Supplementary Submission No 9a

INQUIRY INTO THE USE OF VICTIMS' DNA

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Date received: 4/11/2009

Further submission – the use of victims' DNA

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INTRODUCTION: REGULATING DNA

The problem to be addressed in this inquiry flows directly from fundamental flaws in NSW's regulatory model for DNA in criminal justice. These problems were addressed in both the Committee's own statutory inquiry in 2001 and a follow-up article I wrote in 2002, which noted that NSW had inherited the poor regulatory framework of the Model Criminal Code Officers' Committee Model Forensic Procedures Bill, such as regulation by definition and regulation by criminal offence. These devices mean that:

- the legislation lacks accessible rules directed to particular officials in the process (such as police, database administrators and so on)
- there are regulatory loopholes (such as cavity procedures, discussed below)
- there are overlaps or inconsistencies throughout the statute, leading to legal and policy confusion.

In my previous submission, I described the NSW legislation as 'laughably bad'. Pertinent features of the legislation that merit this description include:

- The initial treatment of victims, who were treated as 'volunteers' and subjected via s76(4) to procedures drafted with suspects in mind (because MCCOC lazily insisted on shoehorning new categories of procedures into an earlier 'model' bill on suspects, rather than redrafting from scratch), including being cautioned (s46), authority to use force (s47), recording of procedures and a caution on objection (s57) and provision of samples to the subject of the procedure (s58). Only the suspension of a part of the Act (thus stopping all mass screening procedures for two years) and the enactment of new provisions on excluded volunteers prevented these procedures from being applied to victims.
- The present requirement in s60 for parts of samples taken from suspects, offenders and volunteers (but not victims) to be provided to the person who gave them for analysis. This is sensible for transient samples, but is idiotic for DNA (which is the Act's raison d'etre.) For example, at present, police who pull hairs from a suspect's head for DNA analysis are required to give some of those hairs straight back to the suspect!

There are many other examples. Being 'laughably bad' is more than just an embarrassment: it reduces stakeholders' faith in the legislation. So, it should be no surprise that NSW Police vehemently oppose new legislation protecting victims; that being said, despite the understandable nature of this opposition, it should not be blindly heeded.

Indeed, I have no doubt that the only long-term solution to the problem of victim DNA is a root and branch reform of NSW's DNA legislation. I am heartened to learn that a simplification of the legislation is on the cards and can only hope that it will ditch all vestiges of the *Model Forensic Procedures Law*. Nevertheless, the remainder of my submission will assume that only tinkering with the current legislation is on the cards.

REGULATING PROCEDURES

While the Inquiry's major concern is (and should be) the unregulated nature of the crime scene index, there are nevertheless some significant (and more easily solved) issues with procedures done directly on victims' bodies. So, I'll address them first.

"Excluded volunteers"

In 2002, the NSW Parliament amended the *Crimes (Forensic Procedures) Act 2000* to remove 'excluded volunteers' from the definition of 'volunteer' in s76(1) of the Act.

The definition of 'volunteer' has always been a flaw in the Act (and in the Model Forensics Procedures Bill.) For starters, it includes some non-volunteers – children and incapable persons – who can be made to give DNA under the Act (with either the agreement of a guardian or the order of a magistrate.) More importantly, the term wasn't otherwise defined in the Model Forensic Procedures Bill and, therefore, potentially covered offenders, suspects and anyone else who consents to give their DNA, effectively blurring all the distinctions that the Act is founded upon. The NSW statute passed in 2000 removed suspects (but curiously not offenders) from the definition. However, Part 8 on volunteers was excluded from the commencement of the Act on 1/1/1, presumably because someone noticed that (a) via s76(4), victims would be subject to inappropriate rules in Part 6, mentioned above; and (b) victims seemed to be both volunteers and a crime scene.

The NSW Parliament's solution was to excise victims of personal offences (variously defined) and (for print procedures only) property offences from the definition of volunteer.

The immediate problem is with s76A, which defines who is exempted. The problems are:

- Clumsy terminology: 'excluded volunteers'. No lay person will be able to understand this.
- The definition in s76A(c)&(d) only covers the prints of property offence 'victims' who undergo an elimination procedure. Why on earth wouldn't this also extend to people who give DNA as an elimination procedure? (It may be that the law was drafted prior to the onset of the use of DNA to investigate break-and-enters.)
- Sub-sections 76A(b)&(d) extend the definition of 'excluded volunteers' to children or incapable persons who are 'volunteered' by a parent or guardian, but do not extend the definition to situations where an order is instead made by a magistrate (under sub-ss 76A(2A) & (2B).) The reasons for this omission, and its effects, are unclear.

But the much bigger problem is with the whole idea of excluding anyone from the Act. The problem with s76 is that it excludes 'excluded volunteers' not only from some silly rules, but most regulation by the Act, including protective provisions. There are two particular problems with this:

First, victims lose some of the good protections of Part 6. In my view, it's perverse for victims to have less protection than offenders, suspects and non-victim volunteers when it comes to forensic procedures. (I'll address the counter-argument about the victims' protocol below.)

