

Standing Committee on Law and Justice

# **The use of victims' DNA**

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## Terms of reference

That the Standing Committee on Law and Justice inquire into and report on the use of DNA material belonging to victims of crime, with particular reference to:

- a. The adequacy of current policies, procedures and practices to protect DNA material belonging to victims.
- b. Whether further restrictions on the use of such DNA material would be appropriate or desirable, for example through legislation.
- c. Any other related matter.<sup>1</sup>

The terms of reference were referred to the Committee by the NSW Attorney General the Honourable John Hatzistergos MLC on 29 June 2009.

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<sup>1</sup> LC *Minutes* No. 110, 1 September 2009, Item 35, p 1303

## Committee membership

|   |                        |                     |
|---|------------------------|---------------------|
| <b>The Hon Christine Robertson MLC</b>      | Australian Labor Party | <i>Chair</i>        |
| <b>The Hon David Clarke MLC</b>             | Liberal Party          | <i>Deputy Chair</i> |
| <b>The Hon John Ajaka MLC</b>               | Liberal Party          |                     |
| <b>The Hon Greg Donnelly MLC</b>            | Australian Labor Party |                     |
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| <b>The Hon Lynda Voltz MLC</b>              | Australian Labor Party |                     |
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<sup>2</sup> Ms Voltz replaced Ms Fazio as a member of the Committee on 2 December 2009 (LC *Minutes* No. 132, 2 December 2009, Item 18, p 1605)

# Table of contents

|                  |  |           |
|------------------|--|-----------|
|                  | Chair's foreword   | ix        |
|                  | Executive summary  | x         |
|                  | Summary of recommendations   | xiii      |
|                  | Glossary   | xiv       |
| <b>Chapter 1</b> | <b>Introduction</b>  | <b>1</b>  |
|                  | <b>Terms of reference</b>  | <b>1</b>  |
|                  | <b>Conduct of the inquiry</b>  | <b>1</b>  |
|                  | Submissions  | 1         |
|                  | Public hearings  | 1         |
|                  | Proposed options paper   | 2         |
|                  | <b>Key issue for the inquiry</b>   | <b>2</b>  |
|                  | <b>Review of the <i>Crimes (Forensic Procedures) Act 2000</i></b>            | <b>3</b>  |
|                  | <b>Report structure</b>  | <b>3</b>  |
| <b>Chapter 2</b> | <b>Identified and unidentified victims' DNA profiles</b>                     | <b>5</b>  |
|                  | <b>Identified victims' DNA profiles</b>                                      | <b>5</b>  |
|                  | How identified victims' DNA profiles are collected and managed               | 5         |
|                  | <b>Unidentified victims' DNA profiles found at crime scenes</b>              | <b>6</b>  |
|                  | How unidentified crime scene profiles are collected and managed              | 6         |
| <b>Chapter 3</b> | <b>Current use and protection of victims' DNA</b>                            | <b>9</b>  |
|                  | <b>Role of NSW Police and NSW Health Division of Analytical Laboratories</b> | <b>9</b>  |
|                  | NSW Police Force   | 9         |
|                  | NSW Health Division of Analytical Laboratories                               | 10        |
|                  | <b>Legislation, policies and procedures</b>                                  | <b>10</b> |
|                  | <i>The Crimes (Forensic Procedures) Act 2000</i>                             | 11        |
|                  | Policies and procedures  | 13        |
|                  | <b>National and NSW DNA Databases</b>  | <b>16</b> |
|                  | NSW DNA Database   | 16        |
|                  | National DNA Database  | 19        |
|                  | <b>Summary of current use of victims' DNA in NSW</b>                         | <b>21</b> |
|                  | Identified victims' DNA  | 21        |
|                  | Unidentified victims' DNA  | 21        |

|                   |  |           |
|-------------------|--|-----------|
|                   | <b>Other jurisdictions</b>   | <b>22</b> |
|                   | Commonwealth and ACT   | 22        |
|                   | Queensland   | 23        |
|                   | Victoria and Tasmania  | 23        |
|                   | South Australia  | 24        |
|                   | Western Australia  | 25        |
|                   | Northern Territory   | 25        |
|                   | Canada   | 26        |
|                   | <b>Issues with the use of identified victims' DNA profiles</b>   | <b>26</b> |
|                   | Committee comment  | 31        |
| <b>Chapter 4</b>  | <b>Unidentified victims' DNA</b>   | <b>33</b> |
|                   | <b>Use of unidentified victims' DNA</b>  | <b>33</b> |
|                   | <b>How prevalent is the use of unidentified victims' DNA?</b>  | <b>34</b> |
|                   | <b>Are the current policies and procedures adequate?</b>   | <b>35</b> |
|                   | Committee comment  | 39        |
|                   | <b>Possible solutions</b>  | <b>40</b> |
|                   | A legislative ban on the use of a victim's DNA profile against that victim   | 40        |
|                   | Limitations on how the crime scene index profiles can be matched against each other to restrict the possibility of matching victims' DNA to unrelated crimes | 46        |
|                   | A discretionary power for courts to admit DNA evidence from victims "where a court deems it in the interests of justice" for major crime categories          | 50        |
|                   | <b>Other jurisdictions and the implications for the national system</b>  | <b>52</b> |
|                   | <b>Concluding comments</b>   | <b>54</b> |
| <b>Appendix 1</b> | <b>Submissions</b>   | <b>57</b> |
| <b>Appendix 2</b> | <b>Witnesses at hearings</b>   | <b>58</b> |
| <b>Appendix 3</b> | <b>Tabled documents</b>  | <b>59</b> |
| <b>Appendix 4</b> | <b>Answers to questions on notice</b>  | <b>60</b> |
| <b>Appendix 5</b> | <b>What is DNA?</b>  | <b>61</b> |
| <b>Appendix 6</b> | <b>Proposed options for dealing with unidentified victims' DNA profiles found in crime scene samples</b>   | <b>63</b> |
| <b>Appendix 7</b> | <b>Minutes</b>   | <b>70</b> |

## Tables and case studies

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|  |           |
|--|-----------|
| <b>Table 1: Matching between indexes on the NSW DNA Database</b>   | <b>18</b> |
| <b>Case 1: Victim of shoe theft potentially linked to unrelated crime scene in NSW</b>                       | <b>36</b> |
| <b>Case 2: Consensual sexual partner matched to unsolved rape case in 1986, Florida, USA</b>                 | <b>36</b> |
| <b>Case 3: Consensual sexual partners of rape victims matched to unrelated crimes – hypothetical example</b> | <b>37</b> |
| <b>Case 4: Victims' family members matched to unrelated crime scenes</b>                                     | <b>38</b> |
| <b>Case 5: Assault victim matched to murders in Wellington, New Zealand</b>                                  | <b>38</b> |
| <b>Case 6: Rape victim matched to death of toddler in Victoria</b>   | <b>39</b> |

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## Chair's foreword

This inquiry into the use of victims' DNA has been a challenging experience for the Committee due to the complex nature of the subject matter. We have relied on the expertise of inquiry participants to help us understand the issues at hand and the implications of any recommendations for change in this area. On behalf of the Committee, I express our gratitude to all participants for their significant contributions.

The key issue for this inquiry that we have reiterated throughout the report is what use can be made of information resulting from an unidentified DNA profile found at a crime scene and placed on the DNA database, which is later identified to be that of a victim, and by virtue of having been placed on the DNA database, may be matched to an unrelated crime where the victim may have been the offender. We have considered whether this information should be able to be used by police in investigations and in court proceedings for the unrelated crime due to the fact the information was appropriated from when that person was a victim – an unidentified victim.

The existence of that match poses significant ethical problems and demonstrates the conflicting imperatives at hand of protecting victims from prosecution so as to encourage them to come forward and report crimes, and supporting police in their work to apprehend offenders.

After considering a number of different options to deal with this key issue from the evidence received, we have recommended that the Attorney General pursue a limited legislative ban on the use of a victim's DNA profile against that victim for an unrelated crime, with a clause that allows for the inclusion of serious offences. This would mean a legislative ban would apply to the use of a victim's DNA profile against that victim for an unrelated offence but not apply to where the unrelated offence is a serious crime. For example, a victim whose DNA is acquired at a crime scene could have his or her DNA used against them if linked to a past or future murder charge, but not if linked to a simple break and enter offence.

We have also recommended a targeted public education campaign informing people of how, if they were a victim of crime providing a DNA sample, their profiles can be used and how they are protected. This would improve victims' understanding of what can and cannot be done with the DNA profiles and what protections are afforded to them.

We believe these recommendations will achieve an appropriate balance between protecting victims' rights and encouraging them to report crime and supporting the work of police in bringing serious offenders to account.

I thank my Committee colleagues for their informed and collaborative approach to this inquiry. I also express my thanks to the Committee secretariat for their professional support.



Hon Christine Robertson MLC  
**Committee Chair**

## Executive summary

The key issue for the inquiry, which was referred by the Attorney General, is what use can be made of information resulting from an unidentified DNA profile found at a crime scene and placed on the DNA database, which is later identified to be that of a victim, and by virtue of having been placed on the DNA database, may be matched to an unrelated crime where the victim may have been the offender. This report considers whether this information should be able to be used by police in investigations and in court proceedings for the unrelated crime due to the fact the information was appropriated from when that person was a victim – an unidentified victim. A number of potential solutions are reviewed and recommendations are made in this regard.

This report also presents information on the role of the relevant NSW Government agencies in managing victims' DNA and the current legislation, policies and procedures that regulate the use and protection of victims' DNA in NSW. The function of the national and NSW DNA databases is explained and there is a brief description of the current use and protection of victims' DNA in other jurisdictions. There is also a discussion in Chapter 3 of this report on issues that some inquiry participants have raised on the use and protection of identified victims' DNA in NSW.

### **Distinction between identified and unidentified victims' DNA**

“Identified victims' DNA profiles” are profiles belonging to those persons who have formally identified themselves to police, or have been formally identified by police, as victims of crime in a particular matter. There are policies and procedures in place, such as the Victims Protocol that provide guidance on collecting and managing identified victims' DNA. Identified victims' DNA profiles are not put on the NSW DNA Database.

“Unidentified victims' DNA profiles” are among crime scene profiles that are put on the NSW DNA Database, and are later identified as belonging to victims. In cases in which it is not clear that a sample relates to a victim, for example in an affray where there may be mixed blood samples, all the profiles derived from that sample are uploaded to the database. If at a later time it becomes apparent that a profile belongs to a victim it is removed from the database.

However, within the timeframe that the sample is put on the DNA database, later identified as a victim and then removed, a match could be made between this now identified victim and an unrelated crime scene. This type of scenario is of concern as there are no practices, policies or legislation in place that cover this class of “unidentified victim.” The key issue for the inquiry is whether this information should be able to be used by police in investigations and in court proceedings for the unrelated crime due to the fact the information was appropriated from when that person was an unidentified victim.

The Committee has acknowledged that it was not informed of any examples of an unidentified victim's DNA found at a crime scene in NSW that has been used against that victim for an unrelated crime. However, the pub brawl example set out in Chapter 3 illustrates the type of scenario that could occur and the Committee was also provided with a number of both hypothetical and real scenarios that highlight some of the potential consequences for the use of victims' DNA as set out in Chapter 4.

Most importantly, it is the potential that this matching between an unidentified victim and an unrelated crime scene can happen that is of concern because it may cause some victims to be reluctant to come forward and the fact that there are no statutory restrictions on the use of unidentified victims' DNA profiles being used to investigate unrelated crimes.

It is understood that a solution needs to ensure victims of crime are not unduly dissuaded from reporting crime, be practicable and supportive of the work of police, and mindful of NSW's participation in the National DNA Database system.

## **Possible solutions**

### ***Limitations on how the crime scene index profiles can be matched against each other***

One proposal the Committee considered involved placing limitations on how crime scene index profiles can be matched against each other to restrict the possibility of matching a victim's DNA to an unrelated crime. The proposal recommended that instead of allowing open matching between all crime scene profiles, matching would only be allowed with other crime scene profiles after all possible measures have been taken to exclude every person who is not reasonably suspected to have committed the offence, including victims. The proposal also included allowable matching if it is "justified in all the circumstances," for example, it may be allowable in urgent, complicated or unusual cases as determined by the database administrator.

The Committee acknowledged a number of concerns about this proposal that were raised by inquiry participants including who should be the person responsible for the significant decision to be made about information relating to a serious crime, the potential negative impact of limiting crime scene to crime scene matches and the practicality of this option in application. The Committee did not recommend this option.

### ***A discretionary power for courts to admit DNA evidence from victims "where a court deems it in the interests of justice" for major crime categories***

This proposal is to provide the courts with the discretionary power to allow the use of victim's DNA against the victim "where a court deems it in the interests of justice" for major crime categories including terrorism, homicide and sexual assault. In the case of major crime investigations, if a person is later identified as having been, or asserts to have been, a victim in the matter from which the profile was obtained, then the admissibility of that evidence should be sought from a magistrate prior to the apprehension of the person.

It was noted by the Committee that this option creates uncertainty for all parties involved as to whether evidence will be admitted. The Committee was also unclear on the impact that this option may have on victims reporting crime. The Committee acknowledged that at the time the decision is to be made by the court information surrounding the case may be limited. After considering these issues the Committee did not recommend this option.

### ***Legislative ban on the use of a victim's DNA profile against that victim***

Based on the evidence received, the Committee has recommended that a legislative amendment to the *Crimes (Forensic Procedures) Act 2000* be pursued to provide for a limited legislative ban on the use of a victim's DNA profile against that victim for an unrelated crime, with a clause that allows for the inclusion of serious offences. This would mean a legislative ban would apply to the use of a victim's DNA profile against that victim for an unrelated offence but not apply to the related offence (the original crime in which the DNA profile was taken), or where the unrelated offence is a serious crime.

The Committee is of the view that a legislative ban on the use of a victim's DNA for an unrelated crime, unless it is a serious offence, satisfies community expectations and allows police to bring serious

offenders to account. For example, a victim whose DNA is acquired at a crime scene could have his or her DNA used against them if linked to a past or future murder charge, but not if linked to a simple break and enter offence.

The Committee noted that as a result of such a ban those victims who have committed a serious offence earlier may not report crimes against them, however, the Committee felt that this consequence can be balanced against the protection given to other victims, who have not committed a serious crime and prosecuting offenders of serious crime.

The Committee did not receive evidence on how a 'serious offence' should be defined in these circumstances, but believes that the Attorney General is better placed to find the appropriate definition to ensure the most serious crimes are included, such as murder, sexual assault or national security offences, while protecting the majority of victims.

In addition, the Committee has agreed with NSW Health's suggestion that crime scene profiles must be removed from the NSW and National DNA Databases once that profile has been identified as belonging to a victim. This will ensure that repeated matching will not continue between the now identified victim's DNA profile and other subsequently uploaded crime scene profiles in NSW or interstate. The Committee noted that this is already NSW Health Division of Analytical Laboratories' protocol and has recommended that this protocol be enshrined in legislation.

The Committee also believes that following on from this legislative ban it will be imperative to give an appropriate warning to victims providing DNA samples that there is the possibility that their DNA sample may be used against them in relation to the crime they are supplying the sample for or a serious offence they may have committed earlier. Therefore, the Committee has recommended that, to reflect the new legislative ban, the Minister for Police require NSW Police to provide appropriate warning to victims providing DNA samples that there is the possibility of using that DNA sample against them in that particular crime or a serious offence.

### ***Targeted public education campaign***

This report has also recommended that the Attorney General undertake a targeted public education campaign informing people of how, if they were a victim of crime providing a DNA sample, their profiles can be used and how they are protected. This may at least help victims understand what can and cannot be done with the DNA profiles and what protections are afforded to them.

The Committee is of the view that the recommendations of this report would achieve an appropriate balance between protecting victims' rights and encouraging them to report crime and supporting the work of police in bringing serious offenders to account.

## Summary of recommendations

### Recommendation 1

31

That the Attorney General undertake a targeted public education campaign for victims of crime who provide DNA samples to inform victims of how their profiles can be used and what protections are afforded to them.

### Recommendation 2

55

That the Attorney General seek an amendment to the *Crimes (Forensic Procedures) Act 2000* to create a legislative ban on the use of a victim's DNA profile against that victim for an unrelated crime, with a serious offence inclusion.

### Recommendation 3

55

That the Attorney General, in consultation with the Minister for Health, pursue a legislative amendment to the *Crimes (Forensic Procedures) Act 2000* to enshrine in legislation the NSW Health Division of Analytical Laboratories protocol to remove crime scene profiles from the NSW and National DNA Databases once that profile has been identified as belonging to a victim.

### Recommendation 4

56

That, to reflect the new legislative ban, the Minister for Police require NSW Police to provide appropriate warning to victims providing DNA samples that there is the possibility of using that DNA sample against them in that particular crime or a serious offence.

## Glossary

|       |  |
|-------|--|
| AFP   | Australian Federal Police                          |
| DAL   | Division of Analytical Laboratories                |
| DNA   | Deoxyribonucleic acid                              |
| FPIT  | NSW Police Forensic Procedures Implementation Team |
| NCIDD | National Criminal Identification DNA Database      |

# Chapter 1 Introduction

This chapter provides an overview of the inquiry process, including the methods the Committee used to facilitate participation by members of the public, government agencies and relevant organisations. It also highlights the key issue for the inquiry and includes an outline of the report's contents.

## Terms of reference

- 1.1 The terms of reference for the inquiry were referred to the Committee by the NSW Attorney General, the Hon John Hatzistergos MLC on 29 June 2009. The terms of reference are reproduced on page iv.

## Conduct of the inquiry

### Submissions

- 1.2 The Committee advertised a call for submissions in *The Sydney Morning Herald* and *The Daily Telegraph* in July 2009. A media release announcing the inquiry and the call for submissions was sent to all media outlets in NSW. The Committee also wrote to relevant stakeholders and individuals inviting them to participate in the inquiry process. Submissions closed on 26 August 2009.
- 1.3 The Committee received a total of nine submissions. This included submissions from Federal and NSW Government organisations, such as CrimTrac, Australian Federal Police, NSW Police Force, NSW Health and the NSW Department of Justice and Attorney General. The Committee also received submissions from two homicide victims' support groups, an academic and a private individual. In general, the Committee was presented with a range of views on whether changes are needed and appropriate in the area of protecting victims' DNA.
- 1.4 A list of submissions is contained in Appendix 1. The submissions received by the Committee are also available on the Committee's website: [www.parliament.nsw.gov.au/lawandjustice](http://www.parliament.nsw.gov.au/lawandjustice).

### Public hearings

- 1.5 The Committee held two public hearings at Parliament House on 25 September 2009 and 30 October 2009. The Committee heard from the Department of Justice and Attorney General, NSW Police Force, NSW Health's Criminalistics Division of the Analytical Laboratories, the Law Society of NSW, the Homicide Victims Support Group, the NSW Council of Civil Liberties and Dr Jeremy Gans from the Melbourne Law School.
- 1.6 A list of witnesses who appeared at hearings is reproduced in Appendix 2. The transcripts of all hearings are available on the Committee's website.

**Proposed options paper**

- 1.7 In addition to submissions and public hearings, the Committee sought further comment from inquiry participants through a proposed options paper that set out the options for reform presented to the Committee. The proposed options paper is included in Appendix 6.
- 1.8 The Committee thanks all the individuals and organisations that provided input during the inquiry.

**Key issue for the inquiry**

- 1.9 The focus of this inquiry is on the use of profiles derived from material obtained from victims of crime which contains deoxyribonucleic acid (DNA). DNA is found in every nucleated cell in the human body. DNA carries the body's genetic information in the form of a code, which determines the physical characteristics of each individual.<sup>3</sup>
- 1.10 A DNA profile is a string of numbers derived by means of a chemical and analytical process which describes a portion of the DNA. DNA is considered to be forensic material, which can be used as evidence in relation to the investigation and prosecution of a crime.<sup>4</sup> Further detail on DNA and DNA profiles is contained in Appendix 5.
- 1.11 The terms of reference for the inquiry was accompanied by information from the Attorney General that provided background and context for the inquiry. This correspondence indicated that the key issue the Attorney General would like the Committee to consider is the use and protection of unidentified DNA profiles acquired from a crime scene that are subsequently identified to be from a victim.<sup>5</sup>
- 1.12 While identified victims' DNA profiles are not placed on the NSW DNA database, there are some circumstances in which a victim's DNA, for example, as part of a crime scene DNA sample, may be placed on the DNA database.<sup>6</sup> The Committee has been asked by the Attorney General to consider what use can be made of information resulting from an unidentified DNA profile found at a crime scene and placed on the DNA database, which is later identified to be that of a victim, and by virtue of having been placed on the DNA database, may be matched to an unrelated crime where the victim may have been the offender.<sup>7</sup>
- 1.13 The concern is that victims of crime may be unduly dissuaded from reporting crime, especially if they may have previously been an offender. The Committee recognises that there is a need

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<sup>3</sup> Standing Committee on Law and Justice, "Review of the *Crimes (Forensic Procedures) Act 2000*", February 2002, p 4

<sup>4</sup> Submission 8, Department of Justice and Attorney General, p 2

<sup>5</sup> Correspondence from the Hon John Hatzistergos MLC, Attorney General, to Chair, 25 June 2009, p 2

<sup>6</sup> Correspondence from the Hon John Hatzistergos MLC, Attorney General, to Chair, 25 June 2009, p 2

<sup>7</sup> Correspondence from the Hon John Hatzistergos MLC, Attorney General, to Chair, 25 June 2009, p 2

to balance competing public interests and any changes must be practicable and supportive of the work of police in bringing offenders to account.

- 1.14 The Committee has considered this key issue in conjunction with other issues raised by stakeholders through out the inquiry process.

