

INQUIRY INTO THE USE OF VICTIMS' DNA

DJAG RESPONSES TO QUESTIONS ON NOTICE

- 1. What changes have been made to the way in which victims' DNA is handled as a result of the recommendations in 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*"?**

We refer the Committee to the Government response to that report tabled in the Legislative Council on 13 May 2009. A review of the Victims Protocol, as mentioned in that response, awaits the conclusion of this inquiry before being actioned.

The Crimes (Forensic Procedures) Amendment Bill 2009, currently being debated by the Legislative Council, implements the final changes arising out the Government's response to that report. We refer the Committee to the second reading speech of that Bill for further detail.

- 2. The Department's submission (p5) advises that links can potentially be made between a victim's DNA and another sample on the crime scene index. Is this resulting forensic information *currently* used by police for investigative purposes and/or used in courts to convict offenders?**

Procedures are currently in place to limit the use of identified victim profiles from crime scenes. Profiles from crime scenes may be identified where someone has consented to providing a sample which is used to exclude them from the investigation. That profile is not uploaded and any matching profile is either not uploaded or removed.

DJAG understands that NSW Health will also remove profiles from the database when they are reasonably suspect to have come from a victim.

These processes do however leave a small category of persons who may be victims and whose profiles are uploaded. This will be the case where the victim has not been identified or they are unco-operative and no other sample to match is available.

DJAG is unaware of any circumstances where a match in these circumstances has been used either for investigative purposes or forensically, however police may be able to assist further.

There is no statutory impediment on such use of a victim's sample in those circumstances, through a match to another offence.

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

A crime scene may contain thousands of DNA samples, of which hundreds might be sent for DNA analysis. Those samples can belong to the victim, the perpetrator, bystanders or even those who have never been at the scene of the crime.

There are two main ways that DNA at a crime scene can be identified as belonging to a victim. The first is through a reference profile which the profile found at the scene can be tested against. Where a victim volunteers his or her DNA that DNA can be matched against the DNA at the scene. The samples are governed by the statutory regime in Part 8 of the *Crimes (Forensic Procedures) Act 2000* and by the Victims Protocol.

The second is through a process of deduction. For example, a female victim of sexual assault inflicted on her by a man will have in a sample taken from her vagina a deposit of semen mixed with vaginal fluid. The profile developed from that sample will have both a male and female component, which can be technologically identified. From that it is deduced that the female profile is the victim profile.

Another example of deduction would be where the victim is known to be bleeding and the perpetrator not, and a DNA profile is developed from a blood sample at the scene. This has been referred to in the DJAG submission as one which can reasonably be suspected to come from a victim. As a matter of practice DAL does not upload these profiles to the database.

There will remain, however, a number of crime scene samples which cannot be identified as belonging to either the victim or the perpetrator using the methods described above. It is possible that one or more of these unidentified profiles could be uploaded to the database and matched against a crime.

Later, it may emerge that the unidentified profile was actually acquired from a victim at the scene of the crime where they were victimised.

These 'unidentified victim profiles' might lead to oppressive situations where, for example, a person who is the victim of a sexual assault is linked to a robbery she committed in the distant past.

4. The Department's submission (p5) advises that the NSW Government has requested that DNA profiles taken from NSW crime scenes and placed on the national database not be matched against DNA profiles from crime scenes in other jurisdictions. Can you elaborate on this issue including the reasoning behind the request and the difficulties it may pose for police?

The issue arose in 2007 when it became apparent that practices relating to the retention and use of profiles on the crime scene index known to come from victims or reasonably suspected to have come from victims were inconsistent across

jurisdictions. NSW, as a matter of policy, does not match these profiles on its database. The existence of these profiles on the crime scene index of the National Database however means that it is possible for NSW to match one of its crimes scenes against a victim whose DNA is on the crime scene index of another jurisdiction, in contravention of its policy. By prohibiting crime scene to crime scene matching over the National Database, NSW ensures that a NSW crime scene can not be matched to a victim whose DNA is on the database of another jurisdiction.