Second, victims also lose some of the protections in the later Parts of the Act that are conditioned on procedures being done 'under the Act', e.g s83 (on destruction), s91 (on

unlawful supply for analysis) or s94 (on removal), or on 'volunteers', e.g. s93(1)(c) (on limited use.)

In this regard, NSW compares poorly with SA and WA, which specifically include victims in their statutes and therefore ensure that they fall within the protective provisions of the Act (while, presumably because they knew what they were doing, avoiding applying inappropriate provisions to victims.)

Body cavities and young children

A related problem, which was there from the start in the C(FP)A and has never been fixed, is the exclusion of:

- 'any intrusion in a person's body cavities except the mouth' from the definition of 'forensic procedure' (s3)
- 'a person under 10 years of age' from the Act's authorisation to carry out forensic procedures (s111)

The purpose of these exclusions is presumably to make sure that no-one can be forced into a cavity search under the Act and that young children can't be made to undergo procedures under the Act. But their effect (while murky) is basically the same as the effect of the exclusion of 'excluded volunteers': they lose the protections of Part 6 and some of the protections of Part 8. This is significant to the present inquiry, because these exclusions obviously implicate crime victims, notably rape victims.

Again, in this regard, NSW compares poorly with Northern Territory, Queensland, South Australia and Western Australia, all of which lack either exclusion and therefore fully regulate all forensic procedures, rather than the NSW Swiss cheese approach; see also Tasmania, which lacks the cavity exclusion. Of course, some of these jurisdictions therefore also allow forced procedures in these categories. But that could be avoided by a provision simply barring forced procedures in those categories.

The Victims Protocol

The supposed answer to at least some of the above regulatory gaps is the victims protocol, which nearly every submission blandly asserted is 'adequate' protection. A close examination raises a number of specific doubts about this claim (see below), but I question in any case whether any mere protocol can be regarded as adequate protection. First, a protocol can be changed by the executive whenever it wants to; it doesn't even get parliamentary scrutiny as a regulation! Second, 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'. (This problem could, perhaps, be solved by a statutory provision to the effect that evidence gathered in contravention of the Victims' Protocol is deemed to have been gathered improperly for this purpose.)

Moreover, the current Protocol has the following apparent flaws:

Apparent exclusions

The Protocol doesn't seem to apply at all to:

- People who provide elimination samples for theft offences (see Clause 1, second para (a). These people get no protections under either the statute or the protocol.
- Body cavity procedures (see Clause 1, footnote 1; the definition of 'forensic procedure' in Annexure A; para (a) of the definition of 'intimate forensic

procedure' in Annexure A.) So, internal exams of rape victims aren't covered by the protocol, but external procedures are covered. Good grief. (Clause 14, first dot point, seems to completely contradict clause 1 & Annexure A.)

- Children under 10 (it seems. These would seem to not be covered by paras (a) or (b) or clause 1, as s111 excludes young children from the Act's authorisation of procedures. But nevertheless, clause 6 first dot point seems to assume children under 10 are covered. At the very least, the definition in clause 1 should be clarified.)

The situation is, at the very least, unclear and raises the possibility of gaps in the regulatory regime that are covered by neither the Act nor the protocol. Such gaps are almost inevitable when protection is divided between two quite different documents.

Destruction

The protocol itself says nothing about destruction of victim DNA profiles. But Annexure C reveals the following approach:

> 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 circumstances e.g. if there is a risk that a case could be re-opened, a request may not be granted immediately.

This is a MUCH lesser protection than is afforded to non-victim volunteers by Part 8, which states:

> 79(2) 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 made under section 81, to be destroyed as soon as practicable after the consent is withdrawn.

Differences between the victims and volunteers include:

- Victim requests must be in writing, whereas volunteer requests need only be 'express' (and volunteers cannot be required to make their request in writing: s79(3))
- 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) for volunteers

I cannot fathom any explanation for these differences, other than a determination by the executive that victims of personal offences should be afforded less protection for their rights than other innocent participants in DNA sampling.

Excluded volunteers (unlimited purposes) index

I'm shocked to learn (via the police submission, but not the Protocol), that there is provision for an 'excluded volunteers (unlimited purpose) index' of the database, whereby a victim's DNA can be placed on the matching database with the victim's consent.

The theory, I guess, is that a victim may be perfectly happy to have the police run a check to see whether or not the victim has committed any offences his/herself. But this is simply obscene. No person in the vulnerable position of a victim should be permitted to make such a choice, nor should the police even dream of taking advantage of it. I cannot disagree more with Submission No 7 on this point.

I hope that this approach (which is mirrored in Part 8 on volunteers) is not used much in practice. But even the potential for its use should be stopped or highly regulated by the Protocol (which, instead, is completely silent on this point.) For instance, what if the victim and a cop get into a discussion about DNA (prompted by Annexure C, say), and the cop mentions that the victim can go on the whole database if she wants, unless she has 'something to hide…'. Even an off-hand remark like that can cause serious problems for victim cooperation with the police. In the hands of an unethical police officer, this option would be a complete menace!

