

Standing Committee on Law and Justice
Inquiry into the use of victims' DNA
Questions on notice

NSW Police Force (Submission 5)

Superintendent Jeff Emery, Commander, Forensic Information Management, Forensic Services Group

1. Do you think the current policies and procedures impact negatively on the reporting of crime?
 - NSW Police Force view is that the current policies and procedures do not impact negatively on the reporting of crime.
 - Current policy continues to ensure victims of crime are not discouraged from coming forward to police.

For example, currently victims' DNA may be matched to a crime scene before that person is identified as a victim and then they may be investigated based on that evidence. Do you think this might deter victims from coming forward?

- The above example is unfounded; in the example it would in fact be unidentified crime scene evidence that is being matched. Only by virtue of the victim reference sample is the victim DNA identified, and then excluded from crime scene material *before* uploading to any DNA databases.
- Victims are afforded the opportunity to come forward to police, be identified as a victim and provide a 'reference sample' causing their DNA to be excluded from investigation or uploading to any DNA databases; this policy continues to ensure that victims of crime are not discouraged from coming forward to police.

2. In terms of identified or known victim profiles:
 - a. What warnings are volunteers given before they submit to DNA sampling? Are the warnings in writing?
 - Victim information sheet and consent form/process
 - Victims are informed in writing and/or verbally of the matters in paragraph 4 and Annexures B and/or C of the Victims Protocol.
 - Victims Protocol is publicly available on the website of NSW Department of Justice & Attorney General (Victims' Services ▶ Victims' Rights).
 - Warnings are in writing.
 - b. Are the warnings adequate? For example, are there instances where a volunteer may not understand all the implications of giving DNA samples?
 - Information provided is adequate
 - Clearly provides for a victim's right not to consent to undergo a forensic procedure
 - Victims are also entitled to have a support person and legal representative of their choice present
 - A parent/guardian of a child or incapable victim is present for the consent process and conduct of the forensic procedure.
 - c. What are your views of the Victims Protocol? Are there any issues with its use and application?
 - NSW Police Force has no issues with the Victims Protocol, its use or its application.
 - The forms are published on the intranet for use by police.

3. The NSW Police submission (p9) refers to the Forensic Procedures Implementation Team. Can you please explain to us the role of this team and how it relates to NSW Health's Division of Analytical Laboratories and operational/investigative police officers?
- The Forensic Procedures Implementation Team (FPIT) administers the operation of the *Crimes (Forensic Procedures) Act 2000* within the NSW Police Force (NSWPF).
 - FPIT is the formal interface point between NSWPF and NSW Health's Division of Analytical Laboratories (DAL).
 - FPIT validates DNA link information received from DAL.
 - FPIT disseminates validated DNA link information to operational police.
 - FPIT administers Standard Operating Procedures (SOPs) concerning the carrying out of Forensic Procedures (DNA Person Sampling).
 - FPIT provides advice to operational police.
4. The submission from NSW Health (Submission 6, p7) mentions a proposal by the NSW Police Force to remove the NSW DNA database and only use the national DNA database. Can you tell us about this proposal and the reasoning behind it?
- Currently, NSW DNA profiles are stored and maintained twice.
 - Requests by NSWPF for DNA profile retentions and destructions have to be processed by NSW Health's Division of Analytical Laboratories (DAL) against the NSW DNA Database, and then effected on NCIDD after a communication between DAL and NCIDD
 - This is costly, inefficient and prone to data integrity problems which
 - undermine the quality of DNA links reported to NSWPF, and
 - undermine compliance with destruction and retention legislation.
 - DAL is burdened by administrative and reporting processes which would be eliminated by a single instance of DNA Profiles.
 - Efficiencies and data integrity would be greatly improved.
 - Proposal is consistent with the preferred Queensland model (i.e. the jurisdiction uses NCIDD for both intra- and inter-jurisdictional DNA matching).
5. We note that approximately 44 recommendations of the January 2007 NSW Ombudsman report entitled "DNA sampling and other forensic procedures conducted on suspects and volunteers under the *Crimes (Forensic Procedures) Act 2000*" were made directly to NSW Police. What changes have been made to the way NSW Police handle and protect victims' DNA as a result of these recommendations?
- Victims ('excluded volunteers') are not covered by the Act, so were beyond the scope of the Ombudsman's review.
 - Of relevance is Recommendation 55: "... consider whether the current protocol for conducting Forensic Procedures on victims is appropriate ... and make changes to the Victims Protocol and NSW Police SOPs ..."
 - NSW Police Force supported a major review of the Victims Protocol being undertaken by the then Attorney General's Department; and
 - NSW Police Force reviewed and did not change the corresponding Standard Operating Procedures (SOPs) as they were found to be adequate.