### Review of the *Crimes (Forensic Procedures) Act 2000*

- 1.15 The Committee conducted a broad based review of the *Crimes (Forensic Procedures) Act 2000* in 2002, which is the relevant legislation for this current inquiry. The Committee made 56 recommendations. The Committee notes that, while this is not the key issue for our current inquiry, it's earlier review did recommend that the Attorney General develop provisions regulating the databasing of identified victims' DNA profiles to ensure that matches are not attempted between victims' profiles and any other crimes.<sup>8</sup> The Government response to this review indicated that the Attorney General's Department would consider recommendations that make proposals to amend the Act as part of its departmental review of the Act.<sup>9</sup>

- 1.16 The Committee notes that the Crimes (Forensic Procedure) Amendment Bill 2008 amended the legislation to provide for tighter restrictions on permissible matching allowed between profiles, including volunteers such as victims who provided their DNA sample for a limited purpose.<sup>10</sup> The report and Government response can be accessed on the Committee's website.

### Report structure

- 1.17 This report is comprised of four chapters. This first chapter outlines the process undertaken by the Committee during this inquiry and highlights the key issue for the inquiry.
- 1.18 Chapter 2 provides detail on the distinction between identified victims' DNA and unidentified DNA profiles found at crime scenes that are later identified to belong to victims and how each category of victims' DNA is managed in NSW.
- 1.19 Chapter 3 presents information that provides context for the inquiry, including relevant legislation, policies and procedures that relate to the current use and protection of victims' DNA in NSW. It identifies the role of NSW Government agencies in managing victims' DNA and outlines the functions of the national and NSW DNA databases. There is also a brief discussion on other jurisdictions' legislation, policies and procedures on the use and protection of victims' DNA. This chapter also includes a brief discussion on the use and protection of *identified* victim's DNA, including the role of the Victims' Protocol.

<sup>8</sup> Standing Committee on Law and Justice, "Review of the *Crimes (Forensic Procedures) Act 2000*", February 2002, p 143. Please note that the Committee membership has changed since this report was tabled.

<sup>9</sup> Government Response to the Standing Committee on Law and Justice, "Review of the *Crimes (Forensic Procedures) Act 2000*", 28 August 2002, p 1

<sup>10</sup> The Hon Penny Sharpe, *NSWPD (Legislative Council)*, 25 June 2008, p 9239

- 1.20** Chapter 4 deals with the key issue for the inquiry – the use and protection of *unidentified* victims' DNA profiles found at crime scenes. It is possible that when an unidentified victim's DNA profile is contained in a crime scene DNA sample and this sample is uploaded to the NSW DNA database a match may be made to a different crime scene before it is established the profile is from a victim. This chapter considers what should be done with this information and reviews a number of potential solutions and makes recommendations in this regard.

## Chapter 2 Identified and unidentified victims' DNA profiles

This chapter provides detail on the distinction between identified and unidentified victims' DNA profiles and provides an overview of how each category is managed by NSW Police and NSW Health.

### Identified victims' DNA profiles

**2.1** Identified victims' DNA profiles are profiles belonging to those persons who have formally identified themselves to police, or have been formally identified by police, as victims of crime in a particular matter.<sup>11</sup>

#### How identified victims' DNA profiles are collected and managed

**2.2** Police take DNA samples via a buccal (mouth) swab from an identified victim in their capacity as an "excluded volunteer (limited purposes)."

**2.3** A person who volunteers a sample of their DNA to be used for limited purposes is "excluded" from the *Crimes (Forensic Procedures) Act 2000*.<sup>12</sup> Instead, identified victim DNA samples are taken in accordance with the NSW Victims Protocol, which was developed by the Attorney General and the Minister for Police in 2007.<sup>13</sup>

**2.4** An identified victim's DNA sample is used as a reference sample for elimination purposes in comparison to other DNA samples found at a crime scene.<sup>14</sup>

**2.5** The categorisation of excluded volunteer (limited purposes) means that the purposes for which the volunteered profile can be used are limited to within case matching and cannot be used for matching outside the case in question.<sup>15</sup>

**2.6** Identified victims' DNA profiles are not put on the NSW DNA Database.<sup>16</sup>

**2.7** Further detail on the NSW DNA Database, the NSW Victims Protocol and the policies followed by NSW Health and NSW Police in managing identified victims' DNA are contained in the next chapter.

<sup>11</sup> Submission 5, NSW Police, p 5

<sup>12</sup> Submission 5, pp 6-7. In contrast, DNA samples taken from suspects are covered by the *Crimes (Forensic Procedures) Act 2000*.

<sup>13</sup> Correspondence from the Hon John Hatzistergos MLC, Attorney General, to Chair, 25 June 2009, p 1

<sup>14</sup> Submission 5, pp 6-7

<sup>15</sup> Submission 5, pp 6-7

<sup>16</sup> Submission 5, pp 6-7

## Unidentified victims' DNA profiles found at crime scenes

- 2.8** Unidentified victims' DNA profiles are among the crime scene profiles that are put on the NSW DNA Database, and are later identified as belonging to victims.<sup>17</sup>
- 2.9** Crime scene profiles often contain unidentified DNA profiles from persons who have not formally identified themselves to police, or have not been formally identified by police as being involved in the incident of the crime scene and/or whose involvement in the matter is unclear or unknown.<sup>18</sup>
- 2.10** The Department of Justice and Attorney General (DJAG) stated that almost any sample taken from a crime scene might contain forensic material belonging to a victim. The DJAG provided the following examples:

A stark example of where this might occur is a semen sample taken as part of a sexual assault kit which would almost certainly contain some material belonging to the victim intermingled with the semen. Another example is material belonging to the occupiers of premises which have been broken into.<sup>19</sup>

### How unidentified crime scene profiles are collected and managed

- 2.11** Multiple DNA profiles may be found at a crime scene. Reference samples are taken from identified victims in order to exclude their profiles from the remaining profiles found at the crime scene, as noted in paragraph 2.4.<sup>20</sup>
- 2.12** Once all identified victims' profiles have been excluded from the crime scene material the remaining unidentified DNA profiles are uploaded to both NSW DNA Database and the National DNA Database for the purpose of potential matching with other person profiles (crime scene to person match) or other crime scene profiles (crime scene to crime scene match) on the databases.<sup>21</sup>
- 2.13** Any resulting matches are used as intelligence by police for further investigation and potential convictions.<sup>22</sup>
- 2.14** The DJAG stated that the NSW Health Division of Analytical Laboratories (DAL), which manages the NSW DNA Database, takes particular care to ensure that profiles known or reasonably suspected to belong to victims derived from material found at crime scenes are not placed on the databases, and not matched against other crimes.

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<sup>17</sup> Ms Penny Musgrave, Director, Criminal Law Review, Department of Justice and Attorney General, Evidence, 25 September 2009, p 4

<sup>18</sup> Submission 5, p 5

<sup>19</sup> Submission 8, Department of Justice and Attorney General, p 4

<sup>20</sup> Submission 5, p 7

<sup>21</sup> Submission 5, pp 6-7

<sup>22</sup> Submission 5, p 7

- 2.15** The DJAG indicated that in cases in which it is not clear that a sample relates to a victim, for example in an affray where there may be mixed blood samples, all the profiles derived from that sample are uploaded to the database.<sup>23</sup>
- 2.16** If at a later time it becomes apparent that a profile belongs to a victim it is removed from the database.<sup>24</sup>
- 2.17** However, Ms Penny Musgrave, Director, Criminal Law Review at DJAG, advised that within the timeframe that the sample is put on the DNA database, later identified as a victim and then removed, a match could be made between this now identified victim and an unrelated crime scene. Ms Musgrave explained:
- The difficulty occurs if in that window where it has not been identified, the match comes through and that person is identified as someone who has committed an offence.<sup>25</sup>
- 2.18** A further way in which a victim's DNA may find its way onto the database and matched to an unrelated crime scene is when a victim's DNA profile is uploaded to the National DNA Database by another jurisdiction that does not follow the NSW practice of not placing victim profiles on the database. This could potentially result in a match between a crime scene in NSW and a victim from another jurisdiction.<sup>26</sup>
- 2.19** If at a later stage that originally unidentified victim is identified, either by coming forward or through further police investigations, then the intelligence that the police have is that the same person was at the original crime scene as a victim and also at an unrelated crime scene, where they may have been an offender. This relates to both scenarios set out above. The key issue for the inquiry is whether this information should be able to be used by police in investigations and in court proceedings for the unrelated crime due to the fact the information was appropriated from when that person was a victim – an unidentified victim<sup>27</sup>
- 2.20** Ms Musgrave advised that this type of matching is an issue as there are no practices, policies or legislation in place that cover this class of samples from the time they are unidentified up until the time they are identified.<sup>28</sup>
- 2.21** The next chapter provides detail on current use and protection of both identified and unidentified victims' DNA in NSW, including the role and policies of NSW Police and NSW Health in this area. The Committee considers proposed solutions to the inquiry's key issue in Chapter 4.

<sup>23</sup> Submission 8, p 5 and Correspondence from the Hon John Hatzistergos MLC, Attorney General, to Chair, 25 June 2009, p 2

<sup>24</sup> Submission 8, p 5

<sup>25</sup> Ms Musgrave, Evidence, 25 September 2009, p 3

<sup>26</sup> Correspondence from the Hon John Hatzistergos MLC, Attorney General, to Chair, 25 June 2009, p 2

<sup>27</sup> Correspondence from the Hon John Hatzistergos MLC, Attorney General, to Chair, 25 June 2009, p 2

<sup>28</sup> Ms Musgrave, Evidence, 25 September 2009, p 8



## Chapter 3      **Current use and protection of victims’ DNA**

This chapter outlines the role of the relevant NSW Government agencies in managing victims’ DNA and the current legislation, policies and procedures that regulate the use and protection of victims’ DNA in NSW. The function of the national and NSW DNA databases is explained and the chapter includes a brief description of the current use and protection of victims’ DNA in other jurisdictions. There is also a discussion on issues that some inquiry participants have raised on the use and protection of identified victims’ DNA in NSW.

### **Role of NSW Police and NSW Health Division of Analytical Laboratories**

**3.1**      The NSW Police Force and the NSW Health Division of Analytical Laboratories are the key government agencies that manage victims’ DNA in NSW.

#### **NSW Police Force**

**3.2**      Most forensic procedures are conducted by police officers, although other experts, such as medical practitioners or dentists, may conduct some procedures.<sup>29</sup>

**3.3**      The NSW Police Forensic Procedures Implementation Team (FPIT) is the key section of the NSW Police Force that manages forensic policies and procedures, including how DNA can be used in police investigations. The FPIT administers the operation of the *Crimes (Forensic Procedures) Act 2000* within the NSW Police Force. FPIT is the formal interface point between the police and the NSW Health Division of Analytical Laboratories.<sup>30</sup>

**3.4**      The role of the FPIT includes:

- validating DNA match information between DNA profiles received from the Division of Analytical Laboratories
- disseminating this validated information to operational police involved in the relevant investigation
- administering the standard operating procedures concerning the carrying out of forensic procedures, including the taking of DNA samples from people
- providing advice to operational police.<sup>31</sup>

<sup>29</sup> NSW Ombudsman, “DNA Sampling and other forensic procedures conducted on suspects and volunteers under the *Crimes (Forensic Procedures) Act 2000*,” October 2006, p i (hereafter referred to as the Ombudsman Report)

<sup>30</sup> Answers to written questions on notice, NSW Police, Question 3, p 2

<sup>31</sup> Answers to written questions on notice, NSW Police, Question 3, p 2

### NSW Health Division of Analytical Laboratories

- 3.5** The NSW Health Division of Analytical Laboratories (DAL) was designated as the agency to provide the NSW Justice System with comprehensive DNA services at the time of the enactment of the *Crimes (Forensic Procedures) Act 2000*. DAL is located in Lidcombe and is administered by the Sydney West Area Health Service (SWAHS). Under section 3(1) of this Act and clause 6 of the *Crimes (Forensic Procedures) Regulation 2008*, the Chief Executive of the SWAHS is declared to be the person “responsible for the care, control and management of the NSW DNA database system.”<sup>32</sup>
- 3.6** The services the DAL provides include:
- forensic biology services involving the analysis of biological materials from crime scene items, victims and suspects
  - forensic DNA services involving testing of DNA samples from crime scene items and persons of interest
  - the management of the NSW DNA Database and uploading of profiles to the National DNA Database.<sup>33</sup>
- 3.7** The Forensic Biology DNA Laboratory of the DAL receives all forensic material from cases for examination from NSW Police, including murders, sexual assaults and property crimes like stolen motor vehicles and break and enters. The cases are examined to identify areas suitable for DNA testing which can be used to provide evidence in criminal cases, as well as provide intelligence to NSW Police as to the possible perpetrator of the crime through matching on the NSW and National DNA Databases.<sup>34</sup>
- 3.8** Once DAL has completed a case, a report is issued to NSW Police. All DNA samples that are “uploadable” to the NSW DNA Database are uploaded by DAL and when a link is obtained from a crime scene to a person or a crime scene to another crime scene, it is reported to the NSW Police FPIT.<sup>35</sup>

### Legislation, policies and procedures

- 3.9** There are various levels of governance pertaining to the use and protection of victims' DNA in NSW. The relevant legislation, the *Crimes (Forensic Procedures) Act 2000*, in conjunction with NSW Government departmental policies and procedures provide guidance on the use and protection of victims' DNA in NSW.

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<sup>32</sup> Submission 6, NSW Health, p 3

<sup>33</sup> Submission 6, p 3

<sup>34</sup> Answers to written questions on notice, NSW Health, Question 1, p 1

<sup>35</sup> Answers to written questions on notice, NSW Health, Question 1, p 1

### **The *Crimes (Forensic Procedures) Act 2000***

- 3.10** The *Crimes (Forensic Procedures) Act 2000* (the Act) regulates police powers to perform forensic procedures on suspects, offenders and volunteers.<sup>36</sup> As noted in a 2006 review of this legislation by the NSW Ombudsman, identified victims of crime are specifically excluded from the operation of the Act.<sup>37</sup> The Act does cover the handling of unidentified DNA crime scene samples but not unidentified DNA samples that are later identified as victims (unidentified victims).<sup>38</sup>
- 3.11** Victims of crime were removed from the Act as the provisions relating to carrying out forensic procedures were not originally proposed to apply to victims and in various circumstances would be considered inappropriate. This issue was explained in the second reading speech for the introduction of the legislation to Parliament:
- The provisions were not originally proposed to apply to victims of personal violence offences. There are formal procedural requirements in Part 8 that are inappropriate for victims of personal violence offences, such as a sexual assault, who may be traumatised at the time they are asked to undergo a forensic procedure. An example of this is the requirement in section 57 of the Act that forensic procedures be electronically recorded. Requiring police to comply with all of the provisions of Part 8 whenever they deal with a victim of crime would also create an unnecessary administrative and legal burden for police.<sup>39</sup>
- 3.12** The Act authorises three different categories of forensic procedures including buccal swabs (mouth swabs) for DNA sampling; non-intimate procedures, such as photographs and fingerprints; and intimate procedures such as blood samples, dental impressions and intimate photos. Forensic procedures can be conducted on suspects, volunteers and certain convicted offenders.<sup>40</sup>
- 3.13** There are a number of safeguards in the Act that protect the rights and interests of people that police conduct forensic procedures on. For example, Part 6 of the Act outlines the general rules and practices for police to follow in carrying out forensic procedures on suspects and Part 8 outlines these rules for certain volunteers. The Act does not apply the safeguards to victims.<sup>41</sup>
- 3.14** Part 11 of the Act provides for a DNA database system. This database contains indexes of DNA profiles obtained from crime scenes, suspects, volunteers, missing persons, and

<sup>36</sup> Standing Committee on Law and Justice, “Review of the *Crimes (Forensic Procedures) Act 2000*”, February 2002, p 10

<sup>37</sup> Ombudsman Report, October 2006, p i

<sup>38</sup> Ms Penny Musgrave, Director, Criminal Law Review, Department of Justice and Attorney General, Evidence, 25 September 2009, p 3

<sup>39</sup> The Hon Carmel Tebbutt MLC, *NSWPD (Legislative Council)*, 12 June 2002, p 3056

<sup>40</sup> Ombudsman Report, October 2006, p i and the *Crimes (Forensic Procedures) Act 2000*, s3 and s76. A forensic procedure is a way to obtain evidence that relates to the investigation and prosecution of a crime.

<sup>41</sup> Ombudsman Report, October 2006, p i and the *Crimes (Forensic Procedures) Act 2000*, Part 6 and Part 8

unknown deceased persons.<sup>42</sup> Only certain types of matching are permitted between these various indexes.<sup>43</sup> More detail on the NSW DNA Database is outlined later in the chapter.

**3.15** Part 11 of the Act also covers the use of crime scene DNA samples in terms of defining what a crime scene profile is and which indexes the crime scene samples can be matched against.<sup>44</sup>

**3.16** The Act does not provide guidance on how to handle a crime scene DNA profile that is later identified as a victim's profile.<sup>45</sup> These samples are managed according to NSW Health departmental policy, as outlined in a later section of this chapter.

**3.17** A recent proposed amendment to the Act, the Crimes (Forensic Procedures) Amendment Bill 2009, that is relevant to this inquiry, provides that in order for a person, who is not a suspect, to validly volunteer to undergo a forensic procedure under the Act, the person must be told that the procedure might produce evidence, which could be used against them in court.<sup>46</sup>

**3.18** In addition to the Act there is the Crimes (Forensic Procedures) Regulation 2008 which:

- provides further definitions on terms used in the Act
- sets out the particulars to be contained in the form of consent to carry out forensic procedures on offenders and volunteers
- provides guidance on access and disclosure of information on the DNA database.<sup>47</sup>

**3.19** The Act does not apply to forensic procedures carried out on people who are deemed to be excluded volunteers as set out in section 76A of the Act. This includes 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.<sup>48</sup>

**3.20** NSW Police advised that they can take DNA samples from an identified victim in their capacity as an "excluded volunteer (limited purposes)." This refers to a person who volunteers a sample of their DNA to be used for limited purposes and from whom the taking of their DNA is excluded from the *Crimes (Forensic Procedures) Act 2000*.<sup>49</sup> For example, if police wish to take a DNA sample from a victim for the purposes of elimination from DNA profiles found

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<sup>42</sup> *Crimes (Forensic Procedures) Act 2000*, s90

<sup>43</sup> *Crimes (Forensic Procedures) Act 2000*, s93

<sup>44</sup> *Crimes (Forensic Procedures) Act 2000*, Part 11

<sup>45</sup> Ms Musgrave, Evidence, 25 September 2009, p 3

<sup>46</sup> The Hon Tony Kelly MLC, *NSWPD (Legislative Council)*, 2 September 2009, p 17066. The key change in the bill concerns the introduction of a legislative scheme to govern the conduct of forensic procedures on children under 10 years of age, who are currently excluded from the provisions of the Act. This Bill was passed on 1 December 2009.

<sup>47</sup> Crimes (Forensic Procedures) Regulation 2008

<sup>48</sup> Ombudsman Report, October 2006, p i and the *Crimes (Forensic Procedures) Act 2000*, section 76A

<sup>49</sup> Submission 5, NSW Police, p 6

at a crime scene, this procedure is not covered by the Act.<sup>50</sup> These procedures are covered by a protocol, which is outlined in the next section.

### **Policies and procedures**

**3.21** As noted above, forensic procedures conducted on most victims of crime are **not** conducted pursuant to the Act as most identified victims of crime are defined as “excluded volunteers” in section 76A. Instead these procedures are conducted in accordance with a protocol, called the Victims Protocol. The Victims Protocol was first developed in 2002 with the latest version agreed to by the Minister for Police and the Attorney General in 2007.<sup>51</sup>

**3.22** In addition to the Victims Protocol, NSW Police and NSW Health advised that there are a number of government policies and procedures in place regarding the protection and use of victims’ DNA. These are all outlined below.

#### ***Victims Protocol***

**3.23** The Victims Protocol sets out the process for carrying out forensic procedures (as defined in the Act) on the following excluded volunteers:

- A person who volunteers to a police officer to undergo a forensic procedure in relation to an offence under Part 3, or Subdivision 2 of Division 1 of Part 4, of the *Crimes Act 1900*<sup>52</sup> of which the person is a victim, or
- A child or incapable person whose parent or guardian volunteered to a police officer that the child or incapable person undergo a forensic procedure in relation to an offence under Part 3, or Subdivision 2 of Division 1 of Part 4, of the *Crimes Act 1900* of which the child or incapable person is a victim.<sup>53</sup>

**3.24** The protocol states that when a police officer asks a victim to consent to a forensic procedure, the victims should be informed of:

- the type of forensic procedure to be carried out
- the way in which the forensic procedure will be carried out
- why the police officer believes the forensic procedure is required
- their right to refuse to undergo the procedure
- if they consent, their right to withdraw consent at any time
- their right to consult a legal practitioner

<sup>50</sup> Submission 5, p 6

<sup>51</sup> Submission 8, Department of Justice and Attorney General, p4 and Ms Musgrave, Evidence, 25 September 2009, p 2

<sup>52</sup> Part 3 and Subdivision 2 of Division 1 of Part 4 of the *Crimes Act 1900* relates to offences against the person and robbery offences respectively.

<sup>53</sup> *Victims Protocol: Conducting a forensic procedure in relation to a victim of a personal violence offence*, 2007, p 1

- that the procedure will only be carried out with their written consent as per Annexure B of the protocol
- if the sample is to be taken from the victim for the purpose of obtaining a DNA profile, the information in Annexure C of the protocol should be explained to the victim and their written consent then obtained.<sup>54</sup>

**3.25** Annexure C of the protocol sets out five points that victims providing a DNA sample are required to understand including that their DNA profile will only be used for the purpose of investigating the offence committed against them and that a request for the destruction of the DNA sample is to be made in writing to NSW Police.<sup>55</sup>

**3.26** An example provided by the Department of Justice and Attorney General (DJAG) of when the Victims Protocol would be followed by police is a buccal (mouth) swab taken from a victim of a break and enter offence in order to exclude their DNA from other DNA evidence at the scene. This victim profile is either not loaded onto the NSW DNA Database, or loaded on specific indexes designated for it, such as the volunteers limited purposes index. If loaded on the database only the permitted matching as set out in section 93 of the Act is allowed.<sup>56</sup>

**3.27** It is noted that this protocol relates to people that have been identified as victims. It does not apply to crime scene DNA samples that can contain unidentified victim DNA profiles, that is, DNA profiles from persons who may be later identified as victims.<sup>57</sup>

### ***NSW Health policies***

**3.28** The NSW Health's DAL has a standard policy to obtain a victim reference DNA sample for the purpose of exclusion from crime scene DNA samples:

With respect to biological material recovered from crime scenes, the standard procedure for medical practitioners in conducting a sexual assault kit involves both the:

- Obtaining of any potential offender DNA, as well as
- Obtaining a reference sample from the victim to isolate the victim's profile and upload only the potential offender profile(s) to the DNA database if necessary.