Informed consent

Informed consent is provided for in clause 5. Just like the Act, it basically consists of a transmission of information from police officer to the subject of the procedure. My broader research has generally questioned the whole approach to informed consent taken in this area: see 'Much Repented: Consent to DNA sampling' (2007, UNSWLJ). It's notable that there's nothing in the protocol about ensuring that a victim's consent is genuine. I have no doubt that forensic nurses do their best, but to claim that a Protocol like this is adequate is to basically rest on your laurels.

Anyway, onto the content of clause 5. First, I'd note that clause 5 gives less protection to victims than volunteers:

- The list of information in clause 5 is narrower than the information given to volunteers in s79(1), omitting 'the purpose for which the forensic procedure is required', 'the offence in relation to which the police officer wants the forensic procedure to be carried out', 'that the forensic procedure may produce evidence that might be used in a court of law', 'that the forensic procedure may be carried out by an appropriately qualified person' and the effect of s84 (inadmissibility of refusal of consent).
- Victims have an entitlement to a 'support person of their choice present at the time they are asked to consent' (clause 9); but that is subject to availability. By contrast, for volunteers, the presence of an 'independent person (not being a police officer)' is mandatory (s79(1))

Perhaps these differences reflect a considered judgment of the differences between victims and volunteers. But I wonder about that. After all, victims are still to be told that they have a 'right to consult a legal practitioner'!

Second, Annexures B and C are quite confusing, especially when juxtaposed with clause 5:

- It seems that Annexure B applies to all victim procedures, but that Annexure C also applies to 'the purpose of obtaining a DNA profile.' So, why does Annexure B have a box labelled 'DNA sample'? And why is the information in that box much shorter than the information in Annexure C (e.g. omitting the destruction info, etc.) The two Annexures seem to be inconsistent with eachother.
- Annexure C is to be used 'If a sample is to be taken from the victim for the purpose of obtaining a DNA profile': This is ambiguous. Is it referring only to

the victim's profile (e.g. taken by a buccal swab) or is it referring to potential crime scene samples (e.g. vaginal swabs) that might be profiled for DNA. It's surely important that victims understand the difference and that it be clear when Annexure C applies.

- Clause 5 says that victims must be told that: 'If they consent, their right to withdraw *at any time*'. This wording also appears in the top half of Annexure C. This implies that consent can be withdrawn after the sample is taken (i.e. that the victim can withdraw the sample from the investigation), but that is contradicted by the lower half of Annexure C, as discussed above, which provides for a more limited destruction regime.
- Annexure C's DNA box is marked: 'Cross out if not applicable'. When might one of the points by not applicable? Who decides this?
- Annexures B and C state: 'Your DNA profile will only be used for the purpose of investigating the offence committed against you.' Annexure C adds that 'evidence in relation to the profile may be used in Court in proceedings against the alleged offender in connection with the offence'. This implies that the DNA profile can't be used against the victim, whereas it can (e.g. if the victim is prosecuted for falsely reporting a rape and his/her profile is used to prove, e.g., that the victim tore their own clothing.), unless an appropriate limiting rule is passed (see next Part.)

Finally, the protocol does not point out that none of these protections are laws, but are instead just the current arrangements agreed upon within the executive. Many victims will surely assume otherwise (and with good reason.)

Conclusion

No doubt the response to these concerns will be that the Protocol 'works well in practice', i.e. no-one's complained *so far*. My view is that the above flaws speak for themselves and I'm shocked that the Protocol survived a recent administrative review unchanged.

Recommendation

The appropriate solution, of course, is to repeal the C(FP)A and start again with a statute where the problem of victim procedures if considered throughout. Examples are WA's statute (with the category of 'involved persons') and SA's (which has the category of 'volunteers and victims'.)

But, I suppose a bandaid solution (partially reversing the flaws of the exclusion of excluded volunteers) is more likely for now. Something like this:

76AA Protections for excluded volunteers

(1) In this section,

a forensic procedure performed on an excluded volunteer includes a forensic procedure:

(a) involving an intrusion into the body cavities; or

(b) performed on a person who is under 10 years old

Victims' Protocol, means a protocol for the carrying out of forensic procedures on excluded volunteers agreed between the Attorney-General and the Minister for Police

(2) For the purposes of s138(1)(a) of the *Evidence Act 1995*, evidence obtained from a forensic procedure performed on an excluded volunteer is taken to have been obtained improperly if the procedure was performed in contravention of the Victims' Protocol as it existed at the time of the procedure

(3) An excluded volunteer must not be asked to consent to their DNA profile being placed on an unlimited purpose index of the DNA database.

(4) Section 79(2) applies to a forensic procedure performed on an excluded volunteer.

(5) Parts 9 to 13 apply to a forensic procedure performed on an excluded volunteer as if the forensic procedure was carried out on a volunteer under this Act.

(6) This section extends to forensic procedures performed before the commencement of this section.

