

INQUIRY INTO THE USE OF VICTIMS' DNA

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Executive Summary

Current policies, procedures and practices

In the opinion of NSW Police Force (NSWPF), current policies, procedures and practices within NSWPF are adequate concerning the use and management of DNA material belonging to victims.

In New South Wales, victims of crime who identify themselves to police, or are identified by police, as victims in an incident have the opportunity to volunteer a sample of their DNA to exclude them from criminal investigation.

NSWPF makes the distinction between 'identified victim profiles' and 'unidentified crime scene profiles'. 'Identified victim profiles' are excluded from criminal investigation and are not uploaded to any DNA databases. 'Unidentified crime scene profiles' are used for criminal investigation and uploading to the DNA databases only once identified victims' profiles have been removed. The use of unidentified crime scene profiles has enormous potential to link to extensive unsolved crime.

NSWPF has in place adequate policy and procedure that

- attempts in all cases to exclude bona fide victims' DNA from being uploaded to any DNA database; and
- prevents dissemination to operational police of DNA links constituting a match with an identified victim, including specific procedures in relation to dealing with other Australian jurisdictions.

NSWPF position is that sufficient protection is afforded victims who have the opportunity to come forward as a victim of crime, provide a reference sample, and have their profile excluded from any use. This policy continues to ensure that victims of crime are not discouraged from coming forward to police.

Further restrictions on the use of victims' DNA

NSWPF is of the opinion that further restrictions on the use of DNA material belonging to victims are undesirable and unnecessary. Such restriction, in the form of legislation that would cause evidence to be inadmissible in court, if derived from a sample of material belonging to a victim, is neither appropriate nor desirable and in fact works against victims by effectively harbouring perpetrators of crime who are exempted from prosecution simply because they too may claim to be a victim.

Any legislation which would cause evidence to be inadmissible in court if derived from a sample of material belonging to a victim would provide perpetrators of crime with exemption from prosecution by virtue of their DNA profile having come to the attention of police as a result of a crime scene in which they will argue their involvement was as a victim, despite not having identified themselves as a victim at the time.

NSWPF believes that, whilst supposedly serving the needs of victims, any such legislative restriction on the use of victims' DNA would actually work against victims by precluding effective policing concerning the perpetrators of crimes against those victims.

Furthermore, 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. It is therefore impracticable and imprudent to attempt to apply legislation solely to 'victims'.

NSW Police Force response to Inquiry's Terms of Reference

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

In the opinion of NSW Police Force (NSWPF), current policies, procedures and practices within NSWPF are adequate concerning the use and management of DNA material belonging to victims.

1.1. NSW Police Force – Position on Use of Victims' DNA

1.1.1 Identified Victim Profiles vs. Unidentified Crime Scene Profiles

Fundamental to the NSWPF position on use of victims' DNA is the distinction between:

- (i) **Identified Victim Profiles** – DNA profiles belonging to those persons who have formally identified themselves to police, or have been formally identified by police, as victims of crime in a particular matter; and
- (ii) **Unidentified Crime Scene Profiles** – Unidentified persons whose DNA has been obtained from crime scene evidence, who have not formally identified themselves to police, or have not been formally identified by police, as being involved in the incident the subject of the crime scene, whose involvement in the matter is unclear or unknown.

1.1.2 Identified Victim Profiles

During attendance at and/or investigation of a crime scene, persons who are the subject of victimisation in respect of that crime are identified by police as the victims in the matter, and/or identify themselves to police as the victims in the matter ("identified victims").

Police take DNA samples from those identified victims in their capacity as an *Excluded Volunteer (Limited Purposes)* – a person who *volunteers* a sample of their DNA to be used for *limited purposes*, and from whom the taking of their DNA is *excluded* from the *Crimes (Forensic Procedures) Act 2000*.

The DNA sample volunteered by, and taken from, the identified victim in the matter is used as a point of reference for the purposes of isolating that identified victim's DNA profile from other profiles which may be obtained from the crime scene, and is therefore called a "reference sample".

