

REPORT OF PROCEEDINGS BEFORE

STANDING COMMITTEE ON LAW AND JUSTICE

INQUIRY INTO THE USE OF VICTIMS' DNA

At Sydney on Friday 25 September 2009

The Committee met at 9.30 a.m.

PRESENT

The Hon. C. M. Robertson (Chair)

The Hon. J. G. Ajaka

The Hon. D. J. Clarke

The Hon. G. J. Donnelly

Ms S. P. Hale

CHAIR: Welcome to the first hearing of the Law and Justice Committee's inquiry into the use of victims' DNA. This is a complex area of inquiry and the level of detail and the submissions to the Committee has demonstrated its complexity. The Committee is keen to find a way to protect the use of victims' DNA that meets community expectation and finds the appropriate balance between the rights of victims and the need for law enforcement. Today's public hearing will provide us with further evidence to use in reaching our recommendations on this important issue.

This morning we will hear evidence from representatives from the Department of Justice and Attorney General, the Forensic Services Group of the New South Wales Police Force and the Criminalistics Division of Analytical Laboratories. Later today the Committee will hear evidence from the Law Society of New South Wales, the Homicide Victims Support Group and the New South Wales Council of Civil Liberties. Before we commence, I make some comments about aspects of the hearing. The broadcasting guidelines relate to photographing and confidentiality, and the media being responsible for what they broadcast. The instructions are at the table, if required. Also, any messages from attendees in the public gallery should be delivered through the attendants or committee clerks.

Committee hearings are not intended to provide a forum for people to make adverse reflections about others. The protection afforded to Committee witnesses under parliamentary privilege should not be abused during these hearings. Therefore, I request witnesses avoid the mention of other individuals unless it is absolutely essential to address the terms of reference. Please make sure mobile phones are turned off.

BRENDAN JAMES THOMAS, Assistant Director General, Crime Prevention and Community Programs, Department of Justice and Attorney General, sworn and examined, and

PENNY MUSGRAVE, Director, Criminal Law Review, Department of Justice and Attorney General, affirmed and examined

CHAIR: Are you conversant with the terms of reference to this inquiry?

Mr THOMAS: We are.

Ms MUSGRAVE: I am.

CHAIR: If you consider at any stage that certain evidence you wish to give or documents you may wish to tender should be seen or heard only by the Committee, please indicate that fact and the Committee will consider your request. If you take any questions on notice, the Committee would appreciate if the response to those questions could be forwarded to the secretariat by Friday 16 October. Due to the length and complexity of the questions, there will be quite a few. We recognise the difficulty in the three-week time frame so please confer with the secretariat before the 16 October if that proves to be difficult.

Mr THOMAS: Sure.

CHAIR: Would either or both of you like to make a short opening statement?

Mr THOMAS: No.

Ms MUSGRAVE: No.

CHAIR: Then I will start with formal questions. The Committee would like to understand how significant an issue the use of victims' DNA is for the people of New South Wales and what can you tell us about the prevalence of instances of people whose DNA was taken as a victim and subsequently matched to another crime in which they were an offender? Has it happened?

Mr THOMAS: The second part of the question, I think, is probably directed towards the police. I do not know that we know the answer to that, do we?

Ms MUSGRAVE: In terms of numbers, we do not have that material, and I suspect that both Health and Police would be in a position to inform the Committee. In terms of significance generally of DNA, it does

have the ability to create a cold hit, which means that you might be able to identify someone where previously no other evidence was available. So in terms of the significance of a DNA hit, it is high.

Mr THOMAS: Yes, and the significance, I suppose, is high irrespective of the number. If you have the victim of an offence's DNA used to prosecute them for a future offence, even if it is only one individual, the significance of that could be quite important in terms of the likelihood of future victims coming forward to report offences or prosecution in general. I do not know that the significance and the number are necessarily always interrelated.

The Hon. GREG DONNELLY: When you say "high", it would be high to the extent that there was some automaticity operating, which would cross-reference; in other words, if information was being stored in silo separately, you would not necessarily have the crossover, would you, to do the matching?

Ms MUSGRAVE: That is right.

Mr THOMAS: That is right.

Ms MUSGRAVE: It is the match that is significant.

The Hon. GREG DONNELLY: The database on which this information is stored?

Mr THOMAS: That is right.

Ms MUSGRAVE: There are a couple of factors there. It is the match that is significant and the fact that the mechanism is there to do that, but also the strength of the DNA evidence itself. It is highly persuasive evidence.

CHAIR: Can you also provide the Committee with a short description of the history of regulating DNA and, in particular, victims' DNA?

Ms MUSGRAVE: I will take that question. The history goes back some time. It goes back to 1994 where the Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General circulated drafts of a model forensics bill. That was endorsed in July 1995 by the Standing Committee of Attorneys-General and a discussion paper entitled "Model Forensic Procedures Bill and Proposed National DNA Database" was released in May 1999. That followed some consultation with the Office of the Commonwealth Privacy Commissioner and a working group of the Commissioners of Police. Understandably, it was a fairly complex area and that step was undertaken. In February 2000, a final model bill was settled on, which set out a comprehensive legislative regime for dealing with forensic procedures and for a DNA database. That was released by the Commonwealth. The New South Wales Act that we now have is largely based on that model bill.

In 2002, there were amendments to the Act in New South Wales where a large class of victims was taken out of the purview of the Act. The reasons behind that were set out in the second reading speech in 2002. The victims that were taken out were titled "excluded victims", and they were taken out largely because victims of personal violence offences and those involved in a robbery were seen as not being victims who should be subject to the same procedures that were set out in the Act. There were also very significant administrative burdens on the police involved in taking samples from that group in that way. At that time the victims' protocol, which is appended to the Department of Justice and Attorney General's submission, was developed in consultation between the Attorney General and police and, in certain parts, with Health. That is a very brief summary of where we are at the moment.

CHAIR: New South Wales adopted the Commonwealth guidelines but is it the only State in your knowledge that has put the issues of the 2002 amendment?

Ms MUSGRAVE: Tasmania, New South Wales and South Australia are in line in terms of adopting the model code. The Northern Territory and Queensland are a little different. As to whether that first group of jurisdictions—Tasmania and South Australia—have adopted the excluded volunteer provision, I will have to take that on notice and get back to the Committee.

The Hon. DAVID CLARKE: Thank you for coming today. I have a general question. Say there is a situation where the victim supplies DNA to assist in finding the offender. Why should that victim's DNA then be put onto a general index, where it could possibly be used against that victim down the track, when there is not a general index for the entire population? Why should we allow that to happen?

Ms MUSGRAVE: It might assist if I outline briefly how a victim's sample is taken. Essentially, the way samples are obtained in New South Wales is from a person or from a crime scene. I think your question relates to taking a sample from a person.

The Hon. DAVID CLARKE: No, it could relate to the other situation. It could be a sample taken from the scene of the crime and then stored in a general index as well. It could be either situation.

Ms MUSGRAVE: The two situations are probably easiest looked at separately because in the first situation, where a sample is taken from a person, there is a procedure set out in the Act under which the consent of the victim is sought and that person can consent to the sample going on the database for a limited purpose or an unlimited purpose. When they do that they are advised of the repercussions. They are told it will go on the DNA database and that it might be used in evidence in the proceedings in which they are a victim or in proceedings generally. Those procedures were reviewed in the Ombudsman's review and as far as the Department of Justice and Attorney General understands, there is no significant difficulty with those processes.

It is quite a different situation where the sample is being taken from a crime scene, for example. As the department understands it, if the sample is known to come from a victim there are procedures in place with police for that to be taken off the DNA database. That is the practice. If the sample is reasonably suspected of having come from a victim, because police have not been able to get the victim's sample and get a reference sample and match it to positively identify it as a victim's sample, that is also taken off the database. That means the possibility of going onto the database for an unlimited purpose applies only to unidentified victims' samples taken from a crime scene. If you go down through the tiers of victims, it is only when you have not been able to positively identify it or reasonably suspect that it is the victim's sample at the crime scene that it might go on the database.

The Hon. DAVID CLARKE: So you are not suggesting that a victim's DNA automatically go onto a general index for the future solving of crimes?

Ms MUSGRAVE: That is not being suggested. The existing practices and procedures are working effectively. The issue is really with that small group of unidentified victims' crime scene samples, which are not covered by the legislation, policy or procedure. They are there for an unlimited purpose. If someone is subsequently identified as that victim they do not have any of the protections.

The Hon. DAVID CLARKE: Just to clarify this, are you saying the issue is about the DNA that has not been classified because it is not known whether it is the victim's or the offender's? The question is whether that should go into a general index. What happens if the crime is subsequently solved? What happens to that DNA then?

Ms MUSGRAVE: If I could take it one step back. That DNA will go onto the database, unless it is identified as a victim or reasonably suspected as being a victim. That does now go on the database.

The Hon. JOHN AJAKA: My understanding is that if the victim is identified, it then goes into the category of "identified" and the victim is given the choice of either leaving the DNA there or removing it. Is that correct?

Ms MUSGRAVE: That is correct. The difficulty occurs if in that window where it has not been identified the match comes through and that person is identified as someone who has committed an offence. And that is compounded by the fact that that might be a victim in New South Wales who has committed a crime here or in another State or a victim who has been uploaded in another State and is identified as having committed a crime in New South Wales.

The Hon. DAVID CLARKE: When you speak about "unidentified", is that for DNA taken from the scene of a crime?

Ms MUSGRAVE: I am using that as a term to identify that category of sample taken from the scene of a crime. It is an unidentified victim sample taken from the crime scene, and it can be subsequently identified as a victim. It would then be dealt with as a victim's sample.

The Hon. JOHN AJAKA: May I go back to your first category, where the victim voluntarily provides DNA. Let us assume the victim says, "Yes, I want it. It can go on the register for ever." Is there a procedure for the victim if in a year or two they change their mind and decide to have the DNA removed and destroyed?

Ms MUSGRAVE: My understanding is that there is a legislative regime for it to be withdrawn, but I would like to confirm that.

The Hon. JOHN AJAKA: If you could take that on notice, we would be grateful.

Ms MUSGRAVE: I will, and I will provide the statutory provision for that to happen.

The Hon. DAVID CLARKE: It would seem reasonable that they should have the right to withdraw it, would it not?

Ms MUSGRAVE: If they are consistent with their control of their sample, yes.

The Hon. DAVID CLARKE: If that provision is not there now, it would be a concern?

Ms MUSGRAVE: I will take that on notice and confirm that the provision is there.

The Hon. JOHN AJAKA: Do you feel comfortable that the victims are given the appropriate advice, noting that victims at the time they are making this decision in many cases have just been involved in a traumatic and horrific experience?

Ms MUSGRAVE: The warnings, I can say, were looked at extensively when the legislation was introduced, and it is a fairly lengthy set of notifications that has to be given to a witness. It was reviewed by the Ombudsman. One of the things the Ombudsman identified was that victims needed to be told that if it was going on for an unlimited purpose, it might be used against them, and that amendment has been introduced in the House and is currently before the Parliament. There is an additional protection in the Act, which is that if the procedures have not been followed for the volunteers under the Act, that evidence cannot be admitted unless its probative value outweighs the prejudice of admitting it. That is under section 82 of the Act. So there are very detailed warnings. In addition to that, there is a legislative prohibition on the admission of that evidence if that procedure is not followed.

The Hon. JOHN AJAKA: Should there be a situation, for example, where a victim's consent should not be sought the very first time they are seen, so that a period of time elapses to ensure that they are seen a second or third time? I can imagine the state of mind of a victim on the very first day.

Ms MUSGRAVE: I suspect the police might be in a better position to answer that, because there is no statutory requirement as to when the sample has to be taken.

Mr THOMAS: Some of those things might have a time factor—for example, if you are dealing with a rape victim.

The Hon. JOHN AJAKA: I understand that. I am talking about the aspect of it possibly going on for ever, as opposed to saying, "Let's use it now. We will only use it now, and then we will approach you in another month or two to see if you want to leave it on." I was thinking of it more in that context.

Ms MUSGRAVE: Police have standard operating procedures in relation to the taking of samples, so I suspect they will be in a better position to speak about that.

Ms SYLVIA HALE: I am looking at a submission from another person to this inquiry. The person has a number of concerns about when a victim's DNA is uploaded. They question whether that is always a necessary procedure to be undertaken, and whether it should be a procedure that only takes place when all other avenues of identifying the victim's DNA have been exhausted. It may be more useful if I read from the person's submission:

One should not lose sight of the fact that a victim or volunteer provides an elimination sample to assist police with their investigation. In many cases, biologists can determine, even without an elimination sample, which profile from the crime scene originated from the victim. In these situations, there is no legitimate reason for the victim's or volunteer's profile to be up-loaded to the crime scene index.

I would like your comment on that. Are there any precautions where you can obtain the victim's DNA, and any procedures whereby, if you can obtain the victim's DNA, you then do not proceed to upload the volunteer's DNA? The submission continues:

In those situations where it cannot be readily determined which crime scene profiles, if any, originated from the victim or volunteer, an elimination sample should be obtained by police. In this regard, it is unethical for police to delay the obtaining of an elimination sample from the victim or volunteer for the sole purpose of being able to upload the "unknown" crime scene profile to the crime scene index.

The question that has been raised there is whether these processes can be undermined by deliberate delay or by ignoring the options of other methods of obtaining DNA. Do you have any comment on that?

Mr THOMAS: On the technical side of that, in terms of what biologists can and cannot do with DNA, I do not know that we can answer that. I do not know that we actually know the answer to that question. I think that is probably better directed towards health, or someone who deals with that side of things. The idea of a victim voluntarily giving DNA is largely for an exclusionary purpose, so that police and other investigators can exclude their DNA from the samples they are looking at so that they can more readily and easily identify who may potentially be an offender. You have to remember that the DNA is advanced fingerprints: it points people in the right investigative direction. It is not necessarily evidence against a person in itself. In terms of whether that can be got in another biological format, I honestly do not know the answer to that.

Ms MUSGRAVE: And I do not think we are in a position to assist on the investigative decisions that police take at the time they are at the crime scene and are confronted by the variety of samples and questions of timing come up. The statutory framework does not dictate that. But the police would be able to assist the Committee, I think, on the decisions and collection procedures they have.

Ms SYLVIA HALE: I assume that what we are largely concerned about is encouraging victims to come forward in order that the perpetrator of the crime might be identified, and not setting up a regime whereby apprehension as to how that DNA will be used will discourage those victims coming forward. It seems to me that in the submission I have referred to there is a genuine concern that delay on the part of the police to obtain those elimination of samples may be used in order to allow the police to upload DNA unnecessarily and crossmatch it against what is on their code. Is it possible to incorporate any safeguards, do you think?

Ms MUSGRAVE: It would be possible to legislate to provide timeframes and safeguards around taking a reference sample from a victim and uploading it onto the database, but as to how that could be done I would not be able to answer now because there is the tension you have touched on today about the time at which you take a reference sample from a victim who has been through a traumatic process. I am very limited to the extent I can assist in responding.

The Hon. GREG DONNELLY: My question flows from some of the language contained in the terms of reference. I make the concession that I am not trained in biology either and I do not have any particular scientific insights into this other than just general reading and understanding. If he cannot answer my question please say so. The actual phrase "DNA material", does that have a particular meaning in the policies, procedures and practices that are used and utilised in this State? Are we actually talking about a specific identifiable?

Mr THOMAS: From what I understand it does. I am just looking for the definition.

The Hon. GREG DONNELLY: I am not meaning to put on the spot. It is just that DNA is used all the time as a generic term. I am wondering whether when we refer to DNA material that we all understand precisely what that means and if it has a specific meaning, particularly in terms of the criminal law of this State?

Ms MUSGRAVE: I can provide a specific response and take that on notice.

The Hon. GREG DONNELLY: Take it on notice, thank you.

Ms MUSGRAVE: In terms of this morning's discussion though it has to be remembered that forensic material is a much larger category. So it might be the whole range of fingerprints, castings, photographs and bodily samples. DNA material is something that you can get DNA from.

The Hon. GREG DONNELLY: Hypothetically, can we say semen or a piece of hair or a blood sample?

Mr THOMAS: There is a definition.

The Hon. GREG DONNELLY: If not too long would you mind reading it out?

Mr THOMAS: It is a ribbon of cells essentially. It is deoxyribonucleic acid or DNA.

Ms MUSGRAVE: It is the material you can derive the DNA from. It is the limited class of those materials.

Mr THOMAS: It is set essentially a string of cells and the pattern in those cells.

The Hon. GREG DONNELLY: Following on from that. As science is progressing forward, as I understand it, there is speculation—I know it is speculation at this early stage but at the rate at which science is developing we might know sooner rather than later—that through DNA it may well become the case that we will understand not just about the biology of the owner of that DNA but perhaps the behavioural aspects of that person. Hypothetically, let us assume in five or ten years time science gets us to the point that through understanding our human DNA it is established that there is a reasonable probability, or some form of probability, that a person may have a particular disposition towards criminal behaviour, for example. The fact that DNA may ultimately prove to be a prism through which we understand human behaviour, as opposed to straight biology, does that not raise issues about maintaining information about people?

Ms MUSGRAVE: I think the Act that we currently have reflects the concerns about DNA and the initial concern of taking a sample from a person that has a very clear identifier in it. We do have a very complex piece of legislation that sets up a series of safeguards. There is the capacity to respond to advances in science to introduce even further safeguards.

The Hon. GREG DONNELLY: That is in the Act itself, is it?

Ms MUSGRAVE: The safeguards in relation to how DNA is dealt with, who has access to it, the fact that there is a responsible person in Health overseeing the storage of the samples and the information that is gleaned from it, is well structured and regulated in the Act. The Act has the capacity to respond to advances in science. It also has to be remembered, that the sample itself is held in one place and then when you are talking about the DNA matching table that is information derived from the sample that sits on the matching table. Ultimately, you are looking at admissibility in a court of law against a perpetrator or, in the discussion we are having, potentially against the victim himself or herself.