(7) Nothing in this section authorises the performance of a forensic procedure on an excluded volunteer without the consent of the excluded volunteer or if the excluded volunteer objects to or resists the carrying out of the procedure.

Obviously, the confusions in the Victims' Protocol need to be ironed out too!

REGULATING INFORMATION

The major issue in DNA law, and the very issue that is before the inquiry, is how to regulate information. As I'll argue below, the problem isn't just (and shouldn't be) limited to victims' DNA, but rather should extend to all information from people who are innocently caught up in an investigation.

Innocent DNA

The premise of Australian DNA databases is that people who commit certain crimes or are reasonably suspected of committing certain crimes lose the privacy of their DNA. They can be placed on a full matching database, allowing any links to unsolved crimes (at least where a perpetrator profile was obtained) to be almost immediately detected. Some people don't like this. Some people think that the DNA of unproven (much less cleared) suspects should not be used in this way. Others think that everyone's DNA should be on the database. But we'll ignore both these views (compelling as they may be.)

The problem is that other people's DNA can also be used in this way and will often be gathered by the police. In Australia, such DNA might be gathered by a volunteer procedure (or, in NSW, by a procedure on an excluded volunteer), or it might be gathered without a procedure. Apart from the requirement of informed consent for volunteers, the gathering of DNA in this way is unregulated in NSW. Moreover, all such information can potentially be put on the crime scene index, which is defined as follows:

> ...an index of DNA profiles derived from forensic material found:
>
> (a) at any place (whether within or outside Australia) where an offence (whether a serious indictable offence or a prescribed offence or an offence under the law of a participating jurisdiction) was, or is reasonably supposed of having been, committed; or
>
> (b) on or within the body of the victim of such an offence; or
>
> (c) on anything worn or carried by the victim at the time where such an offence was committed, or
>
> (d) on or within the body of any person, on any thing, or at any place, associated with the commission of such an offence.

This definition was taken from Canada, but in contrast to Canada, there are no distinctions made about **whose** DNA profile is being put on the database. It might be the perpetrator's, the victims', or someone else. The legislation doesn't say and there are no rules excluding anyone's DNA from this index.

The result is that a person may be subjected to a full matching with unsolved crimes via a crime scene to crime scene match on the database. Section 93 permits such matches without limits. So, in addition to stocking the database with DNA taken from offenders and suspects, the database can also be stocked with DNA that is somehow connected with a crime, including DNA from victims, witnesses and anyone who happens to have shed some forensic material at a crime scene, or on a victim, or on clothing, or on anything or anyone much else who is connected with an apparent crime.

There are at least two cases where such people have been connected to unsolved crimes in this way. In New Zealand, blood from an assault victim in Christchurch was matched to two murders in Wellington. In Victoria, vaginal fluid from the outside of a condom used in a rape was matched to the clothing of a murdered toddler. In both cases, the victims' profiles must have been placed on the crime scene index, presumably under para (b) of the above definition.

As it happens, both these victims were innocent of the crimes they were connected to. The connection was a dud, the result of in-lab contamination. This means that the following two scenarios could have arisen:

- First, if the victims' DNA hadn't been placed on the crime scene index (as in Canada), then the victims themselves would have never been bothered by the police BUT the police would not have realised that the contamination had occurred. Presumably, they would have kept searching for the source of the mystery DNA.
- Second, the scenario that actually happened: the victims' DNA was placed on the crime scene index, they were identified and questioned, and presumably greatly distressed. But the police eventually realised that the DNA was a dud lead and (hopefully) learnt some important lessons about contamination.

As this shows, there is quite a dilemma here. What is worse? The police missing out on some vital information? Or victims having a terrible time?

The probably more likely but also hard scenario that (to my knowledge) hasn't arisen is the possibility that the connection between a victims' DNA and a crime scene isn't bogus, but is rather a compelling lead, implicating either the victim or someone else in an unsolved crime. Which is worse? The police never getting that lead? Or a person being exposed as a criminal because of the serendipity that someone was caught up in a separate crime?

In part, these are questions of principle: should the DNA database be stocked, in part, on DNA that is gathered only because someone is non-suspiciously caught up in a crime scene? Indeed, from someone who may have been innocent of the particular crime under investigation? In short, should we reap an intelligence reward from someone's victimisation? Actually, the police reap such rewards all the time, e.g. by discovering that a victim is using drugs. But, arguably, DNA is different because of the enormous power of the intelligence it provides, extending far beyond the crime in question to any unsolved crime that has been or will ever be databased. One significant recent development in this regard is 'familial searching', whereby police can potentially match an

unknown profile to the close blood relatives of people whose DNA is on the database, including people who are innocently on the database.

But these questions are also ones of practice: while the police can force an offender or a suspect to provide DNA, their ability to gather DNA from volunteers, victims and crime scenes depends, to an extent, on the cooperation of members of the public. Not only does this include the consent of volunteers and victims to forensic procedures, but it also includes the willingness of people to report crimes to the police and to cooperate in aspects of the forensic examination of crime scenes, including not interfering with the scene or destroying evidence, and providing elimination samples so that sense can be made of complex scenes. If this cooperation doesn't occur, then the police will lose potentially vital information too.