The reference sample, provided by the identified victim, is compared with other DNA profiles found at the crime scene in order to exclude the identified victim's DNA profile. This exclusion practice is undertaken in order to delineate the DNA profiles found at the scene of other persons of interest.

This practice of establishing and differentiating multiple DNA profiles found at the same crime scene is called "within case matching". The categorisation *limited purpose volunteer* means that the *purposes* for which the volunteered profile can be used are *limited to within case matching* and cannot be used for matching outside the case in question.

Profiles derived from reference samples volunteered by identified victims are not uploaded to any DNA database, and are not used for any matching with any other profiles outside the case in question.

Conversely, once all identified victims' profiles have been excluded from the crime scene material, the remaining unidentified DNA profiles obtained from the crime scene ("crime scene profiles") are uploaded to both the NSW DNA Database and to the National Criminal Investigation DNA Database (NCIDD) for the purpose of potential matching with uploaded person profiles (scene-to-person match) or other crime scene profiles (scene-to-scene match).

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.

In the above example:

- the woman's reference sample is used purely to isolate the perpetrator's DNA from the crime scene evidence, in order to enable only the perpetrator's DNA to be used for criminal investigation, including uploading to DNA databases;
- the perpetrator's DNA (having been isolated from the victim's DNA by way of her reference sample) is uploaded to the DNA databases for matching; and
- the woman's reference sample is not uploaded to any DNA databases and, as a result, cannot link to anything or be used for any other purpose.

NSWPF wishes to unequivocally confirm its policy of excluding the matching, or uploading to any DNA database, of a DNA profile **obtained from a person sample carried out on a victim**, as a result of that victim coming forward to police and identifying him or herself as the victim of a crime and consenting to their DNA being taken ("reference sample") for the purpose only of isolating their profile from any perpetrators' profiles found at the crime scene.

This policy continues to ensure that victims of crime are not discouraged from coming forward to police.

1.1.3 Unidentified Crime Scene Profiles

Upon collection of forensic material from a crime scene, multiple DNA profiles may be derived. As described above, *reference samples* are taken from identified victims in order to isolate those identified victims' profiles from the remaining profiles found at the scene, for the purposes of excluding the identified victims' profiles from further investigation.

Having excluded the identified victims' profiles from remaining crime scene profiles, those remaining crime scene profiles are uploaded to both the NSW DNA Database and to the National Criminal Investigation DNA Database (NCIDD) for the purpose of potential matching with uploaded person profiles (scene-to-person match) or other crime scene profiles (scene-to-scene match).

The crime scene profiles uploaded to the DNA databases

- belong to unidentified persons whose DNA has been obtained from crime scene evidence;
- do not constitute profiles belonging to identified victims, whose profiles are isolated prior to, and excluded from, uploading.

(Unidentified) crime scene profiles uploaded to the DNA databases may match person profiles and other crime scene profiles from unsolved crimes.

Example

- a pub brawl occurs involving multiple persons;
- knives are used and multiple persons receive stab wounds;
- all involved persons, except a stabbing victim, flee the scene;
- blood from all wounded persons is all over the floor;
- upon attendance at the scene, the stabbing victim is formally identified by police as the victim in the incident and in due course provides a reference sample;
- blood collected from the scene is analysed and multiple DNA profiles are derived;
- the identified victim's reference sample is used to isolate and exclude that victim's profile from the remaining profiles;
- those remaining profiles belonging to unidentified persons ("crime scene profiles") are uploaded to the DNA databases;
- upon uploading to the DNA databases, one of those unidentified crime scene profiles matches the same crime scene profile from eight (8) unsolved armed robberies;
- the pub's closed-circuit television (CCTV) footage is used to successfully identify persons involved in the pub brawl who fled the scene, enabling police to locate those persons now deemed to be 'suspects';
- consequently, DNA person samples are taken from those suspects, one of which matches the eight (8) unsolved armed robberies together with the previously-matched crime scene profile from the pub.