The Hon. GREG DONNELLY: The point I was getting at was that in perhaps 10, 20, 30, 40 or 50 years time, maybe 100 years time, when we know a lot more about DNA and the door into which it really reveals who we are as human beings, in setting up legislative frameworks to utilise DNA I have some reservations to make sure we do not put something in place which we might regret later on. The other thing I wanted to quiz you about was the actual phrase "victims of crime". I know this is a bit of a stark example, and a bit stomach wrenching, parties happen over weekends that teenagers attend—there will be a number of such parties this weekend—and sadly in some instances people get off their faces on drug and alcohol and a number of young women end up in hospital emergency departments. You hear this time and time again from people who work in those emergency departments. Those people may have been subject to sexual assault of one form or another, perhaps rape or otherwise.

When they end up in the emergency departments they are usually under the influence of drugs or alcohol and it is very hard for the attending people looking after those persons to establish whether or not there has been any criminality associated with what has happened. The person has turned up with no obvious physical marks to indicate they have been beaten up or knocked around, but obviously they are in a bad way and there may be some suspicion that something has happened. In that instance do we call those people a victim of crime or a potential victim of crime? What I am getting at is, when those people are being looked after in those

circumstances there is DNA everywhere. Is DNA taken from people in those sorts of circumstances that may be a victim of crime? If that is the case, is that DNA being maintained somewhere?

Mr THOMAS: You are talking about DNA that is collected for general medical purposes, and if someone is being treated medically and cells and blood and everything else is collected for blood tests and so forth, I do not know that any of that material is linked to any of the material that we are talking about for these purposes.

The Hon. GREG DONNELLY: Because that is away from the site where the crime may have occurred?

Ms MUSGRAVE: That would be dealt with under the regime of taking the sample from a person either through a form of consent from a victim under the Act or in that circumstance, where they are a victim of violence, they would be an excluded volunteer and they would be dealt with in accordance with the victim's profile that is annexed to the Attorney General's submission.

The Hon. GREG DONNELLY: What does that mean?

Ms MUSGRAVE: Essentially the Act has set up a regime for getting samples from victims. It was decided if they were a victim of personal violence or robbery then they should be taken out of the purview of the Act and that is dealt with in accordance with the victim's protocol. It is an agreed upon understanding as to how it should be taken and it excludes things like electronically recording the taking of the sample and such things. There are two regimes governing the taking of bodily samples from volunteers.

The Hon. GREG DONNELLY: In the context of our reflection here, the person in the emergency department is then taken out to a general ward and as that person was recovering she recalled there may well have been some criminality associated with what had happened to her, would a call then be made to the police and the police would attend and conduct an interview—is that likely to occur?

Ms MUSGRAVE: Yes. The police will be able to assist further on this but there are sexual assault kits that are used for victims of sexual offences. Again, there are standard operating procedures for police for those circumstances.

The Hon. GREG DONNELLY: You have mentioned the phrase "policies, procedures and practices" a couple of times this morning. I want to make sure we have the full range of things. There are policies, procedures, practices but are there guidelines as well that we should be aware of? Obviously there is legislation and regulation.

Ms MUSGRAVE: Very briefly, there are two categories. There are volunteers who are dealt with under the legislation and there are excluded volunteers who are dealt with under the victims' protocol. Both of those also are governed by the police standard operating procedures in relation to the taking of victims' DNA.

The Hon. GREG DONNELLY: That is a procedure followed statewide by the New South Wales Police Force?

Ms MUSGRAVE: That is correct. The Police will be able to tell you further about that. On the other hand, victims' samples taken from a crime scene are not dealt with under the Act. They are subject to policies and procedures that are in place in Police and Health where if a sample is known to come from a victim it is not uploaded onto the database. That is a policy decision.

Ms SYLVIA HALE: We have just received a copy of a submission from Dr Jeremy Gans of the University of Melbourne this morning. In his submission he makes fairly detailed criticisms of the Crimes (Forensic Procedures) Act 2000, in particular, sections 76 and 76A. Could you provide to the Committee from your perspective a response to the criticisms that he has made? I confess that I am not familiar with those sections. Dr Gans seems to suggest that it is unnecessary on many occasions to upload a victim's DNA, that there is a failure to protect the victim's samples being introduced into evidence when perhaps they should not be and that they may be introduced because the legislative protections are not in place. I would very much appreciate your response.

Ms MUSGRAVE: I can take that on notice, certainly.

CHAIR: We will proceed with formal questions, many of which we expect you will take on notice. I note that the answers to questions on notice are as important as the submission process and will assist in creating the whole picture for the Committee's deliberations. They will be available on the website. Are you aware of any other Australian jurisdictions examining the issue of how best to deal with victims' DNA? Are there any international jurisdictions the Committee could look at when examining this issue?

Ms MUSGRAVE: I am not aware of any jurisdictions currently looking at the issue of victims' DNA, which we are looking at this morning. In the time available, we have been able to identify that Canada has a provision dealing with victims' DNA. I am happy to take the question on notice and provide a written outline about that piece of legislation and any other we can locate.

CHAIR: Recognising that this is a question outside your responsibility, have any other countries had to deal with this issue?

Ms MUSGRAVE: In the time we have had available we were not able to pick up on any extensive literature about it. We can continue that exercise and get back to the Committee.

CHAIR: I asked that question because from what we see on television about other countries, DNA is suddenly the property of the world.

Ms MUSGRAVE: I understand why the question arises. I am not sure what the answer is. We will get back to the Committee on that.

CHAIR: We will need to look into it because the public perception of the use of DNA could be different to the legal and actual use.

Mr THOMAS: I think you are probably right.

CHAIR: But we do not know. Various submissions have been provided to the Committee with comments on current policies, procedures and practices to protect DNA material belonging to victims. You have outlined that you perceive there are good policies. Would you tell us your view on the adequacy of the current practices and any possible issues and problems with the current practices that have been brought to your attention? That may be a leading question. We want to understand why we are looking at this issue at this time.

Ms MUSGRAVE: If I can say very briefly, the issue falls on that limited class of samples taken from unidentified victims from a crime scene because there are not practices, policies or legislation in place in relation to that small class of samples from the time they are unidentified up until the time they are identified.

CHAIR: The DNA is not identified but the victims are identified, because the crime scene has been notified as a crime scene.

Ms MUSGRAVE: That is right.

CHAIR: Therefore, one perceives, the victims of the crime have been notified because it has become a crime scene. When DNA samples are collected from the crime scene, is there a reason why the victims who have already come forward cannot be excluded?

Ms MUSGRAVE: As I understand it, police endeavour to get reference samples. So if the victim is identified and cooperative, then they might have the reference sample and the sample can be identified. If, however, the victim is uncooperative—say, for example, a sexual assault in a domestic violence environment—and they cannot get a reference sample and they do not have a known reference sample which Health could match to the crime scene sample, they will have an unidentified victim sample.

The Hon. DAVID CLARKE: Can you give us a specific example of an unidentified victims DNA situation?

Ms MUSGRAVE: In practice?

The Hon. DAVID CLARKE: Yes.

Ms MUSGRAVE: No, I cannot. Do you mean theoretical?

The Hon. DAVID CLARKE: Yes.

Ms MUSGRAVE: A theoretical situation would be a sexual assault in a domestic violence situation where the victim or neighbours have notified police but the victim is uncooperative and does not want to give a victim sample.

The Hon. DAVID CLARKE: The police then go and investigate and they find a sample themselves?

Ms MUSGRAVE: Yes, or it may be that there is an assault and someone is bleeding or there are mixed blood samples on the floor. Again, the victim or multiple victims of that assault are uncooperative and will not give reference samples.

Mr THOMAS: Or they have left and you do not know who they are.

The Hon. DAVID CLARKE: It is that the narrow range of DNA samples we are talking about as the core reason why we are here today?

Ms MUSGRAVE: Yes.

The Hon. GREG DONNELLY: Ms Musgrave, you made an earlier comment about New South Wales Health. What is the procedure whereby New South Wales Health is involved in the maintenance of DNA records?

Ms MUSGRAVE: New South Wales Health will be able to give you details about that. They manage the database; they are the ones responsible for it.

CHAIR: You have several questions on notice. We will send them to you. Thank you for your evidence this morning; it is very useful.

(The witnesses withdrew)

JEFF EMERY, Commander, Forensic Information Management, Forensic Services Group, New South Wales Police Force, sworn and examined:

CHAIR: Thank you very much for coming along to the first day of hearings on this very, very complex inquiry. We know you will be giving us a lot of very interesting information. I have gone through the processes for the restrictions on our hearings already so I will not waste your time with that, including broadcasting guidelines, any messages that people might want to give us, and adverse mention—which you would already know about. I very much welcome you. Are you conversant with the terms of reference?

Mr EMERY: Yes, I am.

CHAIR: If you should consider at any stage that the evidence you wish to give or documents you may wish to tender should be heard or seen only by the Committee, please indicate that fact and the Committee will consider your request. If you take questions on notice—and judging by the huge list of questions we have for you that it is quite possible—we are making the time for answers to those questions 21 days, which will be 16 October. But if there is an issue you can contact the secretariat, who will be contacting you with any extra questions that are taken on notice during the hearing today. Would you like to start by making a statement?

Mr EMERY: Just briefly. I have been in New South Wales police about 27 years. The majority of the work I have been involved in is about developing strategies and a lot around victims support. I managed the missing persons area for about 15 years and developed a number of community awareness programs. Also, I have been instrumental in disaster victim identification and providing support services to families of missing persons. I have been responsible for the ante-mortem record collection. I provided support in East Timor back in 2000 for the United Nations at the request of the Premier's office, and that was about identifying victims through DNA.

I was also involved in establishing the world's largest information management centre in the tsunami in Thailand in 2005, and that was about using a range of forensic evidence to identify the over 5,500 victims. So I certainly have a bit of knowledge in DNA, but also balancing the rights of victims and providing support services to victims.

CHAIR: While the New South Wales police submission indicates the current policies procedures and practices to protect DNA material belonging to victims are adequate, have there been any issues or problems with these current practices that have been brought to your attention?

Mr EMERY: In reference to victims I have had nothing brought to my attention, and I have checked that with our forensic procedures implementation team who are the point that communicates with DAL about receiving results. I have had it confirmed to me that I have received no information about the problems we are talking about today.

The Hon. JOHN AJAKA: So there are no complaints?

Mr EMERY: Not to my knowledge.

CHAIR: To your knowledge, the victim's DNA that may have been picked up from a crime scene has not been utilised in charging anybody?

Mr EMERY: I am not aware of any since 2000 when it came into practice. The way we basically manage our business is that we identify business problems and we come up with strategies to address business problems. I am not real clear on what the business problem is here.

CHAIR: Do you think it has been possible to manage the process because of the systems, the law, the protocols and the practices that are in place, or do you think that perhaps it is because of the philosophy of the people managing the program to ensure that there is not an issue?

Mr EMERY: I think it is a whole big combination. The fact that it was implemented in 2000, legislation was enacted—very, very complex. I would like to hand up some documents to the Committee. We did a survey amongst police and found that 80 per cent of police find it difficult to understand and difficult to use—79 per cent difficult to understand and 80 per cent difficult to use. So the complexity of the legislation

certainly does not help with this issue. In addition to that, it is not just the legislation, it is the information technology in regard to the way police capture it. We have what is called an old COPS green screen type system that was developed in 1994. It was not built for forensics but when the legislation came in it had to try to be adapted. What we are doing to stop that business problem is we are implementing a new forensic information management system to meet the business requirement and to improve the information exchange with the Department of Health.

So it is a combination that I see. What is very difficult for police is the legislation, and there has already been agreement by the Attorney General's department and by the Premier's Department and by police for a full review of the legislation with a view to streamlining it. I also have a submission on that. So there are a number of complexities. The standard operating procedures: there are 34 procedures for police to follow, to take a very simple sample, comprising 250 pages. It is very complex.

CHAIR: We would be very happy to accept your information. Can you tell us if this can be public information or would you like the Committee maintaining it as private information?

Mr EMERY: I would probably like some time to consider whether or not it should be released to the public.

CHAIR: That is fine. We will consider that. Your submission has a section that says, "Document property of New South Wales Police Force. Consent must be obtained by the Commissioner". Seeing as the commissioner signed off on this we assume it is done?

Mr EMERY: Yes.

The Hon. GREG DONNELLY: Looking at your submission I specifically go to page 12 about the response to the inquiry's terms of reference. In the first couple of paragraphs you say, "The New South Wales Police Force is of the opinion that further restrictions on the use of DNA material belonging to victims are undesirable and unnecessary". Does that position reflect, if I could use the word, frustration that may exist arising from the complexity of what you are working with at the moment, of which some of that may or may not be resolved with further examination—and you have referred to a submission there and other matters—into the future? Is it a result of just having to wade through the complexity of what you have got to deal with at the moment, which may or may not have some of those issues addressed in the future, or are you saying that it is for other reasons? If you are saying for other reasons would you like to elucidate what those reasons might be?

Mr EMERY: I will make it very clear. The legislation at the moment is very, very complex on its own. What we are saying is that if you were to make some changes in regard to legislating some crime scene profiles, whether they are victims and that type of thing, if you legislate about the proposal it would nearly render the whole DNA business completely ineffective. You have really got to balance up the value of the DNA intelligence to police officers. If I can give you an example: With a disaster, when you identify victims the last thing you go to is DNA.

The first thing you go to is fingerprints. They can provide intelligence information within 20 minutes at minimal cost. The second thing you go to is forensic odontology—dental records—to identify people. DNA is always the last resort, because it is very costly and time consuming. Amending the legislation would add a great deal of complexity. The forensic services group will turn up to a crime scene. If there is a victim and that person volunteers a sample, that person is excluded; they are not matched under current policies, procedures and legislation. They cannot be matched against anything. The current proposal could allow loopholes and enable people to come back later and to claim to be a victim in some way, shape or form.

CHAIR: Can you explain your perception of the current proposal?

Mr EMERY: It refers to inadmissibility of evidence in regard to a victim. I included the example of the Sydney airport bkie bashing. One person was dead and there was blood everywhere. The forensic services group turned up and collected samples. A number of victims and offenders were involved in that incident. Police officers do not know who the victims or the offenders are until the investigation is completed, and sometimes that takes years.

The Hon. JOHN AJAKA: I assume that that all goes on the database.

Mr EMERY: Yes.

The Hon. JOHN AJAKA: Because you cannot identify them as a victim per se?

Mr EMERY: That is right.

The Hon. JOHN AJAKA: What happens then?

Mr EMERY: Anything collected from a crime scene is put on the crime scene index of the DNA database and matched against other people and crime scenes. That information is provided to the police by the Department of Health. I make the point that that is intelligence to assist with the investigation.

Ms SYLVIA HALE: Is it intelligence that is actually assisting with that investigation, or is it intelligence that will assist with investigations in future years?

The Hon. JOHN AJAKA: Or cold cases?

Ms SYLVIA HALE: By holding that DNA for such a long period are you not allowing it to be used for a purpose for which it was not originally intended and, therefore, either wittingly or not, allowing people to incriminate themselves? It is a means of self-incrimination.

Mr EMERY: I make it clear: The answer is no. Where a victim volunteers a sample—

Ms SYLVIA HALE: No, I am referring to the situation in which you do not know who is the victim and who is the perpetrator. This information is retained for years. You have samples from both the victims and the perpetrators. However, there may be people who are genuine victims who have left the scene because they fear that if they hang around there will repercussions from the perpetrators who are still there. They may not want subsequently to come back to the police and admit they were there. They may have genuine reasons for keeping their identity hidden. I am not happy with the line of thought that that somehow entitles their DNA to be held and for them to be treated as a potential perpetrator.

Mr EMERY: First, it does not mean that they are a perpetrator. It provides intelligence to police. It will link to them personally only if they have previously been charged and they are on the database. Secondly, it does not make them guilty of any offence. However, it does provide the police with intelligence about who was at the crime scene. It is up to the police to determine who is a victim and who is an offender as part of the investigation. If we draw an analogy to fingerprints, they have been providing this information for 100 years around the world. It is no different in New South Wales, Australia or overseas. Everyone is fingerprinted at crime scenes. They are crime scene profiles and they are put on the fingerprint database and matched. That information is given to the police and they use it as part of the investigation. DNA is no different.

The Hon. DAVID CLARKE: I refer you to the Sydney airport incident. There is blood and unidentified victims' DNA everywhere. The police take a sample and it is subsequently established that that is a sample from a victim. The crime is solved and the perpetrator is convicted. What happens to the DNA of the unidentified victim? Is it destroyed or is it held for some other purpose?

Mr EMERY: Can you ask that question again?

The Hon. DAVID CLARKE: A number of blood samples are found. It could be the blood of a victim or an offender or several victims and several offenders. There is one particular unidentified DNA sample. That DNA is put in the database as that of an unidentified victim. It is subsequently established that that is indeed from a victim. The offender is charged and convicted. Is there any reason that you would keep the DNA of that victim in any database? It started off as an unidentified victim's DNA and the victim is subsequently identified and the crime is solved. Do you keep that DNA for any other purpose?

Mr EMERY: I am trying to comprehend the question.

CHAIR: It would not have been from a volunteer.

Mr EMERY: If it is a volunteer—

CHAIR: What if the victim is dead?

The Hon. DAVID CLARKE: It does not matter whether the victim is dead. There is a blood sample at Sydney airport and it is put in the database as that of an unidentified victim.

Mr EMERY: For a start, it is not the DNA of a victim; it is an identified crime scene profile.

The Hon. DAVID CLARKE: We start on that basis. It is then subsequently established that it is the DNA of a victim. The victim is located and the offender is prosecuted and convicted. What happens to that victim's DNA? Is it kept on a database for any purpose?

Mr EMERY: I believe that at the moment it remains on the crime scene index.

The Hon. DAVID CLARKE: Why?

Mr EMERY: If that person had been previously charged and a sample had been taken, information would be provided to police that Jeff Emery's profile was found at the scene. That information is provided to assist in the investigation.

The Hon. DAVID CLARKE: What if you find that the person has not previously been charged?

Mr EMERY: Then you would not find out that person's name.

The Hon. DAVID CLARKE: I am talking about a situation where you finally establish the identity of the victim.

Mr EMERY: Do you mean if they volunteer at a later date?

The Hon. DAVID CLARKE: You might match it with something else.

Mr EMERY: You will not match a profile against a person unless that person has been charged previously.

The Hon. DAVID CLARKE: They may be a previous victim.

Mr EMERY: Then they will not be matched because victims are not matched against anything. They are used for exclusion purposes at the crime scene.