For other crime, DAL policy and procedure involves the requesting of reference samples from victims (if not already provided) after an assessment of the available biological evidence in the context of the case, and where a DNA profile is believed to have originated from the victim of the crime. This enables the victim's profile to be

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<sup>54</sup> *Victims Protocol: Conducting a forensic procedure in relation to a victim of a personal violence offence*, 2007, p 2

<sup>55</sup> *Victims Protocol: Conducting a forensic procedure in relation to a victim of a personal violence offence*, 2007, Annexure C

<sup>56</sup> Submission 8, p 4

<sup>57</sup> Answers to questions on taken on notice, NSW Health, p 8

identified and filtered from potential offenders' profiles with regard to database uploading and matching.<sup>58</sup>

**3.29** NSW Health advised that the following policies and procedures have been implemented by DAL to protect DNA material belonging to victims and limited volunteers (also referred to as “excluded volunteer – limited purposes”). These policies are applicable to both uploading and non-uploading of person reference samples to the DNA databases:

- Victim and limited volunteer person samples are received and analysed in reference to a specific case. Each such person sample is only used for comparison purposes within the case for which it was submitted and is NOT uploaded for searching on the “active” database.
- Victim and limited volunteer person samples are compared to crime scene samples ONLY for the case for which such person samples were submitted. Such samples are not used for any other matters.
- Profiles obtained from crime scene samples are NOT uploaded to the database for searching if they match a victim sample submitted for the same matter.
- If an uploaded crime scene sample is subsequently determined to match a victim or limited volunteer, the profile is removed from searching on the database – for example a reference sample from a victim or limited volunteer may be submitted some time after the crime scene sample is uploaded.
- There are procedures in place for destruction of victim and limited volunteer profiles upon request.
- A crime scene profile is not uploaded if it knowingly matches a victim or limited volunteer sample or it is reasonably assumed that the crime scene sample originates from the victim or limited volunteer. For example, a female profile found on a vaginal swab can reasonably be assumed to belong to the donor of the swab.
- Unlimited volunteer samples are NOT uploaded to the database until there has been a check by NSW police that the unlimited volunteer category is correct.<sup>59</sup>

**3.30** NSW Health commented that the *Crimes (Forensic Procedures) Act 2000* does not currently prevent the uploading of victim DNA profiles to the NSW DNA Database.<sup>60</sup> Mr Robert Goetz, Acting Deputy Director of DAL confirmed for the Committee that there are no restrictions in the Act that stop victims' DNA profiles from being uploaded to the NSW DNA database but there is a NSW Health departmental policy that restricts this action as set out above.<sup>61</sup>

<sup>58</sup> Submission 5, p 9

<sup>59</sup> Submission 6, pp 6-7. An unlimited volunteer sample refers to a sample that is placed on the unlimited volunteers index and may be used for the purposes of a criminal investigation, that is, it is not limited to the specific criminal investigation for which it was volunteer (refer to section 77 (2)(c) of the *Crimes (Forensic Procedures) Act 2000*).

<sup>60</sup> Submission 6, p 7

<sup>61</sup> Mr Robert Goetz, Acting Deputy Director, Division of Analytical Laboratories, Sydney West Area Health Service, Evidence, 25 September 2009, p 21

***NSW Police policy***

**3.31** The NSW Police FPIT policy for checking DNA matches made through the DNA databases that are provided to police by DAL, prior to dissemination to operational police, is outlined below:

The NSWPF Forensic Procedures Implementation Team (FPIT) conducts a quality review of DNA profile match information before dissemination to investigators. This includes cross-referencing with the Computerised Operational Policing System (COPS) to confirm the accuracy and validity of information with respect to:

- the correct categorisation of samples obtained from persons (including victims);
- compliance with legislative provisions concerning destruction requirements; and
- detecting any other compliance or accuracy issues.<sup>62</sup>

**3.32** NSW Police advised that, for example, this would include confirming the person's forensic procedure details are consistent with information provided by DAL, including checking the sample barcode and checking the person sample is not subject to destruction under the Act.<sup>63</sup>

**3.33** NSW Police commented that this 'routine and thorough checking procedure is considered an adequate safeguard concerning the prevention of dissemination to operational police of DNA links constituting an identified victim profile.'<sup>64</sup>

**National and NSW DNA Databases****NSW DNA Database**

**3.34** NSW has a large and powerful DNA database that is operated by NSW Health's DAL.<sup>65</sup> NSW Health advised that DNA profiles from crime scenes and person samples (suspects, convicted offenders, untested former offenders, untested registrable persons, missing persons, unknown deceased, known deceased) are loaded to the searchable NSW DNA Database. Identified victim samples and limited volunteer samples are loaded to a non-searchable section of the NSW DNA Database.<sup>66</sup>

**3.35** The NSW DNA Database consists of DNA profiles under various indexes, which are defined in section 90 of the *Crimes (Forensic Procedures) Act 2000*, including:

- a crime scene index

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<sup>62</sup> Submission 5, p 9

<sup>63</sup> Submission 5, p 9

<sup>64</sup> Submission 5, p 10

<sup>65</sup> The Hon Paul Macleay MP, *NSWPD (Legislative Assembly)*, 28 September 2006, pp 2545-2546

<sup>66</sup> Answers to written questions on notice, NSW Health, Question 2, p 2

- a missing persons index
- an offenders index
- a suspects index
- an unknown deceased persons index
- a volunteers (limited purposes) index
- a volunteers (unlimited purposes) index.<sup>67</sup>

**3.36** There are time limits set out in the Act that apply to the retention of DNA profiles on the database. For example, in the case of the offenders index if an offender is acquitted or pardoned, the DNA profile must be destroyed as soon as practical.<sup>68</sup>

**3.37** Mr Goetz from DAL provided the following information on destruction and retention of DNA profiles on the database:

With regard to person samples, under the legislation suspect samples can be kept for up to a year, unless there have been extensions. If we do not hear from police that the sample has been extended, we will automatically remove it from the [searchable] database after one year. If at a later stage the police say that the sample can be extended, we can extend that sample. If, on the other hand, they give us a destruction order, that sample is destroyed within a couple of minutes of us receiving that destruction order, and that can never be resurrected.<sup>69</sup>

**3.38** In relation to the crime scene index, there are no time limits relating to retention and destruction. However, if at a later stage a crime scene DNA sample is identified as a victim DNA profile, DAL will remove it from the searchable DNA database.<sup>70</sup>

#### ***Matches made through the database***

**3.39** The Act also sets out permissible matching of DNA profiles against the indexes as set out in Table 1. For example, a DNA profile collected at a crime scene can be placed on the database and compared to DNA profiles on the crime scene index, the missing persons index, offenders index, suspects index, the unknown deceased persons index and the volunteers (unlimited purposes) index. However, it can only be compared to the volunteers (limited purposes) index if matching is for a purpose for which the profile was placed on that index.<sup>71</sup>

<sup>67</sup> *Crimes (Forensic Procedures) Act 2000*, Part 11

<sup>68</sup> *Crimes (Forensic Procedures) Act 2000*, ss 88(2) and 94

<sup>69</sup> Mr Goetz, Evidence, 25 September 2009, p 19

<sup>70</sup> Mr Goetz, Evidence, 25 September 2009, p 22

<sup>71</sup> *Crimes (Forensic Procedures) Act 2000*, s93

**Table 1: Matching between indexes on the NSW DNA Database<sup>72</sup>**

| Index of profile to be matched  | Is matching permitted? |          |                               |                                 |                        |                        |                          |
|---------------------------------|------------------------|----------|-------------------------------|---------------------------------|------------------------|------------------------|--------------------------|
|                                 | column 2               | column 3 | column 4                      | column 5                        | column 6               | column 7               | column 8                 |
| column 1                        | crime scene            | suspects | volunteers (limited purposes) | volunteers (unlimited purposes) | offenders              | missing persons        | unknown deceased persons |
| crime scene                     | yes                    | yes      | only if within purpose        | yes                             | yes                    | yes                    | yes                      |
| suspects                        | yes                    | yes      | no                            | no                              | yes                    | yes                    | yes                      |
| volunteers (limited purposes)   | only if within purpose | no       | no                            | no                              | only if within purpose | only if within purpose | only if within purpose   |
| volunteers (unlimited purposes) | yes                    | no       | no                            | no                              | yes                    | yes                    | yes                      |
| offenders                       | yes                    | yes      | only if within purpose        | yes                             | yes                    | yes                    | yes                      |
| missing persons                 | yes                    | yes      | only if within purpose        | yes                             | yes                    | yes                    | yes                      |
| unknown deceased persons        | yes                    | yes      | only if within purpose        | yes                             | yes                    | yes                    | yes                      |

**3.40** The DJAG advised that the database facilitates matching between profiles so that a profile taken from a suspect can be compared to profiles taken from crime scenes and matched to a particular scene.<sup>73</sup> The DJAG stated there are limitations on the matching that can be made:

Limitations are placed on profiles acquired from certain sources, for example, a profile taken from a volunteer for a particular purpose can only ever be matched for that purpose and can never be matched against profiles taken from suspects.<sup>74</sup>

**3.41** In terms of matches made through the database, the DJAG commented that once a match has occurred between two samples on the database, certain inferences could be drawn. Three examples are:

- A match between a sample on the crime scene index of the database and a sample on the offender index would be powerful evidence that the person's

<sup>72</sup> Tabled document, NSW Health, Permissible matching under the *Crimes (Forensic Procedures) Act 2000*, p2 and *Crimes (Forensic Procedures) Act 2000*, s93

<sup>73</sup> Submission 8, p 2

<sup>74</sup> Submission 8, p 2

DNA was present at that scene and would tend to suggest that that person was there.

- A match between a crime scene profile and another crime scene profile would tend to suggest that the same person was at both crime scenes
- A match between a missing person profile and a suspect would tend to suggest that the suspect is the same person as the missing person.<sup>75</sup>

**3.42** Information obtained from these matches can be used in conjunction with other information to build a case against a suspect or provide intelligence for police to focus their investigation in certain areas. The knowledge that a certain person is likely to have been at a certain place is of itself evidence which can be presented in court against that person.<sup>76</sup>

### **National DNA Database**

**3.43** NSW also takes part in the National DNA Database (National Criminal Investigation DNA Database or NCIDD).<sup>77</sup> The National DNA Database was launched in 2001 and finalised in April 2009. It took eight years to establish the database due to legislative and policy complexities affecting the different jurisdictions.<sup>78</sup> CrimTrac, the Commonwealth Government agency responsible for information sharing for law enforcements, is the custodian of the database.<sup>79</sup>

**3.44** Through agreements it has with CrimTrac and with other jurisdictions in Australia, NSW can, via the National DNA Database, both exchange samples with other jurisdictions and match profiles against profiles uploaded by other jurisdictions.<sup>80</sup>

**3.45** CrimTrac advised that the National DNA Database provides Australia's police with the ability to directly match inter-jurisdictional DNA profiles as it contains DNA profiles from all Australian police jurisdictions.<sup>81</sup> CrimTrac stated 'the database provides Australian police and forensic scientists with a powerful investigative tool which automatically crosses jurisdictional boundaries.'<sup>82</sup>

**3.46** The National DNA Database operates in accordance with relevant Commonwealth, State and Territory legislation governing the collection and matching of DNA profiles. Profiles are removed from the database in accordance with destruction dates notified by the jurisdictions.

<sup>75</sup> Submission 8, p 2

<sup>76</sup> Submission 8, p 3

<sup>77</sup> Submission 8, p 2

<sup>78</sup> Media Release, CrimTrac Agency "*Australia secures complete national DNA sharing*", 14 April 2009

<sup>79</sup> Submission 3, CrimTrac, p 1

<sup>80</sup> Submission 8, p 2

<sup>81</sup> Submission 3, p 1

<sup>82</sup> Submission 3, p 1

The upload, match and destruct capabilities are documented by the audit function on the National DNA Database.<sup>83</sup>

**3.47** Each jurisdiction is responsible for uploading DNA profiles to the National DNA Database. For example, NSW Health's DAL uploads the appropriate DNA profiles obtained in NSW to the National DNA Database indexes.<sup>84</sup> This is a separate process from uploading profiles to the NSW DNA Database.

**3.48** The National DNA Database does not hold the identity of any of the persons whose profiles are placed on the database. Personal information is removed from records before they are uploaded on to the National DNA Database. The personal information is held by relevant jurisdictions.

**3.49** CrimTrac described how the National DNA Database is searched and jurisdictions are notified of a link:

When a jurisdiction has conducted a search that jurisdiction is notified of a link that tells them that there is a match and which jurisdiction to contact to make a request for identifying information. All jurisdictions involved in the link are notified via NCIDD [National DNA Database]. In this way information is protected from general release, such as the identifying information for volunteers, or victims, depending on the jurisdiction, is not automatically released as a result of a match on the NCIDD.<sup>85</sup>

**3.50** Therefore, for example, NSW DNA profiles can only be released by NSW authorities to another jurisdiction if the request is determined to be genuine and lawful.<sup>86</sup>

**3.51** In relation to DAL uploading samples to the National DNA Database, NSW Health advised that only samples that have been agreed to by NSW Police's FPIT are loaded to the National DNA Database.<sup>87</sup> In this regard identified victims' DNA profiles are not uploaded:

At the moment not all samples loaded to the NSW database are loaded nationally. This in particular relates to suspects when NSW Police inform DAL which suspect samples can be loaded to NCIDD [National DNA Database]. Victim and volunteer (limited) samples are not loaded to NCIDD.<sup>88</sup>

**3.52** The DJAG advised the Committee that the Attorney General, on behalf of the NSW Police Commissioner, has requested through CrimTrac that DNA profiles from NSW crime scenes that are on the National DNA Database not be matched against DNA profiles from crime scenes in other jurisdictions, at this stage. The DJAG commented that this protects victims in other jurisdictions but also reduces intelligence available to police:

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<sup>83</sup> Submission 3, p 1

<sup>84</sup> Submission 6, p 6

<sup>85</sup> Submission 3, p 1

<sup>86</sup> The Hon Paul Macleay MP, *NSWPD (Legislative Assembly)*, 28 September 2006, pp 2545-2546

<sup>87</sup> Answers to written questions on notice, NSW Health, Question 2, p 2

<sup>88</sup> Answers to written questions on notice, NSW Health, Question 2, p 2

Whilst this negates the danger of putting a victim from another jurisdiction in jeopardy, it means that police are losing valuable intelligence from crime scene to crime scene links which do not involve victims.<sup>89</sup>

- 3.53** NSW Police confirmed that as a result of this request, NSW has never participated in crime scene to crime scene matching on the National DNA Database, which it indicated limits potential intelligence concerning crime scenes nation-wide.<sup>90</sup>

### Summary of current use of victims' DNA in NSW

- 3.54** In summary, there are differing policies and procedures followed in NSW for the use and protection of identified victims DNA and unidentified victims DNA contained in crime scene samples.

#### Identified victims' DNA

- 3.55** As an example, a victim of an assault may be requested by police to provide a DNA sample to exclude their DNA profile from other DNA profiles found at the crime scene. The victim would be considered an excluded volunteer under section 76A of the *Crimes (Forensic Procedure) Act 2000*, and the police would follow the Victims Protocol in collecting the DNA sample. The victim's DNA profile would be categorised as a limited purpose volunteer profile and would only be used for matching within that particular case.<sup>91</sup>
- 3.56** The identified victim's DNA profile is not uploaded to the NSW or National DNA Databases. It is stored in the DAL unsearchable section of its system and is not used for any matching with any other profiles or indexes outside the case in question.<sup>92</sup>

#### Unidentified victims' DNA

- 3.57** In terms of any unidentified victim's DNA contained in a crime scene sample, there is a potential that the profile will be matched against other indexes and crime scene profiles before the profile is recognised as a victim's DNA profile.
- 3.58** For example, there is a pub brawl involving two people where a knife is used and both people receive stab wounds. Blood from the two wounded people is all over the floor and one of the stabbing victims flees the scene before police arrive. Upon attendance at the scene the police identify the remaining stabbing victim, and in due course obtain a DNA sample from this victim. This person would be treated as either an excluded volunteer and the Victims Protocol would be followed, or as a suspect covered by the Act depending on the circumstances.<sup>93</sup>

<sup>89</sup> Submission 8, p 5

<sup>90</sup> Answers to written questions on notice, NSW Police, Question 8, p 3

<sup>91</sup> Submission 5, p 6

<sup>92</sup> Submission 5, p 6 and Mr Goetz, Evidence, 25 September 2009, p 22

<sup>93</sup> This example is adapted from an example provided in Submission 5, p 8

- 3.59** Blood collected from the scene is analysed and two DNA profiles are derived. The identified victim's DNA profile is used to eliminate their profile from the crime scene sample. This leaves an unidentified profile within the crime scene sample that is uploaded to the crime scene index and the permitted matches (in accordance with section 93 of the Act) are made.<sup>94</sup>
- 3.60** A match from the unidentified profile in the crime scene sample is made to a number of other crime scenes, unsolved armed robberies. This match while not providing the identity of the other victim provides intelligence to police for both the current investigation into the pub brawl and the earlier unsolved armed robberies.<sup>95</sup>
- 3.61** Police may use CCTV footage from the pub or witness accounts to identify the other person involved in the pub brawl and in due course a DNA sample is taken from this person and matches the DNA profile found at the pub brawl crime scene and hence the earlier armed robberies crime scene.<sup>96</sup> The issue for the Committee to consider is, can that information be used as part of the police investigation or in prosecuting that person for the armed robberies, as the original DNA sample was obtained in the context where the person was a victim in the pub brawl. This issue will be looked at in detail in Chapter 4.

## Other jurisdictions

- 3.62** In this section the comments of inquiry participants in relation to the way victims' DNA is handled in various jurisdictions is set out.
- 3.63** Some Australian jurisdictions have similar legislation to NSW in place in relation to forensic procedures as they adopted the Model Bill developed by the Commonwealth Model Criminal Code Officers Committee that was agreed to in 2000. NSW, Commonwealth and ACT legislation closely followed the provisions of this Bill. Tasmania, Victoria and South Australian legislation followed some aspects of the Model Bill. While Queensland, Northern Territory and Western Australia chose not to follow the Bill.<sup>97</sup>

## Commonwealth and ACT

- 3.64** The Australian Federal Police (AFP) advised that it's Biological Criminalistics team, caretaker of the Commonwealth and ACT DNA databases within the National DNA Database, follows the policy set out below in relation to recording of profiles from a victim:

DNA profiles from known victims or persons reasonably suspected of being victims are not loaded onto the NCIDD [National DNA Database]. In this context, known victim profiles include a crime scene DNA profile that has been matched against a reference DNA profile taken from a victim of a particular crime, for the purposes of identifying which crime scene DNA profile(s) relate to that victim. Unknown DNA profiles from crime scenes are uploaded in NCIDD for comparison. This comparison

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<sup>94</sup> This example is adapted from an example provided in Submission 5, p 8

<sup>95</sup> This example is adapted from an example provided in Submission 5, p 8

<sup>96</sup> This example is adapted from an example provided in Submission 5, p 8

<sup>97</sup> Standing Committee on Law and Justice, "Review of the *Crimes (Forensic Procedures) Act 2000*", February 2002, pp 13-14

enables links to be made between different crime scenes as well as between crime scenes and individuals.<sup>98</sup>

- 3.65** The AFP further commented that precautions are taken to prevent DNA profiles from victims being entered onto the National DNA Database. The AFP stated that ‘the AFP laboratory routinely requests police to obtain reference samples from victims and other individuals that may be involved for elimination purposes.’<sup>99</sup>
- 3.66** In addition to these policies, both the Commonwealth *Crimes Act 1914* and the ACT *Crimes (Forensic Procedures) Act 2000* cover forensic procedures conducted on volunteers, which can include victims.<sup>100</sup>

### Queensland

- 3.67** NSW Police advised that Queensland excludes victims profiles from investigation and DNA database uploading upon receipt of a victim reference sample (similar to NSW), however, Queensland does not delay the uploading to DNA databases of unidentified crime scene DNA in the absence of victim reference samples.<sup>101</sup> NSW Health indicated that Queensland uses the National DNA Database as its sole database.<sup>102</sup>
- 3.68** The Queensland legislation *Police Powers and Responsibilities Act 2000* (QLD) does not cover forensic procedures on victims.<sup>103</sup>

### Victoria and Tasmania

- 3.69** NSW Health advised that Victoria and Tasmania follow similar policies in dealing with victims’ DNA profiles to that of the NSW Health’s DAL.<sup>104</sup> NSW Police also indicated that similar to NSW, these jurisdictions do not upload victim profiles to the crime scene index of National DNA Database.<sup>105</sup>
- 3.70** However, unlike Victorian legislation (*Crimes Act 1958*) Tasmanian legislation excludes victims.<sup>106</sup> Under section 5 of the *Forensic Procedures Act 2000* (Tas) which states that ‘nothing

<sup>98</sup> Submission 2, Australian Federal Police, p 1

<sup>99</sup> Submission 2, p 1

<sup>100</sup> Gans, J, ‘DNA Identification and rape Victims,’ *University of NSW Law Journal*, 2005, Vol 28, No 1 and see *Crimes Act 1914* (Cth) s23XWQ and *Crimes (Forensic Procedures) Act 2000* (ACT) s10 and Part 2.8

<sup>101</sup> Answers to written questions on notice, NSW Police, Question 7, p 3