In the above example:

- the use of unidentified crime scene profiles led to intelligence linking a suspect with eight (8) unsolved armed robberies, and potentially also the stabbing;
- the identified victim's DNA was used only for isolation purposes to exclude that identified victim's profile from further investigation or DNA database matching;
- it should be noted that the person who was linked to the eight (8) unsolved armed robberies, whilst they decamped the scene and were treated as a 'suspect', were arguably also a 'victim' in the incident (albeit unidentified), having been wounded and bleeding on the floor as a result;
- close examination of the CCTV footage would potentially confirm that involved persons, other than the identified victim, were arguably also victims in the matter.

The above example clearly demonstrates:

- the benefit able to be realised from the use of unidentified crime scene profiles in the provision of intelligence leading to further investigation and potential conviction, including for matters beyond the case in question;
- that the identified victim's DNA was duly excluded from criminal investigation once isolated and was not misused;
- that 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;
- that restrictions (e.g. legislation) on the use of victims' DNA would prove unworkable as a result; and
- that it is therefore impracticable and imprudent to attempt to apply legislation solely to 'victims'.

1.2 NSW Police Force – Policy & Procedure – Use of Victims' DNA

NSW Police Force (NSWPF), through its Forensic Procedures Implementation Team (FPIT), has in place adequate policy and procedure:

- in cooperation with NSW Health's Division of Analytical Laboratories (DAL) that attempts in all cases to exclude bone fide victims' profiles from being uploaded to any DNA database; and
- that prevents dissemination to operational police of DNA links constituting a match with an identified victim, including specific procedures in relation to dealing with other Australian jurisdictions (such as Northern Territory) with regard to re-identification of inter-jurisdictional DNA links through the National Criminal Investigation DNA Database (NCIDD).

1.2.1 NSW Health's Division of Analytical Laboratories (DAL)

NSW Health's Division of Analytical Laboratories (DAL) standard policy/procedure concerning the obtaining of victim reference samples for exclusion

With respect to biological material recovered from crime scenes, the standard procedure for medical practitioners in conducting a sexual assault kit involves both the

- obtaining of any potential offender DNA, as well as
- obtaining a reference sample from the victim to isolate the victim's profile and upload only the potential offender profile(s) to the DNA database if necessary.

For other crime, DAL policy and procedure involves the requesting of reference samples from victims (if not already provided) after an assessment of the available biological evidence in the context of the case, and where a DNA profile is believed to have originated from the victim of the crime. This enables the victim's profile to be identified and filtered from potential offenders' profiles with regard to database uploading and matching.

1.2.2 NSWPF Forensic Procedures Implementation Team (FPIT) – Dissemination to Operational Police

Forensic Procedures Implementation Team (FPIT) policy/procedure concerning the checking of DNA Link Reports from DAL prior to dissemination to operational police

The NSWPF Forensic Procedures Implementation Team (FPIT) conducts a quality review of DNA profile match information before dissemination to investigators. This includes cross-referencing with the Computerised Operational Policing System (COPS) to confirm the accuracy and validity of information with respect to:

- the correct categorisation of samples obtained from persons (including victims);
- compliance with legislative provisions concerning destruction requirements; and
- detecting any other compliance or accuracy issues.

For example, this will include:

Confirm the person's Forensic Procedure details are consistent with information provided by DAL, including Sample Barcode. Check that the Person Sample is not subject to destruction. If the sample is, or has been subject to destruction, immediately notify the Manager, FPIT.

This routine and thorough checking procedure is considered an adequate safeguard concerning the prevention of dissemination to operational police of DNA links constituting an identified victim profile.

1.2.3 NSWPF Forensic Procedures Implementation Team (FPIT) – Northern Territory and the National Criminal Investigation DNA Database (NCIDD)

Forensic Procedures Implementation Team (FPIT) policy/procedure in relation to dealing with the Northern Territory concerning re-identification of DNA links between New South Wales and the Northern Territory on the National Criminal Investigation DNA Database (NCIDD)

NSWPF neither allows the receipt, nor the dissemination to police, of information concerning NCIDD links that constitute a link with a victim person profile.

