

NSW Health (Submission 6)

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QUESTIONS PLACED ON NOTICE BY THE COMMITTEE

1. Can you please explain how the Division of Analytical Laboratories interacts with NSW Police, including the police's Forensic Procedures Implementation Team?

ANSWER:

Sydney West Area Health Service's Division of Analytical Laboratories (DAL) is part of NSW Health. Within DAL there are two main functional areas – a Public Health area and one involved with Forensics. One of the laboratories within the Forensic area is the Forensic Biology/DNA Laboratory (FBDNA). The FBDNA receives all cases for examination from NSW Police, ranging from the most serious of murders and sexual assaults to property crime such as 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 DNA database. As such, DAL is the custodian of the NSW database for the NSW Police and the provider of DNA profiles to the National Criminal Investigation DNA Database (NCIDD) which is part of the Crimtrac organisation.

All cases are received from NSW Police. Included with the case is pertinent information that allows the scientist at DAL to determine the priority of the case, what items need to be examined and in what order etc. Depending on the type of case, there can be little communication or frequent communication between the staff of DAL and NSW Police. This may include DAL scientists attending Police crime reviews to ascertain details of the crime aiding in the triaging of exhibits.

Once a case has been completed a report is issued and sent to NSW Police. All samples that are loaded to the database are determined to be uploadable by staff of 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 Forensic Procedures Implementation Team (FPIT). As such over the years there has been considerable interaction between DAL and FPIT on operational matters related to the database and link reporting. FPIT also operates the NSW Help Desk which filters phone calls for staff at DAL.

Person samples are also received from NSW Police as allowed under the *Crimes (Forensic Procedures) Act 2000*. These samples can either directly relate to a case, such as a suspect or victim sample, and/or allowed under the legislation (including convicted offenders, unregistered former offenders etc). Destruction requests are electronically received from NSW Police for samples taken under provisions of the Act.

Queries are often sent to FPIT from DAL staff requiring clarification of subject category and other information relating to person samples. For example, DAL queries all samples that are submitted as volunteers (unlimited purposes) as this category allows for almost free matching within the database. Most samples that were listed under this category were found to be incorrectly categorised.

2. Can you describe how the NSW database interacts with the national database?

ANSWER:

DNA profiles from crime scenes and person samples (suspects, convicted offenders, untested former offenders (UFOs), untested registrable persons (URPs), missing persons, unknown deceased, known deceased) are loaded to the searchable NSW database. Victim samples and limited volunteer samples are loaded to a non-searchable section of the NSW database. Samples that have been agreed to by FPIT are loaded to the national database (NCIDD). At the moment not all samples loaded to the NSW database are loaded nationally. This in particular relates to suspects where NSW Police inform DAL which suspect samples can be loaded to NCIDD. Victim and volunteer (limited) samples are not loaded to NCIDD.

3. What liaison does your agency have with CrimTrac – for example, do you regularly meet to discuss evolving issues such as this one?

ANSWER:

Meetings with Crimtrac occur on a yearly/six-monthly basis as part of EUAG – Experts User Advisory Group with representatives from all Australian jurisdictions and Crimtrac. At this meeting issues are discussed that are relevant to the different Australian jurisdictions, for example how are relatives of missing persons going to be searched on NCIDD. It has been proposed that the experts group and the Police group (PUAG) amalgamate so that issues can be discussed in a joint sitting. Issues such as victim's crime scene profiles may be raised but are really an internal jurisdictional matter and not something that relates to Crimtrac's purpose.

4. The NSW Health submission (p4) refers to the January 2007 NSW Ombudsman report entitled "DNA sampling and other forensic procedures conducted on suspects and volunteers under the *Crimes (Forensic Procedures) Act 2000*" and describes a number of recommendations that were made directly to DAL. Can you tell us what changes have been made to the way DAL handles and protect victims' DNA as a result of these recommendations?

ANSWER:

DAL has amended its procedures so that destruction requests include removing not only the link from the person's identification to the DNA profile but also the DNA profile from the database.

5. The NSW Health submission (p7) mentions a proposal by the NSW Police Force to remove the NSW DNA database and only use the national DNA database. Can you elaborate on this?