The Hon. DAVID CLARKE: Assume that the person subsequently comes forward and you have the DNA. If the crime is solved do you hang on to that DNA if that victim has not given consent? It is a different issue if they have given their consent. What happens to that DNA if they have not given consent for you to hang on to it in the circumstances that I have put to you?

Mr EMERY: I think you are referring to an investigation continuing and a year or two down the track the police try to solve that particular crime—

The Hon. DAVID CLARKE: No, I am referring to another crime altogether. A completely different crime is committed—for example, a bank robbery—and you have this victim's DNA and you assume that a victim in one case is an offender in another case and you have kept that DNA for that purpose.

Mr EMERY: I think you might be coming up with a scenario that police face every day of the week in every police station around the world. That is, when a victim of a crime comes into the police station, the first thing the police need to do is identify who they are talking to. So, they will check their systems. If they do a check on David Clarke and find there is an entry from an unpaid parking offence but he is coming in to report another offence, police will make a judgement every day of the week whether to proceed or not proceed. But if it is a murder in another instance, you would think that police around the world would take action if somebody comes in to report, say, a stolen vehicle.

The Hon. DAVID CLARKE: That is what I want to establish. You are saying that that DNA in that scenario I have given you of the blood sample found where the victim is eventually established and the offender

is convicted, you are saying that DNA remains there and can be used against that victim down the track if a subsequent crime is committed by that person?

Mr EMERY: The only way you will be able to identify that person's DNA is by having a previous sample of his DNA and having the name to compare it with. So, there will already be a person profile on the database to connect it to.

The Hon. DAVID CLARKE: I am sorry, I am a bit confused here. You have Mr X's DNA. He was a victim. That is on the database.

Mr EMERY: How do you know it is that person's DNA?

The Hon. DAVID CLARKE: Because that has subsequently been established. This victim has come forward.

Mr EMERY: The only way you can establish that is a person's DNA is by comparing profiles of the two DNAs. The only way you can compare profiles of DNA is if you have his profile.

The Hon. DAVID CLARKE: No, you have Mr X's unidentified victim's DNA and then Mr X turns up a week later and says "I was assaulted," and you do a DNA analysis on him and you establish he has the same DNA as the unidentified DNA that you are holding. So, you have established it is one and the same person.

Mr EMERY: So the scenario is he comes in, say, a week later. He volunteers his sample to have it excluded from the crime scene at the airport—

The Hon. DAVID CLARKE: Well, he just comes in and says, "I was assaulted." Then you do a DNA analysis on him and you establish, yes, here is the blood, this blood of this unidentified victim. It is the same DNA. I am saying that crime is solved. What then happens to that the DNA sample of that victim, or both DNA samples? Is that kept in a database to be used possibly against that person?

Mr EMERY: I guess you are coming up with a scenario—I do not know what the situation is. If I could help to clarify it, if I can use that scene where he came in, say, a week later and wanted to be excluded from the crime scene and wanted to cooperate with the police. You have to look at what the situation is. At the moment there are backlogs in DNA analyses in New South Wales. When we pass over the fence to outsource our DNA analysis to the Division of Analytical Laboratories, it does not happen the same day. It does not happen next week. Some priority ones are given urgency but in some cases there is up to a 12-month backlog. So, if somebody comes in at a later date, a week later, and says, "Can I have that excluded," well—

The Hon. DAVID CLARKE: Assume it has been given urgency. It has all been established, the crime has been solved. What happens to that DNA sample that you are holding? Is it removed from the database or is it kept there to be used against that person in three years when another crime is committed and that person could well be charged? Is it kept for that purpose?

Mr EMERY: I do not want to pass it on to Health or the Division of Analytical Laboratories about this, but when we are provided the information from the Division of Analytical Laboratories about the crime scene profiles, unless they are on the database we do not get a name. At a later date, if somebody comes in and says, "I was at the crime scene," and volunteers a sample for exclusionary purposes, that is the first time you are able to put a name to that crime scene profile.

The Hon. DAVID CLARKE: Would you like to take my question on notice?

CHAIR: I am sure your question will come up again because other people want to talk about it. So, we will move on.

The Hon. GREG DONNELLY: There is hardly time to go through a range of very complex questions but the one I wanted to quiz you on and get your reflections on was this. You said, in answering one of the Hon. David Clarke's questions, that you saw this issue of DNA was no different conceptually from that of fingerprints?

Mr EMERY: Yes.

The Hon. GREG DONNELLY: But surely DNA is significantly different from a fingerprint—I make the concession I am not trained in science in this regard—in that the DNA of a person provides a great deal of information about the person beyond what is an identifying mark on a person's finger? The area I am particularly interested in is an area not yet fully understood by science, and that is the implications of understanding DNA and whether or not DNA in itself in due course will provide any revelations into the nature of the person and the person's disposition or behaviour? I know that sounds a little fanciful and I am not trying to be fanciful, but in us looking at this whole issue, we have to look at where the science might be going in understanding DNA and what that does to give us insights into people. I would like your thoughts on that. Is it not the case that using the analogy between DNA and fingerprints perhaps is not as clear-cut as you are putting?

Mr EMERY: I see it as a biometric. DNA is a biometric. A fingerprint is a biometric. Facial recognition is a biometric. These are all methods to identify people and assist with investigations for investigative purposes. The reason why we outsource part of the forensic business, the DNA analysis, is for the reason you have just stated. There were concerns we might do something more with a DNA profile than what it is intended for. To outsource the DNA analysis to Health, I do not see any different as, say, you get a wart on your hand, you get a doctor to scrape it, and send it off and they send back the results. This is the same thing. Police receive information back just about the request we sent, and that is how these samples match up against other samples at crime scenes or people.

So, what is happening in the future, we certainly have an obligation to continually look at ways of enforcing laws and reducing victims. That is our aim. To track down offenders, it is not only arresting offenders it is the prevention as well. If you are able to arrest these people sooner, it prevents them from causing crimes in the future. I cannot guarantee what is happening in the future but we do outsource the DNA analysis and get the results back.

The Hon. GREG DONNELLY: I am not coming to this discussion with any sense of paranoia and I understand your explanation about outsourcing, but it is more the nature of DNA itself and what it might ultimately prove to contain in terms of the revelation in understanding people and therefore the care, in my view, that must be taken in how we manage the information associated with it.

Mr EMERY: Yes.

Ms SYLVIA HALE: One of the submissions to the inquiry suggests this:

... the Inquiry should be extended to encompass volunteers (Part 8 of the legislation). The male consensual sex partner of a sexual assault victim will, under normal circumstances, be asked to provide his DNA either to exclude him as the donor of the crime scene evidence or to identify his component of any crime scene mixture that is present.

The person who wrote this submission asks:

Why should he not receive the same protection as a victim who provides a sample for elimination purposes? Anyone who volunteers (either under Part 8 or the Victims Protocol) to provide a sample to police for elimination purposes should not have their profiles up-loaded to the crime scene index or, if it has already been up-loaded, should be entitled to have it removed.

Do you have any comment on that?

Mr EMERY: I am trying to understand the point they are trying to make there.

CHAIR: What concerns us is that particularly in sexual assault cases the partner may say, "Oh no, you can't go and report it because they will pick me up for something" and we might actually be obstructing persons coming forward for specific crimes?

Mr EMERY: Once again, the legislation at the moment prevents volunteers from being matched against anything, so if the male and the female provide samples, they are volunteers. They are not matched against any crime scene.

The Hon. JOHN AJAKA: That is the current law?

Mr EMERY: That is the current law.

The Hon. JOHN AJAKA: The concern is that if we change the current law to allow them to be matched, you are going to suddenly have this dreadful dilemma, am I correct?

Mr EMERY: I thought the proposal was that we were here to talk about the inadmissibility of the victims—I thought that was the purpose.

The Hon. JOHN AJAKA: We are. We are also here to contemplate whether that should be changed.

Mr EMERY: Right.

The Hon. JOHN AJAKA: That is one of the ambits.

Mr EMERY: I think it is a matter for public interest and it is a matter for the Attorney General's. There is the issue of when a victim may have been involved in major crimes, such as another sexual assault or another murder, and that type of the thing. That is another issue of public debate of whether or not police have intelligence to believe that that person may be guilty of many serious crimes and whether or not approval could be given by a court for that to be matched against another crime scene.

Ms SYLVIA HALE: To continue on the point I made, the assertion is made here that there are no destruction requirements in relation to crime scene profiles?

Mr EMERY: That is right.

Ms SYLVIA HALE: What is the crime scene profile as opposed to the volunteers or the victims' profile? How do you distinguish between them?

Mr EMERY: Basically a crime scene profile is anything collected, for instance, by the Forensic Services Group. They will turn up at a crime scene and they will collect profiles of that crime scene. The difference between a person profile; a person could give a profile through a buccal swab as a person if he is charged with an offence in a police station or a buccal swab could be given as part of a victim sample. A victim sample would be excluded and not put onto any database.

Ms SYLVIA HALE: If you keep the crime scene profile and you have identified whose DNA is part of that crime scene profile, are you not, in effect, retaining the DNA and the information about the people who were at that crime scene within your database or whatever?

Mr EMERY: With people, for instance suspects, who give a sample, it is 12 months at the moment where if they are not convicted and proved at court, it does need to be destroyed, and police certainly have challenges with that because of trying to receive court outcomes and the transferring of information. As for crime scenes, police do not think it is desirable at all to have to manage destruction of crime scene profiles.

Ms SYLVIA HALE: If you have a crime scene profile and there is a mix of DNA, as part of that crime scene profile do you say, "In this profile we have DNA from person A, person B, person C and person D"?

Mr EMERY: That is the work of the Department of Health. They actually receive the forensic information from police, who then do the separating of the mixed profiles and that type of thing and they are the ones who, once they are separated, put it on the database and then if it matches a person on another crime scene, that information is provided back to police. We deal with that intelligence and we investigate the matter accordingly.

Ms SYLVIA HALE: If you say it is not the procedure to destroy the crime scene profile, you could keep that profile there indefinitely, is that correct?

Mr EMERY: That is right.

Ms SYLVIA HALE: So, in effect, whether a person says, "I want my DNA used only for a specific and limited purpose", if that person's DNA happens to be part of the crime scene profile, whether they like it or not, that information about that person is going to be retained?

Mr EMERY: That is not the case, because what happens is when that person volunteers a sample, the Division of Analytical Laboratories actually then compares that to the crime scenes and excludes the profiles.

CHAIR: So they both go off?

Mr EMERY: The victim sample is compared to the crime scene—the reason why they volunteer the sample is for exclusionary purposes, so their profile is removed from the crime scene profiles and then they are uploaded to the database.

Ms SYLVIA HALE: Sorry, I may have misunderstood you earlier. I thought you said that you retained the crime scene profile and in that profile was the DNA of everyone who had been at the crime scene and that that is kept in perpetuity?

Mr EMERY: No, I am sorry if I said that. What I am saying is that the reasons why people volunteer samples is to have them excluded, so the work that Division of Analytical Laboratories does—and I know they are on next and they can talk about it in more detail—is to exclude their profile from the crime scene profiles and they are not uploaded.

Ms SYLVIA HALE: So that the only DNA that would remain in that crime scene profile is someone who has been unable to be identified?

Mr EMERY: Yes.

Ms SYLVIA HALE: Or perhaps is dead?

Mr EMERY: That is right.

Ms SYLVIA HALE: Or whatever?

Mr EMERY: We call them unidentified profiles, until they are matched against somebody who may be an offender or a suspect. It is not straightforward. There are so many ifs and buts and what you have to do is not look at scenarios that are not real.

Ms SYLVIA HALE: It says here that these profiles can be kept indefinitely. Therefore, even though a victim or volunteer may decide that he or she will provide a DNA sample to the police that can be used for elimination purposes only, that is, for eliminating victims or the volunteers profile from the profiles obtained from the crime scene samples, there is no restriction on what police can do with the victims or the volunteers' crime scene profile or how long it can be kept. Is that correct?

Mr EMERY: It does not sound right. Let us just make it very clear. If a volunteer, a victim, volunteers their profile, they are excluded. They are compared against the crime scene profiles and they are excluded. They are not uploaded to the database for matching. Therefore, the current legislation actually encourages people to cooperate with police, come forward, volunteer their sample and they are excluded. If people do not provide samples, run away from crime scenes, well, they are only crime scene profiles. Police need the information to know if those crime scene profiles match against any people to paint a picture as to what has happened.

The Hon. DAVID CLARKE: Getting back to the issue that I raised with you, I will try to take it from another way so that we can get to the heart of what I am trying to get at. Assume the following: There has been an attempted murder and you have a DNA sample of an unidentified perpetrator. You take that DNA sample and you match it with your database to see if there is a match, correct?

Mr EMERY: Yes.

The Hon. DAVID CLARKE: What I am asking is: on that database that you go to seek a match, are the only DNA samples on that database those of people who have previously been offenders?

Mr EMERY: Yes.

The Hon. DAVID CLARKE: Are you sure of that?

Mr EMERY: There are suspects and there are offenders. Victims are not on the database; volunteers are not on the database.

The Hon. DAVID CLARKE: You can assure us of that?

Mr EMERY: I am 100 per cent confident but, once again, that database is administered or managed by the Department of Health, but I am very confident that is the case.

The Hon. DAVID CLARKE: So that is not administered by your department?

Mr EMERY: No. It actually resides within the Department of Health. There are two databases; a national database, and that is administered and managed by the Department of Health, and also the New South Wales database. Police do not have access to person profiles or crime scene profiles. We have information to the information about the crime scene that we pass.

The Hon. DAVID CLARKE: But you contribute to those databases, is that right?

Mr EMERY: No, we provide the samples collected from crime scenes and pass them to Health.

The Hon. JOHN AJAKA: They do the analysing?

Mr EMERY: That is right. That is what we outsource.

CHAIR: Thank you very much for your assistance today. I am sorry we have an extensive list of questions on notice for you. We are very grateful for your information and the Committee is pleased to have had your expertise at this inquiry. Thank you very much for coming along.

(The witness withdrew)

(Short adjournment)

ROBERT GOETZ, Acting Deputy Director, Division of Analytical Laboratories, Sydney West Area Health Service, sworn and examined:

CHAIR: Thank you for your attendance on the first day's hearing of this incredibly complex inquiry. There are some guidelines in relation to public hearings of upper House inquiries, and that are available at the door. I think you have already sat through some of the hearings, so I am sure you know what goes on. If you should consider at any stage that you have evidence that you would prefer only be heard by the Committee, you may request that and the Committee will consider whether it is appropriate. If you take questions on notice—I know you will, because the questions are extensive and we do not have enough time to go through the prepared questions let alone what Committee members want to put on the agenda—the Committee would prefer that the answers to those questions be returned by 16 October. Recognising that that is a fairly short time frame for a complex group of questions, you can negotiate with the Committee Secretariat if you would prefer. Would you like to commence by making a short opening statement?

Mr GOETZ: I have been working in the field of forensic biology since 1975. I have been involved with DNA testing since 1989. The current system we are using, called Profiler Plus, has been in use in New South Wales since 1998.

CHAIR: Can you give us more detailed information about the work the Division of Analytical Laboratories does in relation to DNA taken from victims of crime?

Mr GOETZ: There are two areas in relation to victims of crime. The first is person samples taken from victims of crime. That is very distinct from crime scene samples, which we identify as originating from victims of crime. Person samples taken from victims of crime are treated under the legislation—there is not much on victims of crime under the legislation, other than section 76A, so we treat them as limited volunteers. They are not put on any active database; they are only matched within a case and they are not matched against anything else. Victim crime scene samples, if known to be victim crime scene samples or reasonably suspected to be known to be victim crime scene samples, are not loaded to the DNA database. Again, they are only used within a case.

The Hon. JOHN AJAKA: What happens to the samples when either they have been matched or the case is over? Are the samples destroyed?

Mr GOETZ: We are talking about what kind of samples—person samples or crime scene samples?

The Hon. JOHN AJAKA: Firstly, person samples, and secondly, crime scene samples.

Mr GOETZ: With regard to person samples, under the legislation suspect samples can be kept for up to a year, unless there have been extensions. If we do not hear from police that the sample has been extended, we will automatically remove it from the database after one year. If at a later stage the police say that the sample can be extended, we can extend that sample. If, on the other hand, they give us a destruction order, that sample is destroyed within a couple of minutes of us receiving that destruction order, and that can never be resurrected.

The Hon. JOHN AJAKA: Let us go back to the "voluntary" victim who shows up to the police and a sample is taken. Let us assume that they have agreed that their DNA sample can remain on the database even when the case is over. Can they subsequently change their mind and have the sample removed from the database if a year or two later they have had a rethink about it?

Mr GOETZ: Just to confirm, a victim person profile is not on any active database. It exists within our system but it is not searched against anything, other than within the case in which the victim actually agreed to give it. If the victim at a later stage says, "I want that sample removed from the database", then we will do it. That normally goes through New South Wales Police, through the Forensic Procedures Implementation Team. They send us the notice, and we will then remove that from the database.

The Hon. JOHN AJAKA: Let us take the other example, where there has been a crime scene, five or six samples are taken, and realistically one does not know whether the samples are those of future defendants, culprits, offenders, or possible victims. How are they treated initially when there is no way of identifying from whom and in what category they are?

Mr GOETZ: The first stage is that the biologist will examine them and extract the DNA profile from them. If all the profiles were the same, then only one profile from those six crime scene samples will be loaded to the database. If the sample cannot be compared to any person then it will be loaded to the database. If at a later stage we identify that that sample was from a victim then that crime scene sample is removed from the database.

The Hon. JOHN AJAKA: Automatically?

Mr GOETZ: It requires some action. I think page 3 of what I have given you is the way we formalise it. Because obviously, even with our laboratory, in order to ensure that there is a review of the process—we do not want someone just to remove a sample from the database—we have someone first say they want it removed and then a senior officer will confirm that that sample should be removed from the database.

The Hon. JOHN AJAKA: Let us take it one step further. That person has been identified as a victim and procedures are gone through and they are removed. Is there a possibility prior to the removal that that person has also been cross-referenced with, or linked with, other crimes where that person could in fact be the offender of those crimes? Is there any possibility of that occurring before he was identified as a victim?