Northern Territory and New South Wales Ministerial Arrangement for the Transmission of DNA Information (20 February 2009)

The *Northern Territory and New South Wales Ministerial Arrangement for the Transmission of DNA Information (20 February 2009)*, facilitating the exchange of information following DNA links on NCIDD, contains the following provisions:

PART 2: EXCHANGE OF DNA INFORMATION

Clause 6: Matching Rules

Victims

- (5) Matching is not permitted where DNA Information in an index or a category is, or is derived from, a victim's profile. If a match is made on the NCIDD between a victim's profile and another DNA profile, and is notified to the respective parties, DNA Information relating to that match shall not be requested by either party nor shall DNA Information be transmitted.

Clause 11: Interpretation

- (1) In this Arrangement:
- (h) a "victim's profile" means:
- (a) a DNA profile known to have come from a victim of crime; or
- (b) a DNA profile derived from a crime scene and reasonably suspected to have come from a victim of the crime at that scene.

extract: Northern Territory and New South Wales Ministerial Arrangement for the Transmission of DNA Information (20 February 2009)

Northern Territory is the only Australian jurisdiction which does not differentiate victims from non-victims with regard to its upload of profiles to NCIDD. This practice therefore precludes NSW from differentiating victim from non-victim NT profiles that have linked with NSW profiles on NCIDD.

In order for NSWPF to ensure that NCIDD links comprising NT victims are not received, whilst at the same time allowing the receipt of NT non-victim links, the following procedures are in place in the NSWPF Forensic Procedures Implementation Team (FPIT):

- A specific *Northern Territory version* of the NCIDD inter-jurisdictional re-identification instrument has been developed and is utilised by FPIT to seek information from NT regarding NT profiles that have matched with NSW profiles on NCIDD. This special NT version of this instrument instructs NT:
 - (a) specifically to “not re-identify victim profiles”; and
 - (b) to specify unequivocally the nature of the profile from the following list
 - ☐ victim crime scene
 - ☐ victim person
 - ☐ person other than the victim
 - ☐ crime scene
 - ☐ limited purposes volunteer [state purpose]
- If, despite the above instructions, information concerning a victim profile link is received, FPIT officers will:
 - (1) note the occurrence in FPIT administrative systems;
 - (2) report the incident to the FPIT Manager; and
 - (3) **under no circumstances** disseminate to operational police the occurrence of, or any information constituting, that DNA link.

NSW Police Force response to Inquiry's Terms of Reference

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

NSWPF is of the opinion that further restrictions on the use of DNA material belonging to victims are undesirable and unnecessary.

NSWPF position is that sufficient protection is afforded victims who have the opportunity to come forward as a victim of crime, provide a reference sample, and have their profile excluded from any use.

NSWPF contends that any legislation restricting the use of victims' DNA would effectively provide perpetrators of crime with exemption from prosecution by virtue of their DNA profile having come to the attention of police as a result of a crime scene in which they will argue their involvement was as a victim, despite not having identified themselves as a victim at the time.

NSWPF therefore contends that further restrictions on the use of DNA material belonging to victims in the form of legislation:

- is neither appropriate nor desirable; and
- whilst attempting to protect victims, actually works against victims by precluding effective policing concerning the perpetrators of crimes against those victims.

