sample	A type of forensic procedure which can be used for DNA sampling or for other investigative purposes. A blood sample can only be taken with the person's consent or by court order. It can be taken by a medical practitioner, nurse or other appropriately qualified person. Police officers are not generally trained to take blood samples.
Buccal swab	The most commonly used forensic procedure for obtaining a DNA sample. Buccal swabs are self administered. The person rubs a sterile swab on the inside of the cheek, and police press the swab onto specially treated paper. The cells which adhere to the paper are used by the lab to generate a DNA profile.
Child	In this report, a person under the age of 18. The Act defines a child as a person aged between 10 and 18 and has separate provisions for forensic procedures conducted on children.
CISB	The NSW Police Criminal Identification Specialist Branch. The CISB provides a fingerprint examination, comparison and identification service using both manual and computerised fingerprint systems.
CNI number	Number on the NSW Police Central Names Index allocated to a person on his or her first contact with police. Details of any subsequent contact with police (including arrests, charges, convictions, forensic procedures, fingerprints and other records) should be recorded against this number.
Cold link	Where a suspect or crime scene is linked to another unsolved crime scene through a match made on the DNA database, usually where there is no previous intelligence suggesting the person and/or the crime scenes are linked. By contrast, a warm link is where police take a DNA sample from a person because they suspect it will link the person to DNA obtained from the crime scene or victim, and it does.

Term	Definition / explanation
Contamination	The transfer of DNA from one source to another. Contamination may be deliberate or accidental, and may occur before, during or after the commission of a criminal offence.
COPS	The Computerised Operational Policing System. COPS provides a structure for police to record details including dates, locations, offences, forensic procedures and custody management records. COPS also contains a 'narrative' field which allows police officers to describe events in their own words.
CourtLink	A proposed IT system for use by all New South Wales courts, which would notify NSW Police of court outcomes electronically.
Court order	An order made by a magistrate or authorised justice authorising a forensic procedure to be conducted on a suspect or (in the case of children and incapable persons) a volunteer.
Crime scene sample	A sample of blood, saliva, semen, hair or other biological material obtained from a crime scene or from the body or clothes of a victim. By contrast, a person sample is taken directly from the body of the person supplying the sample.
CrimTrac	A federal agency which supports Australian police services through the provision of national information systems and investigative tools, including the national DNA database. The national database is not fully operational as only some states and territories have provided DNA profiles.
DAL	The Division of Analytical Laboratories in Lidcombe, Sydney. DAL is responsible for analysing DNA for NSW Police, and for maintaining the New South Wales DNA Database. DAL is part of NSW Health.
DNA	Deoxyribonucleic Acid, which consists of an acid molecule to which sugar groups missing an oxygen molecule are attached. DNA contains a genetic code, which directs the production of proteins which determine everything from hair colour to susceptibility to disease.
DNA analysis	DNA analysis involves several stages: extraction of DNA from biological material, quantitation of available DNA, amplification of specific sites of DNA, and electrophoresis involving the separation and detection of areas of variability of the DNA sites. This is followed by the analysis, verification and interpretation of results.
DNA database	A database used to store DNA profiles obtained from people and from crime scenes. When a profile is added to the database, it may 'match' a profile already on the database, which may be of investigative assistance to police investigating unsolved crimes. The New South Wales DNA database is maintained by DAL. There is also a national DNA database, administered by the CrimTrac agency, which is not fully operational.
DNA profile	The sequence of numbers and letters obtained by analysing DNA at a number of loci. The possibility of two people (other than identical twins) having the same DNA profile is extremely unlikely.
DNA sample	The actual biological material taken from a person, used to obtain the person's DNA profile. Under the Act, DNA samples can be taken by buccal swab, hair sample or blood sample. A DNA sample contains the whole of a person's DNA, and contains a great deal of genetic information, including predictive health information. By contrast, a DNA profile is a series of numbers and letters derived from only a small portion of a person's DNA and contains very little genetic information.