Mr GOETZ: It is possible. Not all victims give the samples at the time that the sample is required, although part of the policy of my department is that we will ask where we think a victim should give a sample to give a sample. Say in the case of attempted murder, there is all this blood everywhere and the police bring in a sample from the crime scene, we will not normally examine that because we say we cannot compare it to anything. We would want the victim's person sample to come in before we start the examination. That is the normal policy of the laboratory.

Ms SYLVIA HALE: And if the victim sample does not come in what do you do then?

Mr GOETZ: Normally then the case will not be examined. Unless there is something to compare it to there is almost no point in examining a case. What are we going to find? We are going to find some DNA there. We do not know who belongs to. It becomes fairly pointless.

The Hon. DAVID CLARKE: I want to go over this question one more time so I can put it beyond a shadow of a living doubt as to what the situation is. You have an attempted murder situation. You have a DNA sample of an unidentified perpetrator. You go and match that sample with your department's database to see if you can find a match. Are the only people with DNA on that database people who have previously been offenders?

Mr GOETZ: And suspects of crime.

The Hon. DAVID CLARKE: And suspects of crime. There is no way that it can include the DNA of victims?

Mr GOETZ: That is correct.

The Hon. DAVID CLARKE: What about the DNA of unidentified victims?

Mr GOETZ: If we were talking about unidentified victims it would then be a crime scene sample.

The Hon. DAVID CLARKE: Yes.

Mr GOETZ: A crime scene sample that is on the database that is not known, or reasonably suspected to be known, to belong to a victim will be on that database. So you will get a link between a crime scene sample and the other crime scene sample.

The Hon. DAVID CLARKE: So it is possible that there could be an unidentified victim's DNA on your database that could be used to establish that that unidentified victim was the perpetrator in another crime?

Mr GOETZ: What we are talking about is two crime scenes profiles. You are talking about a crime scene profile matching with another crime scene profile. So it is scene to scene. You are not identifying that

perpetrator as being the offender in the other crime. All we are talking about is DNA intelligence. It is providing intelligence that there is DNA found at one crime scene that matched another crime scene.

The Hon. DAVID CLARKE: Let us take the first crime scene. Are there situations where the unidentified DNA is clearly that of a victim?

Mr GOETZ: In that scenario that will not be loaded to the database.

The Hon. DAVID CLARKE: You are sure of that?

Mr GOETZ: Absolutely.

The Hon. DAVID CLARKE: An unidentified victim—there is no doubt about that—will not go on to your database?

Mr GOETZ: The unidentified victim really is the sort of item we get where we get the victim's clothing. Say we did not get the victim's person sample but the police insisted it needed to be examined. We would take the blood on the victim's clothing as the victim's own blood, therefore that would not be uploaded to the database.

The Hon. DAVID CLARKE: That is the present situation. Do you agree with the law as it is?

Mr GOETZ: That is not law: that is the policy of my department.

The Hon. DAVID CLARKE: Is that a policy that can be changed by your department?

Mr GOETZ: It is the policy of my department. It depends how it would be changed.

The Hon. DAVID CLARKE: Are you saying your department could make a policy decision and from 1 December 2009 include on your database the DNA of victims?

Mr GOETZ: It is Health's policy that we would not place victims DNA onto the database. To do that would require a Health edict that we can place victims DNA samples on the database. The problem is that within the Act the crime scene profile index is quiet on what can be loaded to the database. The Division of Analytical Laboratories [DAL] and the Department of Health have been very insistent that we do not load victim crime scene profiles onto the database. We have gone to the national database stating our case as exactly that: we will not load to the national database all our database victim crime scene profiles.

The Hon. DAVID CLARKE: Are you saying, strictly speaking, there is nothing to stop your department making a policy decision to henceforth include on the database the DNA of victims? There is nothing in the law to stop you doing that?

Mr GOETZ: There is nothing in the law. There is a policy of our department and our policy is very strict.

The Hon. DAVID CLARKE: Policy can be changed.

Mr GOETZ: In theory. That is probably why in our submission we have said that while it remains with Health our policy will remain in place. However, if it went out to other people we cannot be sure what would happen.

The Hon. DAVID CLARKE: Do you agree with the policy that victims DNA should not be loaded onto your database?

Mr GOETZ: I agree with that policy, yes.

The Hon. DAVID CLARKE: Therefore, do you agree that should be enshrined in legislation?

Mr GOETZ: I am concerned how the legislation would be worded. The legislation could be worded in such a way that it would restrict almost any crime scene samples being loaded onto the crime scene database.

The Hon. DAVID CLARKE: If it were in a form that encapsulates what we are specifically talking about here today?

Mr GOETZ: Again, in our submission we have said where it is "known or reasonably suspected to be known". That is what we believe is a reasonable clause to put in the legislation as to how crime scene samples should be viewed to be loaded onto the database. I think the example that was used in the submission was steering wheel swabs from stolen motor vehicles. We know in that case it could come from the driver of the car or it may come from the person who stole the car. We do not know which one. So we will load it to the database. If at a later stage the driver of the car were to give a sample and we were to identify the crime scene sample as being from the driver, that sample would come off the database.

The Hon. DAVID CLARKE: The bottom line is that a policy of your department could be changed tomorrow to allow victims DNA to be loaded onto the database?

Mr GOETZ: That would require the policy of the Department of Health to be changed.

The Hon. DAVID CLARKE: That is what I am saying. Your department has the capacity to change it as from tomorrow, if it wanted to?

Mr GOETZ: I do not think that our department would change the policy.

The Hon. DAVID CLARKE: I am sure it would not, but it has the power to do so if it so wishes.

Mr GOETZ: In theory, that is correct.

Ms SYLVIA HALE: As to the procedures for the destruction of victims' samples, is that again a question of policy rather than legal obligation as to how it is destroyed?

Mr GOETZ: Are we talking about crime scene profiles or person profiles?

Ms SYLVIA HALE: If you have a victim sample, whether the victim has volunteered the sample or it has appeared in the crime scene profile, what procedures do you follow to destroy that sample?

Mr GOETZ: Again, it is a policy of the department that we will remove the crime scene profiles from the crime scene index database where we know or reasonably suspect that it comes from the victim. With victim person samples, they are not on an active database. They exist within our system. Nothing is compared to them. They just exist. But they can be removed.

Ms SYLVIA HALE: I am asking about the actual procedure whereby they are removed. Is there a policy as to the actual procedure to be followed? What guarantees exist that the destruction has occurred?

Mr GOETZ: We receive destruction requests from Police and we respond to them that the sample has been destroyed.

Ms SYLVIA HALE: Do you destroy them only if you receive a request from Police or do you do that of your own volition, say, 12 months after a suspect sample has been retained?

Mr GOETZ: For a suspect we do, but for a victim there is nothing within the legislation that specifies how long a victim sample can remain within the DAL system. You have to remember that within the DAL system it is not within a searchable database. It just remains within the system. Police can nominate or the victim can request to Police that the sample be removed from the database. Once we receive that notification, that sample will be removed from where it resides. Again, I have to stress it is not on an active database. Nothing is searched against victim person profiles.

CHAIR: How do the persons who volunteered their DNA, the victims, know that they have the right to have the sample removed from the database?

Mr GOETZ: Within the protocols that the police read out to victims, there is a clause that states the purpose they are giving the sample and that they can ask for it to be destroyed. That is not in my area. It is really a Police area.

Ms SYLVIA HALE: We have received a submission today that talks about the inaptness of the model provisions in relation to volunteers and rape victims. Then it talks about the narrowness of sections 76 and 76A. Given what you have said today about policy—you agreed that policy can be subjected to change—are you conscious of any other significant areas in relation to the collection and retention of DNA samples that are dependent solely upon policy rather than legislative requirement?

Mr GOETZ: I would have to take that question on notice. I am not sure.

Ms SYLVIA HALE: I assume that is a matter of considerable interest to the Committee in relation to the leeway a policy allows. You said before that you were concerned that legislative changes might render the whole process ineffective. Do you know of any jurisdiction that has introduced legislation that you believe would appropriately suit both the need for the detection of crime and the need for the protection of the rights of individuals?

Mr GOETZ: As far as I am aware, the legislation around Australia for crime scene samples is very similar to ours. There is nothing, as far as I am aware, in any legislation that specifies what kind of crime scene samples can or cannot be loaded to the database.

Ms SYLVIA HALE: Is there any overseas?

Mr GOETZ: I am not aware of anything overseas.

Ms SYLVIA HALE: Do you think that the legislation we have in place requires modification?

Mr GOETZ: If it were a decision of this Committee that legislation is required to restrict how crime scene profiles can be loaded onto the database, then I would support that so long as it allows, as I said, a reasonable clause to do it. If it were said to us that we have to know that the sample does not come from the victim, that would put so much undue restriction on the use of crime scene samples the DNA database would become almost inoperable. That would be counterproductive to solving crime within New South Wales.

Ms SYLVIA HALE: The previous witness talked about the delay as well as the cost of forensic evidence, particularly DNA evidence. A concern has been raised about a window of opportunity whereby a sample could be uploaded to the database and subsequently the police delay in obtaining a sample from either a volunteer or a victim. In the meantime that window of opportunity has been opened to allow what appears to be the unknown DNA to be matched across varying databases. Do you perceive that as a problem?

Mr GOETZ: No. Unfortunately, there are backlogs within New South Wales and probably right around the world because of the popularity of DNA testing. If you do not start a case for a year, then you are not loading any samples to the database. Therefore, no samples from that crime scene are being loaded to the database. In the meantime the biologist who would review the case would say to the police, "I require a sample from the victim before I will start that case." That is one of the systems within place at the moment. It would never be loaded and it would never be matched against anything.

Ms SYLVIA HALE: Is the use of DNA evidence becoming more extensive? I was always under the assumption it was primarily in relation to assaults on individuals and that type of thing where it would be very useful. Several of the submissions talk about it being used in, say, burglary and theft, and I had not thought of it being used in those cases. Do you know the circumstances of why you are being provided with the DNA? Are you given the background of the case?

Mr GOETZ: The more background we obtain the better for our laboratory because then we can realise whether a sample comes from a victim or not. In the scenario you are talking about, in 2000 the laboratory received just over 1,000 cases a year. By 2005 we were receiving 8,000 cases a year, and most of those cases were not an increase in sexual assaults or murders they were an increase in break and enters and stolen motor vehicles and those types of cases. There is lots of DNA left behind at break and enters—the offender has often cut his hand or has left a cigarette butt. From that we can identify who the perpetrator is. Often, by identifying the perpetrator of a break and enter very early you may stop that person graduating into more serious crime.

Ms SYLVIA HALE: When you have a variety of circumstances that give rise to the DNA testing, do you prioritise, say, assaults upon people over thefts of property, or do you just take them in chronological order as you receive them?

Mr GOETZ: We do not do it in chronological order; we do it in priorities. We have a priority 1 system, which is the most urgent type of cases. We then have a priority 2 system, but it is divided among different streams: there are sexual assault priority 2s, there are priority 2 murders, there are priority 2 assaults. There are some priority 2 high-volume cases as well. A lot of the priority 2s end up being priority 2s because they are required urgently for court. Whether it is a break and enter required urgently for court or a murder required urgently for court, they are still required for the court. So the laboratory works mainly on priority 2 type cases and some priority 3 cases. Priority 3 cases are down the line a bit, and some of those are fairly important cases as well.

The Hon. GREG DONNELLY: Thank you for coming along today and giving your expert testimony. It is a fascinating and complex area. I have been dying to ask this question all morning: Which is your favourite show, *CSI: Miami* or *CSI: Crime Scene Investigation*?

Mr GOETZ: I hate all those shows. We call that "the CSI effect" in court.

The Hon. GREG DONNELLY: I thought that would be the answer from the witnesses: they do not watch the shows. But there is no doubt that those types of programs have influenced popular thinking and almost popular culture about the types of matters we are addressing today.

Mr GOETZ: Absolutely. And also the turnaround time: They can do a turnaround time in half an hour.

The Hon. GREG DONNELLY: It is pretty impressive, isn't it?

Mr GOETZ: We would love to be able to do that.

The Hon. GREG DONNELLY: Where there are matters where the person may not be understood to be a victim of crime, at least in the first instance, and the ones that particularly come to mind are ones that may relate to sexual assault or domestic violence, if we use the scenario of, say, both instances where the person affected—typically a female—ends up in a hospital, in an emergency room or in a ward, at least at that point there may not be any certainty at all that a crime has taken place, although the person has turned up at the hospital. Are you able to explain to me the process?

Say a woman turns up at the emergency department of a hospital. She does not look particularly battered but she may be drug-affected, perhaps cannot remember what has happened, she has been to a party and she has been treated. Are samples of DNA taken from her in any way or is she just treated? What I am getting at is, to the extent that DNA is taken and that information stored, can you help me join the dots as to what follows from that? Can you help me understand that?

Mr GOETZ: I cannot with that one. That is really probably for the emergency department of the hospital to talk about. I can talk about if a sample is taken from that person I can then join the dots thereafter. Say a vaginal swab was taken from that victim and they sent it to our laboratory for examination to see if semen was present, in theory we have two DNA profiles there if semen is present—we have the offender's DNA, if there is an offender, in the semen, and we have the vaginal material of the victim. The policy of my laboratory is if we find semen there we would load that to the database; we would not load the female victim's DNA profile to the database. There is at least one laboratory in Australia that will do that—it will load the female DNA to their database. We do not agree with that. We would load the male DNA profile to the database, the female part of that DNA.

The Hon. JOHN AJAKA: Which database is that? Which State?

Mr GOETZ: Queensland.

The Hon. GREG DONNELLY: In terms of obtaining that genetic material—the semen and the vaginal swab, and there is obviously consent associated with that—the request is made. Who would make that request at the hospital?

Mr GOETZ: Again, that would be a question for the health examiner and the police.

The Hon. GREG DONNELLY: But it may well be the case, and this is a hypothetical example, that the police are not involved. It may be a case of the person turning up and perhaps being afraid to involve the police or acknowledge that something has happened. A person could just turn up and say, "I'm unwell", or what have you. There is no requirement for the police to be involved, is there?

Mr GOETZ: There is a requirement though for my laboratory to receive exhibits from the police. We do not accept exhibits not from the police.

The Hon. GREG DONNELLY: Could you just say that again please?

Mr GOETZ: Our requirement from our laboratory is to accept exhibits from the police. Therefore, if that victim came to a hospital unconscious or maybe conscious and just said, "I fell down the steps", or whatever, then there would be no crime and therefore there will be no submission of exhibits to our laboratory.

The Hon. GREG DONNELLY: Equally, if the person just turned up and was recovering from, say, an episode on drugs or alcohol or a combination and was just recovering over a period of a day or two, unless that individual said, "I think something has happened to me. I would like to speak to a police representative", that, to use a colloquial expression, would just go through to the keeper: there would be no maintenance of any DNA because there would be no test done of her, presumably, and she would be just released in due course?

Mr GOETZ: That is my understanding. We only accept exhibits through the police, and the police normally have got some sort of a charge involved.

The Hon. GREG DONNELLY: It is your understanding that you only receive material on the basis that there is a charge that has been made?

Mr GOETZ: It cannot be a charge has been made because a lot of the cases we receive are unknown. An offence has been committed.

The Hon. GREG DONNELLY: Police believe an offence has been committed and the genetic material has been captured and then it is passed on to you?

Mr GOETZ: That is correct.

The Hon. GREG DONNELLY: Obviously there is an overlap between the police, the individuals who may be involved, the victims and/perpetrators, the health system, and there is legislation as well. Particularly between the health system and the police there is a range of practices, procedures and policies that have developed around the whole issue of DNA and its use. Is it your submission that there needs to be some examination of how all these things overlap and could work better together or dovetail in? Or do you essentially see that things are working reasonably well at the moment?

Mr GOETZ: Things are working, in my opinion, reasonably well at the moment with the current protocols and procedures in place. But we have a division at the moment between who looks after the database, who does the examination of those items, which is Health, and who pursues the criminals, which is the police. So you have a difference there. If you were to merge those two together you have a different scenario occurring. At the moment we are separate, but there is no guarantee that would remain into the future.

CHAIR: Is that healthy?

Mr GOETZ: I believe in the independence of DNA. I believe there should be an independent overseer of the database. I am not saying that police would not do as good a job.

CHAIR: I should not ask public servants for value judgements, but I am.

Mr GOETZ: I believe that there is a value in independence. We have an important tool in DNA. It can be used for many purposes, other than what we use it for. However, within the Department of Health we use it for the strict purposes set down in the legislation, and we do that only within Health. The Hon. Greg Donnelly

asked the previous witness what else could be done with DNA. That could be done in the future, because research is being done around the world to identify more things with DNA—for example, whether it comes from a person with red hair, whether they have a predisposition for heart disease, whether they are six foot tall and so on. That is the next step. We would need another committee like this one if we believed that New South Wales intended to go down that path. However, that is a whole new concept of what DNA can be used for. At the moment the DNA we use in New South Wales is called "junk" DNA. It does not tell you anything about a person.

CHAIR: Except identity.

Mr GOETZ: It does not even do that. It provides a profile. It is still up to the police to match it. We provide some intelligence to the police and they gather all the intelligence together and find the person who committed the crime.

The Hon. GREG DONNELLY: This question may be too complex to answer, and feel free to say so if it is. Obviously there are six State and two Territory jurisdictions in Australia, the Australian Federal Police and various international law enforcement organisations. Is there much of a linkage between them these days, or is it starting to form and providing some structure so that exchange of information takes place more readily?

Mr GOETZ: Again, that is future work. Profiler Plus, the system we use at the moment, will probably be phased out in two or three years because the manufacturer will not make it any more. Laboratories around Australia will look for a new and more effective system with more loci. At the moment we look at only nine different locations on the DNA and the new system will probably look at 16.

The Hon. GREG DONNELLY: Can you explain that?

Mr GOETZ: DNA is a long molecule and it is the same for most people in this room. However, along it there are areas called hyper-variable regions. They are the areas we target. We target nine of those areas and gender with Profiler Plus. The new process will probably look at 16 different regions. There will be more variable regions. They are moving towards that because the manufacturer will no longer support the current technology. Moving to the new technology will not only require more money, but because there will be 16 locations to interpret, each biologist now interpreting nine will have to interpret 16, which will involve more time.