<sup>102</sup> Answers to written questions on notice, NSW Health, Question 5, p 3

<sup>103</sup> Gans, J, ‘DNA Identification and rape Victims,’ *University of NSW Law Journal*, 2005, Vol 28, No 1 and see *Police Powers and Responsibilities Act 2000* (QLD) s448

<sup>104</sup> Answers to written questions on notice, NSW Health, Question 10, p 5

<sup>105</sup> Answers to written questions on notice, NSW Police, Question 7, p 3. The relevant legislation is the *Crimes Act 1958* (Vic) and the *Forensic Procedures Act 2000* (Tas)

<sup>106</sup> Gans, J, ‘DNA Identification and rape Victims,’ *University of NSW Law Journal*, 2005, Vol 28, No 1

in Parts 2, 3, 4, 5, 6 and 7 applies to the carrying out of a forensic procedure on a person because that person is alleged to be the victim of an offence'.<sup>107</sup>

### South Australia

- 3.71** South Australia follows similar policies to NSW in dealing with victims' DNA profiles and does not upload victim profiles to the crime scene index of National DNA Database.<sup>108</sup>
- 3.72** Dr Jeremy Gans, Associate Professor at the Melbourne Law School, provided the Committee with comment on those jurisdictions that had different legislative frameworks to NSW for dealing with victims' DNA.
- 3.73** Dr Gans advised that South Australia used to have an early form of the model legislation that NSW adopted. However, after a guilty person was acquitted on the grounds of a major problem in the South Australian DNA database new simpler legislation was passed in 2007. The new legislation, *Criminal Law (Forensic Procedures) Act 2007* (SA), included provisions for both volunteer and victim procedures, instead of just volunteers. Dr Gans commented that 'in part it is just a change in terminology to acknowledge that volunteers are not all cut from the same cloth.'<sup>109</sup>
- 3.74** Dr Gans advised that South Australia has an interesting inadmissibility rule in relation to victims DNA that should have been destroyed:

Evidence obtained by carrying out a volunteer and victim procedure on a person is inadmissible in any criminal proceedings against that person if by the time the question of admissibility arises the forensic material that came from the procedure should have been destroyed.<sup>110</sup>

- 3.75** Further to this, under the destruction rule for volunteer and victim procedures in South Australia, victims have to request the destruction of their DNA profiles.<sup>111</sup> Dr Gans explained the implications of this is that if there is a match between a victim's DNA profile and a crime scene DNA profile where they may have been an offender, if the victim requests that their DNA sample be destroyed, even after that match has been made, the information cannot be used against them.<sup>112</sup>

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<sup>107</sup> *Forensic Procedures Act 2000* (Tas), s5

<sup>108</sup> Answers to written questions on notice, NSW Health, Question 10, p5 and Answers to written questions on notice, NSW Police, Question 7, p 3

<sup>109</sup> Dr Jeremy Gans, Associate Professor, Melbourne Law School, University of Melbourne, Evidence, 30 October 2009, p 6

<sup>110</sup> Dr Gans, Evidence, 30 October 2009, p 6 and *Criminal Law (Forensic Procedures) Act 2007* (SA), s47(3)

<sup>111</sup> *Criminal Law (Forensic Procedures) Act 2007* (SA), s39

<sup>112</sup> Dr Gans, Evidence, 30 October 2009, p 6

### Western Australia

- 3.76** Western Australia has a different legislative framework for forensic procedures carried out on victims to that of NSW. Dr Gans advised that in Western Australia special provisions were introduced as part of legislation for “involved persons.”<sup>113</sup> Under section 23 of the *Criminal Investigations (Identifying People) Act 2002* (WA) an involved person is a person who is not a suspect but who is reasonably suspected to have been the victim or to have witnessed the commission of an offence.<sup>114</sup>
- 3.77** In the legislation there is also separate informed consent requirements and destruction requirements for involved persons,<sup>115</sup> which are different to the provisions for other types of “volunteers.” Dr Gans suggested that this is a desirable model as ‘you want, at the very least, to have separate provisions dealing with special cases like victims.’<sup>116</sup>

### Northern Territory

- 3.78** The Northern Territory *Police Administration Act 1978* only has only a small number of provisions that relate to DNA compared to the numerous provisions in the NSW legislation.<sup>117</sup> Dr Gans stated that the Northern Territory has a simple set of rules that do not include destruction, retention or use rules for DNA profiles. However, Dr Gans commented that there is a tough inadmissibility provision that states:

If a non-intimate procedure is carried out in accordance with a person’s consent... That is on any volunteer, not just victims, for investigating an offence, the information obtained from the procedure must not be used for investigating another offence other than a relevant offence ... and is inadmissible as evidence in any proceeding other than a proceeding for a relevant offence.<sup>118</sup>

- 3.79** A relevant offence in this legislation means an offence punishable by a term of imprisonment of 14 years or more, for example, serious crime, rape or murder.<sup>119</sup> Dr Gans stated that ‘basically, that is not discretionary. It is a complete mandatory rule of inadmissibility.’<sup>120</sup>
- 3.80** NSW Police commented that the Northern Territory is the only Australian jurisdiction which does not differentiate victims from non-victims among the profiles it loads onto the National DNA Database. This precludes NSW from differentiating victim from non-victim Northern Territory profiles that have linked with NSW profiles on National DNA Database. In order for NSW to ensure that National DNA Database links compromising Northern Territory victims are not received, whilst at the same time allowing the receipt of Northern Territory

<sup>113</sup> Dr Gans, Evidence, 30 October 2009, p 5

<sup>114</sup> *Criminal Investigations (Identifying People) Act 2002* (WA), s23

<sup>115</sup> *Criminal Investigations (Identifying People) Act 2002* (WA), s25(3) and s65 respectively

<sup>116</sup> Dr Gans, Evidence, 30 October 2009, p 5

<sup>117</sup> Dr Gans, Evidence, 30 October 2009, p 6 and *Police Administration Act 1978* (NT), Division 7

<sup>118</sup> Dr Gans, Evidence, 30 October 2009, p 6 and *Police Administration Act 1978* (NT), s147B(2)

<sup>119</sup> *Police Administration Act 1978* (NT), s147B(3)

<sup>120</sup> Dr Gans, Evidence, 30 October 2009, p 6

non-victim links, special Northern Territory specific procedures are in place in NSW Police's FPIT.<sup>121</sup>

### **Canada**

**3.81** Dr Gans also provided the Committee with comment on a relevant overseas jurisdiction, Canada, and its use and protection of victims' DNA:

Canada is of interest in part because it has a similar legal system to ours, but also because the provisions on crime scene profiles in New South Wales, the model was actually mostly drawn from Canada's model.<sup>122</sup>

**3.82** Canada passed its legislation in 1998 and defined the "crime scene index" similar to NSW. However, in addition there is a provision that states that access to information in the crime scene index shall be permanently removed if the information relates to a DNA profile derived from a bodily substance of a victim of an event that was the object of the relevant investigation or a person who has been eliminated as a suspect in a relevant investigation.<sup>123</sup>

### **Issues with the use of identified victims' DNA profiles**

**3.83** Some inquiry participants raised concerns with the policies and practices relating to the use and protection of identified victims' DNA profiles in NSW. While identified victims' DNA is not the main focus of the inquiry, the Committee recognises that these concerns warrant discussion.

**3.84** The main issue is the concern that protections and safeguards for victims are not part of legislation. For example, carrying out of forensic procedures on victims is excluded from the *Crimes (Forensic Procedures) Act 2000*, and therefore the protections provided by the Act that apply to other volunteers, offenders and suspects do not apply to victims. There is suggestion that the Victims Protocol is not adequate in providing protection to victims from the improper use of their DNA sample. A corresponding issue is that victims of crime are unlikely to be aware of this lack of legislative protection when consenting to give their DNA samples.

**3.85** As noted earlier in the chapter, forensic procedures conducted on most victims of crime are not conducted pursuant to the Act as most identified victims of crime are defined as "excluded volunteers" in section 76A. Instead these procedures are conducted in accordance with the Victims Protocol.<sup>124</sup>

**3.86** Dr Gans raised a number of issues with the Victims Protocol, including whether a protocol could be regarded as adequate protection as it could be changed and does not receive parliamentary scrutiny such as legislation. In addition, Dr Gans stated that:

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<sup>121</sup> Answers to written questions on notice, NSW Police, Question 7, p 3

<sup>122</sup> Dr Gans, Evidence, 30 October 2009, p 5

<sup>123</sup> Dr Gans, Evidence, 30 October 2009, p 5

<sup>124</sup> Submission 8, p 4

Being a non-statute, it does not automatically trigger the protection of the exclusionary rule in s138 of the *Evidence Act 1995*; rather, a victim will have to prove that evidence obtained in breach of the protocol was gathered ‘improperly.’<sup>125</sup>

**3.87** Dr Gans also commented that there is less protection for victims in terms of the destruction of their DNA profiles compared to other volunteers who are covered by the Act. Annexure C of the Victims Protocol indicates that:

After the investigation and all Court proceedings in connection with the offence have been finalised, you may request that the police officer in charge of your case ensures that the remainder of the DNA sample, any existing DNA extract and information linking the profile to you is destroyed. The request for destruction will need to be in writing to the NSW Police Force. The NSW Police Force will consider any such request on its merits. In some circumstance eg, if there is a risk that a case could be re-opened, a request may not be granted immediately.<sup>126</sup>

**3.88** In contrast, the process outlined in section 79(2) of the Act for non-victim volunteers is:

If, after the carrying out of the forensic procedure under this Part on a volunteer, the volunteer, or the parent or guardian of the volunteer, expressly withdraws consent to retention of the forensic material taken or of information obtained from the analysis of the material, the forensic material and any information obtained from analysis of the material is, subject to any order under section 81, to be destroyed as soon as practicable after the consent is withdrawn.<sup>127</sup>

**3.89** Dr Gans stated that the differences, and in his view less protection afforded to victims than volunteers, in terms of destruction include:

- Victim requests must be in writing, whereas volunteer requests need only be “expressed” (and volunteers cannot be required to make their request in writing under s79(3) of the Act)
- Victim requests are only available after the proceedings are finalised, whereas volunteer requests can be made at any time
- Victim requests will be complied with only at NSW Police’s discretion, whereas volunteer requests must be complied with unless a magistrate orders otherwise
- There are no fixed criteria for denials of victim requests, whereas there are criteria in s81(2) of the Act for volunteers.<sup>128</sup>

**3.90** Dr Gans also raised issue with potentially misleading wording in Annexures B and C of the protocol. He suggested that wording such as ‘your DNA profile will only be used for the purpose of investigating the offence committed against you’ and ‘evidence in relation to the profile may be used in Court proceedings against the alleged offender in connection with the offence’ implies that the victim’s DNA profile cannot be used against the victim. However, this may not be the case as it may be used against them, for example, if the victim is

<sup>125</sup> Submission 9a, Dr Gans, p 3

<sup>126</sup> Submission 9a, p 3 and NSW Victims Protocol, Annexure C

<sup>127</sup> Submission 9a, p 4 and the *Crimes (Forensic Procedures) Act 2000*, s79(2)

<sup>128</sup> Submission 9a, p 4

prosecuted for falsely reporting a rape and their DNA profile is used to prove that the victim tore their own clothing.<sup>129</sup>

**3.91** Dr Gans expressed concern that the protocol does not point out the protections it does contain are not in fact laws 'but are instead just the current arrangements agreed upon within the executive. Many victims will surely assume otherwise (and with good reason).'<sup>130</sup>

**3.92** The Homicide Survivors Support After Murder Group also raised concern with the current warnings given to victims who provide a DNA sample and suggested that these warnings should be reinforced and made formally in writing.<sup>131</sup>

**3.93** Mr Thomas Spohr, Chair of the Young Lawyers Criminal Law Committee for the Law Society of NSW, was concerned that the penalty for non-compliance with the protocol is unclear:

[M]y concern is that currently there is no penalty for non-compliance with those protocols as far as I am aware or, if it is, it is an internalised process and is not something the subject of legislation... I have every faith in the Division of Analytical Laboratories. However, let us assume for the moment that there was some failure in respect of the protocol. I am not aware of what the consequences would be.<sup>132</sup>

**3.94** A further issue brought to the attention of the Committee by some inquiry participants was that it is only a NSW Health DAL policy not to put identified victims DNA profiles on the NSW DNA Database and not part of any legislation. A policy change would not require public or parliamentary scrutiny in the way a legislative change would allow and the concern is that if this policy was changed and victims' DNA was permitted to be uploaded to the database, matches could potentially be made with other database indexes.

**3.95** As noted earlier in this chapter, NSW Health commented that the *Crimes (Forensic Procedures) Act 2000* does not currently prevent the uploading of victim DNA profiles to the NSW DNA database.<sup>133</sup> It was confirmed that there are no restrictions in the Act that stop victims' DNA profiles from being uploaded to the NSW DNA database but there is a NSW Health departmental policy that restricts this action.<sup>134</sup> This issue is not covered in the Victims Protocol.<sup>135</sup>

**3.96** Mr Liam Burgess, Criminal Justice Convener for the NSW Council of Civil Liberties, commented that, while this is a good policy, it should be part of the legislation:

We think is a very good policy, the same with the recent policies that have been introduced especially for victims. We think they are very good policies but this is an extremely important area and involves significant rights. Parliament has acknowledged

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<sup>129</sup> Submission 9a, p 6

<sup>130</sup> Submission 9a, p 6

<sup>131</sup> Submission 1, Homicide Survivors Support After Murder Group, p 1

<sup>132</sup> Mr Thomas Spohr, Chair of the Young Lawyers Criminal Law Committee, Law Society of NSW, Evidence, 25 September 2009, pp 29-30

<sup>133</sup> Submission 6, p 7

<sup>134</sup> Mr Goetz, Evidence, 25 September 2009, p 21

<sup>135</sup> *Victims Protocol: Conducting a forensic procedure in relation to a victim of a personal violence offence*, 2007

that by passing specific legislation, the *Crimes (Forensic Procedures) Act*. That legislation provides very specific procedures and protections in every other area. We see no reason why excluded volunteers or victims should not be given the same level of protection, that is legislative protection, as everyone else who was brought under these procedures.<sup>136</sup>

- 3.97** Similarly, a submission maker to the inquiry raised concerns with the reliance on policies and procedures for actions that have the potential to impinge on peoples' rights, such as the use of their DNA, and suggests that these policies and procedures that relate to victims should be legislated.<sup>137</sup>
- 3.98** Mr Spohr agreed that there should be legislation to restrict victims' DNA profiles from being loaded onto the NSW DNA Database.<sup>138</sup> Mr Spohr commented that 'from a general rights protection perspective it is not the most desirable position, in our view. Where possible, individual rights ought to be protected in the form of legislation with real consequences, rather than through protocols.'<sup>139</sup>
- 3.99** Dr Gans suggested that the appropriate solution to these issues is to repeal the Act and start again with a statute where the issue of procedures and protections for victims is considered through out, such as is Western Australia or South Australian legislation. However, Dr Gans suggested that a solution partially reversing the exclusion of the "excluded volunteers" from the NSW *Crimes (Forensic Procedures) Act 2000* would go someway to addressing these issues.<sup>140</sup>
- 3.100** The Committee heard that the community's understanding on DNA collection, storage and databasing has been distorted by American television police shows, which Mr Goetz from DAL referred to as the "CSI effect."<sup>141</sup> Mr Spohr commented that 'there is a real concern that DNA as a forensic tool is largely misunderstood, both by bench, bar and the jury.'<sup>142</sup>
- 3.101** Dr Gans also commented that the general community do not understand how DNA is used:

... basically no-one out in the community whatsoever has much of an understanding at all of how DNA is used ... Whenever I talk to people who have been the subject of procedures, they do not understand anything that happened to them. I talked to a few people on Norfolk Island when they were fingerprinted in a mass fingerprint screening. Just about all of them told me DNA was taken from them, even though I have checked with the police and they insisted they never took DNA as part of that mass fingerprinting. People just do not understand what is going on. The good thing news of that is they do not understand that there are flaws in the legislation that could expose them.<sup>143</sup>

<sup>136</sup> Mr Liam Burgess, Criminal Justice Convener, NSW Council of Civil Liberties, Evidence, 25 September 2009, p 45

<sup>137</sup> Submission 4, Name suppressed, p 3

<sup>138</sup> Mr Spohr, Evidence, 25 September 2009, p 31

<sup>139</sup> Mr Spohr, Evidence, 25 September 2009, p 30

<sup>140</sup> Submission 9a, pp 6-7

<sup>141</sup> Mr Goetz, Evidence, 25 September 2009, p 24; see also Dr Gans, Evidence, 30 October 2009, p 14

<sup>142</sup> Mr Spohr, Evidence, 25 September 2009, pp 29-30

<sup>143</sup> Dr Gans, pp 9-10

**3.102** To combat this misunderstanding the suggestion of a public education campaign was raised. Mr Burgess commented that the idea of a public education campaign, in addition to ensuring a simpler and fairer system, is a valid idea:

I do not pretend any expertise on formulating education programs, but I think the point you raise is a very valid one. There are serious issues in relation to educating people on this stuff, but those arise really as soon as you bring in a system of this nature. There are problems with people understanding it. The simpler and fairer the system is, the more easily people will understand it and the more faith they will have in it. If they do not understand the system, all those issues around people not being willing to report crimes because they fear that their information will be stored in the system and used in some unfair way start arising...<sup>144</sup>

**3.103** The DJAG commented that it is not of the view that the treatment of identified victim profiles is in any way deficient, as these profiles are either not loaded onto the database or loaded on specific indexes designated for them.<sup>145</sup>

**3.104** NSW Police have no concerns with the Victims Protocol, its use or its application.<sup>146</sup> It commented that the information provided is adequate and clearly provides for a victim's rights not to consent to undergo a forensic procedure. The NSW Police also indicated that victims are entitled to have a support person and legal representative of their choice present and a parent/guardian of a child or incapable victim is present for the consent process and conduct of the forensic procedure.<sup>147</sup>

**3.105** The NSW Police advised that they specifically provide the following information to identified victims before they submit to DNA sampling:

- Victim information sheet and consent form/process
- Victims are informed in writing and/or verbally of the matters in paragraph 4 and Annexure B and/or C of the Victims Protocol
- Victims Protocol is publicly available on the website of the NSW Department of Justice and Attorney General
- Warnings are in writing.<sup>148</sup>

**3.106** In relation to the lack of legislative protection against identified victims DNA profiles being uploaded to the DNA database, Mr Goetz of NSW Health's DAL indicated that he did not think that the department would change the policy of not uploading victims' DNA to the NSW DNA Database but conceded that in theory it does have the power to change the policy.<sup>149</sup>

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<sup>144</sup> Mr Burgess, Evidence, 25 September 2009, p 45

<sup>145</sup> Submission 8, p 4

<sup>146</sup> Answers to written questions on notice, NSW Police, Question 2, p 1

<sup>147</sup> Answers to written questions on notice, NSW Police, Question 2, p 1

<sup>148</sup> Answers to written questions on notice, NSW Police, Question 2, p 1

<sup>149</sup> Mr Goetz, Evidence, 25 September 2009, p 21

**Committee comment**

- 3.107** The Committee notes the concerns of those inquiry participants who have raised the issue of the lack of legislative protection for identified victims, particularly with reference to the need to provide adequate protection for victims' rights.
- 3.108** The Committee believes identified victims DNA profiles should not be uploaded to the NSW or National DNA databases and supports the NSW Health DAL policy to uphold this restriction. The Committee notes that in its 2002 Review of the *Crimes (Forensic Procedures) Act 2000* it recommended that the Attorney General develop provisions regulating the databasing of victims' DNA profiles to ensure that matches are not attempted between victims' profiles and any other crimes.<sup>150</sup>
- 3.109** Mainly due to the fact that these issues, while relevant, have not been the main focus of this inquiry, the Committee has not received enough evidence on either of these issues to make specific recommendations in this area. The Committee encourages the Attorney General and DJAG to consider these concerns raised by inquiry participants.
- 3.110** However, the Committee believes a targeted public education campaign informing people of how, if they were a victim of crime providing a DNA sample, their profiles can be used and how they are protected, may at least help victims understand what can and cannot be done with the DNA profiles and what protections are afforded to them. Such a campaign may also address the community's understanding of DNA collection, storage and databasing that has been distorted by American television police shows. Also, the Committee believes that if people understand the system then they would have more faith in the system and would not shy away from reporting crimes for fear of what their DNA could be used for. On this basis, the Committee recommends that the Attorney General undertake a targeted public education campaign for victims of crime who provide DNA samples. The Committee notes that this may also require consultation with the NSW Police Commissioner.

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**Recommendation 1**

That the Attorney General undertake a targeted public education campaign for victims of crime who provide DNA samples to inform victims of how their profiles can be used and what protections are afforded to them.

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<sup>150</sup> Standing Committee on Law and Justice, "Review of the *Crimes (Forensic Procedures) Act 2000*", February 2002, p 143



## Chapter 4 Unidentified victims' DNA

This chapter examines the key issue for the inquiry – what use can be made of information resulting from an unidentified DNA profile found at a crime scene and placed on the DNA database, which is later identified to be that of a victim, and by virtue of having been placed on the DNA database, may be matched to an unrelated crime where the victim may have been the offender. This chapter considers whether this information should be able to be used by police in investigations and in court proceedings for the unrelated crime due to the fact the information was appropriated from when that person was a victim – an unidentified victim. A number of potential solutions are reviewed and a recommendation is made in this regard.