Importantly, the above concerns aren't specific to 'victims'. There are other innocent people who could end up on a crime scene index: witnesses, residents or visitors to the scene who shed DNA, family members who step in when the source of DNA is unknown or unavailable, and so on. NSW legislation already has rules designed to prevent two categories of innocents from being 'serendipitously' linked to crimes:

- People who undergo procedures to help find missing persons (i.e. blood relatives of those persons), who cannot have the evidence or anything that flows from it used against them in any proceedings: s83A
- People who provide prints (but not DNA) to solve property crimes (e.g. residents of houses that are burgled or owners of cars that are stolen), whose prints are automatically destroyed after crime scene prints are eliminated: s87A

It is not clear why quite different rules are used for these two categories; why the first category is limited to missing persons (and not, e.g., identifying dead persons or disaster victims or sundry other familial purpose); and why the second category is limited to prints and not DNA. But the bigger question is why they don't cover all people who sampled as non-suspects, including victims.

The practical concerns also extends beyond victims. (Submission 4 is spot on here.) Consider the scenario described in NSW Police's submission:

> Example
>
> - A female is sexually assaulted and is formally identified as a victim;
> - An intimate forensic procedure is carried out on the woman in order to obtain crime scene evidence for the purpose of criminal investigation ("crime scene sample")
> - In addition, the female sexual assault victim also separately provides her DNA via a buccal swab ("reference sample") in order to enable the isolation of her DNA from one or more other DNA profiles potentially obtained from the crime scene sample
> - Having isolated the identified victim's profile from other profiles derived from the crime scene sample, only the unidentified profiles are used for criminal investigation and uploading to DNA databases.

Even if diligently followed, this process may mean that a DNA profile from a consensual sexual partner is loaded onto the database, allowing the serendipitous exposure of unsolved crimes committed by that partner. The problem is that this scenario may, if it becomes known, stop future rape victims who happen to have partners who fear criminal exposure from going forward (either at their own behest or at the behest of their partner or a third party.) This may implicate groups who are particularly vulnerable to rape, such as the family of people involved in criminal groups, or sex workers (who may be told by pimps not to submit to rape forensics as it would be 'bad for business' if a client's DNA was put on the database.)

Ambiguous DNA

Now, as if the above problem isn't trouble enough, there is a further, major complication: often, there will be some significant ambiguity in DNA investigations, especially during the investigation but often even at the end of it. Here are the problems:

Ambiguous crime scene samples

Crime scene samples don't typically come with labels. A DNA sample may be gathered simply by swabbing an otherwise clean looking item. Who is the sample, or even what sort of bodily material it is, is anyone's guess.

That being said, educated guesses will sometimes be possible. Semen, for example, must have come from a man and, if found in someone's body, will presumably be from either a sexual partner of that person, or a rapist. The source of blood might be guessable depending on how many people are believed to have bled. If the crime scene sample is a private location, then it might be possible to come up with a narrow list of possible sources.

Armed with such a list, it will then typically be possible to work out if the DNA is from someone in that list, by: (a) Locating that person; and (b) Getting a sample from them that is known to be their DNA. Options to do the latter include asking for their consent or trying to gather a less formal sample (e.g. from a discarded tissue or the like), although the latter method might be ambiguous both in terms of legality and in terms of whose sample was gathered.

Clearly, the easiest approach is to get a sample from the person who might be the source of it. This will be problematic if the identity of a person isn't known (e.g. an unknown recent sexual partner), or if the person can't be located, or if the person doesn't consent to providing an elimination sample. A particular reason why someone may not consent to the latter is that the person fears being implicated in a crime. This problem could be partially managed by rules like ss83A & 87A, which completely bar the use of DNA against the person who provides it. But that raises the next problem.

Ambiguous people

People don't typically come with labels. A person who initially appears to be innocently involved in a crime may prove to be complicit in the crime. So, that's why it may be inappropriate to immunise apparently innocent people from having their DNA used against them in relation to the crime that is under investigation. (NSW Parliament, in enacting ss 83A, has opted to ignore this problem in relation to families of missing persons.)

Moreover, crimes don't typically come with labels. An apparent crime may prove to be a completely different crime (e.g. a rape complaint may prove to be a false complaint; an apparent murder-suicide may prove to be a double-murder by someone else; an apparent theft may turn out to be an insurance fraud.) So, that's why it may also be inappropriate to immunise apparently innocent people from having their DNA used against them in relation to crimes that turn out to be connected to the apparent crime that is under investigation. (NSW Parliament, in enacting s87A, has opted to ignore this problem in relation to people who provide elimination prints in property offences.)

