

INQUIRY INTO THE USE OF VICTIMS' DNA

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NSW HEALTH SUPPLEMENTARY SUBMISSION

To the
**LEGISLATIVE COUNCIL STANDING COMMITTEE ON LAW AND
JUSTICE**

INQUIRY INTO THE USE OF VICTIMS' DNA

<NOVEMBER 2009>

SUPPLEMENTARY SUBMISSION TO THE STANDING COMMITTEE

NSW Health's supplementary submission to the Standing Committee on Law and Justice is in response to comments provided by NSW Police Force in their answers to Questions on Notice.

QUESTION 4:

Question 4 asked Police to provide reasoning behind their proposal to remove the NSW DNA database and only use the national DNA database. The Police responses are noted below in blue with comments from NSW Health underneath.

Currently, NSW DNA profiles are stored and maintained twice.

NCIDD is a search engine. It searches one profile against another, so regardless if NCIDD is used instead of NSW as a search engine, data will still be stored on both NSW and NCIDD. The NSW Database holds all the other data such as the required auditable information including continuity of profile generation and all the corresponding identifying information. The NSW DNA database is a laboratory information system that controls, documents and stores the processes and results to acquire a profile. NCIDD stores the resulting profile and matches one against the other.

The NSW DNA Database does a lot more than the function of NCIDD. NCIDD cannot replace the NSW DNA Database system; what it can do is to replace a very small part and that is to match the resulting profiles that the NSW DNA Database exports to NCIDD.

Maintenance of the NSW DNA Database has to be done regardless of which matching engine NSW, NCIDD or both is used. NCIDD maintenance by NSW is automated. When an action is done on the NSW DNA Database this is conveyed to NCIDD via NCIDD control files created by DAL.

It must be stressed that most matching does not occur on the NSW or NCIDD database. Most profiles exist within the DAL LIMS and only uploadable profiles are loaded to NSW and NCIDD. All other matching occurs within case.

Regardless of the decision, profile storage and maintenance will not be changed if NCIDD does all the matching; profiles will still be stored on both systems.

Requests by NSWPF for DNA profile retentions and destructions have to be processed by NSW Health's Division of Analytical Laboratories (DAL) against the NSW DNA Database, and then effected on NCIDD after a communication between DAL and NCIDD.

Understanding of retention and deletion is important. Deletion for example is not just a process of deleting the matching profile but the deletion of all information to prevent the profile being re-constructed or re-identified so numerous activities occur for deletion and retentions. To this degree the assumption that deletion and retention will occur only on NCIDD is a false premise. If NCIDD is used for matching the retention and deletion process would still need to be applied to NSW DNA Database first.

Further all requests for retentions and destructions are automatically conveyed to NCIDD from the NSW system. There is no person involvement in the process.

Notwithstanding Police's belief, suspect person samples will not be allowed to remain on the database (NSW or NCIDD) once one year has elapsed from date of collection unless there has been official notification of extension or the CE of SWAHS as the responsible person decides otherwise.

This is costly, inefficient and prone to data integrity problems which

- o undermine the quality of DNA links reported to NSWPF, and
- o undermine compliance with destruction and retention legislation.

Cost is irrelevant to the process as NCIDD is a matching engine that may or may not be used and NSW database would still need to exist. It has no bearing on efficiency as both have to exist and complement each other. Data integrity is not altered by where or who does what matching.

Again to repeat NCIDD is only a matching engine and NSW DNA Database is the structure that manages, controls, documents and produces, manages and reports the profiles. The quality of DNA link reporting is not undermined. The only issue with the compliance with retention and destruction was that Police were not supplying accurate data to DAL and not supplying destruction or retention information in the appropriate time-frame. It appears that the Police do not understand what the NSW DNA Database does and the small part NCIDD plays in DNA Profiling in NSW.

DAL is burdened by administrative and reporting processes which would be eliminated by a single instance of DNA Profiles.

NCIDD is a matching engine and stores a final profile. The NSW DNA Database is more than just a matching engine and as such several occurrences of the profile will exist within the LIMS. To class the administration and reporting as a burden is misleading. They are just activities that have to occur, whether it is local or NCIDD or both. At present DAL could provide a single administration team to report all links whether interstate or intrastate but it is NSW Police who have requested they be kept separate.

Efficiencies and data integrity would be greatly improved.

NCIDD could compliment the NSW DNA Database by doing all matching; this is but a very small activity in the day to day running of the NSW DNA Database. The NSW DNA Database has to provide all the functionality to provide the profile then it has to perform all the activities relating to managing the links and control the process of reporting. There would be no increase to efficiencies and data integrity if NCIDD was used as all data is transferred electronically from NSW to NCIDD without any human intervention. So data supplied to DAL by NSW Police that is incorrect will be incorrect on NSW database and incorrect on NCIDD and if correct will be correct on both databases.