### Use of unidentified victims' DNA

- 4.1 As defined in Chapter 2, unidentified victims' DNA profiles are among the crime scene profiles that are put on the NSW DNA Database, and are later identified as belonging to victims.<sup>151</sup>
- 4.2 Multiple DNA profiles may be found at a crime scene. Reference samples are taken from identified victims in order to exclude their profiles from the profiles found at the crime scene. The remaining unidentified DNA profiles are uploaded to the NSW and National DNA Databases for the purpose of potential matching with other person or crime scene profiles on the databases. Resulting matches are used as intelligence by police for further investigation and potential convictions.<sup>152</sup>
- 4.3 In cases in which it is not clear that a sample relates to a victim, for example in an affray where there may be mixed blood samples, all the profiles derived from that sample are uploaded to the database. If at a later time it becomes apparent that a profile belongs to a victim it is removed from the database.<sup>153</sup>
- 4.4 However, within the timeframe that the sample is put on the DNA database, later identified as a victim and then removed, a match could be made between this now identified victim and an unrelated crime scene. This type of scenario is an issue as there are no practices, policies or legislation in place that cover this class of sample from the time they are unidentified up until the time they are identified.<sup>154</sup>

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<sup>151</sup> Ms Penny Musgrave, Director, Criminal Law Review, Department of Justice and Attorney General, Evidence, 25 September 2009, p 4

<sup>152</sup> Submission 5, NSW Police, pp 6-7

<sup>153</sup> Submission 8, Department of Justice and Attorney General, p 5 and Correspondence from the Hon John Hatzistergos MLC, Attorney General, to Chair, 25 June 2009, p 2

<sup>154</sup> Ms Musgrave, Evidence, 25 September 2009, p 3 and p 8

- 4.5 The key issue for the inquiry is whether this information should be able to be used by police in investigations and in court proceedings for the unrelated crime due to the fact the information was appropriated from when that person was a victim – an unidentified victim.<sup>155</sup>

### **How prevalent is the use of unidentified victims' DNA?**

- 4.6 The Committee sought evidence on how significant an issue the use of victims DNA is for the community and asked inquiry participants to report on the prevalence of instances where an unidentified victim's DNA has been used against that victim for an unrelated crime.
- 4.7 Superintendent Jeff Emery, Commander, Forensic Services Group of the NSW Police Force, advised the Committee that he was not aware of any victims' DNA that was picked up from a crime scene that has been utilised in charging that victim for another crime.<sup>156</sup>
- 4.8 The Department of Justice and Attorney General (DJAG) is also unaware of any instances where a match in these circumstances has been used either for investigative purposes or forensically. However, this could occur as there is no statutory impediment on the use of a victim's sample in these circumstances in relation to another crime.<sup>157</sup>
- 4.9 Mr Brendan Thomas, Assistant Director General, Crime Prevention and Community Programs at DJAG, indicated that the significance of using the information is high regardless of whether it has happened, as it has the potential to impact negatively on victims reporting crime:

... the significance, I suppose, is high irrespective of the number. If you have the victim of an offence's DNA used to prosecute them for a future offence, even if it is only one individual, the significance of that could be quite important in terms of the likelihood of future victims coming forward to report offences or prosecution in general.<sup>158</sup>

- 4.10 This statement was echoed by Dr Jeremy Gans, Associate Professor, Melbourne Law School, who stated that while he has 'not heard of any situation where a victim has been prosecuted or the evidence has been used against them in that way where they are known to be a victim,' it could be, and then there is the possibility that this could impact on victims reporting of crime:

It could be is what worries me, and it could be then leads to the second concern, could this be discouraging victims, and that is complete speculation as well. We just do not know whether victims are getting discouraged. The reason this is less of a problem so far, and maybe it is not in practice a big problem, is because basically no-

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<sup>155</sup> Correspondence from the Hon John Hatzistergos MLC, Attorney General, to Chair, 25 June 2009, p 2

<sup>156</sup> Superintendent Jeff Emery, Commander, Forensic Services Group, NSW Police Force, Evidence, 25 September 2009, p 10

<sup>157</sup> Answers to questions on notice, Department of Justice and Attorney General, Question 2, p 1

<sup>158</sup> Mr Brendan Thomas, Assistant Director General, Crime Prevention and Community Programs, Department of Justice and Attorney General, Evidence, 25 September 2009, p 2

one out in the community whatsoever has much of an understanding at all of how DNA is used ... they do not know anything about the nuances.<sup>159</sup>

### Are the current policies and procedures adequate?

- 4.11** The Committee received contrasting views on whether the current policies and procedures for managing unidentified victims' DNA were adequate in providing protection of the rights of victims, and not discouraging victims from reporting crime.
- 4.12** NSW Police advised that it is not aware of any complaints or identified deficiencies in this area and any further legislation would increase the complexity of current legislation.<sup>160</sup> NSW Police indicated that it's view 'is that the current policies and procedures do not impact negatively on the reporting of crime' and that 'current policy continues to ensure victims of crime are not discouraged from coming forward to police.'<sup>161</sup>
- 4.13** The Homicide Victims Support Group commented that 'the current policies and legislation are adequate and provide appropriate protection so that DNA samples obtained from victims is not misused.'<sup>162</sup>
- 4.14** NSW Health's Division of Analytical Laboratories (DAL) commented that policies and procedures are sufficient, provided there is separation between the enforcers of the law and the custodians of the database:

Given that policies and procedures exist, are auditable and the significance of the separation of the database from NSWPF [NSW Police Force] is retained, then comfort should exist on a real balance being achieved from a community perspective.<sup>163</sup>

- 4.15** In contrast, Mr Liam Burgess, Criminal Justice Convener for the NSW Council of Civil Liberties, stated that the current forensic procedures are not adequate to protect the rights of victims:

... we believe that the current forensic procedures regime does not adequately protect the rights of either victims or other innocent third parties whose DNA may be present at crime scenes. In particular, we believe the current rules in relation to the gathering and treatment of crime scene profiles are problematic, not only for victims but also for other people who genetic material may be present at a crime scene for reasons that are unrelated to having committed any crime.<sup>164</sup>

<sup>159</sup> Dr Jeremy Gans, Associate Professor, Melbourne Law School, University of Melbourne, Evidence, 30 October 2009, pp 9-10

<sup>160</sup> Answers to questions on notice, NSW Police, Question 12, p 5

<sup>161</sup> Answers to questions on notice, NSW Police, Question 1, p 1

<sup>162</sup> Submission 7, Homicide Victims Support Group, p 3

<sup>163</sup> Answers to questions on notice, NSW Health, Question 11, p 5

<sup>164</sup> Mr Liam Burgess, Criminal Justice Convener, NSW Council of Civil Liberties, Evidence, 25 September 2009, p 45

- 4.16** The Committee notes the comments of Dr Gans and Mr Thomas set out earlier that there is the possibility that the current lack of policies and practices in this area could impact negatively on victims reporting crime.
- 4.17** While the Committee was not informed of any examples of an unidentified victim's DNA found at a crime scene that has been used against that victim for an unrelated crime, the pub brawl example set out in Chapter 3 illustrates the type of scenario that could occur. The Committee was also provided with a number of both hypothetical and complex scenarios that highlight some of the potential consequences for the use of victims' DNA.

#### **Case 1: Victim of shoe theft potentially linked to unrelated crime scene in NSW**

Mr Thomas Spohr, Chair of the Young Lawyers Criminal Law Committee for the Law Society of NSW provided the following example from his time at the NSW Office of the Director of Public Prosecutions:

At that time I had a matter in which an accused broke in and stole a bunch of computers and things, but stole a pair of shoes of the victim. In place of the stolen shoes he left his own, and that was how he was caught. His DNA profile was in the shoes that he had left behind, the old shoes. As it happens, he subsequently left the new—that is, the stolen—shoes at a subsequent crime scene. No doubt those shoes would have contained the DNA of the original victim who, under the proposal here at hand, could have potentially become a suspect. Worse still, the victim lived with his brother and I have an idea his brother was an identical twin, which would have meant they had very similar or, as I understand it ... identical DNA profiles ... So, it is not impossible to conceive—in fact this is such a situation—a situation where it would be possible for a victim to become a suspect in a subsequent crime.<sup>165</sup>

#### **Case 2: Consensual sexual partner matched to unsolved rape case in 1986, Florida, USA**

Mr Liam Burgess, Criminal Justice Convener for the NSW Council of Civil Liberties, commented on a situation that arose in the 2003 Shannon Kohler rape investigation in Miami:

That was a case in Florida where, after a series of rapes, the police in Florida undertook a mass DNA screening ... That mass screening did not locate the 2003 rapist but it did throw up a match to an unsolved 1986 rape case. The man whose profile matched was arrested, charged and publicly named in relation to the 1986 offence. It was only after that that it was discovered that his profile matched because he was in 1986 the consensual partner of the victim of the 1986 offence. His profile had been drawn from the bed of the victim for reasons unrelated to any criminal offence. What you see from that is there is the potential also for matches that are to people who are, in some senses, victims although they are not the primary victim. Obviously that was very traumatic both for him, having been arrested and named, and

<sup>165</sup> Mr Thomas Spohr, Chair, Young Lawyers Criminal Law Committee, Law Society of NSW, Evidence, 25 September 2009, p 29

<sup>166</sup> Mr Burgess, Evidence, 25 September 2009, p 47

also for the victim of the 1986 rape who had to come forward and explain all of this ... It never even made it to court but the point is that these situations can arise and be extremely damaging both for primary and secondary victims at a point well before they ever get to court, purely at the early investigative stage even if these things are cleaned up relatively quickly.<sup>166</sup>

### **Case 3: Consensual sexual partners of rape victims matched to unrelated crimes– hypothetical example**

Dr Jeremy Gans, Associate Professor at the Melbourne Law School, provided the following scenario where there may be some impact on victims reporting crime if DNA evidence is allowed to be used against victims:

I have some scenarios in mind where I think this could occur. One of them is not so much about victims' DNA but third parties' DNA. What if, and it is possible under current protocols that it will happen in New South Wales, a test on a rape victim produces some male DNA and the male DNA goes onto the Crime Scene Profile Index, because clearly the male DNA is not the rape victim's DNA, putting aside inter-sex cases, and that male DNA is put on the Crime Scene Profile Index and linked to a whole set of other offences. The police then go back to the victim and say where could this male DNA have come and they realise it perhaps is not from the rapist, it is from a sexual partner of the victim. That sexual partner, hurray, we have caught him, he's a mass killer, or whatever he is, let's put him in gaol, but once word gets out that one way for the police to get hold of someone's DNA is if they are a sexual partner of a rape victim, then word will get around prisons and elsewhere that you have to make sure that your girlfriend, if she is raped, does not go to the police and does not submit to testing. That is the kind of worry I have. It may not involve media publicity, although that could heighten the problem. It involves word of mouth in the system. It is not so much the victims not coming forward, although that could happen as well. It is that kind of scenario, pressure is placed on victims not to come forward.<sup>167</sup>

<sup>167</sup> Dr Gans, Evidence, 30 October 2009, pp 9-10

**Case 4: Victims' family members matched to unrelated crime scenes**

Dr Gans commented on other scenarios that might lead to victims being discouraged to report crimes:

You might be aware that a new approach to the use of DNA which gets occasional publicity, and presumably we will have a case in Australia which gets a lot of publicity soon enough, is trawling the database not for the offender but for family members of the offender. You find a partial match and you think, hey, that person looks interesting, let's go and find out about their relatives and see if they are the serial killer we are looking for. That will implicate and will weigh on the minds of victims who happen to have family members who have things to hide, who might be robbers or whatever they are. It is those people that I worry about. I do not know whether this is around at all, but it is a certain plausibility to my mind.<sup>168</sup>

**Case 5: Assault victim matched to murders in Wellington, New Zealand**

Dr Gans provided the following example of where a victim was suspected of being an offender in an unrelated crime in New Zealand:

A man was assaulted outside a pub in Christchurch. DNA was taken from him. It was placed onto the crime scene profile New Zealand database and was matched to two murders in Wellington. He was then investigated for three months and had to go to a lot of effort to prove he had never left Christchurch. He had no connection to the murders. There were suggestions made that maybe an unknown half brother of his committed the crime. He had no brothers he knew of, but you never know what your parents are up to. In the end, most people believed that that was a case of contamination in the Auckland DNA lab.<sup>169</sup>

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<sup>168</sup> Dr Gans, Evidence, 30 October 2009, pp 9-10

<sup>169</sup> Dr Gans, Evidence, 30 October 2009, pp 2-3

**Case 6: Rape victim matched to death of toddler in Victoria**

Dr Gans provided the following Victorian example:

A very similar thing happened in Victoria more recently, in 2003. The very notorious case, down there anyway, of the death of a toddler, Jayden Leskie. A man was prosecuted but acquitted by a jury of that crime, and then in the subsequent investigation there was a match made between the toddler's clothing and a rape victim from the other side of the State, or the other side of Melbourne anyway. She was investigated, questioned in detail, and asked at length about her siblings. She happened to have 19 half siblings, and so there were questions raised about that. Ultimately, the police realised, as they did in Auckland, that this was almost certainly a case of contamination, although the lab denied that and said it was a bizarre coincidence. Nevertheless, at the coronial inquest there was talk of her being subpoenaed to testify at the coronial inquest by the man who was acquitted ... Contamination is what brought these people into suspicion of being an offender, but that suspicion would never have been acted upon unless they had a match between the contaminated sample and the known sample from the victim.<sup>170</sup>

**Committee comment**

- 4.18** The Committee notes that it was not informed of any examples of an unidentified victim's DNA found at a crime scene in NSW that was matched to an unrelated crime and later used to investigate or prosecute that victim for the unrelated crime. However, it is the potential that this can happen that is of concern and that there are no statutory restrictions on the use of unidentified victims' DNA profiles being used to investigate unrelated crimes.
- 4.19** The Committee is unclear on whether the current practices and procedures have impacted on victims reporting crime and there is no way of knowing whether this is the case and to what extent. The Committee, however, does acknowledge that there is the potential it could happen such as in the hypothetical Cases 3 and 4 outlined by Dr Gans and from the comments provided by DJAG.
- 4.20** The Committee also acknowledges the concerns of the NSW Council for Civil Liberties and Dr Gans that there is an issue as to whether the current practices and procedures adequately protect unidentified victims' rights.
- 4.21** Following on from the advice of the DJAG that there are no policies and practices in place to address this specific situation<sup>171</sup> and the potential impact that it may have on victims not reporting crime or even reducing cooperation with police, the Committee believes a solution is needed as to whether the information should be able to be used to investigate the unrelated crime or used in court proceedings. Solutions to address the issue are canvassed in the following section.

<sup>170</sup> Dr Gans, Evidence, 30 October 2009, pp 2-3

<sup>171</sup> Ms Musgrave, Evidence 25 September 2009, p 3 and p 8

## Possible solutions

- 4.22** The Committee received a number of proposed options from inquiry participants on how to deal with unidentified victims' DNA profiles found in crime scene samples.
- 4.23** In addition to submissions and public hearings, the Committee sought further comment from inquiry participants through a proposed options paper that set out the options presented to the Committee that it believed may have the most merit in achieving an appropriate balance between the competing public interests of ensuring that people who are victims are not unduly dissuaded from reporting the crime and finding practicable solutions that are supportive of the work of police in bringing offenders to account. The proposed options paper is included in Appendix 6.
- 4.24** As the issue of what to do with the DNA match only becomes a concern after it has been identified as belonging to a victim, the term "victim" and not "unidentified victim" has been used to discuss the options set out below.
- 4.25** The paper had three proposed options which inquiry participants provided comment on:
- A legislative ban on the use of a victim's DNA profile against that victim
  - Limitations on how crime scene index profiles can be matched against each other to restrict the possibility of matching victims' DNA to unrelated crimes
  - A discretionary power for courts to admit DNA evidence from victims "where a court deems it in the interests of justice" for major crime categories.

### **A legislative ban on the use of a victim's DNA profile against that victim**

- 4.26** A legislative ban on the use of a victim's DNA profile against that victim was one of a number of possible solutions identified by the DJAG to address the issue.<sup>172</sup> This proposal involves a legislative prohibition in the *Crimes (Forensic Procedures) Act 2000* on the use of DNA known to have come from, or reasonably suspected to have come from, a victim of crime against that victim or any evidence derived from its use.
- 4.27** A legislative prohibition on the use of forensic material, such as DNA profiles, against a person providing the material exists in relation to the missing persons index in the *Crimes (Forensic Procedures) Act 2000* at section 83A. Potentially, a similar legislative prohibition could be included in the Act for victims. Section 83A states:

#### **83A Inadmissibility of certain evidence from forensic procedures undertaken for purpose of missing persons index**

(1) This section applies to a person who volunteers to have a forensic procedure carried out for the purposes of placing information obtained from the analysis of the person's forensic material on the missing persons index.

(2) This section applies:

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<sup>172</sup> Submission 8, p 4

(a) to evidence of forensic material, or evidence consisting of forensic material, taken from a person to whom this section applies by a forensic procedure, and

(b) to evidence of any results of the analysis of the forensic material, and

(c) to any other evidence made or obtained as a result of or in connection with the carrying out of the forensic procedure.

(3) If this section applies, evidence described in subsection (2) is not admissible in any proceedings against the person in a court, but may be admissible if adduced in such proceedings by the person.

(4) This section extends to a person who volunteered to undergo a forensic procedure before the commencement of this section.<sup>173</sup>

**4.28** The current NSW Health policy of taking all reasonable steps to avoid matching victims' profiles would remain but the prohibition would protect those unidentified samples placed on the database, which are subsequently found to belong to a victim.<sup>174</sup>

**4.29** This would mean that while the victim may be identified as the suspect in another unrelated crime, investigators would not be able to pursue that link by further investigations based on that information or use the evidence of the link in court.<sup>175</sup>

**4.30** Dr Jeremy Gans from the Melbourne Law School proposed the following alternative legislative prohibition that could be used for all volunteers, including victims:

**Inadmissibility of certain evidence from forensic procedures on volunteers**

(1) This section applies to volunteers who consented to a forensic procedure for the limited purpose of investigating an offence.

(2) This section extends to excluded volunteers, to procedures involving an intrusion into a person's body cavities, and to procedures performed on children under 10 years old.

(3) This section applies:

(a) to evidence of forensic material, or evidence consisting of forensic material, taken from a person to whom this section applies by a forensic procedure, and

(b) to evidence of any results of the analysis of the forensic material; and

(c) to any other evidence made or obtained as a result of or in connection with the carrying out of the forensic procedure.

(4) If this section applies, evidence described in subsection (2) is not admissible in any proceedings against the person in a court, unless:

<sup>173</sup> Submission 8, p 4 and the *Crimes (Forensic Procedures) Act 2000*, section 83A

<sup>174</sup> Submission 8, p 4

<sup>175</sup> Submission 8, p 4

- (a) the proceedings are a prosecution for the offence in relation to which the forensic procedure was taken; or
  - (b) the subject-matter of the proceedings are in respect of that offence or a related offence;
  - (c) the evidence is adduced by the person
- (5) This section extends to people who underwent a forensic procedure before the commencement of this section.<sup>176</sup>

**4.31** Dr Gans' suggested ban differs from the ban suggested by DJAG in that it applies to unrelated offences only, whereas a ban based on the missing person section applies to any proceedings against that person. Dr Gans' proposal would protect volunteers, including victims, from being implicated in unrelated offences, but not in the offence under investigation or a related offence.<sup>177</sup> This proposal would cover complex scenarios where there is a number of victims and offenders, such as in a pub brawl example set out in Chapter 3.

**4.32** The legislative prohibitions above would also mean that the NSW Victims Protocol that applies to "excluded volunteers" would require modification to reflect the change so that volunteers understand this rule in terms of what might result in providing a DNA sample and also to reassure them that they cannot be implicated in unrelated offences.<sup>178</sup>

#### ***Inquiry participants' comment***

**4.33** The DJAG highlighted a number of advantages for a legislative ban:

- This ban provides protection and support to victims of crimes.
- This ban would relieve some of the difficulties of conflicting priorities by removing the need for a decision maker to balance the conflicting interests.
- A victim in another jurisdiction that is linked to a crime in NSW would not face prosecution in NSW.<sup>179</sup>
- Any failures to abide by policies or procedures, or human error, have no effect on the protection provided to the victim.
- It would not rely on police or laboratory practices and procedures to withdraw identified victims' samples and would protect unidentified samples that had been uploaded and subsequently identified. Hence, it would reassure victims that they have nothing to fear in coming forward to report crimes.<sup>180</sup>

**4.34** The DJAG also noted some disadvantages for a legislative ban. Primarily, that information from matches involving victims would be denied to the police and that there is also the risk

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<sup>176</sup> Submission 9a, Dr Jeremy Gans, p 16

<sup>177</sup> Submission 9a, p16

<sup>178</sup> Submission 9a, p 16

<sup>179</sup> Submission 8, p 4

<sup>180</sup> Answers to questions on notice, Department of Justice and Attorney General, Question 6, p 4

that evidence collected may become inadmissible at a later date because the victim is not identified as a victim from the outset.<sup>181</sup>

- 4.35** The DJAG commented that Dr Gans' alternative legislative ban to 'apply to unrelated offences instead of any proceedings, appears on its face to be an elegant solution to the issue of distinguishing between who is an offender and who is a victims in certain situations such as affrays.'<sup>182</sup>
- 4.36** In addition, the DJAG advised that consideration should be given to recommending that appropriate warning be given to victims about the possibility of using that DNA sample against them in that particular proceeding.<sup>183</sup>
- 4.37** NSW Health indicated that this option is 'the effective way to manage legally the issue of minimising victim crime scene sample upload, coupled with not adversely affecting outcomes in the criminal justice system.'<sup>184</sup>
- 4.38** NSW Health also suggested that it would be preferable to include in this option the present DAL protocol of removing crime scene profiles from the NSW and National DNA Databases once that profile has been identified as being from the victim. Otherwise, the potential still exists for repeated matching to occur to new uploaded crime scene profiles whether in NSW or interstate.<sup>185</sup>
- 4.39** NSW Police stated that it 'strongly objects to any proposed legislation that would automatically preclude evidence being used against a suspect (in order to inculcate concerning potential major crime), simply because that evidence was obtained via a crime scene sample from an event for which it could be argued the person was a victim.'<sup>186</sup>
- 4.40** Further to this, NSW Police commented that 'it is inappropriate to routinely immunise ostensibly innocent people from having their DNA used against them in relation to any crime (but particularly major crimes) in which they are guilty of committing an offence.'<sup>187</sup>
- 4.41** Specifically, NSW Police raised the following concerns with the option of a legislative ban:
- it is unnecessary due to effectiveness of the existing policy
  - such legislation may obstruct policing efforts to inculcate offenders of crime
  - it would increase the complexity of the current legislation
  - it would impact on inter-jurisdictional arrangements.<sup>188</sup>

<sup>181</sup> Answers to questions on notice, Department of Justice and Attorney General, Question 6, p 4

<sup>182</sup> Submission 8a, Department of Justice and Attorney General, p 2

<sup>183</sup> Submission 8a, p 2

<sup>184</sup> Submission 6b, NSW Health, p 2

<sup>185</sup> Submission 6b, p 2

<sup>186</sup> Submission 5a, NSW Police, p 2

<sup>187</sup> Submission 5a, p 2

<sup>188</sup> Submission 5a, pp 2-3

4.42 NSW Police also advised that it opposes any legislative change in light of DJAG's imminent redrafting of the *Crimes (Forensic Procedures) Act 2000* in early 2010.<sup>189</sup>

4.43 CrimTrac advised that it does not support this option in its current form:

An option for a legislative ban when the sample is that of a known victim at the time that the match is made would be supported, if there was an exception for situations where the profile had not been identified as that of a victim at the time that any match was made.<sup>190</sup>

4.44 CrimTrac commented that a legislative ban in NSW would impact the investigation of serious crimes in other jurisdictions. CrimTrac also indicated that it would be more supportive of a discretion on a ban when the profile is matched against a profile involved in a serious crime, such as murder, national security or sexual assault.<sup>191</sup> This is similar to the serious crime inclusion proposal discussed later in this section.