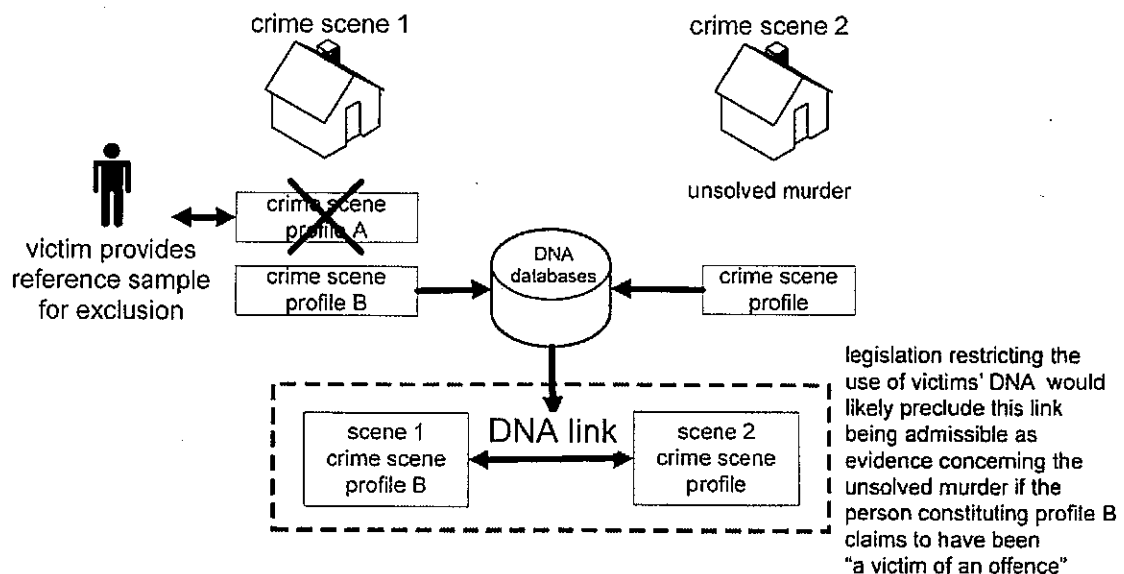
2.1 Legislation Problems: Inadmissibility of Victim Evidence

The actual effect of legislation restricting the use of victims' DNA is that evidence would be inadmissible in proceedings against a person if that person were to claim to have been a 'victim' in the incident from which their DNA was obtained –

- irrespective of whether that person was or was not in fact a victim in that incident, and
- despite that person not having identified themselves to police, or having being identified by police, as a victim in that incident at the time of the incident.

The status of whether a DNA sample at a crime scene belongs to somebody who argues they are or were a 'victim' would, as a result of legislation restricting the use of victims' DNA, likely be something that may be contested in court as a means of getting certain evidence excluded.

NSWPF argues that legislation restricting the use of victims' DNA, irrespective of any purported benefits it may provide to victims, would in fact almost certainly obstruct police in the inculcation of perpetrators of crime.



Example (see above diagram)

- Blood samples are collected from the crime scene (scene 1) and two different DNA profiles are derived (A and B).
- One involved person identifies himself to police as a victim, provides a reference sample which is identified as one of the two profiles found at the scene (profile A) and this profile is therefore excluded from any further use.
- The **remaining crime scene profile (B)** is uploaded to the DNA databases.
- Immediately, a scene-to-scene DNA link occurs between profile B and an unsolved murder (scene 2).
- Police use this link as *intelligence* to track down the person belonging to profile B in order to either inculcate or exculpate that person in relation to the unsolved murder (scene 2).

Regarding the above example, legislation restricting the use of victims' DNA would likely preclude such DNA evidence being used against that person in a court (to inculcate in relation to scene 2) if that person is identified as, or it is asserted that the person is, a victim of an offence through which the evidence was obtained.

All evidence derived from such DNA evidence, including confessions of guilt, would be inadmissible and potentially cause the case to be thrown out of court.

It is essential that investigating police be provided with all relevant information to be used as either intelligence or evidence in a court of law. This could be governed by use of court orders for major crime categories including terrorism, homicide, sexual assault etc where there is significant public interest in detecting and prosecuting the offenders.

NSWPF has internal procedures that prevent crime scene samples that are identified, or are reasonably suspected, as belonging to a victim from being passed on to investigators in the field (refer Section 1.2 of this document). NSWPF believes this is sufficient to meet the Government's policy of protecting victims.

NSWPF has previously advocated a compromise position whereby evidence from victims would be admissible "where a court deems it in the interests of justice".

