

## INQUIRY INTO THE USE OF VICTIMS' DNA

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**NSW Health Submission**

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To the  
**LEGISLATIVE COUNCIL STANDING COMMITTEE ON LAW AND  
JUSTICE**

**INQUIRY INTO THE USE OF VICTIMS' DNA**

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## INTRODUCTION

With the enactment of the *Crimes (Forensic Procedures) Act 2000* (the Act), the Division of Analytical Laboratories (DAL) was designated as the agency to provide the NSW Justice System with comprehensive DNA services. DAL is located in Lidcombe and is administered by the Sydney West Area Health Service (SWAHS). Under section 3 (1) of the Act and Clause 6 of the Crimes (Forensic Procedures) Regulation 2008, the Chief Executive of the Sydney West Area Health Service (SWAHS), is declared to be the person "responsible for the care, control and management of the NSW DNA database system. "

The services provided by DAL include:

- Forensic Biology services involving the analysis of biological materials from crime scene items, victims and suspects. Crime types are classified by DAL as Sexual Assault, Major Crime and High Volume. DAL processes both simple and complex items.
- 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 Criminal Investigations DNA Database (NCIDD).

Protecting the community by preventing and solving crime is a challenging role for which Police need to be equipped with sophisticated technology and crime management support. The Act's mandate is for the use of forensic procedures, particularly the obtaining of DNA samples, as an investigative tool in Police work. It is a significant legislative enhancement for forensic criminal investigation. As a result, the NSW Forensic DNA database was created.

With the introduction of the database, the NSW Police Force has solved crimes that would otherwise remain unsolved through linking traces of DNA left at crime scenes to DNA profiles of convicted offenders and suspects kept on the database. To-date, this database has provided NSW Police Force with links (where there were otherwise no suspects) in over 11,000 crime scenes and has also eliminated well over 1,000 suspects from further investigation. DNA analysis has been critical in solving murders and serious sexual assaults and DAL's Forensic Biology, Forensic DNA and Physical Evidence laboratories provide vital evidence to the NSW Police Force and courts in thousands of criminal cases every year.

## NSW OMBUDSMAN REPORT

In January 2007, the NSW Ombudsman released a report "DNA sampling and other forensic procedures conducted on suspects and volunteers under the *Crimes (Forensic Procedures) Act 2000*". The report made a number of recommendations that were of significance to the way DAL manages the use of victims' DNA. These were:

No	Recommendation
63	<i>DAL continues to use volunteer samples only within the case for which the sample was provided, unless it has confirmed with the relevant police officer that the volunteer did actually intend that his or her profile be placed on the "unlimited purposes" index.</i>
64	<i>DAL deletes all profiles provided by volunteers for 'within case matching' from the database, once the relevant court proceedings have been finalised.</i>
94	<i>When DAL receives a destruction request, it deletes the DNA profile from the database, as well as destroying the forensic material and identifying information.</i>
96	<i>DAL delete all profiles provided by volunteers for 'within case matching' from the database, once the relevant court proceedings have been finalised.</i>

The NSW Government tabled its response to the Ombudsman report in May 2009. The response to the recommendations was:

No	Response
63	<i>The Government supports this recommendation. DAL advises this is still the case.</i>
64	<i>The Government supports this recommendation. The NSW Police Force advises that profiles are presently deleted upon request. The Police DNA Person Sample Integration Project is expected to provide the capability to link the finalisation of court proceedings and the destructions of links between profiles and identity data through changes in information technology.</i>
94	<i>The Government accepts the recommendation. Currently, on receipt of a destruction request, DAL destroys the forensic material and identifying information relating to the DNA profile. NSW Health will amend its procedures, so that existing de-identified DNA profiles are deleted from the database and new profiles are deleted on receipt of a destruction request from the NSW Police Force.</i>
96	<i>The Government accepts the recommendation. Once the Justice Link electronic notification, as mentioned in the response to recommendation 93 is in place, it will become simpler for police to inform DAL when destruction of forensic material and identifying information is necessary.</i>

### **TERMS OF REFERENCE OF THE INQUIRY**

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.

