

INQUIRY INTO THE USE OF VICTIMS' DNA

Name: Name Suppressed

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Partially Confidential

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The Director
Standing Committee on Law and Justice
Parliament House
Macquarie Street
SYDNEY N.S.W. 2000

Dear Sir,

Inquiry into the Use of Victims' DNA

I am lodging this submission as a private citizen

In part, the Committee's Terms of Reference require it to inquire into 'the adequacy of current policies, procedures and practices to protect DNA material belonging to victims'. The first question I would ask is: What is a victim? The term is not defined in the Crimes (Forensic Procedures) Act. Some people regard 'excluded volunteers' as victims and, to a certain extent, this is true.

An 'excluded volunteer' is defined, in part, as 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 of which the person is a victim. Why does the Act not cover all victims rather than only those falling within Part 3 and Subdivision 2 of Division 1 of Part 4? Will your Inquiry encompass all victims or only those persons referred to in the legislation as 'excluded volunteers'?

The testing regime in relation to 'excluded volunteers' is contained in the Victims Protocol developed jointly by the N.S.W. Police Force and the Attorney General's Department.

In my opinion, the Inquiry should be extended to encompass volunteers (Part 8 of the legislation). The male consensual sex partner of a sexual assault victim will, under normal circumstances, be asked to provide his DNA either to exclude him as the donor of the crime scene evidence or to identify his component of any crime scene mixture that is present. Why should he not receive the same protection as a victim who provides a sample for elimination purposes? Anyone who volunteers (either under Part 8 or the Victims Protocol) to provide a sample to police for elimination purposes should not have their profiles up-loaded to the crime scene index or, if it has already been up-loaded, should be entitled to have it removed.

The Act outlines the destruction requirements for suspect, serious indictable offender, untested former offender, untested registrable person and volunteer samples. The Victims Protocol does the same for 'excluded volunteers'. There are no destruction requirements, however, in relation to crime scene profiles. These profiles can be kept indefinitely. Therefore, even though a victim or volunteer may decide that he/she will provide a DNA sample to police that can be used for elimination purposes only i.e. for eliminating the victim's or volunteer's profile from the profiles obtained from the crime scene samples, there is no restriction on what police can do with the victim's or volunteer's crime scene profile or how long it can be kept.

It is unconscionable for a person to lose all his/her rights simply by becoming a victim of an offence.

Encouraging a victim or volunteer to provide an elimination sample - and allowing him/her to specify how police may use that sample - but then up-loading (without the knowledge of the victim or volunteer) the victim or volunteer component of the crime scene sample to the crime scene index, is misleading and deceptive. It is not suggested that this is occurring in N.S.W.

One should not lose sight of the fact that a victim or volunteer provides an elimination sample to assist police with their investigation. In many cases, biologists can determine, even without an elimination sample, which profile from a crime scene originated from the victim. In these situations, there is no legitimate reason for the victim's or volunteer's profile to be up-loaded to the crime scene index. In those situations where it cannot be readily determined which crime scene profiles, if any, originated from the victim or volunteer, an elimination sample should be obtained by police. In this regard, it is unethical for police to delay the obtaining of an elimination sample from the victim or volunteer for the sole purpose of being able to upload the 'unknown' crime scene profile to the crime scene index.

In my opinion, under no circumstances should police knowingly up-load a victim's or volunteer's sample to the crime scene index. If the victim or volunteer is also a suspect in another matter, then the victim or volunteer should be required to provide a suspect sample under Part 6 of the legislation. In such circumstances, a suspect would be afforded all the protections provided by the legislation in relation to such persons including the right to have his/her profile removed from the database if he/she is found not guilty of the offence for which it was taken.

Up-loading to the crime scene index of a profile that police know, or reasonable suspect, has originated from a victim is the population of the database by stealth.

Where a victim or volunteer declines to provide a sample for elimination purposes – and the origin of crime scene profiles cannot be ascertained without this sample – the victim or volunteer should be advised by police that he/she runs the risk of having his/her profile up-loaded and matched with unsolved crime scene profiles in N.S.W. or in some other State or Territory of Australia.

There are some situations where a profile other than the offenders may be inadvertently up-loaded to the crime scene index. It is, for example, not possible for police to obtain elimination samples from everyone who may live or have legitimately visited a property that has now been broken into or from attendees at a party where the identity of many of the 'guests' may have been unknown. If a profile originating from other than the offender is inadvertently up-loaded to the crime scene index in such

circumstances and matched to another unsolved crime, this information should not be disseminated to police (either in N.S.W. or in some other Australian jurisdiction). This policy is easy to enforce when the other crime is a break and enter or something of a like nature but becomes more problematic when the match is to a more serious offence such as a murder or an aggravated sexual assault.

I also have concerns about relying on policies and procedures to enforce standards of acceptable behaviour within the NSWPF. I am of the view that the policies and procedures that restrict the impingement of a person's rights should be reflected in legislation so that they cannot be changed without the appropriate scrutiny.

I also believe that whilst N.S.W. cannot control the legislation enacted by the other Australian States and Territories, or their individual policies and procedures, N.S.W. should continue to decline to seek re-identification of person profiles up-loaded to NCIDD by those other States and Territories where such profiles have originated from victims or limited purposes volunteers. In my view, this restriction should be reflected in the N.S.W. legislation with appropriate penalties for persons who seek to circumvent the legislation either through official or unofficial channels.

Regards