The Hon. GREG DONNELLY: It is more complex.

Mr GOETZ: Exactly. It suddenly becomes a much greater issue than saying that we are moving from nine locations to 16 locations.

CHAIR: That will require many more resources in your organisation.

Mr GOETZ: I would say so.

The Hon. JOHN AJAKA: I refer to the very first term of reference and the use of DNA material belonging victims of crime. We are required to look at the adequacy of current policies, procedures and practices designed to protect the DNA material. In a short sentence, are you satisfied with the current policies and procedures and, if not, what would you recommend we should look at in terms of change?

CHAIR: If we need change.

The Hon. JOHN AJAKA: Yes. I would like your personal opinion.

Mr GOETZ: My personal opinion is that the current procedures within Health are satisfactory. My staff are cognisant of the importance of victim crime scene samples not being placed on the database. We do not place crime scene samples on the database if we know or reasonably suspect them to be from a victim. As far as we are aware that has not created any problems in any Australian jurisdiction so far. To my way of thinking, going further would require legislation. As I said, you have to be careful the way it is worded.

The Hon. JOHN AJAKA: In your dealings with the police, who you in effect take your instructions from—and I understand they are the only people you take your instructions from because they supply you with

the samples—have there been problems with their understanding of the legislation and what you can and cannot or will not do? Have some conflicts arisen, or are they well aware of the limitations and parameters?

Mr GOETZ: We had meetings with the police when we were setting up the NCIDD program. Some police said that they would like victim crime scene profiles loaded. However, I have never once had a policeman come to us and say that he wanted a victim crime scene sample loaded onto the database. If that did happen, we would refuse.

Ms SYLVIA HALE: In the situation where a person has been assaulted and the police know that the partner of that person is not guilty of the assault, could they nevertheless provide you with that person's DNA principally for the purpose of checking it against the database to see whether that person has been involved in other crime?

Mr GOETZ: No. The police would have to collect the sample from, for example, the boyfriend as a limited volunteer. Limited volunteer samples are not searched against anything on the database. They are searched only within a case.

Ms SYLVIA HALE: But the police could say that they picked up a sample and they may know that it is highly likely to be a sample from the boyfriend but they have not asked him for it and cannot prove it. It might be a fishing expedition to find a link to other crimes. Is there any way to prohibit that occurring?

Mr GOETZ: The police officers we deal with are professionals. I would be surprised if they would do that. However, I will deal with the scenario. We get a lot of information about sexual assaults. We will have information about when the victim last had sex with her boyfriend. That intercourse might have happened eight hours before the assault occurred. We will then inform the police that we would like a sample from the boyfriend to extract his profile from the DNA profile we found. Normally the police will do that because otherwise the DNA profile is too complicated to load to the database—it is a mixture of two people's semen. It might be semen from only one person, but we want to know whether it is the boyfriend's. When they bring in the boyfriend's person profile and it is loaded as a limited volunteer sample it is not searched against anything other than data within that case. We will look at that profile and if it matches the boyfriend then that crime scene profile will not be loaded to the database. If it does not match the boyfriend, we assume it comes from the offender and it will be loaded to the database.

CHAIR: So the trail dies.

Mr GOETZ: The boyfriend's person profile is never loaded to the database.

CHAIR: There is a signed off protocol between the Department of Health, NSW Police and the Attorney General in relation to this process. They are taken in accordance with the protocol between police and health Ministers and the Attorney General. So the protocol that you are operating under would appear to have been signed off by all three groups.

Mr GOETZ: I am not aware of that. I would need to take that question on notice. It could be to do with person profiles, not crime scene profiles.

CHAIR: Yes, this is the victim's protocol.

Mr GOETZ: That is the victim's person profile.

CHAIR: Yes.

Mr GOETZ: That is correct. But that is again different from victim crime scene profiles.

CHAIR: I understand that.

Mr GOETZ: We are trying to separate those two. That is how the Act operates.

CHAIR: So that particular protocol is directly related to the Act?

Mr GOETZ: For limited purpose volunteers, not for victims. Under section 76A of the Act, victims or excluded volunteers. There is not much talk about what you can do with excluded volunteers. That is what victims really are, excluded volunteers.

CHAIR: So it is fairly tight in relation to both those areas?

Mr GOETZ: I do not necessarily think it is particularly tight with excluded volunteers or victim person profiles, because no real parts of the Act refer to them, other than that one little part in the definitions. If you look at the matching tables, there is no mention of excluded volunteers in those matching tables. In fact, victims are not even part of that legislation.

CHAIR: So it is only operating off the protocol you have between the three Ministers?

Mr GOETZ: I would have to take that on notice. I am not 100 per cent sure how it is. All I know is we treat victims the same as limited purpose volunteers and, therefore, they can only be searched within purpose.

CHAIR: That is interesting because perhaps there is a space?

Mr GOETZ: There is possibly a space there. It needs to be assessed how victims are referred to within the legislation.

(The witness withdrew)

THOMAS CARSON SPOHR, Solicitor, and Chair, Criminal Law Committee, New South Wales Young Lawyers, affirmed and examined:

CHAIR: If you should consider at any stage there is something you want to tell us that you would prefer remains in confidence, you can ask us and we will consider that request. There will be questions on notice. So, if you are willing, we would prefer them back by 16 October, but you can negotiate with the secretariat for a bit longer if you need that to happen. Would you like to start by making a statement?

Mr SPOHR: Sure. I am here in my capacity, effectively, as somebody who has expertise in the use of expert evidence generally in a forensic context. I have a working knowledge of DNA—that is the science of it—and I have a working knowledge of the DNA legislation as it operates in a forensic court context, but I am not here as an expert on the science or necessarily on the way the databases themselves are used. There is some information in relation, particularly, to the media release that talks about the matching of crime scene samples to other crime scene samples. Using appropriate analysis it would probably be possible to glean useful law enforcement information from the matching of crime scene samples to other crime scene samples.

It has been asked of me whether there is any example I know of that would cause concern. In a previous job I worked at the Office of the Director of Public Prosecutions, that is the New South Wales office. At that time I had a matter in which an accused broke in and stole a bunch of computers and things, but stole a pair of shoes of the victim. In place of the stolen shoes he left his own, and that was how he was caught. His DNA profile was in the shoes that he had left behind, the old shoes. As it happens, he subsequently left the new—that is, the stolen—shoes at a subsequent crime scene. No doubt those shoes would have contained the DNA of the original victim who, under the proposal here at hand, could have potentially become a suspect. Worse still, the victim lived with his brother and I have an idea his brother was an identical twin, which would have meant they had very similar or, as I understand it—and I cannot be entirely sure about this, but I am reasonably sure, perhaps Mr Goetz might be able to correct me—identical DNA profiles.

The Hon. JOHN AJAKA: He is nodding yes.

Mr SPOHR: So, it is not impossible to conceive—in fact this is such a situation—a situation where it would be possible for a victim to become a suspect in a subsequent crime. The other thing I wanted to mention briefly—and I think Ms Sylvia Hale raised before the offences in which DNA is used—in my experience I have mostly seen it in offences that involve invasions of privacy in some form. That is, break and enters, robberies, it is used regularly in murders, less so in assaults, as far as I have seen. Those offences all involve serious invasions of privacy and it ought to be remembered that if a person becomes a witness in some form or a suspect in some form as a result of unknown DNA being placed on a database, that will be a further invasion, not so much of their privacy but it is certainly an infringement of their rights generally. That being the case, this whole area ought to be dealt with with circumspection. That is my opening statement.

CHAIR: Thank you very much. I assure you the skills you bring are what we require for the session, rather than scientific expertise. Various submissions have provided the Committee with information on current policies, procedures and practices to protect DNA material belonging to victims. I would like you to tell us what is your view on the adequacy of the current practices and the issues and problems that people have brought to your attention?

Mr SPOHR: Probably the easiest way to start is to say that I do not know of any specific problems. My general view is that where there are issues they are unlikely to be brought to the attention of anybody because they are likely to be dealt with on a very practical basis, I would have thought. Having dealt both as a prosecutor and as a defence solicitor with the police, in these circumstances the police are very good at dealing with the matter pragmatically. If a result is returned that is in some way confusing or is not consistent with the expected findings, they are very good at putting that to one side.

In relation to the adequacy of the current practices, they seem generally to be adequate in respect of victims. However, having had the benefit of hearing Mr Goetz talk about this, my concern is that currently there is no penalty for non-compliance with those protocols as far as I am aware or, if it is, it is an internalised process and is not something the subject of legislation.

CHAIR: It is a protocol, not legislation?

Mr SPOHR: That is quite right. From a general rights protection perspective is not the most desirable position, in our view. Where possible, individual rights ought to be protected in the form of legislation with real consequences, rather than through protocols. I am also not an expert on what the administrative burdens that would place on the Division of Analytical Laboratories. Although I am now in the position of being a defence solicitor, it is still in everybody's best interests, mine included, that the Division of Analytical Laboratories is properly funded so that they can return their results in a timely fashion. Further burdens, such as legislative burdens that impinge on that, are not in anybody's interests, not least the accused person, who has to wait around while their samples are being tested.

CHAIR: So you are saying that any legislative requirement has to improve the system rather than impede further?

Mr SPOHR: That is so, although I think there ought to be more protection generally. There has been some discussion this morning that the protocol in terms of people who are reasonably suspected of being victims ought to be removed. I have every faith in the Division of Analytical Laboratories. However, let us assume for the moment that there was some failure in respect of the protocol. I am not aware of what the consequences would be. More to the point, the concern is less to do with people who are known to be victims and more to do with samples that are not known to be victims and not reasonably suspected of being from a victim, for example the DNA from the set of shoes that I was talking about before.

There is no way that a person, if that set of shoes was later found, could reasonably know that that pair of shoes was stolen or that it relates to a victim. It is really that limited category of cases where we do not know who the DNA belongs to that is concerning but it is very difficult to know how to deal with that.

CHAIR: Could the same issue actually happen with fingerprinting?

Mr SPOHR: I do not quite know how to answer that question. I suppose it could. There is one further problem here and that is that there is something called transference—and again I am not an expert on it—but a potted way of describing it is that DNA is portable, that is, you can rub off skin cells. DNA is contained in those skin cells, for example, or a hair can be plucked out for whatever reason and your DNA can be transferred from one person to another. That is unlikely to happen with fingerprints, for example, but a victim's DNA could, for example, be picked up—let us take a hypothetical example—on an accused person's jacket or in a case that I am aware of; an accused person was acquitted and one of the arguments was that although the accused person's DNA appeared on her bra strap, that could have appeared there in some other way.

There is the quite well-known case of what is referred to as the Lauren Huxley trial, related to a gentleman by the name of Farmer, where there is a great deal of discussion about how we used what is called mixed sample DNA. Mixed sample DNA is where a single sample contains part of a profile from one person, part of a profile from another person and there is a scientific process by which we determine which bits relate to which person. It is quite possible that a mixed sample could turn up in an entirely unrelated context so that a victim's DNA could turn up in a mixed sample elsewhere.

I am not suggesting that is something that happens regularly nor even that it is something that happens much at all. I do not have any particular evidence, but it is concerning that it could because of the transferability of DNA. Your question initially, however, was fingerprinting. I suppose it could; a bit harder, because if a person leaves a fingerprint on something, there is normally an explanation as to how the fingerprint came to be there. There may not be an explanation as to how DNA comes to be there.

The Hon. DAVID CLARKE: We heard evidence earlier, and you would be aware, that there is a DNA database maintained by the Department of Health?

Mr SPOHR: Yes.

The Hon. DAVID CLARKE: And that only contains DNA of offenders, not of victims?

Mr SPOHR: Yes.

The Hon. JOHN AJAKA: Or suspects.

The Hon. DAVID CLARKE: We heard that they do not have the DNA of victims there because it is the policy of the department not to do that; I understand that. Theoretically they could change that policy tomorrow. Should we therefore have in place legislation to ensure that they do not have that capacity to change the policy tomorrow?

Mr SPOHR: The answer to the second part of the question is yes. I am not sure that the first part of the question, that is, the proposition that the DNA database only contains suspects. I think it could be the case. The problem I am identifying is unknown DNA that is expected to come from a suspected person but could in fact be the DNA of a victim, unknown to any person at the Division of Analytical Laboratories.

The Hon. DAVID CLARKE: Fine. Dealing with the first part, you agree that there should be legislation to enshrine that the department just cannot change the policy to include victims' DNA?

Mr SPOHR: Yes.

The Hon. DAVID CLARKE: Now to the second part, which is a more complex situation, how do you propose that that be dealt with? Is it something that has to be dealt with at all?

Mr SPOHR: It is an extremely complicated question and it is something that we ought to grapple with. I think Mr Goetz did touch upon it. The reality is that a reasonably suspected type test is not a bad solution to it. I have had the opportunity just this morning to have a quick look at the Attorney General's submission and I note that one of the questions deals with the proposed solutions. One of those proposed solutions is discretionary exclusion. Whenever we create a discretion in the law we need to be very cautious about how that is dealt with. If an individual person is tasked with determining whether or not something is reasonably suspected, they need to be accountable as to that.

How we make them accountable is an extremely complicated question. Do we make them accountable to other members of their own department? Do we make them accountable to an independent board? Are there administrative arrangements in place that could potentially already accept that? I think the answer is that yes, it ought to be enshrined in legislation in some way and that it ought to be a test in terms of whether or not it is reasonably suspected and subsequently, once it has come into a forensic domain, which is really where my expert lies, there is a real concern that DNA as a forensic tool is largely misunderstood, both by bench, bar and the jury. The CSI effect was touched on earlier.

It is very complicated to explain to juries what the statistics mean because the statistics come back with huge numbers. The potential that I am really concerned with is that a victim becomes a suspect or an accused person worse still. I think that is an unlikely possibility, but it is a possibility nevertheless. The numbers, if they come back, could be large. If it is not a mixed DNA sample and somehow by transference the DNA is there, the numbers could be big. Explaining to a jury the process by which that comes to be there is not easy, so that the ideal position is to nip it in the bud and try to deal with it at a departmental level, if possible.

The Hon. DAVID CLARKE: And not through legislation?

Mr SPOHR: With legislation providing the consequences of a failure to comply, but the departmental officers enforce that.

The Hon. DAVID CLARKE: Is there anything else you would like to suggest with regard to this whole area?

Mr SPOHR: Perhaps I will deal with the other questions first. I did want to comment briefly on some of the options suggested in the Attorney General's submission.

The Hon. JOHN AJAKA: The real concern for us is this. You will have a situation where victims are encouraged to volunteer their DNA to help solve crime and put the culprit away. But the fear is that if that DNA of the victim ends up going onto a database forever, one day that DNA could be used against the victim to find them guilty of a subsequent offence or even a cold case offence, which currently cannot happen. Earlier you spoke about the discretionary aspect. Your view is that if we start to simply leave it to the discretion of a person as to who goes on the database, who does not, and when, we could end up opening a Pandora's box, because it will then be dependent on who is the person at that time. I can understand the logic of that.

Let us then go to other areas. I guess we are talking about the conflict of the greater good for the public versus the greater good of the individual. If we are dealing with a serious felony-type indictable matter—for example, a murder or a serious rape—where do you perceive the balance to be? In that situation, should you be able to use a victim's DNA, if the victim has committed a subsequent serious crime such as murder, as compared with a summary offence such as break and enter? Do you have a different view on that, or should it be one rule for all?

Mr SPOHR: That is not an easy question. I think the starting point is that, absent consent or a reasonable abrogation of consent, no DNA should ever be kept on the DNA database. We long ago decided that people who commit serious indictable offences—offences triable on indictment and punishable by imprisonment for five years or more—be required to put their DNA on the database. We have said as a matter of policy or as a matter of legislation that that is a reasonable abrogation of their consent. I think this is a much more difficult area, because the context in which the DNA is being provided is not such that you would think that they are abrogating their consent. If they later end up committing an offence, it does not change the fact that their DNA is there—not through any abrogation of their consent but because they actually consented to its use in a different context. As I understand it, that is why the legislation deals with limited and unlimited volunteers.

In the United Kingdom, I have looked at some of the publicly available information and it is suggested that their DNA database contains about 5 per cent of the population, which is said to be a good thing. I am not sure that a large DNA database—notwithstanding that it has very strong prospects as a forensic tool—is something that we should blindly accept as being a good thing. The reality is that the balancing act probably needs to fall, in my view, in favour of people not being charged or convicted with offences. That is why we have, for example, beyond reasonable doubt: it is better that 10 guilty people go free than one go to prison.

So, in my view, wherever there is a question it ought to fall in favour of an accused person. On that basis, I would say that it either be all offences or no offences, and in my view it is better that it be no offences, in the context of the question you have asked.

The Hon. JOHN AJAKA: Let us take it one step further. If you say, "We are now going to ask victims to volunteer their DNA", many people may say, "Not on the basis that you are going to keep it forever and one day use it against me." the reality is that you might as well then have a system of saying, "Let's take the DNA of each and every child that is now born and put that on the database." You could not really say that the victim is in a less vulnerable position in supplying their DNA than a newborn child would be.

Mr SPOHR: That is so. We are now talking about an individual rights perspective, rather than the science or the machinations of it.

The Hon. JOHN AJAKA: I am looking at the social policy aspect.

Mr SPOHR: From an individual rights perspective, I think that is right. I think the starting position is that people ought not to have their DNA on a database unless there is some reason for that database to have their DNA on it. We consider suspect samples being on the DNA database to be reasonable. Perhaps I can use this example. Commonly it is the case, that I have seen, that a person who commits break, enter and steal offences specifically to fund a drug habit commits lots and lots of break, enter and steal offences. At some future time they get caught red-handed in one offence. When they are convicted on that one offence—or even if they are not convicted—and they are required to submit to a personal DNA test, suddenly all their previous offences are discovered. That is largely because, as Mr Goetz said, they have an alarming habit of bleeding everywhere.

The concern is that, in those circumstances, the samples are there because they have offended in some way or they are suspected of having offended. The other samples are there because they are the result of offences. The sample of a person who is a victim is there because somebody else did something to them. They have had their privacy infringed, and if we reasonably suspect that a sample comes from a victim, that person should be absolved of any further invasion of their privacy resulting from what has already been a traumatic event.