What about the solution of only using samples for 'within crime' matching (which presumably includes connected or substitute crimes), but not exposing the samples to the matching database? Well, there we run into the NSW Police's other example about the pub brawl, where a party to the brawl turns out to be a serial armed robber. What differentiates this example from the generic problem of 'serendipitous' matching (e.g. of

a consensual partner of a rape victim with a killing) is that the revelation may cause the police to re-evaluate the initial crime scene, i.e. once the police learn that an apparent victim of a brawl is an organised criminal, that might lead them to realise that s/he wasn't a victim after all. To deny the police the benefit of this *non*-serendipitous discovery would be perverse.

Changing information

A further problem overlaying the above ones is that information is fluid during an investigation. What the police know about a crime scene sample or an involved person may change quite quickly as the investigation progresses.

The apparent solution may be for the police to wait until they can resolve the ambiguity before they seek to place a crime scene sample on a database. But this might be problematic if:

- The investigative need is urgent (e.g. the perpetrator may get away or commit further crimes)
- The information is needed to resolve the ambiguity
- The police or database administrators lack the administrative capacity or resources to manage uploading in this way.

Anyway, what does 'resolved' mean? Nothing is ever certain. Investigative conclusions don't come with labels.

Mixed samples

Finally, there's the small but practical problem of mixed samples, where two people's DNA is mixed. DNA doesn't come with labels, so it may be impossible to separate the DNA into two sources.

Actually, I don't think this is such a big problem, at least if the police know who one of the sources is (e.g. the rape victim if the sample if a vaginal swab.) If the victim has certain alleles, then what should be loaded into the crime scene index is the mixed sample minus those alleles. Yes, the offender may share some alleles with the victim, but the only matches of interest are to those alleles that aren't shared, right?

Possible solutions

Here's my brief commentary on some of the solutions that have been or may be put to the Committee.

AFP's policy (submission no. 2) and NSW Police's policy (submission no. 4)

The police say that they will not load profiles of known victims or profiles from crime scene samples reasonably suspected of coming from a victim. There are three problems with this proposal:

First, while Commonwealth (but not NSW) legislation limits the use of DNA from victims if it is taken via a voluntary procedure, there is no such protection if the DNA comes from a crime scene. That protection is just a voluntary self-imposed limit under the police's policy. It is doubtful that a breach of the procedure would trigger the general rules on inadmissibility of improperly obtained evidence.

Second, there is no definition of a 'victim'. Ultimately, who is and isn't a victim or a suspected victim is a matter for judgment by the police.

Third, it doesn't account for subsequent discovery that someone is a victim. There are no bars on transmission of matches in such cases, nor is there any mention of removal from the database in this circumstance. Again, this would seem to be a matter for the police's discretion. (It may be that the situation is tighter for NT profiles.)

Crimtrac's proposal (submission no. 3)

Crimtrac thinks that 'a crime scene DNA profile that has been identified as the victims' DNA profile thought direct comparison with a known reference sample… should not be loaded onto the Crime Scene Index of the NCIDD where possible.' In addition to the flaws noted for the police policies, this proposal has several serious flaws:

First, it is limited to identified profiles, and therefore provides no protection unless and until the police seek a reference sample from a victim and the victim gives it. Crimtrac proposes that references samples should be sought 'as early as practical', but that doesn't rule out placement before that point (at which moment, the victim will be fully exposed to matching with the national crime scene index.)

Second, the ban on uploading of identified profiles has the gloss 'where possible'. Hardly a compelling protection for victims! When wouldn't it be possible? If the software is clunky? Well, then maybe Crimtrac should fix the software!

Third, there is provision for subsequent removal, but this won't protect victims from matching before then. Moreover, the CNCF's present policy states only that a jurisdiction 'may take steps for the crime scene profile to be removed from NCIDD' in this circumstance. May!

Fourth, it deals with the issue of mixed samples by including all of them on the database. As I mentioned above, a more sensible proposal would be to exclude alleles that are shared with a known victim.

Frankly, I cannot believe that this is a serious proposal. Crimtrac's concern seems to be exclusively about maximising the number of matches on its database (and hence on its laudatory press releases) and in reducing its own regulatory burden. Its submission is really evidence that it is a body entirely ill-suited to managing the policy complexity of the issue of DNA. (See further the discussion of database administration issues, addressed at the end of this submission.)

Department of Justice's proposals (submission no. 8)

DoJ's main proposal is an extension of s83A to victims (whether from procedures on the victims or gathered from the crime scene, I assume.) There's a simplicity to this, but I think that it's too simple, in light of the ambiguities I discussed above. Who are victims? How will a court work that out at a hearing? How will the police be able to guess in advance what a court will work out, given the legal and factual uncertainty about the status of victims?

DoJ's second and third proposals are ameliorations of this, limiting the proposal to vulnerable victims and to non-serious offences. Given the above problems, there's an appeal to this and both options should be seriously considered. But, as the DoJ acknowledges, there are costs, both in terms of the certainty of the rule and in its efficacy in providing solace to nervous victims.

DoJ's final suggestion is simply relying on judicial discretion to sort out all the nuances. Again, there's a simplicity to this. But, as DoJ correctly pointed out, the ensuing ethical dilemma is enormous and there's no reason to think that a court, which will be concerned about its own legitimacy, will resolve it well or consistently or in a way that

resolves systemic concerns about victim cooperation with the police. While some court discretion may be an inevitable part of the proper solution, it needs to be combined with strong preventative measures designed to ensure that the dilemma only reaches the court in rare unavoidable cases.

