

INQUIRY INTO THE USE OF VICTIMS' DNA

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Submission from CrimTrac

Background

CrimTrac was established in 2000 as a Commonwealth Agency under the Attorney-General's portfolio. CrimTrac's primary role is to provide national information sharing solutions to support the effective operation of police services and law enforcement agencies across the Commonwealth, state and territory borders. CrimTrac brokers a wide variety of information to assist investigations by law enforcement agencies and is responsible for finding emerging information technologies and opportunities to enhance information sharing.

The Inter-Governmental Agreement which established CrimTrac, required the agency to deliver four key systems to improve information sharing for police, which included the National Criminal Investigation DNA Database (NCIDD).

The NCIDD was launched in June 2001. It was developed, in consultation with forensic biology specialists and police services, to provide law enforcement agencies with access to a national DNA database. DNA profiles are uploaded, matched and stored on the NCIDD under stringent access and disclosure safeguards.

CrimTrac, as the custodian of the NCIDD, works together with a number of stakeholder advisory groups to ensure that the policies, regulations and practices are appropriate, regularly reviewed, and required changes implemented.

The NCIDD provides Australia's police with the ability to directly match inter-jurisdictional DNA profiles. The NCIDD contains DNA profiles from all Australian police jurisdictions. The profiles are derived from samples collected at crime scenes and from convicted offenders, suspects, missing persons and unknown deceased persons. The database provides Australian police and forensic scientists with a powerful investigative tool which automatically crosses jurisdictional boundaries.

The NCIDD operates in accordance with relevant Commonwealth, State and Territory legislation governing the collection and matching of DNA profiles. Profiles are removed from the database in accordance with destruction dates notified by the jurisdictions. The upload, match and destruct capabilities are documented by the audit function on the NCIDD.

The NCIDD does not contain the identities of persons who have supplied samples for DNA profiling. Personal information is removed from records before they are uploaded on to the NCIDD. Only the Commonwealth, State and Territory forensic laboratories supplying the DNA profiles know the identities of the individual who has provided the biological samples. When a jurisdiction has conducted a search that jurisdiction is notified of a link that tells them that there is a match and which jurisdiction to contact to make a request for identifying information. All jurisdictions involved in the link are notified via NCIDD. In this way information is protected from general release, such as the identifying information for volunteers, or victims, depending on the jurisdiction, is not automatically released as a result of a match on the NCIDD.

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Relevant Issues:

The positions outlined by CrimTrac in this submission relate to the implications of changes to the use of victims' DNA for operation of a DNA database or the NCIDD, rather than the treatment of victims DNA profiles generally. They are the views of CrimTrac as custodian of the NCIDD and do not necessarily represent the views of the Commonwealth or of any jurisdiction.

CrimTrac is of the view that maximising the utilisation of the NCIDD provides beneficial criminal justice outcomes and assists in the resolution of unsolved crime.

The NCIDD became operational in 2001, but it was not until April 2009 that full participation by all Australian jurisdictions, with agreements to match against each of the other jurisdictions, was achieved. This achievement was the result of significant inter-jurisdictional negotiation, legislative reform and co-operation. It is CrimTrac's submission that a change in policy or legislation in one jurisdiction could have a significant effect on the national scheme of participation in the NCIDD and the national utility of the NCIDD. CrimTrac thanks the committee for the opportunity to make this submission.

In making this submission CrimTrac acknowledges the extreme sensitivities around the potential use of victims' DNA, and the impact that these issues can have on the reporting of crime, particularly offences of a sexual or intimate nature. The positions outlined in this submission are intended to provide a balance between protecting the rights of victims while enabling the investigation of offences against those victims.

CrimTrac submits that a significant issue for the committee to consider is the use of victims' DNA that is raised in this submission is the loading of DNA profiles obtained from victims onto the Crime Scene Index of a DNA database. These profiles are normally loaded in accordance with forensic procedures legislation in the jurisdictions. For example the *Crimes Act 1914 (Cth)* provides:

crime scene index means an index of DNA profiles derived from forensic material found:

- (a) at any place (whether within or outside Australia) where an offence (whether a prescribed offence or an offence under the law of a participating jurisdiction) was, or is reasonably suspected of having been, committed; or
- (b) on or within the body of the victim, or a person reasonably suspected of being a victim, of a prescribed offence; or
- (c) on anything worn or carried by the victim at the time when a prescribed offence was, or is reasonably suspected of having been, committed; or
- (d) on or within the body of any person, on anything, or at any place, associated with the commission of a prescribed offence.

However, the issue arising relates to the loading of DNA profiles obtained from victims onto the Crime Scene Index of the NCIDD, *where it has been established through DNA analysis that the profile is the victims*. This is discussed further below.

CrimTrac is the custodian of the NCIDD, and any decision on whether to load DNA profiles obtained from victims onto NCIDD is made by the jurisdiction conducting the investigation.

The reference to 'Victim' In the terms of reference for the Inquiry

A clear distinction must be drawn between a crime scene DNA profile obtained from a victim

and a crime scene DNA profile obtained from a victim that has been identified as that victims DNA Profile through DNA analysis (*identified victim DNA profile*).