Ms SYLVIA HALE: You referred, and the Hon. Greg Donnelly referred also, to the CSI effect. You said how different it was to explain to juries. How adequate are the protections that exist against evidence that basically should be inadmissible being admitted in a trial?

Mr SPOHR: That is an area I do have some expertise in because I have done some work on that in the past. This State does not do a particularly good job of dealing with unreliable expert evidence. I am not suggesting that DNA is necessarily unreliable, but we are slowly expanding into other areas of DNA analysis. One of those is what is called mitochondrial DNA analysis. It produces numbers that are very different to this sort of thing.

Not long ago, certainly this month, there was a case of Fleming in the Supreme Court. I should disclose that I had a peripheral involvement in the prosecution of it. It was a murder case in relation to a gentleman named Fleming who was effectively, on the case, tricked into producing his DNA. He was writing on a page and he spat onto the page and his DNA was extracted from that. The court found, and the Court of Criminal Appeal upheld, that although he was effectively tricked into providing his DNA it certainly was not illegal and it was not unreasonable for the police to do so. It was held to be admissible and he was convicted on that basis.

The protections are very discretionary. The relevant sections are 135 and 137 of the Evidence Act. Both of them say they may exclude evidence if it is more prejudicial than probative. The reality is that, in my view, judges, and counsel for that matter—and I include myself—are inadequately skilled at understanding the science of it to be able to know whether it is a reliable result. I have prosecuted cases—in relation to, for example, a mitochondrial DNA case—where there were any number of ways that that DNA sample could have come to be there. The jury ultimately accepted that that DNA sample came to be there because the accused was the person who did it. Whether they truly understood the submissions put on behalf of the accused that the DNA could have come to be there some other way is an open question. I think the reality is that the protections are probably adequate but at some stage the State of New South Wales, and we as a legal community, ought to consider how we deal with expert evidence. The United States has been much better at dealing with unreliable expert evidence in a forensic context than anywhere in Australia.

Ms SYLVIA HALE: In what way are they better?

Mr SPOHR: There are tests for unreliable scientific evidence. There is one called the Daubert test.

CHAIR: Pick the quasi-scientist?

Mr SPOHR: Yes. The Daubert test and others—that sort of examination of expert evidence in a forensic context is not done very well here. There is a general mechanism for doing it but I think judges and counsel need to be better trained in its use. If we were faced with a case like the one I have suggested, where a victim's DNA somehow turns up at the scene, we may not know that that is how it has come to be there but it relies on adequately skilled counsel to know about that possibility. Counsel has to know that is a way that the DNA could have come to be there, for example, by transference or by some other means. If they do not, and if they do not make that submission, then the protections are neither here nor there. This is why I am talking about starting it a little bit earlier—in relation to the questions asked by the Hon. David Clarke—so we are less likely to have to deal with that because I think counsel and the bench do not necessarily have the requisite degree of training to deal with it.

Ms SYLVIA HALE: In relation to a victim's DNA, one of the submissions received by the Committee suggested that none of division 1 of part 9 applies to victims, including the crucial complete ban on admitting evidence derived from DNA samples that should have been destroyed. They say that you have got the protection in the Evidence Act of weighing up the benefits of admitting it or refusing to do so. Do you believe that that constitutes a problem for victims? It seems to me that there are potentially two problems, one is the lack of legislative requirements overseeing how a victim's DNA is to be destroyed, and then the problem of the admissibility of evidence that is obtained from DNA being incorrectly retained?

Mr SPOHR: It is hard to say. I might need to take that on notice. The reality is that those protections that appear in the Forensic Procedures Act, as opposed to the Evidence Act or the Criminal Procedure Act, I cannot say I have ever seen those provisions used—that does not mean to say that they do not get used. I think if they are not used it is probably more a feature of the fact that criminal lawyers do not know about them. Because it is something when I looked at this about two years ago I was quite surprised at finding in a different place to where we normally look. So I cannot answer that question because I cannot say I have ever seen it used.

The Hon. DAVID CLARKE: I offer my apologies. I have to leave because I need to go somewhere else. I have appreciated the evidence of Mr Spohr as being very valuable. I will be reading the transcript of the remainder of his evidence with a great deal of interest. Thank you, Mr Spohr.

The Hon. GREG DONNELLY: I agree that your evidence has been very informative. I will not refer to the questions on notice because perhaps in due course we will receive them back on areas we have not covered. Nor will I seek to go over the ground that has already been covered this morning thus far. But the matter you were just referring to about training, educating or having people informed about this complex area—this is really asking you for the expression of an opinion so you may be reluctant to do so, and feel free to say so if that is the case—but it will increasingly become utilised within the context of dealing with criminal prosecutions, do you or the society have a view about how this education of lawyers or stakeholders in the system—to use a generic phrase—can be brought up to speed, and kept up to speed, in this every increasingly moving area of science as applied to law?

Mr SPOHR: I can express general views about the profession but not about the bench, for obvious reasons. The reality is that I was until quite recently the chair of the Young Lawyers Continuing Legal Education Committee, which does the bulk of legal education for the Law Society. Solicitors and barristers are required to do a certain amount of compulsory education to continue their practising certificates. I, in that role, took an interest in this area, and expert evidence generally, and tried to put on this kind of education. I do not think it can be done from the outside, with respect.

I do not think that the profession, in relation to how it could be educated, can be regulated from the outside and the same goes, for obvious reasons, for the bench. The bench has a means by which its members are educated—I am temporarily drawing a blank on the name of what it is called—I think it is the Judicial College or something. I think it is really a matter that needs to be dealt with by way of the profession and the bench, if I can put it that way, identifying its own lack of knowledge. I do not think it is something that can be regulated from the outside, except insofar as we can mitigate against failures in their knowledge by putting in some safeguards.

The Hon. GREG DONNELLY: You made a brief reference to the United States, and perhaps also in other jurisdictions such as the European Union and elsewhere in the world, where there is some real sophistication around the use of DNA material to deal with victims of crime. Do you have any recommendation for the Committee as to where we might look to see if there are things for us to draw on, both from the society's point of view and yours, in terms of satisfactory practices, procedures or guidelines—law regulation?

Mr SPOHR: I cannot say that I have seen legislation outside of the country. That is to say, I do not know that I could point to a useful, if you like, model. But I should say that even if models, for example, in the United Kingdom, the United States or the European Union were looked at, they need to be looked at in the context of—and I hate to be harping on the human rights aspect of it—in the United States, the Bill of Rights, and in the United Kingdom and the European Union, their access to the European Bill of Human Rights. There are additional protections of privacy in those nation States that are not available to Australian citizens and that being so, it is always necessary to be cautious before modelling legislation in this State on dual legislation of another State. I think even if we could find a model we would have to be cautious.

The Hon. GREG DONNELLY: No, I take your point.

Ms SYLVIA HALE: I take it that you would support Mr Goetz in his belief that there should be a very clear delineation between the activities of the police force and the activities of the DNA laboratory, and that their roles should not be merged in any way?

Mr SPOHR: That is so, yes. I think that is just good policy—in the same way that the Office of the Director of Public Prosecutions is separated from the police. There ought to be an object aspect to this. I am not suggesting that there is any impropriety in the way that the police operate but inevitably there ought to be an objective handle on this. If the department remains separate that is more likely to be the case.

The Hon. GREG DONNELLY: Do you think we should go beyond a policy or protocol prescription? I find this whole area quite extraordinary as to its complexity and in looking to the future—as you might have heard from earlier questions—as to what it might all mean in terms of issues. Given the raw potential of what DNA provides, do you think we should be reflecting on, if not perhaps in this inquiry but beyond this, going beyond being satisfied with protocols or practice procedure policies and, given the potency of the information, that there should be legislation?

Mr SPOHR: I think at some stage that will be necessary, yes. It appears that as a means of identifying suspects becomes more effective, its potential to accidentally identify the wrong person becomes larger—simply by virtue of the numbers, not by virtue of any necessary flaws or anything like that. Simply, the larger number of people in the database, the more unknown samples there are if we allow it to burgeon, there is a large possibility that something goes wrong. Even one such case would be a tragedy.

Ms SYLVIA HALE: The Police in their submission say that if the legislation focuses on protecting the rights of victims it might impede the processes of law and appropriate outcomes because people subsequently may claim to have been victims even though they did not volunteer involvement at the time a crime was committed. Do you think that is reason not to attempt to focus on the rights of victims?

Mr SPOHR: The short answer is no. Are you referring to question 8 in the questions on notice in relation to the definition of "victim"?

Ms SYLVIA HALE: If you like to take it in relation to that I am more than happy, but I was just looking at the Police submission.

Mr SPOHR: The reason I raise that is because I am sceptical that there is a case in which an accused person could claim to have been a victim and, therefore, could absolve themselves of responsibility. The reality is that DNA is only one link in a chain. I withdraw that. It is only one strand in a cable. That is a definition that is important in a case. It is circumstantial evidence. It does no more than identify that a person who has a very similar profile would have been there at the same time. It is only one strand in a cable. You have to prove by some other means that the person committed the offence. It is not direct evidence that a person commits an offence. Juries are directed about that in all trials in which DNA is an issue. In some cases it may be evidence that certain acts took place. For example, a vaginal swab is taken. If the accused person's DNA is found, it may be evidence that sexual activity took place. For the most part, it is simply evidence that a person was in a place at a particular time or at some stage.

A definition of "victim", however phrased, is unlikely to allow a person to say, "I didn't do it" because you are never going to have a case in which a so-called victim's DNA is the only link in the situation. What is concerning is that the person may become a suspect as a result of their DNA being there. Other evidence may be produced or that person may be investigated although they are entirely innocent and entirely unrelated. It may be that sufficient other evidence is raised to charge them and the cornerstone of the case is the DNA. Even though it is only one strand in a cable, the reality is that juries see a number like, "This profile is expected to occur in fewer than one in 10 billion cases". Their eyes glaze over and they go, "This guy did it". Although they are directed that is not the case, that is the risk. I do not know that there is a danger that simply because we protect victims more we will protect offenders from prosecution. We are concerned about the rights of victims in this context.

CHAIR: I note that you have specific answers in relation to the Attorney General Department's submission. We have only one minute remaining, so it is not appropriate for me to ask you to deliver them now. I have stressed throughout the hearing this morning the importance of the replies to questions on notice. They will be made public. Is there anything you would like to say now?

Mr SPOHR: Having only read it this morning, I can generally express support without going into any specifics. Generally—particularly in relation to the conflicting imperatives, which are on page 6 of the submission—my committee would support the submissions made by the Attorney General's Department. In relation to specifics, I would need a bit more time to consider it.

CHAIR: Thank you for your evidence. I am sorry you have so many questions on notice, but that is the way this inquiry seems to be working.

Mr SPOHR: It is a complicated area.

CHAIR: Thank for your attendance and assistance.

(The witness withdrew)

(Luncheon adjournment)

MARTHA MAREE JABOUR, Executive Director, Homicide Victims Support Group (Australia) Inc, sworn and examined:

CHAIR: Ms Jabour, thank you for attending the first day of hearings of this incredibly complex inquiry relating to the law and the use of DNA samples. I will not read the formal guidelines, but if you want to pass messages to the Committee or someone to pass something to you, please attract the secretariat's attention and they will deliver it for you. The Committee hearing is not intended to provide a forum for people to make adverse reflections about others. The protection afforded to Committee witnesses under parliamentary privilege should not be abused during these hearings. I, therefore, request that witnesses avoid mentioning other individuals unless it is absolutely essential to address the terms of reference. If you have a mobile telephone, would you please put it in silent mode. Are you conversant with the terms of reference of this inquiry?

Ms JABOUR: Yes, I am.

CHAIR: If you consider at any stage that certain evidence you wish to give or documents you may wish to tender should be heard or seen only by the Committee, please indicate that fact and the Committee will consider your request. If you take any questions on notice—unfortunately because of the complexity of the questions almost everybody is taking questions on notice—or the secretariat contacts you, we would prefer the answers by Friday 16 October. We understand that does not provide a lot of time, but if you have any difficulty, contact the secretariat and they will discuss that with you.

Ms JABOUR: Thank you.

CHAIR: Would you like to commence by making a statement?

Ms JABOUR: Yes I would. Firstly, I thank the Committee for giving me the opportunity to come along and present the views and thoughts of the Homicide Victims Support Group. With me today in the gallery is Mr Robert Taylor, who is the President of the Homicide Victims Support Group. His son Simon was murdered by two brothers, one being a juvenile and one being an adult. Also with me is retired Assistant Commissioner John Laycock, who is the coordinator between the Homicide Victims Support Group and New South Wales police. When problems arise with families John is the person who looks after those problems.

I will provide an overview of the Homicide Victims Support Group and who I represent. The Homicide Victims Support Group was formed in 1993 as a result of two families of homicide getting together, getting support and comfort from each other and then, obviously, realising that they could offer each other a whole lot more than counsellors, psychologists and other people who were very caring could offer them. Those people were Garr and Grace Lynch, the parents of Anita Cobby, and Peter and Christine Simpson, who are Ebony's parents. The Homicide Victims Support Group started was the first group of its kind to be formed anywhere in Australia. So, New South Wales led the way in setting up a support group that had very clear aims and objectives, those being that we provide support to every family member of homicide who was referred to us in New South Wales, and also to families where there was a New South Wales connection, examples being the families of the Bali bombing victims, and when backpackers who come to Australia and New South Wales are murdered in our State. That is the remit of the people we look after.

I hate talking about statistics but, currently, we support over 2,700 families in the Homicide Victims Support Group in New South Wales. Of those families, there are well in excess of 400 with unsolved murders. Obviously, DNA is very important and critical to those families. We provide support and education to the community. Our main target of education is the New South Wales police and that is because police form a strong relationship right from the very start with the families left behind. They are there right from the very start to the end of a criminal proceeding. Then the last thing is the area of reform. I would say that is the reason why I am here today. Since the group was started we have been very grateful that the New South Wales Parliament has taken on many of the ideas and legislative reforms that we have brought to both Houses of Parliament and they have been taken on board. So we have been involved in changing a lot of laws that impact on victims of crime right across the board, not just homicide.

What brings me here is obviously the use of victims' DNA. Right from the outset I would like to say that my expertise is in homicide. So my presentation will be just around murder and manslaughter and not necessarily other crimes.

CHAIR: What aspects of how victims' DNA, as handled by law enforcement agencies, are of concern to your group and are you aware of any people whose DNA was taken as a victim and subsequently placed on a database and matched to another crime in which they were an offender?

Ms JABOUR: I am not aware of any problems that family members have. If anything, people want to give their DNA; they want the police and the investigators to have every opportunity to use any investigative tool that becomes available to them. Family members of homicide, it is the least of their worries in the first instance. It is a case of "We would rather police have everything and look at it", because their main priority is that this crime is solved. Insofar as DNA being matched with a victim, I am not aware of any case, because obviously the process is not in place. If there are, I would not have that information but New South Wales police would.

CHAIR: If somehow the collection of DNA evidence, particularly in relation to victims, becomes looser or more can happen with that information, would it be your group's perception that perhaps this could be risky for reporting crime? People may not want to come forward because they do not want to be involved in case it hooks up with something else?

Ms JABOUR: I do not believe that will happen because at the moment there are crimes that are not reported anyway. I think an example of that is a couple of weeks ago there was a young man who was shot in the leg and was taken to Auburn Hospital. He would not identify his assailant. Just recently a young man was shot in his motor vehicle. Once again, he would not identify his assailant but took matters into his own hands. As of yesterday he was charged with conspiracy to murder. So there are going to be some victims that will not report the murder because they are in the wrong place at the wrong time. The circumstances around the crime might be something that they do not want to report.

What I am saying is that murder is only a very small statistic. So I think victims of crime, if it is marketed well and they are told right from the outset that "We are only interested in the most serious of crimes", being murder and manslaughter and any other crimes that the legislators feel need to go into that list, if it is marketed well and we say to people, "We are only interested in a serious crime, not volume crime or housebreaking crime," which a lot of people fear the volume crime, but we are talking about the most serious crimes being captured by the use of DNA, they should not have a concern.

The Hon. GREG DONNELLY: Thank you for coming along and speaking to your submission. Just a couple of questions on terminology: What is a volume crime? Could you explain your understanding of what that means.

Ms JABOUR: Things like break and enters, perhaps motor vehicle offences, shoplifting, minor drugs.

The Hon. GREG DONNELLY: The smaller end of the—

Ms JABOUR: Yes, which makes up a lot of crime.

The Hon. GREG DONNELLY: Just out of interest, you were not here this morning and I understand you would not be aware of this, but the representative from the New South Wales Police Force said that in the context of a break and enter crime, for example, the DNA is most helpful because he said in a large number of instances people inadvertently cut themselves and there is blood everywhere. So certainly in the context of those crimes the DNA is utilised in terms of the investigation.

The other crime that I asked some questions about this morning, and I know it is a sensitive issue but I want to raise it with you, is the area of sexual assault whereby there are instances that take place, particularly around weekends when people drink and take drugs and many young women end up in emergency departments and what have you, not sure exactly what has happened, so it is not clear that there may have been something that was a criminal act. Do you have a view about crimes like that, which probably are not at the top end, as you define them? Tragically there is quite an incidence of them occurring, and unfortunately on a regular basis. But there is also the question about whether the crime is not in terms of the recent activity.

Ms JABOUR: If that person who is the victim of the sexual assault commits a homicide, they should be worried. Their DNA should be taken and should be used to clear up that murder. But if they were a victim of sexual assault and they had committed another crime, once again I say that it depends on the legislators what those other crimes are defined as.

The Hon. GREG DONNELLY: I am actually saying that the sexual assault itself is the issue.

Ms JABOUR: But if their DNA was captured as a mixed DNA, are you saying, from a crime scene?

The Hon. GREG DONNELLY: No. It is this area where these instances are happening and there is a question about whether the police become involved or not. For example, it is my understanding—and domestic violence falls into the same category—that there is a reluctance sometimes to name individuals. The activation of the involvement of the police either does not happen or may be delayed, which I think is probably unfortunate in terms of what they are doing with the perpetrator.

Ms JABOUR: Yes.

The Hon. GREG DONNELLY: But tragically these things happen on a very regular basis. I am just wondering whether you have some reflections on that, given the sort of incidences.