### ***Vulnerable victims***

4.45 The DJAG also identified an alternative option – a limited legislative ban for use of victims' DNA that only applied to vulnerable victims, such as victims of sexual assault and domestic violence.<sup>192</sup> The legislation would specifically prevent the use of these victims' DNA against themselves, including where the sample has already been linked to another crime. The DJAG indicated that the basis for this proposal is the difficulties in encouraging such victims to come forward and report these crimes.<sup>193</sup>

4.46 An advantage of this proposal is that prohibiting the use of DNA taken from vulnerable victims against themselves provides an intelligence boon to police in that it allows them to link remaining "less vulnerable" victims to other crimes.<sup>194</sup>

4.47 However, there is the potential that victims other than those defined as "vulnerable" may decline from reporting crimes for fear of being linked to another crime, perhaps committed decades earlier. This may result in a significant loss to police intelligence and reporting of crime. This proposal may also be perceived by the general community as diluting the protection given to victims.<sup>195</sup>

4.48 NSW Health also raised concern that victims other than those of sexual assault or domestic violence, such as victims of home invasions or assault, may be jeopardised with a definition of "vulnerable victim."<sup>196</sup>

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<sup>189</sup> Submission 5a, p 3

<sup>190</sup> Submission 3a, CrimTrac, pp 1-2

<sup>191</sup> Submission 3a, pp 1-2

<sup>192</sup> This proposal was not included in the Committee's proposed options paper

<sup>193</sup> Submission 8, p 8

<sup>194</sup> Answers to questions on notice, Department of Justice and Attorney General, Question 6, p 4

<sup>195</sup> Answers to questions on notice, Department of Justice and Attorney General, Question 6, p 4

<sup>196</sup> Answers to questions on notice, NSW Health, Question 13, p 6

4.49 NSW Police does not support any further legislative restrictions on the use of victims' DNA, including this proposal.<sup>197</sup>

***Serious offence inclusions***

4.50 Another limited version of a legislative ban presented as a possible solution by the DJAG, is to allow the use of victims' DNA found at crime scenes in the prosecution of those victims for serious offences only and therefore the legislative ban would apply to "non-serious" crimes.<sup>198</sup> For example, a victim whose DNA is acquired at a crime scene could have his or her DNA used against them if linked to a past or future murder charge, but not if linked to a simple break and enter offence.<sup>199</sup>

4.51 The Homicide Victims Support Group also put forward a proposal to allow the use of victims' DNA in relation to the most serious crimes.<sup>200</sup>

4.52 The DJAG noted that its serious offence inclusion proposal affords protection to most victims to encourage them to report crime. However, victims who are also offenders will be aware of the crimes they have committed and may for fear of detection, be less inclined to report crimes.<sup>201</sup>

4.53 The DJAG also commented that allowing prosecution for serious offences will go some way to satisfying community expectations that people who have committed serious offences should be prosecuted.<sup>202</sup>

4.54 NSW Health commented that there may be issues surrounding the definition of serious crimes:

For example, what about a person who has committed numerous BES [Break Enter and Steal] when there is the knowledge that such offenders graduate towards more serious crime. It could still therefore prevent victims of crime coming forward to lodge a complaint.<sup>203</sup>

4.55 The serious offence inclusion is similar in the principle, based on the severity of the crime, to the NSW Police proposal for a discretionary power for courts to admit DNA evidence for major crime categories, an option discussed later in this chapter.

***Committee comment***

4.56 The Committee recognises that the option of legislative ban on the use of a victim's DNA profile against that victim seems to be a relatively simple and clear solution to address the

<sup>197</sup> Answers to questions on notice, NSW Police, Question 13, p 6

<sup>198</sup> This proposal was not included in the Committee's proposed options paper

<sup>199</sup> Submission 8, p 8

<sup>200</sup> Submission 7, p 3

<sup>201</sup> Submission 8, p 8

<sup>202</sup> Answers to questions on notice, Department of Justice and Attorney General, Question 6, pp 4-5

<sup>203</sup> Answers to questions on notice, NSW Health, Question 13, p 6

issue. The Committee notes the merit in Dr Gans' suggestion, as supported by DJAG, to apply the ban to unrelated crimes, but not to the crime that the sample was taken for. The Committee also notes the comments of the DJAG that victims should be warned that the sample they provide may be used against them in relation to the crime the sample was taken for. The Committee acknowledges that such a legislative ban would reassure victims that they have nothing to fear in coming forward to report crimes.

- 4.57** The Committee acknowledges that a legislative ban on the use of victims DNA against that victim is in line with the NSW Health policy to not upload and compare victims' DNA on the NSW DNA Database. The Committee notes NSW Health's suggestion to include in this option the current DAL protocol for a requirement to remove crime scene profiles from the NSW and National DNA Databases once that profile has been identified as being from the victim.
- 4.58** In addition, the Committee notes CrimTrac's and NSW Police's strong objections to further legislative restrictions on the use of victims' DNA, particularly in relation to offenders of serious crimes and the impact this may have on the National DNA Database. The Committee notes NSW Police's comments that DJAG is to undertake a review of the *Crimes (Forensic Procedures) Act 2000* in 2010. The Committee has not been advised of this review by DJAG but would suggest that any findings and recommendations in this report should be considered as part of that review.
- 4.59** The Committee notes that NSW Police and CrimTrac raised issue with a broad legislative ban applying to serious offences and acknowledges that the serious offence inclusion option allows for the offenders of most serious of crimes to not be given the protection of the legislative ban for the use of their DNA in the event they become a victim. While these people may be less inclined to report crimes in which they were a victim, this option may satisfy community expectation that these offenders who have committed serious offences should be prosecuted.
- 4.60** The Committee believes that limiting the legislative ban to apply only to vulnerable victims may be problematic in terms of defining who a "vulnerable victim" should be and has the potential to negatively impact on other victims from reporting crimes and is therefore not recommended.

**Limitations on how the crime scene index profiles can be matched against each other to restrict the possibility of matching victims' DNA to unrelated crimes**

- 4.61** The second proposal for consideration involves placing limitations on how the crime scene index profiles can be matched against each other to restrict the possibility of matching a victim's DNA to an unrelated crime. This proposal has been put forward by Dr Gans.<sup>204</sup> The rationale for the proposal is to provide a principled protection against unanticipated matching between victims and crime scenes, but with the ability to still use the match for unusual or highly ambiguous cases.<sup>205</sup>

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<sup>204</sup> Submission 9a, p 14

<sup>205</sup> Submission 9a, p 15 and Dr Gans, Evidence, 30 October 2009, p 12

- 4.62** This proposal recommends that instead of allowing open matching between all crime scene profiles, matching would only be allowed with other crime scene profiles after all possible measures have been taken to exclude every person who is not reasonably suspected to have committed the offence, including victims. The proposal also includes allowable matching if it is “justified in all the circumstances,” for example, it may be allowable in urgent, complicated or unusual cases as determined by the database administrator.<sup>206</sup>
- 4.63** Dr Gans describes this proposal as a legislative form of the current NSW Police and NSW Health policies to request DNA samples from victims in order to eliminate their DNA profiles from crime scene DNA samples.<sup>207</sup>
- 4.64** It is suggested by Dr Gans that this proposal would have an operational impact on the NSW Health Division of Analytical Laboratories by requiring it to administratively introduce a “crime scene (limited purpose) index” as a staging area for crime scene profiles that can be subject to within case (crime scene) matching. For example, various DNA samples from the same crime scene or case can be matched against each other. Profiles could then be moved to the crime scene (unlimited purpose) index once certain conditions have been satisfied. Such profiles can also be uploaded to the national database. If at a later date, it were established that these conditions were not met, then the profile would be removed and placed again on the crime scene (limited purposes) index.<sup>208</sup>
- 4.65** This proposal involves changes to the matching allowed within the crime scene index and would require legislative amendment to the *Crime (Forensic Procedures) Act 2000*.
- 4.66** The specific amendment put forward by Dr Gans would be to section 93(1) in relation to permissible matching of DNA profiles. It is proposed to amend the table of permissible matching under this section by replacing ‘yes’ in the top left box with “only if within purpose.” This would mean that instead of allowing matches between crime scene and crime scene profiles, matches could only be made “if within purpose.”<sup>209</sup>
- 4.67** After section 93(1), which states:

A matching of a DNA profile on an index of the DNA database system specified at the top of a column of the table to this subsection with a DNA profile on an index of the system specified in column 1 of a row of the table:

a further sub paragraph would be added to set out the circumstances for “only if within purpose” matching to take place:

(d) is permitted by this Part in connection with the crime scene index if ‘only if within purpose’ is shown at the intersection of the relevant row and column, but only if either:

- (i) the other profile is derived from forensic material found:
  - (1) at the place where an offence to which the first profile relates was, or is reasonably suspected of having been, committed; or
  - (2) on or within the body of the victim of such an offence; or

<sup>206</sup> Submission 9a, p 15 and Dr Gans, Evidence, 30 October 2009, p 12

<sup>207</sup> Submission 9a, p 14

<sup>208</sup> Submission 9a, p 17

<sup>209</sup> Submission 9a, p 15

- (3) on anything worn or carried by the victim at the time when such an offence was committed; or
- (4) on or within the body of any person, on any thing, or at any place, associated with the commission of such an offence
- (ii) for every person who:
  - (1) could reasonably be suspected to be the source of the forensic material from which either profile was derived; and
  - (2) is not reasonably suspected to have committed an offence to which that profile relates;
    - either:
      - (3) that person has been excluded as the source of that forensic material; or
      - (4) that person could not be reasonably located; or
      - (5) that person has refused to consent to a forensic procedure to obtain their DNA profile; or
- (iii) the matching is otherwise justified in all the circumstances.<sup>210</sup>

**4.68** Dr Gans advised that a breach of this proposed section would trigger the discretionary exclusion set out in section 82 of the Act.<sup>211</sup>

#### ***Inquiry participants' comments***

**4.69** The DJAG commented that the option of placing limitations on how the crime scene index can be matched would give the administrators and users of the DNA database the discretion to decide whether or not a victims' profile should be used: 'the discretion proposed by Dr Gans is very broad in that it requires the decision maker to consider whether "the matching is justified in all the circumstances".'<sup>212</sup>

**4.70** Further to this, the DJAG stated that the proposal tempers this discretion by providing that where it miscarries, the discretionary exclusion provision in section 82 of the *Crimes (Forensic Procedures) Act 2000* would apply. DJAG advised that a key concern about relying on discretionary exclusions at trial is that a victim might potentially be committed to trial and spend months remanded in custody before being released following a decision to exclude the evidence.<sup>213</sup>

**4.71** To address this the DJAG suggested that the Committee could consider accompanying that discretion with a mandatory exclusion provision in the event the exercise of discretion miscarries:

A mandatory exclusion provides significant incentive to decision makers to ensure that the discretion is appropriately exercised. Such a provision would also provide prosecution authorities with clear guidance on when a prosecution will fail as a result of evidence being inadmissible, which may save victims the trauma of arrest and charge in matters for which they will not be found guilty.<sup>214</sup>

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<sup>210</sup> Submission 9a, p 15

<sup>211</sup> Submission 9a, p 15

<sup>212</sup> Submission 8a, p 1

<sup>213</sup> Submission 8a, p 1

<sup>214</sup> Submission 8a, p 2

**4.72** The DJAG also raised concern with who would be the appropriate person ultimately responsible for the decisions concerning the exercise of this discretion due to the significant consequences of the decisions, that is, the exclusion of evidence in a serious criminal matter.<sup>215</sup>

**4.73** NSW Health, as the database administrator, raised a number of issues with the option of placing limitations on how the crime scene index can be matched. NSW Health commented that it would be likely that this option would add considerable delay or a reduction in how a crime scene sample would be compared to another crime scene sample because it was difficult or impossible to take all possible measures to exclude every person who is not reasonably suspected of having committed the offence.<sup>216</sup>

**4.74** NSW Health provided the following example of how this option may not be practicable in application:

The perfect example that demonstrates this argument is an armed robbery case. A bank is robbed. A smudge is noted on the desk and suspected as having been left by the offender who touched the surface. At present this sample would be loaded to the database and linked to other crime scene samples across NSW or Australia. That information is important intelligence to the Police; that there is the possibility that a common offender is committing armed robberies. If it was required that "all possible measures ... to exclude every person who is not reasonably suspected of having committed the offence" from having left the DNA would require all customers of the bank to be asked to supply a sample of DNA.<sup>217</sup>

**4.75** In addition, NSW Health raised a number of concerns relating to how this option would be handled administratively by DAL:

[I]t would require considerable change to the current procedures in the laboratory for loading of crime scene samples to the database; increased communication with NSW Police in attempting to obtain victims and bystanders DNA samples; considerable time delays in organising scene to scene matching; considerable increase to administrative burden to DAL staff in updating profiles as crime scene samples become uploadable; and budgetary considerations in DNA typing extra person samples.<sup>218</sup>

**4.76** NSW Police raised concerns with this option that related to the role of NSW Health in making the decisions about what should be analysed in a crime scene sample:

NSW Health is not law-enforcement and its role is not to make investigative assumptions or decisions concerning the actual involvement of involved persons or whether or not certain profiles should or should not be placed on matchable indices of the DNA database; these are all matters for the NSW Police Force ... The determination of who is, or who is not, a 'victim' or a 'suspect' in an incident is extremely complex and often ambiguous, and is a matter for determination by investigating police, not the database administrator.<sup>219</sup>

<sup>215</sup> Submission 8a, p 2

<sup>216</sup> Submission 6b, p 3

<sup>217</sup> Submission 6b, p 3

<sup>218</sup> Submission 6b, pp 3-4

<sup>219</sup> Submission 5a, p 4

4.77 CrimTrac does not support the option for limitations on how the crime scene index can be matched as it suggested that this options 'would impede the ability of police to look at and link multiple crime scenes, and would delay the investigation of crimes and the identification of perpetrators.'<sup>220</sup> In addition, CrimTrac raised similar concerns to NSW Health in terms of impact on forensic laboratories, including the potential for significant increase in the number of samples to be processed and the inconvenience to members of the public who are victims of offences.<sup>221</sup>

*Committee comment*

4.78 The Committee notes that this proposal supports victims by aiming to reduce any unanticipated matching between unidentified victims and crime scenes. However, the Committee also notes that it may limit the investigative information that police can have access to in investigative crimes.

4.79 The Committee acknowledges the issues raised by DJAG in relation to considering the need for an accompanying mandatory exclusion provision in the event the exercise of discretion miscarries and the issue of who should be the person responsible for the significant decisions to be made about information relating to a serious crime.

4.80 The Committee also notes the issues raised by NSW Health on limiting crime scene to crime scene matches and the practicality of this option in application.

4.81 The NSW Police issues relating to who the decision-maker in this option are also noted by the Committee.

**A discretionary power for courts to admit DNA evidence from victims "where a court deems it in the interests of justice" for major crime categories**

4.82 This proposal, advocated by NSW Police as a compromise position, is to provide the courts with the discretionary power to allow the use of victim's DNA against the victim "where a court deems it in the interests of justice" for major crime categories including terrorism, homicide and sexual assault.<sup>222</sup>

4.83 NSW Police suggested that in the case of major crime investigations, if a person is later identified as having been, or asserts to have been, a victim in the matter from which the profile was obtained, then the admissibility of that evidence should be sought from a magistrate.<sup>223</sup>

4.84 The DJAG also identified as an option the creation of a discretionary power for the courts to allow the use of victims DNA against the victim but did not limit it to major crimes. DJAG noted that one difficulty would be that the decision as to the admissibility of the victim's DNA would not be addressed until trial, allowing the potential for a victim to have been

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<sup>220</sup> Submission 3a, p 2

<sup>221</sup> Submission 3a, p 2

<sup>222</sup> Answers to questions on notice, NSW Police, Question 13, p 6

<sup>223</sup> Submission 5, p 15

arrested, brought before the court and potentially remanded into custody before a court decides whether or not to allow the use of the DNA.<sup>224</sup>

**4.85** The NSW Police indicated that this difficulty can be avoided because its proposal envisages that the 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.<sup>225</sup>

**4.86** NSW Police suggest that an advantage of this approach is that it would ensure that police, who have conducted the investigation in good faith, with the belief that a sample is not from a victim, would still have the ability to prosecute in certain circumstances if later the sample was proved to be from a victim.<sup>226</sup>

### *Inquiry participants' comments*

**4.87** The DJAG raised the following issues with the option to allow a court to make a discretionary decision to admit evidence before charging in relation to major crimes:

- Consideration should be given to a judicial officer of higher rank than a magistrate to make this decision given that usually these crimes will be prosecuted on indictment and therefore a judge or justice would make a decision on admissibility at the time of trial.
- Consideration should also be given to the difficulty in making a decision concerning the admissibility of evidence prior to charge, when information available may be limited and in light of the significant changes in circumstances which might occur between the time of making the decision and the trial.
- The victim who is under suspicion will be notified of the suspicion at the time of the hearing of the question of admissibility and use of the evidence and might then flee the jurisdiction.<sup>227</sup>

**4.88** On a more general note, the DJAG advised that a discretionary exclusion leaves both investigators and victims unsure as to whether or not the evidence will be admitted. This has the twin negative effects of creating uncertainty in the grounding of prosecutions and discouraging victims from coming forward to give evidence.<sup>228</sup>

**4.89** Dr Gans commented that if this option was in place then there is no reason to believe that a court will resolve this issue consistently or in a way that resolves systemic concerns about victim cooperation with the police.<sup>229</sup>

**4.90** NSW Health commented that this option was somewhat confusing because if a crime scene sample is later identified as being from the victim and the crime is one in which the person

<sup>224</sup> Submission 8, pp 8-9

<sup>225</sup> Answers to questions on notice, NSW Police, Question 13, p 6

<sup>226</sup> Submission 5, p 15

<sup>227</sup> Submission 8a, p 2

<sup>228</sup> Answers to questions on notice, Department of Justice and Attorney General, Question 6, p 5

<sup>229</sup> Submission 9a, pp 12-13

said they were a victim, then NSW Health is unsure why the police would be interested in wanting to have that evidence's admissibility considered by a magistrate. NSW Health suggested that if police investigate the link between the two crime scenes and they believe that it is possible that the victim of crime A is the same person who left the DNA in crime B then to confirm this requires the police to obtain a person sample either in accordance with Act or as a covert sample.<sup>230</sup>

- 4.91** NSW Police advised that while this option is its compromise position, its preferred position is for no changes to the current system. In providing further comment on this option NSW Police stated that if any link was made between that profile and another case prior to the profile being removed from the database, then that link would be legitimate, as at the time the existence of the profile on the database was valid and any contention otherwise should be a matter for determination by a court.<sup>231</sup>
- 4.92** CrimTrac does not support this option as it creates a discretionary power over the use of DNA material in NSW legislation for an offence that might be committed in another part of Australia.<sup>232</sup>

#### *Committee comment*

- 4.93** The Committee notes that this option creates uncertainty for all parties involved as to whether evidence will be admitted. The Committee is also unclear on the impact that this option may have on victims reporting crime. The Committee acknowledges the comments of the DJAG, in particular, that at the time the decision is to be made by the court information surrounding the case may be limited.
- 4.94** The Committee acknowledges NSW Health's comments that NSW Police would still need to obtain a person sample to confirm the match between the crime scenes and the person/victim. The Committee also recognises that this option is a compromise position for NSW Police and that it would prefer no change to the current practices.