ANSWER:

The NSW database and the national database (NCIDD) operate independently but are intimately related. Crime scene samples and convicted offender samples that are loaded to the local database are automatically loaded to NCIDD. But there are a number of person samples on the local database that, due to certain constraints, are not sent to the national database. This is agreed policy from NSW Police.

The use of the local NSW database allows for increased flexibility in the matching process. In the most important priority 1 cases a manual check can be conducted on all samples on the database and an immediate determination can be made if there is a link or not. Equally, weak partial profiles in very important matters can be manually checked to see if there is a match or even multiple matches. These tasks nationally cannot be managed with the same degree of ease.

The local database also allows for immediate response to legislative changes, as well as support for DAL's policies for quarantining suspect samples where there has been a delay in informing DAL of the destruction request. As described elsewhere, DAL will automatically remove suspect samples from the NSW database greater than 1 year old unless informed by Police that the sample can be extended. These samples are sent to a quarantine section of the NSW database awaiting advice. If replaced onto the NSW database they do not get searched again whereas if this occurs nationally all matching is repeated.

It must be stated that the operation of both a local database and a national database does not delay the process. If anything the independence of the local database ensures that the responsible person has control of samples prior to their uploading to the national database. As such the independence may be viewed as a benefit to the people of NSW because, in theory, access to NCIDD could be available to others than Health if agreed to.

At present, Queensland and the ACT are the only jurisdictions that I am aware of that use NCIDD as its sole database.

6. A submission to the inquiry (Submission 4, p2) stated that there is no set timeframe for destructing crime scene DNA profiles. Can you advise the Committee of the current destruction timeframes DNA samples on the various indexes in the NSW database?

ANSWER:

Originally, the destruction of any person profiles was at the instructions of the Police. In the case of R v Masri the judge instructed the DAL biologist that DAL had responsibility under the Act for ensuring that only samples that should be searched are allowed on the database. Thus DAL introduced that suspects are automatically removed one year after collection unless Police advise otherwise. This put the onus on Police to enable suspect samples to remain searchable after 12 months. If removed in such a manner they are placed in a quarantine non-searchable database awaiting instructions from Police. The names within this quarantine database are regularly provided to FPIT for reconciliation purposes.

Victims and volunteer (limited) samples are not placed on the searchable database and therefore are not searched against any category. The samples and the profiles are removed on request of the person.

Unlimited volunteer samples are never loaded to the database unless these samples are checked with FPIT to confirm legitimacy. However, at any time the samples and profiles can be removed on request of the person.

Crime scene profiles are loaded onto the crime scene index. Samples are only removed from this database if it later becomes known that the crime scene sample originates from the victim of the crime.

7. We have been advised that once it has been established that a DNA profile that has been put on the database is from a victim it is then removed.

- a. What is the process for removing these DNA profiles from the database?
- b. Is the victim informed that their profile *was* on the database?

ANSWER:

Once DAL becomes aware that a crime scene profile originates from a victim it organises an internal DAL Database Amendment Form to be sent to an authorised person who has administration rights to remove samples from the database. The form must be checked and countersigned by a senior scientist. The victim is not informed of this action as the victim was not aware that his/her sample was on the database. This would only have repercussions if during the period the sample was on the database a match was made to another crime scene whether in NSW or interstate.

8. The NSW Health submission (p7) advises that a match can potentially be made between a victim's DNA and another sample on the crime scene index before that person has been identified as a victim and the profile removed. If a match is made to an unidentified crime scene profile in which the victim may have been an offender, who is alerted to this match and what process is followed? What role does DAL play?

ANSWER:

Normal FPIT procedure occurs with DAL notifying FPIT that a scene to scene match has been found. If at a later stage the crime scene sample was identified as being from the victim the victim crime scene sample would be removed from the database.

9. What are the difficulties in differentiating between victims and perpetrators in some crimes and the implications of this in dealing with DNA profiles?

ANSWER:

In probably most cases it is impossible to know whether the crime scene profile originates from the perpetrator of a crime. For example, a victim is stabbed and the knife left at the scene. The handle of the knife is swabbed and a profile obtained. It is not known if this profile originates from the perpetrator of the crime or another person who may have handled the knife at an earlier (or later) time. Usually, there needs to be accurate eye-witness accounts about the offender's actions before one can be sure that it is the perpetrator's DNA that is being loaded to the database. For example, a cigarette butt left at the scene of an assault may belong to the offender or a member of the public unless there is eye-witness evidence that absolutely supports that it originates from the offender. In sexual assault cases where the victim has not had previous intercourse, a male DNA profile recovered from the vaginal swabs may be assumed to originate from the offender. In most cases, the DAL staff will make a value judgment depending on the circumstances of the cases and where it can be reasonably determined that the sample originates from a victim it will not be loaded to the database.