6. The Department of Justice and Attorney General's submission (Submission 8, p5) advises that links can potentially be made between a victim's DNA and another sample on the crime scene index before that person has been identified as a victim.
- In such a case it is in fact unidentified crime scene evidence that is being matched.
- a. How often does this occur?
- The matching of unidentified crime scene evidence and other profiles on the crime scene index occurs routinely.
 - If link occurred with a victim's DNA on NCIDD, no notification is made to police.
- b. Is this resulting forensic information currently used by police for investigative purposes and/or used in courts to convict offenders?
- Identified victim DNA is not used for investigation purposes or used in courts to convict offenders.
 - The "resulting forensic information" is in fact unidentified crime scene evidence (not identified victim DNA).
7. The NSW Police submission (p10) refers to differences in how victims' DNA is handled and protected in other Australian jurisdictions such as the Northern Territory. Can you provide us with a breakdown on how the other jurisdictions differ from the practices in NSW?
- New South Wales, Victoria, the Australian Capital Territory, South Australia and Tasmania do not upload victim profiles to the crime scene index of NCIDD.
 - Queensland excludes victim profiles from investigation and DNA database uploading upon receipt of a victim reference sample (similarly to New South Wales), however, Queensland does not delay the uploading to DNA databases of unidentified crime scene DNA in the absence of victim reference samples.
 - Northern Territory is the only Australian jurisdiction which does not differentiate victims from non-victims on NCIDD. This precludes NSW from differentiating victim from non-victim NT profiles that have linked with NSW profiles on NCIDD. In order for NSWPF to ensure that NCIDD links comprising NT victims are not received, whilst at the same time allowing the receipt of NT non-victim links, special NT-specific procedures are in place in FPIT.
8. The Department of Justice and Attorney General's (Submission 8, p5) submission advises that the NSW Government has requested that DNA profiles taken from NSW crime scenes and placed on the national database not be matched against DNA profiles from crime scenes in other jurisdictions. Can you comment on this request and its impact on policing?
- On 24 August 2007, the NSW Attorney General wrote to the CrimTrac agency:
*"The Commissioner of the NSW Police Force has written to me expressing his concern that several jurisdictions are uploading, or are intending to upload, DNA profiles of victims onto the crime scene index of the NCIDD.
We are of the opinion that this practice is contrary to the original intention of NCIDD and could constitute a misuse of the crime scene index, particularly since NCIDD provides other indices that are more suitable for victim profiles, such as the volunteers (limited purposes) index and the volunteers (unlimited purposes) index. The Commissioner has asked me to ensure that NSW crime scene profiles are not matched to crime scene profiles from other jurisdictions until this matter is resolved."*
 - As a result, NSW has never participated in 'scene to scene' matching on NCIDD and this continues to deny NSW any potential intelligence concerning crime scenes nation-wide at which the same DNA has been obtained.

9. The submission from CrimTrac (Submission 3, p3) suggests that a nationally endorsed policy for loading victim DNA profiles on databases is necessary to ensure full participation on the national database and so that victims are treated consistently across jurisdictions. What is your view on this suggestion?
- All jurisdictions should use the volunteers (limited purposes) or volunteers (unlimited purposes) indices on the National Criminal Investigation DNA Database (NCIDD).
 - Currently NSW does not store victim profiles on NCIDD; victim profiles are managed by Department of Health outside of any searchable database. In this regard, NSW Police Force would support the use of NCIDD for this purpose as it would improve the security of the victim profile.
10. The NSW Police submission (p4) highlights the difficulties in differentiating between victims and perpetrators in some crimes. Can you advise us of what the implications of this are in dealing with DNA profiles?
- A crime scene profile cannot be matched to a person unless that person is charged, a 'suspect' sample taken, and their profile stored on the DNA databases.
 - Significant ambiguities exist concerning the delineation of victims versus other involved persons because the perpetrators of crime often are (or claim to be) also victims of crime, often within the same incident.
 - Unidentified crime scene DNA is unable to be differentiated from identified victim DNA in the absence of a 'victim reference sample'. To remedy this, bona fide victims who are identified by police, or identify themselves to police as a victim in the incident, have the opportunity to provide a reference sample; have their DNA identified and isolated from remaining unidentified crime scene DNA; and excluded from criminal investigation and uploading to DNA databases.
 - Inherent in the scenario above is the need for bona fide victims to cooperate with police and participate in the DNA process. As such, where people flee the scene and are therefore not formally identified by police as victims, or refuse to volunteer a limited purposes sample, their DNA will be treated as unidentified crime scene material which is placed on the crime scene index for matching against all other crime scenes.
 - If a person sample was taken as a 'victim' and then that person's status in the investigation changes to a 'suspect', a new 'suspect' person sample is obtained (as the suspect requirements would not have been met).