Term	Definition / explanation
DPP	Director of Public Prosecutions.
ERISP	An Electronically Recorded Interview of a Suspected Person. An ERISP is an audiovisual recording of a police interview with a suspect. ERISPs are recorded by fixed cameras that automatically pan the room and zoom in for close-ups of the person being interviewed.
Excluded volunteer	A volunteer to whom the Act does not apply. Victims of crime and volunteers who provide elimination fingerprints are excluded volunteers.
Familial searching	An investigative technique which aims to identify a suspect based on similarities between a DNA profile obtained from a crime scene, and the profile of a relative of the suspect.
Forensic material	Any samples, hand prints, finger prints, foot prints, toe prints, photographs, casts or impressions, taken from or of a person's body.
Forensic procedure	A way to obtain evidence that relates to the investigation and prosecution of a crime. The Act authorises three different categories of forensic procedures – buccal swabs (for DNA sampling), intimate forensic procedures and non-intimate forensic procedures. A forensic procedure does not include the taking of any sample for the sole purpose of establishing the identify of a person.
FPIT	The NSW Police Forensic Procedures Implementation Team. FPIT is part of the Forensic Services Group, and supports police officers in their use of forensic procedure powers.
FSG	The NSW Police Forensic Services Group is involved in the scientific investigation of criminal matters. It consists of the Forensic Procedures Implementation Team, Crime Scene Operations Branch, Criminal Identification Specialist Branch, Criminal Records Section, Counter Terrorist and Disaster Victim Identification, Professional Services Branch, Clinical Forensic Medicine Unit, and CrimTrac Coordination Unit.
FSS	The Forensic Science Service is an executive agency of the United Kingdom's Home Office. The FSS consists of seven laboratories and provides forensic science services to police forces in England and Wales, as well as being a source of training, consultancy, and scientific support for many overseas and private sector customers. The FSS maintains the UK's National DNA Database.
FTA paper	Specially treated paper used by police officers for DNA samples taken by buccal swab. FTA stands for 'Flinders Technology Associates.' FTA Technology is a chemical treatment that was designed by scientists at Flinders University in South Australia. The paper stabilises the DNA and protects it from oxidation, UV damage and microbial and fungal attack. This means the sample can be stored at room temperature, instead of being refrigerated.
GSR	Gun shot residue. A gun shot residue test involves the swabbing or lifting by tape of any residue left on a suspect who may have recently fired a gun. GSR tests have to be conducted within a few hours of a gun being fired to be effective.
Hair sample	A forensic procedure, usually conducted because a suspect does not consent to providing a DNA sample by buccal swab. Police remove 15-20 hairs from the head or other part of the body (excluding pubic hair). To obtain a DNA profile, the hair must be pulled out with the root attached.

Term	Definition / explanation
Incapable person	An adult who is incapable of understanding the general nature and effect of a forensic procedure, or is incapable of indicating whether he or she consents or does not consent to a forensic procedure being carried out. The Act has separate provisions for forensic procedures conducted on incapable people.
Independent person	A person who is not a police officer or other person involved in the investigation of an offence. An independent person must be present to witness a volunteer sign a forensic procedure consent form, or to witness a forensic procedure which is not electronically recorded.
Interview friend	A support person, usually a parent, guardian or legal representative, or other person acceptable to the suspect. The Act gives children, incapable adults and Aboriginal and Torres Strait Islander suspects the right to have an interview friend present in certain circumstances.
Intimate forensic procedure	A blood sample, pubic hair sample, dental impression, saliva sample other than a buccal swab, or procedure involving the external genital or anal area or the buttocks, or the breasts of a female or a transgender person who identifies as a female, including a photograph, external examination, swab, impression of a wound, or sample taken by vacuum suction, scraping or lifting with tape.
Loci	The areas of DNA analysed to generate a DNA profile. The more loci examined, the more discriminating the comparison. DAL examines nine loci to derive a DNA profile.
LAC	A local area command is one of the 80 local policing regions in New South Wales.
LIMS	The Laboratory Information Management System is the electronic recording system used by DAL to record the receipt of samples and exhibits, and manage its DNA caseload.
Livescan	An inkless process which uses digital technology to scan finger and hand prints. Where Livescan is not available yet, police use the old method of ink, roller and slab.
Mass screening	A method used to try to identify the contributor of DNA found on a victim or at a crime scene, by requesting a section of the population to volunteer DNA samples. The Act does not specifically provide for mass screenings.
NCIDD	The National Criminal Investigation DNA Database, which is managed by CrimTrac. When fully operational, it may contain profiles derived from crime scenes, convicted offenders, suspects and volunteers, although this may depend on the legislation of individual states and territories.
Non-intimate forensic procedure	A procedure conducted on any part of the body (other than the genital or anal area or the buttocks or the breasts of a female or a transgender person who identifies as female), including an external examination of the body, a sample of hair other than pubic hair, a sample from a nail or under a nail, a sample obtained by swab or washing, a sample obtained by vacuum suction, scraping or lifting with tape, a hand, finger, toe or foot print, a photograph, an impression or cast of a wound, or the taking of physical measurements for biomechanical analysis.
POI	Person of interest. Police use the term very broadly, to describe a person who is a suspect or who may, at some point during an investigation, become a suspect.