Ms JABOUR: The unfortunate thing is that that happens now, and there is nothing that says to them that their DNA might be matched with DNA that could link into a crime. But that does happen now, and they hold back and do not want to be involved. There are many reasons why, certainly, victims do come up and say that they are not going to be a part of it.

The Hon. GREG DONNELLY: In relation to that point you have made, which is an interesting one, without giving specific examples and based on your general experience, what are the reasons generally why people do not want to become involved or want to stand back and see what passes through?

Ms JABOUR: It could be a family member. It could be retribution. It could be that they could not be bothered. It could be that they have reported to police in the past and not much has happened. They are examples that I am aware of.

The Hon. GREG DONNELLY: There is a range of reasons?

Ms JABOUR: Yes.

The Hon. JOHN AJAKA: You said your areas of expertise are homicide and manslaughter. When we look at the issue of victims, obviously there is the primary victim, if I may use that term—the person who is deceased.

Ms JABOUR: Yes.

The Hon. JOHN AJAKA: Much of this legislation does not really bear on that, but I see that there are other victims, such as family members—perhaps parents, wives, children, et cetera—who may have been in contact with the home environment where the death may have occurred. I understand that in those circumstances the police want to obtain their DNA as well to help eliminate some, so that they are not wasting time and can focus on who the culprit might be. In those situations, they would be victims who voluntarily provided their DNA. Do you have a view on whether that DNA ultimately should also go into the database, or should that DNA be completely removed and not added to the database?

Ms JABOUR: That is an interesting question because it is one that we did discuss as a group. As I said, Robert Taylor is here. When his son, Simon, was murdered, Robert was also stabbed.

The Hon. JOHN AJAKA: He was a victim.

Ms JABOUR: Yes. At the crime scene you had Robert's DNA, Simon's DNA and obviously the perpetrator's DNA. I can tell you that Robert Taylor would not have any problems having his DNA put on the DNA database and for it to remain there forever. When we did have that discussion with our members, it was a case of this: If you have done nothing wrong, why would you be worried?

The Hon. JOHN AJAKA: There is an extension of that. Some of the concerns I have noticed from reading some of the reports, the submissions and even the evidence is that sometimes a victim will be reluctant to offer his or her DNA, if they believe it will then hit a database and suddenly it connects to something they

have done in the past that is wrong, or they are worried about what will happen if something wrong happens. It basically hinders the police from doing their specific job in relation to what may be a very serious matter. How do we overcome that problem of encouraging victims to voluntarily provide their DNA if they think that at the end of the day there could be a catch if they are forced to have their DNA put onto a database? Remember that voluntarily they can do whatever they like. Should they be forced?

Ms JABOUR: The only time from my perspective that the DNA should be kept on the database and matched is, once again I will say, in relation to the crimes of murder and manslaughter.

The Hon. JOHN AJAKA: You are saying that if the victim in the future commits a murder or manslaughter, that victim who then becomes a defendant would have to be on the database so that the comparison can be done. Your view would be that, yes, they go onto the database, but that is used only for serious offences and not used for non-serious offences.

Ms JABOUR: That is correct. The other point is that if it is on a national database, it is also about crimes being cleared up in another States. That database captures DNA from every State and perhaps clears up unsolved murders in other States. One of the most important things about victims having their DNA on the database and its being voluntary is, in relation to where we are coming from, that it could be quite an important crime prevention tool as well. You know that if you are going to commit a serious crime, your DNA is already on the database, and you might think twice about it. That was a point brought up in a lot of discussion within our group—that some homicides can be prevented. Sixty per cent of homicides are committed within a domestic relationship. The bulk of the work we do is within domestic violence relationships.

The Hon. JOHN AJAKA: I want to put to you just two more extensions of that proposition. I appreciate what you are saying. It is helping enormously. You have a victim or a group of victims—for example, a whole family—who really are in a terrible state. Something very tragic has just occurred or something very horrible has just occurred. They are already are victims. By forcing them to provide their DNA and forcing them to allow it to remain on the register forever, so to speak, are we really treating the victim appropriately in that respect at a time when they have already been violated? In a sense, are we violating their rights again?

Ms JABOUR: We are not, but just in reading the victim's protocol that the police have to go through, I am bewildered at what the police have to go through and at what victims have to put up with. If you look at that protocol, what you are saying is exactly right: it is too cumbersome. That can be simplified a whole lot more than it is. Insofar as are we putting more trauma on them, I do not think we can. The fact that someone they love has been murdered is as dramatic as it is going to get, but it is in the delivery of how that information is asked of them that makes it easier.

Families of homicide victims want to be a part of the investigation. They want police to say, "Can we have this? Can we have that?", because it means that the police are doing something. They are more than willing to give whatever it is that needs to be taken away. They understand that DNA is quite an important investigative tool. It could be the thing that makes or breaks their case, but they understand that it is not the only thing. The police have to have a proper police brief. DNA is not going to be the only thing that solves their murder.

The Hon. JOHN AJAKA: We have a situation now where those that committed the more serious crimes are now compelled to have their DNA on a database. That already exists. We are now saying that we are going to put the victims in the same category, so to speak. If we do that, what is the difference between the victim and, for example, every child at birth having their DNA put on a database? What if we make it compulsory that every person in the State of New South Wales—you, me, everyone—has their DNA on a database? Why would we suddenly put it just on the victims?

Ms JABOUR: There are two points there: If the victim's DNA is picked up at a crime scene as part of a mixed DNA and it is tested and they are found to have committed a serious crime, it is used as part of solving the crime. If the DNA is found not to have been involved in the crime, the victim should be asked whether their DNA can go on the database. So it is voluntary.

The Hon. JOHN AJAKA: That is the current situation.

Ms JABOUR: That is right. But that is the way we would say it should remain.

The Hon. JOHN AJAKA: That is what I am trying to understand. You are not saying it should now become compulsory. You are still allowing the victim to make the decision.

Ms JABOUR: To make a choice if they are cleared of committing a crime of the most serious type.

Ms SYLVIA HALE: You say on page three of your submission:

There are numerous examples where armed hold-ups have been an inside job where an involved person has claimed the status of a victim and then it is discovered that the person is an offender. It is these cases that cause concern.

Can you provide details?

Ms JABOUR: There is a couple of cases. We had an incident where there was a pub brawl that a father started and his son came to his aid and the son was killed. The father was a victim, but also an offender.

Ms SYLVIA HALE: But he used in the subsequent trial the claim that his DNA could not be matched because he was a victim.

Ms JABOUR: No, he was then charged not for the murder but for starting the fight in the pub that led to the murder.

Ms SYLVIA HALE: How did he use his victim status to exonerate himself? The suggestion is that if you can call on your victim status you can prevent your DNA being used.

Ms JABOUR: Only in respect of murder. In this case he used his victim status to access things like victim compensation and counselling when he was the instigator of the crime.

Ms SYLVIA HALE: That is a different situation from using victim DNA. That may have delivered him rights to obtain something, but we are talking about a status that prevents his details being provided to other people such as the police or forensics.

Ms JABOUR: We are taking it one step back and saying that no perpetrator should use the status of victim to access services.

Ms SYLVIA HALE: That is not what we are looking at in this inquiry. That is a series of separate issues. The police are saying that because the DNA is used to make links to a number of unrelated cases, if the alleged perpetrator of those other offences can say, "You acquired my DNA in this instance only because I was a victim", the suggestion is that therefore that would be illegal and that DNA could not be used to make linkages to other cases.

Ms JABOUR: I understand what you are saying. In the incident I have just talked about, the fact that the victim's DNA—that is, the person who started the fight—could not be used means that crime remains unsolved. There might have been DNA at the scene where the fight started and it might have been the DNA that belonged to the person who started the fight, but it could not be used.

The Hon. DAVID CLARKE: Is he known as a suspect?

Ms JABOUR: He is known as a person of interest.

The Hon. DAVID CLARKE: As a suspect they could get his DNA, could they not?

Ms JABOUR: There was a very long police investigation.

The Hon. DAVID CLARKE: Had there been enough evidence for the police to regard him as a suspect, they would have been able to get his DNA.

Ms JABOUR: That is right. There were other suspects—obviously the person who ended up killing the boy, but not the person who started the fight.

Ms SYLVIA HALE: One of the points made this morning was that DNA is probably never in itself determinative of guilt—it is only one strand in a very complex series of things that must be established to prove someone's guilt. I asked one witness whether he knew of a case where an alleged offender had claimed victim status to be absolved of the crime. He said that in his view—and I hope I am not misinterpreting him—there was no such case and there could not be because being classified as a victim would play only a very small role in the proof that had to be provided to satisfy a jury. The other point made this morning was that there is a perception—although it is not well founded—that DNA evidence can be totally relied upon to prove that someone was at a crime scene.

Ms JABOUR: My understanding of DNA is that it is an investigative tool. It is not the only thing that police should rely on to clear up a homicide. With some longstanding unsolved crimes that have recently been solved—some were well over 20 or 30 years old—the police have had a good brief but it was the link with DNA that has led to them solving the case. That involves about four cases this year. DNA proved very important for that. With regard to family members and DNA, once again, because the process is not in place I do not think we are going to know whether that victim's DNA is going to be linked to some of these unsolved homicides.

Ms SYLVIA HALE: You said, "If you have done nothing wrong, why worry?" DNA could be from a piece of someone's hair or from shaking someone's hand. Reference was also made to a fellow who had an identical twin. How do you determine which person was there? DNA may be deposited on a crime scene and that might cause someone to be suspected of committing an offence. Surely we should ensure that any requirement that DNA be provided be surrounded and hedged with protections?

Ms JABOUR: I totally agree. We already have those protections in legislation. Once again, if police are relying on DNA to solve that crime, especially with twins, they have a problem. They have to look at the whole picture and all the evidence to use this DNA.

The Hon. DAVID CLARKE: Except that there is no legislative protection to stop victim's DNA being put on the Department of Health's database. They have a policy not to use victim's DNA, but that could be changed tomorrow. That is not much of a protection.

Ms JABOUR: No, but it is up to the politicians to say that this is where it is going wrong and that it should be examined and that measures should be put in place to ensure that protection.

The Hon. DAVID CLARKE: Would you support such legislation?

Ms JABOUR: If there were problems with it? I am not aware that there are.

The Hon. DAVID CLARKE: The problem being that at the moment victims' DNA cannot be put on to the database maintained by the Department of Health because it has a policy not to do so, and that is understandable. However, theoretically that could be changed tomorrow. Do you think that situation calls for legislation to protect people from that possible change of policy?

Ms JABOUR: I do not have a problem with legislation dealing with that, except that that DNA should be used if it is linked to a serious crime, being murder and manslaughter.

Ms SYLVIA HALE: We had evidence this morning about making these requirements apply only to the most serious crimes—murder and manslaughter. It was stated that that introduces an element of discretion. While it might initially cover murder and manslaughter, there is then further potential on the grounds that if you have done nothing wrong you have nothing to worry about. It might then be a basis for widening the requirements for the provision of DNA. The suggestion was that it is unwise and inadvisable to permit this sort of discretionary approach to things that are fundamental to individual liberties and whatever.

Ms JABOUR: I do not believe there should be a discretion to change anything that is set by Parliament. If there are proper policies and procedure put down that says that this DNA can only be used for murder/manslaughter—and it might be that you decide that there are other crimes that you want to put as a serious crime—that is what it should be.

Ms SYLVIA HALE: What happens when you get a crime that could possibly be a murder, could possibly be a manslaughter but could possibly be a suicide or could possibly be an accident, and the police are investigating? At what stage do you draw the line?

Ms JABOUR: I am not sure about the "it could possibly be". It must be murder or manslaughter is what I am saying.

Ms SYLVIA HALE: It can only be put on the database after a person has been convicted for that crime.

Ms JABOUR: And it is on there anyway after they are convicted. DNA from all prisoners is put on the database after conviction now.

Ms SYLVIA HALE: Are you saying if the police are investigating a death they should have the right for anybody whose DNA turns up in the crime scene—

CHAIR: In any crime scene.

Ms SYLVIA HALE: —in any crime scene to be matched?

Ms JABOUR: To be matched but if it is matched to a murder that is the only time they can use it. If it is matched to a homicide that is the only time that they can use it.

Ms SYLVIA HALE: But that implies that you know beforehand that it is a homicide.

Ms JABOUR: Police pretty much know straight away whether it is a suspicious death or not. And the police investigation does go on for quite a long time. So over time and with all the procedures that do go through police know pretty much at an early stage that it is a homicide.

Ms SYLVIA HALE: Are there problems—it is a perfectly natural human phenomenon—for people to form a hypothesis as to who is responsible and then to look for the evidence that bears out their hypothesis, rather than to be open to other suggestions? If you have that approach apparently verified by DNA evidence, I wonder whether you are potentially undermining the ability for justice to be done.

Ms JABOUR: I am not aware of any cases where that has happened. What I can say just on that, and certainly I hear about it a lot, whether I know there have been people who have been convicted wrongly because of DNA and other things. I was a member of the Serious Offenders Review Council for well in excess of six years, where we went to all the jails across New South Wales and I was part of a team that managed the incarceration of serious offenders. When some of these offenders would say, "I'm not guilty, I didn't do it.", I was passionate about the fact that I do not think anybody who is not guilty of a crime should spend one day in jail. Very often I would have the pamphlet about the DNA reviews that they could apply for and I would give it to them. There was never a referral from any pamphlet that I gave out, which gave me confidence that if they were concerned that it was DNA that fitted them up there is an avenue for people to appeal a conviction that is based on DNA if they have been wrongly convicted.

I believe that that committee does not have a lot of work because a lot of perpetrators, inmates, are not coming forward and saying, "I was wrongly convicted." So I think we have a pretty good system where our judicial system is a very fair one and police practices are very fair and the fact that I do not believe that we have a lot of convictions on DNA that are wrongly convicted. If we do, we have a structure in place that gives them the opportunity to appeal that and to have their case re-looked at right from the start, all forensic evidence. I can say that that is not a committee that actually has a lot of work.

Ms SYLVIA HALE: I stand to be corrected but I thought that it had been made more difficult for people who have been convicted of offences on the basis of DNA evidence to have their case re-examined. I thought there had been administrative impediments but I may be wrong.

Ms JABOUR: I am not aware of them.

Ms SYLVIA HALE: You say that the "HBSG Inc. Australia would argue that a person who did not initially declare themselves as a victim and has discarded their DNA voluntarily at the crime scene should be subject to normal processes." What do you mean by "discarded their DNA voluntarily"?

Ms JABOUR: Where they have cleaned up the crime scene, so there is no DNA there for police to follow up with.

Ms SYLVIA HALE: It is my understanding that it is almost impossible to clean away all traces blood; it is extraordinarily difficult.

Ms JABOUR: It depends on the crime scene.

Ms SYLVIA HALE: Are you saying where they have deliberately attempted to remove evidence of their being there?

Ms JABOUR: That is correct.

Ms SYLVIA HALE: What if a person cleans up in all innocence? They live in a house, they clean up, they have not made any statement to the police.

Ms JABOUR: That happens and murders remain unsolved. The crime scene is not always in a home. It could be in a park or it could be an outside area. They do not necessarily divulge where things might have happened, where things might have started.

Ms SYLVIA HALE: But are you not suggesting that they should lose any protections because they have cleaned up or because they have not disclosed something to the police?

Ms JABOUR: They are a party to the crime then so I say that their DNA should go on the database.

Ms SYLVIA HALE: What if they do it innocently? They clean up innocently, do not talk to the police for any number of reasons.

Ms JABOUR: That would not be innocent if they did not talk to the police and they have knowledge of a murder occurring.

Ms SYLVIA HALE: How do you know if they have not talked to the police beforehand?

Ms JABOUR: Sorry, I am not understanding.

Ms SYLVIA HALE: Say someone cleans up the blood. They appear on the scene. Say, for example, they have no alibi as to where they were but let us assume they were somewhere else. They come and clean up but they do not necessarily go and talk to the police. They may be afraid of talking to the police because they may be guilty of other offences—there could be a whole range of reasons. They may even be afraid that they may be attacked if they are seen to be voluntarily talking to the police. But still they have not had any involvement other than cleaning up the crime scene. Do you think those people should forego any protections?

Ms JABOUR: If they have been involved in committing the crime of murder—

Ms SYLVIA HALE: But if they have not said that they are involved.

Ms JABOUR: I just think someone cleaning up a crime scene, all the blood, and not talking to police, that is a pretty serious thing. Obviously they would know that there is something wrong. There is blood and a crime has been committed. So I think that would be a problem in itself.

CHAIR: I have a point of clarification. Is the group saying that every piece of forensic information that is collected through the system should be available to the police who are investigating murder and manslaughter?

Ms JABOUR: That is correct.

CHAIR: So, that totally changes the process for the taking of victims' DNA, does it not? So, you are asking for that? Victims give their DNA for the purposes of that individual crime and then have the right to request that that DNA be taken off the internal database. Currently that the DNA is maintained by the Division of Analytical Laboratories, the Health Department, and never put onto the system for criminal research. But you

people are asking for all DNA that comes through the forensic system be available to police officers who are investigating murder and manslaughter?

Ms JABOUR: What we are saying is if it is a mixed sample at a crime scene that is taken away to the Division of Analytical Laboratories and tested and that victim's DNA at that point is matched to a homicide, it should be used to clear up the homicide.

CHAIR: A previous homicide?

Ms JABOUR: A previous homicide. If there is no crime that it is linked to, the victim should be asked whether they would like their DNA to remain on the database. If they say yes, it remains there. If they say no, it is taken off.

CHAIR: So that totally changes the emphasis for the victims' DNA samples at the moment to a different purpose altogether. That is what you are asking for?

Ms JABOUR: That is correct.

The Hon. DAVID CLARKE: You are not suggesting that there are circumstances where a victim's DNA should remain on a database without their permission?

Ms JABOUR: No. Should never be without their permission.

(The witness withdrew)

JEREMY LIAM BURGESS, Solicitor and Criminal Justice Convener, New South Wales Council for Civil Liberties, sworn and examined:

CHAIR: If you should consider at any stage that certain evidence you may wish to give or documents you may wish to tender should be heard or seen only by the Committee, please advise the Committee and we will consider that. We also have a system for questions on notice, which is being very much used. We are asking that the answers be sent back by 16 October but we recognise that may be an imposition, so please contact the secretariat beforehand if you are having difficulty with that time frame. Do you have a statement?