I would note that none of DoJ's suggestions deal with the problem of non-victims, even though (as I pointed out earlier), those problems may rebound onto victims.

Canada's approach

Canada protects both victims and eliminated persons and has done so since 1998:

- *DNA Identification Act 1998*, s. 8.1:

> 8.1 Access to the information in the crime scene index shall be permanently removed, in accordance with any regulations that may be made under this Act, if the information relates to a DNA profile derived from a bodily substance of
>
> (*a*) a victim of a designated offence that was the object of the relevant investigation; or
>
> (*b*) a person who has been eliminated as a suspect in the relevant investigation.

- *DNA Identification Regulations 2000*, s. 3:

> 3. (1) If the Commissioner is notified that DNA information in the crime scene index of the DNA Data Bank relates to a person referred to in paragraph 8.1(*a*) or (*b*) of the Act, the Commissioner shall without delay destroy the information and sever all links that may exist to any personal identifiers in any other data bank.
>
> (2) For the purpose of subsection (1), "destroy" means
>
> (*a*) to shred, burn or otherwise physically destroy, in the case of information other than information in electronic form; and
>
> (*b*) to delete, write over or otherwise render permanently inaccessible, in the case of information in electronic form.

This approach seeks to ensure that the crime scene index only contains perpetrator samples, rather than the mishmash allowed in Australia. This is a good aim.

What is left unclear is how this aim is realised. How are victims or eliminated persons defined? How are they identified? What is done in doubtful cases? What is done with information matched prior to identification?

Also, this approach seems to stop any matching of victim or non-suspect profiles, even though such matching will often be important in complex crimes. I note that a Canadian parliamentary committee has proposed creating a new victim index, that is similar to Australia's missing and deceased person indices.

Northern Territory's approach

The much-maligned NT legislation has the commendable features of being very simple (with little regulation), but protecting victims with a simple and very tough rule:

> *Police Administration Act 1978*, s147B
>
> (2) However, if a non-intimate procedure is carried out in accordance with a person's consent under section 145B for investigating an offence, the information obtained from the procedure:
>
> (a) must not be used for investigating another offence other than a relevant offence; and
>
> (b) is inadmissible as evidence in any proceeding other than a proceeding for the offence or a relevant offence.
>
> (3) In this section:
>
> ***relevant offence*** means an offence that is a crime punishable by a term of imprisonment of 14 years or more.

This protects all volunteers (not just victims) from prosecutions for offences other than the one being investigated. But there are flaws:

- There is no protection for crime scene profiles from victims, etc.
- There is no (or reduced) protection for information obtained as a result of a match that shouldn't have occurred.
- What if the volunteer proves to be guilty of a different offence that is closely related to the offence being investigated?
- The definition of relevant offence may change every time the NT parliament changes the maximum sentence for an offence.

Interesting, though, that none of these troubles appear to have arisen to date.

South Australia's approach

South Australia's legislation mentions victims, but they are treated no differently to volunteers. Nevertheless, its legislation has the following interesting rule:

> *Criminal Law (Forensic Procedures) Act 2007*, s47(3)
>
> Evidence obtained by carrying out a volunteers and victims procedure on a person is inadmissible in any criminal proceedings against that person if, by the time the question of its admissibility arises, the forensic material obtained from the procedure should have been destroyed.

Combined with a provision similar to s79(2) of the C(FP)A, this effectively places the use of volunteer/victim DNA against the volunteer/victim in the hands of the volunteer/victim, who can request destruction even after the match has been made, so long as it occurs before the trial. This generous rule is then (appropriately) ameliorated by a regime like the one in Part 8 of the C(FP)A that allows the volunteer/victim's request to be overruled based on certain criteria. Unlike the DoJ's fourth proposal, the timing of the court's judgment will depend on when the request is received, so it might precede the making of a suspicious match. (I have no idea what has happened in practice.)

It is not clear, though, that the rule extends to evidence obtained as a result of a match. If it doesn't, then the protection is actually pretty limited.

Recommendations

I have two suggestions, which could work together or separately.

Use limitation for crime scene profiles

My main proposal is a use limitation, which seeks to turn the approach presently taken by NSW Police into legislative form. That is:

- Crime scene profiles are limited to 'within crime' matching
- Unless the profile isn't suspected to come from a victim
- Or it has been excluded as coming from the victim.
- With practical measures taken to get an exclusionary sample from a victim.

But I've modified this approach in two ways:

- It's extended to cover all non-suspects
- But it's narrowed with a flexible exception for 'justified' circumstances.

The rationale for these changes are set out in my earlier discussion. Broadly, it's to provide a principled protection against serendipitous matching, but with an out for the inevitable odd or highly ambiguous cases. See the final part of this submission for a discussion of how to fit this approach with database administration.