If a DNA sample is obtained from the body of a victim of a crime it is a crime scene sample which of itself may or may not be the victims. It cannot be confirmed as belonging to the victim until such time that a reference DNA sample, which has been taken from the victim under the volunteer provisions of the relevant forensic procedures legislation, has been compared and matched to the crime scene DNA sample. It is at this point that the DNA profile can be considered as an *identified victim DNA profile*.

CrimTrac submits that until such a comparison is made the DNA profile must be treated solely as a crime scene DNA profile capable of being loaded onto the Crime Scene Index of a DNA database.

a. The adequacy of current policies, procedures and practices to protect DNA material belonging to victims.

To ensure full participation in the NCIDD, CrimTrac believes that a nationally endorsed policy or business principle outlining the practice for dealing with the loading of DNA profiles of victims of crime onto the NCIDD is the most appropriate mechanism for managing this issue. In respect of the operation of the NCIDD CrimTrac believes that the policy or business principle should:

- Define an *identified victim DNA Profile* as being a crime scene DNA profile that has been identified as the victims DNA Profile through direct comparison with a known reference sample.
- State that an *identified victim DNA Profile* should not be loaded onto the Crime Scene Index of the NCIDD where possible.
- State that a reference sample be taken from the victim as early as practical to enable those crime scene profiles relating to the victim to be identified and prevented from being loaded onto the Crime Scene Index of the NCIDD (CrimTrac understands that this is the protocol followed by most jurisdictions).
- State that if a jurisdiction becomes aware that a DNA profile has been loaded to the crime scene index and that profile relates to an *identified victim* then the jurisdiction is required to remove that DNA profile.
- Address the issue of mixed profiles by allowing a Crime Scene DNA Profile that may contain an element of the victims DNA profile to be added to the Crime Scene Index of the NCIDD.

Whilst this is CrimTrac's submission, as custodian of the NCIDD, CrimTrac is subject to the relevant Commonwealth, State and Territory legislation governing the collection and matching of DNA profiles and to the agreement of the jurisdictions on management of the NCIDD.

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.

b. Whether further restrictions on the use of such DNA material would be appropriate or desirable, for example through legislation.

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 criminal justice outcomes.

c. Any other related matter.

Deliberations of the CrimTrac NCIDD Consultative Forum (CNCF) on the 'known victims' issue

The CNCF is an advisory group to CrimTrac, as the custodian of NCIDD, and aims to facilitate resolution of policy and legal issues regarding the inter-jurisdictional exchange of DNA profile information and the effective operation of NCIDD. It is comprised of representatives from the Commonwealth and each state and territory with expertise in forensic procedures legislation and DNA policy. The CNCF has been endorsed by the Standing Committee of Attorney's General.

The CNCF has previously had extensive discussions on the issues raised in this submission, and has recommended that national business principles be endorsed that are aimed at managing how identified victim DNA profiles are dealt with in the Crime Scene Index of NCIDD. The draft principles have been generally agreed at the officer level and the CNCF is awaiting further comment from the NSW Representative before they are submitted for Ministerial approval.

The draft business principle recommends that where a request for information is actioned following a match, and one of the jurisdictions involved becomes aware that the DNA profile in question matches an identified victim, that jurisdiction will advise the other jurisdiction of that situation. It is then a decision for the jurisdiction receiving the information to determine whether they are able to continue their investigations into the match, taking into account legislation, policies and procedures within their own jurisdiction.

These principles also state that where a jurisdiction subsequently becomes aware that a crime scene DNA profile relates to a known victim, that jurisdiction may take steps for the crime scene profile to be removed from NCIDD.

Each jurisdiction has administrative access to the NCIDD to re-categorise or delete crime scene DNA profiles if those profiles are identified as belonging to a victim. If profiles are deleted or re-categorised, and this causes the original match criteria to be altered, then all laboratories will be notified by email of the change to that match if it involves one of their DNA profiles.

These business principles will be the subject of further discussion at the CNCF to be held in October 2009 and it is anticipated that approval of any business principles will be sought from the CrimTrac Board of Management, MCPEMP and SCAG.

Mixed DNA Profiles

A complicating factor for the Committee to bear in mind in addressing the issue of DNA samples from victims is the issue of mixed profiles. Any restriction imposed on uploading victims DNA profiles onto a database would need to be crafted to avoid the situation where this restriction would result in mixed profiles being prevented from being uploaded. Mixed profiles are those which could potentially contain parts of a victim's DNA mixed in with the DNA of an alleged perpetrator. Should the mixed profile not be uploaded then it would limit investigative avenues in respect of the crime to which the profile relates.

Complainants who are also suspects

Another issue that CrimTrac submits is relevant to the committee's deliberations, that would affect the utility of a DNA database, is the situation that arises where a person presents to police as a complainant and then becomes a suspect in related offences.

An example would be where a complainant presents as a victim of sexual assault to police, where the alleged perpetrator is found to be a homicide victim, and the complainant subsequently becomes a suspect in the homicide.

That person would originally be treated by police as a volunteer and any restrictions contemplated by the Committee on the use of their DNA profiles as a 'victim' may subsequently limit the utility of the evidence gathered from them as a complainant, in the investigation of the homicide. If for example the victim's profile couldn't be loaded onto a DNA database, then the crime scene sample from the sexual assault could not be used to determine whether the homicide victim was the perpetrator of the sexual assault, which goes to motive.