10. How is victims' DNA dealt with and protected in other Australian jurisdictions? Are similar policies and practices that you operate under followed in other jurisdictions?

ANSWER:

Only Queensland, where they have been instructed by Police, and Western Australia where it is reputed to be part of the legislation, load all crime scene profiles to their database. Victoria, South Australia, Tasmania, and the ACT follow policies similar to DAL.

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

ANSWER:

There must be scope within the legislation for a "reasonable man" approach to the loading of crime scene samples to the database; otherwise samples will be not uploaded. For example, if it was legislated that crime scene sample must be known to originate from the perpetrator very few crime scene samples would ever be loaded to the database. If, on the other hand, it was legislated that the sample must not originate from the victim of crime, it would mean that all crimes would need to be accompanied by a victim person sample. This would include Break and Enters, Stolen Motor Vehicles, Home Invasions etc. This would put innocent victims of crimes to an unnecessary burden, would reduce the number of samples loaded to the database or significantly increase the number of person samples that DAL would need to DNA profile.

If legislation is to be put forward it must allow for reasonableness as its criteria. In my opinion policies and procedures can be 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 is retained, then comfort should exist on a real balance being achieved from a community perspective.

12. In a submission to the inquiry (Submission 4, p3) a proposal is put forward to legislate so that NSW cannot seek re-identification information of victim profiles on the national or other states and territories databases. What is your view on this?

ANSWER:

If there is a match between a crime scene in NSW and a crime scene in another State that knowingly comes from a victim then, depending on the seriousness of the case, it could be considered to be the duty of NSW Police to follow this up. Without a legislative impediment to re-identification occurring, including a penalty provision, it would be unlikely to deter some investigators if it was based only on an understanding not to use a victim crime scene link for prosecution purposes. It would seem hypocritical that NSW would not load victim crime scene profiles to the NSW or NCIDD database but would use the same information from another State to help solve a crime in NSW.

13. The Department of Justice and Attorney General's submission (Submission 8, pp7-9) outlines a number of options to resolve this issue we ask if you are able to provide comment on these proposals:

- (a) A legislative ban on evidence derived from using a victims DNA profile
- (b) Legislative protection only for vulnerable victims, such as victims of sexual assault
- (c) Serious offence inclusions, where the use of victims DNA found at crime scenes can be used to prosecute for serious offences, and
- (d) Providing the courts with the discretionary power to allow the use of victims DNA against the victim.

ANSWER:

- (a) No comment.
- (b) In my opinion this is difficult to define – does it include domestic violence victims, victims of home invasions, victims of assaults, etc – anywhere where the victim needs to come forward to lodge a complaint could be jeopardised with such a formulation.
- (c) Decision would need to be made as to which crimes are "serious". For example, what about a person who has committed numerous BES when there is the knowledge that such offenders graduate towards more serious crime. It could still therefore prevent victims of crime from coming forward to lodge a complaint.
- (d) No comment.

14. If there were any changes recommended to the NSW system of handling victims' DNA, how would this impact on the national DNA database and system?

ANSWER:

This question is predicated on the knowledge as to what the changes will be. It must be realised that NCIDD is the matching engine. Crime scene samples are matched at present so that there would be little difference on NCIDD to what occurs at present if victim samples were loaded. If a match were to occur between a NSW crime victim crime scene and a crime scene in another jurisdiction, in theory the other jurisdiction could request information from FPIT regarding the likely perpetrator of the NSW crime. This could identify it as being a victim crime scene sample which would therefore identify the victim. In addition, there may be difficulties with other States that don't load victim samples to the database.

15. The submission from CrimTrac (Sub 3) suggests that a nationally endorsed policy for loading victim DNA profiles on databases is necessary to ensure full participation on the national database and so that victims are treated consistently across jurisdictions. Do you have a view on this suggestion?