### **Other jurisdictions and the implications for the national system**

- 4.95** The Committee noted in the previous chapter that some jurisdictions manage victims' DNA differently to NSW. The Committee noted that the relevant legislation in the Northern Territory includes a legislative ban on the use of DNA from victims (and other volunteers) for investigating another offence other than a relevant offence and is inadmissible as evidence in any proceeding other than a proceeding for a relevant offence. A relevant offence is defined in the Act as an offence punishable by a term of imprisonment of 14 years or more, for example, serious crime, rape or murder.<sup>233</sup>
- 4.96** Also, the Committee noted that an interpretation of the South Australian inadmissibility rule in relation to victims DNA that should have been destroyed is that, a match between a

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<sup>230</sup> Submission 6b, p 4

<sup>231</sup> Submission 5a, p 6

<sup>232</sup> Submission 3a, p 2

<sup>233</sup> Dr Gans, Evidence, 30 October 2009, p 6 and *Police Administration Act 1978* (NT), s147B(2)

victim's DNA profile and a crime scene DNA profile where they may have been an offender, cannot be used against them if the victim requests that their DNA sample be destroyed, even after that match has been made.<sup>234</sup>

**4.97** In Canada legislation defines its "crime scene index" similar to NSW and also includes a provision that states that access to information in the crime scene index shall be permanently removed if the information relates to a DNA profile derived from a bodily substance of a victim of an event that was the object of the relevant investigation or a person who has been eliminated as a suspect in a relevant investigation.<sup>235</sup>

**4.98** The DJAG commented that this appears to be a statutory requirement to remove access to profiles relating to victims from the crime scene index, and hence the ability to usefully match those profiles.<sup>236</sup>

**4.99** Dr Gans commented that pro-victim legislation, such as that in Canada, has not seen offenders being let off from crimes:

I think the compelling fears which the NSW Police put in their submission about possible side-effects have not played out in Canada in terms of having a limitation like this. There are no stories I have read, there was no testimony before the Canadian parliament of people getting away with offences because of a pro-victim protective amendment. Canada is a different place. Nevertheless, I see they have some suggestion that is a provision in now for 11 years.<sup>237</sup>

**4.100** In its evidence to the inquiry CrimTrac has reminded the Committee of the implications to the National DNA Database system of any changes to NSW legislation:

It is CrimTrac's submission that legislative change in one jurisdiction has the potential to undermine the agreements for participation that are in place, which could broadly compromise criminal justice outcomes.<sup>238</sup>

**4.101** NSW Police also indicated that the existing inter-jurisdictional Ministerial Arrangements for participation in the National DNA Database took six years to agree on and implement.<sup>239</sup>

**4.102** CrimTrac has stated that it 'continues to oppose any changes to the arrangements in place for the use of the DNA profiles of unknown victims of crime with response to the National Criminal Investigation DNA Database (National DNA Database).'<sup>240</sup>

<sup>234</sup> Dr Gans, Evidence, 30 October 2009, p 6

<sup>235</sup> Dr Gans, Evidence, 30 October 2009, p 5

<sup>236</sup> Answers to questions on notice, Department of Justice and Attorney General, Question 16, pp 8

<sup>237</sup> Dr Gans, Evidence, 30 October 2009, p 5

<sup>238</sup> Submission 3, CrimTrac, p 4

<sup>239</sup> Submission 5a, p 3

<sup>240</sup> Submission 3a, p 1

## Concluding comments

- 4.103** The Committee is appreciative of the efforts of those key agencies that provided evidence and advice to the Committee during the inquiry. The limited input from advocacy groups and the general public on this issue may demonstrate that this is not a great concern for the wider community. However, the Committee notes that, as mentioned in the previous chapter, it is likely that the general public may not be knowledgeable on the current use on victims' DNA in NSW.
- 4.104** The Committee acknowledges that it was not informed of any examples of an unidentified victim's DNA found at a crime scene in NSW that was matched to an unrelated crime and later used to investigate or prosecute that victim for the unrelated crime. However, it is the potential that this can happen that is of concern and the fact that there are no statutory restrictions on the use of unidentified victims' DNA profiles being used to investigate unrelated crimes.
- 4.105** The Committee recognises that a solution needs to ensure victims of crime are not unduly dissuaded from reporting crime, be practicable and supportive of the work of police, and mindful of NSW's participation in the National DNA Database system.
- 4.106** Apart from NSW Police providing a clear preference for no change to the current system, the Committee was not informed of any other clear preferences in relation to the solution for this issue. Weighing up all the material that has been provided during the inquiry has enabled the Committee to conclude that the proposed option that appears to have the most merit for achieving the balance noted above is a legislative ban on the use of a victim's DNA profile against that victim for an unrelated crime, with a serious offence inclusion.
- 4.107** The Committee is of the view that a legislative ban on the use of a victim's DNA for an unrelated crime, unless it is a serious offence, satisfies community expectations and allows police to bring serious offenders to account. For example, a victim whose DNA is acquired at a crime scene could have his or her DNA used against them if linked to a past or future murder charge, but not if linked to a simple break and enter offence.
- 4.108** The Committee notes that as a result of such a ban those victims who have committed a serious offence earlier may not report crimes against themselves, however, the Committee feels that this consequence can be balanced against the protection given to other victims, who have not committed a serious crime and prosecuting offenders of serious crime.
- 4.109** The Committee understands NSW Police's reluctance for any further legislative change, however, the Committee believes that it is necessary that legislative protection is given to victims. Having a serious offence inclusion will allow police to continue their work and still have all the investigative tools available to them in bringing serious offenders to account.
- 4.110** The Committee is also mindful of CrimTrac's comments in relation to implications of any legislative change in NSW on the national system, but notes that CrimTrac indicated that it would be more supportive of a legislative change if there was a serious offence inclusion option.
- 4.111** The Committee recommends that a legislative amendment to the *Crimes (Forensic Procedures) Act 2000* be pursued with a section similar to that put forward by Dr Gans in paragraph 4.30, but

with a clause that allows for the inclusion of serious offences. This would mean a legislative ban would apply to the use of a victim's DNA profile against that victim for an unrelated offence but not apply to the related offence (the original crime in which the DNA profile was taken), or in the case that the unrelated offence is a serious crime.

- 4.112** The Committee did not receive evidence on what should define a serious offence in these circumstances. The Committee notes that a "serious indictable offence" is defined in the *Crimes (Forensic Procedures) Act 2000* and is related to an offence that is punishable by a term of imprisonment of 5 years or more. The Northern Territory, which has a similar legislative ban, defines a serious offence as one that is punishable by a term of imprisonment of 14 years or more, for example, serious crime, rape or murder.
- 4.113** The Attorney General is better placed to find the appropriate definition to ensure the most serious crimes are included, such as murder, sexual assault or national security offences while protecting the majority of victims.

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### Recommendation 2

That the Attorney General seek an amendment to the *Crimes (Forensic Procedures) Act 2000* to create a legislative ban on the use of a victim's DNA profile against that victim for an unrelated crime, with a serious offence inclusion.

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- 4.114** In addition, the Committee agrees with NSW Health's suggestion that crime scene profiles must be removed from the NSW and National DNA Databases once that profile has been identified as belonging to a victim. This will ensure that repeated matching will not continue between the now identified victim's DNA profile and other subsequently uploaded crime scene profiles in NSW or interstate. The Committee notes that this is already NSW Health's DAL protocol and recommends that this protocol be enshrined in legislation.

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### Recommendation 3

That the Attorney General, in consultation with the Minister for Health, pursue a legislative amendment to the *Crimes (Forensic Procedures) Act 2000* to enshrine in legislation the NSW Health Division of Analytical Laboratories protocol to remove crime scene profiles from the NSW and National DNA Databases once that profile has been identified as belonging to a victim.

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- 4.115** The Committee also believes that following this reform it will be imperative to give an appropriate warning to victims providing DNA samples that there is the possibility that their DNA sample may be used against them in relation to that crime they are supplying the sample for or a serious offence they may have committed earlier. This would warn victims that while they are protected from being implicated in a non-serious unrelated offence, the DNA sample can be used to investigate the offence they are supplying the sample for and potentially used against them if it was established that they were an offender and not only a victim or a serious offence committed at another time.

- 4.116** This warning could be provided in the Victims Protocol, however, the Committee notes that this draws on similar provisions put forward in the Crimes (Forensic Procedures) Amendment Bill 2009, that in order for a person, who is not a suspect, to validly volunteer to undergo a forensic procedure under the Act, the person must be told that the procedure might produce evidence, which could be used against them in court.
- 4.117** Therefore, the Committee recommends that, to reflect the new legislative ban, the Minister for Police require NSW Police to provide appropriate warning to victims providing DNA samples that there is the possibility of using that DNA sample against them in that particular crime or a serious offence.

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#### **Recommendation 4**

That, to reflect the new legislative ban, the Minister for Police require NSW Police to provide appropriate warning to victims providing DNA samples that there is the possibility of using that DNA sample against them in that particular crime or a serious offence.

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- 4.118** The Committee is of the view that these recommendations coupled with the targeted public education campaign, as set out in Recommendation 1 of this report, would achieve an appropriate balance between protecting victims' rights and encouraging them to report crime and supporting the work of police in bringing serious offenders to account.

## Appendix 1 Submissions

| No | Author   |
|----|--|
| 1  | Homicide Survivors Support After Murder Group Incorporated |
| 2  | Australian Federal Police                                  |
| 3  | CrimTrac   |
| 3a | CrimTrac   |
| 4  | Name Suppressed  |
| 5  | NSW Police Force   |
| 5a | NSW Police Force   |
| 6  | NSW Department of Health                                   |
| 6a | NSW Department of Health                                   |
| 6b | NSW Department of Health                                   |
| 7  | Homicide Victims Support Group (Aust) Inc.                 |
| 8  | Department of Justice and Attorney General                 |
| 8a | Department of Justice and Attorney General                 |
| 9  | Dr Jeremy Gans, Melbourne Law School                       |
| 9a | Dr Jeremy Gans, Melbourne Law School                       |

## Appendix 2 Witnesses at hearings

| <b>Date</b>   | <b>Name</b>               | <b>Position and Organisation</b>  |
|---|---------------------------|---|
| <b>Friday 25 September 2009</b><br><b>Room 814-815</b><br><b>Parliament House</b> | Mr Brendan Thomas         | Assistant Director General, Crime Prevention and Community Programs, Department of Justice and Attorney General |
|   | Ms Penny Musgrave         | Director, Criminal Law Review, Department of Justice and Attorney General                                       |
|   | Superintendent Jeff Emery | Commander, Forensic Services Group, NSW Police Force  |
|   | Mr Robert Goetz           | Acting Deputy Director, Criminalistics Division of Analytical Laboratories, Sydney West Area Health Service     |
|   | Mr Thomas Sphor           | Chair, Young Lawyers Criminal Law Committee, Law Society of NSW   |
|   | Ms Martha Jabour          | Executive Director, Homicide Victims Support Group (Aust) Inc.  |
|   | Mr Liam Burgess           | Convenor of Criminal Justice Subcommittee, NSW Council of Civil Liberties                                       |
| <b>Friday 30 October 2009</b><br><b>Room 814-815</b><br><b>Parliament House</b>   | Dr Jeremy Gans            | Associate Professor, Melbourne Law School, University of Melbourne  |

## Appendix 3 Tabled documents

- 1 Confidential documents, tendered by Superintendent Jeff Emery, Commander, Forensic Services Group, NSW Police Force on 25 September 2009.
- 2 A diagram of a DNA profile, document titled 'Permissible matching under Crimes (Forensic Procedures) Act 2000 and DNA database removal action form, tendered by Mr Robert Goetz, Acting Deputy Director, Criminalistics Division of Analytical Laboratories, Sydney West Area Health Service on 25 September 2009.

## **Appendix 4 Answers to questions on notice**

- 1 NSW Health, Criminalistics Division on Analytical Laboratories
- 2 NSW Police Force
- 3 NSW Department of Justice and Attorney General

## Appendix 5 What is DNA?

### What is DNA?<sup>241</sup>

Following is a basic outline of DNA:

- DNA stands for Deoxyribonucleic Acid and is described as the blueprint for life.
- DNA is found in every nucleated cell in the body.
- DNA carries the body's genetic information in the form of a code, which determines the physical characteristics of each individual. There are approximately 3.3 billion pieces of code.
- Two types of DNA are used in forensic analysis: mitochondrial DNA and nuclear DNA.
- Mitochondrial DNA is less useful as it is not unique to each individual as is inherited through the maternal line as an exact copy. Therefore, siblings of the same mother have identical mitochondrial DNA.
- Nuclear DNA is more unique as it is inherited from both the father and mother, in random combinations. Therefore, siblings' nuclear DNA are similar but not the same (except for identical twins).

### What is DNA profiling?<sup>242</sup>

- Forensic analysis of DNA involves the creation of a profile of specific sites on the DNA molecule. A DNA profile is not a profile of all the 3.3 billion subunits of DNA. The number of sites examined can vary depending on the system used. The Profiler Plus system is most commonly used in Australia, and it examines nine sites, plus the sex indicator.
- The DNA profile created by the analysis is a set of numbers, which can be entered onto a database. An example of a typical DNA profile is:
  - XY 15,15 17,18 21,22 13,13 29,30 13,14 11,12 10,11
- Each of the numbers refer to the number of repeat units at each of the nine sites. The XY in the above example refers to the sex of the person (strong indication of sex rather than a definitive result).
- The nine sites examined in DNA analysis do not impart any information about a person, apart from the sex. Therefore, this information does not provide genetic information about a person, for example, race, hair/eye colour, height or predisposition to disease.
- The information gained from this DNA profiling is used on a comparative basis. For example, comparing one profile to another. Not identifying someone with a particular genetic trait, like hair or eye colour, etc.

<sup>241</sup> Standing Committee on Law and Justice "Review of the *Crimes (Forensic Procedures) Act 2000*", February 2002, p 4

<sup>242</sup> Standing Committee on Law and Justice "Review of the *Crimes (Forensic Procedures) Act 2000*", February 2002, pp 4-5

- DNA profiles can be obtained from biological samples, including those found at crime scenes, on victims, or on items touched by the offender. For example, blood, semen, hair, skin, faeces, urine, saliva, sweat on cigarette butts, chewing gum, masks, clothing, envelopes, etc.
- Not all biological samples will provide a DNA profile as it varies for different material. For example, blood and saliva have a higher success rate of yielding a profile than hair.
- Once the DNA profile is entered onto the database, it can be compared with other profiles on the system. A suspect's profile can be compared with a crime scene sample, or crime scene samples compared with each other.

## Appendix 6 Proposed options for dealing with unidentified victims' DNA profiles found in crime scene samples

*In addition to submissions and public hearings, the Committee sought further comment from inquiry participants through a proposed options paper. The text of that proposed options paper is provided below.*

The Standing Committee of Law and Justice has received a number of proposed options from inquiry participants on how to deal with unidentified victims' DNA profiles found in crime scene samples. The key issue for this inquiry is what use can be made of information resulting from an unidentified DNA profile found at a crime scene and placed on the DNA database, which is later identified to be that of a victim, and by virtue of having been placed on the database, may be matched to an unrelated crime where the victim may have been the offender. The proposed options intend to provide solutions to this issue.

This paper sets out the options presented during the inquiry that the Committee believes may have the most merit in achieving an appropriate balance between the competing public interests of finding practicable solutions that are supportive of the work of police in bringing offenders to account, while at the same time ensuring that people who are victims are not unduly dissuaded from reporting the crime.

### The proposed options

The three proposed options are presented in no particular order:

1. A legislative ban on the use of a victim's DNA profile against that victim
2. Limitations on how crime scene index profiles can be matched against each other to restrict the possibility of matching victims' DNA to unrelated crimes
3. A discretionary power for courts to admit DNA evidence from victims "where a court deems it in the interests of justice" for major crime categories.

#### 1. A legislative ban on the use of a victim's DNA profile against that victim

A legislative ban on the use of a victim's DNA profile against that victim was one of a number of possible solutions identified by the Department of Justice and Attorney General (DJAG) to address the issue.<sup>243</sup> This proposal involves a legislative prohibition in the Crimes (Forensic Procedures) Act 2000 on the use of DNA known to have come from, or reasonably suspected to have come from, a victim of crime against that victim or any evidence derived from its use.

A legislative prohibition on the use of forensic material, such as DNA profiles, against a person providing the material exists in relation to the missing persons index in the Crimes (Forensic Procedures) Act 2000 at section 83A. Potentially, a similar legislative prohibition could be included in the Act for victims. Section 83A states:

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<sup>243</sup> Submission 8, Department of Justice and Attorney General, p 4

### **83A Inadmissibility of certain evidence from forensic procedures undertaken for purpose of missing persons index**

- (1) This section applies to a person who volunteers to have a forensic procedure carried out for the purposes of placing information obtained from the analysis of the person's forensic material on the missing persons index.
- (2) This section applies:
  - (a) to evidence of forensic material, or evidence consisting of forensic material, taken from a person to whom this section applies by a forensic procedure, and
  - (b) to evidence of any results of the analysis of the forensic material, and
  - (c) to any other evidence made or obtained as a result of or in connection with the carrying out of the forensic procedure.
- (3) If this section applies, evidence described in subsection (2) is not admissible in any proceedings against the person in a court, but may be admissible if adduced in such proceedings by the person.
- (4) This section extends to a person who volunteered to undergo a forensic procedure before the commencement of this section.<sup>244</sup>

The current NSW Health policy of taking all reasonable steps to avoid matching victims' profiles would remain but the prohibition would protect those samples placed on the database, which are subsequently found to belong to a victim.<sup>245</sup> This would mean that while the victim may be identified as the suspect in another unrelated crime, investigators would not be able to pursue that link by further investigations based on that information or use the evidence of the link in court.<sup>246</sup>

A number of advantages of this proposal have been presented to the Committee:

- This provides protection and support to victims of crimes.<sup>247</sup>
- This ban would relieve some of the difficulties of conflicting priorities by removing the need for a decision maker to balance the conflicting interests.<sup>248</sup>
- A victim in another jurisdiction that is linked to a crime in NSW would not face prosecution in NSW.<sup>249</sup>
- Any failures to abide by policies or procedures, or human error, have no effect on the protection provided to the victim.<sup>250</sup>

<sup>244</sup> Submission 8, p 4 and the *Crimes (Forensic Procedures) Act 2000*, section 83A

<sup>245</sup> Submission 8, p 4

<sup>246</sup> Submission 8, p 4

<sup>247</sup> Submission 8, p 4

<sup>248</sup> Submission 8, p 4

<sup>249</sup> Submission 8, p 4

<sup>250</sup> Answers to questions on notice, Department of Justice and Attorney General, Question 6, p 4

- It would not rely on police or laboratory practices and procedures to withdraw identified victims' samples and would protect unidentified samples that had been uploaded and subsequently identified. Hence, it would reassure victims that they have nothing to fear in coming forward to report crimes.<sup>251</sup>

The following disadvantages of this proposal have been presented to the Committee:

- It is unnecessary due to the effectiveness of the existing policy.<sup>252</sup>
- Information from matches involving victims would be denied to the police.<sup>253</sup>
- Such legislation could potentially obstruct policing efforts to inculcate offenders of crime.<sup>254</sup>
- There is also the risk that evidence collected may become inadmissible at a later date because the victim is not identified as a victim from the outset, however, it may be possible to draft a legislative provision to provide a discretion in that circumstance. This exception would encourage victims to come forward at the earliest opportunity in order to ensure that they are not inadvertently matched to other offences.<sup>255</sup>
- This could further increase complexity of current legislation despite reform agenda aimed at simplifying the legislation.<sup>256</sup>
- This may reduce the rate of people providing DNA samples, despite current legislation reform efforts to increase sampling rate.<sup>257</sup>

Dr Jeremy Gans from the Melbourne Law School proposed the following alternative legislative prohibition that could be used for volunteers, including victims:

**Inadmissibility of certain evidence from forensic procedures on volunteers**

- (1) This section applies to volunteers who consented to a forensic procedure for the limited purpose of investigating an offence.
- (2) This section extends to excluded volunteers, to procedures involving an intrusion into a person's body cavities, and to procedures performed on children under 10 years old.
- (3) This section applies:
  - (a) to evidence of forensic material, or evidence consisting of forensic material, taken from a person to whom this section applies by a forensic procedure, and

<sup>251</sup> Answers to questions on notice, Department of Justice and Attorney General, Question 6, p 4

<sup>252</sup> Answers to questions on notice, NSW Police, Question 13, p 6

<sup>253</sup> Answers to questions on notice, Department of Justice and Attorney General, Question 6, p 4

<sup>254</sup> Answers to questions on notice, NSW Police, Question 13, p 6

<sup>255</sup> Answers to questions on notice, Department of Justice and Attorney General, Question 6, p 4

<sup>256</sup> Answers to questions on notice, NSW Police, Question 13, p 6

<sup>257</sup> Answers to questions on notice, NSW Police, Question 13, p 6

- (b) to evidence of any results of the analysis of the forensic material; and
  - (c) to any other evidence made or obtained as a result of or in connection with the carrying out of the forensic procedure.
- (4) If this section applies, evidence described in subsection (2) is not admissible in any proceedings against the person in a court, unless:
- (a) the proceedings are a prosecution for the offence in relation to which the forensic procedure was taken; or
  - (b) the subject-matter of the proceedings are in respect of that offence or a related offence;
  - (c) the evidence is adduced by the person
- (5) This section extends to people who underwent a forensic procedure before the commencement of this section.<sup>258</sup>

Dr Gans' suggested prohibition differs from the prohibition relating to the inadmissibility of the missing person index (section 83A) in that it applies to *unrelated offences* only, whereas the missing person section applies to *any proceedings* against that person. Dr Gans' proposal would protect volunteers, including victims, from being implicated in unrelated offences, but not in the offence under investigation or a related offence.<sup>259</sup>

The legislative prohibitions above would also mean that the NSW Victims Protocol that applies to "excluded volunteers" would require modification to reflect the change so that volunteers understand this rule in terms of what might result in providing a DNA sample and also to reassure them that they cannot be implicated in unrelated offences.<sup>260</sup> The Committee notes that many of the advantages and disadvantages set out earlier in relation to the DJAG proposal for a legislative ban may also relate to Dr Gans' alternative legislative ban.

