

INQUIRY INTO THE USE OF VICTIMS' DNA

Organisation: NSW Police

Date received: 30/11/2009

Standing Committee on Law and Justice
Inquiry into the use of victims' DNA:
Proposed options for dealing with unidentified victims' DNA profiles
found in crime scene samples

NSW Police Force Response

Introduction

Following the various submissions made to the *Inquiring into the use of victims' DNA*, the Standing Committee at page 1 of the *Proposed options paper* identifies the critical issue for the Inquiry as being:

What use can be made of information resulting from an unidentified DNA profile found at a crime scene and placed on the DNA database, which is later identified to be that of a victim, and by virtue of having been placed on the database, may be matched to an unrelated crime where the victim may have been the offender.

Importantly, the NSW Police Force has no knowledge of these particular circumstances arising in NSW or NSW cases where investigative action was taken as a result of matching an unidentified victim sample to another crime. Further, the NSW Police is unaware of any disputes concerning improper use of victims' DNA.

To assist the Standing Committee, please find below a brief outline of the NSW Police Force procedures considered most relevant to the critical issue as identified by the Inquiry:

- Where an unidentified crime scene sample is loaded to the DNA database and the sample is subsequently identified as being from a bona fide victim, the profile is removed from the DNA database
- Unidentified crime scene samples uploaded to the NSW database may be matched to unrelated crime scenes. In these circumstances it may be that the unidentified sample is found to match the offender profile in an unrelated crime scene.
- If after this matching occurs and/or investigations commence it is discovered that the DNA sample was derived from a bona fide victim, the NSW Police Force maintain that the matching was conducted lawfully as the DNA sample was not a victim sample at the time of matching. (As indicated, this situation has not arisen in NSW)
- Cognisant that the match was conducted lawfully and investigations carried out in good faith, the NSW Police Force advocate that it may be appropriate to use the matched DNA sample to proceed to prosecution in the case of serious or major crime.

Proposed Option 1:

A legislative ban on the use of a victim's DNA profile against that victim

The NSW Police Force strongly opposes a legislative ban on the use of a victim's DNA profile against that victim.

The introduction of legislation to further restrict the use of DNA material belonging to victims:

- is unnecessary due to the effectiveness of the existing policy;
- is undesirable as such legislation would almost certainly obstruct policing efforts to inculcate offenders of crime;
- would further increase complexity of current legislation despite current Department of Justice & Attorney General-endorsed reform agenda aimed at simplifying;
- would increase red tape, contrary to current NSW Government red tape reduction initiatives;
- would add to the complexity for police concerning forensic procedures legislation
- would likely reduce the rate of DNA person sampling, despite current legislation reform efforts to increase sampling rate.

The NSWPF strongly objects to any proposed legislation that would automatically preclude evidence being used against a suspect (in order to inculcate concerning potential major crime), simply because that evidence was obtained via a crime scene sample from an event for which it could be argued the person was a victim.

The NSWPF notes Department of Justice & Attorney General's statements:

"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 ..."¹

"Thus a cold link involving a victim's profile might be the only basis that police have to investigate an offence. Denying or limiting that use may result in less offenders being prosecuted."²

"One consequence is that the victim may be identified as the suspect in another crime however investigators would not be able to pursue that link by further investigations based on that information or use the evidence of the link in court."³

Dr Jeremy Gans makes the following relevant points:

"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."⁴

"[In] the NSW Police's other example about the pub brawl, a party to the brawl turns out to be a serial armed robber. ... [This] 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."⁵

"A further problem ... 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."⁶

The NSWPF believes it is inappropriate to routinely immunise ostensibly innocent people from having their DNA used against them in relation to any crime (but particularly major crimes) in which they are guilty of committing an offence.