11. Your submission (p4 and p12) raises the issue of finding a workable definition of “victims” that could be used in legislation to ensure that there is not a potential loophole that could actually protect offenders from prosecution.

a. Can you please elaborate on this issue?

- Legislation which would cause evidence to be inadmissible in court if derived from a sample of material belonging to a victim would provide perpetrators of crime with exemption from prosecution by virtue of their DNA profile having come to the attention of police as a result of a crime scene in which they may claim to be a victim, despite not having identified themselves as a victim at the time.

b. Can you see a way to have legislation to protect victims’ DNA that does not provide a loophole for offenders?

- NSW Police Force maintains that any legislation governing the use of victims’ DNA must not provide a loophole able to be exploited by defendants as a means of having certain evidence excluded.
- Rather than legislative amendment, victims’ DNA would be afforded greater protection if the DNA samples (of victims, volunteers and persons of interest) provided to NSW Health’s Division of Analytical Laboratories (DAL) for analysis were ‘de-identified’, that is, provided to DAL labelled only with a barcode, and without any information concerning the identity of the person from whom the sample was obtained.

NSW Police Force is strongly of the view that

- DAL should simply receive and analyse de-identified samples;
- there is no need for DAL or its employees (approx. 80 non-law-enforcement civilian personnel) to have access to personally-identifying information concerning person DNA samples submitted by police for analysis; DAL should therefore not be furnished with person details;
- the current practice of DAL requiring from police personally-identified samples raises serious privacy issues.

12. A submission to the inquiry (Submission 4, p3) suggests that the reliance on *policies and procedures* for actions that have the potential to impinge on peoples’ rights, such as the use of their DNA, is not adequate and that these policies and procedures should be legislated. What is your view on this suggestion?

- NSW Police Force is of the view that further legislation in this regard:
 - is unnecessary and undesirable as NSW Police Force is not aware of any complaints or identified deficiencies in this area; and
 - would further increase the complexity of current legislation, despite current Department of Justice & Attorney General-endorsed reform agenda aimed at simplification.

13. The Department of Justice and Attorney General's submission (Submission 8, pp7-9) outlines a number of proposed solutions to protect the use of victims' DNA and we ask you to please provide comment on these proposals:

- A legislative ban on evidence derived from using a victims DNA profile
- Legislative protection only for vulnerable victims, such as victims of sexual assault
- NSWPF strongly objects for numerous reasons articulated herein and in its Submission to the Inquiry.
- The introduction of legislation to further restrict the use of DNA material belonging to victims:
 - is unnecessary due to the effectiveness of the existing policy;
 - is undesirable as such legislation would almost certainly obstruct policing efforts to inculcate offenders of crime;
 - would further increase complexity of current legislation despite current Department of Justice & Attorney General-endorsed reform agenda aimed at simplifying;
 - would increase red tape, contrary to current NSW Government red tape reduction initiatives;
 - would add to the complexity for police concerning forensic procedures legislation
 - would likely reduce the rate of DNA person sampling, despite current legislation reform efforts to increase sampling rate.
- Serious offence inclusions, where the use of victims DNA found at crime scenes can be used to prosecute for serious offences, and
- Providing the courts with the discretionary power to allow the use of victims DNA against the victim.
- NSW Police Force advocates a position whereby evidence from victims would be admissible "where a court deems it in the interests of justice", for major crime categories including terrorism, homicide, sexual assault etc.