## **2. Limitations on how the crime scene index profiles can be matched against each other to restrict the possibility of matching victims' DNA to unrelated crimes**

The second proposal for consideration involves placing limitations on how the crime scene index profiles can be matched against each other to restrict the possibility of matching a victim's DNA to an unrelated crime. This proposal has been put forward by Dr Gans.<sup>261</sup> The rationale for the proposal is to provide a principled protection against unanticipated matching between victims and crime scenes, but with the ability to still use the match for unusual or highly ambiguous cases.<sup>262</sup>

This proposal recommends that instead of allowing open matching between all crime scene profiles, matching would only be allowed with other crime scene profiles after all possible measures have been taken to exclude every person who is not reasonably suspected to have committed the offence, including victims. The proposal also includes allowable matching if it is "justified in all the

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<sup>258</sup> Submission 9a, Dr Jeremy Gans, p 16

<sup>259</sup> Submission 9a, p 16

<sup>260</sup> Submission 9a, p 16

<sup>261</sup> Submission 9a, p 14

<sup>262</sup> Submission 9a, p 15 and Dr Gans, Evidence, 30 October 2009, p 12

circumstances,” for example, it may be allowable in urgent, complicated or unusual cases as determined by the database administrator.<sup>263</sup>

Dr Gans describes this proposal as a legislative form of the current NSW Police and NSW Health policies to request DNA samples from victims in order to eliminate their DNA profiles from crime scene DNA samples.<sup>264</sup>

It is suggested by Dr Gans that this proposal would have an operational impact on the NSW Health Division of Analytical Laboratories by requiring it to administratively introduce a “crime scene (limited purpose) index” as a staging area for crime scene profiles that can be subject to within case (crime scene) matching. For example, various DNA samples from the same crime scene or case can be matched against each other. Profiles could then be moved to the crime scene (unlimited purpose) index once certain conditions have been satisfied. Such profiles can also be uploaded to the national database.

If at a later date, it were established that these conditions were not met, then the profile would be removed and placed again on the crime scene (limited purposes) index.<sup>265</sup>

This proposal involves changes to the matching allowed within the crime scene index and would require legislative amendment to the *Crime (Forensic Procedures) Act 2000*.

The specific amendment put forward by Dr Gans would be to section 93(1) in relation to permissible matching of DNA profiles. It is proposed to amend the table of permissible matching under this section by replacing ‘yes’ in the top left box with “only if within purpose.” This would mean that instead of allowing matches between crime scene and crime scene profiles, matches could only be made “if within purpose.”<sup>266</sup>

After section 93(1), which states:

A matching of a DNA profile on an index of the DNA database system specified at the top of a column of the table to this subsection with a DNA profile on an index of the system specified in column 1 of a row of the table:

a further sub paragraph would be added to set out the circumstances for “only if within purpose” matching to take place:

(d) is permitted by this Part in connection with the crime scene index if ‘only if within purpose’ is shown at the intersection of the relevant row and column, but only if either:

(i) the other profile is derived from forensic material found:

- (1) at the place where an offence to which the first profile relates was, or is reasonably suspected of having been, committed; or
- (2) on or within the body of the victim of such an offence; or
- (3) on anything worn or carried by the victim at the time when such an offence was committed; or
- (4) on or within the body of any person, on any thing, or at any place, associated with the commission of such an offence

<sup>263</sup> Submission 9a, p 15 and Dr Gans, Evidence, 30 October 2009, p 12

<sup>264</sup> Submission 9a, p 14

<sup>265</sup> Submission 9a, p 17

<sup>266</sup> Submission 9a, p 15

- (ii) for every person who:
- (1) could reasonably be suspected to be the source of the forensic material from which either profile was derived; and
  - (2) is not reasonably suspected to have committed an offence to which that profile relates;
- either:
- (3) that person has been excluded as the source of that forensic material; or
  - (4) that person could not be reasonably located; or
  - (5) that person has refused to consent to a forensic procedure to obtain their DNA profile; or
- (iii) the matching is otherwise justified in all the circumstances.<sup>267</sup>

Dr Gans advised that a breach of this proposed section would trigger the discretionary exclusion set out in section 82 of the Act.<sup>268</sup>

While other inquiry participants have not yet had the opportunity to provide comment on this specific proposal, NSW Health provided general advice on potential implications of changes to the legislation relating to the crime scene index, which may be of relevance:

- If it was legislated that crime scene samples must be known to originate from the perpetrator very few crime scene samples would be loaded to the database.<sup>269</sup>
- If it was legislated that the sample must not originate from the victims of crime, it would mean that all crimes would need to be accompanied by a victim person sample, putting innocent victims of crimes, such as break and enters, stolen vehicles and home invasions to an unnecessary burden.<sup>270</sup>
- Potentially this could significantly increase the number of person samples that the laboratories would need to DNA profile.<sup>271</sup>

### **3. A discretionary power for courts to admit DNA evidence from victims “where a court deems it in the interests of justice” for major crime categories**

This proposal, advocated by NSW Police, is to provide the courts with the discretionary power to allow the use of victim’s DNA against the victim “where a court deems it in the interests of justice” for major crime categories including terrorism, homicide and sexual assault.<sup>272</sup>

NSW Police suggested that in the case of major crime investigations, if a person is later identified as having been, or asserts to have been, a victim in the matter from which the profile was obtained, then the admissibility of that evidence should be sought from a magistrate.<sup>273</sup>

<sup>267</sup> Submission 9a, p 15

<sup>268</sup> Submission 9a, p 15

<sup>269</sup> Answers to questions on notice, NSW Health, Question 11, p 5

<sup>270</sup> Answers to questions on notice, NSW Health, Question 11, p 5

<sup>271</sup> Answers to questions on notice, NSW Health, Question 11, p 5

<sup>272</sup> Answers to questions on notice, NSW Police, Question 13, p 6

<sup>273</sup> Submission 5, NSW Police Force, p 15

The DJAG also identified as an option the creation of a discretionary power for the courts to allow the use of victims DNA against the victim but did not limit it to major crimes. DJAG noted that one difficulty would be that the decision as to the admissibility of the victim's DNA would not be addressed until trial, allowing the potential for a victim to have been arrested, brought before the court and potentially remanded into custody before a court decides whether or not to allow the use of the DNA.<sup>274</sup>

The NSW Police indicated that this difficulty can be avoided because its proposal envisages that the 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.<sup>275</sup>

NSW Police suggest that an advantage of this approach is that it would ensure that police, who have conducted the investigation in good faith, with the belief that a sample is not from a victim, would still have the ability to prosecute in certain circumstances if later the sample was proved to be from a victim.<sup>276</sup>

The Committee was advised of the following disadvantages for this proposal:

- A discretionary exclusion leaves both investigators and victims unsure as to whether or not the evidence will be admitted. This has the twin negative effects of creating uncertainty in the grounding of prosecutions and discouraging victims from coming forward to give evidence.<sup>277</sup>
- There is no reason to believe that a court will resolve this issue consistently or in a way that resolves systemic concerns about victim cooperation with the police.<sup>278</sup>

### Comment

The Committee recognises the potential that these proposals could work separately or together to provide differing levels of protection and regulation relating to the use of victims' DNA in NSW.

The Committee acknowledges that you and/or your agency have provided valuable information on reform in this area, which has been relied upon to draft this paper, and welcomes your comments on some or all of the proposals outlined in this paper.

Further information, including submissions, transcripts and answers to questions on notice, can be found at the Committee's website: [www.parliament.nsw.gov.au/lawandjustice](http://www.parliament.nsw.gov.au/lawandjustice).

<sup>274</sup> Submission 8, pp 8-9

<sup>275</sup> Answers to questions on notice, NSW Police, Question 13, p 6

<sup>276</sup> Submission 5, p 15

<sup>277</sup> Answers to questions on notice, Department of Justice and Attorney General, Question 6, p 5

<sup>278</sup> Submission 9a, pp 12-13

## Appendix 7 Minutes

### Minutes No. 33

Monday 29 June 2009

Room 1102, Parliament House, Sydney at 9.20 am

#### 1. Members present

Ms Robertson (*Chair*)

Mr Clarke (Deputy Chair)

Mr Donnelly

Mr Ajaka

Ms Hale

Ms Fazio

#### 2. \*\*\*

#### 3. Receipt of terms of reference for an inquiry into the use of DNA material belonging to victims of crime

##### 3.1 Adoption of terms of reference

Resolved, on the motion of Ms Fazio: That the Committee adopt the terms of reference received from the Attorney General on 29 June 2009 for an inquiry into the use of DNA material belonging to victims of crime and that the words 'Any other related matter' be included as a third dot point at the end of the terms of reference.

##### 3.2 Reporting terms of reference to the House

Resolved, on the motion of Ms Fazio: That, in accordance with paragraph 5(2) of the resolution establishing the Standing Committees dated 10 May 2007, the Chair inform the House that it has adopted the terms of reference received from the Attorney General on 29 June 2009 for an inquiry into the use of DNA material belonging to victims of crime.

##### 3.3 Time line for inquiry

Resolved, on the motion of Ms Fazio: That the Secretariat, in consultation with the Chair, draft a proposed time line for the inquiry and circulate the time line to the Committee for comment.

##### 3.4 Advertising inquiry and call for submissions

Resolved, on the motion of Ms Fazio: That the Inquiry and the call for submissions be advertised on a date to be determined by the Secretariat in consultation with the Committee, in The Sydney Morning Herald and The Daily Telegraph and any other appropriate publications as determined by the Secretariat.

##### 3.5 Press release

Resolved, on the motion of Ms Fazio: That a press release announcing the commencement of the Inquiry and the call for submissions be distributed to media outlets throughout NSW on a date to be determined by the Secretariat in consultation with the Committee.

##### 3.6 Invitations to stakeholders to make a submission

Resolved, on the motion of Ms Fazio: That the Committee write to stakeholders identified by the Secretariat in consultation with the Committee informing them of the Inquiry and inviting them to make a submission.

##### 3.7 Hearings

Resolved, on the motion of Ms Fazio: That hearings for the inquiry be held on a date to be determined by the Secretariat in consultation with the Committee and that the witnesses that are to be invited to appear also be determined by the Secretariat in consultation with the Committee.

#### 4. Adjournment

The Committee adjourned at 6.10 pm *sine die*.

Rachel Callinan  
Clerk to the Committee

**Minutes No. 34**

Wednesday 26 August 2009

Room 1102, Parliament House, Sydney at 2.00 pm

**1. Members present**

Ms Robertson (*Chair*)

Mr Clarke (*Deputy Chair*)

Mr Donnelly

Mr Ajaka

**2. Apologies**

Ms Hale

Ms Fazio

**3. Minutes**

Resolved, on the motion of Mr Donnelly: That draft Minutes No. 32 and 33 be confirmed.

**4. Inquiry into the use of victims' DNA****4.1 Correspondence**

The Committee noted the following item of correspondence received:

- 24 July 2009 – From Ms Alison Peters, Director, NCOSS, advising that the organisation will not be making a submission to the inquiry.

The Committee noted the following item of correspondence sent:

- 8 July 2009 – From Chair to Attorney General, advising that the Committee resolved on 29 June 2009 to adopt the terms of reference referred by him.

**5. \*\*\*****6. Adjournment**

The Committee adjourned at 2.15 pm *sine die*.

Rebecca Main  
Clerk to the Committee

**Minutes No. 35**

Friday 25 September 2009

Room 814-815, Parliament House, Sydney at 9.15am

**1. Members present**

Ms Robertson (*Chair*)

Mr Clarke (*Deputy Chair*)

Mr Donnelly

Mr Ajaka

Ms Hale

Ms Sharpe (as a participating Member from 1:45pm to 2pm)

**2. Apologies**

Ms Fazio

**3. Minutes**

Resolved, on the motion of Mr Donnelly: That draft Minutes No. 34 be confirmed.

**4. Deliberative meeting**

**4.2 Correspondence**

The Committee noted the following item of correspondence received:

- 16 September 2009, NSW Bar Association advising that the organisation does not wish to make a submission to the inquiry.

**4.3 Publication of submissions**

Resolved, on the motion of Ms Hale: That, according to section 4 of the Parliamentary Papers (Supplementary Provisions) Act 1975 and Standing Order 223(1), the Committee authorise the publication of Submission Nos 1 – 3 and 5- 9.

Resolved, on the motion of Ms Hale: That, according to section 4 of the Parliamentary Papers (Supplementary Provisions) Act 1975 and Standing Order 223(1), the Committee authorise the publication of Submission No 4 with name suppressed at the request of the author.

**4.4 Return of questions on notice**

Resolved on the motion of Mr Clarke: That, witnesses be requested to return answers to questions on notice by Friday 16 October 2009.

**5. Public Hearing – Inquiry into the use of victims' DNA**

Witnesses, the public and media were admitted.

The Chair made an opening statement regarding the broadcasting of proceedings and other matters.

The following witnesses were sworn and examined:

- Mr Brendan Thomas, Assistant Director General, Crime Prevention and Community Programs, Department of Justice and Attorney General
- Ms Penny Musgrave, Director, Criminal Law Review, Department of Justice and Attorney General.

The evidence concluded and the witnesses withdrew.

The following witness was sworn and examined:

- Superintendent Jeff Emery, Commander, Forensic Services Group, NSW Police Force.

Superintendent Emery tendered two confidential documents.

The evidence concluded and the witness withdrew.

The following witness was sworn and examined:

- Mr Robert Goetz, Acting Deputy Director, Criminalistics Division of Analytical Laboratories, Sydney West Area Health Service.

Mr Goetz tendered the following documents:

- Diagram of DNA profile
- Permissible matching under Crimes (Forensic Procedures) Act 2000 and
- DNA database action form for the removal of profile from the database.

The evidence concluded and the witness withdrew.

The following witness was sworn and examined:

- Mr Thomas Spohr, Chair, Young Lawyers Criminal Law Committee, Law Society of NSW.

The evidence concluded and the witness withdrew.

The following witness was sworn and examined:

- Ms Martha Jabour, Executive Director, Homicide Victims Support Group (Aust) Inc.

The evidence concluded and the witness withdrew.

The following witness was sworn and examined:

- Mr Liam Burgess, Convenor of Criminal Justice Subcommittee, NSW Council of Civil Liberties.

Ms Robertson left the Chair at 2.48pm.

Mr Clarke took the Chair.

Ms Robertson resumed the Chair at 2.54pm.

The evidence concluded and the witness withdrew.

The public hearing concluded at 3.05pm. The public and the media withdrew.

## 6. Deliberative meeting

### 6.1 Publication of tabled documents

Resolved, on the motion of Mr Donnelly: That, the Committee accept and publish, according to section 4 of the Parliamentary Papers (Supplementary Provisions) Act 1975 and Standing Order 223(1), the following documents tendered by Mr Robert Goetz, Acting Deputy Director, Criminalistics Division of Analytical Laboratories, Sydney West Area Health Service during the public hearing:

- Diagram of DNA profile
- Permissible matching under Crimes (Forensic Procedures) Act 2000 and
- DNA database action form for the removal of profile from the database.

Resolved, on the motion of Ms Hale: That the Committee accept the documents tendered during the public hearing by Superintendent Jeff Emery, Commander, Forensic Services Group, NSW Police Force and that the secretariat confirm with Superintendent Emery the confidentiality status of the documents and to keep the documents confidential if requested.

### 6.2 Future public hearing for the inquiry into the use of victims' DNA

Committee members agreed to a future half day hearing on Friday 30 October 2009 with academic witnesses.

## 7. Adjournment

The Committee adjourned at 3.15 pm until Friday 30 October 2009 at 9.30am.

Rebecca Main  
Clerk to the Committee

## Minutes No. 36

Friday 30 October 2009

Room 814-815, Parliament House, Sydney at 11.15am

### 1. Members present

Ms Robertson (*Chair*)

Mr Clarke (*Deputy Chair*)

Mr Donnelly  
Ms Fazio  
Ms Hale

2. **Apologies**  
Mr Ajaka

3. **Minutes**  
Resolved, on the motion of Ms Hale: That draft Minutes No. 35 be confirmed.

4. **Deliberative meeting**

**4.1 Correspondence**

The Committee noted the following items of correspondence sent:

- 29 September 2009 – From Chair to Dr Don Weatherburn, NSW Bureau of Crime Statistics and Research, inviting input into the inquiry.
- 29 September 2009 – From Chair to Professor Reg Graycar, Faculty of Law, University of Sydney, inviting input into the inquiry.

The Committee noted the following items of correspondence received:

- 12 October 2009 – Email from the NSW Bureau of Crime Statistics and Research providing a copy of a relevant report in response to the Chair's invitation for input into the inquiry.
- 19 October 2009 – From Mr Robert Goetz, A/Deputy Director, Division of Analytical Laboratories, NSW Health, providing response to questions on notice.

**4.2 Publication of questions on notice**

Resolved, on the motion of Ms Hale: That, according to section 4 of the *Parliamentary Papers (Supplementary Provisions) Act 1975* and Standing Order 223(1), the Committee authorise the publication of answers to questions on notice received from the Department of Health, NSW Police and the Department of Justice and Attorney General.

**4.3 Return of questions on notice**

Resolved on the motion of Mr Clarke: That, witnesses be requested to return answers to questions on notice by Friday 13 November 2009.

4.4 \*\*\*

5. **Public hearing – Inquiry into the use of victims' DNA**

The witness, the public and media were admitted.

The Chair made an opening statement regarding the broadcasting of proceedings and other matters.

The following witness was sworn and examined:

- Dr Jeremy Gans, Associate Professor, Melbourne Law School.

The evidence concluded and the witnesses withdrew.

The public hearing concluded at 12.35pm. The public and the media withdrew.

6. **Deliberative meeting**

**6.1 Inquiry into the use of victims' DNA - Proposed options paper**

Resolved on the motion of Ms Hale: That the Committee seek comment from inquiry participants on a proposed options paper for solutions to address the issue of the use of unidentified victims DNA profiles and that a response to the paper be requested as soon as practical to enable the Committee to endeavour to report by the end of the year.

7. **Adjournment**

The Committee adjourned at 12.36pm until Friday 30 November 2009 at 9.00am.

Rachel Callinan  
**Clerk to the Committee**

### **Minutes No. 37**

Wednesday 11 November 2009

Members Lounge, Parliament House, Sydney at 1.00pm

#### **1. Members present**

Ms Robertson (*Chair*)

Mr Clarke (*Deputy Chair*)

Mr Donnelly

Mr Ajaka

#### **2. Apologies**

Ms Fazio

Ms Hale

#### **3. Inquiry into the use of victims DNA**

##### **3.1 Publication of Supplementary Submission 9a**

Resolved, on the motion of Mr Clarke: That, according to section 4 of the Parliamentary Papers (Supplementary Provisions) Act 1975 and Standing Order 223(1), the Committee authorise the publication of Supplementary Submission 9a.

##### **3.2 Correspondence**

The Committee noted the following item of correspondence sent:

- 10 November 2009, from Chair to key inquiry participants (Dept of Attorney General and Justice, NSW Police, NSW Health, NSW Council for Civil Liberties, Law Society of NSW, CrimTRAC, the Homicide Victims Support Group and Dr Jeremy Gans) seeking comment on the options paper prepared by the Secretariat in consultation with the Chair.

#### **4. \*\*\***

#### **5. Adjournment**

The Committee adjourned at 1.10pm until Friday 11 December at 9.00am, Room 1102.

Rachel Callinan  
**Clerk to the Committee**

### **Draft Minutes No. 38**

Friday 11 December 2009

Room 1102, Parliament House, Sydney at 9.30 am

#### **1. Members present**

Ms Robertson (Chair)

Mr Clarke (Deputy Chair)

Mr Donnelly

Ms Voltz

Ms Hale

#### **2. Apologies**

Mr Ajaka

**3. Change to Committee membership**

Ms Voltz was appointed as a member to the Standing Committee on Law and Justice, as reflected in the Legislative Council Minutes No. 132, Wednesday 2 December 2009, Item 18.

The Chair, on behalf of the Committee, welcomed Ms Voltz.

The Committee acknowledged and expressed its appreciation of the participation and contribution of Ms Fazio during her membership of the Committee.

**4. Minutes**

Resolved, on the motion of Mr Donnelly: That draft Minutes Nos 36 and 37 be confirmed.

5. \*\*\*

6. \*\*\*

7. \*\*\*

**8. Inquiry into the use of victims' DNA****8.1 Correspondence**

The Committee noted the following items of correspondence received:

- 5 November 2009 – From Dr Jeremy Gans, to Principal Council Officer providing a point of clarification to his evidence given on 30 October 2009.
- 10 November 2009 – From Dr Jeremy Gans, to Principal Council Officer advising that he has already provided comment on the proposals raised in the Committee's proposed options paper.
- 2 December 2009 – From Mr Thomas Spohr to Principal Council Officer, advising he will not be providing a response to the Committee's proposed options paper.

**8.2 Publication of submissions**

Resolved, on the motion of Mr Donnelly: That, according to section 4 of the Parliamentary Papers (Supplementary Provisions) Act 1975 and Standing Order 223(1), the Committee authorise the publication of supplementary submissions 3a, 5a, 6a, 6b and 8a.

**8.3 Consideration of the Chair's draft report**

The Chair tabled her draft report titled 'The use of victims' DNA', Report 41, which, having been previously circulated, was taken as being read.

The Committee proceeded to consider the draft report in detail.

Chapter 1 read.

Resolved, on the motion of Mr Donnelly: That Chapter 1 be adopted.

Chapter 2 read.

Resolved, on the motion of Mr Clarke: That Chapter 2 be adopted.

Chapter 3 read.

Resolved, on the motion of Ms Hale: That Recommendation 1 be adopted.

Resolved, on the motion of Ms Hale: That Chapter 3 be adopted.

Chapter 4 read.

Resolved on the motion of Mr Donnelly: That Recommendation 2 be adopted.

Resolved on the motion of Ms Hale: That Recommendation 3 be adopted.

Resolved on the motion of Ms Voltz: That Recommendation 4 be adopted.

Resolved, on the motion of Mr Donnelly: That Chapter 4 be adopted.

Executive summary read.

Resolved, on the motion of Mr Clarke: That the Executive summary be adopted.

Resolved, on the motion of Mr Donnelly: That the Committee Secretariat correct any typographical and grammatical errors in the report prior to tabling.

Resolved, on the motion of Mr Clarke: That the draft report be the report of the Committee presented to the House, together with transcripts of evidence, submissions, tabled documents, minutes of proceedings, answers to questions on notice and correspondence relating to the inquiry, in accordance with Standing Order 231.

The Chair advised the Committee that the report will be tabled on Wednesday 16 December 2009.

**9. Adjournment**

The Committee adjourned at 10.05 am sine die

Rebecca Main

**Clerk to the Committee**