¹ Department of Justice & Attorney General, Responses to Questions on Notice, Question 6, p4

² Department of Justice & Attorney General, Submission 8, p6

³ Department of Justice & Attorney General, Submission 8, p7

⁴ Dr Jeremy Gans, Submission 9a, p10

⁵ Dr Jeremy Gans, Submission 9a, p11

⁶ Dr Jeremy Gans, Submission 9a, p11

The NSWPF agrees with the Homicide Victims' Support Group (Aust) Inc. as follows:

"In the event legislation was suggested to protect DNA samples from all victims from being used it is the stance of the HVSG (Aust) Inc., this would be counterproductive and in effect would allow many perpetrators to go free, which in turn would have an adverse impact on victims overall. Many crimes would also remain unsolved."⁷

The NSWPF concurs with CrimTrac's following statement:

"CrimTrac does not support the further restriction of the use of DNA material through legislation if those restrictions would affect which profiles were loaded to the Crime Scene Index of the NCIDD and if the restrictions would prevent NSW crime scene DNA Profiles being matched with other jurisdictions' DNA profiles.

It would also be of considerable concern to CrimTrac if legislation prevented DNA profiles from crime scenes being loaded to the NCIDD because they may relate to a victim, without any DNA analysis being undertaken to confirm such a result. If this occurred, valuable evidence that might allow for the identification of a perpetrator of the crime would not be able to be loaded to the NCIDD. CrimTrac believes that if this was to occur it would impede the effective operation of any DNA database.

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 [national] criminal justice outcomes."⁸

With regard to the above statement by CrimTrac, NSWPF wishes to reiterate that the existing NCIDD inter-jurisdictional Ministerial Arrangements took six (6) years to agree on and implement.

As previously stated, NSWPF strongly opposes the introduction of any legislative change in light of DJAG's imminent redrafting of the Act in early 2010.

⁷ Homicide Victims' Support Group (Aust) Inc., Submission 7, p2

⁸ CrimTrac, Submission 3, p4

Proposed Option 2:

Limitations on how the crime scene index profiles can be matched against each other to restrict the possibility of matching victims' DNA to unrelated crimes

Proposed Option 2 advocates a situation wherein considerable responsibility for decision-making, concerning, inter alia, the movement of profiles between indices, is incumbent upon "the database administrator", viz:

"Allow open matches if the matching is otherwise justified in all the circumstances, that is allow for the urgent cases, the messy cases, the unusual cases, allow the matching to be done ...[if] ... it is justifiable in the circumstances - this will be a judgement by presumably a database administrator"⁹

"The key issue to me is it should be a person who is independent of the police, and basically a diligent database administrator [who should make the decision as to the legality of uploading the DNA]"¹⁰

The NSWPF makes the following points:

- There are significant implications to this Option, including the time frame in which a decision needs to be made and where the decision-making would rest (a single person or panel)
- NSW Health's role is that of a service provider to NSW Police Force for DNA analysis – to provide NSW Police Force with independent DNA analysis; to manage the DNA databases on behalf of NSW Police Force; and provide notification of DNA links.

NSW Health is not law-enforcement and its role is not to make investigative assumptions or decisions concerning the actual involvement of involved persons or whether or not certain profiles should or should not be placed on matchable indices of the DNA databases; these are all matters for the NSW Police Force; DAL's role is to receive advice from NSW Police Force concerning what should or should not be analysed, the actual involvement of involved persons, and what should or should not be uploaded to the DNA databases, and to notify NSW Police Force of links as and when they occur.

- The determination of who is, or who is not, a 'victim' or a 'suspect' in an incident (or, for that matter, any other involvement type) is extremely complex and often ambiguous, and is a matter for determination by investigating police, not the database administrator.

⁹ Dr Jeremy Gans, Evidence, 30 October 2009, p12

¹⁰ Dr Jeremy Gans, Evidence, 30 October 2009, p13

'Victim': definition, ambiguity and confusion

As can be seen from the NSWPF definition of 'victim', victims are many and varied:

A primary victim is someone who has suffered physical harm, emotional trauma and/or personal or property loss from criminal activity. For example, a person whose car was stolen or a person whose house has been destroyed by arson.

A secondary victim may be someone who has witnessed a crime and might be adversely affected by the experience; for example, a bystander who witnessed a person being assaulted during a robbery attempt. Colleagues, family members and friends can potentially be secondary victims of crime.

The following definition, from the UN general assembly, may also be useful.

'Victims means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within member states, including those laws prescribing criminal abuse of power...'