- 5. 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?**

Section 138 of the *Evidence Act* provides that evidence that is unlawfully or improperly obtained is inadmissible, unless the court exercises a discretion to admit it. Breaching Government policy can constitute improper behaviour for the purposes of section 138, however, in practice, proving a breach of a policy in court presents significant difficulties over proving a breach of law, which can be taken from the face of legislation.

For example, a complete legislative prohibition on use, like that in the Act for people who volunteer profiles to help find missing persons, is absolute, not discretionary, would be less difficult to apply in practice and provides a more powerful restriction on the use of evidence. It may also, however, prevent the use of evidence in a prosecution for a serious offence, which could, depending on the circumstances, be portrayed as an unjust outcome.

- 6. Your Department's submission (pp7-9) outlines four options that have been put forward as solutions to this issue.**
- a. **Can you run through the advantages and disadvantages of each of these proposals?**
 - b. **Do you have a view on which would be the most appropriate option?**

Legislative prohibition

Advantages

A complete legislative prohibition, involving both the use of the evidence and the use of any evidence derived from it (like that which exists for missing persons), is

perhaps the only way to remove any danger of a victim being prosecuted for an offence he or she is linked to.

The advantage of this approach is that any failures to abide by policies or procedures, or human error, have no effect on the protection provided to the victim.

This would take the form of something similar to the absolute ban on the use of missing person DNA in section 83A of the Act.

It would not rely on police or DAL 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.

Disadvantages

Information from matches involving victims would be denied to the police. 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.

Vulnerable victims

Advantages

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 victims to other crimes.

Disadvantages

Where a victim who does not fall under the definition of 'vulnerable' fears being linked to another crime, perhaps committed decades earlier, he or she may decline to come forward and report that crime. This may result in a significant loss to police intelligence and reporting of crime. This dilutes the protection that the public see as being given to victims.

Serious offences inclusions

Advantages

Allowing prosecution for serious offences only will go some way to satisfying community expectations that people who have committed serious offences should not be able to get away with what they have done.

Disadvantages

People who know they committed earlier crimes may be disinclined to report a crime where they have been a victim.

Discretionary exclusion

Section 82 of the *Crimes (Forensic Procedures) Act 2000* provides for a discretionary power to exclude evidence where that evidence was obtained as a result of a breach of the Act or failure to comply with a requirement of the Act.

There are no real advantages to this approach as against the other approaches discussed above. 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.

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

It is imperative that whatever form of regulation is imposed upon the use of victims' profiles, be it policy-based, legislative or otherwise, it takes into account that profiles can be acquired from other jurisdictions that may not take the same approach as NSW to limiting the access and use of victims' profiles. Whether legislation is required concerning victims' profiles that can be obtained from other jurisdictions is in one sense dependant on what approach the committee recommends in relation to victims' profiles in NSW. However, it may be that specific legislation is required in relation to profiles from interjurisdictional sources to ensure that NSW policy is not undermined by the policies of other jurisdictions and all victims regardless of their residence are dealt with consistently in NSW.

The response to question 10 below addresses the need for a nationally endorsed policy concerning victims' profiles.

8. The submission from the Homicide Victims Support Group (Submission 7, p3) raises the issue of finding a workable definition of "victims" that could be used in legislation to ensure that there is not a potential loophole that could actually protect offenders from prosecution. What is your view on this?

There are already provisions in place which apply protections to those labelled as a "victim" (see for example s76A of the *Crimes (Forensic Procedures) Act 2000*). Whilst in most cases distinguishing between victim and assailant should not prove

difficult, one can imagine situations where this is not the case: for example, any matter where self defence is an issue.

Ultimately, such issues are ones of fact, like the multitude which need to be considered by decision makers in the ordinary course of their business. Were courts required to distinguish between victims and perpetrators as a basis of admissibility, one would envisage a body of case law quickly developing to guide police and other decision makers in this regard.

9. 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 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?

It is already possible for a victim to volunteer their DNA for an ‘unlimited purpose,’ which can then, pursuant to section 93 of the Act, be matched against crime scene samples.

In relation to usage in prosecuting the most serious of crimes, DJAG relies on its submission concerning the options available in controlling the use of victims DNA and the discussion of the advantages and disadvantages of each above.

