

## INQUIRY INTO THE USE OF VICTIMS' DNA

**Organisation:** NSW Department of Health

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**NSW HEALTH RESPONSE TO**

**Proposed Options for Dealing with Unidentified  
Victim's DNA Profiles Found in Crime Scene Samples**

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LEGISLATIVE COUNCIL STANDING COMMITTEE ON LAW  
AND JUSTICE

INQUIRY INTO THE USE OF VICTIMS' DNA

<NOVEMBER 2009>

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

NSW Health's submission to the Standing Committee on Law and Justice is in response to proposed options for dealing with unidentified victim's DNA profiles found in crime scene samples.

<b>OPTION 1: A LEGISLATIVE BAN ON THE USE OF A VICTIM'S DNA PROFILE AGAINST THAT VICTIM</b>
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### ***General Comment***

This is a straightforward option which is the effective way to manage legally the issue of minimising victim crime scene sample upload, coupled with not adversely affecting outcomes in the criminal justice system.

### ***Comment to Paragraph 2; Page 2***

It would be preferable to include DAL's present protocol of removing crime scene profiles from the NSW and NCIDD databases once that profile has been identified as being from the victim. Otherwise the potential exists for repeated matching to occur to new uploaded crime scene profiles whether in NSW or interstate. At present there have been a few uploaded NSW crime scene profiles which have been identified as being from the victim after matching a person profile uploaded in another jurisdiction. These crime scene profiles have all been removed from both databases.

### ***Comment to Bullet Point 5; Paragraph 2; Page 2***

While this is true if the sample is not removed there will be potential further matching with the NSW and NCIDD databases. If a murder scene DNA profile in Victoria matches a crime scene DNA profile from NSW then there may be investigations of the profile to determine possible origin. If the NSW sample had previously been identified as being from a victim it would be in the victim's best interest to have had it previously removed from the searchable database.

<b>OPTION 2: LIMITATION ON HOW THE CRIME SCENE INDEX PROFILES CAN BE MATCHED AGAINST EACH OTHER TO RESTRICT THE POSSIBILITY OF MATCHING VICTIMS' DNA TO UNRELATED CRIMES</b>
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### ***Comment to Paragraphs 1 and 2; Page 4***

This may sound like commonsense but a DNA database is effective as a crime fighting tool because crime samples are uploaded and compared to other crime scene samples and person samples as allowed under the legislation. Crime scene sample matches made on the database protect the population against the potential of having their house burgled, car stolen, or the person being sexually assaulted, beaten or murdered by repeat offenders whose DNA sample resides on the database.

This DNA sample may be taken from another crime scene where the crime scene to crime scene link may provide intelligence to NSW police investigators to aid them in solving the crime, or from a direct link between the crime scene sample and the convicted offender or suspect person sample present on the database. An unsolved murder in Katoomba was solved with a scene to scene match to a minor property crime. It would have been extremely unlikely that if this option was successful that the match would have been found and the offender apprehended.

If, as expected, there would be a considerable delay or reduction in a crime scene sample being able to be compared to another crime scene sample because it was difficult or impossible to take "all possible measures ... to exclude every person who is not reasonably suspected of having committed the offence" then there would be far fewer scene to scene matches to unsolved crimes. This concomitantly would result in fewer recidivists being identified by DNA, therefore unwittingly creating the likelihood of further crimes against persons.

The perfect example that demonstrates this argument is an armed robbery case. A bank is robbed. A smudge is noted on the desk and suspected as having been left by the offender who touched the surface. At present this sample would be loaded to the database and linked to other crime scene samples across NSW or Australia. That information is important intelligence to the Police; that there is the possibility that a common offender is committing armed robberies. If it was required that "all possible measures ... to exclude every person who is not reasonably suspected of having committed the offence" from having left the DNA would require all customers of the bank to be asked to supply a sample of DNA.

#### ***Comment to Final Sentence; Paragraph 3; Page 4***

Allowable crime scene to crime scene matching if "justified in circumstances" would be difficult to implement as it requires a decision making process that could be flawed dependent on the database administrator and/or information supplied by NSW Police requesting a search.

#### ***Comment to Paragraph 1; Page 5***

The current protocol of requesting victim's samples are in cases where it is considered there is a very low probability that the DNA profile recovered may originate from the offender. Consider a case where a wallet is stolen and the credit cards are found at the scene. It is obvious that the offender has pulled the credit cards out of the wallet. But the extent of touch and the fact that there would be considerable amounts of the owner's DNA also on the credit card means that the likelihood of obtaining the offender's DNA is very low. In such a case the laboratory requests a sample from the victim. This can be contrasted to a robbery where the Police believe that the offender waited outside the premises. At this site there are a number of cigarette butts. While it is known that this spot is also used by numerous workers from the premises (who all could, theoretically, be asked to provide a person sample) the DNA could provide important intelligence to the Police that helps solve the case if by chance the offender's cigarette butt is uploaded to the crime scene index and compared to another crime scene sample also present on the database. Under the amendments to the Act it would be unlikely that all worker person samples could or would be collected.

#### ***Comment to Paragraph 2; Page 5***

Dr Gans has suggested that there would be an operational impact by creating a "crime scene (limited purpose) index". While this would not be the way in which DAL would manage the process it would require considerable change to the current procedures in the laboratory for loading of crime scene samples to the database; increased communication with NSW Police in

attempting to obtain victims and bystanders DNA samples; considerable time delays in organising scene to scene matching; considerable increase to administrative burden to DAL staff in updating profiles as crime scene samples become uploadable; and budgetary considerations in DNA typing extra person samples. As the robbery scenario above showed it would almost be impossible in that case to ever allow the DNA profile from the cigarette butt to be loaded to the database.

### **Conclusion**

If unrealistic restrictions are placed on crime samples being uploaded onto the database, then negative impacts on the community may occur.

**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**

### ***General Comments***

The commentary to this option is confusing.

### ***Comment to Paragraph 2; Page 6 and Paragraph 2; Page 7***

If a crime scene sample is later identified as being from the victim and the crime is one in which the person said I was a victim, then I am unsure why the police would be interested in wanting to have that evidence's admissibility considered by a Magistrate. It needs to be emphasised most strongly that if an unknown crime scene sample is loaded to the database it will never match a victim unless the victim has also provided a person sample that can be matched under the legislation (most likely a convicted person or suspect sample) or matches another crime scene profile which is later identified as being from a victim.

I assume that the following is probably more relevant. Crime scene A is loaded to the NSW database. Crime scene B from an unrelated crime is also uploaded to the database. A database match report is sent to the Police stating that crime scene A matches crime scene B. The Police investigate the link as crime scene B is from a serious indictable case. They believe that it is possible that the victim of crime A is the same person who left the DNA in crime B. To confirm this requires the Police to be able to obtain a person sample whether as allowable under the Act or as a covert sample.