Term	Definition / explanation
Person sample	A DNA sample taken directly from a person's body, through a forensic procedure (being a buccal swab, hair sample or blood sample). By contrast, a crime scene sample is a sample of biological material obtained from a crime scene or from the body or clothes of a victim.
Profiler Plus	The system of DNA profiling used by all Australian forensic laboratories.
Responsible person	The person who is responsible for the care, control and management of the DNA database. The key responsibilities of this person are to determine who may access information stored on the DNA database, and to ensure forensic material is destroyed in accordance with legislative requirements. The Act does not specify who the responsible person is.
Senior police officer order	An order made by a police officer of or above the rank of sergeant authorising a forensic procedure. Senior police officer orders are only available for non-intimate forensic procedures, where the suspect is an adult who is under arrest. They are used most often for hair samples from suspects who do not consent to providing a DNA sample by buccal swab.
Serious indictable offender	A person who has been convicted of an offence carrying a maximum penalty of five years imprisonment or more. The Ombudsman reported separately on the DNA sampling of serious indictable offenders – see our August 2004 report, <i>The Forensic DNA Sampling of Serious Indictable Offenders under Part 7 of the Crimes (Forensic Procedures) Act 2000</i> .
SMANZFL	Senior Managers of Australian and New Zealand Forensic Laboratories. A group of representatives from forensic science organisations and police in Australia and New Zealand.
SOCO	A Scene of Crime Officer. SOCOs are responsible for the collection of crime scene evidence, such as fingerprints and swabs from crime scenes. They can be either civilians or police officers.
SOPs	NSW Police policies, called Standard Operating Procedures. The SOPs developed by FPIT set out step by step instructions for police officers who conduct forensic procedures.
Suspect	A person whom a police officer suspects on reasonable grounds has committed an offence, who has been charged with an offence, or who has been summoned to appear before a court in relation to an offence alleged to have been committed by the person.
Time out	Time which does not count towards the two hours police generally have to conduct a forensic procedure. Time out includes time required to convey a suspect to a police station or other forensic procedure facility, time reasonably spent waiting for an investigating police officer or appropriately qualified person to arrive at the place where the procedure is to be carried out, time reasonably spent waiting for facilities or equipment to become available, delays to allow the suspect to seek legal advice or receive medical attention, time waiting for an interpreter, delays while the suspect recovers from the effects of intoxication, delays at the suspect's request and time spent waiting for a judicial officer to make an order authorising a forensic procedure.
Trace DNA	Extremely small amounts of DNA such as the few skin cells that may be left behind when a person touches something with their hands. It is possible to obtain DNA profiles from trace levels of DNA found in fingerprints.

Term	Definition / explanation
Victim	A victim of crime, whom police may wish to undergo a forensic procedure. The Act does not apply to victims, who are referred to as 'excluded volunteers.' NSW Police has developed its own policies for carrying out forensic procedures on victims of crime. In many ways these procedures reflect the legislative position on volunteers.
Volunteer	A person other than a suspect or excluded volunteer who volunteers to a police officer to undergo a forensic procedure, or, in the case of a child or an incapable person, whose parent or guardian volunteers to a police officer that the child or incapable person undergo a forensic procedure.
Warm link	Where police take a DNA sample from a person because they suspect it will link the person to DNA obtained from the crime scene or victim, and it does. By contrast, a cold link is where a suspect or crime scene is linked to another unsolved crime scene through a match made on the DNA database, usually where there is no previous intelligence suggesting the person and/or the crime scenes are linked.

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List of submissions

Anti-Discrimination Board, NSW

Australasian Centre for Policing Research

Australian Dental Association

Australian Federal Police

Commonwealth Ombudsman

Community Relations Commission, NSW

Director of Public Prosecutions, NSW

Intellectual Disability Rights Service

Law Society of NSW

Legal Aid NSW

NSW Commission for Children and Young People

NSW Department of Aboriginal Affairs

NSW Department of Ageing, Disability and Home Care

NSW Department of Community Services

NSW Health

NSW Nurses' Association

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