A person may be considered a victim, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim. The term 'victim' also includes, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimisation.¹¹

In some cases a person is believed to be the victim, then, following police investigation, that person has been found to be the offender. Police can be involved in highly complex investigations that sometimes take years to confirm who the actual victims / suspects / offenders are.

As the NSWPF has previously stated:

"... significant ambiguities exist concerning the delineation of victims versus other involved persons because the perpetrators of crime often are (or claim to be) also victims of crime, often within the same incident."¹²

The determination of who are the victims in an incident:

- is often complex, difficult and unclear, and not straight-forward;
- is complicated by the fact that those same persons could be or are also suspects;
- can and often does change over time;
- is solely the responsibility of the police; and
- is not the responsibility of, or something that can be guessed or assumed by, forensic biologists or DNA database administrators.

Both NSW Health and Dr Jeremy Gans corroborate this view as follows:

"... there are situations where it is unknown if the sample originates from a complainant / victim / limited volunteer or from an offender."¹³

"... often, there will be some significant ambiguity in DNA investigations, especially during the investigation but often even at the end of it."¹⁴

"I ... agree with those submissions that talk about the difficulty of defining who is and who is not a victim. ... I think that is a major problem ... So you have to shy away from rules that assume all crime scenes are the same and all investigations are the same. There is too much variation out there."¹⁵

The NSWPF is strongly of the view that any suggestion that it should be the database administrator (NSW Health) who determines allowable matching is unacceptable – such decisions remain the domain of law enforcement – the police, with the courts governing legislative compliance.

¹¹ NSW Police Force Intranet, 18 November 2009

¹² NSW Police Force, Submission 5, p4

¹³ NSW Health, Submission 6, p7

¹⁴ Dr Jeremy Gans, Submission 9a, p10

¹⁵ Dr Jeremy Gans, Evidence, 30 October 2009, p12

Proposed Option 3:

A discretionary power for courts to admit DNA evidence from victims “where a court deems it in the interests of justice” for major crime categories.

The preferred position of the NSWPF is for no change. However, the NSWPF previously advocated a compromise position whereby evidence from victims would be admissible where a court deems it in the interest of justice.

As previously discussed, where a DNA profile derived from an unidentified crime scene sample is uploaded to the DNA database and that profile is later discovered to be from a bona fide victim, the profile is removed from the database. It is the position of the NSWPF that if any link/s were made between that profile and another case prior to the profile being removed from the database, then that link would be legitimate as at the time the existence of the profile on the database was valid. Any contention otherwise should be a matter for determination by a court who could decide whether the public interest and community safety concerns outweigh any other consideration.

It should be noted that this option also has some disadvantages as outlined in the Options Paper, viz:

- 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.
- There is no reason to believe that a court will resolve this issue consistently or in a way that resolves systemic concerns about victim cooperation with the police.

To some degree, this could be mitigated by an application for a court decision to be made early in the investigation process, however this also adds complexity to criminal investigation and reduces timeliness.

The case for no legislative change

The NSWPF notes that the Committee, has formulated three proposed options, however there is a fourth option – that of *no changes*.

The NSWPF is unaware of the existence of any problems concerning the management of victims' DNA in New South Wales, and is unconvinced of the need for any changes to be made to existing legislation, policy or procedure.

In particular, the NSWPF believes that the introduction of legislation to further restrict the use of DNA material is unnecessary due to the effectiveness of the existing policy.

This position is supported by the response of Mr Robert Goetz, A/Deputy Director, Criminalistics, NSW Health's Division of Analytical Laboratories (DAL), to the Committee's question about the adequacy of reliance on policies and procedures:

"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."¹⁶

The Homicide Victims' Support Group (Aust) Inc. also concurs:

"It is the view of the HVSG (Aust) Inc. that the current policies and legislation are adequate and provides appropriate protection so that DNA samples obtained from victims [are] not misused."¹⁷

Mr Thomas Spohr, Solicitor, and Chair, Criminal Law Committee, NSW Young Lawyers:

"In relation to the adequacy of the current practices, they seem generally to be adequate in respect of victims."¹⁸

New South Wales DNA Legislation Reform

It is widely acknowledged that the NSW *Crimes (Forensic Procedures) Act 2000* ("the Act") is long, complex, difficult to follow, complicated and confusing, is inconsistent, and is in desperate need of simplification and replacement.