### **NSW HEALTH SUBMISSION TO THE STANDING COMMITTEE**

NSW Health' submission to the Standing Committee on Law and Justice will address Terms of Reference (a) and (b), as well as making a submission on the NSW DNA Database in accordance with reference (c).

## **THE ADEQUACY OF CURRENT POLICIES, PROCEDURES AND PRACTICES TO PROTECT DNA MATERIAL BELONGING TO VICTIMS.**

The Standing Committee should note that there are currently two DNA databases used by DAL, (1) NSW DNA database (managed by DAL) and (2) National Criminal Investigation DNA Database (managed by CrimTrac), to store and match DNA profiles.

The following policies and procedures have been implemented by DAL to protect DNA material belonging to complainants / victims / limited volunteers applicable to both uploading and non-uploading of person reference samples to the DNA database(s).

- Complainant / victim / 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.
- Complainant / victim / 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 complainant sample submitted for the same matter.
- If an uploaded crime scene sample is subsequently determined to match a complainant / victim / limited volunteer, the profile is removed from searching on the database - for example a reference sample from a complainant / victim / limited volunteer may be submitted some time after the crime scene sample is uploaded OR an intra-jurisdictional match identifies the uploaded profile as matching the complainant or a family member.
- There are procedures in place for destruction of complainant / victim / limited volunteer profiles upon request.
- A crime scene profile is not uploaded if it knowingly matches a complainant / victim / limited volunteer sample or it is reasonably assumed that the crime scene sample originates from the complainant / victim / limited volunteer. For example, a female profile found on a vaginal swab can be reasonably 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.

- DAL has been informed that as Section 90 of the *Crimes (Forensic Procedures) Act 2000* includes reference to known deceased persons in the definition of the volunteers (in limited purposes) index, DNA profiles from known deceased can be searched as an unlimited volunteer.

**WHETHER THE RESTRICTIONS ON THE USE OF SUCH DNA MATERIAL WOULD BE APPROPRIATE OR DESIRABLE, FOR EXAMPLE THROUGH LEGISLATION.**

The *Crimes (Forensic Procedures Act) 2000* does currently not prevent the uploading of crime scene samples from the victim to the database.

One issue to consider in relation to the question of whether restrictions should be imposed in this regard, is that there are situations where it is unknown if the sample originates from a complainant / victim / limited volunteer or from an offender. For example, stolen motor vehicles may have the DNA of the normal driver of the car or it may have the DNA of the offender. The laboratory will upload a recovered profile in such situations because it cannot know, nor reasonably assume, that the profile originated from the normal driver if an elimination sample has not been provided.

**INDEPENDENCE OF THE NSW DNA DATABASE**

The role of the "responsible person" is important in ensuring public confidence in the integrity of the database and its uses. For example, under the Act the "responsible persons" functions include:

- Authorising access to the DNA database system in accordance with section 92 of the Act.
- Ensuring identifying information is appropriately removed from the system in circumstances set out in section 94 of the Act.

With the Chief Executive of SWAHS as the 'responsible person' of the NSW DNA Database, it ensures that there is a body independent of the law enforcement function overseeing the activities of the database. If this independent oversight is maintained, together with existing policies and procedures and the reforms being progressed as a result of the Ombudsman's Report, then it is considered that there are sufficient measures in place for the appropriate management of victims DNA.

If proposals by New South Police Force to close the NSW DNA Database and have all DNA profile matching done by the National Criminal Investigation DNA Database proceed, consideration would need to be given to putting in place legislative measures to ensure public confidence remains in regard to the handling and matching of complainant / victim / limited



volunteer DNA material and the independence of this process. Measures could include clear restrictions to limit Police access to DNA profiles (therefore restricting access to DNA profiles matches) independent oversight or review of management of the database and provision for strict guidelines under the regulations. If there is a loss of confidence by the public in the independence of the DNA Database then there may be a negative impact on the reporting of crimes by victims due to concerns over the use of their DNA.