14. The NSW Police submission (p14) states that previously, NSW Police advocated a compromise position where by evidence from victims would be admissible “where a court deems it in the interest of justice”.
- a. Can you please elaborate on this issue?
- NSW Police Force advocates a position whereby evidence from victims would be admissible “where a court deems it in the interests of justice”, for major crime categories including terrorism, homicide, sexual assault etc.
 - If the legislating of inadmissibility of victim DNA were to occur, NSWPF would seek the ability to prosecute regardless, if forensic evidence coming from a victim implicates the suspect in the commission of the most serious of major crime categories.
- b. Following on from this, would you see this position as similar to the proposal put forward in the Department of Justice and Attorney General submission (Submission 8, p8) of providing the courts with discretionary power to decide on the use of the victims DNA against the victim?
- Yes.
- If so, what is your response to the concerns that the person is likely to have been arrested, brought before the courts and potentially remanded in custody before the court decides whether or not to allow the DNA evidence?
- The above scenario is unfounded; a decision from the court as to whether or not the DNA comparison would be allowed would be sought prior to the apprehension of the person.
15. Do you think a legislative ban on using victim DNA or evidence derived from the sample would have a positive or negative impact on the reporting of crime and why?
- Likely to have no impact (neither positive nor negative).
 - Victims can currently report crime, identify themselves as a victims, provide a reference sample, and not face investigation; this policy continues to ensure that victims of crime are not discouraged from coming forward to police.
 - The legislating of protection that is already afforded victims via existing adequate policy and procedure is unlikely to have either a negative or positive impact on the reporting of crime.
16. In a submission to the inquiry (Submission 4, p3) a proposal is put forward to legislate so that NSW cannot seek re-identification information of victim profiles on the national or other states’ and territories’ databases. What is your view on this?
- It is not possible to know, from NCIDD, whether a profile belongs to a victim in another jurisdiction, until first requesting information concerning that profile. Following and as a result of seeking that information, it is then and only then possible to disallow receipt of that information (rather than the seeking of it).
17. Does the NSW Police Force have a Victims Liaison Group/Unit within the Force? If so, what would their view be on the issues raised today?
- No.
 - Department of Justice & Attorney General has a victims’ support service, including the Victims Support Line.

18. What is your view of the proposal of the Homicide Victims Support Group (Submission 7, p3) that victims who have given their DNA 'be asked if they wish to volunteer and give consent so that their samples are then downloaded onto the main database and treated the same as the general community' but only used in relation to the most serious of crimes?
- The current category *Excluded Volunteer (Unlimited Purposes)* already provides for this.
19. If there were any changes recommended to the NSW system of handling victims' DNA, how would this impact on the national DNA database and system?
- Administrative burden.
 - Likely resulting in changes to Ministerial Arrangements and Matching Tables concerning NCIDD. (It should be noted that the existing Ministerial Arrangements took six (6) years to agree on and implement.)
 - Increased red-tape concerning changes to internal policy and procedure and associated change management burden.
20. In considering what recommendations to make as a result of this inquiry, the Committee needs to balance competing public interests. Any changes must be supportive of the work of police in bringing offenders to account, while at the same time ensure that people who are victims are not unduly dissuaded from reporting the crime. Do you have any insights into how the Committee might resolve this balancing act?
- NSW Police Force suggests that the Committee recommends:
 - That NSW commences matching 'scene to scene' on the National Criminal Investigation DNA Database (NCIDD). Since the commencement in 2007 of NSW participation in NCIDD, 'scene to scene' matching concerning NSW profiles has remained deactivated (see response to Question 8 above: *NSW Attorney General's letter to CrimTrac dated 24 August 2007*). The non-participation of NSW in 'scene to scene' matching on NCIDD continues to deny NSW any potential intelligence concerning crime scenes nation-wide at which the same DNA has been obtained. Such intelligence would contribute to the public interest of bringing offenders to account.
 - That a review be undertaken concerning the (in)appropriateness of the current practice of DAL requiring from police person samples that are labelled with personally-identifying information (as explained in the response to Question 11(b) above); the provision to DAL for analysis of de-identified person samples would further protect victims' DNA and would contribute to ensuring that people who are victims are not unduly dissuaded from reporting the crime.
 - That legislation further restricting the use of victims' DNA is not pursued on the basis that
 - such legislation is undesirable and unnecessary, would provide a loophole for defendants, and would almost certainly obstruct policing efforts in bringing offenders to account;
 - NSW Police Force is not aware of any complaints concerning the use of victims' DNA and, as a result, there does not appear to be any identified problems surrounding this issue; and
 - such legislation, as far as NSW Police Force is aware, would be unprecedented.

– end –