Mr BURGESS: No.

CHAIR: Can you describe the role of your organisation and your interests in the issue of victims' DNA?

Mr BURGESS: Yes. The New South Wales Council for Civil Liberties is an organisation which aims to advocate and secure the rights of everyone, including victims of crime. The council was founded in 1963 and has had special non-government organisation consultant status to the United Nations Social and Economic Committee since 2006. We believe there is strong public interest in protecting the privacy of DNA information, including the DNA profiles of victims of crime and other innocent individuals. We acknowledge the need in this area to strike a balance between two very strong competing interests—the protection of individual rights and genetic privacy, on the one hand, and the need to ensure that community's laws are protected and that individuals who breach those laws are brought to justice.

However, we believe that the current forensic procedures regime does not adequately protect the rights of either victims or other innocent third parties whose DNA may be present at crime scenes. In particular, we believe the current rules in relation to the gathering and treatment of crime scene profiles are problematic, not only for victims but also for other people whose genetic material may be present at a crime scene for reasons that are unrelated to having committed any crime.

CHAIR: Hopefully, during our questioning, you will be able to give us a resolution to this issue.

The Hon. JOHN AJAKA: Can you tell us why it is problematic? You said it was problematic. In what way?

Mr BURGESS: We are concerned that the genetic material from victims of crime and other individuals who have not committed any crime works its way into the DNA database and the State and national level in circumstances we do not think are appropriate and in accordance with the principles that guided the establishment of the database.

CHAIR: Through the crime scene collection process?

Mr BURGESS: Through the crime scene collection.

The Hon. DAVID CLARKE: The DNA database maintained by the Department of Health in New South Wales only includes DNA material of offenders or suspects. It does not include DNA material of victims, but that is not because of any legislation, it is simply because that is the policy of the Department of Health. Do you not think that that is not a good position? Do you not think it should be protected by legislation? That is a policy. It is fine now, but it could be changed tomorrow morning.

Mr BURGESS: Absolutely. It is a policy. We think is a very good policy, the same with the recent policies that have been introduced especially for victims. We think they are very good policies but this is an extremely important area and involves significant rights. Parliament has acknowledged that by passing specific legislation, the Crimes (Forensic Procedures) Act. That legislation provides very specific procedures and protections in every other area. We see no reason why excluded volunteers or victims should not be given the same level of protection, that is legislative protection, as everyone else who was brought under these procedures.

The Hon. DAVID CLARKE: What about victims' DNA which is intermingled with other DNA? A couple of other witnesses have referred to this area and they are concerned about that. What would you do about that?

Mr BURGESS: We agree it is a concern. Is this in relation to whether it should be stored in a database?

The Hon. DAVID CLARKE: Yes.

Mr BURGESS: We believe generally it is undesirable that victims' DNA be stored in forensic databases, but we understand it may be necessary in some circumstances. Our view would be if it is possible at any stage to exclude that information, for example, somebody has already been convicted or the investigation has been closed, then certainly that information should be excluded. We understand there may be circumstances where an investigation is ongoing and it may be unavoidable that there are co-mingled samples. We do not suggest they should not be used in an investigation. It is inevitable in sexual assault investigations and things like that that there will be co-mingled samples, but we certainly do not think they should be added to general databases and used for cross matches with victims' profiles.

Ms SYLVIA HALE: The police commissioner gave an example in his submission of DNA being collected from a pub brawl that was subsequently linked to a number of other unsolved crimes. It should be noted that the person who was linked to eight unsolved armed robberies, whilst they decamped the scene and were treated as suspect, were arguably also a victim in the incident, albeit unidentified, having been wounded and bleeding on the floor as a result of the incident. He concludes that it is impracticable and imprudent to attempt to apply legislation solely to victims. Do you have a comment in relation to that?

Mr BURGESS: On the commissioner's example or on the applicability to victims?

Ms SYLVIA HALE: Imprudent to attempt to apply legislation solely to victims?

Mr BURGESS: We believe that the question of defining victims actually goes to the heart of the problem. It is difficult to adequately define victims, and that is essentially because this is not really solely about victims. Victims are a very important part of this problem but it is not just about the primary victim but also secondary victims and indeed other innocent bystanders whose DNA might be present at a crime scene. It appears to us that the current system for DNA profiling is based on a system not of general inclusion that everyone's DNA should be in a database, but rather on a principle that in order for DNA material to be included in the database, there must be some reason to believe that the person has committed a crime—either they have been convicted, they are a suspect or their DNA was found in such proximity to the crime scene that there is a reasonable basis for believing they might have committed a crime.

What it does not include are people who are innocent of any crime. DNA of the general community is not included. In asking me what this is really about, it is the inclusion of the genetic material of innocent people. Rather than attempting to craft a narrow definition of victims and trying to stop offenders getting through any loopholes, our submission is that Parliament should be crafting a mechanism to ensure that primary and secondary victims and other innocent parties can ensure their DNA can be removed from the system, whatever their status, as long as they are not a suspect or a convicted offender.

CHAIR: Would there have to be a lot of public education of persons who perceive they may be on this database to have their DNA removed? I am trying to think through the practicalities.

Mr BURGESS: In terms of specific mechanisms, I think our suggestion would be any crime scene when investigations have been concluded—it is closed or a person has been convicted—everything, other than the DNA of the perpetrator, should be removed from the database on the basis that it is unrelated. They are innocent people, victims or third parties. In relation to open investigations it is obviously more difficult. There are going to have to be situations where ambiguous DNA is still on the system, but there should still be best efforts made to remove the DNA of victims and innocent third parties, and specifically anyone who is a victim or who believes that their DNA might have been present at the scene for innocent reasons, should have a right to provide an exclusion sample so that their DNA can be removed from the crime scene samples. It will not be perfect but it at least gives people a chance to remove them and it puts victims and innocent third parties back on an equal footing with the rest of the community and ensures they are not disadvantaged vis-à-vis every other

innocent member of the community simply because they were a victim of crime or they happened to be innocently present at a crime scene at some past point.

Ms SYLVIA HALE: In that circumstance, if a crime has been solved, and as part of the solution of that crime there was a crime scene profile, is there a case for removing everybody's DNA, other than perhaps the perpetrator, without people having to specifically apply for that to be done?

Mr BURGESS: Yes, the system I just outlined would be our suggestion in relation to unsolved cases where there is merit in keeping ambiguous profiles on file. In terms of solved cases where there has been a conviction recorded we see no reason why any information, other than the offender's, should be retained.

Ms SYLVIA HALE: Submission 9 to the committee suggests that indeed we may be misguided in thinking of victims as one category but there maybe a diversity of sub-categories—the victim of a break and enter may be very different to the victim of a sexual assault. Do you see sub-categories in the definition of "victims" being of any use?

Mr BURGESS: We believe that considering the often very different needs and different positions of different sub-categories of victims is extremely important in terms of developing procedures and policies for dealing with victims and taking samples. We think it is extremely important to be sensitive to those differences and to the needs of victims generally. In terms of how we deal with those samples, our view is that all victims have an equal right to have their samples removed from the database—they are all innocent people whether they are innocent and a victim of a serious offence or innocent and a victim of a minor offence. We do not think that makes a difference as to whether their DNA should be put on a database and potentially used against them. The point is that they are innocent people the same as every other member of the community and should not be placed at a disadvantage relative to other members of the community in having their DNA stored.

What is important in terms of the distinctions between victims is to remember that there are also shades of grey in victim status—there are primary victims, secondary victims in the immediate family of victims of serious offences and, in this consequence, there are people who were merely present as well. I think it is important to remember that rather than trying to draw a line somewhere in that to remember that all of those people are innocent and did not commit the crime. In some of the cases from overseas—I am sure the committee is already familiar with the situation that arose in the 2003 Shannon Kohler rape investigation in Miami?

CHAIR: No, that has not been quoted for our evidence. That would be useful.

Mr BURGESS: That was a case in Florida where, after a series of rapes, the police in Florida undertook a mass DNA screening.

CHAIR: Wee Waa?

Mr BURGESS: Yes. That mass screening did not locate the 2003 rapist but it did throw up a match to an unsolved 1986 rape case. The man whose profile matched was arrested, charged and publicly named in relation to the 1986 offence. It was only after that that it was discovered that his profile matched because he was in 1986 the consensual partner of the victim of the 1986 offence. His profile had been drawn from the bed of the victim for reasons unrelated to any criminal offence. What you see from that is there is the potential also for matches that are to people who are, in some senses, victims although they are not the primary victim. Obviously that was very traumatic both for him, having been arrested and named, and also for the victim of the 1986 rape who had to come forward and explain all of this.

Ms SYLVIA HALE: Was he found innocent?

Mr BURGESS: It never even made it to court but the point is that these situations can arise and be extremely damaging both for primary and secondary victims at a point well before they ever get to court, purely at the early investigative stage even if these things are cleaned up relatively quickly.

The Hon. GREG DONNELLY: You received some questions on notice and we will follow them up at the completion of your evidence today. Are there any jurisdictions in Australia, including the Commonwealth, that we should give attention to when looking at the issue of DNA and victims of crimes?

Mr BURGESS: Obviously the way that the Australian national system works means that there has to be attention given to how the interrelationship between the various jurisdictions and the sharing of information will work in terms of is there a jurisdiction that provides a model for the approach that New South Wales should take.

The Hon. GREG DONNELLY: Or worth having a look because there are some elements of it that are seen to be advantageous or of some utility, yes.

Mr BURGESS: My understanding is that Western Australia now has some statutory protection for victims, but in our view none of the Australian jurisdictions, as yet—they all roughly follow the model code—represent what we think is an adequate approach to protecting victims and other innocent parties. We would like to see that general exclusion of innocent crime scene profiles and as far as I know, no Australian jurisdiction yet has that.

The Hon. GREG DONNELLY: Which leads to my next question: Are there some overseas jurisdictions that you think the organisation you represents thinks does it quite well in terms of a framework to deal with the matter we are discussing?

Mr BURGESS: There are certainly overseas jurisdictions that take a much narrower approach to the storage of DNA profiles in databases—some European countries where only the DNA profiles of very serious offenders essentially are stored in the databases. It is probably not in the Australian context practical just in New South Wales—I am not familiar with all of the possibilities—but it may not be practical to attempt to adopt a general system from one of those other jurisdictions, albeit a good system, when it has to mesh with the particular arrangements that are currently in Australia under the national framework in the sense that those countries have different ways of classifying their data samples to what we have. Some of those countries do not permit the ongoing database storage of crime scene samples at all. We think that is a good thing, but it may not be practical in the New South Wales context to go for that. It may be better to work on the basis of excluding innocent samples.

The Hon. GREG DONNELLY: Just going back to my question about the interrelationship between jurisdictions in Australia, State, Territory, Commonwealth and amongst the States and Territories; is there some argument that can be put forward that really this whole issue should be considered at a national level to try to come up with a national position, given the utilisation of these sorts of advanced methods to deal with crime and the sharing of information between jurisdictions and that movement of people between jurisdictions is commonplace? Would you care to comment on that?

Mr BURGESS: I think that is true. The existing legislation was formulated in national model legislation. Presumably it would be ideal if any substantial changes could be implemented at a national level as well. At the same time we know that it is very difficult to get those things moving and I do not think any inertia at the national level means that New South Wales should be dragging its heels in terms of ensuring that we are doing the best that we can.

The Hon. GREG DONNELLY: That is what I was getting to.

CHAIR: We are ready have a little problem because of the differences between New South Wales and Queensland.

Mr BURGESS: I am sorry, I am not familiar with that.

CHAIR: Can anyone remember the details from the witness from the Division of Analytical Laboratories?

The Hon. JOHN AJAKA: The impression I got was that they are putting the victims' DNA on the database whereas we do not.

The Hon. DAVID CLARKE: That was Queensland.

The Hon. JOHN AJAKA: And that was Queensland, which we might check up on.

The Hon. GREG DONNELLY: It appears to be the only State or Territory in Australia where that is down, which was a bit of a revelation to us.

Mr BURGESS: Our understanding is that it is those kinds of things of inconsistencies in the State legislation that has led to what are the best policies in the circumstances sometimes, which is where we sometimes refuse to match crime scenes samples from other States because of that, but obviously it would be more desirable if we could have a national framework that adequately protected innocent individuals but allowed for consistent approaches as well.

The Hon. DAVID CLARKE: What would your position be if we do not have victims DNA on our database down here? I do not know what the arrangements are between Queensland and New South Wales. What would your attitude be if New South Wales authorities sought to obtain victims DNA from the Queensland database because they suspected that person of being a perpetrator? What would be your attitude there?

Mr BURGESS: We do not think that it is appropriate for victims DNA to be recorded on DNA databases and in the event that victims DNA has been recorded on those databases, either through an error or because it has been recorded unknowingly as part of a crime scene or because another jurisdiction has intentionally recorded it, we do not think that it is appropriate for New South Wales investigators to make use of that information and we do not think it is appropriate for that information to be used in a New South Wales judicial process.

CHAIR: So how could you stop it?

Mr BURGESS: We would suggest legislative prohibition on the use of that material is the best interim measure. In the long term it is obviously more desirable that that material simply never makes its way onto databases or is removed at the earliest opportunity, but in a situation where we have the potential for that information to exist in other States, I would suggest that prohibition in New South Wales is the best measure.

Ms SYLVIA HALE: One of the submissions we have received suggests that victims are at a disadvantage even in relation to volunteers because a number of protections are not available to them under section 76 and 76A. They suggest, for example, that they do not get the benefit of any rules on carrying out forensic procedures, including the requirement for same-sex procedures, entitlement to have a medical practitioner of the victim's choice present, and bars on the unnecessary presence of police officers. The submission also suggested there is the disadvantage that DNA that has been improperly obtained, stored or accessed in any way, they do not get the protections of this evidence being inadmissible. Similarly, there are no specific rules covering the destruction of DNA. Do you have any evidence or are you aware of these disabilities, if indeed they do exist, impacting on victims?

Mr BURGESS: There are a couple of parts to your question. In terms of the procedural protections for victims that they do not have access to in the Act, yes, we think that is a defect in the current arrangements. We do understand that the victims protocol now embodies some of those protections, but that is only at a policy level and we think it is entirely appropriate that they be elevated to legislative level along with all the other protections. In terms of the lack of destruction of samples and all those sorts of things, yes, we do think that is a problem. It is particularly a problem when samples work their way in through the crime scene investigation avenue because those samples have a particularly wide use that other samples would not have in the sense that they are stored on the database indefinitely and can be matched against any other sample in the database; they are particularly broad.

In terms of practical examples where that has been a problem, we are not aware of many. We understand from published material that there was a victim of a rape in Victoria in the late 1990s who had her genetic material collected in connection with that crime and who then had her genetic material apparently falsely matched to a sample in the Jaidyn Leskie case in 2003. That apparently was the result of some cross-contamination in a laboratory but, nonetheless, it illustrates the kinds of things that can happen where she was forced to relive the trauma of that and to go through a number of investigative processes and, indeed, was almost called to court apparently by someone who was being prosecuted in that case. It can have very serious implications for victims, even in situations where they are not matched to a crime that they have committed but, rather, matched to some other context.

CHAIR: Is there anything else you would like to tell us before we finish?

Mr BURGESS: Only that we would encourage the Committee to consider the broader context of all innocent people that this affects. In the system in Australia and in this State the balance that has been struck between rights and enforcement is based very much on only people who have for some reason been identified as possible offenders, and victim and innocent party information is essentially something that has slipped through the net in an otherwise principled system, and we would encourage the removal of that.

CHAIR: The educative process that is required for the community to understand the collection, storage and database in relation to DNA has been totally distorted in this country by American television police shows, which show a total pretence of the DNA system even according to their own laws, it would appear. A lot of what has been proposed through this inquiry requires a huge amount of public education. Do you have any suggestions on how to counteract the pretend world?

Mr BURGESS: I do not pretend any expertise on formulating education programs, but I think the point you raise is a very valid one. There are serious issues in relation to educating people on this stuff, but those arise really as soon as you bring in a system of this nature. There are problems with people understanding it. The simpler and fairer the system is, the more easily people will understand it and the more faith they will have in it. If they do not understand the system, all those issues around people not being willing to report crimes because they fear that their information will be stored in the system and used in some unfair way start arising, but apart from educating them I think the best thing is to ensure that it is a fair system and a simple system that is not perceived to operate unfairly so that people want to stay away from it.

CHAIR: One of the police person's concerns was that it is already an incredibly complex situation, especially for individual police persons to understand. I think he was frightened that we would fiddle with it and make it worse, so I am not sure how to resolve that.

Ms SYLVIA HALE: Are you familiar with the procedures that the police are required to follow?

Mr BURGESS: I am familiar with the procedures insofar as they are outlined in the police crime protocol and victims protocol.

Ms SYLVIA HALE: Do you see any room for simplifying those procedures?

Mr BURGESS: I realise that they are long documents and that there is a lot there, but we believe that most of those procedures and safeguards are there for very important reasons. We would not like to see them removed just in the name of simplicity.

Ms SYLVIA HALE: Has the failure of police to follow procedures—and they would say unnecessarily very, very complex procedures—resulted in the inadmissibility of DNA evidence?

Mr BURGESS: I might have to take that on notice. I am not sure.

The Hon. DAVID CLARKE: You are not aware of any widespread abuse of the DNA process, are you?

Mr BURGESS: We are not suggesting widespread abuse.

The Hon. DAVID CLARKE: Are you aware of abuse?

Mr BURGESS: I am not personally aware of it.

The Hon. DAVID CLARKE: Even anecdotally?

Mr BURGESS: I am not aware of that either.

CHAIR: Apart from the questions that the secretariat will send to you, if the Committee perceives that there is something else that they would like to know, would you be happy to accept that?

Mr BURGESS: Yes, I would. If I could add one more thing in relation to the last question, our concern is not primarily with abuse of the system. We believe that most of the problems that are arising and that

can potentially arise in the future are from investigations where very well-intentioned investigators are collecting the best information they can, probably very comprehensively. It is just how that travels into the database and maybe impacts on victims later that is our concern.

CHAIR: Thank you for your good work and your organisation.

(The witness withdrew)

(The Committee adjourned at 3.05 p.m.)