Amendments to s93(1), Crimes (Forensic Procedures) Act

1. Replace 'yes' in top-left box with 'only if within purpose'

2. Add a new sub-para:

(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

(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.

Unless an additional exclusionary rule is added, a breach of this rule will trigger the discretionary exclusion in s82. Note that the rule applies to whatever information is available at the time. So, if police later come to suspect or know that they have put an innocent person's profile on the database, then the tougher matching rules will kick in, but only from that point.

Exclusionary rule for elimination procedures

My other main proposal is a method to ensure that everyone is encouraged to provide samples for the purpose of elimination. As noted above, I think extending s83A to all victims goes too far, because of the possibility that a person proves not to be a victim in relation to either the offence under investigation or a closely related offence. Rather, the exclusion should be limited to unrelated offences, as follows:

83B 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:

(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; or

(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.

As can be seen, this rule protects volunteers, including victims, from being implicated in unrelated offences, but not in the offence under investigation or a related offence. It's a more complex, but more principled rule.

It is important that volunteers understand this rule, both so that they know what might follow but also to reassure them that they cannot be implicated in unrelated offences. So, s77 and the Victims' Protocol should be modified to require an explanation of the new section. (Obviously, the explanation should be put in plain language, i.e. 'If you consent to provide a sample for a limited purpose, then nothing that we learn can be used to prosecute you for an unrelated offence.)

Both my suggestions could be modified along the lines of DoJ proposals 2 or 3, though I think that's unnecessary and (as I outline above) potentially problematic.

CONCLUSION: REGULATING DATABASES

There's one remaining complexity, which I will now briefly address: the regulation of DNA databases. My short advice is that you should take Mr Goertz's advice to you on all matters of database regulation: i.e. don't worry overly about the national database; and don't leave database management in the hands of either the police or Crimtrac.

National database

Crimtrac's submission states:

> It is CrimTrac's view that a national policy or business principle could achieve national agreement on the treatment of this issue as far as it relates to the use of the NCIDD and would ensure that victims would be treated consistently by each jurisdiction…
>
> Further, 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.

This is an old furphy in the DNA field: that nationwide uniformity on all aspects of DNA regulations is essential or even desirable.

I'd point out:

- Cooperation between different criminal jurisdictions has always been possible despite different rules in each jurisdiction.
- A drive to uniformity in this area is likely to lead to a drive to minimal protection for victims.
- The foolish push for uniformity (by the Model Criminal Code Officers' Committee and Crimtrac) has produced nothing other than mediocre legislation that isn't uniform and that prevented sensible cooperation across Australia for around ten years.
- It is entirely desirable for a major jurisdiction like NSW to work out what rules best suit its circumstances. There is no reason to think that one solution will suit all of Australia. We have different crime & police profiles (compare the ACT and NT) and different regulatory restrictions (e.g. different rules of evidence, human rights laws, etc.)
- Even if it was a good idea, uniformity on this issue is very unlikely, given the issue's complexity.

My proposed solution of a use limitation on the crime scene index need not cause any problems for the national database. Basically, it can be operationalised by NSW Health introducing a 'crime scene (limited person) index' as a staging area for crime scene profiles that can be subject to within crime scene matching (according to my proposed s93(1)(d)(i).) Profiles can then be moved to the 'crime scene index' (effectively an 'unlimited purpose index') once either condition (ii) or (iii) is satisfied, and such profiles can be similarly uploaded to the national database. If, at a later date, conditions (ii) or (iii) are failed, then the profile should be removed and placed again on the limited purpose index.

I note that NSW presently bars the receipt of crime scene index information from jurisdictions where the information comes from victims. Personally, I'm not convinced that NSW should be trying to protect non-NSW victims in this way; that's really a problem for other jurisdictions to solve. I note that, if (say) a NT victim was matched to a NSW crime, then a NSW court would be strongly influenced by the applicable rules in NT (see *R v Sarjila*, ACT.)

The database administrator

I believe that the major lesson to be drawn from the puzzle that is victim's DNA is that administering a DNA database is a nuanced task. It requires attention, not merely to scientific issues, but to broader policy issues about the principles on which the database is based. In this regard, I am heartened by NSW Health's proactive stance on the problem of victims.

But, I am also alarmed by talk that the NSW database may be shut down and transferred to CrimTrac, and that NSW Health be denied detailed information about the samples it receives (supposedly in the name of victims' privacy.) This smacks of punishment directed at NSW Health for raising the problem of victims in the first place, and of an attempt by police and the technocrats at Crimtrac to seize control of the database and focus on the blind pursuit of more and more profiles.

Every law reform body that has looked at DNA databases has reached the same conclusion: that it is vital that the database be placed in the hands of a body that is independent of the police, lest the police's own desire for information lead them to destroy the very public trust that provides them with that information. In short, the police need to be protected from themselves. Crimtrac – an organisation that is even more single-minded in the shedding of regulations and the gathering of DNA profiles, regardless of their source, than the police – cannot do that job; its miserly proposal to supposedly protect victims (submission 5, as discussed above) attests to that.