10. The submission from CrimTrac (Submission 3, p3) suggests that a nationally endorsed policy for loading victim DNA profiles on databases is necessary to ensure full participation on the national database and so that victims are treated consistently across jurisdictions. What is your view on this suggestion?

DJAG supports the concept of a nationally endorsed policy. NSW was actively pursuing a national approach for a considerable period of time. In the recent past, NSW was developing a business rule to be used on the national database to limit the information transmitted after a match with a victims profile on the crime scene index of the national database. NSW will progress a nationally endorsed policy once the outcome of this inquiry is known and the NSW Government position on the issue finalised.

It is possible, however, through measures which effect the admissibility of evidence in one jurisdiction, for a jurisdiction to take its own approach without adversely affecting matching across the national database.

11. 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?

There are two ways in which protection to non-identified victim crime scene samples could be affected.

1. By providing a legislative ban on the admissibility of that sample.
2. By preventing matching.

Changes involving the *admissibility of evidence* in NSW courts would not directly effect the National Database. When a match occurred over the National Database that was not permitted in NSW, NSW police would not utilise it for their investigation and would not provide details of the match to other jurisdictions.

Changes involving what can and cannot be matched would directly effect NSW's ability to match with other jurisdictions – that is, NSW would have to alter the matching table (which essentially, although not exactly, mirrors that in our Act) to effect the changes and then pursue amended agreements with all other states and territories.

12. New South Wales adopted the Commonwealth guidelines but is it the only State in your knowledge that has put the issues [sic] of the 2002 amendment?

The Model Criminal Officers Committee Model Bill included all volunteers within the scope of its provisions. Jurisdictions around Australia enacted legislation which differ from the Model Bill. NSW's specific approach to victims is unique, however, each jurisdiction's legislation needs to be considered as a whole in order to gauge its impact on victims, as provisions concerning database matching, destruction, consent and other such requirements affect the consequences for victims who provide forensic material.

13. Where the victim voluntarily provides DNA, and says, "Yes. I want it. It can go on the register forever", is there a procedure for the victim if in a year or two they change their mind and decide to have the DNA removed and destroyed?

DJAG understands that police and DAL have procedures in place which allows the material to be removed and destroyed. Details of the procedure can be sought from those agencies.

14. Dr Jeremy Gans of the University of Melbourne made a submission containing fairly detailed criticisms of the *Crimes (Forensic Procedures) Act 2000*, in particular, sections 76 and 76A. Could you provide to the Committee from your perspective a response to the criticisms that he has made? Dr Gans seems to suggest that it is unnecessary on many occasions to upload a victim's DNA, that there is a failure to protect the victim's samples being introduced into evidence when perhaps they

should not be and that they may be introduced because the legislative protections are not in place.

Sections 76 and 76A provide a dual regime for undertaking forensic procedures on victims of crime. Section 76A excludes certain classes of victim from the requirements of the Act. This exclusion provides a significant administrative benefit to police and allows some flexibility in dealing with victims during the daunting moments in the aftermath of a crime.

Dr Gans' criticisms fail to take into account the requirements of the Victim's Protocol, of which a copy has been provided to the Committee. DJAG is unaware of any complaints by victims in relation to police behaviour under the Protocol, or subsequent use of anything acquired through the conduct of a procedure under the Protocol. Further information in this regard might be available from police.

The committee has been made aware of the current policies and procedures in place dealing with victims DNA.

15. Are you aware of any other Australian jurisdictions examining the issue of how best to deal with victims' DNA?

The issue of victims DNA has been discussed at the National Criminal Investigation DNA Database Consultative Forum run by CrimTrac with a view to developing a business rule covering the exchange over the National Database of DNA known or reasonably suspected of coming from victims.

DJAG is not aware of any other jurisdictions examining the issue.

16. Are there any international jurisdictions the Committee could look at when examining this issue?

Section 8.1 of the Canadian *DNA Identification Act S.C., 1998 c 37* provides that the access to information in the crime scene index shall be permanently removed if the information related to a DNA profile derived from a bodily substance of a victim of an offence that was the object of the relevant investigation.

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.

DJAG is not aware of any other legislation which directly deals with the issue.