Dr Jeremy Gans, Associate Professor, Melbourne Law School, concurs:

"... the legislation in New South Wales has been a bit of a disaster. It is not very well written legislation."¹⁹

"... [the] legislation has some significant structural flaws."²⁰

"... I have made submissions to various inquiries pointing out dozens and dozens of ludicrous anomalies in the legislation."²¹

"The appropriate solution, of course, is to repeal the [Act] and start again."²²

Following intensive consultation throughout 2009 between the NSW Police Force, the Minister for Police, the Department of Premier & Cabinet, and the Department of Justice & Attorney General (DJAG), DJAG committed "to undertake a wide-ranging red-tape review of the Act by a high-level panel, and to report back to Cabinet with a complete redraft of the Act, based on that review, within nine (9) months [by April 2010]"²³.

¹⁶ NSW Health, Responses to Questions on Notice, Question 11, p5

¹⁷ Homicide Victims' Support Group (Aust) Inc., Submission 7, p3

¹⁸ Mr Thomas Spohr, Evidence, 25 September 2009, p29

¹⁹ Dr Jeremy Gans, Evidence, 30 October 2009, p2

²⁰ Dr Jeremy Gans, Evidence, 30 October 2009, p4

²¹ Dr Jeremy Gans, Evidence, 30 October 2009, p8

²² Dr Jeremy Gans, Submission 9a, p6

²³ NSW Government's Charge Streamlining Steering Committee, 3 July 2009

The objective of DJAG's imminent review and redrafting of the Act is to drastically simplify the legislation and to significantly reduce the red-tape imposed by it, consistent with the NSW Government's current red-tape reduction initiatives.

In light of the forthcoming review and redrafting of the Act, and its objective of simplification, NSWPF strongly opposes any proposal to create and implement additional legislation—further complicating an already complex Act. The following comments are of relevance:

- Department of Justice & Attorney General (DJAG):

"DJAG is unaware of any complaints by victims in relation to police behaviour under the [Victims'] Protocol, or subsequent use of anything acquired through the conduct of a procedure under the Protocol."²⁴

"DJAG is unaware of any circumstances where a match ... has been used either for investigative purposes or forensically [in circumstances where unidentified profiles that may be victims have been uploaded to the database]"²⁵;

- Dr Jeremy Gans:

"I have not heard of any situation where a victim has been prosecuted or the evidence has been used against them in that way where they are known to be a victim."²⁶

- Mr Thomas Spohr, Solicitor, and Chair, Criminal Law Committee, NSW Young Lawyers:

"... I do not know of any specific problems."²⁷

- NSW Police Force:

"... is not aware of any complaints or identified deficiencies in this area."²⁸

The NSWPF is supportive in principle of a policy that limits the uploading of clearly identified victim profiles for certain crimes (e.g. victim of sexual assault). This policy is already in existence, however clear business rules set by police should be more diligently applied. This would allow for circumstances such as the 'pub brawl' scenario outlined under discussion of Option 1, or other specific cases to be dealt with for the benefit of the public and solving serious crime.

²⁴ Department of Justice & Attorney General, Responses to Questions on Notice, Question 14, p8

²⁵ Department of Justice & Attorney General, Responses to Questions on Notice, Question 2, p1

²⁶ Dr Jeremy Gans, Evidence, 30 October 2009, p9

²⁷ Mr Thomas Spohr, Evidence, 25 September 2009, p29

²⁸ NSW Police Force, Responses to Questions on Notice, Question 12, p5

Conclusion

NSW Police Force is not aware of any problems concerning the use of victims' DNA in New South Wales. Therefore, the pursuit of solutions in the absence of problems appears to be unnecessary.

Any proposal to modify or expand the *Crimes (Forensic Procedures) Act 2000* would appear to be ill-timed as the *Crimes (Forensic Procedures) Amendment Bill 2009* is still under debate in the Legislative Council and the Department of Justice & Attorney General plans to completely redrafting the Act in early 2010.

The NSW Police Force strongly opposes any legislative changes being made concerning this issue.

– ends –