ANSWER:

Crimtrac is the organisation with NCIDD as the search engine. Policies for uploading profiles to the national database rests with each State or Territory jurisdiction. At present policies across Australia differ for loading of victim's crime scene samples to NCIDD as does some of the legislative requirements. Yet it still works. I would therefore not consider that it was necessary to have a national approach to loading of victims' profiles. It could be that the national interest is better served if no victim crime scene profiles were loaded to the database.

16. What is your view of the proposal of the Homicide Victims Support Group (Submission 7, p3) that victims who have given their DNA 'be asked if they wish to volunteer and give consent so that their samples are then downloaded onto the main database and treated the same as the general community' but only used in relation to the most serious of crimes?

ANSWER:

This could create an IT problem as it creates categories within categories. Within the matching on NCIDD and NSW there would be the need for subcategorisation of crime scenes from serious to not serious to "most serious of crimes" to enable such matching to occur. On NCIDD not all States and Territories describe what case is serious or minor crime. So I'm unsure how a sub-category match could occur.

17. In considering what recommendations to make as a result of this inquiry, the Committee needs to balance competing public interests. Any changes must be supportive of the work of police in bringing offenders to account while, at the same time, ensure that people who are victims are not unduly dissuaded from reporting the crime.

- (a) Do you have any insights into how the Committee might resolve this balancing act?
- (b) From the point of view of the work of your agency, what other aspects or issues should the Committee consider?

ANSWER:

- (a) No comment.
- (b) It was raised by the Superintendent Jeff Emery that in cases such as the murder at Sydney Airport the Police would lose information as the victim samples would not be loaded to the database. Under section 90 of the *Crimes (Forensic Procedures) Act 2000* known deceased can be loaded as unlimited volunteers to the DNA database. So the victim of this murder can be loaded and searched against other crimes. In addition, the others involved in the fracas under the legislation could be sampled as suspects and again compared to other uploaded samples. Section 90 does create a situation where a known deceased victim of crime sample can be used to solve other crimes, while if the victim was not deceased the sample cannot be used to solve those same crimes.

RESPONSES TO QUESTIONS TAKEN ON NOTICE

Questions taken on Notice – Page 23

Ms SYLVIA HALE: We have received a submission today that talks about the inaptness of the model provisions in relation to volunteers and rape victims. Then it talks about the narrowness of sections 76 and 76A. Given what you have said today about policy—you agreed that policy can be subjected to change—are you conscious of any other significant areas in relation to the collection and retention of DNA samples that are dependent solely upon policy rather than legislative requirement?

Mr GOETZ: I would have to take that question on notice. I am not sure.

ANSWER:

To my knowledge, the policies in place in relation to the collection and destruction of person samples are contained in the Standard Operating Procedures of NSW Police and Health and mirror the provisions of the legislation. DAL is diligent in ensuring that there is no breach of the legislation in relation to the retention or use of person samples.

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Mr GOETZ: I do not necessarily think it is particularly tight with excluded volunteers or victim person profiles, because no real parts of the Act refer to them, other than that one little part in the definitions. If you look at the matching tables, there is no mention of excluded volunteers in those matching tables. In fact, victims are not even part of that legislation.

CHAIR: So it is only operating off the protocol you have between the three Ministers?

Mr GOETZ: I would have to take that on notice. I am not 100 per cent sure how it is. All I know is we treat victims the same as limited purpose volunteers and, therefore, they can only be searched within purpose.

ANSWER:

The Victims protocol relates to the carrying out of forensic procedures on excluded volunteers. It relates to the collection of a person sample and any other intimate or non-intimate sample as defined in Annexure A.

The protocol was signed only by the then Minister for Police and Attorney General.

Annexure C refers to information given by Police that the victim sample is being taken, and that the sample will only be used for a specific offence. It also details that victim person samples will be destroyed after written advice to that effect is sent by the victim to the Police, who it is assumed will contact DAL when the request is considered actionable.

Therefore although excluded volunteer person samples are not referred to within the Act and are outside any protections that the Act gives, that victims are adequately protected in relation to their person samples through the Victim's protocol.

The Victims Protocol (and the Act) however does not refer to victim (or volunteer) crime scene samples and what can or cannot be done with these samples. The protection in relation to a volunteer or victim profile derived from a crime scene is provided by current Health policies.