Proposal is consistent with the preferred Queensland model (i.e. the jurisdiction uses NCIDD for both intra- and inter-jurisdictional DNA matching).

Queensland does use NCIDD for DNA Matching but they have spent a large amount of time and money on a LIMS system that is equivalent to the NSW DNA Database. The matching is a small part of a DNA Database; NCIDD has an advantage that it connects all states for inter-jurisdictional matching. The adoption of NCIDD for all DNA matching will not reduce the activities or complexity of the NSW DNA Database. It adds an extra activity that requires management and control within the whole process of managing the whole NSW DNA Database. All states maintain the equivalent of the NSW DNA Database and these all feed profiles to NCIDD. It is only Qld that uses NCIDD as their matching engine for both interstate and intrastate matching.

The premise that if you change or destroy the profile on NCIDD negates the responsibility to manage the state database that produced the profile in the first place is misleading and short sighted. NCIDD cannot replace the state databases but works in conjunction. The management and control of state databases still continues regardless of NCIDD and to neglect the State database on the premise that NCIDD does the matching is a threat to integrity, efficiency and undermines the NSW DNA Database.

QUESTION 11B:

Question 11 (b) seeks a view from Police on a suitable legislative provision that eliminates potential loopholes for offenders to have evidence deemed inadmissible. For example, in the case of a crime scene profile recovered from crime A having been 'cold' matched to crime scene B, the evidence in relation to crime scene B being inadmissible if the alleged offender were to claim or be proved to be the victim in crime scene A.

There are several potential views and options to respond to this, including those put forward by contributors to this public hearing. Options include legislative provisions that either regulate what can be matched, or determine the admissibility of evidence derived from matching; (refer for example the Attorney General Submission #8:

<http://www.parliament.nsw.gov.au/Prod/parliament/committee.nsf/V3ListSubmissions?open&ParentUNID=F25B0C94F637C375CA2575ED0022C30F>).

The comments provided in the Police response to 11 (b) does not address appropriate legislative reform, other than to say that legislation must not provide a loophole to offenders. Police do propose however changes to current policy and practice in DNA services provided by DAL, NSW Health.

It is unclear how this response addresses the issues involved:

11 (b) Can you see a way to have legislation to protect victims' DNA that does not provide a loophole for offenders?

There appears to be little or no relevance between these comments and the issues pertaining to the terms of reference for the enquiry. Several things might be inferred:

- ❖ That the need for protection of victim DNA relates to privacy and/or information security concerns in providing DAL with identifiers for DNA sample submissions, rather than the discouragement of victim crime reporting;

- ❖ That DAL policies and procedures somehow plays a fundamental role in unnecessary/erroneous inculpation of victims in criminal investigations;
- ❖ That by having access to identified information, DAL practices provide protection to offenders;
- ❖ That DAL/NSW Health practices and policies in the management of DNA are in breach of privacy and information security provisions.

NSW Health are unaware of any relevant incidents that would provide justification for such views. It should be noted that this 'De-identification' proposal of police is also currently under discussion between Health and Police as a police objective in the development of the Police Forensic Information Management System (FIMS) project. The reasoning for a de-identified approach in that project is no clearer to NSW Health than the response to 11(b). There is disagreement between the two agencies in FIMS development over the need and effects of de-identification in the short term, and a clear position of NSW Health exists over the risks and concerns in adopting this approach. It is believed by NSW Health that adequate planning and consideration is required for the entire DNA management regime among state, national and increasingly international environments. NSW Health believes that the issues raised through the enquiry submissions highlight the need for careful consideration of change

QUESTION 18:

In their response to a proposal by the Homicide Victims Support Group (Submission 7, page 3) NSW Police Force reference a category of *Excluded Volunteer (Unlimited Purposes)*. The response implies that victims can consent to their victim's sample being matched against the DNA database.

The fact is that there is no provision within the legislation that allows for excluded volunteers to be matched on the DNA database, and there is **no** such category of *Excluded Volunteer (Unlimited Purposes)*.

The information sheet provided by NSW Police Force to victims consenting to a forensic procedure states that "...Your DNA profile will only be used for the purpose of investigating the offence committed against you and evidence in relation to the profile may be used in Court in proceedings against the alleged offender in connection with that offence...".

NSW Health would like to be clear that DAL do not upload *Excluded Volunteer* samples to the DNA database.