This would ensure that police, who may have conducted investigations in good faith, with the belief that a sample is not from a victim, would still have the ability to prosecute, even if it was later proved not to be the case.

Police believe use of samples which may be found to belong to 'victims' may be appropriate in certain circumstances, such as cases of **major or serious crime**, subject to magistrate orders such as the interest of justice test.

Example

- bikie bashing murder at a major airport involving approx. 12 persons, some of whom (including the deceased) may be 'victims';
- crime scene DNA samples are collected and placed on the DNA database and link to other murders;
- legislation restricting the use of victims' DNA would preclude police using the DNA results as evidence in court, or as intelligence.

Any legislation which would cause evidence to be inadmissible in court if derived from a sample of material belonging to a victim would prevent the use of evidence derived from a forensic procedure carried out on a suspect if that suspect is also a victim in that or any other offence.

NSWPF wishes to emphasise that just because a person's DNA is found at a crime scene does not mean that the person is guilty of any crime; it is simply an indication that further investigation is required.

NSWPF would object to any proposed legislation that would 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.

This would be especially objectionable considering also the person's opportunity to have identified him/herself at the time of the event as a 'victim' including the provision of a reference sample in order that their profile is excluded from the matter (and, therefore, from any potential other matter resulting).

NSWPF position is that sufficient protection is afforded victims who have the opportunity to come forward as a victim of crime, provide a reference sample, and have their profile excluded from any use.

For a person involved in a crime scene whose blood is on the ground, and who has either fled the scene or, upon liaising with police, has refused to be identified as a victim and provide a reference sample for exclusion-only purposes, that person's DNA is considered by NSWPF as crime scene evidence that should be the subject of full and unfettered matching against all other crime.

In the case of 'major crime' investigations only, if that person is later identified as having been, or asserts to have been, a victim in the matter from which the profile was obtained, then the admissibility of that evidence should be able to be sought from a magistrate.

Any legislation which would cause evidence to be inadmissible in court if derived from a sample of material belonging to a victim would provide perpetrators of crime with exemption from prosecution by virtue of their DNA profile having come to the attention of police as a result of a crime scene in which they will argue their involvement was as a victim, despite not having identified themselves as a victim at the time.

NSWPF believes that, whilst supposedly serving the needs of victims, any such legislative restriction on the use of victims' DNA would actually work against victims by precluding effective policing concerning the perpetrators of crimes against those victims.

Furthermore, NSWPF makes the following points in relation to the use of victims' DNA both within New South Wales, and within other Australian Jurisdictions:

2.2 Use of Victims' DNA in NSW and other Australian jurisdictions

2.2.1 Use of Victims' DNA in New South Wales

NSWPF existing policy is:

- to not use DNA profiles belonging to identified victims for criminal investigation or uploading to DNA databases;
- to use DNA profiles belonging to identified victims only for the purposes of *exclusion* from criminal investigation.

In this regard, the introduction of legislation to further restrict the use of DNA material belonging to victims

- is unnecessary due to existing policy that is effective;
- is undesirable as such legislation would obstruct policing efforts to inculcate offenders of crime (as explained in Section 2.1 of this document).

2.2.2 Use of Victims' DNA in other Australian jurisdictions

NSWPF acknowledges that some other Australian jurisdictions' policy concerning the use of victims' DNA differs significantly from that of New South Wales.

NSWPF has in place adequate policy and procedure that prevents dissemination to operational police of DNA links constituting a match with an identified victim, including specific procedures in relation to dealing with other Australian jurisdictions (such as Northern Territory) with regard to re-identification of inter-jurisdictional DNA links through the National Criminal Investigation DNA Database (NCIDD) - *refer Sections 1.2.2 – 1.2.3 of this document*.

As such, the introduction of legislation to further restrict the use of DNA material belonging to victims

- is unnecessary due to existing policy that is effective;
- is undesirable as such legislation would obstruct policing efforts to inculcate offenders of crime (as explained in Section 2.1 of this document).

– end of submission –